

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

Press release 20/26

This communication follows up on press releases 19/05, 19/07, 19/18, 19/33, 19/34, 19/41, 19/43, 19/48, 19/54, 20/03 and 20/23 issued by the Commission de Surveillance du Secteur Financier in the context of Brexit.

Following the departure of the UK from the EU on 31 January 2020 (the “withdrawal date”) and the forthcoming end of a time-limited transitional period which will operate until 31 December 2020 (the “transitional period”), the CSSF hereby would like to restate and/or clarify the following aspects.

Reminder:

As stated in CSSF press release 20/03 and during the transitional period, EU laws and regulations continue to apply in the UK and UK entities can continue to provide their services in Luxembourg on the basis of their current passporting rights under applicable EU legislation. Such passporting rights will be terminated as of 31 December 2020 at midnight and as such be lost as of 1 January 2021. Such lapse of passporting rights affects notably all UK managers (hereafter the “UK managers”) managing investment funds established in Luxembourg on a cross-border basis, i.e. UCITS and AIFs established in Luxembourg whether regulated under a sectorial law or not (hereafter “Luxembourg funds”). Such lapse of passporting rights also affects the passporting rights in relation to the cross-border marketing of UCITS and AIFs in Luxembourg in particular (and in the EEA at large).

As a consequence of such lapse of passporting rights, the following actions will need to be taken prior to (or by) 31 December 2020 at the latest by the impacted funds and/or managers to the extent no action has been taken so far.

References to the UCITS Directive or AIFMD refer to the Directive 2009/65/EC (“UCITS Directive”) or Directive 2011/61/EU (“AIFMD”) respectively, whereas references to the “Law of 2010” and the “AIFM Law” refer to the Law dated 17 December 2010 on undertakings for collective investment, as amended, and the Law of 12 July 2013 on alternative investment fund managers, as amended, respectively.

Any reference in this press release to UK entities also comprises entities established in Gibraltar.

(a) The lapse of passporting rights in relation to the management of Luxembourg funds on a cross-border basis

All Luxembourg funds currently managed by a UK manager will need to appoint an EU-27 manager (i.e. investment fund managers as defined in Circular CSSF 18/698 (“IFMs”) in the Luxembourg context) so as to maintain EU passporting rights. It is the duty of the governing body of each fund to ensure that appropriate action to such extent is being taken. As a consequence of such appointment, former notifications of cross-border management of funds under the UCITS Directive and/or the AIFMD respectively will be terminated on 31 December 2020 at midnight.

At the same time, new notifications of cross-border management under Article 33 of the AIFMD or Articles 16 to 21 of the UCITS Directive, as applicable, will need to be operated according to the standard procedure applicable in the home Member State of the newly appointed EU-27 manager. In the event of the appointment of a manager established in Luxembourg or in another EU-27 Member State, Luxembourg funds under the supervision of the CSSF will need to inform the CSSF of such change of manager.

Under limited circumstances Luxembourg AIFs under the supervision of the CSSF will be allowed to continue to be managed by their current UK managers (in such event no passporting rights under the AIFMD attached to the manager will be available). Please refer to the CSSF press release 19/48 for more details in respect of the information to be provided to the CSSF regarding the continuation of management by the UK manager, as well as the relevant email address to be used. The deadline of 31 October 2019, initially extended to 15 January 2020 under CSSF press release 19/54 is extended until 31 December 2020. The approval referred to in CSSF press release 19/48 might not be required if the AIF’s constitutive or information documents refer to Brexit consequences and already provide for measures that may be taken on the occasion of Brexit.

All Luxembourg IFMs currently managing funds established in the UK and/or operating in the UK through a branch and wishing to continue the provision of their management services in the UK, will need to apply for the Temporary Permissions Regime (“TPR”) in the UK and inform the CSSF of such application (see CSSF press release 19/05 and CSSF press release 20/23 as well as <https://www.fca.org.uk/brexit>). Luxembourg managers of UK UCITS must be authorised as an AIFM in Luxembourg so to be able to continue to manage these UK funds¹ after 31 December 2020. It is further to be noticed that Article 34 of the AIFM Law applies to this situation as of 1 January 2021 to the extent that the UK funds managed are not marketed in Member States.

(b) The lapse of passporting rights in relation to the cross-border distribution of funds into Luxembourg

In relation to the lapse of passporting rights for cross-border distribution of funds into Luxembourg under a European passport, the required action comprises a notification to withdraw from cross-border distribution into Luxembourg (de-notification) under the regime currently applicable, as well as a new notification or request for authorisation, as the case may be, under the procedures applicable to the manager set-up put in place in view of the Brexit (e.g. in case of a designation of a newly appointed EU-27 manager, a cross-border notification for a distribution into Luxembourg through the home Member State authority of the manager replacing the UK manager will need to follow). It is to be noted that such lapse of passporting rights also applies to EuVECAs, EuSEFs and ELTIFs with a UK manager marketing in Luxembourg.

De-notifications shall be made via email, using the email addresses which can be found on the relevant pages of the CSSF’s web-site (e.g. for UCITS the email address is: NOTIF-OPCET.RUPD@cssf.lu; for AIFs with a non-Luxembourg EU AIFM de-notifications have to be notified through the home National Competent Authority of the relevant AIFM, for AIFs with a Luxembourg AIFM either the email address luaifm31up@cssf.lu or luaifm32up@cssf.lu should be used depending on the current notification). In such de-notification, the CSSF also needs to be informed whether the fund (or any sub-fund thereof) to which the de-notification relates will retain Luxembourg investors and whether a new notification for marketing under the rules applicable after the transitional period will be submitted.

To the extent that a fund for which a de-notification for marketing has been notified to the CSSF continues to retain investors established in Luxembourg and provided that the fund does not wish to pursue any active marketing to investors in Luxembourg going forward, that fund is required to be registered with the CSSF to ensure that the CSSF remains informed and receives the relevant reporting for as long as investors established in Luxembourg are invested in such fund (see also the ESMA’s Questions and Answers on the application of the AIFM Directive – ESMA34-32-352). Such re-registration and reporting obligations do not apply to UK AIFs with an EU-27 AIFM currently notified for marketing in Luxembourg under Article 29 or 31 of the AIFM Law (Article 31 or 32 of the AIFMD) if no further active marketing shall be pursued after 31 December 2020. The re-registration and continuing reporting obligations shall apply to all funds that are currently marketed in Luxembourg and that retain investors established in Luxembourg after the end of the transitional period (i.e. UK UCITS and AIFs managed by a UK AIFM).

The continuing reporting obligations referred to above are those under Article 45 of the AIFM Law referring particularly to the documentation and information to be provided under articles 22, 23 and 24 of the AIFMD or Article 37 of the AIFM Law in the event a UK AIF appoints an EU-27 manager.

New notifications or requests for authorisations for cross-border marketing in Luxembourg shall be made under the rules applicable under the Law of 2010 or the AIFM Law, taking into account that a distinction needs to be made between marketing to professional investors and marketing to non-professional, i.e. retail investors, in relation to cross-border marketing of AIFs in Luxembourg. In this context, marketing of funds established in the UK automatically and in all instances qualifies as marketing of third-country AIFs in Luxembourg in accordance with the relevant provisions under the AIFM Law, and UK managers are automatically and in all instances to be considered as third-country managers as of 1 January 2021. It should be noted that, as of 1 January 2021, current UK UCITS will qualify as AIF from a Luxembourg perspective provided they meet the AIF criteria, given that they cease to be authorised under the UCITS Directive.

b.1) Marketing in Luxembourg to professional investors

Marketing to professional investors in Luxembourg will need to be operated mainly under the provisions of Article 37 or Article 45 of the AIFM Law (Article 36 or Article 42 of the AIFMD). Article 37 of the AIFM Law covers the marketing in Luxembourg after 31 December 2020 of UK AIFs managed by an EU-27 AIFM. Article 45 applies in relation to the marketing in Luxembourg of AIFs (EU AIF or third-country AIF, including UK AIFs) which are managed by a UK manager after 31 December 2020.

The CSSF requires the notification under Article 45 of the AIFM Law to be done by e-mail (ai_fm@cssf.lu) before the start of the marketing in Luxembourg. A [specific information form](#) is available on the CSSF’s website.

It is to be noted that a notification under Article 45 of the AIFM Law automatically triggers the required de-notification mentioned under point (b) above.

The notification procedure under Article 37 of the AIFM Law is specified [here](#).

A notification under Article 37 of the AIFM Law is required only when active marketing is done in Luxembourg or continues to be done after 31 December 2020. UK AIFs notified for marketing in Luxembourg under Article 29 of the AIFM Law (Article 31 of the AIFMD) or Article 31 (Article 32 AIFMD) (managed by an EU-27 AIFM) prior to 31 December 2020 will need to register for active marketing in Luxembourg under the provisions of Article 37 of the AIFM Law. Such registration will automatically trigger a de-notification in relation to Article 29 or Article 31 of the AIFM Law.

The CSSF hereby also reminds AIFMs established in Luxembourg managing UK AIFs prior to 31 December 2020 and having notified the marketing of those AIFs to professional investors in other EU Member States under the provisions of Article 30 of the AIFM Law, that they will need to review the marketing requirements applicable to those funds as of 1 January 2021. Such marketing will be subject to the provisions applicable in the relevant EU Member State in relation to the marketing to professional investors of third-country AIFs.

b.2) Marketing in Luxembourg to retail investors

Marketing to retail investors in Luxembourg will require an authorisation under Article 100(1) of the Law of 2010 for funds other than of the closed ended type managed by a UK manager (UK or non-UK funds) or under Article 46 of the Law of 2013 for UK funds managed by a EU-27 manager, it being understood that only regulated funds can be marketed under these articles. Article 46 of the AIFM Law applies in relation to the marketing in Luxembourg of AIFs (EU AIF or third-country AIF, including UK AIFs) managed by an EU-27 AIFM after 31 December 2020. Article 100(1) of the Law of 2010 applies in relation to the marketing in Luxembourg of UCIs (EU UCI or third-country UCI, including UK UCIs) managed by a UK manager after 31 December 2020.

An authorisation under Article 46 of the AIFM Law requires compliance with CSSF Regulation N° 15-03. Details on the authorisation procedure under Article 46 of the AIFM Law and CSSF Regulation N° 15-03 can be found here: <https://www.cssf.lu/en/marketing-alternative-investment-funds/#marketing-of-foreign-aifs-to-retail-investors-in-luxembourg-article-46-of-the-aifm-law>.

The procedural details regarding requests for authorisation for marketing in Luxembourg under Article 100(1) of the Law of 2010 will be published by the CSSF in due course.

(c) Other Brexit related issues in relation to UCIs

The CSSF would further like to address the following specific issues:

Delegation of investment management/portfolio management and/or risk management activities to undertakings in the United Kingdom

The CSSF would like to remind that legal provisions in Luxembourg fund legislation permit the delegation of IFM functions, such as investment management/portfolio management and/or risk management activities to undertakings in countries outside the European Union (“third countries”). The delegation of investment management/portfolio management and/or risk management activities is possible only if the following conditions are met: (i) these undertakings are authorised or registered for the purpose of asset management, (ii) are subject to prudential supervision and that (iii) cooperation between the supervisory authority of these undertakings (e.g. the UK FCA) and the CSSF is ensured.

In this context, the CSSF would like to restate that on 1 February 2019 ESMA, EU national securities regulators, and the UK FCA signed a multilateral memorandum of understanding (MMoU) covering supervisory cooperation, enforcement and information exchange between individual regulators and the UK FCA, allowing them to share information relating to, amongst others, market surveillance, investment services and asset management activities. This MMoU allows specific activities, such as the delegation of IFM functions, to continue to be carried out by UK based entities on behalf of counterparties based in the EEA. On 17 July 2020, ESMA, EU national securities regulators, and the UK FCA confirmed that this MMoU remains relevant and appropriate to ensure continued good cooperation and exchange of information and will come into effect at the end of the transitional period. Please see the following link for more details: <https://www.esma.europa.eu/press-news/esma-news/esma-tells-market-participants-continue-preparations-end-uk-transition-period>

Compliance with investment policy and eligibility issues

As of the end of the transitional period, any issues of non-compliance with applicable investment rules or policies triggered by the withdrawal of the UK from the European Union will not be considered as occurring in circumstances defined under Article 49(2) of the Law of 2010 concerning undertakings for collective investment for the purposes of Circular CSSF 02/77 (i.e. they will hence be considered as “active breaches”).

The CSSF specifically draws the attention to the provisions related to UCITS master-feeder structures (i.e. a UCITS feeder fund established in Luxembourg investing into a UCITS master fund established in the UK), given that UK UCITS will qualify as “other UCIs” in the sense of articles 41.1(e) and 46.1 of the Law of 2010, the investments into which may not in aggregate exceed 30% of the assets of the Luxembourg UCITS.

In relation to Money Market Funds, the CSSF hereby draws specific attention to the provisions of Article 12 (c) of the Regulation (EU) 2017/1131 on Money Market Funds (MMFR), requiring that deposits with a credit institution having its registered office in a third country is an eligible investment by an MMF only where the third country credit institution is subject to prudential supervision considered to be equivalent to those laid down in Union law in accordance with the procedure laid down in Article 107(4) of Regulation (EU) No 575/2013. At the date hereof this will not be the situation as of 1 January 2021 in relation to credit institutions having their registered office in the UK.

CSSF position on secondments

The CSSF would like to confirm that in accordance with 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, it is as a matter of principle possible to place at the disposal and under the control of an IFM established in Luxembourg the services of a natural person involved in the provision of collective portfolio management services by the IFM. The CSSF hereby would like to clarify that such secondments of staff, provided they comply with all applicable requirements and that the IFM ascertains appropriate supervision over the secondees, are acceptable. Amongst the requirements, there is notably the requirement of a physical presence in the premises of the Luxembourg IFM of the seconded staff, being understood that travels for professional purposes are accepted. Also, the CSSF must be duly notified beforehand by IFMs which make use/intend to make use of secondments. In the specific context of Brexit, the CSSF would like to remind market participants of the necessity to reorganise certain functions and more specifically the marketing function, if such function is staffed with secondees from the UK not being always physically present (i.e. for reason of professional travels) at the premises of the Luxembourg IFM. Such reorganisation of the impacted functions in principle needs to occur prior to 31 December 2020, having regard to the COVID situation.

¹ UK funds which are established as UCITS will no longer qualify as UK UCITS from 1 January 2021.

Keywords

Authorisation | Brexit | ELTIF | European passport | EuSEF | EuVECA | Internal governance | Money Market Fund (MMF)

NAV calculation | UCI prospectus