

AMF Position – Recommendation n° 2014-05 Agreements on the distribution of financial instruments

Background legislation: Articles L. 533-13-1, L. 541- 9 and R. 533-15 of the Monetary and Financial Code, Articles 314-10 and 325-5 of the AMF General Regulation

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1. Context

Analysis of practices and agreements has revealed that relations between the entities responsible for publishing information documents relating to certain financial instruments (“the manufacturers”) and investment services providers (“ISPs”) and financial investment advisers (“FIAs”), hereafter referred to as “the distributors”, were generally governed by written agreements, even prior to January 2010.

In order “to harmonise certain rules applying to the marketing of financial instruments with those applying to the marketing of comparable retail investment products and insurance products” and, more specifically, to “provide for the establishment of agreements governing relations between manufacturers and distributors”, Order n° 2008-1271 of 5 December 2008, the implementing legislation of which came into force in January 2010, made it mandatory for agreements to be drawn up between manufacturers and distributors of financial instruments, life insurance policies and capitalisation contracts.

This legislation states that these agreements must include information pertaining to:

- the verification by the manufacturer that the promotional documents issued by the distributor comply with the regulatory disclosures;
- the provision by the manufacturer to the distributor of all information required for the proper marketing of the financial instruments.

However, it has been observed that the required indications were often imprecise and unsuited to the wide variety of players in the distribution circuit. In such cases the legislator’s will of regulating and ensuring the quality of information issued to the client is therefore not fulfilled.

By contrast, it has been observed that some of the “platforms” using a network of distributors had taken the initiative of drawing up agreements with their partners containing similar obligations to those set forth in their agreements with manufacturers.

In fact, the existence of distribution chains has resulted in an increasing number of interlocutors positioned between the manufacturer and the client. Hence the manufacturer’s contact (“distributor in direct relation with the manufacturer”) may be different from the client’s direct contact (“distributor in direct relation with the client”).

The ACPR and the AMF are responsible for monitoring the entities involved in distribution that fall within their respective, and sometimes common, scope of intervention in relation to legislation drawn up in similar terms. The two authorities therefore conducted a joint review of the implementation of these agreements. Following this review they considered it necessary to clarify their expectations in order to meet the following dual objective:

- clarify the obligations of each party to the agreement in terms of the promotional document validation process and transmission of the information required for the client to assess the characteristics of the financial instruments;
- ensure that clients are protected throughout the marketing chain, with particular emphasis on the reliability of information provided to them in the promotional material disseminated or the advice given.

2. Reminder of the legal and regulatory framework

Pursuant to Article L. 533-13-1 of the Monetary and Financial Code for ISPs and Article L. 541-9 of the same code for FIAs, when ISPs and FIAs (“the distributors”) offer financial instruments, they shall draw up agreements with the entities responsible for publishing the information documents relating to certain financial instruments (“the manufacturer”) in order to stipulate the conditions under which:

- manufacturers provide distributors with the information required to assess the financial instruments marketed;
- distributors are required to submit promotional documents to manufacturers for verification.

Article R. 533-15 of the Monetary and Financial Code states that these agreements shall be drawn up in writing at the request of distributors, and lays down the content of the mandatory clauses of the agreements:

- The manufacturer’s obligations are as follows:
 - o provide the distributor with the regulatory disclosures (the prospectus and, when appropriate, the key investor information document) on the financial products distributed, and with its update,
 - o transmit the information required for the client to understand the financial instrument (where applicable in the form of presentation sheets), and its update,
 - o verify that any draft promotional document sent by the distributor, irrespective of its medium, is compliant with the regulatory disclosures. The agreement must set the deadline within which these verifications are to be made.
- The distributor’s obligations are as follows:
 - o prior to dissemination, submit to the manufacturer any promotional document that it has drafted and any modifications made to such documents,
 - o take into account any observations by the manufacturer (only approved documents may be disseminated).

3. Scope of the Position-Recommendation

3.1 The financial instruments giving rise to the publication of information documents in accordance with Articles L. 214-23-1, L. 214-25, L. 214-53 or L. 412-1.

Instruments destined solely for qualified investors or a restricted circle of investors within the meaning of Section II of Article L. 411-2 of the Monetary and Financial Code, as well as instruments offered in the framework of an incentive, profit-sharing and company savings scheme, are not concerned.

Referred to as “the financial instruments”

3.2 The entities concerned

- ISPs governed by French law or that of another European Union Member State or of a State that is a party to the European Economic Area Agreement but having a branch office in France, and FIAs that offer financial instruments to clients

Referred to as “the distributors”

- management companies (whether French or foreign)
- legal entities (whether French or foreign) issuing securities described in a prospectus approved by the AMF

Referred to as “the manufacturers”

4. Positions and Recommendation

Unless otherwise specified, the policy elements set out below are positions.

In order to ensuring that the client is better informed and that suitable advice is issued, the AMF's position is as follows:

4.1 On communications of a promotional nature:

Where the distributor uses communications of a promotional nature other than those made available to it by the manufacturer, the agreement clearly stipulates:

- 4.1.1 Prior to dissemination, the systematic submission by the distributor to the manufacturer of any new draft communications of a promotional nature, as well as any modifications made to a previously approved draft or to a communication provided by the manufacturer. These communications are submitted to the manufacturer, irrespective of their media and their formats, in the conditions under which they are presented to the public.
- 4.1.2 The issuance by the manufacturer of an opinion on the conformity of the information documents (outright validation, outright refusal, or request for modification) for all communications of a promotional nature sent to it by the distributor under the conditions of 4.1.1, including in their finalised version, prior to any dissemination to the public.
- 4.1.3 The undertaking by the manufacturer to verify the conformity of the communications of a promotional nature within a period (within periods) defined as a maximum number of days, adapted where necessary to the distributor's marketing methods and to the communication medium (media) used.
- 4.1.4 The undertaking by the distributor not to use the promotional documents in the event of nonresponse from the manufacturer. This stipulation appears in the agreement when the agreement does not clearly state the obligation to use only those promotional documents that have been approved by the manufacturer.

4.2 On information relating to financial instruments:

Regarding the information that the manufacturer must transmit to the distributor, the agreement clearly stipulates:

- 4.2.1 So that the parties to the agreement may be able to identify them clearly, an indication of the types of document(s) destined for communication of the information required for the client to assess all the characteristics of the financial instruments.

4.2.2 The deadline set as a minimum number of days, and the terms for transmission of the information and its update prior to the marketing of the financial instruments, stipulating that when such information may be made public, it:

- ✓ must be easily accessible;
- ✓ can be safe kept in such a way that it may easily be referred to for a period adapted to the purposes of such information;
- ✓ can be reproduced identically to the information stored.

4.2.3 Where the distributor only uses communications of a promotional nature provided by the manufacturer, the agreement only includes the elements described in 4.2 above, as well as a provision stipulating that the distributor undertakes to use only the communications of a promotional nature provided by the manufacturer, and not to make any changes to them.

4.3 On distribution chains:

Certain market practices involve “platforms” which enable to provide the distributor, who is in direct contact with the client, with financial products from various manufacturers, and to facilitate the manufacturer’s access to a large number of distributors.

The fact that a distributor is in contact with the client but has no direct link to a manufacturer due to the interposition of an entity (most commonly a platform) cannot release this distributor from its obligation to take all measures required to ensure that the regulatory disclosure is transmitted to the client.

The interposition of an entity between the manufacturer and the distributor in direct contact with the client does not prevent the dissemination of information that is clear, accurate and not misleading.

In this respect, the AMF considers that the information meets these conditions if it tallies with the up-to-date regulatory disclosures and, in cases of communications of a promotional nature, if it has been validated by the manufacturer.

Recommendation:

Where the manufacturer on the one hand and the ISP or the FIA in direct contact with the end client on the other hand are not directly in relation with each other, the AMF recommends that this ISP or this FIA draw up an agreement with the entity interposed between them.

In this agreement, this entity undertakes to transmit:

- to the ISP or the FIA in contact with the client, the regulatory disclosures (and its update) that it receives from the manufacturer in accordance with the agreement signed with this manufacturer as set forth in Article L. 533-13-1 of the Monetary and Financial Code,
- to the manufacturer for validation by the manufacturer, the communications of a promotional nature drawn up by the ISP or the FIA in contact with the end client.

If the manufacturer so agrees, the transmission of up-to-date regulatory disclosure to the ISP or the FIA in direct contact with the end client, and the validation of promotional communications may be governed by an agreement drawn up between the manufacturer and the ISP or the FIA instead of the agreement recommended in the previous paragraph.

The provisions of the present position-recommendation shall apply from 1st January 2015.