

Cross-Border Distribution Directive implemented – What you should know

Executive Summary

- Latest developments concerning cross-border distribution of collective investment funds.
- **Law of 21 July 2021** implementing **Directive (EU) 2019/1160** on cross-border distribution of collective investment undertakings (the **CBDF Directive**) comes into force as of 2 August 2021.
- **Definition of pre-marketing** and necessary pre-marketing notification.
- **De-notification** procedure and its consequences.

The CBDF Directive¹ was conceived to facilitate cross-border distribution of investment funds and to enhance the regulatory framework governing the distribution of UCITS and AIFs.

Luxembourg has implemented the CBDF Directive by way of the law of 21 July 2021 (the **Law**), and it becomes **effective** as of **2 August 2021**. It introduces a number of novelties regarding marketing activities.

The Law amends the provisions of both the law of 17 December 2010 on undertakings for collective investment and the law of 12 July 2013 on alternative investment fund managers.

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1160&from=EN>

A. Main innovation - Pre-Marketing Definition

The Law introduces for the first time a concept of pre-marketing of AIFs and sets out the conditions for such pre-marketing activities for AIFMs. Such term is defined as the provision of information or communication investment strategies or investment ideas by an AIFM or on its behalf to potential professional investors, in order to test their interest in an AIF (or a compartment thereof). This applies to AIFs that are not yet established, but also to those that are established but have not yet made a marketing notification.

Only an AIFM or other regulated entities such as banks or investment firms that act on its behalf are authorised to engage in pre-marketing.

B. Pre-Marketing notification to the authorities

In accordance with the Law, pre-marketing activity by a Luxembourg AIFM requires a notification to the CSSF, which must be made within the two weeks after the start of pre-marketing. There are no strict formal requirements to such notification, only the Member States and the time when the pre-marketing is taking or has taken place need to be mentioned. In addition, a brief description of the investment strategies of the AIF being pre-marketed needs to be set out therein.

C. Reverse Solicitation

The CBDF Directive has largely shut the door to reverse solicitation. It provides that any subscription made within 18 months as from the start of the pre-marketing activities will be considered to have been the result of



marketing, and therefore requires the relevant AIF to be notified for marketing.

D. De-notification Procedure and its consequences

Another innovation that the Law introduces is a formal procedure for management companies or AIFMs to de-register AIFs or UCITS from marketing. This was previously not formalised at all, resulting in significant uncertainties for market players.

It should be noted, however, that in case of AIFs such de-notification has an impact on future pre-marketing activities of the relevant AIFMs: During a period of 36 months after the de-notification, such AIFM cannot pre-market the de-notified AIFs, or even engage in pre-marketing of similar strategies or investment ideas in that Member State.

Conclusion and where we can assist you

It can be expected that from 2 August 2021, fund-raising activities of alternative investment fund initiators that are not an AIFM or a regulated entity themselves will become more challenging. They need to first identify an AIFM that can proceed to the necessary pre-marketing notification of their idea for an investment fund, before they can test investors interest for their concept.

Another new element to be considered by the UCITS management companies and AIFMs is the ESMA guidelines on marketing communications under the Regulation on cross-border distribution of funds.² Those guidelines are expected to be applicable as of January 2022.

The new de-notification procedure is certainly useful tool, and can also lead to some cost savings. However, the 36 months ban on pre-marketing for de-notified AIFs or even those with similar investment strategies or investment ideas seems an unnecessary harsh rule.

²https://www.esma.europa.eu/sites/default/files/library/esma_34-45-1272_guidelines_on_marketing_communications.pdf

Our dedicated investment funds team at GSK Stockmann will be happy to assist you with any notification or de-notification process and further requirements of the Law and guide you through these new changes.

Dr. Marcel Bartnik

Partner

GSK Stockmann SA

marcel.bartnik@gsk-lux.com

Irina Stolarova, LL.M.

Senior Associate

GSK Stockmann SA

irina.stolarova@gsk-lux.com



Copyright

GSK Stockmann SA – all rights reserved. The reproduction, duplication, circulation and/or the adaption of the content and the illustrations of this document as well as any other use is only permitted with the prior written consent of GSK Stockmann SA.

Disclaimer

This client briefing exclusively contains general information which is not suitable to be used in the specific circumstances of a certain situation. It is not the purpose of the client briefing to serve as the basis of a commercial or other decision of whatever nature. The client briefing does not qualify as advice or a binding offer to provide advice or information and it is not suitable as a substitute for personal advice. Any decision taken on the basis of the content of this client briefing or parts thereof is at the exclusive risk of the user.

GSK Stockmann SA as well as the partners and employees mentioned in this client briefing do not give any guarantee nor do GSK Stockmann SA or any of its partners or employees assume any liability for whatever reason regarding the content of this client briefing. For this reason, we recommend you request personal advice.

www.gsk-lux.com

GSK STOCKMANN

BERLIN

Mohrenstrasse 42
10117 Berlin
T +49 30 203907-0
F +49 30 203907-44
berlin@gsk.de

FRANKFURT/M.

Taunusanlage 21
60325 Frankfurt am Main
T +49 69 710003-0
F +49 69 710003-144
frankfurt@gsk.de

HAMBURG

Neuer Wall 69
20354 Hamburg
T +49 40 369703-0
F +49 40 369703-44
hamburg@gsk.de

HEIDELBERG

Mittermaierstrasse 31
69115 Heidelberg
T +49 6221 4566-0
F +49 6221 4566-44
heidelberg@gsk.de

MUNICH

Karl-Scharnagl-Ring 8
80539 Munich
T +49 89 288174-0
F +49 89 288174-44
muenchen@gsk.de

LUXEMBOURG

GSK Stockmann SA
44, Avenue John F. Kennedy
L-1855 Luxembourg
T +352 2718 02-00
F +352 2718 02-11
luxembourg@gsk-lux.com

