Scanning

CACEIS European Regulatory Watch Newsletter

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20

EUROPE

EMIR - ESMA updates its EMIR Q&A

EMIR - ESMA updates the public register for the clearing obligation under EMIR

IDD - Publication of the Insurance Distribution Directive in the EU Official Journal

MAD/MAR - EU Commission proposes level 2 Measures

MAD/MAR - ESMA consults on MAR guidelines regarding market soundings and delayed disclosure of inside information

MIFID II - ESMA guidelines on complex debt instruments and structured deposits

MIFID II - EU Commission proposes one-year extension to the entry into force of MiFID II and MiFIR

UCITS V - ESMA issues Q&A on UCITS and clarifies UCITS V timeline

UCITS - ESMA statement on potential closet index tracking

WORK PROGRAMME - ESMA publishes first supervisory convergence work programme

WORLD

Derivatives Markets - United States CFTC and EU Commission's common approach for transatlantic CCPs

FRANCE

AMF publishes "Guide of European Long-Term Investment Fund (ELTIF)"

AMF publishes "UCITS V Directive: Guide for Management Companies"

LUXEMBOURG

Immobilisation of Bearer Shares - Luxembourg Caisse de Consignation's Q&A on immobilisation of bearer shares

Dormant or inactive Accounts - CSSF Circular on the management of dormant or inactive accounts by credit institutions

UCITS V - Advice of the Luxembourg Council of State on UCITS V Bill

TAX UPDATES

Taxe d'abonnement - Mandatory electronic filing of returns with regard to the taxe d'abonnement by mutual funds and specialized investment funds (Luxembourg)

Taxation of Non-Resident Investment Funds - Financial Court Decision on Taxation of Non-Resident Investment Funds (Germany)

Net Asset Tax - Net Asset Tax applies to foreign investment funds (Belgium)

EUROPE

EMIR

ESMA updates its EMIR Q&A

Background

ESMA publishes a regularly updated Q&A addressing questions relating to Regulation (EU) No 648/2012 ("EMIR").

The Q&A is designed to promote common supervisory approaches and practices in the application of EMIR. It also provides responses to questions posed by the general public, market participants and competent authorities in relation to the practical application of EMIR.

The ESMA EMIR Q&A was last updated on 4 February 2016.

What's in there?

On 16 February 2016, ESMA published an updated version of its EMIR Q&A (ESMA/2016/293 – the "Q&A"), including new questions and answers about the frontloading requirement for the clearing obligation and the clearing obligation.

Firstly, the Q&A deletes its answer to the OTC question 17a regarding the frontloading requirement for the clearing obligation as this point was clarified in article 4 of the commission delegated regulation 2015/2205 of 6 August 2015 (THE "RTS" – AVAILABLE HERE) which entered into force on 21 December 2015.

Secondly, the Q&A clarifies that all types of trade novations are covered by the clearing obligation as set out under article 4(1)b)ii) of EMIR (OTC question 20a), and as regards swap which results from the exercise of a swaption, the clearing obligation applies as shown in the table below (OTC question 20b).

THE UPDATED VERSION OF THE ESMA EMIR Q&A IS AVAILABLE HERE.

TIMELINE			CONCLUSION
Before "frontloading window"	During "frontloading window"	On or after date on which the clearing obligation takes effect	Not subject to AIFMD
		Swaption entered into and exercised	Yes
		Swaption exercised	Yes
	Swaption entered into and exercised		Yes if the swap has a remaining maturity above the minimum remaining maturity defined in the RTS
Swaption entered into	Swaption exercised		No
Swaption entered into		Swaption exercised	No

What's next?

ESMA's Q&A is intended to be continuously edited and updated as and when new questions are received.

EMIR

ESMA updates the public register for the clearing obligation under EMIR

Background

According to Article 6 of Regulation (EU) N0 648/2012 ("EMIR"), ESMA shall maintain a public register to inform market participants on the clearing obligation.

EMIR introduces the obligation to centrally clear certain classes of over-the-counter ("OTC") derivatives contracts through central counterparty clearing ("CCPs") or apply risk mitigation techniques when they are not centrally cleared.

Counterparties subject to the clearing obligation are classified into categories in order to ensure an orderly and timely implementation of this clearing obligation; hence, they are divided into four categories.

What's in there?

On 18 February 2016, ESMA published an update of the public register (the "Register") for the clearing obligation as required under EMIR.

In Section 1.3 of the Register, ESMA provides an update of the links to websites of central clearinghous-

es, which have published the lists of their category 1 clearing members in the classes subject to clearing obligation.

Category 1 firms are either financial counterparties or non-financial counterparties above the clearing threshold who are clearing members of a central clearinghouse. Those firms shall be the first firms to start the central clearing of certain types of derivatives contracts by 21 June 2016.

THE REGISTER IS AVAILABLE HERE.

What's next?

ESMA will update this Register on an ongoing basis.

IDD

Publication of the Insurance Distribution Directive in the EU Official Journal

Background

On 9 December 2002, Directive 2002/92/EC on insurance mediation ("IMD 1") was adopted by the EU Parliament and the Council to address substantial differences between national provisions which create barriers to the taking-up and pursuit of the activities of insurance and reinsurance intermediaries in the internal market.

The application of Directive 2002/92/EC has shown that a number of provisions require further specification with a view to facilitating the exercise of insurance distribution and that the rules relating to protection of consumers requires enhancements.

On 3 July 2012, the EU Commission published a legislative proposal to recast IMD1, and in particular improve the rights of consumer, enhance policyholder protection, ensure cross-sectoral consistency and a level playing field between all participants involved in the selling products.

On 24 November 2015, the EU Parliament adopted at first reading the proposal of the Insurance Distribution Directive (previously IMD2 – "IDD").

On 14 December 2015, the Council of the EU adopted the proposal at first reading (text proposal adopted by the EU Parliament and the Council is available HERE).

What's in there?

On 2 February 2016, IDD was published in the OJEU (AVAILABLE HERE) without any significant departure from the version adopted by the EU Parliament and the Council of the EU.

What's next?

IDD will enter into force on 22 February 2016 and shall be transposed into national laws before the end 23rd of February 2018.

Delegated acts from the EU Commission are expected by early 2017.

MAD/MAR

EU Commission proposes level 2 Measures

Background

On 16 April 2014, the European Parliament and the Council adopted the Regulation (EU) N0 596/2014 namely the Market Abuse Regulation ("MAR"), which was published in the OJEU on 12 June 2014 and will apply from 3 July 2016.

The main goal of MAR is to establish a common regulatory framework on insider dealing, the unlawful disclosure of inside information and market manipulation (market abuse), as well as measures to prevent market abuse.

Furthermore, MAR updates and strengthens the framework of Directive 2003/6/EC on insider dealing and market manipulation ("MAD") by extending its scope to new markets and trading strategies and more particularly by introducing new requirements in order to prevent market abuse.

What's in there?

On 17 December 2015, the EU Commission issued a delegation regulation supplementing Regulation (EU) No 596/2014 (the "Regulation") laying down detailed rules with regard to the below topics:

- The extension of the exemption for certain countries public bodies and central banks of third countries from the obligation and prohibitions set out in MAR in carrying out monetary, exchange-rate or public debt management policy;
- The indicators of market manipulation laid down in annex I to MAR;
- The disclosure thresholds in emission allowances market participants of inside information (which shall be equivalent to 6 million tonnes a year for carbon dioxide (CO2) and for rated thermal input 2,430 MW);
- The competent authority for notification of delays of public disclosure of inside information;
- The circumstances under which trading during a closed period may be permitted by the issuer;
- The type of transactions triggering the duty to notify managers' transactions, which include transactions executed in shares or units of investment funds including AIFs referred to in article 1 of Directive 2011/61/EU (the "AIFMD"), insofar as required by article 19 of MAR.

MORE DETAILED INFORMATION IS PROVIDED IN THE REGULATION, WHICH IS AVAILABLE HERE.

What's next?

The Regulation will enter into force on the twentieth day following that of publication in the OJEU. It will apply from 3 July 2016 onwards.

MAD/MAR

ESMA consults on MAR guidelines regarding market soundings and delayed disclosure of inside information

Background

On 16 April 2014, the European Parliament and the Council adopted the Regulation (EU) N0 596/2014 namely the Market Abuse Regulation ("MAR"), which was published in the OJEU on 12 June 2014 and which will enter into application on 3 July 2016. The main goal of MAR is to establish a common regulatory framework on insider dealing, the unlawful disclosure of inside information and market manipulation (market abuse), as well as measures to prevent market abuse.

On 14 November 2013, ESMA issued a discussion paper (ESMA/2013/1649, the "Discussion Paper")

on its policy orientations on possible implementing measures under MAR.

The Discussion Paper sought views on the following topics:

1 Buy-back programmes and stabilisation
2 Market soundings
3 Specific indicators on market manipulation as defined in Annex 1 of MAR
4 Accepted market practices
5 Suspicious transactions
6 Public disclosure of inside information and delays
7 Insider lists
8 Managers' transactions
9 Investments recommendations
10 Reporting of violations.

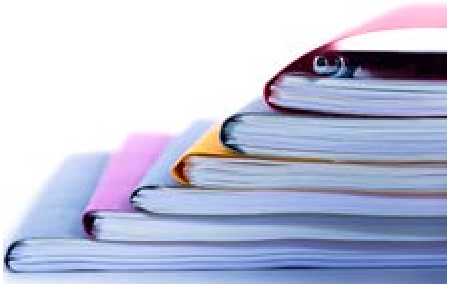
Article 11(1) of MAR defines "market sounding" as a communication of information, prior to the announcement of a transaction, in order to gauge the interest of potential investors in a possible transaction and the conditions relating to it such as its potential size or pricing, to one or more potential investors. Article 17(1) of MAR sets forth that issuers should inform the public as soon as possible of inside information which directly concern them. Article 11(11) and 17(11) of MAR respectively provide that ESMA should issue guidelines addressed to persons receiving market soundings and on legitimate interests of issuers to delay inside information and situations in which the delay of disclosure is likely to mislead the public.

What's in there?

On 28 January 2016, ESMA published its Consultation Paper (ESMA/2016/162) regarding the draft guidelines on MAR.

In its proposal of guidelines, ESMA addresses various recommendations to persons receiving market soundings ("MSR"), such as:

- Ensuring that information resulting from a market sounding is always made available to the Disclosing Market Participants ("DMP");
- An assessment the MSR has to perform to determine whether they are in possession of inside information as a result of the market sounding;
- How to manage potential discrepancies between the MSR and the DMP;
- The implementation of internal procedures and staff training regarding the management of information received in the context of a market sounding;
- The identification of all the issuers and financial instruments by the MSR in the case that the MSR are in possession of inside information as a result of a market sounding;
- Records-keeping in a durable medium for a period of five years.



Article 17(4) of MAR specifies that issuers and emission allowance market participants may, on their own responsibility, delay disclosure to the public of inside information provided that all of the following conditions are met:

- Immediate disclosure is likely to prejudice the legitimate interests of the issuer or emission allowance market participant;
- Delay of disclosure is not likely to mislead the public;
- The issuer or emission allowance market participant is able to ensure the confidentiality of that information.

In its proposal of guidelines, ESMA suggests a non-exhaustive list of cases where immediate disclosure of the inside information is likely to prejudice the issuer's legitimate interests. Such list includes:

- The jeopardy caused by an immediate public disclosure of the outcome of negotiations of an issuer;
- An immediate public disclosure would seriously prejudice the interests of existing and potential shareholders of an issuer which financial viability is in grave and imminent danger;
- The inside information relates to decisions or contracts taken/entered into by the management body of an issuer which need the approval of another body of the issuer in order to become effective;
- The issuer has developed product or invention and the public disclosure would jeopardize the intellectual property rights of the issuer;
- The issuer is planning to buy/sell a major holding in another entity and the disclosure of the information would jeopardize the transaction;
- A transaction previously announced is subject to a public Authority's approval, and such approval is conditional upon additional requirements, where the immediate disclosure of those requirements will likely affect the ability for the issuer to meet them and therefore prevent the final success of the deal or transaction.

Finally, ESMA describes several situations in which the delay of disclosure of inside information is likely to mislead the public:

- The inside information whose disclosure the issuer intends to delay is materially different from a previous public announcement of the issuer on the matter to which the inside information refers to;
- The inside information whose disclosure the issuer intends to delay regards the fact that the issuer's financial objectives are likely not to be met, where such objectives were previously publicly announced;
- The inside information whose disclosure the issuer intends to delay is in contrast with the market's expectations, where such expectations are based on signals that the issuer has previously set.

THE CONSULTATION PAPER IS AVAILABLE HERE.

What's next?

ESMA will consider all comments received on its Consultation Paper by 31 March 2016, with a view to finalising the two sets of Guidelines. A final report will be published by early Q3 2016, around the entry into force of MAR.

MIFID II

ESMA 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 EU Parliament and the Council of the EU.

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.

Article 25(4) of 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.

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

What's in there?

On 4 February 2016, ESMA published its guidelines on complex debt instruments and structured deposits (ESMA/2015/1787, the "Guidelines") and on 5 February 2016, ESMA published translations of its Guidelines.

THE ESMA GUIDELINES ON COMPLEX DEBT INSTRUMENTS AND STRUCTURED DEPOSITS ARE AVAILABLE HERE.

What's next?

The National Competent Authorities will have a period of two months to notify ESMA whether they comply or intend to comply with them. These guidelines shall apply from 3 January 2017.

MIFID II

EU Commission proposes one-year extension to the entry into force of MiFID II and MiFIR

Background

MiFID 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.

Directive 2014/65/EU ("MiFID II") and Regulation 600/2014 ("MiFIR") collectively referred to as MiFID II have been adopted and were scheduled to apply as of 3 January 2017.

To date, "level 2" measures are still outstanding. European regulator ("ESMA"), national authorities and stakeholders are facing implementing challenges.

In November 2015, ESMA had asked for a delay in implementing certain parts of MiFID II.

What's in there?

On 10 February 2016, the EU Commission has issued two proposals, a directive and a regulation, granting an additional year to comply with MiFID II/MiFIR. The new deadline is 3 January 2018.

The extension should not have an impact on the timeline for adoption of the "level 2" implementing measures under MiFID II/MiFIR.

THE TEXT OF THE PROPOSED DIRECTIVE AMENDING MIFID II IS AVAILABLE HERE.

THE TEXT OF THE PROPOSED REGULATION AMENDING MIFIR IS AVAILABLE HERE.

What's next?

The proposals shall be adopted by the EU Parliament and the Council of the EU. They will enter into force 20 days after their publication in the official journal of the EU.

UCITS V

ESMA issues Q&A on UCITS and clarifies UCITS V timeline

Background

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

On 17 December 2015, the EU Commission issued draft level 2 measures supplementing UCITS V with regard to obligations of depositaries (the "Level 2 Measures"). These measures are expected to enter into force later in September/October 2016.

Level 3 measures ie guidelines on sound remuneration policies under article 14 of UCITS V are expected to be issued by the end of Q1 2016.

What's in there?

On 1 February 2016, ESMA published its first UCITS Q&A (2016/ESMA/181 - the "Q&A") replacing and consolidating the 4 previous Q&As and dealing with the implementation timeline of UCITS V.

ESMA confirms the following:

- **Prospectus** – UCITS will be allowed to update their prospectus with regard to remuneration-related information at the next annual update after 18 March 2016, or at the first occasion it is revised between 18 March 2016 and 18 March 2017 at the latest;
- **KIID** - UCITS will be allowed to update KIID at the next annual update after 18 march 2016 or on the first occasion after 18 march 2016;
- **Annual report** - UCITS shall include no additional information concerning their remuneration for the period ending before 18 March 2016. For annual reports relating to period ending on or after 18 March 2016, but before the UCITS management company has completed its first annual performance period in which it has to comply with article 14a and 14b of the Directive, UCITS will be required to include remuneration-related information in their annual reports on a best effort basis;
- **Depositary contracts** - Level 2 Measures will have to be updated promptly in accordance with the transitional arrangements outlined in the Level 2. Nonetheless, regarding the depositary liability

regime, ESMA points out that as from 18 March 2016, the provisions setting out the liabilities of the depositary shall become void, and UCITS V depositary liability provision as set out in UCITS V shall apply instead. Later, when the depositary contracts are amended to comply with the Level 2 Measures the depositary liability provisions in existing contracts will have to be amended.

THE Q&A IS AVAILABLE HERE.

What's next?

ESMA will update its Q&A on a regular basis. The practical consequences in terms of contractual update required by local regulators may vary from one jurisdiction to another.

UCITS

ESMA statement on potential closet index tracking

Background

ESMA attention was drawn to an alleged practice in the European collective investment management industry whereby asset managers claim, according to their funds rules and investor information documentation, to manage their funds in an active manner (and charge fees accordingly) while the funds are, as a matter of fact, staying very close to a benchmark and therefore implementing an investment strategy which requires less input from the investment manager. These funds are called "closet indexing funds".

In many EU Member States, national regulatory authorities have launched or are in the process of launching specific investigations in this regards. The matter has also been subject to considerable attention by investor protection groups and the media throughout the European Union.

What's in there?

On 2 February 2016, ESMA issued a statement (the "Statement") to raise stakeholders (particularly investors) awareness about the potential of some European collective investment funds to be closet index and give details on the work that ESMA has been doing in this context.

The twofold statement consist as follows:

- ⋆**ESMA's Analysis** - As a first step, ESMA performed a quantitative analysis to identify potential closet indexing funds over a sample of equity funds domiciled in EU member states. ESMA also undertook a qualitative research into the documentation of the identified funds to check whether the potential closet indexers identified by the quantitative analysis were describing themselves as active managers in their prospectuses and KIIDS. The results of the analysis indicate that there might be a small but not insignificant number of funds in the EU equity sector that may be closet index trackers. These results underline the need for additional supervisory work in this area;
- ⋆**ESMA recommendation with regard to management companies and investors** – Rules on fund disclosures require that fund managers provide investors with information that is fair, clear and not misleading. ESMA hence recommends that UCITS management companies carefully consider whether the information they provide to investors is (i) an accurate interpretation of the performance objectives of the fund and the amount of risk taken to generate that return and (ii) is aligned with their obligations under the regulation (EU) 1286/2014 (the "KIID Regulation"). The description contained in the objectives and the investment policy section of the KIID shall cover those essential features especially where a reference to a benchmark is implied.

THE STATEMENT IS AVAILABLE HERE.

What's next?

ESMA and national regulatory authorities shall perform additional work on closet indexing. ESMA will coordinate this work and assess the need to further steps to ensure that all market participants comply with the disclosure obligations to the full extent. It will also analyse the need for further clarification, in relation with UCITS disclosure for instance.

WORK PROGRAMME

ESMA publishes first supervisory convergence work programme

Background

REGULATION (EU) NO 1095/2010 of the European Parliament and of the Council of 24 November 2010 requires ESMA to encourage supervisory convergence to ensure sound, effective and consistent supervision. The regulation specifies several tools ESMA can use to reach this goal, and enables it to develop additional tools where necessary.

What's in there?

On 11 February 2016, ESMA published its supervisory convergence work programme ("SCPW") which supplements ESMA's Annual Work Programme for 2016 (ESMA/2015/1475).

Amongst others, ESMA 2016 main focus areas will be as follows:

- ⋆Preparing for the sound, efficient and consistent implementation and supervision of MIFID II/MIFIR;
- ⋆Finalising the IT infrastructure needed to support the effective implementation and supervision of MIFID II/MIFIR;
- ⋆Facilitating the sound and consistent supervision of OTC derivatives markets and in particular of EU CCPs;
- ⋆Supporting the effective application of the Capital Markets Union (in particular in the areas of UCITS / AIFM passport and prospectus convergence).

Amongst the convergence activities that ESMA announced for 2016, several are of top interest for investment fund and asset managers, as listed below.

INVESTMENT MANAGEMENT

⋆AIFMD

ESMA's main focus will be to support the sound efficient and consistent application of AIFMD. This includes the following activities:

- Regular updates of the AIFMD Q&A (reporting, depositaries and scope);
- Improvement of quality and availability of data on AIFM's, including analytical reports to use these data;
- Follow up on consultation on asset segregation under AIFMD;
- Development of a common procedure on imposing leverage limits on AIFM or group of AIFMs;
- Cooperation procedures in the context of the AIFMD non-EU passport;
- Information and experience gathering on supervisory action in relation to liquidity management tools.

⋆UCITS

- Finalisation of guidelines on remuneration principle (Q1- 2016).

- Common approach to rules on eligible assets.

⋆**EU Passport**

Thematic study on the operation of home and host responsibilities under AIFMD and UCITS passport.

⋆**Closet indexing**

ESMA will continue to facilitate co-ordinated action by NCAs to this issue.

⋆**Investor protection and intermediaries**

- **MiFID 2**: ESMA contemplates several actions (finalisation of guidelines, preparation of Q&A, application workshops and training workshops) in order to prepare for the implementation of MiFID 2 / MiFIR on topics such as product governance, independence advice, product intervention powers, disclosure….
- **CFD**: ESMA intends to follow up the work started on marketing and sale of CFD and similar products such as binary options spreads bets.

OTHER THEMES

Other convergence activities mentioned, in the report address the themes of MAR, MiFIR, co-supervisions, Prospectus, Transparency directive, IFRS, trade repositories, CSD…

ESMA SCWP IS AVAILABLE HERE.

What's next?

The implementation of the SCWP will be examined during 2016 and priorities could be re-defined depending on developments during the year. The SCWP provide also indication over 2017 activities (such as AIFMD delegation or consistency in enforcement and sanctions, for instance).

WORLD

DERIVATIVES MARKETS

United States CFTC and EU Commission's common approach for transatlantic CCPs

Background

On 30 October 2014, the EU Commission adopted its first "equivalence" decisions for central clearing counterparties ("CCPs") regulatory regimes applying to Australia, Hong Kong, Japan and Singapore.

On 13 November 2015, five implementing decisions have been published by the EU Commission as regard the equivalence of the regulatory framework of Canada, Switzerland, South Africa, Mexico and the Republic of Korea.

A common approach to the regulation and supervision of derivatives market is necessary to supporting cross border activity.

Both the United States Commodity Futures Trading Commission (the "CFTC") and EU requirements are based on international principles, which accounts for the high degree of similarity between the two regimes. The CFTC and the EU Commission work together, along with counterparts across the global regulatory community, to enhance the granularity of these principles and further harmonise the standards to which internationally active CCPs are held.

What's in there?

On 10 February 2016, the European Commissioner for Financial Stability, Financial Services and Capital Markets Union, Jonathan Hill, and CFTC Chairman Timothy Massad announced a common approach regarding requirements for CCPs.

The key elements of the approach are:

⋆**EU equivalence:**

- The EU Commission intends to adopt shortly an equivalence decision with respect to CFTC requirements for US CCPs which will allow ESMA to recognise US CCPs as soon as practicable;
- Equivalence is necessary so that ESMA can recognise US CCPs wanting to serve EU markets;
- Once recognised by ESMA, US CCPs may continue to provide services in the EU whilst complying with CFTC requirements;
- US CCPs will then become qualifying CCPs for the purpose of the EU Capital Requirements Regulation;
- The CFTC will also propose to streamline the registration process for EU CCPs wishing to register with them;
- In addition, the EU Commission will propose the adoption of an equivalence decision under EMIR to determine that US trading venues are equivalent to regulated markets in the EU.

⋆**CFTC substituted compliance:**

The CFTC will propose a determination of comparability with respect to EU requirements, which will permit EU CCPs to provide services to US clearing members whilst complying with certain corresponding EU requirements. This determination will provide a basis for both EU CCPs already registered with the CFTC as derivatives clearing organisations and those seeking registration to meet certain CFTC requirements by complying with the corresponding requirements as set forth in EMIR. This process will be completed within the same timeframe as the process for EU equivalence and recognition of CFTC-registered US CCPs.

THE AGREEMENT IS AVAILABLE HERE.

What's next?

The steps required to implement the agreement will be put into place as soon as practicable. The CFTC and the EU Commission will work to ensure that changes are implemented in a coordinated manner, and to monitor the impacts resulting from the sequencing of the changes and assess whether any appropriate action is needed. The EU Commission and the CFTC anticipate that CFTC registered CCPs will be in a position to be recognised by 21 June 2016 and the CFTC will work with ESMA to facilitate this process.

The agreement also stresses the fact that it is necessary to proceed rapidly with the adoption of the relevant alternative standard for client margining. Finally, the CFTC and the EU Commission declare that there is scope to expand the range of, and add further detail to, the international principles on the area of international minimum standards in cleared derivatives markets.

FRANCE

AMF publishes "Guide of European Long-Term Investment Fund (ELTIF)"

Background

The Regulation (EU) 2015760 of The European Parliement and of the Council of April 29th 2015 on European Long-term Investment Funds (the "ELTIF") has been applicable in France since December 9th 2015.

What's in there?

On January 21th 2016, the AMF published "Guide of European Long-Term Investment Fund (ELTIF)" (AVAILABLE HERE) intended for:

- ★European AIFMs who wish to obtain ELTIF authorisation for a French fund,
- ★AIFMs who wish to use the passport procedure under the AIFM Directive to market a non-French ELTIF in France, and
- ★Other ELTIF players (distributors, depositaries, investors).

It aims to guide fund managers who would like one of their funds to be authorized as a ELTIF.

What's next?

The AMF General Regulation could, in the future, allow professional specialised funds (FPSs), companies set up as limited partnerships (SLPs), professional private equity investment funds (FPCIs) and professional real estate collective investment undertakings (OPPCIs) that have obtained ELTIF authorisation to be open to retail investors under the conditions laid down in the ELTIF regulation.

AMF publishes "UCITS V Directive: Guide for Management Companies"

Background

The Directive 2014/91/EU (the "UCITS V Directive") entered into force on September 25th 2014.

The requirements included in the UCITS V Directive relating to the depositary duties and the players remuneration are largely based on the requirements imposed within the framework of the Alternative Invesment Funds Manager Directive ("AIFMD Directive").

What's in there?

On February 3th 2016, the AMF published a guide for Management Companies answering some questions about the impacts of the UCITS V Directive on their activity (AVAILABLE HERE).

What's next?

The guide will be updated in accordance with regulatory changes.

The UCITS V Directive must be implemented into French law by the deadline of March 18th 2016 and will be applicable immediately.

LUXEMBOURG

IMMOBILISATION OF BEARER SHARES

Luxembourg Caisse de Consignation's Q&A on immobilisation of bearer shares

Background

The law of 28 July 2014 on the immobilisation of bearer shares and units ("the Law" - available here) was published in the Mémorial on 14 August 2014 and entered into force on 18 August 2014.

The Law has three major consequences: (1) the obligation for issuers of bearer shares or unit issued before the 18 August 2014 to appoint a depositary before the 18 February 2015; (2) the obligation for each holder of bearer shares or units issued since 18 August 2014 to deposit those with such depositary before 18 February 2016; and (3) the cancellation of bearer shares or units which have not been immobilised on 18 February 2016 and the reduction of capital of the issuer by a corresponding amount.

The Law therefore gives an end to the free transfer of bearer shares or units by physical delivery of the certificate in order to ensure the proper identification of the holders of bearer shares or units.

What's in there?

On 5 February 2016, the Luxembourg Caisse de Consignation ("CDC") released its first Q&A on the Law and in particular, regarding the cancellation of bearer shares and units.

Firstly, the Q&A recalls the scope of the law (question 1) and the transitional measures for companies that have issued shares before the 18 August 2014 (question 2) and after that date (question 3).

Secondly, the Q&A clarifies the regime for the cancellation of bearer shares and the corresponding capital reduction process as summarised below:

⋆**Determination of the amount of capital reduction of non-immobilised bearer shares** - Question 4 provides that the cancellation shall be carried out at a price obtained as follows:

$$\textbf{Price} = P - \left[\left(\frac{\text{Number of shares cancelled}}{\text{Total number of shares}} \right) \times D \right]$$

Where P and D being as follows:

$$P = \frac{\text{Amount of the own capital of the company as shown in last balance sheet } \textbf{(1)} \text{ of the company}}{\text{number of share or units issued by the company}}$$

D = amount of premiums+reserves **(2)** *+ fees and charges* **(3)**

(1) *The balance sheet of the company shall be drawn up at a date, which cannot exceed 2 months prior to the cancellation decision.*
(2) *The reserves that may not be distributed under the Law or the articles of incorporation.*
(3) *The fees and charges shall be related to the deed of capital reduction as well as premium.*

⋆**Decision of capital reduction (Question 5)** - Eventhough it is not possible to proceed to a capital reduction for undertakings for collective investment constituted for instance as FCPs or as SICAVs, the provision of the Law shall apply on a case-by-case basis to these entities. Therefore, for these two type of entities, the decision to cancel shares shall be the responsibility of the management body as provided for in the Law. The capital reduction if any, shall be decided in a meeting of the shareholders convened by the management body. The voting process shall be subject to the quorum and majority rules applicables, without taking into account the shares or units suspended. The convening notices to the general meeting are also subject to the relevant legal provisions and as the case may be the articles of incorporation.

⋆**Procedure to deposit assets** - **(Question 6)** - The company shall submit to the CDC the following set of documents when depositing the assets, including additional set of documents which are required in case of deposit other than cash:

- A confirmation duly signed by the company's legal representative or authorised person including certain information further described in the Q&A;
- A certified true copy of the deed of capital reduction as resolved in the extraordinary general meeting of the shareholders, or the minutes of a decision of the management body in the case of SICAVs and FCPs (following the decision of the management company);
- A copy of the specimen certificate for each category of outstanding bearer shares;
- A certified true copy of the decision to make a deposit (if such a resolution has been passed separately from the resolution for a capital reduction);
- The original of the mandate that the management body has given to the person making the deposit to the CDC, duly authorising that person to make that deposit and to file all the above-mentioned documents;
- For assets other than cash, a certificate attesting that the value of the assets shall correspond to the price of the shares or units cancelled and should be divisible in as many equal portions as shares or units cancelled (or smaller denominations, if any);
- For deposit other than cash, the Company shall submit in addition to the above-mentioned documents, a certificate with all relevant documentation attesting the value of the assets deposited corresponds to the price of shares or units that are cancelled and that the assets are divisible in as many equal portions as the number of cancelled shares.

⋆**Tax and fees regimes - Question 7** clarifies that deposits are subject to a deposit fee (determined on the basis of the accounting value of the assets that are deposited) of 1% per year for cash and 2% per year for other assets for which deposits accounts are regularly opened; and potential specific custody fees, which will be paid annually by deduction on the income, and where applicable, on revenues regenerated by the deposited assets. Any restitution will be subject to prior settlement of all remaining fees by the beneficiaries.

⋆**Repayment of assets cancelled - Question 8** details the documents that shall be presented to the CDC by the holder of the bearer shares cancelled to receive the price corresponding to the capital reduction (amongst other the original certificate(s) representing the shares cancelled, written confirmation duly filed in stating the holder's last name and first name, the corporate denomination or company name) and the number of shares held.

THE Q&A IS AVAILABLE HERE.

What's next?

CDC is expected to update its Q&A when new questions are received. Bearer shares or units not immobilised by 18 February 2016 shall be cancelled.

DORMANT OR INACTIVE ACCOUNTS

CSSF Circular on the management of dormant or inactive accounts by credit institutions

Background

The international character of Luxembourg as a financial market place and considering that many customers are physically located outside from the Grand Duchy may result in the proliferation of dormant or inactive accounts especially for banks dealing with international customers.

In the absence of a current legal framework, professionals concerned by the subject would welcome guidance, until the EU legislation dealing with the relevant topic is implemented in Luxembourg.

What's in there?

On 28 December 2015, the CSSF issued circular 15/631 (the "Circular") which is aimed at harmonisation of the market practice in the field of dormant or inactive accounts and safeguard Luxembourg financial market from a legal perspective.

The circular is divided in 5 sections as summarised below:

⋆**Scope**

- The Circular applies to credit institutions but also professionals of the financial sector holding or managing third party deposit account;
- The Circular set forth the definition of "account" which includes the business relationship between the professional and the account customer of any nature (cash account, security account…).

⋆**Obligations imposed on professionals for avoiding existing accounts to become dormant or inactive accounts**

- Under MiFID/MiFIR and AML laws, each professional is required to maintain a regular relationship with its account customers (preferably on an annual basis) and shall monitor this relationship with due care and vigilance to prevent loss of contact with the customer;
- The professional shall set rules to determine where the account shall be considered as dormant or

inactive and follow the CSSF guidance on the dormant accounts;
- In order to determine whether an account is dormant, the professional shall consider if (i) there was no communication from the account holder or its representative for the last six years and if (ii) in the last three years, no transaction has been recorded on the account of the customer or the person acting on his behalf (no wire transfer instructions, no withdrawal of deposits, no selling or buying order…).

⋆**Obligations imposed on professionals holding or managing a dormant account**
- The professional must set up internal detailed procedures in order to identify the inactive relationships in order to monitor outstanding amounts on those dormant accounts;
- Where a relationship is qualified as dormant, the professional shall try to re-establish contact with its account holder by all adequate communication means;
- Any initiative generating costs in order to re-establish the relationship with the account holder shall be assessed under the proportionality approach;
- The professional shall monitor the dormant accounts.

⋆**Unclaimed assets on dormant accounts**

Where it is established that an account is dormant, and where attempts to re-establish contact with the account holder have been unsuccessful, the professional shall continue to manage the assets of the account holder with due care. Administrative fees shall be collected by the professional if they do not excess the value of the deposits and if they can be justified.

⋆**No limitation period the obligation to return the assets**

Under article 2236 of the civil code, the professional shall never under any circumstances enjoy any right of acquisitive prescription in respect of those assets.

THE CIRCULAR IS AVAILABLE HERE.

What's next?

The Circular is applicable immediately.

UCITS V

Advice of the Luxembourg Council of State on UCITS V Bill

Background

The Directive 2014/91/EU (the "UCITS V Directive") will have to be transposed into Luxembourg law by 18 March 2016. The bill 6845 (the "Bill") implementing the UCITS V Directive has been deposited with the Luxembourg Parliament on 5 August 2015. It amends two laws, namely the Luxembourg law of 17 December 2010 regarding the collective investment undertakings as amended (the "UCI law") and the Luxembourg law of 12 July 2013, as amended (the "AIFM law") relating to alternative investment fund managers.

The Bill aims at the transposition in Luxembourg law of three main topics, relating to UCITS depositaries functions, to the remuneration of UCITS managers aiming to avoid excessive risk taking and finally, to administrative sanctions in case of breaches of the obligations applying to UCITS and their managers.

The depositary regime applicable to Part II UCIs will be aligned with the regime applicable to the UCITS.

The Bill also provides for the introduction of a requirement applying to alternative investment fund managers to have recourse to an auditor for the checking of their financial accounts and for the possibility to allow them to offer services on a cross-border basis.

What's in there?

On 20 January 2016, the Luxembourg Council of State (the "Council of State") published its Advice N°6845/2 on the Bill (the "Advice").

The main points raised by the Advice on the Bill are the following:

⋆The definition of the "management body", as transposed in the Bill, should be contemplated in a clearer manner and should have a single possible interpretation in all contexts. The Council of State states in this regard that the proposed definition does not match the definition given by the UCITS V directive and could therefore be misleading. In this context, the Council of State suggests a new definition with a single possible interpretation (article 2 of the Bill);

⋆The Council of State notes that the Bill uses the terms "time limits" instead of the terms "usual time limits" included in the UCITS V directive. The latter definition should therefore be used (article 4 of the Bill);

⋆The exact meaning and the concrete application of article 19, paragraph 5, regarding the possibility for the investors to invoke directly or indirectly the responsibility of the depositary through the management company as long as it does not allow the repetition of recourses or the unequal treatment of the unitholders. Further precisions regarding this subject are also requested by the Council of State (article 6 of the Bill);

⋆The Council of State requests that article 101-1, paragraph 4 of the UCI law should be further completed in the Bill by specifying the fact that management companies managing Part II funds will no longer be governed by the depositary regime of the AIFM law but rather by the depositary regime of the UCITS V directive (articles 16 to 18 of the Bill);

⋆The Council of State notes that contrarily to what is included in the Bill, the Luxembourg law does not allow the CSSF to request data to telecommunication operators. Therefore, it is formally opposed to the fact that the Bill allows the CSSF to access to data belonging to telecommunication operators (article 25 of the Bill).

⋆The Council of State requests that regarding the various infringements mentioned in the new article 148 of the UCI law, the concerned persons and corporate bodies should be precisely listed in the related article (article 26 of the Bill);

⋆The Council of State notes that there is a double use of administrative sanctions in article 147 and 148 of the UCI law and requests a clarification of the field of application of each article (article 26 of the Bill);

⋆The Council of State requests the introduction in the Bill of the possibility of a reversal on appeal (article 26 of the Bill).

THE ADVICE IS AVAILABLE HERE.

What's next?

The Advice will be addressed to the Parliament for consideration.

TAX UPDATES

TAXE D'ABONNEMENT

Mandatory electronic filing of returns with regard to the taxe d'abonnement by mutual funds and specialized investment funds (Luxembourg)

Background

On 29 January 2016, the Council of government adopted a bill, which, amongst others, will introduce mandatory electronic filing of returns with regard to the taxe d'abonnement by mutual funds and specialized investment funds.

What's in there?

The bill is part of a modernization process of procedures for the administration with regard to the registration and handling of the taxe d'abonnement, registration tax and the mortgage system.

First of all, collective investment vehicles and specialized investment funds will be required to send their statements for the taxe d'abonnement to the administration electronically as from 1 January 2018.

With regard to registration and the mortgage system, the purpose is to deal with the consequences of the dematerialization of procedures following the introduction of IT tools making records in paper form unnecessary.

THE LINK IS AVAILABLE HERE.

What's next?

The draft of law is not yet published, new developments are expected soon.

TAXATION OF NON-RESIDENT INVESTMENT FUNDS

Financial Court Decision on Taxation of Non-Resident Investment Funds (Germany)

Background

On 10 February 2016 the German Federal Financial Court published a decision of 17 November 2015 ruling on the taxation of foreign investment funds.

What's in there?

According to German legislation, investment funds are generally treated as transparent for tax purposes as long as they notify their investors of their performance in line with the requirements set forth by the law and on an annual basis. If the notification requirements are not met, the investors are taxed on the total of distributions received as well as 6% of the closing redemption price (or market value, if available).

In the particular court case at hand, a German resident taxpayer who had invested in an investment fund resident in the US and later appealed against the unfavourable flat-rate taxation. The German Federal Financial Court (Bundesfinanzhof) ruled in favour of the taxpayer referring to a previous ECJ decision where it was held that the respective German legislation is incompatible with free movement of capital, as it does not allow the taxpayer the opportunity to provide evidence that could prove the actual size of the income.

Consequently, the Court annulled its decision in order to allow the taxpayer to provide relevant evidence to prove the actual size of his income arising from the US investment fund.

THE LINK IS AVAILABLE HERE.

What's next?

The decision of the Federal Financial Court is not in line with the official guidance issued by the Ministry of Finance, according to which taxpayers must be offered the opportunity to provide evidence only if they have invested in EU/EEA investment funds.

NET ASSET TAX

Net Asset Tax applies to foreign investment funds (Belgium)

Background

On 21 January 2016 an Opinion issued by the European Court of Justice Advocate General stated that the Belgian Net Asset Tax ("NAT") applied to foreign investment funds is compatible with European law.

What's in there?

The Advocate General recommends the CJEU to conclude that the relevant EU provisions do not preclude the levying of the NAT.

Moreover, he also addresses the harsh sanction provided in the NAT legislation, which implies the prohibition of non-Belgian UCIs from continuing to market their units in Belgium when they fail to submit their tax declarations or pay the tax in a timely manner. As this sanction is only applicable to non-Belgian UCIs and not to Belgian UCIs, the Advocate General considers that this sanction constitutes a direct discrimination precluded by the freedom to provide services.

The link is available HERE and HERE.

What's next?

Awaiting the final outcome, Luxembourg and other foreign UCIs (established in DTT countries) can still envisage safeguarding their rights for recovery of the NAT.

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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