3W - Fund Distribution Watch

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

November/December 2018

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What’s new?

Editorial

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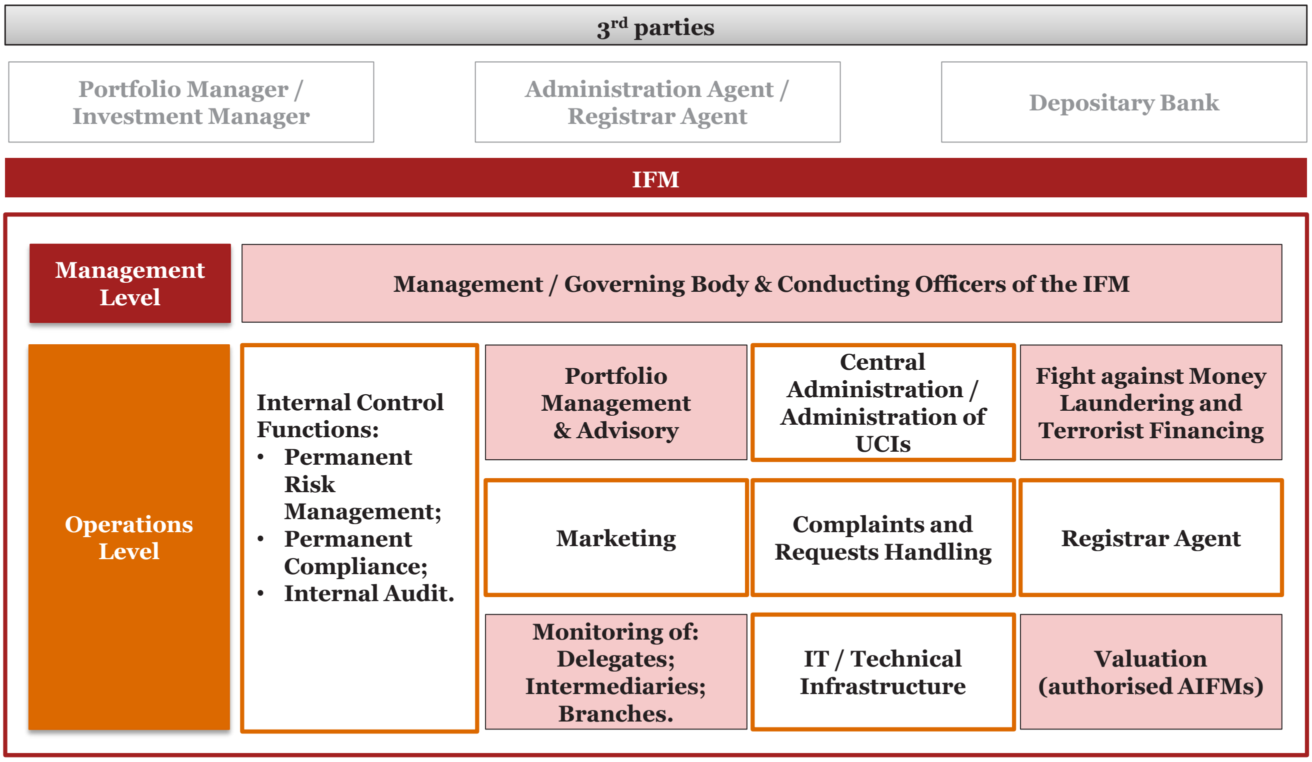
The new governance benchmark for Luxembourg investment fund managers – CSSF Circular 18/698

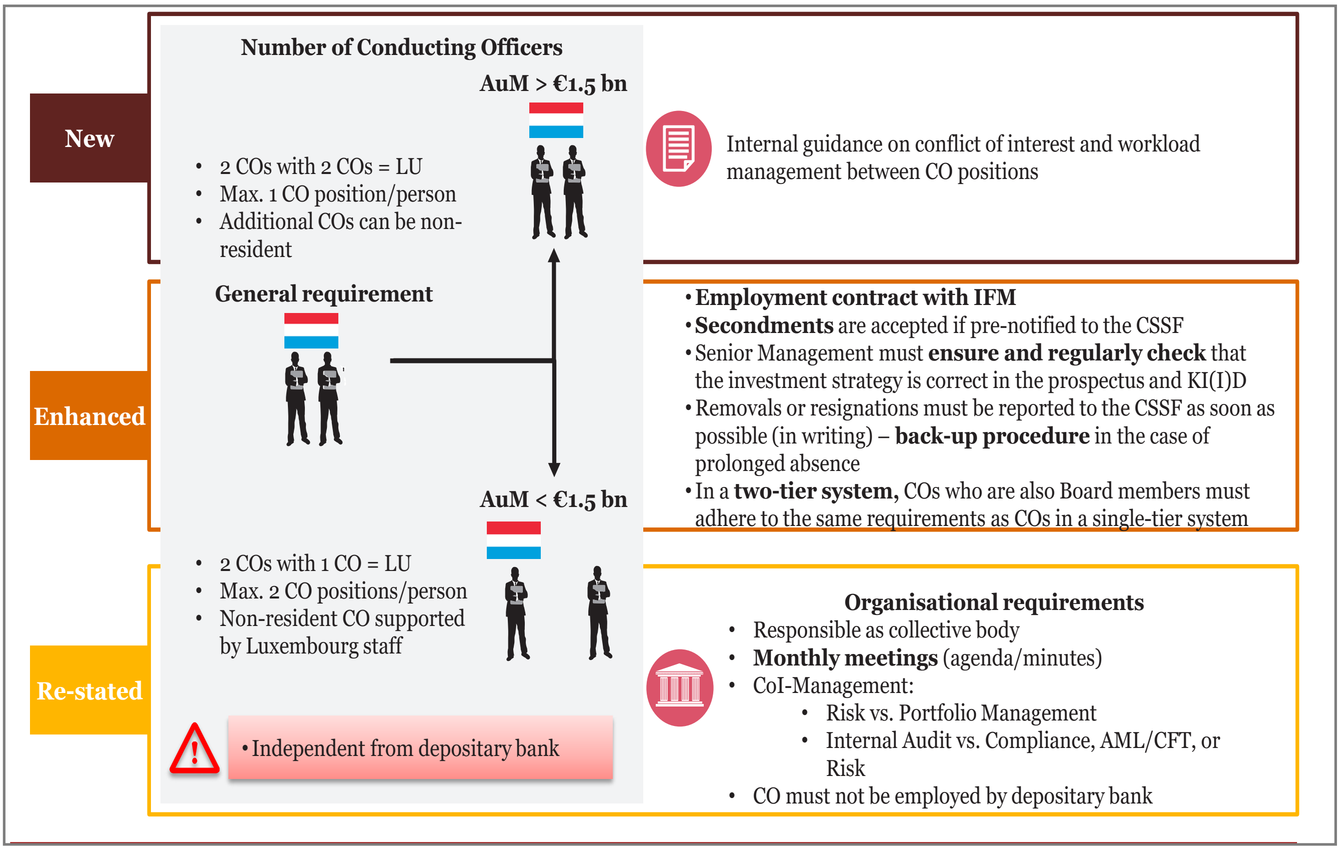
In August 2018, the CSSF published Circular CSSF 18/698. The new Circular, referred to as the 'Governance' or 'Substance' Circular, sets the tone for the governance standards to be complied with by Luxembourg-based investment fund managers ('IFM') and their delegates, as far as delegated duties are concerned.

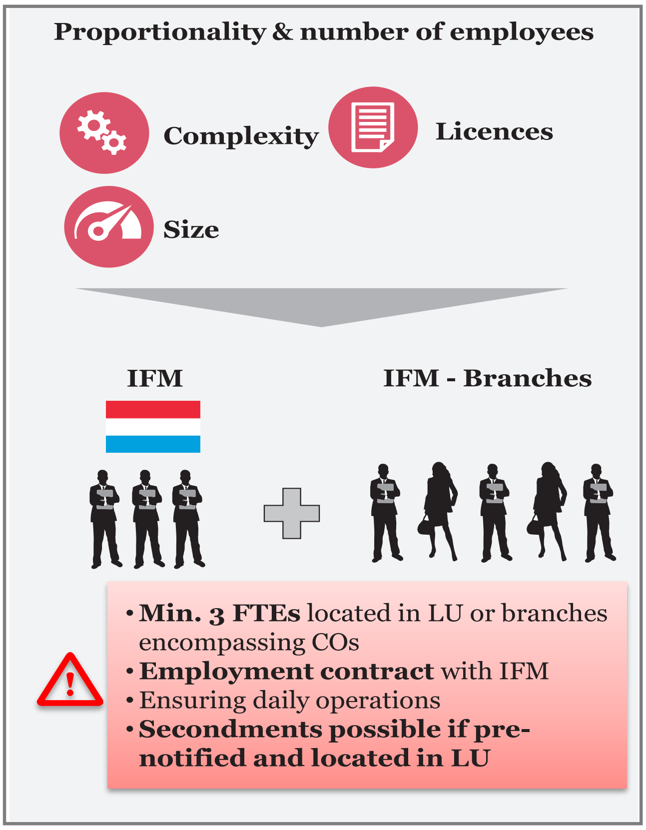
Why a new CSSF Circular?

The new guidance essentially replaces a Circular dating back to 2012 (CSSF 12/546) and includes the most recent European baseline requirements (i.e. EU Directives and ESMA guidance). It also reflects the administrative practice of the CSSF over the past few years.

Consequently, the Circular's benefits clearly outweigh the disadvantages and the new guidance provides a clear and comprehensive framework for IFMs, i.e. (i) level-playing-field governance standards for all parties in Luxembourg, (ii) substance standards at the level of the IFM and (iii) fine-tuned rules governing delegation and oversight.







Level-playing-field governance and substance standards

The CSSF has updated its distinct rules for the conduct of business and governance of an IFM. The IFM's governance bodies, i.e. Board of Directors or Supervisory Body meetings, are to be organised in a coordinated manner (i.e. standing agenda, decision documentation, policies acknowledgment) on a quarterly basis. The management body meetings (i.e. conducting officers) are likewise coordinated on a monthly basis.

Also, the CSSF has formalised its substance standards with regard to the IFM's Board of Directors, Management Body and Central Administration.

As such, the governance structure of an IFM has not changed substantially, but the documentation standards, composition and minimum substance have increased. The Circular sets a relevant substance standard in the EU and is in line with the expectations set out by the EU Commission and ESMA.

Rules for delegation and oversight

Of particular importance are the rules on delegation and oversight of delegates.

The main changes are the following:

I. **Re-statement of the '3 levels' of delegation oversight**, i.e. (i) initial due diligence, (ii) periodic due diligence (risk based) and (iii) ongoing oversight (i.e. KPIs and quality meetings);

II. **Broadening of scope of delegation oversight**, i.e. not only the core functions (portfolio management, risk management and, for UCITS, distribution) as defined by the UCITS and AIFMD Laws are subject to delegation oversight, but also other delegated tasks such as IT, compliance, internal audit, finance, valuation and risk support are subject to at least the initial and periodic due diligence controls. Ongoing monitoring is not required from a regulatory perspective and can be organised on an as-needed basis.

III. **Inclusion of AML requirements**, i.e. in Chapter 5.4, the CSSF has defined distinct scenarios implying AML-related controls for IFMs;

New

Application: Each IFM (incl. branches) registered in an EU member state or a third country

Regulatory framework: AML/CTF law | CSSF 12-02 | CSSF circulars | Law of 27/10/2010 | FATF publications

Staff requirements & duties:

"AML/CTF compliance officer at management level" – Located in Luxembourg
- At least once a year, preparation of a summary report on AML/CTF activities for top management
- Report to be sent to the CSSF **5 months after the IFM's FYE**

\+ "Reporting Manager" – Located in Luxembourg
- Monitoring compliance with professional obligations

Scenarios:
- The CSSF has defined **4 scenarios** differentiating the obligations applicable to an IFM
- Scenarios defined based on the relationship between the IFM and its marketing intermediaries and registrar agent

⚠ **Multiple scenarios can be applicable for one IFM**

New

	Scenario 1	Scenario 2	Scenario 3	Scenario 4 (AIFM-scenario)
Characteristics	• **Direct** relationship with: a) *marketing intermediaries* and/or b) *direct investors* • **Registrar Agent**	• **Direct** relationship with: a) *marketing intermediaries* and/or b) *direct investors* • **Delegated Registrar Agent**	• **No direct** relationship with: a) *marketing intermediaries* and/or b) *direct investors* • **Delegated Registrar Agent**	• **No complementary function of marketing** of UCIs • **Or Registrar Agent function**
Annual inventory of direct intermediaries	✓	✓	✗	✗
AML/KYC & Distribution Procedure	✓	✓	✓	✓
Initial Due Diligence	✓	✓	✓	✗
Periodic Due Diligence	✓	✓	✓	✗
Ongoing Reporting	✓	✓	✗	✗
Delegation Control	✓	✓	✓	✗
Contract with registrar agent	✗	✓	✓	✗

IV. **Specific requirements for investment advisors**, encompassing the duty for selecting and scrutinising the investment advisor recommendations by the IFM;

V. Finally, **more specific guidance as to the oversight of distribution** networks and intermediaries in investment fund share transactions.

What does this mean for fund distribution?

Distribution is subject to oversight and control requirements, both from the perspective of AML as well as for the purposes of broader distribution controls.

The CSSF guidance introduces the concept of 'intermediary', as a counterpart (private or corporate) to the IFM (or its transfer agent) for the subscription/redemption of fund shares.

For direct intermediaries not subject to any other duties imposed by contract or subscription agreement (e.g. execution platforms or collecting agents), only the AML framework applies and provides written requirements to ensure that AML-specific duties are performed by the intermediary in accordance with Luxembourg standards.

For distribution agents to which specific distribution-related duties have been delegated by contractual agreement, the product-related controls apply in addition to the AML-specific ones.

As such, direct intermediaries can be subject to:

I. AML-specific due diligence and oversight; or

II. Due diligence pertaining to the delegated distribution tasks/duties (e.g. quality of shareholders, complaints, minimum subscription amounts, distribution countries); or

III. BOTH, if the direct intermediary is a delegated distribution agent via a distribution agreement.

The distribution oversight is composed of several control layers:

Distribution procedure

• Implementation of 2010 and 2013 requirements on initial due diligence and ongoing monitoring

Due diligence and ongoing monitoring

Due diligence

• Performed on the basis of the 4 AML scenarios
• Includes MiFID II requirements (target market, inducements)

Ongoing monitoring

- distribution incidents
- distribution countries
- MiFID II requirements
- complaints
- subscriptions and redemptions

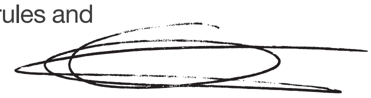
CSSF reporting

• Annual inventory of **direct distribution intermediaries** (5 months after end of FY)

All indirect intermediaries or distribution agents are subject to a 'mutadis mutandis' principle, i.e. the distribution oversight does not require a full look-through on all sub-delegated distribution agents, as long as the IFM has obtained comfort with regard to the first level (i.e. direct distribution intermediary) communicating its delegation and due diligence procedures (existence and efficiency) to sub-delegates.

However, this main principle again changes if the first level (i.e. direct distribution intermediary) is considered high-risk from an AML perspective. In such case, an enhanced AML due diligence process applies, which triggers a look-through on UBOs and sub-delegates/clients.

Consequently, the **distribution network management is to be enhanced** in light of the new CSSF guidance in order to comply with AML requirements (i.e. AML written agreement and, in case of high risk, enhanced due diligence) as well as in terms of broader distribution control requirements (i.e. distribution agreement for MiFID target market information, quality of investors, prospectus rules and selection of sub-delegates).



Olivier Carré

Hot topics

Danemark

5 November 2018

New bill introducing easy access to foreign investment funds for Danish retail investors

A draft bill has been published, which, if adopted by the Danish Parliament, will make it easier for foreign investment fund managers to target Danish retail investors.

The bill is expected to be laid before the Danish Parliament in mid-November 2018 and to be finally adopted before the end of this year.

The new rules will have effect from 1 January 2019.

Europe

9 November 2018

AIFMD/UCITS – Level 2 – Delegated Regulations on safekeeping duties of depositaries to apply from 1 April 2020

Commission Delegated Regulation (EU) No 231/2013 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision has applied since 22 July 2013 In particular, Article (11)(d)(iii) of the AIFMD requires that where a depositary delegates safekeeping functions to third parties (custodians), the assets also be segregated at delegate level. Article 99 of Regulation 231/2013 clarifies how this obligation must be fulfilled.

On 30 October 2018, the Delegated Regulation for AIFs and the Delegated Regulation for UCITS were published in the OJEU ("Regulation 2018/1618" and "Regulation 2018/1619" respectively).

As a reminder, the main amendments introduced by Regulations 2018/1618 and 2018/1619 are summarised in the newsflash.

Europe

23 November 2018

Overview of the asset-management industry in Europe

EFAMA's asset-management report is an effort to provide a snapshot of the European asset-management industry across both the retail and institutional landscape.

Assets managed in Europe reached a record high of EUR 25 trillion in 2017. The consistently good performance since 2008 of both equity and bond markets fostered this growth as a consequence of the renewed trust of investors in the financial markets.

Europe

30 November 2018

CJEU rules on incompatibility with EU law of French withholding tax on dividends received by loss-making non-resident companies

On 22 November 2018, the Court of Justice of the European Union (CJEU) issued its judgment in the French case Sofina (C575/17).

The CJEU held that the French legislation under which non-resident companies in a loss-making position are subject to a final withholding tax on the French-sourced dividends is incompatible with the free movement of capital, and that no overriding reason of public interest may justify such restriction.

France

9 November 2018

Finance Bill for 2019: ATAD and BEPS provisions introduced

On 24 September 2018, the French Government published the finance bill for 2019.

The bill includes measures derived from the Anti Tax Avoidance Directive ((EU) 2016/1164, "ATAD") relating to the limitation of interest-tax deductibility and general anti-abuse rules. If adopted, the law would repeal the 25% haircut limitation, the anti-abuse 'Carrez' rules on expenses related to the acquisition of shares, and current French thin capitalisation rules.

This reform would also amend the participation exemption regime.

Hong Kong

20 November 2018

Circular to intermediaries – Statement on regulatory framework for virtual asset portfolio managers, fund distributors and trading platform operators

The SFC has identified some significant risks associated with investing in virtual assets. To address these risks, it is delivering guidance on the regulatory standards expected of virtual asset portfolio managers and fund distributors. In the circular published on 1 November 2018, the SFC also explored a conceptual framework for the potential regulation of virtual-asset trading-platform operators.

United Kingdom

15 November 2018

Brexit – Temporary Permissions Regulations in force

On 6 November 2018, the Revised Draft Temporary Permissions Regulations were enacted (the "Temporary Permissions Regulations"). The Temporary Permissions Regulations entered into force on 7 November 2018, except for those provisions relating, inter alia, to the repeal of passporting rights, which will enter into force on Exit Day. The Temporary Permissions Regulations were accompanied by an explanatory memorandum prepared by HMT (the "HMT Explanatory Memorandum").

Belgium

21 December 2018

Governance - NBB on internal governance, enacting the EBA guidelines in national law

Background

On 23 October 2018, the National Bank of Belgium (the "NBB") issued circular NBB_2018_28 (the "Circular"), which enacts the guidelines of the European Banking Authority (the "EBA") of 26 September 2017 on internal governance (the "Guidelines") in the Belgian prudential framework. The Guidelines are available here.

The Guidelines provide guidance for practical supervision of governance in financial institutions. On 26 September 2017, the EBA issued new guidelines in order to further harmonise the governance practices that apply to credit institutions and investment firms, thereby ensuring their effective and prudent management. The Guidelines entered into force on 30 June 2018 and replaced EBA guidelines 44 of 27 September 2011.

What's new?

The Guidelines provide guidance for practical supervision of governance in all financial institutions. Specific guidelines 51 and 53, which state that the nomination committee and the risk committee should include a majority of members who are independent and be chaired by an independent member, should be considered a recommended good practice which, in accordance with the provisions of Article 21 (1) (1) of the law of 25 April 2014 (Dutch version, French version), may provide the overall assessment of the organisation and operation of the institution's governance framework.

The Circular was published on the NBB's website on 23 October 2018 and is available in French (here), Dutch (here) and English (here).

What is the impact for you?

For your information only.

21 December 2018

AML/CTF – New series of comments and recommendations on the NBB's website

Background

Following the adoption of the AML/CTF law of 18 September 2017, the National Bank of Belgium (the "NBB") updated its website on 22 May 2018 (cf. NBB communication 2018_04), to include references to all relevant European and Belgian pieces of legislation, circulars and guidelines on the matter, as well as specific comments and recommendations from the NBB itself.

What's new?

On 29 November 2018, after consulting the associations considered representative of the relevant sectors, the NBB published a new series of comments and recommendations on its dedicated AML/CTF website section.

The new comments and recommendations cover the following topics:

1. Anonymous or numbered accounts and contracts;
2. Persons to be identified;
3. Timing of the identification and verification of the identity;
4. Non-compliance with the obligation of identification and verification of the identity;
5. Verification of the identity during the business relationship and implementation of alternatives to the closure of the business relationship;
6. High-risk third countries;
7. Jurisdictions where taxation is low or non-existent;
8. Correspondent relationships;
9. Fund transfers;
10. Financial embargoes and freezing of assets;
11. Execution of obligations by third parties;
12. External whistleblowing.

Some adaptations have also been made to other parts of the AML/CTF website section.

The list of updates is available in French (here) and in Dutch (here).

What is the impact for you?

For your information only.

Denmark

5 November 2018

New bill introducing easy access to foreign investment funds for Danish retail investors

Background

A draft bill has been published, which, if adopted by the Danish Parliament, will make it easier for foreign investment fund managers to target Danish retail investors.

What's new?

The bill is expected to be laid before the Danish Parliament in mid-November 2018 and to be finally adopted before the end of this year.

The new rules will have effect from 1 January 2019.

What's next?

Foreign investment fund managers should consider obtaining the new tax status of an equity-based investment company for their investment funds.

What is the impact for you?

For your information only.

Europe

9 November 2018

MiFID II/MiFIR – Level 3 – ESMA renews its product intervention measures

Background

Regulation (EU) No 600/2014 of the European Parliament and of the Council of the EU on markets in financial instruments has applied since 3 January 2018 ("MiFIR", available here). Article 40 of MiFIR addresses the temporary intervention powers of the European Securities and Markets Authority ("ESMA"). Under certain conditions, ESMA may prohibit or restrict in the EU the marketing, distribution or sale of certain financial instruments or financial instruments with certain specified features, or a type of financial activity or practice.

On 22 May 2018, ESMA adopted two decisions under Article 40 of MiFIR (ESMA35-43-1135, the "Notice on Decisions", available here). On 1 June 2018, the ESMA decisions were published in the OJEU as:

- Decision (EU) 2018/795 to temporarily prohibit the marketing, distribution or sale of binary options ("BOs") to retail clients in the Union, applicable from 2 July 2018 for 3 months ("Decision 2018/795 on BOs", available here); and
- Decision (EU) 2018/796 to temporarily restrict contracts for differences ("CFDs") in the Union, applicable from 3 August 2018 for 3 months ("Decision 2018/796 on CFDs", available here). This restriction consists of leverage limits on opening positions; a margin close-out rule on a per account basis; negative balance protection on a per account basis; preventing the use of incentives by a CFD provider; and a firm-specific risk warning delivered in a standardised way.

On 24 August 2018, ESMA published a press release announcing that on 22 August 2018, its Board of Supervisors had agreed to renew the prohibition on BOs for a further 3 months from 2 October 2018 (ESMA71-99-1026 — the "Press Release on BOs", available here). ESMA also agreed to exclude a limited number of products from the scope of the measure.

On 28 September 2018, ESMA published a press release announcing that on 26 September 2018, its Board of Supervisors had agreed to renew the restriction on the marketing, distribution and sale of CFDs to retail clients for a further 3 months from 1 November 2018 (ESMA71-99-1041, the "Press Release on CFDs", available here). This renewal includes the following:

- Leverage limits on the opening of a position by a retail client vary from 30:1 to 2:1, depending on the volatility of the underlying;
- A margin close-out rule on a per account basis. This will standardise the margin percentage at which providers are required to close out the open CFDs of one or more retail clients;
- Negative balance protection on a per account basis. This will provide an overall guaranteed limit on retail-client losses;
- A restriction on the incentives offered to trade CFDs; and
- A standardised risk warning, including the percentage of losses on a CFD provider's retail-investor accounts.

On 28 September 2018, ESMA also updated its Questions and Answers document (previously updated on 1 June 2018) concerning the application of its temporary product intervention measures on the marketing, distribution and sale of CFDs and BOs to retail clients (ESMA35-36-1262 — the "Q&A", available here).

On 1 October 2018, ESMA issued a notice announcing that on 21 September 2018, it had adopted a decision under Article 40 of MiFIR to prohibit the marketing, distribution and sale of BOs to retail clients (ESMA35-43-1391 — the "Notice on BOs", available here), and that it had been published in the OJEU as Decision (EU) 2018/1466 renewing and amending the temporary prohibition in Decision (EU) 2018/795 on BOs, which applies from 2 October 2018 for 3 months ("New Decision 2018/1466 on BOs", available here).

What's new?

On 31 October 2018, ESMA issued a notice announcing that on 23 October 2018, it had adopted a decision under Article 40 of MiFIR to restrict the marketing, distribution and sale of CFDs to retail clients (ESMA35-43-1397 – the "Notice on CFDs"), which has been published in the OJEU as Decision (EU) 2018/1636 renewing and amending the temporary restriction in Decision (EU) 2018/796 on CFDs ("New Decision 2018/1636 on CFDs").

The Notice on CFDs is available here.

New Decision 2018/1636 on CFDs is available here.

What's next?

New Decision 2018/1636 on CFDs has applied since 1 November 2018 for a period of 3 months.

On 9 November 2018, ESMA updated its Q&A, providing clarification on the application of the temporary product intervention measures in relation to the prominence of the risk warning (Question 5.13 on pages 14-15) and further clarifying what are considered "payments for the purpose of entering into a CFD" (Question 5.2 on page 9) (available here).

What is the impact for you?

For your information only.

9 November 2018

AIFMD/UCITS – Level 2 – Delegated Regulations on safekeeping duties of depositaries to apply from 1 April 2020

Background

Commission Delegated Regulation (EU) No 231/2013 supplementing Directive 2011/61/EU of the European Parliament and of the Council (the "AIFMD", available here) with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision has applied since 22 July 2013 ("Regulation 231/2013", available here). In particular, Article (11)(d)(iii) of the AIFMD requires that where a depositary delegates safekeeping functions to third parties (custodians), the assets also be segregated at delegate level. Article 99 of Regulation 231/2013 clarifies how this obligation must be fulfilled.

Commission Delegated Regulation (EU) 2016/438 supplementing Directive 2009/65/EC of the European Parliament and of the Council (the "UCITS Directive", available here) with regard to obligations of depositaries has applied since 13 October 2016 ("Regulation 2016/438", available here). In particular, Article 22a(3)(c) of the UCITS Directive requires that where a depositary delegates safekeeping functions to third parties (custodians), the assets also be segregated at delegate level. Article 16 of Regulation 2016/438 details how this obligation must be fulfilled.

On 20 July 2017, ESMA published its opinion on asset segregation and application of depositary delegation rules to CSDs (ESMA34-45-277 – the "ESMA Opinion", available here).

On 12 July 2018, based on the ESMA Opinion, the European Commission adopted the following two Delegated Regulations (the "Delegated Regulations"):

- Delegated Regulation amending Regulation (EU) No 231/2013 as regards safe-keeping duties of depositaries (C(2018) 4377 final – the "Delegated Regulation for AIFs", available here); and
- Delegated Regulation amending Regulation (EU) No 2016/438 as regards safe-keeping duties of depositaries (C(2018) 4379 final – the "Delegated Regulation for UCITS", available here).

The Delegated Regulations provide that the starting date of application of the final texts be deferred for 18 months (vs 6 months during the consultation process) after publication in the OJEU.

What's new?

On 30 October 2018, the Delegated Regulation for AIFs and the Delegated Regulation for UCITS were published in the OJEU ("Regulation 2018/1618" and "Regulation 2018/1619" respectively).

As a reminder, the main amendments introduced by Regulations 2018/1618 and 2018/1619 are summarised below:

Description of the amendment to... Regulation 231/2013 (AIFs) Regulation 2016/438 (UCITS)

Frequency of reconciliations between the depositary's internal accounts and records and those of any third party to whom safekeeping has been delegated New Article 89(1)(c) New Article 13(1)(c)

The depositary maintains a record opened in the name of an AIF client/AIFM (of a UCITS client/UCITS management company respectively), showing that the assets kept in custody by a third party belong to a particular AIF/UCITS client New Article 89(2) New Article 13(2)

Minimum details that must feature in the contract between a depositary and a third party on delegation of custody of assets New Article 98(2a) New Article 15(2a)

Clarification of asset segregation requirements for third parties to whom the custody of the AIF's/UCITS' assets has been entrusted Revised Article 99 Revised Article 16

For AIFs, additional obligations for depositaries that delegate the custody of assets to third parties located in a third country Revised Article 99 N/A

Regulation 2018/1618 is available here.

Regulation 2018/1619 is available here.

What's next?

Regulations 2018/1618 and 2018/1619 entered into force on 19 November 2018.

They will both apply from 1 April 2020.

What is the impact for you?

For your information only.

9 November 2018

Financial supervision – Level 3 – ESMA issues public statement on its priorities when assessing 2018 financial statements of listed companies

Background

On 3 April 2018, ESMA published a report entitled "Enforcement and Regulatory Activities of Accounting Enforcers in 2017" (the "2018 Report", available here).

On 26 September 2018, ESMA released its annual work programme asserting where it will direct its attention for 2019, in line with its objectives (the "2019 WP", available here). In the 2019 WP, ESMA committed to contributing to setting up high-quality accounting standards, which would include providing enforcers' views on new IFRS pronouncements and amendments.

What's new?

On 26 October 2018, ESMA issued a public statement entitled "European common enforcement priorities for 2018 annual financial reports" (ESMA32-63-503 – the "Public Statement").

More specifically, the common enforcement priorities for 2018 year-end are:

- specific issues related to the application of IFRS 15: Revenue from Contracts with Customers;
- specific issues related to the application of IFRS 9: Financial Instruments; and
- disclosure of the expected impact of the implementation of IFRS 16: Leases.

ESMA also highlights specific requirements relating to the sections of the annual financial report other than financial statements, such as the disclosure of non-financial information and the application of ESMA guidance on Alternative Performance Measures ("APMs"), as well as particular importance placed on disclosures on the impact of Brexit. The Public Statement is available here. The related press release is available here.

What's next?

ESMA and European national enforcers will monitor and supervise the application of the IFRS requirements, as well as any other relevant provisions outlined in the Public Statement, with national authorities incorporating them into their reviews and taking corrective action where appropriate.

In addition, ESMA will collect data on how European listed entities have applied the priorities, and ESMA will report on findings regarding these priorities in its report on 2019's enforcement activities.

What is the impact for you?

For your information only.

16 November 2018

MiFID II – Level 3 – Translation of ESMA Guidelines on suitability; supervisory briefing

Background

The assessment and reporting of suitability is one of the key requirements for investor protection set out in Article 25(2) of Directive 2014/65/EU ("MiFID II", available here) and further detailed in Articles 54 and 55 of Commission Delegated Regulation (EU) 2017/565 (available here). It applies to the provision of any type of investment advice, whether independent or not, as well as discretionary portfolio management.

On 28 May 2018, ESMA published its final guidelines on suitability requirements under MiFID II (ESMA35-43-1163 – the "Guidelines", available here). In particular, the Guidelines describe the European regulator's expectations regarding the following processes:

- Client information and firms' responsibility for the suitability assessment;
- Know-your-client and product policies and procedures, including the main facts to take into account to ensure that client information is proportionate and reliable;
- Policies and procedures to be put in place to ensure that clients are matched with suitable products, including an assessment of the possible investment alternatives, taking into account products' cost and complexity;
- The qualifications of firm staff involved in material aspects of the suitability process; and
- Record-keeping of the suitability assessments.

What's new?

On 6 November 2018, ESMA published the official translated versions of the Guidelines (available here).

Further, on 13 November 2018, ESMA published its MiFID II supervisory briefing, which summarises the key elements and explains the associated objectives and outcomes of the suitability framework (ESMA35-43-1206, available here).

What's next?

EU competent authorities must notify ESMA by 6 January 2019 of whether they comply or intend to comply with the Guidelines. The Guidelines will then apply from 6 March 2019.

What is the impact for you?

For your information only.

16 November 2018

MMF Regulation – Level 3 – ESMA consults on Draft Guidelines on reporting to competent authorities under Article 37

Background

Regulation (EU) 2017/1131 of the European Parliament and of the Council on money market funds ("MMFs") has applied since 21 July 2018 (the "MMF Regulation", available here), with transitional provisions in relation to existing UCITS and AIFs laid out in Article 44 thereof.

Article 37 of the MMF Regulation provides that ESMA develop draft implementing technical standards ("ITS") to establish a reporting template containing all the information that managers of MMFs must send to their competent authority ("CA").

Commission Implementing Regulation (EU) 2018/708 laying down ITS with regard to the template to be used by managers of MMFs when reporting to CAs has applied since 21 July 2018 ("Delegated Regulation 2018/708", available here).

Following the publication of Delegated Regulation 2018/708, ESMA has worked on draft guidelines and IT guidance that will complement the information included in the ITS, in order for managers of MMFs to have all the necessary information to fill in the reporting template that they must send to the CA of their MMF on a quarterly basis (or annually for an MMF whose total assets under management do not exceed EUR 100 million).

What's new?

On 13 November 2018, ESMA launched its consultation concerning draft guidelines on reporting to CAs under Article 37 of the MMF Regulation (ESMA34-49-144 – the "Consultation Paper").

In the Consultation Paper, ESMA is seeking the views of (i) MMF managers and their trade associations; (ii) AIFs and UCITS managers and their trade associations; and (iii) institutional and retail investors (and associations of such investors) investing in MMFs, on a list of questions listed in Annex I.

In particular, ESMA highlights the following points:

- In order to reduce the cost of compliance, managers of MMFs subject to yearly reporting pursuant to Article 37(1) of the MMF Regulation are allowed to report on a quarterly basis;
- Potential situations in which managers of MMFs have no information to report on MMFs should be exhaustively listed;
- To calculate the thresholds referred to in Article 37(1) of the MMF Regulation, the NAV should be measured when the corresponding data is made available on a quarterly basis (last day of the quarter);
- ESMA requests feedback on the proposed definitions of the various fields of the reporting table;
- ESMA also asks stakeholders to check whether any eligible assets would be omitted from the annex to the draft guidelines (table entitled "CFI codes for eligible securities"); and
- Stakeholders can comment on any other issues concerning any of the sections of the draft guidelines (i.e. general principles, MMF characteristics, portfolio indicators, stress tests, information on the assets, information on the liabilities, and information on LVNAV) or the various fields in the reporting template.

It should be noted that Annex IV to the Consultation Paper contains the full text of the draft guidelines on reporting to CAs (and its annex).

The Consultation Paper is available here.

What's next?

Comments on the Consultation Paper must be submitted to ESMA by 14 February 2019.

In the Consultation Paper, ESMA "confirms that managers would need to send their first quarterly reports mentioned in Article 37 to NCAs in Q1 2020 (and not in July 2018). In addition, there will be no requirement to retroactively provide historical data for any period prior to this starting date of the reporting."

The consultation deadline for submitting comments to the ESMA draft guidelines on stress test scenarios under the MMF Regulation was 1 December 2018 (ESMA34-49-131, available here).

What is the impact for you?

For your information only.

21 November 2018

AML/CFT – Level 3 – ESAs consult on guidelines on cooperation and information exchange for AML/CFT supervision purposes

Background

The Financial Action Task Force recommendations (the "FATF Recommendations", available here) are recognised as a global framework of measures that countries should implement in order to combat money laundering and terrorist financing ("AML/CTF"). The FATF Recommendations have been regularly updated since 16 February 2012. They explicitly state that the cooperation of the competent authorities ("CAs") responsible for overseeing AML/CFT compliance is an essential part of an effective AML/CFT regime.

Directive (EU) 2015/849 of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of ML or TF, which has applied since 26 June 2017, requires CAs of home and host Member States ("MSs") to cooperate to ensure the effective AML/CFT supervision of required entities that operate on a cross-border basis ("4AMLD", available here).

There is a lack of specific references to cooperation and information exchange for AML/CFT supervision purposes in most EU legal texts. Furthermore, 4AMLD contains no detailed provisions on how CAs should collaborate and exchange information. These reasons prevent effective cooperation between national CAs, including the ability to exchange information.

4AMLD has been amended by Directive (EU) 2018/843 ("5AMLD", available here), and MSs must enact the laws, regulations and administrative provisions necessary to comply with it by 10 January 2020. Articles 50a and 57a of 5AMLD require that EU MSs do not prohibit or unreasonably restrict the exchange of information or cooperation between CAs for AML/CFT supervision purposes. It also clarifies the legal basis for cooperation and information exchange between CAs in different MSs. However, 5AMLD does not set out in detail how this should be achieved.

The European supervisory authorities ("ESAs") have concluded that it would be beneficial to clarify the modalities of supervisory cooperation and information exchange, and to create a formal framework that supervisors should use to support effective AML/CFT supervision of firms that operate on a cross-border basis.

What's new?

On 8 November 2018, the ESAs published their consultation paper on draft joint guidelines on the cooperation and information exchange for the purposes of 4AMLD between CAs supervising credit and financial institutions (JC/CP/2018/59 – the "Draft AML/CFT Colleges Guidelines").

The Draft AML/CFT Colleges Guidelines propose creating AML/CFT colleges of supervisors for firms operating on a cross-border basis. The AML/CFT colleges would provide a forum for cooperation for AML/CFT CAs responsible for supervising the same firm in different MSs to work together and improve their understanding of the ML/TF risk associated with the firm, exchange information to inform their approach to AML/CFT supervision of that firm, and coordinate supervisory action where appropriate. To achieve that, the Draft AML/CFT Colleges Guidelines:

- set out the rules governing the establishment and operation of AML/CFT colleges and define the process for information exchange between CAs;
- provide that all CAs carry out a mapping exercise of all firms under their supervision to ascertain which firms would require an AML/CFT college to be set up;
- specify that an AML/CFT college should be set up whenever three or more CAs from different MSs are responsible for the AML/CFT supervision of the same credit or financial institution and its establishments;
- note that the frequency and intensity of each AML/CFT college should be determined on a risk-sensitive basis;
- propose gateways to ensure that prudential supervisors can participate as observers in AML/CFT colleges, and that information from AML/CFT college meetings is available to colleges of prudential supervisors;
- define the process for bilateral cooperation and exchange of information between CAs where the conditions for setting up an AML/CFT college are not met (i.e. the firm operates in only two MSs); and
- provide reasoning for each proposed guideline of the Draft AML/CFT Colleges Guidelines.

The Draft AML/CFT Colleges Guidelines are available here.

What's next?

Comments on the Draft AML/CFT Colleges Guidelines can be submitted until 8 February 2019.

The ESAs will hold a public hearing on the Draft AML/CFT Colleges Guidelines, which will take place at the EBA's premises in London on 18 December 2018 from 14:00 to 16:30 (UK time).

The ESAs will undertake a review of the implementation of the final AML/CFT Colleges Guidelines within four years of their publication.

What is the impact for you?

For your information only.

21 November 2018

MiFID II/MiFIR – Level 3 – ESMA updates its Q&As on market-structure topics

Background

Directive 2014/65/EU and Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments have applied since 3 January 2018 ("MiFID II" and "MiFIR" respectively, available here and here).

The European Commission has adopted delegated and implementing acts to specify how competent authorities and market participants must comply with the obligations laid down in MiFID II and MiFIR (the "MiFID II and MiFIR Delegated and Implementing Acts", available here and here). They include Commission Delegated Regulations:

- (EU) 2017/589 supplementing MiFID II with regard to regulatory technical standards specifying the organisational requirements of investment firms engaged in algorithmic trading ("RTS 6", available here);

- (EU) 2017/578 supplementing MiFID II with regard to regulatory technical standards specifying the requirements on market making agreements and schemes ("RTS 8", available here); and
- (EU) 2017/580 supplementing MiFIR with regard to regulatory technical standards for the maintenance of relevant data relating to orders in financial instruments ("RTS 24", available here).

The general public, market participants and competent authorities can submit questions to the European Securities and Markets Authority ("ESMA") on the practical application of MiFID II and MiFIR in relation to market-structure topics. Since 18 November 2016, ESMA has provided answers to those questions by publishing updates to its Questions and Answers document on MiFID II and MiFIR market-structure topics (ESMA70-872942901-38 – the "Q&A Document", available here).

On 4 October 2018, the Q&A Document was updated, adding new Q&As to Part 3 on direct electronic access ("DEA") and algorithmic trading and Part 5 on multilateral and bilateral systems.

What's new?

On 14 November 2018, ESMA updated its Q&A Document (ESMA70-872942901-38 – the "Updated Q&A Document").

ESMA added a new Q&A 29 (on page 30) to Part 3 on DEA and algorithmic trading. It clarified that the requirement imposed on market markers to volu post simultaneous two-way quotes of comparable size does not restrict the ability of market makers to voluntarily post additional liquidity on either side of the order book.

ESMA further explained that it is not the intention of RTS 8 to prevent market makers that have live two-way quotes from adding further liquidity in the order book on a voluntary basis. Market makers are free to post additional quotes on either side of order book at their discretion, in addition to the "simultaneous two-way quotes of comparable size and competitive price" imposed by Article 2(1)(b) of RTS 8, which addresses the content of binding written market-making agreements. Only quotes that are posted to fulfil the obligations imposed by the market-making agreement should be flagged as such in field 8 ('Liquidity provision activity') of Table 2 ('Details of orders') of the Annex to RTS 24 and field 3 ('Liquidity provision activity') of Table 3 ('Information relating to outgoing and executed orders') of Annex II to RTS 6 on the content and format of order records.
The Updated Q&A Document is available here.

What's next?

ESMA will continue to develop the Q&A Document in the coming months and will review and update it where required.

What is the impact for you?

For your information only.

23 November 2018

Overview of the asset-management industry in Europe

Background

EFAMA's asset-management report is an effort to provide a snapshot of the European asset-management industry across both the retail and institutional landscape.

What's new?

Assets managed in Europe reached a record high of EUR 25 trillion in 2017. The consistently good performance since 2008 of both equity and bond markets fostered this growth as a consequence of the renewed trust of investors in the financial markets.

The asset-management industry is concentrated between the UK, France and Germany, which represent 62% of the whole European market. The industry serves both retail and institutional clients, the latter mainly represented by insurance companies and pension funds, which constituted 53% of total AuM in Europe in 2016.

The article is available here.

Please find the report below: EFAMA Fact Sheet.pdf

What's next?

PwC will keep you updated on future developments.

What is the impact for you?

For your information only.

30 November 2018

CJEU rules on incompatibility with EU law of French withholding tax on dividends received by loss-making non-resident companies

Background

On 22 November 2018, the Court of Justice of the European Union (CJEU) issued its judgment in the French case Sofina (C575/17).

What's new?

The CJEU held that the French legislation under which non-resident companies in a loss-making position are subject to a final withholding tax on the French-sourced dividends is incompatible with the free movement of capital, and that no overriding reason of public interest may justify such restriction.

As this judgment will have to be applied in all EU jurisdictions having a similar tax system, EU Member States should now be required to allow non-resident loss-making companies to defer taxation on their income.

This judgment is also expected to impact other types of income for which withholding taxes apply in the source country (e.g. royalties, interest, and sometimes capital gains). Moreover, as the judgment is based on the free movement of capital (Art. 63 TFEU), it may have implications for non-resident companies established in a third country.

The link is available here: pwc-eudtg-newsalert-27-november-2018.pdf

What's next?

This judgment opens up opportunities relating to withholding taxes within the EU.

What is the impact for you?

For your information only.

30 November 2018

CRR – Level 2 – ECB regulation on materiality threshold for credit obligations past due published in the OJEU

Background

Regulation (EU) 575/2013 of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms has applied since 1 January 2014 (the "CRR", available here).

In accordance with Article 178(1)(b) of the CRR, a default shall be considered to have occurred when the obligor is past due more than 90 days on any material credit obligation to the institution, the parent undertaking or any of its subsidiaries. The materiality threshold for such obligations past due is set by the competent authority ("CA") and reflects a level of risk that the CA considers reasonable.

In this context, Commission Delegated Regulation (EU) 2018/171 on supplementing the CRR with regard to regulatory technical standards for the materiality threshold for credit obligations past due has applied since 7 May 2018 ("Regulation 2018/171", available here). In particular, Article 6 of Regulation 2018/171 provides that a CA shall set a date for the application of the materiality thresholds "which may vary for different categories of institutions but which shall be no later than 31 December 2020 for institutions using the standardised approach laid down in part three, title II, chapter 2 of the CRR".

Within the Single Supervisory Mechanism ("SSM"), the European Central Bank (the "ECB") directly supervises all credit institutions that are classified as significant under the "SSM Regulation" (available here) and the "SSM Framework Regulation" (available here). The ECB has the power to exercise the options and discretions (e.g. Article 178(2)(d) of the CRR) available in Union Law. In setting such a materiality threshold, the ECB should take into account the criteria set out in Regulation 2018/171.

What's new?

On 26 November 2018, regulation (EU) 2018/1845 of the ECB on the exercise of the discretion under Article 178(2)(d) of the CRR in relation to the threshold for assessing the materiality of credit obligations past due was published in the OJEU (ECB/2018/26 –"ECB Regulation 2018/1845").

In this context, ECB Regulation 2018/1845 applies to all significant credit institutions within the SSM, both for retail and for non-retail exposures, irrespective of the method used for the calculation of capital requirements (i.e. significant credit institutions applying the standardised approach and the internal ratings based approach). The materiality threshold comprises the following two components:

- An absolute component, expressed as a specific maximum amount for the sum of all amounts past due owed by an obligor (EUR 100 for retail exposures, and EUR 500 for exposures other than retail exposures); and
- A relative component, expressed as a percentage (equal to 1%) reflecting the amount of the credit obligation past due in relation to the total amount of all on-balance-sheet exposures to that obligor.

ECB Regulation 2018/1845 is available here.

What's next?

By setting a single materiality threshold, ECB Regulation 2018/1845 fosters a harmonised definition of default within the SSM, thereby improving the comparability of risk-weighted assets and defaulted exposures across significant credit institutions.

ECB Regulation 2018/1845 will enter into force on 17 December 2018.

Significant credit institutions must apply the threshold for the assessment of the materiality of a credit obligation past due set by ECB Regulation 2018/1845 no later than 31 December 2020, and must notify the ECB, before 1 June 2019, of the exact date on which they will commence applying such threshold.

What is the impact for you?

For your information only.

Finland

16 November 2018

Guidance on taxation of dividends updated

Background

On 1 November 2018, the Finnish tax administration published updated guidance on the taxation of dividend income (No A148/200/2017 of 1 September 2017).

What's new?

Dividends paid by foreign entities are no longer subject to advance withholding tax in Finland. If the taxpayer (an individual or a company) receives taxable foreign dividends, they may request that the tax administration take this income into account when issuing an annual tax card for advance payments (individuals) or setting the advance payments (legal entities). The taxpayer may also make additional payments during the tax year in order to settle the upcoming tax debt.

The link is available here (only in Finnish).

What's next?

PwC will keep you updated on further developments.

What is the impact for you?

For your information only.

16 November 2018

New rules for foreign venture capitalists and investment funds – public consultation

Background

On 9 November 2018, the Finnish Ministry of Finance issued two proposed amendments to tax legislation governing investment funds, seeking comments.

What's new?

The first amendment concerns foreign venture capitalists, while the second concerns investment funds.

The link is available here (only in Finnish).

What's next?

Interested parties were asked to submit comments by 26 November 2018. If the two amendments are adopted, they will enter into force on 1 March 2019.

What is the impact for you?

For your information only.

France

9 November 2018

Finance Bill for 2019: ATAD and BEPS provisions introduced

Background

On 24 September 2018, the French Government published the finance bill for 2019.

What's new?

The bill includes measures derived from the Anti Tax Avoidance Directive ((EU) 2016/1164, "ATAD") relating to the limitation of interest-tax deductibility and general anti-abuse rules. If adopted, the law would repeal the 25% haircut limitation, the anti-abuse 'Carrez' rules on expenses related to the acquisition of shares, and current French thin capitalisation rules.

This reform would also amend the participation exemption regime.

The link is available here.

What's next?

MNEs operating in France should consider the draft budget's impact on their international financing flows, IP nexus and future cash repatriation.

The French Parliament will now start to review, debate and amend the entire draft budget. This legislative phase will last several weeks before Parliament votes on and enacts a final budget, which could occur by the end of December 2018. These provisions, if adopted, would apply to tax years beginning in or after January 2019.

PwC will keep you updated on further developments.

What is the impact for you?

For your information only.

22 November 2018

Treaty between France and Luxembourg approved by Luxembourg Government Council

Background

On 16 November 2018, the France-Luxembourg Income and Capital Tax Treaty was approved by the Luxembourg Government Council.

What's new?

When the bill implementing the treaty enters in force, it will replace the France-Luxembourg Income and Capital Tax Treaty (1958) and the 1970, 2006, 2009 and 2014 protocols. The text of the bill has not yet been published.

The link is available here (only in French).

What's next?

PwC will keep you updated on further developments.

What is the impact for you?

For your information only.

Hong Kong

20 November 2018

Circular to intermediaries – Statement on regulatory framework for virtual asset portfolio managers, fund distributors and trading platform operators

Background

On 1 November 2018, the Securities and Futures Commission (SFC) issued a circular to intermediaries. This circular informed intermediaries that the Securities and Futures Commission (SFC) had issued a Statement on the regulatory framework for virtual asset portfolio managers, fund distributors and trading platform operators.

What's new?

The SFC has identified some significant risks associated with investing in virtual assets. To address these risks, it is delivering guidance on the regulatory standards expected of virtual asset portfolio managers and fund distributors. In the circular published on 1 November 2018, the SFC also explored a conceptual framework for the potential regulation of virtual-asset trading-platform operators.

This SFC statement sets out:

- the regulatory standards for firms managing virtual asset portfolios and/or distributing virtual asset funds; and
- the conceptual framework for the potential regulation of virtual-asset trading-platform operators.

What's next?

For further information, a copy of the statement is available on the SFC website at http://www.sfc.hk under the section "News & announcements – Policy statements & announcements" or by visiting:

https://www.sfc.hk/web/EN/news-and-announcements/policy-statements-and-announcements/reg-framework-virtual-asset-portfolios-managers-fund-distributors-trading-platform-operators.html

What is the impact for you?

For your information only.

30 November 2018

Introduction of the use of fair value accounting of financial instruments in the tax system

Background

Hong Kong introduced the Inland Revenue (Amendment) (No. 7) Bill 2018.

What's new?

The Bill regulates the accounting of certain financial instruments on a fair value basis, in particular: (i) aligning the tax treatment of financial instruments with their accounting treatment in certain circumstances; (ii) refining the provisions that implement the arrangement relating to automatic exchange of financial account information in tax matters; and revising the meaning of the sibling relationship.

The link is available here.

What's next?

The provisions of the Bill will apply to taxable years beginning on or after 1 January 2018.

What is the impact for you?

For your information only.

Ireland

5 November 2018

What does Budget 2019 mean for financial services?

Background

On 9 October 2018, the Irish Government published the finance bill for 2019.

What's new?

The Minister for Finance's Budget 2019 speech was light in terms of provisions directly targeted at the banking and financial services sector.

The introduction of Controlled Foreign Company (CFC) measures is a fundamental change in Irish tax legislation.

The application of a 12.5% tax rate on exit is a positive development. Its introduction with effect from midnight on 9 October 2018 was somewhat surprising.

Ireland's certainty and transparency in implementing EU/OECD-mandated measures, coupled with clear signs of upcoming tax reform, will be reassuring to FS companies setting up operations in Ireland.

The announcement of a review of the regulation of crowdfunding in Ireland and the withholding-tax obligations of peer-to-peer lending activities is welcome.

The link to the bill is available here.

PwC's comments are available here.

What's next?

PwC will keep you updated on further developments.

What is the impact for you?

For your information only.

Luxembourg

5 November 2018

Banking/PAD – CSSF issues Circular 18/700 to present specific legal provisions applying from 1 November 2018

Background

Directive 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features has applied since 18 September 2016 ("PAD", available here). PAD aims at enhancing the transparency of fees and information relating to payment accounts, as well as improving access to account providers and making it easier to switch between them, both within a Member State and on a cross-border basis.

On 1 February 2018, Commission Delegated Regulation (EU) 2018/32 supplementing PAD with regard to regulatory technical standards for the Union standardised terminology for most representative services linked to a payment account entered into force (the "Delegated Regulation", available here). Pursuant to Article 3(1) of the Delegated Regulation, Member States must establish a provisional list of at least 10 and no more than 20 of the most representative services linked to a payment account and subject to a fee, offered by at least one payment service provider ("PSP") at national level. The list must contain terms and definitions for each of the services identified.

According to Article 37 of the Law of 13 June 2017 on payment accounts transposing PAD (the "Law", available here only in French), Article 5(1)(1.), (2) to (7) and Articles 6, 7 and 9 of the Law (together the "Specific Articles") will enter into force within nine months of the entry into force of the Delegated Regulation, which was 1 November 2018. The Specific Articles are part of Chapter 2 of the Law, entitled "Fees linked to payment accounts", which applies to PSPs offering payment accounts in Luxembourg. The other provisions of the Law entered into force on 19 June 2017.

On 15 June 2018, the Grand-Ducal Regulation of 6 June 2018 on the establishment of a standard list of the most representative services linked to a payment account within the meaning of the Law entered into force (the "Grand-Ducal Regulation", available here only in French). In accordance with Article 1 of the Grand-Ducal Regulation, the "Standard List" contains the following ten representative services:

- "Banque en ligne" (Internet banking);
- "Découvert" (Overdraft);
- "Domiciliation" (Direct debit);
- "Extrait de compte" (Statement of account);
- "Fourniture d'une carte de crédit" (Providing a credit card);
- "Fourniture d'une carte de débit" (Providing a debit card);
- "Ordre permanent" (Standing order);
- "Retrait d'espèces" (Cash withdrawal);
- "Tenue de compte" (Maintaining the account); and
- "Virement" (Credit transfer).

What's new?

On 22 October 2018, the CSSF issued Circular 18/700 providing guidance on the Law, with a focus on the Specific Articles ("Circular 18/700").

In Circular 18/700, the CSSF highlights the following areas of the Law:

- Section A) – The fee information document (especially concerning the package of services) and the (clear, unambiguous, non-technical and not misleading) glossary of the terms set out in the Standard List, including corresponding definitions, must be made available to consumers;
- Section B) – PSPs must provide the consumer, at least annually and free of charge, with a statement of all fees incurred, as well as, where applicable, information regarding the credit and overdraft interest rates applied to the payment account for services linked to the payment account;
- Section C) – In their contractual, commercial and marketing information to consumers, PSPs must use the terms set out in the Standard List, where applicable;
- Section D) – The CSSF provides guidance on its website comparing fees charged by PSPs for at least the services included in the Standard List, in accordance with Articles 9 and 23 of the Law (the "Comparison Website"). The Comparison Website should only list the fees charged by PSPs meeting certain criteria (i.e. having at least 15 branches in Luxembourg and holding at least 2.5% of covered deposits, as set out in the Luxembourg Law of 18 December 2015 on the failure of credit institutions and certain investment firms), unless PSPs voluntarily submit such fees to the CSSF; and

- Section E) – The CSSF details the information requests that may be sent to the entities in scope of the Law, in order for the CSSF to fulfil its reporting obligations to the European Commission every two years (e.g. the number of payment accounts that have been switched and the proportion of applications to switch that have been refused, or the number of payment accounts with basic features that have been opened and the proportion of applications for such accounts that have been refused, including the reason(s) for such refusal). Circular 18/700 is available here (only in French).

What's next?

Circular 18/700 entered into force on 22 October 2018 and repealed Circular 10/479 on bank-account switching (available here only in French).

The Specific Articles (of the Law) have applied since 1 November 2018. Since then, the CSSF Comparison Website has been available at www.frais-compte-paiement.lu and is updated on a monthly basis. On 25 October 2018, the CSSF published a press release on the Comparison Website. The Comparison Website is accessible in French, English and German ("PR18/35", available here only in French).

The CSSF notes that PSPs must communicate the first statement of fees to consumers between 1 November 2018 and 1 November 2019.

What is the impact for you?

For your information only.

9 November 2018

Financial supervision – CSSF updates FAQ on how to obtain authorisation as a PFS (Part I)

Background

The CSSF is best known for being Luxembourg's competent authority for the prudential supervision of professionals of the financial sector (i.e. investment firms, specialised PFS and support PFS), undertakings for collective investment ("UCIs"), UCITS, specialised investment funds ("SIFs") and investment companies in risk and capital ("SICARs").

On 22 December 2017, the Grand-Ducal Regulation of 21 December 2017 on the fees to be levied by the CSSF was published in Mémorial A No 1121 (the "2017 Regulation", available here in French). The 2017 Regulation has applied since 1 January 2018. In particular, Article I(F.) relates to the fees to be levied by the CSSF for PFS.

On 8 July 2018, the Grand-Ducal Regulation of 2 July 2018 amending the 2017 Regulation on certain provisions of the "MiFID II Law" (available here only in French) and the "BMR Law" (available here only in French) entered into force (the "2018 Regulation", available here only in French).

What's new?

On 24 October 2018, the CSSF updated its Frequently Asked Questions document, adding a question on how to obtain authorisation as a PFS ("FAQ Part I").

With regard to the new question 19, entitled "What costs are involved for the assessment by the CSSF of an authorisation request as a PFS?", the CSSF provides the following clarification:

In accordance with Article I(F.)(1) of the 2017 Regulation, as amended, "a single lump sum of EUR 15,000 shall be charged for the examination of each authorisation request by a new PFS. This fee amounts to EUR 8,000 for the examination of an authorisation extension request for an existing PFS which implies adding one or several additional statuses."

FAQ Part I is available here (in English) and here (in French).

What's next?

The CSSF will continue to update its FAQ on PFS as and when required.

What is the impact for you?

For your information only.

6 December 2018

Coalition programme released by incoming Luxembourg Government

Background

On 3 December 2018, the leaders of the three political parties that are to form Luxembourg's new government signed a 246-page coalition agreement setting out policies for the next five years.

What's new?

The three parties in coalition (Liberal, Labour, and Greens) are unchanged from those that formed the 2013-2018 governing coalition, and Xavier Bettel is to continue as Prime Minister.

The government is committed, in particular, not to increase the taxe d'abonnement (subscription tax) on either UCITS or alternative investment funds.

For more details, the link is available here.

What's next?

These measures are expected to have a significant impact on WHT refunds and relief at source.

PwC will keep you updated on further developments.

What is the impact for you?

For your information only.

Netherlands

30 November 2018

Announcement of new tax ruling policy: stricter requirements for issuing rulings

Background

On 22 November 2018, the Dutch Government released a letter that presents a recommendation for a new policy governing international rulings.

What's new?

Stricter requirements are being introduced for the issue of international tax rulings. The Tax and Customs Administration will also be publishing an anonymised summary for each ruling.

Under the new measures, letterbox companies that only locate in the Netherlands for tax reasons and have no other economic value will no longer receive a ruling from the Tax and Customs Administration.

The link is available here.

What's next?

The new tax policy aims to have the measures put into effect on 1 July 2019.

What is the impact for you?

For your information only.

Poland

30 November 2018

Ministry of Finance consults on exit tax rules on firms and individuals

Background

On 23 November 2018, the Ministry of Finance published a public consultation related to proposed rules on an exit tax that enter into force on 1 January 2019.

What's new?

Poland plans to introduce an "exit tax" of up to 19 percent on companies and wealthy individuals who move assets or production abroad.

The link is available here (in Polish only).

What's next?

Interested parties are invited to submit their views and suggestions by 21 December 2018

What is the impact for you?

For your information only.

Spain

9 November 2018

Spain’s 2019 draft budget includes significant corporate tax changes

Background

On 11 October 2018, the Spanish Government announced some of the main building blocks of the 2019 draft budget.

What’s new?

The document includes numerous and significant tax proposals, including the introduction of a 15% minimum tax for large corporations, changes to the participation exemption regime, and the creation of both a digital services tax and a financial transaction tax.

For more information, please refer to Annex 2.

What’s next?

The announcement now will be translated into a legislative proposal and sent to Parliament. Since the Government does not have a majority in either house of parliament, it will need support from several other political groups to secure the passage of the 2019 budget. Therefore, some of the proposed measures may be dropped or substantially amended during the legislative process.

What is the impact for you?

For your information only.

Singapore

1 November 2018

Amendments to Singaporean regulations affecting CISNET online form

What’s new?

On 8 October 2018, the Monetary Authority of Singapore (MAS) published the:

- Securities and Futures Act (Chapter 289) (hereafter the “SFA”);
- Securities and Futures (Offers of Investments) (Collective Investment Schemes) Regulations 2005 (hereafter the “SFR”);
- Securities and Futures (Classes of Investors) Regulations 2018; and
- Practitioner’s Guide to the Collective Investment Schemes Regime under the Securities and Futures Act (Cap. 289).

What’s next?

These amendments have a direct impact on foreign funds authorised under MAS’s Restricted Scheme regime.

The fund manager will have to make some amendments to the online form on the CISNET platform in order to answer the following two supplementary questions:

- Confirmation regarding if the fund is offered to either (i) accredited investors only or (ii) accredited and institutional investors (as defined in Sections 304 and 304A. of the SFA);
- Should the answer to the above be “yes”, then a supplementary question will appear, asking whether the scheme invests solely in non-capital-market products. If investments are made solely in non-capital-market products, as regulated by the amended SFR, MAS must be notified of such investments.

The definition of “capital markets products” given by MAS in the SFA is “any securities, units in a collective investment scheme, derivatives contracts, spot foreign exchange contracts for the purposes of leveraged foreign exchange trading, and such other products as the Authority may prescribe as capital markets products.”

The definition of an “accredited investor” has been revised by MAS, and each eligible accredited investor must opt for Accredited Investor status. Should an eligible accredited investor choose not to opt to be recognised as such, he/she will be treated as a retail investor.

This new regime and the process to obtain consent from an eligible person to be treated as an accredited investor are regulated by the Securities and Futures (Classes of Investors) Regulations 2018, which will enter into force on 8 January 2019.

What is the impact for you?

If you are distributing a foreign fund authorised under the Restricted Scheme regime in Singapore, the fund manager will have to answer the two supplementary questions in the online form on the CISNET platform.

1 November 2018

MAS issues guidelines to facilitate provision of digital advisory services

Background

On 8 October 2018, the Monetary Authority of Singapore (MAS) issued the Guidelines on Provision of Digital Advisory Services to facilitate the provision of these services in Singapore. The guidelines incorporate feedback from the public consultation, as well as learning points from MAS's engagements with the industry.

What's new?

The Guidelines will improve clarity on how the existing rules apply to digital advisory services. To make it easier for entities offering digital advisory services to operate in Singapore, the Guidelines also refine the licensing and business-conduct requirements under the Securities and Futures Act (SFA) and Financial Advisers Act (FAA) as follows:

a) Digital advisers seeking to offer fund-management services to retail investors will be eligible for licensing even if they do not meet the SFA corporate track record requirements, provided that they fulfil other specified safeguards. These safeguards include (i) having board and senior management members with relevant experience in fund management and technology; (ii) offering portfolios that comprise only non-complex collective investment schemes; and (iii) undertaking an independent audit of the digital advisory business at the end of the first year of operations.

b) Digital advisers will be exempt from the FAA requirement to collect the full suite of information on a client's financial circumstances, such as income and financial commitments. This is on the condition that they put in place measures to mitigate the risk of making unsuitable investment recommendations due to limited client information. Examples of mitigating controls include fact-finding questionnaires to identify and decline the onboarding of clients who are clearly unsuitable for the digital advisers' product offerings.1

c) Digital advisers that operate as financial advisers will be allowed to pass their clients' trade orders to brokerage firms for execution, and rebalance their clients' portfolios in collective investment schemes, without the need for an additional capital markets services licence2 under the SFA.

While MAS is making it easier for digital advisers to set up in Singapore, the business model carries unique risks, such as faulty algorithms and cyberthreats. To mitigate such risks, the guidelines set out MAS's expectations for digital advisers to establish robust

MAS is refining its regulatory framework to support innovation in financial advisory services while maintaining adequate safeguards to protect investors' interests. The Guidelines will make it easier for new online business models to provide investors with more options to access investment advice.

What's next?

Digital advisers provide advice on investment products to clients using automated, algorithm-based tools, with limited or no human adviser interaction, allowing consumers greater access to lower-cost financial advice.

The provision of digital advisory services is currently regulated under MAS's capital markets regulatory framework. Providers of digital advisory services must be licensed under the SFA and/or FAA. The type of licence required depends on the entity's scope of activities and business model. Financial institutions currently regulated under the SFA and/ or FAA can already provide digital advisory services.

1. Details are set out in paragraph 47 of the Guidelines.

2. The activities of passing trade orders and rebalancing portfolios are deemed to be dealing in capital-market products and conducting fund-management activities respectively under the SFA, and would ordinarily require the providers of such services to hold a capital markets services licence under the SFA, unless otherwise exempted.

What is the impact for you?

For your information only.

United Kingdom

9 November 2018

Finance Bill 2018-19 published – Non-UK-resident investors' gains in UK real estate and collective investment vehicles to be taxed

Background

On 7 November 2018, the UK Government published the Finance Bill 2018-19. The following summary focuses on the proposed changes from April 2019 to the taxation of non-residents' UK property gains, with particular focus on the detailed provisions in relation to collective investment vehicles.

What's new?

These provisions include various exemptions/relief in response to concerns raised during the consultation process.

This measure extends the scope of the UK's taxation of gains accruing to non-UK residents to include all gains on direct and certain indirect disposals of UK property on or after 6 April 2019.

The link to the bill is available here.

For more information, please refer to Annex 1.

What's next?

PwC will keep you updated on further developments.

What is the impact for you?

For your information only.

15 November 2018

Brexit – Temporary Permissions Regulations in force

Background

The Financial Conduct Authority ("FCA") is governed under the provisions of the Financial Services and Markets Act 2000 ("FSMA", available here). Rules made pursuant to FSMA are contained in the FCA Handbook (the "Handbook", available here).

On 13 July 2017, the "Great Repeal Bill", officially entitled the "European Union (Withdrawal) Bill 2017-2019", was laid before the House of Commons (the "Withdrawal Bill", available here). On 26 June 2018, the Withdrawal Bill received royal assent as the "European Union (Withdrawal) Act 2018" (the "Withdrawal Act", available here). The Withdrawal Act sets out, inter alia, powers to enable HM Treasury ("HMT") to ensure that the UK will have a functioning financial services regulatory regime in all scenarios when the UK leaves the EU on 29 March 2019 ("Exit Day").

On 20 December 2017, HMT published a written statement by the Chancellor of the Exchequer (the "Chancellor's Statement", available here), announcing that while firms should continue to plan on the assumption that there would be an implementation period from 29 March 2019 until December 2020 (the "Implementation Period"), in the event that there is no agreed Implementation Period (the "No-Deal Scenario"), the UK Government would draft legislation by way of statutory instruments ("SIs") to provide, inter alia, for:

- temporary permissions and recognition regimes (the "TPR") to enable EEA firms to continue their activities in the UK for a time-limited period after the UK has left the EU; and
- giving the FCA and other financial regulators responsibility for onshored EU binding technical standards ("BTS").

On 24 July 2018, HMT published the following to legislate for the TPR:

- A draft SI entitled the "EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018" to enable EEA firms authorised in the UK to carry on a regulated activity under the EU passporting regime to apply to participate in the TPR (the "Draft Temporary Permissions Regulations", available here); and
- Explanatory information by way of guidance to accompany the Draft Temporary Permissions Regulations (the "Draft Temporary Permissions Guidance", available here).

On 5 September 2018, HMT published an updated draft of the Temporary Permissions Regulations (the

"Revised Draft Temporary Permissions Regulations", available here). The Revised Draft Temporary Permissions Regulations, which included minor amendments together with new tax provisions and amending the FSMA with regard to persons who cease to be authorised to carry on a regulated activity before Exit Day, were laid before the UK Parliament on 5 October 2018.

On 10 October 2018, the FCA published a consultation paper entitled "Temporary permissions regime for inbound firms and funds" (CP18/29 – the "TPR Consultation", available here). The TPR Consultation set out, inter alia:

- how the FCA expects the TPR to operate;
- how firms and investment funds can enter the TPR; and
- the proposed rules for firms' and funds' marketing activities.

What's new?

On 6 November 2018, the Revised Draft Temporary Permissions Regulations were enacted (the "Temporary Permissions Regulations"). The Temporary Permissions Regulations entered into force on 7 November 2018, except for those provisions relating, inter alia, to the repeal of passporting rights, which will enter into force on Exit Day. The Temporary Permissions Regulations were accompanied by an explanatory memorandum prepared by HMT (the "HMT Explanatory Memorandum").

The Temporary Permissions Regulations are available here.

The HMT Explanatory Memorandum is available here.

What's next?

In the event of a No-Deal Scenario, the passporting system will be discontinued and EEA funds that have notified the FCA before Exit Day of their intention to continue to market in the UK will be able to do so for a three-year period under the Temporary Permissions Regulations.

The FCA will provide feedback on the TPR Consultation together with final rules updating its Handbook in Q1 2019.

What is the impact for you?

For your information only.

30 November 2018

Brexit – FCA 2nd consultation

Background

On 26 June 2018, the European Union (Withdrawal) Act 2018 received royal assent (the "Withdrawal Act", available here). The Withdrawal Act sets out, inter alia, powers to enable HM Treasury ("HMT") to ensure that the UK continues to have a functioning financial services regulatory regime in all scenarios, when the UK leaves the EU on 29 March 2019 ("Exit Day").

On 20 December 2017, HMT published a written statement by the Chancellor of the Exchequer (the "Chancellor's Statement", available here) announcing that firms should continue to plan on the assumption that there would be a transition period from 29 March 2019 until 31 December 2020 (the "Transition Period") under the terms of the withdrawal agreement being negotiated between the UK and the EU (the "Withdrawal Agreement"). The Chancellor's Statement also explained that in the event that the Withdrawal Agreement is not agreed and hence there is no Transition Period (the "No-Deal Scenario"), the UK government would draft legislation by way of statutory instruments ("Sis") to provide for, inter alia, temporary permission and recognition regimes (the "TPR") to enable EEA firms to continue their activities in the UK for a time-limited period after the UK has left the EU, and give the FCA and other financial regulators responsibility for onshored EU binding technical standards ("BTS").

On 9 August 2018, HMT published a document entitled "HM Treasury's approach to financial services legislation under the European Union Withdrawal Act" (the "HMT Document", available here). The HMT Document stated that firms should continue to plan on the assumption that a Transition Period will be in place enabling them to trade on the same terms until December 2020, and requiring them to comply with any new EU legislation that becomes applicable during the Transition Period. The HMT Document also explained that a review of EU and UK domestic financial services legislation had been undertaken to identify deficiencies that will arise when the UK leaves the EU and existing EU law is transferred to UK law; the HMT Document advised that SIs were being drafted under the Withdrawal Act to fix these deficiencies.

On 10 October 2018, the FCA launched a consultation setting out, inter alia, how it intended to amend the Handbook and BTS in the event of a No-Deal Scenario (CP18/28 – the "October 2018 Consultation", available here).

On 6 November 2018, the EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018 were enacted to enable EEA firms authorised in the UK to carry on a regulated activity under the EU passporting regime to apply to participate in the TPR (the "Temporary Permission Regulations", available here). The Temporary Permissions Regulations entered into force on 7 November, except for those provisions relating, inter alia, to the repeal of passport rights which will enter into force on Exit Day. The Temporary Permissions Regulations were accompanied by an explanatory memorandum prepared by HMT (the "HMT Explanatory Memorandum", available here).

What's new?

On 23 November 2018, the FCA published a second consultation on further proposed amendments to the Handbook and BTS (CP18/36 – the "November 2018 Consultation") in the event of a No-Deal Scenario. The proposed amendments include, inter alia, those required to introduce the TPR.

The November 2018 Consultation also sets out the FCA's approach to non-Handbook guidance and to forms which appear in the Handbook.

The November 2018 Consultation is available here.

What's next?

The October 2018 Consultation closes on 7 December 2018 and feedback and final rules will be published in Q1 2019.

The November 2018 Consultation closes on 21 December 2018. The FCA intends to publish feedback and near-final rules in early 2019.

What is the impact for you?

For your information only.

5 December 2018

Brexit – Bank and FCA publish Impact Assessments

Background

The Financial Conduct Authority ("FCA") is governed under the provisions of the Financial Services and Markets Act 2000 (the "FSMA", available here). Rules made pursuant to the FSMA are contained in the FCA Handbook (the "Handbook", available here).

The Bank of England (the "Bank"), the central bank of the United Kingdom, was founded in 1694. The Bank's mission is to maintain monetary and financial stability. The rule-making powers of the Bank are set out in the FSMA.

On 26 June 2018, the European Union (Withdrawal) Act 2018 received royal assent (the "Withdrawal Act", available here). The Withdrawal Act sets out, inter alia, powers to enable HM Treasury ("HMT") to ensure that the UK continues to have a functioning financial services regulatory regime in all scenarios, when the UK leaves the EU on 29 March 2019 ("Exit Day").

On 20 December 2017, HMT published a written statement by the Chancellor of the Exchequer (the "Chancellor's Statement", available here) announcing that firms should continue to plan on the assumption that there would be a transition period from 29 March 2019 until 31 December 2020 (the "Implementation Period") under the terms of the withdrawal agreement being negotiated between the UK and the EU (the "Withdrawal Agreement"). The Chancellor's Statement also explained that in the event that the Withdrawal Agreement is not agreed and hence there is no Implementation Period (the "No-Deal Scenario"), the UK government would draft legislation by way of statutory instruments ("Sis") to provide for, inter alia, temporary permission and recognition regimes (the "TPR") to enable EEA firms to continue their activities in the UK for a time-limited period after the UK has left the EU, and to give the FCA and other financial regulators responsibility for onshored EU binding technical standards ("BTS").

On 27 June 2018, the Chair of the Treasury Select Committee, Nicky Morgan, wrote to the Chief Executive of the FCA, Andrew Bailey, and the Governor of the Bank, Mark Carney, requesting publication by each of them of an analysis of the impact of the Withdrawal Agreement and future framework with the EU (respectively the "FCA Impact Assessment", and the "Bank Impact Assessment") on the FCA's and the Bank's ability to meet their respective objectives (the "June 2018 Letters", available here and here, respectively).

On 11 October 2018, Nicky Morgan wrote again to Andrew Bailey and to Mark Carney to clarify the expectations of the Treasury Select Committee regarding the timing and content of the FCA Impact Assessment and the Bank Impact Assessment (the "October 2018 Letters", available here and here, respectively).

On 9 August 2018, HMT published a document entitled "HM Treasury's approach to financial services legislation under the European Union Withdrawal Act" (the "HMT Document", available here). The HMT Document stated that firms should continue to plan on the assumption that an Implementation Period will be in place enabling them to trade on the same terms until December 2020, and requiring them to comply with any new EU legislation that becomes applicable during the Implementation Period. The HMT Document also explained that a review of EU and UK domestic financial services legislation had identified deficiencies that will arise when the UK leaves the EU and existing EU law is transferred to UK law; the HMT Document advised that SIs were being drafted under the Withdrawal Act to fix these deficiencies.

On 14 November 2018, the UK government and the EU agreed upon a draft Withdrawal Agreement in relation to the UK's impending exit from the European Union on 29 March 2019 (the "Draft Withdrawal Agreement", available here), and an outline political agreement setting out the framework for the future relationship between the UK and the EU (the "Outline Political Declaration"; available here). On 14 November 2018, the UK government published a policy paper entitled "Explainer on the agreement for the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union" (the "Withdrawal Agreement Explainer", available here).

On 22 November 2018, HMT published guidance to a draft SI entitled "The Investment Exchanges, Clearing Houses and Central Securities Depositories (Amendment) (EU Exit) Regulations 2018" that was in the process of being drafted (the "Draft CSD Guidance", available here).

On 25 November 2018, the EU27 leaders met for a special meeting of the European Council at which they endorsed the Withdrawal Agreement presented by the negotiators of the EU and UK and approved a revised Outline Political Declaration (the "Revised Outline Political Declaration", available here). The Revised Outline Political Declaration includes commitments in respect of financial services, including, inter alia, that both the EU and UK should start assessing equivalence with respect to regulatory frameworks as soon as possible after the Exit Day with a view to concluding these assessments before the end of June 2020.

What's new?

On 28 November 2018, the Bank published the Bank Impact Assessment (available here), in which the Bank sets out the potential impact of the economic partnership between the EU and the UK on the UK economy under the following scenarios:

- Current trading arrangements continue to apply during the Implementation Period set out in the Withdrawal Agreement, from 30 March 2019 to 31 December 2020;
- The UK leaves the EU with no Withdrawal Agreement and no Implementation Period; and
- The UK leaves the EU with no trade agreement at the end of the Implementation Period.

On 29 November 2018, the FCA published the FCA Impact Assessment (available here), in which the FCA analyses three scenarios and their impact on the FCA's ability to meet its strategic and operational objectives as follows:

- The UK leaves the EU without an agreement either on 29 March 2019 or after the Implementation Period on 31 December 2020;
- The impact of the Withdrawal Agreement; and
- The impact of the Revised Outline Political Declaration on the framework for the future relationship between the EU and the UK.

On 30 November 2018, HMT published an updated programme of secondary legislation under the Withdrawal Act (the "HMT Legislative Programme", available here).

On 30 November 2018, HMT published a draft SI entitled "The Investment Exchanges, Clearing Houses and Central Securities Depositories (Amendment) (EU Exit) Regulations 2018" (the "Draft CSD SI", available here).

What's next?

On 11 December 2018, the House of Commons will, as required under the Withdrawal Act, vote on the Withdrawal Treaty and the Revised Outline Political Declaration. The vote by the House of Commons is required to take place before the European Parliament determines whether it consents to the conclusion of the Withdrawal Agreement on behalf of the EU.

What is the impact for you?

For your information only.

World

21 November 2018

Financial Stability – IOSCO consults on proposed framework for assessing leverage in investment funds

Background

Recommendation 10 of the Financial Stability Board's 2017 Policy Recommendations to Address Structural Vulnerabilities from Asset Management Activities (available here) provides that the International Organization of Securities Commissions ("IOSCO") focus on the following areas:

- Identify and/or develop consistent measures of leverage in funds to facilitate more meaningful monitoring of leverage for financial stability purposes, and help enable direct comparisons across funds and at a global level;
- Consider identifying and/or developing more risk-based measure(s) to complement the initial measures with a view to enhance authorities' understanding and monitoring of risks that leverage in funds may create;
- In both cases, IOSCO should consider appropriate netting and hedging assumptions and where relevant build on existing measures.

What's new?

On 14 November 2018, following up on Recommendation 10 of the Policy Recommendations, IOSCO consulted on a proposed framework to help measure leverage used by investment funds (CR08/2018 – the "Consultation Paper").

In the Consultation Paper, IOSCO proposes a two-step framework, which seeks an appropriate balance between achieving precise leverage measures and devising simple, robust metrics that can be applied in a consistent manner to a wide range of funds in different jurisdictions. The first step indicates how regulators could exclude funds unlikely to create stability risks in the financial system, whilst also selecting a subset of other funds for further analysis. The second step calls for regulators to conduct a risk-based analysis of the other investment funds identified in the first step.

In addition, IOSCO (i) addresses synthetic leverage, by including exposure created by derivatives; (ii) considers different approaches to analysing netting and hedging and the "directionality" of positions; and (iii) includes approaches that limit model risk.

The Consultation Paper is available here.

What's next?

Comments on the Consultation Paper must be submitted to IOSCO by 1 February 2019.

As IOSCO does not prescribe a particular set of metrics or other analytical tools, it is up to each jurisdiction to determine and adopt the most appropriate risk assessment.

What is the impact for you?

For your information only.

Let’s go deeper

Annex I: Spain 2019 draft budget includes significant corporate tax changes

Spain 2019 draft budget includes significant corporate tax changes

October 15, 2018

In brief

The Spanish government announced some of the main building blocks of the 2019 draft budget on October 11, 2018. The 50-page document includes numerous and significant proposed tax measures. These include the introduction of a 15% minimum tax for large corporations, changes to the participation exemption regime, and the creation of both a digital services tax and a financial transaction tax.

The announcement now will be translated into a legislative proposal and sent to Parliament. Since the government does not have a majority in either house of Parliament, it will need support from several other political groups in order to secure passage of the 2019 budget. Some of the proposed measures could therefore be dropped or substantially modified during the legislative process.

In detail

The Spanish government and Unidos Podemos (the largest of the political parties that supported the socialist party in the no-confidence vote that unseated the former conservative prime minister earlier this year) announced an agreement over the 2019 budget ('the budget agreement') on October 11, 2018. The budget agreement includes several tax measures that will help fund some of the budget's public spending proposals.

The budget agreement is only a blueprint for legislative action. More details will become available once the government sends the actual draft budget to Parliament, which is expected to happen in the coming weeks. Summaries of the key initial proposals that could impact corporate taxation are covered below.

Participation exemption rules

The government proposes to move from a full participation exemption on dividends and capital gains to a partial 95% exemption. The budget agreement explicitly mentions foreign subsidiaries, but is unclear as to whether the potential change to the participation exemption rules would extend to domestic dividends and capital gains, which are currently also fully exempt for corporate taxpayers, or to dividends received within a consolidated tax group. A difference in treatment of foreign and domestic dividends could raise issues of compatibility with EU law.

Minimum 15% corporate income tax

The budget agreement proposes the introduction of a minimum 15% tax on net taxable income for 'large' corporations (compared to the 25% headline rate). The measure would only apply to consolidated tax groups and stand-alone taxpayers with annual net turnover of EUR 20 million or more. This minimum tax would increase to 18% for taxpayers that are subject to a 30% headline rate (banks and certain oil & gas activities).

Based on the wording included in the budget agreement, the minimum tax would apply to taxable income and not the book profit (as some earlier press reports suggested). This would be particularly relevant for holding companies, as dividends and capital gains benefitting from the participation exemption are excluded from taxable income and would thus not be subject to the minimum tax. On the other hand, the measure would primarily affect taxpayers that reduce their tax liability through the application of tax credits and allowances, the utilization of which is already generally limited to 50% of the current year tax liability. As with the rest of the tax measures, the budget agreement does not state what incremental tax revenues would come from this minimum tax.

Tax treaties generally require Spain to give a credit for the taxes paid in the other contracting state (up to the amount of Spanish tax due on the foreign income). It is unclear how the minimum tax would operate in the context of corporate taxpayers entitled to claim foreign tax credits under an applicable double tax treaty. In the Spanish legal system, international treaties take precedence over domestic legislation.

Financial Transaction Tax

A 0.2% financial transaction tax (FTT) on the purchase of Spanish listed shares is being proposed. The FTT would only be levied on transactions executed by 'financial operators' (an undefined term), and only on the purchase of shares issued in Spain by listed companies with a market capitalization in excess of EUR 1 billion.

Non-listed shares, public and private debt instruments, and derivatives would not fall within the FTT's scope.

Digital services tax

The budget agreement calls for the introduction of a 3% digital services tax (DST), which would be levied on revenues that result from the supply of certain digital services, i.e., online advertising, intermediation services (also known as marketplaces), and commercialization of data collected about information provided by users.

The DST would only be imposed on companies with worldwide annual revenues of at least EUR 750 million, and with revenues in Spain above EUR 3 million. It is unclear if the thresholds refer to total revenues or only to revenues derived from activities subject to the DST. The expectation is that the legislation would follow closely the current European Commission proposal for a digital services tax directive.

REIT taxation

Changes are also being proposed on the taxation of real estate investment trusts (REITs, known as SOCIMIs by their Spanish acronym). Currently, SOCIMIs may obtain up to 20% of their income from sources other than their principal activity (real estate rental) and still benefit from the 0% tax rate. Although the wording of the announcement is not entirely clear, it appears to propose a tax on any income not derived from the SOCIMI's principal activity at the general corporate income tax of 25%. Also, undistributed earnings would be subject to a 15% tax.

Other measures proposed

The budget agreement includes more than 20 proposed tax measures. Some of the more relevant ones, in addition to those already outlined above, are as follows:

- As a member of the European Union, Spain must introduce a number of amendments to its domestic tax legislation to comply with the EU anti-tax avoidance directive (ATAD). Some of these changes should be adopted by year-end, with others having a December 31, 2019 deadline. The document released makes a generic reference to the adoption of ATAD, but does not provide any detail of how and when it will take place.
- The budget agreement calls to increase the pressure on tax havens and vows to align the Spanish list of tax havens with internationally adopted lists and standards.
- Adoption of the OECD mandatory disclosure rules for common reporting standard (CRS) avoidance arrangements.
- Reduction of the corporate income tax rate from 25% to 23% for small enterprises (those with annual revenues below EUR 1 million).
- Increased limitations on the use of cash payments in commercial transactions.
- Higher marginal personal income tax rates and a net wealth tax increase for high net worth individuals.

Legislative process ahead

The political parties behind Spain's minority government budget agreement do not control Parliament (they hold 151 out of the 350 seats in the lower house) and therefore they will need to negotiate the text with other smaller parties in order to win their support and pass any legislation. As a result, some of the proposals included in the budget agreement could be abandoned or modified substantially before the 2019 budget is enacted into law.

In terms of legislative process, the government may also consider the introduction of some of these measures as ordinary legislation decoupled from the budget approval process, or could even enact some of them through a Royal Decree-Law, which would enter into force as soon as published in the Official Gazette. However, a Royal Decree-Law would require validation by a simple majority vote in the lower house within 30 days of publication.

The takeaway

If the tax measures proposed in the budget agreement are enacted, they could have a significant impact on both Spanish companies and multinational groups with operations in Spain or using Spain as an investment hub.

Although no draft legislation has been published yet, multinationals with operations or holding companies in Spain should start assessing the potential impact of these proposals on their business and prepare to respond accordingly.

Let's talk

For a deeper discussion of how this might affect your business, please contact:

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Let’s go deeper

Annex II: Publication of Finance Bill 2018-19 - Taxation of gains on non-UK resident investors in UK real estate and Collective Investment Vehicles

Publication of Finance Bill 2018-19 - Taxation of gains on non-UK resident investors in UK real estate and Collective Investment Vehicles

November 7th 2018 04:00 PM • By Juliet Minford

Today the government published Finance Bill 2018-19. The following summary focuses on the proposed changes from April 2019 to the taxation of non-residents UK property gains, with particular focus on the detailed provisions in relation to Collective Investment Vehicles. These include various exemptions/reliefs in response to concerns raised during the consultation process.

Recap on basic rules

As announced at Autumn Budget 2017, and following a consultation, this measure extends the scope of the UK's taxation of gains accruing to non-UK residents to include all gains on direct and certain indirect disposals of UK property, on or after 6 April 2019.

The indirect disposal rules will apply where a person makes a disposal of an entity, in which it has at least a 25% interest (or any interest in certain collective investment vehicles) where that entity derives 75% or more of its gross asset value from UK land.

The 25% ownership test will look for situations where the person holds at the date of disposal, or has held within 2 years prior to disposal, a 25% or more interest in the property rich company. This holding may be directly, or through a series of other entities, or via connected persons.

The 75% property richness test will look at the gross assets of the entity being disposed of. Where a number of entities are disposed of in one arrangement, their assets will be aggregated to establish whether the 75% test is met.

There will be a trading exemption, so that disposals of interests in property rich entities where the property is used in a trade are excluded from the charge. This is likely to apply where, for example, a non-UK resident disposes of shares in a retailer which owns a significant value of shops.

All non-UK resident companies will be charged to Corporation Tax rather than Capital Gains Tax on their gains. The provisions relating to ATED-related Capital Gains Tax on UK residential property will be abolished.

Existing reliefs and exemptions available for capital gains will continue to be available to non-UK residents, with modifications where necessary. Those who are exempt from capital gains for reasons other than being non-UK resident will continue to be exempt (for example, overseas pension schemes and certain charities).

Losses arising to non-UK residents under the new rules will be available. However, the government announced at the Autumn Budget 2018 that they will consult on restricting, from April 2020, the offset by companies of carried forward capital losses to 50% only of the capital gains arising in a later accounting period.

There will be options to calculate the gain or loss on a disposal using the original acquisition cost of the asset or using the value of the asset at commencement of the rules in April 2019. Both options will be available for both direct and indirect disposals. Where the original cost basis is used to calculate an indirect disposal and this results in a loss it will not be an allowable loss.

Special rules for Collective Investment Vehicles

On 7 November 2018, draft legislation dealing with how the rules will apply to disposals by, and interests in, Collective Investment Vehicles ('CIVs') was published.

25% de minimis holding does not apply to disposals by non-UK residents in UK property rich CIVs

The 25% de minimis holding requirement does not apply to UK property rich CIVs, which are broadly defined to include:

1. A Collective Investment Scheme ('CIS')
2. An Alternative Investment Fund ('AIF')
3. A UK REIT
4. A non-UK resident company which meets the property income condition (intended to apply to non-UK entities which are UK property rich and have similar attributes to a UK REIT).

Certain collective investment vehicles which are not marketed as UK property rich, but may nevertheless be UK property rich at the time of a disposal by an investor, are excluded from these provisions.

Certain offshore Collective Investment Vehicles deemed to be opaque for gains purposes with ability to elect to be treated as a partnership

Certain offshore Collective Investment Vehicles which are formed as trusts or contractual co-ownership arrangements will be deemed opaque for capital gains purposes and subject to corporation tax on direct and indirect interests in UK immovable property.

Where such vehicles are also transparent for the purposes of UK tax on income (as in the case of most Jersey Property Units Trusts for example), they will have the ability to make an election to be treated as partnerships for the purposes of UK tax on capital gains.

All participants needs to consent to the irrevocable election, which needs to be made within 12 months of the date the first UK property is acquired/6 April 2019, and which has retrospective effect to that date.

This election will be particularly attractive where all investors are tax exempt. However in other cases disposals by the collective investment vehicle would trigger disposals at the level of a taxable investor if the election has been made; in those cases the following exemption election may be more appropriate.

The exemption election for qualifying collective investment vehicles which are UK property rich.

An election may be made for a qualifying collective investment vehicle, or a qualifying company which is not itself a qualifying collective investment vehicle (but is wholly or almost wholly owned by a collective investment scheme partnership or CoACS).

The effect of the election is to exempt that entity, and any other entities in which it has at least a 40% stake, on direct and indirect disposals of UK property.

Where a company is disposed of by an elected entity there is a deemed (exempt) disposal and reacquisition of its direct and indirect UK property interests (which have been within the exemption regime within the preceding 12 months or more).

There is also an exemption for disposals made by a company (which would not itself be able to make the election) of its interest in entities within the exemption regime where that company is wholly owned by a person or persons who would be exempt from tax on capital gains.

The exemption regime is only available to UK property rich funds in order to be able to tax gains at the investor level and there are special provisions under which an investor may be taxed if capital profits are remitted to the investor in a non-capital form.

Special taxing provisions also apply where the conditions (including UK property rich condition) cease to be met, including provisions where a fund is wound up.

An election may be made by the fund manager with retrospective respect of up to 12 months (or such longer period as HMRC may agree).

HMRC have powers to specify information to be provided by the fund manager in relation to the fund and its investors.

Qualifying conditions for the exemption election

There are various qualifying conditions, not all of which have to be met in all cases, reflecting the different types of funds that invest in UK property.

A collective investment vehicle will be qualifying for this purpose if it meets the following conditions:

(a) it is a collective investment scheme and it meets the genuine diversity of ownership condition,

(b) it is a company which meets the recognised stock exchange condition (i.e. it has ordinary share capital which is regularly traded on a recognised stock exchange) and the non-close condition, or

(c) it is a collective investment vehicle and it meets the UK tax condition and the non-close condition.

A company which is not a collective investment vehicle will be qualifying if it meets the following conditions:

(a) the company meets the UK tax condition and the non-close condition, or

(b) the collective investment scheme which wholly (or almost wholly) owns the company meets the genuine diversity of ownership condition.

The “UK tax condition” will be satisfied where, at any time “solely as a result of double tax arrangements”, the person making the election reasonably considers that no more than 25% of proceeds on a deemed disposal by investors would not be subject to tax.

The “non-close condition” will be satisfied where the company is not a close company (broadly a company controlled by five or fewer participators), or is a close company but only by taking into account a qualifying investor as a direct or indirect participator. The definition of qualifying investor broadly follows that used for the REIT regime, and includes UK and overseas pension schemes, entities which are sovereign immune, UK or overseas REITs and other funds which have made the exemption election.

Non-UK property rich funds

As noted above the exemption election is not available to funds which are not UK property rich. However where the fund is constituted as a CIS partnership or CoACS, and it wholly, or almost wholly, owns companies which themselves are UK property rich, then it may be possible to make elections in relation to those companies.

In other cases where the exemption election is not available, the existing Substantial Shareholdings Exemption (SSE) may be available in respect of disposals of UK property rich companies by the fund.

UK REITs

To coincide with the aforementioned changes with effect from 6 April 2019 in relation to other collective investment vehicles changes will also be made to the UK REIT regime.

Gains on the disposal of UK property rich entities will be exempted under the same mechanism as property disposals.

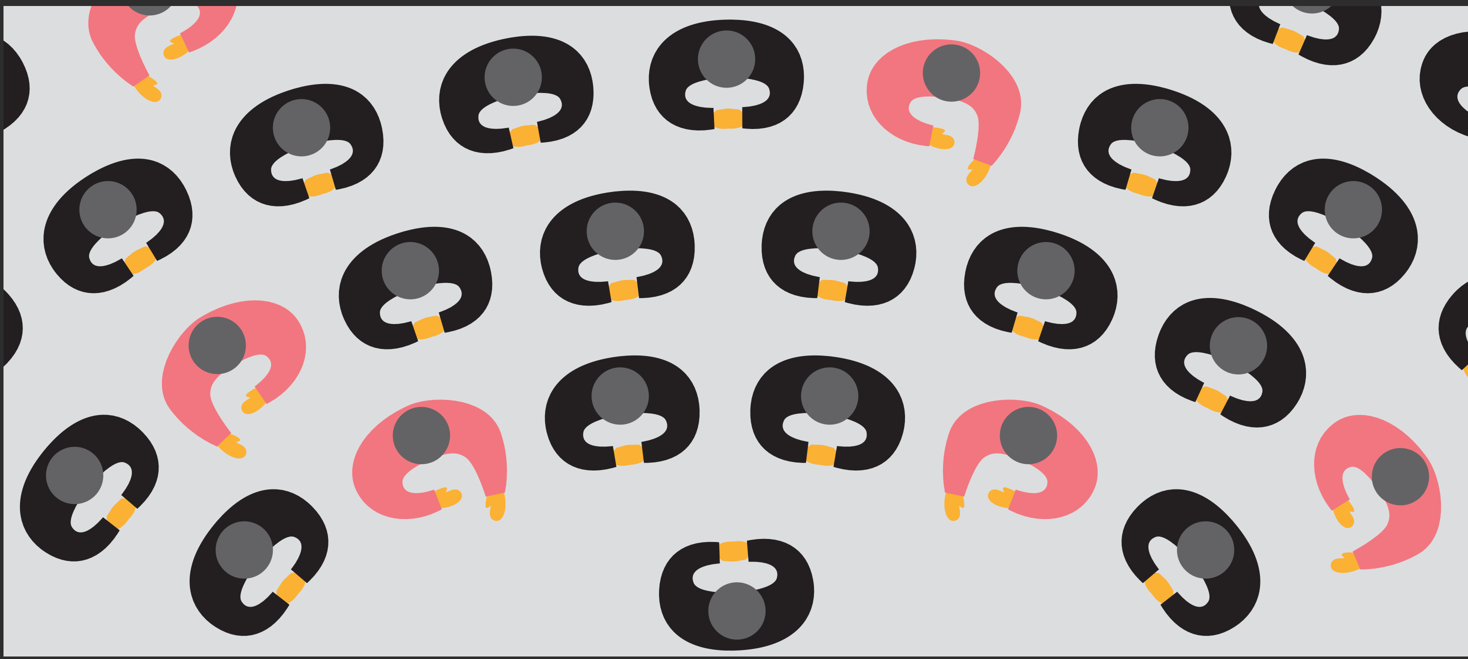
As in the case of a direct disposal of a property which is developed by a UK REIT and disposed of within 3 years (where various conditions are met), gains on indirect disposals where those conditions are met will not be exempted either.

Elected entities which are treated as partnerships for the purposes of these rules will be “looked through” for the purposes of REIT exemptions on capital gains, and may be traced through for the purposes of determining whether a company forms part of a REIT group.

If you would like to discuss any of this further, please get in touch with your usual PwC Real Estate Tax contact.

Notes

Notes



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