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BANKING & FINANCE

MIFID II AND MIFIR - ESMA Q&A

Since October 2016, ESMA has published several Questions and Answers ("Q&As") relating to Directive 2014/65/EU on markets in financial instruments ("MiFID II") and Regulation (EU) No. 600/2014 on markets in financial instruments ("MiFIR"), relating to 6 different topics:

- ESMA/2016/1165: Q&A relating to the provision of CFDs and other speculative products to retail investors under MiFID;
- ESMA/2016/1444: Q&A on MiFID II and MiFIR investor protection topics;
- ESMA/2016/1673: Q&A on MiFID II and MiFIR commodity derivatives topics;
- ESMA/2016/1424: Q&A on MiFID II and MiFIR transparency topics;
- ESMA/2016/1583: Q&A on MiFID II and MiFIR market structures topics; and
- ESMA/2016/1680: Q&A on MiFIR data reporting.

The Q&A on MiFID II and MiFIR investor protection topics is one of the most extensive of these documents. This Q&A, which was most recently updated in December 2016, covers topics relating to the following areas:

- Best execution obligation (article 27 MiFID II);
- Suitability and appropriateness (article 25(2) and 25(6) MiFID II);
- Recording of telephone conversations and electronic communications (16(7) MiFID II);
- Recordkeeping (article 16(6) and 16(7) MiFID II);
- Investment advice on an independent basis (article 24(4) and 24(7) MiFID II);
- Underwriting and placing;
- Inducements (research) (article 24 MiFID II);
- Post-sale reporting; and
- Information on costs and charges (article 24 MiFID II).

The Q&A clarifies various specific rules in these areas and explains the applicability of "Level 2" regulation (in particular the MiFID II Delegated Regulation of 25 April 2016 and MiFID II Delegated Directive of 7 April 2016 issued by the European Commission) to a wide range of topics, ranging from unrequested research "free of charge" to the encryption of records.

ESA JOINT DISCUSSION PAPER ON USE OF BIG DATA BY FINANCIAL INSTITUTIONS

On December 19th 2016, the Joint Committee of the European Supervisory Authorities (consisting of the European Securities and Markets Authority, the European Banking Authority and the European Insurance and Occupational Pensions Authority) (the "ESAs"), issued a discussion paper on the use of "Big Data" by Financial Institutions ("FIs") in order to receive feedback from stakeholders on their preliminary assessment of the potential benefits and risks linked to the use of Big Data by FIs (the "DP").

What is Big Data?

In the DP, Big Data is used to refer to the use of "*high volumes of different types of data produced with high velocity from a high number of various types of sources, often in real time, by IT tools (powerful processors, software and algorithms).*" The DP focuses on the use of Big Data by FIs in their processes, in the provision of services to

clients and in client relationships. Examples of common business models are (financial and payment data) aggregator services, risk assessment in the banking and insurance sector, high frequency trading and deployment of investment strategies using non-traditional data. These business models depend on internet, mobile devices and other internet-connected objects.

Regulatory framework

The DP includes a non-exhaustive presentation of the existing regulatory framework which the ESAs consider relevant for FIs to consider when using Big Data technologies such as:

- data protection rules (Directive 95/46/EC on Data Protection, repealed by General Data Protection Regulation 2016/279 applicable from May 2018; Directive 2002/58/EC on Privacy and Electronic Communications);
- cybersecurity rules (notably Directive 2016/1148 on Security of Network and Information Systems);
- consumer protection rules (Directive 2002/65/EC on Distance Marketing of Financial Services, Directive 2005/29/EC on Unfair Commercial Practices, Directive 93/13/EEC on Unfair Contract Terms and Directive 2006/114/EC on Misleading and Comparative Advertising);
- sectoral financial legislation (conduct of business principles and the prudential and organisational obligations under the Payment Services Directive, Mortgage Credit Directive, Consumer Credit Directive, Payment Account Directive, PRIIPS, Insurance Distribution Directive, MiFID II/MiFIR, UCITS, AIFMD, EMIR, Solvency II, CRD IV); and
- anti-money laundering rules (Anti-Money Laundering Directive 2015/849).

These rules impose obligations on FIs and provide for rights of consumers which relate, *inter alia*, to the collection and processing of personal data, to dealings with consumers, to the measures FIs are required to take to manage operational risks of their information processing systems and to the conduct of business with clients.

Potential benefits and risks

The DP points out that the use of Big Data could benefit consumers (e.g. tailor-made and better quality, more cost-effective services) and FIs (e.g. greater efficiency, better management of risks or fraud), but also could prejudice consumers (e.g. limitations to access, discriminatory pricing practices) and FIs (e.g. data privacy and security issues, reputational and legal risks).

Ultimately, the intention of the ESAs is to determine if any regulatory or supervisory actions are required so as to mitigate the risks of Big Data whilst still garnering the benefits of it.

EU MORTGAGE CREDIT DIRECTIVE - TRANSPOSITION INTO LUXEMBOURG LAW

The law of December 23rd 2016 transposing Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property (the "MCD") and amending the Consumer Code (*code de la consommation*) (the "MCL") was published in Luxembourg's Official Gazette on December 28th 2016. The MCL has a retroactive effect insofar as it applies to credit agreements signed after March 21st 2016.

One of the main goals of the MCD, and in turn of the MCL, is to ensure a "*high level of consumer protection in the area of credit agreements*

relating to immovable property and in order to ensure that consumers looking for such agreements are able to do so confident in the knowledge that the institutions they interact with act in a professional and responsible manner".

The MCL applies to:

(1) credit agreements with consumers (natural persons acting for purposes other than his or her commercial, industrial, artisanal or liberal activities) which are secured either by a mortgage or by another comparable security commonly used on residential immovable property or secured by a right related to residential immovable property; and
(2) credit agreements the purpose of which is to acquire or retain property rights in land or in an existing or projected building, provided that the credit agreement has a value of at least EUR 75,000.

The MCL sets out conditions which must be satisfied prior to the conclusion of a residential immovable property contract. For example, publicity or marketing communications with respect to the agreements must be fair, clear and not misleading. Also, the lender (or the credit intermediary) must provide personalised information regarding the offer using a European Standardised Information Sheet (ESIS) (which is set out in the Grand Ducal Regulation of December 23rd 2016), allowing the consumer to compare with other alternatives. Another key precondition is that the lender (or credit intermediary) is required to evaluate the solvability of the consumer in a rigorous manner, using information which is necessary, sufficient and proportionate.

The MCL also introduces rights and obligations of the parties after conclusion of the contract with respect to early repayment and foreclosure. The consumer has a right to early repayment of the loan, in which case the total cost of the credit must be reduced by the interest and charges applicable to the remainder of the credit period. The lender has the right to receive fair and objective compensation but the compensation shall not exceed the financial loss to the lender. The lender's right to initiate foreclosure proceedings is limited, as lenders must exercise reasonable forbearance before foreclosure proceedings are initiated. Moreover, the costs charged to the consumer for the default cannot exceed what is necessary to indemnify the lender for the costs incurred after the default.

The MCL also sets out the requirements for establishment and supervision of credit intermediaries and appointed representatives and the rules of conduct which they must abide by.

CAPITAL MARKETS

MARKET ABUSE

UPDATE OF ESMA Q&A - OCTOBER 2016

On October 26th 2016, the European Securities and Markets Authority ("ESMA") published an update of its Questions and Answers ("Q&A") on Regulation (EU) No 596/2014 of 16 April 2014 on market abuse (the "Market Abuse Regulation") to include one new question and answer in Section 2- Managers' transactions and four new questions and answers in Section 3- Investment recommendation and information recommending or suggesting an investment strategy.

The answer to the newly-added question in Section 2 clarifies that in respect of managers' transactions carried out under Article 19(1) of the Market Abuse Regulation in a currency other than Euro, that the exchange rate to be used to determine if the threshold set forth in Article 19(8) of the Market Abuse Regulation is reached, is the official daily spot foreign exchange rate, which is applicable at the end of the business day the transaction is conducted. ESMA also states that the reference rate published on the ECB website should be used, where possible.

Section 3 comprises of four new questions relating to investment recommendations. In its response to Question 1 of this section, ESMA clarifies that it is the substance of a communication (e.g. phone call, chat functions, sales notes) and not its label, form or medium that determines whether or not it is an "investment recommendation" under the Market Abuse Regulation. ESMA's response to Question 2 indicates that, generally speaking, a communication which does not refer to either a financial instrument or an issuer, is not an investment recommendation; ESMA notes however that this must be analysed on a case by case basis because, for example, a communication in respect of a specific sector composed of a limited number of issuers may be considered an investment recommendation regarding those issuers, even if no issuer is specifically mentioned. ESMA confirms in response to Question 3 that an investment firm who produces an investment recommendation will fall within the scope of Article 3(1)(34)(i) of the Market Abuse Regulation even though the production of such recommendations is not its main business. Lastly, in response to Question 4, ESMA clarifies that material intended for distribution channels or for the public concerning one or several financial instruments, which includes statements that such instruments are "undervalued", "fairly valued" or "overvalued" shall be considered an investment recommendation.

ENTRY INTO FORCE OF ESMA GUIDELINES

On October 20th 2016 ESMA published the translations of two sets of guidelines which it was mandated to issue under Regulation (EU) No 596/2014 of 16 April 2014 on market abuse (the "Market Abuse Regulation"), specifically, its guidelines to persons receiving market soundings ("MSRs") (the "Guidelines to MSRs") and its 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"). Following a linguistic issue in the Polish translation of the Guidelines to MSRs, all 22 language versions were re-published on November 10th 2016.

The Guidelines were stated to apply two months after their publication which means that the Delay Guidelines are applicable since December 20th 2016 and that the Guidelines to MSRs are applicable since January 10th 2017.

On October 20th 2016, the CSSF published CSSF Circular 16/646 in order to transpose the Delay Guidelines into Luxembourg regulation with immediate effect and likewise, on January 11th 2017, the CSSF published CSSF Circular 17/648 in order to transpose the Guidelines to MSRs into Luxembourg regulation with immediate effect.

For details on the content of the Guidelines, please refer to our previous article on this topic in the September 2016 Newsletter.

UPDATE OF ESMA Q&A - DECEMBER 2016

On December 20th 2016, the European Securities and Markets Authority ("ESMA") published a further update of its Questions and Answers ("Q&A") on Regulation (EU) No 596/2014 of 16 April 2014 on market abuse (the "Market Abuse Regulation") to include three new questions and answers in Section 2- Managers' transactions and four new questions and answers in Section 3- Investment recommendation and information recommending or suggesting an investment strategy.

In the answers to the new questions in Section 2, ESMA has:

- clarified that for the purposes of calculating whether the threshold for triggering the notification obligation under Article 19(1) of the Market Abuse Regulation has been reached, the transactions carried out by a person discharging managerial responsibilities ("PDMR") and by persons closely associated to that PDMR, should not be aggregated;
- set out the rules for calculating the price of gifts, donations and inheritance for the purposes of the notifications and disclosure of managers' transactions under Article 19 of the Market Abuse Regulation; and
- confirmed that the receipt of shares by a PDMR as part of a remuneration package (i.e. a conditional transaction) does not have to be notified pursuant to Article 19(1) of the Market Abuse Regulation and Article 10(2)(i) of Commission Delegated Regulation (EU) 2016/522 until the occurrence of the relevant conditions and the actual execution of the transaction.

In the answers to the new questions in Section 3, ESMA has:

- confirmed that communications to clients containing purely factual information on one or more financial instruments or issuers shall not constitute an "investment recommendation" under the Market Abuse Regulation, so long as it does not explicitly or implicitly recommend or suggest an investment strategy;
- confirmed that a communication intended for distribution channels or for the public will not amount to a new investment recommendation if it only reports or refers to a previously disseminated investment recommendation and does not contain any new elements of opinion or valuation or confirmation of a previous opinion or valuation; however, in the same context, ESMA draws attention to the requirements of Commission Delegated Regulation (EU) 2016/958;
- confirmed that recommendations relating to a derivative traded solely outside a trading venue fall within the scope of Article 20 of

the Market Abuse Regulation insofar as its price or value depends on, or has an effect on the price or value of a financial instrument admitted to trading on a regulated market, traded or admitted to trading on a multilateral trading facility ("MTF"), traded on an OTF, or for which a request for admission to trading on a regulated market or MTF has been made; and

- clarified how to determine whether a recommendation which relates to a derivative has been given on the same financial instrument for purposes of complying with Article 4(1)(h) of Commission Delegated Regulation (EU) 2016/958.

ENTRY INTO FORCE OF THE NEW MARKET ABUSE LAW

On December 30th 2016, the law of December 23rd 2016 on market abuse (the "New Market Abuse Law") entered into force. The New Market Abuse Law implements Regulation (EU) No 596/2014 of 16 April 2014 on market abuse (the "Market Abuse Regulation"), transposes Directive 2014/57/EU of 16 April 2014 on criminal sanctions for market abuse (the "Market Abuse Directive") and Commission Implementing Directive 2015/2392 and repeals the Luxembourg law of May 9th 2006 on market abuse (the "Previous Market Abuse Law").

In addition to describing in detail the administrative sanctions/measures and criminal sanctions applicable in case of violation of certain provisions of the Market Abuse Regulation, the New Market Abuse Law designates the CSSF as the competent authority for the purposes of the Market Abuse Regulation and sets out its powers (with an indication of which powers need prior judicial authorisation before being exercised); the cooperation which is required between the CSSF and the State Prosecutor, when exercising their respective powers is also described. Furthermore, the rules regarding the cooperation of the CSSF with competent authorities of Member States and of third countries are detailed.

Issuers who are subject to the Luxembourg law of January 11th 2008 on transparency requirements for issuers, as amended (the "Transparency Law") should note that that law has been amended by the New Market Abuse Law so as to extend the definition of "regulated information". Previously "regulated information" covered all information which the issuer, or any other person who has applied for the admission of securities to trading on a regulated market with the issuer's consent, is required to disclose under the Transparency Law as well as under Article 6 of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (which in summary referred to inside information). The new definition of "regulated information" will still cover inside information (by referring to Article 17 of the Market Abuse Regulation) but also the notifications which an issuer is required to make in respect of transactions conducted by persons discharging managerial responsibilities and persons closely associated with them (by referring to Article 19 of the Market Abuse Regulation).

Finally, we refer you to the CSSF press release regarding the entry into force of the New Market Abuse Law.

PROSPECTUSES: UPDATE OF ESMA Q&A

On December 20th 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 a new question and answer regarding the applicability of ESMA's guidelines on alternative performance measures (the "ESMA APM Guidelines") to prospectuses comprising separate documents published before and on/after July 3rd 2016.

A prospectus may be drawn up as a single document or as separate documents. In the latter case the prospectus will comprise of a registration document, a securities note and if applicable, a summary note.

An alternative performance measure ("APM") is a financial measure of historical or future financial performance, financial position, or cash flows other than a financial measure defined or specified in the applicable financial reporting framework. The ESMA APM Guidelines apply to issuers with securities traded on regulated markets and persons responsible for drawing up a prospectus; they set out the principles that issuers should follow when presenting APMs in documents.

ESMA has confirmed, in the latest version of the Q&A as regards the applicability of those guidelines, that:

- where a registration document which contains APMs was published **before July 3rd 2016** and that registration document is combined with a securities note published **on/after July 3rd 2016**, the ESMA APM Guidelines apply to the securities note (and summary, if applicable) but not to the registration document;
- where information contained in a registration document which was published **before July 3rd 2016** is incorporated by reference into a prospectus published **on/after July 3rd 2016**, the ESMA APM Guidelines do not apply to that registration document, but only to the remainder of the prospectus;
- where a registration document was approved **before July 3rd 2016** but only published **on/after July 3rd 2016** and it is combined with a securities note published **on/after July 3rd 2016** or, where the information contained in such a registration document is incorporated by reference into a prospectus published **on/after July 3rd 2016,** the ESMA APM Guidelines apply to all documents comprising the prospectus; and finally
- where a prospectus or registration document was published **before July 3rd 2016** but supplemented **on/after July 3rd 2016,** the ESMA APM Guidelines apply to the supplement.

THE LUXEMBOURG OFFICIAL APPOINTED MECHANISM AND LEGAL ENTITY IDENTIFIERS

Pursuant to Article 7 of the Commission Delegated Regulation (EU) 2016/1437 of 19 May 2016 supplementing Directive 2004/109/EC ("Transparency Directive") with regard to regulatory technical standards on access to regulated information at Union level (the "Delegated Regulation 2016/1437"), each official appointed mechanism ("OAM") shall use legal entity identifiers ("LEIs") as the unique identifiers for all issuers as from January 1st 2017.

As a consequence, issuers filing regulated information (within the meaning of the Transparency Directive) with the OAM of the Luxembourg Stock Exchange (which is the only appointed OAM in Luxembourg) are required to have an LEI.

An LEI is a 20-character reference code designated to a single legal entity in accordance with the ISO 17442 standard, which allows an interested party to easily identify legal entities and funds participating in financial markets transactions. LuxCSD has been sponsored as the pre-LOU (Local Operating Unit) of the Global Legal Entity Identifier System for Luxembourg domiciled entities and investment funds.

To obtain an LEI from LuxCSD an issuer (or someone on its behalf) shall connect to the LuxCSD self-registration service for LEIs on the GMEI portal; if you would like to check whether an issuer already has a LEI, this can be done through this link.

CORPORATE

ENTRY INTO FORCE OF THE LAW CREATING THE S.À R.L.-S

The law dated July 23rd 2016 introducing the S.à r.l.-S as a variant of the currently existing private limited liability company (*Société à responsabilité limitée* or S.à r.l.) in Luxembourg came into force on January 16th 2017 (the "Law").

This Law creates a new vehicle aimed at fostering entrepreneurial drive more effectively as well as boosting productivity and innovation.

WHO IS ELIGIBLE?

The Law intends to stimulate the development of the entrepreneurial spirit by creating, for entrepreneurs that are natural persons, a legal structure that not only offers a protection in terms of personal liability, but also enhances their visibility.

To this end, S.à r.l.-S is **strictly** reserved to physical persons as shareholders and **only** individual persons can become managers thereof. Furthermore, a physical person cannot become shareholder of several S.à r.l.-S at the same time, unless the parts have been transferred because of death.

A VARIATION OF THE S.À R.L.?

S.à r.l.-S is a variation of S.à r.l. which has proven to grant a great deal of flexibility whilst ensuring a sound legal structure. In other words, the existing rules regulating the S.à r.l. will apply to the S.à r.l.-S except when provided otherwise by the Law of August 10 1915, as amended.

Which scope of permitted activities?

The corporate object of the S.à r.l.-S must compulsorily relate to activities requiring a business licence application. Such business licence must be obtained prior to the constitution of the S.à r.l.-S since it must be filed upon filing the S.à r.l.-S with the Luxembourg register of commerce and companies.

Reduced corporate capital and legal reserve

S.à r.l.-S may be incorporated with an initial corporate capital of Euro 1, which must be entirely subscribed and paid-up. Thus, the corporate capital of a S.à r.l.-S may be comprised between EUR 1 and EUR 12,000.

The very limited amount of corporate capital is counterbalanced with the obligation for shareholders of such S.à r.l.-S to create a (non-distributable) legal reserve funded on a yearly basis by the allocation of one-twentieth (5%) of the net profits. Such allocation shall cease to be compulsory when the aggregate amount of the legal reserve and the corporate capital shall reach EUR 12,000.

Name

S.à r.l.-S must appear after the name of the company on all documents issued by the Company either in long form "*société à responsabilité limitée simplifiée*" or in short form "S.à r.l.-S".

Costs and formalities efficiency

- S.à r.l.-S may be set up by a private deed, a special deed or a notarial deed, which will be published. The choice is up to the founder of the S.à r.l.-S.
- Reduced costs of incorporation upon the setting up a S.à r.l.-S through a private deed with an initial share capital of EUR 1. The total amount necessary to incorporate the company, that is with all the required registrations and publications, would amount to EUR 191 with a yearly membership fee to the Luxembourg Chamber of commerce (*Chambre de Commerce*) of Euro 70.

Non-limited duration

S.à r.l.-S must be considered as a transitory regime aimed at allowing young entrepreneurs to reach a certain level of stability.

SOCIETAL IMPACT COMPANY (SIS)

Context

The Luxembourg legislator introduced in December 2016 by the enactment of the law of December 12th 2016 (the "Law") a new legal framework for companies with a social or societal impact, *la société d'impact sociétal* ("SIS").

Since 2009, the Luxembourg government has strongly supported the development of the social and solidarity economy. In this context, the *Union Luxembourgeoise de l'Economie Sociale et Solidaire* ("ULESS") was created in July 2013 and aims to defend and to promote the interests of the social and solidarity economy, a fast-growing sector in Luxembourg.

Because the existing structures were not necessarily best suited to support both social/societal and commercial activities, the Law aims to create a specific legal framework for those companies dedicating their activities to supporting people in a fragile situation or contributing to the preservation or development of specific social or societal issues as well as combating exclusion or inequality and discrimination.

Derogation to the principle of financial benefit

The Law derogates from the provision of the civil code by virtue of which a commercial company is normally driven by the aim of procuring a financial benefit for its shareholders. As a consequence, a SIS may provide in its articles of association that it is not incorporated with the view to procure a financial benefit for its shareholders.

Form and conditions

The Law provides that any public limited liability company (*société anonyme*), private limited liability company (*société à responsabilité limitée*) or cooperative company (*société coopérative*) which complies with the principles of the social and solidarity economy may opt for the status of the SIS and be granted approval by the Ministry responsible for social and solidarity economy.

However, any SIS must comply with four cumulative conditions:

- perform a continuous activity of production, distribution or exchange of goods or services;
- support people in a fragile situation or contributing to the preservation or development of specific social or societal issues as well as combating exclusion or inequality and discrimination;
- maintain an autonomous managements and
- half of potential benefits must remain in the SIS and be reinvested for the maintenance and development of the corporate purpose.

The Law further provides that the maximum annual remuneration paid by a SIS to any of its employees may not exceed six times the amount of the social minimum wage.

Corporate object and Ministry agreement

As stated above, any of the above mentioned company forms may apply for the SIS status which shall be granted by the Ministry responsible for social and solidarity economy provided that the corporate object of the SIS complies with the above indicated cumulative conditions and that key performance indicators (KPIs) allowing for the effective and fair measurement of the implementation of the SIS corporate object are indicated in the articles of association thereof.

The Law further provides that any resolution likely to amend the corporate object and KPI clauses must be submitted to the Ministry for prior approval.

Share capital

As explained above, the SIS derogates from the principal laid down in article 1832 of the Luxembourg civil code and therefore allows SIS to be financed by philanthropic investors and non-philanthropic investors.

Therefore, in compliance with the Law, the share capital of the SIS shall be represented by "*parts d'impact*" ("Impact Shares") which do not entitle their holders to participate in the profits of the SIS, if any; and "*parts de rendement*" ("Return Shares") which entitle their holders to profits under the conditions that the KPIs measurement evidences that the social and societal objectives set in the articles of association have been met. Potential benefits allocated to Impact Shares are exclusively aimed at the performance of the corporate object of the SIS and are entirely reinvested in the SIS.

Impact Shares and Return Shares are exclusively issued in registered form with a determined nominal value. Holders of Return Shares may request the conversion of their Return Shares into

Impact Shares at any time but Impact Shares cannot be converted into Return Shares.

In all circumstances, the entire share capital of a SIS must always be represented by at least 50% of Impact Shares.

Tax regime

From a tax perspective, a SIS is generally a fully taxable company like any other commercial company unless its share capital is composed exclusively of Impact Shares, in which case it will be fully exempt from corporate income tax, municipal business tax and net wealth tax.

Cash donations made to a SIS which has only issued Impact Shares are deductible as special expenses, akin to donations made to qualifying not-for-profit organisations.

Supervision

The SIS is submitted to the control of a special commission specifically created to assist the Ministry and control on a continuous basis that SIS comply with the authorization granted.

Annual accounts are audited by an independent auditor (*réviseur d'entreprise agréé*) also in charge of controling that no debt instruments have been issued or that no loans have been contracted directly or indirectly from shareholders.

Applicable law

The SIS is submitted to the law dated August 10th 1915 on commercial companies, as amended, except for specific provisions provided in the Law.

Entry into force

The Law became effective as of December 19th 2016.

INVESTMENT FUNDS

SECURITIES FINANCING TRANSACTIONS - ESMA CONSULTATION PAPER

On September 30th 2016 ESMA published a Consultation Paper on Draft Regulatory Technical Standards ("RTS") and Implementing Technical Standards ("ITS") under Regulation (EU) 2015/2365 of 25 November 2015 on transparency of securities financing transactions ("SFT") and of reuse (the "SFTR") and amendments to related EMIR RTS (the "Consultation Paper"). ESMA explains in the Consultation Paper that the reason for these draft RTS and ITS is "*to take into account legal developments as well as to ensure consistency, where relevant, between the frameworks of both the SFTR and EMIR regulations*".

ESMA issued the Consultation Paper after considering the feedback received by stakeholders on the discussion paper published on March 11th 2016 (we refer you to our article of April 16th 2016). The Consultation Paper includes details on:

(i) the procedure and criteria for registration as trade repository under the SFTR,

(ii) the use of internationally agreed reporting standards, the reporting logic under the SFTR and the main aspects of the structure of a report issued in accordance with the SFTR,

(iii) the requirements regarding transparency of data and aggregation and comparison of data,

(iv) the access levels of authorities and

(v) the tables of fields for the relevant types of SFT.

The consultation closed on November 30th 2016 and ESMA is currently considering all comments received from various stakeholders. EFAMA, the representative association for the European investment management industry, has expressed the view that the investment funds and asset managers industry is facing an unfair treatment compared to other market participants for the following reasons:

- excessive amount of data is required to be delivered to the competent authorities with regard to SFT. Frequent disclosure of data and updates of information documents would be extremely costly for counterparties to SFT and in turn for their clients. EFAMA believes that these costs should be balanced by greater benefits.
- the regime imposed on UCITS (and extended to AIFs in several EU countries) pursuant to ESMA's 2012 Guidelines on ETFs and other UCITS issues (the "Guidelines") deprive regulated funds from access to margining. The draft RTS read in conjuction with the Guidelines pose increasing pressure on regulated funds to provide collateral without having the tools to meet their regulatory obligations as well as burdensome reporting requirements.

As a consequence, EFAMA considers that the currently proposed reporting framework applicable to funds and asset managers is going against the EU Commission's willingness to foster non-bank financing in Europe while bringing no benefit to end-investors.

The final report and the draft RTS will be submitted to the European Commission for endorsement by the end of Q1/beginning Q2 2017.

ESMA Q&A ON UCITS DIRECTIVE – UPDATE

On October 12th 2016 the European Securities and Markets Authority ("ESMA") updated its Questions and Answers on the application of the UCITS Directive ("Q&A").

The updated Q&A now includes four new questions and answers on:

(i) **Regulated markets in Member States under Directive 2009/65/EC of 13 July 2009 relating to undertakings for collective investment in transferable securities (the "UCITS Directive").**
Any multilateral trading facility ("MTF") operated in the European Union will be considered as a regulated market within the scope of the UCITS framework as long as the MTF meets the requirements set out in article 50(1)(b) of the UCITS Directive (operates regularly and is recognised and open to the public). Instruments in which a UCITS invests that are traded on such a MTF on behalf of a UCITS must comply with the Directive 2007/16/EC of 19 March 2007 relating to UCITS as regards the clarification of certain definitions (the "Eligible Assets Directive"), in particular with its article 2(1). If a UCITS proposes to invest in such an instrument, it should actively seek and review information regarding the liquidity and negotiability of that instrument in order to be satisfied that the presumptions of liquidity and negotiability in the last sub-paragraph of Article 2(1) are well-founded.

(ii) **Translation requirements in relation to the remuneration disclosure.**
The information on the remuneration policy which has to be made available on a website

needs not to be translated into the language of the country where the UCITS is being distributed. It should be translated into one of the following:

a. the official language, or one of the official languages, of the UCITS host Member State;
b. a language approved by the competent authorities of that Member State; or
c. a language customary in the sphere of international finance.

(iii) Reinvestment of cash collateral.
Reinvestment of cash collateral in short-term money market funds should be included in the 10% limit of investment in units of other funds.

(iv) Commencement of periodical reporting pursuant to article 13 of the Regulation 2015/2365 on transparency of securities financing transactions and of reuse (the "SFTs Regulation").
The first reporting pursuant to article 13 and annex A of the SFTs Regulation should be the first annual or half yearly report published after January 13th 2017.

NEW CIRCULAR 16/644 FOR DEPOSITARIES OF UCITS

CSSF Circular 16/644 regarding the provisions applicable to credit institutions acting as UCITS depositary subject to Part I of the 2010 Law and to all UCITS, where appropriate, represented by their management company (the "Circular CSSF 16/644") applies from October 13th 2016. It repeals and replaces CSSF Circular 14/587 as it has been modified by Circular CSSF 15/608. The CSSF press release 16/10 had already announced that CSSF Circular 14/587 would be replaced by a new circular in order to adapt its content to the provisions of the Delegated Regulation (EU) 2016/438 supplementing the UCITS Directive with regard to the obligations of depositaries (the "Obligations of Depositaries Regulation").

As a consequence depositary banks of UCITS may need to update their depositary agreements in order to reflect the requirements of the Circular CSSF 16/644.

The main changes are the following:

- Depositary agreements should be supplemented by a mapping table evidencing that all the requirements of article 2.2 of the Obligations of Depositaries Regulation are covered by the agreement. The mapping table should be sent to the CSSF on an annual basis.
- Depositary agreements should describe the reporting and escalation procedure. Specific details of the same may be further detailed in an operating memorandum agreed between the parties to the depositary agreement.
- In case of termination of a depositary agreement, until another depositary is appointed or in case of liquidation until the liquidation is closed, the former depositary should keep open all cash and securities accounts.
- The CSSF Circular 16/644 clarifies the terms "delegation" and "outsourcing" and the due diligence obligations, eligibility criteria and CSSF prior agreement for each case. Delegation is the appointment of a third party to safe-keep assets within the meaning of articles 18(4) and 34(3) of the 2010 Law (i.e. custody and record keeping). Outsourcing is for the other activities of the depositary and operational tasks.
- The functions a depositary may carry out in addition to the depositary function now

include acting as collateral manager and collateral agent.

- It has been clarified that material changes in the depositary's organisation need to be notified and approved upfront by the CSSF.

UCITS V AND AIFMD – ESMA REMUNERATION GUIDELINES

On October 14th 2016 the European Securities and Markets Authority (ESMA) published two sets of guidelines on sound remuneration policies under Directive 2009/65/EC of 13 July 2009 as amended by Directive 2014/91/EU of 13 July 2014 (the "UCITS Directive") and under Directive 2011/61/EU of 8 June 2011 on Alternative Investment Fund Managers (the "AIFMD") (the "UCITS Guidelines" and "AIFMD Guidelines").

The UCITS and AIFMD Guidelines have remained identical to the guidelines included in the ESMA final report on sound remuneration policies under the UCITS Directive and the AIFMD which was published on March 31st 2016 (we refer you to our previous article). As mentioned therein, ESMA did not integrate in the final report the guidance included in the draft version of the UCITS Guidelines with regard to the possibility to waive certain provisions under the UCITS Directive on the basis of the proportionality principle.

Such provisions referred mainly to the pay-out-process (i.e. the requirements on variable remuneration on instruments, retention, deferral and ex-post incorporation of risk for variable remuneration).

However, ESMA published on March 31st 2016 a letter addressed to the European legislators, calling them to provide clarity on the application of the proportionality principle, mainly in relation to its application on the pay-out process, in view of ensuring the consistent application of the remuneration requirements in the asset management sector.

It appears from the final UCITS Guidelines that despite the publication of this letter, no amendment has been done to the UCITS Guidelines for the purposes of clarifying the conditions under which it is permitted to waive the requirements relating to the pay-out process.

National Competent Authorities (NCAs) were required to notify ESMA as to whether they comply or intend to comply with the finalised Guidelines, or to provide their reasons for non-compliance, by December 15th 2016. ESMA will publish a compliance table based on the responses received from the NCAs.

The UCITS and AIFMD Guidelines apply from January 1st 2017. However, with regard to the UCITS Guidelines, the guidance on the rules on variable remuneration should first apply to variable remuneration in relation to the first full performance period after January 1st 2017. ESMA thus underlines that a management company whose accounting period ends on December 31st should apply the guidelines on the rules on variable remuneration to the calculation of payments relating to the 2017 accounting period.

OUT-OF-COURT RESOLUTION OF COMPLAINTS

On November 11th 2016 the CSSF published CSSF Regulation 16-07 relating to out-of-court complaint resolution (the "Regulation"). It entered into force on the same day.

The Regulation constitutes an updated version of the CSSF Regulation 13-02 relating to the out-of-court resolution of complaints, which is now

repealed except in relation to all requests filed with the CSSF before the entry into force of the Regulation.

The Regulation introduces various changes to the out-of-court resolution of complaints procedure as it:

- introduces some new definitions (e.g. the definition of consumer);
- extends the scope of application to include requests filed pursuant to the law of July 23rd 2016 concerning the audit profession and requests filed through the European ODR (on-line dispute resolution) platform;
- clarifies the conditions under which the filing of a complaint with the CSSF is inadmissible;
- sets a limit of one year for filing a request with the CSSF in case the complainant has received neither a satisfactory answer nor an acknowledgement of receipt from the professional. This period of one year starts from the date the complainant filed his request with the professional.

In addition, the Regulation requires that professionals supervised by the CSSF shall publish the details of their complaint-handling policies on their website, including information on the role of the CSSF acting as an out-of-court complaint resolution body. If professionals do not have a website, they are required to provide their customers with the same information through other means, i.e. in their brochures or contractual documents.

If a professional is not able to satisfy a complainant's request, then it must inform the latter in writing about the existence of the out-of-court complaint resolution procedure at the CSSF. In cases where a professional decides to have recourse to the out-of-court complaint resolution procedure to resolve a dispute arising from a customer complaint, then it shall:

(i) send to the complainant a copy of the Regulation (or the link to the CSSF website) and
(ii) inform the latter about his right to file a request with the CSSF within one year of the filing of his request with the professional.

As a consequence, all professionals subject to the supervision of the CSSF and within the scope of the Regulation shall ensure that:

(i) their internal procedures comply with the requirements set out in the Regulation, especially with regard to customer communication procedures and
(ii) they have published the details relating to their complaints-handling policies in accordance with the Regulation.

It is to be noted that specialised investment funds ("SIFs") and investment companies in risk capital ("SICARs") remain out of the scope of the Regulation since there is no legal base prescribing its application neither in the law of February 13th 2007 on SIFs nor in the law of June 15th 2004 on SICARs. On the contrary, undertakings for collective investment subject to the law of December 17th 2010, as amended ("UCI Law") are subject to the Regulation, pursuant to article 133 (3) of the UCI Law.

Details concerning the application of the Regulation are contained in the relevant CSSF FAQ (in French only).

MONEY MARKET FUND REGULATION – UPDATE

On November 14th 2016, the European Parliament reached an agreement on the draft Regulation on Money Market Funds (The "Draft MMF Regulation").

As previously explained in our newsletter of July 2016, pursuant to the Draft MMF Regulation regulated money market funds may take three different forms:

(i) variable net asset value funds (standard and short-term),
(ii) public debt constant net asset value funds, and
(iii) a new category of low volatility net asset value money market funds.

The regulation will be subject to a review 5 years after the date of entry into force.

The text published on November 30th 2016 differs slightly from the text published on June 10th 2016. Main changes relate to:

- Clarification that if UCITS and AIFs have characteristics similar to money market funds the Draft MMF Regulation will apply.
- Clarification of the categories of financial assets that the MMF may invest in.
- MMFs may acquire the units or shares of other MMFs provided that the MMF whose acquisition is contemplated does not hold units or shares in the acquiring MMF.
- A MMF whose units or shares have been acquired shall not invest in the acquiring MMF during the period in which the acquiring MMF holds units or shares in it.
- Particularities relating to the stress tests and procedures to deal with vulnerabilities.
- Transparency requirements.
- Penalties and powers of competent authorities.

The Draft MMF Regulation will apply for new funds 12 months after its date of entry into force. Existing money market funds will have 18 months to comply with the regulation from the date of entry into force. This means that existing Luxembourg UCITS or AIFs (regulated or unregulated), that invest in short term assets whose main objective is to offer returns in line with money market rates or preserving the value of the investment, shall submit an application to the CSSF together with all documents and evidence necessary to demonstrate the compliance with the Draft MMF Regulation. Pursuant to the terms of the Draft MMF Regulation the CSSF will have 2 months to assess whether the UCITS or AIF is compliant.

The Draft MMF Regulation is expected to be approved by the European Parliament at first reading. It will then be submitted to the Council for adoption. It is expected to be published in the Official Journal of the European Union in the second quarter of 2017. The Draft MMF Regulation shall enter into force on the twentieth day following its publication in the Official Journal of the European Union.

PRIIPS REGULATION – UPDATE

Regulation 1286/2014 of 26 November 2014 on the key information document (“KID”) for packaged retail and insurance-based investment products (“PRIIPs”) (the “PRIIPs Regulation”) sets out uniform rules on the form and information of the KID in order to enable retail investors to understand and compare the key features and risks of the PRIIP. Regulatory Technical Standards in relation to article 8 of the PRIIPS Regulation (the “RTS”) have been drafted as explained in our previous newsletter and on November 9th 2016, the European Parliament rejected them. As a consequence, on December 8th 2016, the European Council has decided to extend the date of application of the PRIIPs Regulation until January 1st 2018.

The PRIIPs Regulation provides a transitional regime for UCITS until December 31st 2019. Until that date, the current UCITS key investor information document ("KIID") regime remains in place and UCITS/management companies are not required to have a KID in place compliant with the PRIIPs Regulation.

By December 2018, the European Commission must decide whether to:

(i) prolong these transitional arrangements,
(ii) require UCITS management companies to produce a PRIIPs KID instead of a UCITS KIID, or
(iii) consider the UCITS KIID equivalent to the PRIIPs KID.

However, that does not mean that UCITS and their management companies are not affected by the PRIIPS Regulation until December 2018. Where a UCITS is used as the reference product underlying a PRIIP, the PRIIP manufacturer will be obliged to produce a KID if the product is intended for retail distribution. While it is the PRIIP manufacturer which will likely prepare the KID, it will expect summary risk indicators, performance scenarios and costs and charges to be delivered to it by the UCITS.

All Luxembourg funds offering PRIIPs to retail investors will be required to publish a KID from January 1st 2018 onwards. Since Luxembourg law allows Part II funds the option of producing a UCITS KIID such funds should, if they offer their shares to retail investors, benefit from the same exemption as UCITS and therefore should be able to publish a UCITS KIID-like document instead of a PRIIPS KID until at least December 31st 2019.

AIFMD- UPDATED Q&A

On November 16th 2016 and one month later, on December 16th 2016, the European Securities and Markets Authority ("ESMA") issued updated versions of its Q&A on the application of AIFMD (the "Q&A").

Additional sub-questions have been issued under the sections relating to "Notifications of AIFs", "Reporting to national competent authorities under Articles 3, 24 and 42" and "Delegation"

In relation to the notifications of AIFs the Q&A clarifies that if an AIFM wishes to notify the national competent authorities of the relevant Member State of a material change to a notification made on a cross-border basis pursuant to Articles 32(7) or 33(6) of AIFMD such AIFM is required to hand in the full set of documentation required by Articles 32 or 33 with the revised notification letter and highlight any amendment to both the original notification letter and to the accompanying documentation. However ESMA has expressly excluded the creation of a new share class as falling under the scope of what is considered as being a "material change".

On the reporting to national competent authorities under Articles 3, 24 and 42 an additional question has been added to clarify the case where a non-EU AIFM reports information to the national competent authorities of a Member State under Article 42 of the AIFMD. In such case the Q&A makes it clear that only the AIFs marketed in that Member State have to be taken into account for the purpose of the reporting. However, when Member States apply ESMA's opinion of October 1st 2013 for the effective monitoring of systemic risk under Article 24(5), first sub-paragraph, of the AIFMD, AIFMs are also requested to report information on non-EU master AIFs not marketed

in the EU that have either EU feeder AIFs or non-EU feeder AIFs marketed in the Union under Article 42. Non-EU AIFMs should apply the same principle if the master AIF is established in the Union and not marketed in the Union (i.e. they should report information on the EU master AIF not marketed in the Union).

In relation to situations where the AIFM does not itself perform the functions set out in Annex I of the AIFMD, and that a third party performs one of them, the Q&A clarifies that the relevant function should be considered as having been delegated by the AIFM to such third party and therefore, the AIFM should be responsible for ensuring compliance with the requirements on delegation set forth by the AIFMD and with the AIFMD itself. The Q&A clearly states that the above provisions apply to all functions stated in point 1 and point 2 of Annex I of the AIFMD. This includes the administration function.

Finally, in relation to delegation of functions, the Q&A clarifies the scope of Article 5(1)(a) of AIFMD and indicates that AIFMs managing externally-managed AIFs may not delegate the performance of the portfolio management or risk management to their governing body or any other internal resource of the externally-managed AIF. Internally managed AIFs may do so. The Q&A explains that if the external AIFM may delegate to third parties the task of carrying out functions on its behalf in accordance with Article 20 of the AIFMD the externally-managed AIF does not, however, qualify as a "third party" in accordance with Article 20(1) of the AIFMD.

The updated Q&A is available at: https://www.esma.europa.eu/file/20831/download?token=GMqNzYGS

TAX

LUXEMBOURG 2017 TAX REFORM

On December 14th 2016, the 2017 tax reform law was voted and later published on December 27th 2016 in the official gazette (hereafter the "**Law**"). For further details on the 2017 tax reform please refer to our August legal alert.

The most important changes impacting corporate and individual taxpayers are recapped below:

Corporate taxpayers:

- The corporate income tax rate is decreased to 19%, thus leading to an aggregate income tax rate of 27.08% (for Luxembourg-City). A further decrease to 18% shall be voted in 2018, thus leading to an aggregate income tax rate of 26.01% (for Luxembourg-City) for 2018;
- Tax losses incurred as of the tax year 2017 going forward will have a limited carry forward of 17 years. Previously incurred tax losses will continue to be carried forward indefinitely. Losses incurred prior to 2017 will be used first;
- Option to defer the deduction of the annual depreciation;
- The minimum net wealth tax applicable for financial companies (i.e. companies whose assets are composed of more than 90% of financial assets and whose total balance sheet exceeds EUR 350,000) is increased from EUR 3,210 to EUR 4,815 as of 2017;
- Compulsory electronic filing of income tax, municipal business tax and net wealth tax return as from the tax year 2017 going forward;

- Extension of the joint and several liability of the directors to the payment of VAT: the management of a company has to ensure that the latter fulfils its VAT obligation and if there is a non-fulfilment by the company because of a fault ("*inexécution fautive*") of the management, the VAT authorities are authorised to issue a "décision d'appel en garantie" to any of the directors who will, as a result, become liable for the VAT payment.

Individual taxpayers:

- The final withholding tax on interest income (RELIBI) is increased from 10% to 20%;
- The temporary budget balancing tax of 0.5% is abolished;
- Two new tax brackets of 41% and 42% have been introduced for income exceeding EUR 150,000 and EUR 200,004 respectively.

NEW RULES FOR INTRA-GROUP FINANCING

On December 27th 2016, the head of the Luxembourg tax authorities issued circular L.I.R. No. 56/1 – 56bis/1 relating to the tax treatment and more specifically the transfer pricing aspects of companies engaged in intra-group financing transactions (the "Circular"). The Circular was issued further to the introduction in the Luxembourg tax code of a new article which outlines the transfer pricing rules applicable to "controlled transactions" ("Article 56 bis LIR"). The provisions of Article 56 bis LIR are inspired by the OECD Transfer Pricing Guidelines and set out the methodology that must be applied to determine "arm's length" prices.

With effect as from January 1st 2017, the Circular replaces the two previous circulars L.I.R. No. 164/2 dated January 28th 2011 and No.164/2bis dated April 8th 2011 on the same topic.

The main changes introduced by the Circular are the following:

- The rule regarding the equity at risk ("*capitaux propres adéquats*") of at least 1% of the principal amount of the loans, or EUR 2,000,000, has been ***removed***;
- Going forward, the equity at risk, for transfer pricing purposes, will have to be determined on the basis of the facts and circumstances specific to the intra-group financing transaction and ***credit analysis methods***;
- If the remuneration earned by a Luxembourg company that acts as ***an intermediary*** (i.e. it grants loans to group companies and is funded by group companies) is not supported by a transfer pricing report, it is acceptable, for ***simplification purposes***, that the taxable result is determined as a return on assets. Currently, a minimum return of 2% after taxes is acceptable but this rate may be revised in the future by the tax authorities on the basis of relevant market analysis. Where this simplification rule is applied, the transaction will be subject to the automatic exchange of information;
- With regard to the criteria of effective presence in Luxembourg ("*présence réelle au Luxembourg*") and in order to be deemed to bear the risk related to its financing activities, the Luxembourg entity must have, in addition to the existing requirements (e.g. Luxembourg resident board members with the capacity to bind the company), qualified personnel which have the skills needed to control the risk related to the financing transactions.

Advance Pricing Agreements ("APA") issued on the basis of the rules applicable before the introduction of Article 56 bis LIR will no longer

bind the tax authorities as from January 1st 2017 for fiscal years subsequent to 2016. It is, of course, possible to request a new APA on the basis of the new transfer pricing rules.

CBC REPORTING AND RELEVANT NOTIFICATION PROCEDURE

The law transposing the EU Directive 2016/881 of 25 May 2016 on country-by-country reporting (hereafter "CbC") into domestic law was voted on December 13th 2016 and later published on December 27th 2016 in the official gazette (hereafter the "Law"). It thus became applicable as of 2016. For further details on CbC please refer to our July and September newsletters.

Pursuant to the Law, each Luxembourg entity of a multinational group that falls within the scope of CbC must notify each year before the end of the relevant reporting fiscal year of the group whether it is the reporting entity or, if it is not, the name and country of residence of the group entity that will submit the CbC report. For the year 2016, the deadline for the notification was therefore December 31st 2016 for multinational groups having a financial year that matches with the calendar year. Because of the late publication of the Law and in order to give taxpayers sufficient time to fulfil their filing obligations, the deadline for the notification has been exceptionally extended to March 31st 2017. The extension of the deadline was communicated by way of a newsletter issued by the Luxembourg tax authorities (as well as in the Frequently Asked Questions section of their website). For subsequent years, any late filing could result in fines of up to EUR 250,000.

An online system has been set up in order to file the above mentioned CbC notification directly through the guichet.lu website, which is however only accessible via an activated LuxTrust certificate that either the company itself or its mandate should own.

OECD RELEASE OF MULTILATERAL INSTRUMENT: BEPS ACTION 15

On November 24th 2016, the Organisation for Economic Co-operation and Development (hereafter referred as "OECD") released the Multilateral Convention to implement tax treaty related measures to prevent base erosion and profit shifting (hereafter referred as "MLI" or the "Instrument") in accordance with BEPS action 15.

The MLI is the result of the mandate given in February 2015 by the OECD/G20 to an ad hoc group, representing around 100 jurisdictions, to develop an Instrument aiming to modify in a more efficient and quicker manner the double-tax treaty network, which includes more than 2,000 bilateral conventions, of the participating jurisdictions.

The instrument is already open for signature since December 31st 2016 and will be effective once five jurisdictions at least have signed it. A first signature ceremony is expected to take place in June 2017.

BEPS ACTIONS COVERED?

The following BEPS actions are included in the MLI:

- Hybrid mismatches (BEPS Action 2);
- Treaty abuse – simplified limitation of benefit clause (BEPS Action 6);
- Avoidance of PE status (BEPS Action 7);
- Improving dispute resolution (BEPS Action 14);
- Arbitration.

Only the minimum standards of the BEPS report recommendations are mandatory (albeit with some optionalities). These are treaty abuse and dispute resolution. The other BEPS actions are optional.

How does the MLI work?

- The MLI supplements and modifies the existing double-tax treaties concluded between different jurisdictions by imposing to signing jurisdictions a common set of minimum standards that will be applicable to the chosen double-tax treaties;
- The OECD will be the depositary of the Instrument;
- The Instrument is available for signature to all States or duly authorised jurisdictions (ex: Guernsey, Isle of Man, Jersey, etc.);
- The Jurisdictions have to prepare the list of their double tax treaties that will be covered by the MLI;
- Jurisdictions can make reservations or opt out of certain provisions, where it is permitted (such as Part VI regarding Arbitration);
- Finally, States and any other jurisdiction have to ratify, accept or approve the Instrument.

Timing

It is expected that the taxable periods beginning in 2019 will be the first periods to which the MLI will apply.

By way of this Instrument the above mentioned BEPS Actions may be implemented swiftly since the MLI enables a modification of the existing treaties without using the traditional procedure (i.e. amending protocol).

VAT ON DIRECTORS' FEES – ADMINISTRATIVE GUIDANCE

On September 30th 2016, the Luxembourg VAT Authorities (*Administration de l'Enregistrement et des Domaines*) published circular letter No. 781 dealing with the VAT treatment applicable to services provided by independent company directors (the "Circular"). A series of frequently asked questions is also available on the website of the VAT Authorities.

The administrative guidance provided by the Circular was eagerly awaited after the confirmation, in early 2016, by the Luxembourg VAT Authorities to the Luxembourg Association of Company Directors that directors' fees are subject to VAT (please refer to our April 2016 Newsletter).

The Circular recalls that the services provided by independent directors to the companies they managed are to be considered as an economic activity within the meaning of the Luxembourg VAT law and should thus be subject to VAT at the standard rate of 17% in case the services are deemed to be located in Luxembourg.

An exemption may, however, be available for purely honorific activities, where the consideration paid to the director is a mere compensation for costs incurred. Although this point is not covered in the Circular, the general exemption for fund management services may also apply to fees charged by directors to investment vehicles that benefit from this VAT exemption.

The VAT Authorities further confirm that the reverse charge mechanism applies to services provided by non-resident directors to Luxembourg companies, which either qualify as VAT taxable persons or are VAT registered non-taxable legal entities.

According to the Circular, employees that are appointed company directors as representatives of their employers should not be considered as acting independently and should thus not qualify as VAT taxable persons. Their employer should instead register for VAT purposes and account for its employees' directorship activities.

The Circular finally specifies that VAT taxable independent directors as well as Luxembourg entities liable to declare the VAT on directors' fees under the reverse charge mechanism should make sure that they comply with the VAT rules and the content of the Circular as of January 1st 2017. In this respect, it should be noted that the law voted on December 14th 2016 increases the penalties that may be applied in case of non-compliance with the VAT law.

E-COMMERCE: NEW VAT RULES PROPOSED BY THE COMMISSION

On December 1st 2016, the European Commission published a set of proposed amendments to the EU VAT legislation currently in force (the "Proposal"). The suggested measures aim at improving the VAT environment for e-commerce businesses in the EU with a particular focus on small and medium size enterprises.

With (intended) effect as of January 1st 2018, the Proposal provides that a supplier may opt to locate cross-border electronically supplied services in the Member State of establishment of the service provider, in case the total volume of such cross-border electronic supplies carried out by the supplier does not exceed EUR 10,000.- in the contemplated calendar year. Under the standard rules these services are located in the Member State of the recipient. This option should allow start-ups and small businesses to avoid the obligation to register in multiple Member States or to use the mini-one-stop-shop scheme.

Other simplification measures notably include the extension of the possibility to apply the invoicing and record keeping rules applicable in the Member State in which the supplier is established instead of the Member State in which the supply is deemed to be located. The same should apply with respect to the collection of pieces of evidence by small and medium size enterprises when assessing where their customer is based.

The Proposal furthermore intends to extend the scope of the mini-one-stop-shop scheme allowing businesses to avoid multiple registrations and to report and pay the VAT collected to one single VAT authority. The scheme is notably planned to be opened, as from January 1st 2018, to taxable persons who are not established in the EU but are nevertheless registered in a Member State e.g. because they carry out occasional transactions subject to VAT in that Member State. In addition, as from January 1st 2021, the scheme will be extended to distance sales of goods and to services other than electronically supplied services. This measure is a major step forward in administrative simplification and should be welcomed by a large number of small and medium size enterprises.

Finally, the Commission seems to recognise the current inconsistency in the taxation of physical books/journals and e-books/e-papers, as it suggests to allow Member States to align the rates applicable to both types of publications. Should the Commission proposal be adopted, Luxembourg could apply its super-reduced rate of 3% to e-publications as from January 1st 2018.

THE EU CHARTER OF FUNDAMENTAL RIGHTS APPLIES TO VAT

In a recent Judgement rendered by the District Court of Luxembourg-city (*Tribunal d'arrondissement de Luxembourg*), the application of the Charter of Fundamental Rights of the European Union (the "Charter") to value added tax ("VAT") was confirmed.

Even though the Charter was solemnly proclaimed at the Nice European Council on December 7th 2000, it became only legally binding on the EU institutions and on national governments with the entry into force of the Lisbon Treaty on December 1st 2009.

The judges of the District Court recalled, in their decision dated December 7th 2016 (Civil Judgment I No. 432/16, docket No. 168 940, the "Judgement") that the Charter applies to all situations governed by EU law. VAT being an indirect tax, which is harmonised at EU level, the District Court concluded that the Charter applies to it.

Although, to our knowledge, the Judgement is the first domestic decision which deals with the applicability of the Charter to VAT, the European Court of Justice (the "ECJ") already ruled that the Charter applies to VAT (ECJ, February 26th 2013, case C-617/10, *Akerberg Fransson*).

This recognition at both EU and national levels can be seen as an undeniable step forward regarding the rights of taxpayers, especially because the application of the Luxembourg domestic law procedural safeguards contained in the law dated December 1st 1978 on non-contentious administrative procedure (*procédure administrative non contentieuse*) and its implementing Grand-Ducal Decree of June 8th 1979 to VAT is still disputed in Luxembourg case law.

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www.bsp.lu

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

T. +352 26025 – 1
mail@bsp.lu

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