

New EU Rules in Force: Pre-Marketing and De-Registration of UCITS and AIFs

As we discussed in our earlier update, EU Cross-Border Fund Distribution Rules - Are you Ready?¹ from 2 August 2021, a new EU Directive and Regulation on the cross-border distribution of collective investment funds (the "CBFD Directive" and "CBFD Regulation") are required to be implemented in EU Member States ("Member States"). Among other things, the new rules amend AIFMD² with the objective of harmonising the ability for EU AIFMs to distribute AIFs across the EU, including by introducing a new regime for 'pre-marketing'.

Although the new rules cover the situation where EU AIFMs of EU AIFs wish to use the AIFMD marketing passport (available only within the EU), it has become clear that some Member States also intend to apply certain provisions to non-EU AIFMs (including UK and US managers) in relation to marketing of their AIFs under the Article 42 AIFMD national private placement regimes ("NPPRs").

With the CBFD Directive having to be transposed into each Member State's national law, it has been left to each Member State to determine how its local implementing provisions will not "*in any way disadvantage EU AIFMs vis-a-vis non-EU AIFMs*". At the time of writing, we have already seen some divergence where for example, in Germany, they will apply the CBFD Directive in a similar

way to non-EU AIFMs as they do for EU AIFMs. This update focuses on the pre-marketing rules, and the resulting implications for reverse solicitation; non-AIFMs marketing AIFs to professional investors; as well as de-registration for both UCITS and AIFs.

For information on other aspects of the EU regime on the cross-border distribution of investment funds, please see our previous updates on New ESMA Guidelines for Fund Marketing Communications³ and / or Cross-Border Distribution of Funds - Implementing Technical Standards⁴.

Pre-Marketing of AIFs

The previous rules on pre-marketing AIFs under AIFMD, whether it was permitted and, if so, the conditions under which it was permitted, varied considerably between Member States and was often unclear. The CBFD Directive aims to address these divergences by introducing a harmonised definition of pre-marketing and the conditions under which EU AIFMs can engage in pre-marketing. This will allow EU AIFMs to gauge market interest before establishing an AIF or registering an AIF under a marketing passport in a Member State (subject to certain conditions).

¹ <https://maples.com/en/knowledge-centre/2021/6/eu-cross-border-fund-distribution-rules-are-you-ready>

² Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010.

³ <https://maples.com/en/knowledge-centre/2021/7/new-esma-guidelines-for-fund-marketing-communications>

⁴ <https://thoughts.maples.com/post/102h0j0/cross-border-distribution-of-funds-implementing-technical-standards-its-publi>

The CBFDD Directive 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 European 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”.

EU AIFMs are permitted to engage in pre-marketing of an AIF or a sub-fund thereof which is not yet established or which has not yet been notified for marketing under Article 31 or Article 32 of AIFMD in the Member State where the potential investors are domiciled.

The CBFDD Directive goes on to provide that certain conditions apply to pre-marketing, including that:

- The information must not be sufficient to allow investors to commit to acquiring shares in an AIF and must not constitute an offer or invitation to subscribe for shares in an AIF.
- The information must not amount to subscription forms or similar documents in draft or final form.
- An EU AIFM shall be required to notify its home Member State national competent authority ("NCA") within two weeks of having commenced pre-marketing outlining certain details (e.g. on the Member States where pre-marketing is being conducted, investment strategies presented and a list of the AIFs which

form part of the pre-marketing activities (if relevant)).

- An EU AIFM must ensure that pre-marketing is adequately documented.

Under the CBFDD Directive, only certain third parties may engage in pre-marketing on behalf of an authorised EU AIFM where the third party is authorised as:

- An investment firm under the MiFID II Directive.⁵
- A credit institution under the Credit Institutions Directive.⁶
- A UCITS management company under the UCITS Directive.⁷
- An AIFM in accordance with the CBFDD Directive.
- Acts as a tied agent in accordance with the MiFID II Directive.

Consequently, AIFMs should review current distribution arrangements to ensure these obligations are fulfilled.

Reverse Solicitation

Under the new rules, any subscription made by an investor within 18 months of the commencement of pre-marketing of shares / interests in an AIF referred to in the context of pre-marketing (or established as a result of pre-marketing) shall be subject to registration requirements under Article 31 or Article 32 of AIFMD.

⁵ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

⁶ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC.

⁷ Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

Consequently, pre-marketing activities will preclude EU AIFM from being able to rely on reverse solicitation for a period of 18 months.

Non-EU AIFMs Excluded

Pre-marketing under the CBFDD Directive is available to EU AIFMs only. The provisions on pre-marketing do not apply to non-EU AIFMs, who must continue to operate within the rules applicable in each individual jurisdiction and, as noted above, certain Member States are introducing provisions into local law to facilitate this. In addition, there will be no harmonised pre-marketing regime for UCITS.

De-Registration of UCITS and AIFs

The CBFDD Directive harmonises and aligns the procedures for UCITS and AIFs to cease marketing in a host Member State, including any of its share classes.

Conditions to de-register under the CBFDD Directive include:

- Except in the case of closed-ended AIFs and AIFs regulated under the ELTIF Regulation⁸, there must be a blanket offer to repurchase or redeem, free of any charges, all shares held by investors in the host Member State. The offer must be publicly available for at least 30 working days and addressed individually to all investors whose identity is known.
- The intention to de-register must be made public at least by electronic means and in a medium which is suitable for a typical investor.
- Contractual arrangements with financial intermediaries or delegates must be modified or terminated with effect from

the date of de-registration in order to prevent any further offering of shares. The UCITS management company / AIFM must cease any new or further, direct or indirect, offering or placement of units / shares of the UCITS / AIF in the relevant jurisdiction on this date.

For UCITS and retail AIF de-registrations, the blanket offer to repurchase / redeem and the notification of intention to de-register must be provided in the official language (or one of the official languages) of the host Member State or in a language approved by the host NCA.

Notifications to de-register must contain the information referred to in the three bullet points above. While notifications to de-register are currently notified directly to the host Member State NCA and are effective immediately upon notification, the CBFDD Directive requires notifications to be filed by the UCITS management company / AIFM with the home Member State NCA for verification and onward transmission to the host member state NCA and ESMA.

Home Member State NCAs are required to verify the completeness of notifications received and transmit the notification onwards to both the host Member State NCA and ESMA no later than 15 working days from the date of receipt of a complete notification. Upon transmission of the notification, the home Member State NCA must promptly notify the UCITS management company / AIFM of the transmission.

Notably, the CBFDD Directive does not impose any pre-conditions for de-registration relating to the number of investors in a Member State who remain invested in the UCITS / AIF. Provided the fund is no longer being marketed / offered in the Member State in question, it should be possible to de-register. Where investors from that Member State remain

⁸ Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds.

invested in the fund, however, the UCITS / AIF must continue to provide them with any updated information and fund documentation as required by the UCITS Directive / AIFMD (e.g. where applicable, updated prospectus, constitution, KIIDs, annual and interim financial statements, etc.).

Post-De-Registration Limitation on Pre-Marketing of AIFs

Notably, a 36-month prohibition on pre-marketing will apply to AIFMs for any de-registered AIFs or AIFs of similar investment strategies / ideas, in the Member State identified in the notification. This limitation is significant and could result in issues for promoters of closed-ended AIFs in particular who may wish to market successor funds. In practice, AIFMs may choose not to de-register AIFs to avoid the prohibition on pre-marketing successor funds.

Timeline

The deadline for transposition of the CBFDD Directive was 2 August 2021. At the time of writing, a number of Member States, including Ireland and Luxembourg, have transposed the CBFDD Directive. The Central Bank of Ireland⁹ and Luxembourg's Commission de Surveillance du Secteur Financier¹⁰ have also updated their requirements in relation to pre-marketing on their websites. A number of Member States, however, have yet to implement the CBFDD Directive into local law, but implementation is expected imminently.

⁹ <https://www.centralbank.ie/regulation/industry-market-sectors/funds-service-providers/aifm/passporting>

¹⁰ <https://www.cssf.lu/en/pre-marketing-by-aifms/>

How the Maples Group Can Help

The Maples Group Global Registration Services ("GRS") team supports UCITS and AIFMs in their multi-market distribution strategies by providing an integrated global network of experts coordinated by a dedicated central team supporting all legal and regulatory aspects governing the cross-border marketing of investment funds on both a private placement and public offer basis.

Further Information

If you would like further information, please liaise with the below or your usual Maples Group contact.

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