



Commission de Surveillance
du Secteur Financier

Circular CSSF 20/744

COMPLEMENT TO CIRCULAR
CSSF 17/650 "APPLICATION
OF THE LAW OF 12 NOVEMBER
2004 ON THE FIGHT AGAINST
MONEY LAUNDERING AND
TERRORIST FINANCING, AS
AMENDED (HEREINAFTER
"AML/CFT LAW") AND GRAND-
DUCAL REGULATION OF 1
FEBRUARY 2010 PROVIDING
DETAILS ON CERTAIN
PROVISIONS OF THE AML/CFT
LAW ("AML/CFT GDR") TO
PREDICATE TAX OFFENCES"

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Re: Complement to Circular CSSF 17/650 “Application of the Law of 12 November 2004 on the fight against money laundering and terrorist financing, as amended (hereinafter “AML/CFT Law”) and Grand-ducal Regulation of 1 February 2010 providing details on certain provisions of the AML/CFT Law (“AML/CFT GDR”) to predicate tax offences”

Luxembourg, 3 July 2020

**To all the persons and entities
under the supervision of the
CSSF**

Ladies and Gentlemen,

The purpose of this circular is to complement Circular CSSF 17/650 of 17 February 2017 which provides for guidance on the extension of the offence of money laundering to aggravated tax fraud (*fraude fiscale aggravée*) and tax evasion (*escroquerie fiscale*) and on applicable anti-money laundering and counter-terrorist financing (“AML/CFT”) professional obligations.

The amendments concern only **Annex 1 of Circular CSSF 17/650** and provide for new indicators to be taken into account in the context of collective investment activities (under a newly added title II.). Thus, Annex 1 of Circular CSSF 17/650 currently providing for a list of common indicators applicable to all professionals under the AML/CFT supervision of the CSSF (with the new title *I. Common indicators*), will be completed with an additional list of indicators specific to the collective investment activities and to professionals providing services in that particular sector (under the new title *II. Specific indicators concerning collective investment activities*).

CSSF expects professionals under its AML/CFT supervision to take these new indicators, where relevant, into account in their risk assessment and when designing risk mitigation measures proportionate to their risk exposure within the specific context of collective investment activities.

Pursuant to these modifications, Annex 1 of circular CSSF 17/650 should be replaced with the following text:

“Annex 1

List of indicators concerning the professional obligation to report suspicions regarding the predicate offence of laundering of an aggravated tax fraud or tax evasion

This annex provides a list of indicators likely to reveal a possible laundering of a predicate tax offence to the professionals of the financial sector subject to the AML/CFT supervision of the CSSF. The professional shall respect the following steps:

- If an indicator or a combination of indicators raises doubts, the professional shall examine the business relationship/transaction more thoroughly in order to verify if doubts are justified given the context of the transactions and the professional’s knowledge of the customer’s situation (KYC and KYT).

- Where doubts remain, the professional shall report the suspicions to the FIU.

A single indicator, or even several indicators, are not necessarily sufficient grounds for raising a suspicion of laundering.

It must be noted that the following examples of indicators are neither exhaustive, nor do they exclude other criteria, and that they may change over time.

I. Common indicators (“List I.”)

(1) The customer is a legal person or a legal arrangement set up in a jurisdiction that is not subject to AEOI/CRS/FATCA reporting¹⁰ and this “entity” has no economic, asset or other reality, except where (1) the customer demonstrates that its establishment complies with the legal provisions of the country of residence of the customer/beneficial owner or (2) the existence of the entity is in effect known to the tax authorities of the country of residence of the beneficial owner based on supporting evidence.

(2) The customer is a company or uses companies in which a multitude of statutory changes (unexpected and short-term changes) have taken place, for example with the purpose of appointing new managers, moving the registered office to a jurisdiction which is not subject to AEOI/CRS/FATCA reporting, amending the corporate purpose or corporate name, not justified by the economic situation of the company.

(3) The use of companies or legal structures located in a jurisdiction other than the tax residence or place of regular economic or professional interests of the beneficial owner, except where (1) the customer demonstrates that its establishment complies with the legal provisions of the country of residence of the customer/beneficial owner or (2) the existence of the legal person is in effect known by the tax authorities of the country of residence of the beneficial owner based on supporting evidence.

(4) Completion of a commercial transaction at a price that is obviously underestimated, overestimated or inconsistent.

¹⁰ <http://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/crs-by-jurisdiction/>

(5) Findings of anomalies in the documentation justifying the transactions, and notably atypical or unusual transactions (e.g. no VAT number, no invoice number, no address, all of which may put into question the supporting evidence of the document supplied).

(6) The customer's refusal to provide the tax compliance documentation or information needed for tax reportings or the presence of indications raising suspicions regarding fiscal noncompliance (e.g. refusal to communicate the tax identification number or the fiscal address, refusal to complete the AEOI/CRS/FATCA self-certification, refusal to receive a tax reporting, the AEOI self-certification signed by the customer states a fiscal address in Luxembourg while the postal address and/or telephone number and/or any other information shows that the customer does not reside in Luxembourg).

(7) Substantial increase, over a short period, of movements on banking account(s) which was (were) until then scarcely active or inactive, without this rise being justified, notably by a verified development of economic or business activities of the customer.

(8) Observation of inconsistencies between the business volume (e.g. based on company accounts) and movements on bank accounts.

(9) Substantial and/or irregular transactions linked to professional activities on personal/private accounts.

(10) Payment or reception of fees to or from foreign companies without business activities or without substance or link between the counterparties and whose purpose seems to be economically unjustified re-invoicing.

(11) Classification of a company or legal structure as "Active Non-Financial Entity" based on CRS regulations and without the change being justified by the development of the business of the company or legal structure.

(12) Requests for assistance or provision of services whose purpose could be to foster circumvention of the customer's tax obligations.

(13) Use by the customer of complex structures without economic or asset purpose, except where e.g. (1) the customer demonstrates that its establishment complies with the legal provisions of the country of residence of the customer/beneficial owner or (2) the existence of the legal person is in effect known by the tax authorities of the country of residence of the beneficial owner based on supporting evidence.

(14) Unjustified refusal of any contact or unjustified request of hold mail and more particularly if the customer is domiciled in a jurisdiction that is not subject to AEOI/CRS/FATCA reporting (e.g. the unjustified request of a customer not to be contacted ever in writing (post and/or email); the customer states that tax obligations are fulfilled and has signed a tax compliance statement, but has never collected its post or consulted its account online. The customer does thus not have the necessary elements to fulfil its tax obligations).

(15) The transfer of funds from a country that according to the professional could be considered as being risky from a tax transparency point of view, except for example where the customer provides evidence that the funds have been declared.

(16) Inconsistent information available to the professional concerning the tax residence of the customer.

(17) Use of so-called back-to-back loans, without valid justification.

(18) Move of the tax residence from a jurisdiction that is not subject to AEOI/CRS/FATCA reporting to a jurisdiction that is subject to such reporting without notifying the professional, in order, potentially, to escape reporting.

(19) Financial transactions that are inconsistent with the usual activities of the customer or with its profile or with the asset situation stated by the customer or suspect operations in sectors that are prone to VAT or other tax fraud, in a generally cross-border context.

(20) Withdrawal or deposit of cash that is not justified by the level or nature of the commercial activity or known professional or asset situation.

(21) Documentation on tax compliance leaving room for doubt as it was issued by a person close to the final customer and there being a potential conflict of interests.

The customer reference should be read as investor for the above listed indicators in the context of the collective investment activities and the professionals providing services in that particular sector.

II. Specific indicators concerning collective investment activities (“List II.”)

Complex investment structuring

1) The collective investment fund¹¹ (the “UCI”) has recourse to a complex investment structure, involving one or more legal entities or one or more legal investment structures interposed between the UCI and the ultimate target investment, located in different jurisdictions with some of them not complying with international transparency standards, except where this investment structure complies with the tax provisions of the country of residence of these companies or legal investment structures.

Tax base erosion

2) The IFM business model results in a significant decrease of the investment fund manager’s (the “IFM”)¹² taxable earnings by using cross-border transfers, triggering questions regarding compliance with transfer pricing rules and more generally with Luxembourg laws implementing directly or indirectly BEPS related actions¹³. Such cross-border transfers can be:

- financial flows (e.g. management or marketing commissions and/or retrocessions but also interest or dividend flows); and/or
- intangible assets.

Investment transactions

3) The UCI performs investment transactions on unregulated markets where the economic beneficiaries of the counterparties to the transaction and/or their intermediaries are located in a jurisdiction not subject to AEOI / CRS / FATCA reporting or which present risk factors similar to those specified under point 79 of the FATF Guidance for a Risk-Based Approach for the Securities Sector dated October 2018¹⁴.

4) Transactions do not have apparent economic rationale in a specific context (e.g. Private Equity / Real Estate context).

¹¹ As defined in points 1) a. to e. of CSSF Circular 19/721

¹² As defined in point 1) f. of CSSF Circular 19/721

¹³ The Base erosion and profit shifting (“BEPS”) refers to tax planning strategies used by multinational enterprises that exploit gaps and mismatches in tax rules to avoid paying tax. The BEPS actions developed in the context of the OECD/G20 BEPS Project aim at addressing tax avoidance and ensuring that profits are taxed where economic activities generating the profits are performed and where value is created. <http://www.oecd.org/tax/beeps/>

¹⁴ <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/rba-securities-sector.html>

5) Frequent transactions result in losses for which the professionals or the counterparty appears to have no concern.

Efficient portfolio management techniques¹⁵

6) The UCI uses efficient portfolio management techniques such as securities lending transactions which may create tax arbitrage or tax refund that have been or could be considered as aggravated tax fraud/tax evasion as highlighted i.a. by ESMA in its report "*ESMA70-154-1193 - Preliminary findings on multiple withholding tax reclaim schemes*".

SICAR

7) The UCI, under the SICAR Law of 15 June 2004, is not in a position to fulfil the requirement of investing in securities representing "risk capital" and in particular, to create value at the level of the portfolio companies/of developing the target entities in accordance with the requirements of CSSF Circular 06/241 specifying aforementioned law. Not fulfilling these requirements would have as a consequence that the company uses illegally the SICAR status which could have a significant tax impact.

Subscription tax

8) The UCI or the IFM is not in possession of adequate and sufficient information on the quality and status of the investors in order to make the subscription tax declarations to the *Administration des Enregistrements et Domaines* in an appropriate manner and in accordance with the legal requirements applicable to it, unless it can be justified that

- these legal or tax statuses of the investors comply with the legal requirements governing the subscription tax; and
- the investors' status comply with the legal provisions of the country of residence of these investors.

Investor tax reporting

9) The UCI or the IFM distributes its units¹⁶ in a country which has in place a set of obligations for investor tax reporting. The reporting is based, among other things, on various requirements such as,

- the registration with the tax authorities and/or,
- the tax reporting of tax data.

¹⁵ As defined in the CSSF Circular 08/356

¹⁶ As defined in paragraph 27 of Article 1 of the Law of 17 December 2010 or securities or partnership interests as defined in Article 1 of the law of 13 February 2007 (hereafter the "Units")

The above mentioned requirements will be used by the investors (or the final investors in case of a fund of funds structure) for their tax returns or by the paying agents to deduct or levy withholding taxes that may be considered equivalent to tax advances to their personal or corporate tax return, unless the UCI or the IFM can justify that:

- it has taken the necessary steps to ensure that such steps taken by the UCI or the IFM and/or by a service provider comply with the rules and principles of the local tax laws; and
- the UCI or the IFM has taken the necessary steps to provide information to investors or foreign tax or regulatory authorities on a timely manner as required by the local laws of the country of distribution.

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