

In case of discrepancies between the French and the English texts, the French text shall prevail

Luxembourg, 22 January 2003

To all the Luxembourg undertakings for collective investment and those intervening in the functioning and supervision thereof

CSSF CIRCULAR 03/88

Re: Classification of the undertakings for collective investment governed by the provisions of the Law of 20 December 2002 concerning undertakings for collective investment

Dear Sir, Madam,

This Circular aims to specify the classification of undertakings for collective investment (UCIs) governed by the Law of 20 December 2002, which came into effect on 1 January 2003. The main amendments introduced by the Law of 20 December 2002 are set out in CSSF Circular 03/87.

The Law of 30 March 1988 relating to UCIs as amended (the “Law of 30 March 1988” hereafter) will remain in force until 13 February 2007. Consequently, two laws will simultaneously govern the UCI industry until that date.

According to the transitional provisions laid down by the Law of 20 December 2002, the following UCIs, created under the regime of the Law of 30 March 1988, must comply with the new legal provisions by 13 February 2004 at the latest:

- UCITS subject to Part I of the Law of 30 March 1988 created between 13 February 2002 and 1 January 2003;
- UCITS under Article 1 of the Law of 30 March 1988, excluding those under Article 2 of this Law, created between 1 January 2003 and 13 February 2004, which have initially chosen to be subjected to the Law of 30 March 1988;
- UCIs existing on 1 January 2003, subject to Part II of the Law of 30 March 1988, which qualify as UCITS governed by Part I of the Law of 20 December 2002;
- UCIs existing on 1 January 2003 under Part II of the Law of 30 March 1988 and that qualify as UCIs subject to Part II of the Law of 20 December 2002;
- UCIs created between 1 January 2003 and 13 February 2004, which qualify either as UCITS subject to Part I of the Law of 20 December 2002, or as UCIs under Part II of the Law of 20 December 2002, and that have initially chosen to be governed by the Law of 30 March 1988 (Part II).

All undertakings for collective investment created as from 13 February 2004 will ipso jure be governed by the Law of 20 December 2002 and must comply with the provisions laid down therein as from the date of their creation.

UCITS subject to Part I of the Law of 30 March 1988 created before 13 February 2002 will however have the choice, until 13 February 2007, to either continue to be governed by the Law of 30 March 1988 or to submit to the Law of 20 December 2002.

I. General considerations

A UCI is deemed to be based in Luxembourg if the registered office of the management company of a *fonds commun de placement* (FCP) or that of the investment firm is located in Luxembourg.

According to their characteristics, Luxembourg UCIs governed by the Law of 20 December 2002 are either subject to Part I or Part II of the said Law.

This classification allows to distinguish between:

- undertakings aimed at by Directive 85/611/EEC of the Council of 20 December 1985 on the co-ordination of laws, regulations and administrative provisions relating to certain undertakings for collective investment in transferable securities (UCITS) as amended;
- other undertakings which do not fall within the scope of Directive 85/611/EEC as amended.

II. Determination of UCIs governed by Part I of the Law of 20 December 2002

Part I of the Law of 20 December 2002 applies to all UCIs, the sole object of which is the investment in transferable securities and/or other liquid financial assets referred to in Article 41(1) of the aforementioned Law.

Considering the definition above, the criterion defining whether a UCI is subject to Part I or Part II of the Law of 20 December 2002 is the planned investment objective. If the UCI invests in transferable securities and/or other liquid financial assets referred to in the aforementioned Article 41(1) of the Law of 20 December 2002, it is subject to Part I, save for the exceptions outlined in section III. hereafter.

UCITS subject to Part I of the Law of 20 December 2002 are of the open-ended type in that the rules that govern them impose that they repurchase directly or indirectly their units or shares at the request of the investors.

Particular attention must be drawn to the transitional provisions of the Law of 20 December 2002 as referred to above, and more particularly Article 134(5) concerning UCIs existing at the effective date of the said Law and likely to qualify as UCITS under Part I by virtue of the widening of the concept of eligible assets.

Accordingly, a UCI currently governed by Part II of the Law of 30 March 1988, must, if its investment policy so warrants, submit to the provisions of Part I of the Law of 20 December 2002 by 13 February 2004 at the latest, or otherwise face exclusion from Part I in accordance with Article 3 of the said Law.

III. Determination of UCIs governed by Part II of the Law of 20 December 2002

Part II of the Law of 20 December 2002 applies to all UCIs the principal purpose of which is the investment in securities other than transferable securities and/or other liquid financial assets as referred to in Article 41(1) of the Law, as well as to all UCITS excluded from Part I.

Indeed, Article 3 of the Law of 20 December 2002 provides exceptions to the basic rule referred to in point II. above, by excluding certain categories of UCITS from the scope of Part I.

The grounds for exclusion, based on the following four categories, are the same as provided for by the Law of 30 March 1988. They were the subjects of a detailed description in IML Circular 91/75. The first three categories detailed below are basically the same as those described in IML Circular 91/75. The fourth category has been adapted in order to reflect the widening of the concept of eligible assets of UCITS, entailing that certain UCIs that were excluded from Part I of the Law of 30 March 1988 will henceforth not be excluded from Part I of the Law of 20 December 2002.

UCITS excluded from Part I of the Law of 20 December 2002 fall within the following four categories:

1. UCITS of the close-ended type. As opposed to UCITS of the open-ended type, these UCITS may not, at the request of investors, repurchase directly or indirectly their units or shares.

Refunds made to investors following a decision by the UCITS is not deemed to be equivalent to a repurchase, where this refund was not brought about by a request by investors based on any repurchase right.

Where the units/shares of a UCITS of the close-ended type are redeemed at the request of investors as from a certain date, the UCITS concerned falls under the scope of Part I of the Law from that date, except where it falls under one of the UCITS categories referred to in points 2 to 4 hereafter. Where this approach is planned from the outset, the prospectus must, from the outset, draw the attention of the investors to this fact and its possible consequences, in particular as regards the investment policy.

2. UCITS, which raise capital without promoting the sale of their units/shares to the public of the European Union or any part of it.

The exclusion from Part I of the Law does not exempt the UCITS concerned from the obligation to raise capital from the public, which all undertakings must comply with in order to qualify as a UCI; it simply prohibits the UCITS concerned from carrying on any promotional activity within the EU according to the definition of this concept in each Member State. In Luxembourg, the term “promotional activity” refers in particular to the use of promotional media, such as the press, radio, television or advertising circulars. However, it does not refer to subscription offers, which are aimed at a limited circle of particularly well-informed investors.

As a result, the UCITS concerned are those that, whilst being publicly available, waive all promotional activity within the EU.

3. UCITS, the units/shares of which, under their constitutional documents, may only be sold to the public in countries that are not members of the European Union.

The exclusion is only effective on the condition that the management regulations or the statutes of these UCITS specifically stipulate that the sale of their units/shares is limited to the public of countries, which are not members of the European Union and/or of the European Economic Area.

UCITS, the units/shares of which are listed on the Luxembourg Stock Exchange and that market their units/shares solely outside the European Union and the European Economic Area, are also included in this category.

4. Categories of UCITS determined by the CSSF, for which the rules laid down in Chapter 5 of the Law of 20 December 2002 are inappropriate given their investment and borrowing policies.

UCITS qualifying for this exclusion belong to one of the following categories:

- 4.1. UCITS whose investment policy allows to invest 20% or more of their net assets in assets other than transferable securities and/or other liquid financial assets as referred to in Article 41(1) of the Law of 20 December 2002.
- 4.2. UCITS whose investment policy allows to invest 20% or more of their net assets in venture capital. Investment in venture capital is to be read as investment in shares of newly created companies or companies still at the development stage.
- 4.3. UCITS whose investment policy allows to contract borrowings on a permanent basis and for investment purposes, amounting to at least 25% of their net assets.
- 4.4. Umbrella-type UCITS of which one compartment does not fall under Part I of the Law of 20 December 2002 owing to its investment or borrowing policy.

Yours faithfully,

COMMISSION DE SURVEILLANCE DU SECTEUR FINANCIER

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