

## Snapshot Tax and Regulations

# EU Cross-Border Marketing Rules: Mind the Gaps

- > The European Commission's rules on the cross-border distribution of funds that facilitate the marketing of AIFs throughout the EU are now in effect
- > In 2021 ESMA has issued Guidelines to specify how the requirements for all marketing communications addressed to investors should be applied
- > Despite clear requirements, important gaps remain

In July 2019, the European Commission adopted a [Directive](#) and a [Regulation](#) on the cross-border distribution of collective investment undertakings, known as the cross-border distribution of funds package (CBDF package), to reduce regulatory barriers to the marketing of AIFs throughout the EU.

In addition to the CBDF package, in 2021 ESMA has issued [Guidelines](#) to specify how the requirements for all marketing communications addressed to investors should be applied. They include: information on risks and rewards, costs, performance and expected future performance and sustainability-related aspects.

### Pre-marketing:

This regime is subject to national interpretation and applies to passported AIFs only. Under the pre-marketing regime:

- > Managers may provide a draft prospectus or offering documents to potential investors,

provided that they do not contain information 'sufficient to allow investors to take an investment decision'. Draft documents must also clearly state they do not constitute an offer or invitation to subscribe.

- > Pre-marketing notification: AIFMs must notify their home state regulator within two weeks of beginning their pre-marketing, specifying where and for which periods pre-marketing is taking or has taken place and include



a brief description of the pre-marketing, including information on the investment strategies presented and the AIF(s) covered. In addition AIFMs must ensure that pre-marketing is adequately documented. AIFMs can only accept subscriptions from investors contacted through pre-marketing activity once they complete the formal AIFMD marketing process. Importantly, any subscription made within 18 months of pre-marketing activity is considered the result of marketing, for which a marketing filing must be made. As a result, starting any pre-marketing activity precludes reliance on reverse solicitation for 18 months.

- > Third parties: any third party carrying out pre-marketing on behalf of an AIFM needs to be authorised and the distributor or placement agent is directly subject to the pre-marketing rules. AIFMs must ensure that all marketing communications addressed to investors are identifiable as such describe the risks and rewards of purchasing units or shares in an equally prominent manner, that is fair, clear and not misleading.

## Mind the Gaps

While the CBDF package and the Guidelines set out clear requirements, some gaps remain. A few examples follow:

- **Authorised persons**  
Pre-marketing is restricted to authorised persons, including the AIFM itself; however, it remains unclear whether the AIFM can

use unauthorised third parties such as sponsors or asset managers as agents in the pre-marketing process.

- **Notification procedures**  
The Directive provides that any subscription within 18 months from the start of pre-marketing is considered to be the result of marketing and shall be subject to the applicable notification procedures referred to in Articles 31 and 32 AIFMD. It is unclear, however, whether this rule applies only to investors that were contacted in the course of pre-marketing or whether it applies to all investors in the member state where pre-marketing took place, although we are seeing some regulators provide guidance

on this (for example, the Luxembourg CSSF has noted it is the latter in its [pre-marketing guidance](#)). It is also not clear whether there is a single 18-month window (i.e., the “start of pre-marketing”), or whether it is per member state.

- **Marketing under NPPRs**  
The CBDF package does not apply to non-EU AIFMs/AIFs marketing under National Private Placement Regimes; however some member states, including Luxembourg and Germany, have extended application of the rules to non-EU AIFMs marketing under NPPR. Therefore, in some countries but not in others, the marketing rules also apply to non-EU AIFMs marketing under NPPRs.



- **Denotification**

The Directive stipulates that for a period of 36 months from the date on which contractual arrangements with financial intermediaries or delegates related to pre-marketing activities are modified or terminated in connection with denotification of pre-marketing activities, the AIFM shall not engage in pre-marketing of units or shares of the EU AIFs referred to in the notification, or in respect of similar investment strategies or investment ideas, in the member state identified in the notification. This requirement raises the possibility that closed-ended investment fund managers might maintain registrations for existing closed-ended AIFs in order to ensure that they can pre-market successor AIFs / similar investment ideas in the relevant state where the existing AIF is registered, however, it is not clear that this approach is permissible.

- **Marketing communications**

The Guidelines specify the requirements applicable to the information contained in “marketing communication”, but there is a lack of clarity on what activities constitute “marketing”.

- **Past performance**

While past performance refers to the past performance of the actual AIF being marketed, it is unclear what applies when a brand new fund or a fund that has not yet been established is being marketed.

- **Sustainability-related terms**

Section 6.5. of the Guidelines creates restrictions or guidelines regarding the inclusion of sustainability related-aspects in marketing communications. However, as there is no clear definition, national interpretations apply.

**Next steps:**

ESMA launched a consultation in May 2022 seeking public input to develop implementing technical standards (ITS) and regulatory technical standards (RTS) to specify the information to be provided, as well as the content and format of notification letters to be submitted by management companies and alternative investment fund managers (AIFMs)

to the national competent authorities (NCAs) to undertake cross-border marketing or cross-border management activities in host member states.

ESMA also aims to develop procedures for the communication of the notification file by the relevant home NCA to the host NCAs of the member states where these activities are expected. Responses are due by 9 September and INREV is currently evaluating the consultation and formulating its position to submit a possible response. ESMA expects to publish a final report by the beginning of 2023.

To see the full EU cross-border marketing rules: mind the gaps paper [click here](#).

