

Funds: AIFMD and the TUF

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The marketing of funds follows its own regime. A Swiss collective investment scheme is neither an undertaking for collective investment in transferable securities (UCITS) under Directive 2009/65/EC nor a fund managed by an authorized manager from the Union. It is therefore a non-EU alternative investment fund for the purposes of the AIFMD, and its marketing in Italy is governed by Articles 43 and 44 TUF. Marketing to professional investors requires CONSOB's authorization in accordance with Article 42 AIFMD and the conditions of the TUF. Marketing to retail investors is possible only for funds that meet the conditions of Article 44 TUF and the implementing rules of CONSOB, including a notification to CONSOB, equivalence of the depositary arrangements, equal treatment of investors and Italian facilities for retail investors.¹ In practice few Swiss funds are registered for distribution in Italy. Lugano banks that wish to offer their own fund products to Italian clients usually set up parallel funds in Luxembourg or Ireland, which can be passported under the UCITS Directive.

The fund rules interact with reverse solicitation in a way that is often overlooked. A client who asks his Lugano bank to buy units in a specific Swiss fund for his account receives a service at his own initiative. A bank that suggests the same fund to the same client in the course of an advisory meeting in Milan markets an unregistered fund in Italy. ESMA has warned since 2021 that the reverse solicitation exemption is not available for the marketing of funds under the Cross-Border Distribution of Funds Directive, which introduced the concept of pre-marketing and restricted the use of reverse solicitation for eighteen months after pre-marketing.²

Common misconception. A clause in the account opening documents by which the client confirms that he approached the bank at his own initiative does not establish reverse solicitation. ESMA has stated that such clauses

and disclaimers are irrelevant to the assessment, which depends on the facts of each communication and is made service by service.

1 Notes

1. TUF, Art. 44 (Commercializzazione di FIA non riservati), text at Brocardi.it, <https://brocardi.it/testo-unico-intermediazione-finanziaria/parte-ii/titolo-iii/capo-ii-ter/art44.html>. ↩
2. Directive (EU) 2019/1160 of 20 June 2019 on cross-border distribution of collective investment undertakings, Art. 2 inserting Art. 30a AIFMD (pre-marketing, eighteen-month rule). ESMA's letter of 17 December 2021 to the European Commission on reverse solicitation and the Cross-Border Distribution Directive is mentioned in Huertas (above). ↩

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