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CACEIS European Regulatory Watch Newsletter

No.13 July 2015

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## EUROPE

### AML - AMLD4/ AMLR4 published in the OJEU

#### ■ Background

The anti-money laundering framework so called AML4 is composed of a draft directive ("AMLD4") and a draft regulation ("AMLR4"). Please see [SCANNING N° 12](#) for additional background.

#### ■ What's in there?

On 5 June 2015, AML4 and AMLR 4 have been published in the Official Journal of the European Union.

[THE AMLD4 TEXT IS AVAILABLE HERE](#) (Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC).

[THE AMLR4 TEXT IS AVAILABLE HERE](#) (Regulation (EU) 2015/847 of the European Parliament and of the Council of 20 May 2015 on information accompanying transfers of funds and repealing Regulation (EC) No 1781/2006).

#### ■ What's next?

The publication date triggers a two year period where Member states will be required to implement the 4th AMLD into national legislation. This would mean that the 4th AMLD should be effective in each Member State by July 2017 at the latest.

As of this date, all obliged entities will have to comply with the new framework.

### Cross-selling Responses by ESAs to consultation on Guidelines for cross- selling practices

#### ■ Background

The European Supervisory Authorities ("ESAs") Joint Committee ("JC") has been evaluating the risks to customers that may arise from joint purchases of different products or services, generally known as cross-selling practices.

Although these practices are advertised as cost efficient, they often entail risks and could, in the long term, result to significantly higher costs for clients and other harmful consequences.

The ESAs, mandated to protect customers by the ESAs Regulations as well as other EU sectorial legislations such as MiFID II, have developed draft guidelines which will address in more detail the issue of cross-selling practices and their potential detrimental impacts.

On 22 December 2014, the JC of the ESAs published a consultation paper on the draft guidelines for cross-selling practices. The deadline for the submission of comments was 22 March 2015.

#### ■ What's in there?

On 13 May 2015, the JC of the ESAs has published the responses to the consultation on draft guidelines for cross-selling practices. There were 33 responses to the consultation from a variety of banks, insurers and consumer groups.

[THE RESPONSES TO THE CONSULTATION PAPER ARE AVAILABLE HERE.](#)

#### ■ What's next?

The JC expects to publish the final guidelines in Q2 2015.

### EMIR - Public consultation launched and hearing hosted by the European Commission on EMIR review

#### ■ Background

On 16 August 2012, the regulation (EU) No 648/2012 on OTC Derivatives, central trade's repositories and risk mitigation requirements for derivative counterparties came into force (EMIR). EMIR was introduced to regulate previously unregulated areas such as the over-the-counter derivatives market across Europe and has been designed as a key post-crisis tool.

The regulation lays down clearing and reporting requirements for the over-the-counter (OTC) derivatives contracts and uniform requirements for the performance of activities of central counterparties and trade repositories.

The regulation is now directly applicable and enforceable throughout the EU and is designed to ensure the stability of the European financial system by prevent it from domino collapses.

However, Article 85 (1) of the EMIR mandates the European Commission to undertake a general review and prepare a report on this regulation by 17 August 2015.

On 21 May 2015, the European Commission launched a public consultation on the EMIR review.

#### ■ What's in there?

On 21 May 2015, the EU commission launches a public consultation seeking to receive the widest scope of markets participants' feedbacks on EMIR namely the input from the European System of Central Banks (ESCB), the European Securities

Markets Authority (ESMA) and the European Systemic Risk Board (ESRB).

The market feedbacks shall allow the EU Commission to access a number of specific areas on EMIR among others:

- ★ The access of CCPs to central bank liquidity facilities,
- ★ The functioning of supervisory colleges for CCPs,
- ★ The CCPs margins practices and,
- ★ The systemic importance of non-financial firms.

[THE CONSULTATION PAPER CAN BE FOUND HERE.](#)

On 29 May 2015, the European Commission held a public hearing in Brussels to consider what have already been achieved under the EMIR and what is still to come.

[THE SPEECH TO THE PUBLIC HEARING CAN BE FOUND HERE.](#)

## What's next?

The public consultation will close on 13 August 2015.

On 17 August 2015, the commission shall review and prepare a general report on the EMIR and submit this report to the EU Parliament and Council with any necessary proposal.

Following the public hearing and the outcome of the public consultation, the European commission shall draft a report to be submitted to the European Parliament and to the Council in the course of the year.

# EMIR - Public hearing on EMIR review hosted by the European Commission

## Background

On 16 August 2012, the regulation (EU) No 648/2012 on OTC Derivatives, central trade's repositories and risk mitigation requirements for derivative counterparties came into force (EMIR). EMIR was introduced to regulate previously unregulated areas such as the over-the-counter derivatives market across Europe and has been designed as a key post-crisis tool.

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## What's in there?

On 29 May 2015, the European Commission held a public hearing in Brussels to consider what have already been achieved under the EMIR and what is still to come.

[THE SPEECH TO THE PUBLIC HEARING CAN BE FOUND HERE.](#)

## What's next?

The public consultation will close on August 13th. Following the public hearing and the outcome of the public consultation, the European commission shall draft a report to be submitted to the European Parliament and to the Council in the course of the year.

# EMIR - ESMA feedback statement on the impact of EMIR on the calculation of counterparty risk for OTC financial derivative transactions

## Background

The Directive 2009/65/EC adopted on 13 July 2009 as amended by Directive 2014/91/EU allows UCITS to invest in both exchange-traded derivatives (ETDs) and in OTC derivative transactions.

On 4 July 2012, the Regulation on OTC Derivatives, Central Counterparties and Trade Repositories (known as "EMIR" – the European Market Infrastructure Regulation) was adopted and entered into force on 16 August 2012 (Regulation (EU) No 648/2012).

Under EMIR, certain OTC derivative transactions will become subject to clearing obligations. Which raises the issue of how UCITS should calculate the limits on counterparty risk in centrally-cleared OTC derivative transactions and whether they should apply the same rules to both OTC derivative transactions and ETDs.

On 22 July 2014 ESMA published a discussion paper ([WHICH CAN BE FOUND HERE](#)) on the impact of EMIR on the calculation of the counterparty risk of financial derivative transactions by UCITS.

## What's in there?

On 22 May 2015, ESMA published a feedback statement on the impact of EMIR on the calculation of the counterparty risk of financial derivative transactions by UCITS.

The feedback statement summarises the 20 responses received to the consultation paper issued in October 2014.

Echoing the standpoint of the participants, ESMA recognises that;

- ★ Even though EU CCPs and non-EU CCPs recognised by ESMA should be considered as low-risk counterparties, UCITS might apply some counterparty risk limits to these entities. Considering the working assumption that those entities are at low risk, the limits applied might be high;
- ★ UCITS management companies should distinguish between the types of segregation arrangement when assessing their Clearing Member (CM) counterparty risk ;
- ★ UCITS should not apply any counterparty risk limits to CMs under individual client segregation;
- ★ UCITS should take into account in the calculation of counterparty risk, both OTC financial derivative transactions and Exchange Trade Derivatives (ETDs);
- ★ UCITS should not apply any counterparty limits to CMs, in case of other types of segregation arrangement offering the same degree of protection to the investor as the individual client segregation. Conversely, if the protection is lower than individual client segregation, UCITS should exercise a counterparty risk limit to the CM and the level of this limit should be equivalent to the one expected for omnibus client segregation. Omnibus client segregation should be regarded as the clearing arrangement that provides the lowest level of the client asset's protection.



- ★ UCITS should apply the counterparty risk limits of Article 52 of the UCITS Directive transactions cleared by non-EU CCPs not recognised by ESMA.
- ★ UCITS might need to apply counterparty risk limits to CMs in the case of omnibus client segregation, especially if some amount of asset are not passed on to EU CCP or non-EU CCP recognised by ESMA especially if this amount is not measurable.
- ★ ICA (Indirect client arrangement) may enhance the UCITS' counterparty risk which would need to be further assessed if a modification of article 52 of the UCITS Directive sees light.

[THE ESMA FEEDBACK STATEMENT IS AVAILABLE HERE](#)

## What's next?

Based on the feedback received, ESMA will determine whether a recommendation to the European Commission is to be made in order to initiate a modification of the UCITS Directive for the calculation of centrally-cleared OTC derivative transactions and ETDs.

# EMIR - ESMA opinion on the composition of CCP Colleges under EMIR

## Background

On 4 July 2012, the Regulation (EU) NO 648/2012 (EMIR) was adopted by the European Parliament and the Council on OTC derivatives, central counterparties and trade repositories.

On 24 November 2010, Regulation (EU) No 1095/2010 (ESMA Regulation) of the European Parliament and of the Council was adopted to address shortcoming in EU financial supervision following the 2008 crisis.

On 15 October 2013, European Council has adopt-

ed Regulation (EU) No 1024/2013 (SSM Regulation) conferring specific tasks on the European Central Bank (ECB) concerning policies relating to the prudential supervision of credit institutions.

In relation to the CCP College composition and the voting rights, this regulatory framework is set out as follows:

### ESMA REGULATION

- ★ Empowers ESMA to issue opinions to competent authorities for the purpose of building a single Union supervisory culture and steady and homogenous supervisory practices, procedures and approaches across the European Union under Article (29)(1)(a);
- ★ Gives competence to ESMA to promote and monitor the college of supervisors established according to EMIR pursuant Article 21(1);
- ★ Provides according to Article 18(1) that a CCP competent authority shall establish, manage and chair a CCP college to ease the granting or refusal authorisation under Article 17 of EMIR.

### EMIR

- ★ Provides in Article 18(2) that the College shall be composed among others authorities, of "the competent authorities" in charge with the supervision of the clearing members (CMs) of the CCP that are established in the three member states with the largest contributions to the default fund of the CCP mentioned in Article 42 on an aggregate basis over one-year period. (Article 18 (2) (c).

### SSM REGULATION

- ★ Tasks the European Central Bank (ECB) with the prudential supervision of credit institutions as the competent authority or the designated authority in the participating member states as established by the relevant union law (Article 1);
- ★ Provides that ECB may take direct prudential supervisory responsibility from national competent authorities over CMs which are significant credit institutions (Article 6(4)).

According to EMIR, each college member should be allowed one vote regardless of the number of functions it assumes under EMIR.

However in ESMA opinion on voting procedure for CCP Colleges under EMIR, issued on 28 May 2014, a separate vote is possible where a member of the college is appointed as a representative of the Eurosystem as central bank of issue under Article 18(2) (h).

## What's in there?

On 7 May 2015 ESMA issued an Opinion on the composition of CCP colleges under EMIR and the voting rights aspects.

This opinion aims to add more clarification to the scope of the authorities which qualifies as college member under Article 18(2) (c) of EMIR following the creation of SSM regulation and to clarify the voting rights to be held by ECB as college member.

### CONCERNING THE COMPOSITION OF THE COLLEGE UNDER ARTICLE 18(2)(C) OF EMIR :

- ★ The ECB should become a member of the CCP College when it has taken over the direct prudential supervision of any of a defaulting clearing members (CMs) of the CCP that are established in the three member states with the largest contributions to the default fund of the CCP.
- ★ The national competent authority shall remain a member of the CCP College if such authority performs direct prudential supervisory duties on some of the CMs established in the three Member States with the largest contributions to the default fund of the CCP.
- ★ A national competent authority which is currently a member of the college and has no supervisory function on any of the CMs established in the three largest contribution to the default fund of the CCP, has no longer the right to sit as member of the college.

### CONCERNING THE VOTING RIGHTS

- ★ When ECB becomes a CCP College member ,it has one vote, regardless of whether the national competent authorities which are still a member of the college continue to be a college member (Article 18(2) of EMIR).
- ★ The ECB should have one single vote where it is also appointed in accordance with Article 3(3)of Commission Delegated Regulation No 876/213, as the single representative of the Eurosystem as central Bank of the issue in a CCP college (Article 18(2)(h) of EMIR). Furthermore the ECB may design another participant who shall have no voting right.
- ★ A National Bank is not allowed to cast a separate vote under Article 18(2)(h) of EMIR where it is ap-



pointed pursuant Article 3(3) of the commission Delegated Regulation No 876/213 as the single representative of the Eurosystem as central bank of the issue (Article 18(2)(h) of EMIR) if the ECB becomes a college member in the same college.

## What's next?

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

## MiFID - MiFID II/ MAR new deadline for draft technical standards



## Background

On 11 May 2015 ESMA requested new deadlines timetable for delivery of the technical standards which are currently in the drafting phase.

[THE LETTER TO THE EUROPEAN COMMISSION CAN BE FOUND HERE.](#)

## What's in there?

On 14 May 2015 the European Commission has granted a two-month delay to ESMA for the delivery by ESMA of final technical standards for MiFID II and MAR to allow an early legal review by the Commission legal services assessing the legality and legislative quality of the standards. Conscious this will provide for an additional procedural step, the European Commission has given ESMA until September 2015 (instead of July 2015) to submit its technical standards.

## What's next?

Draft technical standards will be issued by ESMA not later than September 2015.

# LUXEMBOURG

## MiFID - CSSF circular 15/615, transposing ESMA's final guidelines on the definition of commodity derivatives under MiFID I

## Background

On 21 April 2004, Directive 2004/39/EC on markets in financial instruments ("MiFID") was adopted by the European Parliament and Council. This directive was mainly aimed at improving the competitiveness of EU financial markets by creating a single market for investment services and activities, and ensuring a high degree of harmonised protection for investors in financial instruments, such as shares, bonds, derivatives and various structured products.

Directive 2014/65/EU on markets in financial instruments ("MiFID II") was approved by the European Parliament on 15 April 2014, by the Council of the EU on 13 May 2014 and has to be implemented by EU Member States till 3 January 2017 at the latest. MiFID II aims to bring greater transparency and improve the overall functioning of the EU's financial markets, thus strengthening investor protection.

In the above mentioned context, ESMA realised that, for a significant time period (between today and the date of application of MiFID II), there will be no single, commonly adopted definition of derivatives in the EU under MiFID I, particularly regarding physically settled commodity forwards. ESMA, therefore, attempted to fill this gap with the publication of its guidelines (ESMA/2015/675) on "The application of the definitions in Sections C6 and C7 of Annex I of Directive 2004/39/EC (MiFID)".

## What's in there?

On 11 June 2015, the CSSF published Circular

15/615, which transposed as such the above mentioned guidelines.

The ESMA guidelines (and subsequently the CSSF circular) addressed mainly the following points:

They provide an explanation of what is meant by "physically settled" commodity forwards, in the context of C6 and C7 of Annex 1 of the MiFID I Directive. According to the definition provided, physical settlement could incorporate various delivery methods, notably physical delivery, delivery of a document giving rights of an ownership nature to the relevant commodities or other methods of bringing about the transfer of rights of an ownership nature in relation to the relevant quantity of commodities without physically delivering them.

They confirm that forwards traded on a regulated market or Multilateral Trading Facility (MTF) fall within the scope of MiFID I, Annex C6.

[CSSF CIRCULAR 15/615 IS AVAILABLE HERE.](#)

## What's next?

These guidelines have very short duration. They will apply as from 7 August and will be superseded by the Commission's delegated acts on MiFID II.

# TAX

## LUXEMBOURG

## FATCA - Extension of the first reporting deadline to 31 July 2015

## Background

On 30 March 2015, the Luxembourg Parliament published the draft law adopting the US-Luxembourg Intergovernmental Agreement under the terms of which the US "Foreign Account Tax Compliance Act" (FATCA) will be effective in Luxembourg.

According to the draft law, Reporting Luxembourg Financial Institutions (including the one that have not identified any US Reportable Accounts) should report on FATCA for the data pertaining to the financial year 2014 by 30 June 2015 at the latest.

## What's in there?

As the law is not final, the Luxembourg tax authorities recently confirmed to local industry groups that the deadline for the first reporting will be automatically and exceptionally postponed to 31 July 2015 instead of 30 June 2015.

This special extension is granted on the basis of article 83 (1) of the Luxembourg General Tax Law. Reporting Luxembourg Financial Institutions are not required to file an extension request with the Luxembourg tax authorities.

## What's next?

Even though this confirmation of extension contradicts the newsletter dated 27 May 2015 that is still published on the Luxembourg Tax Administration's website, we expect the authorities to confirm this change publicly in the coming days.

Moreover, for the future years, the deadline should remain the 30th of June.

## SWITZERLAND

# ECOFIN - Agreement on the automatic exchange of financial account information

## What's in there?

On 27 May 2015, in order to improve international tax compliance, the European Union and Switzerland signed an agreement on the automatic exchange of financial account information.

The agreement represents an important step in ongoing efforts to clamp down on tax fraud and tax evasion. It upgrades a 2004 agreement that ensured that Switzerland applied measures equivalent to those in an EU directive on the taxation of savings income.

The new agreement is in line with the EU Directive on Administrative Cooperation and the OECD's Common Reporting Standard. Under this agreement both EU and Switzerland will automatically and reciprocally exchange financial account information.

The information to be reported on an annual basis concerns the taxpayers financial and account balance information with their names, addresses, tax identification numbers and dates of birth.

[THE AMENDING PROTOCOL TO THE AGREEMENT BETWEEN THE EUROPEAN COMMUNITY AND THE SWISS CONFEDERATION IS AVAILABLE HERE.](#)

## What's next?

Under the agreement, the EU and Switzerland will automatically exchange information on the financial accounts of each other's residents, starting in 2018. The aim is to address situations where a taxpayer seeks to hide capital representing income or assets for which tax has not been paid.

## OECD

# BEPS - Revised base erosion and profit shifting proposals on permanent establishments

## Background

The earlier OECD proposals, which set out alternative approaches to a number of significant Permanent Establishment (PE) issues, have been replaced by a set of definitive proposals which are largely focused on expanding the scope of the dependent agent rule (including narrowing the scope of the independent agent rule) and narrowing the scope of the specific activity PE exemptions.

## What's in there?

On 15 May 2015, the OECD has released its revised proposals on the PE rules in Article 5 of the OECD Model Tax Treaty.

An important element of the package is a proposed anti-fragmentation rule intended to prevent abuse of the PE rules by segregating activities across associated entities. Taken together, the proposed rules will clearly expand the scope of existing PE rules.

[THE REVISED DISCUSSION DRAFT IS AVAILABLE HERE.](#)

## What's next?

Interested parties are requested to provide comments - which the OECD requests be kept as short as possible - on these revised proposals by 12 June 2015. The proposals are then to be discussed by the OECD's Working Party 1 in late June, when they will be asked to finalise the changes to the OECD Model Treaty.



# Scanning

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