Luxembourg Newsflash - 18 April 2019

MiFID 2 third country access: the Luxembourg temporary regime now clarified by the CSSF

On 12 April 2019, the CSSF released its Circular letter 19/716 on the provision in Luxembourg of investment services or performance of investment activities and ancillary services in accordance with Article 32-1 of the law of 5 April 1993 on the financial sector, as amended (the "LFS").

The purpose of this circular letter is to provide guidance on the rules and restrictions which apply to third country financial service providers when providing MiFID investment services, activities and ancillary services to Luxembourg clients.

Third country service providers are service providers which are not established within the European Economic Area, such as U.S., Swiss and Japanese service providers, and in the future – provided no deal is reached with the EU – UK service providers.

MiFID investment services, activities and ancillary services include services 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.

The Circular letter 19/716 does not apply in relation to the provision of other types of financial services such as lending, payment services, cash deposits and securities custody not linked to investment services.

The rules and restrictions which apply to third country financial service providers when providing MiFID investment services to Luxembourg clients derive from Article 32-1 of the LFS. This article was already introduced into the LFS by a law of 30 May 2018 on markets in financial instruments which implemented EU Directive 2014/65/EU on markets in financial instruments (MiFID 2) into Luxembourg law. Circular letter 19/716 provides guidance on this Article 32-1 of the LFS and thus on requirements that have already been in force for over six months.

The rules set out in Article 32-1 of the LFS are summarised in our newsflash dated 12 June 2018_

In summary, 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 cross border services to per se professional clients and eligible counterparties

Regulation (EU) No 600/2014 on markets in financial instruments (MiFIR) provides for the possibility for third country firms to provide investment services throughout the EU to per se professional clients and eligible counterparties after such firms have completed a registration with the European Securities and Markets Authority (ESMA). One of the conditions to register with ESMA is that the European Commission has adopted an equivalence decision with respect to the laws and regulations of the country of origin of the firm.

As the ESMA registration may be a lengthy process since it presupposes that the European Commission has adopted an equivalence decision, MiFID II provides that EU Member States may in the absence or until the European Commission has adopted an equivalence decision, apply their own national rules in this area. The Luxembourg national rules applying in the absence of an equivalence decision by the European Commission are set out in Article 32-1 of the LFS.

In accordance with Article 32-1 of the LFS, third-country firms wishing to provide investment services to eligible counterparties and per se professional clients in Luxembourg on a cross border basis in the absence of an equivalence decision by the European Commission, are authorised to do so, provided that:

– they are authorised to provide the said services in their country of establishment,

– they are subject to supervision and authorisation rules deemed equivalent to the LFS by the CSSF and

– cooperation between the CSSF and the local supervisory authority of the firm concerned is ensured.

Circular letter 19/716 provides guidance on the above three conditions to be met in order to benefit from Article 32-1 of the LFS.

1. Condition relating to third-country equivalence

The Circular letter 19/716 specifies that the CSSF verifies if the service provider is subject to supervision and authorisation rules which the CSSF deems equivalent to Luxembourg rules. The list of countries which the CSSF considers equivalent will be published by the CSSF and be updated from time to time when the CSSF will receive requests from third country firms to use Article 32-1 of the LFS. So far no list of equivalent countries has been published and the CSSF has not yet taken any equivalence decision.

The Circular letter 19/716 explains that the CSSF considers, in principle, that third countries that are not signatories of the IOSCO Multilateral Memorandum of Understanding are not equivalent. It also considers as non-equivalent those third countries that do not have adequate legislation and supervision with respect to the fight against money laundering and terrorist financing (AML/CFT) and that the CSSF will take into account the FATF list of high risk jurisdictions / non-cooperative countries.

Finally, the CSSF explains that where the CSSF takes an equivalence decision and the European Commission also takes an equivalence decision relating to the same country, the third country firm may still decide to rely on the Luxembourg national regime and on the equivalence decision of the CSSF for up to 3 years after the European Commission deems the third country equivalent.

2. Condition relating to the cooperation between the CSSF and the third-country supervisory authority

The CSSF verifies that the cooperation between the CSSF and the supervisory authority(ies) of the third country is ensured. Cooperation takes the form of an agreement concluded with the supervisory authority (ies) in the form, in general, of a memorandum of understanding (MoU) between the authorities or by the signature of an addendum to an existing MoU.

3. Conditions relating to the third-country firm

The third-country firm must be authorised in the third country where it is established to provide the investment services it wishes to provide in Luxembourg.

The CSSF requires third country firms to formally request an approval from the CSSF to use the third country access regime of Article 32-1. A specific form contained in Circular letter 19/716 must be completed by the third country firm and submitted together with a number of documents to the CSSF to this end.

The information and documents to be submitted include:

– Identification and contact details of the third country firm;
– Information on the legal framework applying to the third country firm (including description of activities, type of license held, identity of competent supervisory authority, applicable conduct of business rules and organisational requirements, complaints handling and AML/CTF framework);
– Information regarding the third country firm's plans in Luxembourg (including overall business strategy, type of clients targeted, type of investment services, investment activities and ancillary services contemplated);
– Information on investor protection (including applicable client asset protection rules and investor protection schemes);
– Basic documents (including articles of association, audited financial statements of the last three years, copy of license or other evidence of licensing, confirmation that only per se professional clients and eligible counterparties will be serviced).

Ongoing obligations in the context of the provision of cross border services to per se professional clients and eligible counterparties

The Circular letter 19/716 specifies that the third country firm must inform clients that it is not allowed to provide services to clients other than eligible counterparties and per se professional clients and is not subject to supervision in the European Union. It must also clearly indicate the name and the address of its supervisory authority.

The CSSF may request a periodic reporting for supervisory or statistical purposes, which has however not yet been defined.

The third country firm must notify the CSSF in writing of any material change to the information submitted to the CSSF and in particular in case the third country firm has knowledge that the conditions of Article 32-1 of the LFS are no longer met (e.g. in case it no longer holds a valid authorisation in its country of origin).

Provision of services to retail clients

The Circular letter 19/716 does not contain much guidance on this type of services and simply refers to the requirement of Article 32-1 of the LFS which specifies that for such services, a local branch must be established in Luxembourg (unless exemptions apply – see below).

Exemptions

Circular letter 19/716 specifies that third-country firms may provide investment services, investment activities and ancillary services on a cross border 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 (see ESMA Questions and Answers on MiFID II and MiFIR investor protection and intermediaries topics). Finally, the CSSF specifies that the initiative of a client does not allow the third country firm to market other categories of financial instruments or investment services to clients. This is aligned with the MiFID 2 reverse solicitation concept.

The CSSF also expressly mentions that the approach set out in CSSF circular letter 11/515 which is much more flexible and relies on a classic territorial approach no longer applies in relation to the provision of investment services. These rules and exemptions remain thus only available for financial services other than investment services.

Contacts and questions

Since the equivalence decisions of the European Commission are not expected in the short term, the rules of Article 32-1 and Circular letter 19/716 will be the relevant regime to be followed over the next months.

In case you wish to receive some more detailed information in relation to Circular letter 19/716, MiFID 2 or any related aspect or requirement thereunder, please feel free to directly contact the Arendt MiFID 2 team for any further question you may have.

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