

EU Cross-Border Marketing Rules: Mind the Gaps



21 June 2022

CBDF Package

AIFMD authorises cross-border marketing passports for the marketing of AIFs in the EU. 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), were subsequently adopted to reduce regulatory barriers¹ to the marketing of AIFs throughout the EU and are now in effect.

The Directive introduces, inter alia, a new harmonised pre-marketing regime for AIFs under AIFMD, alignment of marketing notifications and a de-notification process for AIFs marketing in a host member state. The Regulation, in turn, addresses requirements around marketing communications, including verification, and the creation of central databases for the publication of national marketing requirements, together with fees and charges and a list of AIFs and their managers.

Pre-marketing

Key provisions of the CBDF package include harmonised pre-marketing regime under AIFMD. It defines pre-marketing as:

'provision of information or communication, direct or indirect, on investment strategies or investment ideas by an EU AIFM or on its behalf, to potential professional investors domiciled or with a registered office in the Union in order to test their interest in an AIF or a compartment which is not yet established, or which is established, but not yet notified for marketing in accordance with Article 31 or 32, in that Member State where the potential investors are domiciled or have their registered office, and which in each case does not amount to an offer or placement to the potential investor to invest in the units or shares of that AIF or compartment'.

The pre-marketing regime is subject to national interpretation and applies to passported AIFs only, not investment funds marketing under national private placement regime. 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.

The pre-marketing regime contains requirements for 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. 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.

The pre-marketing regime also contains provisions for 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, fair, clear and not misleading.

¹ The related consultations: https://ec.europa.eu/finance/consultations/2016/cross-borders-investment-funds/index_en.htm and https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1435-Reducing-barriers-to-cross-border-distribution-of-investment-funds_en

ESMA's Marketing Communications Guidelines

As required by the Regulation, ESMA has issued [Guidelines](#) (the Guidelines) to specify the application of requirements for all marketing communications addressed to investors that include: information on risks and rewards, costs, performance and expected future performance and sustainability-related aspects.

Moreover, marketing communications should include sufficient information to make it clear that the communication has a purely marketing purpose, is not a contractually binding document or an information document required by any legislative provision and is not sufficient to take an investment decision.

Mind the Gaps

While the CBDF package and the Guidelines set out clear requirements related to a number of activities, some gaps remain, and several other areas remain unclear. In addition, some inconsistencies within the EU are created by different member state actions. A few examples follow:

Authorised persons

The Regulation provides that pre-marketing is restricted to authorised persons, including the AIFM itself; however, can the AIFM 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 within scope. Therefore, investment managers should be aware that, 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. The provisions of the new Article 32(a) suggest a black-out period applies to pre-marketing of successor AIFs / similar investment strategies if an existing similar fund is de-registered, and this practice might avoid that result.

What is a “marketing communication”?

Materials related to “pre-marketing”, which is defined in AIFMD, are excluded from the definition of “marketing communications” by the Guidelines. However, this leads to many questions, such as:

- Do pitch books used during pre-marketing become “marketing communications” after a marketing filing is made (as the pre-marketing exclusion no longer applies)?
- Although Private Placement Memoranda (PPMs) are not always specifically required by law/regulation, are they excluded from being “marketing communications” if they contain Article 23 disclosures?
- Does the use of material that does not constitute “marketing communication” automatically qualify as pre-marketing?
- Are materials provided in response to reverse solicitation “marketing communications”?

Past performance

Rules on “past performance” in the Guidelines are also unclear in some respects. For example, while “past performance” refers to the past performance of the actual fund being marketed, what applies when a brand new fund or a fund that has not yet been established is being marketed? Is it the case that any track record included in marketing materials should simply be the manager’s historic performance, which is not actually “past performance” within the meaning of the Guidelines.

Sustainability-related aspects

Section 6.5. of the Guidelines creates restrictions or guidelines regarding the inclusion of sustainability related-aspects in marketing communications. However, there is no related definition. In the absence of definitions, some national regulators such as in Germany have defined terms such as “green” and “sustainable”, which leads to potentially inconsistent rules throughout the EU.

We note this is an evolving topic, however. For example, ESMA subsequently issued a [supervisory briefing on sustainability risks and disclosures](#) (dated 31 May 2022) which applies to the Guidelines and is intended to further enhance convergence among national regulators on these topics.

Next steps

On 17 May, ESMA launched a consultation seeking public input to develop implementing technical standards (ITS) and regulatory technical standards (RTS) to specify the information to be provide, 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 envisaged. Responses are due by 9 September and INREV is currently evaluating the consultation and formulating its position to submit a possible response. ESMA will consider the feedback it received to this consultation and expects to publish a final report by the beginning of 2023. For more information, see [here](#).