

Luxembourg, 8 February 2021

## **Response to the ESMA consultation paper on Guidelines on marketing communications under the Regulation on cross-border distribution of funds**

### **Introduction**

The Association of the Luxembourg Fund Industry (ALFI) represents the face and voice of the Luxembourg asset management and investment fund community. The Association is committed to the development of the Luxembourg fund industry by striving to create new business opportunities, and through the exchange of information and knowledge.

Created in 1988, the Association today represents over 1,500 Luxembourg domiciled investment funds, asset management companies and a wide range of business that serve the sector. These include depositary banks, fund administrators, transfer agents, distributors, legal firms, consultants, tax advisory firms, auditors and accountants, specialised IT and communication companies. Luxembourg is the largest fund domicile in Europe and a worldwide leader in cross-border distribution of funds. Luxembourg domiciled investment funds are distributed in more than 70 countries around the world.

We thank ESMA for the opportunity to participate in this consultation on Guidelines on marketing communications under the Regulation on cross-border distribution of funds.

### **General comment**

As a general comment, ALFI would like to underline that marketing communications represent an opportunity for fund players to distinguish themselves and their products from their competitors. Therefore imposing too strict format requirements for such type of documents, whether in paper or digital presentation is not desirable. ALFI would also like to raise the attention of ESMA to the fact that the marketing and distribution of AIFs is very much different from the distribution of UCITS – in respect of channel as well as in respect of target clients – so that one size guidelines cannot fit all.

**Q1 In light of the fact that the Guidelines should apply to all marketing communications relating to investment funds and that distribution of funds is often carried out by distributors, the requirements set out in the Guidelines were inspired by those set out in Article 44 of the Commission Delegated Regulation (EU) 2017/565. Against this background, please specify whether:**

- a) **You agree that the requirements set out in the Guidelines are in line with those set out in the provisions of Article 44 of the Commission Delegated Regulation (EU) 2017/565;**

We generally agree that the proposed Guidelines are in line with the Article 44 of the Commission Delegated Regulation (EU) 2017/565 on organisational requirements and operating conditions for investment firms with the below remarks (b and c).

On a different aspect, we note that while ESMA acknowledges that the distribution of funds is often carried out by distributors rather than fund managers, it is of the view that fund managers “ *should be responsible for ensuring compliance of all marketing communication addressed to investors even when they are being addressed by distributors*” (p. 6 of the Consultation Paper).

Distributors are subject to marketing and distribution requirements stemming out from the legal and regulatory frameworks applicable to them by virtue of their own licences and authorisations and should remain responsible for identifying and complying with the relevant requirements applicable to their distribution activities: fund managers cannot assume responsibility for the distributor's marketing documents.

- b) You see any gap between the guidance provided under the Guidelines proposed in this consultation paper and the rules applying under the provisions of the aforementioned Article. If so, please justify the reasons and specify which gaps you have identified, including if you consider that the guidance provided under the proposed Guidelines is more comprehensive than the rules applying under the provisions of the aforementioned Article; and**

We have not found in the Guidelines the following obligations provided by Article 44 of the Commission Delegated Regulation (EU) 2017/565.

- Article 44.2(a): the information includes the name of the investment firm (i.e. no equivalent provision for UCITS / AIF managers (“IFMs”));
- Article 44.3(b): in case of comparison, the sources of the information used for the comparison are specified;
- Article 44.3(c): the key facts and assumptions used to make the comparison are included,
- Article 44.4(b): the information must include appropriate performance information which covers the preceding 5 years, or the whole period for which the financial instrument has been offered, the financial index has been established, or the investment service has been provided where less than five years, or such longer period as the firm may decide, and in every case that performance information is based on complete 12-month periods (this was only found in the Guidelines with regards to simulated past performance),

- Article 44.6(a): Where the information contains information on future performance, investment firms shall ensure that the following conditions are satisfied: (a) the information is not based on or refer to simulated past performance,
- Article 44.6(d): the information is based on performance scenarios in different market conditions (both negative and positive scenarios), and reflects the nature and risks of the specific types of instruments included in the analysis,
- Article 44.7: Where the information refers to a particular tax treatment, it shall prominently state that the tax treatment depends on the individual circumstances of each client and may be subject to change in the future.

In order to reduce the gaps between the proposed Guidelines and the Commission Delegated Regulation (EU) 2017/565, and therefore the possibilities of misunderstanding or errors in the application of such texts, we suggest also including the above in the proposed Guidelines.

**c) Any requirements of the proposed Guidelines should be further aligned with the provisions of the aforementioned Article**

ALFI would see merit in streamlining the guidelines on marketing communication and the requirements set out in the Commission Delegated Regulation (EU) 2017/565 to some extent. However we call upon ESMA to clarify what is specifically expected to be done by product manufacturers in the context of the guidelines as such.

We have identified the following suggestions that would further align the proposed Guidelines with Article 44 of the EU Regulation 2017/565.

- 1) Article 44.2 (b) of the EU Regulation 2017/565 provides that the investment firm should give “*fair and prominent indication of any relevant risks when referencing any potential benefits*”, whereas the proposed Guidelines provide in Paragraph 10 that the fund manager should “*always give a fair and prominent indication of any risks*”. We are of the opinion that only the main risks (or most relevant risks for the purpose of the communication) should be disclosed. Indeed, it might not be technically possible to detail in a marketing communication, especially on small format communications, all risks associated with the investment. Giving a list of risks only referred to by their category (e.g. “market risk”, “economic risk”, “regulatory risk” etc.) would not, in our opinion, be considered as fair and clear.
- 2) Article 44.2 (c) of the EU Regulation 2017/565 provides that “*the information uses a font size in the indication of the relevant risks that is at least equal to the predominant font size used throughout the information provided, as well as a layout ensuring such indication is prominent*”, while the proposed Guidelines in Paragraph 11 provides: “*the font, size, and position used to describe the rewards should be the same as those used to describe the risks*”. We suggest that the proposed Guidelines should reflect the logic

of Article 44.2(c) of the EU Regulation 2017/565, restricting creative freedom on the font size only.

- 3) In the two following sentences provided by the proposed Guidelines (Paragraph 15), it can be inferred that the only requirement to ensure clarity of the communication is the language in which it is provided.
- *“When promoting a fund open to retail investors or potential retail investors, marketing communications should be considered **clear** for the target audience of the promoted fund if they are written in the official language(s), or one of the official languages, of the Member State in which they are provided”,*
  - *“However, when promoting a fund open to professional investors only, marketing communications may be considered **clear** for the target audience of the promoted fund if they are written in a language customary in the sphere of international finance”.*

Similarly, in the following sentence: *“Additionally, the information should be seen as **not misleading** when it is consistently presented in the same language throughout all marketing communications that are provided to each investor or potential investor, unless the investor or potential investor has agreed to receive information in more than one language.”* it can be inferred that the communication is *necessarily* not-misleading when provided in the same language throughout all marketing communications.

In order to avoid reducing the clarity and non-misleading character of a communication to the language in which it is written, it could be suggested to replace the terms “clear” and “not-misleading” by the term “appropriate”, or the sentences could be rephrased to show that the provision of the marketing communication in the relevant languages “participates” to the clarity of the communication.

## **Q2: Do you agree with this all-encompassing approach as regards the definition of marketing communications?**

One should differentiate between the pre-marketing regime subject to Directive (EU) 2019/1160 on facilitating cross border distribution of collective investment undertakings and the marketing as such. In our view documents used in the context of a pre -marketing regime should not be considered as marketing communication under the guidelines.

The context around the publication or release of a marketing communication is key to determine the intention to tease investors’ interests, to advertise or to rather simply provide financial data to an existing investor aiming at following up the evolution of the investment made. As a matter of example, in the latter case, the communication should not be qualified as “marketing communication” since there is no intention to market the investment fund concerned. We would also consider that any documents which are not considered as marketing documents could be used during the marketing period per se.

Furthermore, it must be underlined that there seems to be a discrepancy between the text of the consultation and the guidelines to the extent paragraph 11 of the consultation refers to the AIFMD definition of the term “marketing”, whilst the scope of the guidelines is larger and encompasses a very wide range of documents.

Furthermore, we are of the opinion that the marketing communications which should be subject to the Guidelines as proposed in the Consultation Paper (paragraph 11) should be limited to marketing communications made at the initiative of or on behalf of the fund manager, in order to avoid any doubt in the interpretation of what constitutes a marketing communication. Indeed it can be inferred from the second sentence under “1. Scope” – “Who?”: “*regardless of the issuer of these marketing communications*” that a communication made by a third party not related in any way to the fund manager, which would mention enough information to identify a fund and supposedly mention the fund in a positive way, could be a marketing communication even though the fund manager has no control over that third party (and we understand that this is not the aim of the proposed Guidelines).

We tend to disagree with a definition of marketing communications without regards to their issuer (“regardless of the issuer of those marketing communications” – proposed Guidelines – 1. Scope – Who?) if it is not also mentioned that the communication is made at the initiative or on behalf of the fund manager. This has also to be read in parallel with point 4.5 of the proposed Guidelines: “*A UCITS management company, an AIFM, a EuSEF manager or a EuVECA manager should ensure that any reference to a UCITS or an AIF it manages in a press article, advertisement or press release on the Internet or any other medium [...]*”. We understand that it is referred notably to press articles published *at the initiative or on behalf of the fund manager*.

Accordingly, we are of the opinion that “*(e) communications describing the characteristics of a UCITS or an AIF, which are handed down to distributors by a UCITS management company, an AIFM, a EuVECA manager or a EuSEF manager, which are eventually addressed to investors, even if such communications were not meant to be handed down to investors or potential investors*” should be removed from the list of marketing communications, since this type of communication is, by definition, not addressed to investors *on behalf of the fund manager*.

It is worth mentioning that we understand that (f) refers to communications made by a third party and being re-used by the fund manager for marketing purposes (as opposed to a comprehension that would oppose two alternative possibilities: (i) communications by a third party for marketing purposes, (ii) communications used by the fund manager for marketing purposes). Indeed, in the later interpretation, case (i) does not involve any communication made at the initiative or on behalf of the fund manager

**Q3: Do you agree that a non-exhaustive list of marketing communications should be included in the Guidelines? If yes, please specify whether any element should be added to, or withdrawn from, this list, as set out in the Section 1 of Annex IV below.**

There are already several lists of mandatory documents (such as the prospectus) contained in various regulatory instruments. Therefore, ALFI is not in favour of including any additional list. This would not be useful in our view, and could potentially be risky, as the naming of documents can vary from one jurisdiction/issuer to another.

We would instead recommend to have a list of criteria (relating to the content and format) helping to define what is/is not a marketing communication. For example, the concept of marketing communication should exclude any communication that does not name or describe a particular product.

**Q4: Do you agree that the Guidelines appropriately take into account the on-line aspects of marketing communications? If not, please specify which aspects should be further detailed.**

ALFI agrees that the on-line aspects of marketing communications are important and have to be addressed as part of the guidelines. However the current draft does not specify what is to be understood as “on-line” in this context. It must be noted that there are internet fora that aim at providing information as to good investments or rankings. ALFI is of the view that the fund promoter/manager should not be held accountable for any information issued on websites which are not under their control.

ALFI would also recommend to avoid any redundancy with already existing EU regulations which aim at regulating online services like distance marketing and to protect consumers.

**Q5: Do you agree that the Guidelines should include a negative list of the documents that should not be considered as marketing communications? If not, please provide details on your views. If yes, please specify whether any element should be added to, or withdrawn from, this list, as set out in Section 1 of Annex IV below.**

ALFI would see a merit in having a general definition of what is not to be considered as marketing communication, but does not see any value added in having a negative list, which could prove non exhaustive. Furthermore, depending on the context some communications may fall under the notion of marketing or not and it would be difficult to list all possible situations (for example a speech given during a roadshow by an asset manager is not necessarily classified as a marketing communication).

We would instead recommend to have a list of criteria (relating to the content, format, or purpose) helping to define what is/is not a marketing communication. For example, financial data is not to be considered as marketing communication.

**Q6: Do you agree that a short disclaimer is the most appropriate format to identify marketing communications as such and that the disclaimer should mention the existence of the prospectus of the fund?**

ALFI agrees that a short disclaimer is sufficient and is the most appropriate format to identify marketing communications. This should be similar to what is applicable to communication relating to non-financial products and could take the form of a simple flag mentioning “This is a marketing communication”. However, adding a reference to the prospectus would make this disclaimer already too long and not useful since this is already requested by Article 4(2) and Article 4 (5) of the EU Regulation 2019/1156 facilitating cross-border distribution of collective investment undertakings to ensure that marketing communications contain a reference to the existence of the prospectus for UCITS and for AIFs, which publish a prospectus in accordance with Commission Delegated Regulation (EU) Regulation 2017/565. This should a fortiori not be an obligation for these AIFs which do not issue prospectuses.

The place of the disclaimer should also be left to the appreciation of the fund promoter. Finally the question is also how and when to apply the guidelines in an online marketing situation. For example, should the abovementioned disclaimer appear in case a promoter describes its fund on its website? In case of a podcast? In our view, similar to what we can read/hear in respect of non-financial products, the “disclaimer” could be a simple pop-up or vocal warning.

In case the target audience only includes professional investors, we would recommend to add to the “marketing communication” flag the indication “Restricted to professional investors”, so that it can be immediately identified.

**Q7: Do you agree with the approach on the description of risks and rewards in an equally prominent manner? If you do not agree, please indicate your proposed approach to ensuring that all marketing communications describe the risks and rewards of purchasing units or shares of an AIF or units of a UCITS in an equally prominent manner.**

In our view it is not the purpose of marketing documents to include lengthy statements. In particular, in case investors are professional ones this is an overkill.

It must be underlined that the KIID must be submitted to the investor in any case before the subscription into fund units or shares. It should therefore not be replaced by a marketing communication.

Moreover the guidelines do not distinguish between different types of funds and different types of investors. There can be no one-size-fits all solution in this regard. As mentioned above, the information on the description of risks and rewards already exists in other documents and one should avoid duplicating such information in various places. As mentioned in the ESMA Q&A on the UCITS Directive, there is also a need to ensure consistency between different documents and adding another layer of disclosure obligations might jeopardize this objective.

We would thus recommend that when a KIID is required the description of risks and rewards as foreseen in the guidelines should not be imposed. This should also be the case for AIF pre-marketing documents.

Finally, ALFI wonders what the exact meaning of “in an equally prominent manner” is and have the following reserves:

- 1) *Reserve regarding the risks*: Article 44.2 (b) of the EU Regulation 2017/565 provides that the investment firm should give “*fair and prominent indication of any relevant risks when referencing any potential benefits*”, whereas the proposed Guidelines provide in Paragraph 10 that the fund manager should “*always give a fair and prominent indication of any risks*”. Paragraph 35 of the proposed Guidelines requires that marketing communications, when mentioning the risks and rewards “*should refer at least to the material risks mentioned in the KID, the KIID, the prospectus, [...]*”.

We are of the opinion that only the main risks (or most relevant risks for the purpose of the communication) should be disclosed. Indeed, we are of the opinion that the level of information contained in a marketing communication should be fit to the size and format of the marketing communication: it might not be technically possible to detail in a marketing communication, especially on small format communications, all risks associated with the investment.

- 2) *Reserve regarding the notion of “equally”*: the proposed Guidelines seem to draw an emphasis on the notion of “equally” that is very difficult to apply in practice for the following reasons:
  - The Guidelines give the example of a double-column table as an example of presentation of the risks and rewards in an equally prominent manner. We are of the opinion that a two-column table presenting the risks and rewards is not adapted to the fund sector, as it gives the immediate impression that a reward and a risk that are on the same line are intrinsically related. Risks are applicable to the investment in general and are not necessarily related to a specific reward. A two-column table would therefore, in our opinion, be misleading for the investor or potential investor.
  - In addition, as the list of risks is necessarily much longer than the rewards, the presentation of risks and rewards in a two-column table will necessarily seem unbalanced to investors and potential investors, leading them to have a wrong impression of the investment.
  - The Guidelines also provide for the following guidance: “*Both the risks and rewards should be mentioned either at the same level of one immediately after the other*”. It might be technically difficult to comply with this guideline since rewards are generally disseminated throughout the presentation, which makes it difficult to assess when exactly to provide for the risks. It would also not be efficient to include a list of risks every time a possible reward is mentioned.

We are of the opinion that the risks could be disclosed with the same font size as the rewards, but in a specific section that would not necessarily follow immediately the rewards but that would be a full-fledged section/part related to the risks. Footnotes could be inserted after the presentation of the main rewards of the investment, giving the reference of the section on risks.

We therefore do not agree with the fact that “*marketing communications where rewards are described at the beginning while the risks are described at the end*” should be considered as not meeting the requirement of the EU Regulation 2019/1156.

- 3) *Reserve regarding the reference for the determination of the font size of the information on risks:* Finally, Article 44.2 (c) of the EU Regulation 2017/565 provides “*the information uses a font size in the indication of the relevant risks that is at least equal to the predominant font size used throughout the information provided*”, while the proposed Guidelines in Paragraph 11 provides: “*the font, size, and position used to describe the rewards should be the same as those used to describe the risks*”. The Guidelines are thus currently stricter than the text of Article 44.2(c) of the EU Regulation 2017/565, which will generate confusion among investment firms and IFMs.

**Q8: Please specify whether any specific requirements should be set out in the Guidelines for the description of risks and rewards in an equally prominent manner in marketing communications developed in other media than paper (e.g. audio, video or on-line marketing communications).**

We refer to our answer to questions 6 and 7 above. Furthermore, MiFID imposes marketing material to be fair, clear and not misleading in any case, even in on-line situations.

We would also like to underline that a distinction should be made between the risk disclosure and the risk warning. The latter, which seems to be an element required by the guidelines, does not need a full disclosure of the risk profile of the fund.

**Q9: What are your views on this approach? Do you agree that the fair, clear and not misleading character of the information may be assessed differently for marketing communications relating to funds open to retail investors and marketing communications relating to funds open to professional investors only?**

The important element to take into account in relation to the requirement for a fair, clear and not misleading information is the recipient of such information and not the type of fund as such. In certain cases, retail investors may indeed not understand the information meant for institutional investors, in other cases technical details may be relevant for both investors. We would therefore suggest that on top of the short disclaimer mentioning the status of marketing communication a specific mention like “For institutionals only” is used where needed.

We would suggest a few modifications in the description of the characteristics of the suitability of the marketing communication to the target investors or potential investors.

- In Paragraph 14 of the proposed Guidelines:
  - we understand that by “*refrain from using technical wording*”, it is understood “*refrain from using excessively technical wording*” since in order to provide a clear, fair and non-misleading information, the issuer has sometimes no choice but to use wording that could be considered as technical;
  - we would remove the terms “*easy to read*”, which is a very subjective concept difficult to assess on an objective basis. Instead, more objective criteria could be used, for example: “*refrain using different words to designate the same concept or idea*”, “*avoid complex syntax or syntax that would be subject to various interpretations*”;

We also refer to the comment made in Q1 c point 3) which is equally applicable here.

**Q10: Do you agree that marketing communications should use the same information as that included in the information documents of the promoted fund?**

Please refer to our answer to question 7 above. Marketing communication should not use the same information as the one included in information documents of the promoted fund as these documents have a different objective. No additional information should be required in such marketing communication as long as there is consistency between the various documents.

This calls for several precisions:

- The Consultation Paper mentions “*consistent and not contrary with*” (Paragraph 25) while the proposed Guidelines only mention “*consistent with*” (Paragraph 16) – we are of the opinion that “*consistent and not contrary to*” would be more complete and therefore leave less space for interpretation;
- We are of the opinion that the word “same”, as proposed in Question 10, should not be used, since it would mean that a fund manager is not allowed to give a different level of information than what is disclosed in the legal and regulatory documents. In other words, a fund manager could not add new or more granular information to the marketing communication that is not comprised in the legal and regulatory documents but that is consistent and not contradictory with such legal and regulatory documents. This would be detrimental to the investors and would oblige the fund manager to modify its legal and regulatory documents every time they wish to disclose new or different information in the marketing communication (e.g. to make a precision, disclose some new figures or information with regards to the market environment etc.). We agree

instead with the terms “*consistent and not contrary to*” leave the possibility to add new information to the marketing communication, which is not comprised in the legal and regulatory documents but which is consistent and not contrary to legal and regulatory documents of the fund.

- We also note that “*legal and regulatory documents of the fund*” is defined by Paragraph 16 of the Guidelines as list of documents (Prospectus, KID etc.) whereas “*information documents*” is defined in the Consultation Paper as “*information documents referred to in Article 23(1) of the AIFMD, Article 13(1) of the EuVECA Regulation or Article 14(1) of the EuSEF Regulation*” (Paragraph 16 of the Consultation Paper). We understand that “*information documents*” therefore refers to the document encompassing all information required under Article 23(1) of the AIFMD, Article 13(1) of the EuVECA Regulation or Article 14(1) of the EuSEF Regulation.

We note that in Paragraphs 18 and 19 of the proposed Guidelines, it seems that it is referred to “*information documents*” as a synonym for “*legal and regulatory documents*”, which does not seem to be in line with the definitions above-mentioned. The title of Question 10 also refers to “*information documents*” whereas the Consultation Paper on the same topic (Paragraphs 25 and 26 leading to Question 10) refers to “*legal and regulatory documents*”.

Since we understand that the ESMA meant that marketing communications should be consistent with, and not contrary to “*legal and regulatory documents*”, we have drafted our answer to this Question 10 to refer only to “*legal and regulatory documents*” and would suggest ESMA to amend the Guidelines accordingly in order to avoid any wrong interpretation of ESMA’s intentions.

**Q11: What are your views on this approach? Do you agree that no minimum set information on the characteristics of the promoted investments should be required in marketing communications as this should depend on the size and format of the marketing communication?**

We agree with the approach proposed.

**Q12: What are your views on these requirements relating to the fair, clear and not misleading of the information on risks and rewards?**

Please refer to our answer to question 8. If the information on risks and rewards is consistent between documents, it should be considered as being not misleading. This is a matter to be appreciated on a case-by-case basis.

**Q13: Do you agree with this approach on the presentation of costs?**

Information on costs is already contained in the KIID. In our view if the elements of information relating to costs in the marketing communication are not contradictory to those contained in the KIID there should be no reason to duplicate such information, and a simple reference to the KIID may be made.

In addition, we do not agree with paragraph 40 of the draft Guidelines on page 37 : *“40. Where any part of the total costs is to be paid in, or represents an amount of, a currency other than that of the Member State in which the target investors are residents, the marketing communication should provide an indication of the currency involved, the applicable currency conversion rates and costs, and the arrangements for payment or other performance.”* In our view, such topic has to be monitored by supervisors but seems not relevant in marketing communications.

**Q14: Do you agree with this approach relating to the information on past and expected future performance?**

As mentioned above, the purpose of marketing communications is not to replicate or complete existing mandatory documents. A simple reference to those, as applicable, should be sufficient. However it must also be possible to adapt the contents according to the constraints of marketing communication. We would therefore suggest to amend paragraph 19 (Section 6.1) of the Draft Guidelines which currently requires performance information to be the same as in the fund documents. Such paragraph 19 should rather ensure that no conflicting information is presented to investors.

**Q15: Do you agree with this approach relating to the information on the sustainability-related aspects of the investment in the promoted fund?**

In our view, where elements of this approach are already dealt with in the context of the application of the SFRD, there is no need to add any further sustainability-related information in marketing communications. One should avoid overlaps with other regulatory texts. The reference made to marketing communications in the SFRD should therefore be sufficient to ensure a level-playing field in Europe in this regard.

Should there however be any harmonisation of the marketing communication documents, it should be clarified that it would be without prejudice to Art. 6 of the SFDR, whereby if financial market participants do not deem sustainability risks to be relevant, this should be explicitly stated and explained.

**Q16: What is the anticipated impact from the introduction of the proposed Guidelines? Do you expect that the currently used practices and models of marketing communications would need to be changed?**

The introduction of the proposed guidelines will have a profound impact on the practices and models of marketing communications. Therefore, it is important that the requirements do not represent undue costs and do not entail detrimental effects in the difficult period our industry is going through and that they are worthwhile and do not duplicate other existing obligations. One must take into account the fact that promoters like to have their brand reflected in their marketing communication around the world and they should not be deprived of this possibility.

**Q17: What additional costs and benefits would compliance with the proposed Guidelines bring to the stakeholder(s) you represent? Please provide quantitative figures, where available.**

Additional costs and benefits of the compliance with the proposed guidelines are not known and would be difficult to quantify. There may be hidden costs as well. Although at first sight a harmonized pan-European marketing communication approach would be a positive evolution and would ensure a level-playing field between all types of concerned documents, one should remember that the EU is not isolated and that there may be other requirements applicable in third countries as well.