



ESMA and Luxembourg CSSF Updates: Multilateral MoU and Delegation of Portfolio Management and Risk Management Activities in the Context of Brexit

On 25 January 2019, Luxembourg's financial regulator, the *Commission de Surveillance du Secteur Financier* (the "CSSF"), issued a press release in relation to the delegation of portfolio management and / or risk management activities to undertakings in the United Kingdom ("UK")¹.

The press release is a welcome development and provides reassurance to the fund industry in respect of existing and future delegation arrangements in light of the continuing uncertainty surrounding Brexit.

On 1 February 2019, additional relief in respect of existing and future delegation arrangements was provided when the European Securities and Markets Authorities ("ESMA") issued a press release confirming that ESMA and the European securities regulators have agreed a multilateral memorandum of understanding ("MMoU") with the Financial Conduct Authority (the "FCA"), thereby securing post-Brexit delegation of portfolio management and/or risk management activities to undertakings located in the UK.

Background

Following the UK's 2016 referendum, there was a concern that UCITS management companies and alternative investment fund managers ("AIFMs") may not be permitted to continue delegating certain key functions (typically the portfolio management function) to asset managers located in the UK.

This concern was primarily the result of various legislative provisions² which only permit the delegation of certain functions to entities located in third countries under certain conditions, among which, the condition that cooperation between the CSSF and the competent authority of that third country is ensured. In practice, this requires a memorandum of understanding ("MoU") to be in place between the CSSF and the competent authority of the relevant third country.

Such cooperation in the form of a MoU does not exist between the CSSF and the FCA. However, the CSSF's press release confirmed that the CSSF and FCA are currently seeking to address and rectify this in order to ensure that the relevant cooperation arrangements are in place before 29 March 2019.

Provisions in Applicable Legislation

In its press release, the CSSF took the opportunity to remind the fund industry that Luxembourg law permits the delegation of portfolio management and / or risk management activities to undertakings in countries located outside the European Union ("EU"), provided the following conditions are satisfied:

- a. the third country undertaking is authorised or registered for the purpose of asset management;
- b. the third country undertaking is subject to prudential supervision; and
- c. cooperation between the CSSF and the relevant third country's competent authority is ensured.

The CSSF also clarified that, in the event of a no-deal Brexit, in which case the UK will become a third country, Article 110 of the 2010 Law³, Article 18 of the 2013 Law⁴ and Article 42b of the 2007 Law⁵ would apply to asset managers located in the UK. Therefore, on the basis that the UK satisfies and continues to satisfy the conditions set out in the preceding paragraph, UCITS management companies and AIFMs may continue to delegate these functions to entities located in the UK.

Cooperation Between the CSSF and the FCA

The press release suggested that the CSSF had already started discussions with the FCA in order to have the necessary MoU in place by 29 March 2019, with the CSSF confirming that it will endeavour to have "*...the required cooperation between the UK FCA and the CSSF...in place on 29 March 2019 in the event of a "no deal" Brexit.*"

ESMA Press Release

As noted above, on 1 February 2019, ESMA issued a press release confirming that a MMoU has been agreed with the FCA but that it will only take effect in the event of a no-deal Brexit. The MMoU covers supervisory cooperation, enforcement and information exchange between individual European regulators and the FCA and will allow them to continue sharing information relating, but not limited, to market surveillance, investment services and asset management activities.

Conclusion

Asset management firms will take comfort that, in the case of a hard Brexit, they will continue to be able to delegate certain core functions to their FCA regulated UK entities which means, in essence, that current operating models will remain in place. Please note, however, that a no-deal Brexit would preclude UK asset managers from, among others, acting as management companies to UCITS and to Luxembourg RAIFs and would have negative consequences in relation to marketing arrangements.

Further Information

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

¹CSSF press release 19/05 of 25 January 2019.

²Specifically, Article 110 of the law of 17 December 2010 on undertakings for collective investments, Article 18 of the law of 12 July 2013 on alternative investment fund managers and Article 42b of the law of 13 February 2007 on specialised investment funds.

³The law of 17 December 2010 on undertakings for collective investments.

⁴The law of 12 July 2013 on alternative investment fund managers.

⁵The law of 13 February 2007 on specialised investment funds.