

MiFID top-up license and potential impact on transfer pricing models

Luxembourg is a central hub for the world's leading asset managers to distribute their investment funds globally. Brexit saw many asset managers relocate their operations and assets from the United Kingdom and strengthen their presence in Luxembourg, providing them continued access to EU passporting rights for cross-border management and fund distribution. Moreover, asset managers have faced continued pressure on their global profitability in recent years, with costs exceeding revenue growth rates⁽¹⁾, showing declining margins overall. In response, many asset managers are rethinking their worldwide operating models by consolidating their activities to achieve cost efficiencies and a broader service offering.

In line with this trend, regulated Investment Fund Managers (IFMs) in Luxembourg are increasingly applying for a license extension to perform additional activities covered by the second Markets in Financing Instruments Directive⁽²⁾ (MiFID II)—or the “MiFID top-up license”. This license allows IFMs to offer more services, such as discretionary portfolio management, investment advice and executing trades, while complying with MiFID II. According to the Commission de Surveillance du Secteur Financier's (CSSF) recent statistics, 87 IFMs obtained a MiFID top-up license in Luxembourg as of 31 December 2022.⁽³⁾

Regulatory framework

MiFID II was transposed into Luxembourg law by the Law of 30 May 2018 on markets in financial instruments. The Directive lays down organizational, governance, consumer protection and market functioning rules, and sets out the passporting process for firms that provide one or more MiFID II listed services. Under MiFID Article 4(1), an investment firm is “any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis”. If a legal person meets these criteria and is not otherwise exempt from MiFID, they will require authorization as an investment firm.



In principle, IFMs are exempt from the Directive, as collective portfolio management is not considered a MiFID service. However, and as clarified by the CSSF's FAQ of 10 June 2021, MiFID applies to collective portfolio management services provided through a delegation agreement by (i) third parties to an authorized IFM and (ii) an authorized IFM to another authorized IFM.⁽⁴⁾

In Luxembourg, and in light of these regulations, delegate IFMs are authorized through a MiFID top-up license to perform discretionary portfolio management services and non-core services—such as investment advice, administration of units and, for alternative IFMs, reception and transmission of orders—as long as they do not benefit from a MiFID exemption. Therefore, IFMs are not subject to the MiFID's full scope, but are also not authorized to provide other MiFID services than those on their license extension.

The asset management industry's growth, increased cost pressure, Brexit and ongoing regulatory developments have driven asset managers to rethink their operating models, including expanding the scope of their activities. The MiFID top-up license allows IFMs to offer an additional range of services like managing and marketing discretionary mandates, or marketing and providing investment advice for funds that the IFM does not currently manage.

Transfer pricing considerations and challenges

Transfer pricing considerations arise when parties to a transaction are deemed



to be related.⁽⁵⁾ In these cases, the transaction's conditions and remuneration should reflect those that would have been set between unrelated parties in comparable circumstances – the arm's length principle.

Understanding the operating model and value creation throughout the parties' value chain is the first step of a transfer pricing analysis. In an asset management context, IFMs operate under two main operating models: centralized or decentralized. In Luxembourg, most players operate under a centralized model—one regulated entity in Luxembourg (the IFM) manufactures the funds and delegates certain functions (e.g., distribution, investment advisory, fund administration) to other related (or unrelated) parties across different jurisdictions.

A functional analysis must be undertaken to identify the functions performed, risks born and assets employed by each party involved in the value chain. Typically, in a centralized model, the IFM holds the regulatory license as a key intangible asset and performs the so-called principal function. This means it retains risk management and oversight over the functions delegated to either related or unrelated parties.

As investment management and distribution activities are of primary importance within the industry and represent key drivers of profitability, they are typically carried out by related parties. However, external distribution channels are sometimes used to sell investment products to potential investors. Fund ad-

ministration is often delegated to third-party service providers, where the involvement of the IFM is limited to supervision and monitoring of such delegated activity.

In light of the MiFID top-up license, IFMs would need to re-assess and identify any additional functions performed, risks borne and assets employed and how this would impact their current and future operating model. They should also assess whether the MiFID top-up license's additional services would be performed by the IFM and/or delegated to other related (or unrelated) parties. Even if the IFM delegates some functions to other parties, the IFM must retain oversight and be ultimately responsible for these delegated functions.

To perform these additional services, the IFM would likely need extra resources (e.g., hiring new employees). At the same time, it would also be relevant to understand to what extent synergies will be created by leveraging the existing resources, such as know-how, employees, internal systems and procedures. While in practice, the IFM's additional functionality on the distribution and investment management side may be somewhat limited (i.e., typically some senior employees and/or directors), the IFM would still bear additional risks and ongoing costs as the centrally regulated MiFID-entity that must be considered in the transfer pricing model.

After understanding the operating model and assessing each party's functional profile, an arm's length remuneration must be assessed to compensate the IFM and the delegated parties at arm's length. Under the MiFID top-up license, the IFM now also shares the key functions and risks of the distribution and investment management activities related to discretionary mandates, bears additional risks, and employs relevant key intangible assets (i.e., the MiFID top-up license). These must be factored in and considered in the transfer pricing model and the parties' respective remuneration in each jurisdiction.

In practice, and on top of the typical remuneration for its principal function, the IFM should earn an additional remuneration for the functions performed, risks born and assets employed for providing the new MiFID II services (e.g., discretionary portfolio management) and any additional costs to comply with the Directive.

IFMs with a MiFID top-up license typically follow a centralized model, with the IFM delegating discretionary and non-core services to other parties while retaining risk management and oversight over the delegated functions. In this model, the IFM usually retains a share of the management fees assessed through a benchmarking exercise, which is based on comparable uncontrolled transactions under which third-party IFMs work under a similar delegation model.

Ideally, asset managers would consider the impact on their transfer pricing model before requesting the license extension, to ensure alignment with the details provided to the regulator on the additional MiFID services they want to offer, how this will impact their resources (e.g., the number of employees and respective roles, internal systems), their delegation model and financials, among others.

IFMs revisiting their operating models should also consider (i) the tax treatment of restructuring related costs linked to the migration to new operating models, and (ii) potential exit taxation if the operating model change involves the cross-border transfer of existing contracts, customer base or something else of value.

Conclusion

IFMs granted MiFID top-up licenses may be subject to further regulations that could impact their operating model and, consequently, their transfer pricing model. This is a good moment for asset managers to revisit their current and future transfer pricing models to align to the evolving value chain and ensure all involved parties across different jurisdictions are appropriately remunerated.

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1) European Fund and Asset Management Association, Asset Management in Europe – an overview of the asset management industry, 14th edition, 14 December 2022.

2) Directive 2004/39/EC.

3) CSSF, Investment fund managers - situation as at 31 December 2022, 7 March 2023.

4) CSSF, “Publication of the CSSF FAQ providing clarifications on the application of MiFID to Luxembourg Investment Fund Managers (IFMs),” press release, 10 June 2021.

5) Art. 56 LITL: two enterprises are considered related enterprises where one of them participates directly or indirectly in the management, control or capital of the other or if the same persons participate directly or indirectly in the management, control or capital of both enterprises.

LCL Data Centers publie son premier rapport ESG

Des indicateurs clés de performance (KPI) de durabilité concrets

LCL, spécialiste des datacenters avec 5 centres de données en Belgique, publie son premier rapport de développement durable. Le rapport contient des objectifs clairs à court, moyen et long terme. Le principal objectif en matière de climat est de devenir neutre en carbone d'ici 2030. LCL suivra en permanence ses progrès et en rendra compte annuellement, en toute transparence.

Réalisation des KPI de durabilité

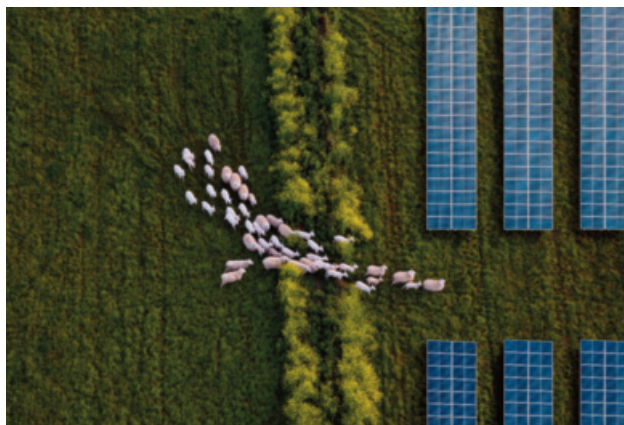
Pour ce faire, LCL va notamment :
- utiliser du biocarburant HVO100 pour tous ses groupes électrogènes de secours ;
- installer un système d'extinction au gaz plus respectueux de l'environnement ;
- réduire l'efficacité énergétique, le PUE, de ses datacenters à 1.3 ;
- optimiser en permanence ses installations de refroidissement ;
- lancer des projets circulaires pour la réaffectation du matériel informatique ;
- mettre en place un système de

récompense pour les employés qui réduisent leur empreinte écologique.

Durabilité dans son ADN

Le spécialiste belge des centres de données LCL a toujours accordé une importance majeure à la durabilité et à l'environnement. C'est donc tout naturellement que LCL a conclu en janvier 2021 le Pacte des Centres de Données pour la Neutralité Climatique (PCDNC), une initiative volontaire des principaux fournisseurs d'infrastructures cloud et des gestionnaires de centres de données.

L'objectif de cette initiative est d'accompagner l'intégralité des centres de données en Europe vers une neutralité carbone d'ici 2030, en soutien au « Green Deal » européen. Fin novembre 2021, LCL s'est inscrit pour atteindre un objectif supplémentaire dans le cadre de l'initiative Science Based Targets (SBT) : la limitation du réchauffement climatique sous le seuil de 1,5°C. Aujourd'hui, LCL poursuit donc son parcours en matière de développement durable avec une série de KPI concrets, que l'entreprise publie dans son premier rapport ESG.



Réduction des émissions de CO2 de 42% d'ici 2030

L'un des objectifs que LCL s'est fixés pour réduire son empreinte écologique est de réduire les émissions de CO2 de ses datacenters de 42% d'ici 2030. Afin d'atteindre cet objectif, l'entreprise mettra en œuvre 4 points d'action concrets.

1. HVO100 pour les générateurs de secours

D'ici 2024, LCL utilisera du biocarburant, HVO100, pour les générateurs de secours de tous ses datacenters. En octobre 2022, le

spécialiste des datacenters a annoncé que LCL Brussels-Ouest, le datacenter d'Alost, serait le premier de tous les datacenters à faire fonctionner ses générateurs de secours au biocarburant renouvelable.

2. Efficacité énergétique de 1.3

Le spécialiste des datacenters s'engage à réduire le PUE de tous ses datacenters à 1.3 d'ici 2030. Le datacenter d'Alost affiche déjà un PUE inférieur à 1.3.

3. Des voitures électriques

LCL vise à avoir une flotte entièrement électrique d'ici 2027.

4. Système d'extinction écologique

Cette année et dans les années à venir, le spécialiste des datacenters prévoit de remplacer le système d'extinction au gaz actuel par un système d'extinction écologique, à savoir Novec 1230. En cas d'incident, cela permettra d'éviter toute émission de CO2.

De 5 à 40% d'énergie verte d'ici 2030

LCL vise également à atteindre 40% d'énergie verte autoproduite sur tous ses sites de datacenters d'ici 2030. LCL achète actuellement 100% d'énergie renouvelable et l'entreprise produit elle-même 4,73% d'énergie verte. Afin d'atteindre l'objectif de 40% d'énergie verte autoproduite, LCL prévoit de conclure cette année des contrats d'énergie renouvelable (Corporate Power Purchase Agreements) avec des acteurs locaux. En 2023, LCL entreprendra également d'autres initiatives pour rendre ses datacenters plus verts. Par exemple, le spécialiste des datacenters optimisera en permanence ses installations de refroidissement, lancera des projets circulaires pour la réaffectation du matériel et mettra en place un sys-

tème de récompenses pour les employés qui réduisent leur empreinte écologique. LCL se fixe également des objectifs sociaux, tels que des investissements dans la sécurité et le bien-être au travail, ainsi que des objectifs de gouvernance, notamment l'obtention des dernières certifications ISO.

Partenariats durables

Comme déjà mentionné, LCL a un partenariat avec PCDNC et iSBT, mais ce ne sont pas les seuls. LCL Data Centers collabore également avec l'entreprise gemblouoise Sheep Solution, pour l'entretien de la pelouse de son parc solaire à Gembloux. Le parc solaire de LCL Wallonia One compte aujourd'hui au total 3.300 panneaux solaires, pour une puissance de 1,6 MW. Sheep Solution propose une alternative écologique aux tondeuses traditionnelles, c'est-à-dire l'éco-pâturage par des moutons.

Dans la mesure du possible, LCL essaie toujours d'opter pour une entreprise locale dans le choix de ses partenaires.

Consultez le rapport ESG de LCL Data Centers sur <https://sustainability.lcl.be/fr/>