

News Update

INVESTMENT MANAGEMENT GROUP

I. IMPLEMENTATION UCITS IV IN DUTCH FINANCIAL SUPERVISION ACT

1. On 2 February 2011, the Ministry of Finance sent the Second Chamber of Parliament its proposal for an act implementing Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investments in transferable securities (recast) (the “**UCITS IV Directive**”) in the Dutch Financial Supervision Act (the “**FSA**”) (the “**Proposal**”). In addition, a draft for a general administrative measure (*algemene maatregel van bestuur*) for the further implementation of the UCITS IV Directive and the Proposal was published for consultation.
2. This news update summarizes the following notable amendments to the FSA resulting from the Proposal and the general administrative measure:
 - a. subfunds (*subfondsen*);
 - b. the EU passport for managers;
 - c. master/feeder constructions;
 - d. merger of UCITS (nationally and cross border); and
 - e. key investor information.
3. It should be noted that both the text of the Proposal and the general administrative measure are still subject to amendments.

Therefore it is possible that they will not be implemented as currently drafted.

II. THE PROSPOSAL

Subfunds

4. The Proposal introduces the concept of the subfund. A subfund is an investment compartment within an existing UCITS. The Proposal implements the practice of treating subfunds as separate collective investment schemes (*beleggingsinstellingen*). The provisions applicable to collective investment schemes or unit trusts (*beleggingsfondsen*) will also apply to subfunds.
5. As a result, the provisions regarding, among others, the claims order for claims on a collective investment scheme’s assets (*rang regeling*) will also apply to subfunds. This increases the protection of interests of participants in a subfund.
6. For reasons of efficiency and cost, collective investment schemes consisting of subfunds are required to include the information on the subfunds in their prospectus, annual accounts, annual reports, and half year accounts. Furthermore, the assets of a subfund can be held by the depositary of the UCITS of which it is a part instead of a separate depositary being required.

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EU Passport for managers

7. Under the Proposal, the licence of a manager to manage UCITS and offer units in UCITS in the Netherlands (“**Dutch manager**”) can be “passported” within the EU after having obtained the prior approval of the relevant supervisory authority in the Netherlands, the Autoriteit Financiële Markten (“**AFM**”), or after having notified the AFM. Similarly, a license of a manager to manage UCITS and offer units in UCITS by another EU member state (“**EU manager**”) can be “passported” into the Netherlands.
8. The applicable procedures and information requirements depend on whether the manager intends to undertake the activities through a branch office or the provision of cross border services.

Procedures for services through a branch office

 9. The managing of a UCITS or the offering of units in a UCITS by a Dutch manager in other EU member states through a branch office, requires the prior approval of the AFM. In principle, the Dutch manager should be able to establish its branch office and start business immediately after having received a notification of the competent authority in the relevant EU member state or within two months of the receipt of the AFM’s consent. The process should ultimately take up to a maximum of four months.
10. An EU manager can manage a UCITS or offer units in a UCITS managed by it through a branch office in the Netherlands:
 - a. immediately after notification to that effect by the AFM; or
 - b. within two months of receipt of the notification of the competent authority of their home EU member state that it has forwarded the notification to the AFM.
11. However, the management of a Dutch UCITS by an EU manager requires the approval of the AFM. The approval process will take approximately two months. The AFM will provide its consent unless:
 - a. the manager does not have a licence for the management of the type of UCITS concerned; or
 - b. the manager or the Dutch UCITS will not be able to comply with the applicable provisions on its conduct (*gedragstoezicht*).
12. Presumably the AFM will grant its approval within the two month waiting period set out in paragraph 11. However, neither the Proposal nor the explanatory notes thereto provide additional details in this respect.

Procedures for service through cross border services

13. The provision of cross border services or the cross border offering of units in a Dutch

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UCITS within the EU by a Dutch manager are subject to a lighter notification procedure.

14. The Dutch manager can offer the units in the Dutch UCITS managed by it in another EU member state upon receipt of notification from the AFM that it has informed the competent authority of the relevant EU member state. The notification should take place within 10 working days.
15. The Dutch manager intending to provide cross border services in another EU member state should notify the AFM thereof. The AFM must forward the complete notification to the competent authorities of the relevant member state with a copy to the Dutch manager within one month.
16. The Proposal does not contain any provisions as to when the Dutch manager may commence its cross border services or when the EU manager can commence its cross border activities in the Netherlands. However, based on the UCITS IV Directive a manager can commence the provision of its services once the competent authority of its home member state has notified the competent authority of the relevant EU member state (i.e. ultimately within one month after having notified the competent authority of its home member state). However, if the manager has also submitted a request for approval to manage a UCITS to the competent authorities of the relevant member state, a longer term can apply

Dutch requirements applicable to EU managers

17. EU managers managing a Dutch UCITS or managing or offering units in UCITS in the Netherlands through a branch office are subject to certain Dutch requirements, in particular to rules of conduct with respect to complaints procedures, conflict of interests, conduct of business and delegation of services. The EU manager providing cross border services in the Netherlands is subject to fewer Dutch regulations.

Master/Feeder UCITS

18. The Proposal introduces the master UCITS and the feeder UCITS into the FSA allowing groups of UCITS to substantially pool their assets. To qualify as a feeder UCITS at least 85% of the invested assets (*vermogen*) of a UCITS must be invested in a master UCITS.
19. A Dutch UCITS requires AFM approval to become a feeder UCITS. In addition, the decision to become a feeder UCITS triggers an obligation for the intended feeder UCITS to enable its unit holders to offer their units in the intended feeder UCITS for redemption or repurchase by the intended feeder UCITS at cost price.
20. To ensure that the feeder UCITS has sufficient and correct information on the master UCITS, agreements for the exchange of information must be entered into between:

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- a. the feeder UCITS and the master UCITS (unless they are part of a group in which case internal regulations suffice);
 - b. the custodians of the feeder UCITS and the master UCITS; and
 - c. the accountants of the feeder UCITS and the master UCITS.
21. In view of the connection between a feeder UCITS and a master UCITS, the manager of a feeder UCITS is entitled to suspend the redemption, repurchase or repayment of or subscription for the feeder UCITS' units, if the master UCITS, whose units it holds, temporarily suspends the redemption, repurchase or repayment of or subscription for its units.
22. In addition, depending on the circumstances the liquidation or merger of a master UCITS may trigger the liquidation of its feeder UCITS.
23. Generally, in the Netherlands a UCITS will have the tax status of *fiscale beleggingsinstelling* (FBI) -taxed at a 0% corporate income tax rate- or *vrijgestelde beleggingsinstelling* (VBI) - exempt of corporate income tax. To qualify as FBI, certain detailed requirements apply, including requirements as to directors and shareholders. As a result of those requirements, it may not always be possible for a master UCITS to qualify as FBI.
- Merger of UCITS**
24. The possibility to merge different UCITSs and/or their subfunds nationally and cross border is intended to stimulate the internal market and create economies of scale. Under the Proposal two or more UCITSs can merge:
- a. through a legal merger whereby (i) an existing UCITS (the "**receiving UCITS**") acquires all the assets and liabilities of another UCITS who will then dissolve ("**merging UCITS**"), or (ii) a new UCITS incorporated by the merging UCITS (for the purpose of and as a result of the merger) will acquire the assets and liabilities of at least two merging UCITS; or
 - b. through the joining of the assets of a merging UCITS and a receiving UCITS, whereby the merging UCITS will not be dissolved until its liabilities have been settled ("**asset merger**").
25. A merging Dutch UCITS must notify the AFM of an intended merger and obtain its prior approval before implementing the merger.
26. The merging and the receiving UCITS must inform their unit holders about the intended merger after the AFM and, if applicable, the other relevant competent authority of an EU member state have consented to the merger.

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27. The merging UCITS must enable its unitholders to have their units redeemed, repurchased or to exchange them for units in a similar UCITS managed by the same manager or an affiliated manager prior to the execution of the merger.

Key investor information

28. Key investor information as prescribed by the EU Commission's Regulation 583/2010 will be required for the offering of units in collective investment schemes. The key investor information format will be a harmonised format within the EU to ensure adequate investor protection and guarantee the comparability of information.

29. Under the Proposal and the draft general administrative measure, the requirement to draw up and provide key investor information applies to the offering of all units not only units in UCITS. This is intended to further facilitate investors and allow them to make comparisons between various types of units.

Implementation

30. The provisions of the UCITS IV Directive should be implemented and be applied by the Member States as of 1 July 2011. Considering the late date at which the Ministry of Finance has sent the proposal to the Parliament it remains to be seen whether the deadline will be met.

31. The Proposal provides that it enters into force on 1 July 2011. If the Proposal is published in the State Gazette (*Staatsblad*) after 1 July 2011, the Proposal will enter into force the day after its publication. The draft general administrative measure provides that it will enter into force the day after its publication in the State Gazette.

If you have any queries regarding this newsletter, please do not hesitate to contact one of our investment management specialists or tax specialists.

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