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INVESTOR SERVICES

EUROPE

CRD IV - EBA issues consultation paper on draft guidelines on sound remuneration polices and disclosures

Background

On 26 June 2013, the European Parliament and the Council adopted Directive 2013/36/EU (the "CRD IV Directive") on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms.

Articles 74 and 75 of the CRD IV Directive require institutions to develop remuneration policies and practices promoting sound and effective risk management and mandate the European Banking Authority ("the EBA") to draft guidelines in this direction.

The EBA's predecessor, the Committee of European Banking Supervisors ("the CEBS"), had already issued guidelines on this topic.

What's in there?

On 4 March 2015, the EBA issued a consultation paper containing draft guidelines on sound remuneration policies under the CRD IV Directive and disclosures under Regulation (EU) No 575/2013 (the "CRR"). When developing these guidelines, the EBA worked closely with ESMA as regards remuneration for investment firms.

The proposed guidelines complete the relevant provisions of the CRD IV Directive and the CRR and aim to ensure a level playing field amongst institutions as regards remuneration, taking into account their specific circumstances. In this context, institutions are required to implement sound remuneration policies based on sound governance processes, discouraging staff from excessive risk-taking.

The draft guidelines apply to competent authorities and to the institutions referred to in point 3 of Article 4(1) of the CRR, including branches of credit institutions having their head office in a third country. As regards institutions, the EBA specifies that the guidelines apply on an individual, consolidated and sub-consolidated basis and that details are provided as regards the application of the remuneration requirements in a group context.

Furthermore, the draft guidelines cover all types of remuneration to all staff of the above institutions. However, they provide for two different levels of implementation, by distinguishing between all staff and specific categories of staff ("identified staff"). The latter term refers to staff whose professional activities have a material impact on the institutions' risk profile and for which stricter remuneration requirements are proposed.

The major question for the EBA in its consultation paper is the extent of application of the principle of proportionality, according to which institutions should implement remuneration policies appropriate to their size, organisation and scope of activities. However, the EBA remarks that the CRD IV Directive does not explicitly provide for any waivers of the application of principles such as the deferral of variable remuneration, the pay out in instruments and the application of malus and clawback. While some flexibility is granted to the institutions, the requirements have, nevertheless, to be applied at least at the minimum thresholds set by the CRD IV Directive. The EBA therefore stresses that the principle of proportionality cannot lead to the non-application of these rules.

In this context, the EBA seeks input from all interested stakeholders on the impact of the remuneration requirements on small and non-complex institutions, for which – in the EBA's view – certain provisions should be *"neutralised"*. Moreover, the EBA declares its intention to submit advice to the European Commission suggesting legislative amendments allowing for a broader application of the proportionality principle.

THE CONSULTATION PAPER CAN BE FOUND HERE.

What's next?

The deadline for the submission of comments is 4 June 2015. The EBA will consider all comments received and will finalise its proposed guidelines in the course of 2015.

The EBA's final guidelines will replace the "CEBS Guidelines on Remuneration Policies and Practices", which will be repealed as a result.

ELTIFs - European Parliament adopts ELTIF Regulation

Background

On 26 June 2013, the European Commission issued a proposal for a regulation of the European Parliament and of the Council on European Long-term Investments funds ("the draft ELTIF Regulation"). The proposal provides for a new long-term investment vehicle for both professional and retail investors, accompanied by the relevant product framework and an EU-wide passport. The underlying objective of the above draft Regulation is to raise and channel capital towards long-term investments in the real economy of the EU.

On 17 April 2014, the European Parliament adopted amendments to the Commission's proposal in a plenary session, while on 24 April 2014, the Presidency of the Council issued a first compromise proposal. The Presidency of the Council subsequently issued further compromise texts on 8 May, 27 May and 4 June 2014, respectively.

On 26 November 2014, a provisional agreement between the European Parliament and the Council was reached, which led to the issue of a final compromise text on 5 December 2014.

On 16 February 2015, the European Parliament's Economic and Monetary Committee ("the ECON") issued a supplementary report introducing some changes to the proposed ELTIF regime.

What's in there?

The European Parliament adopted its position at first reading in a plenary vote on 10 March 2015.

The position of the European Parliament reproduces the version of the Draft ELTIF Regulation issued by the ECON.

THE POSITION OF THE EU PARLIAMENT LEGISLATIVE OF 10 MARCH 2015 CAN BE FOUND HERE.

What's next?

As a next step, the Draft ELTIF Regulation will need to be endorsed by the Council.

The Regulation will enter into force on the 20th day following its publication in the Official Journal of the EU, which is expected in mid-2015.

The Regulation will be enforceable six months after its entry into force.

The European Securities and Markets Authority ("ESMA") shall, after conducting a public consultation, develop draft regulatory technical standards to specify the common definitions, calculation methodologies and presentation formats of the cost and submit those drafts regulatory technical standards to the Commission 3 months after the date of entry into force of this regulation.

EMIR - ESMA to cooperate with Japanese regulator on CCPs

Background

Article 25(2)(c) of the European Market Infrastructure Regulation ("EMIR") requires the establishment of cooperation agreements as a precondition for the European Securities and Markets Authority ("ESMA") to recognise Central Counterparties ("CCPs") established in third countries so that they can provide clearing services to clearing members or trading venues established in the European Union.

The European Commission has adopted, under Article 25(6) of EMIR, the Commission Decision 2014/752/EC, recognising that Japan's legal and supervisory arrangements ensure that Covered CCPs comply with legally binding requirements equivalent to those of EMIR, that Covered CCPs are subject to effective supervision and enforcement in Japan on an ongoing basis and that Japan's legal framework provides for an effective equivalent system for the recognition of third-country CCPs.

What's in there?

ESMA and the Financial Services Agency of Japan ("FSA") have concluded a Memorandum of Cooperation ("MoC"), establishing cooperation arrangements regarding CCPs that have been established and licensed or approved in Japan by the FSA and have applied to ESMA for recognition under EMIR ("Covered CCPs"). The said MoC gives ESMA the power to monitor the ongoing compliance of the Covered CCPs with the recognition conditions. The MoC is effective as of 18 February 2015.

The scope of cooperation between the signatories of the MoC includes:

- ★ General issues, including with respect to regulatory, supervisory or other developments concerning the Covered CCPs;
- ★ Issues relevant to the operations, activities and services of the Covered CCPs; and
- ★ Any other areas of mutual interest.

Furthermore, the MoC highlights the importance of close cooperation where a Covered CCP (in particular a CCP of systemic importance) experiences, or is threatened by, a potential financial crisis or other emergency situation.
Finally, the MoC clearly states that ESMA does not have, pursuant to the regime under EMIR for recognition of third-country CCPs, direct supervision or enforcement powers over the Covered CCPs and that it will rely on the supervision and enforcement capacity of the FSA.

THE MOC IS AVAILABLE HERE.

What's next?

Following the establishment of cooperation arrangements between ESMA and the Japanese regulator under EMIR, ESMA will be able to recognise Japanese CCPs having applied to ESMA for recognition in order to provide clearing services in the European Union.

ESMA is working closely with other third-country authorities on similar cooperation arrangements.

金融庁
Financial Services Agency

EMIR - ESMA to cooperate with Singapore regulator on CCPs

Background

Article 25(2)(c) of EMIR requires the establishment of cooperation agreements as a precondition for the European Securities and Markets Authority ("ESMA") to recognise Central Counterparties ("CCPs") established in third countries so that they can provide clearing services to clearing members or trading venues established in the European Union.

The European Commission has adopted, under Article 25(6) of EMIR, Commission Decision 2014/753/EC, recognising that Singapore's legal and supervisory arrangements ensure that the Covered CCPs comply with legally binding requirements equivalent to those of EMIR, that the Covered CCPs are subject to effective supervision and enforcement in Singapore on an ongoing basis and that Singapore's legal framework provides for an effective equivalent system for the recognition of third-country CCPs.

What's in there?

ESMA and the Monetary Authority of Singapore ("MAS") have concluded a Memorandum of Understanding ("MoU"), establishing cooperation arrangements regarding CCPs established in Singapore and authorised by the MAS as Approved Clearing Houses having applied to ESMA for recognition under EMIR ("Covered CCPs"). The said MoU gives ESMA the power to monitor the ongoing compliance of the Covered CCPs with the recognition conditions. The MoC is effective as of 10 February 2015.

The scope of cooperation between the signatories of the MoU includes:

- General issues, including with respect to regulatory, supervisory or other developments concerning the Covered CCPs;
- Issues relevant to the operations, activities and services of the Covered CCPs; and
- Any other areas of mutual interest.

Furthermore, the MoU highlights the importance of close cooperation where a Covered CCP (in particular a CCP of systemic importance) experiences, or is threatened by, a potential financial crisis or other emergency situation.

Finally, the MoU clearly states that ESMA does not have, pursuant to the regime under EMIR for recognition of third-country CCPs, direct supervision or enforcement powers over the Covered CCPs and that it will rely on the supervision and enforcement capacity of the MAS.

THE MOU IS AVAILABLE HERE.

What's next?

Following the establishment of cooperation arrangements between ESMA and the Singapore regulator under EMIR, ESMA will be able to recognise Singapore CCPs having applied to ESMA for recognition in order to provide clearing services in the European Union.

ESMA is working closely with other third-country authorities on similar cooperation arrangements.

EMIR - ESMA issues revised opinion on the draft RTS on the Clearing Obligation for Interest Rate Swaps

Background

On 1 October 2014, the European Securities and Markets Authority ("ESMA") submitted to the European Commission draft RTS on the clearing obligation for interest rate swaps pursuant to Article 5(2) of EMIR.

On 18 December 2014, the Commission informed ESMA of its intention to endorse these draft RTS with amendements and submitted to ESMA a modified version thereof (corrigendum notification).

On 29 January 2015, ESMA sent its comments to the European Commission in the form of a formal opinion.

What's in there?

On 6 March 2015, ESMA issued a revised opinion, taking into account the Commission's corrigendum letter and revising its formal opinion of 29 January 2015. The revised opinion was published on ESMA's website on 9 March 2015.

In its revised opinion, ESMA incorporates the practical issues raised in the Commission's corrigendum notification, but does not introduce any material changes to the original opinion nor does it modify the draft RTS.

As a reminder, ESMA agrees in principle with the objectives that the Commission wishes to achieve through its proposed modifications.

It raises, however, certain doubts in relation to the Commission's proposals and explains in its opinion why some of these proposals need to be reconsidered. The main focus areas are presented below:

- ESMA considers the tool proposed by the Commission as regards non-EU intragroup transactions (namely the introduction of a clause indicating that for a period of maximum three years any third country shall be deemed equivalent within the meaning of Article 13(2) of EMIR) to be inappropriate from a legal perspective. In case the Commission intends to define a later application date for those transactions, ESMA would prefer to explore, in cooperation with the Commission, a different manner to incorporate this provision;
- ESMA generally backs the modifications on the frontloading section and the Commission's intention to further postpone the start date of the frontloading requirement, but it has a few observations on the wording of certain recitals;
- ESMA proposes to apply the 8 billion threshold to investment funds for the definition of counterparties at fund (or sub-fund) level, when the counterparties are UCITS or AIFs;
- ESMA proposes amendments to the wording of certain recitals, notably the deletion of certain superficial parts.

ESMA'S REVISED OPINION CAN BE FOUND HERE.

What's next?

ESMA's revised opinion will be communicated to the European Parliament and to the Council for official approval.

Miscellaneous - ESMA publishes overview of all guidelines and technical standards

Background

Under Article 16 of Regulation (EU) No 1095/2010 establishing the European Securities and Markets Authority ("ESMA") (the "ESMA Regulation"), ESMA has the power to issue guidelines addressed to competent authorities and/or market participants in the EU in order to promote supervisory convergence.

Furthermore, according to Articles 10 et seq. of the ESMA Regulation, ESMA has the power to draft technical standards to be submitted to the European Commission for endorsement. These technical standards may be either regulatory technical standards (RTS) adopted by the Commission by means of delegated acts or implementing technical standards (ITS) adopted by the Commission by means of implementing acts.

What's in there?

On 2 March 2015, ESMA published an overview of all guidelines and technical standards elaborated by ESMA within the frame of its mandates. This overview takes the form of comprehensive tables listing ESMA's guidelines and technical standards as well as related documents, such as the relevant discussion papers, consultation papers and feedback tables.

ESMA'S OVERVIEW OF ITS GUIDELINES AND TECHNICAL STANDARDS IS AVAILABLE HERE.

What's next?

ESMA's tables will be updated on a regular basis.

LUXEMBOURG

Luxembourg tax authorities clarify the granting of residency certificates to Luxembourg UCITS

Background

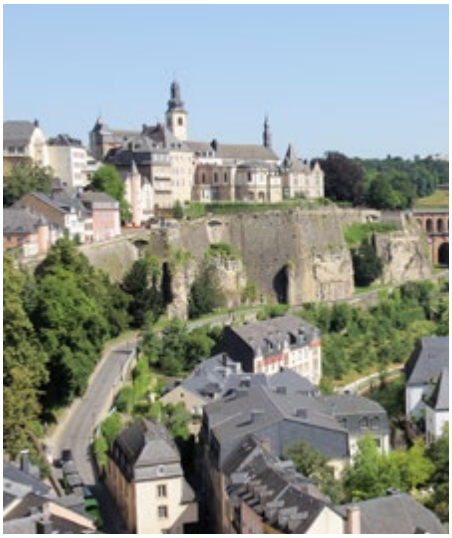
On 12 February 2015, the Luxembourg tax authorities ("LTA") published a circular clarifying the granting of residency certificates to Luxembourg undertakings for collective investments ("UCIs") governed by the Law of 17 December 2010 and by the Law of 13 February 2007 applicable to specialised investment funds ("SIFs").

What's in there?

The LTA clarified that, even though UCIs (lato sensu) structured as SICAVs/SICAFs are considered from a Luxembourg point of view as taxable entities and thus are eligible to double tax treaties ("DTTs") benefits, this approach is not followed by all contracting States with whom Luxembourg has signed DTTs ("the Contracting States").

In this context, the LTA have published:

- A list of DTTs which apply to UCIs, because of, either i) a specific clause contained in the DTT, ii) an agreement between the two Contracting States or iii) an interpretation of the LTA;
- A list of DTTs that do not apply to UCIs because of, either i) a specific clause contained in the DTT, ii) an agreement between the two Contracting States, iii) an interpretation of the LTA or of the foreign tax authorities;
- A list of DTTs according to which it is unclear whether UCIs are eligible to DTT benefits.



The LTA clarified as well that a UCIs can request in any event a residency certificate on the basis of the domestic law, provided that it delivers:

- A certified statement that the UCIs is a SICAV/SICAF and that it is under the supervision of CSSF;
- A valid justification for obtaining the certificate;
- A detailed statement of revenues in respect of which the request is made.

Finally, the LTA have specified that FCPs can exceptionally claim DTT benefits under two circumstances:

- In the context of the DTT between Luxembourg and Ireland, where the FCP is eligible to treaty benefits even though no residency certificate has been emitted; or
- In case of certain recent DTTs, enumerated in the circular, which confer expressly to FCPs the right to claim DTT benefits. In these circumstances, a certificate of residency has to be requested.

THE CIRCULAR IS AVAILABLE HERE.

What's next?

This circular will be kept updated regularly by the LTA depending on the entry into force of new DTTs or agreements.

Luxembourg draft law implementing FATCA adopted by the Conseil de Gouvernement

Background

On 28 March 2014, Luxembourg and the US entered into an Intergovernmental Agreement ("IGA") to implement the Foreign Account Tax Compliance Act ("FATCA") into Luxembourg law. While Luxembourg Financial Institutions are expected to first report on FATCA to the Luxembourg tax authorities by 30 June 2015 at the latest, the IGA had still not been ratified by the Luxembourg Parliament.

What's in there?

On 6 March 2015, the Conseil de Gouvernement approved the draft law applying FATCA in Luxembourg under the terms of the IGA, thereby forwarding the matter to the Luxembourg Parliament to vote upon the law.

THE RELEVANT OFFICIAL PRESS RELEASE IS AVAILABLE HERE.

What's next?

It can be expected that the Luxembourg Parliament will vote on the draft law in the foreseeable future and that final administrative circulars should in principle be issued by the Luxembourg tax authorities upon entry into force of the law. Consequently, the first reporting will very likely take place by 30 June at the latest.

SWITZERLAND

SFAMA Transparency Guidelines - New text for foreign funds

Background

The Swiss Funds & Asset Management Association ("SFAMA") issued on May 22, 2014 its revised Guideline on Duties Regarding the Charging and Use of Fees and Costs ("Transparency Guideline"). It entered into force on July 1, 2014.

What's in there?

On March 17, 2015, SFAMA and FINMA reached an agreement regarding the model text for the Swiss specific information to be contained in the prospectuses of foreign funds. It comprises in particular a model language with regard to the mandatory implementation of said Guideline.

The SFAMA Transparency Guidelines stipulate certain disclosure requirements with regard to e.g. the receipt of rebate and retrocession payments and need to be implemented in the prospectuses of foreign funds distributed in Switzerland.

The applicable deadlines to effect such implementation are the following:

- **Registered foreign funds** (eligible for distribution to non-qualified investors in Switzerland): The appointed Swiss representative of registered foreign funds must submit the amended prospectus to FINMA until June 1, 2015 at the latest. The provisions with regard to the granting of rebates (if any) need to be complied with only after the relevant amendments have been made into the fund's prospectus.
- **Non-registered foreign funds:** Although this has not been formally confirmed by SFAMA, the same deadline (i.e. June 1, 2015) should also apply to foreign funds distributed in Switzerland exclusively to qualified investors. Due to the lack of their registration with FINMA, the relevant documents does not need to be submitted to FINMA but need to contain the required Annex at the same point of time.
- **Swiss Funds :** The SFAMA Transparency Guideline also needs to be implemented in the prospectuses of Swiss funds. Due to an extension of the applicable deadline by SFAMA, this implementation needs to be undertaken and submitted to FINMA before August 31, 2015.

NETHERLANDS

AIFMD - Update on AIFMs

Background

As per 22 July 2014 the Alternative Investment Fund Mangers Directive ("the AIFMD") is applicable to all managers of AIFs, including the managers who obtained a license prior to 22 July 2013.

What's in there?

The Dutch Supervisory Authority has started the ongoing supervision of the licensed managers of AIFs.

What's next?

Topics that have the special attention of the Dutch Supervisory Authority ("the AFM") will be made public later.

NEWSBRIEF OF THE AFM IS AVAILABLE HERE.

Scanning

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