EVERSHEDS SUTHERLAND

International Funds Net
Country Updates

June 2019

EUROPE

Belgium

Tax development affecting Luxembourg SICAVs

The Brussels Court of Appeal recently issued a decision by which the imposition of the Belgian annual tax (*tax d'abonnement*) upon Luxembourg SICAVs which market their shares in Belgium is considered to be a violation of Article 22 of the Belgian-Luxembourg Double Taxation Treaty and hence invalid. This annual tax is currently levied at a rate of 0.0925% on the fund's 'net outstanding amounts invested in Belgium'.

Foreign collective investment vehicles that market their shares publicly in Belgium are subject to such tax, once they are registered with the Financial Services and Markets Authority (FSMA).

The decision of the Brussels Court of Appeal is based on the reasoning that Luxembourg SICAVs are "residents" of Luxembourg as referred to in Article 4 of the Treaty. This means all Luxembourg SICAVs (even those not registered with the FSMA) would be entitled to claim the reduced treaty rate (15%) of Belgian withholding tax with respect to their Belgian-source interest and dividend income (subject to a case by case analysis), instead of the Belgian statutory tax rate of 30%.

It should be noted that the Belgian Income Tax Administration has filed an appeal against the decision of the Brussels Court of Appeal with the Belgian Supreme Court (*Cour de Cassation*). However, such appeal is considered unlikely to succeed and in any event it does not prevent Luxembourg SICAVs from filing refund claims in order to preserve their rights (given the applicable 5-year statute of limitations). Their refund claim could be initiated either:

- because they have paid the annual tax *(tax d'abonnement*) over the past five years and/or
- because they have paid withholding tax on any Belgian-source interest or dividends collected over the past five years.

Further, fund managers should consider the impact of their fiduciary responsibility to investors, which could impose a duty to file such refund claims on them.

Refund claims in respect of either the annual tax *(tax d'abonnement*) or the withholding tax paid in 2015 must be filed no later than 31 December 2019.

Germany

BaFIN introduces additional performance fee requirements for UCITS funds

In January of next year a number of additional requirements relating to performance fees will be introduced by the German regulator, BaFIN, for UCITS funds distributed in Germany. These include a minimum 12-month crystallisation period, a high water mark or a clawback mechanism running over at least 5 years.

Many funds domiciled outside of Germany fall short of these criteria. Research done by Fitz Partners has found that only 10% of Luxembourg and 30% of Irish funds will qualify for distribution in Germany under the new rules.

The impact of BaFin's new performance fee clauses for German domestic UCITS

The German regulator BaFin updated the requirements for cost clauses of domestic UCITS funds in June 2018, including the requirements for performance fees. Since then, it has been reported in Luxembourg, UK and Ireland, that BaFin is going to introduce new performance fee requirements and will apply these requirements to non-domestic UCITS seeking to being marketed in Germany.

There has been no official statement by BaFin confirming the introduction of new rules and we believe it is very unlikely that BaFin will further update the current requirements from June 2018 that are already in place. However, given the EU-wide aspirations to agree on a common standard for performance fees in the retail fund sector – an ESMA consultation paper on this topic is due to be published this year - it is in our view advisable for UCITS seeking marketing approval in Germany to comply with the German requirements in order to ensure a smooth marketing registration process.

BaFin has published sample cost clauses for open-ended retail funds which include requirements for the calculation and presentation of performance fees (the

Sample Clauses).

To read the Sample Clauses on the BaFin website (German language only), click here.

To read an English translation of the key clauses, click here.

With regard to performance fees, the most important requirements for German UCITS according to the Sample Clauses are:

- Bench Mark or High Water Mark

  Performance fees to be calculated by comparing the performance of the UCITS to either an appropriate bench mark or a high water mark for each financial year accounting period. The high water mark is defined as highest share value during the five previous financial years.

- Negative Amount carried forward

  In case of an underperformance in relation to the benchmark, the negative benchmark difference must be carried forward. The UCITS Management Company will only receive a performance fee in the subsequent year if the outperformance exceeds the negative amount carried forward. For the annual calculation of the performance fee, any underperformance amounts during the previous five financial years must be taken into account. The negative amount carried forward may not be limited by a cap.

- Fee Cap

  Performance fees must be capped at a certain percentage of the average NAV of the UCITS during the financial year.

Impact on Ireland:

The Irish supervisory authority, the Central Bank of Ireland (the CBI), has not issued a formal statement on this matter. However, on 31 May 2019 the CBI published revised regulations applicable to UCITS, the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1))(Undertakings for Collective Investment in Transferable Securities) Regulations 2019 (the 2019 Regulations), which follow on from an earlier CBI consultation and replace the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1))(Undertakings for Collective Investment in Transferable Securities) Regulations 2015, as amended (the 2015 Regulations). For the most part, as the 2019 Regulations, codify existing requirements they are effective from May 2019, subject to certain exemptions and grandfathering provisions.

The 2019 Regulations introduce a number of new requirements that apply to UCITS, such as: in relation to share class provisions, codify the existing CBI guidance on performance fees and make a number of other changes to the 2015 Regulations. The changes in the 2019 Regulations follow on from a consultation in April 2018 and a thematic review of performance fees in the same year by the CBI to examine methodologies used to calculate performance fees to ascertain if they were in line with the CBI's UCITS performance fee guidance. The CBI's approach to performance fees was previously set out on its website and its fund application forms and is now detailed in the 2019 Regulations.

At present, it is estimated that 98% of Irish-domiciled UCITS meet the current CBI guidance.

The 2019 Regulations provide for the following (which codify the current performance fee guidance in place by the CBI in its funds application forms):

- Performance fees must only be payable (or accrued) by the UCITS on achieving:
  - A new high net asset value over the life of the UCITS or
  - The out-performance of an index (Benchmark)

It is anticipated that the CBI will clarify by way of guidance that this may be on either achieving:

- A new high NAV per share or
- A new high NAV adjusted for subscriptions and redemptions (High Water Mark)

Further:

- The calculation of the performance fee must not crystallise more than once per year (in line with the IOSCO Good Practices)
  - Similarly, it is anticipated that the CBI will clarify by way of guidance that performance fees may crystallise upon an investor redemption
- The performance fee must not be paid more than once per year

- The responsible person must ensure that the calculation of the performance fee is verified by the depositary

- Where a UCITS has multiple managers or advisers, the responsible person must ensure that the performance fee is only payable on the performance of that part of the portfolio for which the investment manager or adviser is responsible

As the CBI mandates either the outperformance of a High Water Mark or Benchmark, the clawback mechanism is not used.

The CBI's current guidance on performance fees also puts in place a cap and explicitly provides, "it is not the [CBI's] practice to approve performance fees above 20% of the increase over the highest previous NAV or 20% of the amount the amount by which the UCITS outperforms the Index."

In addition, the CBI guidance also currently provides that "any underperformance of an index in preceding periods is cleared before a performance fee becomes due in subsequent periods.", which arguably addresses the issue of negative amounts being carried forward.

The CBI Regulations illustrate that the CBI'S thinking has independently been in line with BaFin's requirements (and largely achieves the same effect as the BaFin requirements) and IOSCO Good Practices. However, it may be the case that terminology and how compliance is achieved will require further clarification to demonstrate that Irish UCITS Funds are in compliance with the BaFin Requirements to ensure Irish-domiciled funds are eligible for marketing within Germany from January 2020, and that the marketing registration process is as efficient as possible.

Impact on Luxembourg:

The Luxembourg supervisory authority, the Commission de Surveillance du Secteur Financier (the CSSF), has not taken a formal written position on this matter. However, the CSSF has adopted a new market practice regarding the performance fee calculation in order to be aligned with the IOSCO guidelines on fees and expenses of collective investment schemes dated August 2016 (the IOSCO Guidelines).

In this context, the CSSF is requesting Luxembourg UCITS to have (i) a performance fee paid on an annual basis (ie a bi-annual performance fee calculation is no longer acceptable), and (ii) a five-year period in relation to the reset of such performance fee.

That being said, it would be prudent for a Luxembourg UCITS which intends to distribute in Germany to ensure their fund complies with the BAFIN requirements. We believe that the CSSF will welcome such steps given its willingness to fully comply with IOSCO Guidelines.

Greece

Central Ultimate Beneficial Owner Register (Central UBO Register) is set up

A long-awaited Ministerial Decision setting forth the operation of the Central UBO Register has been enacted. This decision sets out the details for the relevant maintenance and registration procedures. The initial filing obligation should take place before the end of 2019.

The scope of the registration obligation has become broader. Each legal entity having a registered office in Greece or conducting any business activity that is taxable in Greece (such as a Greek branch of a foreign company) is subject to an obligation of collecting and keeping adequate, accurate and up to date information on their UBOs in a special register kept at their registered office.

Listed companies are exempt from the requirement of keeping a special register, since such companies are already required to keep a notifications record in accordance with Law 3556/2007. Listed companies are automatically registered with the Central UBO Register through an interface between the Central Securities Depository and the "GSIS" e-platform. However, the requirement to keep a special register does apply to subsidiaries and any branches of domestic or foreign companies with parent companies that are listed in Greece or abroad.

Registration of date with the Central UBO Register will take place via the "GSIS" e-platform in three stages:

- Group A: from 16.09.2019 to 14.10.2019

  This group includes Greek shipping companies, including shipping companies under law 959/1979 and Greek offices of foreign shipping companies established under article 25 of Law 27/1975

- Group B: from 30.09.2019 to 01.11.2019

This group includes private companies, Greek branches of foreign companies, foundations and joint ventures

- Group C: form 14.10.2019 to 29.11.2019

  This group includes companies taking the form of a société anonyme or a limited liability company, as well as partnerships which do not fall into Groups A and B above

Access to date of beneficial owners is no longer limited to persons who have a proven legitimate interest. For a special fee the public will have access to specific UBO information, such as their full name, nationality and the nature and scope of the beneficial interest.

Luxembourg

"Luxembourg isn't a tax haven anymore" confirmed Pascal Saint-Amans, Director of the Centre for Tax Policy and Administration of the OECD

On Monday 24 June, a meeting was held in Luxembourg between Pierre Gramegna, the Luxembourg Finance Minister, and Pascal Saint-Amans, the Director of the Centre for Tax Policy and Administration of the Organization for Economic Co-operation and Development (OECD).

Discussions focused on the latest developments in international taxation, including the challenges relating to the digitalization of the economy.

Pascal Saint-Amans highlighted the progress made by Luxembourg over the past five years in terms of tax transparency and with respect to the implementation of the BEPS Action Plan.

"Today, Luxembourg fully respects the rules and is not dragging its feet" Mr. Saint-Amans said.

This confirmation by Pascal Saint-Amans is a welcome acknowledgement of the efforts of Luxembourg to ensure that it no longer bears the characteristics of a tax haven.

Pascal Saint-Amans also noted that, despite being a small and open economy, the fact that Luxembourg is willing to stay competitive is a constructive sign for Europe and the OECD.

The recent global approach to tax regulations will in time lead to better harmonization of international tax rules. Tax is no longer the key driving element of an economic transaction, but is only a part of a jurisdiction's competitiveness.

This is a major step for the Luxembourg financial centre, with each party, including government, authorities, the financial industry, having contributed over the five past years to this transition.

Having just implemented ATAD and the Multilateral Instrument (MLI), Luxembourg is continuing the pace of change with the upcoming transposition of DAC6 and ATAD 2.

Netherlands

Netherlands Authority for the Financial Markets (AFM) no-deal planning: exemption from licensing requirement

On 4 February 2019, the Dutch Secretary of Finance enacted a Ministerial Regulation that includes the United Kingdom within the scope of section 10 of the Exemption Regulations under the Financial Supervision Act. Investment firms with a seat in the UK and fulfilling the requirements of section 10 of the Exemption Regulations can (in certain circumstances) apply to be exempt from the requirement to be licensed by the AFM in order to conduct certain investment services in the Netherlands.

This Ministerial Regulation will only come into force in the event of a hard Brexit.

Switzerland

Update on the status of Swiss Financial Market Legislation

New legislation on Financial Services and Financial Institutions is set to impact foreign Fund Providers, Asset Managers and Investment Advisers in 2020.

The legislation sets up two new key triggers for regulatory requirements that are to replace the term "distribution" in the context of collective investment schemes. The two triggers are:

- **Financial Service**:

  Under the new legislation any individual

making contact with a client and offering them a specific financial service must be entered into a newly established 'Client Adviser Register' by an expected deadline of 30 June 2020. To qualify for entry onto the register individuals will have to demonstrate sufficient professional knowledge, familiarity with applicable rules of conduct and (if relevant) a specific professional insurance policy.

Providers of financial services will also be expected to:

- Affiliate themselves with an ombudsman's office (expected deadline 30 June 2020)
- Allocate their clients to a private, professional or institutional client segment (expected deadline 31 December 2020)
- Observe specific rules of conduct depending on the relevant client segment (expected deadline 31 December 2020).

With regard to the meaning of 'financial services' portfolio management and investment advice is clearly captured, however it is expected that the definition will be clarified in implementing ordinances in November 2019.

- **Offer and Advertising**:

Given that the definition of 'offer' is very general and the definition of 'offeror' is missing, it is expected that these will also be clarified in further implementing ordinances in November 2019.

The new legislation requires Swiss Financial Market and Supervisory Authority (FINMA) approval in the event of an offering of UCITS to private clients and to professional clients who have opted in to be treated as private clients.

In other areas FINMA approval has become less burdensome, but potentially more useful.

Further, the requirement for a Swiss representative and paying agency in the area of offers to qualifying investors will be abolished, except for opted out high-net-worth individuals and private investment structures without professional treasury operations created for them.

The new legislation also subjects Swiss presences (even informal presences) of foreign Asset Managers promoting segregated mandates to a new FINMA authorisation requirement. The expected deadlines are as follows: FINMA should be notified by the 30 June 2020 and authorisation obtained by 31 December 2022.

FINMA launches UCITS application on its survey and application platform

FINMA has launched a new online survey and application platform – the Erhebungs- und Gesuchsplatform (EHP). From 1 June 2019 applications relating to foreign collective investment schemes (including UCITS) can be made via the EHP. The EHP does not require an electronic signature, but firms will need to register on the platform and appoint two responsible people.

FINMA made this announcement via email and telephone to Swiss representatives, who will then need to grant access to external counsel if they wish these to use the EHP.

It is still possible to make hard-copy filings or file using the existing electronic FINMA-filing platform. Electronic filings made via either platform benefit from lower fees than the hard-copy equivalent, however the existing electronic FINMA-filing platform is expected to be phased out in the coming months.

UK OVERSEAS TERRITORIES

British Virgin Islands

British Virgin Islands tax authority announced deadline extensions for certain filing requirements

The British Virgin Islands Tax Authority (ITA) has announced that the British Virgin Islands Financial Account Reporting System (BVIFARS) is being updated in light of the Country-by-Country Reporting (CbCR) regime. Consequently the registration deadline for BVI 'Constituent Entities' has been extended. Constituent Entities can continue to register with the ITA by email. Further information is expected when the BVIFARS is ready and when email registration is to come to an end.

The ITA has also announced that the deadline for non-reporting BVI financial institutions to register for common reporting standards (CRS) has been extended. A further press release is expected to be issued with details of the revised deadline.

Further, the reporting deadline for BVI financial institutions qualifying as Trustee Documented Trusts with reportable accounts has been extended to 28 June 2019.

Cayman Islands

Preimeo v HSBC: Cayman Court of Appeal considers service provider claims

On 13 June 2019 the Cayman Islands Court of Appeal (CICA) handed down its judgment in Primeo Fund v Bank of Bermuda (Cayman) Ltd & Anr. The judgment considers the claims advanced against HSBC group companies in their role as administrator and custodian to Primeo Fund (Primeo), a Madoff feeder fund. A remaining issue is the question of reflective loss, in respect of which Primeo's liquidators are consider an appeal to the Privy Council.

The first instance judge had held that Bank of Bermuda (Cayman) Limited (BoB Cayman) and HSBC Securities Services (Luxembourg) SA (HSSL)(together HSBC) had breached ongoing duties owed in their dual capacities as administrator and custodian to Primeo. Additionally HSSL was found strictly liable for theft of cash invested with Bernard L Madoff Investment Securities (BLMIS). Damages were, however, not awarded. It was found at first instance that Primeo had not suffered any loss when paying cash to BLMIS, HSBC hadn't caused loss by its breaches and that Primeo's losses were a reflection of losses suffered by other Madoff feeder funds into which Primeo had switched its investments.

Primeo and HSBC appealed and cross-appealed respectively.

Primeo's appeal was largely successfully. The CICA held that Primeo had suffered losses when it paid cash to BLMIS and that HSBC, in breaching its duties as administrator and custodian, had caused Primeo's losses. The CICA additionally reduced the deduction for contributory negligence made at first instance and held that the claims were not time barred. In contrast, HSBC's cross-appeal was largely unsuccessful.

The biggest hurdle that remains for Primeo's stakeholders is the rule against reflective loss and CICA adopted a broad interpretation of the principle. However, it is hoped that a UK Supreme Court judgment expected later this year will go some way towards clarifying the scope of the rule.

Guernsey

New research reveals private capital takes a bigger stake in the private equity market

Since the financial global financial crisis the net private financial wealth of family offices and high-net-worth individuals doubled in nominal terms. Allocations to alternative assets such as venture capital and private equity have also doubled.

Guernsey Finance has undertaken a survey to understand the developing trends in the merging of the private capital and equity space. Guernsey Finance has published a report, exploring the question of whether private capital is as significant a source of investment for private equity firms and their funds as macro trends suggest.

Click here to read the full report.

Guernsey enhances its offer in the family office space

On 12 June 2019 the Guernsey Financial Services Commission (GFSC) published guidance on the way that private trust companies are controlled and administered by licensed fiduciaries.

It is hoped that this revised guidance will offer greater clarity and certainty to clients, making Guernsey a more attractive option for private wealth management.

To view the guidance, please click here.

AMERICAS

Chile

CCR introduces modifications to Agreement 32 limiting shareholder concentration

The Comisión Clasificadora de Riesgo (CCR) has issued a modification to Agreement 32 for the approval of foreign funds, in which a 25% limit is set for the participation of a single shareholder in a fund seeking approval, but granting higher limits exceptionally depending on the liquidity of the asset class in which the fund invests.

Shareholder concentration has traditionally been considered a requisite for approval, but no specific limit

was mentioned until now.

Previous criteria still apply under the liquidity exceptions and as of now, there are no plans to request updated information to currently approved funds.

Future modifications are expected in the information that a fund seeking approval needs to provide with regard to its investors and the criteria concerning the definition of nominee/omnibus accounts.

ASIA PACIFIC

India

The Securities and Exchange Board of India (SEBI) sets out proposals to amend the Foreign Portfolio Investors Regulations (FPI Regulations)

On 24 May 2019 the SEBI published the report of the Working Group on FPI Regulations. Some of the key recommendations made by the working group made include:

- Fast track on-boarding process for select Category II FPIs
- Simplified registration for Multiple Investment Manager structures
- Pensions funds to be considered for Category FPI registration
- Review of broad based condition for appropriately regulated entities
- Entities majorly owned by investors eligible for Category I registration shall be deemed Category I FPI
- Certain entities owned by Category II eligible investors shall be eligible for Category II FPI registration
- A simplified registration requirement for Category III FPIs
- Removal of the "opaque structure" definition
- Separate registration for sub-funds of a fund with a segregated portfolio
- KYC Reliance on same group regulated entity of custodian for non-PAN documents
- Liberalised investment cap
- Review of prohibited sector for foreign investment for FPIs
- Review of restriction on Sovereign Wealth Funds for investment in corporate debt securities
- Liberalisation for regulated Category III FPIs
- Permitting FPIs for off-market transactions
- Harmonization between investment restrictions in FPI regulations and FEMA 20(R)
- Reclassification of investment from FPI to FDI
- Alignment between FPI and AIF routes
- Strengthening of ODI framework
- Entities established in the IFSC be deemed to have met the jurisdiction criteria for FPIs

To read the full report, please click here.

Myanmar

Myanmar tax update: IRD confirms changes to the financial year for cooperatives and private enterprises

The Myanmar Internal Revenue Department (IRD) has issued a letter confirming that changes to the tax year of reporting for cooperatives and private enterprises will take effect from 1 October 2019. This brings the financial year in line with Myanmar's new budget year. The IRD stated that:

- There will be a six month transition period (1 April 2019 – 30 September 2019) and
- A new financial year will commence from 1 October 2019 and run until 30 September 2020.

Furthermore, the IRD has confirmed that any advance tax payments made during the period ending 31 March 2019 will form part of the assessment year 2019. Any advance payments made in the transition period will form part of the assessment year 2019-20.

It is still uncertain if this change applies to individuals or personal income tax.

South Korea

Post-Brexit free trade deal agreed with South Korea

South Korea and the UK have agreed a free trade agreement is designed to ensure that business can continue to trade with South Korea. This is the first post-Brexit trade agreement secured by the UK in Asia.

South Korea's parliament is yet to approve the deal, but it is expected that the pact will be ratified prior to 31 October 2019.

and it is advisable to consult with local legal counsel before any actual undertakings.

For more information on these updates or about IFN, our specialist solution for global AIFs and UCITS distribution activities, please contact:

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