

## FUNDS & INVESTMENT MANAGEMENT

### PRE-MARKETING OF INVESTMENT FUNDS IN THE NETHERLANDS

#### Introduction

The bill implementing the European Union's Directive on the Cross-Border Distribution of Funds (CBDF) has been adopted by the Dutch Lower Chamber on 23 September 2021. Its adoption by the Dutch Upper Chamber is expected on 12 October 2021, followed a few days thereafter by its implementation in the Dutch Financial Supervision Act.

The CBDF covers a variety of matters in order to take away barriers and to further harmonise the European regime for the cross-border distribution of investment funds (both AIFs and UCITS) with a view to achieving an even more competitive and integrated internal market for investment funds. Such matters include notification procedures (for both registration and de-registration), marketing communications, making facilities available to investors, costs for supervision and pre-marketing.

This briefing focusses on pre-marketing, given its novelty for the Dutch market and the scope and application of the pre-marketing rules (which also extend to non-EU fund managers). The CBDF covers the pre-marketing of AIFs, but not the pre-marketing of UCITS. The Netherlands did not have a specific pre-marketing regime for AIFs prior to the CBDF being implemented and is now goldplating CBDF by applying the pre-marketing rules to non-EU fund managers as well.

#### The Cross-Border Distribution of Funds Directive

The regime for the pre-marketing of investment funds has not been harmonised in the European Union before. The two main European Directives - the AIFM Directive and the UCITS Directive - contain regimes for the marketing of investment funds but not for any form of pre-marketing. Pre-marketing in the various EU member states has therefore always been subject to local rules and local interpretations of what is allowed under the existing two Directives.

The CBDF now aims to create a harmonised regime on the pre-marketing for the entire European Union in respect of investment funds falling within the scope of the AIFM Directive (AIFs). The pre-marketing rules do not apply to investment funds falling within the scope of the UCITS Directive (UCITS) and the European Commission shall assess in the coming 2 years if there are merits in creating similar rules for UCITS.

#### Key issues

##### Main features of the CBDF

- The CBDF's general rule in relation to pre-marketing of investment funds is that pre-marketing is allowed for EU-based AIFMs subject to certain conditions.

*Pre-marketing is a new concept in the Netherlands and the direct impact is mandatory registration with the Authority for the Financial Markets.*

- The CBDF does not cover fund managers which are based outside of the EU.

*The Netherlands will apply the pre-marketing rules to such non-EU fund managers nonetheless.*

- Third party distributors may engage in pre-marketing on behalf of EU and non-EU fund managers, provided the third party distributor is licensed as bank, investment firm (or is a tied agent) or as fund manager.

*Third party distributors which are MiFID authorised in the Netherlands on the basis of an exemption may not engage in pre-marketing.*

## **Pre-marketing, what is it?**

Pre-marketing is defined as the provision of information or communication (direct or indirect), on investment strategies or investment ideas by a European AIFM (a fund manager within the meaning of the AIFM Directive) or on its behalf, to potential professional investors domiciled in the Netherlands in order to test their interest in an AIF which is not yet established (or which is established but not yet registered for marketing) and which does not amount to an offer or placement. This is a general description of a variety of matters that may occur prior to the actual taking on of subscriptions. In other words, pre-marketing can consist of any type of promotional activity in respect of existing or future fund strategies with a view to testing the water, seeing if there is investor appetite, trying to increase investor appetite and any other matters aimed at subscriptions by investors in due course.

## **Conditions for pre-marketing**

The CBDF expressly allows for pre-marketing by European AIFMs. There are no requirements with respect to the content of the information that is provided. However, in line with the pre-marketing notion, the information provided should not allow for any actual subscriptions or commitments (and should also not amount to draft subscription or commitment forms). In relation to not-yet-established AIFs, the information should not amount to constitutional documents, a prospectus or offering document in final form.

A draft prospectus (or other form of offering document) should furthermore not contain information which is sufficient to allow investors to take an investment decision and should clearly state that (i) it does not constitute an offer or invitation to invest and (ii) the information contained in it should not be relied upon because it is incomplete and may be subject to change.

The European AIFM is required to send a letter to its supervisor within two weeks after it has begun with the pre-marketing. The letter should specify in which EU member states the European AIFM will pre-market and during which period. It should furthermore contain a brief description of the pre-marketing (including information on the investment strategies) and, where relevant, a list of the AIFs to which the pre-marketing relates. The supervisor will consequently inform the supervisors in the other EU member states in which pre-marketing will take place.

European AIFMs should ensure that investors may only invest in the AIF once the formal registration procedure for marketing of the AIF has been completed. Any subscription of an investor in a EU AIF within 18 months of the EU AIFM having begun pre-marketing shall be considered marketing to which the registration procedure applies. In other words, in case investors wish to subscribe within a period of 18 months after pre-marketing has started, the AIF will need to be formally registered. Only after such period of 18 months could any such subscription be regarded as made on the basis of reverse inquiry.

## **Is this a big change?**

Essentially, all of this is new. Prior to the Cross-Border Distribution Directive, the regime in the Netherlands mostly allowed for any form of pre-marketing without registration formalities, provided no actual offer to subscribe was made. This is no longer the case and AIFMs will need to consider their

activities in the Netherlands prior to starting any type of sounding of investors or presentations at seminars.

In the case of well-defined pre-marketing campaigns in which fund managers (or third party distributors appointed by them) engage in roadshows or other activities during a specific period, the pre-marketing period can easily be notified to the regulator and will have a clear start and end date. It may be more difficult in practice for fund managers who engage with investors or potential investors on an ongoing basis, and therefore not within a specific limited period. Any such contacts may well qualify as pre-marketing and should therefore be considered in the context of the new rules.

### **Application to non-EU AIFMs**

In order to harmonise the regime for all AIFMs that wish to engage in pre-marketing in the Netherlands, regardless of their domiciliation, the Netherlands has opted for the additional application of the pre-marketing rules to non-EU AIFMs. This means that non-EU AIFMs, regardless of where they are located, should register with the Dutch Authority for the Financial Markets in case they wish to engage in pre-marketing activities in the Netherlands. Any such registration will have local effect only, meaning that it only covers pre-marketing in the Netherlands and not in any other EU Member State. Actual marketing of investment funds by non-EU AIFMs (i.e. allowing for subscriptions) thereafter is possible but subject to further registration requirements.

### **What does this mean in practice for non-EU fund managers?**

Non-EU fund managers will all qualify as non-EU AIFMs. Any pre-marketing by non-EU fund managers of funds managed by them, or of investment strategies (or other communications falling within the definition of pre-marketing) will require the non-EU fund manager to complete the standard form of registration as made available by the Dutch Authority for the Financial Markets. This will need to be done within 2 weeks after the pre-marketing has started and will, in any event, need to indicate during which period pre-marketing takes place. Non-EU fund managers engaging in pre-marketing on an ongoing basis, rather than during a specific period, will carefully need to consider the new rules. Any form of pre-marketing will furthermore take away the possibility to rely on reverse solicitation, meaning that once pre-marketing has started investors can only be allowed to subscribe upon the registration for marketing having been completed.

### **Third party distributors**

Third party distributors may engage in pre-marketing on behalf of EU and non EU-based fund managers, provided the third party distributor is licensed as bank, investment firm (or is a tied agent) or as fund manager. This authorisation requirement is introduced in order to ensure that only authorised financial institutions engage in investor-facing actions. For the Netherlands it is important to note that any such financial institutions which are not Dutch should be duly passported into the Netherlands prior to the pre-marketing. For investment firms which are registered under an exemption from the licence requirement (the exemption which is available to investment firms from the United States, Switzerland and Australia), it is important to note that they will

not qualify. Only EU-based licensed institutions will therefore be eligible as third party distributor.

For more information please contact [robert.smits@cliffordchance.com](mailto:robert.smits@cliffordchance.com)

## CONTACTS



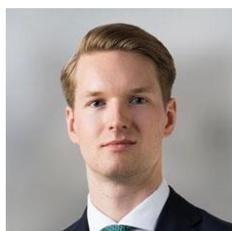
**Robert Smits**  
**T** +31 20 711 9356  
**E** robert.smits  
 @cliffordchance.com



**Marian Scheele**  
**T** +31 20 711 9524  
**E** marian.scheele  
 @cliffordchance.com



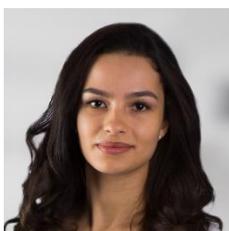
**Tjerk de Jonge**  
**T** +31 20 711 9638  
**E** tjerk.dejonge  
 @cliffordchance.com



**Wouter van den Bosch**  
**T** +31 20 711 940  
**E** wouter.vandenbosch  
 @cliffordchance.com



**Michiel Sunderman**  
**T** +31 20 711 9658  
**E** michiel.sunderman  
 @cliffordchance.com



**Marina Sarkisjan**  
**T** +31 20 711 9517  
**E** marina.sarkisjan  
 @cliffordchance.com

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Clifford Chance, Droogbak 1A, 1013 GE  
 Amsterdam, PO Box 251, 1000 AG  
 Amsterdam

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