Fundraising in the EU and the UK

A Technical Guide

Start

Osborne Clarke

Introduction

When the European Union's regime for regulating private investment funds was introduced in 2013, it was envisaged that over time it would morph into a harmonised regime extending to regulate non-EU fund managers distributing their funds into the European Economic Area. This has not happened, and as the EU has not taken the opportunity to introduce an international marketing passport with the latest reforms coming into effect in April 2026, this will not happen any time in the foreseeable future.

Instead of simplicity, the regime has only grown more complicated.

The regime referred to 'alternative investment fund managers' (AIFM) as those who provided funds that were an alternative to retail funds, as regulated by the AIFM Directive[1]. AIFMD introduced an optionality for member states to permit capital raising by non-EEA fund managers. But if member states allowed this, they had to apply certain minimum standards, which they were permitted to 'gold-plate' as they each saw fit.

These regimes are known as National Private Placement Regimes (NPPRs) and fund managers must be aware of the divergent rules and their impact on how to raise capital. Now, even where implemented in broadly the same manner across member states, the time, effort and cost to bring a fund to market varies considerably.

Some NPPRs are a benign 'register and report' regime (such as in the Netherlands) and others stretch to a complete ban on private placement for non-EEA funds (such as in Italy and Poland). In most notification regimes no vetting of information provided is undertaken by the regulator; instead the fund manager is liable for its correctness.

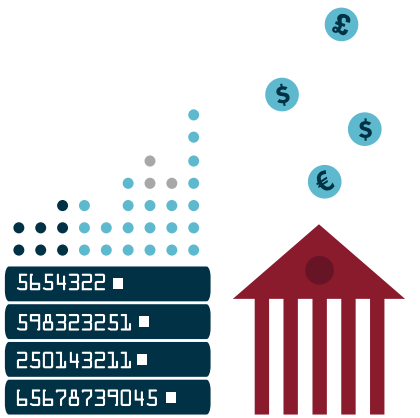
Certain member states require 'authorisation', meaning no marketing may commence until a permission to do so has been granted in writing by the local financial services authority, on the basis of the regulator's review of submitted documentation, often following additional queries from the regulator, where the application is considered incomplete, unclear or does not address that particular member state's concerns or bespoke requirements (such as in Germany and Norway).

To complicate matters, NPPRs are now combined with a relatively new framework for what is known as 'pre-marketing', that does not formally directly apply to non-EEA fund managers but nevertheless has implications for raising capital by non-EEA fund managers. Furthermore, even when fund managers steer clear of the rules regulating private funds, those raising capital must be wary of the extent to which their activities could be caught by the EU's regulatory framework for investment services (MiFID II[2]) and any local marketing rules, such as in the UK.

Finally, as the UK left the EU before the creation of the EU's pre-marketing regime, as well as the EU's ESG regulation of the financial system and the introduction of AIFMD II, there are now substantial and vital differences between the rules governing capital raising in the UK and the EU. This difference will widen from 16 April 2026 and onwards.

All-in-all an incoherent patchwork of legislation exists, which participants must navigate, with diverging interpretations of the same substance, often causing confusion, not to mention frustration, for those simply trying to raise capital.

We therefore seek to counter this confusion in this technical guide in a helpful, simple, and structured manner.



1. Directive (EU) No 2011/61/EU on Alternative Investment Fund Managers as amended.

2. Directive (EU) 2014/65/EU on markets in financial instruments as amended.

Osborne Clarke's Fund Marketing Platform

Where this technical guide seeks to bring clarity as to how the regulatory regimes fit together and what key concepts apply, it can also be read in conjunction with Osborne Clarke's Fund Marketing Platform.

The platform provides a more granular view of which rules apply in each individual EEA member states, the UK, Switzerland, and other selected jurisdictions further afield. This provides a quick feasibility assessment of whether capital raising can be undertaken in each jurisdiction, giving fund managers an informed basis to swiftly take forward their fundraising plans.

Complementary access to Osborne Clarke's Fund Marketing Platform for our clients and business partners can be requested **here** or via the QR code below.

Legislative background

The marketing of Alternative Investment Funds (AIFs) throughout the EEA is largely governed by the requirements of the AIFMD as modified by national transposition of AIFMD II[3] with effect from 16 April 2026.

This is in addition to a pre-marketing regime, a regime pertaining to environmental, social, and governance issues, referred to as "SFDR", shorthand for **the Sustainable Finance Disclosure Regulation**[4], and on the horizon, SFDR II. The UK's NPPR regime is largely based on the EU's first AIFM regime.

Broadly, marketing of AIFs falls into one of two methods: either (i) marketing using the AIFMD 'passport' or (ii) any available national private placement regimes. In addition, many funds are sold outside the scope of the AIFMD on the basis of so-called 'reverse solicitation'.

Raising capital as a consequence of investors taking the first step to invest does not generally fall within the definition of 'marketing' under the AIFMD. This means no rules (at all) derived from the Directive apply to such capital raising. An exception to this is where pre-marketing has occurred in the investor's member state, as explained below.

The AIFMD passport is currently only available to EEA AIFMs' marketing of EEA AIFs to professional investors domiciled in the EEA. Brexit has meant that UK fund managers no longer benefit from this passport and need to market AIFs under individual member states' NPPRs.

Assumptions

When looking at capital raising in the EEA, we are assuming that both the AIFM and the AIF are domiciled outside the EU[5]. When undertaking the same endeavour in the UK, we are assuming that neither are domiciled in the UK or Gibraltar.

When AIFMD II comes into effect on 16 April 2026, this will include special rules that apply to loan-originating activities of funds in the EEA; the impact of these rules on raising capital has not been included in this guide. This guide mainly focuses on raising capital from non-retail investors, as defined under MiFID II as it applies in the EU and UK respectively, meaning professional investors, institutional investors or eligible counterparties.

Actively raising capital from 'deep' retail investors invariably requires authorisations from the local financial regulator, which is rarely feasible in practice. However, there are certain retail rules, which must be considered when raising capital from other investors, and these are included where needed.

3. Directive (EU) 2024/927 of the European Parliament and of the Council of 13 March 2024 amending Directives 2011/61/EU and 2009/65/EC as regards delegation arrangements, liquidity risk management, supervisory reporting, the provision of depositary and custody services and loan origination by alternative investment fund.

4. Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector.

5. The EEA consists of the following European Union member states: Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, as well as Iceland, Liechtenstein and Norway. To avoid any doubt, Switzerland is neither part of the EU nor EEA, and has its own separate NPPR regime, which is not included in this guide, but can be found in our Fund Marketing Platform.

Marketing in the UK

Marketing is defined under the Alternative Investment Fund Managers Regulations 2013[6] (UK AIFMR) as being:

"….a direct or indirect offering or placement of units or shares of an AIF managed by it [the AIFM] to or with an investor domiciled or with a registered office in the United Kingdom or Gibraltar, or when another person makes such an offering or placement at the initiative of, or on behalf of, the AIFM."

This definition can be interpreted as follows:

Text	Comment
"a direct or indirect	An 'indirect' offer or placement includes situations where the AIFM distributes units or shares of the AIF through a chain of intermediaries. For example, a third party placement agents who temporarily purchase units or shares with the objective of distributing to a wider investor base is considered to make an indirect offering or placement when the units or shares are made available for purchase by investors; provided the third party is acting at the initiative of, or on behalf of, the AIFM.
offering or placement	The FCA takes the view that an offering or placement takes place for the purposes of the UK AIFMR when a person seeks to raise capital by making a unit or share of an AIF available for purchase by a potential investor. This encompasses situations which constitute a contractual offer that can be accepted by a potential investor in order to make the investment and form a binding contract, and situations which constitute an invitation to the investor to make an offer to subscribe for the investment. An 'offering or placement' does not, however, include secondary trading of units or shares of an AIF (provided such transfer of units or shares does not constitute an indirect offering or placement described above).
of units or shares of an AIF managed by it	The terms 'unit' and 'share' are to be treated as generic and can be interpreted as encompassing all forms of equity, or other equity-like rights, in an AIF.
to or with an investor domiciled or with a registered office in the United Kingdom or Gibraltar	The investor must be domiciled or have a registered office in the UK or Gibraltar. Domicile in this case does not necessarily have the same meaning as under tax law but is to be interpreted as 'permanently resident'. Reference to 'investor' in the UK AIFMR should be regarded as a reference to the person who will make the decision to invest in the AIF (which may not be the entity that legally invests).
or when another person makes such an offering or placement	This captures offers by third party placement agents, broker dealers and marketing teams.
at the initiative of, or on behalf of, the AIFM"	The corresponding position would be for the placement to be at the initiative of the investor – in other words, a reverse solicitation, which is therefore outside of the scope of the UK AIFMR rules.

6. www.legislation.gov.uk/uksi/2013/1773/contents/made

Gauging investor interest in the UK

It follows from the above that in the UK 'marketing' has a specific meaning for the purposes of the UK's NPPR that differs from how the term is ordinarily understood, as well as how it is widely interpreted in the EU.

Due to the regulatory impact, much thought has been given to whether the promotional activity of a fund manager is 'marketing' under the UK AIFMR and is therefore subject to the various regulatory and reporting requirements.

Commonly, managers look to be free to approach investors with a view to discussing a particular investment opportunity without having to register the offer with the FCA and complying with local UK rules.

The FCA considers that no documentation and information supplied to investors can be in a materially final form so as to allow the investor to purchase a unit or share in the AIF unless the AIFM has notified the fund for marketing.

The consequence of this interpretation is that any marketing communications made in relation to draft documentation do not fall within the meaning of an 'offer' or 'placement' for the purposes of the UK AIFMR. For example, a flip book or a pathfinder version of the private placement memorandum (PPM) does not constitute an offer or placement, provided such documents cannot be used by a potential investor to make an investment in the AIF.

This interpretation also has differing consequences for closed-ended funds (such as a private equity fund) and open-ended funds (such as hedge funds). The former, at least in relation to activity before first close, will market prior to final documents being completed or even the AIF being established. The latter conduct is a continual offering of interests and are therefore (once outside the initial offer period) always likely to have documentation in a 'materially final form'.

This only relates to rules derived from 'marketing' under the UK AIFMR. The FCA makes it clear that if a promotion is not 'marketing' it may still be subject to the UK's **financial promotion** laws[7]. Most pre-marketing communications will therefore be caught by the financial promotion rules if such a communication is considered "a significant step in the chain of events leading to an agreement to engage in investment activity" [8]. If it is, investment managers must ensure the communication is 'fair, clear and not misleading' and that it is only directed to the appropriate person.

This important interpretation has led to a market distinction between **'pre-marketing'**, using draft documents, which does not require notification, and **'marketing'** which generally does require notification. However, as explained below, in the EU 'pre-marketing' is a legal concept with a distinct and defined meaning. In individual EEA member states pre-marketing may not be permissible, is only permissible subject to notification of the host state's regulator, or it is unclear whether it is permissible due to differing legal interpretations.

Further requirements apply where the investment manager is targeting retail investors in the UK, as the fund will often need authorisation as a 'recognised' scheme.

Reverse solicitation

The UK AIFMR explicitly excludes the offering or placement of units or shares in an AIF at the initiative of a professional investor, the so-called "reverse solicitation" much beloved of US managers[9].

Consequently, if a fund is exclusively distributed under the reverse solicitation exemption, no notification to the FCA is needed in relation to this fund and no NPPR related obligations arise. The sale is entirely outside the scope of the UK AIFMR for all matters, but not outside of any financial promotion rules or the UK disclosure requirements.

The FCA is of the view that a confirmation from the investor stating that the offering or placement of units or shares of the AIF was made at its initiative should normally be sufficient to demonstrate that this is the case, provided this is obtained before the offer or placement takes place[10]. However, AIFMs and investment firms cannot rely upon such confirmation *"if this has been obtained to circumvent the requirements of the legislation that implemented AIFMD"*[11].

Accordingly, it would seem difficult to raise an entire fund solely in reliance on reverse solicitation; as a 'reverse enquiry marketing strategy' precludes 'active' marketing, it does not seem plausible.

7. PERG 8.37.6
8. PERG 8.37.14
9. UK AIFMR regulation 47.
10. PERG 8.37.11
11. PERG 8.37.11

New UK disclosure regime

The current disclosure rules are being phased out by the new Consumer Composite Investment (CCI) regime, however, as explained below, AIFMs using the UK NPPR can avoid the obligations under this new regime and will not have to provide information under the current disclosure regime.

The CCI replaces the following three EU-inherited disclosure regimes:

(i) the Packaged Retail Investment and Insurance Products Regulation (UK PRIIPs[12]);

(ii) the disclosure rules applying to UK-authorised retail funds (UK UCITS[13]); and

(iii) similar disclosure rules for certain UK retail funds that do not align completely with the EU's retail rules, but are substantially similar to UK UCITS (NURS).

The current rigidly templated 'Key Information Documents' and 'Key Investor Information Documents' are largely viewed as ineffective in helping consumers make informed investment choices, and these will be retired under the new regime.

The regime represents a fundamental shift from highly prescriptive disclosures to a more flexible, principles-based approach, encouraging firms to innovate in consumer communications, including through digital means.

The less prescriptive approach may expose firms to compliance risks, particularly for unauthorised firms facing unfamiliar standards and EEA firms dealing with divergent requirements from their home jurisdictions.

The CCI regime covers investments distributed to retail investors in the UK whose returns depend on the performance of indirect investments or reference values, excluding pension products and pure protection contracts, with all fund products currently under UK PRIIPs falling within scope. It also includes products such as structured deposits, derivatives, insurance based investment products and contingent convertible securities.

The new rules utilise the designated activities regime, creating four designated activities carried on in respect of CCIs: manufacturing; advising; offering; and selling CCIs, which allows the FCA to apply CCI rules to both authorised and unauthorised firms. Under the regime, when a CCI is distributed to UK retail investors manufacturers must provide 'product summaries' alongside core information to distributors before distribution begins, whilst distributors can tailor these summaries for end customers in accordance with their obligations under the Consumer Duty. Unlike the current disclosure documents, product summaries have no prescribed format, allowing firms to tailor them to specific products. This does not mean total freedom, however. Product summaries retain some degree of prescription, particularly on the description of risks and costs.

The FCA is replacing the 1-7 synthetic risk-reward score in UK PRIIPs with a 1-10 metric. Whilst both are based on volatility, the revised metrics scale aims to prevent bunching and ensure more granular variation. This is accompanied by balanced risk-reward descriptions and a 10-year past performance graph, where possible. Cost information must include explanations of performance fees and carried interest, with a summary of costs over 12 months and their impact on returns.

The regime applies high-level standards for unauthorised firms carrying on CCI activities, such as offshore fund managers utilising the UK gateway to distribute to retail investors; the overseas funds regime. These include basic product governance standards, requiring unauthorised manufacturers to establish a product approval process that ensures, among other things, that the product can meet the needs of its target market and provide fair value.

The FCA will also require unauthorised firms to comply with rules equivalent to other high-level principles authorised firms are subject to, for example concerning integrity, due skill and care, management and control and client assets.

Firms which play a material role in the manufacturing of a CCI in collaboration with others may also fall under the "manufacturer" definition.

Given the wide definition of a manufacturer, which encompasses multiple activities in relation to a CCI, this raises the question as to whether an overseas fund's board, administrator or general partner would be subject to the new standards.

The rules were based on a three-star consultation paper denoting rules that will be high-impact, broad in scope, and likely to require material changes for many firms, and will take effect on 8 June 2027. Until then, the UK's current PRIIPs disclosures must be adhered to.

An optional transitional period for the CCI regime will begin when the legislation commences on 6 April 2026. From this date manufacturers will be able to choose between producing a product summary or following the disclosure requirements that currently apply to them.

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12. As 'onshored' in the UK by the Packaged Retail and Insurance-based Investment Products (Amendment) (EU Exit) Regulations 2019 and amended.

13. Known as Undertaking for collective investment in transferable securities (UCITS).

UK PRIIPs currently applies to all products that provide an investment opportunity to retail investors where (irrespective of the investment's legal form) the product's return is subject to the performance of assets which are not directly purchased by the UK retail investor. AIFs therefore constitute PRIIPs for the purposes of the regime.

Accordingly, any AIFM that promotes an AIF to a retail investor (including where there is a reverse solicitation), is required to provide that investor with a Key Information Document prior to providing any subscription documents.

Avoiding CCI disclosures

Where distributing via the UK's NPPR regime most fund managers should be able to avoid the new CCI disclosures all together, including having to provide a "product summary", as the obligations do not apply where a CCI manufacturer has taken reasonable steps to ensure that:

– The offer and any associated communications about the consumer composite investment (including any prospectus) feature prominent and clear disclosures to the effect that the consumer composite investment is being offered only to investors who are or would be categorised as professional clients or eligible counterparties under the FCA's rules in COBS 3[14], and

– is not intended for retail investors; and are directed only to investors eligible for categorisation as professional clients or eligible counterparties under the FCA's rules.

Furthermore, the distribution strategy and arrangements with distributors for the CCI must be appropriate in light of the non-retail target market.

14. The FCA's Conduct of Business Sourcebook.

Raising capital in the EEA

Marketing to EEA professional investors must be done via individual member states' NPPR, and in accordance with local rules.

Osborne Clarke's Fund Marketing Platform provides an overview of the feasibility of marketing into EEA member states, and can be accessed via the QR link above, as well as setting forth additional AIFMD compliance requirements, which certain member states require when marketing into their jurisdiction.

In member states where marketing is allowed, non-EEA managers will need to ensure compliance with the annual reporting and pre-investment disclosure requirements and reporting obligations contained in Articles 22 (an annual report for each AIF), 23 (specific investor disclosures) and 24 (reporting obligations to local financial services authorities), respectively, of the AIFMD.

This is in addition to disclosures under the SFDR, which for AIFs not focusing on ESG matters, mainly consist of disclosures that can be added to the fund's PPM.

AIFs that promote, among other characteristics, environmental or social characteristics (so-called 'light-green' or Article 8 funds), must also provide investors with prescriptive 'Annex II' disclosures to their PPMs, as well as ongoing disclosures in 'Annex IV' annexes to their annual reports. Whereas AIFs that have sustainable investment, or a reduction in carbon emissions, as their objective must provide 'Annex III' annexes to their PPMs, as well as an ongoing 'Annex V' annex to their annual reports.

ESMA's SFDR PPM annexes can be found here in word: **link**, and we recommend seeking legal advice on how to disclose correctly under the EU's SFDR regime.

Marketing in the EEA is defined, in a similar manner as the UK, as being *"…a direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM of units or shares of an AIF it manages to or with investors domiciled or with a registered office in the Union".*

To understand what constitutes marketing in the EU, however, an understanding of so-called 'pre-marketing' is required, as these concepts are mutually exclusive; an activity that falls under pre-marketing, does not constitute marketing, and may not be permissibly, or only permissible subject to an additional local notification.

Pre-marketing, as the name implies, is an activity prior to marketing, and is explained below.

Notification of pre-marketing

In addition to new definitions and processes, a pre-marketing notification requirement has been introduced to the AIFMD. If an EEA AIFM intends to pre-market in a member state, it must notify its own member state's competent regulatory authority within two weeks of beginning the pre-marketing, setting out details of the member states in which the pre-marketing is taking place and the periods in which the activity is taking place, as well as a brief description of the activities, the strategies, and the AIFs covered.

Prior to the implementation of the **Directive EU/2019/1160** (CBDD) and the **Cross-border Distribution Regulation EU/2019/1156** (CBDR; jointly the pre-marketing framework), which ushered in the pre-marketing regime, what constituted 'marketing' differed materially between member states. While some member states treated initial conversations with investors about a new AIF as marketing, thus triggering the notification and/or application process under that member state's NPPR much earlier, others only considered 'marketing' to take place upon the provision of final-form documents offering an interest in the AIF which are capable of being accepted by investors.

Since 2 August 2021, the pre-marketing framework has governed the pre-marketing, marketing, as well as de-notification of marketing of AIFs in the EEA.

Through the implementation of the pre-marketing framework marketing now excludes initial conversations or sharing information on investment strategies or ideas with prospective professional investors, requiring a less onerous submission of a pre-marketing notification instead.

At first glance, as the pre-marketing framework only applies to EEA AIFMs, the marketing rules and interpretations for non-EEA AIFMs should therefore have been unaffected by the pre-marketing regime. However, the EU's view, underpinned by the European Securities and Markets Authority (ESMA), seems to be that unless national member state legislation explicitly allows pre-marketing for non-EEA AIFMs, such pre-marketing is not permissible at all.

ESMA states, in its **Questions and Answers on the Application of the**[15], that the "AIFMD does not cover pre-marketing activities by non-EU AIFMs. Therefore, non-EU AIFMs should not be allowed to carry out pre-marketing activities pursuant to the AIFMD. However, national laws, regulations and administrative provisions may allow non-EU AIFMs to carry-out pre-marketing activities at national level and where this is the case, non-EU AIFMs do not benefit from a passport allowing them to carry out these activities in other Member States."

This is based on EU principles reflected in recital 12 of the CBDD which provides that "national laws, regulations and administrative provisions necessary to comply with [AIFMD] and, in particular, with harmonised rules on pre-marketing, should not in any way disadvantage EU AIFMs vis-à-vis non-EU AIFMs".

If non-EEA AIFMs are allowed to pre-market in an EEA member state without being subject to requirements at least as stringent as those under the cross-border framework they would be put at an advantage compared to EEA AIFMs.

One objection in principle rarely raised against ESMA's stance is that their interpretation is outside the EU's competence (ultra vires). Third country marketing is enshrined in primary legislation as a national prerogative.

This subject to the minimum requirements under AIFMD Article 42. Access is granted exclusively on a state-by-state level by the local financial services authority, only enabling the raising of capital from investors located in their member state. As such, there is limited EU nexus, and the regulation of pre-marketing from non-EEA members states should be left to individual members states to regulate.

If the EU is of a different opinion, this is a matter to address between the EU and the member state, not a matter that regulates how the local law applies between the non-EEA AIFM and the member state in question.

Here the correct legal redress would be to initiate infringement proceedings against that member state, and for the courts to ultimately opine on the matter – rather than seeking to implement a prohibition via a law that does not apply to non-EEA AIFMs regulating activities that were legal before the non-applicable rules came into force.

The requirement on local regulators not to disadvantage EEA AIFs initially resulted in a confusing marketing landscape for non-EEA AIFMs post-implementation of the CBDD and CBDR, with local regulators diverging significantly in their treatment of pre-marketing by non-EEA AIFMs of non-EEA AIFs. Whilst some member states, most recently Norway, have clarified their position in legislation, the area is still unclear.

In practice, and the safer way to proceed is to accept that pre-marketing cannot take place in those member states that have not explicitly extended the pre-marketing regime to non-EEA AIFMs.

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15. Q&A on the Application of the AIFMD" (ESMA34-32-352), Section XVII: Marketing, Question 1 (QA 707), last updated 14 June 2023.

Pre-marketing rules under the member states' NPPRs fall into three broad categories:

– **Category 1:** Member states which have extended the CBDD and CBDR rules to pre-marketing for non-EEA AIFMs and AIFs under their NPPRs;

– **Category 2:** member states which have yet to extend or provide official guidance on the application of the pre-marketing rules to non-EEA AIFMs and AIFs under their NPPRs; and

– **Category 3:** member states which have explicitly or impliedly stated that pre-marketing by non-EEA AIFMs and AIFs under the NPPR is prohibited, requiring non-EEA AIFMs to submit full marketing notifications or applications before raising capital for AIFs in their jurisdictions.

It is unclear what the rules are for EEA sub-threshold AIFMs in relation to 'pre-marketing', but they are potentially barred from notifying their funds for marketing, and thus raising capital, where they are unauthorised by their home regulator. This is because they may fall outside the scope of the required Memorandums of Understanding, that need to be in place between their home regulator, the fund's home regulator, and the host member state's regulator, which is a prerequisite to use NPPRs.

Links to notification or pre-marketing

Category 1 – extension of pre-marketing rules to non-EEA AIFMs

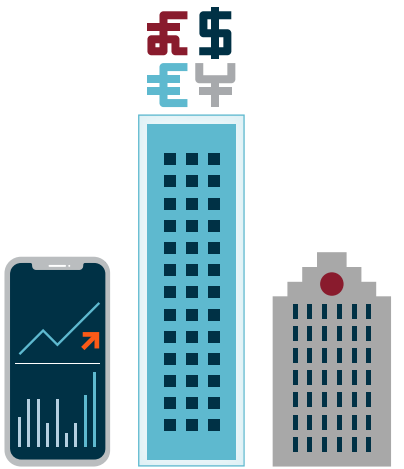
Some national regulators have implemented corresponding rules allowing non-EEA AIFMs and their AIFs to pre-market under their respective NPPRs to ensure EEA AIFMs are not disadvantaged. Accordingly, non-EEA fund managers will need to observe these rules when targeting investors in certain EEA jurisdictions, most notably this includes Finland, Germany, Luxembourg, Sweden, and the Netherlands.

Category 2 – Availability of pre-marketing uncertain

Regulators in Austria, Belgium, Ireland and Spain have provided no formal rules or official guidance to date on the availability of pre-marketing for non-EEA AIFMs under their NPPRs of which we are aware. As noted above, given ESMA's stance, non-EEA fund managers looking to carry out pre-marketing activities in these jurisdictions will need to engage local counsel for advice on how regulators interpret the scope of pre-marketing and marketing in light of the CBDD and CBDR.

Category 3 – pre-marketing unavailable to non-EEA AIFMs

Pre-marketing in France, Denmark, Italy, and Poland is explicitly or impliedly unavailable to non-EEA AIFMs. Non-EEA AIFMs looking to approach investors in Denmark and Norway will be required to submit an application with the local regulator for full marketing permission. In France, Italy and Poland, non-EEA AIFMs can neither pre-market nor market an AIF, leaving only reverse solicitation as an option. Norway has recently set forth legislative proposals to preclude non-EEA AIFMs from pre-marketing.



Definition of pre-marketing

The wording of the definition of 'marketing' under the AIFMD remains unchanged after the implementation of the cross-border framework. However, pre-marketing has been defined, and any activity that falls under the pre-marketing definition does not constitute marketing in a host member state (providing that the AIF has not been notified for marketing), as the concepts are mutually exclusive. 'Pre-marketing' is extremely broadly defined, as:

"….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…"

Text	Comment
"….provision of information or communication, direct or indirect, on investment strategies or investment ideas	A wide ranging condition, which could conceivably include telephone calls and meetings. Again, the condition includes an 'indirect' proviso, which could catch the use of cap intro firms or placement agents.
by an EU AIFM or on its behalf,	As noted above, this only relates to EEA AIFMs. Third country AIFMs (including UK managers) are currently out of scope. However, several member states have applied similar rules under their NPPR, and in practice, the regime precludes pre-marketing from non-EEA AIFMs where no regime has been implemented in a host state.
to potential professional investors domiciled or with a registered office in the Union	This relates to potential sales to professional investors as defined under MiFID II – sales to non-professional investors are out of scope and covered under domestic law.
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***	The distinction between funds which are not yet established and those which are is important for closed ended and open ended funds. The inclusion of 'established' funds was a late addition, and is of significance to hedge funds and other open ended fund conducting a continual offer.
in that Member State where the potential investors are domiciled or have their registered office	The investor must be domiciled or have a registered office in the EEA. Domicile in this case does not necessarily have the same meaning as under tax law but is to be interpreted as 'permanently resident'.
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…"	As set out below, where an offering document is provided to a potential investor, it should contain a clear warning that the document is not an 'offer'.

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Article 30a of the AIFMD sets out the conditions, harmonised across the EEA, for undertaking pre-marketing without triggering a formal marketing notification requirements (but for the avoidance of doubt, a pre-marketing notification is required); namely that the information presented to potential professional investors **must not**:

– be sufficient to allow investors to commit to acquiring units or shares of a particular AIF;

– amount to subscription forms or similar documents, whether in **draft or final form**; or

– amount to constitutional documents, a prospectus or offering documents of a not-yet-established AIF in final form.

Furthermore, where a draft prospectus or offering document is provided to investors, those documents must not contain information sufficient to allow investors to make investment decisions and **must clearly state that**:

"the document does not constitute an offer or an invitation to subscribe to units or shares in the AIF[16]*"*; and

"the information presented therein should not be relied upon because it is incomplete and may be subject to change."

Practically, this should be relatively easy to comply with.

The golden rule to follow for taking refuge in the pre-marketing safe harbour is therefore **'Do not hand out subscription agreements'** as part of your information pack. Obviously, 'pre-marketing' is just that: an exercise undertaken before formal marketing. It therefore follows that no investor can be accepted into a fund (or even sign a commitment letter) without the AIFM completing an AIFMD marketing notification or authorisation in the relevant member state.

In addition, under the pre-marketing regime, no subscription to a fund is permitted from an investor in a member state within 18 months of pre-marketing commencing, until the fund has been notified or authorised for marketing. There is no scope to rely on the reverse solicitation exemption, even if the investor in question did not receive, and was wholly unaware of, the pre-marketing. This only applies in relation to the member state in which pre-marketing has taken place and only in relation to the AIF which has been notified for pre-marketing. As such, careful consideration of pre-marketing strategies and drafting of any pre-marketing notifications to the local regulator is recommended to avoid precluding reverse solicitation for a broader range of AIFs than intended.

Note that, like the AIFMD marketing passport, the pre-marketing framework only applies in relation to information provided to professional investors. The pre-marketing rules do not apply to high-net-worth investors who do not meet the 'professional investor' test under MiFID II; however, that does not mean that funds may be distributed to such retail investors without separate authorisation.

The pre-marketing framework introduced a formalised notification procedure in the circumstances where a fund is no longer marketed in a jurisdiction; however these do not apply to non-EEA AIFMs.

The new rules therefore imply that without a required discontinuation notice being filed with the member state's regulator, the obligations that come with marketing permissions must continue to be followed (e.g. reporting and disclosure requirements).

An AIFM sending a discontinuation notice to the local regulator will need to consider carefully the logistical difficulty, and prospect of breach of the AIFMD, of ensuring that for a period of 36 months after the date of de-notification neither:

– a new offer is inadvertently made to investors in the relevant member state in respect of an AIF which has been de-notified, and

– nor is an AIF with "similar investment strategies or investment ideas" subsequently pre-marketed in that member state.

An adverse consequence of this rule is that AIFMs will be prohibited from pre-marketing their follow-on funds to investors in the relevant member state(s) until the expiry of the 36-month period, where such a de-notification notice has been submitted.

Instead of the pre-marketing regime, non-EEA AIFMs must follow the NPPR regime regulations for individual member states when they cease marketing. In those member states that have extended the pre-marketing regime to non-EEA AIFMs, similar requirements may arise.

In practice, the regulatory obligations that flow from a fund manager's initial marketing notification or authorisation continue until notice to the local financial services authority is granted, irrespective of whether marketing has ceased in practice. Some jurisdictions require that all local investors who have subscribed as a consequence of the marketing have been redeemed, or that certain investor disclosures are still provided after the fund ceases marketing for as long as investors from that jurisdiction hold interests in the AIF.

16. Slightly modified wording applies for qualifying venture capital funds and qualifying social entrepreneurship funds under the CBDR.

Availability of reverse solicitation after notification of pre-marketing

Not only are the pre-marketing notification requirements easily engaged – potentially triggered by online press releases or social media posts about a specific fund – but those seeking to raise capital should note that pre-marketing in an EEA state precludes reverse solicitation in that EEA state for a period of 18 months after the pre-marketing has started.

Even in circumstances where an investor is not aware of the manager's pre-marketing activities in the EEA state and approaches the manager on its own initiative, the fact that pre-marketing has occurred in the past 18 months in the investor's jurisdiction requires the manager to follow through with the full marketing notification procedure under the relevant member state's NPPR to accept capital from that investor.

Consequently, in jurisdictions where marketing is unlikely to be granted, e.g. due to depo-lite requirements that the manager will not entertain, or is never granted to non-EEA AIFMs, pre-marketing should be avoided altogether to at least preserve the ability to raise capital via reverse solicitation.

Again, the scope of any pre-marketing notifications, which are submitted, should be drafted with this in mind to limit the reach of any preclusion.

For those investors domiciled in member states who have not extended the pre-marketing framework, non-EEA AIFMs need to either abstain from pre-marketing altogether, and hope for reverse solicitation, or go directly to obtaining marketing permission.

As highlighted above, the new rules on pre-marketing give rise to:

(i) an extremely broad definition of what constitutes pre-marketing – though a clear definition of "pre-marketing" helps managers distinguish between pre-marketing and marketing activities, activities that previously left open the availability of the reverse solicitation exemption are now caught by the pre-marketing notification requirements;

(ii) a requirement to notify the regulator within 2 weeks of any pre-marketing commencement, adding an additional step (and cost) for managers in their fundraising process; and

(iii) what amounts, in effect, to a major clampdown on the use of reverse solicitation, as any subscription to a fund within 18 months of commencing pre-marketing is deemed to be a result of that activity, which narrows the availability of the reverse solicitation exemption.

In other jurisdictions where the applicable rules are murky, non-EEA fund managers will need to proceed cautiously when approaching investors or risk triggering the full marketing notification or application requirements. Local counsel should be engaged early; ideally before communications relating to funds are made available to investors in each EEA member state. Contact information to local counsel can be found in Osborne Clarke's Fund Marketing Platform.

16. Slightly modified wording applies for qualifying venture capital funds and qualifying social entrepreneurship funds under the CBDR.

Application to placement agents, cap intro firms and other distributors

The CBDD introduced an important new regulatory clarification and extension for placement agents, capital introduction firms and other distributors. As noted above, distribution under the AIFMD covers 'indirect' marketing. Any third party carrying out pre-marketing on behalf of an AIFM will need to be authorised as either: an investment firm under MiFID II, a credit institution, a UCITS management company or an AIFM or act as a tied agent in accordance with MiFID.

At this stage, it is not altogether clear what the third party should be regulated as, since 'marketing' is not in itself a regulated activity. There are differing views as to which of the MiFID regulated activities apply. It is commonly regarded as one of 'investment advice', 'receiving and transmitting orders in relation to one or more financial instruments' (RTO) or 'placing of financial instruments without a firm commitment', but none of these activities is a perfect fit for a distributor, so further regulatory guidance would be welcome in this regard.

We are not aware of any specific regulatory guidance that has come into force definitively resolving this question. In practice, many placement agents and marketing firms obtain authorisation to receive and transmit orders; however, whether this is necessary is debatable.

As regards RTO, a distinction can be drawn in the context of MiFID II:

– "Wide RTO" which covers bringing together a buyer and a seller. Whilst this could, in principle, capture marketing and distribution activities, it does not apply where the seller is issuing new financial instruments. On this basis, it may not extend to a fundraising for a fund, as the AIFM is issuing new interests rather than selling existing ones. This interpretation reflects the FCA's view and may not be interpreted in the same manner across all EEA member states.

– "Narrow RTO" which covers actually handling subscription orders and could apply to new subscriptions being transmitted on behalf of investors. However, carrying out marketing activities alone is not sufficient to constitute RTO under this narrower interpretation.

Where a firm is simply introducing investors to general partners, with no subscription orders being received or transmitted, it is difficult to see how either type of RTO is engaged.

As regards to placing of financial instruments, any person going out actively to secure investments into a fund would be at risk of this activity being engaged. Whilst some take the view that placing should only capture corporate finance activity relating to commercial businesses, we are not aware of any clear regulatory guidance supporting this restriction. That said, marketing alone is unlikely to constitute placing in its own right; rather, marketing forms part of a broader overall service that, taken as a whole, may amount to placing.

Furthermore, a technical argument is sometimes put forward that an interest in a limited partnership is not a transferable security and, therefore, MiFID does not apply. It may be the case that interests are not transferable; however, the lack of transferability does not bring limited partnership interests out of MiFID's scope.

In the UK, 'units in collective investment undertakings' include interests in limited partnerships (assuming that the partnership in question is an AIF) and as such are still a financial instrument. In the EU, 'units' were interpreted purposively by regulators during the AIFMD negotiations and implementation, as EU law does not define units by reference to a legal form but by the substance of the undertaking they relate to. This given the AIFMD expressly provides that the legal form of an AIF (whether constituted under contract law, trust law, statute, or any other legal form) is immaterial for the application of the directive.

An example of this teleological interpretation can be found in an ESMA Q&A, where shares in EU exchange-traded retail funds (EU UCITS) were deemed to be units in collective investment undertakings rather than shares for financial service regulatory purposes. This also extended to other collective investment undertakings[17]. As such units in limited partnerships are likely to be viewed as in scope of MiFID in the EEA as well.

From 16 April 2026, AIFMD II introduces a new exemption under Article 20(6a) of the AIFMD, which provides that where the marketing function of an AIFM is performed by one or several distributors acting on their own behalf, such function shall not be treated as a delegation subject to AIFMD II's delegation requirements.

The precise scope and practical implications of this exemption remain to be clarified, and ESMA has forwarded related questions to the European Commission[18]. Fund managers and their distributors should monitor regulatory developments carefully as this exemption is implemented.

In the absence of definitive guidance at the EU level, fund managers appointing third party distributors should ensure that any such distributor holds appropriate authorisation under MiFID II and that the basis for that authorisation is considered carefully in light of the activities that will be carried out.

17. ESMA Q&A, dated 2 June 2023, question 5.

18. ESMA Q&A 2636, dated 10 September 2025.

Requirements for marketing communications

On 2 August 2021, ESMA published **guidelines on marketing communications** under the CBDR. The guidelines specify that marketing communications should:

– be identifiable as marketing material;

– describe the risks and rewards of purchasing units or shares of an AIF in an equally prominent manner; and

– contain information which is fair, clear and not misleading.

The guidelines also take into account the online aspects of marketing communications.

Only fund managers are subject to the guidelines. Consequently, distributors, such as investment firms, are not subject to the guidelines, although they may have to apply other rules governing the information issued to investors or potential investors, such as Article 44 of the **Commission Delegated Regulation (EU) 2017/565**, which contains conditions for ensuring fair, clear and not misleading information to clients.

The guidelines apply to all communications for EU retail funds (UCITS) and AIFs, including EuVECAs, EuSEFs, ELTIFs and Money Market Funds, that have a marketing purpose. In this context, ESMA states that it may be useful to refer to how "marketing" is defined by Article 4(1)(x) of the AIFMD. The notion of "marketing communications" under the guidelines is proposed to encompass all communications, regardless of the medium used, which contain a direct or indirect offering or placement of units or shares of a fund to or with investors domiciled or with a registered office in the EEA.

Helpfully, the draft guidelines include a (non-exhaustive) list of examples of communications that may be considered as marketing communications (which introduces reference to messages broadcast on social media platforms), and those that should not be considered as marketing communications.

Although the guidelines relate to marketing communications under the pre-marketing framework, non-EEA AIFMs are likely to be subject to the same requirements when marketing under the NPPR.

18. ESMA Q&A 2636, dated 10 September 2025.

Application to retail investors

The pre-marketing rules, only apply to professional investors, not retail investors. A "retail investor" for these purposes will be a "retail client" as defined for the purposes of MiFID II. This may include individuals (for example, members of staff of the AIFM and high-net-worth individuals), smaller undertakings, municipalities or local authorities who do not or cannot "opt up" to "professional client" status.

As each member state may, at its discretion, permit marketing of AIFs to retail investors in accordance with local laws a harmonised cross-border approach to retail distribution is currently lacking, outside the remit of UCITSs. That said, granting permission to retail investors is not an option member states have used extensively, albeit certain member states do allow marketing of AIFs to a limited group of more sophisticated retail investors.

The rules did, however, amend the AIFMD and introduce a 'local facilities' requirement to ensure there is a consistent minimum level of treatment of retail investors in the EEA.

Member states must ensure that AIFMs make available, in each member state where they intend to market an AIF to retail investors, facilities to perform the following tasks:

- processing investors' subscription, payment, repurchase and redemption orders relating to the units or shares of the AIF, in accordance with the conditions set out in the AIF's documents;
- providing investors with information on how orders can be made and how repurchase and redemption proceeds are paid;
- facilitating the handling of information relating to the exercise of investors' rights arising from their investment in the AIF in the member state where the AIF is marketed;
- making the latest annual report of the AIF and pre-investment disclosures under Articles 22 and 23 of AIFMD available to investors for the purposes of inspection and obtaining copies;
- providing investors with information relevant to the tasks that the facilities perform in a durable medium in the applicable language; and
- acting as a contact point for communicating with relevant financial supervisory authorities in that member state.

These facilities may be provided by a third party, provided it is subject to regulation and supervision governing the tasks which it performs. Where a third party is used, a written contract is required evidencing the appointment and specifying: (i) which of the tasks are not performed by the manager marketing retail products in the EEA and (ii) that the third party receives all the relevant information and documents from the manager marketing retail products in the EEA.

Member states are not able to require the AIFMs marketing retail products in the EEA to have a physical presence in host member states or to appoint a third-party representative in that state.

As currently promulgated, **the EU PRIIPs regime**[19] applies to all products that provide an investment opportunity to EEA retail investors where (irrespective of the investment's legal form) the product's return is subject to the performance of assets which are not directly purchased by the EEA retail investor. AIFs will therefore constitute PRIIPs for the purposes of the regime.

Accordingly, any AIFM that distributes an AIF to a retail investor (including where there is a reverse solicitation), is required to provide that investor with a Key Information Document prior to providing subscription documents, in addition to mandatory disclosures under the SFDR.

19. Regulation (EU) No. 1286/2014, as supplemented and amended.

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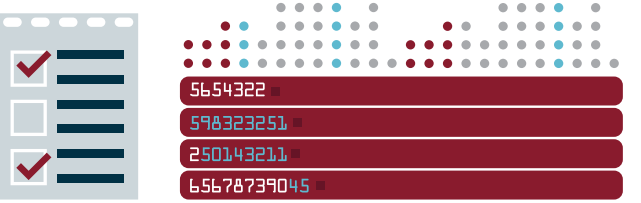

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