

NEW EU CROSS-BORDER MARKETING RULES: TIME FOR AIFs TO ADAPT

Regulation (EU) 2019/1156 and Directive 2019/1160 (CBDF Rules) introduced new rules relating to the cross-border marketing and distribution of collective investment undertakings within the EU. While most of these rules will only apply from 2 August 2021, managers and distributors going to the market now or in the next months with alternative investment fund products are likely going to face the new CBDF Rules during their fundraise and should be preparing for compliance.

BACKGROUND AND SCOPE OF CBDF RULES

The CBDF Rules, which form part of a wider package of initiatives under the Capital Markets Union (CMU) action plan, aim at facilitating the cross-border marketing and distribution of collective investment undertakings within the EU¹ by reducing the remaining regulatory barriers and improving cost efficiency, whilst continuing to strive for better investor protection. The rules were adopted on 20 June 2019 and entered into force on 1 August 2019.

Among other things, the CBDF Rules amend the AIFMD and UCITS Directive with a view to harmonise and standardise certain operational aspects of the cross-border marketing regimes applicable to alternative investment funds (AIFs) and undertakings for collective investment in transferable securities (UCITS). The rules also amend the European venture capital funds (EuVECA) and European social entrepreneurship funds (EuSEF) Regulations.

Although the CBDF Rules apply to collective investment undertakings generally, this Briefing will focus exclusively on the main rules applicable to AIFs.

PRE-MARKETING OF AIFs

New harmonised definition of "pre-marketing"

The CBDF Rules have introduced a new harmonised definition for "pre-marketing" into the AIFMD, which applies to **authorised EU AIFMs** (i.e. not to small registered AIFMs and to non-EU AIFMs) in respect of **EU AIFs, which are either not yet established or already established but not yet notified for marketing** in the EU under the AIFMD.

Key Points for AIFs:

- New harmonised definition and conditions for "pre-marketing"
- New requirements for marketing communications and possible *ex-ante* verification by NCAs for AIFs marketed to retail investors
- New conditions and procedure for discontinuation of marketing
- New requirement for local facilities to be made available for marketing to retail investors
- New deadlines for NCAs in relation to material change notifications

¹ Please note that the CBDF Rules (and the AIFMD) assimilate Iceland, Norway and Liechtenstein (which are contracting parties to the agreement creating the European Economic Area (EEA)) to the Member States of the EU, within the limits of the EEA agreement and related acts.

This definition only permits pre-marketing where it is addressed to potential professional investors in the EU and provided that there is no offer or placement of the relevant AIF to such investors.

This new definition is an important change, implying in practice that any activities going beyond the scope of "pre-marketing" will be considered as marketing activities subject to the formal marketing notification process as required by the AIFMD.

New conditions for "pre-marketing"

The CBDF Rules have supplemented the pre-marketing definition by a new pre-marketing procedure, amongst others requiring the following:

- **Pre-marketing materials** – During the course of pre-marketing, any information presented to potential professional investors by an authorised EU AIFM must **not**: (i) be sufficient to allow investors to commit to investing in a particular AIF, (ii) consist in some sort of subscription forms or similar documents (whether in a draft or a final form) and (iii) consist in the final form of constitutional documents, prospectus or offering documents of a not-yet-established AIF. Drafts of the constitutional and/or offering documents can be presented to potential investors provided that those drafts do not contain sufficient information for investors to take an investment decision and clearly state that they do not constitute an offer or an invitation to subscribe in the AIF and that the information presented therein cannot be relied upon because it is incomplete and may change.
- **Pre-marketing notification process** – Within two weeks of having begun pre-marketing, an authorised EU AIFM must send an informal letter about its pre-marketing activities to its home Member State national competent authorities (NCAs), the latter promptly informing the NCAs of the host Member State(s) in which the EU AIFM has engaged in pre-marketing. This pre-marketing notification is **distinct from the AIFMD marketing notification procedures** and EU AIFMs shall ensure that (i) investors do not invest in an AIF through pre-marketing and (ii) that investors contacted as part of pre-marketing only invest in the pre-marketed AIF through the formal marketing notification procedures as permitted under the AIFMD.
- **Pre-marketing by placement agents and distributors** – Only third parties that are duly authorised in the EU as investment firm (or tied agent of an investment firm under MiFID), as credit institution, as UCITS management company or as AIFM are allowed to engage in pre-marketing activities on behalf of an authorised EU AIFM. In practice, this means that placement agents and distributors will need to ensure that they have the relevant authorisations and licenses to pre-market AIFs on behalf of an authorised EU AIFM.

MARKETING COMMUNICATIONS TO INVESTORS

In order to better protect investors, the CBDF Rules provide for new uniform requirements which apply to authorised EU AIFMs addressing marketing communications to investors (professional and retail) in AIFs.

Key features of "pre-marketing" definition:

- provision of information or communication, direct or indirect, on investment strategies or investment ideas
- by an EU AIFM or on its behalf (e.g. a placement agent)
- to potential professional investors domiciled or with a registered office in the EU
- in order to test their interest in an AIF (or a compartment), which is not yet established or established but not yet notified for marketing under the AIFMD in that Member State where the potential investors are domiciled or have their registered office
- and which does not amount to an offer to invest in the relevant AIF (or compartment)

Pre-marketing impact on reverse solicitation

- Any subscription by professional investors in an AIF, which occurs within 18 months after an EU AIFM engaged in pre-marketing activities for that AIF, shall be considered as the result of marketing and shall be subject to the applicable AIFMD marketing notification procedure
- Consequently, an EU AIFM will not be able to invoke and rely on reverse solicitation for such period of 18 months

Tighter track record requirements

Authorised EU AIFMs shall ensure that all marketing communications addressed to investors:

- are **identifiable** as such;
- describe the **risks and rewards** of investing in an AIF in an equally prominent manner;
- contain **fair, clear and not misleading information**.

Moreover, marketing communications which contain specific information about an AIF must not contradict, or diminish the significance of, the information to be disclosed to investors as per the AIFMD requirement.

Similarly, if an AIF publishes a prospectus under the Prospectus Regulation or in accordance with national law, or applies rules on the format and content of the UCITS key investor information (KIID), its marketing communications must not contradict, or diminish the significance of, the information contained in that prospectus/KIID, but must indicate that a prospectus /KIID exists and how it can be obtained.

Possible ex-ante verification by NCAs

When **AIFs are marketed to retail investors**, there is a possibility for NCAs to require (and this already since 1 August 2019) a prior notification of the marketing communications that authorised EU AIFMs intend to use (directly or indirectly) in their dealing with AIFs' investors. This possible *ex-ante* verification by NCAs is therefore not a prior condition for marketing the AIFs and shall not be part of the AIFMD marketing notification procedures. However, it shall be without prejudice to any supervisory powers to verify marketing communications ex-post.

DISCONTINUATION OF MARKETING OF AIFs

The CBDF Rules provide for new harmonised conditions and a de-notification procedure to allow **authorised EU AIFMs** to discontinue the marketing of some or all of their **EU AIFs** in one or several host Member State(s) in respect of which these EU AIFMs had made a previous notification for marketing under the AIFMD passport.

De-notification conditions

All the following cumulative conditions must be fulfilled by an authorised EU AIFM to discontinue the marketing of an EU AIF in a host Member State:

- **A blanket offer** must be made to redeem, free of charge, the interests held by investors in the AIF in that host Member State (except for closed-ended AIFs and ELTIFs). Such offer must be publicly available for at least 30 working days and be addressed individually, directly or through financial intermediaries, to all investors in that host Member State whose identity is known.
- **The intention to terminate marketing arrangements** for all the interests in the AIF in that host Member State must be made publicly available by means of a publicly available medium (including electronic means), which is customary for marketing AIFs and suitable for a typical AIF's investor.
- **Contractual arrangements with financial intermediaries or delegates** must be modified or terminated with effect from the date of the de-

notification to ensure that they will not continue to offer or place those AIFs units/shares whilst it is being de-notified.

- **No pre-marketing of the de-notified AIF** (or of other AIF(s) with similar investment strategies or investment ideas) can be undertaken by the EU AIFM in the relevant host Member State for a period of 36 months after the date of de-notification.
- **The AIFMD annual report and investors disclosure requirements** continue to apply to investors who remain invested in the de-notified EU AIF.

De-denotification procedure

The CBDF Rules require that the authorised EU AIFM submits a de-notification notice to its home Member State NCAs and ceases any new or further, direct or indirect, offering or placement of the relevant AIF in the relevant host Member State as from the date referred to in the de-notification.

Within 15 working days of receiving a complete de-notification file, the AIFM's home Member State NCAs must then transmit it to the NCAs of the Member State referred to in the notification as well as to ESMA.

LOCAL FACILITIES

The CBDF Rules requires that **all AIFMs (EU or non-EU)**, which are marketing or intend to market **any AIFs (EU or non-EU)** to **retail investors in the EU**, establish certain local facilities in each of the host Member States where the AIFs are marketed to retail investors.

Facilities' role

Local facilities will have to perform the following tasks in the official language(s) of the relevant host Member State or in a language approved by that host Member State NCAs:

- processing investors' subscriptions, payment, repurchase or redemption orders relating to the AIF;
- providing investors with information on how orders can be made and how redemption proceeds are paid;
- facilitating the handling of information relating to the exercise of investors' rights arising from their investment in the AIF in the Member State where the AIF is marketed;
- making fund rules or instruments of incorporation and the latest annual report of the AIF available for inspection;
- acting as a contact point for communicating with NCAs.

No physical presence needed

The establishment of facilities in the relevant host Member State(s) where AIFs are marketed to retail investors does not require the AIFM to have a physical presence, nor to appoint any third party representative in such host Member State(s). Indeed, such facilities may be provided through the use of electronic or other means of distance communication. Moreover, these facilities can be provided by the AIFM and/or, under certain conditions, by a third party subject to regulation and supervision governing the tasks to be performed.

De-notification impact on successor AIFs

- The 36-month black-out period for the pre-marketing of the de-notified AIF or of AIFs with similar strategies (including successor funds) may form a major obstacle to de-notification
- In particular, managers and distributors should not take a decision to de-notify closed-ended AIFs arriving at the end of their fundraising periods too lightly if they plan to pre-market successor AIFs before the end of this 36-months period

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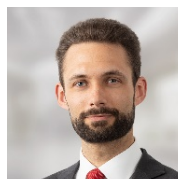
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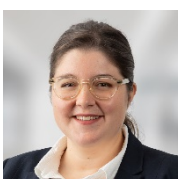
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