



Commission de Surveillance  
du Secteur Financier

2021-2023  
MARKETING  
COMMUNICATIONS  
UNDER THE  
REGULATION ON  
CROSS-BORDER  
DISTRIBUTION OF  
FUNDS

GENERAL FINDINGS AND  
OBSERVATIONS

## 2021-2023 MARKETING COMMUNICATIONS UNDER THE REGULATION ON CROSS-BORDER DISTRIBUTION OF FUNDS

### Introductory Remarks

1. In 2022, the CSSF launched a thematic review on the content and use of marketing communications (hereafter “MCs”) by Luxembourg investment fund managers (“IFMs” as defined in [Circular CSSF 22/795](#)), under Article 4 of [Regulation \(EU\) 2019/1156](#) of the European Parliament and of the Council of 20 June 2019 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 (hereafter “CBDF Regulation”). Article 4 of the CBDF Regulation has been supplemented by [ESMA Guidelines 34-45-1272](#) on marketing communications under the Regulation on cross-border distribution of funds (hereafter “ESMA Guidelines”). In this context, the CSSF launched a campaign to collect information on MCs and performed sample testing on MCs to verify their compliance with the applicable requirements under Article 4 of the CBDF Regulation and the ESMA Guidelines on a sample of IFMs during the period from 1 April 2021 to 31 March 2023.
2. In accordance with Article 8 of the CBDF Regulation, and with a view to both increasing awareness and transparency on the rules applicable to MCs and to ensuring investor protection, every second year national competent authorities, including the CSSF, should prepare and send to ESMA a report on those rules and their practical application on the basis of ex-ante and ex-post verifications of MCs.
3. Before setting out the general findings and observations from the thematic review, we remind you that the European Commission via ESMA and the Questions and Answers on the application of the UCITS Directive (Question 1 of Section XIII) and the application of the AIFMD (Question 4 of Section VIII), respectively, clarifies that “Fund managers are responsible for the compliance with Article 4 of Regulation (EU) 2019/1156, irrespective of who is the actual entity marketing the fund, and of the relationship it has with the third party distributor (whether it is contractual or not).”
4. In addition, the CSSF hereby asks all IFMs to take these general findings and observations into account when reviewing their procedures, establishing new MCs and/or verifying the consistency of MCs in use and, if applicable, to take the necessary corrective measures.

## General findings and observations

5. Firstly, the CSSF would like to point out that even if neither the CBDF Regulation nor the ESMA Guidelines contain a definition of “marketing communication(s)”, Section 1 of the ESMA Guidelines provides examples of the type of messages that may or may not be considered as MCs.
6. As mentioned in Section 2 of [Circular CSSF 22/795](#) on the application of the Guidelines of the European Securities and Market Authority on marketing communications (ESMA 34-45-1272) under Regulation (EU) 2019/1156 (CBDF Regulation), the CSSF considers that the IFMs shall assess, on the basis of the examples mentioned in the Guidelines, whether or not a certain message or communication addressed to investors or potential investors qualifies as “marketing communication”.
7. From these examples, the CSSF retains that “corporate communications broadcast by the fund manager [...] which do not refer to a specific UCITS or AIF or a group of UCITS or AIFs, unless the activities of the fund managers are limited to one fund or a small number of funds which are implicitly identified in such corporate communication” should not be considered as MCs.

### Identification as such of marketing communications

8. Article 4(1) of the CBDF Regulation requires that “**all marketing communications addressed to investors are identifiable**”. Point 6 of the ESMA Guidelines clarifies that “**the requirement for marketing communications to be identifiable as such should imply that all marketing communications include sufficient information to make it clear that the communication has a purely marketing purpose**, is not a contractually binding document or an information document required by any legislative provision and is not sufficient to take an investment decision. In this context, a **marketing communication should be deemed to be identified as such when it includes a prominent disclosure of the terms “marketing communication”** (even when preceded by the # symbol when the use of that symbol accentuates the text which it precedes in the case of on-line marketing communications), such that any person looking at it, or listening to it, can identify it as a marketing communication.”
9. In relation to these requirements, the main weakness observed by the CSSF is that the indication of the commercial character of the document was only displayed in a disclaimer at the end of the document among other information. Another current element of non-compliance is that the relevant message was not flagged at all as a marketing communication.

10. The CSSF expects that all MCs are identified as such by means of a prominent disclosure of the terms “marketing communication” even if the support is a website or a social media platform.

#### Consistency with fund’s documents

11. Article 4(2) and respectively Articles 4(4) and 4(5) of the CBDF Regulation require that MCs containing specific information about a fund/sub-fund do not contradict or diminish the significance of the information contained in the fund’s documents.
12. Point 18 of the ESMA Guidelines further stipulates that “the **information presented in the marketing communication should be consistent with the legal and regulatory documents of the promoted fund**, as applicable, in particular:
  - a) The prospectus or the information to be disclosed to investors in accordance with Article 23 of Directive 2011/61/EU, Article 13 of Regulation (EU) No 345/2013 or Article 14 of Regulation (EU) No 346/2013,
  - b) The legal documentation of the fund, in particular the Memorandum & Articles of Association, By-Laws, Trust Deed or similar documents required to legally establish a fund,
  - c) The KID or KIID,
  - d) The information disclosed on the websites of UCITS management companies, AIFMs, EuVECA managers and EuSEF managers under Regulation (EU) 2019/2088, and
  - e) The annual and half-yearly reports.”

Point 20 adds the following: “Consistency between the marketing communication and the legal and regulatory documents does not mean that all relevant information which is necessary to make an investment decision should be embedded in the marketing communication. However, the **wording or the presentation used in the marketing communication should not be inconsistent with, add to, diminish or contradict any information mentioned in the legal or regulatory documents** of the promoted fund.”

13. In relation to this “consistency” requirement, the CSSF observed weaknesses or areas of improvement in relation to almost all the elements mentioned in the ESMA Guidelines. This paragraph only focuses on issues related to the description of the features of the investments. Other topics will be covered later in this report.
14. In relation to the description of the features of the investments, the data in the MCs are either not in line with the content of the fund documents or do not include sufficient information for the target investors/potential investors to understand the key elements of those features (e.g. leverage, type of eligible assets, recommended holding period, etc.)
15. Consistency with fund documents allows a MC to be fair and not misleading. The CSSF expects that the wording and indicators used in the MC, the KID or KIID, the prospectus or equivalent, and the SFDR required disclosures are consistent.

Suitability of the marketing communication for the target investors or potential investors

16. Point 16 of the ESMA Guidelines states that “All marketing communications, regardless of the target investors, should contain fair, clear and not misleading information. However, **the level of information and the way that the information is presented may be adapted to whether investment in the promoted fund is open to retail investors (i.e. UCITS or retail AIFs), or to professional investors only (i.e. non-retail AIFs)**. In particular, marketing communications promoting funds open to retail investors should refrain from using excessively technical wording, provide an explanation of the terminology used, be easy to read and, where relevant, provide adequate explanation on the complexity of the fund and the risks arising from investment to assist investors’ understanding of the characteristics of the promoted fund”. Point 29 further provides that “When the marketing communication promotes a fund open to retail investors, it should **be ensured that the meaning of all terms describing the investment is clear.**”
17. The CSSF has identified issues and room for improvement regarding the requirements set above. The CSSF observed difficult-to-read disclaimer sections containing most of the legal information such as requirements of Articles 4(2), 4(3) and 4(5) of the CBDF Regulation. Either the text size was too small, and/or the information was presented in a block of text without spaces, sometimes over several pages. The CSSF also noted that sometimes the vocabulary and/or the indicators used did not allow for easy reading and understanding of the MC, especially when addressed to retail investors.
18. The CSSF expects that all information contained in a MC is easily readable, that all acronyms and all terms describing the investment used in the MC are properly defined and understandable by the target investors. The CSSF also expects that information in notes or disclaimers is easy to find and to read. In addition, the CSSF recommends that the MC clearly identifies the type of investors targeted. This is even more advisable when the MC only targets one type of investor while the fund/sub-fund is open to both retail and professional investors.
19. Also, when the MC displays a label, a certification or ratings, the CSSF expects that, firstly, the information is sufficiently precise concerning the fund/sub-fund rewards and the year concerned (where applicable); and secondly, that there is a reference to the entity that granted this label (etc.), i.e. that there is at least a hyperlink to a website where an investor/potential investor can find further information.
20. Regarding hyperlinks, in line with point 28 of [ESMA Supervisory Briefing on sustainability risks and disclosures](#) (ESMA 34-45-1427), the CSSF expects that the use of hyperlinks should be limited and [that, if used, such hyperlinks point to the exact place where the relevant information may be found]. In addition, these hyperlinks should be maintained over time to ensure that investors do not find broken links where information is no longer available.

### Mandatory references to the availability of fund documents

21. Articles 4(2), 4(3) and 4(5) of the CBDF Regulation require that a MC displays some regulatory information.
22. Articles 4(2) and 4(5) require that “all marketing communications (of UCITS and respectively AIFs which publish a prospectus or have a KID) **indicate that a prospectus exists and that the key investor information is available**. Such marketing communications shall specify **where, how and in which language investors** or potential investors **can obtain** the prospectus and the key investor information and shall provide **hyperlinks to or website addresses for those documents**.”
23. Article 4(3) states that MCs of UCITS “shall specify **where, how and in which language investors** or potential investors **can obtain a summary of investor rights** and shall provide a **hyperlink** to such a summary” and that “such marketing communications shall also contain clear information that the manager or management company [...] **may decide to terminate the arrangements made for the marketing** of its collective investment undertakings in accordance with Article 93a of Directive 2009/65/EC and Article 32a of Directive 2011/61/EU.”
24. In relation to these requirements, the CSSF observed that either the required references were not included at all, or that they were only partially displayed, e.g. there was a reference to the existence of the fund’s documents but there was no indication in which language they are available nor where to obtain them.
25. The CSSF expects that the information mentioned in this sub-chapter is, in principle, included in the MC.

### Information on risks and rewards

26. Article 4(1) of the CBDF Regulation requires that “all marketing communications addressed to investors are identifiable as such and **describe the risks and rewards of purchasing units or shares of an AIF or units of a UCITS in an equally prominent manner**”. In addition, Sections 5 and 6.2 of the ESMA Guidelines further provide requirements on information on risks and rewards. Among other things, it is stated that:
  - Information in MCs should be consistent with the fund’s documents.
  - The MCs should mention where complete information on the risks can be found in a clear and prominent manner.
  - In case of AIFs open to retail investors, the MC should clearly mention the illiquid nature of the investment where this is the case.
27. For the MCs tested that disclosed risks and rewards, the main weaknesses and points of improvement observed by the CSSF concern the lack of consistency of information disclosed with the fund’s documents and the lack of indication on where to find complete information on risks.

28. Accordingly, the CSSF expects that sections related to risks are properly tailored to the fund/sub-fund promoted (e.g. the risks for equity or bond sub-funds should not be the same) and that a prominent indication on where to find complete information on risks is disclosed even for MCs addressed to professional investors only.

#### Information on costs

29. Section 6.3 of the ESMA Guidelines concerns information on costs. In particular, point 41 states that “marketing communications should include an **explanation to allow investors to understand the overall impact of costs on the amount of their investment and on the expected returns**”. As mentioned previously, information in a marketing communication **should be consistent with the legal and regulatory documents of the promoted fund.**
30. When disclosed, the presentation of costs in MC was not satisfactory because either the information disclosed was not in line with the fund’s documents or the CSSF deemed the information to be insufficient.
31. Indeed, the CSSF is of the view that to be fair, clear and not misleading, a MC that presents costs should display the periodicity of these costs as well as a prominent indication that NOT all costs are presented, and that further information can be found in the prospectus or equivalent.

#### Information on performance and benchmark

32. Section 6.4 of the ESMA Guidelines provides the requirements regarding information on performance and also contains some provisions on the use of benchmarks. Among others, the following requirements are listed:
- Past performance data in the MC should be consistent with past performance included in the fund’s documents (especially KIID/KID) including data for the benchmark index, if any.
  - Information on past performance should not be the main information of the MC.
  - The reference period chosen for measuring the performance and the source of the data should be mentioned.
  - Past performance should be disclosed for the **preceding 10 years for funds establishing a KIID, or for the preceding 5 years for other funds**, or the whole period for which the relevant funds have been offered if less than 10 years for funds establishing a KIID or less than 5 years for other funds.
  - **In every case** past performance information should be **based on complete 12-month periods but** this information **may be supplemented with performance for the current year updated at the end of the most recent quarter.**
  - **Any change that significantly affected the past performance** of the promoted fund should be **prominently disclosed.**

- When information on past performance is presented, this information should be preceded by the following statement: **"Past performance does not predict future returns"**.
  - For funds recently set up and for which no past performance records are available, the reward profile may be represented only by reference to the benchmark's past performance or to the objective return, when a benchmark or objective return are envisaged in the legal and regulatory documents of the promoted fund.
33. In addition, regarding benchmarks, point 28 of the ESMA Guidelines specifies that "When marketing communications describe the investment policy of the promoted fund, in order to assist investors' understanding, the following is recommended practice: [...]"
- c) Active funds which are managed in reference to an index should provide **additional disclosure on the use of the benchmark index and indicate the degree of freedom from the benchmark.**
  - d) Active funds which are **not managed in reference to any benchmark index should also make this clear to investors."**
34. The most frequent elements of non-compliance and areas of improvement observed by the CSSF in the areas above are the following:
- (i) The reference period chosen to disclose performance is not the required 10-year period for funds establishing a KIID/KID or 5 years for other funds.
  - (ii) The performance for the current year is not updated at the end of the most recent quarter but at the end of the most recent month.
  - (iii) For newly launched funds, no performance data is disclosed in the KIID/KID, but performance data based on a related group strategy (or equivalent) is displayed.
  - (iv) For funds resulting from a merger or a contribution in kind, this event is not properly displayed in the marketing communication while performance data is displayed for the period before the creation of the fund.
  - (v) Details on the use of the benchmark are not sufficient and/or not prominently disclosed.
35. The CSSF expects that:
- (i) The periodicity criteria are respected.
  - (ii) The consistency with fund's documents is ensured.
  - (iii) Any changes significantly affecting the past performance of the promoted fund is prominently disclosed.
36. In addition, more transparency on the use of a benchmark is required. The CSSF recommends including the same information in the MC as in the fund's documents.



### Information on sustainability-related aspects

37. Section 6.5 of the ESMA Guidelines and point 60 state, among other things, that when disclosing information on the sustainability-related aspects, the MC should include a **link to the website where information on sustainability-related aspects is provided in relation to the promoted fund**, where relevant given the nature of the MC. Point 61 adds that this information on the sustainability-related aspects should not outweigh the extent to which the investment strategy of the product integrates sustainability-related characteristics or objectives.
38. In relation to these aspects, the CSSF observed on one hand that the link provided in the MC points to generic information on the sustainability-related aspects (i.e. not in relation to the fund/sub-fund promoted), and on the other hand, that in some cases the MC was only focused on sustainability-related aspects.
39. Accordingly, and as previously mentioned, the CSSF expects that a link to a given website points to information related to the specific fund/sub-fund promoted. The CSSF also expects a good balance between disclosures on sustainability-related aspects and other aspects of the investment strategy of the promoted fund/sub-fund.

### Short marketing communications

40. Point 31 of the ESMA Guidelines provides that: “In the case of short marketing communications, such as messages on social media, the marketing communication should **be as neutral as possible**, also it should indicate where more detailed information is available, in particular by **using a link to the relevant webpage where the information documents of the fund are available**”.
41. In very rare cases, the CSSF noted a MC that is not neutral. As mentioned above, the CSSF also observed that the required link did not point to a webpage where the information documents of the fund/sub-fund are available but rather to the homepage of the investment fund manager.
42. Again, the CSSF expects that hyperlinks used in MCs refer to webpage(s) where the actual information documents of the fund/sub-fund are available.



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