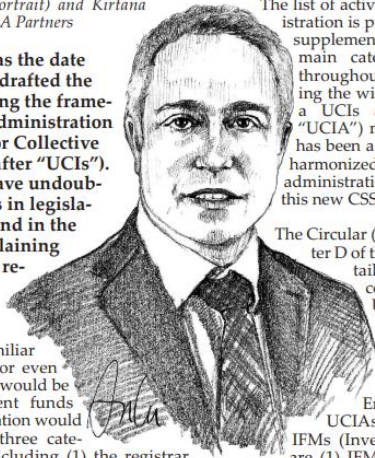


A fresh take on the administration of investment funds

By Cédric LEROY (portrait) and Kirtana BHOOJEDHUR, HACA Partners

January 1991 was the date when was last drafted the circular detailing the framework around the administration of Undertakings for Collective Investments (hereafter "UCIs"). Ever since, there have undoubtedly been changes in legislations, technology and in the market, hence, explaining CSSF's decision to re-visit the current rules.



The list of activities around UCIs administration is provided in article 12, with supplement details around the three main categories being provided throughout the Circular. Considering the wide range of activities that a UCIs administrator (hereafter "UCIA") might be subject to, there has been a growing need for a more harmonized framework around their administration, which transpired into this new CSSF Circular 22/811.

The Circular (May 2022) replaces Chapter D of the Circular IML 91/75, detailing the rules around the central administration of UCIs.

Eligibility and scope of the Circular

For those not very familiar with the terms UCI or even administration, UCIs would be defined as investment funds while their administration would broadly encompass three categories of services, including (1) the registrar function involving the update and maintenance of the shareholders register, (2) the NAV calculation and accounting function, entailing all aspects around ensuring that the UCI's NAV is accurate and (3) client communication, comprising the handling of confidential information and correspondence for investors.

Entities eligible to act as UCAs (UCI administrators), IFMs (Investment Fund Managers) are (1) IFMs established in Luxembourg, including foreign ones carrying out the activity for investment funds established in Luxembourg, (2) external service providers including licensed credit institutions and their Luxembourg branches, registrar agents, client communication agents and administrative agents and lastly (3) regulated Luxembourg

UCIs. For the last category, the entities are only able to act as UCAs for themselves. According to the Circular, before any of the three categories of entities can act as UCIA, there is a need for them to assess their eligibility in providing these services based on applicable legal provisions. With the eligibility criteria fulfilled, the Circular applies for entities acting as UCIA for regulated and non-regulated UCIs established in Luxembourg, or not.

The Circular comes with quite extensive details around the administration activity of UCIs, covering wide aspects, with some of them being summarized below.

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The Circular is also supported by templates, helping administrators to transition to new reporting requirements.

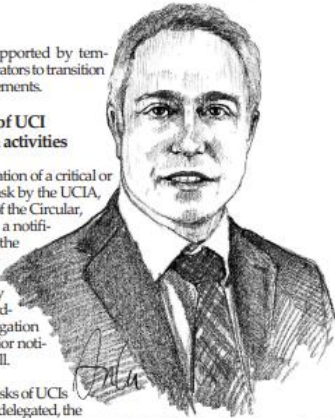
Delegation of UCI administration activities

In the event of the delegation of a critical or important operational task by the UCIA, according to article 100 of the Circular, this would be subject to a notification being sent to the CSSF, at least three months prior to the planned delegation. Any subsequent change regarding the aspects of delegation would be subject to a prior notification being sent as well.

Although one or more tasks of UCIs administration might be delegated, the Circular prohibits the delegation of the monitoring of the delegated tasks or the due diligence/oversight on the delegates to be delegated. The Circular provides further details around the delegation aspects, including but not limited to, the necessary documents required such as written contracts, delegation procedures and oversight reports, due diligence aspects, delegation to group and the remaining responsibilities of the UCIA, even following the delegation of tasks. As per article 99, the requirements on delegation set out in the Circular apply *mutatis mutandis* where delegated UCIs administration tasks are sub-delegated (with the exception of ICT delegation).

Changes in reporting requirements

The Circular also comes with new reporting requirements, as highlighted in article 7 and supported by Annex B, regarding the administrators' business activities and resources. The reporting is required on an annual basis, being due at the latest five months after the financial year of the UCIA. Although this Circular comes into effect immediately following its date of publishing on 16 May 2022, this annual report would be due starting from 30 June 2023 only.



plan or DRP) and addresses the practice to be adopted around access rights.

Application of the Circular and sharing our perspective

It is with no doubt that the objective behind this Circular is to provide a more uniform and well established framework for the administration of UCIs, with the entity being in charge of the central administration of the UCIA (as mentioned in the previous circular), now being denominated as the UCI administrator and the introduction of the grouping of their services under three main functions.

Several important points are considered. To name a few, the notion of massive outsourcing is not allowed, showing the need for UCAs to stay in their role, in form and in substance, and the storage of documentation is addressed with the Circular reducing the need to keep physical documents but instead, only critical and irreplaceable ones. The need for notification, instead of formal authorisation in the case of delegation of an important operational task, is also in line with the CSSF's recent approach to outsourcing, allowing a faster and smoother process.

The Circular does introduce more administrative work in terms of reporting and documentations needed at the level of the UCIA. However, this ensures the need to have up-to-date information and a proper operational framework, reflecting the notion of good practice and sound governance implemented in Luxembourg. It however needs to be mentioned that there is a lack of definition regarding depositaries. According to the Law of 5 April 1993, depositaries can be holding different licences with different roles and responsibilities as per Chapter 1, but also as per the Chapter 2 and Art. 26 or Art 26-1. Although article 63 of the Circular does mention the scope of depositaries as those being in charge of safekeeping of assets, other articles do not provide for this parameter.

Another pertinent matter is that the (new) definition of the obligation of the UCIA in terms of tax for the investment funds will also bring legal challenges in the contractual arrangement between the UCIA and the funds/IFMs due to the complexity and level of potential tax liabilities. These tax obligations dictated by tax and corporate laws, in addition to the sectorial laws (UCITS Law, etc...), would have been more on funds and IFMs as part of their corporate responsibilities. Given that the CSSF has increased its market expectation of tax governance of the funds and IFMs through the issue of the CSSF Circular 20/744, this new statement could be considered as surprising.

What to do next?

This new Circular comes with new requirements, urging UCAs to review their current policies and procedures as well as delegation models and contracts, on top of assessing whether their UCI administration set-up is in line with the requirements of this new Circular, all being services provided by HACA Partners, with the support of a strong team of well experienced professionals. It is also true that non-regulated service providers currently providing certain UCIA activities will have to assess their eligibility in providing these services without an authorization being obtained from the CSSF.

As previously mentioned, the Circular enters into effect immediately, i.e., as from the 16 May 2022. However, for entities already acting as UCAs as at that date, the requirement for authorization is not applicable and a grandfathering period is granted until 30 June 2023, in order to allow them to comply with the remaining provisions of the Circular. With regards to the annual reporting, all entities are required to file them starting as from 30 June 2023.

Resources

In terms of resources, the Circular mentions the need for the UCIA to have adequate and sufficient resources in terms of human resource, operational infrastructure and technology. An adequate staff base would imply having employees sufficient in number and appropriate in terms of experience and skills, proportionate to the volume of UCIs serviced and their complexity, while ensuring the four eyes principle. The UCIA is also required to establish clear hierarchical and reporting lines as well as trainings to allow the proper functioning of departments.

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Documentations

The Circular takes a prudent approach towards the regulation of UCIs administration activities, and this is reflected in the increased administrative responsibilities of the administrators in terms of documentation. The Circular obliges that a written contract be established between the UCIA and the UCI, with instructions as to the various components to be present in the agreement (article 38). It also mentions the creation and maintenance of a manual of procedures and processes covering all related administrative functions of UCIs, to be reviewed by the administrator at least annually (article 47). Other requirements include the need for up-to-date organizational charts (article 51), measures against fraud (article 52) and KPIs/KRIs (key performance indicators/ key results indicators) covering the UCI administration activity (article 53). Strengthening of the internal controls is further emphasized with the establishment of an effective conflict of interest policy and a policy around the approval of new business relationships and services.

Relationship with the depository

With regards to the relationship with the depository in general, the Circular puts emphasis on the need for independence and separation between the UCIA and

New tax obligations falling on the UCIA

The Circular defines the duties of the UCIA activities under article 12, which includes a new responsibility, being that of the "calculation, reporting and verification of payment of taxes, such as subscription tax or the VAT for regulated UCIs established in Luxembourg".

IT considerations

A section of the Circular is also dedicated to IT requirements considering the fast pace of the IT industry, mentioning the need to establish a framework around ICT risks to protect the entity against cyberattacks or other IT deficiencies which might be detrimental towards the safeguarding of security of information. This implies that the UCIA must have its own system of execution i.e., procedures and technical and ICT infrastructures. In addition, the need for a professional software is mentioned for the calculation of NAVs and maintenance of shareholder registers. Furthermore, in situations where the UCIA uses a system located outside of Luxembourg, the latter should have a secure backup of all accounting and registrar positions. The Circular also mentions the need for the establishment of a business and service continuity policy (i.e., business continuity plan or BCP and disaster recovery

4,3 milliards d'euros d'avoirs russes gelés au Luxembourg

A ce jour, les opérateurs luxembourgeois ont gelé des avoirs de personnes et entités sanctionnées à hauteur de 4,267 milliards d'euros. Il s'agit d'avoirs bancaires et de valeurs mobilières.

À la demande du ministère des Finances, le Luxembourg Business Register (LBR) a identifié les sociétés immatriculées au Registre de commerce et des sociétés (RCS) pour lesquelles sont renseignées des personnes reprises dans les listes de sanctions. Jusqu'à présent, plus de 90 entités et 1.100 entités légales ont été désignées.

Ces chiffres ont été présentés le 7 juin 2022, à l'occasion d'une réunion extraordinaire du Comité de suivi sous la présidence de Yuriko Backes, ministre des Finances. Le comité a fait le point sur les mesures restrictives de l'Union européenne en réaction à l'agression militaire de la Russie contre l'Ukraine, les modalités relatives

au régime de sanctions, leur mise en œuvre sur le plan national et leur impact éventuel sur le secteur financier. La législation nationale, notamment la loi du 19 décembre 2020 relative à la mise en œuvre de mesures restrictives dans le domaine financier, permet au ministère des Finances, au ministère de la Justice, aux autorités de surveillance et aux organismes d'autorégulation de contrôler le respect des sanctions et d'agir en cas de non-respect.

Les autorités luxembourgeoises coopèrent étroitement avec leurs homologues européens et des autres États membres, afin d'assurer une mise en œuvre efficace des sanctions et de prévenir ainsi d'éventuelles tentatives de contournement. Les autorités luxembourgeoises sont à la disposition de tous les opérateurs économiques pour les aider à répondre à toutes les questions qu'ils pourraient avoir dans ce contexte.

Source : ministère des Finances

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