

Alternative Investment Funds: Marketing and Reverse Solicitation in the AIFMD Context

Luxembourg as a jurisdiction is often targeted by fund promoters and placement agents looking for institutional money. This is mainly due to the large number of Luxembourg-based fund of funds and private banks. Anyone raising capital in Luxembourg or from Luxembourg-based investors for a new alternative investment fund (the “AIF”) must therefore keep in mind the concepts of “marketing” and “reverse solicitation”.

When are we in the presence of a marketing activity?

This notion is better understood through its constitutive elements which can be introduced by the following questions:

What? meaning what is being marketed, *i.e.* the shares or units of an AIF (the “Shares”).

Who? This question deals with the entity carrying out the marketing activity, *i.e.* the AIF itself, its alternative investment fund manager (the “AIFM”) or an intermediary thereof such as one or more placement agents (the AIF, the AIFM and the placement agents being together referred to as the “Offeror”).

How? *i.e.* the manner in which the marketing is being carried out. In this respect, two important notions come into play: the one of active versus passive offer, and the potential offer *versus* firm offer.

The difference between active and passive offer will be dealt in more details under the concept of “reverse solicitation” below.

A firm offer requires that the offering documents relating to the Shares be in a form where the documents can be used by the prospective Investors (as defined below) to *formally* subscribe or commit to subscribe for Shares. When are we then in the presence of a “firm offer”?

• *Absence of offer (and consequences):* the presentation of an elaborate business plan/idea and/or a draft term sheet does not equate to a “firm offer” as long as a potential Investor is not able to subscribe for Shares on that basis. As a consequence, the Offeror is not required to receive the pre-approval from or make a notification to the Luxembourg financial supervisory authority (the *Commission du Secteur Financier* or “CSSF”) prior to making such presentation.

• *Offer:* a firm offer may take various forms (*e.g.* advertising, distribution of AIF documents to prospective Investors, road shows, distance marketing) provided that the relevant material delivered to Investors can be used to *formally* subscribe or commit to subscribe for Shares.

To whom? Here one must make the difference between a potential purchaser being part of the same group as the AIF/AIFM for instance and the one who is not. If the purchaser is a “group entity”, then the offer of Shares should in principle not be viewed as marketing. A distinction is therefore to be made between group in-

vestors (the “Purchasers”) and actual third party investors (the “Investors”).

Where? on the Luxembourg territory, except if the “firm offer” is made through “distance marketing” *i.e.* any marketing activity which is carried out by any means of communication (*e.g.* telephone, website) which does not imply the simultaneous physical presence in Luxembourg of (i) the Offeror, and (ii) the Investor. Distance marketing qualifies as marketing in Luxembourg when the Investors are domiciled or have their registered office in Luxembourg (the “Luxembourg-Based Investors”) – and the relevant materials can be used by the Luxembourg-Based Investors to formally subscribe or commit to subscribe for Shares.

When? To fall within the actual concept of marketing, the offer must in general take place during the capital raising phase of the AIF. Therefore, a secondary trading of the Shares does not in principle fall within the concept of marketing as understood herein as long as there is no indirect offering or placement of the Shares through one or more intermediaries acting at the initiative or on behalf of the AIFM or the AIF.



Photography Raoul Somers

Conclusion

There is a “marketing activity” within the AIFMD context when the Offeror actively offers the Shares for a firm purchase by either one or more potential Luxembourg-Based Investors or in Luxembourg to potential Investors during the capital raising phase of an AIF.

What constitutes a reverse solicitation?

Reverse solicitation consists in *providing information* regarding an AIF and making Shares of that AIF available for purchase to a potential Investor *following an initiative* taken by that Investor (or an agent of that Investor) without any *solicitation* made by the AIF or its AIFM (or an intermediary acting on their behalf) in relation to the relevant AIF.

Therefore a “reverse solicitation” is not to be seen as “marketing” as long as the following elements are cumulatively present:

- the Investor (or an agent of the Investor) has approached the AIFM or the AIF in its *own initiative* with the intention of investing in (or, initially, receiving information regarding) the AIF(s) managed by such AIFM; and
- neither the AIFM, nor the AIF (nor any intermediary acting on their behalf

such as a placing agent) solicited the investor to invest in the relevant AIF.

The AIFM has the burden of proof as regards the Investor’s initiative to invest in an AIF managed by the AIFM. The AIFM can provide evidence by means of written confirmation by the Investor that he/she has decided on his/her own initiative to invest in (or, initially, request for information regarding) the relevant AIF(s).

For the avoidance of doubt, the reverse solicitation route may in no case be invoked to circumvent the requirements contained in the AIFM directive.

EZECHIEL HAVRENNE

Background on the author

Ezechiel is a local partner at NautaDutilh and leads the Luxembourg investment funds practice of the firm. He counts among his clients large international private equity firms, global real estate firms, banks, financial groups, institutional investors, and mutual fund promoters.

Ezechiel provides practical and in-depth regulatory and legal advice on the structuring and establishment of Luxembourg unregulated and regulated investment structures, and co-investment vehicles. He also assists fund managers throughout the investment and divestment phases.

Ezechiel is Editor-in-Chief of the JurisNews Investment Management edited by Larcier-Promoculture since 2013. He published in 2015 the three volumes of the Investment Management Code with Larcier-Promoculture in English and French. He obtained his Law Degree from the University of Louvain (UCL), Belgium, and did an Erasmus at the *Universidad Complutense de Madrid* School of Law, Spain. He holds an LLM degree in Corporate, Intellectual Property and Antitrust Law from the University of Pennsylvania Law School, USA. He is fluent in English, French, Dutch and Spanish.

* Neither the explanations provided in this article nor the article itself should, in any way, be viewed, understood, or construed as a legal opinion or advice on the matter discussed herein.