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CACEIS European Regulatory Watch Newsletter

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EUROPE

EMIR - CSSF creates website section on non-financial counterparties under EMIR

Background

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).

EMIR applies to central counterparties and their clearing members, to financial counterparties and to trade repositories, but also to non-financial counterparties and trading venues where so provided.

What's in there?

On 19 January 2015, the CSSF announced the creation of a new section on its website ("Non-financial counterparties") under the tab "EMIR". This new section contains a summary of the regulatory requirements applicable to non-financial counterparties under EMIR.

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

Background

On 1 October 2014, ESMA submitted to the European Commission a draft RTS on the clearing obligation on Interest Rate Swaps pursuant to Article 10(1) of Regulation No (EU) 1095/2010 and Article 5(2) of EMIR.

On 18 December 2014, the Commission informed ESMA of its intention to endorse, with amendments, the draft RTS and submitted to ESMA a modified version thereof.

What's in there?

On 29 January 2015 ESMA sent its comments to the EU Commission in the form of a formal opinion pursuant to Article 44(1) of the ESMA Regulation ("the Opinion").

In the Opinion, ESMA agrees with the Commission's side with regards to the objectives the Commission wants to reach with its proposed modifications. It is especially in favour of postponing the starting date of the frontloading obligation. It has, nonetheless, raised some observations related to the following points:

- ESMA considers that the modification proposed by the Commission concerning equivalence in relation to non-EU intra group transactions is not appropriate from a legal perspective and considers that, in the absence of equivalence decisions under Article 13(2) of EMIR, other ways to address the problem should be explored by the Commission to reach the same result;
- ESMA generally agrees with the modifications made by the Commission concerning frontloading, although indicates a few observations and improvements with respect to several recitals;
- ESMA agrees with the suggestion of the Commission that clarification regarding the calculation of the 8 billion threshold for investment funds should be included in a recital to the draft RTS. To that end, ESMA has incorporated a provision in Article 2 to indicate that the 8bn threshold applies at fund level when the counterparties are UCITS or AIFs. A recital with the justification was also added.

THE CONSULTATION PAPER CAN BE FOUND HERE.

What's next?

ESMA's Opinion containing the second version draft RTS will be communicated to the EU Parliament and Council for official approval.

EMIR - ESMA issues feedback statement on the central clearing of non-deliverable forwards

Background

EMIR mandates ESMA to draft technical standards regarding the clearing obligation of different derivative classes.

On 1 October 2014, ESMA published its third consultation paper on the clearing obligation, ESMA/2014/1185 "Clearing Obligation under EMIR (no.3)" for the clearing of foreign-exchange non-deliverable forwards OTC derivatives.

What's in there?

On 4 February 2015, ESMA published a feedback statement on the clearing obligation for Non-Deliverable Foreign-Exchange Forwards ("FX NDF"). The feedback statement summarises the answers received to the consultation paper issued in October 2014.

During the consultation period, ESMA received some concerns and suggestions from stakeholders that needed further consideration.

Main concerns include:

- There is only one European CCP currently authorised to clear FX NDF (LCH.Clearnet Ltd) and no third-party CCPs clearing FX NDF is recognised;
- There are insufficient characteristics to define the scope of the clearing obligation included in the consultation paper (e.g. suggestions were made to limit the scope to contracts traded under non-modified EMTA template);
- There is a lack of market experience in clearing FX NDF, and the only authorised CCP has not yet experienced any price disrupting event;
- The maximum maturity of FX NDF contracts should not cover longer maturities due to low market volume of clearable FX NDF and their limited liquidity, especially on contracts with longer maturity (more than 12 months);
- Categorisation of counterparties should be consistent across the RTS on the clearing obligation, with appropriately modified assessment deadlines;
- Proposed dates of application of the clearing obligation, frontloading starting date and minimum remaining maturity all received fragmented responses from stakeholders.

THE ESMA'S FEEDBACK IS AVAILABLE HERE.

What's next?

Based on the feedback received, ESMA will not propose a clearing obligation on FX NDF classes at this stage. ESMA believes more time is needed to address appropriately the main concerns raised during the consultation. However, ESMA may still propose a clearing obligation on FX NDF classes on a later stage.

EuVECA - EuSEF- ESMA provides technical advice on the delegated acts related to EuVECA and EuSEF

Background

On 17 April 2013, the EU Parliament and Council adopted Regulation (EU) No 345/2013 on European Venture Capital Funds (EuVECA) and Regulation (EU) No 346/2013 on European Social Entrepreneurship Funds (EuSEF) ("the Regulations").

The two Regulations establish a uniform set of rules for the marketing and investment techniques used by all undertakings qualifying as EuVECA and EuSEF, as well as for the managers of such undertakings.

Several provisions in these two Regulations call for the adoption of delegated acts by the European Commission. On that basis, the Commission submitted to ESMA on 27 May 2014 an official request for technical advice.

What's in there?

On 16 February 2015, ESMA published a report (issued on 3 February 2015) containing its final technical advice to the Commission. Prior to issuing its final advice, ESMA considered the work carried out by several working groups – under the auspices of both EU institutions and other international organisations - and consulted various interested stakeholders. The final text, which was subsequently communicated to the Commission, comprises mainly the following parts:

- The first part provides advice on the types of goods and services or methods of production for goods and services embodying a social objective. This advice will eventually simplify the identification of the so-called *"social enterprises"*;
- The second and third parts deal with the issue of conflicts of interests for EuSEF and EuVECA managers, respectively. More specifically, they list several types of conflicts of interests and further indicate how to prevent and tackle them;
- The fourth part deals with advice on social impact measurement, notably with regard to its methodology and outcomes;
- The fifth part gives advice on the information that EuSEF managers should provide to investors. Special mention is made to the obligation to provide information on the investment strategy and assets targeted.

The report is complemented by Annexes containing the Commission's mandate for technical advice, a cost-benefit analysis of the different policy options presented, the text of the final advice to the Commission and the opinion of ESMA's Securities and Markets Stakeholder Group.

ESMA'S FINAL TECHNICAL ADVICE CAN BE FOUND HERE.

What's next?

On the basis of the technical advice provided by ESMA, the Commission will adopt the delegated acts provided for in the EuSEF and EuVECA Regulations.

MAR - ESMA issues final technical advice concerning the Market Abuse Regulation

Background

On 14 November 2013, the European Securities and Markets Authority ("ESMA") published a discussion paper to seek the views of interested parties on ESMA's policy orientation and initial proposals for the Regulation on market abuse ("MAR") implementing measures (technical advice to the European Commission, ESMA technical standards and Guidelines).

After its publication in the Official Journal of the EU on 12 June 2014, the MAR entered into force on 2 July 2014.

On 15 July 2014, ESMA published two consultation papers ("the Consultation Paper(s)").

Purpose of the first Consultation Paper (ESMA/2014/808 AVAILABLE HERE) was to seek comments on the technical advice that ESMA shall give to the European Commission ("Commission") on a number of possible delegated acts concerning the Regulation, as listed in the relevant Commission requests for advice.

The second Consultation Paper aimed at collecting stakeholders' views on draft technical standards on the MAR (ESMA/2014/809 AVAILABLE HERE).

What's in there?

On 3 February 2015, ESMA published its technical advice ("the Technical Advice") regarding the new Market Abuse Regulation, following the first Consultation Paper published on 15 July 2014.

The Technical Advice is divided into five main sections, each reflecting an aspect of the mandates received from the Commission. Those five sections can be summarised as follows:

(i) Specification of the indicators of market manipulation

ESMA's Technical Advice clarifies the MAR market manipulation indicators, by giving examples of practices that may be considered as market manipulation but also proposing "additional" indicators of market manipulation;

(i) Minimum thresholds for the purpose of the exemption for certain participants in the emission allowance market from the requirement to publicly disclose inside information

ESMA recommends to set the minimum thresholds, exempting certain market participants in the emission allowance market from publicly disclosing inside information, at six million tonnes of CO2eq per year and at 2,430 MW rated thermal input;

(iii) Determination of the competent authority for notification of delays in public disclosure of inside information

ESMA suggests how to determine to which relevant regulator any delay in disclosing the inside information that needs to be notified;

(iv) Managers' transactions

ESMA provides clarifications on the enhanced disclosure of managers' transactions, and recommends disclosing any acquisition, disposal, subscription or exchange of financial instruments of the relevant issuer or related financial instruments carried out by managers, further illustrated through a non-exhaustive list of types of transactions subject to this obligation. ESMA also clarifies the transactions that can be allowed by the issuer during a closed period when normally managers are prohibited to trade;

(v) Reporting of infringements

ESMA's Technical Advice proposes procedures and arrangements to ensure sound whistleblowing infrastructures – i.e. EU national regulators should allow the receipt of reports of infringements, including appropriate communication channels and guarantee the protection of reporting and reported persons, with respect to their identity and their personal data.

THE TECHNICAL ADVICE IS AVAILABLE HERE.

What's next?

ESMA will send its Technical Advice to the European Commission for its consideration and preparation of the related delegated acts.

ESMA will deliver their regulatory technical standards regarding MAR in July 2015.

MIFID II/MIFIR - ESMA publishes Addendum Consultation Paper on implementing rules for MiFIR

Background

Directive 2014/65/EU on markets in financial instruments ("MIFID II"; AVAILABLE HERE) and Regulation (EU) No 600/2014 on markets in financial instruments ("MIFIR"; AVAILABLE HERE) were approved by the European Parliament on 15 April 2014 and by the Council of the EU on 13 May 2014. The two texts were published in the Official Journal of the EU on 12 June 2014 and entered into force on 2 July 2014.

MiFID II and MiFIR aim at bringing greater transparency and improve the overall functioning of the EU's financial markets, thus strengthening investor protection. They cover both secondary markets and investors protection issues.

On 22 May 2014, ESMA published a Discussion Paper on MiFID II/MiFIR (the "Discussion Paper") available here) in order to obtain stakeholders' views on the draft regulatory technical standards (RTS) and implementing technical standards (ITS) that ESMA is required to submit to the European Commission under MiFID II/MiFIR.

On 19 December 2014, ESMA launched a public consultation on draft RTS and ITS for the implementation of MiFID II and MiFIR through practically applicable rules ("THE CONSULTATION PAPER" AVAILABLE HERE).

What's in there?

On 18 February 2015, ESMA issued an *"Addendum Consultation Paper"* ("the Addendum") as regards the RTS to be drafted under MiFIR, in order to collect stakeholders' input on transparency requirements for non-equity instruments, topic which was not covered in ESMA's previous Consultation Paper. The Addendum complements the transparency section of the Consultation Paper and should be read in close conjunction with the latter.

ESMA's Addendum covers transparency and liquidity issues for the following non-equity instruments: (1) foreign exchange derivatives; (2) credit derivatives; (3) other derivatives; (4) contracts for difference. More specifically, the new consultation paper focuses on the assessment of the liquidity of these instruments and specifies large in scale (LIS) and size specific to the instrument (SSTI) thresholds for pre-trade and post-trade transparency purposes. To identify the above non-equity products, ESMA made use mainly of trade repositories data and data from trading venues.

Furthermore, ESMA calls for comments with regard to its liquidity definitions and criteria and consults on a potential deferral period and a volume measure for foreign exchange derivatives.

ESMA'S ADDENDUM IS AVAILABLE HERE.

What's next?

ESMA will consider all stakeholders' contributions received by 20 March 2015 in order to finalise its draft RTS. ESMA's final report will be submitted to the European Commission for endorsement in mid-2015.

MiFID II, MiFIR and their implementing measures will be applicable as from 3 January 2017.

LUXEMBOURG

AIFMD - ALFI responds to ESMA's consultation on asset segregation under the AIFMD

Background

The Alternative Investment Fund Managers Directive ("THE AIFMD" AVAILABLE HERE) entered into force on 21 July 2011 and its transposition period ended on 22 July 2013. The provisions on AIF depositaries and in particular those on the segregation of assets under custody are a key aspect of the AIFMD regulatory framework, aiming at enhancing investors' protection.

On 1 December 2014, ESMA published the *"ESMA Consultation Paper - Guidelines on asset segregation under the AIFMD"* ("THE CONSULTATION PAPER AVAILABLE HERE) containing ESMA's proposals for possible guidelines on the AIFMD asset segregation requirements when safekeeping duties have been delegated by the appointed depositary of an AIF to third parties.

The guidelines will address the question of whether (or not) there should be segregated accounts for the AIF assets of each depositary when a delegate holds assets for multiple depositary clients.

What's in there?

On 3 February 2015, ALFI published its reply form to the Consultation Paper.

In its preliminary remarks, ALFI wishes the issuance of guidelines by the ESMA on the topic as well as on the general concept of asset segregation at depositary, delegate and sub-delegate level. However, ALFI believes that segregation going beyond the separation of proprietary's assets from customer's assets does not necessarily provide better protection for end investors. The same applies to the segregation between AIF and non-AIF assets by way of separate accounts, which does not seem to be required by the AIFMD.

Examining the options proposed by ESMA, ALFI notes that neither option 1 nor option 2 addresses the core issue, namely the account structure requirements below the level of the depositary, and recommends an option that does not impose excessive separation of AIF accounts from non-AIF accounts at the level of delegates and sub-delegates.

ALFI therefore suggests a differentiated level of segregation according to the status of the third party as delegate (Level 1) or sub-delegate (Level 2), as follows: The depositary should ensure that 1) delegates maintain segregation of assets between the proprietary's assets of these delegates, the proprietary's assets of the depositary, the AIF and non-AIF assets of the depositary and the assets of other customers of the depositary which are not AIF and non-AIF assets, and 2) sub-delegates maintain segregation between their proprietary's assets and customer's assets. Moreover, segregation at delegate level between multiple depositaries should take place at group level and not at legal entity level (i.e. one single AIF and non-AIF account for depositaries being part of the same group). ALFI thus proposes an hybrid solution, combining the possibility to mix up AIF and non-AIF assets at delegate level (Level 1) with the possibility to mix up assets from different depositaries belonging to the same group.

Provided that the above recommendation of differentiated account structures is considered, ALFI leans towards option 2 of the consultation paper, as it would limit the number of accounts at delegate level. Indeed, according to the ALFI, multiplication of accounts at the different levels of the custody chain would result in significant additional infrastructure, operational and reconciliation costs as well as an increased need for follow-up of unreconciled items and associated resolution measures.

ESMA's consultation ended on 30 January 2015.

ALFI'S REPLY FORM TO ESMA'S CONSULTATION PAPER IS AVAILABLE HERE.

What's next?

ESMA will consider the feedback received to the consultation with a view to finalising its guidelines and publishing a final report in Q2 2015.

AIFMD - CSSF issues information on AIFMD reporting

Background

Articles 3(3)(d) and 24(1), (2) and (4) of the Alternative Investment Fund Managers Directive ("the AIFMD"), which entered into force on 21 July 2011 and were transposed into Luxembourg legislation with the law of 12 July 2013, lay down regular reporting obligations for EU AIFMs as well as for non-EU AIFMs marketing alternative investment funds (AIFs) in the EU.

Under the above provisions, AIFMs have at least an annual obligation to submit their AIFMD reporting to their competent authorities.

All Luxembourg-domiciled AIFMs and all non-EU AIFMs marketing AIFs in Luxembourg were required to submit their AIFMD reporting to the CSSF by 31 January 2015 (with the exception of funds of funds).

What's in there?

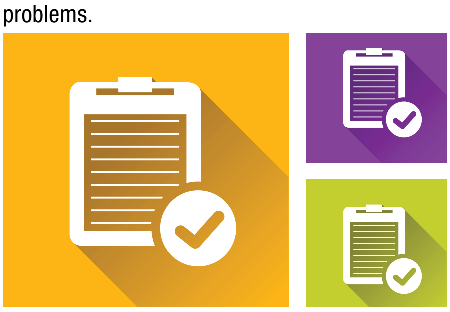
On 10 February 2015, the CSSF issued a document providing information about the first AIFMD reporting and describing the different feedback files that the CSSF is issuing to entities performing the AIFMD reporting. It also describes the controls that the CSSF performs on the reporting files.

The document outlines how the AIFM-reporting file is treated by the CSSF, the controls that are involved (technical, format, identification and content controls) and the feedback files that are issued. Every AIFM and technical agent must receive at least three positive feedback files until all control checks are performed adequately. The document includes a list of CSSF error codes for AIFM and AIF-reporting files.

THE AIFMD REPORTING DOCUMENT IS AVAILABLE HERE.

What's next?

The document will be updated regularly on the basis of the exchanges regarding encountered problems.



EMIR - ALFI responds to ESMA's consultation on the reporting obligation under Article 9 EMIR

Background

Article 9 of EMIR gives mandate to the ESMA to draft regulatory and implementing technical standards in relation to the application of the reporting obligation for counterparties and CCPs.

In September 2012, ESMA's Final Report was delivered, with the regulatory technical standards entering into force on 15 March 2013 and the implementing technical standards on 10 January 2013 (with effect from 15 March 2013). ESMA subsequently proposed to update the Technical Standards taking into account the key Q&As that ESMA has issued since September 2012 on the reporting obligation, as well as other additional improvements, in a new Final Report.

On 10 November 2014, ESMA issued the *"ESMA Consultation Paper - Review of the technical standards on reporting under Article 9 of EMIR"* ("the Consultation Paper") about revision of the technical standards on reporting.

What's in there?

On 10 February 2015, ALFI published its answer to the ALFI generally agrees with the ESMA's proposals concerning clarifications of data fields, adaptations of existing fields to the reporting logic prescribed in existing Q&As and the introduction of new fields and values to reflect market practice or other necessary regulatory requirements. ALFI includes the following suggestions and comments to ESMA's specific questions:

- **Q1:** The "other" category should not be removed from the derivative class and type descriptions;
- **Q3:** Reporting of values in ETD should be possible for both negative and positive values, as well as in all cases where there could be a negative number from the perspective of one of the counterparties **(Q6)**;
- **Q4:** A field for "historical data" alongside a field for current data should not be considered, as it would be an unjustifiable burden on market participants;
- **Q5:** ESMA should provide further clarifications, in the case of ETD ordered by the customer of a clearing member, (i) if the legal relationship between the customer and the Clearing Member is to be reported as a derivative (ETD/OTC); and (ii) if yes, which country should be determined by the customer (CCP's country of domicile/Clearing Members' country of domicile);
- Further clarifications should be given on the definition of "seller", specifying more particularly that the "seller" means credit institutions and investment firms and excludes UCITS/AIF management companies;
- **Q8:** If ESMA considers extended identification of index components, it should be clarified which country code should be considered if an index or basket considers reference entities domiciled in different countries;
- It should be sufficient to request a flag "B"/"I" with regards to the identification of indices and baskets, as further identification of index components could be problematic;
- **Q10:** Compound strategies should be reported as single positions, as suggested by ESMA, and reported in a general field where the name of the strategy can be provided;
- **Q11:** Notional should be clarified according to ESMA's suggestion at point 63 of the consultation paper, namely that in the case of contracts where the notional, due to the characteristics of the contract, varies over time, the original notional shall be the one valid on the date of conclusion of the contract;
- A transitional period 6 months minimum should be granted for the entry into force of the technical standards.

ALFI'S RESPONSE FORM TO THE CONSULTATION PAPER IS AVAILABLE HERE.

What's next?

ESMA will consider all comments received by 13 February 2015 and all contributions received will be published following the closing of the consultation.

The Final Report will be submitted to the European Commission. The Commission has three months to decide whether to endorse ESMA's draft regulatory and implementing technical standards.

PRIIP's - ALFI responds to ESAs discussion paper on PRIIPs

Background

Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products ("the PRIIPs Regulation") aims at improving the quality, comparability and overall transparency of pre-contractual information provided to retail investors seeking to invest in such products.

The PRIIPs Regulation came into force on 29 December 2014 and will become applicable across the EU on 31 December 2016.

On 17 November 2014, EBA, EIOPA and ESMA (the three European Supervisory Authorities or "ESAs") published a Discussion Paper on PRIIPs ("THE DISCUSSION PAPER" AVAILABLE HERE), as a first step in the preparation of the Regulatory Technical Standards (RTS) that the ESAs are empowered to draft in specific areas of the PRIIPs Regulation. The consultation ended on 17 February 2015.

What's in there?

On 17 February 2015, ALFI responded to the ESAs Discussion Paper from an investment funds perspective.

In the ALFI's opinion, it is essential that implementation of the PRIIPs Regulation is aligned with the implementation of other EU pieces of legislation having the same purpose, i.e. MIFID II, IMD, the UCITS Directive and the AIFMD. Consequently, a product manufacturer should not be required to produce more than one disclosure document, such as the UCITS KIID, which is deemed to fulfil the requirements set by the PRIIPs Regulation.

Furthermore, ALFI stresses out that a few areas of discrepancy would need to be gapped, as mentioned in the ESAs Discussion Paper, in particular:

- ⋆Disclosure on costs and charges in the PRIIPs KID should be aligned with the UCITS KIID rules and MiFID II. The same should apply to the risk section;
- ⋆The pre-sale disclosures provided for in Article 23 of the AIFMD in the case of AIFs marketed to retail investors are not necessarily aligned with the content of the PRIIPs KID;
- ⋆As regards insurance-based investment products, Article 3 of the PRIIPs Regulation provides that both Solvency II and PRIIPs Regulation will apply, but leaves open the question as to whether the PRIIPs KID may or may not satisfy all information items included in Article 185 of Solvency II.

Concerning investments funds, ALFI considers that a generic description of the underlying investment options is not necessary. Such a description should only be provided, if necessary, by way of specific KIDs for each one of the options offered.

Finally, ALFI is of the view that, should the UCITS management companies and others benefiting from the transitional provision of Article 32 of the PRIIPs Regulation have to comply with the new set of rules at a later stage, they should have the option to produce on a voluntary basis PRIIPs KIDs instead of UCITS KIIDs already before they are required to do so.

ALFI'S RESPONSE TO THE DISCUSSION PAPER CAN BE FOUND HERE.

What's next?

The ESAs will use the feedback received from stakeholders which participated to the consultation in order to prepare the draft RTS.

A consultation on the draft RTS, setting out the ESAs conclusions, will follow in the autumn of 2015.

CSSF urgent reminder on appointing a depositary for bearer shares and units

Background

The Law of 28 July 2014 on the immobilisation of bearer shares and units ("THE LAW" IS AVAILABLE HERE) was published in the Mémorial on 14 August 2014 and entered into force on 18 August 2014.

The Law requires the appointment of a depositary for the deposition of bearer shares or units, and specifies the terms and conditions as well as the consequences, particularly for non-compliance with the Law.

What's in there?

On 26 January 2015, the CSSF issued a reminder to all public limited companies, corporate partnerships limited by shares and management companies of UCI incorporated in the form of a common contractual investment fund (FCP) who have issued bearer shares or units that a depositary must be appointed for the deposition of those bearer shares or units by 18 February 2015 at the latest.

Detailed information concerning the appointment of a depositary in the field of investment funds was provided by the CSSF in an FAQ (AVAILABLE HERE) and published on their website. The CSSF has stated that the answers given therein can, where appropriate, be applied beyond the scope of just UCI.

The CSSF also emphasised in particular that domiciliation agents governed by the Law of 31 May 1999 on the domiciliation of companies are obliged to ensure compliance with the Law requirements and should take appropriate actions in the event where one of their domiciled companies does not comply with the provisions of the Law.

THE CSSF PRESS RELEASE IS AVAILABLE HERE.

What's next?

A depositary must be appointed by 18 February 2015 at the latest by all public limited companies, corporate partnerships limited by shares and management companies of UCI incorporated in the form of a common contractual investment fund (FCP) who have issued bearer shares or units.

BELGIUM

Belgian Constitutional Court cancels retroactive increase of the yearly Belgian Subscription Tax

Background

The Belgian Subscription Tax is an annual tax applicable to undertakings for collective investment (both on Belgian and on foreign undertakings that are commercialized in Belgium). It is based on the value of the net subscriptions made by Belgian investors through a Belgian financial intermediary and is calculated on the number of outstanding shares in Belgium on December 31st.

Article 106 of the Belgian Act of 17 June 2013 containing tax and financial provisions relating to sustainable development retroactively increased the annual tax rate from 0.08% to 0.0965% effective as of the 1st of January 2013 and to 0.0925% as of the 1st of January 2014.

What's in there?

On 22 January 2015, the Belgian Constitutional Court cancelled Article 106 of the Belgian Act of 17 June 2013 containing tax and financial provisions relating to sustainable development in a case between the Luxembourg domiciled fund *Robeco Capital Growth Funds vs. the Belgian State* (case n° 1/2015). Consequently, Article 106 is to be permanently removed from the Belgian Act of 17 June 2013.

The Court annulled the increase of the annual tax rate from 0.08% to 0.0965% effective as of the 1st of January 2013. However, the increase to 0.0925% as of 1st January 2014 is maintained.

What's next?

UCITS can request repayment of the amounts unduly paid.

NETHERLANDS

Update of the Dutch Act on Financial Supervision

Background

On 6 February 2015, the act amending the Dutch Act on Financial Supervision ("Wijzigingswet financiële markten 2015") was officially published in the Dutch Law Gazette ("Staatscourant").

What's in there?

The Dutch Act on Financial Supervision has been amended regarding remuneration policies and the amendments include :

- ⋆The obligation for each financial enterprise to have remuneration policies;
- ⋆The obligation to publish the remuneration policies;
- ⋆ Bonus cap on the variable part of remuneration;
- ⋆ A prohibition on guaranteed variable fees.

The Act is applicable as per 1 January 2015 with the exception of the bonus cap for employees in service before 1 January 2015.

What's next?

As per 1 January 2016 the Act will also be applicable for existing employees.

GERMANY

European market standards for corporate actions processing - German legal adjustment of due date for payment of cash distributions

Background

The Corporate Actions Joint Working Group (CAJWG), consisting of the main relevant European market participants, i.e. issuers, market infrastructures and intermediaries, developed in 2012 a set of European market standards for corporate actions processing, which includes inter alia the following standardized sequences of dates relevant for corporate actions processing with regards to cash distributions:

- ⋆The day of the announcement of the corporate action by the issuer during the general meeting,
- ⋆The ex-date on the first day after the general meeting, i.e. the first day on which the security is traded without the right to benefit from the corporate action event,
- ⋆The record date on the second day after the general meeting, i.e. the day on which all positions of a security are booked at the central securities depository (CSD) as basis for the settlement of the corporate action event for this security, and
- ⋆The payment date on the third day after the general meeting, i.e. the day on which the payment is due by the issuer and has to be booked on the securities holder's account.

Contrary to the European wide harmonized due date for the payment resulting from a corporate action event being a cash distribution, the German Stock Companies Act (AktG) actually stipulates in its Art. 58 para 4 AktG that the cash distribution is already due on the first day after the general meeting.

What's in there?

In order to align the due date for cash distributions in Germany with the due date defined in the European Market Standards, the Federal Government has published a Draft Amendment of the German Stock Companies Act (Aktienrechtsnovelle) initiated by the Ministry of Finance and Customer Protection on the 7th January 2015 and has sent the draft to the Federal Council on 23rd January for statement until 6th March 2015.

In Article 1 number 5 of the Amendment of the German Stock Companies Act the following sentences shall be added to Art. 58 para 4 AktG: *"the cash distribution shall be due on the third day after the announcement in the General Meeting except a later date has been agreed in the general meeting or the statutes"*.

This legal modification permits a harmonized due date for the payment of cash distributions throughout Europe and makes it easier for foreign investors to invest in Germany.

What's next?

In order to ensure a harmonized settlement process for the cash distributions in 2015 within the German market, the Amendment of the German Stock Companies Act provides for the new Art. 58 para 4. AktG to be effective as of 1st January 2016.

SWITZERLAND

Revision of the FINMA Anti-Money Laundering Ordinance

Background

The FINMA Anti-Money Laundering Ordinance (hereinafter "AMLO-FINMA"), which has been in force in its current form since 1 January 2011, has been revised and the Swiss Financial Supervisory Authority (hereinafter "FINMA") opens a consultation on its draft. This latter takes into account the revision of the Anti-Money Laundering Act of 12 December 2014 and the revised Financial Action Task Force (hereinafter "FATF") recommendations. It also draws inspiration from the FINMA's supervisory practice and recent market developments.

What's in there?

The current AMLO-FINMA is in force since 1 January 2011. The partial revision of the FATF's recommendations in 2012 and the consequential revision of the Anti-Money Laundering Act ("AMLA") and which has been adopted in December 2012 have rendered necessary the adaptation of the AMLO-FINMA.

Are worth mentioning the following material adjustments:

- **The concept of "controller":** this newly introduced concept serves to consistently determine the natural persons behind operationally active legal entities and partnerships. All financial intermediaries are affected by this concept.
- **Special regulations for CIS institutions:** The new regulations are directed at fund management companies, CIS investment companies and CIS asset managers. Those latter must identify the subscriber of fund units and the beneficial owner. Under certain conditions, a relaxation of due diligence requirements is provided for.
- **New payment methods:** The revised AMLO-FINMA now governs the prerequisites under which relaxation of due diligence requirements is allowed for payment service providers offering cashless payment transactions.
- **Reporting requirements:** The revised AMLA enshrines an important novelty. Indeed, the innovation is that despite reports to the Money Laundering Report Office, client instructions must be executed by financial intermediaries (assets are not frozen immediately). A new provision sets out that significant assets may only be withdrawn in a form which enables prosecuting authorities to follow the trail ("paper-trail").

What's next?

The new provisions inserted in the revised AMLO-FINMA draft are tightly interwoven to the international prescriptions and will contribute to meet the requirements in transparency. The reduction of the risk of financial crime that should emerge from this revision will benefit to the Swiss financial center. However, it can be expected that various provisions of the revised ordinance will have a directly financial, personal and/or organisational impact on financial intermediaries.

In the process of consultation, the deadline for communicating a potential position paper is 7 April 2015.

WORLD

OTC Derivatives - IOSCO publishes final report on risk mitigation standards for non-centrally cleared OTC Derivatives

Background

In April 2014, according to the reform program announced by G20 Leaders in 2009, the International Organization of Securities Commission ("IOSCO") approved the mandate of a working group on risk mitigation standards for non-centrally cleared OTC derivatives (the "IOSCO Working Group"), to develop, together with the Basel Committee on Banking Supervision ("BCBS") and the Committee on Payments and Market Infrastructure ("CPMI"), a set of regulatory standards on risk mitigation techniques for non-centrally cleared OTC derivatives.

In September 2014, the IOSCO Working Group released the proposed standards for consultation.

What's in there?

On 28 January 2015, the IOSCO published their final report on Risk Mitigation Standards for non-centrally cleared OTC Derivatives ("the Standard" ; "the Report"). The Standards are intended to promote the adoption of sound risk mitigation techniques to promote legal certainty over the terms of non-centrally cleared OTC derivatives transactions, to foster effective management of counterparty credit risk and to facilitate timely resolutions of disputes.

The Report suggests nine risk mitigation Standards that should be implemented in order to mitigate the risks inherent in the non-centrally cleared OTC derivative markets.

- **Standard 1: Scope of Coverage**
  Financial entities and systemically important non-financial entities ("covered entities") that engage in non-centrally cleared OTC derivatives should employ risk mitigation techniques consistent with the standards set out in the Report.

- **Standard 2: Trading Relationship Documentation**
  Covered entities should establish and implement policies and procedures to execute written trading relationship documentation with their counterparties prior to or contemporaneously with executing a non-centrally cleared OTC derivatives transaction. Such documentation should include all material terms governing the trading relationship between the counterparties.

- **Standard 3: Trade Confirmation**
  Covered entities should establish and implement policies and procedures to ensure the material terms of all non-centrally cleared OTC derivatives transactions are confirmed as soon as practicable after execution of the transaction.

- **Standard 4: Valuation with Counterparties**
  Covered entities should agree on and clearly document the process for determining the value of each non-centrally cleared OTC derivatives transaction at any time from the execution of the transaction to the termination, maturity, or expiration thereof, for the purpose of exchanging margins.

- **Standard 5: Reconciliation**
  Covered entities should establish and implement policies and procedures to ensure that the material terms and valuations of all transactions in a non-centrally cleared OTC derivatives portfolio are reconciled with counterparties at regular intervals.

★**Standard 6: Portfolio Compression**

Covered entities should establish and implement policies and procedures to regularly assess and, to the extent appropriate, engage in portfolio compression.

★**Standard 7: Dispute Resolution**

Covered entities should agree on the mechanism or process for determining when discrepancies in material terms or valuations should be considered disputes, as well as how such disputes should be resolved as soon as practicable. The mechanism or process should provide for the prompt notification to authorities of such disputes that remain unresolved after a reasonable period of time if the applicable regulation requires such notification.

★**Standard 8: Implementation**

Authorities should implement the standards described in the report as soon as practicable.

★**Standard 9: Cross-border Transactions**

The different regulatory regimes should interact so as to minimise inconsistencies in risk mitigation requirements for non-centrally cleared OTC derivatives across jurisdictions.

The Standards are all accompanied by key considerations that describe how they should be implemented. The rationale behind each Standard is also provided to guide and help with their implementation.

THE FINAL REPORT IS AVAILABLE HERE.

What's next?

Authorities are encouraged to implement these Standards as soon as practicably possible and to implement them in a manner that is consistent with the key considerations so as to ensure a harmonised application across jurisdictions.

Scanning

This publication is produced by Legal and Compliance teams of CACEIS with the kind support of Communication teams and Group Business Development Support teams.

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