

ATOZ ALERT

New measures for Luxembourg investment funds in the context of COVID-19

25 March 2020

Considering the development of the COVID-19 crisis, a number of new measures and communications have been issued to the attention of the financial centre over the past days.

Organisational measures

Business continuity plans

On 22 March 2020¹, the Commission de Surveillance du Secteur Financier (“CSSF”) urged all supervised entities to immediately review their current organisational set-up to ensure that:

- the least possible staff has to travel to, and work from, their usual workplace or back-up site. The deployment of staff members to the usual workplace or back-up site should be limited to vital functions that are essential to maintain the critical mission of supervised entities for them to remain operational provided that these functions cannot be performed remotely;
- where staff is not equipped with laptops or other mobile devices, entities implement desktop and other remote access solutions, cloud based or not, as soon as possible.

Previously, the CSSF advised professionals to activate their business continuity plans and to use, where appropriate, other production sites in or outside Luxembourg. To guarantee a rapid and efficient implementation of such measures, no prior authorisation from the CSSF is required². Simultaneously, the European Securities and Markets Authority (“ESMA”) is making the same recommendation³ to all financial market participants to ensure operational continuity in line with regulatory obligations.

¹https://www.cssf.lu/fileadmin/files/Publications/Communiqués/Communiqués_2020/C_Coronavirus_review_organisations_setups_22_0320.pdf

² http://www.cssf.lu/fileadmin/files/Publications/Communiqués/Communiqués_2020/C_Coronavirus_covid-19_comportement_entites_surveillees_020320.pdf

³ <https://www.esma.europa.eu/press-news/esma-news/esma-recommends-action-financial-market-participants-covid-19-impact>

Good governance

For good governance purposes, the Grand-Ducal Regulation of 20 March 2020⁴ introduced measures in order to provide mechanisms enabling companies and other legal persons to hold shareholders and board meetings without having to be physically present. **These measures apply with immediate effect.**

As a result, companies can, despite any contrary provision in their articles of association, whatever the expected number of participants at the general meeting, hold any general meeting without a physical meeting, and can require their shareholders and other participants to participate in the meeting and to exercise their rights exclusively:

- remotely, by a vote in writing or in electronic form, provided that the full text of the resolutions or decisions to be taken has been published or communicated to the participants;
- through a proxy appointed by the company; or
- by video conference or other means of telecommunication allowing identification of the participants.

The same rule applies to meetings of management bodies such as boards of directors, boards of managers and supervisory boards. Such meetings may be held, and resolutions may be passed by way of:

- written circular resolutions; or
- video conference or any other means of telecommunications allowing the identification of participants.

This emergency system will thus allow the bodies of any company or legal person to be able to hold their meetings without requiring the physical presence of their members while guaranteeing their effective participation and the exercise of their rights. Participants through such means will be considered present for the purposes of determining the quorum and majorities.

Furthermore, concerning the holding of the annual general meetings, companies and other legal persons may, notwithstanding any contrary provision in their articles of association, convene them on a date which falls:

- 6 months after the end of their financial year, or
- until 30 June 2020.

The Grand-Ducal Regulation of 20 March 2020 does not deal with the fiscal consequence of holding meetings remotely. From a tax point of view, this may indeed shift the place of effective management of a company outside Luxembourg. Thus, a Luxembourg company may become taxable in the jurisdiction in which the place of effective management is located (in accordance with an applicable tax treaty).

As this situation may last for several months (also depending on the evolution of the COVID-19 outbreak in different jurisdictions), it should be considered to organise board of director meetings in Luxembourg with the physical presence of Luxembourg resident directors on Luxembourg soil (the board of director meeting could be held via conference call or video conference). Non-Luxembourg resident directors may dial-in but should ideally not intervene and instead provide a proxy to the Luxembourg resident directors that can represent the non-resident directors. In some cases, short-term changes in regard to the composition of the board of directors might be considered such as appointing additional Luxembourg directors to a board of directors. Unfortunately, this is not a purely Luxembourg question.

⁴ <http://www.legilux.lu/eli/etat/leg/rqd/2020/03/20/a171/jo>

Reporting and management

ESMA recommends⁵ issuers to disclose any relevant significant information concerning the impacts of COVID-19 on their fundamentals, prospects or financial situation in accordance with their transparency obligations under the Market Abuse Regulation as soon as possible. In addition, issuers should provide transparency on the actual and potential impacts of COVID-19, to the extent possible based on both a qualitative and quantitative assessment of their business activities, financial situation and economic performance in their 2019 year-end financial report if these have not yet been finalised or otherwise in their interim financial reporting disclosures. Finally, asset managers should continue to apply the requirements on risk management and react accordingly.

ESMA has also issued a decision temporarily requiring the holders of net short positions in shares traded on a European Union (“EU”) regulated market to notify the relevant national competent authority (“NCA”) if the position reaches or exceeds 0.1% of the issued share capital⁶. As no competent authorities have adopted sufficient measures to increase their visibility of the evolution of net short positions activity through the establishment of lower reporting thresholds, ESMA considered that lowering the reporting thresholds should ensure that all national competent authorities across the EU and ESMA have the best possible data set available to monitor the market trends and enable themselves and ESMA to take further measures, if necessary.

Finally, the CSSF grants⁷ an extension of four additional weeks for the submission of the 2019 Survey related to the fight against money laundering and terrorist financing⁸. Consequently, the new deadline for the submission of the Survey will be close of business on 10 April 2020. The Survey was launched on 3 February 2020 and answers had to mandatorily be submitted through the CSSF eDesk portal by 15 March 2020. In case of failure to submit the Survey by close of business on 10 April 2020, the CSSF will consider that the professional is in breach of the article 5(1) of the Law of 12 November 2004 on the fight against money laundering and terrorist financing. CSSF will thus be in a position to apply the relevant sanctions.

Specific measures

Swing pricing

In the context of the COVID-19 pandemic, the developments in the financial markets and questions from the industry in relation to the application of the swing pricing mechanism by the investment funds, the CSSF provided clarifications to the industry in the form of an updated CSSF Q&A relating to the “Swing Pricing” mechanism. Due to the current exceptional market circumstances involved by the COVID-19, the CSSF allows the board of directors of the UCI or, if applicable, the management company, to increase the swing factor beyond the maximum level mentioned in the UCI prospectus, on a temporary basis. This decision must again be duly justified and consider the best interest of the investors⁹.

Call taping under MiFID II

ESMA has issued a public statement¹⁰ to clarify issues regarding the application of the MiFID II requirements on the recording of telephone conversations.

⁵ <https://www.esma.europa.eu/about-esma/covid-19>

⁶ https://www.esma.europa.eu/sites/default/files/library/esma70-155-9546_esma_decision_-_article_28_ssr_reporting_threshold.pdf

⁷ https://www.cssf.lu/fileadmin/files/Lois_reglements/Circulaires/Blanchiment_terrorisme/lettre-circulaire_170320_AML-CFT.pdf

⁸ https://www.cssf.lu/fileadmin/files/Lois_reglements/Circulaires/Blanchiment_terrorisme/lettre-circulaire_310120_AML-CFT.pdf

⁹ http://www.cssf.lu/fileadmin/files/Metier_OPC/FAQ/FAQ_Swing_Pricing_Mechanism_200320.pdf

¹⁰ https://www.esma.europa.eu/sites/default/files/library/esma35-43-2348_esma_statement_on_covid-19_telephone_recording.pdf

According to MiFID II, firms must keep mandatory records, amongst others, recording of telephone conversations relating to, at least, transactions concluded when dealing on own account and the provision of client order services that relate to the reception, transmission and execution of orders. Alternatively, when such measures cannot be put in place, firms are required to adopt alternative arrangements to ensure full compliance with existing regulatory requirements such as the use of recordable electronic communications as an alternative to telephone conversations.

ESMA recognises that, considering the exceptional circumstances created by the COVID-19 outbreak, some scenarios may emerge where, notwithstanding steps taken by the firm, the recording of relevant conversations may not be practicable (for example due to the sudden remote working of a significant amount of staff, or the lack of access to electronic communication tools by clients).

Therefore, if, under these exceptional scenarios, firms are unable to record voice communications, ESMA expects them to consider what alternative steps they could take to mitigate the risks related to the lack of recording. Alternative steps include the use of written minutes or notes of telephone conversations when providing services to clients. Client must be prior informed of the impossibility to record the call and that written minutes or notes of the call will be taken instead. In these scenarios, firms should also ensure enhanced monitoring and ex-post review of relevant orders and transactions.

However, ESMA requires that firms implement all possible actions to ensure that the above measures remain temporary and that recording of telephone conversations is restored as soon as possible.

New tick size regime for systematic internalisers

ESMA expects competent authorities not to prioritise their supervisory actions in relation to the new tick-size regime¹¹ introduced in MiFIR towards systematic internalisers, as of 26 March 2020 and until 26 June 2020, and to generally apply their risk-based supervisory powers in their day-to-day enforcement of applicable legislation in this area in a proportionate manner.

Securities Finance Transactions Reporting

ESMA postpones¹² the reporting obligations related to securities financing transactions under the Securities Financing Transactions Regulation and under the Markets in Financial Instruments Regulation.

The new regulatory obligations under Regulation (EU) 2015/2365 (SFTR) requires reporting of all Securities Financing Transactions (“SFTs”) to a registered Trade Repository (“TR”). TRs centrally collect and maintain the records of SFTs and they play a central role in enhancing the transparency of SFTs markets and reducing risks to financial stability. SFTR envisages a phased-in approach as regards the counterparties subject to the reporting obligation. Reporting obligations for credit institutions, investment firms, and relevant third country entities become applicable as of 13 April 2020.

ESMA requires competent authorities not to prioritise their supervisory actions towards entities subject to Securities Finance Transactions reporting obligations as of 13 April 2020 and until 13 July 2020.

As a result, ESMA does not consider it necessary to register any TR ahead of 13 April 2020. However, ESMA expects TR to be registered sufficiently ahead of the next phase of the reporting regime, i.e. 13 July 2020, for credit institutions, investment firms, central counterparties and central securities depositories, and relevant third-country entities to start reporting as of this date.

¹¹ https://www.esma.europa.eu/sites/default/files/library/esma70-156-2486_public_statement_tick_sizes.pdf

¹² https://www.esma.europa.eu/sites/default/files/library/esma80-191-995_public_statement.pdf

Do you have further questions?



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