

A call for specifying the “Pre-Marketing” concept within the AIFMD

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A need for clarity

On the 12th of March 2018, the EU Commission via an explanatory memorandum (“**Explanatory Memorandum**”), adopted a package of further measures intended to deepen, unify and further integrate the capital markets sector of the 28 EU Member States.

The package of measures suggested within the Explanatory Memorandum, include *inter alia*, a proposal to amend and supplement the Alternative Investment Fund Managers Directive 2011/61 (“**AIFMD**”) with the underlying purpose being to assist the aspiration of the EU Member States of creating a Capital Markets Union.

As it has been stated in the past, a Capital Markets Union between all Member States, can only be created via the elimination of local legal and regulatory barriers, which unfortunately exist at the local level of EU Member States and responsible for preventing the efficient cross-border distribution of investment funds within the EU.

A positive step for the elimination of the previously mentioned obstacles is the introduction of legal clarity on a marketing/pre-marketing level across all EU Member States. More particularly and as the Explanatory Memorandum highlights, in some Member States, pre-marketing is permitted and defined as a concept, whilst in some other Member States such concept does not exist at all. In addition, although some Member States have adopted measures and procedures for pre-marketing activities, such measures and procedures deviate between them.

Proposed Amendments

As noted within the Explanatory Memorandum, Member States shall ensure that an EU alternative investment fund manager (“**AIFM**”) wishing to engage in pre-marketing shall not be required to notify the competent local authority of such activity.

However, pre-marketing must concern an investment idea or strategy and not an already established EU alternative investment fund (“**AIF**”).

More specifically, the proposed definition of “pre-marketing” is:

“A direct or indirect provision of information on investment strategies or investment ideas by an AIFM or on its behalf to professional investors domiciled or registered in the Union in order to test their interest in an AIF which is not yet established.”

Accordingly, in that way the AIFM, will be able to test investor’s reception for a particular investment idea which has not yet implemented. However, the AIFM during this pre-marketing

period will be prohibited from supplying to prospective investors any information or material even in a draft form in relation to the AIF that they are informed about.

More specifically, Member States shall ensure that an AIFM can engage in pre-marketing activities in the EU unless such activities:

- a) relate to an established AIF;
- b) contain reference to an established AIF;
- c) enable investors to commit to acquiring units or shares of a particular AIF;
- d) amount to a prospectus, constitutional documents of a not-yet-established AIF, offering documents, subscription form or similar documents, whether in a draft or final form allowing the investors to take an investment decision.

Lastly, the new directive will introduce a mechanism for the discontinuation of marketing of units or shares of AIFs in Member States, other than in the home Member State of the AIFM and also set conditions and tasks which an AIFM must follow in order to market units of AIFs to retail investors.

Next Steps

This new directive, is expected to introduce legal certainty and clarity within this complex and multidimensional sector and is perceived by all key players as another positive step towards the creation of a unified Capital Markets Union.

The directive is anticipated to be adopted in May 2019 and Member states will have 24 months to transpose it into national legislation.