

Luxembourg Regulator Publishes Guidance on the Provision of Regulated Services by Non-EEA Investment Firms

7 July 2020

The Luxembourg financial regulator (*Commission de Surveillance du Secteur Financier*, “the CSSF”) recently published a [circular](#) (the “Circular”) and a new [regulation](#) (the “Regulation”) on the “equivalence” of the supervisory and authorisation framework that applies to “third-country” investment firms in certain states outside the European Economic Area (“the EEA”).¹ The Regulation grants Canada, Switzerland, the United States of America, Japan, Hong Kong and Singapore equivalence status. Firms from these countries will now be able to apply for authorisation to provide investment services to Luxembourg clients.

The Circular also provides some helpful guidance on the provision of investment services by non-EEA firms and, more specifically, answers the question as to when a service is considered to be within the territorial scope of the Luxembourg regulatory framework.

Both announcements are relevant for non-EEA investment managers or advisers providing portfolio management or investment advisory services to alternative investment fund managers (“AIFMs”) in Luxembourg and are of particular significance for the continuity of services provided by UK investment firms post-Brexit.

Background—Conditions for Providing Investment Services in Luxembourg. Under the Markets in Financial Instrument Regulation (“MiFIR”), third country firms can provide investment services on a cross-border basis throughout the EU if the European Commission (the “Commission”) has made a decision on the equivalence of the relevant third country’s prudential and business conduct standards. However, no such decisions have yet been taken by the Commission. Even once they will be taken, it is expected that there will be a long registration process to go through. Pending the Commission’s equivalence decisions (and potentially for three years after), third country firms can provide services in EEA states on the basis of national regimes where available.

¹ The “EEA” is the European Economic Area and includes the member states of the European Union together with Norway, Iceland and Liechtenstein.

Luxembourg has now established a new national regime that permits third country firms to provide services on a cross-border basis if certain conditions are met, including:

- The CSSF has made a decision on equivalence regarding the third country in which the investment adviser in question has its administrative or corporate seat. For example, the CSSF would not consider as equivalent countries that do not provide sufficient guarantees as to their anti-money laundering regimes or are not signatories to the Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information of the International Organization of Securities Commissions.
- The client in Luxembourg is a *per se* professional client.
- The third country firm wishing to provide services in Luxembourg is authorised to provide such services in its country of origin.

The introduction of Luxembourg's national equivalence regime is good news. However, it is limited in its application. The regime only provides for investment services to be rendered in Luxembourg, without access to a European "passport". Once the Commission takes an equivalence decision, Luxembourg's national regime will exist for a three-year transitional period, after which the third country firm will need to conform to the pan-EU regime set out in MiFIR.

Territorial Reach of Luxembourg Registration and Authorisation Requirements.

The Circular clarifies the circumstances in which a service is performed "in Luxembourg". If the service is not performed in Luxembourg, registration or authorisation requirements will not apply.

The Circular states that the investment service is deemed to be provided "in Luxembourg" when any of the following conditions is met:

- the third country firm has an establishment (such as a branch) in Luxembourg;
- the third country firm provides an investment service to a retail client established or located in Luxembourg; or
- the place where the "characteristic feature" of the service is provided (the essential service for which payment is due) is Luxembourg.

The CSSF expressly recognizes that there are specific situations where, although the third country firm provides investment services to a professional client established or located in Luxembourg, the service may not be considered as being provided "in

Luxembourg” if the characteristic feature of such service is not provided in Luxembourg. In these situations, firms are not required to seek registration or authorisation from the CSSF, as they are outside the scope of the Luxembourg regulations. It is the responsibility of the third country firm to analyse the situation and to document it accordingly. Of course, that leaves the question, at least with respect to investment advice, as to whether the characteristic feature of “rendering advice” is where the advice is being prepared (and the decision to give such advice is taken) as opposed to where the advice is being received. We would argue that the characteristic feature should be where the personnel giving such advice is located, but the Circular is not entirely clear.

“Reverse Solicitation”. The Circular also confirms the general principle that, if the client specifically requests the service without being solicited by the third country firm, (“reverse solicitation”), no registration and authorisation requirements apply. The Circular refers to guidance given by the EU regulator (the European Securities and Market Authority) in that context.² The Circular clarifies that the exemption applies to both retail and professional clients. It is framed as a narrow exemption, defined as “the act by a client established or located in Luxembourg of triggering on its own initiative the provision of an investment service or the execution of an investment activity by a third country firm”.

The Circular further specifies that reverse solicitation should be assessed on an ongoing basis, for each service rendered. The CSSF stresses that it is the responsibility of the third country firm to analyse the relevant circumstances before providing any services on this basis, as well as to document and preserve the analysis.

In summary, the Circular provides helpful guidance, both as regards the transitional regime that Luxembourg will offer until the pan-EEA regime in MiFIR is introduced (the timing for which is not yet known) and also by providing guidance on when a service is deemed to be rendered in Luxembourg. It appears that, under the new regime, portfolio managers that make decisions outside of Luxembourg for the benefit of professional clients, such as Luxembourg AIFMs, would not be within the scope of the regulations. The same should be true, in our view, for investment advisers, where the investment advice is effectively prepared and given by a team outside of Luxembourg.

* * *

Please do not hesitate to contact us with any questions.

² Questions and Answers On MiFID II and MiFIR investor protection and intermediaries topics
https://www.esma.europa.eu/sites/default/files/library/esma35-43-349_mifid_ii_qas_on_investor_protection_topics.pdf

LONDON



Patricia Volhard
pvolhard@debevoise.com



Simon Witney
switney@debevoise.com



John Young
jyoung@debevoise.com



Eric Olmesdahl
eolmesdahl@debevoise.com

FRANKFURT



Jin-Hyuk Jang
jhjang@debevoise.com



Clarisse Hannotin
channotin@debevoise.com



Johanna Waber
jwaber@debevoise.com

LUXEMBOURG



Christopher Dortschy
cdortschy@debevoise.com



Helena Inghelram
hinghelram@debevoise.com