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Investment Funds 2022

Belgium: Law & Practice

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Law and Practice

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1. MARKET OVERVIEW

1.1 State of the Market

The Belgian fund market is dominated by foreign undertakings for the collective investment in transferable securities (UCITS) and alternative investment funds (AIFs), marketed to Belgian professional and retail investors mainly by investments funds originating from Luxembourg.

During recent years, the Belgian fund market – to be understood as the net asset value of funds governed by Belgian and foreign law that are publicly distributed in Belgium – has generally followed an upward trend. Recent statistics published by the Belgian Asset Managers Association (the BEAMA) report that the net asset value of Belgian investment funds amounted to EUR231.75 billion at the end of 2020, representing an increase of 5.5% (compared to 17.2% in 2019), despite the COVID-19 crisis.

This trend continued in the first and second quarters of 2021, which were marked by a 6.40% and 5.28% increase respectively, resulting in net asset value of EUR259.6 billion at the end of June 2021.

2. ALTERNATIVE INVESTMENT FUNDS

2.1 Fund Formation

2.1.1 Fund Structures

A variety of AIFs exist under Belgian law. There are three main types, all of which have specific categories, depending on the assets the AIF wishes to invest in and the type of investor it wishes to target:

- public AIFs (collecting all or part of their capital from a public offer in Belgium);
- institutional AIFs (collecting their capital exclusively from (Belgian or foreign) institutional investors located in Belgium or abroad, and whose interests may be acquired only by "eligible" investors); and
- private AIFs (which do not collect any of their capital from a public offer in Belgium).

The Act of 19 April 2014 on alternative investment fund managers (AIFM Act) organises those categories of AIFs and is complemented by several specific Royal Decrees.

The AIFM Act was enacted following the introduction of the Alternative Investment Fund Managers Directive (Directive 2011/61/EC) (AIFMD), but its scope of application is broader. The following collective investment undertakings qualify as AIFs and are subject to the AIFM Act:

- those that raise capital from investors with a view to investing that capital in the interest of these investors in accordance with a certain investment policy; and
- those that do not qualify as an undertaking regulated under the UCITS Directive (Directive 2009/65/EG).

However, the following entities are excluded from the scope of the AIFMD:

- holding companies;
- institutions for occupational retirement provision; and
- securitisation special purpose vehicles.

In addition, to maintain the attractiveness and competitiveness of the Belgian legal system, a non-AIF regulated status is also available for companies investing in real estate (*sociétés immobilières réglementées/gereglementeerde vastgoedvennootschappen* – SIR/GVV) (also referred to as a "BE-REIT").

Unless the AIFM Act or one of the implementing Royal Decrees provides otherwise (see below), public, institutional and private AIFs may be established as either a common contractual fund (*fonds commun de placement/gemeenschappelijk beleggingsfonds*) (FCP) or an investment company (*société d'investissement/beleggingsvenootschap*).

FCPs are similar to a unit trust in the UK or a mutual fund in the USA: they do not have any legal personality, so each of the investors qualifies as a (co-)owner. In exchange for their commitment, investors receive participation rights in the FCP.

Most AIFs incorporated under Belgian law take the form of an investment company. Investment companies that have variable capital are commonly referred to as BEVEKs/SICAVs, meaning that the share capital changes automatically as a result of the investors' subscriptions and redemptions. On the other hand, investment companies that have fixed capital, called BEVAKs/SICAFs, do not allow their investors to exit the fund at any time, so the share capital is less subject to fluctuation. In exchange for their investment, investors receive shares in the investment company.

There are also many AIFs without a specific regulated structure (venture funds capital, hedge funds, etc).

This contribution focuses on the following types of AIFs, which are commonly present on the Belgian investment fund market and are regulated by specific Royal Decrees (please see **2.3.1 Regulatory Regime**):

- public AIFs investing in financial instruments and liquidity (the majority of which are BEVEKs/SICAVs);
- institutional AIFs, in particular:
  - (a) institutional BEVEKs/SICAVs investing in financial instruments and liquidity; and
  - (b) specialised Real Estate Funds (SREIFs), a type of institutional BEVAK/SICAF; and
- private *privaks/pricafs* (a specific type of private BEVAK/SICAF).

Authorisation of the AIF

Public AIFs investing in financial instruments and liquidity are subject to direct supervision by the Financial Markets and Services Authority (the FSMA), which must grant its authorisation before these AIFs start their activities. To that end, the FSMA must receive, inter alia, the AIF's articles of association (for an investment company) or management regulations (for an FCP), and the details of the depository and the management company. In respect of a Belgian public AIF, the management company must be established in Belgium.

As an investment company, the AIF will also have to submit information on its governing body, its senior management and the persons responsible for the independent controlling functions (which must all be "fit and proper") to the FSMA.

An official list of authorised public AIFs is published on the FSMA's website. The FSMA usually considers applications for authorisation within three months.

Institutional AIFs and private *privaks/pricafs* are not supervised by the FSMA. Because of the favourable tax regime attached to these types of AIFs, they must be registered with and are subject to the supervision of the Federal Public Service Finance (FPSF), which usually considers applications for registration within 30 days.

Authorisation of the AIFM

Unless the structure of the AIF allows internal management (self-managed AIFs), an AIF must in principle appoint an alternative investment

fund manager (AIFM) that is authorised by the FSMA. Self-managed AIFs may also decide to delegate certain management duties to an external management company. The FSMA will authorise the AIFM if all legal and regulatory conditions are met. These conditions relate to, among others, remuneration, conflicts of interest, risk management, liquidity management and depositary requirements. Applications are considered within three months of a complete file being submitted.

As is the case in other EEA Member States, less stringent rules exist for "sub-threshold" AIFMs that manage portfolios of AIFs that stay below the assets under management (AuM) size criteria provided for under the AIFMD. This option is available only if the sub-threshold AIFM does not publicly offer AIFs (otherwise, the majority of the rules arising from the AIFM Act do apply). Sub-threshold AIFMs cannot make use of the AIFMD passport regime but must register with the FSMA. If they wish to benefit from a European passport regime under the AIFMD, they can "opt in", which triggers the application of the requirements under the AIFM Act.

2.1.2 Common Process for Setting Up Investment Funds

Setting-Up Process

The setting-up process for a Belgian investment vehicle depends on its legal structure.

Establishing an FCP is a flexible, fast and cheap process. AIFs that take the form of an FCP are established by a private deed through the mere signing of the fund's management regulation. An FCP has no legal personality.

To benefit from legal personality, an AIF must adopt a corporate form, in which case it will be an investment company.

The AIFM Act lists the types of company forms available to incorporate an investment company. In principle, public and institutional AIFs can choose between two types of company forms:

- a public limited liability company (*naamloze vennootschap/société anonyme* – NV/SA); or
- a limited partnership by shares (*commanditaire vennootschap op aandelen/société en commandite par actions*).

SREIFs and private *privaks* can opt for a third form, which is the ordinary limited partnership (*gewone commanditaire vennootschap/société en commandite simple*).

However, the amended Belgian Code of Companies and Associations (BCCA) has downsized the number of company forms available under Belgian law: the limited partnership by shares and the ordinary limited partnership have ceased to exist. In practice, adopting the corporate form of an NV/SA appears to be the only possible option for investment companies. AIFs that have not yet amended their articles of association to adopt this company form must do so by 1 January 2024 at the latest (if amending their articles of association before that date, the application of the new regime is triggered immediately).

The capital of an NV/SA is represented by shares, to which multiple voting rights can be attached. Prior to being incorporated as such before a Belgian notary, investment companies must open a blocked incorporation bank account with a bank in Belgium and transfer their initial share capital to this bank account.

An AIF incorporated as an investment company is, in principle, subject to the BCCA. However, the AIFM Act deviates from the BCCA with respect to specific requirements, such as the denomination of the AIF or its initial capital, and disapplies other provisions of the BCCA. For

instance, public AIFs (BEVEKs/SICAVs) must have an initial capital of EUR1.2 million, and the life duration of a SREIF is limited to ten years by law.

Establishing an AIF in the form of an investment company will thus take more time and be more expensive than opting for an FCP. Of all AIFs, public AIFs are subject to the most demanding regime: in addition to the various operational requirements, stringent disclosure obligations also apply. Please see **2.1.4 Disclosure Requirements**.

2.1.3 Limited Liability

AIFs established as FCPs are organised as co-ownerships; investors are only liable for the debts of the FCP up to the net assets of the fund and pro rata to their participation.

The creditors of the manager of the FCP or the investors do not have any recourse against the assets of the FCP, which serve only as security for debts, commitments and obligations that are borne by the FCP's assets in accordance with the objectives set out in the FCP's investment policy.

Pursuant to the BCCA, the liability of a shareholder of an AIF taking the form of an NV/SA is limited to its subscription or commitment. The corporate veil may be pierced in very limited circumstances involving commingling of the assets of the shareholder(s) and the company.

2.1.4 Disclosure Requirements

Disclosure by the AIF

When raising capital from investors, Belgian AIFs are required to disclose certain information to (potential) investors. The content depends on the type of fund and the targeted investors.

AIFs may only publicly offer their interests in Belgium or abroad to (professional and retail) investors on the condition of providing a prospectus and a key investor information document (KIID). The KIID finds its origin in Regulation No 1286/2014 on key information documents for packaged retail and insurance-based investment products (PRIIPS Regulation), on the basis of which it must be provided to retail investors. This document contains, inter alia, the investment objectives and policy of the fund, the risk profile, the costs and associated charges, past performance and practical information. In addition, investors must receive semi-annual and annual reports.

An offer is defined as any communication addressed by any means, provided that the most important features of the offer are described and that the price of the offer is determined or can be determined. A "public offering" in the sense of the AIFM Act means that interests are offered to at least 150 individuals or legal entities that do not qualify as "professional" investors.

The AIFM Act organises a private placement regime ("safe harbour"), pursuant to which the following offers do not have a public character and therefore constitute a private placement of funds:

- offerings to professional investors only (the AIFM Act refers to the notion of "qualified investors" under the Prospectus Regulation, which in turn refers to the notion of professional clients under Annex II of MiFID II (see **2.2.3 Restrictions on Investors**);
- offerings to fewer than 150 natural or legal persons, other than professional investors;
- offerings that require at least EUR100,000 per investor and per security (closed-ended vehicles);
- offerings that require at least EUR250,000 per investor and per security (open-ended vehicles);

- offers of securities, other than units of open-ended undertakings for collective investment, with a denomination per unit of at least EUR100,000; and
- offers of securities for a total consideration within the EEA of less than EUR100,000 calculated over a period of 12 months.

It must be emphasised that even offers under the private placement regime can attract certain disclosure requirements. Such requirements do not arise from the AIFM Act but find their origin in other European and national regulations; please see **2.3.7 Investor Protection Rules**.

The prospectus and the KIID (and any significant changes to these documents) may only be published after obtaining the FSMA's approval. Notices, advertisements and other documents relating to an offer or announcing/recommending the offer may only be published after they are approved by the FSMA, regardless of the method of publication. However, notices and other documents relating to the corporate life of the AIF are submitted to the FSMA prior to distribution, but without being subject to prior approval.

Any communication on Belgian territory to more than 150 natural or legal persons other than professional investors with a view to providing information or advice, or to soliciting these persons in relation to interests of open-ended AIFs that are or will be the subject of an offer of sale or subscription, is prohibited when it is made by an AIF or by a person capable of transferring the securities in question, or when it is made on their behalf, except in the following circumstances:

- if the offer involves at least EUR250,000 per investor and per security, or a total consideration within the EEA of less than EUR100,000 calculated over a period of 12 months; or
- if a prospectus and a KIID have been approved by the FSMA or an information note has been published.

In addition, persons intending to publicly offer interests in an open-ended AIF must notify the FSMA prior to such offer and submit all documentation required.

Many of the specific Royal Decrees applicable to the different types of AIF contain additional specific rules on mandatory disclosures to investors.

Reporting by the AIFM

Depending on the AuM, the AIFM must report to the FSMA annually, semi-annually (if it is not a small-scale manager and the AuM are less than EUR1 billion) or quarterly (if the AuM of managed AIFs exceeds EUR1 billion). Reporting concerns the AIFM itself, the AIF(s) it manages, the AIF that substantially uses leverage and any specific issue requested by the FSMA.

Institutional AIF/Private Privak/SREIF

Institutional AIFs, private *privaks* and SREIFs have certain reporting obligations towards the FPSF. In respect of SREIFs, the SREIF Decree prescribes an annual valuation of the net asset value as well as a valuation by an independent expert of the fair value of the immovable property and rights in rem on immovable property held by the SREIF or its subsidiaries.

In case of infringements of the AIFM Act or the specific regulations applicable to the AIFs that are not remedied, the FPSF can decide, after motivated notice, to strike them off the list, with the loss of the particular regulatory and tax regime as a consequence.

2.2 Fund Investment

2.2.1 Types of Investors in Alternative Funds

Investors located in Belgium investing in AIFs are diverse, and include retail investors, pension funds, insurance companies, commercial banks, asset managers, regional public investment institutions, etc. Belgian-based family offices are also playing an increasing role, structuring their investment through AIFs.

2.2.2 Legal Structures Used by Fund Managers

Belgian AIFMs often adopt the legal form of an NV/SA. Until recently, managers also frequently used a limited partnership or a co-operative company (*cooperatieve vennootschap/société coopérative*) but the BCCA has abolished the limited partnership and restricted the use of the co-operative company. Where applicable, existing companies must amend their articles of association to adopt a new form, by 1 January 2024 at the latest (if amending their articles of association before that date, the application of the new regime is triggered immediately).

2.2.3 Restrictions on Investors

In accordance with European legislation, three categories of investors can generally be distinguished:

- retail investors;
- professional investors; and
- so-called "eligible" investors.

Depending on the type of AIF, targeting certain types of investors is either allowed or prohibited.

Public AIFs are open to both professional and retail investors in Belgium. However, providing services under the AIFMD passporting regime is only possible for public AIFs that solely address professional investors. Under the AIFMD, a "professional investor" is an investor that is considered to be a professional client or that may, on request, be treated as a professional client within the meaning of Annex II to Directive 2014/65/EC. Foreign AIFs may only be marketed to retail (non-professional) investors in Belgium, provided that the private placement regime and the rules laid down in the AIFM Act are complied with.

Institutional AIFs and SREIFs are only open to "eligible investors". There are two types of eligible investor:

- per se professional clients (ie, professional clients within the meaning of MiFID II, with the exclusion of clients that requested to be treated as professional clients, unless falling within the scope of the following category); and
- other investors that are legal entities and are included in the register of eligible investors maintained by the FSMA. Belgian resident individuals never qualify as eligible investors.

A specific category of "private investors" can invest in private *privaks*. Private investors are defined as investors that hold for their own account offers of securities issued by a private *privak* meeting certain conditions, such as requiring a total consideration of at least EUR25,000 per investor and per class of securities.

2.3 Regulatory Environment

2.3.1 Regulatory Regime

All Belgian AIFs are regulated by and subject to the AIFM Act. The following Royal Decrees further implement the provisions of the AIFM Act in respect of specific types of AIFs, and also lay down investment limitations.

- Belgian public AIFs investing in financial instruments and liquidity are subject to the Royal Decree of 25 February 2017 on certain alternative investment funds and their management companies. As this type of fund can

also be offered to retail investors, the rules imposed on such public AIFs are modelled after and similar to the rules laid down in the UCITS Act. Please see **3.3.1 Regulatory Regime**.

- Institutional AIFs investing in financial instruments and liquidity must adhere to the rules arising from the Royal Decree of 7 December 2007, which provides specific rules for institutional open-ended AIFs. The list of financial instruments in which this type of institutional AIF can invest is defined by the Financial Sector Act of 2 August 2002. The list also includes financial instruments that are related to another financial instrument in one of the following ways:
  (a) it is convertible into the financial instrument concerned or exchangeable for it;
  (b) it gives the holder the right to acquire or subscribe to the financial instrument concerned;
  (c) it is issued or guaranteed by the issuer or a guarantor of the financial instrument concerned, where there is a significant correlation between the prices of the two instruments;
  (d) it is a certificate representing or constituting the equivalent value of the financial instrument concerned; or
  (e) it provides a return specifically linked, by virtue of the terms and conditions of issue, to the price movement of the financial instrument concerned.
- SREIFs must comply with the Program Law II of 3 August 2016 (SREIF Law) and the Royal Decree of 9 November 2016 relating to specialised real estate investment funds (SREIF Decree). SREIFs can only invest in specific types of real estate, as listed in the SREIF Decree. With respect to Belgian real estate, the SREIF is also allowed to invest in shares in a Belgian real estate company if it either absorbs this company or converts it into an SREIF or an (institutional) BE-REIT within 24 months. Promotion – understood as a main or ancillary activity implying a forward sale or a sale within five years of construction – is strictly prohibited. No compulsory diversification requirement or leverage limits apply to the SREIF, but the SREIF may freely decide to apply these types of limitations as part of its investment policy as defined in its articles of association.
- Private *privaks* are regulated by the Law of 22 April 2003 on financial transactions and markets with a view to setting up a new category of collective investment undertakings, to be known as private *privaks*, and containing various tax provisions. The rules applicable to this vehicle are detailed further by a Royal Decree of 23 May 2007. The sole purpose of private *privaks* is the collective investment in authorised financial instruments issued by non-listed companies.

In addition, AIFs (and Belgian-regulated service providers) must take account of and/or comply with the FSMA's guidelines and circulars (please see **2.3.8 Approach of the Regulator**).

2.3.2 Requirements for Non-local Service Providers

Under the AIFMD and the AIFM Act, the depository can be a credit institution, a MiFID investment undertaking or an institution subject to regulatory and prudential supervision and authorised to act as a depository for UCITS (see **3. Retail Funds**). An AIFM may not act as a depositary for the AIFs it manages.

Each AIF must also appoint an auditor, which is to be chosen from the FSMA's list of recognised auditors and auditing companies.

2.3.3 Local Regulatory Requirements for Non-local Managers

The AIFM Act applies to AIFMs domiciled in Belgium or managing AIFs governed by Belgian law or marketing foreign AIFs in Belgium.

An AIFM that is authorised under the AIFM Directive and active in any other EEA Member State may manage an EEA-governed fund in Belgium on a cross-border basis by making use of the harmonised AIFMD passport regime. Similarly, a manager holding a European passport may market a Belgian fund on a cross-border basis, following a simple notification procedure.

A "third-country" AIFM that is active in a non-EEA Member State may market a foreign AIF under one of the safe harbours set out in the AIFM Act, provided that it first submits a notification to the FSMA. Marketing may only start once the FSMA has issued its confirmation.

2.3.4 Regulatory Approval Process

Please see **2.1.1 Fund Structures**.

2.3.5 Rules Concerning Marketing of Alternative Funds

Please see **2.2.3 Restrictions on Investors**.

As mentioned, a public offering of an AIF's interests entails certain disclosure requirements, such as publishing a prospectus and a KIID (please see **2.1.4 Disclosure Requirements**). In addition, even if an AIF's interests are offered under one of the safe harbours set out in the AIFM Act, marketing may still entail additional requirements; please see **2.3.7 Investor Protection Rules**.

It is worth noting that, in respect of public AIFs, the AIFM Act imposes the obligation to publish a KIID and a prospectus regardless of whether its interests are marketed to retail or professional investors, hence the latter must also receive these documents.

Please also note that if an investment firm that does not qualify as an AIFM or as a manager under the UCITS law intends to distribute an AIF's interests in Belgium, prior authorisation by the FSMA is required pursuant to 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.

Recently, Directive (EU) 2019/1160 with regard to cross-border distribution of collective investment undertakings (Cross-border Distribution Directive) introduced a definition of pre-marketing and provides for conditions under which an EU AIFM can engage in pre-marketing without having to make effective use of the European passport. Pre-marketing is, in summary, defined as the direct or indirect provision of information or communication on investment strategies or investment ideas by an AIF manager (or on its behalf) to potential professional investors in order to test their interest in an AIF (whether yet established or not) and which in each case does not amount to an offer or placement to the potential investor to invest in the units of shares (together interests) of that AIF.

These new rules imply that an AIF or its manager (AIFM) cannot rely on the reverse solicitation exemption for a period of 18 months following the pre-marketing activities, as any subscription by a professional investor within that period of the EU AIFM having begun pre-marketing will be considered to be the result of marketing and should be subject to the applicable passporting notification procedures.

2.3.6 Marketing of Alternative Funds

Please see **2.2.3 Restrictions on Investors**.

2.3.7 Investor Protection Rules

Prior Approval of Advertising Material

In addition to the information a potential investor must receive by means of a prospectus, information memorandum or KIID (please see **2.1.4 Disclosure Requirements**), the marketing of an AIF may trigger the applicability of the Royal Decree of 25 April 2014 on certain information requirements when commercialising financial products to non-professional (retail) clients (Transversal Royal Decree), even when conducted under the private placement regime set out in the AIFM Act (please see **2.1.4 Disclosure Requirements**).

The notion of "financial products" is broader than the notion of "financial instruments" used in the context of MiFID II or the notion of "investment instruments" used in the context of the Prospectus Regulation. A "financial product" can be a savings product, an investment product or an insurance product (other than a savings/investment product).

Exceptions from the Royal Decree's scope of application are made in terms of the countervalue, among other things: the rules do not apply if the purchase of a financial product requires an initial countervalue of at least EUR100,000.

The Transversal Royal Decree (and a complementing Circular of the FSMA) regulates the minimum content of any marketing material addressed to (even one) retail investor(s), and submits advertising for prior approval by the FSMA.

Regulation (EU) 2019/1156 on Facilitating Cross-Border Distribution of Collective Investment Undertakings

The Cross-border Distribution Regulation introduces uniform rules on minimum requirements for marketing communications as of 2 August 2021. AIFMs must:

- ensure that marketing communications addressed to investors are identifiable as such;
- describe the risks and rewards of purchasing interests in an equally prominent manner;
- be fair, clear and not misleading;
- not contradict regulatory transparency information (Article 23 of the AIFMD);
- specify where, how and in which language investors can obtain a summary of investor rights and provide a hyperlink to such summary including (as appropriate) information on access to collective redress mechanisms at EU and nation levels in the case of litigation; and
- include clear information on possible termination of marketing.

These provisions must be read together with European Securities and Markets Authority's Guidelines on Marketing Communications under the Regulation on cross-border distribution of funds (ESMA Guidelines).

General Good Provisions

Marketing in Belgium by an EEA or foreign law-governed AIFM requires compliance with the so-called "provisions of general good", which are listed on the FSMA's website. The list is non-exhaustive but includes book VI of the Belgian Code of Economic Law in its entirety (and Royal Decree No 71 of 30 November 1939 on door-to-door sales and peddling).

Book VI of the Belgian Code of Economic Law on Consumer Protection

Marketing to retail investors may trigger the applicability of Book VI of the Belgian Code of Economic Law, if such retail investors qualify as consumers.

A consumer is a natural person who acts for purposes that are outside his or her trade, business or profession.

Book VI of the Code of Economic Law lists, among other things, the contractual terms that are considered unfair and thus unauthorised.

Whether or not professional clients under Part II of Annex II to MiFID II (including clients that request to be treated as professional clients – see **2.2.3 Restrictions on Investors**) may still qualify as consumers for the purpose of Book VI of the Code of Economic Law is not clear. In any case, companies will not qualify as such, as a consumer must always be a natural person.

The FSMA has published a communication containing an overview of conditions according to which clauses are considered acceptable.

A recent law on unfair clauses in B2B agreements has been enacted. An exemption applies for financial services, which can be construed broadly but should cover the marketing of AIFs in Belgium.

Door-to-Door Sales and Peddling

Belgian law prohibits the peddling of securities and door-to-door sales of securities, merchandise and goods. Interests in an AIF qualify as securities in the meaning of that regulation. According to Belgian law, the peddling of securities is defined as going to another person's premises in order to buy, sell, exchange or offer to buy, sell or exchange securities with immediate delivery against payment or deferred payment.

Door-to-door sales of securities are authorised only if they are targeted at licensed financial intermediaries (ie, credit institutions and investment firms). Door-to-door sales are defined as habitually going to other persons to advise, offer or solicit the purchase, sale, subscription or exchange of securities, or to advise, offer or solicit participation in transactions in relation to these securities.

2.3.8 Approach of the Regulator

The FSMA regularly issues guidelines in order to further implement and detail the legal and regulatory framework. As such, the FSMA explains the legal and regulatory provisions applicable to the supervised entities and gives recommendations regarding financial services and activities. Although the FSMA's guidelines are "soft law", they provide useful and authoritative information on the applicable norms and the regulator's expectations.

In addition, the FSMA has investigatory powers and can issue warnings and/or impose sanctions in case of non-compliance. In practice, the FSMA does not tend to issue fines immediately upon becoming aware of a breach or non-compliance with (minor) regulatory or legal requirements. The FSMA can perform onsite inspections and retrieve all information it deems necessary to assess and resolve a case.

In certain cases, face-to-face meetings with the regulator may be organised.

2.4 Operational Requirements

An AIF must invest the capital it raises in accordance with its investment policy as described in the prospectus and the KIID, and only in the interests of the investors.

Authorised AIFs must comply with the risk and borrowing restrictions, the valuation and pricing of the assets held by the AIFs and the transparency requirements set out in the AIFM Act, the specific Royal Decrees and the AIFMD, as applicable.

Belgian vehicles must further comply with Belgian laws, regulations and the FSMA's guidelines concerning anti-money laundering (AML) and counter-terrorist financing (CTF), in particular the Act of 18 September 2017 relating to the fight against money laundering and the financing of

terrorism, as amended from time to time, and the Royal Decree of 30 July 2018 regarding the register of ultimate beneficial owners.

Issuers whose securities are admitted to trading on the Belgian regulated market within the meaning of MiFID II are also subject to the obligations imposed by various EU directives that have been implemented under Belgian law, particularly the following:

- the Prospectus Regulation (Regulation No 2017/1129) and the related Commission Delegated Regulation (EU) No 2019/980 of 14 March 2019;
- the Transparency Directive (Directive 2004/109/EC) as implemented by the Act of 2 May 2007 on the disclosure of major holdings in issuers whose shares are admitted to trading on a regulated market and laying down miscellaneous provisions (Transparency Act); and
- the Market Abuse Regulation (Regulation 596/2014).

Pursuant to the Short-selling Regulation (Regulation 236/2012), the FSMA should be notified of net short positions in shares, sovereign debt and uncovered credit default swaps.

2.5 Fund Finance

Pursuant to the Royal Decree of 25 February 2017 concerning certain public AIFs and AIFMs, borrowing is allowed but must be limited to 10% of the fund's net asset value on a temporary basis.

A recent report from the FSMA and the National Bank of Belgium (NBB) on asset management mentions that Belgian investment funds (both UCITS and AIFs) have no or hardly any financial leverage. It is therefore likely that the fund finance market is less developed compared to other EEA Member States. The lack of financial leverage also explains why the liquidity risk, which could realise itself in case of a mismatch between the liquidity of the assets and the fund's redemption profile, is regarded as the most important risk.

An FSMA circular (FSMA Opinion 2017 01) defined the notion of leverage in the context of the AIFM Act as any method by which the AIFM increases the exposure of an AIF it manages, whether through borrowing cash or securities, through derivative positions or by any other means. In general, the FSMA considers loans that are an economic substitute for the AIF's capital to constitute leverage in line with the European Commission's position. Loans entered into by an AIF that are temporary in nature and fully covered by capital commitments by investors are therefore excluded from the leverage calculation.

The manager must demonstrate that the leverage limits applied with respect to each AIF it manages are reasonable, and that it complies with those limits at all times. The FSMA may impose restrictions on the leverage that a manager can use or may impose any other restriction on the management of the AIF it manages.

2.6 Tax Regime

Tax Regime Applicable to AIFs

The applicable tax regime mainly depends on whether the AIF has a legal personality (investment company) or not (FCP) (please see **2.1.2 Common Process for Setting Up Investment Funds**).

Investment company

As a rule, AIFs are subject to corporate income tax at the ordinary tax rate of 25%.

Upon request, AIFs may benefit from a deviating corporate tax regime, in which case their taxable basis is limited to disallowed expenses (other than impairment and capital losses on shares)

and abnormal or gratuitous advantages received (Tax AIF). In such a case, the investment proceeds of Tax AIFs are usually not taxed at their level.

Considering that AIFs are formally subject to corporate income tax (although on a very limited basis for what concerns the Tax AIFs), in principle AIFs are eligible to treaty benefits from a Belgian perspective (to be assessed on a case-by-case basis).

FCP

As a rule, AIFs without legal personality are not subject to corporate income tax. Their income is immediately taxable in the hands of the investors according to a full and immediate tax transparency regime, irrespective of any distribution to the investors (as if the FCP does not exist).

Besides, AIFs are subject to a yearly net asset tax at a flat rate of 0.0925% on the net amounts outstanding in Belgium on 31 December of the preceding year. Exceptions apply for certain AIFs (eg, private *privak/pricaf*).

Tax Regime Applicable to Investors

Investment company

Belgian individual investor

The tax regime applicable to Belgian individual investors depends on the nature of the income earned from the AIF, as follows:

- dividends: withholding tax of 30%;
- interest (paid or capitalised): withholding tax of 30%;
- share capital reduction/reimbursement is in principle not taxable. As an exception, if the AIF has retained earnings/reserves, the reimbursement of share capital will be partially requalified as dividend distribution (taxable at 30%) (pro rata the amount of said retained earnings/reserves in the total of the AIF's adjusted net equity);
- capital gains realised on shares are in principle not taxable, provided they are realised within the normal management of the private estate of the investor, except if and to the extent the AIF holds (directly or indirectly) more than 10% of its assets in debt instruments. In such a case, the interest component included in the capital gain is taxable as interest income (30% withholding tax); and
- liquidation and redemption bonuses paid by Tax AIFs are in principle not taxable, except if and to the extent the Tax AIF holds (directly or indirectly) more than 10% of its assets in debt instruments. In such a case, the interest component included in the liquidation/redemption bonus is taxable as interest income (30% withholding tax).

Belgian corporate investor

All income/proceeds earned by corporate investors subject to Belgian corporate income tax are taxable at the ordinary rate of 25%, subject to the application of the participation exemption regime (PER) (100% exemption).

The PER applies under the following conditions:

- if there is a minimum participation of at least 10% or an acquisition value of EUR2.5 million;
- if property is held in full for an uninterrupted period of at least 12 months (or if there is a commitment to hold should the 12-month period not be reached at the time of the distribution); and
- subject to tax requirement at the level of the distributing entity and each direct or indirect affiliate.

The PER may apply to income received from AIFs subject to the ordinary corporate income tax regime. Provided the AIF qualifies as an "investment company" from a Belgian tax perspective, the PER applies irrespective of the

minimum participation requirement or the minimum holding period.

In principle, income received from a Tax AIF cannot benefit from the PER, given its deviating corporate tax regime.

Please note that certain specific rules exist for certain Tax AIFs (eg, under certain conditions, Belgian corporate investors in a private *privak* may benefit from the PER on dividends and capital gains on shares received).

A 30% withholding tax is also due on dividends paid by AIFs, unless a minimum participation of at least 10% is held by the Belgian corporate investor in the AIF. The withholding tax suffered is not considered as a final tax but can be credited against the final corporate income tax due or refunded in case of excess. The withholding tax cost can therefore be considered as a mere pre-financing cost.

FCP

Belgian individual investor

According to the full tax transparency regime, investors are immediately taxed on the underlying income earned by the AIF (as if the latter did not exist), irrespective of any effective distribution to the investors, as follows:

- dividends (including liquidation and acquisition bonuses): flat rate of 30%;
- interest (paid or capitalised): flat rate of 30%;
- share capital reduction/reimbursement is in principle not taxable. As an exception, if the underlying company has retained earnings/reserves, the reimbursement of share capital will be partially requalified as dividend distribution (taxable at 30%) (pro rata the amount of said retained earnings/reserves in the total of the fund's adjusted net equity); and
- capital gains: not taxable as far as they are realised within the normal management of the private estate of the investors.

In practice, a full breakdown of the underlying income (ie, per date and type of income generated by each underlying asset) should be available in order for the investors to be able to apply the appropriate tax treatment to each underlying income.

Subsequent distributions of the above income to the investors are consequently not subject to tax.

If the investors are not able to obtain the full breakdown of the income generated by the underlying assets, the tax transparency regime cannot be applied and taxation should be deferred until effective distribution, as follows:

- all distributions are taxable as interest income at 30% withholding tax (except liquidation and acquisition bonuses which are not taxable, if and to the extent the AIF does not hold (directly or indirectly) more than 10% of its assets in debt instruments – see above); and
- in the absence of any legal basis, capital gains realised on the sale of the units of the AIF are in principle not taxable (if and to the extent the AIF does not hold (directly or indirectly) more than 10% of its assets in debt instruments – see above). The Belgian tax administration nevertheless takes the position that such capital gain is taxable as movable income (30%).

Belgian corporate investor

According to the tax transparency regime, investors subject to the Belgian corporate income tax regime are taxed on the underlying income earned by the AIF (as if it did not exist) at the

corporate income tax rate of 25%, unless the PER regime applies.

Compliance with the PER conditions should be appreciated at the level of each underlying company (as if the AIF did not exist), in accordance with the tax transparency regime.

Please note that the application of the full tax transparency regime also requires a full transparency approach from an accounting perspective (amongst others, the direct recording of the underlying investment lines of the AIF and the underlying profit & loss of the AIF, pro rata the corporate investor's interest in the AIF).

If the full tax transparency regime cannot be applied (because no sufficient breakdown is available), taxation is postponed until effective distribution, and all distributions made by the AIF or capital gains realised on the AIF's shares are taxable at the ordinary corporate income tax rate (25%).

Preferential Tax Regime

Belgian tax resident individuals are in principle not taxable on the liquidation and redemption bonuses received from Tax AIFs (with legal personality), except if and to the extent the Tax AIF holds (directly or indirectly) more than 10% of its assets in debt instruments.

Belgian tax resident individuals realising a loss upon liquidation of a private *privak* that has been incorporated since 2018 benefit from a tax credit corresponding to 25% of said loss. The tax credit is limited to EUR25,000 per year per individual.

Belgian corporate investors may benefit from the PER on dividends and capital gains on AIFs subject to the ordinary corporate income tax regime, irrespective of the minimum participation requirement or the minimum holding period, provided the AIF qualifies as an "investment company" from a Belgian tax perspective.

3. RETAIL FUNDS

3.1 Fund Formation

3.1.1 Fund Structures

Under Belgian law, there are basically five types of public or retail funds:

- the Belgian UCITS fund;
- the Belgian public AIF that invests in financial instruments and liquidity (modelled after the regime applicable to UCITS);
- the Belgian public *privak*;
- the Belgian starter fund; and
- the Belgian public real estate fund.

The Belgian UCITS fund meets the conditions set forth in Directive 2009/65/EC. The other funds listed above are AIFs and thus fall within of the scope of the Belgian AIFM Act (as extensively discussed under **2. Alternative Investment Funds**). As the Belgian fund market is mainly dominated by Belgian UCITS funds, we will further concentrate on this type for the remainder of this section.

A UCITS governed by Belgian law is open-ended and established as either a common contractual fund (FCP) or an investment company (BEVEK/SICAV). A BEVEK/SICAV must be incorporated as a public limited liability company (NV/SA). An FCP is always managed by an (authorised) management company (since it lacks legal personality); a BEVEK/SICAV can either be self-managed or appoint a management company. Self-managed BEVEKs/SICAVs may also decide to delegate certain management duties to an external management company.

Belgian UCITS can have either a Belgian or a foreign management company. Over the past few years, the number of UCITS appointing a Belgian management company and the number of self-managed UCITS has decreased; instead, the fund landscape has seen an increase in the number of UCITS with a foreign management company.

The total value of the net assets of Belgian public open-ended UCITS rose to EUR199.65 billion at the end of Q3 2021, representing an increase of 26.90% in one year.

3.1.2 Common Process for Setting Up Investment Funds

As regards regulatory approval, each public or retail fund (and its sub-funds) must obtain an authorisation from the FSMA before commencing its activities. Authorisation is dependent on fulfilling the following conditions:

- acceptance by the FSMA of the UCITS' manager chosen by the FCP or authorisation of the BEVEK/SICAV. The UCITS Act mentions the following requirements that must be fulfilled by the BEVEK/SICAV in order to obtain authorisation:
  - (a) it must have its statutory seat and head office in Belgium;
  - (b) the senior management of the BEVEK/SICAV must be entrusted to at least two natural persons; and
  - (c) there must be an appropriate policy structure in place, proportionate to its (contemplated) activities;
- FSMA's approval of the management rules or articles of association of the UCITS; and
- FSMA's acceptance of the UCITS' choice of custodian.

A company cannot simultaneously act as the UCITS' manager and the UCITS' custodian.

The FSMA decides on the application within two months.

3.1.3 Limited Liability

Please see **2.1.3 Limited Liability**.

3.1.4 Disclosure Requirements

Interests in a UCITS fund can be subject to a "public offering" (please see **2.1.4 Disclosure Requirements**), as a result of which stringent disclosure obligations must be complied with.

The UCITS Act organises the national private placement regime similarly to that of the AIFM Act. The following offerings do not have a public character and therefore constitute a private placement of funds:

- offerings solely to professional investors (the UCITS Act refers to the notion of "qualified investors" under the Prospectus Regulation, which in turn refers to the notion of professional clients under Annex II of MiFID II; please see **2.2.3 Restrictions on Investors**);
- offerings to fewer than 150 natural or legal persons, other than professional investors;
- offerings that need at least EUR250,000 per investor and per security (open-ended vehicles) or EUR100,000 (closed-ended vehicles); and
- offers of securities for a total consideration within the EEA of less than EUR100,000 calculated over a period of 12 months.

3.2 Fund Investment

3.2.1 Types of Investors in Retail Funds

Recently published information shows that, at the end of 2019, UCITS represented 71% of Belgian public open-ended investment funds. In 2020 the number of UCITS (sub-)funds decreased from 729 to 712, but the UCITS' total net assets expanded from EUR148.50 billion to EUR161.67 billion.

Interests in UCITS can be offered to all types of investors. Because of the stringent regulatory framework UCITS are subject to, they are particularly suitable for households and private individuals.

3.2.2 Legal Structures Used by Fund Managers

Please see **2.2.2 Legal Structures Used by Fund Managers**.

3.2.3 Restrictions on Investors

Please see **3.2.1 Types of Investors in Retail Funds**.

3.3 Regulatory Environment

3.3.1 Regulatory Regime

Public open-ended UCITS are subject to the Law of 3 August 2012 on certain forms of collective management of investment portfolios (UCITS Act) and the Royal Decree of 12 November 2012 on certain public undertakings for collective investment (UCITS RD).

The rules arising from these regulations apply to the following:

- all Belgian UCITS, whether they raise funds in Belgium or abroad through a public offering of units, from institutional or private investors; and
- all EEA-governed UCITS, when their securities are the subject of a public offering in Belgium (please see **3.3.5 Rules Concerning Marketing of Retail Funds**).

The UCITS Act and the UCITS RD provide for stringent and detailed asset eligibility, liquidity and diversification requirements. UCITS may only invest in transferable securities and other liquid financial instruments authorised by these regulations.

The UCITS RD exhaustively lists the transferable securities and liquid financial in which a UCITS can invest. A UCITS must also respect certain investment limitations. For instance:

- its total exposure (maximum exposure) to derivatives must be limited to 100% of the net value of the assets;
- it must invest up to 10% of its assets in transferable securities and money market instruments, issued by one and the same issuer (this limit can be increased under certain conditions);
- it can invest up to 20% of its assets in deposits made with the same undertaking;
- its counterparty risk in a derivative transaction cannot exceed:
  (a) 10% of its assets, when the counterparty is a credit institution; or
  (b) 5% of its assets in other cases; and
- without prejudice to the above limits, a UCITS fund must invest up to 20% of its assets in one and the same undertaking, through a combination of:
  (a) transferable securities or money market instruments issued by that undertaking;
  (b) deposits with that undertaking; and
  (c) risks arising from OTC derivative transactions relating to that undertaking.

The UCITS RD further prohibits a UCITS from acquiring precious metals or commodities, or financial instruments representing such metals or commodities.

3.3.2 Requirements for Non-local Service Providers

EEA-governed UCITS that want to pursue their activities in Belgium must appoint an intermediary in Belgium to handle their financial services. This intermediary will be the FSMA's primary contact person. Practice has shown that the intermediary responsible for providing the above

financial services is also often entrusted with the marketing of the UCITS' interests.

The UCITS' depository must be either a Belgian (branch of a) credit institution, the NBB, a stock-broking company established in Belgium or a foreign investment firm. In respect of the latter types of custodians, the UCITS Act prescribes certain minimum requirements (eg, to establish appropriate policies and procedures to ensure compliance with the obligations arising from the UCITS Act and regulations made in implementation thereof). The UCITS' AIFM may not simultaneously act as a depositary.

Each UCITS must also appoint an auditor chosen from the FSMA's list of recognised auditors and auditing companies.

3.3.3 Local Regulatory Requirements for Non-local Managers

An EEA-authorised manager may manage and market authorised UCITS funds in Belgium by establishing a branch or on a cross-border basis if it proceeds under the passport regime under the UCITS Directive.

3.3.4 Regulatory Approval Process

Please see **3.1.2 Common Process for Setting Up Investment Funds**.

3.3.5 Rules Concerning Marketing of Retail Funds

A UCITS governed by foreign law and intending to market its interests in Belgium must complete a notification procedure.

Marketing of a UCITS occurs where an offer is made to the public for the account of UCITS, including the receipt and transmission of orders for securities of the UCITS in question. Any person receiving compensation or advantages from the UCITS on the occasion of a public offering or the receipt and transmission of orders for interests of the UCITS is considered to act for the UCITS' account.

It follows that UCITS marketing their interests in Belgium without offering them to the public are discharged of the obligation to complete the notification procedure.

Entitlement to market the UCITS' interests in Belgium does not automatically allow the UCITS to distribute advertisements – this requires the prior approval of the FSMA. Belgian public open-ended UCITS and UCITS governed by foreign law are subject to the same rules in respect of announcements, advertisements and other materials relating to the public offer of interests in Belgium.

Regulation (EU) 2019/1156 on facilitating cross-border distribution of collective investment undertakings introduces rules on minimum requirements for marketing communications that UCITS management companies must take into account as of 2 August 2021. These provisions must be read together with the ESMA Guidelines.

3.3.6 Marketing of Retail Funds

Please see **3.2.1 Types of Investors in Retail Funds**.

3.3.7 Investor Protection Rules

Pursuant to the UCITS Act, all advertising materials must be submitted for approval to the FSMA before they can be distributed in Belgium.

Please also see **2.3.7 Investor Protection Rules** ("Prior Approval of Advertising Material"), which applies mutatis mutandis in respect of UCITS.

3.3.8 Approach of the Regulator

UCITS are subject to the direct supervision of the FSMA. For the role of the FSMA, please see **2.3.8 Approach of the Regulator**.

3.4 Operational Requirements

Regarding the investments a UCITS can make, please see **3.3.1 Regulatory Regime**.

Regarding the appointment of a custodian, please see **3.3.2 Requirements for Non-local Service Providers**.

3.5 Fund Finance

In principle, a UCITS is prohibited from taking out loans. However, the Royal Decree of 12 November 2012 provides for two exceptions pursuant to which a UCITS can:

- take out loans denominated in foreign currency, to which loans of the same value and duration are linked for the sole purpose of purchasing foreign currency, provided that its net debt position remains or will remain unchanged as a result of these operations; or
- take out loans of up to 10% of its net assets, insofar as it concerns short-term loans.

Please also see **2.5 Fund Finance**.

3.6 Tax Regime

Tax considerations listed under **2.6 Tax Regime** apply mutatis mutandis to retail funds, subject to the fact that all retail funds benefit from the deviating corporate income tax regime.

Consequently, distributions made by retail funds can in principle not benefit from the PER at the level of Belgian corporate investors. Please note that exceptions may apply for certain retail funds (eg, under certain conditions, corporate investors in a Belgian SICAV/BEVEK may benefit from the PER on dividends and capital gains on shares received).

A tax on stock exchange transactions (TSET) applies on the trade of capitalisation shares (eg, the sale, purchase, repurchase and conversion) where these transactions are concluded or carried out in Belgium through a Belgian financial institution or (since 1 January 2017) through an intermediary established abroad (as far as the transaction order is directly or indirectly given by either an individual whose habitual residence is in Belgium, or a legal entity on behalf of its registered office or establishment in Belgium). The rate of TSET is 1.32% (with a maximum of EUR4,000 per transaction).

4. LEGAL, REGULATORY OR TAX CHANGES

4.1 Recent Developments and Proposals for Reform

EU Directive 2019/1160 and EU Regulation 2019/1156

The European Parliament and the Council have introduced new rules to reduce the regulatory barriers currently hindering cross-border distribution of investment undertakings. EU Directive 2019/1160 and EU Regulation 2019/1156 introduce the following:

- a definition of pre-marketing;
- uniform requirements for marketing materials;
- the possibility of ex-ante notification of marketing materials (when marketing to retail investors);
- rules for de-notification;
- new rules aimed at transparent and proportionate fees and charges levied by national competent authorities; and
- a new central ESMA database on the cross-border marketing of UCITS and AIFs.

The Cross-border Distribution Directive has been implemented in Belgian law by the Belgian Act of 4 July 2021 transposing European directives and implementing European regulations on financial matters (I).

Sustainable Finance Disclosure Regulation

As of March 2021, most provisions of the Sustainable Finance Disclosure Regulation (Regulation (EU) 2019/2088) have entered into force. The Sustainable Finance Disclosure Regulation aims to create a harmonised transparency regime to integrate ESG considerations into investment decision-making or advisory processes of AIFMs. To attain more transparency on how financial market participants integrate sustainability risks into their investment decisions, AIFMs must now disclose certain ESG-related information.

Taxonomy Regulation

Following the entry into force of Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment, additional disclosure obligations became mandatory as of 1 January 2022, such as the disclosure as to whether or not the relevant financial product invests in taxonomy-aligned economic activities.

AIFMD and UCITS Delegated Act

On 2 August 2021, the Commission Delegated Regulation (EU) 2021/1255 amending the Delegated Regulation (EU) 231/2013 (AIFMD delegated act) and the Commission Delegated Directive (EU) 2021/1270 (UCITS delegated Acts) were published in the EU Official Journal.

Both acts impose duties on AIFMs and UCITS management companies to integrate sustainability risks in the management of AIF/UCITS, to include in their conflicts of interest procedures a consideration of any conflicts that may arise as a result of the integration of sustainability risks, to take into account sustainability risks (and, if relevant, the principal adverse impacts of investment decisions on sustainability factors) as part of the due diligence in the selection and ongoing monitoring of investments, and to capture details of procedures to manage sustainability risks in the risk management policy.

Member States must implement the AIFMD Delegated Directive by 31 July 2022 at the latest. The UCITS Delegated Regulation will apply from 1 August 2022.

Mandatory Disclosure Rules (MDR – DAC6)

On 20 December 2019, the Belgian legislator transposed Directive 2018/822, commonly referred to as DAC6, into national legislation. DAC6 obliges certain intermediaries and relevant taxpayers to report information on cross-border arrangements that meet certain criteria to the FPSF.

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