NEW EU RULES FOR FUNDS' PRE-MARKETING AND THE FUTURE OF REVERSE SOLICITATION

Background

On 12 July 2019, the Directive (EU) 2019/1160 of the European Parliament and the Council of 20 June 2019 amending Directives 2009/65/EC ("**UCITS Directive**") and 2011/61/EU ("**AIFMD**") on cross-border distribution of collective investment undertakings ("**Directive**") was published in the Official Journal of the European Union.

This Directive is complemented by Regulation (EU) 2019/1156 of the European Parliament and of the Council ("**Regulation**"), also published on 12 July 2019, laying down additional rules and procedures concerning undertakings for collective investment in transferable securities ("**UCITS**") and alternative investment fund managers ("**AIFMs**").

Both the Directive and the Regulation are aimed to establish uniform rules on the publication of national provisions concerning marketing requirements for UCITS and AIFMs in relation to their cross-border activities. In particular, the Regulation further strengthens the principles applicable to marketing communications governed by UCITS Directive and extends the application of those principles to AIFMs, thereby resulting in a high standard of investor protection, regardless of the type of investor.

Pre-marketing activities

As a novelty, these pieces of regulation introduce a harmonised definition of "pre-marketing"[1], whose rules on pre-marketing will only apply to authorised-EU AIFM.

It is worth mentioning that, currently, AIFMD only regulates "marketing"[2] and not "pre-marketing". Indeed, the boundary between the two concepts is set unilaterally by national competent authorities (i.e. barriers) in relation to its own jurisdiction; therefore, the definition of pre-marketing and the conditions under which it is permitted vary considerably within the EU: (i) in certain Member States pre-marketing is not regulated (e.g. Spain); (ii) in others, pre-marketing activities are assimilated to marketing, and trigger notification requirements;

[1] According to the Directive, pre-marketing means the 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 EU in order to test their interest in an alternative investment fund ("**AIF**") or a compartment which is not yet established, or which is established, but not yet notified for marketing in accordance with the AIFMD 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.
[2] A direct or indirect offering or placement, at the initiative of (or on behalf of) the fund manager of units or shares of an AIF it manages, to or with investors domiciled, or with a registered office, in the EU.

(iii) while in other jurisdictions (e.g. UK) the presentation of draft offering documents does not currently constitute marketing, provided no binding subscription is made. In this context, the Directive aims to address this asymmetry, which is a significant step for EU fund promoters to avoid significant wasted time and expenses.

To this extent, an EU fund promoter will be allowed to test the interest of prospective investors for certain strategies before proceeding with the establishment of an AIF (i.e. promotional activities in relation to a particular proposed AIF or not general discussions about potential fund strategies). However, in order not to fall into the marketing notification requirements, the documents must avoid contain any information that is deemed to be sufficient to allow investors to take an investment decision and shall clearly state that: (i) they do not constitute an offer or an invitation to subscribe to units or shares of an AIF; and (ii) the information presented therein should not be relied upon because it is incomplete and may be subject to change. Namely, EU AIFMs may engage in pre-marketing, as long as the information presented to potential professional investors: (i) is insufficient to allow investors to commit to acquiring units or shares of a particular AIF; (ii) does not amount to subscription forms or similar documents (whether in a draft or a final form); and (iii) does not amount to constitutional documents, a prospectus or offering documents of a not-yet-established AIF in a final form.

Another highlight is the 18-month moratorium. To this extent, the Directive states that any subscription by professional investors, within 18 months of the EU AIFM having begun pre-marketing, to units or shares of an AIF referred to in the information provided in the context of pre-marketing, or of an AIF established as a result of the pre-marketing, shall be considered to be the result of marketing and shall be subject to the applicable notification procedures. If, further to pre-marketing, the subscription occurs after the 18-month period, then the marketing notification procedures under the AIFMD are not applicable.

The 18-month moratorium is not crystal clear as it applies to "professional investors" in general and does not specify the territory where the pre-marketing is rendered. We understand that the 18-month moratorium refers to the specific professional investors targeted within the territory where they are domiciled.

Additionally, a new notification requirement for pre-marketing to professional investors in the EU is regulated (representing a key change for those jurisdictions that have already been

provided for pre-marketing activities). Specifically, the Directive requires an authorised EU AIFM to send, within two weeks of it having begun pre-marketing, an informal letter to its regulator which must specify the Member States in which and the periods during which the pre-marketing is taking or has taken place, a brief description of the pre-marketing including information on the investment strategies presented and, where relevant, a list of the AIFs and compartments of AIFs which are or were the subject of pre-marketing.

Although these rules on pre-marketing are limited to authorised EU AIFM, the Regulation, extends the pre-marketing regime to managers of qualifying venture capital funds and qualifying social entrepreneurship funds. Accordingly, the pre-marketing rules have no impact on non-EU AIFMs when marketing their funds in the EU. We have to wait and see how national competent authorities determine whether to extend the pre-marketing rules to non-EU AIFMs, considering that the Directive expressly prohibits Member States adopting a regime more advantageous for non-EU AIFMs (i.e. even the notification of pre-marketing activity to its home regulator).

By 2 August 2021, Member States shall adopt and publish the national laws, regulations and administrative provisions necessary to comply with the Directive. In the same vein, the requirements for marketing communications and the new rules on pre-marketing under the Regulation shall apply from 2 August 2021.

Reverse solicitation approach

In view of the above, what happens when an authorised EU AIFM relies on "*reverse solicitation*"? And for non-EU AIMFs?

Seemingly, both the Directive and the Regulation do not remove reverse solicitation[3]. Notwithstanding, in connection with the 18-month moratorium (which is a long period indeed), it will become more difficult to rely on reverse solicitation as any subscription, within this period, by professional investors to units or shares of an AIF referred to in the information provided in the context of pre-marketing, or established as a result of the pre-marketing, will be considered to be the result of marketing.

[3] Reverse solicitation - i.e. where an investment is made, at the initiative of an investor, in an AIF managed or marketed in the EU - does not trigger any notification obligations. According to the AIFMD, the provisions regulated under this piece of regulation "*should not affect the current situation, whereby a professional investor established in the Union may invest in AIFs on its own initiative, irrespective of where the AIFM and/or the AIF is established*".

Further precision is required in order to ascertain whether an EU AIFM can continue to rely on reverse solicitation for on-site prospections where more general discussions about potential fund strategies are presented or when an EU professional investor solicits information on or invests in a particular AIF on its own initiative (i.e. with neither pre-marketing nor marketing activities associated).

To conclude, although the new pre-marketing rules facilitate harmonization and alignment among Member States, they could adversely affect the current pragmatic view of the AIF market, either by the notification of the pre-marketing activity to the home regulator, the effect on non-EU AIFMs (and post-Brexit) or the future of reverse solicitation (even considering the MiFID II safe harbour for non-EU Members).

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