FMA

Finanzmarktaufsicht
Liechtenstein

FMA Communication 2023/1 – Use of investment advisors for funds

Communication on the use of investment advisors for funds pursuant to the Alternative Investment Fund Managers Act (**AIFMG**), the Undertakings for Collective Investment in Transferable Securities Act (**UCITSG**), and the Investment Undertakings Act (**IUG**)

Reference:	FMA-M 2023/1
Addressees:	Alternative investment fund managers (AIFMs) under the AIFMG, management companies under the UCITSG, and management companies under the IUG
Publication:	Website
Enactment:	14 March 2023
Entry into force:	15 March 2023
Last amendment:	-
Legal bases:	● AIFMG and AIFMV ● UCITSG and UCITSV ● IUG and IUV

Landstrasse 109 • Postfach 279 • 9490 Vaduz • Liechtenstein
Telefon +423 236 73 73 • www.fma-li.li • info@fma-li.li

1. Introduction

The principles and requirements applicable to investment advice for funds are explained below. Investment advice[1] as defined in MiFID means the provision of a personal recommendation in respect of one or more financial instruments. In the context of the term "investment advice", it is irrelevant whether the advisor is referred to as an investment advisor or a specialist advisor, given that the activity itself is decisive for classification as an investment advisor/specialist advisor. The terms "investment advisor", "specialist advisor", and similar terms are therefore considered to be synonymous.

While investment advice as part of the transposition of the MiFID II directive (2014/65/EU) is defined in Article 4(1)(3) of the Liechtenstein Asset Management Act (VVG) and requires a licence, advisory services relating to non-financial instruments are permissible without a licence. An advisor who provides advice exclusively in relation to non-financial instruments is not subject to the requirements of MiFID. If a non-licensed advisor is used, it must be stated expressly in the fund documents that advice is provided solely in relation to non-financial instruments.

This Communication explains the principles of investment advice in respect of one or more financial instruments in a fund.

2. Investment advice for a fund

Under Article 4(1)(4) of MiFID II (2014/65/EU), investment advice means the provision of personal recommendations to a client, either upon its request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments.[2] In principle, investment advice must involve a specific recommendation for a financial instrument.

Investment advice properly provided by third parties does not qualify as delegation. The requirements of the delegation provisions do not apply. This means that the management company or AIFM or an appointed asset manager retains the unrestricted authority to make investment decisions. The final investment decision must always be made by the management company, the AIFM, or the appointed asset manager. Similarly, the management company, the AIFM, or the appointed asset manager is under an obligation to review the investment proposal before implementation. Accordingly, investment advisors may only make recommendations and provide other services (e.g. market studies, reporting, etc.), but they are in no way entitled to make investment decisions themselves.

In general, Article 5(1) MiFID II sets out that the provision of investment services and/or the performance of investment activities as a regular business on a professional basis is subject to prior authorisation by the competent supervisory authority. Investment services are defined in Annex I Section A of MiFID II. Investment services also include investment advice, which therefore constitutes an activity requiring authorisation under supervisory law. In Liechtenstein, the applicable requirements have been transposed in Article 3(1)(a) of the Asset Management Act (VVG) and Annex 2 Section A(5) of the Banking Act (BankG). An investment advisor situated within the territorial scope of MiFID requires supervisory authorisation, regardless of whether the investment advisor acts in relation to natural or legal persons, which means also in respect of fund assets.

[1] Investment advice, i.e. the provision of a personal recommendation in respect of transactions in financial instruments, must be distinguished from advisory services that are not related to financial instruments (non-financial instruments).

[2] An aid for understanding the definition of investment advice can be found in CESR/10-293; https://www.esma.europa.eu/sites/default/files/library/2015/11/10_293.pdf

3. Investment advice from a third country

a) Investment advice from a third country:

If the investment advisor is situated in a third country, the regulation of the country of domicile applies. If investment advice is subject to authorisation in that country, evidence of the national authorisation must be submitted as part of the application. If no authorisation is required in the third country, the investment advisor may act without a licence. However, the management company or AIFM must document that investment advice does not require regulatory authorisation in the third country.

b) Investment advice from Switzerland:

A Swiss investment advisor of a foreign collective investment scheme in the form of a Liechtenstein fund provides a financial service pursuant to Article 3(c)(4) of the Swiss Financial Services Act (FinSA) to an institutional client within the meaning of Article 4(3)(c) FinSA (foreign collective investment schemes). It makes no difference whether investment advisors provide their activity directly to the collective investment scheme or management company/AIFM or the activity is provided to the delegated asset manager with or without a registered office in Switzerland.

Unless the investment advisor of collective investment schemes is already subject to supervision under Article 3 of the Swiss Financial Market Supervision Act (FINMASA) due to other activities, the client advisor (natural person) must be entered in a register of advisors. Evidence of entry in a Swiss register of advisors must be provided to the FMA upon submission of the application. Irrespective of the fact that the collective investment scheme is an institutional client, affiliation to a Swiss ombudsman is also required.

4. Verification of the investment advisor by the principal

A principal engaging an investment advisor must subject the advisor to a careful selection process. This means that the principal must verify whether the investment advisor has the necessary authorisation to provide investment advice for financial instruments. The principal should also satisfy itself that the investment advisor has the necessary expertise in respect of the planned investments. In principle, the remarks set out in FMA Communication 2020/1 on the obligations relating to the delegation of functions apply, with respect to the identification and verification of the engaged investment advisor.

5. Documents to be submitted for an investment advisor

If an investment advisor is used, the investment advisor agreement (including the annex governing the distribution of fees) and any authorisation of the investment advisor (if such authorisation is required in the home country and the investment advisor provides advice on financial instruments) must be submitted. If the investment advisor receives more than half of the asset management remuneration and/or the performance fee, a detailed justification regarding the fee split must also be submitted. The signed complete agreement must be submitted to the FMA at the latest when the FMA authorises or takes note of the investment advisor.

The fund documents must disclose the investment advisor together with a description of the investment advisor's activities for the fund. The fund document must also include a brief reference to the investment advisor agreement and describe the remuneration structure[3]. Depending on the type of regulation and the

[3] i.e., clarification whether remuneration is paid from the fund or from the asset management remuneration

structure of the fund,[4] any conflicts of interest and the corresponding mitigation measures must be disclosed in the fund documents.

6. Undue influence of third parties on the fund

Influence of third parties on the investment decision and/or on implementation of the specific investment strategy is not permitted. Third parties are persons who are not named in the fund documents and/or do not have the required authorisation to provide financial services relating to a financial instrument and accordingly have not been appointed as investment advisors.

Possible indicators of third-party influence are (non-exhaustive list):

- Target investments of the fund with a relation to third parties, such as promoters or specialist advisors
- Advertising the fund on third-party websites not listed in the fund documents (except permissible distribution)
- Receipt of fees or inducements (directly or indirectly) without disclosure

A distinction must be made between the undue influence of third parties and the involvement of advisory boards, e.g. Sharia boards or ESG advisory boards and the like. Their involvement is permissible to the extent that the advisory board is not involved in the selection of the financial instrument, but merely subjects the selected financial instrument to a compliance check before the transaction and/or makes non-binding recommendations to the decision-maker. Undue influence must also be distinguished from the involvement of advisors for the examination of individual assets or strategic advice without reference to one or more financial instruments.

7. Data protection

The FMA processes personal data exclusively in accordance with the general data processing principles of the General Data Protection Regulation (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC) as well as in line with Liechtenstein data protection law.

All information regarding the processing of personal data, as well as details about the processing purpose, the data controller and the rights of data subjects can be found in the FMA Privacy Policy: https://www.fma-li.li/en/fma/data-protection/fma-privacy-policy.html

[4] Conflicts of interest may arise, for example, from relationships of the investment advisor to the financial instrument analysed (such as: investment advisor has likewise invested in the instrument, investment advisor has professional or close relationships to the issuer or financial instrument) or from benefits relevant to the assets (such as commissions).

8. Entry into force

This Communication was approved by the Executive Board of the FMA on 14 March 2023 and enters into force on 15 March 2023.

The FMA is happy to answer any questions.
Telephone: +423 236 73 73
Email: info@fma-li.li