

PRE-MARKETING AND MARKETING OF ALTERNATIVE INVESTMENT FUNDS IN THE EU/EEA

The expanded role
of the AIFM
to support fund initiators





THE EXPANDED ROLE OF THE AIFM TO SUPPORT FUND INITIATORS IN PRE-MARKETING

New rules for pre-marketing of Luxembourg investment funds

From August 2021, new EU legislation and amendments to existing directives provide for further harmonisation to the cross-border marketing and distribution of alternative investment funds (AIFs) within the EU and EEA Member States and in particular in relation with pre-marketing activities.

The AIFM Directive (2011/61/EU) (the “AIFMD”) provides clear rules for the AIFM to market AIFs. However, pre-marketing practices were different across each EU Member State and were not controlled or regulated in terms of the information conveyed and notification to regulators.

This made pre-marketing activity difficult as it was unclear in which countries it was permitted. There was also legal insecurity for prospects to invest on the back of the pre-marketing communications.

The new directive (2019/1160/EU) on Cross Border Distribution of Funds (or “CBDF Directive”) moves to align pre-marketing with marketing rules. The main condition for pre-marketing is the appointment by the initiator of an EU pre-marketing agent, which may be an authorised EU alternative investment fund manager (“EU AIFM”) such as Inn pact Fund Management S.A. (“Innpact AIFM”), among others.

The EU AIFM will engage in pre-marketing with specific conditions. Similar to marketing rules, the EU AIFM will notify the regulator of the proposed target EU/EEA jurisdictions. The EU AIFM controls the information and must document the process.

Clearer rules now exist that define pre-marketing activity along with marketing activity by adding new pre-marketing clauses to the AIFMD.

The two primary stages for marketing of an AIF within the EU are defined as:



PRE-MARKETING

Pre-marketing is “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 which is not yet established, or which is established, but not yet notified for marketing”.



MARKETING

Marketing is the provision of information to a professional investor and where the investor can complete a subscription and commitment to an AIF.

New EU pre-marketing framework sets rules for the initiator in contacting investors

Pre-marketing of a proposed AIF is a core component in the successful launch of such product.

Fund initiators, general partners and investment managers are no longer entitled to carry out EU pre-marketing activity prior to the launch of an AIF independently. They may pre-market outside of the EU/EEA provided that they comply with regulations in each such jurisdiction. In addition, the information should be consistent with the rules of the CBDF Directive. It must therefore not be understood as an offer or a call for subscription to shares/units of the AIF.

The CBDF Directive seeks to harmonise the different interpretations of pre-marketing across the EU jurisdictions which is to the benefit of initiators.

Accordingly, the EU AIFM can engage in pre-marketing in the EU/EEA through its appointment by the initiator. The EU AIFM simply has the obligation to notify the regulator to control the information (non-solicitation, non-offer) and to monitor the process. Innpact AIFM provides this service in coordination with the initiator.



Engaging with an authorised AIFM for pre-marketing

The pre-marketing regulations have specific obligations for AIFMs which require a close coordination with the AIF initiator.

The pre-marketing rules require the AIF initiator through the AIFM to notify EU Member State regulators (for Luxembourg, the Commission de Surveillance du Secteur Financier - CSSF) of the proposed pre-marketing activity within two weeks.

With the proven experience in supporting the pre-marketing of impact funds, Innpact Fund Management S.A. can be your partner AIFM for pre-marketing in the EU/EEA.

Client acceptance

Innpact AIFM completes a preliminary client acceptance stage where it collects information, some of which will be required for the pre-marketing notification to be made to the CSSF, **prior to such notification** (and launch of pre-marketing activity).

This may include but not limited to:

- Contact details of the initiator
- KYC of the initiator including governance and shareholder information
- Corporate documents of the initiator
- Term sheet & structure of the proposed product
- Pitch deck (if draft prospectus is not available)
- Details of the strategy, sectors and targeted investors
- Targeted jurisdictions across EU/EEA for cross-border notification of pre-marketing



After reviewing this information, the AIFM will be in a position to **approve a mandate** to represent the initiator and the proposed AIF in the pre-marketing of the AIF to professional investors in the EU/EEA.

PRE-MARKETING INFORMATION REQUIREMENTS Ref. CBDF Directive Art. 2

Prior to filing the notification letter and during the pre-marketing activity, the AIFM is responsible for ensuring that the information:

- Is not sufficient to allow investors to commit to acquiring shares/units of the AIF;
- Does not amount to subscription forms or similar documents whether in a draft or a final form; or
- Does not amount to constitutional documents, a prospectus or offering documents of a not yet-established AIF in a final form.

If a draft prospectus or offering documents are provided, they shall not contain information sufficient to allow investors to take an investment decision and shall clearly state that:

- They do not constitute an offer or an invitation to subscribe for shares or units of an AIF; and
- The information should not be relied upon because it is incomplete and may change.

The CBDF Directive requires the AIFM to play an active role in pre-marketing compliance monitoring in terms of validating information and ensuring the information is in compliance with the regulations and that pre-marketing is adequately documented.



The pre-marketing notification in Luxembourg

Luxembourg authorised AIFMs engaging in pre-marketing in either Luxembourg or in another EU Member State shall send a duly completed pre-marketing notification letter to the CSSF within two weeks of starting the pre-marketing activity. Circular CSSF 22/810 effective 12 May 2022 provides for filing electronically only.



Innpact Fund Management S.A. is registered with the CSSF and has the authority to make such electronic filing.

AIFMD did not previously restrict professional investors who wanted to invest in AIFs at their own initiative. Non-EU initiators also sought to use reverse solicitation but now both of these activities are more restricted.

For 18 months after the AIFM has started pre-marketing, any new subscription will be considered as a result of marketing activity and so requires a marketing notification using the mechanism of the AIFMD passport.

Pre-marketing notification to the CSSF

The pre-marketing notification shall be made to the CSSF **within two weeks** of starting pre-marketing activity.

The information to be included in the notification is collated and validated by the AIFM prior to filing and includes:

- The Member States where pre-marketing will take place
- The period during which pre-marketing is taking place
- Provision for a third-party to act on behalf of the AIFM (note this must be an authorised AIFM or a MiFID tied agent)
- Description of the pre-marketing information including information on the investment strategies
- Name of the proposed AIF
- Home Member State
- Legal form of the AIF



The CSSF shall then promptly inform the competent authorities of the EU/EEA Member State(s) in which the Luxembourg AIFM is or has been engaged in pre-marketing.

The pre-marketing process

The AIFM and the AIF initiator will together define **the strategy for contacting potential investors**. This is a coordinated process with the following requirements:

- The information to be reviewed and approved by the AIFM to comply with the requirements for pre-marketing

- Contacts to be screened to be professional investors

- The AIFM to ensure that pre-marketing is adequately documented

- Preliminary KYC to be completed for all contacted investors that indicate an interest in the proposed AIF

The approved information may be held in a data room with access controlled by the AIFM and the initiator. The list of contacted investors will be maintained by the AIFM.



As the AIFM is responsible for pre-marketing, it will participate in contacts with prospective investors in conjunction with the initiator.



THE ROLE OF THE AIFM TO SUPPORT FUND INITIATORS IN MARKETING

The marketing notification and the AIFMD passport

The AIFMD already provides the requirements for the marketing notification. There is no change with the CBDF Directive.

An authorised EU AIFM may market units or shares of any EU AIF that it manages to professional investors in its home Member State or other Member States of the EU/EEA. **Prior to commencing marketing activity, the AIFM shall submit a notification to the authority of its home Member State in respect of each EU jurisdiction** where it intends to market the AIF.

This is a more detailed process than the pre-marketing notification and shall include the submission of the prospectus of the AIF.

For marketing in Luxembourg, no later than twenty days after the date of receipt of the complete marketing notification, the AIFM is informed when it can start marketing by the CSSF.

For other EU jurisdictions, the CSSF will transmit the complete file to the competent authorities in each selected country no later than twenty days after the date of receipt of the complete marketing notification, however the AIFM may start marketing activity in selected jurisdictions on the date of notification to the CSSF.

The marketing passport permits an EU AIFM to market units or shares of any EU AIF that it manages to professional investors in its home Member State as well as in other EU/EEA Member States as notified to the CSSF.

Marketing communications

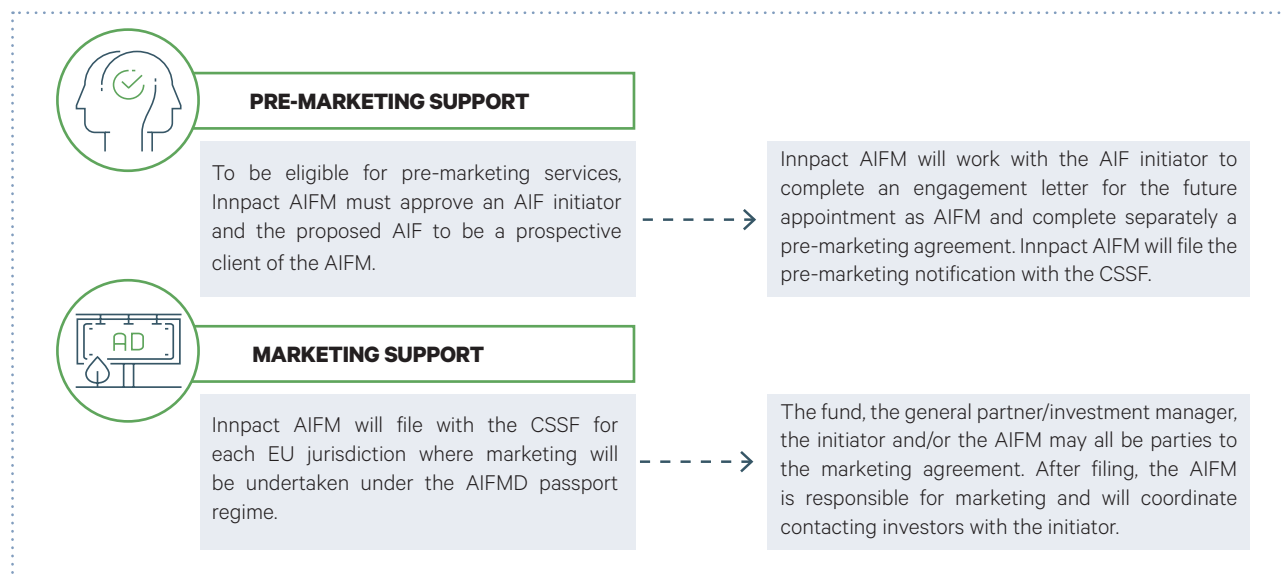
AIFMs shall ensure that all marketing communications addressed to investors are identifiable as such and describe the risks and rewards of purchasing units or shares of an AIF. All information included in marketing communications must be fair, clear and not misleading.

This is an important topic that as an AIFM we address with initiators as to how to represent potential performance and to highlight risks (and mitigants).

How we can help you

Innpact Fund Management S.A. is an authorised AIFM in Luxembourg and is approved by the CSSF for private equity (including VC), private debt and fund of funds. Our AIFM provides Risk Management, Compliance, Portfolio Management, Reporting and Pre-Marketing and Marketing services for its clients.

Innpact AIFM fully coordinates the contacting of investors with the initiator. We can either facilitate pre-marketing and marketing with names of prospective investors provided by the initiator (facilitator model) and/or may provide names of prospective investors and approach them in coordination with the initiator (introducer model).





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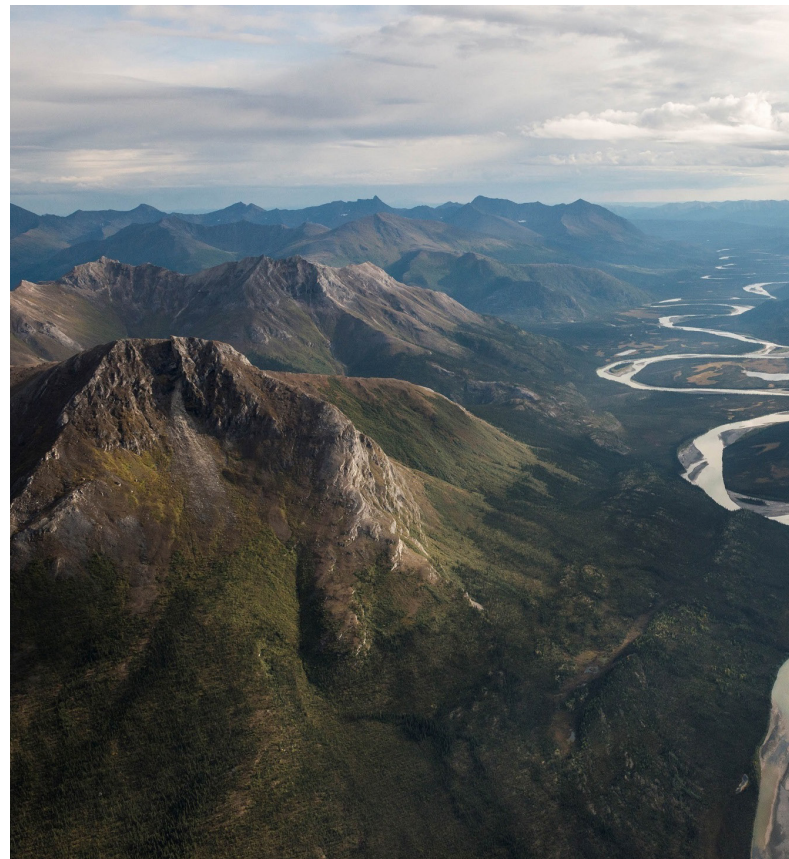
Innpact Fund Management S.A. belongs to the Innpact group which is a leading impact finance specialist providing advisory and third-party fund management services.

Our team, based in Luxembourg and Mauritius, has unrivalled expertise in designing impact funds and blended finance vehicles.

Our group works with fund managers, initiators and investors around the world on impact investing projects totaling more than \$8 bn targeting the Sustainable Development Goals.

We provide our services with motivation and dedication, being faithful to our mission and our values.

Dedicated to Impact Finance.



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