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## EUROPE

### AIFMD

# ESMA clarifies the depositary's liability regime in its AIFMD Q&A

### Background

The Alternative Investment Fund Managers Directive ("AIFMD") sets up a framework for the regulation of the alternative investment fund managers ("AIFMD") in Europe.

ESMA has issued and regularly updates a Q&A document aiming to promote common supervisory approaches and practices in the application of the AIFMD and its implementing measures, providing responses to questions posed by the general public and competent authorities in relation to the practical application of the AIFMD.

The previous update was dated 2 December 2015.

### What's in there?

On 15 December 2015, ESMA published an updated version of its AIFMD Q&A (ESMA/2015/1873) including on the depositary's liability regime regarding its safe keeping duties.

ESMA confirms that the depositary is liable for all assets that is related to its safe keeping duties, which includes, according to the look through provision of Articles 89(3) and 90(5) of the AIFMD Level 2 Regulation ([AVAILABLE HERE](#)):

★ Underlying assets held by financial and, as the case may be, or legal structures controlled directly or indirectly by the AIF or the AIFM acting on behalf of the AIF; and

★ Underlying assets held by financial and, as the case may be, or legal structures established by the AIF or by the AIFM acting on behalf of the AIF for the purposes of investing in the underlying assets and which are controlled directly or indirectly by the AIF or by the AIFM acting on behalf of the AIF.

Look through provisions do not apply to funds of funds or master-feeder structures provided they have a depositary which safe keeps the fund's assets appropriately.

[THE Q&A IS AVAILABLE HERE.](#)

### What's next?

ESMA will update its Q&A on a regular basis when new questions are received.

## AUTOMATION OF FINANCIAL ADVICE

# ESAs consult on automation in financial advice

### Background

EBA, ESMA and EIOPA (together the "ESAs") are putting the digitalisation of financial services under scrutiny and in particular the growing number of financial institutions offering automated tools in order to provide financial advice or recommendations to their clients. Some concerns emerged with

the lack of clarity and harmonized regulation at EU level.

### What's in there?

On 4 December 2015, the ESAs published a joint discussion paper on the automation of financial advice (JC 2015 080 - "the Discussion Paper") laying down the outcome of their observations and seeking stakeholders' feedbacks to the following topics:

★ Main characteristics of automated financial advice tools;

★ Potential benefits for consumers and financial institutions relating to cost, access, delivery and quality of services;

★ Potential risks to consumers and financial institutions; and

★ Possible evolution of the market and of the use of automated financial advice tools considering expectation of consumers and process adopted in financial firms.

[THE DISCUSSION PAPER IS AVAILABLE HERE.](#)

### What's next?

Feedback shall be provided on 4 March 2016 at the latest.

The ESAs will decide considering the feedback if any regulatory and/or supervisory action is required.



## CRR

# The Council of the EU publishes compromise proposal on CRR amendment

## Background

On 1 January 2014, Regulation (EU) 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms, the Capital Requirements Regulation (“CRR”), came into force. CRR is one of two instruments adopted at the level of the European Union to implement the Basel III agreement on the regulatory framework for banks (the other being Directive 2013/36/EU known as Capital Requirement Directive IV).

On 30 September 2015, the EU Commission published an action plan on a capital markets union, aiming to achieve a true single market for capital across the 28 EU Member States. Part of this plan is the securitisation initiative, which will be implemented by means of a new regulation on securitisations and of an amendment of CRR.

The proposal of the EU Commission on the amendment of CRR ([AVAILABLE HERE](#)) attempts to make the capital treatment of securitisations for banks and investment firms more risk-sensitive and able to reflect properly the specific features of simple, transparent and standardised securitisations (“STS Securitisations”), as defined under recital (9) of the CRR proposal.

## What's in there?

On 18 November 2015, the Council of the EU published a compromise text on the proposal of the EU Commission, whereby the following information has mainly been added:

- ★ More definitions and specifications under Article 242 of CRR;
- ★ Clarifications on the criteria for STS securitisations under Article 243 of CRR;
- ★ Clarifications on the calculation of the exposure value of securitisation positions and conditions in order to benefit from the 0% conversion value under Article 248 of CRR;
- ★ Clarifications on the hierarchy of methods under Article 254 of CRR;
- ★ Clarifications on the Internal Assessment Approach under Article 265 of CRR.

[THE COMPROMISE TEXT IS AVAILABLE HERE.](#)

## What's next?

The compromise text will be submitted to the EU Parliament for endorsement.

## ELTIF

# ELTIF regulation is live!

## Background

The ELTIF regulation is important for the EU Commission's ambition to foster long-term financing and contribute to the creation of the capital market union (the “CMU”) objective of smart sustainable and inclusive growth; as such, ELTIF represents a milestone in the development of cross-border European long-term business.

On 26 June 2013, the EU Commission proposed the creation of a new type of investment fund, to raise capital from institutional and retail investor across EU, and to provide finance to the Union's real economy.

On 8 June 2015, the regulation of the EU Parliament and of the Council 2015/760 on European long-term investment fund (the “ELTIF Regulation”) entered into force and was published on 29 April 2015 in the Official Journal of the European Union. The ELTIF Regulation applies since 9 December 2015.

On 30 September 2015, the EU Commission proposed the amendments to the Solvency II delegated regulation in order to review calibration for the infrastructure projects and the ELTIFs.

## What's in there?

Since December 9, 2015, managers are able to set up ELTIFs as the ELTIF Regulation applies.

The ELTIF Regulation lays down uniform rules on the authorisation, investment policies and operating conditions of EU alternative investment funds (EU AIFs) or compartment of EU AIFs that are marketed in the European Union as ELTIFs. Such funds have as objective to invest into long term projects, such as real assets or SME financing (including loans).

ELTIF features can be summarised as follows:

- ★ ELTIF must be managed by a licensed AIFM.
- ★ ELTIF shall be subject to prior authorisation by its competent authority and ESMA shall keep central public register of this authorisation.
- ★ ELTIFs shall invest in long term assets (real assets and SME financing).
- ★ ELTIFs are subject to risk diversification and investment restrictions.

★ ELTIFs shall normally be close end with a clearly identified maturity date.

★ ELTIFs are potentially eligible to institutional and retail investors.

★ ELTIFs are subject to transparency requirements (prospectus publication and specific disclosures in prospectus, marketing documents, annual report and key investor document or KID. A KID is required if the ELTIF is distributed to retail investors.

★ ELTIF regulation shall also provide for conflict of interest policies.

[THE ELTIF REGULATION IS AVAILABLE HERE.](#)

## What's next?

As ELTIF framework has been adopted as a regulation, no Member State transposition is required.

ESMA shall develop draft regulatory technical standards.

In Luxembourg it is expected that the CSSF will publish soon application forms on their website.

## EMIR

# ESMA declares guarantees used to cover energy derivatives transactions shall be fully collateralised from March 2016

## Background

On 4 July 2012, Regulation (EU) No 648/2012 (“EMIR” [AVAILABLE HERE](#)) was adopted by the EU Parliament and the Council on OTC derivatives, central counterparties and trade repositories, and entered into force on 16 August 2012.

The Regulation, directly applicable and enforceable throughout the EU, aims at increasing financial stability and safety by preventing the situation where a collapse of one financial firm can cause the collapse of others.

EMIR applies to all types of derivatives contracts as defined in points (4) to (10) of Section C of Annex I of Directive 2004/39/EC (Markets in Financial Instruments Directive – MiFID). Hence, EMIR also covers energy derivatives transactions.



## What's in there?

On 19 November 2015, ESMA publicly stated that it would not further extend the existing grace period of three years for the non-financial firms' use of non-collateralised bank guarantees to cover transactions in energy derivatives cleared by European central counterparties ("CCPs"). ESMA hence reminds concerned stakeholders that from 15 March 2016 onwards, CCPs authorised under EMIR will need to completely collateralise commercial bank guarantees used to cover transactions in derivatives concerning electricity or natural gas produced.

ESMA gauged the need to further extend the grace period and considered that an extension would not be appropriate due to the following reasons:

- ★ Allowing fully uncollateralised commercial bank guarantees could lead to an undue source of risk for CCPs;
- ★ The existing 3 years grace period looks sufficient for the wholesale energy market to prepare for the incoming collateral obligations;
- ★ Some European CCPs already have implemented the EMIR requirements;
- ★ EMIR requires that a CCP only accepts highly collateral with minimal credit and market risk; and
- ★ A new postponement would maintain a discrepancy with international standards such as the CPMI-IOSCO Principles for Financial Market Infrastructures.

[ESMA'S PUBLIC STATEMENT IS AVAILABLE HERE.](#)



## What's next?

ESMA awaits the concerned stakeholders to take the appropriate measures in order to be ready for the implementation of the collateral obligation concerning commercial bank guarantees by March 2016.

### EMIR

## EU Commission recognizes 5 countries as EU equivalent for CCPs regulatory regime

### Background

On 4 July 2012, Regulation (EU) No 648/2012 ("EMIR" [AVAILABLE HERE](#)) on OTC derivatives, central counterparties ("CCPs") and trade repositories, was adopted by the EU Parliament and the Council and entered into force on 16 August 2012.

EMIR is directly applicable and enforceable throughout the EU, and it aims at increasing financial stability and safety by preventing the situation where a collapse of one financial firm can cause the collapse of others.

In accordance with Article 25 of EMIR, CCPs which are not established in an EU Member State would only be able to provide clearing services to EU clearing members and trading venues if they have been recognised by ESMA as being subject to equivalent requirements.

On 30 October 2014, the EU Commission adopted its first "equivalence" decisions applying to Australia, Hong Kong, Japan and Singapore.

## What's in there?

On 13 November 2015, 5 implementing decisions have been published by the EU Commission as regard the equivalence of the regulatory framework of the following countries:

- ★ Canada (Commission Implementing Decision (EU) 2015/2040);
- ★ Switzerland (Commission Implementing Decision (EU) 2015/2043);
- ★ South Africa (Commission Implementing Decision (EU) 2015/2042);
- ★ Mexico (Commission Implementing Decision (EU) 2015/2041);

- ★ The Republic of Korea (Commission Implementing Decision (EU) 2015/2044).

[THE PRESS RELEASE IS AVAILABLE HERE.](#)

## What's next?

Every non EU CCPs which are interested to obtain recognition shall provide an application to ESMA. The list of equivalent CCP regimes is updated on ongoing basis.

### EMIR

## ESMA's Consultation Paper on margin period of risk for Central Counterparties Client Accounts

### Background

On 4 July 2012, Regulation (EU) No 648/2012 ([AVAILABLE HERE](#)) was adopted by the European Parliament and the Council on OTC derivatives, central counterparties and trade repositories ("EMIR"), and entered into force on 16 August 2012.

The Regulation, directly applicable and enforceable throughout the EU, aims at increasing the stability of the financial system.

Title IV of EMIR mandated ESMA to develop draft Regulatory Technical Standards ("RTS") on the area of Central Counterparties ("CCPs"), published as RTS No 153/2013.

Article 26 of EMIR RTS No 153/2013 defined the time horizons for the liquidation period for CCPs. The rationale for defining precisely time horizons for the liquidation is that, within the liquidation period, the CCP should be able to either transfer or liquidate the position of the defaulting clearing member, and have sufficient margins to cover the exposures arising from the transfer or liquidation of the relevant positions. In developing this Regulation, ESMA took the view that a two-day liquidation period was a prudent minimum for products other than OTC derivatives.

On 26 August 2015, ESMA published its discussion paper on the review of Article 26 of RTS No 153/2013, in relation to client accounts. This discussion paper sought stakeholders' views on the aforementioned Article.



# The EU Commission releases level 2 measures on the clearing obligation of OTC Derivatives contracts

## Background

On 4 July 2012, Regulation (EU) No 648/2012 ("[EMIR](#)" [AVAILABLE HERE](#)) was adopted by the EU Parliament and the Council on OTC derivatives, central counterparties ("CCPs") and trade repositories, and entered into force on 16 August 2012.

The Regulation, directly applicable and enforceable throughout the EU, aims at increasing financial stability and safety by preventing the situation where a collapse of one financial firm can cause the collapse of others.

On 1<sup>st</sup> October 2014, ESMA proposed to the EU Commission draft RTS for the clearing obligation of interest rate OTC derivatives. This proposition was finally adopted by the EU Commission on 6 August 2015.

## What's in there?

On 1<sup>st</sup> December 2015, the Commission Delegated Act 2015/2225 (the "Delegated Regulation") was published in the Official Journal of the EU, and introduced a clearing obligation for 4 designated interest rate OTC derivatives:

- ★ Basic swaps;
- ★ Fixed to float interest rate swaps;
- ★ Forward rate agreements;
- ★ Overnight index swaps.

Counterparties subject to the clearing obligation should be classified into categories in order to ensure an orderly and timely implementation of the clearing obligation; hence, they are divided in four categories as follows:

- ★ CATEGORY 1 : clearing members as of the date of entry into force of this regulation for at least one of the above OTC Derivatives of at least one of the CCPs authorised or recognised before the date to clear at least one of those classes;
- ★ CATEGORY 2 : comprising counterparties not belonging to Category 1 which belong to a group

whose aggregate month-end average of outstanding gross notional amount of non-centrally cleared derivatives for January, February and March 2016 is above EUR 8 billion and which are any of the following:

- (i) Financial counterparties;
- (ii) AIFs as defined under Article 4(1)(a) of Directive 2011/61/EU (the "AIFMD") that are non-financial counterparties;

★ CATEGORY 3: comprising counterparties not belonging to Category 1 or 2 which are any of the following:

- i) Financial counterparties;
- (ii) AIFs as defined under Article 4(1)(a) of Directive 2011/61/EU ("the AIFMD") that are non-financial counterparties;

★ CATEGORY 4: comprising non-financial counterparties that do not belong to Category 1, Category 2 or Category 3.

★ The clearing obligation shall become applicable as follows:

- . On 21 June 2016, for Category 1 counterparties;
- . On 21 December 2016, for Category 2 counterparties;
- . On 21 June 2017, for Category 3 counterparties;
- . On 21 December 2018, for Category 4 counterparties.

[THE DELEGATED REGULATION IS AVAILABLE HERE.](#)

## What's next?

The Delegated Regulation entered into force the twentieth day following that of its publication in the Official Journal of the European Union (20 December 2015).

ESMA shall propose obligations for other types of OTC derivative contracts in the future.

## **MiFID II**

# ESMA final report on guidelines on complex debt instruments and structured deposits

## Background

On 15 May 2014, Directive 2014/65/EC on markets in financial instruments ("MiFID II") ([AVAILABLE HERE](#)) was adopted by the European Parlia-

ment and Council.

MiFID II is a cornerstone of EU financial services law and has been revamped in order to adapt it to changing markets and implement G20 commitments to bring non-equity products under regulation and move the majority of OTC trading onto regulated platforms.

It has laid down the types of investment services and activities that should be licensed across the EU and the organisational and conduct standards that such service providers should comply with.

The implementing measures that will supplement MiFID II will take the form of delegated acts and technical standards.

Article 25(4) of Directive NO 2014/65 ("MiFID II") allows investment firms, under certain conditions, to provide investment services that only consist of execution or reception and transmission of orders without obtaining client information necessary to assess the appropriateness of the services or product for the client (so-called "execution only"). One of the conditions for the application of Article 25(4) of MiFID II is that the services relates to products that are "non-complex". As such, the investment firms shall provide investment services without obtaining client information necessary to determine the appropriateness of the product they sell to the client.

In this context, Article 25(10) of MiFID II required ESMA to develop by 3 January 2016 guidelines that specify the criteria for the assessment of more complex products, such as:

- ★ Bonds and other forms of securitised debt and money market instruments incorporating a structure which makes it difficult for the client to understand the risk involved;
- ★ Structured deposits incorporating a structure which makes it difficult for the client to understand the risk of return or the cost of exiting the product before its term.

On 24 March 2015, ESMA published a consultation paper on the draft guidelines and addressing the concept of embedded derivative.

These guidelines apply in relation to Article 25(4) of Directive 2014/65/EU ("MiFID II").

## What's in there?

On 26 November 2015, ESMA published its guidelines on complex debt instruments and structured deposits (ESMA/2015/1783, the "Guidelines").

In its Guidelines, ESMA specifies the criteria for the assessment of (i) debt instruments incorporating a structure that makes it difficult for the client to understand the risk involved and (ii) structure deposits



incorporating a structure that makes it difficult for the client to understand the risk of return or the cost of exiting the product before term. ESMA also clarifies the concept of “embedded derivatives” for the application of Article 25(4)(a) of MiFID II. For those products, execution-only services cannot be provided.

An embedded derivative should be interpreted as a component of a debt instrument that causes some or all of the cash flows that otherwise would result from the instrument to be modified according to one or more defined variables. For instance, ESMA is in the opinion that the following instruments should be considered:

- ★ Contingent convertible bonds also referred to as “Coco Bonds”;
- ★ Convertible and exchangeable bonds;
- ★ Indexed bonds and turbo certificates;
- ★ Callable or puttable bonds;
- ★ Credit-linked notes;
- ★ Warrants.

Regarding debt instruments incorporating a structure making it difficult for the client to understand the risk, ESMA suggests that they include the following debt instruments:

- ★ Debt instruments which returns depends on the performance of a defined asset pool (asset-backed securities, residential mortgage backed securities, commercial mortgage backed securities, collateralised debt obligations);
- ★ Debt instruments which returns is subordinated to the reimbursement of debt held by others (subordinated debt instruments, certificates);
- ★ Debt instruments where the issuer enjoys discretion to modify the cash flows of the instrument;
- ★ Debt instruments lacking a specified redemption or maturity date (perpetual bonds);
- ★ Debt instruments having an unusual underlying (catastrophe bonds);
- ★ Debt instruments with complex mechanisms to determine or calculate the return;
- ★ Debt instruments structured in a way that may not provide for a full repayment of the principal amount;
- ★ Debt instruments issued by a special purpose vehicle;
- ★ Debt instruments with complex guarantee mechanisms;
- ★ Debt instruments with leverage features.

Regarding structured deposits incorporating a structure making it difficult for the client to under-

stand the risk of return, they include the following:

- ★ More than one variable affects the return received; or
- ★ The relationship between the return and relevant variable or the mechanism to determine or calculate the return is complex; or
- ★ The variable involved in the calculation of the return is unusual or unfamiliar to the average retail investor; or
- ★ The contract gives the credit institution the unilateral right to terminate the agreement before maturity.

Regarding structured deposits incorporating a structure making it difficult for the client to understand the cost of exiting the product before term, ESMA indicates that it includes deposits for which the exit cost is:

- ★ Neither a fixed sum;
- ★ Nor a fixed sum for each month (or part thereof) remaining until the end of the agreed term;
- ★ Nor a fixed percentage of the amount deposited.

[THE GUIDELINES ARE AVAILABLE HERE.](#)

## What's next?

Once these guidelines will be translated into the official EU languages and published on the ESMA website, the National Competent Authorities will have a period of two months to notify ESMA whether they comply or intend to comply with them. They shall apply from 3 January 2017.

## MIFID II

# ESMA issues standards on reporting, cooperation and suspensions under MiFID II

## Background

On 15 May 2014, Directive 2014/65/EC on markets in financial instruments (“MiFID II”) ([AVAILABLE HERE](#)) was adopted by the European Parliament and Council.

MiFID II is a cornerstone of EU financial services law and has been revamped in order to adapt it

to changing market realities and implement G20 commitments to bring non-equity products under regulation and move the majority of OTC trading onto regulated platforms.

It has laid down the types of investment services and activities that should be licensed across the EU and the organisational and conduct standards that such service providers should comply with.

The implementing measures that will supplement MiFID II will take the form of delegated acts and technical standards.

ESMA is required by MiFID II and MiFIR to develop a range of Regulatory Technical Standards (“RTS”) and Implementing Technical Standards (“ITS”).

## What's in there?

On 11 December 2015, ESMA published its final report (ESMA/2015/1858 the “Final Report”) on 8 drafts ITS under MiFID II. The Final Report incorporates some feedback received from previous consultation and proposes specific templates, standard forms and procedures regarding the following topics:

- ★ Standard forms, templates and procedures for cooperation arrangements in respect of a trading venue whose operations are of substantial importance in a host Member State [ITS 1];
- ★ Format and timing of the communications and the publication regarding the suspension and removal of financial instruments from trading on a Regulated Market (“RM”), a Multilateral Trading Facility (“MTF”) or an Organised Trading Facility (“OTF”) [ITS 2];
- ★ Standard forms, templates and procedures for the authorisation of data reporting services providers [ITS 3];
- ★ Position reporting (Article 58(5)) [ITS 4];
- ★ Format and timing of weekly position reports (Article 58(7)) [ITS 5];
- ★ Standard forms, templates and procedures for competent authorities to cooperate in supervisory activities, on-site verifications, and investigations and for the exchange of information [ITS 6];
- ★ Standard forms, templates and procedures for the consultation of other competent authorities prior to granting an authorisation [ITS 7 IPISC];
- ★ Procedures and forms for submitting information on sanctions and measures [ITS 8].

It describes the feedback received in the public consultations and the rationale behind ESMA's final proposals.

[ESMA'S REPORTS ARE AVAILABLE HERE.](#)

## What's next?

The final report has been submitted to the EU Commission on 11 December 2015. The EU Commission has three months to decide whether to endorse the technical standards. However, this period can be extended by one additional month.

The publication of the above mentioned ITS follows two other sets of Technical Standards on the implementation of MiFID II published in June and September. ESMA's different sets of Technical Standards have been sent for approval to the European Commission.

## MiFID II

# EU - ESMA publishes final guidelines on MiFID II requirements for knowledge and competence

## Background

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

According to Article 25(1) of MiFID II, investment firms have to "ensure and demonstrate to competent authorities on request that natural persons giving investment advice or information about financial instruments, investment services or ancillary services to clients on behalf of the investment firm possess the necessary knowledge and competence to fulfil their obligations under Article 24 (ie general principles and information to clients) and this Article (ie assessment of suitability and appropriateness and reporting to clients).

On 23 April 2015, ESMA published a consultation paper on draft guidelines for the assessment of knowledge and competence under MiFID II (ESMA/2015/753 - available here). The consultation closed on 10 July 2015.

## What's in there?

On 17 December 2015, ESMA published the final report on guidelines for the assessment of knowledge and competence (ESMA/2015/1886, the "Guidelines").

The below highlights the Guidelines main features:

### **A - Criteria required for the assessment of knowledge and competence of staff member providing**

**information on investment products, investment services or ancillary services.**

★ Staff members shall be able to understand :

- the investment services and the investment products which they provide to the client or which is being offered or recommended (key characteristics, risk and features, total amount of costs and charges to be incurred by the client, impact of the financial markets and other events on the value and pricing of the investment products).

- the difference between past performance and future performance scenarios as well as the limits of predictive forecasting;

- Staff members shall be able to assess the data relevant to the investment products on which they provide information to clients such as KIID, prospectuses, financial statements, or financial data;

★ Staff members shall have basic knowledge of valuation principles for the type of investment products offered or recommended to clients;

**B - Enhanced requirements for the assessment of knowledge and competence of staff providing investment advice on investment products.**

Staff providing investment advice shall take the following actions:

★ Take into account the complexity of products when providing advice on investment products;

★ Perform suitability tests and understand how the type of investment product provided by the firm may not be suitable for the client considering its profile:

★ Understand the fundamentals of managing a portfolio, including being able to understand the implications of diversification regarding individual investment alternatives.

**C - Investment firms organisational requirements to assess, maintain and update knowledge and competence.**

★ Establish a process to ensure that a clear distinction is made between the role of "giving advice" and the role of "giving information" on investment products;

★ Ensure the adequacy of the knowledge and competence of staff member through ongoing training;

★ Carry out internal or external reviews of suitability assessments;

★ Submit upon request to the management body of records concerning knowledge and competence;

★ Supervise staff without appropriate qualification or experience;

★ Ensure staff is familiar with the firm's conflicts of interest policy and with the regulatory framework on the reception/payment of inducements.

These guidelines specify that all staff members (new and existing) are subject to knowledge and competence requirements according to relevant regulatory and legal requirements, and business ethics standards. Exemption to the Guidelines is only granted to staff member distributing documentation (brochures, KIID, leaflets, etc.) or back office employees without any direct contact with the client.

[THE GUIDELINES ARE AVAILABLE HERE.](#)

## What's next?

The guidelines will be published on the ESMA website and shall come into effect on 3 January 2017.

## UCITS V

# The EU Commission proposes level 2 measures on UCITS V

## Background

Directive 2014/91/EU namely the UCITS V Directive, entered into force on 25 September 2014. It will apply from 18 March 2016 onwards.

The UCITS V 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 set forth in the Proposal specify the depositaries obligations which are for most of them aligned to the Commission Delegated Regulation 213/2013 on the AIFM depositary duties except for areas where UCITS level 1 text differ from AIFMD requirements (re-use of assets, insolvency protection, liability discharge, independence of depositary, etc.).

The delegated acts shall enter into force in September 2016, 6 months after the entry into force of UCITS V (18 March 2016).

[THE PROPOSAL IS AVAILABLE HERE.](#)



## What's next?

The EU Parliament and the Council of the EU shall review and comment the proposal within the next 3 months.

# LUXEMBOURG

## AIFMD

# CSSF rules for the marketing of non EU AIFs to retail investors

## Background

On 8 June 2011, Directive 2011/61/EU amending Directive 2003/41/EC, was adopted by the EU Parliament and the Council (the "AIFMD").

On 1 July 2011, the AIFMD was published in the Official Journal of the EU and entered into force on the 20 July 2011.

On 12 July 2013, the AIFMD was transposed in the national law in Luxembourg (the "AIFM Law").

With respect to Article 46 of the AIFM Law, authorised AIFMs are allowed to market their units or shares of AIFs they manage to retail investors in Luxembourg in accordance with the AIFMD.

## What's in there?

On 27 November 2015, the CSSF issued its Regulation n° 15-03 (hereafter "the Regulation") laying down the conditions AIFMs shall meet to be authorised to market unit or shares of non-EU AIFs to retail investors in Luxembourg.

The Regulation covers the marketing of units or shares of

- ★ non-EU AIFs managed by an EU AIFM (either authorised in Luxembourg pursuant to chapter II of the AIFM Law, or authorised in another member state) or
- ★ non-EU AIF managed by a AIFM authorised in a third country.

In Luxembourg, marketing to retail investors of units or shares of non-EU AIFs shall be permitted where the following conditions are met:

### 1 - AUTHORISATION BY THE CSSF (ARTICLE 5) – APPLICATION FORM

The application form shall include the following information:

- ★ A certificate delivered by the non-EU AIF supervisory authority, attesting that the non-EU AIF is duly authorised and is subject to ongoing supervision;
- ★ A supplement to the prospectus/ issuing documents, the prospectus/ issuing document of the non EU-AIF including specific information on the marketing of the units and shares in Luxembourg;
- ★ The last financial statements;
- ★ Resume of the non-EU AIF directors ;
- ★ Information on the contract between the non-EU AIF and the paying agent in Luxembourg;
- ★ Information on the master feeder if the non-EU AIF is a feeder AIF (domicile of the master feeder is established, prospectus...);
- ★ Information on the risks linked to the investment policy on the non-EU AIF;
- ★ Information on the fees and commissions, if any, that shall be borne by the investors;
- ★ Information on the Luxembourg depositary responsible for the subscription of the units or shares (name, address and functions);
- ★ Information as to the most recent prospectus/ issuing documents are available;
- ★ Information on the disclosure of the net asset value per unit or shares of the non-EU AIF;
- ★ Information on the name of the Luxembourgish newspaper in which notice to investors are to be published;

The CSSF may require any further information that might be useful to grant authorisation.

### 2 - CRITERIA NON-EU AIF SHALL FULFIL TO BE AUTHORISED (ARTICLE 6)

The non-EU AIF shall meet the following criteria:

2.1 The requirement of the Article 46 of the AIFM Law and in particular, the AIF shall be managed by a single AIFM.

The single AIFM might be either an authorised AIFM established in Luxembourg (duly authorised pursuant to chapter 2 of the AIFM Law) or an AIFM authorised (pursuant to chapter II of the AIFMD) established in an another member state or in a third country.

The AIFM managing the non-EU AIF shall comply and continue to comply with the AIFMD at all time.

2.2 If the non-EU AIF is a feeder, the master feeder of the non-EU AIF shall be subject to the ongoing supervision of the competent authority under the national law. In this case, the non-EU AIF competent authority shall cooperate with the CSSF.

2.3 The non-EU AIF shall communicate to the CSSF any event of a material change.

### 3 - CONDITIONS IN ORDER TO BE ELIGIBLE FOR MARKETING UNITS OR SHARES TO RETAIL INVESTORS IN LUXEMBOURG (ARTICLE 7)

### 4 - TO MARKET ITS UNITS OR SHARES TO RETAIL INVESTORS IN LUXEMBOURG, AN NON-EUAIF SHALL COMPLY WITH THE FOLLOWING RULES:

4.1 Subscription and redemption price determination - The non-EU AIF shall determine the subscription and redemption price per unit or share at fixed intervals and a at least once a month.

4.2 Risk spreading - The non-EU AIF shall in particular demonstrate compliance to appropriate risk diversification and concentration rules limits. The CSSF considers that risk diversification and concentration limits are sufficient if the non-EU AIF investment policy is compliant with the following:

#### A - SECURITIES

1/ The non-EU AIF shall not invest more than 10% of its assets in securities that are not listed or not admitted to trading on another regulated market which is regularly operating, recognised and open to the public;

2/ The non-EU AIF shall not acquire more than 10% of the securities of the same type issued by a single issuer;

3/ The non-EU AIF shall not invest more than 20% of its assets in securities of the same issuer.

The restrictions in point 1, 2,3 above are not applicable to the following investments:

- ★ Investments in securities that are issued or guaranteed by a member state of the OECD or any of its regional and local authorities or by supranational public institutions and organisations of a community, regional or global nature;

- ★ Investments in targeted UCIs subject to risk diversification and concentration rule limits at least comparable to those provided under Part II of the Law of 17 December 2010 on undertaking for collective investments.

#### B - LOANS

The non-AIF shall not enter into securities borrowings having an amount exceeding 25% of its net asset value without prejudice of point D below.

#### C - USE OF FINANCIAL DERIVATIVE INSTRUMENTS

- ★ When making use of financial derivative instruments, the non-EU AIF shall ensure a proper risk diversification at the level of the underlying assets;

★Furthermore, the non-EU AIF shall be subject to diversification and concentration limits and shall comply with investment policies that are comparable to those provided under Part II of the Law of 17 December 2010 on undertaking for collective investments.

#### D - REAL ESTATE ASSETS

In order to ensure minimum risk spreading, the non-EU AIF shall not invest more than 20% of its assets in a single real estate investment.

In addition, the sum of the non-EU AIF borrowings shall not exceed on average, 50% of the estimated value of all assets.

(2) Exemptions to the rules above, real estate may be granted by the CSSF based on a paper justification taking into consideration the specific investment policy of the non-EU AIF.

#### IV - PROVISIONS RELATING TO THE REDEMPTION, REPURCHASE AND SUBSCRIPTION OF UNITS OR SHARES AND INFORMATION DISCLOSURE (ARTICLE 8)

(1) An non-EU AIF authorised pursuant to the Regulation shall appoint a credit institution for the payment, the repurchase and the subscription of units or shares to be made to the investors in Luxembourg;

(2) In addition, a non-EU AIF authorised shall take all necessary measures to make the information and documents required by this Regulation available to investors. in one of the following languages: French, English, German or Luxembourgish. They have made available through a website.

#### V - LUXEMBOURG MARKETING RULES (ARTICLE 9)

The AIFM marketing non-EU AIF to retail investors in Luxembourg shall also comply with the law of 8 April 2011 (as amended by the law of 2 April 2014) concerning the implementation of a consumer code. Pursuant to Article 46 of the AIFM Law, the CSSF shall be informed in case the non-EU AIF intends to cease the marketing of units or shares to retail investors in Luxembourg.

[THE REGULATION \(ONLY IN FRENCH\) IS AVAILABLE HERE.](#)

### What's next?

This Regulation has been published in the Memorial on December 2, 2015 and on the CSSF's website. It entered into force on the first day of the month following its publication in the Memorial on January 1, 2016.

## 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") applies 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](mailto:setup.uci@cssf.lu)

## REPORTING

# CSSF Circular 15/627 on new U 1.1 reporting for investment funds (UCITS, UCI's, SIFs, SICARs)

## Background

The LMI Circular 97/136 and the CSSF Circular 07/310 currently in place require monthly data (table 0.1.1) to be submitted to the CSSF. Such data includes amongst others financial information on the unit/share class for the reference month or information on investment income and expenses for the reference month in the base currency of the UCI.

## What's in there?

On 3 December 2015, the CSSF published its Circular 15/627 (the "Circular") on a new monthly reporting (referred to as "U 1.1 reporting") repealing the reporting requirements pursuant to LMI Circular 97/136 and CSSF Circular 07/310.

Entities captured in the scope of the U 1.1 reporting

are listed below:

- ★Luxembourg domiciled undertakings for collective investment ("UCIs");
- ★Specialised investment funds ("SIFs");
- ★Investment companies in risk capital ("SICARs");

In this regard, the monthly information to be submitted to the CSSF by UCITS, Part II UCIs, SIFs and SICARs will be used for statistical and supervisory purposes. The reporting files will have to be submitted electronically using exclusively channels accepted by the CSSF.

This U.1.1 reporting will allow the following considerations:

- ★Extension of the scope of the existing monthly reporting to SICARs;
- ★Enhancement of the content of the reporting in terms of financial, functional and descriptive information and the financial data;
- ★Conversion the current format into XML format;
- ★Facilitating the exchange of information between UCIs and the CSSF.

The U.1.1 reporting shall cover the period going from one month from the last report submitted at the last day of every month (the "Reference Date").

The U.1.1 reporting shall be drawn up separately for each sub-fund. No consolidation is required at umbrella level.

The U.1.1 shall state the currency in which the financial figures are expressed.

The Circular also introduces new concepts, such as "reporting status", whereby the UCI will have to choose one of these options: "final", "provisional", or "null report".

The content of the reporting will be limited to general information on the report and the sender, on the UCI, financial information on the UCI, general information on the unit/share class.

[THE CIRCULAR IS AVAILABLE HERE.](#)

## What's next?

All UCIs in scope of the Circular will have to provide the U 1.1 reporting as from 30 June 2016.



## UCITS

# New CSSF UCITS FAQ

## Background

The UCITS V Directive entered into force on 25 September 2014. It will apply from 18 March 2016 onwards.

The UCITS V Directive is amongst other providing a new set of rules when breaches are identified by the authorities of a Member State. In particular ESMA will maintain a central database of all sanctions communicated by national competent authorities.

## What's in there?

On 8 December 2015, the CSSF published a FAQ on the law of 2010 with the aim of highlighting some of the key aspects of the laws and regulation governing Luxembourg UCITS (and in particular eligible assets and diversification rules. It is addressed to management companies managing undertakings of collective investment and undertakings for collective investment in transferable securities ("UCITS") that are established in Luxembourg.

[THE CSSF FAQ DOCUMENT IS AVAILABLE HERE.](#)

## What's next?

The CSSF updates its FAQ's on a regular basis.

# TAX UPDATES

## AEOI

# EU - New rules to help EU tax authorities exchange information adopted by EU Commission

## 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 since 1 January 2016.

# FRANCE

## AIFMD

# New updates of the AMF's published policy to comply with AIFM Directive

## Background

The AIFM Directive has been transposed into French law during summer 2013 and since that date the AMF has been providing information on its application in order to enlighten the market participants. The AMF answers the questions issued by the relevant professionals by publishing and regularly updating an FAQ on AIFMD's transposition into French national law, Instructions and Positions-Recommendations.

## What's in there?

On 1st December 2015, the AMF has updated several Instructions and Positions-Recommendations to pursue the transposition of the AIFM Directive<sup>1</sup>.

Two substantial modifications regarding the Position DOC-2005-14 and the Position-Recommendation DOC-2012-11 must be highlighted:

- ★ Position DOC-2005-14<sup>2</sup> is now dedicated to Professional Specialized Investment Funds.
- ★ The Positions and Recommendations related to Private Equity Investment Funds and Professional Private Equity Investment Funds are gathered un-

der the Position-recommendation DOC-2012-11<sup>3</sup>. It is recalled that the acceptance of the Professional Private Equity Investment Funds regulation at the time of the subscription constitutes the shareholders' agreement on the liability guarantee agreements signed by the management company. Besides, other clarifications are brought on these funds regarding their ability to block the shares' purchase within a period upper than ten years.

Some instructions have also been completed and changed regarding the following points:

- ★ **The publication frequency of the periodical report:** From now on, the management companies dealing with UCITs and AIFs have the option to publish a periodic report more often, which means that they no longer need to submit the end of a semester. This also means that they have the possibility to reduce the frequency of their report's publication.
- ★ **The information contained in the standard plan or regulation of the prospectus:** The presentation of the costs related to the fees owed to the AMF by the management companies will be modified in the standard plan of the UCITs and AIFs' prospectus. These fees will no longer be posted in the management fees and will from now on be included in the amount of the running costs.
- ★ **The investment quota's display of UCITs or AIFs in other UCITs, AIFs or foreign investment funds:** The display of the investment quota in other funds is divided into three categories which calculation is based on the investment and no longer on the exposition (modification of Article 31-3 if AMF's instructions n° 2011-19 et n° 2011-20):
  - Investment below 10% (threshold triggering the notion of "funds of funds");
  - Investment higher than 10% but lower than 20% (threshold triggering the obligation of indirect fees' display in the KIID)
  - Investment higher than 20%

These Instructions and Positions-Recommendations are directly effective.

<sup>1</sup>[DOCTRINE DE L'AMF NOUVELLE MISE À JOUR D'INSTRUCTIONS, DE POSITIONS ET DE RECOMMANDATIONS](#)

<sup>2</sup>[POSITION DOC-2005-14](#)

<sup>3</sup>[POSITION - RECOMMANDATION DOC-2012-11](#)

<sup>4</sup>[INSTRUCTION DOC-2011-19](#)

<sup>5</sup>[INSTRUCTION DOC-2011-20](#)



# BELGIUM

## LAW OF 16 DECEMBER 2015 ON THE COMMUNICATION OF INFORMATION RELATING TO FINANCIAL ACCOUNTS

### Information regarding financial accounts within the framework of AEOI

#### Background

The Belgian law of 16 December 2015 on the communication of information relating to financial accounts, by Belgian financial institutions and the Federal Public Authority of Finance, within the framework of an automatic exchange of information at international level for tax purposes (hereafter “the law”), was published in the Belgian official gazette on the 31st December 2015 and has entered into force on the 1st of January 2016.

The law implements the Directive 2014/107/EU that amends Directive 2011/16/EU on administrative cooperation in the field of taxation, the Intergovernmental Agreement as concluded between Belgium and the United States of America dated 23 April 2014 concerning FATCA and the multilateral agreement signed on 29 October 2014 within the framework of the Common Reporting Standard (CRS).

#### What's in there?

The law stipulates that reporting financial institutions have to communicate automatically certain information concerning declarable accounts opened at these financial institutions towards the Federal Public Authority of Finance. The Federal Public Authority of Finance transmits the necessary information towards the United States of America (FATCA) or for AEOI, any country participating to the AEOI program. The reporting financial institutions are required to inform the concerned natural persons that personal information will be communicated to the Federal Public Authority of Finance.

Administrative sanctions ranging from EUR 1.000 to EUR 5.000 are applicable in the event of non-compliance with the law. Criminal sanctions as stipulated in the Belgian Income Tax Code may be applied in the case of fraud.

#### What's next?

Further to the law, all Belgian financial institutions must verify if their account holders are tax resident in other participating AEOI countries. Should this be the case, the institution must report these account holders to the Belgian Public Federal Service Finance. As mentioned above, the Belgian Public Federal Service Finance will then undertake the necessary steps to submit this information to the tax authorities of the country in which the account holder is resident for tax purposes.

Reporting Belgian financial institutions must submit their first XML FATCA reports (covering the period between 1 July to 31 December 2014) to the Belgian Public Federal Service Finance within 10 days from the publication of the Act. However, the Belgian Public Federal Service Finance

has announced that the delay of 10 days will be applied in a flexible manner and that in practice a one month delay starting from the publication date in the Belgian official gazette will apply for submitting the XML FATCA reports.

## LAW OF 26 DECEMBER 2015

### Measures for improvement of job creation and purchasing power

#### Background

The Belgian law of 26 December 2015 introducing measures for improvement of job creation and of purchasing power (hereafter “the law”) was published in the Belgian official gazette on 30 December 2015. This law contains various measures taken by the Belgian government with the objective to improve job creation and purchasing power.

#### What's in there?

Among the measures taken, the law increases the general withholding tax rate applicable to dividends and interest attributed as of 1 January 2016 from 25% to 27%. There are certain exceptions that will continue to benefit from reduced withholding tax rates, being:

- ✦ Interests on ordinary savings accounts;
- ✦ Interests on certain government bonds (the ‘Letterme bonds’);
- ✦ Dividends received on certain new stocks from



small companies acquired from 1 July 2013 onwards.

## What's next?

Adaptation of fund documentation (prospectuses) to reflect the increase in withholding tax.

## THE NETHERLAND

### GUIDELINES FOR ASSET MANAGERS ISSUED BY THE DUTCH SUPERVISORY

Guidelines points of attention for asset managers acting both as wealth manager of individual clients and as investment manager of funds for collective investments.

#### Background

On 22 December 2015 the Dutch supervisory authority named Stichting Autoriteit Financiële Markten issued a guideline for asset managers<sup>6</sup>.

#### What's in there?

The guidelines are dedicated to wealth managers acting both as wealth manager of the capital of individual clients and as investment manager of funds for collective investments. The aim of the guidelines are to detect and prevent potential conflicts of interests and to safeguard the interests of private persons when an asset manager is looking after their capital. There is no permit to combine both functions but there are certain requirements depending on the organization.

There is a distinction between a wealth manager manager that solely sells their own funds on the one hand and the wealth manager that sells their own funds but also selects funds of third parties on the other hand. Both when acting as wealth manager of

individuals and investment manager of funds at the same time.

If the wealth manager only sells their own funds and does not select funds of third parties then the regulator only obliges to investigate if there can be a conflict of interest and to describe them and to make sure the clients have all necessary information on the fund regarding the costs and the suitability of the product.

For the second category the regulator sees more risk that the rights of the investors will be harmed. In this case there is an obligation to look critically at the margins, to define a limit on the volume and to take measures if the performance of the funds is below expectations.

The policy is valid as per December 2015.

[HTTPS://WWW.AFM.NL/NL-NL/PROFESSIONALS/NIEUWS/2015/DEC/LEIDRAAD-VERMOGENSBEHEER-HUISFONDSEN](https://www.afm.nl/nl-nl/professionals/nieuws/2015/dec/leidraad-vermogensbeheer-huisfondsen)

## TAX UPDATES

### AEOI

EU - New rules to help EU tax authorities exchange information adopted by EU Commission

#### 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.](#)

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.

### CRS

Luxembourg adopts the amended Directive on Administrative Cooperation enacting the 'Common Reporting Standard' (CRS) in Luxembourg Law

#### Background

On 9 December 2015, the Luxembourg Parliament passed the law which enacts Directive 2014/107/EU in Luxembourg law. The law implements the CRS and will enter into force on 1 January 2016. It clarifies the options taken by Luxembourg, the obligations of Luxembourg Financial Institutions (FIs) and the sanctions in the event of non-compliance.

CRS imposes obligations on FIs to review and collect information on their clients/investors in an effort to identify their tax residence and to provide certain specified account information to their relevant foreign tax authority (via the Luxembourg tax authorities) on an annual basis. Several provisions of the law are aligned with the provisions of the law adopting the Luxembourg-US Intergovernmental Agreement (the 'FATCA Law').

#### What's in there?

##### ON-BOARDING OF NEW CLIENTS/INVESTORS

For new accounts, Luxembourg FIs are required to obtain a self-certification mentioning the name, address, tax residence, tax identification number (TIN) and place and date of birth (for individuals) of the Account Holder upon account opening. If this

self-certification is not completed or is unreliable, a Luxembourg Financial Institution should in principle not open the account.

Even though this obligation to collect the TIN and place and date of birth should only concern Account Holders resident in a Reportable Jurisdiction, a Reporting Luxembourg FI can request that information from all non-Luxembourg resident clients or investors upon account opening.

#### DUE DILIGENCE REGARDING PRE-EXISTING ACCOUNTS

The law clarifies that Luxembourg FIs must apply their due diligence procedures to all their non-Luxembourg resident clients and investors (the so-called 'wider approach'). If a financial account is not a Reportable Account at the time the due diligence procedures are applied (e.g. because the Account Holder is a tax resident in a Late Adopter Jurisdiction), the Reporting Luxembourg FI may nevertheless use the result of the due diligence when the account becomes a Reportable Account.

Under the law, Luxembourg FIs are allowed to apply the procedures governing New Accounts (i.e. obtain a self-certification from all or part of their pre-existing clients) to Pre-Existing Accounts. The law also authorises Luxembourg FIs to apply the 'current address test' to determine the tax residence of the Account Holder of Lower Value Pre-Existing Individual Accounts.

The Reporting Luxembourg FI is required to use reasonable efforts to obtain the TIN and date and place of birth of Pre-Existing Account Holders before the end of the second year following the one in which the Pre-Existing Accounts were identified as Reportable Accounts.

The law explicitly refers to industry codes to classify Pre-Existing Entity Accounts.

#### REPORTING

It is confirmed that Reporting Luxembourg FIs will have to submit their first reports to the Luxembourg tax authorities no later than 30 June 2017.

According to the commentaries of the law, Reporting Luxembourg FIs are required to file a report with the Luxembourg tax authorities even if they have not identified any Reportable Accounts (in practice they will have to file a nil report). This may be relevant to Luxembourg Investment Managers and Investment Auditors who are Reporting FIs under the CRS but do not have in principle any Financial Accounts to report.

#### CONTROL AND PENALTIES

The commentaries of the law clarify that the Luxembourg tax authorities and Luxembourg FIs will have to use the OECD Commentaries on the CRS when interpreting this law.

In line with the FATCA Law, if a Reporting Luxembourg FI doesn't apply the due diligence rules or doesn't put in place procedures in view of the reporting, it may be liable to a penalty of up to EUR 250,000.

If a Reporting Luxembourg FI doesn't file the required report or if it files a late, incomplete or inaccurate report, it may be liable to a penalty of 0.5% of the amounts that should have been reported, with a minimum of EUR 1,500.

#### DATA PROTECTION RULES

Reporting Luxembourg FIs cannot invoke any professional secrecy rules to refuse to report the required information. Reporting Luxembourg FIs should inform each individual that information will be collected and possibly reported.

The law explicitly refers to the Luxembourg law on data privacy and protection for the elements to be communicated to the client. A Reporting Luxembourg FI must communicate to individuals that:

- ★The Luxembourg FI is responsible for personal data processing;
- ★The personal data is intended to be used for the purpose of the CRS;
- ★The data will be reported to the Luxembourg tax authorities and the tax authorities of the jurisdiction(s) of residence of the Account Holders or Controlling Persons of a Passive NFE;
- ★The reported individual has the right to access the data/financial information reported to the Luxembourg tax authorities and has the right to rectify that data;
- ★They are required to reply to each information request sent to them. A Reporting Luxembourg FI must also inform them about what may happen if they fail to answer (e.g. potentially reporting to the wrong foreign tax authority).

Data elements used in the context of the CRS cannot be stored longer than what is necessary. The commentaries of the law clarify that from a commercial and tax perspective, documents should be kept for at least ten years while for anti-money laundering/know your client purposes they must be kept for at least five years after the end of the client relationship.

[THE LINK IS AVAILABLE HERE AND HERE.](#)

## What's next?

The law mentioned that the list of Luxembourg Non-Reporting FIs and Excluded Accounts specific to the Luxembourg market will be published later on in a Grand-Ducal Regulation. However, based on the list published by the European Commission on 30 October 2015, we already know that there will be no Luxembourg-specific Non-Reporting status.

A Grand-Ducal Regulation will also include the names of the CRS Reportable Jurisdictions with which Luxembourg will enter into the automatic exchange of information.

The Luxembourg tax authorities are expected to publish a FAQ to provide FIs with further guidance (e.g. with respect to the circumstances under which an account can be opened without a valid self-certification) by the end of the year. Circulars from the Luxembourg tax authorities are also expected in early 2016.

### ECOFIN COUNCIL

## On the Ministers' Agenda: Corporate Taxation, the Banking Union, and the Financial Transaction Tax

### Background

On 8 December 2015 the Economic and Financial Affairs (ECOFIN) Council came together to discuss various issues on the agenda, a large part of which concerned various topics regarding corporate taxation. The financial transaction tax (FTT), Base Erosion and Profit Shifting (BEPS) and the Consolidated Corporate Tax Base (CCCTB) were only some topics in this discussions.

## What's in there?

### CORPORATE TAXATION & TAX EVASION

The Council discussed measures geared towards prevention of corporate tax evasion, which includes the strengthening of the Code of Conduct on Business Taxation, the implementation of the OECD's BEPS project, and the proposal for an EU Common Consolidated Corporate Tax Base was reviewed. Regarding BEPS, the main aim is to put the OECD recommendations into practice at EU level as soon



as possible. Moreover, the CCCTB would establish a common system for calculating and consolidating the corporate tax base in the Member States, which could help to mitigate problems resulting from the divergence between different tax systems in various European jurisdictions. The discussions for the CCCTB are still underway within the EU, as the adoption requires a unanimous decision of all EU Member States.

#### FINANCIAL TRANSACTION TAX

The proposal foreseeing to introduce an FTT in eleven Member States via 'enhanced cooperation' was discussed. Ten of the participating Member States (Austria, Belgium, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia and Spain) stated that they reached an agreement on different elements the FTT should have. These include, amongst others, the treatment of derivatives, shares, etc.

[THE LINK IS AVAILABLE HERE AND HERE.](#)

#### What's next?

Scanning's next editions will keep you updated on further ECOFIN Council meetings and the conclusions reached during those meetings.

### EU SAVINGS DIRECTIVE

## Repeal of EU Savings Directive and new EU Directive on Administrative Cooperation in the Field of Direct Taxation

#### Background

On 10 November 2015 the Council repealed Directive 2003/48/EC, which since 2005 has allowed tax administrations better access to information on private savers.

Directive 2003/48/EC required the automatic exchange of information between member states on private savings income. This enabled interest payments made in one member state to residents of other member states to be taxed in accordance

with the laws of the state of tax residence. The directive was last amended in March 2014 to reflect changes to savings products and developments in investor behavior since it came into force in 2005. Repeal of the directive follows a strengthening of measures to prevent tax evasion and is part of a tax transparency package presented by the Commission in March 2015. The repeal also eliminates the overlap between Directive 2003/48/EC and other legislation in the same field.

#### What's in there?

Due to transitional measures adopted by a 'repeal directive', Directive 2003/48/EC will apply until 1 January 2016, at which point the new Council Directive 2014/107/EU (adopted December 2014) will enter into force. These transitional measures also contain a derogation granted to Austria under Directive 2014/107/EU, allowing it to apply the Directive one year later than other Member States. Directive 2014/107/EU implements a single global standard developed by the OECD for the automatic exchange of information (the so-called 'common reporting standard'). This new global standard alters provisions on the mandatory automatic exchange of information between tax administrations: it extends the scope of the exchange to include interest, dividends and other types of income.

Regarding the previously mentioned overlap, Directive 2014/107/EC is generally broader in scope than the repealed Directive 2003/48/EC. In cases of overlap of scope, it is provided that Directive 2014/107/EU is to prevail.

Individual EU 'Savings Agreements' with Andorra, Liechtenstein, Monaco, San Marino and Switzerland, initially based on Directive 2003/48/EC, are currently being revised to be aligned with Directive 2014/107/EU and the new global standard. For example, the revised EU-Switzerland Agreement on automatic exchange of financial account information has taken into account provisions of Directive 2014/107/EU and now ensures that EU residents will no longer be able to hide undeclared income in Swiss accounts.

[THE LINK IS AVAILABLE HERE AND HERE.](#)

#### What's next?

Scanning's next editions will keep you updated when information regarding the next steps becomes available.

### NET WEALTH TAX

## Luxembourg Net Wealth Tax Reduction - Circular I. Fort. n° 47bis of 19 November 2015

#### Background

On 19 November 2015 the Luxembourg tax authorities have issued the Circular I. Fort. n° 47bis ('the Circular') clarifying the modalities of the Net Wealth Tax (NWT) reduction as from 1 January 2015, further to the Law dated 25 November 2014 modifying § 8a VStG ('the Law').

As a reminder, the 0.5% NWT due by a Luxembourg entity on its net assets can be reduced (except up to the minimum Corporate Income Tax (CIT) until 2015 and up to the minimum NWT as from 2016 if the bill n° 6891 is voted before year-end) provided that several conditions apply, notably:

- ★A ceiling which is the CIT due and,
- ★The obligation to book a special reserve amounting to 5 times the NWT reduced and which has to be kept during 5 years.

#### What's in there?

##### DETERMINATION OF THE CEILING AND DATE OF REQUEST FOR NWT REDUCTION

Based on the Law, as from 2015 the NWT can be reduced up to the limit of the CIT of the preceding year (and not the current year anymore). The Circular clarifies that the NWT reduction for a fiscal year is to be requested in the corporate tax return of the preceding year.

2014 being the year of transition, the 2014 tax returns will contain the NWT reduction request for both 2014 and 2015 each one with a ceiling of the CIT of the year 2014.

##### BOOKING OF A SPECIAL RESERVE FOR 5 YEARS

The special reserve corresponding to 5 times the amount of NWT reduction of year N has to be booked before the end of year N by allocation of profits or fee reserves of year N-1. This reserve should be kept for 5 years.

It is therefore very important to carefully manage allocation of profits especially regarding dividend distribution to ensure that the latter will not jeopardise the possible NWT reduction of the following year(s).

In that respect, 2016 NWT reduction will be possible through the creation of a special reserve by allocation of annual profits of preceding year (2015 profits will serve to create special reserve) or free reserves at the time of the request. This special reserve will have to be booked before the end of the fiscal year 2016 and kept for 5 years (2016, 2017, 2018, 2019 and 2020) until the end of fiscal year 2020.

The creation and evolution of the special reserve for each year must be clearly identified in the commercial balance sheet. It is also recommended to create a sub-account per year of respective NWT reduction. There is an administrative tolerance for the transitional period. Exceptionally for the years 2014 and 2015, only one special reserve can be booked representing 5 times the amount of the higher (between 2014 and 2015 NWT) amount of NWT reduced. This special reserve will have to be allocated through either 2014 profits or free reserves and has to be booked as follows: the special reserve for the purpose of the 2014 NWT reduction will have to be booked at the latest at the end of fiscal year 2015 and the special reserve for the purpose of the 2015 NWT reduction will have to be booked at the latest at the end of fiscal year 2016.

[THE LINK IS AVAILABLE HERE AND HERE.](#)

## What's next?

Scanning's next editions will keep you updated in case any new information regarding the NWT becomes available.

## **NET WEALTH TAX**

Council of State published its opinion regarding Government bill 6891 and potential NWT changes for SICARs

## Background

On 12 December 2015, the Luxembourg Council of State published their opinion regarding the Luxembourg Government bill 6891 (the "Tax Measures Bill"), released in October 2015.

## What's in there?

Until 2015, SICARs have not been subject to Net Wealth Tax in Luxembourg. The proposed measures, if approved, would modify the regime of the Net Wealth Tax by introducing a digressive scale of rates as well as a minimum Net Wealth Tax charge instead of the Minimum Corporate Income Tax. The minimum Net Wealth Tax would be introduced for all Luxembourg resident corporate entities.

SICARs would continue to be exempt from the general Net Wealth Tax regime (i.e. the digressive scale). However, they would be subject to the new minimum Net Wealth Tax as from 2016.

The minimum Net Wealth Tax would be calculated in the same way as the current minimum Corporate Income Tax (i.e. EUR 3,210 for entities having a sum of fixed financial assets, transferable securities and cash at banks which exceeds 90% of their total gross assets and EUR 350,000. For all other entities, an amount between EUR 535 and EUR 32,100 will be applicable depending on a company's total gross assets).

[THE LINK IS AVAILABLE HERE.](#)

## What's next?

This bill has now to be adopted by the Luxembourg Parliament.

## **WITHHOLDING TAX**

Austria - Increase in Austrian withholding tax - Effects for different Investors

## Background

As mentioned in August 2015, new provisions introduced by the 2015/2016 tax reform will enter into force on 1 January 2016.

## What's in there?

The new provisions of the 2015/2016 tax reform will increase the Austrian withholding tax to 27.5% for all proceeds from capital investments with one major exemption – interest payments from cash accounts and savings books. To simplify the taxation of investment funds, the various components of an investment fund's taxable income are all subject to a withholding tax rate of 27.5%.

[THE LINK IS AVAILABLE HERE AND HERE.](#)

## What's next?

According to the accrual principle the increased tax rate of 27.5% will be applicable for a fund's distributions as well as annual deemed distributed income which is accrued by the investors as of 1 January 2016.



# 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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