

FINNIUS

Pre-marketing rules now also in force in the Netherlands

9 November 2021

 5 MINUTES

Introduction

On 5 November 2021, the Decree dated 29 October 2021 determining the time of entry into force of the Dutch Implementing Act on Cross-Border Distribution of Investment Institutions and UCITS Directive was published in the Dutch Gazette (*Staatsblad*) (the **Implementation Act**), resulting in the Implementation Act being applicable in the Netherlands as of **November 6, 2021**.

The Implementation Act implements the provisions of Directive (EU) 2019/1160 regarding the cross-border distribution of collective investment undertakings (the **Directive**). In addition, there is a Regulation (the **Regulation**) with directly effective rules on cross-border distribution of investment funds, which already applies as of 2 August 2021.

The Implementation Act provides, among other things, rules on pre-marketing and requires authorised fund managers, among other things, to send a pre-marketing notification to the Netherlands Authority for the Financial Markets (*Stichting Autoriteit Financiële Markten*, **AFM**). This now formally applies as of 6 November 2021 and it is important that fund managers send a notification to the AFM in time, starting now. We explain this in more detail in this news item. Also note: In respect of EuVECA and EuSEF fund managers, the notification requirement already applies as of 2 August of this year.

Definition of pre-marketing

The definition of pre-marketing has been included in Article 1:1 Wft and captures in short the provision of information or the making of a statement to potential professional investors in a Member State about investment strategies or investment ideas by a fund manager with the intention of ascertaining whether these professional investors are interested in units in a fund that has not yet been established or that has already been established but in respect of which an AIFMD licence has not yet been applied for, or if the fund manager has not yet notified the AFM of its intention to offer units in a European fund, and where providing the information or making of the statement in no way results in the offering of units to professional investors.

Relevant Amendments

Notification of pre-marketing to the AFM

Under the new Article 2:69 Wft, Dutch authorised fund managers may engage in pre-marketing if the information to be provided to potential professional investors is/does not:

- (a) sufficient to enable investors to commit to acquiring units in an investment vehicle;
- (b) amount to subscription forms or similar documents in draft or final form; and
- (c) amount to final incorporation documents, a prospectus or offering documents of an investment vehicle not yet established.

Should this be the case, it would be considered an offering of units (*marketing*), which in principle requires a license pursuant to Dutch law.

Fund managers must notify the AFM of the pre-marketing within two weeks after the pre-marketing has commenced. This notification obligation does not apply to a fund manager that is exempted from the license obligation pursuant to the registration regime (the so-called “light regime”). The obligation does apply to “domestic” pre-marketing, i.e. the situation in which a fund manager undertakes pre-marketing activities exclusively among Dutch investors.

The pre-marketing must be reported by means of the [notification form](#) made available by the AFM for this purpose, in which the following must be included:

- (i) The Member States where pre-marketing is taking place or has taken place;
- (ii) During which period the pre-marketing is taking place or has taken place;
- (iii) A description of the pre-marketing including information on the investment strategies and investment ideas presented; and
- (iv) The investment vehicles that are or were the subject of the pre-marketing.

It should be noted that the notification form of the AFM states that the period during which pre-marketing takes place must be the same for all Member States reflected in the notification form. If pre-marketing activities are carried out on different dates in one or more Member States, a separate notification form must be submitted to the AFM. The AFM will then inform the supervisory authority of the Member State where the pre-marketing takes place or took place.

Section 2:69 Wft applies *mutatis mutandis* to a fund manager of an investment institution with its registered office in a non-designated state as referred to in Section 1:13b(1) Wft that proceeds to pre-market to professional investors in the Netherlands (i.e., pursuant to the so-called National Private Placement Regime).

Not being allowed to perform pre-marketing in case of discontinued offer

If a fund manager has notified the AFM that the fund manager will cease to offer units in a European investment institution to professional investors in another Member State, the fund manager is not permitted under the Implementing Act to pre-market units in a European investment institution previously offered by the fund manager and which offering has ended, or in a European investment institution with similar investment strategies or investment ideas in the Member State indicated in the fund manager’s notification to the AFM, in the thirty-six (36) months period following the date of the above-mentioned notification.

Marketing if enrolled within 18 months after pre-marketing

Fund managers must be aware that any subscription by a professional investor to units of an investment institution within eighteen (18) months of the Dutch fund manager's pre-marketing activities and to which the information provided in the context of the pre-marketing related, or any subscription to units of an investment institution established as a result of the pre-marketing, is considered to constitute an offer of units. Therefore, the fund manager must be authorised and/or a European passport in that Member State to be allowed to make such offer.

Conclusion and to do's

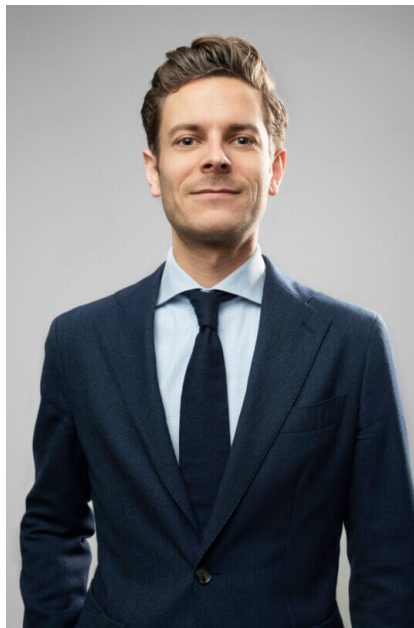
The pre-marketing phase, which previously often took place without supervision, now requires a form of compliance by fund managers. Authorised fund managers must be aware of the concept of pre-marketing in their activities prior to actually managing or offering units in the relevant fund and, where necessary, notify the AFM. This therefore also applies to domestic pre-marketing.

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