

MiFID II – CSSF Issues New Circular on Third Country Firms Access

On 10 April 2019, Luxembourg's financial regulator, the Commission de Surveillance du Secteur Financier (the "CSSF"), published CSSF circular 19/716 (the "Circular") relating to the provision in Luxembourg of investment services or the performance of investment activities and ancillary services (the "MiFID Services") by third-country firms ("TCF") in accordance with Article 32-1 of the law of 5 April 1993 on the financial sector, as amended (the "1993 Law").

The Circular provides further guidance with respect to the various regimes available to such firms pursuant to Article 32-1 of the 1993 Law as well as the conditions to be met and the information and documentation to be submitted in this respect.¹

Background

The law of 30 May 2018 on markets in financial instruments² amended the 1993 Law by inserting a number of new articles, including Article 32-1 which introduced the TCF regime into Luxembourg law, and also amending certain other articles.

Article 32-1 sets out the various regimes available to TCFs that seek to provide MiFID Services in Luxembourg. The applicable regime will depend on the nature of clients to

¹ The Circular confirms that point 4 of Section II of CSSF Circular 11/515 no longer applies to TCFs with regard to the provision of investment services.

² The law of 30 May 2018 on markets in financial instruments implemented Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments amending Directive 2002/92/EC and Directive 2011/61/EC into Luxembourg law.

whom the TCF intends to provide MiFID Services and Article 32-1 identifies two categories of clients: (i) retail clients and professional clients on request and (ii) *per se* professional clients and eligible counterparties.

Provision of MiFID Services to Retail Clients and / or Professional Clients on Request

While the Circular does not provide any additional detail with respect to the regime applicable where MiFID Services are provided to retail clients and / or professional clients on request, it does reiterate that TCFs must establish a branch in Luxembourg if they wish to provide MiFID Services to retail clients and / or professional clients on request.

These branches are subject to the same authorisation rules as applicable to credit institutions and investment firms incorporated under Luxembourg law and subject to the supervision of the CSSF.

In addition, they must comply with the following conditions:

- (a) The MiFID Services which the TCF is seeking to provide in Luxembourg are subject to authorisation and supervision in the third country where the TCF is established (the "Third Country"). In addition, the TCF must be properly authorised, whereby the Third Country's competent authority has paid due regard to any recommendations made by the FATF³

³ Financial Action Task Force.

in relation to anti-money laundering and counter terrorist financing ("AML/CTF");

- (b) There is a cooperation agreement in place between the CSSF and the Third Country's competent authority which includes a provision regulating the exchange of information;
- (c) There is sufficient initial capital at the free disposal of the branch of the TCF;
- (d) One or more persons are appointed to be responsible for the management of the branch and they must, at all times, be of sufficiently good repute with sufficient knowledge, skills and expertise to perform their duties and comply with all of the relevant requirements that apply to management bodies of professionals of the financial sector;
- (e) The Third Country has signed an agreement with Luxembourg which fully complies with the standards set out in Article 26 of the OECD Model Tax Convention on Income and on Capital regarding the exchange of information on tax affairs; and
- (f) The branch must participate in the Luxembourg investor compensation scheme (système d'indemnisation des investisseurs au Luxembourg).

Provision of MiFID to Per Se Professional Clients and/or Eligible Counterparties

A TCF may provide MiFID Services to per se professional clients and / or eligible counterparties either (i) through a branch established in Luxembourg or (ii) from the

Third Country on a cross-border basis without establishing a branch in Luxembourg.

Where the TCF intends to establish a branch to provide MiFID Services, it must satisfy the requirements set out above under 'Provision of MiFID Services to Retail Clients and / or Professional Clients on Request'.

If, however, a TCF intends to provide MiFID Services from the Third Country on a cross-border basis, it may do so in one of two ways: (i) based on a decision by the CSSF (the "National Regime") or (ii) based on an equivalence decision of the European Commission and registration in the register of TCFs maintained by ESMA⁴ (the "European Regime").

National Regime

In the absence of an equivalence decision by the European Commission in respect of a Third Country, a TCF may provide MiFID Services subject to the following conditions:

- (a) The TCF is subject to supervision and authorisation rules deemed by the CSSF to be equivalent to those set out in the 1993 Law;
- (b) Cooperation between the CSSF and the Third Country's competent authority is ensured; and
- (c) The TCF is authorised in the Third Country to provide the MiFID Services it intends to offer in Luxembourg.

Third Country Equivalence

The CSSF will assess and determine whether a Third Country is equivalent for the purposes of the National Regime. If the CSSF finds the Third Country to be equivalent, it will be

⁴ European Securities and Markets Authority.

included in a list of equivalent third countries which will be published and kept up-to-date by the CSSF. No such list has yet been published by the CSSF.

Third Countries that are not signatories of the IOSCO Multilateral Memorandum of Understanding as well as Third Countries that do not have adequate legislation and supervision with respect to AML/CTF will not be considered equivalent.

A Third Country may be removed from the list in the event the conditions on which equivalence was granted are no longer satisfied.

Cooperation between the CSSF and the Third Country's Competent Authority

A cooperation arrangement must exist between the CSSF and the Third Country's competent authority and will, generally, take the form of a memorandum of understanding ("MoU").

The Circular provides that a MoU will only be possible where the Third Country's competent authority assures the CSSF that cooperation and exchange of information with the Third Country's competent authorities responsible for prudential supervision, supervision of conduct of business rules and AML/CTF will take place.

Authorisation to provide MiFID Services

The TCF must be authorised in the Third Country to provide the MiFID Services it intends to provide in Luxembourg.

Prior to the TCF accessing the Luxembourg market, a formal written application must be made to the CSSF that must include the form in Annex II of the Circular, in addition to certain other documents and information.

The National Regime does not provide the TCF with a European passport and, therefore, does not give the TCF access to the whole EU market.

In the event the European Commission adopts an equivalence decision with respect to a Third Country the CSSF considers equivalent, the TCF may choose to continue to provide MiFID Services in Luxembourg under the National Regime for a period of up to three years following the adoption of the equivalence decision by the European Commission.

European Regime

A TCF may provide MiFID Services from the Third Country on a cross-border basis provided the following conditions are satisfied:

- (a) Prior to the MiFID Services being provided by the TCF, the European Commission has adopted an equivalence decision in respect of the Third Country in which the TCF has its head office or its registered office; and
- (b) The TCF is registered in the relevant register maintained by ESMA (the "Register").

Registration in the Register will give the TCF access to the whole EU market and is, therefore, similar to a European passport.

Reverse Solicitation

A TCF will be exempt from the foregoing requirements where a client, irrespective of its classification, seeks out MiFID Services at the client's 'own exclusive initiative' (the "Reverse Solicitation"). In such circumstances, the TCF may provide the MiFID Services without being subject to the requirements to establish a branch or ensure an equivalence decision has been adopted.

Each instance of Reverse Solicitation will be assessed on a case-by-case and continuous basis and the Circular explicitly refers to ESMA's guidance⁵ in this context.

This exemption may, however, be of limited use as Reverse Solicitation only permits a TCF to provide the particular MiFID Service requested by the client, and does not allow a TCF to market new categories of investment product or investment service to such client.

Conclusion

The provisions of Article 32-1 of the 1993 Law together with the guidance set out in the Circular will be of significance to TCFs seeking to provide MiFID Services to per se professional clients and / or eligible counterparties in Luxembourg until such time as the European Commission adopts one or more equivalence decisions.

In addition, in light of the certainty of the UK becoming a third country from the date on which the UK leaves the EU, this Circular provides a possible solution for FCA regulated entities providing MiFID Services in Luxembourg, whereby such entities may continue to provide MiFID Services to Luxembourg based clients after the UK leaves the EU.

For assistance on the above matters, please speak with your usual Maples Group contact or any of the contacts listed below.

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⁵https://www.esma.europa.eu/sites/default/files/library/esma35-43-349_mifid_ii_gas_on_investor_protection_topics.pdf