

Everything non-EU managers need to know about marketing alternative investment funds in the EU

Insights - 23/05/2023

In this article, which first appeared in Chambers Expert Focus, partner Anne-Gaëlle Delabye and associate Caroline Lecomte from Ogier's investment funds team outline how managers from third countries should go about marketing alternative investment funds in the EU.

Non-EU managers need to bear the EU regulatory landscape in mind when accessing the EU market. Since 2019 and 2021 respectively, the [EU Regulation](#) and [EU Directive](#) on cross-border fund distribution have shaped this landscape by laying down additional rules on the conditions alternative investment fund managers (**AIFMs**) must satisfy in order to distribute investments funds across the EU. Although EU AIFMs are primarily within the scope of these rules, non-EU AIFMs who wish to market their funds in the EU are also impacted.

What Options Do Non-EU AIFMs Have?

There are several key points that non-EU AIFMs need to take into account when considering EU structuring options.

Pre-marketing

Among other changes, the EU Directive introduced the following exact definition of pre-marketing: "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 AIF or a compartment that is not yet established – or that is established in the EU 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."

Before introducing an investment idea or strategy to a prospective EU investor, the non-EU AIFMs must assess whether their approach will enter into the regulatory perimeter of this definition and trigger the commencement of the pre-marketing phase.

When it comes to pre-marketing within the above-mentioned framework, non-EU sponsors need to consider the following two possible scenarios.

Pre-marketing by EU AIFMs

Testing potential investors' interests in an investment idea or strategy falls within the scope of the pre-marketing regime.

A non-EU AIFM can collaborate with an EU AIFM, which will manage the fund on behalf of the non-EU one through the so-called host or chaperone model. This will enable it to benefit from the EU-wide marketing passport, meaning that – subject to the notification of the EU AIFM's regulator – the pre-marketing activity can be conducted in all EU member states without any additional approval, as the regulator will notify all other national competent authorities.

Pre-marketing by non-EU AIFMs themselves

Pre-marketing conducted by non-EU AIFMs cannot benefit from a pre-marketing passport, and any activities carried out by non-EU AIFMs are subject to the respective national regimes of EU member states.

These national private placement rules are very disparate and do not permit non-EU AIFMs to market the fund on an EU level. Instead, they determine prerequisites for the specific chosen market. Opting for this solution requires non-EU AIFMs to obtain a separate marketing authorisation in each of those countries.

The EU Regulation instructs EU member states to ensure that the national regimes should not disadvantage EU AIFMs vis-à-vis non-EU AIFMs. However, Luxembourg has chosen to apply the same conditions and notification procedures to EU AIFMs and non-EU AIFMs alike.

Direct marketing

In principle, if the non-EU AIFM has already determined its target investors and their jurisdictions, it has the opportunity to follow a similar pattern of distribution – albeit in the marketing phase directly this time. The non-EU AIFM can choose to engage with an EU AIFM through a delegation or advisory model or it can undertake to apply for a licence in a specific jurisdiction, depending on the need for a marketing passport and the costs involved.

Reverse solicitation

Reverse solicitation is the third path an AIFM could consider taking besides the usual licensing and passport procedures. The offering of a fund based on reverse solicitation ensures that the

investment is made at the sole initiative of the investor and neither the AIFM nor the fund has solicited the investor. In contrast with the pre-marketing, the investor takes the initiative to contact the AIFM. Even though such a situation is favourable, as it avoids the need for the AIFM to comply with marketing rules, reverse solicitation is and should remain an exception with regard to the placement strategy of the non-EU AIFM.

In addition, reverse solicitation may also be limited/prohibited in the jurisdiction of the prospective investors and this is likely to require non-EU AIFMs to search for local legal advice on a country-by-country basis.

A key change brought about by Article 2(2) of the EU Directive has had a direct impact on reverse solicitation – namely, the provision stating that any subscription by professional investors within 18 months of beginning pre-marketing must be considered the result of marketing and is therefore subject to the applicable notification procedures. As a consequence, reverse solicitation is only possible if the AIFM envisages no pre-marketing of its fund at all.

About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

Disclaimer

This client briefing has been prepared for clients and professional associates of Ogier. The information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Regulatory information can be found under [Legal Notice](#)

Meet the Author



Anne-Gaëlle Delabye

Partner

Luxembourg Legal Services

E: anne-gaelle.delabye@ogier.com

T: +352 2712 2039

Related Services

Investment Funds

Related Sectors

Funds Hub