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CBDF Framework

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The cross-border distribution of funds framework came into force in the European Union on 2 August 2021, made up of two main EU legislative instruments: Directive (EU) 2019/1160 amending the UCITS and AIFMD Directives (the “CBDF Directive”) and Regulation (EU) 2019/1156 (the “CBDF Regulation”) supplemented by a Commission Delegated Regulation 2021/955 and ESMA Guidelines on marketing communications published on 2 August 2021 (“ESMA”) which will come into force on 2 February 2022. This is an EU legislative framework intended to facilitate the cross-border distribution of funds in the EU by removing barriers to create a more competitive EU investment landscape.

The framework allows AIFMs to test the market and assess the appetite of potential investors for new investment strategies through the introduction of a so-called ‘pre-marketing’ regime.

The main provisions of the CBDF Framework can be grouped under the following six headings:

1. Broad Principles
2. Discontinuation of Marketing
3. Facilities for Retail Investors
4. Transparency Requirements
5. Pre-marketing
6. Fees and Charges

Transposition of the CBDF Directive into Maltese laws

The CBDF Directive was transposed into Maltese subsidiary legislations and rules. Malta’s transposition is generally a copy-out of the CBDF Directive, yet the pre-marketing rules were not extended to non-EU AIFMs even though Recital 12 to the CBDF Directive states that pre-marketing rules “should not in any way disadvantage EU AIFMs vis-à-vis non-EU AIFMs.” It also remains unclear how the 18-month moratorium on reverse solicitation enquiries following pre-marketing notification will be applied for any professional investor from the jurisdiction, even when such investor was not part of the pre-marketing activities that followed a notification.

Compliance with ESMA Guidelines on marketing communications

The broad marketing principles that feature in the CBDF Regulation are further supplemented by the new ESMA Guidelines on marketing communications which AIF and UCITS marketing communications must follow by 2 February 2022. These guidelines provide examples of marketing communication which make it clear that the term is to be interpreted very broadly and, in case of doubt, covers all material. Only legal and regulatory documents and information, for example: the prospectus, key investor information document (KIID), key information document (KID), periodic reports, fund contracts, corporate communications, non-fund related short communications and pre-marketing information, or communications are excluded.

The new ESMA Guidelines broadly mirror existing MiFID requirements on marketing including the requirement that these be clearly identified as such (through the inclusion of the terms ‘marketing communication’ in the marketing material) and detailed rules on how risk and rewards, costs, past performance and expected future performance and sustainability-related aspects should feature in the marketing material.

Next steps

The CBDF Framework will trigger a certain degree of implementation effort for fund management companies. Fund managers should familiarise themselves with the new CBDF Framework to start preparing for this aspect of the CBDF package. Besides reviewing marketing communications to ensure that they are in line with the new marketing communication rules which will come into force on 2 February 2022, fund managers may also need to consider their arrangements with distributors and their pre-marketing and marketing plans and strategies.



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