

## ESMA Clarification on Fund Marketing

The fund distribution environment in Europe has been subject to new regulations in recent years as attempts have been made to close perceived loopholes and ensure pan European standards but also to facilitate cross border fund sales in a more efficient manner. ESMA updated its Questions and Answers on both UCITS and the AIFMD, respectively, on 20th July 2022 (together the “Updated Q&As”) to address a question regarding the responsibility for ensuring compliance with aspects of these new rules.

### Background

Pan-European marketing passports are available for funds under the legal framework’s created under both the AIFMD and UCITS legislation. However, a new EU cross-border distribution regime comprising Directive 2019/1160 (the “Directive”) and Regulation 2019/1156 (the “Regulation”) (together the “CBDF”) took effect on 2 August 2021 in order to update the applicable regimes. The CBDF has introduced a host of changes which include revised marketing disclosure requirements, rules pertaining to “pre-marketing” and the rules pertaining to the provision of local facilities agents, among other items. Further details of the impact of various aspects of the CBDF are available in our past relevant Legal Updates.

### Marketing Requirements

The CBDF introduced harmonised requirements in relation to marketing materials distributed within the EU. These are based upon the principles of fair, clear and not misleading marketing but the CBDF also includes certain granular requirements including obligations to require marketing materials to be clearly labelled as marketing; reference the associated prospectus (and KID), include specific warnings as well as highlighting relevant risks and rewards of the fund and to outline how a summary of investor rights may be obtained, including information on potential redress mechanisms, etc (the “Marketing Requirements”). These requirements have been further clarified in ESMA Guidelines.

### Query

The query raised and addressed by the Updated Q&As is essentially which entity has responsibility

for ensuring compliance with the Marketing Requirements.

### Clarification

The updated Q&As confirm that it is the management company (AIFM or UCITS Manco) which is responsible for compliance with the Marketing Requirements, irrespective of who is the actual entity marketing the fund, and of the relationship it has with such third-party distributor. This arises because marketing is one of the functions included in the management of funds, and therefore subject to the provisions on delegation (Article 13 of Directive 2009/65/EC and Article 20 of Directive 2011/61/EU). In the context of Irish funds this has already been the subject of clarification under the CP86 reforms and is also reflected in the Central Bank’s requirements pertaining to appointments of distributors for UCITS.

### Implications

The implications of the foregoing are that management companies will need to ensure that they have appropriate contractual provisions ensuring that all entities involved in the distribution chain are observing the requirements of the CBDF. They will likely also need to obtain related input and comfort from any relevant delegate investment managers and to ensure their policies and procedures reflect these obligations, including determining the extent to which they will conduct due diligence to ensure ongoing observance of the relevant requirements.



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