

Non-official translation of the French original

Luxembourg, 22nd January 2003

To all Luxembourg undertakings for collective investment and to those who act in relation to the operation and the control of such undertakings.

CIRCULAR CSSF 03/88

Concerns: **Classification of undertakings for collective investment subject to the provisions of the law of 20th December 2002 relating to undertakings for collective investment**

Ladies and Gentlemen,

The purpose of this circular is to clarify the classification of undertakings for collective investment (UCIs) which are subject to the law of 20th December 2002 which came into force on 1st January 2003. The main changes brought forward by the law of 20th December 2002 are described in circular CSSF 03/87.

The amended law of 30th March 1988 relating to UCIs (hereafter the "law of 30th March 1988") will remain in force until 13th February 2007 and, as a consequence, until such date two distinct laws will regulate on a parallel basis matters regarding UCIs.

Pursuant to the transitional provisions appearing in the law of 20th December 2002, the following UCIs created under the law of 30th March 1988 will need to comply with the new legal provisions by 13th February 2004 at the latest:

- UCITS subject to part I of the law of 30th March 1988 created between 13th February 2002 and 1st January 2003;
- UCITS within the meaning of article 1 of the law of 30th March 1988, excluding those referred to in article 2 of such law, created between 1st January 2003, and 13th February 2004, which had opted in a first stage to submit themselves to the law of 30th March 1988;

- UCIs existing on 1st January 2003, subject to part II of the law of 30th March 1988 which qualify as UCITS under part I of the law of 20th December 2002;
- UCIs existing on 1st January 2003, subject to part II of the law of 30th March 1988 which qualify as UCIs subject to part II of the law of 20th December 2002;
- UCIs created between 1st January 2003 and 13th February 2004, which qualify either as UCITS under part I of the law of 20th December 2002 or as UCIs under part II of the law of 20th December 2002 and which had opted in a first stage to submit themselves to the law of 30th March 1988 (part II).

All undertakings for collective investment created on and after 13th February 2004 are subject, by operation of law, to the law of 20th December 2002 and will need to comply with the provisions thereof as from the date of their creation.

UCITS subject to part I of the law of 30th March 1988 created prior to 13th February 2002 will have the choice, until 13th February 2007, to continue to be subject to the law of 30th March 1988 law or to submit themselves to the law of 20th December 2002 law.

I. General considerations

A UCI is considered to be situated in Luxembourg if the registered office of the management company of the common fund or the registered office of the investment company is located in Luxembourg.

Depending on their characteristics, Luxembourg UCIs governed by the law of 20th December 2002 law are either subject to part I or subject to part II of such law.

This classification allows to distinguish between:

- undertakings which are subject to the Council directive 85/611/EEC of 20th December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), as amended;
- other undertakings which do not fall within the scope of the directive 85/611/EEC, as amended.

II. Determination of UCIs subject to part I of the law of 20th December 2002.

Part I of the law of 20th December 2002 is applicable to all UCIs the exclusive object of which is to invest in transferable securities and/or other liquid financial assets referred to in article 41 (1) of the law.

Considering the aforementioned definition, the criteria which determines whether a UCI is subject to part I or part II of the law of 20th December 2002 is its proposed

investment objective. If the UCI invests in transferable securities and/or other liquid financial assets referred to in the aforesaid article 41 (1) of the law of 20th December 2002, part I of such law is applicable to it, except for the situations described under item III. below.

UCITS subject to part I of the law of 20th December 2002 are of the open-ended type in that the rules applicable to them require that they repurchase directly or indirectly their units or shares at the request of the investors.

The attention must be drawn to the aforementioned transitional provisions of the law of 20th December 2002 and, in particular, to article 134 (5) concerning UCIs which exist on the date of the coming into force of such law and which might become UCITS subject to part I as a result of the extension of the concept of eligible assets.

Accordingly, a UCI which is presently subject to part II of the law of 30th March 1988 might have to submit itself, because of its investment policy, by 13th February 2004 at the latest to the provisions of part I of the law of 20th December 2002 if it is not excluded from part I pursuant to article 3 of such law.

III. Determination of UCIs subject to part II of the law of 20th December 2002

Part II of the law of 20th December 2002 is applicable to all UCIs the principal object of which is to invest in assets other than transferable securities and/or other liquid financial assets referred to in article 41 (1) of the law, as well as to all UCITS excluded from part I.

In its article 3, the law of 20th December 2002 provides for exceptions to the basic rule set forth under item II. above by excluding from the scope of part I certain categories of UCITS.

The cases of exclusion, which relate to the four categories described herebelow, are identical to those provided for by the law of 30th March 1988. They were described in detail in circular IML 91/75. The three first categories described hereafter remain fundamentally identical to their description in circular IML 91/75. The fourth category has been adjusted to take account of the extension of the concept of eligible assets of UCITS as a result of which certain UCIs which were excluded from part I of the law of 30th March 1988 are no longer excluded from part I of the law of 20th December 2002.

UCITS excluded from part I of the law of 20th December 2002 relate to the four following categories:

1. UCITS of the closed-ended type.

These UCITS can be defined by distinguishing them from open-ended UCITS which, directly or indirectly, repurchase their units or shares at the request of investors.

The reimbursement to investors upon a decision of the UCITS is not tantamount to a repurchase if such reimbursement occurs absent any request from investors based on a right to request repurchase.

If the securities of a UCITS of the closed-ended type are repurchased at the request of investors after a certain date, such UCITS shall fall within the scope of application of part I of the law as from such date on, unless it belongs to one of the other categories of UCITS referred to in paragraphs 2. to 4. hereafter. In case this feature is established at inception, the prospectus must, from the outset, attract the investors' attention to that fact and to the possible consequences arising therefrom, including those relating to the investment policy.

2. UCITS which raise capital without promoting the sale of their units or shares to the public within the European Union ("EU") or any part of it.

The exclusion from part I of the law does not dispense the UCITS concerned from the condition of the collection of public savings which all undertakings must comply with in order to qualify as UCI; it simply prohibits the UCITS concerned to engage in any promotional activity within the EU as this concept is defined in each member State. In Luxembourg, the concept of "promotional activity" refers in particular to the use of advertisements methods such as press, radio, television or advertisement circulars. It does not however refer to offers of subscription which are addressed to a limited particularly knowledgeable circle of investors.

It follows from the above that the UCITS concerned hereby are those which, even though they are addressed to the public, renounce to any promotional activity within the EU.

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

The exclusion only operates at the condition that the management regulations or the articles of incorporation of these UCITS specifically provide that the sale of their units or shares is limited to the public of countries which are not members of the European Union and of the European Economic Area.

Are also covered by this category, UCITS the units or shares of which are listed on the Luxembourg Stock Exchange and which market those units or shares solely outside the European Union and the European Economic Area.

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

UCITS covered by this exclusion belong to one of the following categories:

- 4.1. UCITS the investment policy of which permits the investment of 20 % or more of their net assets in securities other than in transferable securities and/or other liquid financial assets referred to in article 41 (1) of the law of 20th December 2002.
- 4.2. UCITS the investment policy of which permits the investment of 20 % or more of their net assets in venture capital. Investment in venture capital shall be taken to mean investment in securities of companies which have been recently constituted or which are still in the early development stage.
- 4.3. UCITS the investment policy of which permits the borrowing, on a permanent basis and for investment purposes, of amounts of at least 25 % of their net assets.
- 4.4. Multiple compartment UCITS, one compartment of which is not subject to part I of the law of 20th December 2002 by reason of its investment or borrowing policy.

Yours sincerely,

COMMISSION FOR THE SUPERVISION OF THE FINANCIAL SECTOR

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