August 5, 2021

The Cross-Border Marketing Rules and Alternative Investment Funds

New rules have come into effect, but lack of certainty continues for non-EU managers

Directive (EU) 2019/1160 and Regulation (EU) 2019/1156 (the "Cross-Border Marketing Rules") came into force in the European Union on 2 August 2021. These introduce new restrictions on what pre-marketing activities can be undertaken in the EU as well as a new notification obligation.

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Background

The Cross-Border Marketing Rules were introduced to streamline certain aspects of marketing investment funds under the regime for alternative investment fund managers ("AIFMs"). Divergent approaches and interpretations by Member States to certain aspects of the AIFMs regime have led to uncertainty for managers marketing their funds in the EU. Whilst the Cross-Border Marketing Rules are a step in the right direction to provide some consistency, much uncertainty remains. This is more so for non-EU managers, who are arguably not directly caught by the new requirements except at the discretion of the national regulators. Apart from Germany and Luxembourg, both of which have passed legislation confirming that the rules will apply to non-EU managers and the Netherlands, where a draft legislative proposal stating that the pre-marketing rules will apply to non-EU managers is being debated, most Member States have not yet published implementing provisions, and so the extent to which the new rules will be applied by each Member State towards non-EU managers is unclear.

What is pre-marketing under the new rules?

If the Cross-Border Marketing Rules do apply to non-EU managers, they will be most impacted by the new definition of "pre-marketing". Previously, each Member State had its own definition of "pre-marketing" and its own rules as to whether this was permitted in their state. The Cross-Border Marketing Rules have introduced a harmonised definition of "pre-marketing", which is meant to eradicate different interpretations by Member States.

> *"Pre-marketing" is defined as:*
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> *i. the provision of information or communication, direct or indirect, on investment strategies or investment ideas;*
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> *ii. by an EU AIFM or on its behalf (e.g. by a placement agent);*
>
> *iii. to potential professional investors domiciled or with a registered office in the EU;*
>
> *iv. in order to test their interest in an alternative investment fund (an "AIF"), which is not yet established or established but not yet notified for marketing under Directive 2011/61/EU (the "AIFMD"); and*
>
> *v. which does not amount to an offer to invest in the relevant AIF.*

Where manager level information is provided by an AIFM to potential investors with the intention of admitting such investors into one of the funds managed or marketed by the AIFM, this could be considered pre-marketing under the Cross-Border Marketing Rules.

Pre-marketing restrictions

In connection with the introduction of the definition, there are new restrictions regarding pre-marketing. Pre-marketing materials must not (i) be sufficient to allow investors to commit to investing in a particular AIF, (ii) consist of subscription forms or similar (whether in draft or a final form) and (iii) consist of the final form of constitutional documents, prospectus or offering documents of a not-yet-established AIF.

Drafts of the constitutional and/or offering documents (for example, private placement memoranda) 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.

Practical tips for managers:

i. *ensure private placement memoranda contain appropriate disclaimers and are not circulated in final form during the pre-marketing stage and do not contain sufficient detail to allow an investor to make an investment decision;*

ii. *ensure subscription agreements are not circulated during the pre-marketing stage, even if they are in draft form.*

Pre-marketing notification obligation

Within two weeks of commencing pre-marketing, an authorised EU AIFM must send an informal letter about its pre-marketing activities to its home Member State regulator, who will notify the host regulators in which the EU AIFM has engaged in pre-marketing. As non-EU AIFMs will not have a home Member State regulator, this notification will be made to the regulator of the Member State where the non-EU AIFM is applying for marketing approval/making a marketing notification.

Practical tips for managers:

i. *check if the Member State in which pre-marketing will be conducted has a template for the pre-marketing notification; and*

ii. *keep records of any submitted pre-marketing notifications.*

Other aspects of the Cross-Border Marketing Rules

Another aspect of the Cross-Border Marketing Rules is that any subscription by investors within 18 months of an EU AIFM having begun pre-marketing will be considered to be the result of marketing and should be subject to the applicable notification procedures. It is unclear whether this restriction will only apply to investors contacted by the AIFM during the pre-marketing stage or to all investors in a Member State. It is therefore expected that reliance on reverse solicitation will likely be reduced in countries where pre-marketing takes place.

Practical tips for managers:

i. *obtain advice to check if there is guidance available regarding the geographic scope of the reverse solicitation restriction; and*

ii. *keep records of investors who have been contacted by the manager during the pre-marketing stage and when such investors were contacted and keep records of any reverse solicitation requests.*

The Cross-Border Marketing Rules also restrict the ability of EU AIFMs to appoint non-EU distributors or placement agents to conduct pre-marketing. EU AIFMs are permitted to appoint only certain types of authorised EU financial institutions to engage in pre-marketing activities on their behalf (i.e., MiFID firms and their tied agents, banks, UCITS management companies, and other EU AIFMs). Importantly, the interpretation in various Member States differs as to whether marketing is itself a licensable activity and advice should be sought as to how marketing is characterised from a licensing perspective in the investor's Member State. If a country applies this rule to non-EU managers, it also means non-EU funds will need to be distributed by an EU-regulated manager (if the manager itself is not marketing the fund).

Practical tips for managers:

i. *obtain advice in investor's jurisdiction if marketing is a licensable activity (for example, this is the case in Germany);*

ii. *conduct due diligence on placement agents to ensure they have appropriate licenses/approvals in that jurisdiction; and*

iii. *contractually require placement agents to retain such licenses/approvals throughout the fundraise.*

Although the introduction of a harmonized definition of "pre-marketing" is helpful, the position for non-EU managers remains uncertain until more Member States publish implementing legislation confirming if the Cross-Border Marketing Rules will apply to them. As the Cross-Border Marketing Rules state that EU AIFMs should not be disadvantaged vis-à-vis non-EU AIFMs, it seems likely that non-EU AIFMS will be caught; however, non-EU AIFMs are encouraged to monitor the status. As such, any manager commencing marketing activities should seek advice to assess whether they are caught by the new rules and any other impact they may have on their fundraising activities.