

Luxembourg issues a bill of law on Brexit

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In light of developments over recent months and the fact that the exact conditions of the withdrawal of the United Kingdom (**UK**) from the European Union (**EU**) remain uncertain due to the rejection of the withdrawal agreement on January 15 2019 by the UK Parliament, the Luxembourg legislature took the pre-emptive step on 31 January 2019 of introducing a Bill of Law No 7401 (the **Bill**) on measures to be taken in relation to the financial sector in case of withdrawal of the UK from the EU .

The primary objective of the Bill is to preserve the stability of financial markets, enable investor protection and avoid risks for British enterprises carrying out financial activities in the EU Member States, as well as for players of the Luxembourg financial sector. It gives Luxembourg regulatory and supervisory authorities the powers, strictly limited in scope and time, necessary to implement temporary measures they deem necessary to ensure continuity in the financial sector.

The proposed amendments to the primary legislation relating to the financial markets being proposed by the Bill are summarised below.

Investment funds

The law of 17 December 2010 relating to undertakings for collective investment (**UCI Law**), and the law of 12 July 2013 on alternative investment fund managers (**AIFM Law**) are to be amended in a way that, in the case of withdrawal of the UK from the EU without a withdrawal agreement based on article 50 of the Treaty on European Union (no-deal Brexit), the Luxembourg Financial Sector Supervisory Authority (*Commission de Surveillance du Secteur Financier, CSSF*) will be able to take certain measures, in order to maintain proper functioning or stability of financial markets, or to guarantee the protection of shareholders and unit-holders or investors.

In that regard, the CSSF may continue to apply the management passporting regime towards management companies of undertakings for collective investment in transferrable securities (**UCITS**) and alternative investment fund managers (**AIFMs**), for a maximum duration of 21

months starting from 29 March 2019, the date of withdrawal of the UK from the EU **(Withdrawal date)**.

Conditions for application of the aforementioned management passporting regime are the following:

- a. management companies must be authorised as such by the UK authorities, under the Directive 2009/65/EC[1] or Directive 2011/61/EU[2];
- b. UCITS or AIFs they manage have to be established in Luxembourg; and
- c. management activities have to be carried out in Luxembourg through an established branch or *via* the free provision of services.

The regime will also apply to contracts entered into after the Withdrawal Date, but only in the case of them having a close link with a contract existing at the moment of withdrawal.

Activities under (c) covered by this provision consist of:

- a. For UCITS ManCos:
 - i. management of UCITS authorised under the Directive 2009/65/EC, ie portfolio management, administration and marketing (as stated in the Annex II of the UCI Law);
 - ii. management of other UCIs not covered by that Directive and for which they are subject to prudential supervision and units of which are not marketed in other Member States;
 - iii. management of portfolios of investments in certain financial instruments[3], including those owned by pension funds, in accordance with mandates given by investors on a discretionary, client-by-client basis;
 - iv. as non-core services: investment advice concerning financial instruments mentioned under (iii); and
 - v. safekeeping and administration in relation to units of UCIs.
- a. For AIFMs:
 - i. investment management/portfolio and/or risk management and other additional functions in the course of collective management of an AIF, such as administration, marketing and activities related to the assets of AIFs (as stated in the Annexe I of the AIFM Law)
 - ii. additional management of UCITS subject to authorisation under Directive 2009/65/EC
 - iii. additional management of portfolios of investments, including those owned by pension funds and institutions for occupational retirement provision, in accordance with mandates given by investors on a discretionary, client-by-client basis; and

- iv. additional non-core services comprising investment advice, safe-keeping and administration in relation to shares or units of collective investment undertakings and reception and transmission of orders in relation to financial instruments.

An equivalent transitional regime is planned for insurance and reinsurance companies and will be exercised by the Luxembourg Insurance Commission (*Commisariat aux Assurances, CAA*).

Financial Sector

The law of 5 April 1993 relating to the Financial Sector, as amended (**the FSL**), the law of 10 November 2009 on payment services, as amended (**the PSL**) and the law of 18 December 2015 on the resolution, reorganisation and winding up measures of credit institutions and certain investment firms and on deposit guarantee and investor compensation schemes (**the Bail-In Law**) are proposed for amendment in a way that, in the case of withdrawal of the UK from the EU without a withdrawal agreement based on article 50 of the Treaty on European Union (**no-deal Brexit**), the CSSF will be able to take certain measures, in order to maintain proper functioning or stability of financial markets, or to guarantee the protection of depositors and investors.

Amendments to the FSL

In that regard, the CSSF may continue to apply the provisions under article 30 of the FSL applicable to community credit institutions and investment firms to UK credit institutions exercising the freedom to provide services or who have an established branch or who have a tied agent in Luxembourg at the Withdrawal Date, for a maximum duration of 21 months starting from the Withdrawal Date, notwithstanding the fact that such UK credit institutions or investment firms will no longer qualify as community credit institutions or investment firms.

The CSSF may also continue to apply the provisions applicable to community credit institutions and investment firms under article 30 of the FSL to other regulated UK firms (that provide authorized financial services and who are providing such services in Luxembourg through the freedom to provide services, via an established branch or via a tied agent at the Withdrawal Date for a maximum duration of 21 months starting from the Withdrawal Date, notwithstanding the fact that such UK firms will no longer qualify as community firms.

The continued application of the community provisions as set out above and the corresponding exemptions from the requirements under the FSL for non-community credit institutions, investment firms and other firms providing financial services shall be available only for contracts concluded prior to the Withdrawal date or on the condition that the contracts concluded thereafter have a direct link with contracts in existence at the time of the Withdrawal Date.

Amendments to the PSL

The Bill proposes amending the scope of the PSL to expressly exclude payment systems and securities settlement systems from the provisions relating to final settlement in payment and securities settlement systems (**Final Settlement Provisions**), although certain exemptions are also foreseen (detailed below).

A new definition of "third country system" shall be included in the Final Settlement Provisions, which shall require two specific conditions to be met in order for a system to fall within this definition:

- a. it must be subject to supervision by a state regulatory authority whose central bank holds an interest in the capital of the Bank for International Settlements; and
- b. it admitted by the Central Bank of Luxembourg (CBL) to its list of payment systems and securities settlement services in third countries.

As mentioned in point (b) above, the CBL shall be required to establish an official list of payment systems and securities settlement services in third countries that meet the requirements of a "third country system" set out above and have been admitted to the list by the CBL. The list shall be available on the CBL website and published at least once a year (at year-end) in the Luxembourg official gazette (*Journal Officiel du Grand-Duché de Luxembourg*).

The Bill provides for the following exemptions to the exclusion of "third country systems" from the scope of the Final Settlement Provisions:

- the insolvency ring-fencing provisions are preserved in respect of "third country systems" provided they meet the definition requirements;
- the opening of insolvency proceedings provisions are preserved in respect of "third country systems" provided they meet the definition requirements;
- the reporting obligation on the CBL to inform the operator of a "third country system" in the event that it has received notification of any application or decision to open insolvency proceedings in respect of a Luxembourg participant; and
- the information obligations imposed on Luxembourg institutions participating in "third country systems" are preserved.

Similar to the amendments proposed to be introduced to the FSL, the CSSF may continue to apply the community provisions under article 21 to UK payment institutions and under article 24-15 to electronic money institutions exercising the freedom to provide services or who have an established branch or who have a tied agent in Luxembourg at the the date of the Withdrawal Date for a maximum duration of 21 months starting from the Withdrawal Date, notwithstanding the fact that such UK payment and electric money institutions will no longer qualify as community institutions.

The continued application of the community provisions shall be subject to the same requirements as for the FSL i.e. available only for contracts concluded prior to the Withdrawal Date or on the condition that the contracts concluded thereafter have a direct link with contracts in existence at the time of the Withdrawal Date.

Amendments to the Bail-In Law

The Bill proposes that the exemptions to the Bank Recovery and Resolution Directive^[4] "bail-in tools" transposed into Luxembourg law by the Bail-In Law be preserved.

The timing of the publication of this Bill coincides with the signing of a memorandum of understanding (MoU) between ESMA and the UK Financial Conduct Authority (FCA), as well as a multilateral MoU between the FCA and National Competent Authorities (NCAs) of Member States. Although the text of the MoUs has not yet been published, ESMA officials have stated that it will address portfolio management delegation to UK asset managers and the exchange of information needed for proper functioning of connected financial markets.. In that context, post-Brexit the FCA will be vested with broad transitional powers allowing it implement various measures without the need for the UK Parliament's approval or scrutiny, allowing the FCA to adapt to the timing of changes and to ensure alignment with EU legislation and consequently preserving the integrity of the market.

This law represents one of the measures Luxembourg has taken alongside ESMA, and aligned with its policies, in order to minimise disruptions on a wider market. In the future, we expect to witness similar measures to be taken by other Member States' regulators, as well as further clarifications to be given by the Luxembourg authorities.

Should you have any queries, please contact Ogier in Luxembourg.

^[1] Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)

^[2] Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers (AIFMD)

^[3] As listed in the section B Annex II of the Luxembourg Law of 5 April 1993 on the financial sector, as amended.

^[4] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment

firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council

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Meet the Author



Anne-Gaëlle Delabye

Partner

Luxembourg Legal Services

E: anne-gaëlle.delabye@ogier.com

T: [+352 2712 2039](tel:+35227122039)

Key Contacts



Aurélie Clementz

Partner

Luxembourg Legal Services

E: aurelie.clementz@ogier.com

T: +352 691 432 024



Bertrand Gérardin

Partner

Luxembourg Legal Services

E: bertrand.geradin@ogier.com

T: +352 2712 2029



Laurent Thailly

Partner

Luxembourg Legal Services

E: laurent.thailly@ogier.com

T: + 352 2712 2032



Hadrien Brémon

Counsel

Luxembourg Legal Services

E: hadrien.bremon@ogier.com

T: +352 27 12 20 71

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