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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

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 of 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. Introduction
 2. Regulatory framework
 3. When is notification mandatory?
 4. Treatment of the notification dossier
 5. Updating the notification dossier
 6. Obligations when marketing in Belgium
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1. Introduction

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 or when notifying the termination of marketing and the obligations that apply when units are marketed in Belgium.

2. Regulatory framework

3. The basis for the Belgian legislation on UCITS consists of the Law of 3 August 2012 on undertakings for collective investment that fulfil the conditions of Directive 2009/65/EC and undertakings for investment in receivables (hereafter “the UCITS Law”) and the Royal Decree of 12 November 2012 on undertakings for collective investment that fulfil the conditions of Directive 2009/65/EC (hereafter “the UCITS RD”).

3. When is notification mandatory?

4. 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 UCITS Law, “marketing units of a UCITS” is involved where an offer is made to the public within the meaning of Article 3, 13°, i) of the UCITS Law. That provision defines an offer to the public as follows: *“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 these securities. This definition also applies to the placing of securities through financial intermediaries.”*

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 UCITS Law.

5. Where a UCITS comprises more than one *compartment (or sub-fund)*, the notification procedure must be completed for each compartment. If a UCITS wishes to market several compartments, there is no need to complete the notification procedure separately for each compartment: it can complete a single notification procedure for all compartments in question.

We wish to recall, however, that marketing a new compartment fund does require a new notification procedure.

6. The FSMA maintains a list of all registered UCITS and compartments, in accordance with Article 149 of the UCITS Law. The list is organised by UCITS/compartment, without distinguishing among *share classes* within those compartments. The share classes are thus not entered on the list referred to in Article 149 of the UCITS Law. The UCITS must, however, specify in the notification letter included in its dossier (see also paragraph 8) which classes it intends to offer to the public in Belgium. Moreover, the notification dossier must be updated if additional share classes are to be marketed for UCITS or for compartments that have already been entered on the list, or if part of the existing classes are no longer to be marketed (see also paragraph 12).

4. Treatment of the notification dossier

4.1. Submitting a notification dossier

7. 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 documents referred to in Article 93(2) of Directive 2009/65/EC¹.

As regards the *key information document*, this document must be submitted to the FSMA in advance for each PRIIP marketed in Belgium.² The FSMA expects to receive the key information document for the UCITS in question along with the notification dossier; subsequent changes to this document are to be submitted via an update to the notification dossier (see also paragraph 12).

8. As regards the *notification letter referred to in Article 93(1) of Directive 2009/65/EC*, the following clarifications should be noted:

- The FSMA accepts notification letters that are drawn up in one of the national languages of Belgium or in English.
- Regarding companies responsible for marketing units of the UCITS/UCITS compartments: it is sufficient to provide an overview of the category(ies) of companies responsible for marketing, without the notification letter having to contain a full list with the names of the companies themselves. It should be noted that only (categories of) companies as referred to in Article 71 of the UCITS Law may be included here; for instance, insurance companies are not mentioned in that article.
- “Manner in which the issue, sale, repurchase or redemption price of units of UCITS will be made public”: the UCITS must disclose the NAV of the units in one or more newspapers published in Belgium or in another format accepted by the FSMA.”³ For more information on this matter, please see paragraph 30.
- “Details necessary, including the address, for the invoicing or for the communication of any applicable regulatory fees or charges by the competent authorities of the host Member

¹ This comprises the key investor information document (in so far as one is being drawn up), the prospectus, the fund rules or instruments of incorporation and, where applicable, its latest annual report and the subsequent half-yearly report.

² Article 37sexies of the Law of 2 August 2002 on the supervision of the financial sector and on financial services, as further specified in the Royal Decree of 25 December 2017 clarifying the obligation to submit the key information document in advance to the Financial Services and Markets Authority and containing miscellaneous provisions. In the second paragraph of Article 37sexies, § 2, there are a number of exceptions to the obligation to submit the document in advance to the FSMA; a UCITS that is offered to the public in Belgium will, in principle, not fall within these exceptions.

³ Article 220, third paragraph of the UCITS RD.

State⁴: the notification letter must always contain the details of the contact person responsible for the payment of the FSMA's operating expenses (see also point 6.6 of this circular). The notification letter must contain at least the name, the entity, the address, the phone number and the email address of that contact person. If a notification letter contains other contact details than those found in an earlier notification dossier for the same UCITS, the FSMA will consider the most recent information relating to that UCITS.

- "Facilities for performing the tasks referred to in Article 92(1) of Directive 2009/65/EC"⁵: for every one of the tasks referred to in Article 92(1), the FSMA expects the UCITS to include in the notification letter the requisite explanation and information on the way in which it makes those facilities available in Belgium. It is up to the entity that performs these tasks to ensure that it has any necessary authorizations to do so⁶.
- The UCITS does not have to include proof of payment in its notification letter (see also point 6.6 of this circular).

9. *The items referred to in Article 93(2) of Directive 2009/65/EC and the key information document must be drawn up in one of the national languages of Belgium or in English.*

As regards the *key information document*, the FSMA refers to Article 7(2) of Regulation 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs). If the UCITS is to be promoted through marketing documents written in one or more of the national languages of Belgium, the FSMA expects to receive the key information document in the language in which these marketing documents are (or will be) submitted to it for approval (see also point 6.4 of this circular).

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.

⁴ Information that, pursuant to Article 93(1) of Directive 2009/65/EC, must be included in the notification letter.

⁵ Information that, pursuant to Article 93(1) of Directive 2009/65/EC, must be included in the notification letter.

⁶ Therefore it is not impossible that the entity which performs the task referred to in Article 154, § 2, 1° of the UCITS Law might carry out activities in Belgium that require the authorization referred to in Article 2, 1°, 1 of the Law of 25 October 2016 on access to the business of investment firms and on the legal status and supervision of portfolio management and investment advice companies (receipt and transmission of orders).

4.2. Transmission of the dossier and start-up of marketing in Belgium

10. 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 of 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 registers the UCITS on the list referred to in Article 149 of the UCITS Law, 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 thus always start marketing its units in the Belgian market as soon as it has received notification from the competent authorities of its home Member State that the dossier has been submitted.

11. The FSMA draws attention to the fact that although the registration of a UCITS on the list referred to in Article 149 of the UCITS Law entitles it to market its units in Belgium, this does not automatically mean that the UCITS may distribute advertisements. Marketing communications require prior approval by the FSMA. For further details on this matter, please see point 6.4 of this circular.

5. Updating the notification dossier

5.1. General provisions

12. In accordance with Article 154, § 3 of the UCITS Law, a UCITS must notify the FSMA in writing in the event of a change to the information contained in the notification letter as described in paragraph 8 or to the share classes to be marketed. The notification is to be made by email and at least one month before the change is to be implemented.

Changes to the *information in the notification letter* include any change to one or more elements included in the notification letter. For example, they may involve a change to the details for the contact person responsible for the payment of the FSMA's operating expenses, the available facilities or the location where the NAV will be published.

A UCITS that wishes to start marketing in Belgium *an additional share class* of a compartment that is registered on the list referred to in Article 149 of the UCITS Law must, before beginning to market these classes, also submit to the FSMA the key information document for the share class in question.

A UCITS that *no longer wishes to market* in Belgium one or more share classes of a compartment that is registered on the list referred to in Article 149 of the UCITS Law must, via an update to the notification dossier, communicate this to the FSMA if, after this update, there is at least one class of that compartment still being marketed in Belgium⁷. If a UCITS wishes to stop marketing all share

⁷ The FSMA has noted that in certain cases it receives so-called “denotification dossiers” (see point 7 of this circular), which seek to stop the marketing in Belgium of one or more, but not all share classes of a given

classes of an existing compartment, and in other words wishes to remove the compartment from the list referred to in Article 149 of the UCITS Law, it must follow the procedure described in point 7 of this circular.

In accordance with Article 217 of the UCITS RD, 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/EC⁸ and their translations may be kept up to date at all times. The updated 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.

Every updated version of the key information document of the UCITS and their translations must be submitted in advance to the FSMA⁹.

13. An update to the notification dossier may also require the publication of an announcement to the unitholders in Belgium. For more information about such announcements, please see point 6.3 of this circular.
14. It goes without saying that submitting the information in order to update of the UCITS dossier does not exempt the UCITS from having to comply with the notification procedure if new compartments are marketed in Belgium (see point 3 of this circular).

5.2. Practical arrangements for updating the notification dossier

15. The above-mentioned updates must be sent by email to the following *address*: intro.cis.passeport@fsma.be.
16. UCITS must submit all documents in the dossier in an *electronic format* that is compatible with the FSMA's office applications.
17. The *subject line of the email* should be structured as follows:

Home Member State (country code ISO 3166-1-alpha-2 code)_BE_Name of the UCITS_UPDATE_Part¹⁰
18. The name of the files in annex to the email should be structured in such a way that at least the name of the UCITS (or – for the key information document – of the compartment), the document type and the language of the document can be inferred.

compartment. The FSMA will process these dossiers in accordance with the update of the notification dossier described herein.

⁸ Namely, the key investor information document (in so far as one is being drawn up), the prospectus, the articles of association or the management rules and the annual and half-yearly report.

⁹ Article 37sexies, § 2 of the Law of 2 August 2002 on the supervision of the financial sector and on financial services, as further specified in the Royal Decree of 25 December 2017 clarifying the obligation to submit the key investment document in advance to the Financial Services and Markets Authority and containing miscellaneous provisions. In the second paragraph of Article 37sexies, § 2, there are a number of exceptions to the obligation to submit the document in advance to the FSMA; a UCITS that is offered to the public in Belgium will, in principle, not fall within these exceptions.

¹⁰ "Part" (e.g. "1/2", "2/2") should be included only if the dossier consists of several emails.

19. The email should have a list of annexes in the *text portion*. If a dossier is submitted via several emails, the number of parts that make up the dossier must also be indicated here.

In the notification of the changes or updates, the UCITS should also indicate the date when these enter into force. This information is not required for the periodic reports published after those periodic reports that are submitted with the notification.

The FSMA advises that a clear overview also be provided of the changes made.

5.3. Technical arrangements when updating the notification dossier

20. Emails may be no larger than 30 MB. Data can always be zipped. If this measure is not sufficient, the documents should be divided among several zip files (in several emails). Emails larger than 30 MB will not be delivered by the FSMA server to the relevant department.
21. Each document sent by email must be attached to an email and may consist of no more than one file.
22. Each document must be sent in one of the following formats: pdf, doc or docx.
23. The files must be readable in a Windows environment.
24. Each file should be printable.
25. The sender is responsible for protecting the data sent (authentication, confidentiality, etc.). Neither emails nor files may be encrypted. Winzip files may not be password-protected.

6. Obligations when marketing in Belgium

6.1. Making the necessary facilities available

26. A UCITS that plans to market its units in Belgium must make available the facilities necessary for the performance of the tasks set out in Article 154, § 2 of the UCITS Law. The UCITS is not required to have a physical presence in Belgium or to appoint a third party for this purpose.

The facilities must be made available in one of the national languages of Belgium. The FSMA does, however, allow for those services to be provided in English if no offer to the public is made in Belgium or if - if there is an offer to the public - it is guaranteed that no marketing communications will be or have been distributed in Belgium in one of the national languages. Furthermore, it is the responsibility of the entity that makes the facilities available in Belgium to ensure that the Belgian language legislation is complied with in all cases.

27. The entity responsible for the task referred to in Article 154, § 2, 6° of the UCITS Law is the privileged contact person for the FSMA for all matters relating to the activities in Belgium of a UCITS governed by foreign law.

6.2. Information to be provided to investors

28. A UCITS that markets its units in Belgium must provide at least the following documents in Belgium:

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

These documents must be made available in one of the national languages or in English. As regards the key information document, there may be an obligation to make it available in one of the national languages; the FSMA refers in this regard to Article 7(2) of Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs).

29. Certain items of information that concern specifically the marketing of units of a UCITS in Belgium may have a significant impact on an investor's decision whether or not to invest in the UCITS, although they are not necessarily included in its prospectus or key information document. These include, among other things, the fees and costs charged for the issue and repurchase of units, any minimum subscription amount or the applicable tax regime. Given the importance of this information, summed up in Article 218, first paragraph of the UCITS RD, financial intermediaries that are responsible for the marketing of units in a UCITS must inform investors in this regard before the latter subscribe. This requirement does not apply to information that is already precisely and thoroughly described in the prospectus or the key information document.

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 that website. If the financial intermediary makes use of a fact sheet containing only the relevant data, this fact sheet does not have to be submitted to the FSMA for approval.

30. The FSMA recalls that each UCITS registered in Belgium is required, in accordance with Article 220 of the UCITS RD, to *publish its net asset value* (or the net asset values of the compartments 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. The FSMA publishes, on its own website, a list of websites that it has accepted to date.

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 issues or repurchases at that net asset value. This recommendation is aimed at harmonizing the publication dates of the net asset values of UCITS governed by Belgian law and of UCITS governed by foreign law.

6.3. Publication of announcements and notifications in Belgium

31. The FSMA wishes to recall that each UCITS in Belgium must disseminate all announcements and notifications to unitholders in at least one of the national languages¹¹.

The announcements and notifications in question must contain at least the information that the UCITS distributes in its home country. The said information must be distributed in Belgium by the same sorts of methods as in the host country of the UCITS¹².

32. Announcements and notifications about events in the life of the UCITS must always be submitted in advance to the FSMA¹³. This must be done by email to cis.pub@fsma.be.

33. As regards announcements and notifications about events in the life of the UCITS, the following clarifications should be noted:

- In terms of their contents, they must comply with a number of conditions laid down in the UCITS Law¹⁴.
- If they contain information about several compartments, of which at least one is not marketed in Belgium, the FSMA recommends adding a statement to the relevant compartment(s) that they are not marketed in Belgium (by a mention in a footnote/an additional paragraph/...).
- If they contain information about dividends, the FSMA recommends including at least the following information: gross and net yield, withholding tax rate, currency of the dividend and relevant data (cum or ex-coupon, payment date).
- The announcement must make the UCITS clearly identifiable. The FSMA recommends in this regard that in addition to the name of the UCITS, the nationality and the address also be given, as well as a statement that this is a UCITS.

34. For more information about announcements and other documents announcing or recommending an offer of units to the public or a similar offer, please see FAQ 3 of Communication FSMA_2022_29 dated 12/12/2022 with FAQs about marketing communications for UCIs.

¹¹ Article 150, § 1, first paragraph of the UCITS Law. The FSMA did not avail itself of the possibility provided for in that paragraph of approving other languages.

¹² Article 215, § 1 of the UCITS RD.

¹³ Article 155, § 1 of the UCITS Law.

¹⁴ The announcements and notifications must, for instance, indicate that a prospectus and a key information document has been, is being or will be published, and state where investors can obtain those documents; the information they contain may not be incorrect or misleading, and must agree with the contents of the prospectus, the key information document and their updates if the documents have previously been published, or if they will be published at a later time, with the information to be provided therein (Article 155, § 2, second paragraph of the UCITS Law) and they may not make any mention the FSMA (Article 155, § 1, second paragraph of the UCITS Law).

6.4. Supervision of marketing communications

35. Supervision of marketing communications is based on a set of advertising rules intended to prevent the dissemination in Belgium of advertisements that do not meet a minimum number of quality criteria. In many cases, these materials are an important source of information on which investors base their decision to subscribe to units of a UCITS. It is therefore essential that the information conveyed via that medium be irreproachable in terms of its clarity and correctness.
36. Detailed explanations of the applicable advertising rules are provided in Communication FSMA_2022_29 dated 12/12/2022 with FAQs about marketing communications for UCIs.

In addition to setting out the FSMA's expectations about the concrete application of the advertising rules, the FAQs also contain explanations of the procedure to be followed by UCITS before they can begin publishing marketing communications, notably in the light of the ex ante supervision of the FSMA.

If marketing communications are disseminated in Belgium in one or more national languages, the key information document must also be provided in the same language(s). The FSMA expects to receive the key information document in the national language in which the marketing communications are submitted to it for approval.

37. The FSMA points out that the speed with which it can process the marketing communications submitted to it depends on the latter's conformity with the legal obligations.

It recommends in this regard that intermediaries which use these forms of advertising set up specific procedures to guarantee such conformity, and that the appropriate compliance officer of the said intermediaries be directly involved in the procedure before the marketing communications are sent to the FSMA.

In these matters, where speed is of the essence, the FSMA is confident that such measures will contribute to quicker processing of the numerous marketing communications that it receives for approval.

6.5. Requirements regarding the reporting or transmission of information to the FSMA

38. Apart from 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.

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

39. Foreign UCITS contribute to the operating expenses of the FSMA. To this end, they make an annual payment to the FSMA based on 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. This payment is made after receipt of the request for payment sent by the FSMA; no payment is owed at the time when a notification dossier is submitted. A list of the current fee amounts is provided on the FSMA's website.

7. Termination of marketing in Belgium

40. Foreign UCITS whose units are marketed in Belgium may choose to terminate the marketing of the UCITS or of a compartment thereof in Belgium¹⁵. In order to do so, the UCITS must submit a dossier to the competent authorities of its home Member State, in accordance with the legislation in force in that Member State transposing Article 93a of Directive 2009/65/EC (what is known as a “denotification dossier”). The information referred to in Article 93a(1)(a) and (b) of Directive 2009/65/EC must be submitted in one of Belgium’s national languages.

This rule does not apply where (a compartment of) the foreign UCITS ceases to exist following a liquidation or restructuring. In that case, the UCITS must always submit an update to its notification dossier to the FSMA in accordance with the procedure set out in point 5 of this circular, requesting that the UCITS/the compartment be removed from the list of undertakings for collective investment governed by foreign law¹⁶.

41. UCITS that plan to publish an announcement or notification in Belgium on the occasion of a denotification procedure should consult point 6.3 of this circular.

42. The FSMA will withdraw the registration of the UCITS or the compartment in question from the list referred to in Article 149 of the UCITS Law immediately after receiving a notification submitted by the home Member State authorities pursuant to Article 93a(3) of Directive 2009/65/EC or on a later date as communicated in the denotification dossier.

43. As from the date referred to in Article 93a(1), third subparagraph of Directive 2009/65/EC, the UCITS must cease any new or further, direct or indirect, offering or placement of its units which were the subject of the denotification. In so doing, the UCITS must comply with the provisions of Article 156/1, § 2 of the UCITS Law.

8. Exemptions

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

¹⁵ Art. 165, § 4 of the UCITS Law.

¹⁶ The FSMA has noticed, however, that in practice certain UCITS in this situation submit an update to the notification dossier to the FSMA as well as a denotification dossier in accordance with point 7 of this circular. In such cases, the FSMA can determine, depending on the types of documents involved, which dossier to process. Submitting a denotification dossier in connection with a liquidation or restructuring does not, however, remove the obligation, where applicable, to publish a press release on the matter in Belgium (see point 6.3 of this circular).