

The puzzle of cross-border marketing of investment funds in the Netherlands

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Introduction

Following the transposition of the Alternative Investment Fund Managers Directive (AIFMD) in the national legislations of the EU member states, the cross-border marketing regimes for investment funds have changed significantly. Due to transitional provisions and the possibility for member states to keep in place national private placement regimes, cross-border marketing can be quite a puzzle.

This article describes the possibilities for cross-border marketing in the Netherlands by EU and non-EU management companies which qualify as AIFMs (AIFMs) under the AIFMD¹. I will limit myself to the outline of the possibilities and the specific additional rules imposed at a national level in the Netherlands and will therefore not discuss the specific obligations for cross-border situations as already set out in the AIFMD.

Marketing - general

The AIFMD uses the term “marketing”, which is defined as “a direct or indirect offering or placement at the initiative of the AIFM or on its behalf of the AIFM of units or shares of an AIF it manages to or with investors domiciled or with a registered office in the Union.” Whether an AIFM is deemed to market units in an AIF in the Netherlands depends on the facts and circumstances. In some situations it will be perfectly clear who took the initiative. Especially when there has been no prior contact between the AIFM and the investor and the AIFM has not taken any actions in relation to Dutch investors. On the other hand, an AIFM will be deemed to market an AIF in the Netherlands if e.g. it places an advertisement for the AIF in a newspaper or on a Dutch website². Neither the Dutch Financial Markets Supervision Act (FMSA, *Wet op het financieel toezicht*) nor the Netherlands Authority for the Financial Markets (AFM), however, explicitly state when an investment fund is deemed to be offered at the initiative of the AIFM. Guidance on this question can be derived from a policy rule of the AFM³. Circumstances which could lead to the conclusion that units of an AIF are marketed in the Netherlands are e.g.:

- The AIFM refers potential investors to its agents in the Netherlands;
- The AIFM uses media directed at residents of the Netherlands;
- The website of the AIFM or AIF contains information addressing Dutch investors, e.g. references to or comparisons with Dutch legislation (regulatory, tax or otherwise) or using Dutch language.

Regarding the phrase “direct or indirect” it is important to note that a distribution agreement, fee arrangement or other reimbursement, paid to a third party marketing the AIF could lead to conclusion that the AIF is marketed in the Netherlands. Consequently, the AIFM should comply with the rules of the AIFMD and/or with the rules set out below.

When discussing the cross-border marketing of units of an AIF to Dutch investors, the following situations can be distinguished⁴:

- EU AIFMs (without an AIFMD passport) and non-EU AIFMs offering units of an AIF to Dutch professional investors⁵;
- Non-EU AIFMs situated in Guernsey, Jersey or the US offering units of an AIF to Dutch professional and retail investors; and

- EU AIFMs offering units of an EU AIF to Dutch retail investors.

Marketing to professional investors

EU-AIFMs and non-EU AIFMs who already offered units of an AIF prior to 22 July 2013 but who are not yet authorized pursuant to the AIFMD (and hence have no EU-passport) may continue their activities until 22 July 2014. As of 22 July 2014 EU-AIFMs have to use their passport in order to offer units in an EU-AIF in the Netherlands.

For non-EU AIFMs it is important to realize that they will not be able to obtain authorization pursuant to the AIFMD (including a passport) before 22 July 2015. At least until 22 July 2018, non-EU AIFMs are allowed to offer units of an AIF in the Netherlands provided that;

- The units are only offered to so-called “qualified investors”;
 - o Roughly speaking, “qualified investors” are institutional investors. In legal terms: professional clients and eligible counterparties as defined in MiFID and persons who requested to be treated as a professional investor pursuant to MiFID⁶.
- Appropriate cooperation agreements are in place between the AFM and the supervisor of the country where the non-EU AIFM is established; and
- The third country where the non-EU AIFM is established is not listed as a Non-Cooperative Country and territory by FATF.

No registration or notification with the AFM is required. In order to ensure that no uncertainty exists about to whom the units are offered, in practice, sales legends and disclaimers are included in all information and marketing material.

Marketing by AIFMs situated in Guernsey, Jersey or the US

A special regime is, at least until 22 July 2018, available for AIFMs situated in Guernsey, Jersey or the US⁷. This regime is referred to as the “adequate supervision regime⁸”. Following an investigation by the AFM, these countries have been designated as such by the Dutch Minister of Finance.

Under strict conditions, AIFMs established in these countries are allowed to market units of an AIF in the Netherlands to professional and retail investors. There are no restrictions relating to the assets (or diversification thereof) in which the AIF may invest.

AIFMs may offer units of an AIF under the “adequate supervision regime” provided that:

- (i) No restrictions are imposed on the AIFM by its home supervisor and the applicable legislation regarding the type of investor to whom the units in the AIF may be offered. Thus avoiding that an AIF meant for institutional investors is offered to Dutch retail investors;
- (ii) The AIFM meets the (sometimes strict) information and marketing requirements set out in the FMSA; and
- (iii) In case of marketing to retail investors: the AIFM files a notification with the AFM.

Regarding the information requirements, in general, the AIFM must meet some of the requirements as set out in the AIFMD: regarding the annual report, disclosure to investors and the reporting obligations to competent authorities⁹. The information which has to be provided to an investor has to be provided in the form of a prospectus.

At first sight it seems that the extensive information requirements which had to be met before 22 July 2013 when offering units of an AIF to Dutch retail investors formally no longer have to be met. This is, however, an error in the law and (according to the AFM) not the intention of the legislator. For example, when offering units of an AIF to Dutch retail investors, the following additional information requirements have to be met:

- The prospectus has to contain additional information (e.g. by means of an addendum) and a statement from the AIFM and an auditor that the prospectus contains the required information (in case the AIF is open-end);
- The annual account has to contain additional information such as a statement from the AIFM that the AIFM complies with the requirements regarding its operations;

- A key investor information document (“KIID”) must be available and, in case of direct sales, provided by the AIFM to the investor in good time before the subscription. This KIID is the same as the one for UCITS;
- The AIFM must have a website on which (e.g.) the prospectus, key investor information document, annual accounts and semi annual accounts of the AIF are published.

The aforementioned requirements are similar to the ones applicable prior to 22 July 2013. There are, however, some additional requirements which have to be met. For example, the AIFM must have procedures functionally separating front and back office activities and the AIFM must be a member of an independent dispute commission (if one exists). Due to the fact that an error has been made regarding the scope of the requirements it is not certain whether these additional requirements should also be applied in cross-border situations.

In addition to the information requirements, the AIFM must also comply with the marketing requirements as set out in the FMSA. In general, marketing material must be fair, clear and not misleading. There are, however, strict additional requirements regarding the marketing material which have to be taken into account and which can vary depending on whether marketing takes place by advertisements, internet or other means. In all circumstance, the marketing material must include a graphical risk indicator (comparable to the one included in KIID).

Marketing to retail investors by EU AIFMs

EU-AIFMs are permitted to offer units of an EU-AIF to Dutch retail investors on a cross-border basis provided that they:

- (i) are authorized pursuant to the AIFMD;
- (ii) filed a notification with the AFM in accordance with the AIFMD notification procedure; and
- (iii) comply with the strict additional national requirements in the Netherlands relating to retail investor protection. These additional national requirements are the same as set out above in paragraph 4.

There are no restrictions relating to the assets (or diversification thereof) in which the AIF may invest. Again, however, due to an error made in the transposition of the AIFMD in the FMSA, formally it does not seem possible for an EU AIFM to offer units of an EU AIF on a cross-border basis. It is expected that this will be amended as per 1 January 2014 and that the AFM will allow cross-border marketing under the aforementioned conditions in the mean time.

1[1] E.g. the interaction with the Prospectus Directive will not be discussed.

1[2] From a pure Dutch legal point of view one can argue whether this is entirely correct. In practice, however, this is the most common position.

[3] Policy rule (*beleidsregel*): 06:14 Actief zijn in Nederland.

[4] Unless otherwise stated, it is assumed that the AIFM and AIF are situated in the same country.

1[5] Obviously, an EU-AIFM authorized pursuant to the AIFMD can use its passport to market units of its EU- AIFs in the Netherlands.

1[6] Excluding eligible counterparties who chose not to be treated as a professional investor.

1[7] Regarding the US: provided that the AIF is a mutual fund registered with the SEC as an investment company.

1[8] Prior to 22 July 2013, the “adequate supervision regime” also applied to AIFMs established in France, Ireland, Luxembourg, Malta and the UK. AIFMs who offered units in an AIF under the “adequate supervision regime” prior to 22 July 2013 may continue to do so until 22 July 2014.

1[9] Articles 22, 23 and 24 AIFMD. The “adequate supervision regime” is based on article 42 AIFMD, hence the applicability of the aforementioned provisions.