

Cross Border Distribution of Funds

New requirements relating to cross border distribution are due to apply from 2 August 2021, when the provisions of the Cross Border Distribution Directive (“**CBDD**”) are due to be transposed into national law and the provisions of the Cross Border Distribution Regulation (“**CBDR**”) are due to come into effect. The requirements apply to UCITS management companies and AIFMs in relation to the marketing and distribution of UCITS and AIFs.

The Cross Border Distribution Directive amends both the UCITS Directive and the AIFMD in the manner set out below.

AIFMD Amendments	UCITS Directive Amendments
<ul style="list-style-type: none"> ▪ Insertion of a definition of "pre-marketing" 	<ul style="list-style-type: none"> ▪ Aligning national notification procedures
<ul style="list-style-type: none"> ▪ New provisions regarding the discontinuation of marketing (or de-notification) 	<ul style="list-style-type: none"> ▪ New provisions regarding the discontinuation of marketing (or de-notification)
<ul style="list-style-type: none"> ▪ Member States to make certain facilities relating to payments, repurchasing or redeeming units and the provision of information available to retail investors where marketing to retail investors is permitted 	<ul style="list-style-type: none"> ▪ Prohibition on Members States requiring UCITS to have local facilities such as local paying agents
<ul style="list-style-type: none"> ▪ New principles relating to marketing communications 	<ul style="list-style-type: none"> ▪ Principles relating to marketing communications moved from the UCITS Directive to CBDR

New Pre-Marketing Regime

The AIFMD is amended to introduce a new definition of “pre-marketing” and to provide for conditions for the use of pre-marketing by EU authorised alternative investment fund managers (“**AIFMs**”). To date, there has been inconsistency between member states in relation to what activities could be undertaken before formal marketing requiring notification would be deemed to have taken place. Under the new definition, pre-marketing involves:

- the provision of information or communication, direct or indirect, on investment strategies or investment ideas;
- by an EU AIFM or on its behalf; ¹
- to potential professional investors domiciled or with a registered office in the EU;

¹ Only EU regulated entities (MiFID investment firms and tied agents, banks, UCITS management companies and other AIFMs) may act on behalf of the AIFM.

- in order to test their interest in an AIF which is not yet established, or which is established, but not yet notified for marketing in the member state where the potential investors are domiciled or have their registered office; and
- which does not amount to an offer or placement to the potential investor to invest in the AIF.

EU AIFMs will not be permitting to engage in pre-marketing where the information provided to potential investors:

- is sufficient to allow investors to commit to acquiring units or shares of a particular AIF;
- amounts to subscription forms or similar documents whether in draft or final form; or
- amounts to constitutional documents, a prospectus or offering documents of a not yet established AIF in final form.

Draft offering documents must clearly state that they do not constitute an offer or invitation to invest in the AIF and that the information should not be relied upon because it is incomplete and may be subject to change.

An EU AIFM must send, within two weeks of commencing pre-marketing, an “informal letter” to the competent authorities of its home member state setting out the following information:

- the members 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 which are or were the subject of pre-marketing.

The CBDD provides that any investment by professional investors within 18 months of the EU AIFM having commenced pre-marketing in an AIF referred to in pre-marketing information or in an AIF established as a result of the pre-marketing, will be considered to be as a result of marketing and will be subject to the notification procedures set out in the AIFMD. This means that EU AIFMs will not be able to rely on reverse solicitation in these circumstances for a period of 18 months after conducting pre-marketing.

Discontinuation of Marketing

An EU AIFM will be able to “de-notify” marketing arrangements for some or all of its funds in a member state where the below conditions are met.

- A blanket offer must be made to repurchase or redeem, free of any charges or deductions, all investments in the AIF held by investors in that member state. The offer must be publicly available for at least 30 days and must be addressed, either directly or through financial intermediaries, individually to all investors in the member state whose identify is known. (This condition does not apply with respect to close-ended AIFs.)
- The intention to terminate marketing arrangements is made public in that member state by means of a publicly available medium.
- Any contractual arrangements with financial intermediaries or delegates are modified or terminated with effect from the date of de-notification in order to prevent new or further, direct or indirect, offering of the AIF.
- The EU AIFM must submit a notification to the competent authorities of its home member state containing information relating to the blanket offer, the intention to terminate and the modification or termination of contractual arrangements.
- The EU AIFM must not engage in pre-marketing activities with respect to the AIFs referred to in the notification to the competent authority (or in respect of similar investment strategies or investment ideas) in the member state identified in the notification for a 36 month period following the date of de-notification.
- The EU AIFM must continue to provide investors who remain invested in the AIF and competent authorities in its home members state with the information required to be included in annual reports and prospectuses under the AIFMD.

Local Facilities

In order to address inconsistencies between member states with regard to facilities agents, paying agents and similar service providers, the CBDD includes new rules applicable to all UCITS management companies marketing UCITS and all AIFMs marketing AIFs to retail investors in relation to the maintenance of local facilities in host member states. Managers will be required to establish local facilities in each host member state to:

- process investor subscription and investment orders and make payments to investors;
- provide investors with information on how an order can be made and how redemption proceeds are paid;
- facilitate the handling of information relating to the exercise of investor rights;
- make investor disclosure documents, periodic reports, key investor information documents (“KIIDs”) etc available for inspection; and
- act as a contact point for communicating with host member state regulators.

All of these facilities may be provided by electronic means. Member states must not require that managers have a physical presence in the host member state.

Fund Marketing Communications

The CBDR sets out broad principles that fund marketing communications from AIFMs and UCITS management companies must comply with (derived from existing provisions in the UCITS Directive, which will be removed from the UCITS Directive once the CBDR applies). Marketing communications must:

- be identifiable as marketing communications;
- describe the risk and rewards of investing in an equally prominent manner;
- be fair, clear and not misleading;
- indicate, in the case of UCITS management companies, that a prospectus exists and that the KIID is available;
- specify where, how and in which language investors or potential investors can obtain the prospectus and KIID and provide hyperlinks to or website addresses for those documents;
- specify where, how and in which language investors can obtain a summary of investor rights and provide a hyperlink to such a summary, which must include, as appropriate, information on access to collective redress mechanisms at EU and national level in the event of litigation; and
- also contain clear information that the manager may decide to terminate the arrangements made for the marketing of funds in accordance with the UCITS Directive / AIFMD.

Competent authorities may require prior notification to them of marketing communications for UCITS and AIFs that are marketed to retail investors; this will not be a pre-condition to the marketing of the fund.

On 27 May 2021, ESMA [published](#) its Guidelines on Marketing Communications, which were the subject of a public [consultation](#) between 9 November 2020 and 8 February 2021. The guidelines provide guidance on the application of the requirements that marketing communications: be identifiable as marketing communications; describe the risk and rewards of investing in an equally prominent manner; and be fair, clear and not misleading. The guidelines will apply six months after their publication on the ESMA website in the official languages of the EU.

Database of National Laws

Competent authorities must publish online all applicable national laws, regulations and administrative provisions governing marketing rules for AIFs and UCITS. ESMA will maintain a centralised database. Competent authorities will have to publish and maintain central databases on their websites of their fees or charges.

Implementation

Despite the fact that the CBDD and CBDR are due to apply from 2 August 2021, few member states have moved so far to implement the legislation and we are awaiting transposing legislation in Ireland.

Please get in touch with your usual Asset Management and Investment Funds Department contact or any of the contacts listed in this publication should you require further information in relation to the material referred to in this briefing note.

Full details of the Asset Management and Investment Funds Department, together with further updates, articles and briefing notes written by members of the Asset Management and Investment Funds team, can be accessed at www.matheson.com.



**Tara Doyle**

Partner

T +353 1 232 2221**E** tara.doyle@matheson.com**Michael Jackson**

Managing Partner

T +353 1 232 2000**E** michael.jackson@matheson.com**Dualta Counihan**

Partner

T +353 1 232 2451**E** dualta.counihan@matheson.com**Shay Lydon**

Partner

T +353 1 232 2735**E** shay.lydon@matheson.com**Philip Lovegrove**

Partner

T +353 1 232 2538**E** philip.lovegrove@matheson.com**Liam Collins**

Partner

T +353 1 232 2195**E** liam.collins@matheson.com**Elizabeth Grace**

Partner

T +353 1 232 2104**E** elizabeth.grace@matheson.com**Oisín McClenaghan**

Partner

T +353 1 232 2227**E** oisín.mcclenaghan@matheson.com**Michelle Ridge**

Partner

T +353 1 232 2758**E** michelle.ridge@matheson.com**Barry O'Connor**

Partner

T +353 1 232 2488**E** barry.oconnor@matheson.com**Donal O'Byrne**

Partner

T +353 1 232 2057**E** donal.o'byrne@matheson.com**Catriona Cole**

Partner

T +353 1 232 2458**E** catriona.cole@matheson.com**Bronagh Maher**

Professional Support Lawyer

T +353 1 232 3757**E** bronagh.maher@matheson.com

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