Luxembourg

World's first Green Exchange launched in Luxembourg by the Luxembourg Stock Exchange

ESMA Updates on AIFMD and UCITS

New rights for minority shareholders

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World’s first Green Exchange launched in Luxembourg by the Luxembourg Stock Exchange

On 27 September 2016, the newly introduced Luxembourg Green Exchange went live with its unique platform (the “**LGX**”) with 114 listed green bonds in 19 different currencies, 25 international issuers and a total amount raised of up to $45bn and that has itself been launched by the Luxembourg Stock Exchange (the “**LuxSE**”).

This overview introduces the main aspects of the world’s first platform having listed green financial instruments based on the related frequently asked questions of the LuxSE.

1 Background

In December 2015, 195 countries adopted during the Paris climate conference (the “**COP21**”) the first universal, legally binding global climate deal (the “**Paris Agreement**”) setting out a global action plan in order to put the world on track to avoid dangerous climate change by limiting global warming to well below 2°C. This Paris Agreement will enter into force in 2020.

In the year 2007 the first green bonds have been listed on the LuxSE. The LGX is a platform that brings together issuers of and investors in green financial instruments, where the issuers can market these and publish how the proceeds will be used and the investors can be sure to have access to securities that are proven to be 100% green.

2 Main aspects on the LGX

The difference between the LGX and other exchanges who offer the listing of green securities is the fact that the industry best practices[1] for green securities have been settled as mandatory requirement. Moreover, the LGX obliges its issuers to apply ex-post reporting once a security has been issued.

The advantages for issuers on the LGX may be seen in the fulfillment of its reporting obligations in accordance with the best practices which are recognized within an international frame. Issuers can publicly demonstrate their commitments to climate change and its consequences, while investors enjoy an unrestricted access to the available information on the listed securities and greater transparency.

Although the interest in green financial instruments grows, there exists the fear of the growing risk of greenwashing. However, the strict rules and green principles of the LGX ensure that issuers as well as investors may access information with regard to the use of proceeds of the securities and therefore, enhance the transparency on the overall scope of the ongoing projects of the issuers.

3 Entry requirements

It is also important to stress how interested issuers may join the LGX. As the LGX is not a new market, but a platform for financial instruments, in a first step the securities of the issuers must be listed on the official list of the LuxSE and admitted to trading on its regulated market or its Euro MTF market.

Once listed, the issuer has to:

- self-label its securities as “green” by exploring the intended green nature of the security and choosing the relevant box in the LuxSE’s application form;
- disclose the use of the proceeds by confirming that the proceeds will be completely used to (re-)finance green projects pursuant to the GBP and CBI;
- provide ex-ante external review in the form of consultant reviews, verifications, certifications or rating reports, second opinions; and
- commit to regular ex-post reporting for the entire time of the existence of the security[2], while the LuxSE recommends to fulfill such ex-post reporting once a year until the project has been completed.

[1] ICMA’s Green Bond Principles (the “**GBP**”) and the Climate Bonds Initiative’s (the “**CBI**”) are recognised as industry best practices by the LGX.

[2] Please note that the ex-post reporting begins not later than 12 months after the green security has been issued and can be submitted in forms such as the use of proceeds, audit report, sustainability/ESG report, annual report, interim impact report.

The LuxSE has published a non-exhaustive list of project categories which may be excluded from the entry into the LGX:

- Nuclear power production;
- Trade in the Convention on International Trade in Endangered Species of Wild Fauna and Flora;
- Animal testing for cosmetic and other non-medical products;
- Medical testing on endangered species;
- Fossil fuels (specifically oil, gas and coal), including "clean coal".

In order to examine whether the applying issuer meets the entry requirements, the LuxSE's Green Team verifies the use of proceeds and ex-ante reviews against the entry requirements. Such team is also responsible for the existence of disclosure and transparency of a security check, but does not define the underlying investments' quality. In any cases, where the team has any doubt over the eligibility, the Green Advisory Board will review such application and make the final decision.

It is important to know that even if a security cannot qualify for the access to the LGX, it still can be listed on the official list of the LuxSE and admitted to trading on its two markets.

4 Further steps

After verification of the application and the admission to the LGX, the security will be displayed on the LGX. Although the LGX has no standards or rules on the documentation for ex-post reporting, the LuxSE reserves its right to withdraw a security in case it does not comply with the LGX requirements and/or following the Green Advisory Board's recommendations. The LuxSE's annual review will ensure that the issuer complies with its commitments to disclosure and transparency.

The entry into the LGX does not implicate any additional fees, while all issuers have to bear the costs of any additional reporting obligations.

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ESMA Updates on AIFMD and UCITS

1 Update of the ESMA Q&As relating to the application of AIFMD

On 19 July 2016 and 6 October 2016 respectively, the European Securities and Markets Authority ("**ESMA**") updated its Questions and Answers with regard to the application of the Alternative Investment Fund Managers Directive ("**AIFMD**") (Ref. ESMA/2016/1439) ("**AIFMD Q&As**"). The new points concern the impact on the AIFMD of (i) Regulation (EU) 648/2012 on OTC derivatives, central counterparties and trade repositories ("**EMIR**"), and (ii) Regulation (EU) 2015/2365 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012 ("**SFTR**"):

- In Section XII of the AIFMD Q&As, ESMA clarifies that alternative investment fund managers ("**AIFMs**") cannot rely, other than as a point of reference, on the valuation provided by the central counterparty (the "**CCP**") for OTC financial derivative transactions which are centrally cleared and subject to the reporting obligation of EMIR. AIFMs must have in place a process for proper and independent verification of the value of such transactions. Nevertheless, the AIFM should be able to justify any deviation from the valuation provided by the CCP.

- In Section XIII of the AIFMD Q&As, ESMA clarifies that under Article 13 of SFTR, information relating to securities financing transactions and total return swaps shall be disclosed by management companies of undertakings for collective investment in transferable securities ("**UCITS**"), UCITS investment companies and AIFMs, in the next annual report of each UCITS/alternative investment fund ("**AIF**") under management (or half-yearly report for UCITS), to be published after 13 January 2017 (which may relate to a reporting period beginning before that date).

The latest version of the AIFMD Q&As is available on ESMA's website.
https://www.esma.europa.eu/sites/default/files/library/2016-1436_qa_aifmd.pdf

2 Update of the ESMA Q&As relating to the application of the UCITS Directive

On 19 July 2016 and 12 October 2016 respectively, ESMA updated its Questions and Answers with regard to the application of the UCITS Directive (Ref. ESMA/2016/1455) ("**UCITS Q&As**"). The new points concern (i) regulated markets under the UCITS Directive, (ii) translation requirements in relation to the remuneration disclosure, (iii) reinvestment of cash collateral, and (iv) the impact of EMIR and SFTR on the UCITS Directive:

- In Section I of the UCITS Q&As, ESMA clarifies that the term "regulated market in a Member State" may be understood to include a "multilateral trading facility" ("**MTF**") operated in the EU, provided that such an MTF meets the requirements set out in Article 50(1)(b) of the UCITS Directive. Furthermore, instruments which are traded on an MTF must comply with the Eligible Assets Directive requirements. Therefore, a UCITS proposing to invest in this type of instrument should actively seek and review information regarding the liquidity and negotiability of that instrument in order to ensure that presumptions of liquidity and negotiability are well-founded.

- In Section II of the UCITS Q&As, ESMA clarifies that in case of cross-border distribution, information on the remuneration policy of a UCITS which has to be made available on a website (and in a paper copy upon request), should fall under Article 94(1)(c) of the UCITS Directive relating to information or documents other than the key investor information document. Such information should be translated, at the choice of the UCITS, into either: (i) (one of) the official language(s) of the UCITS host Member State, (ii) a language approved by the competent authorities of that Member State, or (iii) a language customary in the sphere of international finance.

- In Section III of the UCITS Q&As, ESMA clarifies that (re-)investment of cash collateral in short-term money market funds by a UCITS should be treated in the same way as any other investment made by the UCITS in units of other UCITS or other funds and should be compliant with all the relevant UCITS Directive requirements (including the 10% investment limit in target funds under Article 50(1)(e)(iv)).

- In Section VI of the UCITS Q&As, ESMA clarifies that UCITS management companies cannot rely, other than as a point of reference, on the valuation provided by the CCP for OTC financial derivative transactions which are centrally cleared and subject to the reporting obligation of EMIR. UCITS management companies must have in place a

process for accurate and independent verification of the value of such transactions. Nevertheless, the UCITS management company should be able to justify any deviation from the valuation provided by the CCP.

- In Section VII of the UCITS Q&As, ESMA clarifies that under Article 13 of SFTR, information relating to securities financing transactions and total return swaps shall be disclosed by UCITS management companies, UCITS investment companies and AIFMs, in the next annual report of each UCITS/AIF under management (or half-yearly report for UCITS), to be published after 13 January 2017 (which may relate to a reporting period beginning before that date).

The latest version of the UCITS Q&As is available on ESMA's website.
https://www.esma.europa.eu/sites/default/files/library/2016-1455_qa_on_application_of_the_ucits_directive.pdf

3 ESMA advice relating to the AIFMD marketing passport

On 19 July 2016 and 12 September 2016 respectively, ESMA updated its advice relating to the application of the AIFMD passport (the "**Passport**") to non-EU AIFMs and non-EU AIFs (Ref. ESMA/2016/1140) (the "**Advice**").

It is reminded that the Passport is currently only applicable to EU AIFMs and EU AIFs, while non-EU AIFMs and non-EU AIFs are subject to national private placement regimes in each Member State, as the case may be. In this regard, ESMA already assessed certain non-EU countries in 2015[3], an assessment which has now been completed and to which a number of non-EU countries have been added. The assessment was based on the following criteria: (i) investor protection, (ii) market disruption, (iii) obstacles to competition, and (iv) monitoring of systemic risk.

Based on such criteria, ESMA concluded that there were no significant obstacles to extending the Passport to Canada, Guernsey, Japan, Jersey and Switzerland.

Concerning the other assessed countries, ESMA advised that:

- the Passport could be extended to the United States, at least with regard to certain types of funds. ESMA had reservations, however, due to differences between the EU and the United States with regard to the regimes for public offering of funds, which could create an un-level playing field;
- there are no significant obstacles to extending the Passport to Hong Kong and Singapore with regard to AIFs, although ESMA raised some concerns regarding access of UCITS (i.e. possible for UCITS from certain Member States only);
- the Passport could be extended to Australia provided the Australian Securities and Investment Committee (ASIC) extends the "class order relief", currently available only to some Member States, to all Member States;
- regarding Bermuda and the Cayman Islands, ESMA could not give any definitive advice until further regulatory developments have taken place in the respective countries; and
- for the Isle of Man, the absence of an AIFMD-like regime made it difficult to assess whether the investor protection criteria were met.

The Advice will now be considered by the European Commission, while ESMA will continue to work on its assessment of other non-EU countries not yet covered.

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[3] Please refer to our Newsletter dated 3. Quarter 2015

New rights for minority shareholders

The Luxembourg law of 10 August 2016 modernising the law concerning commercial companies of 10 August 1915 (the "**Company Law**") and modifying the Civil Code (the "**New Law**") has introduced significant new rights for the minority shareholders which are applicable since 23 August 2016.

1 The liability actions towards directors

One of these rights, provided for in the new article 63bis of the Company Law, is the action *ut singuli* which is giving the possibility for individual shareholders or holders of profit shares representing at least 10% of all the votes entitled to be expressed at the annual general shareholders' meeting of a *société anonyme* (S.A.), a *société par actions simplifiée* (S.A.S.) or *a société en commandite par actions* (S.C.A.) to bring, on behalf of the company, a claim against the directors, or, in two-tier structures, against the members of the management board and the supervisory board for any harm caused to the company as a result of mismanagement or breach of the articles of association of the company or of the Company Law.

Before the legislative reform, the action on behalf of the company required the approval of a simple majority of shareholders, whereas minority shareholders could introduce proceedings on their own behalf but in a very limited number of cases.

The right is inspired by the Belgium law where the action *ut singuli* has showed itself to be effective.

As of now, it is recommended that the members of the management take this new right into consideration when evaluating their liability risk.

2 The right to request information on management decisions

Inspired by the provisions applying to listed companies, another right, provided for in the revised article 154 of the Company Law, is the right of shareholders and/or holders of 10% of the whole capital or voting rights of all forms of companies to address written questions on management decisions with respect to the company's and its affiliated entities' operations.

In the absence of a response by the management body within one month, the relevant shareholders may request the president of the district court sitting in commercial matters and in the form of summary proceedings (*président du tribunal d'arrondissement siégeant en matière commerciale et comme en matière de référé*) to appoint one or several experts to establish a report on the operations that were the subject of the written questions. The judge may decide that the costs of the investigation shall be advanced by the company.

Before the law of 10 August 2016, the request for an independent investigation was allowed to shareholders representing at least 20% of the share capital and was conditioned by the existence of "exceptional circumstances".

This reform therefore considerably facilitates the access to an independent investigation and is expected to be a powerful tool for the minority shareholders.

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