

CSSF clarifies MiFID application to Luxembourg investment fund managers

News - 26/07/2021

On 10 June 2021, the Luxembourg Financial Sector Supervisory Authority (the **CSSF**) has issued new versions of (i) its frequently asked questions (**FAQs**) relating to the Law of 17 December 2010 on undertakings for collective investment (the 2010 Law) and (ii) its FAQs covering the Law of 12 July 2013 on alternative investment fund managers (the **2013 Law**).

Both FAQs have been updated following the publication of a FAQ from the CSSF relating to the application of MiFID [1] provisions to Luxembourg Investment Fund Managers (**IFMs**).

First of all, the CSSF has highlighted that collective portfolio management of funds does not fall within the scope of [2] MiFID, if undertaken by IFMs themselves.

Should this not be the case, and an IFM delegates one or more functions included in the collective portfolio management to another authorised IFM, or to a third-party, this exemption will not apply, and the IFMs that delegate part of their functions shall qualify as clients under MiFID.

Effects of such delegations will vary, depending on the service provider:

- If third parties are mandated to execute the activity on behalf of the IFM, the IFM is considered as a client and the third party may be subject to MiFID rules if the service rendered (i) qualifies as an investment service under Section A Annex I of MiFID, (ii) relates to transactions on financial instruments under Section C Annex I of MiFID (the Financial Instruments) and, (iii) is provided by a third party established in the EU or considered to be provided in Luxembourg by a non-EU third party under Part III of CSSF Circular 19/716 [3].
- In case of a delegation to another IFM, the delegate will, in principle and depending on the tasks performed, be authorised to provide discretionary portfolio management and non-core services, such as investment advice, administration of units and transmission of orders [4]. They will neither be subject to all MiFID rules [5], nor be authorised to provide all MiFID services or activities [6].

Considering marketing, the same principle applies:

- Luxembourg IFMs that market funds that they do not directly manage on behalf of another IFM are viewed as an intermediary under MiFID, and required to be authorised under the 2010 or 2013 Law (depending on the type of fund and service provided – eg discretionary portfolio management and, at least safekeeping and administration of UCIs or, for authorised AIFMs, transmission of orders) [7];
- EU IFMs in the same situation need to be authorised under the UCITS or AIFM Directive [8].

Furthermore, the CSSF has clarified that, although fund marketing is not considered as an investment service under MiFID [9], some MiFID services may be used for fund distribution:

- "Reception and transmission of orders relating to UCIs;
- Execution of orders on behalf of clients;
- Dealing on own account;
- Portfolio management;
- Investment advice;
- Underwriting and/or placing of UCIs on a firm commitment basis;
- Placing of UCIs without a firm commitment basis."

The CSSF has also specified that investment advice activities are not included in collective portfolio management, as set out in the 2010 and 2013 Laws. Therefore, such advice qualifies as personal recommendations^[10] issued to a client and, if provided in relation to the aforementioned Financial Instruments, is subject to MiFID rules. Delegation to another IFM is possible if the latter is also authorised to provide investment advice under the 2010 or 2013 Laws, respectively^[11].

Finally, the FAQ covers certain cases in which third parties providing investment services to IFMs may benefit from MiFID exemptions:

- Intragroup service exemption^[12];
- Services complementary to their professional activities^[13]; and
- Investment advice not specifically remunerated, if rendered within another non-MiFID professional activity^[14].

A partial exemption is further foreseen for authorised EU IFMs providing discretionary portfolio management and non-core services^[15].

Should the third party perform any of the above activities without an authorisation, they must be able to prove that they fall out of scope of applicable MiFID provisions.

Finally, the CSSF has reminded concerned entities that it expects compliance with these FAQs as soon as possible, and by **31 December 2021** at the latest. In the meantime, it recommends that IFMs perform an analysis of their organisation model in order to assess potential needs for authorisations to provide services under Article 101 (3) of the 2010 Law or under Article 5 (4) of the 2013 Law, as well as compliance of third country entities acting as their delegates or on their behalf, with the third country regime foreseen in the CSSF's Circular 19/716.

[1] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments.

[2] Article 2 (1) of MiFID / article 1-1 (2) (i) of the Law of 5 April 1993 on the financial sector (the 1993 Law)

[3] Circular CSSF 19/716, as amended by Circular CSSF 20/743, on the provision in Luxembourg of investment services or performance of investment activities and ancillary services in accordance with Article 32-1 of the LFS.

[4] Article 101 (3) of the 2010 Law or article 5 (4) of the Law of 2013.

[5] Only articles 1-1, 37-1 and 37-3 of the 1993 Law and articles 15, 16, 24 and 25 of MiFID apply.

[6] Only those covered under article 101 (3) of the 2010 Law or under article 5 (4) of the 2013 Law.

[7] Articles 1-1, 37-1 and 37-3 of the 1993 Law and articles

15, 16, 24 and 25 of MiFID, will be applicable

[8] Article 6 (3) of the UCITS Directive or article 6 (4) of the AIFMD.

[9] Sections A and C Annex II of the 1993 Law or sections A and B of Annex I of MiFID.

[10] Article 9 of MiFID delegated regulation 2017/565.

[11] Article 101 (3) b) of the 2010 Law or under article 5 (4) (b) (i) of the 2013 Law.

[12] Article 1-1 (2) (b) and (c) of the 1993 Law or article 2 (1) (b) of MiFID.

[13] Article 1-1 (2) (b) and (c) of the 1993 Law or article 2 (1) (b) of MiFID.

[14] Article 1-1 (2) (l) of the 1993 Law or article 2 (1) (k) of MiFID.

[15] These are subject to articles 1-1, 37-1 and 37-3 of the 1993 Law and articles 15, 16, 24 and 25 of MiFID.

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