



## – Information Sheet –

# Pre-Marketing of EU and Non-EU AIF to professional investors

Published: 19.01.2022

### Content

➤ Legal base and purpose	1
➤ Scope	1
➤ Definition of pre-marketing	2
➤ Background	2
➤ Considerations for non-EU AIF	2
➤ Is pre-marketing possible?	3
➤ Obligations of the AIFM	3
➤ Delegation of pre-marketing	4

### Legal base and purpose

Directive (EU) 2019/1156 of 20th June 2019, amending directive 2011/61/EU (AIFMD), lays down procedures and rules concerning the pre-marketing efforts of alternative investment fund managers (AIFMs). Its goal is to further coordinate the conditions for fund managers operating in the European internal market and to facilitate cross-border distribution of their funds, whilst maintaining a high standard of investor protection, regardless of their type.

### Scope

Pre-marketing of EU and Non-EU AIFs to professional investors within the EU



## Definition of pre-marketing

Article 4 (1) directive 2011/61/EU (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.**”*

## Background

The European legislators have identified a **shift** in the fund distribution **modalities** within the market. A trend towards direct interaction between the investor and the fund management for marketing and advice have been noticed, whilst distribution, subscription, payments and redemptions are typically executed through other means. Resulting from this, the goal has been set to modernise and specify the requirements to providing facilities (specifically) to **retail investors**, whilst obliging Member States not to require a local **physical presence** for the provision of such facilities. At the same moment, the rules ensuring investors have access to all information which they are entitled to, before the foreground of investor protection have been specified.

In order to ensure the consistent treatment of retail investors, it is necessary that the requirements relating to facilities be also applied to AIFMs where Member States allow them to market units or shares of alternative investment funds (AIFs) to retail investors in their territories.

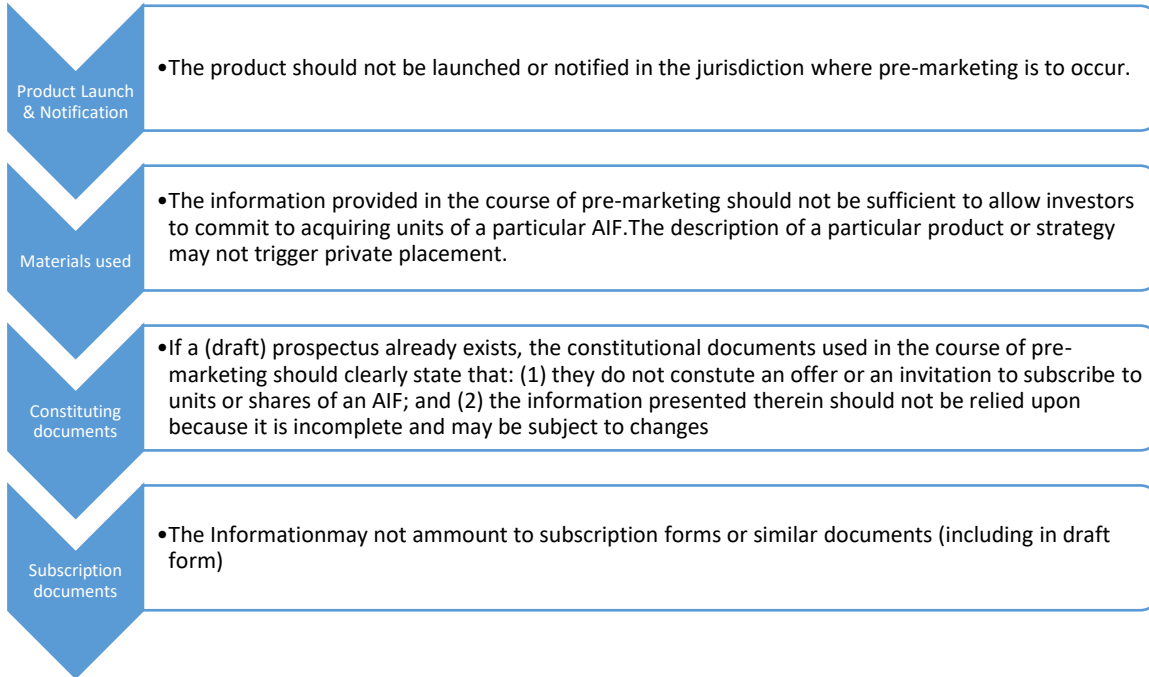
There are cases where an AIFM wishing to test investor appetite for a particular investment idea or investment strategy is faced with diverging treatment of pre-marketing in different national legal systems. The definition of pre-marketing and the conditions under which it is permitted vary considerably between those Member States in which it is permitted, whereas in other Member States there is no concept of pre-marketing at all. To address those divergences, **a harmonised definition of pre-marketing should be provided and the conditions under which an EU AIFM can engage in pre-marketing should be established.**

## Considerations for non-EU AIF

National laws, regulations and administrative provisions necessary to comply the (pre-) marketing provisions as detailed within the AIFMD and implemented by the national legislatures, should not in any way disadvantage EU AIFMs vis-à-vis non-EU AIFMs. Consequently, and in order to create a **level playing** field between EU AIFMs and non-EU AIFMs, the same conditions and notification procedures apply to non-EU AIFMs when they engage in pre-marketing to potential professional investors.



## Is pre-marketing possible?



Pre-marketing is possible

## Obligations of the AIFM

Within two weeks of having begun pre-marketing activities, the **AIFM** is to send **an informal letter** to the **competent authorities** of its home state, i.e.: in which the AIFM is established.

The letter shall include the following:

- The Member States in which pre-marketing is or will take place
- The periods during which pre-marketing has occurred
- A brief description of the pre-marketing efforts
- Information on the investment strategies presented in the course of pre-marketing
- List of AIFs or relevant compartments subject to pre-marketing (if available)

The home Member State regulatory authority to whom the AIFM has notified his pre-marketing efforts will then notify all other Member State Authorities in which pre-marketing is or has taken place. The AIFM will receive requests by the other Member State Authorities for additional information on the pre-marketing efforts via his home authority.

In the case of a non-EU AIF, the notification in accordance with the criteria set out above, should be made directly to the relevant authority of the Member State in which pre-marketing is to take place.

The AIFM may not be required to notify the respective host authorities himself and / or provide information on the addressees of their pre-marketing efforts, or any additional information, beyond that specified above.



The AIFM **must ensure** that investors **do not acquire** units or shares in an AIF through their pre-marketing efforts. The use of the pre-marketing regime may not lead to private placement and a circumvention of market access requirements.

Any subscription to units or shares of the AIF, or to the compartment(s) referred to in the information provided in the context of pre-marketing, or of an AIF or compartment established as a result of this pre-marketing, made within 18 months of the AIFM having begun pre-marketing, by professional investors in the relevant Member State shall be considered to be the result of active marketing within a member state. This includes subscriptions made by professional investors subscribing at their own initiative and those which have not been approached during the pre-marketing phase. The AIF is then subject to the requirements as laid down in articles 31 and 32 AIFMD (Directive 2011/61/EU) – detailing amongst others, the ordinary distribution procedures (establishment and notification) of AIF within Europe.

Lastly, the AIFM is required to document the entire pre-marketing effort adequately.

### Delegation of pre-marketing

Delegation of pre-marketing efforts is possible, provided the third party holds a European license as an investment firm and upholds the requirements set out above.

## Your Contacts

Viktor Fischer, Attorney at Law

**Managing Partner**



[viktor.fischer@reussprivate.li](mailto:viktor.fischer@reussprivate.li)



+41 (0) 792 54 04 88



<https://www.linkedin.com/in/viktor-fischer-cross-border-fund-distribution/>

Pino Becker, LL.M.

**Managing Partner**



[pino.becker@reussprivate.li](mailto:pino.becker@reussprivate.li)



+41 (0) 792 09 86 96



<https://www.linkedin.com/in/pino-becker/>

*This document and the information contained herein have been prepared by the authors and remain their sole property. The distribution and/or reproduction of the same, in whole or in part, including the information contained herein, is strictly prohibited without the written consent of the authors. The authors endeavor to ensure the accuracy of the information provided, but make no warranty, express or implied, as to its accuracy or completeness (including any liability to third parties). To the extent permitted by law, the authors shall not be liable for any direct, indirect or consequential damages arising out of the use of or access to this document in whole or in part. All rights reserved.*