

LEGAL UPDATE

Implementation of the Directive with regard to cross-border distribution of collective investment undertakings is taking shape: from pre-marketing to de-notification

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Implementation of the Directive with regard to cross-border distribution of collective investment undertakings (the 'Directive') is taking shape. Currently, a [consultation](#) on the implementing act relating to the Directive is open. The Directive applies to fund managers of alternative investment funds and collective investment undertakings. In this Legal Update we discuss the broad outlines of this legislative proposal.

Pre-marketing

The definition of pre-marketing and the conditions under which pre-marketing is possible will be harmonised. The definition ensures that fund managers will no longer have to deal with different interpretations of this concept in different Member States. Pre-marketing means that a fund manager tests investor appetite for a certain investment idea or investment strategy. No units or shares are actually offered for sale (yet). Following the implementation of the Directive, an important limit will be imposed on pre-marketing: if a professional investor subscribes for units within 18 months after the pre-marketing has commenced, this will be considered the result of an offer for which authorisation is required or a notification must have been submitted.

De-notification

A fund manager may offer units or shares in another Member State. In many cases, the supervisory authority of the Member State concerned will charge ongoing supervisory costs. If a fund manager wants to cease offering units in a Member State (de-notification), it will currently be confronted with different rules per Member State. Following the implementation of the Directive, de-notification will take place subject to harmonised conditions. One of the conditions will be that the fund manager must make a public offer to investors in the relevant Member State, open for a period of 30 days, to buy the outstanding units or shares. The fund manager must also disclose the intention to cease offering units via a medium commonly used for offering units and which is suitable for the investors concerned.

No physical presence of the manager in cross-border offerings

It has become clear that, for fund managers of UCITS, the provision of essential investor information or processing purchasing and redemption orders can be burdensome. The reason for this is that some Member States require the physical presence of the manager for cross-border offerings. Following the implementation of the Directive, Member States may no longer apply such requirements. The reason is that communication nowadays is conducted electronically or by telephone. In order to preclude discrepancies between UCITS (and managers of UCITS) and AIFs, the physical presence of fund managers of AIFs may no longer be expected either.

Advertising statements

The Regulation on facilitating cross-border distribution of collective investment undertakings (the 'Regulation') prescribes the requirements marketing communications must meet. For instance, the information must be fair, clear and not misleading. These requirements will also be applicable to managers of AIFs in the Netherlands, as far as they offer units to non-professional investors. Because fund managers of AIFs and UCITS must comply with the Regulation, s.4:19 of the Financial Supervision Act ('Wft') will no longer apply to these fund managers. We discussed this issue in a previous Legal Update, which you can read [here](#).

Interested parties can respond to the consultation up to 14 February 2021.

Would you like more information or do you have some questions? Please do not hesitate to contact us.

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