Newsletter

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SUMMARY

AML

AML UPDATE

Mutual Evaluation - FATF: a new start for Luxembourg

In February 2014, the Financial Action Task Force ("FATF") reviewed the progress made by Luxembourg in addressing the deficiencies identified in its 2010 mutual evaluation report. Luxembourg was placed in the regular follow-up process as a result of non-compliant and partially compliant ratings for twelve of the core and key recommendations in its 2010 mutual evaluation report. The February 2014 follow-up report contains a detailed description and analysis of the actions taken by Luxembourg in respect of the 2010 mutual evaluation report.

Among the key measures taken by Luxembourg, FATF acknowledged the amendments made to the AML/CFT regime through the introduction of new legislation:

- reinforcing the legal framework for AML/CFT (the three laws of October 27th 2010),
- addressing the deficiencies of the terrorist financing offence (law of December 26th 2012),
- introducing criminal liability for legal persons (law of March 3rd 2010)
- adopting Grand-Ducal Regulations (among others, the one of February 1st 2010 specifying some existing obligations provided for in the AML/CFT law of November 12th 2012),
- and other Regulations (the CSSF Regulation no. 12-02 of December 14th 2012 and the Commissariat aux Assurances Regulation no. 13/01 of December 23rd 2013) to implement the provisions of the AML/CFT Regime.

FATF concluded that Luxembourg has addressed a significant number of material deficiencies under all core and key Recommendations and brought the level of technical compliance with these Recommendations to a level of compliance at least equivalent to largely compliant. Luxembourg has therefore taken sufficient measures to be removed from the regular follow-up process.

Within the framework of the FATF evaluations of February 2014, the *Commission de Surveillance du Secteur Financier* issued the CSSF circular no. 14/584 on February 17th 2014 regarding progresses made by some jurisdictions on implementation of FATF recommendations.

Guidance

The Basel Committee on Banking Supervision

On January 15th 2014, the Basel Committee on Banking Supervision issued a set of guidelines to describe how banks should include risks related to money laundering and financing of terrorism within their overall risk management framework. The guidelines include cross-references to FATF standards to help banks comply with national requirements based on those standards.

The Wolfsberg Group

The Wolfsberg Group of banks, which is an association of eleven global banks, aims to develop financial services industry standards, and related products, for Know Your Customer, Anti-Money Laundering and Counter Terrorist Financing policies. The Wolfsberg Group announced the publication of its Guidance Paper (on January 29th 2014) and revised AML Principles and Frequently Asked Questions (February 18th 2014).

A step towards the e-Filing of STR ?

The head of the Luxembourg Financial Intelligence Unit recently announced that the suspicious transactions report form would be revised during the Summer 2014 and that e-filing would be available to professionals subject to the AML laws and regulations.

BANKING & FINANCIAL SERVICES

APPROVAL PROCESS FOR HOLDERS OF KEY FUNCTIONS IN CREDIT INSTITUTIONS AND INVESTMENT FIRMS

In accordance with points 17 and 105 of Circular 12/552 relating to central administration, internal governance and risk management (the "Circular") of the *Commission de Surveillance du Secteur Financier* ("CSSF") as amended, the CSSF published details of the process (the "Process") to be followed by banks and investment firms supervised by the CSSF in requesting the approval of the appointment of any key function holders as well as the notification of their resignations or dismissals.

The Process applies to credit institutions and investments firms governed by Luxembourg law, including their branches, and to Luxembourg branches of credit institutions and investment firms originating outside the European Economic Area (the "Institutions").

The Process shall apply to the following key officers: directors, authorised managers, chief compliance officer, chief risk officer and chief internal auditor.

With regard to the approval by the CSSF of the appointment of any key function holder, point B of the Process sets out the documents and information that must be notified to the CSSF. In addition, the Institution must confirm in the cover letter attached to the application file that:

i. the appointment of the relevant person has been approved by the board of directors of the Institution,
ii. the appointment is made in accordance with the principles set forth in points 17 and 18 of the Circular and

iii. an assessment of the relevant person has been made in accordance with the guidelines of the European Banking Authority on the assessment of the suitability of members of the management body and key function holders (EBA/GL/2012/06).

The Institution must also mention any negative information or fact of which it is aware concerning the relevant person and explain why it judged these elements to be insignificant in considering his/her candidature.

In case of renewal of the mandate or any change concerning a person already approved, the Institution should only notify the new information to the CSSF by reference to the initial application.

Any resignation of key function holders must be notified by the Institution to the CSSF as soon as possible. This notification shall contain the reasons for the resignation and a copy of the resignation letter. The Institution shall also inform the CSSF if, and when, the replacement of the resigned person will occur.

The Institution must inform immediately the CSSF of any dismissal of key function holders. Such notification must contain a complete and detailed justification of such decision and should attach a copy of the dismissal letter. The Institution should not omit any argument or reason that influenced its decision or that was invoked towards the dismissed person.

For any appointment, resignation or dismissal of a key function holder, the applications must be sent to the CSSF by registered mail and in original. Within one month following the receipt of the complete file, the CSSF may convene the management body and/or the chairman of the board of directors of the Institution, as well as the concerned person if the CSSF considers that an interview might be useful.

Any appointment by the Institution of a director and of a person of the authorised management is subject to the CSSF's prior express approval. In contrast, the appointment of the persons responsible for the internal control functions (i.e. the chief compliance officer, the chief risk officer and the chief internal auditor) is deemed to be accepted by the CSSF, unless the CSSF advises to the contrary within one month from the date of receipt of the complete file.

The Process entered into effect on February 18th 2014. For all those key function holders appointed prior to this date, other than the chief risk officer, Institutions do not need to re-apply to the CSSF. For the chief risk officer each Institution must notify their nomination to the CSSF in accordance with the Process, including those risk officers appointed prior to the entry into effect of the Process.

The Circular and the Process (only in French) are available at: http://www.cssf.lu/en/laws-and-regulations/circulars/news-cat/44.

REPORTING AND TRANSPARENCY OF SECURITIES FINANCING TRANSACTIONS

Together with the proposal regarding the structural reform of the European banking sector the European Commission adopted on January 29th 2014 a proposal for a regulation on reporting and transparency of securities financing transactions (the "Proposal"). The aim of the Proposal is to prevent banks, once the proposal on structural reform takes effect, from shifting part of their activity to the less regulated shadow banking sector.

Pursuant to the Proposal, firms that engage in securities financing transactions ("SFTs"), irrespective of whether they are financial or non-financial entities, will need to proceed to a reporting similar to that applicable under the European Market Infrastructure Regulation ("EMIR"). SFTs include a variety of secured transactions that have similar economic effects such as lending or borrowing securities and commodities, repurchase (repo) or reverse repurchase transactions and buy-sell back or sell-buy back transactions.

Transparency

Pursuant to the Proposal, management companies of UCITS, UCITS investment companies and AIFMs shall inform their investors on the use they make of SFTs as well as of other financing structures. Such information will need to be disclosed to the investors in the pre-investment information to be delivered to them, the prospectus and also the annual reports.

Rehypothecation

Rehypothecation is the use of collateral by the collateral taker for its own purposes. Under the Proposal such reuse of collateral is subject to the fulfilment of certain conditions such as (i) obtaining the consent of the providing counterparty and (ii) the disclosure of the risks attached to such rehypothecation which should be clearly explained to the providing counterparties.

Reporting to trade repositories

Details of SFTs shall be reported by the counterparties thereto to a registered trade repository. This information will be centrally stored and easily and directly accessible to the relevant authorities, such as ESMA, ESRB and the ESCB, for the purpose of identification and monitoring of financial stability risks entailed by shadow banking activities of regulated and non-regulated entities.
The trades will need to be reported no later than one working day following the conclusion, modification or termination of the transaction.
This reporting may be delegated.

The above mentioned reporting requirement would apply 18 months after the entry into force of the regulation and the transparency disclosure requirements 6 months after such entry into force which is not expected to happen before 2015.

The text of the Proposal is available at:
http://ec.europa.eu/internal_market/finances/docs/shadow-banking/140129_proposal_en.pdf

CAPITAL MARKETS

CSSF FAQ ON TRANSPARENCY REQUIREMENTS FOR ISSUERS OF SECURITIES

On February 25th 2014, the *Commission de Surveillance du Secteur Financier* (the "CSSF") published an update of its Frequently Asked Questions (the "FAQ") in relation to the law of January 11th 2008 on transparency requirements for issuers of securities, as amended (the "Transparency Law"). New FAQ 48 clarifies in which cases an issuer that benefits from an exemption set out in Articles 7 or 30(6) of the Transparency Law (hereafter "Exempted Issuers"), have to publish periodic information.

FAQ 48 confirms that issuers not subject to, or only partially subject to the periodic information requirements set out in Articles 3, 4 and 5 of the Transparency Law are nonetheless still required to publish any information considered as "inside information" according to Article 6(1) of Directive 2003/6/EC on insider dealing and market manipulation (market abuse) (the "Market Abuse Directive"). We are reminded that the notion of "regulated information" defined under Article 1(10) of the Transparency Law includes inside information.

Of particular interest is that the CSSF clarifies that the following information must be disseminated, made available to an officially appointed mechanism (OAM) for the central storage of Regulated Information and filed with the CSSF:

- a financial report made available to the public by an Exempted Issuer on its own initiative or in order to comply with another legal or regulatory requirement, is in principle inside information, given the nature of the information it contains;
- documents made available in the context of a general meeting (e.g. the annual and consolidated accounts, the management report or the auditors' report) that fulfil the criteria of inside information.

The updated FAQ is available at: http://www.cssf.lu/fileadmin/files/MAF/FAQ_transparency/FAQ_transparency_eng_250214.pdf.

ESMA Q&A ON PROSPECTUSES

On January 15th 2014, the European Securities and Markets Authority ("ESMA") published an update of its Questions and Answers (the "Q&A") on prospectuses including two new questions and answers.

The newly added questions and answers, Nos. 91 and 92 concern (i) the format of the individual summary for several securities and (ii) the applicable registration document schedule where a listed issuer proposes to issue convertible or exchangeable debt securities where the underlying securities are the issuer's shares.

Q&A 91 emphasises that if there is an individual summary relating to several securities (as provided for in article 24 (3) (second paragraph) of the Regulation (EC) no. 809/2004 of 29 April 2004 implementing Directive 2003/71/EC as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements, as amended (the "Prospectus Regulation")), the information in the individual summary needs to be easily accessible and the comprehensibility of the summary shall not be affected. In addition, we are reminded that the individual summary is subject to the length constraints set out in article 24(1) of the Prospectus Regulation. ESMA then describes two different formats which may be used for an individual summary relating to several

securities, so long as the abovementioned conditions are satisfied.

Q&A 92 clarifies that where an issuer proposes to issue convertible or exchangeable debt securities where the underlying securities are the issuer's shares, a debt registration document can be used where those particular shares arising from the conversion or exchange are already issued and admitted to trading on a regulated market. We are reminded that pursuant to Article 4 of the Prospectus Regulation the use of the share registration document schedule (Annex I) (or Annexes XXIII or XXV if the proportionate schedules are applicable) is required, in cases of convertible or exchangeable securities, provided that these shares or other transferable securities equivalent to shares are or will be issued by the issuer of the security and are not yet traded on a regulated market.

The updated Q&A is available at: http://www.esma.europa.eu/system/files/2014-esma-35_21st_version_qa_document_prospectus_related_issues.pdf

CORPORATE

REFORM OF THE REGIME FOR THE PUBLICATION OF LEGAL NOTICES IN LUXEMBOURG

Draft law number 6624 filed on October 4th 2013 provides for changes to the procedures for legal publications concerning companies and associations in Luxembourg (the "Draft Law"). The explanatory memorandum of the Draft Law explains that its central purpose is to facilitate the access of third parties to information and to reform the system for the publication of official legal information in Luxembourg.

There are two main pillars to the Draft Law: (i) replacement of the *Mémorial C, Recueil des Sociétés et Associations* (the "Memorial C") by publication in an electronic form on a new central electronic platform to be called the *Registre électronique des sociétés et associations* ("RESA") and (ii) increased efficiency in terms of reduced waiting periods for publication and cutting costs associated with handling and publishing/filing costs associated with the Memorial C.

The current system for the filing and publication of documents with the Luxembourg Trade and Companies Register ("RCS") is paper based requiring the filing of two different types of documents with the manager of the RCS: one for inscription in the data base of the RCS and the other for publication in the Memorial C. The information is immediately available for consultation in the file of the commercial entity concerned on the website of the RCS (https://www.rcsl.lu), and its content is identical to that which will appear subsequently in the published version of the Memorial C (available on http://www.legilux.public.lu/entr/index.php).

The Draft Law shall amend the existing legislation in order to achieve its stated aim of standardising the requirements for the filing and publication of legal documents in Luxembourg.

Included in the Draft Law are the following principal reforms:

(i) The manager of the RCS shall be responsible for the publication of legal information concerning companies and associations in Luxembourg.

(ii) The introduction of a legal obligation to file all documents electronically with the RCS.

Each document will be published at the moment it is confirmed as validly electronically filed with the RCS.
The Draft Law provides that the RCS shall make available a help desk for those requiring assistance to make electronic filings. The manager of the RCS shall file those documents manually submitted to it for filing on the basis of a mandate granted to it by the person filing the document.

(iii) The Memorial C in its current form will be replaced by a list of publications available on RESA.

The RCS will become the manager of a 'journal of publications' in an electronic format (a list of publications in PDF format), containing links to the documents filed in electronic format, allowing the user to open each document directly in electronic PDF format. RESA will be integrated into the website of the RCS.
The internet site of Legilux which hosts the Memorial C in electronic version will not be maintained. The archives of the publications in the Memorial C will however be retained and a link to these archives will be proposed on the website of the RCS.
It is envisaged that this reform will reduce the administrative costs associated with the formatting and publication of the Memorial C.

(iv) Each document will be published at the moment it is confirmed as validly electronically filed with the RCS.

The filing and publication of legal publications with the RCS will now become a part of the same procedure. This proposed reform shall abolish the current requirement for companies to reformulate the same information in a special document for the sole purpose of legal publication and will remove the current delay between the date of filing and the date of publication with the RCS.

INVALIDITY PROCEEDINGS BROUGHT BY A COMPANY ISSUING BONDS

Decision of the Court of Appeal (*Cour d'Appel*) of February 1st 2012.

The interim relief judge (*Juge des Référés*) declared inadmissible the filing by a Luxembourg public limited company (the "Company") requesting a court order (*ordonnance*) for the cancellation of notifications of bondholders' meetings.

The above request was introduced by the Company in the context of notifications sent by the bondholders' representative convening several bondholders' meetings in order to create a fund to, *inter alia*, finance legal proceedings in connection with the bondholders' objection to

the approved safeguard proceedings (*Procédure de Sauvegarde*) opened by the Company.

The Company appealed the decision of the interim relief judge.

The Court of Appeal specified that in the absence of specific legal provisions relating to the invalidity of shareholders' or bondholders' meetings, the court may exercise its discretion to assess the validity of a meeting. Furthermore, the Court of Appeal pointed out that principles applying to shareholders' meetings are applicable to bondholders' meetings.

Moreover, the courts will consider a meeting as valid if the non-compliance with the legal and statutory provisions did not, as a result, cause the decision rendered at such meeting to be invalid and, conversely, they will consider such meeting as invalid if such non-compliance altered the meeting's decision.

Finally, the Court of Appeal mentioned that legal doctrine recognises the invalidity of a procedure as a result of a formal defect (*nullité pour vice de forme*) to the extent that it caused damage to the person relying upon such.

In the case at hand, the Company raised the invalidity of a notice calling for a second bondholders' meeting arguing that (i) the notification for the second meeting should have been communicated subsequently to the holding of the first meeting and (ii) the second meeting should have mentioned the resolutions of the first meeting.

According to case-law, the notification formalities for the holding of shareholders' meetings, including those related to the agenda are expressed in the exclusive interest of shareholders. Thus, a company, not being a shareholder, is not entitled to invoke the non-compliance with the required formalities.

Furthermore, the defects on which the Company based its arguments of invalidity are formal defects (*vice de forme*). The rules regarding the form of notification are for the protection of the security holders. Thus, this invalidity may be argued only by the shareholders, respectively by the bondholders.

The Court of Appeal concluded that the Company was not entitled to invoke the non-compliance with notification formalities (i.e. the date of notification and the absence of information on the first meeting's resolutions in the second meeting's agenda) and only the bondholders may avail of such non-compliance in its claims (if any).

INVESTMENT FUNDS

REGULATORY TECHNICAL STANDARDS DETERMINING TYPES OF ALTERNATIVE INVESTMENT FUND MANAGERS

On December 17th 2013, the European Commission ("EC") published a proposal for a delegated regulation ("Delegated Regulation") supplementing Directive 2011/61/EU ("AIFMD") with regard to regulatory technical standards determining types of alternative investment fund managers ("AIFMs").

Article 1 of the proposed Delegated Regulation makes the distinction between the management of (i) open-ended and (ii) closed-ended alternative investment funds ("AIFs"). This difference is important in order to apply correctly the rules on liquidity management and valuation.

i. An AIFM of an open-ended AIF shall be considered to be an AIFM which manages an AIF the shares of which are, at the request of any of the shareholders, to be repurchased or redeemed prior to the commencement of its liquidation phase, directly or indirectly, out of the assets of the AIF and in accordance with the procedures and frequency set out in its rules or instruments of incorporation, prospectus or offering documents.

ii. An AIFM of a closed-ended AIF is then an AIFM which manages an AIF other than an open-ended AIF. In addition, for the purposes of article 61(3) and (4) of AIFMD, each AIFM in so far as it manages AIFs whose shares are repurchased or redeemed after an initial period of at least five (5) years during which redemption rights are not exercisable should be considered to be an AIFM of a closed-ended AIF.

Pursuant to article 1.4 of the proposed Delegated Regulation, when a change in the redemption policy of the AIF has the effect of changing the type of AIF an AIFM manages, the rules relevant to the new type of AIF shall be applied to that AIF by the AIFM.

In accordance with articles 56 and 58 of AIFMD the proposed Delegated Regulation has been notified simultaneously to the European Parliament ("EP") and the Council of the European Union ("Council"). Those institutions may object to the proposed Delegated Regulation within a period of three months, i.e. until March 17th 2014.

On the Council side, the General Secretariat of the Council published a statement on February 4 th 2014 indicating that the Council has no intention of objecting to the proposal.

However, at the initiative of the EP, the initial three month period has been extended by a further three months. The EP has therefore until June 17th 2014 to object to the proposal.

In the event that there is no objection from both institutions the Delegated Regulation will enter into force on the twentieth (20th) day following its publication in the Official Journal of the European Union.

Read here the full text of the proposed Delegated Regulation:
http://ec.europa.eu/internal_market/investment/alternative_investments/index_en.htm

CSSF PUBLISHES UPDATED FAQ ON AIFM

The *Commission de Surveillance du Secteur Financier* ("CSSF") published first on February 20th 2014, then on March 17th 2014, updated versions of its frequently asked questions ("FAQ") concerning the Luxembourg law of July 12th 2013 on alternative investment fund managers ("AIFM Law") as well as the Commission Delegated Regulation (EU) no. 231/ 2013 of December 19th 2012.

Two new questions have been added to the FAQ updated on February 20th 2014. The first one concerns the question of valuation of the AIF's assets. It is stated that the valuation function can be performed either by the AIFM itself or by an external valuer, subject to the fulfilment of the conditions set forth in article 17(4)(a) of the AIFM Law. When the valuation function is made by an external valuer, the latter can be either (i) the depositary of the AIF provided that the requirements of article 17(4) paragraph 2 of the AIFM Law are met or the (ii) administrator of the AIF if it fulfils the requirements under articles 17(4) and 17(5) of the AIFM Law. The appointment of any external valuer has to be formalised by written contract, which clearly states that it is the external valuer within the meaning of article 14(4)(a) of the AIFM Law and sets out its tasks.

The second question deals with transaction costs for AIFs established under Part II of the law of December 17th 2010 relating to undertakings for collective investment ("UCITS Law"). In particular, the issue was to determine if AIFs established under Part II of the UCITS Law must disclose the transaction costs in their periodical financial reports. The CSSF answered this issue in the affirmative.

The update of the FAQ published on March 17th 2014 relates to section 14 and in particular to the question concerning the period from which authorised AIFMs or registered AIFMs, which have been authorised or registered before July 23rd 2014, have to file their first reports with the CSSF.

For details, please refer to 14.d) of the updated FAQ which is available at: http://www.cssf.lu/en/aifm

CSSF CIRCULAR 14/581 ON NEW REPORTING OBLIGATIONS FOR ALTERNATIVE INVESTMENT FUND MANAGERS

On January 13th 2014, the *Commission de Surveillance du Secteur Financier* ("CSSF") issued circular 14/581 (the "Circular") on new reporting obligations for alternative investment fund managers ("AIFM").

The purpose of the Circular is to provide clarification on the technical details that AIFMs need to comply with in order to fulfil their reporting obligations. The Circular states that information regarding the operational issues on the reporting such as the reporting frequency, the reporting periods, the first reporting for existing registered and authorised AIFMs can be found either in the final ESMA report dated November 15th 2013 (please refer to a previous article "ESMA guidelines on reporting obligations under AIFMD") or in the updated FAQ of the CSSF.

The Circular also provides that the reporting files must be sent electronically via the two channels (namely E-file or SOFIE SORT) authorised by the CSSF, in accordance with CSSF circular 08/334. For further details on the legal reporting, please refer to the following link: http://www.cssf.lu/en/legal-reporting/transport-protection/.

The Circular is available at: http://www.cssf.lu/en/laws-and-regulations/circulars/news-cat/44/

UCITS V: AGREEMENT REACHED BY EUROPEAN PARLIAMENT AND COUNCIL

We reported in our newsletter of September 2013 that on July 3rd 2013 the European Parliament ("EP") rejected some proposals regarding the remuneration of the managers of undertakings for collective investment in transferable securities ("UCITS") contained in the proposed directive amending Directive 2009/65/EC on UCITS as regards depositary functions, remuneration policies and sanctions ("UCITS V Directive") regarding bonus caps and performance fees for managers of UCITS.

Since then, despite a compromise text having been reached by the representatives of the Council of the European Union ("Council") under the Lithuanian presidency on December 4th 2013, the Council was of the view that some isolated concerns remain in relation to sanctions, depositary liability and entities eligible to perform depositary functions. The first trilogue negotiations took place on January 15th 2014 and after the second and last trilogue discussions on February 5th 2014, a political agreement between the EP and the Council was reached on February 25th 2014 (the "Agreement").

The Agreement deals with the following key elements:

- **Depositaries**
  The Agreement lays down that only a limited number of credit institutions and sufficiently-capitalised regulated firms will be permitted to act as depositaries. Furthermore, any depositary will be liable for any loss of UCITS assets held in custody. For UCITS investors there will always be a direct right of redress against the depositary. The rules on the depositary's liability have been aligned with those under the alternative investment fund managers directive ("AIFMD").
- **Protection of investors' assets**
  In the case of insolvency of the depositary, the assets will be protected through clear segregation rules and safeguards provided by the insolvency law of each Member State.
- **Remuneration**
  The aim in introducing a requirement to have a remuneration policy is to discourage excessive risk-taking by managers of UCITS. These rules are equivalent to those laid down in AIFMD.
- **Sanctions**
  The Agreement provides for a harmonisation of the administrative sanctions across the EU Member States.

On the basis of the Agreement the draft UCITS V Directive will be subject to a plenary vote of the EP but without clear indication of the timetable. However, it is to be expected that the UCITS V Directive will be transposed into national law across EU Member States in 2016.

For a full description of the Agreement, please see the press release of the European Commission: http://europa.eu/rapid/press-release_STATEMENT-14-27_en.htm

ESMA Q&A ON AIFMD

Within the frame of Directive 2011/61/EU on alternative investment fund managers ("AIFMD"), the European Securities and Markets Authority ("ESMA") published on February 2nd 2014 a "Questions and Answers" document ("FAQ Document") on the practical application of the AIFMD.

The aim of the FAQ Document is to promote common supervisory approaches and practices in

the application of the AIFMD and its implementing measures by providing answers to questions posed by the general public and competent authorities.

The European Commission has already published its own "Questions and Answers" document on the AIFMD, which can be found at http://ec.europa.eu/yqol/index.cfm?fuseaction=legislation.show&lid=9

The current version of the FAQ Document covers the following topics:

Remuneration rules

The FAQ Document clarifies to which accounting period an alternative investment fund manager shall apply the guidelines on sound remuneration policies under the AIFMD published by ESMA ("Remuneration Guidelines") for the first time.

In addition, ESMA also clarifies to which extent the Remuneration Guidelines apply to persons appointed as delegates by an AIFM to perform portfolio and risk management functions. In this context, ESMA states that delegates subject to the rules of Directive 2013/36/EU (the "Capital Requirements Directive") are considered to be subject to rules that are equally as effective as the rules under the Remuneration Guidelines.

Information on the marketing of alternative investment funds

The FAQ Document states that the notification for marketing in an EU Member State other than the home Member State, applies to each new investment compartment of an alternative investment fund ("AIF") even if such AIF has already been subject to a previous notification.

Clarification on the reporting under article 42 of the AIFMD

Reporting of non-EU alternative investment fund managers ("Non-EU AIFM") under article 42 of the AIFMD to the national competent authorities shall only cover the AIFs marketed in the Member State of such national authorities.

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Although the information currently provided in the FAQ Document is relatively scarce, the intention is that it will be continually updated.

General questions on the practical application of the AIFMD may be sent to ESMA at: AIFMD-questions@esma.europa.eu

The FAQ Document is available at: http://www.esma.europa.eu/system/files/2014-163_qa_on_aifmd_february_for_publication.pdf

INVESTMENT FUNDS – EMIR

EMIR UPDATED FAQ

On February 11th and March 20th 2014 ESMA updated its FAQ (the "FAQ") on the implementation of Regulation (EU) no. 648/2012 on OTC derivatives, central counterparties and trade repositories ("EMIR").

New questions have been added and some of the existing answers have also been modified for improved clarity. All sections from the previous Q&A have been updated except for the one relating to exchange traded derivative reporting.

The document provides new guidance in a number of areas and the main add-ins include the following:

- Clarification that the fee information that Central Counterparties (CCP) and Clearing Members (CM) must make publicly available is expected to be published on a website of the firm in an easily identifiable page without access limitation (CCP Q16).
- Confirmation that it is not compliant with EMIR to not report to a trade repository the identity of a counterparty even if its local legislation prohibits disclosure of its identity since the requirement set forth under Article 9(5) of EMIR cannot be waived (TR Q 10 (d)).
- Clarification on the cases where the fields specified in the Annex to the Commission Delegated Regulation (EU) no. 148/2013 relating to the reporting to trade repositories are not mandatory and therefore may be left blank (TR Q 20).
- Guidance on the criteria to be applied by two counterparties to determine the one that would generate the Unique Trade ID (TR Q 19) and on how to assign a Unique Product Identifier (UPI) when common product taxonomies such as ISIN are not available (TR Q 21).
- Guidance on what to include in notifications to national competent authorities pursuant to Article 3 of EMIR when counterparties of a same group apply for the intragroup exemptions pursuant to Article 4(2) of EMIR (OTC Q 6).
- Clarification that where the transactions are CCP cleared at a third country CCP not recognised under Article 25 of EMIR the EU-based counterparty is not required to apply risk mitigation techniques under Article 11 of EMIR as those are only applicable to transactions that are not cleared irrespective of the status of the CCP under EMIR (OTC Q 12).
- How to identify the buyer and the seller in a FX forward transaction (TR Q 24).

The updated FAQ is available on the link: http://www.esma.europa.eu/system/files/2014-297_qa_vii_on_emir_implementation_20_march_14.pdf

FIRST EUROPEAN CCP AUTHORISED ON MARCH 18TH

The Commission Delegated Regulations (EU) nos. 148/2013 to 153/2013 of December 19th 2012 supplementing EMIR were published in the Official Journal on February 23rd 2013 and entered into force on March 15th 2013.

From the entry into force of the adopted Delegated Regulations European Central Counterparties (CCPs) established in the EU/EEA had 6 months to submit their application for authorisation under EMIR.

On March 18th last Nasdaq OMX received its authorisation from the Swedish Financial Supervisory Authority and became the first CCP authorised under EMIR meaning that the clock

starts ticking towards the first clearing obligations for the products that Nasdaq OMX clears.

As a consequence of this first authorisation ESMA updated its timeline for the clearing obligations under EMIR.

The clearing obligation procedure which is further defined in Article 5(2) of EMIR is triggered every time a new CCP clearing OTC derivatives is authorised meaning that where CCPs are authorised on different dates, clearing obligation procedures may run in parallel.

It should be noted that each time a new CCP is authorised, ESMA has to draft relevant regulatory technical standards, and have them approved by the European Commission. Only then can the mandatory clearing of the classes of derivatives covered by the CCP become effective.

The first clearing obligations are expected to be in force earliest December 2014 and more likely 2015 and would be limited to all or some of the OTC derivatives and currencies included in the Nasdaq OMX authorisation. These include Interest Rate Swaps (DKK, EUR, NOK, SEK currencies), Overnight Indexed Swaps (EUR, SEK) and Forward Rate Agreements (DKK, EUR, NOK, SEK).

EMIR – DEFINITION OF DERIVATIVES

On February 14th 2014 the European Securities and Markets Authority (ESMA) sent a letter to the European Commission (the "Commission") where it asked for clarification on whether FX forwards should be classified as derivatives in the Markets in Financial Instruments Directive (MiFID) and consequently also in the European Market Infrastructure Regulation (EMIR) as the latter cross-refers to MiFID for its definitions.

The letter stressed the lack of a harmonised approach to what should be understood as a derivative across the different European countries.

ESMA further clarified that under the current MiFID there is not a common adopted definition for derivatives and this leads, particularly for foreign exchange (FX) forwards and physically settled commodity forwards, to an inconsistent application of EMIR.

The Commission responded to this letter on February 26th last by concluding that FX forwards are in the scope of MiFID and consequently also of EMIR.

However, the Commission did not provide an answer to ESMA's concerns about how to distinguish between derivatives (FX forward contracts) and currency spot contracts.

The Commission said they would investigate this further and assess options to ensure a consistent application of the legislation and asked for more information and data from ESMA about how the definition of "FX forward" under MiFID has been transposed in Member States.

With regard to the definition of "commodity forwards that can be physically settled" the Commission indicated that this is already being discussed under the negotiations for MiFID II and invited ESMA to assess the status of such forwards in preparation for its advice to the Commission under MiFID II for which it will receive a mandate before the Summer.

The text of the Commission's response to ESMA is available at:
http://www.esma.europa.eu/content/EC-response-classification-financial-instruments

TAX

FATCA – MODEL 1 INTERGOVERNMENTAL AGREEMENT BETWEEN THE UNITED STATES AND LUXEMBOURG SIGNED

The Foreign Account Tax Compliance Act ("FATCA") was introduced in the US in order to tackle non-tax compliance by US taxpayers with foreign accounts. In short, FATCA imposes foreign financial institutions ("FFIs") to report to the US Internal Revenue Service ("IRS") information about US accountholders and certain US investors. A 30% withholding tax will apply on US sourced income paid to FFIs if FFIs do not comply with FATCA reporting obligations.

The US department of treasury has issued two model agreements in order to implement FATCA. These agreements serve as a base for the negotiations between the US and the country implementing FATCA. The fundamental difference between model 1 and model 2 is that, under model 1, FFIs will report information to their domestic tax authorities which will then convey such information to the IRS whilst under model 2, the FFIs must report directly to the IRS. On May 21st 2013, Luxembourg chose model 1 to exchange the information required under FATCA.

On February 27th 2014, Luxembourg and the US agreed on the content of the model 1 agreement ("IGA Model 1") and, on March 28th 2014, the IGA Model 1 was signed. IGA Model 1 is now subject to Luxembourg parliamentary approval. The text of the IGA Model 1 should be made available shortly.

CLARIFICATION OF THE IP REGIME

The Lower Administrative Court of Luxembourg (*Tribunal administratif* - the "Court") issued decision 31140 on November 6th 2013 clarifying the conditions for the availability of the Luxembourg intellectual property regime ("IP Regime") - which exempts 80% of the income deriving from qualifying intellectual property rights ("IP") - particularly the condition with respect to the date of creation or acquisition of the IP which has to be after December 31st 2007.

In the case at hand, the tax authorities, on the basis of the circular issued by the head of the tax authorities on March 5th 2009 ("IP Circular"), denied the application of the IP Regime to the capital gain realised upon the disposal of drawings and patterns because they were not registered with the *Office Benelux de la Propriété Intellectuelle ("OBPI")*. According to the tax authorities, the registration date with the OBPI allows to determine with certainty whether the drawings and patterns were created after December 31st 2007.

Since article 50bis LIR does not give any definition or guidance for the determination of the *date of creation* of drawings and patterns, the Court referred to the Benelux Convention on Intellectual Property of February 25th 2005 ("Benelux Convention") and ruled that the date of creation of drawings and patterns in the sense of article 50bis (4) LIR may, alongside with its registration with the OBPI and without a more specific provision in article 50bis LIR, be the date on which the IP is made public pursuant to the conditions described in article 3.3. of the Benelux Convention.

In its ruling, the Court emphasised that the circulars issued by the head of the tax authorities are not statute provisions but internal administrative guidelines which may not impose

additional or more stringent conditions than those expressly mentioned in the law. The Court concluded that for the application of the IP regime, the tax authorities cannot request that the drawings and patterns are registered with the OBPI since this condition is not expressly provided by the law. However, if the taxpayer has not registered its drawings and patterns, it should be able to prove that these IPs have been created after December 31st 2007. In the case at hand, the taxpayer did not provide any elements to the Court sustaining that the IPs have been created after December 31st 2007. The claim of the taxpayer was therefore rejected.

AUTOMATIC EXCHANGE OF INFORMATION ON INTEREST PAYMENTS – LUXEMBOURG CONFIRMS ITS COMMITMENT

Luxembourg moves towards automatic exchange of information for certain types of income. The draft law implementing the EU Directive 2011/16/UE on the administrative cooperation in the field of taxation and introducing the automatic exchange of information for certain income (director fees, wages and pensions) was approved on March 12th 2014. The automatic exchange of information for these categories of income will be effective as from January 1st 2015 with respect to income of the tax year 2014. For more information, please refer to our newsletter of January 2014.

As announced last year by the former Prime Minister, Jean-Claude Juncker, and confirmed by the Prime Minister Xavier Bettel, Luxembourg will apply automatic exchange of information as provided for by the Savings Directive as from January 1st 2015. A draft law was submitted to the Luxembourg parliament in this respect on March 18th 2014 (the "Draft Law").

The Draft Law provides for the abolishment of the withholding tax applied to interest income paid to individuals resident in another EU Member State. As from 2015, the exchange of information will automatically apply to interest income paid by Luxembourg paying agents to individuals resident in another EU Member State.

On March 20th 2014, the Prime Minister confirmed that Luxembourg will endorse the proposal of amendments to the Savings Directive since, as requested by Luxembourg, the EU Commission committed to implement a level playing field with third countries such as Switzerland which should reflect the revised scope of the EU Savings Directive in their agreements with the European Union.

With the aim of closing the existing loopholes and prevent tax evasion, the following main amendments to the Savings Directive have been proposed:

- A look through approach for payment of interest to certain categories of entities and legal constructions located outside the European Union and which do not ensure a real and satisfying taxation of the income of such entities.
- A look through approach for payments made to certain entities and legal constructions located in an EU Member State such as trusts and transparent entities.
- Extension of the scope of the Savings Directive to securities equivalent to receivables for which benefits are determined at the date of subscription and the repayment of 95% of the invested capital is ensured.
- Extension of the scope of the Savings Directive to uncoordinated Undertakings for Collective Investments and insurance contracts deriving income from debt claims.

The proposal for the amendments of the Savings Directive will now be discussed before being approved and transposed into the national legislation. The entry into force in Luxembourg of the amended directive is not expected before January 1st 2017.

TAX REGIME APPLICABLE TO HIGHLY SKILLED MIGRANT WORKERS

The Circular L.I.R. no. 95/2 (New Circular), issued by the Luxembourg tax authorities on January 27th 2014, replaces the circular L.I.R no. 95/2 of May 21st 2013 ("Old Circular" - see in this respect our newsletter dated April – June 2013) which provides specific tax provisions exempting part of the expenses borne by employers in relation to highly skilled workers moving to Luxembourg.

The New Circular primarily aims at extending the scope of the Old Circular. Under the Old Circular, expenses borne by employers in relation to highly skilled employees moving to Luxembourg are tax exempt if such employees were working abroad for an international group and are assigned to a Luxembourg company of the same group or if such employees are hired abroad by a Luxembourg company. Under the New Circular, the exemption is also available with respect to employees recruited abroad by a company established in another EEA Member State.

Furthermore, the New Circular no longer requires that the highly skilled employee moving to Luxembourg uses its specialised professional knowledge to promote "*sustainable economic activity in Luxembourg*". Under the New Circular, such employee is only required to convey its specialised professional knowledge to local personnel.

Under the New Circular, the employee is required to file a Luxembourg income tax return if its Luxembourg non-resident employer did not withhold wage tax on a voluntary basis.

The New Circular keeps all other provisions of the Old Circular and applies retroactively as from January 1st 2014.

TRANSFER OF SUBSIDIARY TO A RELATED ENTITY – LOSS DENIED BY THE LUXEMBOURG TAX AUTHORITIES

The Lower Administrative Court of Luxembourg (*Tribunal administratif* - the "Court") issued decision 31612 on January 13th 2013 stating that the estimated realisation value (*valeur estimée de réalisation*) of non-quoted shares shall correspond to the price that could be obtained on the market taking into account all circumstances that may impact the price, in particular, the net wealth of the company and the profit expectations and not taking into consideration abnormal and personal circumstances and conditions such as shareholding relationship between the seller and the acquirer.

In the case at hand, a company increased the share capital of its subsidiary by EUR 22 million and sold it the day after to a related company for EUR 1. The loss realised upon the disposal of the subsidiary was considered by the tax authorities as a non-allowable expense. According to the tax authorities, the participation was sold for EUR 1 only because of the shareholding link of the parties.

The company sustained that the sale price shall be determined by reference to the estimated

realisation value of the subsidiary which, in the case at hand, had been determined on the basis of the discounted cash flow method.

The Court stated that neither the Luxembourg Income Tax Law nor the Evaluation Law ("*Bewertungsgesetz")* provide for a method for the determination of the estimated realisation value. The Evaluation Law specifies only that it shall correspond to the price that could be obtained on the market taking into account all circumstances that may impact the price.

The Court concluded that the discounted cash flow method used by the company to determine the sale price of its subsidiary could be admitted but the taxpayer did not provide sufficient elements demonstrating that both the net wealth and the profit expectations were taken into account.

The conclusion that may be drawn from the above is that taxpayers should ensure that a comprehensive and detailed report is available to demonstrate that the price retained for intra-group transactions corresponds to the estimated realisation value of the transferred asset.

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