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## Notification procedure for undertakings for collective investment governed by the law of another Member State of the European Economic Area and fulfilling the conditions of Directive 2009/65/EC

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### Scope:

Undertakings for collective investment that are governed by the law of another Member State of the European Economic Area and that fulfil the conditions set out in Directive 2009/65/EC.

### Summary/Objective:

This circular contains information on the laws, regulations and administrative provisions that apply to UCITS from another EEA Member State that wish to market their units in Belgium.

### Structure:

1. Regulatory framework
  2. When is notification mandatory?
  3. Treatment of the notification dossier
  4. Updating the notification dossier
  5. Obligations to be met when marketing in Belgium
  6. Termination of marketing in Belgium
  7. Exemptions
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Dear Sir or Madam,

1. This circular is intended to set out the principal aspects relating to the marketing in Belgium of units of UCITS governed by foreign law.
2. The circular provides an overview of the regulatory framework and of the circumstances in which a notification procedure is required. It also explains the procedure to follow when submitting or updating a notification dossier and the obligations that apply when units are marketed in Belgium.

Information is also provided on the laws, regulations and administrative provisions that are specifically relevant to the arrangements made for marketing units in Belgium of UCITS governed by foreign law. The circular implements the Belgian legislation transposing Article 91(3) of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (hereafter "Directive 2009/65/EC") and Article 30 of Commission Directive 2010/44/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards certain provisions concerning fund mergers, master-feeder structures and notification procedure (hereafter "Directive 2010/44/EU").

### 1. Regulatory framework

3. The basis of the Belgian regulatory framework applicable to public open-ended UCIs consists of the Law of 3 August 2012 on certain forms of collective management of investment portfolios (hereafter "the Law of 3 August 2012") and the Royal Decree of 12 November 2012 on certain public undertakings for collective investment (hereafter "the Royal Decree of 12 November 2012").
4. Account must also be taken of the provisions of Commission Regulation (EU) 584/2010 of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards the form and content of the standard notification letter and UCITS attestation, the use of electronic communication between competent authorities for the purpose of notification, and procedures for on-the-spot verifications and investigations and the exchange of information between competent authorities (hereafter "Regulation 584/2010").

### 2. When is notification mandatory?

5. If a UCITS governed by foreign law wishes to market its units in Belgium, it must complete the notification procedure.

In accordance with the definition in Article 3, 30°, of the Law of 3 August 2012, "marketing of units of a UCITS" is involved where an offer is made to the public for the account of a UCITS, including the receipt and transmission of orders for securities of the UCITS in question. Anyone who receives compensation or advantages directly or indirectly from the UCITS on the occasion of an offer made to the public or the receipt and transmission of orders for securities of the UCITS concerned, will be considered to be acting for the account of the UCITS.

An offer to the public is defined as follows in Article 3, 13°, of the Law of 3 August 2012;

- a) a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to those securities, and which is made by a UCITS, by a person authorized to dispose of the securities in question, or for their account;
- b) admission to trading on an MTF that is open to the public.

Therefore a UCITS that markets its securities in Belgium without offering them to the public does not have to complete the notification procedure. To determine whether or not an offer is public in nature, the UCITS should refer to the criteria listed in Article 5, § 1, of the Law of 3 August 2012.

6. Where a UCITS comprises more than one *sub-fund*, the process described above for UCITS must be followed separately for each sub-fund. If a UCITS wishes to market several sub-funds, there is of course no need to complete a separate notification procedure for each one. The UCITS may complete a single notification procedure for all the sub-funds in question.

We wish to recall, however, that marketing a new sub-fund requires a new notification procedure.

7. The aforementioned list is drawn up per sub-fund, without making any distinction between different *share classes* held within them. Therefore these classes are not registered as such. The UCITS must, however, specify in the notification letter included in its dossier (see also paragraph 9 below) which classes it intends to offer to the public in Belgium.

### 3. Treatment of the notification dossier

#### 3.1. Submitting a notification dossier

8. A UCITS governed by foreign law that intends to market its units in Belgium must submit a notification dossier to the competent authorities in its home Member State. The notification dossier is to be drawn up and submitted in accordance with the law of its home Member State, and must contain the following items:
  - a) the notification letter referred to in Article 93(1) of Directive 2009/65/EC;
  - b) the items referred to in Article 93(2) of Directive 2009/65/EC<sup>1</sup>.
9. Pursuant to Article 1 of Regulation 584/2010, the *notification letter referred to in Article 93(1) of Directive 2009/65/EC* must be drawn up in accordance with the model set out in Annex 1 to the aforementioned Regulation. The FSMA accepts notification letters that are drawn up in one of the national languages of Belgium or in English. This paragraph provides the necessary clarifications regarding what the FSMA considers to be the necessary information that must be provided in Part B of the notification letter.

Point 1 of Part B of the notification letter provides information on the companies that will be responsible for marketing, as referred to in Article 3, 22°, c), of the Law of 3 August 2012. For this, it is sufficient to provide an overview of the category/ies of companies that will be responsible for marketing without the notification letter needing to include a full list of the companies themselves.

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<sup>1</sup> This comprises the key investor information, the prospectus, the fund rules or instruments of incorporation and, where applicable, the latest annual report and the subsequent half-yearly report by the UCITS.

The paying agent referred to in point 2 of Part B is the intermediary responsible for providing the financial service<sup>2</sup>.

Point 2 of Part B must also include the details of the FSMA's contact person for correspondence regarding the UCITS in Belgium. This refers to the person whom the FSMA can contact regarding matters such as updates to the dossier or the contribution to the FSMA's operating expenses. The following details must be provided:

- Name/title
- Address
- Telephone number
- E-mail address
- Fax

10. The key investor information document that is part of the dossier must be drawn up in one of the national languages of Belgium. *The other items referred to in Article 93(2) of Directive 2009/65/EC* (prospectus, fund rules or instruments of incorporation, annual report and half-yearly report) must be drawn up in one of the national languages of Belgium or in English.

The FSMA wishes to emphasize that the quality of the translation of the documents intended for investors is the sole guarantee that this information will in fact be understood by them. The FSMA therefore asks that the greatest possible care be taken in preparing these translations. In all cases it is important to ensure that the translated documents are comprehensible, do not contain material errors or omissions in relation to the original document and are free of any misleading expressions.

### 3.2. Finalizing the process and start-up of marketing in Belgium

11. Pursuant to the legislation of the UCITS' home Member State implementing Article 93 of Directive 2009/65/EC, the competent authorities of the home Member State must transmit to the FSMA the notification dossier submitted by the UCITS, no later than 10 working days from the date of receipt. Upon the transmission of the dossier, the competent authorities of the UCITS' home Member State must immediately notify the UCITS of the transmission, in accordance with the provisions of the legislation of the home Member State.

As soon as the FSMA has received the notification dossier, it adds the UCITS to the list referred to in Article 149 of the Law of 3 August 2012, and the UCITS can market its units in Belgium. In practice, in accordance with Article 93(3) of Directive 2009/65/EC, the UCITS may immediately access the Belgian market as from the date of the notification by the competent authorities of its home Member State that the dossier has been transmitted.

12. The FSMA draws attention to the fact that although the registration of a UCITS on the list referred to in Article 149 of the Law of 3 August 2012 entitles it to market its units in Belgium, this does not automatically mean that the UCITS may distribute advertisements. Advertisements require the prior approval of the FSMA. For further details on this matter, please consult point 5.3 of this Circular.

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<sup>2</sup> Further details as regards the concept of the financial service provider will be provided in point 5.1 of this circular.

#### 4. Updating the notification dossier

13. In accordance with Article 154, § 3 of the Law of 3 August 2012, a UCITS must give written notice to the FSMA in the event of a change in the information regarding the arrangements made for marketing communicated in the notification letter or a change regarding the share classes to be marketed. The notification, which is made by e-mail, must take place before the UCITS implements the change in question.

A change in the *arrangements made for marketing* refers to any change to one or more elements described in paragraph 9.

A UCITS that wishes to start marketing *an additional share class* of a sub-fund in Belgium that is registered on the list as referred to in Article 149 of the Law of 3 August 2012, must submit the key investor information document for the share class in question to the FSMA before the marketing can begin.

The notification of these amendments occurs by way of a description, in the main body of, or in an attachment to the e-mail, of the amendments made.

14. In accordance with Article 217 of the Royal Decree of 12 November 2012, the UCITS must immediately submit all necessary information to the FSMA in order that the *items referred to in Article 93(2) of Directive 2009/65/EC*<sup>3</sup> and their translations may be kept up to date at all times. The UCITS must inform the FSMA as soon as possible of any amendments to those items. The notification is made by e-mail.

The amended documents must be accessible to the FSMA in electronic form. The UCITS must inform the FSMA as to where the documents are accessible in electronic form.

Except as regards periodic reports that are published after those that were submitted together with the notification, the UCITS should also mention, in the notification of the updates or amendments, the date from which these come into effect. The FSMA recommends that a clear overview also be given on the amendments made.

15. The above-mentioned updates made in electronic form should be sent to the following *e-mail address*: [intro.cis.passeport@fsma.be](mailto:intro.cis.passeport@fsma.be).

16. The FSMA recommends that the dossiers be updated in electronic form.

UCITS that opt for electronic submission must transmit all the documents that make up the dossier in an electronic format that is compatible with the FSMA's office application. The format and manner of submission are set out in the annex to this circular. Before the UCITS e-mails documents to the FSMA, it should ensure that in its e-mail system it has selected the option for receiving automatic confirmation of receipt of the e-mail message. If no confirmation is received, the UCITS must contact the FSMA to confirm that the dossier has been received.

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<sup>3</sup> Namely, the key investor information document, the prospectus, the instruments of incorporation or fund rules, and the annual and half-yearly report.

17. It goes without saying that submitting the information in order to update its dossier does not exempt the UCITS from having to comply with the notification procedure if new sub-funds are marketed in Belgium (see point 2 above).

## 5. Obligations to be met when marketing in Belgium

### 5.1. Intermediary responsible for providing financial services to the UCITS

18. Article 92 of Directive 2009/65/EC specifies that UCITS which market their units in a Member State must, in accordance with the laws, regulations and administrative provisions in force in the Member State where their units are marketed, take the measures necessary to ensure that facilities are available in that Member State for making payments to unit-holders, repurchasing or redeeming units and making available the information which UCITS are required to provide.
19. Article 154, § 2 of the Law of 3 August 2012 therefore requires UCITS to designate an intermediary in Belgium to handle their financial services. The types of intermediary authorized to act in this capacity are listed in the same paragraph. The intermediary designated for this purpose is the privileged contact person for the FSMA for all matters relating to the activities in Belgium of a UCITS governed by foreign law.
20. The Law of 3 August 2012 entrusts to this intermediary the tasks of making payments to unit-holders, selling or repurchasing units as well as distributing the information that UCITS are required to provide. The tasks listed in the aforementioned § 2 of Article 154 are understood to be the following functions and transactions:
- making available all the facilities necessary for subscribing to and redeeming units, paying coupons, exercising the rights attaching to the securities, etc.;
  - handling all related administrative formalities: exchange and netting of any settlement differences when switching between sub-funds, deposit of securities in view of participating in General Meetings, etc.;
  - making available and/or publishing all relevant information: prospectus, key investor information, periodic reports, net asset value, official publications, etc.

The UCITS' financial service provider therefore covers the material transactions that allow it to fulfil subscription and redemption orders and other transactions that are a necessary complement to the marketing activities.

21. In light of the above-mentioned financial services of a UCITS, the intermediary that provides these services must have a legal status that authorizes it to receive cash and securities from its clients. An investment firm that wishes to serve as a UCITS' financial service provider must therefore have the requisite authorization to be able to provide the ancillary services of safekeeping and administration of financial instruments as referred to in Article 46, 2°, 1, of the Law of 6 April 1995 on the legal status and the supervision of investment firms.

It should also be made clear that providing the financial services of a UCITS and marketing its units are two distinct activities. It should therefore not be concluded that the intermediary that provides the UCITS' financial services is necessarily also entrusted with the marketing

management referred to in Article 3, 22°, c), of the Law of 3 August 2012. However, it seems that in many configurations currently present on the Belgian market, the intermediary which provides the financial services also markets the units of the UCITS in question.

## 5.2. Information to be provided to investors

22. UCITS that market units in Belgium must provide at least the following documents in Belgium in the language mentioned below:

- i. key investor information;
- ii. prospectus;
- iii. fund rules or instruments of incorporation;
- iv. annual and half-yearly report.

Document (i) must be made available in one of the national languages of Belgium. Documents (ii) through (iv) must be made available in one of the national languages or in English.

23. Certain items that specifically concern the marketing of UCITS units in Belgium, can have a significant influence on the decision of an investor on whether or not to invest in the UCITS whilst they are not necessarily covered in the prospectus or key investor information. This concerns inter alia the fees and costs charged when issuing or repurchasing units, any minimum subscription amount, or the applicable tax regime. Given the importance of this information, summarized in Article 218, (1), of the Royal Decree of 12 November 2012, financial intermediaries responsible for marketing the units of a UCITS must provide prospective investors, before the latter make their intended investment, with at least this information. This requirement is not applicable to the information that is already precisely and correctly described in the prospectus or the key investor information.

Financial intermediaries must provide the necessary information to investors on a durable medium before the latter make their intended subscription. If the subscription is made via a website, this information must also be provided via this website. If the financial intermediary makes use of a fact sheet in which only the information in question appears, this fact sheet does not need to be submitted to the FSMA for approval.

24. The FSMA recalls that each UCITS registered in Belgium is required, in accordance with Article 220 of the Royal Decree of 12 November 2012, to *publish its net asset value* (or the net asset values of the sub-funds and share classes marketed in Belgium) in one or more daily newspapers published in Belgium, on a website recognized by the FSMA or in another form accepted by the FSMA. In this regard, the FSMA considers that the publication of the net asset value exclusively on a website, without any other form of publication, does not in itself guarantee a suitable distribution of this information<sup>4</sup>. The FSMA further recommends that in all publications in which the net asset value is mentioned, that value should be dated to the closing date for the receipt of orders for issue or repurchase at that net asset value. This recommendation is aimed at

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<sup>4</sup> The FSMA would however like to point out that on the date of publication of this circular one website was accepted for the publication of the net asset value of UCIs marketed in Belgium without any other form of publication.

harmonizing the publication dates of the net asset values of UCITS governed by Belgian law and of UCITS governed by foreign law.

25. Finally, it should more generally be borne in mind that Belgian investors must be provided with the *same information as investors in the home State*, as determined by the authorities of the said home State.

### 5.3. Supervision of advertising

26. Supervision of advertising materials is based on a number of regulatory provisions intended to prevent the distribution in Belgium of advertising that does not meet the minimum quality criteria. In many cases, these materials constitute an important source of information on which the investor bases his or her decision to subscribe to units of a UCITS. It is therefore essential that the information conveyed via that medium be irrefragable in terms of its clarity and correctness.
27. As regards announcements, advertisements and other materials relating to a public offer of units in Belgium, pursuant to Article 219, § 2 of the Royal Decree of 12 November 2012, which declares Articles 35, 36, 37, §§ 1 and 2, (1), and 38 to 46 of that Royal Decree to be in force, UCITS governed by foreign law are subject to the same provisions as Belgian public open-ended UCIs.

All advertising materials must, in accordance with Article 155 of the Law of 3 August 2012, be submitted for approval to the FSMA before they can be distributed in Belgium.

If advertising is disseminated in Belgium in one or more national languages, the key investor information document must be provided in the same language or languages, and must therefore first be submitted to the FSMA.

28. It should be noted that the speed with which the FSMA can treat the materials submitted depends on the extent to which they comply with the basic requirements laid down in the aforementioned Articles 35, 36, 37 §§ 1 and 2 (1), and 38 to 46.

The FSMA recommends in this regard that intermediaries that use advertising materials adopt specific procedures to guarantee compliance and that the appropriate compliance officer of those intermediaries be directly involved in the aforesaid procedure before the materials are submitted to the FSMA.

Since speed of implementation is of the essence when it comes to such materials, the FSMA is confident that these measures will contribute to a quicker processing of the many advertising materials that are submitted to it.

### 5.4. Requirements regarding the reporting or transmission of information to the FSMA

29. Beyond the framework of the notification procedure and the updating of the notification dossier, as described in this circular, there is no obligation for foreign UCITS to report specific information to the FSMA.

## 5.5. Fees or other sums that must be paid to the FSMA or to other statutory bodies

30. Foreign UCITS contribute to the operating expenses of the FSMA. They do so by paying the FSMA an annual sum, pursuant to the Royal Decree of 17 May 2012 on the financing of the FSMA's operating expenses implementing Article 56 of the Law of 2 August 2002 on the supervision of the financial sector and on financial services.

## 6. Termination of marketing in Belgium

31. Foreign UCITS whose units are marketed in Belgium may choose to terminate their marketing in Belgium<sup>5</sup>. In order to do so, the UCITS must submit a dossier to the FSMA and follow the procedure described below. The procedure to be followed differs depending on whether the UCITS has 100 or fewer unit-holders in Belgium. Where the UCITS has sub-funds, the limit of 100 unit-holders applies at the level of each sub-fund.

The following regulation does not apply where a foreign UCITS ceases to exist following a liquidation or restructuring. In that case, the UCITS must submit an update to its notification dossier (see above) to the FSMA, requesting that it be removed from the list of undertakings for collective investment governed by foreign law.

32. If a UCITS with *100 or more unit-holders in Belgium* wishes to stop marketing its units in Belgium, it must first submit a draft press release to the FSMA informing the unit-holders of its intention to stop marketing its units in Belgium. The press release should be published either in two daily newspapers with a national circulation or with a large print-run, or in any other form approved by the FSMA, and must contain at least the following items:
- the date when marketing the units in Belgium will in fact be terminated;
  - the consequences of that termination (refusal of all subsequent requests for subscription or switching between sub-funds);
  - Unit-holders must be given the opportunity to have their units repurchased without charge (with the exception of any applicable taxes), or to exchange, without charge (with the exception of any applicable taxes), their units for those of another open-ended UCI marketed in Belgium.

The UCITS will, however, remain on the list of undertakings for collective investment governed by foreign law until it provides evidence that the UCITS has fewer than 100 unit-holders in Belgium. This means that the UCITS must retain its financial service provider, as described above, until such time as this evidence has been handed over.

Once the UCITS falls below the threshold of 100 unit-holders in Belgium, the financial service provider need no longer be retained. From that time on, the UCITS may also be removed from the list of undertakings for collective investment governed by foreign law. The UCITS must submit a dossier to the FSMA to this end, containing the following items:

- the request to be removed from the list of undertakings for collective investment governed by foreign law;

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<sup>5</sup> Art. 154 § 4, (2), of the Law of 3 August 2012.

- a draft press release informing unit-holders that the financial services in Belgium are being terminated;
- evidence that the UCITS has fewer than 100 unit-holders in Belgium.

The new press release should be published either in two daily newspapers with a national circulation or with a large print-run, or in any other form approved by the FSMA, and must contain at least the following items:

- the date when the financial services in Belgium will in fact be terminated, which date must allow a reasonable period during which the financial service provider is maintained (at least 1 month after the publication of the press release);
- the address abroad where, after the end of the aforementioned time period, unit-holders obtain information on their units and organize their repurchase.

33. If a UCITS with *fewer than 100 unit-holders in Belgium* wishes to stop marketing its units in Belgium, a financial service provider need no longer be retained. The UCITS may then be removed from the list of undertakings for collective investment governed by foreign law. The UCITS must submit a dossier to the FSMA for this purpose, containing the following items:

- the request to be removed from the list of undertakings for collective investment governed by foreign law;
- a draft of the press release<sup>6</sup>;
- evidence that the UCITS has fewer than 100 unit-holders in Belgium.

The press release should be published either in two daily newspapers with a national distribution or with a large print-run, or in any other form approved by the FSMA, and must contain at least the following information:

- the date when marketing of the units and the financial services provided in Belgium will in fact be terminated, which date must allow for a reasonable period during which the financial services are maintained (at least 1 month after the publication of the press release);
- Unit-holders must be given the opportunity, during the aforementioned time period, to have their units repurchased without charge (with the exception of any applicable taxes), or to exchange, without charge (with the exception of any applicable taxes), their units for those of another open-ended UCI marketed in Belgium;
- the address abroad where, after the end of the aforementioned time period, unit-holders obtain information on their units and organize their repurchase.

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<sup>6</sup> If the UCITS demonstrates that it has no unit-holders in Belgium, no press release needs to be published.

## 7. Exemptions

34. No UCITS, shares classes of UCITS or categories of investors are exempt from the rules or requirements governing arrangements made for marketing.

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Yours sincerely,

Jean-Paul Servais  
Chairman

Annex: [FSMA\\_2013\\_05-1 / Practical arrangements for the electronic submission of documents to the FSMA](#)