A common language is not enough

Marcel Meyer
Partner
Audit
Deloitte

Robert Pejhovsky
Partner
Audit
Deloitte

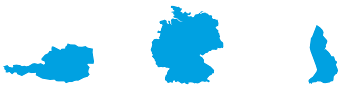
Hartmut Birkner
Senior Manager
Audit
Deloitte

Sharing a mother tongue is very helpful when it comes to distribution—after all, we feel most comfortable when discussing business in our own language. This creates a sense of belonging in a market where competition is truly international and industry leaders in many segments from "abroad" (in particular the UK and the US) enter the market.

From our experience, language seems to be a key driver when establishing sales teams, in particular in the German-speaking region that covers Germany, Austria, Switzerland, and Liechtenstein. Unfortunately, a shared language does not mean shared laws and regulations. That is particularly relevant when it comes to Switzerland, so far continuing to resist the temptation of joining the European Union (EU) or the European Economic Area (EEA), at least for the near future. From a business perspective, the temptation would certainly be great in many regards. Asset management serves as a particularly striking example. With the introduction of the UCITS and AIFM directives, a single market with mostly harmonized, but at least similar standards has been established, which facilitates cross-border distribution activities. Germany and Austria as EU member states, and Liechtenstein as an EEA member state, are able to benefit in many ways from the potential that the aforementioned directives offer.

We would like to give you a practitioner's overview of product registration in German-speaking countries—an important element when it comes to cross-border distribution . Despite one common language, there are four different regulatory set-ups to be considered. For these purposes, we have made the distinction between public distribution (covering essentially the UCITS world) and non-public distribution (covering the rest, in particular the AIFM directive). This has proven to be a helpful approach for navigating the different sets of rules applicable in German-speaking countries. We have tried to group countries to which a homogenous set of rules applies.

Public Distribution



Austria ⟷ Germany ⟷ Liechtenstein

The benefits of the UCITS directive are available to Austria, Germany and Liechtenstein. This means that all authorized UCITS domiciled in these countries are eligible for the regulator-to-regulator notification procedure between these countries under UCITS IV. However, it is highly relevant from a practical perspective that not all aspects regarding the cross-border distribution are harmonized and member states have a certain degree of freedom to maintain a limited set of national rules. These specific characteristics are certainly manageable, but may prove time-consuming and hence frustrating if time to market is a relevant factor (as it often is). In table 1, we have compiled a non-exhaustive list of differences in the application of UCITS notifications for the markets under discussion. The requirement to appoint local agents—e.g., an information or paying agent—is relevant when determining a timeline for the market entry as the selection and negotiation processes take time and have to be taken into consideration.

Germany ⟷ Switzerland

As a third country, Switzerland closely monitors the development of EU laws and regulations. Compliance of Swiss law with European counterparts is a necessary requirement for the entitlement of Swiss asset managers to manage European collective investment schemes. However, there has always been hope in Switzerland that transposing EU law into Swiss laws and regulations might even do a little bit more than just that, namely granting Switzerland broader access to the European market. Consequently, Switzerland has introduced a fund type equivalent to the European UCITS. The Swiss security fund (Effektenfonds) adheres to essentially the same rules as UCITS—and in some aspects even stricter rules apply.

For the first time, following EU law seems to pay off for Switzerland and its European counterpart in terms of enlarged market access. On 1 January 2014, an agreement between BaFin and FINMA entered into force, introducing a notification procedure for UCITS that intend to market their units in Switzerland and vice versa. The notification procedure is the same as for UCITS and the same rules apply when it comes to the appointment of agents (e.g., paying agents), required documentation, and specific language, just as they would apply between EU member states. This regulator-to-regulator notification procedure is highly beneficial for the asset management industry in both Germany and Switzerland, as it ensures:

1. Minimum delays for entering a market with new or existing products
2. A truly plannable market entry

These points are relevant for roadshows and imperative for strengthening the relationship with key clients (i.e., seed investors). Delays in a complicated approval process—which relies on many involved stakeholders and is therefore subject to many potential sources of error—bear the potential to challenge clients' trust in their asset managers and in turn the trust of asset managers in their service providers. Delays in defined timelines for a product launch in a given country for reasons that are beyond one's control are not easy to communicate to clients and they may regard such delays with suspicion.

With the introduction of the notification procedure between Germany and Switzerland, there is a compelling case for asset managers targeting retail investors in all German-speaking markets from a pure distribution perspective: launching a UCITS under German law and reaching out to all German-speaking countries by using the simplified notification procedure.

Austria/Liechtenstein ⟶ Switzerland

The aforementioned simplifications of the notification procedure are currently limited to German UCITS. Austrian and Liechtenstein UCITS need to follow the standard procedure of obtaining FINMA approval before starting public distribution activities in Switzerland. In most cases, approval may be obtained in reasonable time, i.e., within one month, provided that all required documents are filed in the required manner (please see table 1 for certain requirements to consider). In exceptional cases, the approval process may take longer—namely if the organizational set-up of a UCITS indicates that an investment advisor does in effect act as investment manager of the UCITS, thus circumventing licensing requirements.

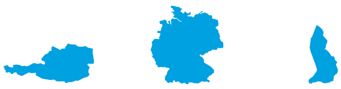
Switzerland ⟶ Liechtenstein

As the procedure and requirements for registering Swiss collective investment schemes in Liechtenstein is quite similar to the way this functions the opposite way round, we will refrain from elaborating on this further.

Switzerland ⟶ Austria

Switzerland is regarded as a third country as Swiss collective investment schemes are neither eligible for the UCITS notification procedure nor is an agreement in place, as is the case with Germany. Consequently, there is no standardized procedure for registering a Swiss collective investment scheme for public distribution in Austria.

Non-public Distribution



Austria ⟷ Germany ⟷ Liechtenstein

With the introduction of the AIFMD and the associated EU passport, there are no more standalone requirements on a product level when an AIFM intends to cross borders and distribute to a restricted, qualifying target audience. The notification of the AIFM regarding the provision of cross-border services includes all relevant AIFs that it intends to distribute. While the notification procedure is not yet strictly harmonized, it should not pose significant challenges for asset managers based in EU member states (as opposed to the reporting requirements under AIFMD).

However, Liechtenstein as an EEA member state is a special case. The AIFMD has not yet been incorporated by all EEA member states; thus Liechtenstein is currently treated as a third country and national, non-harmonized regimes apply for inbound and outbound AIFs. As it is expected that this situation will change in the coming months (i.e., the application of the AIFMD extending to all EEA member states), we refer to the following deliberations concerning the relationship with Switzerland in this respect:

Austria/Germany/Liechtenstein ⟶ Switzerland

There are two possibilities to consider for asset managers from Austria, Germany, or Liechtenstein when intending to target a restricted Swiss clientele that excludes retail investors. This path has to be followed for all products that do not qualify as UCITS, as otherwise the equivalence of the applicable rules to Swiss laws and regulations would need to be demonstrated to FINMA. In most cases this is very difficult as applicable rules are often simply not equivalent. Consequently, the options for an EEA asset manager are:

1. Remaining entirely out of scope of Swiss legislation by directing activities exclusively to (i) regulated financial intermediaries i.e., banks, securities traders, fund management companies, and asset managers of CIS or (ii) regulated insurance institutions (Art. 3(1) and 10(3)(a) and (b) CISA). Other exemptions available always necessitate that the initiative for the distribution activities is with the investor (i.e., reverse solicitation one way or another);
2. Exclusively targeting qualified investors according to Swiss law. These include the aforementioned entities and certain additional target investors (e.g., corporations or pension funds, each with professional treasury). In these cases, there is no need to obtain FINMA approval for the relevant investment schemes. A Swiss representative and paying agent need to be appointed and a limited set of additional rules observed.

Switzerland ⟶ Austria/Germany

As long as the applicability of the AIFMD passport to third countries is not clarified—ESMA has issued an advice on this matter and suggested that the EU Commission postpone further deliberations on those issues until March 2016—the private placement regime as outlined by the Austrian FMA must be followed. The Austrian private placement regime explicitly refers to UCITS or comparable collective investment schemes. The main criteria of the Austrian regime are (i) the number (up to 149), (ii) nature (need for protection) and anonymity (from the perspective of the asset manager) of targeted individuals. However, these criteria need to be assessed on a case-by-case basis.

Switzerland ⟶ Germany

Swiss asset managers can register investment funds for distribution to professional or semi-professional investors in Germany in the event that the notification procedure described above does not apply. The approval process is quite extensive (even more so if targeting semi-professional investors) and essentially covers the demonstration of equivalence of local laws and regulations with EU rules (i.e., AIFMD). Following receipt of a complete file, BaFin will make a decision within two months in the case of distribution to professional investors or four months in the case of distribution to semi-professional investors.

Switzerland ⟶ Liechtenstein

The formal rules and procedural steps are identical to those already laid down above for public distribution.

Table 1: Overview of important requirements in relation to public distribution

	AUSTRIA	GERMANY	LIECHTENSTEIN	SWITZERLAND
Paying agent		Required only if units of UCITS are/were issued as printed individual certificates		
Information agent				
Umbrella	Statement listing notified compartments	Prominent statement listing **non-notified** compartments in relevant sales documentation	No special requirements	Every reference to non-notified/ non-approved compartments is to be removed from sales documentation
Other major specific features		Information for investors in Germany needs to be explicitly 1. page-numbered and 2. listed in the table of contents		Mandatory wording of information for investors in Switzerland Publication of total expense ratio Mention of representative, paying agent and location where relevant documents may be obtained in every publication
Specific tax requirements	Tax reporting Appointment of tax representative	Tax reporting		Tax reporting

 Yes

 No