3W - Fund Distribution Watch

What's new in the cross-border distribution world?

January to March 2020

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Editorial

New Swiss rules at the point of sale for offering and marketing funds in Switzerland

The new rules in a nutshell

With effect from 1 January 2020, the new Swiss Financial Services Act (FinSA) and Financial Institutions Act (FinIA) have materially changed the regulatory requirements for offering funds in Switzerland. On the one hand, FinSA imposes new obligations for the distribution process and distributors of funds; on the other hand, it alleviates the requirement to have a representative and paying agent when offering funds to "per se" qualified investors. A transition period until 31 December 2021 applies to most of these new obligations; however, the obligation to affiliate with an ombudsman and to register on a client advisor register enter into force earlier.

Fund distribution is a financial service under the new regime

The distribution of funds at the point of sale to clients in Switzerland now qualifies as a financial service under FinSA, triggering the following new obligations:

- Client advisor registry: Client advisors of financial service providers – meaning any natural person who distributes funds to clients in Switzerland – must be entered into the newly established Swiss Client Advisor Register no later than six months after the first client advisor registry is licensed by the Swiss Financial Market Supervisory Authority (FINMA). Prudentially supervised fund distributors must be registered if they distribute funds to private clients in Switzerland, as must non-prudentially supervised fund distributors, regardless of the classification of their clients in Switzerland (institutional, professional or private). Sufficient knowledge of fund distribution must be proven (see https://www.webassessor.com/finsaclientadvisortest for further information).
- Financial services ombudsman: Fund distributors must affiliate with a financial services ombudsman no later than six months after the first financial services ombudsman is recognised.
- Duty to segment clients: Clients must be divided into the categories of institutional, professional and private.
- Duty to inform: Prior to distributing funds or when entering into a contract, financial service providers must provide information about the risks, costs, financial services provided, and financial instruments offered.
- Organisational obligations: Financial service providers must be adequately organised; conflicts of interest must be adequately addressed; retrocessions must be allocated to the client unless there has been an explicit waiver; and employees must be adequately monitored and trained.
- Duty to render accounts: If requested to do so, financial service providers must render accounts on the financial services that have been provided.

New obligations applicable to the offering and advertisement of funds in Switzerland

Funds creators that offer funds in Switzerland aimed at private investors must – as under the old regime – appoint a representative and a paying agent, and must have the fund documents approved by FINMA. A key investor document (KID) must also be created. Offerings to high-net-worth individuals who have opted out require only the appointment of a representative and a paying agent. However, neither a representative or paying agent nor fund-document approval is required under the new regime if the offering is made to "per se" professional investors. This is a welcome relaxation of the previous provisions, and applies immediately. Advertisement precedes the offering of funds and must be designated as such in the marketing documentation

For further information, please contact:

Martin Liebi
PricewaterhouseCoopers Legal, Zürich, Switzerland
martin.liebi@ch.pwc.com
+41 76 341 65 43

Hot topics

Belgium

30 January 2020

FSMA indexes fees applicable to marketing of foreign UCITS and AIFS in Belgium

Pursuant to the Royal Decree of 17 May 2012 on the financing of the FSMA's operating expenses, the FSMA has recently indexed the fees applicable to public offerings of UCITS and AIFs in Belgium for the year 2020.

The indexed fees will now be invoiced by the FSMA further to any notification or registration file of a UCITS or AIF approved by the regulator, as described above.

Chile

29 January 2020

Reduction in minimum AuM requirement applicable to offshore alternative fund managers (AFMs) marketing their funds under private placement rules to Chilean pension funds and insurance companies

With effect from 17 December 2019, the Agreement and Section II.2.6 of the Pension Fund Investment Regime have been updated with regard to pension-fund investments in AIFs.

The minimum AuM requirement has been reduced from US$5 billion to US$2 billion. Therefore, as of the above date, the CCR requires that an AIFM have at least US$2 billion in AuM in the relevant asset class (private equity, private debt, infrastructure or real estate) at all times.

Europe

05 February 2020

MiFID II/MiFIR – Level 2 – ESMA consults on 3 draft technical standards on provision of investment services and activities in European Union by third-country firms until 31 March 2020

On 31 January 2020, ESMA issued its consultation paper on the proposed 3 Draft Technical Standards (ESMA35-43-2131 — the "Consultation Paper").

The Consultation Paper is primarily addressed at third-country firms providing investment services and activities in the European Union either (i) on a cross-border basis according to the national law of their host Member State, or (ii) though a branch in accordance with Chapter IV (Provision of investment services and activities by third-country firms) of Title II (Authorisation and operation conditions for IFs) of MiFID II, and their third-country competent authorities. It is also addressed at competent authorities in the European Union and firms that are subject to MiFID II and MiFIR.

RTS 27 if ESMA has not published any calibrated market sizes.

Italy

21 February 2020

Asset Management – EFAMA and SWIFT publish Joint Fund Processing Standardisation Report 2018

The CONSOB has updated his maintenance and annual fees to be paid for UCITS funds and alternative funds following recent European laws and recommendations regarding transparency on regulators fees.

Spain

21 February 2020

Regulatory fees for marketing UCITS and AIFs updated for 2020

Spanish Law 16/2014 of 30 September regulating the fees of the National Securities Market Commission (CNMV) provides that each person or entity involved or acting in the financial markets, without exception, pay the relevant applicable fees depending on the activities and services provided by the CNMV.

Since the 2020 budget act has yet not been approved, the 2018 budget act will apply and an increase of 1% will still be requested for the year 2020 as per Article 86 of Law 06/2018 on the Spanish Budget Act.

Luxembourg

07 January 2020

AML/CTF – CSSF issues Circular 19/732 clarifying identification and verification of identity of UBO(s)

On 23 December 2019, the Luxembourg Commission de Surveillance du Secteur Financier (CSSF) issued Circular 19/732 entitled "Prevention of Money Laundering and Terrorist Financing: Clarifications on the Identification and Verification of the Identity of the Ultimate Beneficial Owner(s) ["UBOs"]" ("Circular 19/732").

The aim of Circular 19/732, which is addressed at all professionals under the CSSF's AML/CTF supervision, is to provide guidance on the legal requirements applicable to the identification and verification of the identity of the UBO with a view to enhancing financial transparency.

Luxembourg

08 January 2020

BMR – CSSF issues Communiqué underlining various developments for concerned entities using benchmarks

Regulation (EU) 2016/1011 of the European Parliament (the "Parliament") and of the Council on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds ("IFs") entered into force on 30 June 2016 and has applied, with certain exceptions, since 1 January 2018. The BMR is relevant for any IF that uses any benchmark to assess its performance, to define asset allocation for its portfolio, or to compute its performance fees.

Regulation (EU) 2019/2089 of the Parliament and of the Council amending the BMR as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks entered into force on 10 December 2019 and is directly applicable.

On 24 December 2019, the Luxembourg Commission de Surveillance du Secteur Financier (the "CSSF") issued a communiqué on various developments concerning the BMR (the "Communiqué"), addressed at all entities that are subject to its supervision and are using benchmarks ("Concerned Entities").

Luxembourg

28 January 2020

UCITS Directive – CSSF reminds UCITS management companies of deadlines regarding ESMA Q&A updates on UCITS KIID benchmark disclosures

The requirements for key investor information documents ("KIIDs") for undertakings for collective investment in transferable securities ("UCITS") are specified in Commission Regulation (EU) No 583/2010 of 1 July 2010 implementing Directive 2009/65/EC as regards key investor information and conditions to be met when providing key investor information or the prospectus in a durable medium other than paper or by means of a website.

On 29 March 2019, the European Securities and Markets Authority ("ESMA") updated its Q&A document relating to the UCITS Directive by amending and adding new Q&As 4b and 4cbis (pages 14-15; Q&A 4c was deleted) regarding past performance, and new Q&As 8a, 8b and 8c (pages 17-22) regarding the disclosure of the benchmark index in the objectives and investment policies, in Section II entitled "KIID for UCITS".

On 27 January 2020, the Luxembourg Commission de Surveillance du Secteur Financier (the "CSSF") issued a communication regarding the ESMA Q&A Updates (the "Communication").

Luxembourg

13 March 2020

UCITS – CSSF issues Version 8 of FAQs concerning 2010 Law on undertakings for collective investment

Directive 2009/65/EC of the European Parliament and of the Council of the EU on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities ("UCITS") has applied since 30 June 2011. The UCITS Directive establishes a common regulatory and supervisory framework applicable to UCITS and their management companies ("ManCos") pursuing activities in the EU.

The UCITS Directive has been converted into Luxembourg legislation by the Law of 17 December 2010. Part I and Part IV of the UCI Law concern UCITS and ManCos, respectively.

The CSSF FAQs should be read in conjunction with the questions and answers, issued by the European Securities and Markets Authority (the "ESMA"), concerning the application of the laws and regulations governing UCITS.

On 10 March 2020, the CSSF issued version 8 of its FAQs ("CSSF FAQs V8") which provides some clarifications and amendments on the fees.

Belgium

30 January 2020

FSMA indexes fees applicable to marketing of foreign UCITS and AIFS in Belgium

Background

Pursuant to the Royal Decree of 17 May 2012 on the financing of the FSMA's operating expenses, the FSMA has recently indexed the fees applicable to public offerings of UCITS and AIFs in Belgium for the year 2020.

What's new?

When marketing a foreign UCITS or AIF in Belgium, the amounts to be paid to the FSMA following an initial or subsequent registration, as well as for the annual maintenance fees, have been amended.

The fees have been indexed as follows:

- Subsequent registration of new sub-fund in Belgium:
  - EUR 398 per compartment (Art. 29)
- Annual fees payable to local authority:
  - UCITS – EUR 2,718 to 2,720 per compartment (Art. 5, §4, 1°)
  - AIFs to professional investors – EUR 0 (Articles 32, 36 and 42 AIFMD)
  - AIFs to retail investors – EUR 16,977 to 16,989 EUR (Art. 5, §4, 2°; Article 43 AIFMD)

What's next?

The indexed fees will now be invoiced by the FSMA further to any notification or registration file of a UCITS or AIF approved by the regulator, as described above.

What is the impact for you?

The new fees apply when registering or notifying the above-mentioned products in Belgium, and when the annual regulatory fees are due for payment.

The fees have not been made available on the FSMA website.

Chile

29 January 2020

Reduction in minimum AuM requirement applicable to offshore alternative fund managers (AFMs) marketing their funds under private placement rules to Chilean pension funds and insurance companies

Background

As per Article 28 of CCR Agreement N°32 (the "Agreement"), until now, any offshore alternative fund manager seeking to obtain or maintain CCR approval for distribution under private placement to Chilean pension funds and insurance companies had to have at least US$5 billion in assets under management (AuM).

https://www.ccr.cl/uploads/metodologia/Agreement32.pdf

What's new?

With effect from 17 December 2019, the Agreement and Section II.2.6 of the Pension Fund Investment Regime have been updated with regard to pension-fund investments in AIFs.

The minimum AuM requirement has been reduced from US$5 billion to US$2 billion. Therefore, as of the above date, the CCR requires that an AIFM have at least US$2 billion in AuM in the relevant asset class (private equity, private debt, infrastructure or real estate) at all times.

What is the impact for you?

The AuM threshold to be maintained at all times is now at least US$2 billion in AuM in the relevant asset class.

Finland

09 January 2020

Tax Administration issues guidance on new tax rules for investment funds

Background

On 1 January 2020, the Finnish Tax Administration issued guidance on new tax rules for investment funds.

What's new?

The guidance provides details on the conditions required for a tax exemption based on the characteristics of the fund (Finnish fund, company limited by shares, or transparent partnership).

In any case, the taxpayer has to provide evidence that they fulfil all of the requirements for the tax exemption.

The link is available here (in Finnish and Swedish only).

What's next?

PwC will keep you updated on further developments.

What is the impact for you?

For your information only.

24 January 2020

Finnish Parliament approves bill on mandatory disclosure rules

Background

On 16 December 2019, the Finnish Parliament approved a bill following Council Directive (EU) 2018/822 as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, which was published on 5 June 2018.

What's new?

The law on the exchange of cross-border tax arrangements and mandatory disclosure entered into force on 1 January 2020 and will be effective from 1 July 2020. There is also a retrospective effect for arrangements implemented on or after 25 June 2018.

The link is available here (in Finnish and Swedish only).

What's next?

Guidelines on the interpretation of the law and reporting procedures are expected in March or April 2020.

What is the impact for you?

For your information only.

France

16 March 2020

Sustainable finance and collective investment schemes: the AMF publishes authoritative literature on investor information on 11 March 2020

What's new?

Driven by growing investor demand, the offering of funds integrating environmental, social and governance criteria is accelerating.

While the rapid development of "sustainable" management is unquestionably a very positive development, the growth in commercial arguments regarding these issues does raise questions about proper investor information, especially the information aimed at retail investors and more particularly the issues of preventing the risk of "greenwashing".

The AMF, which is responsible for ensuring that the information provided to investors is clear, accurate and not misleading, has published a Recommendation (DOC-2020-03) aimed at ensuring that non-financial factors are considered in the investment process and that their place in investor communications is proportional to the reality of the situation. This means that the investors should have greater clarity in the offer in order to enhance their protection when they show an interest in investments which emphasise the consideration of non-financial criteria.

Funds that wish to highlight the consideration of non-financial criteria as a central element of communication will have to comply with the minimum standards specified by the AMF Recommendation and more precisely justify an approach based on a significant commitment.

Measurable objectives for taking non-financial criteria into account must be included in regulatory documents such as the prospectus. These measurable objectives must be meaningful to ensure a real distinction between the approaches.

The Recommendation applies immediately to new collective investments, changes to existing collective investments and new notifications to the AMF of the marketing in France of a foreign UCI. For existing products, the name, marketing documentation and KIID must be updated by the end of November 2020.

This first stage does not cover all the issues relating to the quality of non-financial disclosures on collective investment schemes and is part of a process of gradual improvement in practices. In particular, important issues such as the quality and relevance of the non-financial data used or the measurement of the potential impact of the strategies implemented are not addressed in this authoritative literature.

The AMF may need to refine its policy or adapt it in line with changes in market practices and European legislation such as the "Disclosure" Regulation. The French regulator is also working to clarify the disclosure procedures for funds that take non-financial criteria into account in their investment process without making them a central commitment.

What is the impact for you?

For more information in this regard, please consult the AMF's Recommendation (DOC-2020-03).

Germany

10 January 2020

Bundestag adopts Act on mandatory reporting of cross-border tax-planning arrangements

Background

On 12 December 2019, the Bundestag adopted a law introducing the mandatory reporting of cross-border tax-planning arrangements. The law includes the amendments recommended by the Finance Committee. Some other tax regulations have also been amended as part of this law. As this is a statute requiring assent, the approval of the Bundesrat is required.

What's new?

The government bill introduces important amendments to the bill on cross-border tax arrangements; among others, the definition of a "tax advantage" has been supplemented and some amendments to reporting obligations have been made.

Moreover, the ability to offset losses on income from forward transactions and from losses on investments held as private assets has been limited.

The link is available here.

What's next?

PwC will keep you updated on further developments.

What is the impact for you?

For your information only.

Europe

3 January 2020

Sustainable finance – Level 3 – ESAs issue reports on undue short-term pressure on corporations

Background

On 8 March 2018, the European Commission (the "Commission") issued its "Action Plan: Financing Sustainable Growth" (COM(2018) 97 final - the "Action Plan", available here), which aims to:

1. reorient capital flows towards sustainable investment in order to achieve sustainable and inclusive growth;

2. manage financial risks stemming from climate change, resource depletion, environmental degradation and social issues; and

3. foster transparency and long-termism in financial and economic activity.

On 1 February 2019, the European Banking Authority (the "EBA"), the European Insurance and Occupational Pensions Authority ("EIOPA") and the European Securities and Markets Authority ("ESMA") - together referred to as the European supervisory authorities (the "ESAs") - received a call for advice from the Commission to each develop a report presenting evidence of undue short-term pressure from the financial sector on corporations, and advising on possible further policy actions (the "Call for Advice", available here). The Call for Advice is part of Action 10 of the Action Plan, which aims to foster sustainable corporate governance and attenuate short-termism in capital relates to the above-mentioned third objective of the Action Plan.

What's new?

On 18 December 2019, in response to the Call for Advice, the ESAs each issued a report on undue short-term pressure from the financial sector on corporations (EIOPA-BOS-19-537 the "EIOPA Report"; and ESMA30-22-762 the "ESMA Report").

The EBA Report assesses the potential presence and drivers of short-termism by looking at potential short-term pressures exerted by banks on corporate clients, and potential short-term pressures that banks may be under from shareholders and capital markets. Furthermore, the EBA Report assesses whether banking regulations play a role in exacerbating or mitigating short-termism. Overall, based on an analysis of available qualitative and quantitative sources, the EBA Report identifies limited concrete evidence of short-termism but cannot necessarily label it systematically as undue. This is at least partly due to methodological constraints, data availability and the inherent difficulty in measuring undue short-termism.

The EIOPA Report states that no clear evidence of undue short-termism in insurance and institutions for occupational retirement provision ("IORPs") was found, although their investment practices are sensitive to macroeconomic circumstances such as the persistent low interest-rate environment.

In a press release on the ESMA Report (the "Press Release", available here), EMSA's Chair stated: "Short-termism in securities markets is often the cause of companies failing to take into account long-term objectives and the sustainability of their strategy and investment decisions. […] The short-term performance pressures on companies can result in an excessive focus on immediate profit extraction hindering them in meeting sustainability goals."

For further information, please consult the EBA Report, the EIOPA Report and the ESMA

What's next?

The EBA Report recommends that the Commission and the EU legislators:

- maintain a robust regulatory prudential framework;
- foster the adoption of longer-term perspectives by institutions through more explicit legal provisions on sustainability;
- continue to enhance disclosures of long-term risks and opportunities by both corporations and banks; and
- improve information flows and data access and support the role of the banking sector in raising awareness of sustainability challenges and environmental, social and governance ("ESG") risks.

The EIOPA Report recommends:

- developing a cross-sectorial framework with the aim of promoting long-term investments and supporting sustainable economic growth at EU level; and

- facilitating the generation and publication of long-term performance benchmarks to increase the focus on long-term value creation rather than immediate shareholders' interests or excessively short-term profitability objectives.

The ESMA Report recommends that the Commission take action in key areas, such as:

- disclosure of ESG factors, including:
  - amending Directive 2014/95/EU (the "Non-Financial Reporting Directive", available here);
  - promoting a single set of international ESG disclosure standards;
  - requiring the inclusion of non-financial statements in annual financial reports; and
- institutional investor engagement, including:
  - a review of the "White List", i.e. a list of activities on which shareholders can cooperate without the presumption of acting in concert under Directive 2004/25/EC (the "Takeover Bids Directive", available here);
  - a potential shareholder vote on the non-financial statement; and
  - monitoring the application of Directive (EU) 2017/828 (the "Shareholder Rights Directive II", available here).

What is the impact for you?

For your information only.

6 January 2020

CRR – Level 2 – Commission Implementing Regulation (EU) 2019/2091 amends list of closely correlated currencies

Background

Regulation (EU) No 575/2013 of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms has applied, with certain exceptions, since 1 January 2014 (the "CRR", latest consolidated version available here).

Article 354(1) of the CRR provides that institutions may provide lower own-funds requirements against positions in relevant closely correlated currencies. Article 354(3) provides that the European Banking Authority (the "EBA") develop draft implementing technical standards ("Draft ITS") listing such closely correlated currencies and submit these for adoption to the European Commission (the "Commission").

On 28 November 2015, Commission Implementing Regulation (EU) 2015/2197 laying down ITS with regard to closely correlated currencies in accordance with the CRR ("IR 2015/2197", available here) was published in the Official Journal of the EU (the "OJEU"). IR 2015/2197, which entered into force on 18 December 2015, lists in its Annex the closely correlated currencies that meet the requirements of Article 354(1) of the CRR.

On 22 October 2018, Commission Implementing Regulation (EU) 2018/1580 amending IR 2015/2197 ("IR 2018/1580", available here) was published in the OJEU. IR 2018/1580 entered into force on 11 November 2018. Article 1 of the IR 2018/1580 provides that its Annex replace the Annex to IR 2015/2197.

What's new?

On 9 December 2019, Commission Implementing Regulation (EU) 2019/2091 amending IR 2015/2197 was published in the OJEU ("IR 2019/2091").

Paragraph 1 of the preamble of IR 2019/2091 states that it is necessary to update the list of closely correlated currencies to ensure that the currency pairs referred to in the Annex to IR 2015/2197 continue to reflect the actual correlation between the relevant currencies. Thus, Article 1 of IR 2019/2091 provides that its Annex replace the (amended) Annex to IR 2015/2197.

Paragraph 2 of the preamble of IR 2019/2091 states that the list of closely correlated currencies uses 31 March 2018 as the end date for the purpose of computing the three- and five-year data series required to assess the currency pairs in accordance with the CRR.

IR 2019/2091 is available here.

What's next?

IR 2019/2091 entered into force on 29 December 2019.

The Commission will, when necessary, continue to update the list of closely correlated currencies in the Annex to IR 2015/2197 by means of implementing regulations.

What is the impact for you?

For your information only.

6 January 2020

Financial stability – Level 3 – ESRB publishes Recommendation on exchange and collection of information for macroprudential purposes on branches of credit institutions having their head office in another MS or in a third country (ESRB/2019/18)

Background

The European Systemic Risk Board (the "ESRB"), which is the macro-prudential pillar of the European System of Financial Supervision ("ESFS"), was established by Regulation (EU) No 1092/2010 ("Regulation 1092/2010", available here). Regulation 1092/2010 entered into force on 16 December 2010.

The ESRB is responsible for the macro-prudential oversight of the EU financial system and for preventing and mitigating systemic risk. The ESRB therefore has a broad remit, covering banks, insurers, asset managers, shadow banks, financial-market infrastructures and other financial institutions and markets. In pursuit of its macro-prudential mandate, the ESRB monitors and assesses systemic risks and, where appropriate, issues warnings and recommendations. In addition, sector-specific EU legislation mandates the ESRB to issue opinions with regard to certain matters of financial stability or macroprudential policy.

What's new?

On 9 December 2019, the Recommendation of the ESRB on exchange and collection of information for macroprudential purposes on branches of credit institutions having their head office in another Member State ("MS") or in a third country (ESRB/2019/18 the "Recommendation") was published in the Official Journal of the EU (the "OJEU").

Section 1 of the Recommendation comprises the following:

- Recommendation A — Cooperation and exchange of information on a need-to-know basis:
  - Recommends that the relevant authorities exchange information deemed necessary for the discharge of their tasks related to the adoption and/or activation of macroprudential policy measures or for other financial stability tasks, in an effective and efficient manner, as regards branches in a host MS of credit institutions having their head office in another MS or in a third country; and
  - Recommends that the relevant authorities establish memoranda of understanding or other forms of voluntary arrangements for cooperation and exchange of information among themselves — or with a relevant authority of a third country — regarding branches in the host MS of credit institutions having their head office in another MS or in a third country, where considered necessary and appropriate by all parties involved to facilitate the exchange of information.
- Recommendation B — Changes to the EU legal framework:
  - Recommends that the European Commission (the "Commission") assess whether any impediments exist in EU legislation that prevent authorities entrusted with the adoption and/or activation of macroprudential policy measures or with other financial stability tasks from having or obtaining the necessary information on branches to carry out those functions or fulfil those tasks; and
  - Recommends that the Commission propose that EU legislation be amended to remove any such impediments, where it concludes, as a result of its assessment, that such impediments exist.
- Recommendation C — Guidelines for and the monitoring of exchange of information:
  - Recommends that the European Banking Authority (the "EBA") issue guidelines in accordance with Recommendation A for the exchange of information between relevant authorities regarding branches of credit institutions having their head office in another MS, which should include a list of information to be exchanged, as a minimum, on a need-to-know basis, and within the limits of applicable EU and national laws. Recommendation C sets out what such a list should include, as a minimum, at both branch and parent-group/parent-institution level; and
  - Recommends that the EBA monitor on a regular basis, in cooperation with the ESRB, the effectiveness and efficiency of the exchange of information between relevant authorities regarding branches of credit institutions having their head office in another MS or in a third country.

For further information, the Recommendation is available here.

What's next?

Subsection 3 of Section 2 of the Recommendation provides that addressees be requested to report to the ESRB and to the Council of the EU (the "Council") on the actions taken in response to the Recommendation, or to adequately justify any inaction, in compliance with the following timelines:

- Recommendation A:
  - By 31 December 2020, the relevant authorities are requested to deliver to the ESRB and to the Council an interim report on the implementation of Recommendation A;
  - By 31 December 2024, the relevant authorities are requested to deliver to the ESRB and to the Council a final report on the implementation of Recommendation A, taking into account the potential changes to national and EU law and to the EBA guidelines.
- Recommendation B:
  - By 31 December 2022, the Commission is requested to deliver to the ESRB and to the Council a report on the implementation of Recommendation B.
- Recommendation C:

By 31 December 2023, the EBA is requested to deliver to the ESRB and to the Council a report on the implementation of Recommendation C.

What is the impact for you?

For your information only.

9 January 2020

Transparency Directive – Level 3 – ESMA issues Report on use of APMs by issuers and on compliance with its APM Guidelines

Background

The European Securities and Markets Authority (the "ESMA") may issue guidelines under Article 16 of Regulation (EU) No 1095/2010 (the "ESMA Regulation", latest consolidated version available here) in relation to the acts referred to in Article 1(2) of the ESMA Regulation, which include Directive 2004/109/EC (the "Transparency Directive", latest consolidated version available here).

On 3 July 2016, the ESMA Guidelines on Alternative Performance Measures ("APMs") became applicable. According to Paragraph 17 of the Guidelines, an APM is a financial measure of historical or future financial performance, financial position or cash flows, other than a financial measure defined or specified in the applicable financial reporting framework. The Guidelines apply in relation to APMs disclosed by issuers or persons responsible for the prospectus when publishing regulated information or prospectuses (including supplements thereto). Examples of regulated information are management reports disclosed to the market in accordance with the Transparency Directive, and ad hoc disclosures (e.g. annual earnings results published in accordance with Article 17 of the Market Abuse Regulation, latest consolidated version available here).

Paragraph 5 of the Guidelines provides that the Guidelines apply to APMs disclosed by issuers or persons responsible for the prospectus when publishing regulated information or prospectuses on or after 3 July 2016. In accordance with Article 16(3) of the ESMA Regulation, issuers or persons responsible for the prospectus, as well as competent authorities, must make every effort to comply with the Guidelines.

What's new?

On 20 December 2019, ESMA issued a report on the use of APMs and on compliance with the Guidelines (ESMA32-334-150 — the "Report").

The Report reveals that all issuers — in a sample of 123 issuers from 27 European Economic Area ("EEA") countries that apply the APM Guidelines (excluding Denmark, Croatia, Iceland and Liechtenstein) — use APMs in their communications to the market (see Section 4 of the Report). When analysing the use of APMs by sector and market capitalisation, ESMA observed that, on average, more APMs are disclosed in the energy, healthcare and financial sectors and by large issuers. Significant differences are found in the type of APMs used between issuers in the non-financial sector and those in the financial sector. The most commonly used APMs in the non-financial sector in both management reports and ad hoc disclosures are earnings before interest and taxes ("EBIT"); operating results; earnings before interest, taxes, depreciation and amortisation ("EBITDA"); and net debt. The most commonly used APMs in the financial sector are net interest income, cost-to-income ratio, and return on equity ("ROE").

Furthermore, the Report states that ESMA reviewed the management reports of 123 issuers and the ad hoc disclosures of 106 issuers, finding that only 16 and 10 issuers respectively fully complied with all principles of the Guidelines in relation to all APMs used (see Section 5 of the Report). ESMA notes that all the remaining issuers partially complied with the Guidelines, either by complying with all principles but not in relation to all APMs, or by complying with some principles in relation to all APMs. ESMA observed a good level of compliance in relation to the principles in the Guidelines regarding comparatives, consistency and the unbiased nature of the APMs reported. However, shortcomings were identified in relation to compliance with the principles in the Guidelines regarding explanations, reconciliations and definitions. These findings apply across all types of documents analysed, including prospectuses. Issuers' overall compliance with the Guidelines is lower in ad hoc disclosures than in management reports.

For further information, the Report is available here.

What's next?

ESMA expects issuers to consider the findings of the Report when preparing management reports, ad hoc disclosures and prospectuses. A set of recommendations is included in Section 5.4 of the Report.

Regarding the use of APMs, ESMA will leverage the Report when it responds to projects such as the International Accounting Standards Board's (the "IASB") Primary Statements Project and Principles of Disclosure Project.

ESMA will continue to closely monitor developments and market practices in relation to the use of APMs. In this respect, ESMA will pay particular attention to the expected impact of IFRS 16 leases (available here) on the use of APMs, both in financial statements and elsewhere.

What is the impact for you? For your information only.

16 January 2020

AIFMD – Level 3 – ESMA publishes 2nd Annual Statistical Report on EU AIFs highlighting potential liquidity mismatch

Background

An important policy initiative in response to the global financial crisis is collecting data on alternative investment funds a_nt Fund Managers (the "AIFMD", available here), such that since July 2014, AIFMs have had to report detailed information on the AIFs they manage to national competent authorities ("NCAs").

On 7 March 2019, the European Securities and Markets Authority ("ESMA") published its first statistical report on EU AIFs, 2019 (ESMA50-165-748 — the "First Report", available here). The reporting period for the First Report was 31 December 2017, and the charts and analyses therein were based on data provided by the NCAs to ESMA under the AIFMD. The First Report covered data from 26,378 AIFs, or 80% of the market. Among other things, the First Report revealed that the EU AIF sector in 2017, as measured by net asset value ("NAV"), amounted to €4.9tn, or nearly a third of the total EU fund industry. The First Report included three sections, covering:

- market monitoring – including an analysis of structures and trends in EU AIF markets, building on the indicators developed for risk monitoring;
- statistical methods – focusing on the classification of funds in the 'other AIFs' category, as well as the exposure of AIFs to leveraged and collateralised loan obligations; and
- AIF statistics – setting out a list of indicators and metrics monitored by ESMA.

What's new?

On 10 January 2020, ESMA published its second statistical report on EU AIFs, 2020 (ESMA50-165-1032 — the "Second Report"). The reporting period for the Second Report is 31 December 2018, and its content is based on data from 30,357 AIFs, almost 100% of the market.

The Second Report reveals that the EU AIF sector in 2018, as measured by NAV, amounted to €5.8tn (+11% from the First Report), or nearly 40% of the total EU fund industry.

In a sector breakdown, the Second Report reveals that funds of funds ("FoFs") account for 14% of the industry, followed by real-estate ("RE") funds (12%), hedge funds ("HFs") (6%) and private-equity funds (6%). The remaining category, other AIFs, accounts for 61% of the industry, covering a range of strategies, with fixed income and equity accounting for 67%. Most AIFs are sold to professional investors (84%), but retail participation is significant at 16%, with the highest share in the FoF and RE categories. The Second Report also states that the two sectors with the highest percentage of retail investors are FoFs with 31% and RE with 21%.

For further information, the Second Report is available here.

What's next?

In the Second Report, ESMA found potential issues linked to "liquidity mismatch", especially for FoF and RE funds. Many of the funds in the RE sector offer daily liquidity (e.g. half of commercial RE funds offer daily liquidity to investors), which constitutes a structural vulnerability risk as they invest in illiquid assets while allowing investors to redeem their shares over a short time frame. For the FoF sector, ESMA notes that "more than 70% of FoFs are open-ended, with a majority offering daily redemptions. At the very short end, FoFs face a liquidity mismatch, with investors able to redeem 35% of the NAV within one day, whereas only 24% of assets can be liquidated within this time frame."

ESMA also stresses that HFs are exposed to "financing risk, as one third of their financing is overnight, but they tend to maintain large cash buffers, which are also used to meet future margin calls relating to derivatives [sic] positions."

ESMA will publish further statistical reports on EU AIFs annually.

What is the impact for you?

For your information only.

27 January 2020

PRIIPs Regulation – Level 3 – SMSG publishes advice on ESMA's closed consultation on draft amendments to PRIIPs KID

Background

Regulation (EU) No 1286/2014 of the European Parliament (the "Parliament") and of the Council of the EU (the "Council") on key information documents ("KIDs") for packaged retail and insurance-based investment products ("PRIIPs") has applied since 1 January 2018 (the "PRIIPs Regulation", latest consolidated version available here).

The European Commission (the "Commission") is empowered to adopt delegated and implementing acts to specify how competent authorities and market participants must comply with the obligations laid down in the PRIIPs Regulation (the "Implementing and Delegated Acts", available here). They include Commission Delegated Regulation (EU) 2017/653 laying down regulatory technical standards ("RTS") with regard to the presentation, content, review and revision of KIDs and the conditions for fulfilling the requirement to provide such documents ("Delegated Regulation 2017/653", latest consolidated version available here).

On 30 July 2019, the Joint Committee ("JC") of the European supervisory authorities (the "ESAs") sent a response letter to the Commission on the exclusion of three performance-scenario options in PRIIPs consumer testing. In this context, the ESAs would still consider the following options when consulting stakeholders on proposed amendments:

- Option 4 for structured products on the use of illustrative

performance scenarios only;

- Option 5 for insurance-based investment products ("IBIPs") on the inclusion of illustrative scenarios showing the performance drivers and returns at different time periods, as well as probabilistic scenarios; and
- Option 6 for IBIPs on the inclusion of past performance information showing average performance over different time periods.

On 16 October 2019, the JC of the ESAs launched its consolidated consultation on draft amendments to Delegated Regulation 2017/653 (JC 2019 63 – the "CP", available here). The purpose of the CP was twofold: (i) to make specific changes to allow the rules to be applied to investment funds that are expected to have to prepare a PRIIPs KID from 1 January 2022; and (ii) to address issues that have been identified by stakeholders and supervisors since the implementation of the PRIIPs KID in 2018. As part of the review of Delegated Regulation 2017/653, the Commission, in cooperation with the ESAs, undertook a consumer testing exercise to assess the effectiveness of different presentations of performance scenarios based on the Response Letter (see Section 4 of the CP). The responses to the CP, which stakeholders could submit until 13 January 2020, are available here.

What's new?

On 21 January 2020, the Securities and Markets Stakeholders Group (the "SMSG") of the European Securities and Markets Authority ("ESMA") issued its advice on the CP (ESMA22-106-2077 the "Advice").

Among others, the SMSG provides the following general comments (on pages 4-7 of the Advice):

- An interim targeted review i.e. "quick fix" of Delegated Regulation 2017/653 is no substitute for the necessary review of the PRIIPs Regulation. The SMSG underlines the fact that the amendments to Delegated Regulation 2017/653 could be made prior to the expected review of the PRIIPs Regulation. In order to avoid constant changes to the regulatory framework, the SMSG advises that any amendments to the PRIIPs KID resulting from the CP should not be implemented until the Commission completes its review of the PRIIPs Regulation;
- The SMSG states that performance scenarios should only be presented if they provide reliable, clear and meaningful information for retail investors. The SMSG considers that the best way to ensure that the information provided by performance scenarios is reliable would be to adapt the methodology by product category;
- The SMSG considers that any review of performance scenarios should aim to achieve an appropriate balance between the cost of implementation and the value that enhanced disclosure brings to investors, taking into account the reliability of the information provided by performance scenarios;
- The SMSG strongly recommends including past performance in the PRIIPs KID for all products except structured notes that past performance is not an indicator of future performance. Any information on past performance should therefore be accompanied by the clear warning that past performance is of no utility for predicting future performance; and
- The SMSG states that probabilistic scenarios are not the best solution for investment funds, for which it suggests using illustrative scenarios.

Furthermore, the SMSG provides specific comments (on pages 8-19 of the Advice) regarding:

- how future performance scenarios should be estimated;
- the reference rate;
- the risk premium;
- investors' reliance on, and the reliability of, future performance scenarios;
- how future performance scenarios should be presented;
- the role of simulated past performance in the construction of performance scenarios;
- other probabilistic approaches to estimating future performance scenarios;
- illustrative scenarios and structured products;
- illustrative scenarios and non-structured products (mainly investment funds);
- illustrative scenarios combined with past performance for non-structured products;
- how costs should be presented;
- the amendment proposed in the CP;
- how transaction costs should be estimated;
- the recommended holding period;
- multi-option products ("MOPs"); and
- future enhancements to the PRIIPs KID (database).

For further information, the Advice is available here.

What's next?

According to the CP, the ESAs intend to conclude their PRIIPs KID review around the end of Q1 2020. However, it should be underlined that in such a case, the ESAs would be acting against the SMSG's Advice regarding the timing issue. The ESAs will consider the feedback from respondents to the CP, as well as the results of the consumer testing exercise, when deciding on their final proposals. The results of the consumer testing exercise are expected in Q1 2020.

The CP provides that the ESAs submit their final proposals to the Commission shortly after concluding their PRIIPs KID review. These would then be subject to endorsement by the Commission, following which the Parliament and Council would be given the opportunity to express any objections to the amending RTS as adopted by the Commission.

What is the impact for you?

For your information only.

3 February 2020

UCITS liquidity-risk management – Level 3 – ESMA launches CSA with NCAs

Background

The UCITS regulatory framework includes a broad range of liquidity-risk management ("LRM") provisions that aim at ensuring that UCITS investors are able to redeem their investments on request. Compliance with the UCITS LRM rules contributes to ensuring financial stability, investor protection and the orderly functioning of financial markets.

What's new?

On 30 January 2020, ESMA announced the launch of a Common Supervisory Action (the "CSA") with the national competent authorities (the "NCAs") in order to supervise UCITS managers on LRM across the EU in a convergent manner (the "Announcement").

In particular, the CSA will involve the NCAs at the following two stages:

- First stage – The NCAs will request quantitative data from the majority of UCITS managers based in their respective Member States, to gain an overview of the supervisory risks faced; and
- Second stage – The NCAs will focus on a sample of UCITS managers and UCITS to carry out more in-depth supervisory analyses.

For further information, the Announcement is available here.

What's next?

The CSA will be conducted during 2020. The NCAs will share knowledge and experiences through ESMA to ensure supervisory convergence in the way in which they supervise LRM.

What is the impact for you?

For your information only.

3 February 2020

CRD/CRR – Level 3 – ECB publishes letter and recommendation on dividend distribution policies and 2019 SREP outcome

Background

Directive 2013/36/EU of the European Parliament (the "Parliament") and of the Council of the EU (the "Council") on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms ("CRD IV", latest consolidated version available here) and Regulation (EU) 575/2013 of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms (the "CRR", latest consolidated version available here) have applied since 1 January 2014. It should be noted that CRD IV and the CRR have been amended by Directive (EU) 2019/878 ("CRD V", available here) and Regulation (EU) 2019/876 ("CRR II", available here) respectively. While CRD V and CRR II both entered into force on 27 June 2019, the former will apply, with certain exceptions, from 29 December 2020, while the latter will apply, with certain exceptions, from 28 June 2021.

CRD IV requires supervisors to review how banks comply with the prudential rules laid down by CRD IV and the CRR. This annual supervisory review and evaluation process ("SREP") requires supervisors to assess the risks that banks face and check that banks are equipped to manage those risks properly. More specifically, the SREP considers a bank's business models, governance arrangements and internal control systems, as well as risks to capital and liquidity, while considering the results of supervisory stress tests.

The SREP has been run since the end of 2014 for significant institutions ("SIs") in the eurozone by the Single Supervisory Mechanism (the "SSM"), which is a network of national competent authorities ("NCAs") coordinated by an ad hoc "Banking Supervision" structure within the European Central Bank (the "ECB"). The ongoing supervision of SIs is performed by Joint Supervisory Teams ("JSTs") comprising supervisors from NCAs and the ECB. The SSM was established by Council Regulation (EU) No 1024/2013 conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions (the "SSM Regulation", available here), which entered into force on 3 November 2013. Regulation (EU) No 468/2014 of the ECB establishing the framework for cooperation within the SSM (the "SSM Framework Regulation", available here), which entered into force on 15 May 2014, lays down criteria for assessing whether banks are considered SIs – and are therefore under the ECB's direct supervision (the "Criteria", available here). Less significant institutions ("LSIs") are eurozone banks that do not fulfil any of the Criteria. LSIs are supervised by their NCAs, under the oversight of the ECB. In exceptional cases, the ECB may take over direct supervision

of LSIs.

What's new?

On 21 January 2020, the ECB published a letter from the Chair of its Supervisory Board, Andrea Enria, addressed to SIs supervised under the SSM regarding remuneration policies (SSM-2020-016 - the "Letter", available here). In the Letter, the ECB underlines the fact that it pays close attention to the dividend and remuneration policies of the financial institutions under its supervision, and in particular any impact that such policies may have on an institution maintaining a sound capital base.

Also on 21 January 2020, the ECB published its recommendation on dividend distribution policies (ECB/2020/1 - the "Recommendation", available here and here). The Preamble to the Recommendation mentions that a conservative distribution policy is considered part of adequate risk management and a sound banking system. The Recommendation provides the following:

- Paragraph 1 of Section I: Credit institutions should establish dividend policies using conservative and prudent assumptions in order, after any distribution, to satisfy the applicable capital requirements and the outcomes of the SREP;
- Paragraph 2 of Section I:
  - Concerns specific recommendations to credit institutions - designated as Category 1, 2 or 3 - paying dividends in 2020 for the 2019 financial year. Credit institutions that cannot comply with the Recommendation because they consider themselves legally required to pay dividends should immediately contact their JST;
  - Credit institutions designated as Category 1, 2 or 3 are also expected to meet the Pillar 2 guidance ("P2G"). If a credit institution operates or expects to operate below P2G, it should contact its JST immediately. The ECB will review why the credit institution's capital level has fallen, or is expected to fall, and will consider taking appropriate and proportionate institution-specific measures; and
  - In their dividend policy and capital management, credit institutions are also expected to take into account the potential impact on capital demand due to future changes in the EU's legal, regulatory and accounting frameworks. In the absence of specific information to the contrary, the future Pillar 2 requirements ("P2Rs") and P2G used in capital planning are expected to be at least as high as the current levels.
- Section II: The Recommendation is addressed at "significant supervised entities" and "significant supervised groups" as defined in points (16) and (22) of Article 2 of the SSM Framework Regulation; and
- Section III: The Recommendation is also addressed at the NCAs and designated authorities with regard to "less significant supervised entities" and "less significant supervised groups" as defined in points (7) and (23) of Article 2 of the SSM Framework Regulation.

On 28 January 2020, the ECB published the following aggregate outcome of its 2019 SREP (the "2019 Outcome", available here):

- The SREP Common Equity Tier 1 ("CET1") requirements and guidance (excluding systemic buffers and countercyclical buffer) for the 2019 cycle remained stable overall at 10.6%, as in the 2018 cycle;
- The business model remains a key supervisory focus, with supervisors highlighting banks' business-model sustainability as a key risk area in the 2019 SREP;
- Governance remains a risk area of particular supervisory concern due to deteriorating scores driven by limited effectiveness of management bodies, weaknesses in internal controls, poor data-aggregation capabilities and weak outsourcing arrangements;
- When the ECB conducted its first SREP in 2015, the volume of non-performing loans ("NPLs") held by SIs stood at around EUR 1 trillion (8% NPL ratio). By the end of September 2019, the volume of NPLs held by SIs had fallen to EUR 543 billion (3.4% NPL ratio);
- Operational risk driven by specific one-off losses and increased IT/cyber-risk for a number of SIs represents a key area of ongoing focus for supervisors; and
- Overall, the risk-management processes for capital and liquidity – the Internal Capital Adequacy Assessment Process (the "ICAAP") and the Internal Liquidity Adequacy Assessment Process (the "ILAAP") – show significant need for improvement, also in light of their role in the SREP, which will increase in the future.

It is of note that the 2019 Outcome includes aggregate data by business model and bank-by-bank information on P2Rs for the first time, in an effort to improve transparency. For the 2019 SREP cycle, 108 banks agreed to this disclosure or have already published the P2Rs on their own websites. The P2Rs are binding capital requirements determined via the SREP, which cover, and apply in addition to, risks that are underestimated or not covered by the minimum capital requirement (i.e. Pillar 1).

What's next?

The 2019 Outcome – whether in the form of capital add-ons or qualitative measures – applies to banks in 2020.

The ECB has published a table (available here) listing the names of the SIs along with their P2Rs (100% CET1 add-ons), determined during the 2019 SREP cycle, applicable from Q1 2020. The SIs listed have either already disclosed their P2Rs or have not done so but have given their consent to the ECB to publish them. Given that the ECB intends to publish the consolidated P2Rs of each bank or banking group, it has invited banks that have not already disclosed their P2Rs to approve their publication by the ECB.

What is the impact for you?

For your information only.

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5 February 2020

MiFID II/MiFIR – Level 2 – ESMA consults on 3 draft technical standards on provision of investment services and activities in European Union by third-country firms until 31 March 2020

Background

On 25 December 2019, Regulation (EU) 2019/2033 and Directive (EU) 2019/2034 on the prudential supervision of investment firms ("IFs") entered into force ("IFR 2019/2033", available here and here; and "IFD 2019/2034", available here, respectively).

IFR 2019/2033 and IFD 2019/2034 have introduced changes to the MiFIR (available here) and MiFID II (available here) regimes on the provision of investment services and activities in the European Union by third-country firms. Such changes include new reporting requirements from third-country firms to ESMA on an annual basis in accordance with Article 46 of MiFIR (recast), while also granting ESMA the power to ask third-country firms in the ESMA register to provide data relating to all orders and transactions in the EU, whether on own account or on behalf of a client, for a period of five years.

Under IFR 2019/2033 and IFD 2019/2034, ESMA is mandated to develop the following draft technical standards by 26 September 2020 (together the "3 Draft Technical Standards"):

- Draft regulatory technical standards ("RTS") to specify the information that the applicant third-country firm is to provide in the application for registration referred to in Article 47(4) of MiFIR and the information to be reported in accordance with 47(6a) of MiFIR;
- Draft implementing technical standards ("ITS") to specify the format in which the application for registration referred to in Article 47(4) of MiFIR is to be submitted and the information referred to in Article 47(6a) of MiFIR is to be reported; and
- Draft ITS to specify the format in which the information referred to in Article 41(3) and (4) of MiFID II is to be reported.

What's new?

On 31 January 2020, ESMA issued its consultation paper on the proposed 3 Draft Technical Standards (ESMA35-43-2131 — the "Consultation Paper").

The Consultation Paper is primarily addressed at third-country firms providing investment services and activities in the European Union either (i) on a cross-border basis according to the national law of their host Member State, or (ii) though a branch in accordance with Chapter IV (Provision of investment services and activities by third-country firms) of Title II (Authorisation and operation conditions for IFs) of MiFID II, and their third-country competent authorities. It is also addressed at competent authorities in the European Union and firms that are subject to MiFID II and MiFIR.

Stakeholders' feedback is expected on the following six questions:

- Q1 (on page 13): Do you agree with the list of information to be requested by ESMA from applicant third-country firms for registration in the ESMA register? If no, which items should be added or deleted and for which reasons? Please provide detailed answers;
- Q2 (on page 16): Taking into account the list of information in Article 46(6a) of MiFIR, as amended by IFR 2019/2033, do you agree with the list of information that third-country firms providing investment services and investment activities in the Union in accordance with Article 46 of MiFIR should report to ESMA on an annual basis? If no, which items should be added or deleted and for which reasons? Please provide detailed answers;
- Q3 (on page 16): Do you have any comments about the format details provided in the draft ITS under Article 46(8) of MiFIR? If no, what would you add, delete or amend and for which reasons? Please provide detailed answers;
- Q4 (on page 19): Do you agree with the additional details provided in the draft ITS under Article 41(5) of MiFID II? If no, what would you add, delete or amend and for which reasons? Please provide detailed answers;
- Q5 (on page 19): Do you agree with the cost benefit analysis as it has been described in Annex II?
- Q6 (on page 19): Are there any additional comments that you would like to raise and/or information that you would like to provide?

The 3 Draft Technical Standards are annexed to the Consultation Paper (Annex III on page 28, Annex IV on page 131 and Annex V on page 182).

For further information, the Consultation Paper is available here.

What's next?

Comments on the Consultation Paper must be submitted to ESMA via the dedicated response form (available here) by 31 March 2020.

ESMA will consider responses in Q2 expects to publish the

final texts of the 3 Draft Technical Standards and send the final report to the European Commission for endorsement in Q3 2020.

IFR 2019/2033 and IFD 2019/2034 will apply, with certain exceptions, from 26 June 2021.

What is the impact for you?

For your information only.

28 February 2020

Council conclusions on revised EU list of non-cooperative jurisdictions for tax purposes

Background

On 27 February 2020, the Council's conclusions on the European Union list of non-cooperative jurisdictions for tax purposes were published in the Official Journal of the European Union.

What's new?

The last update in February 2020 led to the addition of the following 12 territories:

1. American Samoa
2. Cayman Islands
3. Fiji
4. Guam
5. Oman
6. Palau
7. Panama
8. Samoa
9. Seychelles
10. Trinidad and Tobago
11. US Virgin Islands
12. Vanuatu

For further information, please follow this link.

What's next?

PwC will keep you updated on further developments.

What is the impact for you?

For your information only.

19 March 2020

SSR/COVID-19 – ESMA issues decision requiring net short position holders to report positions of 0.1% and above of the issued share capital

Background

Regulation (EU) No 236/2012 of the European Parliament and of the Council of the EU on short selling and certain aspects of credit default swaps has applied since 1 November 2012 (the "SSR", available here). Article 28 of the SSR describes intervention powers of the European Securities and Markets Authority ("ESMA") in exceptional circumstances.

The European Commission (the "Commission") is empowered to adopt delegated and implementing acts to specify how competent authorities and market participants shall comply with the obligations laid down in the SSR (the "Implementing and Delegated Acts", available here). They include Commission Delegated Regulation (EU) No 918/2012 supplementing the SSR with regard to definitions, the calculation of net short positions, covered sovereign credit default swaps, notification thresholds, liquidity thresholds for suspending restrictions, significant falls in the value of financial instruments and adverse events ("Delegated Regulation 918/2012", available here).

Article 24 of Delegated Regulation 918/2012 refers to Article 28 of the SSR and addresses criteria and factors to be taken into account in determining when adverse events or developments and threats arise.

What's new?

On 16 March 2020, ESMA published its decision (ESMA70-155-9546 — the "ESMA Decision") temporarily requiring the holders of net short positions in shares traded on a EU regulated market to notify the relevant national competent authority ("NCA") if the position reaches or exceeds 0.1% of the issued share capital after the ESMA Decision enters into force. A related public statement (ESMA71-99-1291 — the "ESMA Statement") was released together with the ESMA Decision.

ESMA considers that lowering the reporting threshold is a precautionary action that, under the exceptional circumstances linked to the ongoing COVID-19 pandemic, is essential for authorities to monitor developments in markets. The measure can support more stringent action if required to ensure the orderly functioning of EU markets, financial stability and investor protection.

The ESMA considers that the current circumstances constitute a serious threat to market confidence in the EU, and that the proposed measure is appropriate and proportionate to address the current threat level to EU financial markets.

On 16 March 2020, the Luxembourg Commission de Surveillance du Secteur Financier (the "CSSF") published a communiqué informing about the ESMA Decision (the "CSSF Communiqué").

The ESMA Decision is available here.

The CSSF Communiqué is available here.

What's next?

The ESMA Decision enters into force immediately upon its publication on ESMA's website on 16 March 2020 and will apply for a period of 3 months.

The ESMA Decision requires net short position holders to notify NCAs of their relevant positions as at the close of the trading session on 16 March 2020. The temporary transparency obligations apply to any natural or legal person, irrespective of their country of residence. They do not apply to shares admitted to trading on a regulated market where the principal venue for the trading of the shares is located in a 3rd country, nor do they apply to market making or stabilisation activities.

ESMA, in coordination with NCAs, continues to monitor developments in the financial markets as a result of the COVID-19 situation and has expressed that it is prepared to use its powers to ensure the orderly functioning of EU markets, financial stability and investor protection.

What is the impact for you?

For your information only.

27 March 2020

SFTR/EMIR/MiFIR/COVID-19 -–ESMA issues revised public statement on the postponement of the reporting obligations related to securities financing transactions

Background

Regulation (EU) No 648/2012 of the European Parliament (the "Parliament") and of the Council of the EU (the "Council") on OTC derivatives, central counterparties and trade repositories ("TRs") entered into force on 16 August 2012 ("EMIR", available here).

Regulation (EU) 2015/2365 of the Parliament and of the Council on transparency of securities financing transactions ("SFTs") and of reuse and amending EMIR has applied since 17 July 2017 (the "SFTR", available here).

Regulation (EU) No 600/2014 of the Parliament and of the Council on markets in financial instruments and amending EMIR has applied since 3 January 2018 ("MiFIR", available here).

The SFTR mandates reporting of all SFTs to a registered TR. TRs centrally collect and maintain the records of SFTs and they play a central role in enhancing the transparency of SFT markets and reducing risks to financial stability.

The SFTR envisages a phased-in approach as regards the counterparties subject to the reporting obligation. Reporting obligations for credit institutions, investment firms, and relevant third-country entities become applicable on 13 April 2020. These will be followed by the central counterparties, central securities depositories ("CSDs") and relevant third-country entities with a start of the reporting obligation on 13 July 2020, by insurance companies, funds, institutions for occupational retirement provision and relevant third-country entities on 12 October 2020 and by non-financial counterparties on 11 January 2021.

SFTs with members of the European System of Central Banks ("ESCB") are exempted from reporting under Article 4 of the SFTR; however, these SFTs are reportable by investment firms as of 13 April 2020 under Article 26 of MiFIR, as specified by the second subparagraph of Article 2(5) of Commission Delegated Regulation (EU) 2017/590 (available here) supplementing MiFIR with regard to regulatory technical standards for the reporting of transactions to competent authorities ("CAs").

On 18 March 2020, the European Securities and Markets Authority ("ESMA") issued a public statement on the postponement of the reporting obligations related to SFTs under the SFTR and under EMIR (ESMA80-191-995 –"Statement v1", available here). In Statement v1, ESMA expresses its understanding that the SFT-reporting implementation is heavily impacted by the COVID-19 crisis. It acknowledges the challenges that TRs, relevant counterparties, entities responsible for reporting or report-submitting entities and, to the extent applicable, investment firms, may face in finalising their implementation of the SFT-reporting requirements and in completing the necessary technical set-up before 13 April 2020.

Statement v1 informs that ESMA expects CAs not to prioritise their supervisory actions towards counterparties, entities responsible for reporting and investment firms in respect of SFT-reporting obligations, under the SFTR and under the MIFIR, as of 13 April 2020 and until 13 July 2020, including regarding SFTs entered into in that period of time, and to generally apply their risk-based approach in the exercise of supervisory powers in their day-to-day enforcement of applicable legislation in this area in a proportionate manner.

Further, Statement v1 informs that ESMA does not consider it necessary to register any TRs ahead of 13 April 2020. This is intended to give TRs more time to cope with the emergency and be ready to support the new reporting regime at a later point in time. ESMA is also not available to record the details of SFTs. As a result, ESMA considers that counterparties, entities responsible for reporting and report-submitting

entities will be unable to report by the reporting start date.

Statement v1 also says that ESMA expects TRs to be registered sufficiently ahead of the next phase of the reporting regime, i.e. 13 July 2020, for credit institutions, investment firms, central counterparties and CSDs and relevant third-country entities to start reporting as of this date. ESMA continues to closely monitor implementation by the relevant market participants as well as the impact of the relevant measures taken with regard to COVID-19 to ensure alignment of SFT-reporting requirements and supervisory practices in the EU.

What's new?

On 26 March 2020, ESMA published its revised version of Statement v1 replacing this document on its website (ESMA80-191-995 –"Statement v2"). It has been revised in response to feedback received from financial market participants and stakeholders.

Statement v2 clarifies that SFTs entered into between 13 April 2020 and 13 July 2020 and SFTs subject to backloading under the SFTR also fall within those issues in respect of which CAs are not expected to prioritise in their supervisory actions towards counterparties, entities responsible for reporting and investment firms in respect of their reporting obligations under the SFTR or MiFIR and to generally apply their risk-based approach in the exercise of supervisory powers in their day-to-day enforcement of applicable legislation in this area in a proportionate manner.

ESMA's Statement v2 is available here.

What's next?

ESMA continues to closely monitor implementation by the relevant market participants as well as the impact of the relevant measures taken with regard to COVID-19 to ensure alignment of SFT-reporting requirements and supervisory practices in the EU.

What is the impact for you?

For your information only.

31 March 2020

IFRS 9/COVID-19 – Level 3 – ESMA and EBA issue statements on accounting and prudential implications

Background

IFRS 9 "Financial Instruments" ("IFRS 9", available here) specifies how an entity should classify and measure financial assets, financial liabilities, and some contracts to buy or sell non-financial items.

In light of the COVID-19 spread across the globe, a variety of measures have been, and continue to be, taken by EU governments to prevent the transmission of the COVID-19 along with economic support and relief measures aimed at addressing the economic consequences of the outbreak on individuals, households and businesses. Such relief measures include, but are not limited to, moratoria on repayment of loans, overdraft facilities and mortgages, loan guarantees as well as other forms of business support targeted at individual firms or specific industries (e.g. for liquidity purposes).

In particular, the European Securities and Markets Authority ("ESMA") notes that, in the COVID-19 context, issuers might be making measures available to borrowers on a voluntary basis. These might take the form of renegotiations, rollovers or rescheduling of cash-flows that might or might not have an impact on the net present value of these cash-flows.

What's new?

On 25 March 2020, ESMA issued a public statement entitled "Accounting implications of the COVID-19 outbreak on the calculation of expected credit losses in accordance with IFRS 9" (ESMA32-63-951 – the "ESMA Statement", available here).

Overall, ESMA considers that the "principles-based nature of IFRS 9" includes sufficient flexibility to faithfully reflect the specific circumstances of the COVID-19 outbreak and the associated public policy measures. More specifically, ESMA provides guidance in relation to the following areas:

- Accounting for the modifications resulting from the introduction of the support measures;
- Assessment of significant increase in credit risk ("SICR");
- Expected Credit Loss ("ECL") estimation;
- Public guarantees on issuers' exposures; and
- Other transparency aspects.

Besides, the ESMA Statement is consistent as regards financial reporting with the statement entitled "Statement on the application of the prudential framework regarding Default, Forbearance and IFRS 9 in light of COVID-19 measures" that was issued by the European Banking Authority on 25 March 2020 (the "EBA Statement", available here). In the EBA Statement, the EBA clarifies certain aspects on the functioning of the prudential framework, especially (i) the prudential identification of loans in default, (ii) the classification of forborne exposures and (iii) considerations on IFRS 9. The EBA is of the view that the application of public or private moratoria, aimed at addressing the adverse systemic economic impact of the COVID-19 pandemic, "should not be considered by themselves as an automatic trigger to conclude that a significant increase in credit risk has occurred".

What's next?

The ESMA Statement and the EBA Statement should be read jointly concerning IFRS 9 aspects.

Issuers and their auditors are required to consider the ESMA Statement. ESMA will continue to monitor issuers' practices in relation to IFRS 9 and in particular as regards the application of judgement in the current COVID-19 context. For further information on the audit of financial statements, ESMA refers to the statement entitled "CEAOB emphasises the following areas that are of high importance in view of COVID-19 impact on audits of financial statements" published by the Committee of European Auditing Oversight Bodies on 25 March 2020 (the "CEAOB Statement", available here).

The EBA expects institutions to distinguish "between obligors for which the credit standing would not be significantly affected by the current COVID-19 situation in the long term", from "those that would be unlikely to restore their credit worthiness". In any case, in determining the impact on banks' income statements stemming from the recognition of the ECL, the EBA stresses that "the mitigation provided by the existence of collateral or public guarantees would need to be considered". The EBA will continue its efforts, started with the benchmarking on IFRS 9, on monitoring the institutions' practices in the current COVID-19 circumstances in order to understand better the impact of IFRS 9 on capital requirements and the way banks are applying judgment in the assessment of the level of and changes in credit risk of their exposures.

At Luxembourg level, the Commission de Surveillance du Secteur Financier refers to the EBA Statement in Q&A 9 of its frequently asked questions document on the COVID-19 (the "CSSF FAQ", available here).

What is the impact for you?

For your information only.

31 March 2020

AIFMD – Level 3 – ESMA consults on draft guidelines to address leverage risk in the AIF sector until 1 September 2020

Background

Article 25(1) of Directive 2011/61/EU provides that Member States shall "ensure that the competent authorities of the home Member State of the AIFM use the information to be gathered under Article 24 for the purposes of identifying the extent to which the use of leverage contributes to the build-up of systemic risk in the financial system, risks of disorderly markets or risks to the long-term growth of the economy" (the "AIFMD", available here).

Under the AIFMD framework, investment fund managers are obliged to report granular data for each leveraged Alternative Investment Fund ("AIF") they manage to National Competent Authorities ("NCAs"), including detailed information on the AIF's use of leverage, size, investment strategies, principal exposures, geographical focus, investor ownership and concentration, instruments traded, market risk, counterparty risk profile, liquidity profile (including redemption profile), and operational and other risk aspects. In this context, AIFs with a leverage ratio of more than 3 times their NAV, calculated according to the commitment method, are viewed as employing leverage on a "substantial basis". Managers of such AIFs are required to report on the five largest sources of borrowed cash or securities as well.

On 30 April 2018, the recommendation of the European Systemic Risk Board of 7 December 2017 on liquidity and leverage risks in investment funds was published in the OJEU (ESRB/2017/6 – the "ESRB Recommendation", available here). With reference to the ESRB Recommendation E, ESMA is recommended to:

- Give guidance on the framework to assess the extent to which the use of leverage within the AIF sector contributes to the build-up of systemic risk in the financial system;
- Give guidance on the design, calibration and implementation of macroprudential leverage limits;
- Give guidance on how NCAs should notify ESMA, the ESRB and other NCAs of their intention to implement macroprudential measures under Article 25(3) of the AIFMD; and
- Use the information received from NCAs pursuant to Article 25(3) of the AIFMD to benchmark and share knowledge with national macroprudential authorities and the ESRB on practices on the use of leverage limits and the imposition of other restrictions on the management of AIFs.

On 7 March 2019, ESMA published its first annual statistical report on EU AIFs 2019 (ESMA50-165-748 – the "First Statistical Report", available here).

What's new?

On 27 March 2020, following up on ESRB Recommendation E, ESMA launched its consultation concerning "Guidelines on Article 25 of the AIFMD" (ESMA34-39-967 – the "Consultation Paper").

In this context, ESMA is seeking feedback from asset managers managing AIFs and their trade associations on the 9 questions summarised in Annex I to the Consultation Paper (on page 19).

The purpose of the proposed draft guidelines is to promote supervisory convergence in the way NCAs assess how the use of leverage within the AIF sector contributes to the build-up of systemic risk in the financial system, and how NCAs design, calibrate and implement leverage limits (Cf. Annex II to the Consultation Paper on pages 20-33). For clarification purposes, "leverage" is defined in the draft guidelines as "any

method by which the AIFM increases the exposure of an AIF it manages whether through borrowing of cash or securities, or leverage embedded in derivative positions or by any other means".

In particular, ESMA specifies that the risk assessment should be designed according to the following 2-step approach:

- Under "Step 1"(i.e. level, source and different usages of leverage), NCAs should identify not only AIFs employing leverage on a "substantial basis", but also "non-substantially leveraged AIFs which may cause risks to financial stability and thus need to be assessed under Step 2"; and
- Under "Step 2" (i.e. leverage-related systemic risk), NCAs should evaluate potential risks to financial stability of the AIFs identified under Step 1. NCAs should at least include the following risks: (i) risk of market impact, (ii) risk of fire sales, (iii) risk of direct spillover to financial institutions, and (iv) risk of interruption in direct credit intermediation.

For further information, the Consultation Paper is available here.

What's next?

Comments on the Consultation Paper must be sent to ESMA using the dedicated "Response Form" (ESMA34-32-535, available here) by 1 September 2020.

ESMA will consider the feedback it receives with a view to finalising the guidelines for publication afterwards.

Within 2 months of the date of publication of the final guidelines on ESMA's website in all EU official languages, NCAs to which these guidelines apply must notify the ESMA whether they (i) comply, (ii) do not comply, but intend to comply, or (iii) do not comply and do not intend to comply with these guidelines.

What is the impact for you ?

For your information only.

Italy

21 February 2020

CONSOB fees payable for the 2020 fiscal year

What's new ?

For offerings to the public, the fees are as follows:

a) For subjects offering to the public their units or shares (UCITS) following the completion of the notification procedure pursuant to Article 42 of Italian Legislative Decree no. 58/1998 and the filing of a prospectus, and for which the offering to the public is in progress as at 2 January 2020 (retail funds), €1,945.00 for each fund or, where applicable, for each sub-fund. Listed funds/ sub-funds, or funds with one or more listed classes, are excluded from the calculation;

b) For subjects for which the offering made following the notification procedure pursuant to Article 42 of Legislative Decree no. 58/1998 (UCITS) was closed in previous years and which, as at 2 January 2020, have resident in Italy, €1,375.00 for each fund or, where applicable, for each sub-fund;

c) For subjects that market units or shares of non-reserved AIFs following the completion in the previous year of a marketing authorisation procedure pursuant to Article 44 of Italian Legislative Decree no. 58/1998, €1,775.00 for each fund or, where applicable, for each managed sub-fund.

Where the investment undertaking markets UCITS to professional investors, the fees are as follows:

d) For subjects that market units or shares of reserved AIFs following the completion of a marketing procedure pursuant to Article 43 of Italian Legislative Decree no. 58/1998, €900.00 for each fund or, where applicable, for each managed sub-fund;

e) For subjects that market units or shares of UCITS to professional investors following the completion of a notification procedure pursuant to Article 42 of Italian Legislative Decree no. 58/1998, €900.00 for each fund or, where applicable, for each managed sub-fund.

In brief

- €900 per single AIF or UCITS fund/sub-fund marketed to professional investors only.
- €1,945 per single UCITS fund/sub-fund distributed to retail investors.
- €1,775 per single AIF fund/sub-fund distributed to retail investors.
- €1,375 per foreign UCITS with subscribers residing in Italy and that was closed for subscription before 2 January 2020.

In addition, the fee payable by collective investment undertakings' shares, exchange-traded funds (ETFs) or active exchange-traded funds (active ETFs) is a fixed amount of €3,136.00 for each fund class quoted; for issuers offering shares of funds or sub-funds, two quoted fund classes are excluded from the fee calculation.

If you need any further information, please refer to the following CONSOB link: http://www.consob.it/web/consob-and-its-activities/other-regulatory-measures/documenti/english/resolutions/res21211.htm

What is the impact for you? Invoices will be issued by CONSOB in March 2020 and sent to management companies.; they should be paid by the 15 April 220.

India

21 February 2020

India Union Budget – 2020-21

What's new?

Hon'ble Finance Minister Ms Nirmala Sitharaman presented India's Union Budget for the 2020-21 fiscal year on Saturday 1 February 2020. In a bid to aid the Government's aim of achieving a USD 5 trillion economy by FY 2024-25, the Budget proposed various tax-friendly policies and amendments that have a positive impact on India-bound portfolio investments.

With the reintroduction of the classical regime of taxing dividends in the hands of the investors and the consequential abolition of dividend distribution tax (DTT), the Government has achieved the dual objective of reducing the compliance burden on corporate entities and reducing the overall tax burden on foreign portfolio investors (FPIs) by allowing them to claim a credit in the home country of the tax incurred in India on the dividend income. Various incentives for deepening the bond market, in the form of lower withholding tax on interest income and an increase in investment limits, have also been announced.

Certain clarity has also been provided on the applicability of offshore transfer provisions to FPIs based on their categorisation. Also, amendments to attract investors to the International Financial Services Centre (IFSC) were announced.

The Finance Bill proposals have been tabled before the Indian Parliament for are therefore subject to change.

A flyer summarising the direct tax budget proposals impacting on the FS sector is available at:

https://www.pwc.in/assets/pdfs/budget/2020/key-proposals-for-the-fs-sector.pdf

What is the impact for you?

For your information only.

Japan

06 March 2020

Strategic Partnership Agreement – Bill 7529 submitted to Luxembourg Parliament

Background

On 17 July 2018, the EU and Japan signed a strategic partnership agreement (ST/8463/2018/INIT – the "SPA", available here) as well as an economic partnership agreement (ST/7965/2018/INIT – the "EPA", available here). The European Parliament voted on both the SPA and the EPA on 12 December 2018 (the "EC Press Release", available here). The Japanese Parliament ratified the SPA on 8 December 2018. Most of the provisions of the SPA have applied provisionally since 1 February 2019. The EPA entered into force on 1 February 2019.

The SPA, which is the first-ever bilateral framework agreement between the EU and Japan, aims to ensure closer political and economic cooperation on a whole host of bilateral, regional and multilateral issues. The SPA covers numerous policy areas, including:

- Counter-terrorism (Article 8);
- Economicand financial policy (Article 13);
- Environment / Climate change (Articles 23 and 24);
- Combating corruption and organised crime (Article 33); and
- Combating money laundering and financing of terrorism (Article 34).

A joint committee (Article 42), which shall meet once a year, will coordinate and give strategic direction to the SPA. A dispute settlement mechanism is provided for in Article 43.

The SPA shall officially enter into force, for an unlimited period, after ratification procedures by EU Member States.

What's new?

On 26 February 2020, the Luxembourg Minister of Foreign and European Affairs submitted document 7529/00 to the Luxembourg Parliament containing (i) the text of the bill approving the SPA, (ii) an explanatory memorandum, (iii) an impact assessment sheet, (iv) a financial statement, and (v) the French version of the text of the SPA ("Document 7529/00").

The text of Bill 7529 contains only 1 Article providing that the SPA is thereby approved.

For further information, Document 7529/00 is available here (only in French).

What's next?

Bill 7529 will be referred to the parliamentary Committee on Foreign and European Affairs, Cooperation, Immigration and Asylum for further discussion. According to Article 48(2) of the SPA, either party may notify, in writing, the other party of its intention to terminate the SPA. The termination will take effect 6 months after the date of receipt of that notification by the other party.

What is the impact for you?

For your information only.

Liechtenstein

21 February 2020

Change in fees for processing notification for marketing an alternative investment fund (AIF)

What's new?

The updated fee schedule for processing notifications for the marketing of AIFs is as follows:

1. Distribution of a Liechtenstein AIF by a Liechtenstein AIFM in other EEA Member States (outgoing notification):

   - Single funds: CHF 500 per single fund
   - Umbrella funds: CHF 500 per sub-fund

2. Distribution of an EEA AIF (other than Liechtenstein) by an EEA AIFM (other than Liechtenstein) in Liechtenstein (incoming notification):

   - Single funds: CHF 500 per single fund
   - Umbrella funds: CHF 500 per sub-fund

3. Management of an EEA AIF (other than Liechtenstein) by a Liechtenstein AIFM (outgoing notification):

   - CHF 500 for processing a notification

4. Management of a Liechtenstein AIF by an EEA AIFM (other than Liechtenstein) (incoming notification):

   - CHF 500 for processing a notification

What's next?

The adjusted fee schedule entered into force on 1 February 2020.

What is the impact for you?

For your information only.

Luxembourg

6 January 2020

Liquidity-risk management – CSSF issues Circular 19/733 implementing IOSCO Recommendations on LRM for open-ended UCIs

Background

On 1 February 2018, the International Organization of Securities Commissions ("IOSCO") issued the following recommendations and good practices seeking to improve liquidity-risk management ("LRM") practices of open-ended collective investment schemes ("CISs"):

- Final report entitled "Recommendations for LRM for CIS" (FR01/2018 – the "IOSCO Recommendations", available here); and
- Final report entitled "Open-ended Fund LRM – Good Practices and Issues for Consideration" (FR02/2018 – the "IOSCO Good Practices", available here).

On 23 February 2018, the Luxembourg Commission de Surveillance du Secteur Financier (the "CSSF") released a press release in this respect entitled "ESRB and IOSCO publish recommendations for investment funds" ("PR 18/08", available here).

What's new?

On 20 December 2019, following up on PR 18/08, the CSSF issued Circular 19/733 implementing the IOSCO Recommendations into Luxembourg regulations. This Circular is addressed at all Luxembourg investment fund managers ("IFMs") and undertakings for collective investment ("UCIs"), as well as all involved in the operation and supervision of such undertakings ("Circular 19/733").

In this context, Circular 19/733 applies to the entities defined in Section 1 of the Circular (the "Entities"), namely the following IFMs managing open-ended UCIs:

- Chapter 15 management companies ("ManCos") pursuant to the Luxembourg Law of 17 December 2010 relating to UCIs (the "2010 Law", as amended, available here);
- Chapter 16 ManCos pursuant to the 2010 Law;
- Luxembourg branches of IFMs subject to Chapter 17 of the 2010 Law;
- Investment companies that have not designated a ManCo within the meaning of Article 27 of the 2010 Law;
- Alternative investment fund managers ("AIFMs") authorised under Chapter 2 of the Luxembourg Law of 12 July 2013 on AIFMs (the "2013 Law", as amended, available here); and
- Internally managed AIFs within the meaning of Article 4(1)(b) of the 2013 Law.

In addition, Circular 19/733 applies to open-ended specialised investment funds ("SIFs") that are not referred to in the specific provisions of Part II of the Law of 13 February 2007 (the "2007 Law", as amended, available here) and are subject to the provisions of CSSF Regulation N° 15-07 (available here) laying down detailed rules on the application of Article 42a of the 2007 Law as regards the requirements in relation to risk management and conflicts of interest.

Section 2 of Circular 19/733 details the IOSCO Recommendations by addressing the following main elements of the LRM process:

- The design process of UCIs;
- The day-to-day liquidity management of UCIs; and
- Contingency planning.

For further information, Circular 19/733 is available here.

What's next?

Circular 19/733 entered into force on 20 December 2019.

The CSSF expects Entities to implement the IOSCO Recommendations and to draw on the related IOSCO good practices to implement a robust and effective LRM process for each of their managed open-ended UCIs. In particular, the CSSF highlights: "The effectiveness of the LRM process should be subject to regular periodic reviews and the process should be updated as appropriate. Also, the occurrence of certain events like, for instance, if the UCI is to invest in a new type of asset, may necessitate additional reviews and possible updates of the LRM process."

The CSSF recommends that open-ended UCIs subject to Part II of the 2010 Law that are not managed by an authorised AIFM as defined in the 2013 Law, consider the provisions of Circular 19/733.

Entities referred to in the scope of managing closed-ended UCIs are also advised to consider the provisions of Circular 19/733 where deemed necessary and relevant.

What is the impact for you?

For your information only.

7 January 2020

AML/CTF – CSSF issues Circular 19/732 clarifying identification and verification of identity of UBO(s)

Background

Several provisions of Directive (EU) 2015/849 ("4AMLD", as amended, available here) must be read in conjunction to identify the ultimate beneficial owner ("UBO"), most notably Articles 3(6) and 3(12), which contain definitions; Article 13 in relation to customer due diligence ("CDD") obligations; and Articles 30 and 31 concerning the establishment of a central register of beneficial ownership ("BO") information. It should be noted that Article 30 of 4AMLD has been amended by Directive (EU) 2018/843 ("5AMLD", available here).

As the practical implementation of updated FATF Recommendations 10, 24 and 25 (available here) has been challenging for professionals, the FATF developed a guidance paper on transparency and beneficial ownership in 2014 (available here), and continues to provide guidance on the topic (available here) with the aim of creating an effective system that prevents, among other things, the misuse of legal persons and legal arrangements for criminal purposes. The latest FATF document in that respect containing practical guidance is the October 2019 Best Practices Paper on beneficial ownership for legal persons (available here).

At Luxembourg level, the Law of 13 February 2018 implemented the 4AMLD requirements on professional obligations with respect to the beneficial owner through amendments to the Law of 12 November 2004 on the fight against money laundering and terrorist financing (the "AML/CTF Law", as amended, available here). The most relevant legislation in relation to the UBO are Articles 1(7) and 3(2) of the AML/CTF Law and Article 1(2) of the Grand-Ducal Regulation of 1 February 2010, as amended (available here). CSSF Regulation 12-02 of 14 December 2012, as amended (available here), particularly Articles 3, 17, 21-23 and 25, should equally be taken into account.

The establishment of a central register on BO information, which has been introduced through the Law of 13 January 2019 (available here only in French) and the Grand-Ducal Regulation of 15 February 2019 (available here only in French), should also be considered. The Law entered into force on 1 March 2019 with a transition period of six months, which was extended for three months (until 30 November 2019).

What's new?

On 23 December 2019, the Luxembourg Commission de Surveillance du Secteur Financier (CSSF) issued Circular 19/732 entitled "Prevention of Money Laundering and Terrorist Financing: Clarifications on the Identification and Verification of the Identity of the Ultimate Beneficial Owner(s) ["UBOs"]" ("Circular 19/732").

The aim of Circular 19/732, which is addressed at all professionals under the CSSF's AML/CTF supervision, is to provide guidance on the legal requirements applicable to the identification and verification of the identity of the UBO with a view to enhancing financial transparency.

The structure of Circular 19/732 is summarised in the table below:

Topic	References in circular 19/732
Introduction; purpose of Circular 19/732	Points 1 to 8 (pages 1 to 4)
I. Identifying the UBO 1. General considerations	Points 9 to 17 (pages 4 to 6)
2. Definition of the UBO	Point 18 to 19 (page 7)
2.1 The customer is a natural person	Point 20 (page 7)
2.2 Legal persons and legal arrangements	Point 21 (page 7)
2.2.1 General guidance	Points 22 to 24 (page 8)
2.2.2 Legal framework applicable to legal persons and legal arrangements - General rules - Fiduciary and trust specifics - Exemption: Companies whose shares are admitted to trading on regulated markets (EU or equivalent)	Points 25 to 35 (pages 8 to 14) Figure 1 - Trust direct ownership: All persons in blue must be identified as UBOs Figure 2 - Trust indirect ownership: All persons in blue must be identified as UBOs Figure 3 - Trust indirect ownership
2.2.3 Threefold procedure to determine UBO - Direct or indirect ownership: The threshold approach - Control through any other means: Effective control - Natural person holding the position of senior managing official ("SMO")	Points 36 to 61 (pages 14 to 27) Figure 4/Table 4 - Simple one-layer ownership structure Figure 5/Table 5 - Multiple ownership structure Figure 6/Table 6 - Cumulative ownership Figure 7/Table 7 - In-concert ownership Figure 8/Table 8 - Decision control over the customer Figure 9/Table 9 - Majority control Figure 10/Table 10 - Decision rights Figure 11 - SMO Figure 12 - SMO
2.2.4 Specific relationships - Non-profit organisations ("NPOs"), charities or similar entities; - Public administration or public establishments; - Bearer shares; - Pension funds/Superannuation funds or similar relationships	Points 62 to 70 (pages 27 to 31) Figure 13/Table 13 - Example ASBL (1) Figure 14 - Example ASBL (2): The members of the board (Conseil d'administration) are to be considered UBOs Figure 15 - Public administration: The members of the board (Conseil d'administration) are to be considered UBOs
II. Documenting and verifying the UBO's identity	Points 71 to 80 (pages 32 to 34)
III. FATF indicators of a concealed BO a) Indicators concerning the customer b) Indicators about the transaction	Points 81 and 82 (pages 34 to 38)
FATF/Egmont Group Report on concealment of BO (July 2018)	Annex I (pages 39 to 228)
FATF Report to the G20 on BO (September 2016)	Annex II (pages 229 to 237)
FATF Guidance on transparency and BO (October 2014)	Annex III (pages 238 to 285)
FATF Best practices on BO for legal persons	Annex IV (pages 286 to 367)

For further information, Circular 19/732 is available here.

What's next?

Circular 19/732 entered into force on 23 December 2019.

Circular 19/732 should be read in conjunction with other CSSF circulars and regulations related to AML/CTF (including, but not limited to, CSSF Circulars 17/650, 17/661 and 18/698, accessible here), as well as the applicable legal and regulatory framework. The examples provided in Circular 19/732 are meant to assist professionals in meeting their obligations, but are not intended to be exhaustive. Professionals should develop AML/CTF policies, procedures, systems and controls that are adequate and effective considering the nature, scale and complexity of their respective businesses, as well as their overall exposure to ML/TF risks.

What is the impact for you?

For your information only.

8 January 2020

BMR – CSSF issues Communiqué underlining various developments for concerned entities using benchmarks

Background

Regulation (EU) 2016/1011 of the European Parliament (the "Parliament") and of the Council on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds ("IFs") (the "BMR", latest consolidated version available here) entered into force on 30 June 2016 and has applied, with certain exceptions, since 1 January 2018. The BMR is relevant for any IF that uses any benchmark to assess its performance, to define asset allocation for its portfolio, or to compute its performance fees.

Regulation (EU) 2019/2089 of the Parliament and of the Council amending the BMR as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks ("Regulation 2019/2089", available here) entered into force on 10 December 2019 and is directly applicable.

What's new?

On 24 December 2019, the Luxembourg Commission de Surveillance du Secteur Financier (the "CSSF") issued a communiqué on various developments concerning the BMR (the "Communiqué"), addressed at all entities that are subject to its supervision and are using benchmarks ("Concerned Entities").

More specifically, the CSSF underlines the following developments affecting Concerned Entities:

- Extension of transitional provisions - Article 1(9) of Regulation 2019/2089 inserted new paragraphs 4a and 4b and amended Paragraph 5 of Article 51 of the BMR. Paragraphs 4a and 4b permit the use of benchmarks that have been declared as critical by the European Commission until 31 December 2021, while the amended paragraph 5 extends the permission to use benchmarks provided by third-country administrators until 31 December 2021.
- Fallback and information provisions:
  - The CSSF reminds Concerned Entities that Article 28(2) of the BMR requires robust fallback provisions to be drawn up and maintained in the event that a benchmark materially changes or ceases to be provided. The CSSF therefore strongly urges Concerned Entities to be prepared for the cessation of, for instance, the Euro Overnight Index Average ("EONIA") and the London Inter-bank Offered Rate ("LIBOR"), which is expected at the turn of the year 2021/2022. To this end, the CSSF recommends that Concerned Entities regularly monitor the relevant working groups (e.g. for EONIA the working group on euro risk-free rates, available here, and for LIBOR the Working Group on Risk-Free Reference Rates, available here); and
  - The CSSF reminds Concerned Entities that Article 29(2) of the BMR requires that where the object of a prospectus to be published is transferable securities or other investment products that reference a benchmark, the prospectus must include clear and prominent information stating whether the benchmark is provided by an administrator included in the European Securities and Markets Authority's ("ESMA") register under Article 36 of the BMR (available here).
- Permitted uses by Concerned Entities - The CSSF provides a detailed list that, with effect from 1 January 2020, restricts Concerned Entities to the use of certain benchmarks.

For further information, the Communiqué is available here.

What's next?

The CSSF will continue to inform Concerned Entities of updates regarding the BMR.

What is the impact for you?

For your information only.

9 January 2020

AML/CTF – Government submits Bill 7512 establishing a central electronic system for the retrieval of data concerning IBAN accounts and safe-deposit boxes to Parliament

Background

Directive (EU) 2015/849 of the European Parliament (the "Parliament") and of the Council on the prevention of the use of the financial system for the purposes of money laundering or financing of terrorism ("ML/TF") has applied since 26 June 2017 ("4AMLD", available here).

At Luxembourg level, 4AMLD was mostly transposed by the Luxembourg Law of 13 February 2018 (the "4AMLD Transposition Law", available here only in French), which entered into force on 18 February 2018. For ease of reading, the latest coordinated version of the Luxembourg Law of 12 November 2004 on the fight against ML/TF is available here (the "2004 Law", as amended).

Directive (EU) 2018/843 amending 4AMLD entered into force on 9 July 2018 and has applied since 10 January 2020 ("5AMLD", available here). For ease of reading, the latest consolidated version of 4AMLD, as amended by 5AMLD, is available here. The main changes introduced by 5AMLD consist of: (i) broadening access to information on beneficial owners ("BOs"), improving transparency in the ownership of companies and trusts; (ii) addressing risks linked to prepaid cards and virtual currencies; (iii) cooperation between financial intelligence units ("FIUs"); and (iv) improved checks on transactions involving high-risk third countries.

More specifically, Article 32a(1) of 4AMLD, as inserted by 5AMLD, provides that Member States ("MS") put in place centralised automated mechanisms, such as central registries or central electronic data-retrieval systems, which allow the identification, in a timely manner, of any natural or legal persons holding or controlling payment accounts and bank accounts identified by IBAN and safe-deposit boxes held by a credit institution within their territory.

Luxembourg is undertaking legislative steps to transpose 5AMLD by means of several pieces of draft legislation, primarily Bill 7467 (available here only in French), which was due by 10 January 2020. As a reminder, the establishment of a central register on BO information in Luxembourg, as provided by Article 30 of 4AMLD (as amended by 5AMLD), was introduced by the Luxembourg Law of 13 January 2019 (the "BO Law", available here only in French) and the Grand-Ducal Regulation of 15 February 2019 (the "BO Regulation", available here only in French).

What's new?

On 23 December 2019, the Luxembourg Government submitted Document 7512/00 (the "Document"), which contains Bill 7512 establishing a central electronic system for the retrieval of data concerning payment accounts and bank accounts identified by IBAN and safe-deposit boxes held by credit institutions in Luxembourg ("Bill 7512"), to the Luxembourg Parliament.

Bill 7512 will transpose, among others, Article 32a(1) of 4AMLD as inserted by 5AMLD, and will amend relevant national laws such as the 2004 Law (see Article 11 of Bill 7512) and the BO Law (see Article 14 of Bill 7512).

According to the explanatory memorandum for the Document, in the context of AML/CTF, such central electronic systems are effective means of obtaining timely and unfragmented access to information on the identity of holders of bank accounts, payment accounts and safe-deposit boxes, their agents and BOs. It is thus proposed that the Luxembourg Commission de Surveillance du Secteur Financier (the "CSSF") establish such a central electronic system (see Article 7 of Bill 7512).

More specifically, the provisions in Chapter 2 of Bill 7512 (i.e. Articles 2 to 6) detail the obligations of professionals (as defined in Article 1(3) and (6) of Bill 7512) concerning the creation of a data file and the keeping of data on the holders of bank accounts, payment accounts and safe-deposit boxes.

For further information, the Document is available here (only in French).

What's next?

Article 15 of Bill 7512, on page 15 of the Document, provides that the obligation to set up a data file (allowing the identification of natural or legal persons) in accordance with Article 2(1) thereof concern:

- payment accounts and bank accounts identified by an IBAN that exist on the date of entry into force of the final law or are opened after that date; and
- safe-deposit boxes rented on or after the date of entry into force of the final law.

Article 17 of Bill 7512, on page 15 of the Document, provides that the final law be referenced as: "Law of [insert date] establishing a central electronic system for the retrieval of data concerning IBAN accounts and safe-deposit boxes" (in French "loi du [*insérer la date de la présente loi] instituant un système électronique central de recherche de données concernant des comptes IBAN et des coffres-forts").

What is the impact for you?

For your information only.

9 January 2020

EU Directive on tax dispute resolution mechanisms transposed

Background

On 23 December 2019, the Luxembourg Parliament passed the transposition bill relating to the Directive on Tax Dispute Resolution Mechanisms (the "TDRM Directive").

What's new?

The Luxembourg Parliament has passed the transposition bill relating to the TDRM Directive.

The TDRM Directive aims at improving tax dispute resolution mechanisms in an EU context by enlarging the range of cases in which Member States are obliged to come to a binding solution, providing for clear and enforceable timelines, enhancing transparency, and providing for legal remedies for the taxpayer to move the procedure along.

The link is available here.

What's next?

PwC will keep you updated on further developments.

What is the impact for you?

For your information only.

9 January 2020

Banking supervision – Circular CSSF 19/731 amending Circular CSSF 19/710 on documents to be transmitted on an annual basis by credit institutions

Background

On 21 February 2019, the Luxembourg Commission de Surveillance du Secteur Financier (the "CSSF") issued Circular 19/710, which lists all the documents that credit institutions must provide on a yearly basis to the CSSF and the European Central Bank (the "ECB") ("Circular CSSF 19/710", available here).

What's new?

On 12 December 2019, the CSSF issued Circular CSSF 19/731 on documents to be transmitted on an annual basis by credit institutions to the CSSF and the ECB (the "Circular CSSF 19/731").

Circular CSSF 19/731 repeals, among others, Circular CSSF 19/710 by requesting credit institutions to stop transmitting their documents to the CSSF in paper format, but to instead transmit them in electronic format using e-file or SOFiE.

The electronic documents need to be transmitted to the CSSF using the correct name convention, which is specified in the appendix to Circular CSSF 19/731. Completed paper versions of the documents must be kept by the credit institutions.

For further information, Circular CSSF 19/731 is available here (only in French).

What's next?

Circular CSSF 19/731 has applied since 12 December 2019.

What is the impact for you?

For your information only.

22 January 2020

AML/CTF – CSSF publishes 1st ML/TF risk assessment on collective investment sector

Background

Luxembourg has long been committed to anti-money laundering and counter-terrorist-financing activities ("AML/CTF") and, for this purpose, it is also committed to developing a deeper understanding of its own risks and capabilities, in the face of growing and evolving ML/TF risks and in line with international guidance.

From mid-2016 to 2018, the Luxembourg competent authorities carried out their first national risk assessment (the "NRA") with a view to identifying, understanding and assessing ML/TF risks and supporting the definition of the national AML/CTF strategy.

On 20 December 2018, the Luxembourg Ministry of Finance published its summary report on the NRA (the "NRA Report", available here in English and here in French). It identified the investment sector, and collective investments in particular, as inherently high-risk. The quality of the implemented mitigating measures made it possible to reduce the residual risk to medium. Consequently, the Luxembourg Commission de Surveillance du Secteur Financier (the "CSSF") chose to drill down on the risk assessment for this sub-sector at the start of 2019.

What's new?

On 17 January 2020, the CSSF issued a communiqué (the "Communiqué") including the first Luxembourg ML/TF risk assessment focusing on the collective investment sub-sector, as an extension of the NRA (the "Assessment Document"). The scope of this Assessment Document encompasses all Luxembourg-regulated undertakings for collective investment. It focuses on investment-fund managers ("IFMs"), considering their specific AML/CTF roles and responsibilities in the sector, as well as covering other market participants such as service providers (for instance, registrar and transfer agents).

The Assessment Document addresses, among others:

- inherent risk – threat assessment, which highlights the fact that the threat of ML proceeds from domestic crime is significantly lower than from international crime, due to Luxembourg's relatively low crime rate and limited presence of organised crime. The threat of ML proceeds from international crime is higher, given the international exposure of Luxembourg undertakings for collective investment ("UCIs"). The Assessment Document defines various threats (fraud, tax crimes, corruption and bribery, insider trading and market manipulation), presenting global risks for collective investments and then focusing on specific risks for the Luxembourg industry.
- inherent risk – vulnerability assessment, which considers five main risk factors: (i) intermediaries; (ii) clients/investors and geography; (iii) market structure; (iv) products, services and transactions; and (v) distribution channels. It is analysed how these risk factors influence various clustering elements; and
- mitigating factors – both supervisory measures and controls at entity level and resulting residual risk for the different clusters. It is considered that there are three groups in analogy to the risk scoring: management companies for undertakings for collective investment in transferable securities ("UCITS"); alternative IFMs; and self- or internally managed UCIs. The mitigation assessment is based on four mitigating factors: risk-based approach; AML/CTF supervision; ongoing monitoring; and procedures and training.

The Assessment Document includes a list of the most frequent off- and on-site findings (Section 6.5), divided into identified best practices and most common shortcomings.

The Assessment Document also outlines (in Section 7) high-level recommendations (with examples of how IFMs may show compliance) to enhance the regulatory and supervisory framework. These recommendations are intended to be integrated into the CSSF's current AML/CTF strategy and action plan.

The Assessment Document was drafted by the CSSF, the Cellule de Renseignement Financier (Financial Information Unit, the "CRF"), and industry associations and private-sector participants, which formed an external AML/CTF working group. It is aimed for public distribution and constitutes a short version of a more substantive CSSF internal risk assessment.

The Communiqué is available here.

What's next?

The CSSF expects supervised entities involved in the collective investment sector to reflect the findings and conclusions from this sub-sector risk assessment in their frameworks to ensure that they remain appropriate to effectively mitigate ML/TF risks.

The CSSF has emphasised that, while this assessment does not directly cover unregulated investment vehicles, pension funds or securitisation vehicles, these vehicles might find the information contained in this assessment helpful to reflect upon and strengthen their AML/CTF framework.

What is the impact for you?

For your information only.

22 January 2020

MiFID II/prospectus requirements – LuxSE's updated Rules and Regulations enter into force on 31 January 2020

Background

The Luxembourg Stock Exchange (the "LuxSE", available here) brings together the following four business lines: listing, trading, disseminating data and reporting. The LuxSE offers issuers the choice between its EU-regulated market and its exchange-regulated market, referred to as the Bourse de Luxembourg (the "BdL") and the Euro Multilateral Trading Facility (the "Euro MTF") respectively. The Euro MTF, which is a self-regulated MTF introduced by Directive 2004/39/EC ("MiFID", latest consolidated version available here; replaced by "MiFID II", latest consolidated version available here), was launched by the LuxSE in 2005. A detailed comparison of the two markets offered by the LuxSE is available here.

Any listing on the LuxSE requires that a prospectus be prepared and subsequently approved by a competent Luxembourg authority. For an overview of the listing process, more information is available here.

The 2018 version of the LuxSE's Rules and Regulations (11/2018 – the "2018 Rules and Regulations")

What's new?

On 15 January 2020, the LuxSE published a substantially modified version of the 2018 Rules and Regulations (01/2020 – the "Updated Rules and Regulations").

The Updated Rules and Regulations provide the LuxSE's clients with greater clarity, increased transparency and improved usability. The Updated Rules and Regulations consist of the following parts:

- Part 0: Common definitions;
- Part I: Admission of securities to trading on the securities markets of the LuxSE and simultaneous admission to its official list;
- Part II: Prospectus approval for admission of securities to trading;
- Part III: Market rules of the Luxembourg Stock Exchange; and
- Part IV: Public auctions organised by the LuxSE.

The main changes introduced by the Updated Rules and Regulations relate to the following prospectus requirements for admitting securities onto the LuxSE's Euro MTF:

- Provision of clearly structured building blocks in the form of appendices for both issuers and securities across all asset classes, as well as guidelines on how to combine them. These could be used as check and validation lists for prospectuses;
- Lighter requirements for listed entities and convertible debt;
- Introduction of a single schedule for derivative securities;
- Broader scope of prospectus exemptions; and
- Creation of a single prospectus regime for admission to trading on the Euro MTF.

Concerning the BdL, the LuxSE has also introduced an appendix for alleviated prospectuses for admission to trading on the regulated market of securities not covered by the EU Prospectus Regulation (available here).

For further information, the Updated Rules and Regulations are available here.

What's next?

The Updated Rules and Regulations entered into force on 31 January 2020, thereby replacing the 2018 Rules and Regulations.

The LuxSE notes that, as it had to perform a complete rework in drafting the Updated Rules and Regulations, it has not provided a marked-up version.

What is the impact for you?

For your information only.

28 January 2020

UCITS Directive – CSSF reminds UCITS management companies of deadlines regarding ESMA Q&A updates on UCITS KIID benchmark disclosures

Background

The requirements for key investor information documents ("KIIDs") for undertakings for collective investment in transferable securities ("UCITS") are specified in Commission Regulation (EU) No 583/2010 of 1 July 2010 implementing Directive 2009/65/EC (the "UCITS Directive", available here) as regards key investor information and conditions to be met when providing key investor information or the prospectus in a durable medium other than paper or by means of a website (the "KIID Regulation", available here).

In accordance with Article 79(1) of the UCITS Directive and to ensure communications that are fair, clear and not misleading, the information disclosed in the UCITS KIID should be consistent with the UCITS' investment objective in the prospectus.

Pursuant to Article 23(3) of the KIID Regulation, a KIID with duly revised presentation of past performance of the UCITS must made available no later than 35 business days after 31 December each year.

On 29 March 2019, the European Securities and Markets Authority ("ESMA") updated its Q&A document relating to the UCITS Directive (ESMA34-43-392 – the "ESMA Q&A Updates", available here) by amending and adding new Q&As 4b and 4cbis (pages 14-15; Q&A 4c was deleted) regarding past performance, and new Q&As 8a, 8b and 8c (pages 17-22) regarding the disclosure of the benchmark index in the objectives and investment policies, in Section II entitled "KIID for UCITS".

What's new?

On 27 January 2020, the Luxembourg Commission de Surveillance du Secteur Financier (the "CSSF") issued a communication regarding the ESMA Q&A Updates (the "Communication").

In particular, the CSSF reminds UCITS management companies and self-managed UCITS (together "UCTS Management Companies") of the following:

- The benchmark-related disclosures in the UCITS KIID should in particular include:
  - whether the UCITS is "actively" or "passively" managed;
  - an indication of the benchmark index (or indices) that the UCITS is tracking or referring to; and
  - in accordance with the above-mentioned Q&A 8b, a disclosure on the use of the benchmark (e.g. outperformance objective, performance comparison, risk limitation, definition of investment universe), the degree of freedom from the benchmark and the past performance against the benchmark when the UCITS' investment approach includes or implies a reference to a benchmark.
- In accordance with the above-mentioned Q&A 8c, it should be clarified that (i) the description of the underlying investment universe of the UCITS should indicate to what extent the target investments are (or are not) part of the benchmark; and (ii) the KIID should describe the degree or level of deviation of the UCITS in regard to the benchmark, thereby considering, where applicable, the quantitative and/or qualitative deviation limitations underlying the investment approach, as well as the narrowness of the investment universe.

For further information, the Communication is available here.

What's next?

Based on the ESMA Q&A Updates and the Communication, UCITS management companies must:

- transmit their updated KIIDs to the CSSF via the usual transmission channels "by 19 February 2020" (i.e. 35 [Luxembourg] business days after 31 December 2019); and
- assess whether a change in their prospectus is necessary, to verify that KIID and prospectus disclosures are aligned and, where applicable, to file an updated prospectus with the CSSF "until the earlier of the next revision of the prospectus or the end of the year 2020".

What is the impact for you?

For your information only.

12 March 2020

Tax authorities issue administrative guidance on application of ATAD1 CFC rules

Background

On 4 March 2020, the Luxembourg tax authorities issued a 25-page administrative circular (the "CFC Circular"), providing guidance on their interpretation of article 164ter of the Luxembourg tax law ("LITL") relating to controlled foreign company ("CFC") taxation.

What's new?

The CFC Circular emphasises that its text complements the existing Luxembourg transfer pricing rules.

In this sense, the CFC Circular introduces a transfer pricing documentation obligation for Luxembourg taxpayers to prepare, on an annual basis, a functional analysis covering any relationships with foreign entities or permanent establishments that the CFC rules deem to be CFCs.

Such documentation should be made available upon request to the Luxembourg tax authorities.

You can find further information here.

What's next?

Taxpayers need to assess their situation considering the potential impact of the article 164ter CFC rules, which are effective for tax years beginning on or after 1 January 2019.

What is the impact for you?

For your information only.

13 March 2020

UCITS – CSSF issues Version 8 of FAQs concerning 2010 Law on undertakings for collective investment

Background

Directive 2009/65/EC of the European Parliament and of the Council of the EU on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities ("UCITS") has applied since 30 June 2011 (the "UCITS Directive", latest consolidated version is available here). The UCITS Directive establishes a common regulatory and supervisory framework applicable to UCITS and their management companies ("ManCos") pursuing activities in the EU.

The European Commission has adopted implementing and delegated acts to specify how competent authorities and market participants shall comply with the obligations laid down in the UCITS Directive (the "Implementing and Delegated Acts" are available here).

The UCITS Directive has been converted into Luxembourg legislation by the Law of 17 December 2010 (the "UCI Law", as amended, available here). Part I and Part IV of the UCI Law concern UCITS and ManCos, respectively.

The Luxembourg Commission de Surveillance du Secteur Financier (the "CSSF") issues frequently asked questions concerning certain key aspects of the laws and regulations governing UCITS from a Luxembourg perspective (the "CSSF

FAQs"). The CSSF FAQs are therefore primarily addressed to ManCos that are established in Luxembourg. On 2 September 2019, version 7 of the CSSF FAQs ("CSSF FAQs V7", available here) was issued.

The CSSF FAQs should be read in conjunction with the questions and answers, issued by the European Securities and Markets Authority (the "ESMA"), concerning the application of the laws and regulations governing UCITS (ESMA-34-43-392 — the "ESMA Q&As"; the latest version, which was issued on 4 June 2019 is available here).

What's new?

On 10 March 2020, the CSSF issued version 8 of its FAQs ("CSSF FAQs V8") which provides the following amendments:

- Question 9.1 (new), page 24, on how a UCITS should disclose performance fees to investors and to whom performance fees of a UCITS are payable. In response thereto, the CSSF provides that:
  - The UCITS must disclose in the prospectus the performance fee model it uses as well as the investment manager who is the recipient of such a performance fee; and
  - If there is a sharing arrangement of the performance fee with any investment advisor(s) contractually linked to the UCITS, the prospectus shall inform about this arrangement.
- Question 9.2 (new), page 25, on how a UCITS should specify and disclose the investment manager's fee and the investment advisor's fee, if any, in comparison with other fees paid out of the assets of the UCITS. In response thereto, the CSSF provides that:
  - The UCITS must disclose expenses or fees in the prospectus. In accordance with Point 6 of Schedule A of Annex I of the UCI Law, such a disclosure should distinguish between those to be paid by the unit-holders and those to be paid out of the assets of the UCITS. Where a service fee is directly paid out of the assets of the UCITS to investment manager(s) and investment advisor(s) contractually linked to the UCITS, the method of calculation or the rate of the fee to each recipient must be disclosed in the prospectus;
  - When other expenses or fees for activities beyond the direct scope of investment management or advice are payable out of the assets of the UCITS to investment manager(s) or investment advisor(s), such expenses or fees must be disclosed separately in a manner that clearly informs investors about the nature of such expenses or fees; and
  - Where an "all-in" fee is proposed, meaning that only one compensation amount is paid out of the assets of the UCITS to a recipient - i.e. generally a ManCo - who will afterwards pay the other service providers to the UCITS, the prospectus must clearly state the scope, nature and preferably specify each contractual recipient of such an "all-in" fee.

The answers to Question 9.1 and 9.2 are intended to provide clarity to investors concerning compensation, expenses and fees, which allows for comparison across UCITS and thus facilitate investment choice.

For further information, CSSF FAQs V8 is available here.

What's next?

It is worth nothing that the CSSF FAQs are amended from time to time and that the CSSF reserves the right to alter its approach to any matter it covers. Stakeholders are therefore advised to regularly check the website of the CSSF to see if questions have been added and/or positions have been altered.

What is the impact for you?

For your information only.

23 March 2020

AML/CTF/COVID-19 – CSSF extends the deadline for the non-banking sector to submit the 2019 Survey by 10 April 2020 and urges all supervised entities to immediately review their operational set-up

Background

Article 5(1) of the Luxembourg law of 12 November 2004 on the fight against money laundering and terrorist financing (the "AML/CTF Law", available here) provides that "the professionals, their directors and employees are obliged to cooperate fully with the Luxembourg authorities responsible for combating money laundering and terrorist financing ["ML/TF"]". The CSSF recalls in this context that Article 8-4 (1) of the AML/CTF Law provides that "the supervisory authorities have the power to impose administrative sanctions and to take other administrative measures laid down in paragraph 2 with respect to professionals subject to their respective supervisory powers in accordance with Article 2-1 which do not comply with the professional obligations laid down in Articles (…) and 5 (…)".

On 28 November 2019, the Luxembourg Commission de Surveillance du Secteur Financier (the "CSSF") issued press release 19/57 entitled "Survey related to the fight against ML/TF" informing that the annual survey for the year 2019 (the "2019 Survey") would be launched on 3 February 2020 ("PR 19/57", available here). According to the CSSF, the 2019 Survey remains "generally unchanged" in substance compared to the previous year. On 31 January 2020, based on PR 19/57, the CSSF issued a circular letter in relation to the launch of the 2019 Survey ("Circular-Letter 1", available here), which is addressed to the following "Entities":

- To the Management Board and the Board of Directors of all:
  - Credit institutions;
  - Investment firms;
  - Investment Fund Managers ("IFMs") including registered AIFMs, Luxembourg branches of IFMs, SIAGs, FIAAGs and investment funds which did not designate an IFM;
  - Payment institutions and electronic money institutions; and
  - Specialised professionals of the financial sector ("PSF" in French) incorporated under Luxembourg law.
- To all Luxembourg branches of the above-listed entities having their registered office in an EU country or a third country.

The 2019 Survey must be initiated and submitted via the CSSF's eDesk portal (available here) by a member of the "Authorised Management of the entity" or, preferably, the "AML/CTF Compliance Officer who is responsible for AML/CTF compliance". However, the completion of the 2019 Survey may be assigned by the "person responsible for AML/CTF compliance" within the CSSF's eDesk portal to "another employee of the entity". The "Authorised Management" is ultimately responsible for completing the 2019 Survey adequately. The aforementioned persons and their potential delegates are required to have an eDesk account with a LuxTrust authentication.

For the banking sector, the answers to the 2019 Survey questions had to be submitted through the CSSF's eDesk portal by 2 March 2020. For other sectors, the answers to the 2019 Survey questions had to be submitted through the CSSF's eDesk portal by 15 March 2020 (the "Initial Deadline"). In its Circular Letter 1, the CSSF notes that a dedicated "eDesk Survey AML/CTF Questionnaire User Guide" (i.e. a 6-page document that is available here for IFMs) was released to provide further assistance in completing the questionnaire.

What's new?

On 17 March 2020, the CSSF issued a second circular letter extending the Initial Deadline for the above-mentioned Entities, except for credit institutions, payment institutions and electronic institutions, to submit their 2019 Survey to the CSSF ("Circular Letter 2", available here).

In Circular Letter 2, the CSSF explains that it is granting four additional weeks, acknowledging that potential delays regarding the timely submission by professionals of the 2019 Survey may have occurred due to the Survey being hosted on the eDesk platform and the implementation of the relevant registration process, and considering that the COVID-19 pandemic creates exceptional circumstances. Therefore, the new deadline for these professionals to submit their answers to the 2019 Survey is 10 April 2020 (COB).

On 20 March 2020, the CSSF last updated its frequently asked questions' document on the COVID-19 pandemic.

On 22 March 2020, having regard to the spread of COVID-19, the CSSF issued a communiqué (the "Communiqué", available here), which urges all supervised entities to immediately review their operational set-up as follows:

- "The least possible staff has to travel to, and work from, their usual workplace or backup site. The deployment of staff members to the usual workplace or backup site should be "limited to vital functions that are essential to maintain the critical mission of supervised entities for them to remain operational provided that these functions cannot be performed remotely;
- Where staff is not equipped with laptops or other mobile devices, entities implement as soon as possible virtual desktop and other remote access solutions, cloud based or not".

What's next?

The CSSF highlights that if the 2019 Survey is not submitted by 10 April 2020 (COB), the CSSF will consider that the professional is in breach of Article 5(1) of the AML/CTF Law. The CSSF will be in a position to apply the sanctions provided for in Article 8-4 of the AML/CTF Law and it will also consider previous breaches of the aforementioned obligation by the professional when determining the sanction.

In the Communiqué, the CSSF stresses that "remote access from home must be privileged over other forms of working, including working from backup centres". The CSSF will provide further COVID-19 updates on the homepage of its website (available here), as this health crisis evolves.

What is the impact for you?

For your information only.

23 March 2020

Financial Supervision/COVID-19 – CSSF updates FAQs on Swing Pricing Mechanism

Background

A full or partial Swing Pricing Mechanism ("SPM") has been applied in Luxembourg to protect existing shareholders from dilution associated with shareholder purchases and redemptions and to help manage liquidity risks.

The Luxembourg Commission de Surveillance du Secteur Financier (the "CSSF") supervises the following entities (together "UCIs"):

- UCITS subject to Part I of the Luxembourg law of 17 December 2010 relating to undertakings for collective investment (the "2010 Law", available here);
- UCIs subject to Part II of the 2010 Law; and
- SIFs subject to the Luxembourg law of 13 February 2007 relating to specialised investment funds (the "2007 Law", available here).

On 10 December 2015, the Association of the Luxembourg Fund Industry ("ALFI") published the third edition of its "Swing Pricing Guidelines" (only accessible to members here).

On 31 July 2019, the CSSF issued its first frequently asked questions' document on the SPM ("FAQ v1", available here). In this context, FAQ v1 clarified the following 5 areas:

- The UCI's articles of association or management regulations should permit adjustments to the NAV in order to counter the dilution effects of capital activity;
- The minimum information that should be mentioned in the UCI's prospectus in relation to the application of the SPM;
- The minimum information that should be mentioned in the UCI's annual and semi-annual report in relation to the SPM;
- "Circular CSSF 02/77" (available here) applies to an administrative error in relation to the application of the SPM; and
- The organisational requirements that apply in the context of the application of the SPM by the UCI.

What's new?

On 20 March 2020, the CSSF updated its FAQ on the SPM ("FAQ v2").

In FAQ v2, the CSSF clarifies the following points concerning the use of swing pricing (applied similarly to dilution levies) by UCIs:

- UCIs can increase the swing factor to be applied on the NAV up to the maximum level laid down in the prospectus without prior notification to the CSSF;
- The situations in which UCIs can increase the applied swing factor beyond the maximum swing factor laid down in the prospectus of the fund;
  - Case 1 – The UCI's Board of Directors or, if applicable, the Management Company, can decide to increase the swing factor in accordance with the provisions and conditions of the fund's prospectus. The decision must be duly justified and take into account the investors' best interests;
  - Case 2 – where the fund's prospectus does not enable the UCI's Board of Directors or, if applicable, the Management Company to go beyond the maximum level laid down in the prospectus – The CSSF temporarily allows the UCI's Board of Directors or, if applicable, the Management Company, given the current extraordinary market circumstances brought about by COVID-19, to increase the swing factor beyond the maximum level mentioned in the UCI's prospectus. This decision must again be duly justified and take into account the investors' best interests. The CSSF adds that the UCI's prospectus must be updated at the earliest convenience to formally allow the UCI's Board of Directors or, if applicable, the Management Company to go beyond the maximum level under certain predefined conditions; and
- In the 2 above-mentioned cases, the Board of Directors must communicate this decision to current as well as new investors through the usual communication channels as laid down in the prospectus. The UCI must provide the CSSF (i.e. the case officer in charge of the UCI) with a detailed notification of the resolution, including a specific explanation of the reasons for such resolution.
- The extent to which a UCI can increase the applied swing factor beyond the maximum swing factor disclosed in the fund's prospectus.
  - The CSSF usually observes that the maximum swing factors laid down in a UCI's prospectus vary between 1% and 3%;
  - The maximum swing factor could be raised temporarily beyond the maximum level laid down in the UCI's prospectus provided the following minimum elements are observed:
    - The revised swing factors are the result of a robust internal governance process and are based on a robust methodology (including market / transaction data-based analysis) that provides for an accurate NAV which is representative of prevailing market conditions; and
    - An appropriate communication is made to investors through the usual communication channels, such as the ordinary notice to investors, through the fund's internet website or by another means as disclosed in the prospectus.

For further information, FAQ v2 is available here.

The dedicated CSSF "Communiqué" is available here.

What's next?

For a swing factor adjustment going beyond the maximum swing factor laid down in the UCI's current prospectus, the CSSF stresses that it can ask the UCI "to justify on an ex-post basis the level of the swing factor applied and to provide documentary evidence that such factor was at any time representative of the prevailing market conditions".

Taking into account FAQ v2, the CSSF will consolidate the existing FAQ v1 in due time (available here) and update it where required.

The CSSF will provide further COVID-19 updates on the homepage of its website (available here), as this health crisis evolves.

What is the impact for you?

For your information only.

24 March 2020

Financial Supervision/COVID-19 – CSSF issues Communiqué on Regulatory Reporting

Background

Entities supervised by the Luxembourg Commission de Surveillance du Secteur Financier (the "CSSF") are requested to submit reliable supervisory information to the CSSF, especially during the COVID-19 crisis.

However, for certain operational reasons, such supervised entities may experience difficulty in preparing or validating their CSSF reporting due to "staff not being available" (e.g. because they work remotely without having full access to all systems).

What's new?

On 23 March 2020, the CSSF issued a communiqué entitled "Regulatory Reporting" (the "Communiqué")

In the Communiqué, the CSSF formally asks supervised entities to perform the CSSF regulatory reporting "when it is due". In the event of operational difficulties, the concerned supervised entity should "contact the CSSF" through the usual channels as soon as possible and ahead of the relevant reporting deadline(s).

For further information, the Communiqué is available here.

What's next?

During the COVID-19 crisis, the CSSF will not apply a "strict enforcement policy" with regard to reporting if "delays are duly justified". The "leeway applied by the CSSF" will be closely coordinated with national authorities, the European Supervisory Authorities (the "ESAs") and the European Central Bank (the "ECB").

The CSSF will provide further COVID-19 updates on the homepage of its website (available here), as this health crisis evolves.

What is the impact for you?

For your information only.

27 March 2020

Financial Reporting/COVID-19 – CSSF further updates FAQ to extend certain reporting deadlines

Background

On 3 March 2020, the Luxembourg Commission de Surveillance du Secteur Financier (the "CSSF") started to publish a frequently asked questions' ("FAQ") document on the COVID-19 situation.

On 23 March 2020, the CSSF released a COVID-19 communiqué concerning its approach to regulatory reporting ("Communiqué 1", available here). In Communiqué 1, the CSSF stressed that it would refrain from applying enforcement measures in the case of delays justified by operational difficulties in the current COVID-19 context. To this end, the CSSF must be informed before the expiry of the submission deadline as set out in the relevant regulations.

On 25 March 2020, the CSSF released a COVID-19 communiqué entitled "Long Form Reports" ("Communiqué 2", available here).

What's new?

On 26 March 2020, the CSSF issued a further update to its COVID-19 FAQ by inserting the new Q&As 6, 7 and 8 (the "Updated FAQ").

In Q&A 6, the CSSF extends the deadline for submitting the monthly/quarterly prudential reporting tables by specialised PFS where necessary ("exceptionally granted"). The

"reasoned" request must be e-mailed to the CSSF's usual contact person for the specialised PFS.

In Q&A 7, the CSSF extends the deadlines for certain reports that are listed in the Updated FAQ and that must be submitted by UCIs, SIFs, SICARs, investment fund managers, pension funds and securitisation undertakings to the CSSF. In this context, communication to the CSSF must take place by e-mail and messages must be sent exclusively to this address: opc@cssf.lu.

In Q&A 8, the CSSF "exceptionally" extends the deadline for certain documents listed in the Updated FAQ and that must be submitted by banks to the CSSF. The "reasoned request" must be e-mailed to the bank's usual contact person at the CSSF. For significant banks, these requests will, if necessary, be dealt with in consultation with the European Central Bank (the "ECB").

What's next?

The CSSF encourages concerned entities to submit the above-mentioned reports on time, where the submission can be made within the usual time limits without compromising the quality of the reporting and in line with the health rules to contain the COVID-19 spread.

The CSSF will provide further COVID-19 updates on the homepage of its website (available here), as this health crisis evolves.

What is the impact for you?

For your information only.

Netherlands

24 January 2020

Netherlands may levy tax on dividends from substantial interest

Background

On 10 January 2020, the Dutch Supreme Court ruled on whether a dividend payment by a company established in the Netherlands to a foreign corporate shareholder, should be regarded as taxable income for Dutch corporate income-tax purposes (a so-called "substantial interest").

What's new?

The foreign shareholder, which was interposed, was ultimately held by an individual. This question was answered in the affirmative, and therefore the dividend payment could indeed be subject to Dutch corporate income tax.

The judgment is important for foreign shareholders who hold an interest in a Dutch company via an intermediate holding company. When the intermediate holding company receives a dividend or revenue from the sale of shares, it becomes relevant as to whether a so-called "substantial interest" exists.

The link is available here.

What's next?

PwC will keep you updated on further developments.

What is the impact for you?

For your information only.

Peru

12 March 2020

Publication of administrative guidance on tax for non-domiciled companies

Background

On 28 February 2020, Peru's tax authority published guidance concerning the tax treatment of a non-domiciled company's profits.

What's new?

Administrative guidance 018-2020-SUNAT/7T0000 explains that Article 24-A of the Income Tax Law contains a specific anti-avoidance rule that applies to situations where a firm transfers profits without formulating a formal agreement at a shareholders' meeting.

For more information, please consult this link (in Spanish only).

What's next?

PwC will keep you updated on further developments.

What is the impact for you?

For your information only.

Spain

16 January 2020

Regulatory fees for marketing UCITS and AIFs updated for 2020

What's new?

Spanish Law 16/2014 of 30 September regulating the fees of the National Securities Market Commission (CNMV) provides that each person or entity involved or acting in the financial markets, without exception, pay the relevant applicable fees depending on the activities and services provided by the CNMV.

According to the Spanish Constitution, if the annual budget act is not adopted before the first day of the relevant financial year, the annual budget of the previous year will be automatically deemed to be extended until a new one is adopted.

Since the 2020 budget act has yet not been approved, the 2018 budget act will apply and an increase of 1% will still be requested for the year 2020 as per Article 86 of Law 06/2018 on the Spanish Budget Act.

CNMV fees for 2020	UCITS	AIFs (Articles 32, 36 and 42)
Initial registration	€1,030.30 per UCITS per single umbrella	€2,575.75 per AIF (or, as the case may be, per sub-fund)
Annual maintenance	€2,575.75 per UCITS per year	€3,090.90 per AIF (or, as the case may be, per sub-fund) per year

What is the impact for you?

For your information only.

Switzerland

16 January 2020

New rules on fund-marketing materials

What's new?

- Advertising for financial instruments (including funds) and financial services (including asset management and investment advisory services) "must be clearly identifiable as such" (Art. 68 para. 1 of the Swiss Financial Services Act ("FinSA"));
- Financial service providers, when complying with their duty to provide their clients with the mandatory information set out in Art. 8 FinSA (applicable from 31 December 2021), "must indicate advertising as such";
- According to Art. 68 para. 2 FinSA, advertising must mention the prospectus and the key information document (KID) for the financial instrument in question, as well as where these legal documents can be obtained;
- Advertising and other information on financial instruments intended for investors must correspond to the details given in the prospectus and the KID (Art. 68 para. 3 FinSA);
- According to Art. 95 para. 2 of the Swiss Financial Services Ordinance ("FinSO"), the following are not considered an advertisement: (a) the naming of financial instruments without or in connection with the publication of prices, NAVs, price lists or developments, or tax figures; (b) reports on issuers or transactions, in particular where these are required by law or regulations by supervisory authorities or trading venues; (c) the making available or transmission of notices by an issuer to existing clients through financial service providers; and (d) reports in the trade press. According to the explanatory report on FinSO, an advertisement must ultimately serve to offer certain financial instruments.

What does this mean for you?

Financial service providers will need to update their marketing materials to ensure that advertising materials for the purpose of FinSA and FinSO are clearly identified and the necessary disclaimer(s) are included therein.

For more information, please refer to the following link: https://www.finma.ch/en/authorisation/fidleg-und-finig/

What is the impact for you?

For your information only.

United Arab Emirates

12 March 2020

New Law No.3 of 2020

Background

On 23 February 2020, the Ruler of the Emirate of Dubai issued new law No. 3 of 2020, regarding the Dubai Multi Commodities Centre ("DMCC").

What's new?

This new law will regulate the free zone of the DMCC established through decision No.4 of 2002 to enhance commodity trade.

Under the law, all companies registered in the DMCC must be considered free zone companies for all their activities: contracts, advertisements, invoices.

What's next?

The by-laws required to implement the law will be published shortly.

What is the impact for you?

For your information only.

United Kingdom

8 January 2020

Liquidity – FCA and Bank of England statement on joint review of open-ended funds

Background

In its latest Financial Stability Report, the Financial Policy Committee (the "FPC") has set out the initial findings of a joint review by the Financial Conduct Authority (the "FCA") and the Bank of England (the "BoE") on open-ended investment funds and the risks posed by their liquidity mismatch.

As set out in the July 2019 Report (available here), the BoE and the FCA are undertaking a joint review into vulnerabilities associated with liquidity mismatch in open-ended funds. The review builds on the FPC's 2015 assessment (available here), the FCA's 2019 Policy Statement on funds investing in inherently illiquid assets (available here), and the work by the Financial Stability Board (the "FSB") and the International Organization of Securities Commissions ("IOSCO").

What's new?

The FPC has reviewed the progress of the work and identified that, if greater consistency between the liquidity of a fund's assets and its redemption terms is to be achieved:

1. Liquidity of funds' assets should be assessed by reference to the price discount needed for a quick sale of a representative sample (or vertical slice) of those assets or the time period needed for a sale which avoids a material price discount. In the US, the Securities and Exchange Commission has recently adopted measures of liquidity based on this concept.

2. Redeeming investors should receive a price for their units in the fund that reflects the discount needed to sell the required portion of a fund's assets in the specified redemption notice period, ensuring fair outcomes for redeeming and remaining investors.

3. Redemption notice periods should reflect the time needed to sell the required portion of a fund's assets without discounts beyond those captured in the price received by redeeming investors.

The latest Financial Stability Report from the FPC is available here.

What's next?

The review will now consider how these principles could be implemented in a proportionate and effective manner.

The FCA will use the conclusions of the review, which will be released in 2020, to inform the development of the FCA's rules for open-ended funds.

Recognising the global nature of asset management, the conclusions could also be used by UK regulators in international work at the FSB and IOSCO and with other competent authorities.

What is the impact for you?

For your information only.

17 January 2020

Implementation of EU MDR – final Regulations

Background

On 31 October 2019, the UK Government announced that it would introduce legislation to implement EU Directive 2018/22 – known as the EU Mandatory Disclosure Regime ("EU MDR") or DAC 6 – requiring taxpayers and their advisers to disclose details of certain cross-border arrangements to HMRC. The Government consulted on draft legislation over the summer of 2019 and has now laid final Regulations before Parliament (as well as releasing its responses to the consultation and an impact assessment).

The link is available here.

What's next?

These Regulations were to become law unless the House of Commons passed a motion preventing that before 3 March, which was extremely unlikely. They are due to enter into force on 1 July 2020.

What is the impact for you?

For your information only.

17 January 2020

AML/CTF – Amendments to Government's Money Laundering Regulations enter into force

Background

The Financial Action Task Force (the "FATF") sets internationally endorsed standards in the field of anti-money laundering and counter-terrorist financing ("AML/CTF"), and updates them addressing new issues (the "FATF Standards", available here).

Directive (EU) 2018/843 ("AMLD5", available here) of the European Parliament and of the Council amending Directive (EU) 2015/849 ("AMLD4", available here) on the prevention of the use of the financial system for the purposes of ML or TF entered into force on 9 July 2018. The EU Member States had to bring into force laws, regulations and administrative provisions necessary to comply with AMLD5 by 10 January 2020.

To incorporate the FATF Standards and to transpose AMLD5 to update the UK's AML regime, the ML and TF (Amendment) Regulations 2019 (the "Amendment Regulations", available here) set out the amendments to the ML, TF and Transfer of Funds (Information on the Payer) Regulations 2017.

What's new?

On 10 January 2020, the Financial Conduct Authority (the "FCA") updated its website section on ML to highlight the fact that specific changes in MLRs entered into force on that day and firms needed to comply with them (the "General Update").

The General Update drew attention to amendments in relation to:

- high-risk factors – amendments to Regulation 33 require firms to include new additional high-risk factors when assessing the need for enhanced due diligence, and seek additional information and monitoring in certain cases. These may occur, for instance, where there are relevant transactions between parties based in high-risk third countries;
- e-money thresholds for customer due diligence ("CDD") – among others, amendments to Regulation 38 regarding e-money address certain situations in which firms can forego CDD measures;
- CDD – amendments to Regulation 28 require firms to update their records relating to the beneficial to understand the ownership and control structure of their corporate clients, and record any difficulties encountered in identifying BOs; and
- reporting discrepancies – Regulation 30A includes a new requirement for firms to report to Companies House discrepancies between the information the firm holds on their clients and the information held in the Companies House Register.

On 10 January 2020, the FCA also updated its website section on cryptoassets to inform readers that from that day, the FCA is the AML and CTF supervisor of UK cryptoasset businesses (the "Cryptoasset Update").

The General Update is available here.

The Cryptoassets Update is available here.

What's next?

The FCA expects firms to comply with the Amendment Regulations from 10 January 2020. The FCA also informs readers that, in assessing the FCA's approach to firms that may not be compliant on that date, it will take into account evidence that they have taken sufficient steps before then to comply with these new obligations.

Businesses carrying out certain cryptoasset activities must comply with the amended MLRs in relation to those activities with effect from 10 January 2020, and must register with the FCA during 2020.

The new Part 5A of the Amendment Regulations on requests for information about accounts and safe-deposit boxes, which enters into force on 10 September 2020, imposes duties on credit institutions and the providers of safe custody services to respond to requests for information via a central automated mechanism.

What is the impact for you?

For your information only.

4 February 2020

Financial Supervision – FCA publishes update on evaluation of Retail Distribution Review and Financial Advice Market Review

Background

In 2006, the Financial Services Authority (the "FSA"), the predecessor of the Financial Conduct Authority (the "FCA"), launched the Retail Distribution Review (the "RDR", described here) with the aim of establishing a more resilient, effective and attractive retail investment market in which consumers would have confidence. It made several changes to the way in which investment products were distributed to retail consumers in the UK. The RDR raised the minimum level of adviser qualifications, changed the way in which charges and services were disclosed to consumers, and banned the use of commission to pay for financial advice. Most of the rules it introduced took effect in 2012.

In 2015, jointly with Her Majesty's ("HM") Treasury, the Financial Advice Market Review (the "FAMR", described here) was launched, building on the work of the RDR. It had a wide scope and looked at the entire financial services market to assess the accessibility and affordability of advice and guidance to help people with financial decisions.

In 2017, the FCA carried out a representative survey of UK adults – the financial products they hold, their attitudes and experiences of dealing with these products and services, and the firms that provide them (the "Financial Lives Survey", described here).

On 1 May 2019, the FCA published a call for input (by 3 June 2019), outlining its plans to evaluate the RDR and the FAMR and asking for views on the issues that stakeholders thought the FCA should consider as part of its review (the "Call for Input", available here).

In July 2019, the FCA updated its website to inform stakeholders of the main themes that had emerged up to that point as a result of the Call for Input (the "2019 Update", available here).

In August 2019, the FCA surveyed approximately 400 firms, asking them to provide information on their advisory services, including business models and strategies, target clients, charging structures, future plans, the use of technology and any recent innovations (the "2019 Survey").

What's new?

On 14 January 2020, further to the 2019 Update, the FCA updated its website to add an evaluation of the RDR and the FAMR. The FCA informed readers that it was now analysing the data from the 2019 Survey, and would use it, together with other data it collects, to inform its view of how services are developing to serve consumers now and in the future.

The FCA also informed readers that it had commissioned qualitative research on how consumers interact with the market. This research will explore consumers' view of their needs for support with financial issues, how they go about getting that support, and their experiences. Together with the quantitative findings of the Financial Lives Survey, this is intended to inform the FCA's view of the current state of the market and how it is developing from a consumer perspective.

The 2020 Update is available here.

What's next?

The FCA will continue its consumer research and analysis of firm data. It will assess whether there are any gaps between the products and services firms are offering and what consumers need and want.

The FCA will also continue to work with other organisations and stakeholders. It is particularly keen to understand the impact that technology has had on the market and its potential to help meet consumer needs. The FCA is keen to hear from firms about their plans to use technology in improving efficiency and offering innovative services, and what challenges and barriers they are facing in doing so.

The FCA wants to explore further the potential for new services to emerge in the market. It is interested in both alternative advice services and unregulated information services. It wants to understand more about the barriers to providing alternative services. For instance, is there a lack of demand for new services or are there economic or regulatory barriers that prevent them from emerging?

The FCA expects to publish the final RDR/FAMR review report later in 2020.

What is the impact for you?

For your information only.

09 March 2020

Brexit – Council Decision (EU, Euratom) 2020/266 authorising the opening of negotiations with the UK for a new partnership agreement published in the OJEU

Background

On 1 February 2020, the United Kingdom of Great Britain and Northern Ireland (the "UK") withdrew from the EU. The arrangements for the withdrawal are set out in the agreement (the "Withdrawal Agreement", available here) on the withdrawal of the UK from the EU and the European Atomic Energy Community ("Euratom") negotiated and concluded in accordance with Article 50 of the Treaty on EU (the "TEU", available here).

The Withdrawal Agreement entered into force on 1 February 2020 and provides for a transition period during which Union law applies to and in the UK (the "Transition Period"). The Transition Period will end on 31 December 2020, unless the Joint Committee established by the Withdrawal Agreement adopts, before 1 July 2020, a single decision extending the Transition Period for up to 1 or 2 years.

In the guidelines of 23 March 2018, the European Council restated the Union's determination to have as close as possible a partnership with the UK in the future (the "Guidelines", available here). According to the Guidelines, such a partnership should cover trade and economic cooperation, and other areas. The European Council set out the Guidelines with a view to the opening of negotiations on the overall understanding of the framework for the future relationship that was elaborated in a political declaration (the

“Declaration”, available here) accompanying the Withdrawal Agreement.

The Declaration establishes the parameters of a partnership across trade and economic cooperation with a free trade agreement at its core, law enforcement and criminal justice, foreign policy, security and defence and wider areas of cooperation.

Article 184 of the Withdrawal Agreement provides that the Union and the UK are to use their best endeavours to take the necessary steps to negotiate the agreements governing their future relationship referred to in the Declaration and to conduct the procedures for the ratification or conclusion of those agreements, with a view to ensuring that those agreements apply, to the extent possible, as from the end of the Transition Period.

What’s new?

On 25 February 2020, the Council of the EU adopted a decision authorising the opening of negotiations for a new partnership with the UK, and formally nominating the European Commission (the “Commission”) as the EU negotiator (5870/20 — the “Adopted Decision”).

The addendum to the Adopted Decision included negotiating directives which constitute a mandate to the Commission for the negotiations (5870/20 ADD REV 3 — the “Negotiating Directives”). According to the Commission, the Negotiating Directives cover all areas of interest for the negotiations, including trade, law enforcement and judicial cooperation in criminal matters, foreign policy, security and defence, participation in European Union programmes and other thematic areas of cooperation. They are divided into 6 main parts. Part II of the Negotiating Directives (on page 8) addresses economic aspects, including services and investment, cooperation on financial services, capital movements and payments.

On the same day, the Commission published a questions and answers document on future EU-UK partnership (the “Q&As”). The Q&As address economic partnership, general, practical and governance related aspects.

On 27 February 2020, the Adopted Decision was published in the Official Journal of the EU as Council Decision (EU, Euratom) 2020/266 authorising the opening of negotiations with the UK for a new partnership agreement (“Decision 2020/266”).

On 28 February 2020, the Commission published the terms of reference on the UK-EU future relationship negotiations (the “Terms of Reference”). The Terms of Reference, agreed by the EU and the UK negotiators, establish the structure of the talks, including indicative dates.

The Adopted Decision is available here.

The Negotiating Directives are available here.

Decision 2020/266 is available here.

The Q&As are available here.

The Terms of Reference are available here.

What’s next?

Formal negotiations with the UK were set to begin the week of 2 March 2020.

During the Transition Period, the UK will continue to apply Union law, but it will no longer be represented in the EU institutions.

What is the impact for you?

For your information only.

20 March 2020

Consultation on tax treatment of asset holding companies in alternative fund structures

Background

On 11 March 2020, the Government of the United Kingdom opened a consultation concerning the UK’s fund regime. It covers direct and indirect tax, and refers to relevant areas of regulation.

What’s new?

This consultation looks at whether the tax treatment of companies used by funds to hold assets could make the United Kingdom more attractive for these companies. The consultation is open until 19 May 2020.

Further information are available here.

What’s next?

PwC will keep you updated on further developments.

What is the impact for you?

For your information only.

World

16 March 2020

AML/CTF – FATF publishes guidance on use of digital ID systems for customer due diligence

Background

The Financial Action Task Force’s (“FATF”) 40 recommendations are recognised as the global anti-money laundering (“AML”) and counter-terrorist financing (“CTF”) standards (the “Recommendations” available here). The FATF provides interpretive notes to some of the Recommendations (the “Interpretive Notes”). The Recommendations have been regularly updated since 16 February 2012. In particular, Recommendation 10 provides that financial institutions should be required to undertake customer due diligence (“CDD”) measures in accordance with certain criteria.

The FATF strongly supports the use of new technologies in the financial sector that align with, and strengthen, the implementation of AML/CTF standards and financial inclusion goals. Due to the rapid growth in digital financial transactions, the FATF seeks to acquire a better understanding of how individuals are being identified and verified. Digital identity (“ID”) technologies are evolving rapidly, giving rise to a variety of digital ID systems. Digital ID systems that meet high technology, organisational and governance standards can improve the trustworthiness, security, privacy and convenience of identifying natural persons in a wide variety of settings. Such digital ID systems can also reduce costs and increase efficiencies for regulated entities, and allow for the re-allocation of resources to other AML/CTF functions. However, digital ID systems can also pose ML/TF risks.

On 31 October 2019, the FATF launched a public consultation on draft guidance on digital ID (the “Consultation”, available here). The purpose of the Consultation was to develop guidance to assist governments, regulated entities and other relevant stakeholders in determining how digital ID systems can be used to conduct certain elements of CDD under Recommendation 10. Stakeholders could submit their responses to the Consultation until 29 November 2019.

What’s new?

On 6 March 2020, based on the Consultation, the FATF published its guidance on digital ID (the “Guidance”). The Guidance, which is non-binding, encompasses the following key sections:

- Digital ID terminology and key features (Section II)
  - For the purposes of the Guidance, this Section defines “official identity”, a “digital ID system” and the key components thereof and describes the digital ID assurance frameworks and technical standards for the reliability of digital ID technology, processes and architecture.
- FATF standards on CDD (Section III)
  - This Section clarifies the application of Recommendation 10(a) in the context of digital ID systems. Regulated entities are required to determine the extent of CDD measures using a risk-based approach (“RBA”) in accordance with the Interpretive Notes to Recommendation 1 and the Interpretive Notes to Recommendation 10; and
  - This Section also considers how reliable digital ID systems can support other AML/CTF requirements under Recommendation 10(d).
- Benefits and risks of digital ID systems for AML/CTF compliance and related issues (Section IV)
  - This Section describes some of the potential benefits and potential risks of digital ID systems. Raising awareness of the potential risks permits stakeholders to prevent or effectively manage such by applying the RBA set out in Section V; and
  - This Section also underlines several broader challenges presented by digital ID systems, which may have an indirect impact on AML/CTF efforts.
- Assessing whether digital ID systems are sufficiently reliable and independent under a RBA to CDD (Section V)
  - This Section provides guidance for governments, regulated entities and other relevant stakeholders on

how to apply a RBA to using digital ID systems for customer identification and verification consistent with Recommendation 10(a) and to support ongoing DD under Recommendation 10(d); and

- This Section also explains how to leverage digital ID assurance frameworks and standards for assessing reliability and independence.

Furthermore, the Guidance includes the following 5 appendices:

- "Description of a Basic Digital Identity System and its Participants" provides a more detailed overview of the concepts set out in Section V regarding the components of a digital ID system (Appendix A);
- "Case Studies" provides examples of digital IDs in use in various jurisdictions, including for CDD and access to financial services (Appendix B);
- "Principles on Identification for Sustainable Development" provides an overview of the governance/accountability, privacy, and other operational issues that are being addressed by various jurisdictions and organisations (Appendix C);
- "Digital ID Assurance Framework and Technical Standard-Setting Bodies" lists several standard setting bodies not including national or regional bodies that have developed relevant digital ID assurance frameworks or standards (Appendix D); and
- "Overview of US and EU Digital Assurance Frameworks and Technical Standards" provides details on national and regional digital ID assurance frameworks in the US and the EU (Appendix E).

For further information, the Guidance is available here.

What's next?

The Guidance is intended to assist governments, regulated entities and other relevant stakeholders in determining whether digital ID systems are appropriate to conduct CDD under Recommendation 10.

What is the impact for you?

For your information only.

Notes

Notes

Key GFD Contacts

José-Benjamin Longrée

Partner
PwC Luxembourg
+352 49 48 48 2033
jose-benjamin.longree@lu.pwc.com

Christophe Saint-Mard

ETF Global Distribution Leader
PwC Luxembourg
+352 49 48 48 2134
christophe.saint-mard@lu.pwc.com

Robert James Glover

Partner
PwC Luxembourg
+352 49 48 48 4457
robert.james.glover@lu.pwc.com

Sherry Lu

Manager
PwC Luxembourg
+352 49 48 48 5038
sherry.lu@lu.pwc.com

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