

YPOG Briefing:

NEW MARKETING RULES FOR ASSET MANAGEMENT COMPANIES

Berlin, February 03, 2022 | Lennart Lorenz and Stefanie Nagel

Overview

Different regulatory approaches to the cross-border distribution of investment funds may lead to significant distribution and access barriers in the European single market. For this reason, the European legislator has enacted Regulation (EU) 2019/1156 ("**Marketing Regulation**"), applicable since August 2, 2021, which is intended to facilitate the cross-border distribution of investment funds, in particular by establishing uniform rules on distribution requirements and marketing communication. On the same day, the European Securities and Markets Authority ("**ESMA**") published related guidelines on marketing communications ("ESMA Guidelines"), which specify the marketing communication requirements set out in Article 4(1) of the Marketing Regulation. The ESMA Guidelines enter into force on February 2, 2022 and apply in particular also to EuVECA Managers under Regulation (EU) 345/2013 ("**EuVECA Regulation**"). They are the relevant addresses of the following remarks.

1. What do the ESMA Guidelines regulate?

The ESMA Guidelines specify the **requirements for marketing communications** within the European financial system as set out in Article 4 of the Marketing Regulation. The ESMA Guidelines apply to all marketing communications addressed to investors or potential investors in alternative investment funds, irrespective of any cross-border reference. In particular, the following are considered to be **marketing communication**

- Any communication promoting a fund (pitch decks, press releases, video presentations, radio messages, etc.)
- Postings on social media platforms
- Advertisements
- Third-party communication used by the fund manager for marketing purposes

Excluded from the term "marketing communication" are legally required documents of the fund (e.g., key information documents (KID), periodic reports, partnership agreements), short messages without fund reference as well as pre-marketing information/communication.

2. Who is in-scope of the ESMA Guidelines?

In addition to EuVECA managers, the ESMA Guidelines are in principle addressed to all UCITS management companies, including any UCITS which has not designated a UCITS management company, alternative investment fund managers (AIFM), and EuSEF managers.

Not covered by the provisions of the Marketing Regulation and thus also not by the ESMA Guidelines are those managers of alternative investment funds that are registered exclusively pursuant to Section 2(4) of the German Investment Code ("**KAGB**") (so-called "sub-threshold AIFMs"). For most of the private equity and venture capital managers based in Germany, the following statements are therefore of no relevance due to them being only sub-threshold AIFMs.

3. What needs to be considered from now on?

For all intents and purposes, EuVECA managers must henceforth ensure that all marketing communications addressed to investors are (a) **identifiable** as such, describe the risks and rewards of purchasing units or shares of a fund in a (b) **equally prominent manner** and that all information included in marketing communication is (c) **fair, clear and not misleading**.

The most important requirements for marketing communication for EuVECA managers can be summarized as follows:

a.) Recognizability – identification of marketing communication as such

All marketing communication must contain sufficient information to make it clear that the communication has a pure **marketing purpose**. For this reason, marketing communication must be explicitly labeled with the term "marketing communication" in a clearly visible location. For online marketing communication, the hashtag **#MarketingCommunication** may also be used.

In addition, marketing communication should always contain a clearly displayed disclaimer. What is clearly displayed remains a question of the specific individual case. As an example, the ESMA Guidelines provide the following wording for a disclaimer:

"This is a marketing communication. Please refer to the information document of the EuVECA and to the PRIIPS KID before making any final investment decision."

In the case of short online marketing communication (e.g., banners or short videos on a website), the disclaimer may be dispensable. In these cases, only the use of the term "marketing communication" or the hashtag #MarketingCommunication is sufficient.

b.) Description of risks and rewards in an equally prominent manner

If a marketing communication contains information about **rewards**, the associated **risks** should be mentioned either at the same level or immediately after the rewards. It is insufficient to place the risks in footnotes, in another document or in the "small print". It is recommended that they be presented in the form of a two-column table or a list in which

risks and rewards are clearly differentiated on a single page. In practice, care should therefore be taken particularly in the case of so-called **pitch decks**, to ensure that the risks are also described accordingly in addition to the rewards.

In addition, the risk profile of the fund disclosed in the marketing communication should be consistent with that of the PRIIPS KID.

Furthermore, marketing communication should also reflect the risks presented in the information documents required by law or regulation (e.g., the investor information pursuant to Article 13 EuVECA Regulation).

c.) Fair, clear and not misleading

- General requirements

All marketing communications should contain information that is fair (=objectively accurate), clear (=unambiguous and understandable) and not misleading (=not likely to cause misconception), with the extent of the information and the manner in which it is presented depending on the particular investor base (retail vs. professional investors). The marketing communication should be written in (one of) the official language(s) used in the part of the Member State where the fund is distributed or in another language accepted by the national competent authorities of that Member State. In our view, the drafting of marketing communications in English should be permitted across the European Union; otherwise, pan-European marketing activities - contrary to the objectives of the Marketing Regulation - would be made considerably more difficult.

Marketing communication should be consistent with the other fund documentation (e.g., articles of association, investor information pursuant to Article 13 EuVECA Regulation).

Statements should be adequately justified based on objective and verifiable sources, which should be quoted. Over-optimistic wording such as "the best fund/manager" and wording that would diminish the risks such as "safe investment" or "effortless returns" should be avoided. Wording that implies high returns without including a clear reference to the risks of loss should also be avoided.

Comparisons with other funds should be limited to those funds that have similar investment policies and risks and rewards profiles unless the marketing materials provide a pertinent explanation of the funds' differences.

- Cost information

If reference is made to costs associated with purchasing, holding or selling shares of a fund, an explanation of how these costs affect the amount invested and the expected returns must be provided.

- Presentation of the performance

Numerous requirements are placed on the presentation of information about the past or future performance of the promoted fund. For example, information about past performance must be based on historical data. The marketing communication should also state the reference period and source of the data, as well as include the following disclaimer:

"Past performance does not predict future returns."

The disclosure of past performance based on simulations is only permitted to a limited extent.

The presentation of future performance should be individual for each fund and disclose performance for a time horizon consistent with the recommended investment horizon. In addition, a disclaimer should be included to the effect that future performance may be subject to taxation. The following statement should also be included:

"The scenarios presented are an estimate of future performance based on evidence from the past on how the value of this investment varies, and/or current market conditions and are not an exact indicator. What you will get will vary depending on how the market performs and how long you keep the investment/product. "

- Information on aspects relevant to sustainability

For funds with a sustainability-related feature, a link to the website where the information is provided in accordance with Regulation (EU) 2019/2088 (SFDR) should be included. Information about sustainability-related aspects should not outweigh the extent to which sustainability-related characteristics or objectives are part of the fund's investment strategy. The sole advertising of sustainability aspects of a fund, without any reference to the other characteristics/objectives of the fund to be considered in the investment decision - as they result, for example, from the investor information pursuant to Article 13 EuVECA Regulation - is therefore likely to be inadmissible.

4. Sanctions

Violations of Article 4 of the Marketing Regulation may result in fines of up to €200,000.

We are happy to support you and open for further exchange.

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