

Luxembourg CSSF: Final Brexit Preparations December 2020

On 7 December 2020, Luxembourg's financial regulator, the Commission de Surveillance du Secteur Financier ("CSSF") issued a press release¹ to clarify and reiterate the actions that management entities located in the United Kingdom ("UK")² and which manage and / or market Luxembourg funds on a cross-border basis need to take prior to the end of the transitional period for Brexit, i.e. 31 December 2020. The CSSF also addresses certain other Brexit related issues in the press release.

Background

The press release follows on from various Brexit related communications issued by the CSSF over the course of 2019 and 2020. These earlier communications sought to give UK entities, which provide services in Luxembourg under the relevant European Union ("EU") passport regime, comfort and guidance in terms of the status quo and actions such entities could take to ensure business continuity in a post-Brexit environment.

During the transitional period ("TP"), which will end at midnight on 31 December 2020, EU laws and regulations apply to the UK and UK entities continue to benefit from the EU passport regimes. The CSSF, conscious of the impending

¹ <https://www.cssf.lu/en/2020/12/end-of-the-transitional-period-on-31-december-2020-following-the-withdrawal-of-the-united-kingdom-of-great-britain-and-northern-ireland-from-the-european-union/>

² Any reference to UK entity or UK entities also includes entities established in Gibraltar.

deadline, has issued guidance in the form of this press release to ensure UK entities as well as the Luxembourg funds they manage and / or market are aware of the state of play from 1 January 2021 along with the steps they should take to ensure business continuity and minimise operational impact.

Management of Luxembourg Funds on a Cross-border Basis

UK IFMs

Luxembourg funds currently managed by an investment fund manager ("IFM") established and licensed in the UK that wish to maintain EU passporting rights after 31 December 2020 will need to appoint an IFM located in one of the twenty-seven EU member states ("EU27"). A change of IFM will terminate the existing cross-border management notification at midnight on 31 December 2020 and a new cross-border management notification must be submitted under Article 33 of the AIFMD³ or Articles 16 – 21 of the UCITS Directive⁴ in accordance with the notification procedure applicable in the relevant EU member state. In addition, Luxembourg funds supervised by the CSSF⁵ must inform the CSSF of the change of IFM.

³ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:174:0001:0073:EN:PDF>

⁴ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:302:0032:0096:en:PDF>

⁵ To be understood as a fund that is subject to specific 'product' regulation in Luxembourg, i.e. a SIF, SICAR or similar.

The CSSF notes in certain limited circumstances a Luxembourg alternative investment fund ("AIF") supervised by the CSSF⁶ may continue to be managed by a UK IFM after 31 December 2020. Entities and funds opting for this approach must observe the notification procedure and requirements set out in CSSF press release 19/48⁷ which we summarised in our October 2019 client update⁸.

Luxembourg AIFs supervised by the CSSF whose constitutive and / or information document addresses Brexit, its consequences and the measures that may be taken upon the occurrence of Brexit are exempt from this notification procedure but should nevertheless take the appropriate actions and, to the extent relevant, inform the CSSF of the change of IFM (if applicable) and / or update their offering documents accordingly.

The press release highlights that, in the scenario where the IFM is not changed to an EU27 IFM, the EU marketing passport will no longer be available.

While the press release does not explicitly address Luxembourg AIFs that are not subject to CSSF supervision, its silence in this regard acknowledges that AIFs which are not subject to specific 'product' regulation may continue to be managed by a UK IFM. There are no notification requirements applicable in this context and as noted, the EU marketing passport will no longer be available.

Luxembourg IFMs

Luxembourg IFMs currently managing UK funds and / or operating in the UK through a branch are reminded that they must opt in to the UK's

temporary permissions regime ("TPR") in order to be able to continue to provide services in the UK. The CSSF also requires Luxembourg IFMs that have made a TPR notification to inform it of such notification.

UK UCITS will automatically cease to be UCITS on 1 January 2021 and Luxembourg IFMs must ensure they are authorised as an AIFM (which includes ('Super ManCos')) if they intend to continue managing these funds. To the extent these funds are not marketed in the EU, Article 34 of the 2013 Law⁹, which stipulates certain limited conditions, will apply to the Luxembourg IFM from 1 January 2021.

Cross-border Distribution of Luxembourg Funds

The loss of passporting distribution rights requires entities to take positive action by withdrawing their current marketing notification ("Deregistration Notification") and, where applicable, either submitting a new notification or requesting authorisation.

The loss of passporting distribution rights also applies to EuVECAs, EuSEFs and ELTIFs which have appointed a UK IFM and are marketing into Luxembourg.

Deregistration Notification

A Deregistration Notification must be made by email to one of the email addresses below and must indicate whether (i) any Luxembourg investors will remain invested in the fund/sub-fund in question and (ii) a new marketing notification will be submitted following the TP¹⁰:

⁶ See note above.

⁷ https://www.cssf.lu/wp-content/uploads/files/Publications/Communiqués/Communiqués_2019/CP1948_mandatory_notification_Brexit_111019.pdf

⁸ <https://maples.com/en/Knowledge-Centre/Industry-Updates/2019/10/Luxembourg-CSSF-Mandatory-Notifications-October-2019>

⁹ <https://www.cssf.lu/en/document/law-of-12-july-2013-coordinated-version/>

¹⁰ Note automatic deregistration in cases of filing of notifications under Articles 37 or 45 of the 2013 Law – see below.

- UCITS: NOTIF-OPCETRUPD@cssf.lu;
- AIFs with a Luxembourg AIFM: luaifm31up@cssf.lu or luaifm32up@cssf.lu depending on the context of the notification; or
- AIFs with an EU AIFM (excluding Luxembourg AIFMs): to the AIFM's national competent authority.

The press release imposes new (re-) registration and reporting obligations on each fund for which a Deregistration Notification has been made, provided that Luxembourg investors remain invested in the fund at the end of the TP and it will no longer be actively marketed to Luxembourg investors. This does not apply to UK AIFs with an EU27 IFM currently marketing in Luxembourg under Article 29 or Article 31 of the 2013 Law provided that no further active marketing is undertaken after 31 December 2020.

New Marketing Notification/Request for Authorisation

The rules set out in the 2010 Law¹¹ or the 2013 Law will apply to all new marketing notifications or requests for authorisation to market in Luxembourg. The CSSF emphasises the distinction between marketing AIFs to professional investors and non-professional (i.e. retail) investors in Luxembourg and confirms that all UK AIFs will qualify as third-country AIFs and UK UCITS will qualify as AIFs unless they fail to meet the AIF criteria.

Marketing to Professional Investors in Luxembourg

After the TP, marketing to professional investors will have to be conducted in accordance with the national private placement regimes. In Luxembourg, Article 37 of the 2013 Law will apply where UK AIFs are managed by an EU27

IFM, while Article 45 of the 2013 Law will apply where an AIF is managed by a UK IFM. In both instances, a notification will only be necessary where marketing in Luxembourg will continue after 31 December 2020.

Notifications under Articles 37 and 45 must be made by email to aifm@cssf.lu prior to the commencement of any marketing activity and include the required form. Notifications made under Articles 37 and 45 will automatically result in a Deregistration Notification.

Luxembourg IFMs Managing UK AIFs

The CSSF reminds Luxembourg IFMs managing UK AIFs and availing of the marketing passport under Article 30 of the 2013 Law to review the marketing requirements applicable to third-country funds in the relevant member states in advance of 1 January 2020. Appropriate action should also be taken in this respect.

Marketing to Retail Investors in Luxembourg

In order to market regulated EU and non-EU UCIs managed by a UK IFM and regulated EU and non-EU AIFs managed by an EU27 IFM to retail investors in Luxembourg, authorisation under Article 100(1) of the 2010 Law and Article 46 of the 2013 Law respectively must be sought.

Authorisation requests under Article 46 of the 2013 Law must be sent by email to opc@cssf.lu and include the required form. CSSF Regulation N° 15-03¹² contains detailed rules on the procedure and the conditions applicable to the marketing of foreign AIFs to Luxembourg retail investors.

The CSSF will publish further details on the procedure for requesting authorisation under Article 100(1) of the 2010 Law in due course.

¹¹ <https://www.cssf.lu/en/Document/law-of-17-december-2010/>

¹² https://www.cssf.lu/wp-content/uploads/files/Lois_reglements/Legislation/RG_CSSF/RCSSF_No15-03eng.pdf

Other Brexit Related Issues in Relation to UCIs

Delegation of Portfolio Management and / or Risk Management

The CSSF again took the opportunity¹³ to remind market participants that Luxembourg law permits the delegation of portfolio management and / or risk management activities to undertakings located outside the EU, provided:

- The third country undertaking is authorised or registered for the purpose of asset management;
- The third country undertaking is subject to prudential supervision; and
- Cooperation between the CSSF and the relevant third country's competent authority is ensured.

On 1 February 2019, the European Securities and Markets Authorities ("ESMA") issued a press release confirming that ESMA and the European securities regulators had agreed a multilateral memorandum of understanding ("MMoU") with the Financial Conduct Authority ("FCA"). The MMoU secures post-Brexit delegation of portfolio management and / or risk management activities to undertakings located in the UK.

On 17 July 2020, ESMA, the European securities regulators and the FCA confirmed that the MMoU will come into effect at the end of the TP.

Compliance with investment policy and eligibility issues

Breach of investment policy

From 1 January 2021, the CSSF will consider and treat each non-compliance with a UCITS' investment policy and restrictions that is triggered

¹³ <https://maples.com/en/Knowledge-Centre/Industry-Updates/2019/01/ESMA-and-Luxembourg-CSSF-Updates>

¹⁴ https://www.cssf.lu/wp-content/uploads/files/Lois_reglements/Circulaires/Hors_blanc_himent_terrorisme/cssf02_77eng.pdf

by the UK's withdrawal from the EU as an active breach. The press release confirms that such non-compliance will not fall within the scope of Article 49(2) of the 2010 Law for the purpose of CSSF circular 02/77¹⁴.

UCITS Master-Feeder Structures

In the context of a Luxembourg UCITS feeder fund investing into a UK UCITS master fund, the CSSF notes that from 1 January 2021 a UK UCITS master fund will qualify as an "other UCI" within the meaning of Article 41(e) and Article 46 of the 2010 Law. The CSSF also notes that investments into funds qualifying as 'other UCIs' may not in aggregate exceed 30% of the assets of the Luxembourg UCITS feeder fund.

Money Market Funds

Article 12(c) of Regulation (EU) 2017/1131¹⁵ ("MMFR") considers a deposit with a credit institution to be an eligible investment for a money market fund provided:

- It is repayable on demand or is able to be withdrawn at any time;
- It matures in no more than 12 months; and
- It is made with an EU credit institution or a non-EU credit institution subject to prudential rules considered equivalent to those laid down in Regulation (EU) No 575/2013¹⁶.

The CSSF confirms that, from 1 January 2021, credit institutions with a UK registered office will not satisfy item (c) of Article 12(c) of the MMFR if status quo is maintained.

¹⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R1131&from=EN>

¹⁶ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0575&from=EN>

Secondments

The CSSF confirms that secondment arrangements relating to collective portfolio management activities as foreseen by Article 3 of Commission Directive 210/43/EU¹⁷ and Article 1(2)(b) of Commission Delegated Regulation (EU) No 231/2013¹⁸ remain acceptable, provided that there is compliance with all applicable requirements and the IFM ensures appropriate supervision over the secondees. Certain applicable requirements include:

- A physical presence at the premises of the IFM (business travel equates to physical presence at the IFM's premises); and
- Notifying the CSSF prior to the use of secondees.

Specifically in the context of Brexit, the CSSF clarifies that certain functions, including the marketing function, may need to be reorganised prior to 31 December 2020 if UK secondees are not physically present in Luxembourg.

How can the Maples Group help?

We are assisting clients and their international advisers who are considering what measures they should take in light of this press release to ensure compliance with the relevant requirements.

While the majority of entities and funds are well advanced in their Brexit preparations, now is the time to finalise those Brexit plans. When doing this, entities and funds should consider, *inter alia*:

- Whether an existing UK IFM needs to be replaced with an EU27 IFM;
- Whether the current distribution strategy is appropriate once the TP ends;
- Whether any changes must be made to the investment policy and / or restrictions; and
- Whether any fund documents need to be updated and, where appropriate, filed with or approved by the CSSF or another national competent authority.

Further Information

For further information, please contact one of the below contacts or your usual Maples Group contact.

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This update is intended to provide only general information for the clients and professional contacts of the Maples Group. It does not purport to be comprehensive or to render legal advice.

¹⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010L0043&from=EN>

¹⁸ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:083:0001:0095:EN:PDF>