

Luxembourg Law of 10 May 2016 implementing the UCITS V Directive

The Luxembourg law of 10 May 2016 (2016 Law) was published in the Luxembourg official journal, the *Mémorial A*, on 12 May 2016 and will enter into force on 1 June 2016.

The new law implements Directive 2014/91/EU on undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions (UCITS V Directive) and also introduces a number of changes to the Luxembourg legislation applicable to investment funds other than UCITS.

UCITS and the 2016 Law

To a large extent, the 2016 Law faithfully implements the UCITS V Directive by amending the current UCITS regime laid down in Part I of the law of 17 December 2010 on undertakings for collective investment (UCI Law) in the following three areas:

- the duties and liabilities of depositaries of UCITS
- the remuneration policies of UCITS management companies/self-managed investment companies
- the sanctions that the CSSF is empowered to apply by virtue of the UCI Law.

For additional information on the UCITS V regime, you may wish to refer to the previous client briefings prepared by Clifford Chance on the remuneration policy of management companies and on the legal regime of the depositaries under UCITS V that we can provide to you upon request.

Non-UCITS and the 2016 Law

New Depositary Regime for Part II UCIs

In addition to the implementation of the UCITS V Directive, the 2016 Law also modifies Part II of the UCI Law to impose the new UCITS V depositary regime not only to Luxembourg UCITS (as required by the UCITS V Directive), but also to all Luxembourg undertakings for collective investment subject to Part II of the UCI Law (Part II UCIs) independent of the amount of their assets under management, i.e. regardless whether these Part II UCIs – which all qualify as alternative investment funds (AIFs) – are below or above the EUR 100/500 million thresholds laid down in the Luxembourg law of 12 July 2013 on alternative investment fund managers (AIFM Law).

Changes Impacting AIFMs

The 2016 Law introduces some modifications into the AIFM Law, including the following:

- **Accounting documents of AIFMs audited by an independent auditor:** The 2016 Law requires Luxembourg-authorized alternative investment fund managers (AIFMs) to have their annual accounting documents audited by one or more independent auditors (*réviseurs d'entreprise agréés*) approved by the Luxembourg supervisory authority (CSSF), even if this is not prescribed by Directive 2011/61/EU of 8 June 2011 on alternative investment fund managers (AIFMD). Beyond the duty of assessing the financials of the AIFM, the independent auditor will be vested with some other functions, including for instance the obligation to inform the CSSF if it becomes aware, whilst carrying out its duties concerning the AIFM, of any fact or decision likely to constitute a material breach of the AIFM Law. In practice, it has to be noted that so-called Luxembourg "Chapter 15 and 16 management companies" that are also acting and authorized as AIFMs by the CSSF must already have their accounting documents audited by an independent auditor. This obligation is imposed on them by the UCI Law as a mandatory condition for their authorization and licence as management companies by the CSSF. In this respect, the 2016 Law clarifies that the independent auditor of these management companies can also be mandated to perform the annual audit of their accounting documents and other functions now imposed by the amended AIFM Law.

- Cross-border provision of MIFID investment services by AIFMs:** The 2016 Law explicitly provides for the possibility for Luxembourg-authorized AIFMs to passport certain MiFID investment services (as set out in Article 5(4) of the AIFM Law) on a cross-border basis, provided that they are duly authorized and licensed by the CSSF for the provision of these services. This amendment to the AIFM Law reflects an amendment introduced by MiFID2 into the AIFMD which had, in principle, to be applied by Member States from 3 July 2015 (although the European Securities and Markets Authority (ESMA) had recommended that national competent authorities could accept the passport notification for the MiFID services by an AIFM authorized under Article 6(4) of the AIFMD even before 3 July 2015). In Luxembourg, it should be recalled that the CSSF had already accepted, as per ESMA's recommendation, the passport of MiFID services under Article 6(4) of the AIFMD and Article 5(4) of the AIFM Law for both Luxembourg AIFMs passporting in the EU and EU AIFMs passporting into Luxembourg.

What Needs To Be Done and By When

The 2016 Law will enter into force on **1 June 2016**.

However, the 2016 Law still provides that without prejudice of the application of the old provisions of the UCI Law governing the depositary regime (in case of non compliance with the new depositary requirements imposed by the 2016 Law):

- both UCITS created before and after 1 June 2016 – or management companies as applicable – must comply with the new UCITS V depositary and remuneration provisions by 18 March 2016
- both Part II UCIs created before and after 1 June 2016 must comply with the new depositary regime imposed on them by the 2016 Law, and which is aligned with the one applicable to UCITS, by 18 March 2016.

Notwithstanding the above and without prejudice of any further guidance that could be adopted as regards the implementation timeline, the CSSF issued a press release in the beginning of March 2016 (Press Release 16/10) to clarify some practical issues in relation to the implementation of the UCITS V regime and the extension of the UCITS V depositary regime to Part II UCIs, including in

particular the following guidance as to the 18 March 2016 transposition deadlines.

UCITS V – Timing for Update of UCITS Documentation

In Press Release 16/10, the CSSF has confirmed that it will generally apply the timelines outlined in ESMA Q&A on the application of the UCITS Directive as regards the updating of KIIDs, prospectuses and depositary contracts of Luxembourg UCITS in relation to all aspects under the UCITS V regime.

As a result, the UCITS V Directive (but also the 2016 Law provisions), and especially the new depositary and new remuneration regimes, are in principle applicable as from 18 March 2016. However, some extended deferral dates are envisaged namely for the implementation of the so-called UCITS V Level 2 measures, as summarised below:

- Remuneration Policy:** UCITS management companies and self-managed investment companies have to implement the remuneration policy principles required by the UCITS V Directive and the 2016 Law and already make available information about their remuneration policy on a website as soon as possible after 18 March 2016.
- Prospectus:** There was no need to update the prospectus of UCITS on 18 March 2016 in order to include the remuneration information prescribed by the UCITS V Directive and the 2016 Law. However, such information has to be included on the first occasion the prospectus is revised for another purpose after 18 March 2016 and no later than 18 March 2017.
- KIID:** The KIID of UCITS should be updated to include the remuneration information prescribed by the UCITS V Directive and the 2016 Law either on the first occasion the KIID is revised/replaced or at the next annual update after 18 March 2016 (i.e. in February 2017, as KIIDs must be updated annually within 35 days following 31 December of each year).
- Annual Report:** The annual report of UCITS relating to a financial year that ended before 18 March 2016 does not need to include the remuneration information prescribed by the UCITS V Directive and the 2016 Law. As regards the annual report relating to a financial year that ends on or after 18 March 2016, but before the UCITS management company has completed its first annual performance period in which it has to comply with Articles 14a and 14b of the UCITS V Directive (as transposed by the 2016 Law through the introduction of

new Articles 111bis and 111ter in the UCI Law), the remuneration-related information should be inserted in the annual report on a best-efforts basis and, to the extent possible, explaining the basis for any omission.

- **Depository Agreement:** The depository agreements of UCITS should be revised promptly in accordance with any transitional arrangements outlined in EU Commission delegated regulation 2016/438 of 17 December 2015 concerning the obligations of depositaries under the UCITS V Directive (Delegated Regulation), which provides for a six-month transitional provision after the date of its entry into force (i.e. until 13 October 2016).

UCITS V – Depository Bank Aspects

Without prejudice to the clarifications it gave on the timing for updating UCITS prospectuses, KIIDs and depository contracts in view of compliance with the UCITS V requirements, the CSSF recalled in its Press Release 16/10 that its Circular 14/587 regarding the provisions applicable to credit institutions acting as UCITS depository banks entered into force as of 18 March 2016.

However, the CSSF has indicated that Circular 14/587 will be reviewed and adapted, by the end of September/beginning of October 2016, to the depository-related provisions of the 2016 Law and of the Delegated Regulation. In the meantime, in the event of a conflict

between the provisions of Circular 14/587 and the 2016 Law (e.g. aspects related to the notion of safekeeping of assets), the provisions of the 2016 Law shall prevail.

Part II UCIs – Depository Bank Aspects

In Press Release 16/10, the CSSF indicated that the new depository regime shall be applicable to all Part II UCIs and their depository banks as of the date of entry into force of the 2016 Law, i.e. on 1 June 2016.

Upon amendment of Circular 14/587, the CSSF will also clarify to what extent the provisions of such Circular, as amended, will apply to Part II UCIs.

Further advice

Clifford Chance would be pleased to advise in detail on any of the aspects covered in this client briefing or relating to the UCITS V Directive and the 2016 Law more generally.

Contacts



Joëlle Hauser
Partner

T: +352 48 50 50 1
E: joelle.hauser
@cliffordchance.com



Paul Van den Abeele
Partner

T: +352 48 50 50 1
E: paul.vandenabeele
@cliffordchance.com



Caroline Migeot
Counsel

T: +352 48 50 50 1
E: caroline.migeot
@cliffordchance.com



Augustin de Longeaux
Counsel

T: +352 48 50 50 1
E: augustin.delongeaux
@cliffordchance.com



Arne Bolch
Counsel

T: +352 48 50 50 1
E: arne.bolch
@cliffordchance.com

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Clifford Chance, 10 boulevard G.D. Charlotte, B.P. 1147, L-1011 Luxembourg, Grand-Duché de Luxembourg
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