

# Cooley

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This briefing is a supplement to our Alternative Investment Fund Managers Directive briefing, which is [here](#).

In this briefing, we have used the terms we defined in our primary briefing without redefining them. The two briefings should therefore be read together.

## ***Marketing a fund***

The Directive defines "marketing" as: "a direct or **indirect offering or placement** at the initiative of the [Manager] or on behalf of the [Manager] of **units or shares** of [a Fund] it manages to or with **investors** domiciled or with a registered office in the [EU]".<sup>1</sup> The European legislature has deliberately left it up to the Member States of the European Union to decide:

- What "**offering or placement**", "**units or shares**" and "**investors**" means in their respective jurisdictions; and
- Whether "**marketing**" includes or excludes "**reverse solicitation**".

Each country has taken a different approach to each of these things. The United Kingdom's Financial Conduct Authority has taken this approach:

- An "**offering or placement**" takes place "when a person seeks to raise capital by making a unit of share of [a Fund] available for purchase by a potential investor. This includes situations which constitute a contractual offer that can be accepted by a potential investor in order to make the investment and form a binding contract, and situations which constitute an invitation to the investor to make an offer to subscribe for the investment";<sup>2</sup>
  - An "**offering**" includes "situations where the units or shares of [a Fund] are made available to the general public";
  - A "**placement**" includes "situations where the units or shares of [a Fund] are only made available to a more limited group of potential investors";
  - "**Offering**" and "**placement**" do not include:
    - "secondary trading in the units or shares of [a Fund] because this does not relate to the capital raising in that [Fund], except in situations where there is an indirect offering or placement ... Similarly, the listing of the units or shares of [a Fund] on the official list ... will not ... constitute an offering or placement, although it may be accompanied by ... an offering or placement";<sup>3</sup> or
    - "Any communications relating to [draft (i) notification letters to the FCA; (ii) the Fund's rules or instruments of incorporation; (iii) the identification of the depositary; (iv) the description of, and the information about, the Fund that will be given to investors, and certain other specified documents, will not] fall within the meaning of an 'offer' or 'placement' ... For example, a promotional presentation or a pathfinder version of the private placement memorandum would not constitute an offer or placement, provided such documents cannot be used by a potential investor to make an investment ... However, a unit or share ... should not be made available for purchase as part of the capital raising ... on the basis of draft documentation in order to circumvent the marketing restriction";<sup>4</sup>
- An "**indirect**" "**offering or placement**" "would include situations where [ a Manager] distributes units or shares ... through a chain of intermediaries";<sup>5</sup>
- "**Units or shares**" are "generic [terms] and can be interpreted as encompassing all forms of equity of, or other rights in, [a

Fund]";<sup>6</sup>

- **"Investor"** is "a reference to the person who will make the decision to invest". If "that person acts on its own behalf and subscribes directly ... , the investor [is] the person who subscribes ... [W]here that person engages another person to subscribe ... on its behalf ... the [Manager] should 'look through' the subscriber to find the underlying investor who will make the decision to invest ... and that person should be regarded as the investor ... Where a discretionary manager subscribes, or arranges for another person to subscribe, on behalf of an underlying investor ... and the discretionary manager makes the decision to invest ... on that investor's behalf without reference to the investor, ... the discretionary manager should be considered to be the investor..."<sup>7</sup>;
- **"Reverse solicitation"** is not **"marketing"**. "A confirmation from the investor that the offering or placement ... was made at its initiative, should normally be sufficient to demonstrate that this is the case, provided this is obtained before the offer or placement takes place ... [Managers] should not ... rely upon such confirmation if this has been obtained to circumvent the requirements of [the Directive]".<sup>8</sup>

Some other European countries have taken a more flexible approach to "marketing" than this; but most have been rather more restrictive.

## **Marketing a fund**

A Fund is a **"collective investment undertaking ... which: (i) raise[s] capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and (ii) do[es] not require authorisation pursuant to Article 5 of [the undertakings for collective investment in transferable securities] Directive 2009/65/EC"**.<sup>9</sup>

In its [Guidelines on key concepts of the AIFMD](#), the European Securities and Markets Authority (ESMA) explained that:

1. "The following characteristics, if all of them are exhibited by an undertaking, should show that the undertaking is a **collective investment undertaking ...**:
  - a. [It] does not have a **general commercial or industrial purpose**;
  - b. [It] pools together capital raised from its investors for the purpose of investment with a view to generating a **pooled return** for [them]; and
  - c. [Its] unitholders or shareholders ... as a collective group ... have no **day-to-day discretion or control**. The fact that one or more but not all of [them] are granted **day-to-day discretion or control** should not be taken to show that the undertaking is not a collective investment undertaking".

For these purposes:

- a. A **general commercial or industrial purpose** is "the purpose of pursuing a business strategy which includes characteristics such as running predominantly (i) a commercial activity, involving the purchase, sale, and/or exchange of goods or commodities and/or the supply of non-financial services; [and/or] (ii) an industrial activity, involving the production of goods or construction of properties";
- b. A **pooled return** means "the return generated by the pooled risk arising from acquiring, holding or selling investment assets – including the activities to optimise or increase the value of those assets – irrespective of whether different returns to investors, such as under a tailored dividend policy, are generated"; and
- c. **Day-to-day discretion or control** means "a form of direct and on-going power of decision – whether exercised or not – over operational matters relating to the daily management of the undertakings' [sic] assets and which extends substantially further than the ordinary exercise of decision or control through voting at shareholder meetings on matters such as mergers or liquidation, the election of shareholder

representatives, the appointment of directors or auditors or the approval of the annual accounts".

2. On "**raise[s] capital**": "the commercial activity of taking direct or indirect steps by an undertaking or a person or entity acting on its behalf (typically, the [Manager]) to procure the transfer or commitment of capital by one or more investors to the undertaking for the purpose of investing it in accordance with a **defined investment policy** should amount to the activity of **raising capital**".
  - a. It is immaterial whether "the activity takes place once, on several occasions or on an ongoing basis", and whether "the transfer or commitment of capital takes the form of subscriptions in cash or in kind";
  - b. (Without prejudice to the following sub paragraph) "when capital is invested in an undertaking by a member of a **pre-existing group**, for the investment of whose private wealth the undertaking has been exclusively established, this is not likely to be within the scope of raising capital"; and
  - c. The fact that a member of a **pre-existing group** invests alongside other investors "should not have the consequence that the criterion 'raising capital' is not fulfilled. Whenever such a situation does arise, all the investors should enjoy full rights under the [Directive]".

For these purposes:

- a. A "**pre-existing group**" means "a group of family members, irrespective of the type of legal structure that may be put in place by them to invest in an undertaking and provided that the sole ultimate beneficiaries of such legal structure are family members, where the existence of the group pre-dates the establishment of the undertaking. This shall not prevent family members joining the group after the undertaking has been established ... 'family members' means the spouse of an individual, the person who is living with an individual in a committed intimate relationship, in a joint household and on a stable and continuous basis, the relatives in direct line, the siblings, uncles, aunts, first cousins and the dependants of an individual".
3. On "**number of investors**":
    - a. "An undertaking which is not prevented by its national law, the rules or instruments of incorporation, or any other provision or arrangement of binding legal effect, from raising capital from more than one investor should be regarded as an undertaking which raises capital from a number of investors ... even if it has in fact only one investor";
    - b. "An undertaking which is prevented by its national law, the rules or instruments of incorporation, or any other provision or arrangement of binding legal effect, from raising capital from more than one investor should be regarded as an undertaking which raises capital from a number of investors ... if the sole investor:
      - i. Invests capital which it has raised from more than one ... person with a view to investing it for the benefit of those persons; and
      - ii. Consists of an arrangement or structure which in total has more than one investor for the purposes of the [Directive]".
4. On "**defined investment policy**":
    - a. "An undertaking which has a policy about how the pooled capital in the undertaking is to be managed to generate a **pooled return** for the investors from whom it has been raised should be considered to have a defined investment policy ... The factors that would, singly or cumulatively, tend to indicate the existence of such a policy are ...:
      - i. The investment policy is determined and fixed, at the latest by the time that investors' commitments to the undertaking become binding on them;

- ii. The investment policy is set out in a document which becomes part of or is referenced in the rules or instruments of incorporation of the undertaking;
- iii. The undertaking or the [Manager] has an obligation (however arising) to investors, which is legally enforceable by them, to follow the investment policy, including all changes to it;
- iv. The investment policy specifies investment guidelines, with reference to criteria including any or all of the following:
  - i. To invest in certain categories of assets, or conform to restrictions on asset allocation;
  - ii. To pursue certain strategies
  - iii. To invest in particular geographical regions;
  - iv. To conform to restrictions on leverage;
  - v. To conform to minimum holding periods; or
  - vi. To conform to other restrictions designed to provide risk diversification;
- v. With regard to the investment policy specifying investment guidelines, any guidelines given for the management of an undertaking that determine investment criteria other than those set out in the business strategy followed by an undertaking having a **general commercial or industrial purpose** should be regarded as 'investment guidelines';
- vi. Leaving full discretion to make investment decisions to the [Manager] should not be used as a mean[s] to circumvent the provisions of the [Directive]".

## NOTES

1. See article 4(1)(x) of the Directive. [back](#)
2. See PERG 8.37.5G. [back](#)
3. See PERG 8.37.5G. [back](#)
4. See PERG 8.37.6G. [back](#)
5. See PERG 8.37.7G. [back](#)
6. See PERG 8.37.8G [back](#)
7. See PERG 8.37.9G. [back](#)
8. See PERG 8.37.11G. [back](#)
9. See article 4(1)(a) of the Directive. [back](#)

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