

Luxembourg law on mandatory deposit and immobilisation of bearer shares and units

The Luxembourg law dated 28 July 2014 on the mandatory deposit and immobilisation of bearer shares and units (Law) entered into force on 18 August 2014.

The objective of the Law is to bring Luxembourg law in line with the requirements of the Financial Action Task Force (FATF) and the Global Forum on Transparency and Exchange of Information for Tax Purposes regarding the identification of holders of bearer shares/units. The Law therefore introduces a new mandatory procedure requiring that bearer shares/units issued by commercial companies and certain regulated investment vehicles are deposited with a depositary established in Luxembourg and who is subject to general obligations under the legislation on the combat against money laundering and terrorism financing (AML/CTF).

Scope of the Law

The Law applies to the following Luxembourg entities that have issued or will issue bearer shares/units:

- public limited liability companies (*sociétés anonymes – SA*);
- corporate partnerships limited by shares (*sociétés en commandite par actions – SCA*);
- investment companies in risk capital (SICAR), which are incorporated in the form of an SA or SCA;
- undertakings for collective investment in transferable securities (UCITS), specialised investment funds (SIF) and other undertakings for collective investment (UCIs), which are incorporated in the form of an SA, SCA or mutual funds (*fonds commun de placement – FCP*).

Main features of the Law

Mandatory deposit and immobilisation with a depositary

Bearer shares/units, whether they have already been issued or will be issued in the future, must be deposited with a depositary established in Luxembourg who is appointed by the management body of the relevant commercial company or investment vehicles.

The Law provides that the depositary cannot be a shareholder of the issuer.

Furthermore the management body of the issuer will need to choose a depositary established in Luxembourg among the following categories of professionals:

- credit institutions;

- portfolio managers (*gérants de fortunes*);
- distributors of units/shares in undertakings for collective investments;
- specialised professionals of the financial sector duly licensed in accordance with the amended Luxembourg law of 5 April 1993 on the financial sector as family office, company domiciliation agent, professional providing company set-up and management services, registrar agent or professional custodian of financial instruments;
- lawyers (*avocats*) (registered either on list I or IV of the Official List of lawyers held by the Luxembourg bar association);
- notaries (*notaires*);
- statutory auditors (*réviseurs d'entreprises*) and approved statutory auditors (*réviseurs d'entreprises agréés*); and

- chartered accountants (*experts-comptables*).

The above professionals are all subject to Luxembourg legislation on AML/CTF.

The depositary holds the deposited bearer shares/units for the account of the share/unit-holder who is owner of the bearer shares/units.

An excerpt of the documents relating to the appointment and/or the termination of the mandate of the depositary has to be filed with the Luxembourg register of commerce and commercial companies and published in the Luxembourg official gazette (*Mémorial C*).

The depositary may not surrender the bearer shares/units except in a limited set of circumstances where he may convey the bearer shares/units to (i) his successor as depositary, in case of termination of services or (ii) the issuer in case of, *inter alia*, conversion of the bearer shares/units to registered shares/units or redemption of its own bearer shares/units by the issuer.

Consequences of registration of bearer shares/units, ownership and shareholder rights

Register of bearer shares/units

According to the Law, the depositary needs to keep a register of bearer shares/units which are deposited with it, such register being mandatorily kept in Luxembourg (Register).

The Register must contain the precise identity of each share/unit-holder along with the number of shares/units held, the date of the deposit, and, as relevant, any transfers of shares/units with the date of such transfer or any

conversion into registered shares/units.

Registration and ownership

The ownership of a bearer share/unit has to be registered on the Register. The ownership of the relevant bearer share/unit therefore exclusively results from the registration of the relevant share/unit-holder in the Register.

A share/unit-holder may require the depositary to issue a certificate evidencing the registrations covering such holder in the Register. However, such certificate does not qualify as title of ownership, but merely certifies the deposit of the bearer shares/units at the date of issue of the certificate.

Exercise of share/unit-holder rights

Any rights relating to the bearer shares/units may only be exercised if the bearer shares/units have been deposited with the depositary and the required information is duly inscribed in the Register.

Transfer of bearer shares/units

The Law abolishes the transfer of bearer shares/units by the mere tradition of the certificate.

In order for a transfer of bearer shares/units to be enforceable *vis-à-vis* the issuer and third parties, the transfer has to be registered by the depositary in the Register. The depositary may for such purpose accept any document or notification establishing the transfer of ownership between the transferor and the transferee.

Pledges over bearer shares/units

The Law also modifies the amended Luxembourg law of 5 August 2005 on financial collateral arrangements by allowing that the transfer of possession of bearer shares/units

registered in the Register and hence the enforceability of a pledge over such bearer shares/units can be ensured by means of a inscription of the pledge on the margin of the Register.

Confidentiality and access to the Register

The Register is neither published nor filed with the Luxembourg register of commerce and commercial companies, thus preserving the confidentiality of the Register content towards third parties.

As regards confidentiality towards other share/unit-holders, the Law ensures that share/unit-holders only have access to their own registrations in the Register.

Liability of and sanctions for the management bodies and the depositary

The Law criminally sanctions the members of the management body of an issuer with a fine of up to EUR 125,000, in case they knowingly:

- do not maintain a register of registered shares or units at the registered office of the issuer;
- do not designate a depositary;
- do not deposit the bearer shares/units with such depositary in accordance with the Law;
- recognise the rights attached to bearer shares/units, albeit these shares/units have not been deposited with the appointed depositary or not all required information has been inscribed in the Register.

The civil law liability of the depositary for its obligations under the Law is determined according to the same rules as the liability of management body members.

The depositary or where it is a legal entity, its management body members, are also punished by a criminal fine of up to EUR 25,000, if they knowingly act in breach of the provisions of the Law.

Transitional provisions

Bearer shares/units issued after 18 August 2014 have to be deposited with a depositary fulfilling the requirements of the Law immediately upon issuance.

As regards bearer shares/units issued before 18 August 2014, their issuer must appoint a depositary fulfilling the requirements of the Law by 18 February 2015 and these bearer shares/units will have to be deposited with the appointed depositary by 18 February 2016.

Furthermore, voting and financial rights (such as distribution rights and rights to payment of redemption proceeds) attached to bearer shares/units which have not been immobilised with the depositary by 18 February 2015 will automatically be suspended, respectively deferred,

until they have been immobilised. Also, in case of a suspension of voting rights, the relevant bearer shares/units will not be counted for the calculation of the quorum and of majorities during general meetings of share/unit-holders. Holders of such shares or units are not admitted to the general meetings.

Any bearer shares/units not immobilised by 18 February 2016 have to be cancelled, entailing a need to proceed to a corresponding share capital reduction of the issuer. Any cancellation of bearer shares/units in accordance with the Law will need to be carried out at a price determined on the basis of a recent balance sheet (respectively the recent net asset value in case of a SICAR, UCITS, SIF or other UCI), such price being reduced, the case being, by the amount of undistributable share premiums, reserves, commissions and charges relating to the act for the capital reduction. The net proceeds of such cancellation will be deposited with the Luxembourg *Caisse de Consignation* until restitution is requested by a person having validly established his/her entitlement.

Further CSSF Guidance

On 30 December 2014, the Commission de Surveillance du Secteur Financier (CSSF) published a FAQ document on its website in relation to Luxembourg regulated investment vehicles impacted by the Law, i.e. SICARs, UCITS, SIFs, and other UCIs, which are incorporated in the form of SA, SCA or FCP.

In its FAQ, the CSSF clarifies, among others, that any service provider of Luxembourg regulated investment vehicle impacted by the Law (e.g. the registrar and transfer agent or depositary bank) can be appointed as depositary in the sense of the Law to the extent such entity fulfils the requirements imposed by the Law.

The CSSF further requires in its FAQ that Luxembourg regulated UCITS, SIFs, other UCIs and SICARs incorporated in the form of an SA, SCA or FCP, which have issued bearer shares/units inform their share-/unit-holders on the implications and deadlines of the Law, as well as on the identity of the depositary, in an

Timeline

- The law entered into force on **18 August 2014**
- Register of registered shares/units must be kept at the registered office of the issuer **immediately**
- Bearer shares/units **issued after 18 August 2014** have to be deposited with a depositary **immediately** upon issuance
- Bearer shares/units **issued before 18 August 2014** have to be deposited with a depositary by **18 February 2016**, **BUT** the issuer of these bearer shares/units must appoint the depositary by **18 February 2015**
- All voting and distribution rights attached to bearer shares/units not deposited by 18 February 2015 will be suspended
- All bearer shares/units not deposited by 18 February 2016 will be cancelled and the net proceeds of such cancellation will be deposited with the Luxembourg *Caisse de Consignation*

adequate manner.

According to the CSSF FAQ, the prospectus of these investment vehicles has, in any case, to be amended in order to reflect the abovementioned information. In addition to the amendment of the prospectus, the CSSF considers that information of the share-/unitholders can also be achieved by all means, including the following:

- the usual information sources used by the investment vehicle as are mentioned in its prospectus;
- the website of the investment vehicle or its management company;
- a notice to share-/unitholders published in at least two newspapers with adequate circulation, one of which at least shall be a Luxembourg newspaper;
- an information circulated through the distribution chain.

Clifford Chance can provide you with an integrated and dedicated team that will be happy to answer your questions on the Law of 28 July 2014 and to assist you in order to comply with its requirements.

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