

Global Registration Services Market Update – Q2 2023

Period: 1 April 2023 – 30 June 2023

Europe

ESMA Updates AIFMD Q&A Regarding Non-EU AIFMs Pre-Marketing Activities

On 26 May 2023, the European Securities and Markets Authority ("ESMA") updated its Q&As on the application of the AIFMD¹ regarding third country / non-EU AIFMs pre-marketing activities.

The updated Q&A confirms that Article 30a of the AIFMD does not cover pre-marketing activities by third country / non-EU AIFMs meaning those entities should not be allowed to carry out pre-marketing activities pursuant to the AIFMD unless so permitted by member state national laws, regulations and administrative provisions. ESMA further reiterated that any such national laws, regulations and administrative provisions should not in any way disadvantage EU AIFMs *vis-à-vis* non-EU AIFMs.

For further details on what member states permit pre-marketing activities be undertaken by third country / non-EU AIFM, please feel free to get in touch.

ESMA Updates AIFMD Q&A Regarding Notification of AIFMs

On 13 June 2023, ESMA published a further reiteration of its AIFMD Q&A in which it clarified a number of questions with regard to

pre-marketing and de-notifications by (EU) AIFMs.

Pre-Marketing by Third Parties

The updated Q&A clarifies that pursuant to Article 30a(3) AIFMD, pre-marketing can be conducted by an EU AIFM or by an appropriately regulated third party on behalf of an authorised EU AIFM.², as an AIFM in accordance with AIFMD, or acts as a tied agent in accordance with Directive 2014/65/EU.

Furthermore, such third party is subject to the conditions for pre-marketing set out in Article 30a AIFMD.

Registered AIFMs and Pre-Marketing

The revised Q&A clarified that registered AIFMs referred to in Article 3(2) of the AIFMD, which do not qualify as EuSEF manager or EuVECA manager³, are not subject to the obligation to notify pre-marketing pursuant to Article 30a(1) of the AIFMD.

Unless it is required otherwise under national rules, Article 30a AIFMD applies to the authorised EU AIFMs. Sub-threshold EU AIFMs covered by Article 3(2) AIFMD, which have not opted in under Article 3(4) AIFMD, are referred to as registered AIFMs and consequently do not have the EU-wide AIFM passport to exert asset

¹ Directive 2011/61/EU, as amended

² That third party must be authorised as an investment firm in accordance with Directive 2014/65/EU, as a credit institution in accordance with Directive 2013/36/EU, as a UCITS management company in accordance with Directive 2009/65/EC as an AIFM in accordance with AIFMD, or acts as a tied agent in accordance with Directive 2014/65/EU.

³ Such terms as defined under AIFMD

management or marketing activities on a cross border basis.

Furthermore, except for Article 3(3) and (4) and Article 46 AIFMD, activities of sub-threshold EU AIFMs are governed by the national rules, including those on pre-marketing.

De-Notifications in Member States where there are no Investors

The Q&A confirmed that in cases where there are no investors in a host Member State, AIFMs wishing to de-notify the arrangements previously made for marketing the units or shares of the EU AIFs they manage must still comply with the obligations set out in Article 32a(1) of the AIFMD⁴.

As such, the AIFM must ensure that there are no investors uninformed about the AIFM's market exit, that all marketing is publicly terminated and any marketing arrangements with the third parties are terminated or modified to prevent any further marketing of the de-notified AIF.

Article 32a(1), second subparagraph, AIFMD also remains applicable, i.e. the AIFM must cease any new or further marketing of units or shares of the AIF it manages in the Member State in respect of which it has submitted a de-notification.

ESMA Updates UCITS Q&A Regarding De-Notification of UCITS

On 13 June 2023, ESMA published a further reiteration of its UCITS Q&A in which it clarified the position with regard to de-notification arrangements for a host Member State in which there are no investors.

In cases where there are no investors in a host Member State, UCITS wishing to de-notify the

arrangements previously made for marketing their units must still comply with the obligations set out in Article 93a(1) of the UCITS Directive.

As such, UCITS must ensure that there are no investors uninformed about the UCITS' market exit, that all marketing is publicly terminated and any marketing arrangements with third parties are terminated or modified to prevent any further marketing of the de-notified UCITS.

ESMA Report on Marketing Requirements and Marketing Communications under the Regulation on Cross-Border Distribution of Funds

On 3 July 2023, ESMA published a report on marketing requirements and marketing communications under the Regulation on cross-border distribution of funds (the "Regulation")⁵.

The Regulation provides that, by 30 June 2021, and every second year thereafter, ESMA shall submit a report to the European Parliament, the Council and the Commission which presents an overview of marketing requirements in all Member States and contains an analysis of the effects of national laws, regulations and administrative provisions governing marketing communications based also on the information received from national competent authorities.

ESMA submitted its first report to the co-legislators on 30 June 2021. This report is therefore the second ESMA's report under the Regulation.

In this report, ESMA provides an overview of the marketing requirements across Member States and analyses the effects of national laws, regulations and administrative provisions governing the marketing communications for investment funds.

The report makes the following key findings: The transposition of Directive 2019/1160 ("CBDF Directive") on cross-border distribution

⁴ Article 32a(1), point (a), AIFMD lays down an explicit exemption referring to closed-ended European long-term investment funds governed by Regulation (EU) 2015/760.

⁵ Regulation (EU) 2019/1156 of 20 June 2019

of funds and the entry into force of the ESMA Guidelines on funds' marketing communications, helped reach a greater level of harmonisation in areas where national divergences existed (e.g. regarding pre-marketing or the de-notifications of arrangements made for the marketing of UCITS and AIFs).

In addition, because of the transposition of the CBDF Directive, the diverging rules and practices identified in the previous ESMA report, with respect to the obligation for management companies and AIFMs to appoint a local third party to serve as a contact point in host Member States to carry out marketing activities, have disappeared.

With respect to the verification of marketing communications, despite the powers national competent authorities ("NCAs") have under the Regulation, it is apparent that only a limited number of NCAs carry out any ex-ante verifications of marketing communications, while an increasing number of NCAs reported carrying out ex-post verifications.

ESMA will submit a new reiteration of the report to the European Parliament, the Council and the European Commission in two years.

The full report is available online⁶.

Ireland

Updates on Publication of National Provisions Governing Marketing Requirements for AIFs

On 11 May 2023, the Central Bank of Ireland (the "Central Bank") updated its webpage on the national provisions governing marketing requirements for AIFs.

The revised website guidance provides updated information on the format and content of

⁶ https://www.esma.europa.eu/sites/default/files/2023-07/ESMA34-45-1814_-_2023_Report_on_Marketing_requirements_and_marketing_communications_under_the_Regulation_on_cross-border_distribution_of_funds.pdf

marketing material and the Central Bank's approach to verification of marketing communications.

The updated provisions applicable to the marketing of AIFs in Ireland can be accessed online⁷.

Luxembourg

CSSF Issues Updated FAQ on CBDF Notification Procedures

On 29 June 2023, the Commission de Surveillance du Secteur Financier (the "CSSF") published a revised FAQ on CBDF Notification Procedures. The update was in respect of the deletion of '*replacement of AIFM*' as an example of a life cycle event in respect of the answer to Question 3 (b) on the cases in which a de-notification letter must be submitted.

The updated FAQ is available online⁸.

Norway

Introduction of Fees for Marketing UCITS and AIFs

As outlined in our recent Passle update⁹, following consultation in 2019, the Norwegian Ministry of Finance has now updated the rules thereby introducing supervisory fees payable to the Norwegian regulator, *Finanstilsynet*, in respect of cross-border marketing activities into Norway by non-Norwegian AIFMs and UCITS.

Under the new rules, annual levies as well as one off application / registration levies will be introduced in respect of the following:

- (a) UCITS established in another member state marketing cross border into Norway pursuant to the UCITS directive;

⁷ <https://www.centralbank.ie/regulation/industry-market-sectors/funds/aifs/guidance/publication-of-national-provisions-governing-marketing-requirements-for-AIFs>

⁸ <https://www.cssf.lu/en/marketing-alternative-investment-funds/>
⁹ <https://thoughts.maples.com/post/102ig1z/norway-introduction-of-fees-for-marketing-of-ucits-and-aifs>

- (b) The marketing of an AIF managed by an AIFM authorised or registered in another EEA country; and
- (c) Non-EEA AIFMs applying to market under the AIFMD national private placement regime ("NPPR").

The annual fee will take effect from 1 June 2023 and amount to NOK7,000 (approx. EUR 600) per sub fund (both UCITS and AIF) and will be capped at NOK10,000 (approx. EUR 850).

While the one off application / registration levies are capped at NOK30,000 (approx. EUR 2,500), the exact amount of this fee has yet to be confirmed but the minimum has been set at NOK5,000 (approx. EUR 425). The confirmed fee will come into effect from 1 January 2024.

UK

HM Treasury Publishes Draft Statutory Instrument – The Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) Order 2023

On 27 March 2023, HM Treasury published a draft of The Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) Order 2023. The draft statutory instrument (the "Statutory Instrument") proposes to expand the scope of the financial promotion restriction in section 21 of the Financial Services and Markets Act 2000 (FSMA), by amending the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (2005/1529) (the FPO), to include financial promotions in respect of certain cryptoassets.

The Statutory Instrument provides for the regulation of in-scope cryptoasset financial promotions. This is aimed at improving consumers' understanding of the risks associated with cryptoasset investments and ensuring that cryptoasset promotions are held to the same standards as for broader financial services.

The Statutory Instrument creates a new controlled investment (defined as a 'qualifying cryptoasset') and amends relevant controlled activities to incorporate reference to qualifying cryptoassets and also applies and modifies certain existing exemptions to qualifying cryptoassets and creates a temporary, limited exemption to the financial promotion restriction.

There will be an implementation period of four months from the day after the Statutory Instrument is made before it comes into force, shortened from an original six-month implementation period in light of recent market turmoil and growing consumer risks and harms relating to cryptoassets.

UK and EU Sign MoU on Financial Services Regulatory Cooperation

On 27 June 2023, the UK and EU signed the MoU on regulatory cooperation in financial services.

The MoU, which was agreed by the UK and EU in May 2023, will set up a joint forum to discuss financial services issues twice yearly and will pave the way for increased contact between officials in the European Commission financial services directorate and the UK Treasury.

The forum will serve as a platform to facilitate structured regulatory cooperation, with objectives including improving transparency, reducing uncertainty, identifying cross-border implementation issues, and exchanging information and views on regulatory issues of common interest.

The MoU will not necessarily result in an 'equivalence' assessment by the Commission of the UK Markets in Financial Instruments Directive (MiFID) framework (or other UK financial services legislation), which is what UK investment firms have been hoping for, so that they can provide investment services to professional clients in the EU.

Financial Services and Markets Bill Receives Royal Assent

On 29 June 2023, the UK Government announced that the Financial Services and Markets Bill (the Bill) received royal assent and is now the Financial Services and Markets Act 2023 (the "Act"). The Act is central to delivering the UK Government's vision to reform the regulatory framework for the UK's financial services sector, following Brexit.

The Act also gives the ability to revoke much EU law, including rules for asset managers, insurers, and wholesale markets, once replacement rules are finalised.

The Act also introduces new secondary objectives for the Financial Conduct Authority ("FCA") and the Prudential Regulation Authority — to facilitate the growth and international competitiveness of the UK economy. This will be backed up by changes to enhance the scrutiny and accountability of the regulators, including ensuring regular reporting and a greater focus on cost-benefit analyses.

FCA Decreases Periodic Fees for EEA UCITS Marketing Under the TPR

On 5 July 2023, the FCA published the Periodic Fees (2023/2024) and Other Fees Instrument 2023 setting the regulatory fees and levies to be applied in 2023/2024.

The FCA has substantially decreased its fees for EEA UCITS marketed under the Temporary Permissions Regime ("TPR") for the period from 1 April 2023 – 31 March 2024:

Scheme Type	Basic Fee (£)	Total funds / sub-funds (aggregate)	Fee (£)
EEA UCITS scheme recognised under Part 6 of The Collective Investment	150 (was 324)	1-2	150 (was 324)
		3-6	375 (was 810)

Schemes (Amendment etc.) (EU Exit) Regulations 2018	7-15	750 (was 1,620)
	16-50	1,650 (was 3,564)
	>50	3,300 (was 7,128)

Australia

Extension of Transitional Relief for Foreign Financial Services Providers

The Australian Securities and Investments Commission ("ASIC") has extended for a further 12 months the transitional relief for foreign financial services providers ("FFSPs") from the requirement to hold an Australian financial services ("AFS") licence when providing financial services to Australian wholesale clients.

Transitional arrangements for ASIC's sufficient equivalence relief and limited connection relief were due to expire on 31 March 2023.

The extension of the transitional relief to 31 March 2024 is made by ASIC Corporations (Amendment) Instrument 2022/623¹⁰.

The new relief instrument also delays the commencement of the ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2020/199 until 1 April 2024. Under that instrument ASIC gives licensing relief to some FFSPs that provide funds management financial services to certain categories of Australian professional investors.

During this extended transitional period, ASIC will consider new applications for individual temporary licensing relief, or new standard or foreign AFS licence applications, from entities that cannot rely on the transitional relief.

FFSPs that have been, or are granted a foreign AFS licence, will be able to continue to operate

¹⁰ <https://www.legislation.gov.au/Details/F2022L01022>

their financial services business in Australia under the licence issued by ASIC.

Canada

Canadian Securities Regulators Defer Launch of New SEDAR+ Filing System

On 1 June 2023, the Canadian Securities Administrators ("CSA") issued an update about SEDAR+, the new system that will be used by all market participants to file, disclose and search for issuer information in Canada's capital markets. The planned launch date of 13 June 2023 was extended to 25 July 2023, with a further contingency date set for 12 September 2023.

The extension was made to ensure the process of the migration of large volumes of data from multiple legacy systems to the SEDAR+ system meets the CSA's strict quality control standards.

Until SEDAR+ goes live, all capital market participants are required to continue using SEDAR and the other systems in current use.

The flat-fee model announced on 23 March 2023, which reduces overall annual system fee costs by seven per cent which came into effect on 9 June 2023 will apply to all SEDAR and National Registration Database (NRD) filings.

How the Maples Group Can Help

Maples Group GRS supports UCITS¹¹ and AIFMs¹¹ in their multi-market distribution strategies by providing an integrated global network of experts coordinated by a dedicated central team supporting all legal and regulatory aspects governing the cross-border marketing of investment funds on both a private placement and public offer basis.

Further Information

Should you require any further information or assistance in this regard, please contact the following or any member of the Maples Group GRS team.

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The Maples Group's Irish legal services team is independently ranked first among legal service providers in Ireland in terms of total number of funds advised (based on the most recent Monterey Insight Ireland Fund Report, as at 30 June 2022.

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¹¹ Domiciled in Ireland and Luxembourg.