

Brexit CSSF on the end of the transitional period

Insights - 09/12/2020

On 7 December, the Luxembourg Financial Sector Supervisory Authority (the CSSF) issued a press release which restates and/or clarifies some aspects of the end of the post-Brexit transitional period (31 December 2020).

The key points of the press release are summarised below.

Application of EU law – cessation of passporting rights

Following the end of the transitional period, EU law will cease to apply in the UK – current passporting rights of UK entities under EU legislation will be terminated as of 1 January 2021.

This will especially have an impact on all UK managers managing, on a cross-border basis, UCITS and AIFs established in Luxembourg, as well as passporting rights for cross-border marketing in Luxembourg.

Actions to be taken

The CSSF has highlighted the need for impacted funds to take action by 31 December 2020 (if not already the case), depending on their particular situation.

1) Passporting rights related to the cross-border management of Luxembourg funds

In order to maintain passporting rights, all Luxembourg funds currently managed by a UK manager need to appoint an EU-27 manager. Notifications received by the CSSF under the AIFMD and UCITS Directive will be terminated on 31 December – new ones (under article 33 of the AIFMD of articles 16 to 21 of the UCITS Directive, respectively) will have to be submitted to

the regulator of the home Member State and the CSSF duly informed of such a change of manager.

Luxembourg AIFs may, under certain circumstances, maintain their current UK management – in that case, no passporting rights attached to the manager will remain. This situation is limited to those AIFs which:

(i) obtain an approval^[1] of their investors (consisting exclusively of professional^[2] and/or well-informed^[3] ones) in accordance with the conditions laid down for an amendment of articles of association or limited partnership agreements, and

(ii) submit a corresponding email notification to the CSSF, accompanied with supporting documentation,

all before 31 December 2020^[4].

To continue managing funds established in the UK, Luxembourg IFMs need to apply for the Temporary Permissions Regime before the Financial Conduct Authority (the FCA) (and UCITS ManCos will have to be authorised as AIFMs to be able to continue to manage UK UCITS).

2) Passporting rights related to cross-border distribution on funds into Luxembourg

As passporting rights will cease after 31 December, a notification on the withdrawal from the cross-border distribution will have to be submitted to the CSSF via email. This may be followed by a new notification on the appointment of an EU-27 manager through the home Member State supervisory authority, or by a request for authorisation of the manager in Luxembourg, submission of which has to be announced already in the withdrawal notification.

If a UK UCITS or AIF managed by UK AIFM, which has expressed an intent to withdraw from marketing in Luxembourg, retains local investors after the end of the transitional period without pursuing active marketing, it needs to be registered with the CSSF and carry out continuous reporting obligations.

The CSSF has highlighted that, as of 1 January 2021, marketing of all UK funds qualifies as marketing of third-country AIFs, and UK managers will be considered as third-country managers. Given that UK UCITS will cease to be authorised under the UCITS Directive, they will qualify as AIFs from a Luxembourg perspective, should they meet the relevant AIF criteria.

(a) marketing in Luxembourg to professional investors

Following an appropriate notification, this activity will be performed either in accordance with rules applicable to marketing of UK AIFs managed by an EU-27 AIFM (article 37 of the AIFM law^[5] / article 36 of the AIFMD), or those applicable to the marketing of EU or third country AIFs

managed by a UK manager (article 45 of the AIFM law/article 42 of the AIFMD).

In the first case scenario, a notification under article 37 of the AIFM law is required only when active marketing will continue to be carried out after 31 December 2020. UK AIFs notified for marketing in Luxembourg under the provisions of articles 31 and 32 of the AIFMD (in the home state of the AIFM or in Member States other than the home state, respectively) will need to register for active marketing under article 37 of the AIFM law, triggering an automatic withdrawal of the previous notification. The second situation will produce a similar effect: a notification under article 45 of the AIFM law is required before the start of marketing activities and will also trigger a notification withdrawal.

Finally, Luxembourg AIFMs managing UK AIFs and having notified marketing of those AIFs to professional investors in other EU Member States were reminded of the need to verify and/or review applicable marketing provisions in relevant EU Member States after 31 December 2020.

(b) marketing in Luxembourg to retail investors

Open-ended regulated funds will need to seek authorisation for marketing to retail investors, whether under article 100-1 of the UCI law^[6] if managed by a UK manager (EU or third-country UCIs), or under article 46 of the AIFM law, if managed by a EU-27 manager (EU or third country AIFs).

3) delegation of investment management/portfolio management and/or risk management activities to undertakings in the United Kingdom

The CSSF has issued a reminder that Luxembourg law allows the delegation of investment management/portfolio management and/or risk management activities to undertakings in third countries if three conditions are met:

- (i) such undertakings are authorised or registered for the purpose of asset management,
- (ii) are subject to prudential supervision, and
- (iii) the cooperation between the CSSF and the FCA is ensured. The latter condition was met on 1 February 2019, when ESMA, EU national securities regulators and the FCA signed a memorandum of understanding which covers inter alia, supervisory cooperation and expressly allows for such delegation to UK based entities.

4) Compliance with investment policy and eligibility issues

Another reminder concerns potential breaches of investment policies and states that any issues of non-compliance with investment policies arising from the end of the transitional period shall be considered as active breaches.

Considering UCITS master-feeder structures, Luxembourg established UCITS feeder will be allowed to invest in a UK UCITS master only to the threshold of 30% of their assets.

As for money market funds, the CSSF has raised attention to the fact that deposits with a credit institution having its registered office in a third country are eligible investments only where such an institution is subject to prudential rules deemed equivalent to those laid down by EU law, which is not the case with UK credit institutions at the time.

5) Staff secondments

Finally, the CSSF has confirmed that it finds staff secondments from the UK acceptable, if compliance with applicable requirements^[7], as well as appropriate supervision are ensured. Professional travels are acceptable, considering one of the requirements is physical presence on the premises of the Luxembourg IFM. Those IFMs which intend to operate secondments must notify the CSSF beforehand. If certain functions of the IFM, especially in relation to marketing, are staffed with UK secondees that are not always present, the CSSF highlights the need to assess and review and/or reorganise such functions, in principle prior to 31 December 2020.

[1] It might not be required if the fund's constitutive or information documents already provide for such an option.

[2] As defined under article 3 of Directive 2011/61/EU

[3] As defined under article 2 of the Luxembourg law of 15 June 2004 relating to the investment company in risk capital or under article 2 of the Luxembourg law of 13 February 2007 on specialised investment funds, under article 2 of the Luxembourg law of 23 July 2016 on reserved alternative investment funds, or such other equivalent local law standard.

[4] "...when circumstances justify a delay, an explanation of such circumstances together with a copy of the appropriate convening notice (or draft consultation) duly sent to the shareholders/limited partners, and as the case may be, to the bondholders." For more details, please refer to the [CSSF press release 19/48](#).

[5] Law of 12 July 2013 on alternative investment fund managers

[6] Law of 17 December 2010 on undertakings for collective investment

[7] Article 3 of the UCITS Directive related Commission Directive 2010/43/EU and Article 1 (2) (b) of the AIFMD related Commission Delegated Regulation (EU) 231/2013

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