

## **Brexit: important clarifications published by the CSSF**



The CSSF has published on 15 July 2019 two press releases concerning mandatory notifications for UK firms as well as for UCIs and their managers in the context of Brexit.

### **1. Mandatory CSSF notification for UK firms in the context of Brexit**

On 15 July 2019, the CSSF issued a press release 19/33 regarding mandatory notification requirements applying to UK firms in the context of the withdrawal of the United Kingdom from the European Union.

The CSSF reminds that firms that are currently authorised under the CRD, MiFID II, PSD 2 or EMD in the UK ("UK firms") will be considered as "third-country firms" and will lose the benefit from their existing passporting rights under the relevant EU Directives from the date the UK leaves the EU without concluding a withdrawal agreement ("hard Brexit"). The CSSF thus addresses this reminder to credit institutions / banks operating under EU Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (CRD IV), investment firms operating under EU Directive 2014/65/EU on markets in financial instruments (MiFID II), payment institutions operating under EU Directive 2015/2366/EU on payment services in the internal market (PSD 2) and electronic money institutions operating under EU Directive 2009/110/EC on the taking up, pursuit and prudential supervision of the business of electronic money institutions (EMD).

The CSSF stresses that the provision of regulated services in Luxembourg without a proper authorisation is illegal and thus subject to sanctions and that UK firms should by now have taken the necessary steps to prepare and anticipate the consequences of a possible hard Brexit.

The CSSF then makes (1) a general statement on authorisation requirements and (2) provides additional details on the steps to be followed to benefit from the transitional regime introduced by a law of 8 April 2019 relating to the measures to be taken in relation with the financial sector in case of a withdrawal of the United Kingdom from the European Union (the "Brexit Law"), which amends amongst others the law of 5 April 1993 on the financial sector (the "LFS").

#### *1.1. Authorisation requirements*

The CSSF mentions that UK firms that intend to continue their business and conclude new contracts in Luxembourg following a hard Brexit are required to submit an application for an authorisation to the CSSF as soon as possible. The CSSF further mentions that UK firms should

be mindful that the granting of an authorisation can take up to 12 months following the reception of a complete application file and that UK firms that have not received the necessary authorisation are required to cease all business as of the date of a hard Brexit.

The CSSF's statement in this respect is rather broad. In our view, a number of situations are to be distinguished in this respect.

In case the relevant UK firm has a branch or permanent establishment in Luxembourg which it wishes to maintain post-Brexit, it will need to obtain an authorisation in Luxembourg.

In case the relevant UK firm provides services on a cross border basis, a distinction must be made between (A) the provision of investment services and ancillary services within the meaning of MiFID II such as discretionary portfolio management, investment advice, execution of orders and reception and transmission of orders in relation to transactions on financial instruments and the safekeeping of financial instruments if provided along with investment services and (B) other financial services such as lending, payment services, cash deposits and securities custody not linked to investment services. An authorisation will not be required in each case.

#### (A) MiFID II investment services (Legal basis: Article 32-1 of the LFS)

As regards the cross border provision of MiFID II investment services a distinction must be made between (i) the provision of services to retail clients and opt-up professional clients and (ii) the provision of services to per se professional clients and eligible counterparties.

- Provision of services to per se professional clients and eligible counterparties: in the absence of an ESMA registration, the firm can apply to the CSSF to benefit from the national Luxembourg regime for the cross border provision of investment services in accordance with CSSF circular letter 19/716. A description of such regime is contained in our Newsflash "[MiFID 2 third country access: the Luxembourg temporary regime now clarified by the CSSF](#)". Certain exemptions, are, however, available (see below)
- Provision of services to retail clients and opt-up professional clients: a local branch must be established in Luxembourg in such case. Again, certain exemptions are, however, available – see below.
- Exemptions: as previously pointed out by the CSSF in its circular letter 19/716, third-country firms may provide investment services, investment activities and ancillary services on a cross border basis to any type of Luxembourg clients (retail clients, professional clients and eligible counterparties) without requiring a local branch, any local or EU registration nor equivalence decision, in case the service is provided at the own exclusive initiative of the client (reverse solicitation exemption). The CSSF specifies that the situation in terms of reverse solicitation is to be analysed on a case by case basis and refers expressly to the guidance provided by ESMA in this area (alignment with the MiFID II reverse solicitation

concept). The reverse solicitation exemption covers also the continued execution of existing agreements in certain cases (a reliance on the transitional regime described in point 2 below thus not being necessary in each case).

#### (B) Other financial services (Legal basis: Article 32 (5) of the LFS)

As regards other financial services, the more flexible approach set out in Article 32 (5) of the LFS and the CSSF circular letter 11/515 which rely on a classic territorial approach applies.

In summary authorisation requirements are triggered in case the relevant firm would have a permanent establishment in Luxembourg or employees or other representatives of the relevant firm would, occasionally and temporarily travel to Luxembourg in order to provide actual financial services during their presence on the Luxembourg territory. A broader set of exemptions is thus available.

##### *1.2. Clarifications on transitional regime*

The CSSF explains in its press release that with respect to existing activities, to ensure the orderly functioning and the stability of the financial markets or the protection of depositors, investors and consumers, the Brexit Law empowers the CSSF to allow UK firms that are currently providing financial services in Luxembourg under the EU passport to continue their activities for a limited period after the occurrence of a hard Brexit (the “transitional regime”). The CSSF further explains that the transitional regime is limited in scope as it applies only to the scenario of a hard Brexit and only to contracts that have entered into force before Brexit (“existing contracts”) as well as to contracts concluded after Brexit with close links to existing contracts (“closely-related contracts”).

This regime will mostly be useful for firms which are not able to operate under the rules described in point 1 above.

In its press release, the CSSF indicates that it has decided to set the transitional period at 12-months following the date of a hard Brexit.

The CSSF has further clarified that UK firms that are planning to continue to serve existing contracts in Luxembourg under the transitional regime will be required to notify the CSSF accordingly that a dedicated notification portal will be opened on the CSSF website in the coming weeks and that notifications will have to be made no later than 15 September 2019.

The CSSF further indicates that it will assess each notification received and inform the UK firms individually as to whether they can benefit or not from the transitional regime. The CSSF also explains that for the purpose of the assessment, the CSSF will verify that the conditions of the Brexit Law are met, in particular, that the UK firm has duly passported its services into Luxembourg in the past and that the information on their activities is coherent and sufficiently

detailed.

UK firms will thus not be able to automatically benefit from this transitional regime, but will need to submit a filing to the CSSF which will assess if the UK firm can benefit from this regime.

In case you wish to receive some more detailed information on the various regimes available for UK firms to continue providing services to Luxembourg clients, please liaise with your usual contact in the MiFID II Team for any further question you may have.

## **2. Mandatory CSSF notification applying to UCIs and their managers located in the UK in the context of Brexit**

While the CSSF, by its new press release 19/34 dated 15 July 2019, is following up on the implications of the Brexit Law, it is however worth noting that this press release does not concern the delegation of investment management / portfolio management functions by a Luxembourg UCITS or AIF to a UK based entity, which has been dealt with separately by the CSSF in its press release 19/05 issued on 25 January 2019.

The current press release 19/34 published by the CSSF refers only to UCIs and/or their managers established in the United Kingdom that are currently authorised entities under the UCITS Directive and/or the AIFM Directive and describes the procedure that these entities have to follow in case of a hard Brexit when they will lose their passporting rights under the relevant directives.

The notification process imposed by the CSSF on the impacted entities will allow the CSSF to get a clear picture of the intention of these entities as regards the provision of services in Luxembourg after a hard Brexit. Such notifications have to be made no later than by 15 September 2019. A dedicated notification portal will be opened on the CSSF's website in the coming weeks.

The impacted entities will be required to submit to the CSSF, as soon as possible but no later than by 31 October 2019 the corresponding application for authorisation, or, as the case may be, the corresponding notification or information on any action taken otherwise, depending on the nature of the activities they wish to pursue after a hard Brexit and/or the steps undertaken to address the loss of passporting rights

On the basis of the information submitted, and in order to ensure the continuity of existing contracts and the protection of UCI investors, the CSSF may, on a case-by-case basis, grant impacted UCIs and/or their managers, the possibility to continue their activities in Luxembourg for a period of 12 months following the date of a hard Brexit; the impacted UCIs and/or managers will be informed of the granting of the transitional regime within 10 business days of the submission of the required information. This transitional regime may only be granted under the condition that the Brexit notification and the subsequent application and/or notification have been submitted

within the established timeframe.

The CSSF further emphasizes that entities that are currently authorised in the United Kingdom under both the UCITS Directive and the AIFM Directive will be required to proceed with a Brexit notification for both licenses. However, entities that have already submitted an application for authorisation with the CSSF in anticipation of a hard Brexit are required to submit a Brexit notification to the CSSF.

As a final note, the CSSF also informs the investment fund industry that they will in due course communicate additional information regarding any notification requirements applicable in relation to the possibility granted to UCIs to rectify any Brexit related investment breaches under the transition provisions applicable under the Brexit laws.