

COMMENT

A GUIDE TO GERMANY'S NEW PRE-MARKETING RULES

Sebastian Seeger and Joachim Kayser of Goodwin Procter, Frankfurt outline the new pre-marketing obligations for German AIFs come into force this August, which come with a distinctive German twist

On August 2nd new and stricter regulations on Alternative Investment Funds pre-marketing in Germany will go into effect. Thus, the German

legislator implements the Directive (EU) 2019/1160 on cross-border distribution of collective undertakings (Cross border distribution directive, the Directive) in the national Capital Investment Code (Kapitalanlagegesetz, KAGB) with a specific German twist.

With these new regulations comes a host of questions; how will this change the practices of alternative investment fund managers (AIFMs), advisors and investors and what are German deviations from the European legal framework? We have compiled some answers for you.

STATUS QUO

According to the current legal situation, which is essentially characterized by the administrative practice of the Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin) pre-marketing of funds was not seen as an area of concern and had fewer regulations. Marketing subject to notification required that the investment fund had already been launched or at least that a contract was ready to be offered

without any gaps that still had to be negotiated, but any “pre”-marketing before this remained unregulated.

THE NEW REGULATIONS

This situation, especially BaFin’s practice, is about to change considerably through the new regulations. Here are the main points:

Pre-marketing – Definition and Scope

The new regulations introduce the EU-definition of pre-marketing, according to which pre-marketing is, in essence, the provision by or on behalf of an AIFM, of information or communication about investment strategies or investment concepts to potential professional or semi-professional investors with the aim of determining the extent to which the investors are interested in an AIF or a sub-investment fund which is not yet or is authorized but has not yet been the subject of a marketing notification.

One specific German deviation from the Directive concerns the inclusion of semi-professional investors – a well-known peculiarity of the German investment law - in the definition. Two more things are noteworthy: Firstly, the regulation’s definition also includes non-EEA AIFMs, what might be of particular interest to UK and US AIFMs and deemed in line with the objective of the directive, that EU-AIFMs should not be discriminated by the national regulations and administrative provisions transposing the

harmonised rules on pre-marketing against non-EU-AIFMs. Secondly, the explanatory notes to the bill confirm the current administrative practice of BaFin, according to which the mere advertising of the AIFMs general capabilities is to be considered separately from advertising for a specific investment fund and therefore should not qualify as (pre)marketing.

Limitations to pre-marketing

According to the new regulations, the AIFM may engage in pre-marketing, except where the information provided to prospective professional and semi-professional investors is:

1. Sufficient to enable investors to commit to purchasing units or shares of a particular AIF;
2. Subscription forms or comparable documents, whether they are in a draft or in final form; or
3. Constituent documents, prospectuses or offering documents of an AIF not yet authorized in final form;

If draft prospectuses or offering documents are provided, they shall not contain information sufficient for investors to make an investment decision and shall clearly state that:

1. It does not constitute an offer or an invitation to subscribe for units or shares of an AIF; and
2. The information presented therein should not be relied upon as it is incomplete and subject to change.

Application of marketing rules

A new concept resulting from the Directive has been transposed into German law. The Directive provides for a statutory fiction, stipulating in essence, that all subscriptions of units or shares of an AIF within 18 months after the AIFM company has commenced pre-marketing shall be deemed to be the result of marketing and shall therefore be subject to notification. Here we have reached a sticking point of the new regulation. This necessitates a substantial change as to BaFin's current administrative practice, whereby notification procedures are not triggered in the phase of the pre-marketing. Under the new regulations, the furnishing of a draft prospectus and/or investment termsheet is deemed to qualify as premarketing which triggers the statutory fiction of pre-marketing for the period of 18 months.

Pre-marketing notification obligation ("German gold-plating")

German AIFMs shall notify BaFin about the commencement of pre-marketing. The same applies to non-EU-AIFMs, whom - other than the Directive - the new German implementation regulations also include in the mandatory notification procedure. They do not profit from a "passporting" regime like EU-AIFMs which only have to notify their respective home country authority, which then contacts BaFin. German and non-EU-AIFMs have to notify BaFin within two weeks after the commencement of pre-marketing and provide the following information:

Effects on reverse solicitation

1. The periods during which the pre-marketing is taking or has taken place;
2. A brief description of the pre-marketing including information on the investment strategies presented; and
3. Where relevant, a list of the AIFs and compartments of AIFs which are or were the subject of pre-marketing.

The explanatory notes to the German bill state, that "it follows from the definition [of pre-marketing] that pre-marketing originates from the management company or on its behalf. If the initiative to acquire units of a fund comes from the potential investor (reverse solicitation), it is neither distribution nor pre-marketing". Nevertheless, there is a potential friction between the above mentioned statutory fiction and reverse solicitation. In light of a purely textual interpretation the wording could mean that no reverse solicitation is possible during the 18-month period. However, in view of the general passive freedom to provide services, it seems more convincing to limit the statutory fiction of pre-marketing to investors, to whom the AIF was in fact pre-marketed and to permit reverse solicitation with regard to investors, who were not contacted in the course of the pre-marketing.

TO DO'S

Consequently, especially as an AIFM, advisor or placement agent you must be aware of the upcoming rules (in particular the new filing obligation) and comply as of August 2021. ♦

