

## **CSSF Streamlining requirements and process for mutual recognition of Hong Kong funds**

[ 28 February 2020 ]

### **Mutual Recognition of Funds (MRF) between Luxembourg and Hong Kong**

1. The Securities and Futures Commission of Hong Kong (SFC) and the Commission de Surveillance du Secteur Financier (CSSF) signed a Memorandum of Understanding concerning Mutual Recognition of Covered Funds and Covered Management Companies (MoU) on 15 January 2019 (as amended from time to time). The MoU provides a framework for mutual recognition of covered funds offered, marketed and distributed to retail investors in Luxembourg and to the public in Hong Kong.
2. In this circular, Hong Kong-domiciled funds that are eligible for CSSF authorisation or have received CSSF authorisation under the MRF are denoted as “Hong Kong Covered Funds” while Hong Kong management companies that are eligible to manage Hong Kong Covered Funds are denoted as “Hong Kong Covered Management Companies”.
3. The SFC and the CSSF may consider extending the MRF to include other types of funds in future in accordance with the MoU.

#### **I. General principles**

4. MRF operates on the principles that, in respect of a Hong Kong Covered Fund that has been authorised by the SFC and is seeking or has received authorisation to be marketed in Luxembourg to retail investors within the meaning of article 1 (54) of the Luxembourg law of 12 July 2013 on alternative investment fund managers (the Law of 2013):
  - a. the Hong Kong Covered Fund shall meet the eligibility requirements set out in the paragraphs 8 to 17 below and comply with all of the applicable requirements set out in this circular (see below);
  - b. the Hong Kong Covered Fund shall remain authorised by the SFC in Hong Kong and be allowed to be offered, marketed and distributed to the public within Hong Kong;
  - c. the Hong Kong Covered Fund shall operate and be managed in accordance with the relevant laws and regulations in Hong Kong and its constitutive documents;
  - d. the sale and distribution of the Hong Kong Covered Fund in Luxembourg shall comply with the applicable laws and regulations in Luxembourg;
  - e. where relevant, the Hong Kong Covered Fund and the Hong Kong Covered Management Company shall comply with the additional rules released by the CSSF governing the authorisation, post-authorisation and ongoing compliance in the context of the offering,

marketing and distribution of the Hong Kong Covered Fund to retail investors in Luxembourg;

- f. the Hong Kong Covered Management Company of the Hong Kong Covered Fund shall ensure investors in both Hong Kong and Luxembourg receive fair treatment, including in respect of investor protection, exercise of rights, compensation and disclosure of information; and
  - g. ongoing disclosure of information on the Hong Kong Covered Fund shall be made available to investors in Hong Kong and Luxembourg at the same time (so far as is reasonably practicable given the different time zones of the jurisdictions).
5. In general, funds that are seeking CSSF authorisation or have received CSSF authorisation for offering, marketing and distribution in Luxembourg to retail investors pursuant to the law of 17 December 2010 relating to undertakings for collective investment (the Law of 2010) have to comply with Article 100 (1) of the Law of 2010, Article 45 of the Law of 2013, this circular, guidelines and other requirements as may be issued by the CSSF from time to time. On the basis of the principles set out above, if a Hong Kong Covered Fund complies with the relevant Hong Kong laws and regulations and the conditions described in this circular, it will enjoy a streamlined process of authorisation for offering, marketing and distribution in Luxembourg to retail investors.
6. In view of the differences between the Hong Kong's and the Luxembourg's regulatory regimes, to ensure proper investor protection and consistency with existing CSSF-authorised funds, this circular sets out the additional requirements with which a Hong Kong Covered Fund has to comply when applying for CSSF authorisation for offering, marketing and distribution to retail investors in Luxembourg under the MRF, as well as other requirements which a Hong Kong Covered Fund has to observe after obtaining CSSF authorisation.

## **II. Marketing authorisation conditions applicable to Hong Kong Covered Funds**

7. To ensure proper investor protection and consistency with existing Luxembourg collective investment schemes authorised for marketing to retail investors in Luxembourg, Hong Kong Covered Funds are required to comply with the requirements set out in the paragraphs 8 to 17 below.
- A. Eligibility requirements applicable to Hong Kong Covered Funds
8. The Hong Kong Covered Fund must be established, domiciled and managed by a Hong Kong Covered Management Company in accordance with Hong Kong laws and regulations and its constitutive documents and authorised by the SFC under section 104 of the SFO for public offering in Hong Kong.
9. The Hong Kong Covered Fund must be one of the following fund types:
- (a) a general equity fund, bond fund or mixed fund; or
  - (b) a feeder fund where the underlying fund falls within one of the fund types in paragraph 9(a) above and complies with the requirements in this circular.
10. The Hong Kong Covered Fund's net derivative exposure (as defined in Note to 7.26 of the Code on Unit Trusts and Mutual Funds (UT Code)) must not exceed 100% of the fund's net asset value.

11. The Hong Kong Covered Fund must not invest in (i) physical commodities including precious metals or commodity based investments or real estate, (ii) crypto-assets or crypto-currencies, or (iii) certificates representing the assets referred to under (i) or (ii).
12. The Hong Kong Covered Fund must not have share class with hedging arrangement other than currency hedging.
13. The Hong Kong Covered Fund must have at least one dealing day for redemption every two weeks.

B. Eligibility requirements applicable to Hong Kong Covered Management Companies

14. The Hong Kong Covered Management Company must be domiciled in Hong Kong and licensed with the SFC for Type 9 regulated activity (asset management) in accordance with Part V of the SFO.
15. The Hong Kong Covered Management Company and its responsible officers (as defined in Part 1 of Schedule 1 to the SFO) who are licensed for Type 9 regulated activity (asset management) have not been subject to any of the following disciplinary actions taken by the SFC, in the past 3 years or since the date of establishment of the Hong Kong Covered Management Company if it has been established for less than 3 years:
  - a. with respect to the Hong Kong Covered Management Company, a revocation or suspension of its license by the SFC pursuant to section 194 of the SFO; and
  - b. with respect to the responsible officers of the Hong Kong Covered Management Company, a revocation or suspension of their licenses by the SFC pursuant to section 194 of the SFO.
16. Where the Hong Kong Covered Management Company delegates the investment management functions to another entity authorised to manage collective investment schemes, such entity is operating in one of the acceptable inspection regimes recognized under 5.1 of the UT Code.

C. Trustee/custodian

17. The trustee/custodian appointed by the Hong Kong Covered Fund must be a bank licensed under section 16 of the Banking Ordinance (Chapter 155 of the Laws of Hong Kong), or a subsidiary of such a bank; or a trust company approved by the Mandatory Provident Fund Schemes Authority.

D. Luxembourg paying agent

18. The Hong Kong Covered Fund must appoint a credit institution in Luxembourg in compliance with the Law of 2010 in order to ensure that facilities are available in Luxembourg for making payments to unit-holders or redeeming units. The Applicant must provide to the CSSF a proof that a paying agent has been appointed for its Hong Kong covered Fund among the application documents (as defined in paragraph 38 below) to be provided to the CSSF.

E. Marketing rules, offering documents, ongoing disclosure, advertisements / marketing materials and language

*Rules applicable to the marketing of shares or units of Hong Kong Covered Funds in Luxembourg*

19. Under Luxembourg domestic law, a Hong Kong Covered Fund would be considered, for the purpose of the MRF, as an alternative investment fund (AIF), therefore the marketing rules applicable to the AIF shall apply.

20. Pursuant to article 45 of the Law of 2013, a Hong Kong Covered Management Company may be authorised to market a Hong Kong Covered Fund it manages to retail investors in Luxembourg, subject to the compliance with the following provisions set out in the Directive 2011/61/EU (the AIFMD Directive): article 22 (annual report)<sup>1</sup>, article 23 (disclosure to investors)<sup>2</sup>, article 24 (reporting obligations to the CSSF)<sup>3</sup>, articles 26 to 30 (notification to the CSSF in respect of major holdings and control of non-listed companies and issuers)<sup>4</sup>.
21. Under article 1(9) of the Law of 2013, “marketing” is defined as a direct or indirect offering or placement at the initiative of the alternative investment fund manager (AIFM) or on behalf of the AIFM of units or shares of an AIF it manages to or with investors domiciled or with a registered office in the European Union.
22. Pursuant to the CSSF position (CSSF Frequently Asked Questions concerning the Law of 2013, question 21), marketing in Luxembourg within the meaning of the Law of 2013 takes place when the AIF, the AIFM or an intermediary on their behalf seeks to raise capital by actively making units or shares of an AIF available on the Luxembourg territory for firm purchase by a potential investor.
23. Marketing activity can be performed by an offer or placement which may be materialized in various forms (e.g. advertising, distribution of AIF documents to prospective investors, road shows, distance marketing), provided the relevant material delivered to investors can be used to formally subscribe or commit to subscribe for shares or units of the AIF.
24. However, the following shall not be considered as acts of marketing in Luxembourg:
  - a. Providing information regarding an AIF and making units or shares of that AIF available for purchase to a potential investor following an initiative of that investor (or an agent of that investor) without any solicitation made by the AIF or its AIFM (or an intermediary acting on their behalf) in relation to the relevant AIF;
  - b. investments made in AIFs in the context of a discretionary mandate for the management of individual investment portfolios at the initiative of the investment manager;
  - c. a proposal to invest in an AIF in the context of an investment advisory agreement at the initiative of the adviser;
  - d. investments in targeted AIFs made in the context of collective portfolio management of a UCI or an AIF at the initiative of such UCI/AIF or its management company, AIFM, portfolio manager or other agent.
25. The following national marketing rules, other than the rules provided for by regulations on EU level (i.e. AIFMD rules, MiFID rules), may also be applicable to the distribution of CIS (UCITS or AIFs) in Luxembourg:

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<sup>1</sup> Detailed list of the applicable provisions of the AIFMD Directive : Article 22 (1), Article 22 (2) (a) to (f), Article 22 (3).

<sup>2</sup> Detailed list of the applicable provisions of the AIFMD Directive: Article 23 (1) (a) to (p), Article 23 (2), Article 23 (4) (a) to (c), Article 23 (5) (a) to (b).

<sup>3</sup> Detailed list of the applicable provisions of the AIFMD Directive: Article 24 (1), Article 24 (2) (a) to (d), Article 24 (4).

<sup>4</sup> Articles 26 to 30 of the AIFMD Directive are applicable only where the Hong Kong Covered Fund falls within the scope of article 26 (1) of the AIFMD Directive. The situation referred to is that of a fund which acquires control of a non-listed company. Pursuant to Article 26 (5) of the AIFMD Directive, “control” means more than 50 % of the voting rights of the non-listed company.

The Law of 8 April 2011 concerning the implementation of a Consumer Code.

26. The aforementioned law set out rules relating to consumer protection covering inter alia the following areas: unfair commercial practices, misleading advertising, consumer information, unfair contract terms, protection of consumer in distance agreements.

#### *Offering documents*

27. The disclosure of information relating to a Hong Kong Covered Fund shall be complete, accurate, fair, clear, effective and shall be capable of being easily understood by investors.
28. The offering documents of a Hong Kong Covered Fund must be up-to-date and contain information necessary for investors to be able to make an informed judgement of the investment proposed to them.
29. A Hong Kong Covered Fund may use the prospectus authorised by the SFC. Unless otherwise provided for in this circular, matters such as the type of documents, content, format, frequency of update and the updating procedures must comply with the applicable Hong Kong laws and regulations and the provisions of its constitutive documents. The SFC-authorized prospectus may be supplemented by a Luxembourg covering document for proper disclosure of specific information for the marketing in Luxembourg as referred to under paragraph 40 below including the additional information referred to in article 23 (1) and (2) of Directive 2011/61/EU
30. The Hong Kong Covered Management Company of a Hong Kong Covered Fund must take reasonable steps and measures to ensure that any updated offering documents are made available to investors in Hong Kong and Luxembourg at the same time (so far as is reasonably practicable given the different time zones of the jurisdictions).

#### *Ongoing disclosure*

31. The Hong Kong Covered Management Company of a Hong Kong Covered Fund must take reasonable steps and measures to ensure that the ongoing disclosure of information of the Hong Kong Covered Fund (including periodic financial reports, notices and announcements) is despatched and made available to investors in Hong Kong and Luxembourg at the same time<sup>5</sup> (so far as is reasonably practicable given the different time zones of the jurisdictions) and, in the case of suspension of dealings, immediately notify the CSSF.
32. The Hong Kong Covered Management Company may use the annual report of the Hong Kong Covered Fund as the basis for distribution in Luxembourg. The Hong Kong Covered Management Company shall also ensure the disclosure of the additional information referred to in article 22 (2) of Directive 2011/61/EU.
33. The ongoing disclosure should be filed with the CSSF as soon as possible and in any event within one week after it has received SFC's authorisation or is filed with the SFC.
34. In addition, Hong Kong Covered Funds shall disclose any other information which may have a material impact on investors in Luxembourg.

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<sup>5</sup> To the extent there are requirements on minimum notice period and content of or template for notice to Luxembourg investors under relevant Luxembourg laws and regulations, the Hong Kong Covered Funds should comply with these requirements and ensure that investors in Hong Kong and Luxembourg receive equal treatment in terms of the notice period and information disclosed.

### *Advertisements / marketing materials*

35. All marketing communications in relation to the Hong Kong Covered Funds issued to investors in Luxembourg shall be clearly identifiable as such. They shall be fair, clear and not misleading. In particular, any marketing communication comprising an invitation to purchase units of Hong Kong Covered Funds shall make no statement that contradicts or diminishes the significance of the information contained in the prospectus/ offering documents of that fund. It shall indicate that a prospectus / offering document exist and specify where such documents may be obtained by investors or potential investors or how they may obtain access.

### *Language*

36. The offering documents, notices, financial reports, advertisements and the constitutive documents shall be provided to investors in Luxembourg in either: French, German, English or Luxembourgish. Such information and documents may notably be provided on a website.

## **III. Application process**

### **A. Application documents**

37. Prior to marketing its units or shares to retail investors in Luxembourg, a Hong Kong Covered Fund must have obtained an authorisation for such marketing by the CSSF in accordance with the provisions hereafter.

38. The authorisation request to be filed with the CSSF shall include the following documents and information:

- a. the constitutive document of the Hong Kong Covered Fund;
- b. the prospectus / issuing document of the Hong Kong Covered Fund;
- c. specific information for the marketing in Luxembourg referred to in paragraph 40;
- d. the latest annual report of the Hong Kong Covered Fund;
- e. a key information document for investors as required by the European Regulation (EU) n°1286/2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs);
- f. the draft agreement to be entered between the Hong Kong Covered Fund and the Luxembourg paying agent;
- g. if the Hong Kong Covered Fund is a feeder fund, information on the master fund including information on where the master fund is established, the master funds' constitutive documents and the prospectus / issuing document of the master fund.

39. The Hong Kong Covered Management Company shall request the SFC to provide directly to the CSSF a certificate confirming that the eligibility requirements set out in paragraphs 8 to 17 above are met. The CSSF will not take up the application if no such certificate is received from the SFC.

40. In addition the Hong Kong Covered Fund shall ensure proper disclosure of all information useful to investors in Luxembourg for them to invest will full knowledge of the facts. The information shall comprise:

- a. appropriate information on the risks inherent to the investment policy of the Hong Kong Covered Fund;
- b. information on the fees and expenses that may be charged to investors;
- c. the name, address and duties of the paying agent in Luxembourg;
- d. the place / website where the latest prospectus / issuing document, the key information document, the constitutive documents and the latest financial reports of the Hong Kong Covered Fund are made available;
- e. details on how the net asset value of the Hong Kong Covered Fund is published;
- f. the additional information referred to in article 23 (1) and (2) of the Directive 2011/16 /EU and Section XIII (Guidelines on disclosure) of the ESMA guidelines on sound remuneration policies under AIFMD (ESMA/2013/232)<sup>6</sup>.

The above information may be supplemented for example by an addendum to the prospectus / issuing document of the Hong Kong Covered Fund.

#### B. Authorisation process

41. Upon receipt of the application documents, the CSSF will have five working days to assess that all application documents have been duly and properly submitted. If not, the CSSF shall inform the Hong Kong Covered Fund accordingly within such five working day period.
42. Provided that the Hong Kong Covered Fund meets all the applicable requirements set out in this circular and if no request for information, as described below, is issued by the CSSF, the CSSF will grant authorisation with conditions to a Hong Kong Covered Fund within a one-month period. The one-month period will start from the date the CSSF confirms that it has received, to its satisfaction, the application documents and eligibility certificate listed in the paragraphs 38 to 39 above (take-up date of the application).
43. For the authorisation of a Hong Kong Covered Fund to become effective, the conditions that are required to be fulfilled include: (i) the submission of the offering documents properly addressing all the comments of the CSSF, (ii) the valid appointment of a Luxembourg paying agent.
44. Should a request for information be issued by the CSSF, the CSSF will grant authorisation to a Hong Kong Covered Fund within two months from the take-up date of the application provided that all outstanding issues have been addressed to the satisfaction of the CSSF.

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<sup>6</sup> The disclosure requirement referred to in Article 23(1)(e) of Directive 2011/61/EU may be fulfilled by disclosing that the Hong Kong Covered Management Company has sufficient financial resources at its disposal to enable it to conduct its business effectively and meet its liabilities under 5.2(b) of the UT Code.

The disclosure requirement referred to in Article 23(1)(g) of Directive 2011/61/EU may be fulfilled by disclosing the summary of valuation policies and procedures and pricing policies of the Hong Kong Covered Fund as required under Appendix C2B of the Revised UT Code.

The disclosure requirement referred to in Article 23(2) of Directive 2011/61/EU may be fulfilled by disclosing that the trustee/custodian and Hong Kong Covered Management Company cannot (i) be exempted from liability to investors imposed under Hong Kong law or breaches of trust through fraud or negligence, or (ii) be indemnified against such liability by investors or at investors' expense as provided under 6.6 of the UT Code.

Hong Kong Covered Management Companies and Hong Kong Covered Funds are not required to meet the substantive or operational requirements as set out in ESMA/2013/232 and its related regulations.

45. A request for information might be sent by the CSSF for any clarifications relating only to matters relating to paragraphs 8 to 36 that it considers necessary.
46. The CSSF may refuse the application if outstanding issues are not addressed to the satisfaction of the CSSF within the two-month period.
47. Once the CSSF authorises the application, it will notify the SFC.

C. Fee payment to the CSSF

48. An invoice will be mailed by the CSSF to the applicant subsequently to the authorisation issued by the CSSF. The various fees levied by the CSSF are laid down by the Grand-ducal Regulation of 21 December 2017 relating to the fees to be levied by the Commission de Surveillance du Secteur Financier.

#### **IV. Ongoing requirements applicable to Hong Kong Covered Funds**

A. Reporting obligation

49. Hong Kong Covered Management Companies marketing Hong Kong Covered Funds in Luxembourg are required to comply with the reporting requirements under article 24 (1), (2) and (4) of Directive 2011/61/EU. The reporting frequency and the reporting periods are those set out in the ESMA Reporting Guidelines (ESMA/2014/869).
50. In a configuration where a Hong Kong Covered Management Company is marketing Hong Kong Covered Funds in Luxembourg and in other Member States of the EU, the reporting to the CSSF under the requirements of article 24 (1), (2) and (4) of Directive 2011/61/EU should only cover the data for those Hong Kong funds that are marketed in Luxembourg.

B. Changes to Hong Kong Covered Funds

51. No change shall be made to a Hong Kong Covered Fund resulting in non-compliance with the eligibility requirements set out in the paragraphs 8 to 17. The Hong Kong Covered Management Company must notify such change to the SFC and to the CSSF as soon as possible.
52. Changes to a Hong Kong Covered Fund shall be made in accordance with the applicable Hong Kong laws and regulations and the provisions of its constitutive documents. Changes to a Hong Kong Covered Fund shall not contravene the applicable Luxembourg and Hong Kong laws and regulations and the requirements set out in this circular. These changes shall be effective upon approval by the SFC or compliance with the appropriate procedures.
53. The SFC shall notify the CSSF of any change approved by the SFC in respect of a Hong Kong Covered Fund authorized by the CSSF in Luxembourg as soon as possible and in any event within one week from the date of approval.

The SFC will confirm to the CSSF that the Hong Kong Covered Fund effecting such changes continues to meet the eligibility requirements set out in the paragraphs 8 to 17.

54. In addition revisions made to the offering documents relating to changes to Hong Kong Covered Funds require the CSSF's approval before disclosure to the investors in Luxembourg.

55. The Hong Kong Covered Fund shall ensure that investors in Luxembourg are informed of any material changes to the documents and information listed under paragraph 38 and upon which the CSSF based its decision to grant the marketing authorisation.

C. Breach

56. In the event of a breach of Hong Kong laws and regulations or of the requirements set out or referred to in this circular, which is notifiable to the SFC and which could affect Luxembourg investors in a Hong Kong Covered Fund, the Hong Kong Covered Management Company shall endeavour to notify the SFC and the CSSF at the same time and rectify the breach promptly. The Hong Kong Covered Management Company will notify the CSSF once the breach has been rectified.

57. Following CSSF authorisation, if a Hong Kong Covered Fund ceases to meet any of the requirements as set out in this circular, the CSSF may withdraw its authorisation to market the fund to retail investors in Luxembourg, after informing the SFC. In any case, the Hong Kong Covered Fund shall cease to be offered to retail investors in Luxembourg and shall not accept subscriptions from the new investors in Luxembourg without CSSF's prior approval.

D. Termination of marketing / Withdrawal of authorisation

58. Following CSSF authorisation of a Hong Kong Covered Fund, if its Hong Kong Covered Management Company no longer wishes to market the units or shares of the Hong Kong Covered Fund to retail investors in Luxembourg on the basis of the MRF, the CSSF shall be informed. The Hong Kong Covered Fund has to provide notice to Luxembourg investors of its intention not to maintain such authorisation in accordance with the relevant Luxembourg laws and regulations.

59. The CSSF may at any time review a Hong Kong Covered Fund's authorisation and may modify, add to or withdraw any of the conditions of such authorisation, or withdraw the authorisation, as it consider appropriate.

E. Termination of Hong Kong Covered Fund

60. Termination notice to investors of a Hong Kong Covered Fund shall be submitted to both the SFC and the CSSF for prior approval.

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