Scanning

CACEIS European Regulatory Watch Newsletter

No.19 February 2016 19

EUROPE

AIFMD - EU Commission answers to ESMA on the AIFMD passport

MIFID II - ESMA publishes final guidelines on cross-selling practices under MiFID II

MIFID II - ESMA consults on transaction reporting, reference data, order record keeping and clock synchronisation

SFTR - Regulation on transparency of securities financing transaction and re-use ("SFTR")

UCITS V - The EU Commission proposes Delegated regulation on UCITS depositary duties

LUXEMBOURG

AIFM/UCITS - Extension of the scope of entities subject to quarterly reporting under CSSF circular 10/467

AUDIT - CSSF press release on the external rotation mechanism of statutory audit firms auditing public interest entities (PIE)

ELTIF - CSSF publishes ELTIF's application form

SIF/SICAR - CSSF specifies risk management and conflicts of interest policy requirements for SIF and SICAR

NETHERLANDS

Dutch data protection regime - New regulations

Dutch tax treatment of limited partnerships and funds for joint account - New amended regime applicable

TAX UPDATES

AEOI - New Rules to Help EU Tax Authorities Exchange Information Adopted by European Commission (EU)

CRD IV - EBA Guidelines on CRD IV (EU)

INVESTMENT TAX ACT - Reform of the Investment Tax Act (Germany)

CIVs - New Rules on the Tax Treatment of CIVs (Norway)

STOCK OPTION PLANS - New Reporting Requirement for Stock Option Plans (Luxembourg)

caceis
INVESTOR SERVICES

EUROPE

AIFMD

EU Commission answers to ESMA on the AIFMD passport

Background

On 21 July 2013, the final text of the AIFMD became effective across the EU (AVAILABLE HERE). Amongst other things, the AIFMD makes provision for the passport, which is currently reserved to EU AIFMs and AIFs, to be potentially extended in future.

On 30 July 2015, ESMA issued an advice (ESMA/2015/1236 AVAILABLE HERE) on the application of the passport to non-EU AIFMs and AIFs in accordance with the rules set out in Article 35 and Articles 37 to 41 of the AIFMD, and an opinion (2015/ESMA/1235 - available here) on both the functioning of the passport for EU AIFMs pursuant to Article 32 and 33 of the AIFMD, and that of the national private placement regimes ("NPPRs") set out in Articles 36 and 42 of the AIFMD.

The EU Commission agreed with ESMA on its advice to grant the AIFMD passport to Guernsey, Jersey and Switzerland, but shall take no decision without a sufficient number of third countries assessment.

What's in there?

On 19 January 2016, ESMA published the feedback letter (the "Letter") received from the EU Commission following its previous opinion and advice on the AIFMD passport.

The below highlights the main points of the answer:

- The EU Commission invited ESMA to complete by 30 June 2016 the assessment of Hong Kong, Singapore and the United states, and to assess 6 other third country jurisdictions which are Japan, Canada, Isle of Man, Cayman Islands, Bermuda and Australia;
- Regarding the enforcement of the AIFMD rules in third country jurisdictions, ESMA shall provide to EU Commission a more detailed assessment of the capacity of supervisory authorities and their track record in ensuring effective enforcement;
- ESMA is also invited to provide a preliminary assessment of the expected inflow of funds into the EU from relevant third countries;

THE LETTER IS AVAILABLE HERE.

What's next?

ESMA shall published an updated opinion on the functioning of the EU passport and NPPRs once the AIFMD will be fully transposed through EU and when more practical experience on the functioning of this framework will be available.

Opinion and advice received from ESMA will be taken into account in the AIFMD review which is expected by 2017.

esma European Securities and Markets Authority

MIFID II

ESMA publishes final guidelines on cross-selling practices under MiFID II

Background

The Directive 2014/65/EU on markets in financial instruments ("MiFID II" - AVAILABLE HERE) entered into force on 2 July 2014.

According to article 24(11) of MIFID II, when an investment service is offered together with another service or product as part of a package or as a condition for the same agreement or package ("cross selling practices"), the investment firm shall inform the client whether it is possible to buy the different components separately and shall provide for a separate evidence of the costs and charges of each component.

In addition, paragraph 2 of this article precise that where the risks resulting from such an agreement or package offered to a retail client are likely to be different from the risks associated with the components taken separately, the investment firm shall provide an adequate description of the different components of the agreement or package and the way in which its interaction modifies the risks.

Paragraph 3 set forth that ESMA, in cooperation with EBA and EIOPA, shall develop guidelines for the assessment and the supervision of cross-selling practices indicating, in particular, situations in which cross-selling practices are not compliant with obli-

gations laid down in paragraph 1 of article 24(11).

On 22 December 2014, ESAs published a consultation paper ("CP") on draft guidelines for cross selling practices (JC/CP/2014/05 available here). The consultation closed on 22 March 2015.

What's in there?

On 22 December 2015, ESMA published the final report on guidelines on cross selling practices (ESMA/2015/1861, the "Final Report"). With these draft level 3 measures, ESMA indicates to competent authorities high level principles and practical ways to ensure firms comply with their obligations in the context of cross-selling practices within the meaning of subparagraph 42 of article 4(1) MiFID II. Thus the scope of the Final Report is more limited than the one of the CP as insurance services and products are not covered.

It derives from the above that the guidelines included in the Final Report would apply to cross-selling activities performed by investment firms, credit institutions and management companies or AIFM providing investment services.

The below is a brief overview of the final guidelines set forth in Annex 5 of the Final Report:

- **Disclosure of price and cost information (guideline 1):** a clear breakdown and aggregation of all relevant known costs associated with the purchase of the package and its component products (such as administration fees, transaction costs and exit or pre-payment penalty charges) or as default, an estimation of these costs based on reasonable assumptions, shall be provided to clients.
- **Disclosure of key information on non-price features and risks, where relevant (guideline 5):** a firm shall disclose information on the difference between non price features and risks which are linked to the packaging of different products and non-price features and risks linked to each product separately.
- **Prominent display and timely communication of information disclosed (guidelines 2, 3, 4 and 6):** information that shall be disclosed regarding guidelines 1 and 5, shall be provided in good time before the client is bound to the agreement, in a prominent, accurate manner and in simple language in order to ensure that the client understands the cost impact of the package proposed and will be able to take a well informed decision.
- **Prominent display and communication of "optionality of purchase"(Guideline 7):** a firm shall informed its clients that products proposed in a package could be or not purchased separately and shall design their purchase options in order to allow the client to be able to take a conscious decision without false perception.
- **Requirement of adequate training for staff in charge of distributing each products sold (Guideline 8):** a firm shall include training on inherent risks of the component products and of the bundled or tied package to its relevant staff.
- **Conflicts of interest policy shall include requirements on the remuneration structures of sales staff** and be monitor by senior management in order to ensure responsible business conduct, fair treatment of clients and avoidance of conflicts of interest (Guideline 9).
- **Post-sale cancellation rights attached to the purchase** of one or more component products of a package shall be preserved despite bundled or tied package (Guideline 10). In particular, no disproportionate or unjustified penalties shall apply in case of split of a cross selling offer.

THE FINAL REPORT IS AVAILABLE HERE.

What's next?

The final guidelines included in the Final Report will be published on the ESMA website and shall come into effect on 3 January 2017.

MIFID II

ESMA consults on transaction reporting, reference data, order record keeping and clock synchronisation

Background

The following MIFIR RTS have been published by ESMA on 28 September 2015 (ESMA/2015/464):

- RTS 22 covering draft regulatory technical standards on reporting obligations under Article 26 of MiFIR;
- RTS 23 covering financial instruments reference data under Article 27 of MiFIR;
- RTS 24 covering draft regulatory technical standards on the maintenance of relevant data relating to orders in financial instruments;
- RTS 25 covering draft regulatory technical standards on clock synchronization.

What's in there?

On 23 December 2015, ESMA issued a consultation paper with the aim of issuing guidelines complementing the RTS 22, 23, 24 and 25 at a later stage (ESMA/2015/1909).

THE CONSULTATION PAPER IS AVAILABLE HERE.

What's next?

ESMA will take into consideration feedback received before 23 March 2016 and a publication of the final guidelines is expected in the second half of the same year.

SFTR

Regulation on transparency of securities financing transaction and re-use ("SFTR")

Background

On 29 January 2014, the EU Commission published a proposal for a regulation on reporting and transparency of securities financing transactions ("SFTs" AVAILABLE HERE).

This proposal aimed at enhancing financial stability by setting out reporting obligations and by preventing banks and other financial intermediaries from circumventing the regulation, which occurs notably by shifting parts of their activities to the less-regulated shadow banking sector. It requires, inter alia, detailed reporting on securities lending transactions, repurchase transactions, reverse repurchase transactions, total return swaps ("TRS") in UCITS and AIF's annual reports and prospectuses.

On 17 June 2015, the council of the presidency and the EU Parliament reached an agreement on the proposed regulation and, on 29 October 2015, the EU Parliament adopted its position at first reading. On 16 November 2015, the Council of the EU voted and adopted the final text of the Securities Financing Transaction Regulation (the "SFTR").

What's in there?

On 23 December 2015, the SFTR was published on OJEU and entered into force on 12 January 2016.

The regulation introduces new measures to improve transparency over SFTRs and TRS:

1. SFTR'S DEFINITION

★Repurchase transaction;

★Securities and commodities lending and securities or commodities borrowing;

★A buy-sell back transaction or sell-buy back transaction;

★A margin lending transaction.

2. TRANSPARENCY OF STFS

Counterparties to SFTs shall report the details of any SFT they have concluded.

2.1 Entities concerned

★**Counterparties** - Pursuant to articles 4 and 15, the SFTR shall apply to counterparties to a SFTR's transaction as defined below:

- Any financial and non-financial counterparty established in the EU or in a third-country (if the SFTs is concluded in a course of a the operations of the EU branch of the third-country counterparty (together the "Counterparties"));
- UCITS' management companies and UCITS' investment companies in accordance with Directive 2009/65/EC;
- AIFs' managers authorized in accordance with Directive 2011/61/EU;
- Any EU and non-EU counterparty engaging in the reuse. A non-EU counterparty will be subject to SFTR if the reuse is effected in the course of the operations of an EU branch of such non-EU counterparty. The reuse concerns final instruments provided under a collateral arrangement by an EU counterparty or the EU branch of a non-EU counterparty.

The following entities are not captured by the requirements of article 4 and 15 of the SFTR:

- Member of the European System of Central Banks (the "ESCB");
- Other member states bodies;
- Other union public bodies performing similar functions or in charge with or intervening in the management of the public debt;
- The Bank for international settlements.

Transactions to which a member of the ESCB is a counterparty shall not fall into the scope of article 4 of the SFTR as well.

★**Trade repositories ("TRs")** - SFTs shall be reported to TRs registered (article 5) or recognised (article 19).

TRs shall be:

- registered with ESMA for the purposes of the reporting requirements;
- be established in the EU;
- meet the requirements laid down in article 78, 79, and 80 of EMIR as well.

2.2 The Reporting Obligation (article 4)

★Detail of SFTs to be reported: Counterparties shall report details of any SFTs they have concluded on the day following the conclusion, the modification or the termination of the transaction.

★SFTs concluded before 12 January 2016 and remain outstanding on that date shall be reported if their remaining maturity exceeds 5 months (180 days), is an open maturity and remain outstanding 180 days after that date.

★SFTs concluded on or after the 12 January 2016.

2.3 Application date of the reporting transaction

FINANCIAL COUNTERPARTY ART 3(3)	**ART 33(2) POINT (A)**
(a) An investment firm in accordance with Directive 2014/65/EU (MIFID2)	**(i)12 months** following the entry into force of the delegated acts ("DA")
(b) A credit institution in accordance with Directive 2013/36/EU (CRD IV)	**(i) 12 months** following the entry into force of the DA
(c) An insurance undertaking or a reinsurance undertaking authorised in accordance with Directive 2009//138/EC (Solvency II)	**(iii) 18 months** after the date of entry into force of the DA
(d) A UCITS and where relevant its management company, authorised in accordance with Directive 2009/65/EC (UCITS IV)	**(iii) 18 months** after the date of entry into force of the DA
(e) An AIF managed by AIFMs authorised or registered in accordance with the Directive 2001/61/EU (AIFMD)	**(iii) 18 months** after the date of entry into force of the DA
(f) An institution for occupational retirement provision authorised or registered in accordance with Directive 2003/41/EC (Occupational Pension Funds Directive)	**(iii) 18 months** after the date of entry into force of the DA
(g) A central counterparty ("CCP") authorised in accordance with Regulation n0648/2012 (EMIR)	**(iii) 18 months** after the date of entry into force of the DA
(h) A central securities depository ("CSD") authorised in accordance with Regulation (EU) N0 909/2014 (On improving securities settlements in the EU and on Central securities depositories "CSD")	**(ii) 15 months** after the date of entry into force of the DA
(i) A 3rd country entity which could require authorisation or registration in accordance with the legislative acts referred to in points (a) to (h) if it were established in the Union	**(i) 12 months**, **(ii) 15 months** or **(iii) 18 months** after the date of entry into force of the DA
NON-FINANCIAL COUNTERPARTIES ART 3(4)	**ART 33(2)**
An undertaking **established** in the Union or a 3rd country other than the entities referred to above	**(iv) 21 months** after the date of entry into force of the DA

3. TRANSPARENCY IN COLLECTIVE INVESTMENT UNDERTAKINGS IN FINANCIAL REPORTS (ARTICLE 13)

★UCITS management companies, UCITS investments companies and AIFMs shall disclose the use they make of SFTs and TRS as further described in article 13(1) in the financial statements;

★Authorised SFTs and TRS shall be disclosed in UCITS/AIFM prospectuses in a clear statement that those transactions and instruments are used.

COLLECTIVE INVESTMENT UNDERTAKINGS	**DISCLOSURE OF SFTS AND TRS**
UCITS management companies	**(a)** In the **half-yearly** and **annual report** (article 68 of UCITS IV)
UCITS investments companies	**(a)** In the **half-yearly** and **annual report** (article 68 of UCITS IV)
AIFMs	**(b)** In the **annual report** (article 22 of the AIFMD)

The information to be provided in the UCITS half-yearly and annual reports are laid down in the ANNEX Section A.

The requirements go beyond what is currently required and include details on SFTR's volume, concentration data, collateral, maturity, counterparties, reuse of collateral, safekeeping of collateral, return and costs. These requirements shall apply from 13 January 2017.

4. TRANSPARENCY IN PRE-CONTRACTUAL DOCUMENTS (ARTICLE 14)

UCITS Prospectus (article 69 of Directive 2009/65/

EC- UCITS IV) and the information to be made available by the AIFM pursuant to article 23 of the AIFMD shall specify the SFTs and TRS which UCITS management companies or UCITS investment companies and AIFM are authorised to use and include a clear statement that those transactions are used.

Annex B specifies the details to be included in prospectuses. It includes information on maximum proportion of AUM or expected proportion of AUM details over collateral (type, valuation, safekeeping, reuse…) policy on sharing returns… These requirements will apply from 13 July 2017 for UCI's constituted before 12 January 2016.

5. TRANSPARENCY OF REUSE (ARTICLE 15)

In general, entities shall be entailed to reuse financial instruments as below provided:

- ⋆The entity receiving the reuse shall duly inform in writing the providing counterparty of the risks and consequences of the right of use of collateral, concluding a title transfer collateral arrangement;
- ⋆The providing counterparty shall grant express prior consent as evidenced by a signature, in writing or in a legally manner;
- ⋆The providing counterparty shall be informed of the risks and consequences in the event of the default of the receiving counterparty.

For UCITS and AIF's, provision on re-use as per AIFMD and UCITS will continue to apply.

6. SANCTIONS:

- ⋆**Administrative pecuniary sanctions:** in order to ensure compliance by counterparties with the obligations deriving from this Regulation and that they are subject to similar treatment across the Union, Member States should ensure that competent authorities have the power to impose administrative sanctions and other administrative measures which are effective, proportionate and dissuasive.
- ⋆**Maximum administrative pecuniary sanctions** of at least three times the amount of the profits gained or losses avoided because of the infringement where those can be determined by the relevant authority can be imposed:
  - In respect of a natural person, a maximum administrative pecuniary sanctions of at least EUR 5 000 000 can be imposed.
  - In respect of a legal person, a maximum administrative pecuniary sanction of at least EUR 5 000 000 for infringement of article 4 and EUR 15 000 000 for infringement of article 15.
- ⋆**Publicity of sanctions and reporting to ESMA through a public statement** which indicates the person responsible and the nature of the infringement.

THE SFTR IS AVAILABLE HERE.

What's next?

By 2016, pursuant to article 4(9), the specifications relating to the SFTs' reporting (principal amount, currency, assets used as collateral, quality and value…) shall be further developed by ESMA in draft RTS, in close cooperation with the ESCB.

Competent authorities may cooperate with competent authorities of other Member States with respect to facilitating the recovery of pecuniary sanctions.

UCITS V

The EU Commission proposes Delegated regulation on UCITS depositary duties

Background

Directive 2009/65/EC provides a harmonised legal framework for undertaking for collective investment in transferable securities ("UCITS") that can be freely marked across the EU.

In order to reinforce the rules applicable to UCITS, in particular with respect to the duties and the liability of UCITS depositaries, the EU commission proposed some amendments to the UCITS Directive.

On 23 July 2014, Directive 2014/91/EU namely the UCITS V Directive was adopted. The UCITS V amended the UCITS IV Directive with respect to depositary rules, remuneration and sanctions. UCITS V entered into force on 25 September 2014. It will apply from 18 March 2016 onwards.

The UCITS Directive provides for several empowerments for the EU Commission to adopt delegated acts to further specify the new depositary requirements. The UCITS Directive is largely aligning the UCITS requirements as regards to the depositary and remuneration with AIFMD.

What's in there?

On 17 December 2015, the EU Commission published a proposal for a Commission Delegated Regulation (the "Proposal") supplementing the UCITS IV Directive with regard to the depositaries functions.

The depositaries functions as specified under the Proposal are, for most of them, aligned to the Commission Delegated Regulation 213/2013 on the AIFM depositary duties (the "AIFMD Delegated Acts"). Even though UCITS delegated acts are designed to be consistent with the AIFMD Delegated Acts to ensure a level playing field guaranteeing the investor protection, differences remain, because UCITS regime is more restrictive than the AIFM regime, hence a few remarks can be made:

- ⋆**Duties regarding the contract for the appointment of a depositary (article 2):** The UCITS regime provides that when delegating safekeeping functions to a third party, the depositary should ensure that the third party performs all the delegated functions and complies with the contract and other legal requirements such as independence requirements and prohibition of re-use (Recital 18 of the Proposal). This requirement differs from the contract particulars of article 83 (h) of AIFMD that requires the depositary or the third party to which safekeeping has been delegated, to disclose in the agreement whether it shall re-use the assets it has been entrusted with.
- ⋆**Duties regarding the valuation of units and shares under article 5 of the Proposal:** UCITS regime does not provides for the appointment of an external valuer as provided under article 19 of the AIFMD. Consequently, the AIFMD depositary requirement to perform additional check for the appointment of the external valuer (article 94 of the AIFMD Delegated Acts) is not included in the Proposal.
- ⋆**Duties regarding the timely settlement of transactions as set forth under article 7 of the Proposal:** Where transactions do not take place on a regulated market, the UCITS depositary shall notify the management company or the investment company that transactions involving the assets of the UCITS are not remitted to the UCITS within the usual time limits. In comparison with this provision, the AIFMD depositary shall carry on its duties by only assessing the usual time limits. No notification procedure is required under article 96.2 of the AIFMD Delegated Acts.
- ⋆**Safekeeping duties regarding the ownership verification and record keeping (article 14):** Under article 90.5 of the AIFMD Delegated Acts, the AIFMD depositary duties with regard to safekeeping of assets shall apply on a look-through basis to underlying assets held by financial or legal structures. This requirement is not included in the Proposal since UCITS can only invest in units of UCITS

authorised according to the UCITS IV Directive or comparable UCIs as defined under article 1 (2) (a) and (b) of the same Directive.

★**Insolvency protection of UCITS assets when delegating the custody function (article 17):** The Proposal establishes a new framework in case of insolvency of the third party to which safekeeping has been delegated. This insolvency regime goes beyond the one provided for the AIFMD depositary regime under article 99.2 of the AIFMD Delegated Acts. The Proposal sets out a "safe harbour procedure" to keep the UCITS assets unavailable for distribution /realisation of benefit among the creditors of that third party. In particular the depositary shall undertake its duties by ensuring that the third party to whom UCITS assets safekeeping have been delegated as described below:

- The depositary shall receive a legal advice from an independent advisor confirming the recognition by the third country applicable insolvency law, of a segregation policy and unavailability of the UCITS assets; this requirement is to be met at the time of the conclusion of the delegation agreement and over the life time of the agreement.
- The depositary shall be informed by the third party where the conditions to be met under the UCITS V Delegated Act are no longer met and where there are any changes occurring in connection with the UCITS depositary clients. In comparison, article 99.2 of the AIFMD Delegated Acts only foresees an obligation for the AIFM's depositary to assess additional arrangements to minimise the risk of loss and maintain an adequate standard of protection.

★**No liability discharge for the UCITS depositary (article 19):** By opposition to the AIFMD depositary regime where the depositary is allowed to discharge its liability under certain conditions, under the UCITS depositary regime this possibility is not foreseen.

★**Independence requirements (Chapter 4):** The depositary shall perform its duties in compliance with the independence rules as set forth under the UCITS Proposal and as summarised below:

- There shall be no common management between the management company and the depositary.
- The appointment of the depositary and delegation of safekeeping shall be made following a strong decision making-process. In case of existence of a link or group link (article 22) between the management company and the depositary appointed, the management company shall keep documentary evidence of the assessments of the depositary appointing process. A report based on the assessments performed shall be established.
- The management company or the investment company shall demonstrate to the competent authority of the UCITS home member state that it is satisfied with the appointment of the depositary and that the appointment of the depositary is in the sole interest of the UCITS and its investors.
- The management company shall justify to investors the choice of the depositary upon request.
- The depositary shall have in place a decision-making process for choosing the third party to whom it may delegate the safekeeping functions in accordance with article 22a of UCITS IV, as amended.

★**Conflict of interest (article 23):** Where a link or a group link exists between them, the management company or the investment company and the depositary shall put in place policies and procedures ensuring that they:

- Identify all conflicts of interest arising from that link;
- Take all reasonable steps to avoid those conflicts of interest.

Where a conflict of interest referred to in the first subparagraph cannot be avoided, the management company or the investment company and the depositary shall manage, monitor and disclose such conflict of interest in order to prevent adverse effects on the interests of the UCITS and of the investors of the UCITS.

In contrast, articles 30 to 36 of section 2 of the AIFMD Delegated Acts provide that the conflicts of interests (type, policy, procedures to prevent or manage, monitor and disclose potential conflicts of interests) duties lies within the AIF manager and not the depositary.

★**Independence of management boards and supervisory functions (article 24)**

Where a group link exists between them, the management company or the investment company and the depositary shall ensure that:

(a) Where the management body of the management company and the management body of the depositary are also in charge of the supervisory functions within the respective companies, at least one-third of the members or two persons, whichever is lower, on the management body of the management company and on the management body of the depositary shall be independent;

(b) Where the management body of the management company and the management body of the depositary are not in charge of the supervisory functions within the respective companies, at least one-third of the members or two persons, whichever is lower, on the body in charge of the supervisory functions within the management company and within the depositary shall be independent.

For the purposes of the first paragraph, members of the management body of the management company, members of the management body of the depositary or members of the body in charge of the supervisory functions of the above companies shall be deemed independent as long as they are neither members of the management body or the body in charge of the supervisory functions nor employees of any of the other undertakings between which a group link exists and are free of any business, family or other relationship with the management company or the investment company, the depositary and any other undertaking within the group that gives rise to a conflict of interest such as to impair their judgment.

THE PROPOSAL IS AVAILABLE HERE.

What's next?

The delegated acts shall apply 6 months after their entry into force (expected date: September 2016).

LUXEMBOURG

AIFM/UCITS

Extension of the scope of entities subject to quarterly reporting under CSSF circular 10/467

Background

On 1st July 2010, the CSSF published the circular 10/467 concerning electronic transmission of financial information to be transmitted to the CSSF on a periodic basis by management companies subject to Chapter 13 of the law of 20 December 2002 (now referred to as management companies under Chapter 15 of the law of 17 December 2010) relating to undertakings for collective investment, as well as modifications to certain periodic tables. According

to this circular, management companies subject to chapter 15 of the law of 17 December 2010 on UCIs ("Chapter 15 Management companies") were required to communicate electronically quarterly statements on their financial position, profit and loss accounts, funds managed, investment mandates and staff.

What's in there?

On 29 December 2015, the CSSF published Circular CSSF 15/633 ("the Circular"), which extends the scope of management companies and investment fund managers subject to quarterly reporting of financial information foreseen under circular 10/467. Indeed, from now on, all investment fund managers (as listed below) and their branch are required to provide the above mentioned financial information to the CSSF.

The following management companies, investment fund managers and their branch will have to quarterly report on their financial data to the CSSF:

a) Chapter 15 Management companies as initially required under Circular 10/467;
b) Companies subject to article 125-1 and 125-2 of chapter 16 of the law of 17 December 2010 on UCIs ("Chapter 16 Management companies");
c) External alternative investment fund managers authorised in accordance to the Law of 12 July 2013 ("AIFM").

More detailed information regarding the submission process of the reporting is provided in the Circular, which is AVAILABLE HERE.

What's next?

The Circular is applicable immediately. The first data to communicate by the Chapter 16 Management companies and AIFMs are those by December 31, 2015. The submission deadline for those entities has now been extended from 20 January to 29 February 2016 at the latest.

AUDIT

CSSF press release on the external rotation mechanism of statutory audit firms auditing public interest entities (PIE)

Background

The law of 18 December 2009 on the audit profession that came into force on 23 February 2010 assigns to the CSSF public oversight of the mission of the profession of audit. The above mentioned law has been modified by a CSSF Circular 13/578 (AVAILABLE HERE) which aims to present an update of the legislative and regulatory frame concerning the audit profession.

On 27 May 2014, regulation n°537/2014 ("the Regulation") of the EU Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities ("PIE") was published in the JOEU and shall apply from 17 June 2016 onwards. It defines 'public interest entities' as 'entities governed by Luxembourg law whose transferable securities are admitted to trading on a regulated market of a Member State within the meaning of point 14 of Article 4(1) of Directive 2004/39/EC, credit institutions as defined in point 12 of Article 1 of the amended Law of 5 April 1993 on the financial sector, Luxembourg insurance undertakings as defined in Article 25(1)(h) of the amended Law of 6 December 1991 on the insurance sector, excluding the undertakings and bodies referred to in Article 26(4) of the amended Law of 6 December 1991 on the insurance sector, pension funds referred to in Article 25(1)(hh) of the amended Law of 6 December 1991 on the insurance sector and the Luxembourg reinsurance undertakings referred to in Article 25(1)(nn) of the amended Law of 6 December 1991 on the insurance sector. A Grand-Ducal regulation may designate other entities as public-interest entities, by reason of the nature of their business, their size or the number of their employees.

What's in there?

According to the Regulation n°537/2014, the CSSF asserts that when the statutory audits have been entrusted to the same statutory audit firms since:

- A period prior to 16 June 1994, those PIE shall change their statutory audit firms as of 16 June 2020 at the latest;
- A period between 17 June 1994 and 16 June 2003, those PIE shall change their statutory audit firms as of 16 June 2023 at the latest;
- A period between 16 June 2003 and 17 June 2006, those PIE will have to:
  - Either change their statutory audit firm as of 16 June 2016;
  - To conduct a tender exercise to maintain the same statutory audit firm for a period not exceeding ten years, subject to the adoption of the bill relating to the audit profession before 17 June 2016.

THE CSSF PRESS RELEASE IS AVAILABLE HERE.

What's next?

The public interest entities will have to rotate their appointed audit firms every ten years at least.

The bill to be adopted before 17 June 2016 may foresee that the mandate of statutory audit firms could be renewed for an additional period of ten years subject to tender exercise.

ELTIF

CSSF publishes ELTIF's application form

Background

The Regulation (EU) 2015/760 of The European Parliament and of the Council of 29 April 2015 on European Long-term Investment Funds ("ELTIF") has been applicable in Luxembourg since 9 December 2015.

What's in there?

On 21 December 2015, the CSSF published the application form to be completed and submitted to the CSSF by each applicant requesting agreement as an ELTIF (AVAILABLE HERE).

What's next?

Once completed, the ELTIF application form shall be sent electronically to setup.uci@cssf.lu

SIF/SICAR

CSSF specifies risk management and conflicts of interest policy requirements for SIF and SICAR

Background

Article 42bis of the Law of 13 February 2007 on specialised investment funds (the "SIF Law") provide that the CSSF is entitled to adopt implementing measures as regards as risk management and conflicts of interest requirements.

Article 7a of the Law of 15 June 2004 on investment companies in risk capital (the "SICAR Law") provide that the CSSF is entitled to adopt implementing measures as regards as conflicts of interest requirements.

What's in there?

On 7 January 2016, CSSF published regulations n°15-07 (the "SIF Regulation" AVAILABLE HERE) and n°15-08 (the "SICAR Regulation" AVAILABLE HERE) laying down the requirements in relation to the management of risk and conflicts of interest for SIFs and SICARs which are not managed by an authorised AIFM.

The SIF Regulation replaces and repeals CSSF Regulation n°12-01 regarding requirements on risk management and conflicts of interest policy for SIF as required under article 42bis, which previously applied to all SIF's, whereas the new regulators apply only to SIF's and SICAR's not falling under the scope of the AIFMD, as AIFMD set out specific requirements in term of conflicts of interest and risk management.

The below briefly details, the requirements set out in the SIF Regulation, which reflects the requirements previously applicable under the CSSF Regulation 12-01:

1. REQUIREMENTS APPLICABLE TO THE SIF REGULATION (15-07)

1.1 Conflicts of interests requirements (chapter II)

⋆**Identification of potential conflicts of interest (article 6):** For the purposes of identifying the types of conflict of interest that may arise in the course of providing investment and investment activities likely to prejudice the interests of the SIF, SIFs shall identify minimum criteria to monitor certain activities. A list of the specific situation to be monitor is further set out in the Regulation.

⋆**Conflicts of interest policy (article 7):** SIF shall establish, implement and maintain an effective conflicts of interest policy set out in writing and appropriate to the size and organisation of the firm and the nature, scale and complexity of its business and of the group to which the fund belongs. This policy shall include procedures and measures in order to identify, monitor and prevent potential conflict of interest that could arise from personal transaction, activities such as collective portfolio management or from the exercise of voting rights attached to securities held. The establishment of this conflict of interest policy shall be confirmed to the CSSF in the request for agreement of the SIF.

⋆**Independence requirement (article 8):** An independence policy shall be set up for the firm and shall ensure that relevant persons engaged in different business activities involving a conflict of interest, carry on those activities at a level of independence appropriate to the size and activities of the investment firm and of the group to which it belongs, and to the risk of damage to the interests of clients.

⋆**Management of services or activities giving rise to conflict of interest likely to harm the investment firm interests (article 9(1)):** Investment firms shall keep and regularly update a record of the various collective portfolio management activities carried out by or on behalf of the firm in which a conflict of interest entailing a risk of damage to the interests of the fund has arisen or, which may arise in case of ongoing service or activity.

⋆**Information and disclosure (article 9(2)):** Where organisational or administrative arrangements made by the fund to prevent conflicts of interest from adversely affecting the interest of the Fund are not sufficient to ensure, with reasonable confidence, that risks of damage to fund interests will be prevented, the management body shall be informed to ensure that appropriate measure will be taken to guaranty that the fund will act in the best interest of itself and its clients. This situation shall also be disclose to clients as well as the steps and decisions undertaken by the management body.

1.2 REQUIREMENTS REGARDING THE RISK MANAGEMENT (CHAPTER I)

⋆**Establishment of a risk management function (article 4(1) and article 4(2)):** SIFs must establish and keep operational a risk management function which shall be independent, from a hierarchical and operational point of view, of the operational units. CSSF could allow SIF to derogate to this independence obligation if the said derogation is appropriate and proportionate considering the nature, scale and complexity of the activities as well as the structure of the SIF.

⋆**Independence requirement (article 4(2)):** A SIF shall be able to demonstrate that appropriate protection measures have been taken against conflicts of interests, in order to allow an independent exercise of risk management activities. The latter should also comply with the requirements of Article 42 bis (1) of the SIF Law.

⋆**Authority and access of the function (article 4(3)):** The risk function must enjoy the necessary authority and an access to every necessary and relevant information to the performance of its tasks.

⋆**Delegation to third party (article 4(4)):** SIFs may delegate to a third party all or part of the activity of the risk management function provided that the third party has the skills and abilities necessary to perform the activities of the risk management function in a reliable, professional and efficient manner in conformity with the legal and regulatory requirements.

⋆**Management body** should adopt the risk management system of the SIF and, subsequently, submit it to regular and documented review (article 4(5)).

⋆**Communication to CSSF (article 4(6)):** SIFs must communicate to the CSSF, under their application for approval, a description of the risk management system. Thereafter, any significant change in their risk management system shall be notified to the CSSF.

⋆**Risk management function (article 5):** The function involves to implement and keep operational risk management policy in order to detect, measure, manage and monitor the exposure to market risks, liquidity and counterparty, and exposure to other risks, including operational risk, which may be significant in the activities of the SIF (article 5(1)(a)).

The risk management function shall ensure compliance with the risk limit system of the SIF (article 5(1)(b)).

2. CONFLICTS OF INTEREST REQUIREMENTS APPLICABLE TO SICAR (REGULATION 15-08)

The requirements set out in the Regulation 15-08 in relation to the management of conflicts of interest for SICARs which are not managed by an AIFM, are similar as the ones detailed on the same topic for SIF (point 1.1. above).

Conflicts of interest requirements

	SIF		SICAR	
	Subject to AIFMD	Not subject to AIFMD	Subject to AIFMD	Not subject to AIFMD
BEFORE	Regulation 12-01 +AIFMD	Regulation 12-01	AIFMD	/
NOW	AIFMD	Regulation 15-07	AIFMD	Regulation 15-08

Risk management requirements

	SIF		SICAR	
	Subject to AIFMD	Not subject to AIFMD	Subject to AIFMD	Not subject to AIFMD
BEFORE	Regulation 12-01 +AIFMD	Regulation 12-01	AIFMD	/
AFTER	AIFMD	Regulation 15-07	AIFMD	/

What's next?

Both regulations will become applicable from the day following their publication in the Memorial.

SICAR already set up at the entry into force of this have until 31 March 2016 to comply with this new requirements.

NETHERLANDS

DUTCH DATA PROTECTION REGIME

New regulations

Background

In 2015 the Dutch government has adopted regulations on the protection of data and the notification of incidents concerning data.

What's in there?

Companies in the Netherlands are already obliged to have procedures in place for the secure treatment of data. The adopted regulations aim to manage the incidents of the processing of data by arranging a pro-active notification obligation.

A data controller will be obliged to immediately notify the Dutch Data Protection Authority (Autoriteit Persoonsgegevens) of any security breaches and/or data leaks that have or are likely to have serious adverse consequences for the protection of personal data.

The same act comprises huge fines for not notifying the Dutch authority with a maximum of EUR 820,000 or 10% of the company's annual net turnover per violation.

What's next?

The amended regulations are applicable as per 1 January 2016[1].

DUTCH TAX TREATMENT OF LIMITED PARTNERSHIPS AND FUNDS FOR JOINT ACCOUNT

New amended regime applicable

Background

In the Netherland limited partnerships and funds for joint account can be treated fiscal transparent if the fulfill certain conditions. One conditions is the consent that is necessary for admission or replacement (limited partnerships) and redemption and transfers (funds for joint account). This consent requirement is now simplified for master-feeder structures.

What's in there?

For limited partnerships in a master-feeder structure there is a simplified regime for the conditions to remain fiscal transparent.

If there is a new partner only the consent of the general and limited partners of the concerned entity (master of feeder) in which the new partner is admitted or replaced is necessary. The general partner of the concerned entity may grant the permission on behalf of the other entity.

The above means for funds for joint account that are closed end that the permission of the fund manager of the concerned fund is enough to represent the investors of the closed end fund that is investing in another closed end fund or limited partnership.

What's next?

The amended regime is applicable as per 1 January 2016[2] if the legal documents of the entities are adapted and include the simplified regime.

TAX UPDATES

AEOI

New Rules to Help EU Tax Authorities Exchange Information Adopted by European Commission (EU)

Background

On 15 December 2015, the European Commission adopted new rules to make it easier for tax authorities of EU Member States to exchange financial information so that they can ensure full tax transparency and cooperation.

What's in there?

This regulation implements certain provisions of Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Implementing Regulation (EU) No 1156/2012 (Commission Implementing Regulation of 15 December 2015). This act replaces the previous implementing provisions by consolidating them with new provisions as regards the computerised format to be used for the automatic exchange of financial account information.

THE LINK IS AVAILABLE HERE.

What's next?

The detailed rules imply that practical arrangements are now in place for the entry in force of the amended Directive on Administrative Cooperation from 1 January 2016.

[1] http://wetten.overheid.nl/BWBR0011468/geldigheidsdatum_05-02-2016

[2] http://wetten.overheid.nl/BWBR0037431/geldigheidsdatum_05-02-2016#7

CRD IV

EBA Guidelines on CRD IV (EU)

Background

On 21 December 2015 the European Banking Authority (EBA) published its final guidelines on sound remuneration policies ("Guidelines").

What's in there?

The deadline for compliance with the Guidelines has been moved from 1 January 2016 to 1 January 2017. Once the process of translating the Guidelines into various European languages will be completed, Member State regulators will have a two-month period in which they will be required to confirm whether they will comply with all or parts of the Guidelines. It would then be expected that any required changes to local regulation will be made.

The Guidelines contain some significant changes to the current remuneration requirements, which will particularly impact smaller banks and asset managers (even if part of an insurance group) that are in scope of the CRD IV, who were previously exempt from a requirement to cap the bonuses of certain staff. While currently uncertain, future legislative changes may also impact the extent to which asset managers that are not within the scope of CRD IV will also be impacted by this in future.

The key areas for the guidelines are as follows:

- Proportionality;
- Long-term incentives;
- Material risk takers;
- Shareholder involvement;
- Instruments;
- Deferral and retention periods;
- Retention, guarantees and buyouts;
- Allowances.

THE LINK IS AVAILABLE HERE.

What's next?

Scanning's next editions will keep you updated when any new information becomes available.

INVESTMENT TAX ACT

Reform of the Investment Tax Act (Germany)

Background

On 16 December 2015, the German ministry of finance has issued a draft bill modifying the Investment Tax Act.

What's in there?

The draft proposes significant changes to the current law, which are summarised below:

As of 2018 collective investment schemes should be split into three categories and the respective taxation changes.

- Investment funds (mutual funds) are all investment schemes which are neither a special fund nor a partnership.
- Special funds are all AIF where the number of investors is limited to 100 non-individual investors. Acc. to the new draft individuals can in principle also no longer invest indirectly through partnerships in special funds.
- Investment schemes in the form of partnerships will no longer be taxed acc. to the InvTA but acc. to the regular German tax regime, i.e. they will have to do a partnership tax return on behalf of their German investors.

THE LINK IS AVAILABLE HERE.

What's next?

The industry and associations will have time to submit their comments until mid-January 2016. This first draft is very similar to the discussion paper issued in July 2015 and suggests considerable changes to the taxation system, especially for mutual funds (German or foreign). The draft introduces a lump sum taxation scheme for these funds as of 1 January 2018, which could reduce their attractiveness, especially for institutional investors.

CIVS

New Rules on the Tax Treatment of CIVs (Norway)

Background

On 1 January 2016, new rules concerning the tax treatment of collective investment funds and investors entered into force in Norway

What's in there?

According to the new regulations, the split of portion of the fund's equity investments will determine the classification of the unit holder's type of income and tax liability.

Accordingly, the total equity portion in the fund must be determined and reported annually in addition to other requirements.

Norwegian collective investment funds must report information for the investors' tax assessment directly to the tax authorities. Non-Norwegian funds are not obliged to provide such reporting, but may provide the reporting on a voluntary basis.

If the required information is not reported neither by the fund nor the unit holders, all distributions and gains/losses will be treated as capital/interest income for the unit holders and taxed at 25% (2016). Accordingly, funds with a functioning reporting routine are likely to have a marketing advantage in the Norwegian market.

THE LINK IS AVAILABLE HERE.

What's next?

The new rules entered into force on 1 January 2016. Nevertheless, the regulation affects Norwegian investors making new investments in any collective investment fund from 7 October 2015 onwards.

New Reporting Requirement for Stock Option Plans (Luxembourg)

Background

On 28 December 2015, the Luxembourg tax authorities released a new Circular Letter (n°104/2bis) which introduces additional reporting obligations for the employer in connection with stock option/warrant plans in the context of increased scrutiny over the use of options/warrants as a remuneration tool in Luxembourg.

What's in there?

The Circular Letter applies to all stock option plans implemented as from 1 January 2016. According to the Circular Letter:

- The employer must notify the implementation of a stock option plan to the Préposé of the competent Luxembourg tax office at least two months before the plan is implemented (the Circular Letter does not provide that the tax authorities shall give an upfront agreement for the implementation of the plan);
- The employer shall also provide the tax office with a copy of the plan documentation and the list of the participants of the plan.

For stock option plans which are intended to be implemented in January of February 2016, it is our understanding that immediate notification shall be made to the tax authorities. For stock option plans implemented before 1 January 2016 (but for which some or all options/warrants have not yet been allocated) the employer has to notify the tax authorities. As per the stipulation of the Circular Letter, it is our understanding that only stock option plans are subject to the new reporting obligation and thus other incentive plans (such as SAR, Share Plans, etc.) should not be concerned.

THE LINK IS AVAILABLE HERE AND HERE.

What's next?

With the publication of the Circular Letter, the tax authorities have equipped themselves with a tool that allows them to have a better view of the extent to which employers use stock options as a remuneration for their employees. It may be expected that more audits will be performed by the tax offices in this respect.

Scanning's next editions will will keep you updated when any new information becomes available.

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.

Editors

Gaëlle Kerboeuf, *Group General Counsel* @

Chantal Slim *Compliance and Regulatory Watch Manager (France)* @

Permanent Editorial Committee

Gaëlle Kerboeuf, Group General Counsel

Chantal Slim, Compliance and Regulatory Watch Manager (France)

Eliane Meziani-Landez, Head of Legal (France)

Emilie Zaracki, Legal Officer (France)

Joëlle Prehost, Compliance Officer (France)

Ana Vazquez, Head of Legal (Luxembourg)

Véronique Bastin, Head of Compliance (Luxembourg)

Stefan Ullrich, Head of Legal (Germany)

Costanza Bucci, Legal and Compliance Manager (Italy)

Mireille Mol, Legal and Compliance Manager (Netherlands)

Charles du Maisnil, Head of Legal - Risk & Compliance (CACEIS Belgium)

Helen Martin, Head of Legal (Ireland)

Samuel Zemp, Head of Legal and Compliance (CACEIS Bank Luxembourg - Swiss Branch) Sandra Czich, Head of Legal and Compliance (CACEIS Switzerland)

Philippe Naudé, Marketing and Communication Specialist (France)

Arianna Arzeni, Head of Group Business Development Support

Design

Sylvie Revest-Debeuré, CACEIS, Communications

Photos credit

Yves Maisonneuve, Yves Collinet, CACEIS, Fotolia

CACEIS

1-3, place Valhubert

75 206 Paris CEDEX 13

www.caceis.com