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Communication FSMA\_2018\_08 of 19/06/2018

## Provision or supply of investment services and/or activities on a cross-border basis by portfolio management and investment advice companies governed by Belgian law

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### **Scope:**

This Communication is addressed to portfolio management and investment advice companies governed by Belgian law.

### **Summary/Objectives:**

Forms to be filled in by a portfolio management and investment advice company that wishes to provide or supply investment services and/or activities within the territory of another Member State of the European Economic Area (EEA):

- by establishing a branch within the territory of that other Member State; or
- by using tied agents established in that other Member State in which it has not established a branch; or
- under the freedom to provide services.

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## 1. European passport regime – Introduction

In application of what is known as the European passport regime, as transposed into Belgian law<sup>1</sup>, portfolio management and investment advice companies (hereafter “PMIAC”) governed by Belgian law may provide or supply some or all of the investment services and/or activities for which they are authorized, within the territory of another EEA Member State, under the freedom to provide services, by establishing a branch or by using one or more tied agents.

By way of reminder, a tied agent is *“a natural or legal person who, under the full and unconditional responsibility of only one investment firm on whose behalf it acts, promotes investment and/or ancillary services to clients or prospective clients, receives and transmits instructions or orders from the client in respect of financial instruments or investment services, places financial instruments and/or provides advice to clients or prospective clients in respect of those financial instruments”*<sup>2</sup>.

PMIACs may use the services of tied agents only if the latter are entered in the public register of the Member State in which they are established<sup>3</sup>.

In Belgium, they are therefore required to be registered with the FSMA as agents in banking and investment services<sup>4</sup>. The other Member States also have an equivalent register.

A tied agent may provide only the following services for the account of the PMIAC, insofar as the PMIAC is itself authorized for those services and activities:

- the receipt and transmission of orders for one or more financial instruments, including bringing together two or more investors, thereby bringing about a transaction between those investors; and
- investment advice.

## 2. Exercise of the freedom to provide services – Initial notification

Any PMIAC that intends to provide or supply, within the territory of another EEA Member State, all or some of the investment services and/or activities for which it is authorized, under the freedom to provide services, must inform the FSMA in advance by means of the form provided for this purpose and which is included as Annex 1 to this Communication.

A PMIAC that in this context wishes to use the services of one or more tied agents established in Belgium must also mention this on the aforesaid form.

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<sup>1</sup> Articles 47 to 53 of the Law of 25 October 2016 on access to the business of investment services and on the supervision of portfolio management and investment advice companies (“Law of 25 October 2016”).

<sup>2</sup> Article 2, 25° of the Law of 25 October 2016.

<sup>3</sup> Article 29, §§ 3 and 5 of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (MiFID II) (“Directive 2014/65/EU”).

<sup>4</sup> Article 5 of the Law of 22 March 2006 on intermediation in banking and investment services and on the distribution of financial instruments.

On condition that the information provided is complete and correct, the FSMA shall submit the said notification within a month of its receipt to the competent authority of the EEA Member State within the territory of which the PMIAC wishes to provide or supply all or some of its investment services and/or activities (“host Member State”). The PMIAC can then begin to provide or supply the aforesaid investment services and/or activities within the territory of the host Member State.

### 3. Establishment of a branch - Initial notification

Any PMIAC that intends to provide or supply within the territory of another EEA Member State, under the freedom of establishment, all or some of the investment services and/or activities for which it is authorized must inform the FSMA in advance using the form provided for this purpose and which is included as Annex 2 to this Communication.

A PMIAC that in this context wishes to use the services of one or more tied agents established within the territory of the host Member State must also mention this on the aforesaid form. Moreover, it must submit to the FSMA, for each of the said tied agents, a separate notification concerning the exercise of the right to use a tied agent, by filling in the form included as Annex 3 to this Communication.

The FSMA may oppose the said proposal by a decision justified by the detrimental repercussions that opening a branch may have for the administrative structure or financial health of the PMIAC. This decision must be notified to the PMIAC at the latest three months after receiving the completed dossier. In the absence of such a decision by the prescribed deadline, the FSMA is considered not to oppose the PMIAC’s proposal<sup>5</sup>.

If the FSMA has no grounds for opposing the proposal of the PMIAC, and on condition that the information provided is complete and correct, the FSMA shall submit the said notification within three months of its receipt to the competent authority of the host Member State<sup>6</sup>.

Upon receipt of a communication from the competent authority of the host Member State or, failing such communication, at the latest within two months of the date the notification was sent by the FSMA, the branch may be established and commence business<sup>7</sup>.

### 4. Use of one or more tied agents established in the host Member State – Initial notification

A PMIAC may provide or supply, within the territory of another EEA Member State, all or some of the investment services and/or activities for which it is authorized, by using the services of one or more tied agents established in the host Member State without having established a branch there. In that case, it must inform the FSMA in advance, by means of the form provided for this purpose and included as Annex 3 of this Communication.

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<sup>5</sup> Article 47, §§ 3 and 4 of the Law of 25 October 2016.

<sup>6</sup> Article 48 of the Law of 25 October 2016.

<sup>7</sup> Article 35, § 6 of Directive 2014/65/EU.

Unless the FSMA has grounds for doubting the adequacy of the PMIAC's administrative structure or financial health in the light of the activities envisaged and on condition that the information provided is complete and correct, the FSMA shall submit the said notification within three months of its receipt to the competent authority of the host Member State<sup>8</sup>.

Upon receipt of a communication from the competent authority of the host Member State or, failing such communication, at the latest within two months of the date the notification was sent by the FSMA, the agent(s) may commence its/their activities provided it is/they are entered in the public register of the Member State in which it is/they are established<sup>9</sup>.

## 5. Change to an initial notification

PMIACs must notify the FSMA of any change whatsoever to the information that was previously communicated, and must do so at least one month before the implementation of the said change.

The notification must be made using the forms included as Annexes 1, 2 or 3 to this Communication, according to whether the change concerns a notification of the freedom to provide services, of the establishment of a branch or of the use of the services of one or more tied agents. The PMIACs need fill in only those parts of the form relevant to the changes made to the initial notification.

If the change concerns a notification of the freedom to provide services, and on condition that the information provided is complete and correct, the FSMA shall without delay inform the competent authority of the host Member State.

If the change concerns a notification of the establishment of a branch or of the use of one or more tied agents, and on condition that the information provided is complete and correct, the FSMA shall submit the said notification within three months of its receipt to the competent authority of the host Member State, unless it has grounds for doubting the PMIAC's administrative structure or financial health in the light of the proposed changes<sup>10</sup>.

## 6. Termination of the operation of a branch or cessation of the use of a tied agent

PMIACs that decide to terminate the operation of a branch or to cease using the services of one or more tied agents must inform the FSMA in advance using the form included as annex 4 to this Communication.

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<sup>8</sup> Article 48 of the Law of 25 October 2015.

<sup>9</sup> Article 16 of the Commission Implementing Regulation (EU) 2017/2382 of 14 December 2017 laying down implementing technical standards with regard to standard forms, templates and procedures for the transmission of information in accordance with Directive 2014/65/EU of the European Parliament and of the Council.

<sup>10</sup> Article 50, § 3, of the Law of 25 October 2016.

## 7. Repealing measure

This Communication repeals and replaces *Communication CBFA\_2009\_30 of 18 November 2009 – Provision of cross-border services – Standard notification forms* as well as the annexes to that Communication.

Annexes:

- [FSMA 2018\\_08\\_1 / Provision of investment services and activities passport notification - Article 34 of Directive 2014/65/EU](#)
- [FSMA 2018\\_08\\_2 / Branch passport notification - Article 35 of Directive 2014/65/EU](#)
- [FSMA 2018\\_08\\_3 / Tied agent passport notification - Article 35 of Directive 2014/65/EU](#)
- [FSMA 2018\\_08\\_4 / Termination of the operation of a branch or the use of a tied agent established in another Member State – Article 35 of Directive 2014/65/EU](#)