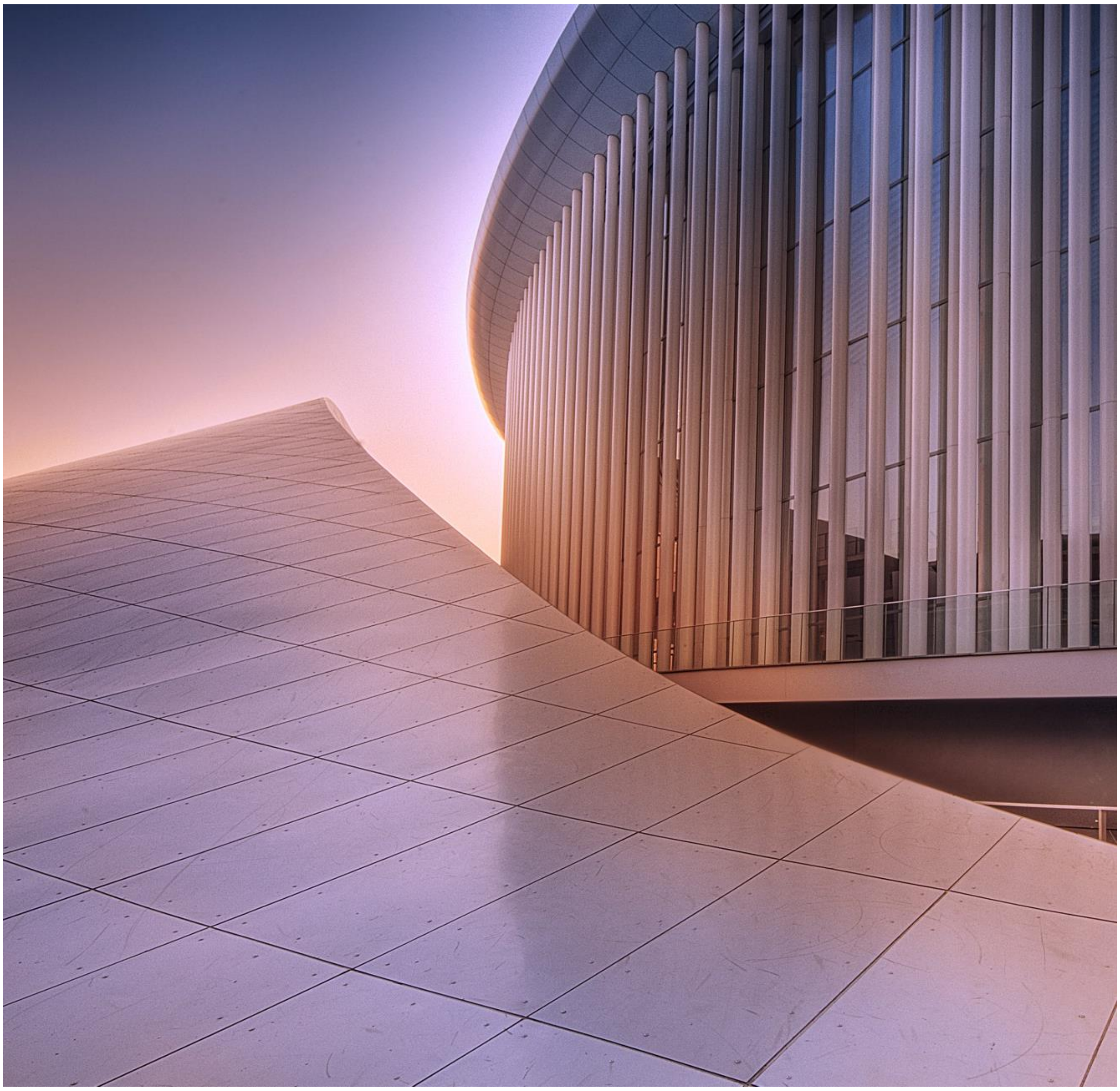
Newsletter – 09.2016



BONN STEICHEN & PARTNERS

NEWSLETTER

DATED

SEPTEMBER 2016

BSP BONN STEICHEN & PARTNERS
LUXEMBOURG LAW FIRM

SUMMARY

CAPITAL MARKETS

EUROPEAN BENCHMARKS REGULATION

Regulation (EU) 2016/1011 of June 8th 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds (the "Benchmarks Regulation"), entered into force on June 30th 2016 and will apply from January 1st 2018.

The Benchmarks Regulation was introduced as a response to several cases of benchmark manipulation. Citing conflicts of interest as one of the main causes of benchmark manipulation, the European legislator has set up, with the Benchmarks Regulation, a preventive regulatory regime to combat such manipulation.

The scope of the Benchmarks Regulation is broad. It applies to indices, i.e. published figures regularly determined by the application of a calculation method, or an assessment, on the basis of underlying values, such as assets, prices, quotes or surveys, to the extent that they are used to (1) determine amounts or values of financial contracts/instruments or (2) measure the performance of an investment fund.

The Benchmarks Regulation subjects "administrators" (entities providing benchmarks) and "contributors" (entities contributing input data for benchmarks), to governance and conflicts of interest requirements, among other rules. Moreover, the calculation of benchmarks must satisfy a stringent set of requirements related to input data and methodology. Supervised entities (including credit institutions, investment firms and UCITS) can only use benchmarks provided by administrators located in the European Union or, subject to certain conditions being fulfilled, benchmarks provided by an administrator in a third country. ESMA will maintain a register of administrators and benchmarks.

In order to tailor the rules according to the degree of risk of benchmark manipulation, the Benchmarks Regulation distinguishes between types of benchmarks to which different rules apply. One distinction is by type (e.g. interest rate). Another distinction is by market usage. The Benchmarks Regulation designates "critical" benchmarks (determined by the European Commission), significant benchmarks (at least 50 billion in value) and non-significant benchmarks. Benchmarks deemed to be critical will be subject to stricter rules, including the power for the relevant competent authority to mandate contributions of input data. Pursuant to the Benchmarks Regulation, the European Commission has adopted Commission Implementing Regulation (EU) 2016/1368 of August 11th 2016 establishing a list of critical benchmarks used in financial markets. Currently only the Euro Interbank Offered Rate (EURIBOR) is listed as a critical benchmark.

In conformity with national law, the Benchmarks Regulation endows competent authorities with powers to intervene in case of infringement of the rules, such as by freezing assets and temporary cessation of practices contrary to the Benchmarks Regulation. Member States are required to empower competent authorities to impose administrative sanctions.

ESMA is requested to develop various draft regulatory technical standards and implementing technical standards under the Benchmarks Regulation by April 2017.

To summarise: the Benchmark Regulation introduces a comprehensive regime for the provision and use of benchmarks which a significant number of credit institutions and investment firms must soon comply with.

MARKET ABUSE

MARKET ABUSE - ESMA GUIDELINES

Article 11(11) of Regulation (EU) No 596/2014 of April 16th 2014 on market abuse (the "Market Abuse Regulation") provides that ESMA shall issue guidelines to persons receiving market soundings ("MSRs") (the "Guidelines to MSRs") and Article 17(11) of the Market Abuse Regulation provides that ESMA shall issue guidelines on legitimate interests of issuers to delay disclosure of inside information and situations in which the delay of disclosure is likely to mislead the public (the "Delay Guidelines" and together with the "Guidelines to MSRs", the "Guidelines"). On July 13th 2016 ESMA issued its final report ESMA/2016/1130 on the Guidelines.

The Guidelines to MSRs (which apply to competent authorities and MSRs) cover the factors which MSRs should consider in assessing whether information disclosed to them amounts to inside information, the steps MSRs must take if inside information has been disclosed to them and the records that such persons must maintain to demonstrate they've complied with Article 8 and 10 of the Market Abuse Regulation.

The Delay Guidelines (which apply to issuers and MSRs) set out a non-exhaustive list of the cases where immediate disclosure of inside information is likely to prejudice the issuers' legitimate interests which include:

- when the issuer is conducting negotiations and the outcome would likely be jeopardised by immediate public disclosure;
- when the financial viability of the issuer is in grave and imminent danger and disclosure could jeopardise the negotiations for financial recovery;
- when the information relates to decisions or contracts which require the approval of another corporate body (other than the general assembly);
- where the issuer has developed a product/invention and immediate public disclosure could jeopardise IP rights;
- when the issuer is planning to buy or sell a major holding in another entity and disclosure could jeopardise the plan; and
- where a previously announced transaction is subject to a public authority's approval and disclosure could prevent the ability of the issuer to meet the requirements for the approval.

The Delay Guidelines also set out a non-exhaustive list of situations in which delay of disclosure of inside information is likely to mislead the public, which include where the inside information:

- is materially different from information which was previously publicly announced;
- relates to the fact that the issuer's financial objectives, which were previously publicly announced, are unlikely to be met;
- is in contrast with the market's expectations, which are based on signals sent to the market by the issuer.

The Guidelines will apply 2 months after publication of the translations. Competent authorities must notify ESMA whether they comply or intend to comply with the Guidelines, stating their reasons for non-compliance. Progress on the publication of the translations of the Guidelines and their date of application can be monitored through the list of all ESMA guidelines which is published on the ESMA website. This list will ultimately include a link to a compliance table showing which Member States have opted to comply with the Guidelines.

MARKET ABUSE - UPDATE OF ESMA Q&A

On July 13th 2016, the European Securities and Markets Authority ("ESMA") published an update of its Questions and Answers on the Market Abuse Regulation ("Q&A") to include one new question and answer in Section 2- Managers' transactions.

The newly-added question and answer seeks to clarify whether the "*announcement*" of the interim or year-end financial results determines the timing of the closed period referred to in Article 19(11) of Regulation (EU) No 596/2014 of April 16th 2014 on market abuse (the "Market Abuse Regulation").

Pursuant to Article 19(11) of the Market Abuse Regulation, a person discharging managerial responsibilities within an issuer shall not conduct any transactions on its own account or for the account of a third party, directly or indirectly, relating to the shares or debt instruments of the issuer or to derivatives or other financial instruments linked to them during a closed period of 30 calendar days before the "*announcement*" of an interim financial report or a year-end report which the issuer is obliged to make public according to the rules of the trading venue where the issuer's shares are admitted to trading or national law.

ESMA has confirmed that the date when the "*announcement*" is made is the end date for the thirty-day closed period.

ESMA has also made it clear that when the issuer announces preliminary financial results, that contain all the key information relating to the financial figures that will be included in the year-end financial report, this will be considered as the "*announcement*" of the year-end financial report. If the announced information changes after its publication, this will not trigger another closed period but must be dealt with in accordance with Article 17 of the Market Abuse Regulation.

ESMA reiterates that persons discharging managerial responsibilities remain subject at all times to Articles 14 and 15 of the Market Abuse Regulation.

MARKET ABUSE - NEW DRAFT LAW

On July 29th 2016, draft law No 7022 (the "Draft Law") was introduced in the Luxembourg Parliament. The Draft Law shall, *inter alia,* implement Regulation (EU) No 596/2014 of April 16th 2014 on market abuse (the "Market Abuse Regulation"), transpose Directive 2014/57/EU of April 16th 2014 on criminal sanctions for market abuse (the "Market Abuse Directive") and repeal the Luxembourg law of May 9th 2006 on market abuse (the "Current Market Abuse Law").

Although the Market Abuse Regulation is directly applicable in all EU Member States, additional measures are required at the national level to ensure its implementation, in particular to complete the provisions concerning administrative sanctions for market abuse. This is dealt with in Chapter 3 of the Draft Law. Chapter 3 of the Draft Law also helpfully clarifies the requirement under Article 17, paragraph 4, sub-paragraph 3 of the Market Abuse Regulation for issuers who have delayed the disclosure of inside information under that article, to inform the competent authority of the delay and to provide a written explanation of how the conditions for delay were met. Article 17 of the Market Abuse Regulation allows Member States to provide that an explanation be provided only upon the request of the competent authority rather than automatically when notifying the delay. Indeed Article 4(4) of the Draft Law provides that the aforementioned explanation shall only be provided upon request of the CSSF.

Chapter 4 of the Draft Law, if adopted, shall transpose the Market Abuse Directive which sets out in detail the criminal penalties for market abuse.

Finally, the Annex to the Draft Law sets out the procedures to enable reporting of potential or actual violations of the Market Abuse Regulation, for the most part, reproducing Commission Implementing Directive (EU) 2015/2392 of December 17th 2015 on the Market Abuse Regulation (the "Implementing Directive").

The Draft Law was submitted to the Luxembourg Parliament after the deadline (July 3rd 2016) by which Member States should have taken the necessary measures to comply with Article 39(2) of the Market Abuse Regulation, to transpose the Market Abuse Directive and to transpose the Implementing Directive. For this period before the Draft Law is approved and in force, during which the Current Market Abuse Law and the Market Abuse Regulation co-exist, the CSSF has helpfully prepared a substitution table indicating which provisions of the Current Market Abuse Law have been replaced by prevailing provisions in the Market Abuse Regulation.

MARKET ABUSE - LUXEMBOURG STOCK EXCHANGE FAQS

In August 2016, the Luxembourg Stock Exchange ("LuxSE") published frequently asked questions (the "FAQs") in light of the entry into force of Regulation (EU) No 596/2014 of April 16th 2014 on market abuse (the "Market Abuse Regulation") which is directly applicable in Luxembourg.

In general, the FAQs clarify that the market abuse rules applicable for issuers of securities listed on the regulated market of the LuxSE (the "LuxSE Regulated Market") have been extended, pursuant to the Market Abuse Regulation, to issuers of securities listed on the Euro MTF.

The three primary obligations for issuers of securities listed on LuxSE markets, i.e.

(i) disclosure of inside information,
(ii) maintenance and disclosure (to the CSSF upon request) of insider lists and
(iii) reporting and public disclosure of managers' transactions,

now all apply to the Euro MTF whereas previously only the obligation to disclose inside information was applicable.

As regards the requirement under the Market Abuse Regulation to disclose inside information, the LuxSE takes the view that there is no real impact for issuers listing on the Euro MTF as an equivalent requirement was previously applicable pursuant to Articles 1001 and 1004 of the rules and regulations of the LuxSE ("LuxSE R&R") which articles have now been deleted from the LuxSE R&R. In addition, the information must be made available on the website of the issuer for a period of five years.

As regards the requirement to maintain and disclose insider lists, issuers listing securities on the Euro MTF must now provide, upon request of the CSSF, a current list of all persons who have access to inside information. A similar requirement already applied to issuers listing on the LuxSE Regulated Market. The original list and any subsequent updates must be retained by the issuer for at least 5 years.

As regards the requirement to report and publicly disclose managers' transactions, issuers listing securities on the Euro MTF must now ensure that persons discharging managerial responsibilities ("PDMR") and persons closely associated with them notify the issuer and the CSSF of every transaction executed on their own account relating to the issuer's financial instruments. A similar requirement already applied to issuers listing on the LuxSE Regulated Market. The public disclosure must be made no later than 3 business days after the transaction has been executed and the issuer shall use a reliable media to disseminate managers' transactions to the public and where applicable, shall use the officially appointed mechanism.

Overall the LuxSE is of the view that the changes to issuers' obligations pursuant to the Market Abuse Regulation will not have a major impact on those issuers who already had securities listed on the LuxSE Regulated Market (as similar obligations already applied to such issuers). The biggest impact of the Market Abuse Regulation will be on issuers of equity securities listed on the Euro MTF who have no securities listed on the LuxSE Regulated Market with only a minor impact on issuers of debt securities issued on the Euro MTF (as such securities are less actively traded than equity).

PROSPECTUS - UPDATE OF ESMA Q&A

On July 15th 2016, the European Securities and Markets Authority ("ESMA") published an update of its Questions and Answers on prospectus related issues (the "Q&A") to include two new questions and answers.

The newly-added questions and answers, No. 99 and 100, seek to clarify the rules regarding:

(i) the dissemination of amended advertisements; and
(ii) the inclusion of Alternative Performance Measures concerning an issuer ("APMs") in information disclosed about the offer to the public or the admission to trading on a regulated market.

Q.99. How should the requirement to disseminate an amended advertisement at a minimum through the same means as the original advertisement be applied when the advertisement is a roadshow?

Pursuant to Article 11 of Commission Delegated Regulation (EU) No 2016/301 of November 30th 2015 (the "Delegated Regulation"), an amended advertisement shall be published without undue delay following the publication of a supplement if the significant new factor, material mistake or inaccuracy which triggered the requirement for the supplement, renders the previously disseminated advertisement inaccurate or misleading. Article 11(3) of the Delegated Regulation requires that the amended advertisement be disseminated at a minimum through the same means as the original advertisement, unless the original advertisement was orally disseminated. ESMA clarifies that the exemption for orally disseminated advertisements covers roadshows, including those where visual or printed elements are used. The general requirement to amend the roadshow advertisement still applies such that the issuer, offeror or person asking for admission to trading on a regulated market (the "Relevant Person") should disseminate an amended version of information provided through the roadshow through the means which it considers most suitable to reach the roadshow audience which depends on the type of roadshow and the nature of the participants. A new roadshow is not required.

Q.100. What is the rule regarding the inclusion of APMs in information disclosed in oral or written form about an offer to the public or admission to trading on a regulated market ("Disclosures") in case a participant at a live presentation requests information about an APM which is not included in the prospectus.

Pursuant to Article 12 of the Delegated Regulation, Disclosures, whether for advertisement or other purposes, shall not contain APMs unless they are contained in the prospectus.

If the request for information is **before** the prospectus is approved and published, the information may be provided but should then be included in the draft of the prospectus prior to its approval by the national competent authority.

If the request for information is **after** the prospectus is approved and published, either the information can be provided, in which case a supplement containing the APM must be published, or if the issuer, offeror or person asking for admission to trading does not wish to publish a supplement, it shall decline to provide information on the APM.

In either of the scenarios above, where the Relevant Person opts to provide information on an APM, ESMA notes that its guidelines on APMs must be taken into account.

LUXEMBOURG GREEN EXCHANGE

On September 27th 2016, the Luxembourg Stock Exchange launched the Luxembourg Green Exchange (LGX), a new platform dedicated exclusively to green financial instruments (so far, only green bonds). LGX is not a new market but rather compliments the two existing markets of the Luxembourg Stock Exchange. The goal of LGX is to raise the bar for disclosure on green securities; it should boost investor trust in the green market by providing the means for investors to have access to information relating to the use of proceeds of green securities in a transparent and efficient way. For the issuers, it allows them the possibility to raise awareness of their on-going green projects.

Green bonds are debt instruments that have been issued to fund new and existing projects that have environmentally sustainable benefits.

Access to LGX is limited to issuers who comply with strict eligibility criteria:

- before applying to join LGX, the green bond must first be listed on either the EU regulated market of the Luxembourg Stock Exchange or the exchange-regulated Euro MTF market;
- the bond must be labelled as green or equivalent;
- the use of proceeds from the issuance must be disclosed, and that use must be exclusive to financing or refinancing projects which are 100% green;
- issuers must provide an external review from a third party before applying to join the LGX (which may be in the form of a second opinion, certification, verification or rating report); and
- issuers must commit to regular reporting (on a qualitative and/or quantitative basis) on the use of proceeds from the security throughout its lifecycle.

LGX will not be accessible to securities relating to nuclear power production, trade in CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora), animal testing for cosmetic and other non-medical product, medical testing on endangered species and fossil fuels.

All securities on LGX are displayed on the website of the Luxembourg Stock Exchange at https://www.bourse.lu/green-bonds-trading. Issuers wishing to list a green bond shall send an email to bolide@bourse.lu.

CORPORATE

THE TRANSITORY PERIOD FURTHER TO THE REFORM OF THE LUXEMBOURG COMPANY LAW

CONTEXT

As you may know from our [previous newsflash on the subject dated July 2016], company law matters are regulated by the Luxembourg law of August 10th 1915 on commercial companies, as amended from time to time (the Law 1915), as well as some provisions of the Luxembourg civil code relating to certain Luxembourg legal entities.

AMENDMENTS

On August 10th 2016, has been implemented the long awaited bill of law 5730 aimed at modernizing and amending the Law 1915 and amending some provisions of the Luxembourg civil code as well as of the law of December 19th 2002 on the register of commerce and companies and accountancy and annual accounts of companies (the Amendment Law).

ENTRY INTO FORCE

The Amendment Law became effective as of August 23rd 2016 leading to the amendment of the Law 1915 (the Amended Law 1915).

TRANSITION PERIOD

The Amendment Law specifically provides for a transitional period of twenty-four months, starting as of its entry into force. Therefore, further to a first set of queries raised over the last weeks in relation to this transitional period, we thought useful to give you a more detailed explanation for a valid assessment of the situation.

Hence, despite many hesitations and interpretations, the transitional period shall be as follows:

(i) the Amendment Law came into force on August 23rd 2016;
(ii) a transitional period of twenty-four months has been provided, which will run until August 23rd 2018;
(iii) Luxembourg companies incorporated after August 23rd 2016 will directly be subject to the application of the Amended Law 1915;
(iv) Luxembourg companies incorporated and in existence before August 23rd 2016 will remain subject to the existing regime of the Law 1915 for a transitional period of twenty-four months:

- in case statutory provisions are in contradiction with the Amended Law 1915: the Law 1915 will remain applicable until August 23rd 2018;
- if a new rule introduced by the Amended Law 1915 is not provided in the articles of association of a company: the Amended Law 1915 shall apply as of August 23rd 2016;
- if the articles of association of a company faithfully transpose the text of an article of the Law 1915: the Law 1915 remains applicable (for that specific reference) until August 23rd 2018; finally
- if within the articles of association of a company, reference is made to a precise article of the Law 1915 (for instance article [x]) or to the Law 1915: the Amended Law 1915 will apply directly as of August 23rd 2016.

These rules are only valid unless prior amendment of the company's articles of association to comply with the Amended Law 1915 and consequently benefit as of such amendments from the new enacted rules offering flexibility and security.

Conclusion

All Luxembourg based and incorporated companies will face a questioning phase in the course of which an assessment will need to be performed as to whether or not any articles of association, shareholder agreements, joint ventures agreements, incentive plans or any other constitutive documents, will require amendment during the transitory period following the entry into force of the Amended Law 1915.

We strongly recommend performing such analysis as soon as possible in order to avoid any possible detrimental situation to the company and to determine whether the shareholders want to benefit directly or only at the end of the transitional period fixed at August 23rd 2018, of the new rules provided under the Amended Law 1915.

Over the coming period we shall continue to offer you a tailored discussion and introduction into the amendments.

Should you need any further information, please do not hesitate to contact us.

INVESTMENT MANAGEMENT

EMIR

ESMA CONSULTATION PAPER ON CHANGES TO PHASE-IN PERIOD

On July 13th 2016, the European Securities and Markets Authority ("ESMA") published a consultation paper proposing to change the phase-in period for central clearing of OTC derivatives applicable to financial counterparties with a limited volume of derivatives activity under the European Market Infrastructure Regulation ("EMIR").

The financial counterparties targeted by the proposal are those currently categorised in Category 3 under EMIR Delegated Regulations i.e. those financial counterparties (and certain funds which are classified as non-financial counterparties) belonging to a group whose aggregate positions in OTC derivatives are below EUR 8bn. Category 3 counterparties are subject to the following clearing deadlines:

- 1st Commission Delegated Regulation covering interest rate derivatives in the G4 currencies sets a deadline of June 21st 2017;
- 2nd Commission Delegated Regulation covering European index CDS sets a deadline of February 9th 2018.

In addition, in November 2015, ESMA submitted a third draft RTS covering interest rate derivatives in NOK, PLN and SEK. Those RTS have been endorsed by the European Commission but not yet published. It is intended however to extend the deadline in those RTS also.

Category 3 financial counterparties are facing several issues partly linked to the size of the counterparty's activity which prevents them from becoming a clearing member and accessing direct central clearing and thus preventing them from complying with the above deadlines.

In order to meet their clearing obligations those counterparties must become the client of a clearing member, or establish indirect clearing arrangements. However the clearing members' appetite to provide client clearing services beyond the most important and biggest clients for their franchise and/or beyond the most active clients has been relatively limited.

In light of the above elements ESMA proposes to amend (by additional RTS) EMIR's Delegated Regulations on the clearing obligation to prolong, by two years, the phase-in for Category 3 financial counterparties.

The consultation, which closed on September 5th 2016 sought stakeholders' views on the proposal to extend the phase in period. ESMA intends to publish a final report by the end of 2016.

ESMA ISSUES UPDATED Q&A ON EMIR

On July 26th 2016, the European Securities and Markets Authority ("ESMA") issued an updated version of its Q&A on the implementation of Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR) ("Q&A").

An additional sub-question No 43 has been issued under the section relating to "Trade Repositories".

ESMA clarifies that when a derivative contract is cleared by an entity which is not a CCP within the meaning of EMIR (e.g. a clearing house), the field "CCP ID" should not be populated. This field should only be populated with the identifier of a central counter-party which meets the definition of Article 2(1) of EMIR.

The updated Q&A further clarifies that if the transaction is executed in an anonymised market and cleared by a clearing house, the counterparty executing the transaction should request the trading venue or the clearing house that matches the counterparties to disclose, before the reporting deadline, the identity of the other counterparty.

ASSET SEGREGATION AND CUSTODY SERVICES – CALL FOR EVIDENCE

On July 15th 2016, the European Securities and Markets Authority ("ESMA") published a Call for Evidence on asset segregation and custody services ("Call for Evidence") under the Alternative Investment Fund Managers Directive ("AIFMD") and the Directive on Undertakings for Collective Investment in Transferable Securities ("UCITS Directive").

This paper is the long awaited follow-up to the ESMA Consultation Paper "Guidelines on asset segregation under the AIFMD" dated December 1st 2014.

Under AIFMD, fund depositaries and fund managers are required to provide information on how assets are segregated in practice, how omnibus accounts are used, the nature of the accounts held with the depositary, the depositary's delegate and the delegate's sub-delegate.

In this context, the 2014 Consultation Paper was mainly oriented on the operational challenges that would be faced in the custody chain and ESMA consulted on two possible options regarding the asset segregation requirements in case of delegation of safe-keeping duties by the appointed depositary of an alternative investment fund ("AIF").

However, the majority of respondents at that time strongly objected to both options claiming that the proposed levels of segregation do not result in any benefit for clients in the event of the insolvency of a depositary or its delegate. They also highlighted the cost implications of these levels of segregation and stressed that, accurate books and records, are of greater importance to protect investors in the event of insolvency. The respondents further expressed a preference for some of the options mentioned in the cost-benefit analysis accompanying the proposal.

Based on this analysis, ESMA identified a number of assertions about the challenges and costs arising from the current EU framework on asset segregation and has issued this Call for Evidence to gather input that will form an assessment of the best future orientation policy.

The UCITS V Directive has introduced segregation requirements broadly aligned with those applicable under AIFMD so that this analysis will have an impact on the application of both directives.

In this Call for Evidence ESMA seeks views on any asset segregation regime which ensures that:

(a) assets are clearly identifiable as belonging to the AIF/UCITS, and

(b) investors receive adequately robust protection by avoiding the ownership of the assets being called into question in case of the insolvency of any of the entities in the custody chain.

ESMA is also gathering feedback on:

a) any need to provide additional guidance on the notion of custody services; and

b) how the depositary delegation rules should apply to CSDs (namely whether the use of CSDs shall be regarded as delegation, and whether the meaning of "custody" should be expanded so that persons other than the holder of the assets are regarded as providing custody services).

Depending on the outcome of its analysis, ESMA will consider what the best approach to adopt is. This may include addressing the EU institutions to ask for legislative changes under the AIFMD and UCITS Directive if it is considered that the current legislative framework imposes requirements that are unnecessary to achieve the policy objective of ensuring a strong level of investor protection, in the event of the insolvency of any of the entities in the custody chain.

The orientation policy to follow this Call for Evidence will have an impact on the application of both directives.

The consultation closed on September 23rd 2016 and ESMA intends to finalise its work on asset segregation by the end of 2016.

ESMA Q&A UPDATES – UCITS AND AIFMD

The European Securities and Markets Authority ("ESMA") published on July 15th and 19th 2016 respectively, an update of the questions and answers document ESMA/2016/1135 relating to the Application of the UCITS Directive and of the questions and answers document ESMA/2016/1136 relating to the Application of the AIFMD Directive (the "FAQs").

The update of both FAQs relates to the impact of the European Market Infrastructure Regulation 648/2012 ("EMIR") on the UCITS and AIFMD directives. In particular, the question was raised whether a UCITS management company or an AIFM may rely on the valuation provided by the central counterparty in respect of OTC financial derivative transactions that are centrally cleared and subject to the reporting obligation of EMIR.

ESMA clarified that UCITS management companies and AIFMs shall have in place a process for accurate and independent verification of the value of OTC financial derivative transactions, even if they are centrally cleared. The valuation provided by the CCP can only serve as a point of reference for the verification performed by the UCITS management company or the AIFM. Nevertheless, the UCITS management company or the AIFM should be able to justify any deviation from the valuation provided by the CCP.

AIFMD PASSPORT EXTENSION – ESMA ADVICE

On July 19th 2016, the European Securities and Markets Authority ("ESMA") published its advice (the "Advice") on the application of the AIFMD passport to non-EU alternative investment fund managers ("Non-EU AIFMs") and non-EU alternative investment funds ("Non-EU AIFs"). The Advice follows ESMA's previous advice and opinion published in July 2015 (see our dedicated article dated August 2015) where 6 non-EU countries were assessed in relation to the extension of the AIFMD marketing passport. Following this first advice ESMA received a letter from the European Commission inviting ESMA to complete its advice on (*inter alia*) the following:

- the assessment of the non-EU countries included in this first advice on which no definitive views had been provided;
- the assessment of six other non-EU countries: Australia, Bermuda, Canada, Cayman Islands, Isle of Man, and Japan.

ESMA's assessment is done on a case-by-case basis against the criteria of investor protection, market disruption, competition and monitoring of systemic risk.

In its Advice, ESMA has given positive assessments for Guernsey, Jersey, Switzerland, Canada, Japan, and, subject to an amendment to local law, Australia. This means that, in ESMA's view, there are no obstacles to the AIFMD third-country passport being extended to these countries.

The United States, Hong Kong and Singapore have all been granted a limited positive assessment. Bermuda, the Cayman Islands and the Isle of Man have not received a positive assessment by ESMA.

With regards to the United States, ESMA invites the legislators to consider extending the AIFMD passport only to U.S. funds dedicated to professional investors marketed in the EU by managers not involving any public offering and that are not mutual funds.

ESMA has given a positive assessment in respect of Hong Kong and Singapore but points out that there is not a level playing field in respect of marketing to retail investors in these countries (the marketing of funds to retail investors by funds from some EU Member States is acceptable while marketing of funds from other EU Member States is not).

ESMA did not provide for a positive feedback at this stage in relation to Bermuda and the Cayman Islands, both of which are in the process of implementing AIFMD-like regimes and making other regulatory updates. Similarly, no definitive advice was provided for the Isle of Man, where the absence of a regime comparable with the AIFMD does not allow for ESMA to assess whether the investor protection criterion is met.

The advice will now be considered by the European Commission, Parliament and Council.

PART II UCIS – DEPOSITARY REGIME

On July 29th 2016, the draft law 7024 was deposited with the Luxembourg Parliament, amending, among other laws, the law of December 17th 2010 on undertakings for collective investment (the "UCI Law") (the "Draft Law"). The Draft Law proposes clarifications with regard to the depositary regime applied to undertakings for collective investment which are subject to Part II of the UCI Law ("Part II UCIs").

Following the entry into force of the law of May 10th 2016 transposing Directive 2014/91/EU of July 23rd 2014 (the "UCITS V Directive") (we refer you to our article of May 16th 2016), the UCI Law currently provides that Part II UCIs shall fall within the scope of the UCITS depositary regime without making any distinction according to the type of investors to whom they are marketed. This lack of clarity has created confusion within the Luxembourg fund industry over the course of this year.

For this reason, the Draft Law intends to specify that the UCITS depositary regime shall only apply to all Part II UCIs allowing the marketing of their units to retail investors in Luxembourg. Such funds may be managed by either an authorised AIFM or a registered AIFM. This regime is justified by the need to ensure a higher level of protection for retail investors investing in Part II UCIs.

Part II UCIs which do not allow the marketing of their units to retail investors in Luxembourg shall appoint a depositary in accordance with the following rules:

- if the Part II UCI is managed by an authorised AIFM the depositary will be appointed in accordance with the law of July 12th 2013 on alternative investment fund managers;
- if the Part II UCI is managed by a registered AIFM the depositary will be appointed in accordance with the law of February 13th 2007 on specialised investment funds.

In order to ensure that such Part II UCIs fall within the scope of the AIFM depositary regime or the SIF depositary regime respectively, the Draft Law further suggests that their offering documents should clearly state that they do not allow the marketing of their units to retail investors. Similarly, Part II UCIs allowing the marketing of their units to retail investors shall provide a statement to this effect in their offering documents.

RAIF REGISTRATION - CIRCULAR RCSL 16/02

Following the entry into force of the law of July 23rd 2016 on Reserved Alternative Investment Funds ("RAIF Law"), the Luxembourg Register of Commerce and Companies ("RCS") published on August 3rd 2016 circular RCSL 16/02 (the "Circular") which follows and completes circular 16/01 of March 24th 2016 (for more information about this circular please refer to our article, *FCP – Changes to registration at RCS*).

This Circular aims to clarify the following procedures applicable to this specific type of fund:

- registration of reserved alternative investment funds ("RAIFs") with the RCS;
- publication of the mention of creation of the RAIF;
- registration of the RAIF on the list referred to in paragraph (3) of article 34 of the RAIF Law.

The Circular clarifies that, as for all other companies, RAIFs have to be registered with the RCS under the legal form adopted at the time of their creation. However, RAIFs subject to chapter 4 of the RAIF Law, meaning those that have not adopted the form of a SICAV or a mutual fund (*fonds commun de placement*) nor any of the forms provided for by article 1 of December 19th 2002 relating to the RCS will have to be registered under a new section L created by Circular 16/01 specifically for this form of fund, by providing the following information:

- name of the RAIF;
- inception date of the RAIF; and
- for the management company of the fund, the name, form, registered office and registration number if relevant.

In addition to the above mentioned registration, RAIFs that have not been constituted by notarial deed, are also requested to publish a notice regarding their constitution. Such notice shall indicate the AIFM that manages them. The notice shall be deposited with the RCS for publication on the *Recueil Electronique des Sociétés et Associations* ("RESA") within 15 working days of the notarial deed ascertaining the creation of the RAIF.

Finally, the Circular clarifies that the registration of the RAIFs on the dedicated list for RAIFs, which is to be made pursuant to article 34(3) of the RAIF Law, is to be requested in writing to be sent with an acknowledgement of receipt to the manager of the RCS. A RAIF has twenty working days from the day of the notarial deed ascertaining its constitution to be inscribed on the list.

CSSF FAQ ON UCI LAW

On August 24th 2016, the CSSF published the second version of its Frequently Asked Questions ("FAQs") concerning the Luxembourg Law of December 17th 2010 relating to undertakings for collective investment (the "UCI Law"). The second version adds ten new questions and answers to the first version of the FAQs dated December 8th 2015, discussed in our newsletter of January 2016.

The second version of the FAQs provides clarification on the following matters:

ELIGIBLE ASSETS FOR UCITS

First, the FAQs confirm that a UCITS master fund can invest in funds or be a fund of funds provided that its target funds are eligible under article 41(1)(e) of the UCI Law.

Further, in relation to the investments made by UCITS in open and closed-ended UCIs, the FAQs provide definitions for open and closed-ended UCIs: open-ended UCIs are UCIs with units which are, at the request of holders, repurchased out of such UCI's assets, even if their constitutional documents provide for limitations on the exercise of redemption rights. On the contrary, closed-ended UCIs are those UCIs whose constitutional documents do not provide for the right of investors to request any redemption.

In the same section, the FAQs set out the conditions that institutions shall fulfil in order to qualify as eligible counterparties in the context of OTC derivative transactions or of efficient portfolio management techniques.

DIVERSIFICATION RULES APPLIED TO UCITS

The FAQs further explain that, pursuant to the principle of risk-spreading, it would not be acceptable for a portfolio of a UCITS to contain different structured transferable securities not embedding derivatives that are all linked to the performance of the same underlying asset. In this context, the FAQs highlight that the application of a 20% limit of the net assets to each underlying asset of such transferable securities has to be respected, providing the possibility that this limit may be raised up to 35% for a single underlying asset.

Moreover, according to the FAQs, UCITS may derogate from the investment limits provided under articles 43, 44, 45 and 46 of the UCI Law for a period of six months following the date the UCITS is entered on the CSSF list. In case the date of inscription to such list differs from the effective launching date of the UCITS, the effective launching date shall be taken into consideration as the starting date provided that the latter date has been notified to the CSSF.

DELEGATION TO THIRD PARTIES

With regard to the delegation of the investment management function, the FAQs mention that a UCITS may delegate such function pursuant to article 110 of the UCI Law to an investment fund manager which is either authorised or registered and subject to prudential supervision, and, in the case of a third country manager, as long as cooperation between the CSSF and the supervisory authority of such country is ensured. The FAQs further underline that investment fund managers located in the EEA or an OECD country and subject to prudential supervision of an authority are considered to fulfil the above criteria. If such entities are located in another country the CSSF shall accept them in principle, provided that it has signed a Memorandum of Understanding covering UCITS with the relevant supervisory authority.

PUBLIC-INTEREST ENTITIES

The FAQs finally define the meaning of public-interest entities ("PIEs"): PIEs include entities whose transferable securities are listed on a regulated market of any Member State. Thus, a UCITS will be considered as a PIE if its units are admitted to trading on a regulated market. A list of the main implications of Directive 2006/43 on audits of annual accounts and Regulation 537/2014 on specific requirements regarding statutory audits of PIEs is also included.

PRIIPS REGULATION – UPDATE

On September 14th 2016, the European Parliament rejected the regulatory technical standards approved by the European Commission in June 2016 on the presentation and content of the KID (the "RTS"). The RTS had previously been rejected by the Economic and Monetary Affairs Committee (the "ECON") on September 1st 2016. The RTS supplement the provisions of Regulation (EU) No 1286/2014 (the "PRIIPS Regulation") on key information documents for packaged retail and insurance-based investment products.

ECON considered that the Joint Committee of the three European Supervisory Authorities (EBA, EIOPA and ESMA the "ESAs") and the European Commission have not taken into account their considerations relating to the protection of retail investors. The European Parliament and ECON would prefer that the PRIIPS Regulation does not enter into force as foreseen on December 31st 2016 and its effectiveness is postponed until an agreement is reached on the RTS. ALFI mentioned in their press release of September 16th 2016 their agreement with this view.

However, to postpone the entering into force of the PRIIPs Regulation, a new regulation should be approved by the European Commission. If a new regulation is not approved to postpone the entry into force of the PRIIPs Regulation, by January 1st 2017, PRIIP manufacturers must prepare and publish KIDs for each PRIIP they manufacture and from that date, the entities selling or advising on PRIIPs (banks, insurance or securities firms) must provide KIDs to retail investors.

TAX

NEW CORPORATE TAX MEASURES 2017

On July 26th 2016, the Minister of Finance presented the new corporate tax measures that would be applicable as from 2017. The most relevant changes applicable to corporations are as follows:

- reduction of the corporate income tax rate
- limitation of tax losses carried forward
- increase of the investment tax credits
- increase of the minimum net wealth tax.

For further details, please refer to [our Legal Alert on the Luxembourg 2017 tax reform].

COUNTRY-BY-COUNTRY REPORT

On August 2nd 2016, draft law 7031 introducing country-by-country reporting (the "Draft Law") was submitted to the Luxembourg Parliament with the aim of transposing into Luxembourg law:

(i) EU Directive 2016/881 which has extended the scope of the automatic and mandatory exchange of information in tax matters to country-by-country reporting ("CbC Reporting"); and
(ii) the recommendations of BEPS Action 13 relating to CbC Reporting. For further information on EU Directive 2016/881 please refer to our [newsletter of July 2016].

REPORTING ENTITIES

CbC Reporting is applicable to multinational groups ("MNE"), i.e. groups that include two or more enterprises tax resident in different jurisdictions or carrying out a business through a permanent establishment in another jurisdiction, having a total consolidated group revenue exceeding EUR 750 million.

It is, in principle, the ultimate parent of the MNE that is obliged to submit the CbC report to the competent authority of the jurisdiction in which it is resident. The Draft Law provides that, in certain circumstances listed hereafter, the filing obligation is applicable to any entity part of the MNE and this is applicable both to EU and non-EU countries.

A Luxembourg tax resident group entity (which is not the ultimate parent of the MNE) will be required to file the CbC report in the following circumstances:

- the ultimate parent company is not subject to CbC reporting obligations in its State of residence; or
- the jurisdiction in which the ultimate parent entity is resident has signed a multilateral agreement to which Luxembourg is party but does not have a qualifying competent authority agreement in effect with Luxembourg at the time the reporting of the information is required; or
- there has been a systemic failure of the jurisdiction of tax residence of the ultimate parent company.

INFORMATION TO BE EXCHANGED

The CbC report includes two parts:

- for each country in which the MNE has one or more subsidiaries/permanent establishment, the aggregate amount of (a) the revenue, (b) the profits/losses before taxes, (c) income tax paid, (d) income tax accrued, (e) stated capital, (f) accumulated earnings, (g) number of employees, and (h) tangible assets other than cash or cash equivalents;

- per country, the list of the subsidiaries, their business activities, tax residence and, if different from the tax residence, the jurisdiction under the laws of which they are organised.

Timing and penalties

The reporting entities should file their CbC Reporting within 12 months after the last day of the relevant accounting year and the tax authorities should exchange such report with the concerned jurisdictions within 15 months after the last day of the relevant accounting year. The first reporting will be with respect to the year 2016 and an extended period of 18 months will be available to the tax authorities to proceed with the exchange of the information.

The infringement of any of the CbC report filing obligations will be sanctioned by a penalty that could amount to EUR 250k.

DEDUCTION OF INPUT VAT BY BRANCH

On June 21st 2016, the European Court of Justice (the "ECJ") issued a ruling (C-393/15) on the possibility for a branch established in Poland to deduct input VAT incurred on the acquisition of goods and services used for the purpose of internal supplies to its Slovakian head-office.

The business of the Slovakian company consists in the sale of antivirus software to customers, which is subject to VAT in Slovakia. The Polish branch contributes to the activity of its head-office by producing components to be included in the software products.

The Polish VAT authorities denied the recovery of input VAT incurred by the branch on the goods and services acquired by it in Poland, on the grounds that the branch did not carry out any activity falling within the scope of VAT in Poland.

The ECJ had to deal with the question, whether articles 168 and 169 a) of the 2006/112/EC Directive on the common system of value added tax (the "VAT Directive") preclude the possibility for a foreign permanent establishment, realising internal operations for its head office established in another Member State, to deduct input VAT in the Member State where it (i.e. the permanent establishment) is registered for VAT purposes, despite the fact that said input VAT is ultimately related to VAT taxable supplies carried out by the head office in another Member State.

The ECJ decided to rule by reasoned order, which constitutes a simplified procedure, available *i.a.* in cases where the reply to the referred question admits no reasonable doubt.

Before addressing the specific question referred to it, the ECJ recalled that the fundamental principle of VAT neutrality relies upon the right to deduct input VAT, so that said right should in principle not be restricted in any way.

Further, the ECJ referred to article 169 a) of the VAT Directive, which provides that any VAT taxable person shall be entitled to deduct input VAT incurred on goods or services acquired for the purpose of transactions carried out outside the Member State in which the input VAT is incurred, provided that said input VAT would have been deductible had the transactions been carried out within the relevant Member State. The ECJ concluded from the above wording that the right to deduct input VAT should be granted or denied to a VAT taxable person contemplated in its entirety and that consequently the effective place of taxation of the VAT taxable supplies carried out by said person should not be relevant for the purpose of determining the extent of its right to deduct input VAT.

The ECJ's conclusion is further confirmed by the fact that article 9 of the VAT Directive provides for a broad definition of the notion of economic activity without any limitation whatsoever as to the place where the activities are carried out.

The ECJ consequently held that the Polish permanent establishment should be entitled to deduct the input VAT incurred in connection with subsequent supplies to its Slovakian head office.

CASE LAW: TAX TREATMENT OF TRANSACTIONS INVOLVING OWN SHARES

In 2009, two of the three shareholders of a Luxembourg resident corporation (hereafter "LuxCo") agreed to buy-out, at fair market value, the third shareholder by exercising their pre-emption rights, in order to avoid a third party acquiring shares in the company. If said third party had acquired shares in Luxco it would have resulted in Luxco being forbidden to continue its current economic activity due to a conflict of interest in its regulated field of activity. Instead of holding onto the shares, the two shareholders resold the acquired shares to LuxCo itself for the same price. As a result, LuxCo was holding approximately 50% of its own shares. LuxCo decided not to cancel the repurchased shares.

The two remaining shareholders spent several years searching for new shareholders to whom those shares could be sold without creating a conflict of interest. Finally, in 2011, several new shareholders were found, to which the shares of LuxCo (held by LuxCo itself) were sold at the then applicable fair market value. As, during those three years in which LuxCo held its own shares, its business activity declined due to deteriorating market conditions, LuxCo ended up realizing a loss on the disposal of its own shares to the new shareholders. The Luxembourg tax authorities considered that pursuant to this mechanism, the losses that should have been borne by the shareholders were effectively transferred to LuxCo and as such the tax deductibility of said loss was refused and it was requalified as a hidden dividend distribution.

The Lower Administrative Court refused to follow the Luxembourg tax authorities' position. The Court agreed that there was no hidden dividend distribution and confirmed the tax deductibility of said loss on the disposal. They made this decision on the grounds that LuxCo proved to a sufficient extent that:

(i) sound economic reasons justified such a transaction (the risk of being prohibited to exercise its current activity due to the conflict of interest); and that
(ii) the reduction in taxable result is economically justified and not exclusively dictated by the shareholders' considerations.

The fact that the former shareholder received a lower considerations for his shares in LuxCo from the existing shareholders, pursuant to the exercise of the pre-emption rights, than the one proposed by the third party and that LuxCo had its own economic interest in mind when repurchasing its own shares (rather than the interests of its shareholders) seems to have convinced the judges of the Lower Administrative Court.

Whether all uncertainties revolving around transactions with own shares are now dissipated still remains to be seen as

(i) the State still has the possibility to lodge an appeal before the Upper Administrative Court; and
(ii) the present case-law seems to have hinged on the very specific set of circumstances revolving around this case, which might be difficult to reproduce in other situations.

BONN STEICHEN & PARTNERS THANKS ALL THE CONTRIBUTORS

Christine Beernaerts, Anna Campbell, Luc Courtois, Pierre-Alexandre Degehet, Nuala Doyle, Elodie Girault, Peik Heirman, Natalia Hernandez, Helen Liu, Oriana Magnano, Evelyn Maher, Pol Mellina, Daniel Riedel, Viktoria Sourlagka, Melvin Tjon Akon.

www.bsp.lu

2, rue Peternelchen | Immeuble C2
L-2370 Howald | Luxembourg

T. +352 26025 – 1
mail@bsp.lu