

Pre-marketing will be approved in the EU – but will be more difficult for Germany than is currently the case

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The European Commission's aim: To facilitate the cross-border distribution of investment funds. The result: Pre-marketing will be allowed in all member states, but the consequences are severe. Pre-marketing is to be regulated uniformly throughout the EU by a directive and a regulation. In the future, subscriptions will be possible only after the marketing notification procedure has been completed.

In March 2018, as part of a package of measures to enhance the capital market union, the EU Commission presented proposals for a directive and a regulation on the cross-border distribution of investment funds. One of its objectives was to harmonise the pre-marketing rules of the AIFM Directive. The transposition of the project into EU legislation has progressed so far that the triilogue negotiations between the Commission, the EU Parliament and the Council were successfully concluded in February 2019. Currently, only the formal approval by the Council is pending.

Pre-Marketing is now defined

First, a definition of “pre-marketing” is added to the AIFM Directive. The complex wording essentially means that the AIFM or its sales partners in pre-marketing may communicate only information about the investment strategy and the investment concept; the information provided to potential investors may not constitute an offer. The relevant AIF or sub-fund may already exist, but may not be notified for distribution. However, a notification for marketing in one member state does not preclude pre-marketing in another member state.

‘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 registered in the Union in order to test their interest in an AIF which is not yet established, or in an AIF which is established, but not yet notified for marketing in accordance with Article 31 or 32, or in compartments of such AIFs, 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 investor to invest in the units or shares of that AIF or compartment.

Pre-marketing is explicitly allowed...

The details will be set out in a new Article 30a of the AIFM Directive. It requires all member states to allow pre-marketing if the other conditions are met.

... but only within narrow limits

The information presented to potential investors must not enable them to commit to acquiring units or shares of a particular AIF, i.e. to take an investment decision. Which factors play a role in this is more clear from the further conditions:

- The information presented must not amount to subscription forms or similar documents whether in a draft or a final form.



- The information presented must not amount to constitutional documents, a prospectus or offering documents of a yet to be established AIF in a final form.
- Where a draft prospectus or offering documents are provided, such documents may not contain sufficient information to allow investors to take an investment decision. This provision remains unclear. In the absence of further clarification from ESMA, the AIFM itself will continue to have to assess whether its information and drafts fulfil this condition. In Germany, we expect that the BaFin's FAQs on marketing will remain an important orientation aid.
- Draft prospectus or offering documents must clearly state that:
 - the documents do not constitute an offer or an invitation to subscribe to units or shares of an AIF; and
 - the information presented in those documents should not be relied upon because it is incomplete and may be subject to change.

These mandatory disclaimers do not alter the fact that drafts of the prospectus or the offer documents must be suitable (in terms of content) for use in pre-marketing, i.e. these must contain too little information to enable investors to take an investment decision. The AIFM must ensure this regardless of the mandatory disclaimer.

Pre-marketing requires notification and documentation

The AIFM is required to notify its national supervisory authority within two weeks by an informal letter of the start of the pre-marketing process. The letter must contain the following information:

- The member states and the periods of time in which the pre-marketing took place;
- a brief description of the pre-marketing, including the information on the investment strategies presented; and
- where relevant, a list of the AIFs and compartments of AIFs which were the subject of pre-marketing.



Documents to be informed:

- [EU Draft of Directive 2019](#)
- [EU Draft of Regulation 2019](#)

The national supervisory authority then informs the supervisory authority of the target country, which in turn can request further information on pre-marketing in its territory. However, the directive prohibits member states from imposing additional requirements for the pre-marketing, nor may they require the AIFM to provide information on the content and addressees of pre-marketing.

The AIFMs is also obligated to ensure that all pre-marketing is adequately documented.

No subscription without marketing notification

Until now, in Germany, with regard to professional and semi-professional investors, it has been held that the negotiation of fund documents does not constitute a marketing activity if the documents are (obviously) not yet complete for an offer because they still have gaps to be negotiated. Only upon conclusion of the negotiations of the conditions is it possible to undertake marketing activities. In its FAQs relating to marketing, the German supervisory authority (BaFin) correctly points out that otherwise any state of negotiations would have to be notified to the supervisory authorities. If the investors involved in the negotiations decide to subscribe for units, no notification procedure is currently required with regard to the negotiated fund and these investors. As the BaFin points out, once the negotiations have been concluded, the terms of the fund and the subscription are complete for



an offer, but no further marketing activity takes place at the initiative of the AIFM, as the investors involved in the negotiations have themselves played a decisive role in establishing the fund. A marketing notification is only required if there is a specific intention to market the fund to investors other than those who were involved in the negotiations.

In our view, the current treatment is appropriate, but it will be made impossible by the directive. According to the new directive, AIFMs must ensure that investors contacted as part of pre-marketing may acquire units or shares in that AIF only under marketing permitted in accordance with articles 31 or 32 of the AIFM Directive. In our opinion, the Commission is pushing investor protection too far here. When a fund initiator negotiates with professional investors to implement an investment strategy and design a specific fund, the parties involved are generally at the same level. There is no compelling reason to impose the protection of the marketing notification on the professional investors who have participated in the establishment of the fund. This applies not only to single investor special funds, but also to club deals and funds with a homogeneous investor base.

In addition, a period of 18 months is prescribed (starting with the commencement of pre-marketing) during which all subscriptions by professional investors are deemed to be the result of marketing activities.

What about third country AIFs?

According to recital 11b of the new directive, national laws, regulations and administrative provisions necessary to comply with the new directive and, in particular, with harmonised rules on pre-marketing, should never disadvantage an EU AIFM vis-à-vis a non-EU AIFM. Accordingly, member states must apply, at the very least, the harmonised provisions on pre-marketing and reverse solicitation to a non-EU AIFM. However, the new directive is silent on the notification procedure. The notification obligation would therefore also apply to the pre-marketing of a non-EU AIF. Without a passport, notification would have to be addressed to every national supervisory authority in which pre-marketing takes place.

Identical regulations for EuSEV and EuVECA

The new regulation introduces identical rules into Regulations (EU) No 345/2013 on European Venture Capital Funds and (EU) No 346/2013 on European Social Entrepreneurship Funds.

Deadline for transposition: 24 months

The drafts were passed by the EU Parliament on 16 April. The Committee of Permanent Representatives of the Member States already confirmed in February that the Council would agree to the compromise reached in the trilogue negotiations.

The provisions of the new directive must be transposed into national law and applied no

	No Marketing	Pre-Marketing	Marketing
General information about the AIFM		Presentation of investment concept and strategy, without product in final form	Initial presentation with final product
Sale of units by investor			
Offer to existing investors for subscription of additional units		Negotiation of gaps in documentation not yet in final form	In the future: each subscription by investors contacted in pre-marketing for subscribed AIF
Fulfilling obligations regarding provision of information		Subscription by investor with whom terms and conditions negotiated	
Contact by investor			In the future: each subscription within 18 months after commencement of pre-marketing for subscribed AIF



later than 24 months after the entry into force of the new directive. The amendments to the EuVECA and EuSEV Regulations will also enter into force 24 months after the entry into force of the amending regulation.

Conclusion

The pre-marketing concept remains unclear even after the uniform definition and the further provisions. The management companies continue to remain responsible for checking and determining whether their activities and drafts of fund documentation are still sufficiently vague for use in pre-marketing. We believe that the BaFin's FAQs on marketing will continue to provide useful guidance. Unlike in the past, however, pre-marketing will be a regulated activity in the future. The management companies will be subject to an obligation to notify and document during this phase.

Funds for professional and semi-professional investors will no longer be able to do without a marketing notification even if the investors and the AIFM have negotiated the terms in advance.

Please feel free to contact us if you have any questions regarding marketing and distribution.

 **in touch: Any questions? Please do not hesitate to contact us!**



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