



# Investment Management and Funds Marketing Funds in Europe

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# Speakers



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*\* EEA, i.e. EU 27 and Liechtenstein, Norway, Iceland*

# Pre-Marketing in the EU



# Pre-Marketing in the EU

## Cross-Border Distribution Directive

- **Previously**, "testing waters" was a grey area
- **Objective** of the CBDD is harmonisation of the pre-marketing regimes across the EU
- Amendment to AIFMD was to be transposed by EU Member States by 2 August 2021
- Separate timing for the EEA



# Pre-Marketing in the EU

## Definition

### Article 4(1)(aea) AIFMD:

" 'Pre-marketing' means 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."

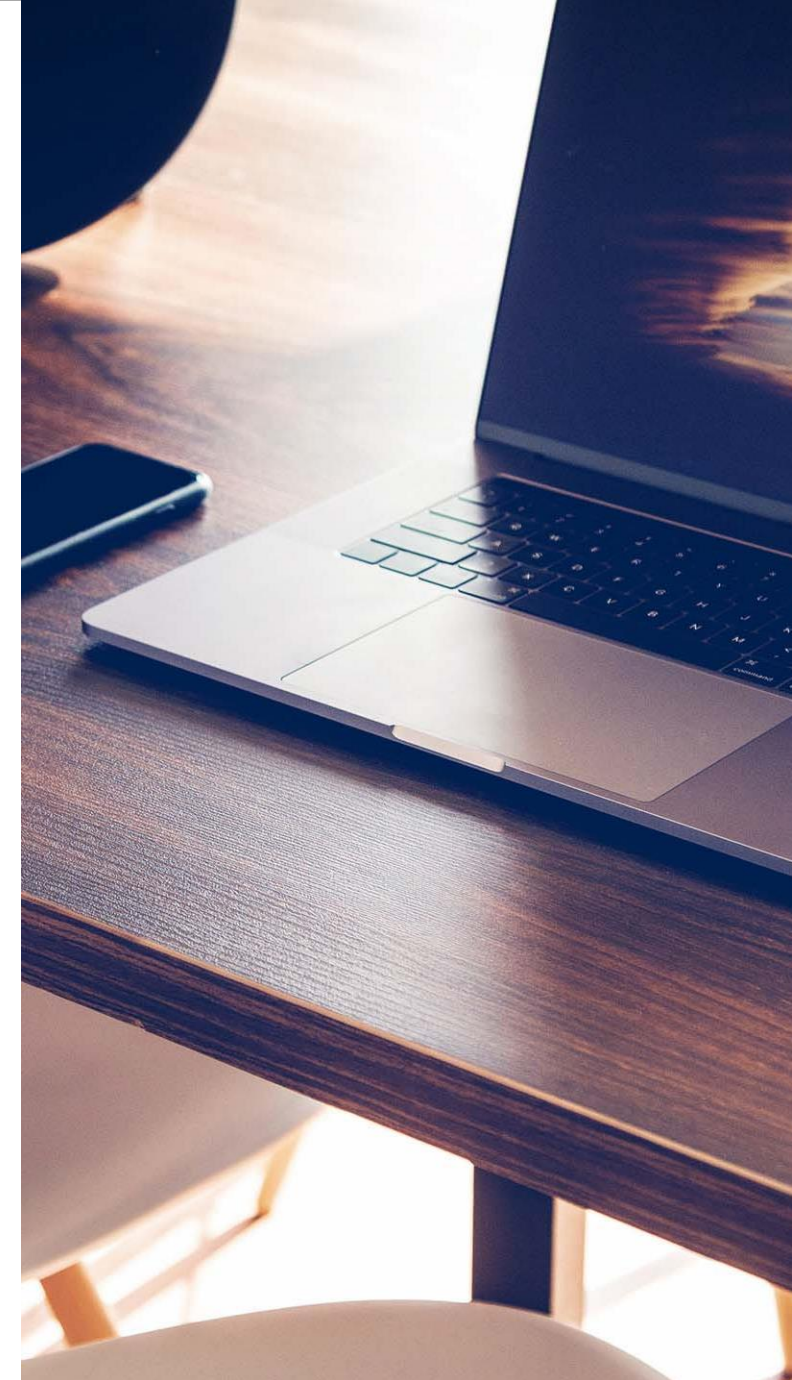
## In a nutshell

Pre-marketing is communicating with prospective professional investors about your investment strategies and ideas in a manner which is not a binding offer.

# Pre-Marketing in the EU

## Scope

- **EU** AIFMs: for **EU** AIFs (established or to be established)
- Professional investors
- Provision of information on investment strategies or ideas



# Pre-Marketing in the EU

## Procedure

Notification to the **Home State** Regulator of the AIFM (regulator-to-regulator process)

- Within 2 weeks of having started pre-marketing activities in an EU jurisdiction (i.e. after the pre-marketing has started!)
- Need to include:
  - information on the target Member States;
  - intended periods of pre-marketing activities;
  - brief description of the investment strategies; and
  - AIF(s) to be pre-marketed

## Remember

- Reverse solicitation excluded for 18 months
- Registration for **full marketing** under Article 32 AIFMD before accepting any subscription



# Pre-Marketing in the EU



## "Dos"

- Provide draft documentation only
- Include a disclaimer on draft documentation/ marketing materials
- Plan ahead your pre-marketing activities to comply with regulatory requirements in a timely manner



## "Don'ts"

- Do not provide subscription documents (draft or final)
- Do not provide final constitutional, prospectus or offering documents for **non-established** AIFs
- Do not pre-market without the necessary license for yourself
- Do not accept any commitment to subscribe prior to registration

# Pre-Marketing in the EU

## Out of Scope

No harmonisation for:

- **EU** AIFMs: for **non-EU** AIFs (established or to be established)
- **Non-EU** AIFMs: for **EU** AIFs or **non-EU** AIFs (established or to be established)

## Requirements

- Country-per-country basis
- Two general approaches:
  - Extension of the AIFMD regime (notification of the pre-marketing activities to the **Host State** Regulator)
  - Reliance on the “old” national pre-marketing regime (or tolerance)

# Marketing in the EU



# Marketing in the EU

## Definition

### Article 4(x) AIFMD:

" 'Marketing' means a **direct or indirect offering or placement at the initiative of the AIFM** or on behalf of the AIFM of units or shares of an AIF it manages to or with investors domiciled or with a registered office in the Union."

## In a nutshell

Marketing means a binding offer to a prospective investor to acquire an interest in your fund

## Two solutions

- EU AIFM passport
- National Private Placement Regime (**NPPR**)

# The EU AIFM Passport

Harmonisation under AIFMD (Article 32)

## Scope

**EU** AIFMs: for **EU** AIFs (regulated or not)

## Requirements

- Standard notification to the **Home State** Regulator of the AIFM (regulator-to-regulator process)
- Multi-jurisdictional
- Max. 20 business days
- Variable fees

## Remember

**Do not begin marketing before the end of the notification process**

# National Private Placement Regime

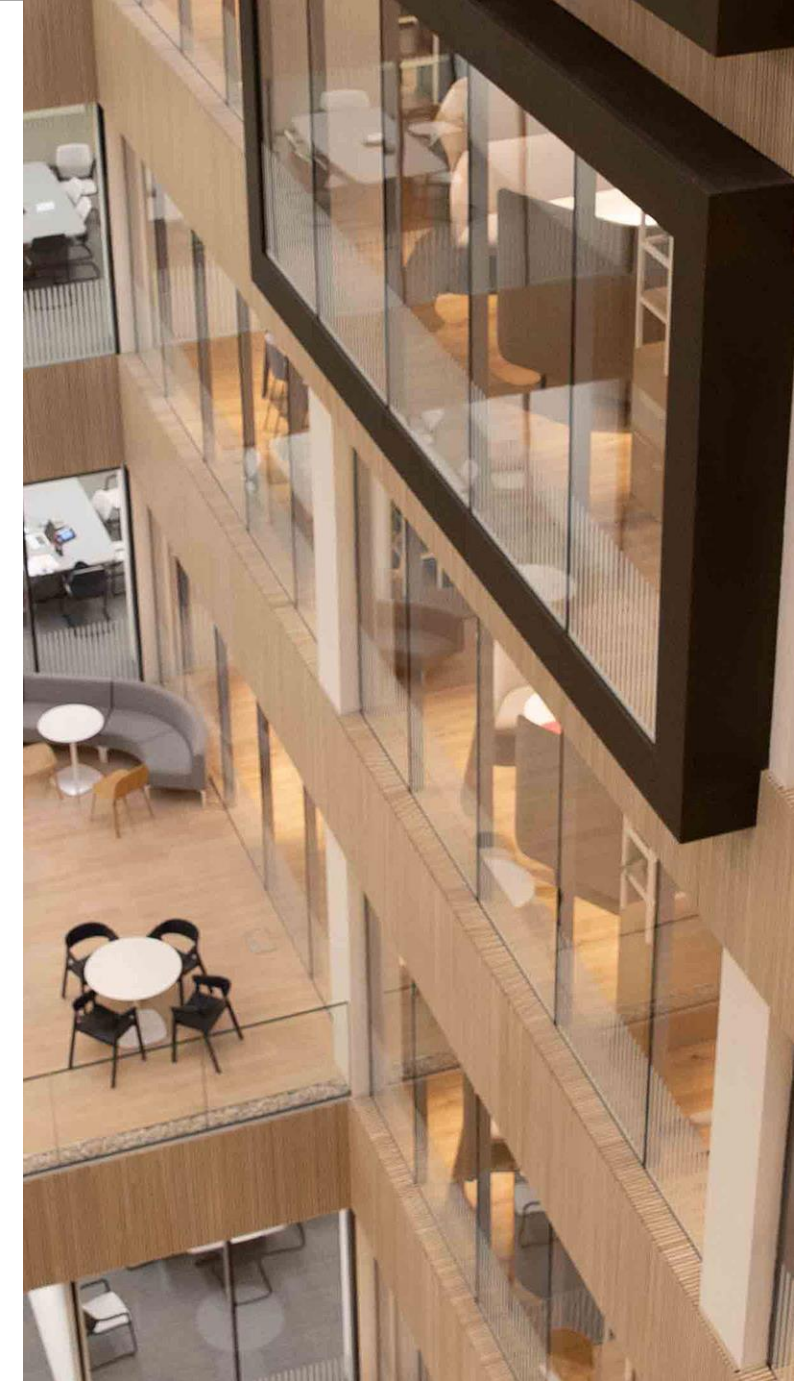
Left to national discretion under AIFMD (**Article 36 / Article 42**)

## Scope

- No harmonisation for:
  - **EU** AIFMs: for **non-EU** AIFs
  - **Non-EU** AIFMs: for **EU** AIFs or **non-EU** AIFs

## Requirements

- Registration with the **Host** State Regulator
- Variable on a country-per-country basis  
(e.g. legally impossible or very difficult in practice in Italy, France, Spain or Portugal)



# Marketing a Feeder Fund

**"Feeder fund"**: An AIF which invests 85% in a single **master AIF** (or several AIFs with identical strategies) or have 85% of exposure to such AIF

**Rule:** The feeder fund follows the marketing regime of the master fund

## EU Passport

- For EU feeder fund, managed by EU AIFM
- **Together with** EU master fund, managed by EU AIFM

## NPPR

- Everything else!

## Remember

No EU AIFM Passport if EU Feeder in a non-EU Master AIF

# Marketing in the EU

## Other considerations

- Reverse solicitation to be carefully considered
- Marketing to **retail investors**: Non-harmonized
  - Semi-professional investors v. “true” retail investors
  - PRIIPs KID
- Sub-thresholds AIFMs: Non-harmonised
- Disclosures and reporting:
  - Article 23(1) pre-contractual disclosures
  - AIFMD-compliant annual report **and**
  - Annex IV reporting
- Marketing communications: European **and** national requirements



# Marketing in France



# Marketing in France

## Definition of “marketing” under French law

- Availability of AIFMD marketing passport to professional clients for EU AIFM managing EU AIFs
- Exclusivity of regime provided by article L.214-24-1 of the French monetary and financial code

## What is not considered “marketing” under French law and practical considerations

- Reverse solicitation
- Secondary transactions (except for GP led transactions)
- Carried interest units
- Non fund specific market trends

# Marketing to French retail investors

- No cross border marketing to French retail investors with the AIFM passport
- Prior authorisation of the AIFM required.
- Difficult and theoretical in practice to date in the absence of mutual assistance agreements between France and other EU and non-EU jurisdictions.

# Marketing in France

## Marketing in France to professional clients of AIFs established in a third country or EU AIFs managed by a third-party manager

### Requirements:

1. Prior authorization of the AMF
2. Following 3 conditions satisfied:
  - Asset manager/ Manager complies with the AIFM Directive and has appointed a depositary
  - Appropriate cooperation arrangements are in place
  - Where AIF/ Manager is established in a third country, that country must not be on money laundering/ terrorist lists.

# Marketing in France

Overview of the regime applicable to marketing in France of units or shares of AIFs

		French asset management company		Manager authorised in another Member State of EU	Manager established in a third country
		Not authorised	Authorised		
French AIF	Professional Clients	As appropriate, authorisation, declaration or compliance	Marketing possible with prior notification to the AMF	Marketing possible with prior notification to the local regulator (e.g. CSSF etc.)	N/A
	Retail Clients		Marketing possible with prior authorisation by the AMF		Marketing possible with prior authorisation by AMF, subject to mutual recognition agreement
AIF established in another Member State of the EU	Professional Clients	Marketing not possible	Marketing possible with passport; prior notification to AMF required	Marketing with passport: prior notification to local regulator (e.g. CSSF etc.) required	Marketing possible with prior authorisation by the AMF
	Retail Clients		Marketing possible with prior authorisation by AMF, subject to mutual recognition agreement		
AIF established in a third country	Professional Clients	Marketing not possible	Marketing possible with prior authorisation by the AMF		
	Retail Clients		Marketing possible with prior authorisation by AMF, subject to mutual recognition agreement		

# Marketing in Germany



# Marketing in Germany

## Definition of “marketing” under German law

*" 'Marketing' is the direct or indirect offering or placement of units or shares of an investment fund."*

## What is not considered “marketing” under Germany law and practical considerations

- Reverse solicitation (not possible vis-à-vis retail investors)
- General (not fund-related) marketing initiatives of the AIFM
- Non fund specific market trends

## Applicable Regime

- Marketing of investment funds by the AIFM is part of the portfolio management activities and is subject to the KAGB implementing UCITS and AIFM Directive
- Distribution of investment fund units by a third party (on behalf of the fund or the AIFM) generally qualifies as MiFID service

# Non-EU AIFs: Notification requirements

## Notification obligation

The intended marketing of units and shares must be notified to the BaFin.

## Timeline of notification procedure

- Preparation of documentation and internal requirements
- Filing
- Review by BaFin
- Requests for any missing particulars and documents within 20 working days
- Decision of BaFin within 2 months following the filing of the complete notification (4 months in case of marketing vis-à-vis semi-professional investors is intended).



# Non-EU AIFs: Notification requirements

## Information and documentation requirements

- Information on the AIFM, its board and the depositary
- The fund documentation (partnership agreement, articles etc.) and further fund rules of investment fund
- A description of the investment fund and all investor information on the investment fund (including mandatory pre investment information, Section 307 KAGB)
- Information on how the AIFM will prevent the marketing of the investment fund's units to retail investors
- Evidence of payment of the notification fee (EUR 1,641)

## Marketing (also) to semi-professional investors

Additional information and documents in line with requirements for an AIFM licence

# Non-EU AIFs: Notification requirements

## Internal Requirements

- Preparation of the notification documentation and gathering the required detailed documentation
- If not implemented yet, appointment of a depositary
- Implementation of measures preventing marketing and distribution of the fund to retail investors
- In case marketing to semi-professional investors: Implementation of internal compliance measures and procedures in order to ensure ongoing compliance with KAGB/AIFMD provisions

## Ongoing obligations

- Filing annual report of the investment fund
- Ongoing information, transparency and disclosure requirements vis-à-vis its investors

# Marketing and Distribution in Germany

Overview of the regime applicable to marketing in Germany of units or shares of AIFs

Location of AIFM	Location of Fund	Types of Investors	Provision
EU AIFM	EU AIFs	Semi-professional and professional investors	Sec. 323 KAGB
Non-EU AIFM	EU AIFs and Non-EU AIFs	Semi-professional and professional investors	Sec. 330 KAGB
EU or Non-EU AIFM	EU or Non-EU AIFs	Retail investors	Sec. 320 KAGB
German or EU AIFM	Non-EU AIFs or German special feeder AIF or EU feeder AIF, whose master AIF is not an EU AIF or German AIF	Semi-professional and professional investors	Sec. 329 KAGB

## **Applicable Regime regarding the Distribution of AIFs in Germany**

Distribution of investment fund units by a third party (on behalf of the fund or the AIFM) generally qualifies as MiFID service and generally requires authorisation in Germany.

# Pre-Marketing and Marketing in the UK



# General; Impact of Brexit

## General

- "Parallel" pre-marketing and marketing regime in the UK

## Alignment between EU and UK

- Regime for AIFs in the UK now governed by Alternative Investment Fund Managers Regulations 2013/1773 (the "**UK AIFMR**")
- UK AIFMR still fairly closely aligned to AIFMD
  - Marketing passport no longer available
  - Definition of "third country"

## Horizon scanning

- Likely to be more divergence going forwards?



# Pre-Marketing in the UK

## Practical considerations

- No notifications to the FCA are required
- Pre-marketing must not enable an investor to make a subscription
- UK Financial Promotions Regime will apply
  - Clear, fair and not misleading
  - Promotions must be approved or exempt
- Pre-marketing likely to be a regulated activity if carried out from within the UK
  - FCA authorised person
  - Exemptions may be available if outside the UK



### "Dos"

- Provide draft documentation only
- Ensure correct disclaimers are included
- Consider what activities are being performed in the UK



### "Don'ts"

- Do not provide subscription documents (draft or final)
- Do not provide final constitutional, prospectus or offering documents
- Do not accept any commitment to subscribe prior to registration

# Marketing

## Remember

- Prior notification to the FCA required before marketing in the UK
- Full scope UK AIFM marketing UK AIFs required to submit a marketing application:
  - FCA has 20 business days to approve the application
  - Material changes must be notified to the FCA at least one month in advance
- Third country AIFMs required to submit a NPPR notification:
  - NPPR notifications submitted online through “Connect” system
  - Marketing can start as soon as the notification has been submitted
  - Material changes must be notified to the FCA at least one month in advance

# Thank you. Questions?



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