FMA

Finanzmarktaufsicht
Liechtenstein

FMA Instruction 2021/19 – Instruction on cross-border distribution of funds

Instruction on cross-border distribution of funds and changes concerning fund notifications

Reference:	FMA I 2021/19
Addressees:	Management companies under the UCITSG **(MCs),**
	Alternative investment fund managers **(AIFMs)** authorised under the AIFMG
	EuVECA managers and
	EuSEF managers under Regulations (EU) No 345/2013 and No 346/2013
Re:	UCITS and management companies,
	AIFs and AIFMs,
	EuVECA funds and EuVECA managers,
	EuSEF funds and EuSEF managers
Publication:	Website
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1. Preliminary remarks

This Instruction contains an overview of Directive (EU) 2019/1160 amending Directives 2009/65/EC and 2011/61/EU with regard to cross-border distribution of collective investment undertakings and Regulation (EU) 2019/1156 on facilitating cross-border distribution of collective investment undertakings and amending Regulations (EU) No 345/2013, (EU) No 346/2013 and (EU) No 1286/2014. These enactments were published in the Official Journal of the European Union on 12 July 2019. Directive (EU) 2019/1160 has been in force in the EU since 2 August 2021. Regulation (EU) 2019/1156 has been in force in the EU since 1 August 2019, with the exception of Article 4(1) to (5) (Requirements for marketing communications), Article 5(1) and (2) (Publication of national marketing requirements and creation of a hyperlink to ESMA), and Articles 15 and 16 (Introduction of pre-marketing in Regulations (EU) No 345/2013 and No 36/2013), which have been applicable since entry into force of the Directive on 2 August 2021.

Direct applicability in Liechtenstein depends on the date of incorporation into the EEA Agreement. Directive (EU) 2019/1160 and Regulation (EU) 2019/1156 have been transposed in advance as part of the legislative amendments to the AIFMG and UCITSG, so that there is no disadvantage for Liechtenstein funds and their management companies/AIFMs resulting from the delay in EEA incorporation.

2. Important changes

2.1 Harmonisation of UCITS notification procedure with AIF notification procedure in the event of changes to the marketing notification

Under Article 98(6) UCITSG, management companies must inform the host Member State authorities of any amendment to their UCITS. This will remain the case in the new version of Article 98(6) UCITSG, i.e. the UCITS must keep the information and documents referred to in Article 98(1) and (2) UCITSG (prospectus, constitutive documents, KIID, etc.) up to date at all times and transmit all changes to the notified host Member State authorities on its own responsibility.

Under Article 98(7) UCITSG, the management company must notify the FMA and the host Member State authorities in writing of any changes to the information pertaining to their UCITS contained in the notification letter at least one month prior to the implementation thereof. This means that changes to the marketing modalities or the marketed unit classes also give rise to a notification obligation vis-à-vis the FMA and the host Member State authority. This pertains exclusively to the information as set out in Annex B of the notification template. The analogous rule for AIFs is found in Article 116 AIFMG.

A uniform provision is now also contained in Article 98(8) UCITSG and Article 116(2) AIFMG, according to which the FMA may, within 15 working days, prohibit the management company of the UCITS or the AIFM from carrying out the change, to the extent that the change would result in potential violations of the law. If a change is carried out despite the prohibition, the FMA is free to take further supervisory measures (Article 98(9) UCITSG and Article 116(2) AIFMG).

Pursuant to Article 98(1) UCITSG, information on fees and charges as well as on the facilities referred to in Article 96 UCITSG (e.g. facilities for subscription and redemption orders as well as information points for investors and contact points for communication with authorities) must now also be included in the marketing notification. The same applies to AIF notifications pursuant to Article 113(2)(i) and (k) AIFMG.

2.2 No obligation to establish a physical presence in the host Member State

In the course of providing facilities in the host Member State which have to fulfil certain tasks vis-à-vis investors, the establishment of a physical presence shall no longer be required for marketing either UCITS or AIFs to retail investors. A paying agent in the country of marketing is therefore no longer required. Instead, it now suffices to make facilities available by electronic means for processing subscription, repurchase, and redemption orders, making payments, handling investor complaints, providing sufficient information, and establishing a contact point for communication with the competent authorities.

The information must be made available (also by electronic means) to investors in the official language of the country of marketing or in another language approved in that country. It must be ensured that the processing of subscriptions and redemptions complies with European principles and that investors are provided with information about their subscriptions and redemptions. A contact point must also be established to communicate with the competent domestic supervisory authority, but this contact point does not have to be located in the country of marketing. The contact point may also be provided by a third party if it is subject to appropriate supervision.

2.3 De-notification of marketing

If the fund management company decides to no longer continue the cross-border distribution of the fund in a country of marketing, it must de-notify the marketing arrangement to the FMA (see Articles 116a and 117 AIFMG and Articles 98a and 99 UCITSG). The FMA checks the de-notification for completeness within a period of 15 working days. After a successful completeness check, the FMA forwards the de-notification to the authorities of the host Member State. The FMA informs the AIFM or the management company that the de-notification has been forwarded. ESMA must also be informed of the de-notification. The following documents must be submitted for completeness:

- The de-notification must be made in the same way as the marketing notification. This means that a **written de-notification** must be submitted with evidence of compliance with the following four (cumulative) conditions.
- An **offer to investors to repurchase or redeem all units** must be made. The offer must be published for at least 30 days. No additional costs or redemption discounts may be charged to the investors as a result of the return of the units.
- Attention must also be drawn to the consequences of the de-notification for investors who do not wish to return their units, and the necessary information must continue to be provided to them.
- The intention to de-notify marketing arrangements must be **made public by means of a publicly available medium, including by electronic means**, which is customary for the fund and suitable for investors.
- The de-notification must also indicate **any contractual arrangements with financial intermediaries or delegates that are modified or terminated** with effect from the date of de-notification.

As a result of the de-notification, no pre-marketing for a similarly structured fund (comparable investment strategy or investment concept) may be carried out in the EEA Member State mentioned in the de-notification for a period of three years from the de-notification of the marketing arrangements. Any changes to the de-notification documents must be forwarded to the FMA. The FMA as the home Member State authority forwards the changes to the competent host Member State authorities.

3. Pre-marketing for AIFs

The term "pre-marketing" is now defined in Article 4(49) AIFMG, and the preconditions for pre-marketing are set out in the new Articles 111a and 111b AIFMG. Pre-marketing must be addressed solely to professional investors.

In brief, pre-marketing gauges the potential interest of a professional investor in a specific investment strategy of an AIF for which no marketing notification yet exists, regardless of whether the AIF or a sub-fund is already established or registered or not.

In the context of pre-marketing, no documents or information may be provided to potential professional investors that would:

- be sufficient to allow investors to commit to acquiring units or shares of a particular AIF, e.g. because the documents or information relate to an AIF that is already established (Article 111a(1)(a) AIFMG);
- amount to subscription forms or similar documents whether in a draft or a final form (Article 111a(1)(b) AIFMG); or
- amount to constitutional documents, a prospectus or offering documents in a final form of an AIF that has not yet been established or registered (Article 111a(1)(c) AIFMG).

According to Article 111a(2) AIFMG, when draft fund documents or offering documents are provided, they must not contain information sufficient to allow investors to take an investment decision and must clearly state that:

- they do not constitute an offer or an invitation to subscribe to units or shares of an AIF; and
- the information presented therein should not be relied upon, because it is incomplete and may be subject to change.

When carrying out pre-marketing measures, the AIFM is required to notify this to the FMA within two weeks by simple letter, in paper form or by electronic means to the email address fonds@fma-li.li.

That letter must specify the Member States in which and the periods during which the pre-marketing is taking or has taken place, a brief description of the pre-marketing including information on the investment strategies presented and, where relevant, a list of the AIFs and their sub-funds which are or were the subject of pre-marketing.

The FMA will inform the competent authorities of the Member State in which the pre-marketing is taking or has taken place. The competent authorities of the countries in which the pre-marketing has taken place may request the FMA as the home country authority of the AIFM to provide further information on the pre-marketing. Please note that this is an informal notification and does not constitute a pre-marketing notification procedure.

The AIFM must ensure at all times that the investor does not or cannot subscribe to fund units or shares as a result of the pre-marketing. The fund units or shares may be subscribed to only after a marketing notification has been made. Where a subscription is made by professional investors within 18 months after the pre-marketing, this is considered to be a result of marketing and requires a marketing notification before the AIF is subscribed to.

Delegation of pre-marketing is possible, but it is limited to the following delegatees: investment firms, asset management companies, credit institutions, UCITS management companies, AIFMs, distributors, and tied agents.

The AIFM is required to provide adequate documentation of the pre-marketing. This requires that the documents must at least contain a disclaimer that it is not an offer or invitation to subscribe to units or shares, and that the documents are non-binding and may still be subject to change.

4. Transparent fees and charges for marketing notifications

To provide fund managers with an overall view of the marketing costs incurred and as a basis for decision-making, all fees and charges for marketing notifications in Liechtenstein are published on the FMA website. As before, the FMA will send fund managers an invoice or payment instructions clearly stating the method of payment and the payment due date. ESMA will in future publish hyperlinks on its website to the fee and charge information of the authorities of the individual Member States. By 2 February 2022, the ESMA website is to include an interactive tool for calculating fees and charges based on the information provided by Member States.

5. Central ESMA database on cross-border distribution of funds

By 2 February 2022, ESMA intends to make available a central database on cross-border distribution. This database is intended to list all marketed AIFs and UCITS with their countries of marketing as well as their management companies/AIFMs. ESMA will be informed by the FMA about any de-notification of marketing and will adjust the database accordingly. In addition, ESMA will also use this database to provide information on the Member States' fees and charges and will set up a tool for this purpose.

6. Uniform requirements for marketing notifications

Marketing notifications must now be clearly recognisable as such, and the opportunities and risks described with the products must be presented clearly and understandably. All information must be fair, clear, and not misleading. The information in the marketing notifications must not contradict the fund documents. The marketing notifications must also draw attention to the new possibility of de-notification.

UCITS marketing notifications must state that a UCITS prospectus exists and that the essential information is available to the investor. They must also indicate where, how, and in which language potential investors can obtain a summary of investor rights; additionally, hyperlinks to the relevant summaries must be provided, referring to information on the enforcement of rights.

ESMA will provide further details in a guideline.

6.1 Ex-ante verification of marketing notifications by the supervisory authority

For the purpose of verifying compliance with Regulation 2019/1156 and the national provisions concerning marketing for UCITS and AIFs (which market their units to retail investors), the FMA may require ex-ante communication of the marketing notifications. The FMA will not make use of this option at present.

6.2 Publication of national provisions concerning marketing requirements / Central ESMA database

Pursuant to Article 5 of Regulation 2019/1156, the FMA will publish and maintain on its website up-to-date and complete information on all applicable national laws, regulations and administrative provisions governing fund distribution. The information is available under the following links:

- https://www.fma-li.li/de/aufsicht/bereich-wertpapiere-und-markte/vertriebsanforderungen-fur-aif-und-ogaw.html
- https://www.fma-li.li/en/supervision/securities-and-markets-division/marketing-requirements-for-aifs-and-ucits.html

By 2 February 2022, ESMA plans to make available on its website a central database that summarises the hyperlinks to country websites.

7. Change directory

With the amendment of February 8th 2022, the link to the relevant FMA information on all applicable national legal and administrative provisions for fund distribution has been added to this Instruction.

8. Data protection

The FMA processes personal data exclusively in accordance with the general data processing principles of the General Data Protection Regulation (Regulation (EU) No. 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC) and in line with applicable data protection law.

Information regarding the processing of personal data, including details about the purpose of processing, the data controller and the rights of data subjects can be found in the FMA Privacy Policy: https://www.fma-li.li/en/fma/data-protection/fma-privacy-policy.html

9. Entry into force

This Instruction entered into force on 26 August 2021.

Please contact the FMA for further information.
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