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# Luxembourg

ESMA and CSSF Updates on AIFMD

Entry into force of the Regulation (EU) No 596/2014 on market abuse and its main changes for issuers and persons discharging managerial responsibilities

Reform of the Audit Profession:
The Implications of New Luxembourg Legislation

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# ESMA and CSSF Updates on AIFMD

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

On 3 June 2016, the European Securities and Markets Authority ("**ESMA**") published an updated version of its Questions and Answers (the "**Q&As**") (Ref. ESMA/2016/909) with regard to the application of the Alternative Investment Fund Managers Directive (the "**AIFMD**"). The new questions and answers concern (i) the marketing of EU alternative investment funds ("**AIFs**"), as well as (ii) the influence that committed capital can have on the calculation of the total value of assets under management and additional own funds:

- In Section II of the Q&As, ESMA clarifies that in the context of marketing under Article 31 of the AIFMD, no distinction is made whether an EU AIF is domiciled in the same Member State as the AIFM or not. Furthermore, an EU AIFM may only, in its home Member State, market an EU feeder AIF with an EU master AIF (managed by an authorised EU AIFM) under Article 31 of the AIFMD. Marketing of an EU feeder AIF with a non-EU master AIF is subject to Article 36(1) of the AIFMD.

- In Sections IX and X of the Q&As, ESMA further explains that as a general rule, committed capital shall not be taken into account when calculating the total value of assets under management. Indeed, committed capital does not, in principle, contribute to the actual assets of the AIF for which it was pledged, as long as it has not been drawn down by the AIFM.

The latest version of the Q&As is available on ESMA's website: https://www.esma.europa.eu/sites/default/files/library/2016-909_qa_aifmd_0.pdf

## 2 Update of the CSSF FAQs concerning the AIFM Law

On 9 June 2016, the *Commission de Surveillance du Secteur Financier* (the "**CSSF**") published an updated version of its Frequently Asked Questions (the "**FAQs**") on the Law of 12 July 2013 on alternative investment fund managers, as amended (the "**AIFM Law**").

Following an opinion of ESMA published on 11 April 2016 (ref. ESMA/2016/596) relating to loan origination by funds, questions have been added in the FAQs concerning Luxembourg-based AIFs engaging in loan origination, participation and/or acquisition.

The CSSF underlines that loan origination is not prohibited under the AIFM Law or other relevant laws regulating Luxembourg investment funds, and may thus be authorised under certain conditions. However, the CSSF will review such conditions on a case-by-case basis. Similarly, loan participation and/or acquisition may be permitted under certain conditions. The AIFM Law and other relevant (product) laws shall nevertheless always be complied with.

For each AIF engaging in loan origination, participation and/or acquisition, the following key principles should be adhered to:

- all aspects and risks of such activity(ies) are addressed;

- proper organisational and governance-structures are applied;

- the necessary expertise/experience is available (and supported by the relevant technical and human resources);

- the relevant policies and disclosures are put in place.

The CSSF concludes that it is the responsibility of the AIFM, or where applicable, the AIF itself, to ensure the implementation of a robust and appropriate approach for loan origination, participation and/or acquisition. The CSSF will evaluate in the context of its approval and on-going supervisory process, if applicable, on a case-by-case basis the approaches put in place by the relevant AIFM or, where applicable, by the AIF.

The latest version of the FAQs is available on the CSSF's website: http://www.cssf.lu/fileadmin/files/AIFM/FAQ_AIFMD.pdf

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# Entry into force of the Regulation (EU) No 596/2014 on market abuse and its main changes for issuers and persons discharging managerial responsibilities

On 3 July 2016 the Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (the "**MAR**")[1] has entered into force.

The below overview summarizes the main changes linked to the entry into force of the MAR, notably for issuers as well as persons discharging managerial responsibilities within an issuer (the "**PDMR**") and persons closely associated with them (the "**PCA**") within managers' transactions. As Luxembourg is well-known for the Euro MTF market (the "**Euro MTF**") operated by the Luxembourg stock exchange (the "**Luxembourg Stock Exchange**"), we will only refer to the consequences of the MAR for debt securities admitted to trading on the Euro MTF.

## 1 Scope of the market abuse regime

The general approach of the MAR is to establish a common framework on insider dealing, unlawful disclosure of inside information and market manipulation and also measures to prevent market abuse in order to ensure the integrity of financial markets in the European Union as well as to enhance investor protection and confidence in those markets.

Before the entry into force of the MAR on 3 July 2016, it was applying to regulated markets only. The main change demonstrates now the extension also to multilateral trading facilities (the "**MTF**") (i.e. the Euro MTF of the Luxembourg Stock Exchange).

## 2 Disclosure requirements

### (a) Public disclosure of inside information

According to Article 17 of the MAR issuers shall inform the public as soon as possible of inside information which directly concerns that issuer.

Before the entry into force of the MAR, the obligation to publish any inside information was not covered as such by the market abuse law, but by the rules and regulations of the Luxembourg Stock Exchange (the "**Rules and Regulations**"). It was foreseen that issuers with its shares and debt securities admitted to trading on the Euro MTF were obliged to promptly publish information on any major new developments relating to its activities and which could have influenced the price of the shares. Now, such disclosure obligation is clearly encompassed by the MAR and applicable in relation to the regulated market as well as the MTF. In answer to such entry into force of the MAR, the Luxembourg Stock Exchange has deleted Articles 1001(i) and 1004(i) of its Rules and Regulations.

### (b) Insider lists

Article 18 of the MAR states a further additional disclosure obligation for issuers who have requested or approved admission of their financial instruments to trading on a regulated market or the MTF or any person acting on their behalf or account by requiring them to maintain its own insider list. This means, any person who has access to inside information and who is working for the issuers under an employment agreement or performing otherwise tasks through which they get access to inside information, have to be placed on such a list that itself shall be kept up-to-date.

The insider list shall include at least:

- the identity of any person having access to inside information;
- the reason for including that person in the insider list;
- the date and time at which that person obtained access to inside information;
- the date on which the insider list was drawn up.

[1] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014R0596&from=DE

The insider list shall be promptly updated by the issuers or any person acting on their behalf or account, including the date of the update, in the following circumstances:

- where there is a change in the reason for including a person already on the insider list;
- where there is a new person who has access to inside information and needs to be added to the insider list; and
- where a person ceases to have access to inside information.

The issuers or any person acting on their behalf or account shall retain the insider list for a period of at least five years after it is drawn up or updated.

### (c) Manager's transactions

Article 19 of the MAR sets out a transactions notification requirement for PDMR and PCA in order to improve the financial markets' transparency. Therefore, PDMR and PCA should notify the issuer or the emission allowance market participant (the "**EAMP**") and the Supervision Commission of the Financial Sector (the "**CSSF**") (i) in respect of the issuers, of every transaction conducted on their own account in relation to the shares or debt instruments of that issuer or to derivatives or other financial instruments linked thereto and (ii) in respect of the EAMP relating to emission allowances, to auction products based thereon or to derivatives relating thereto.

The issuer itself is responsible to ensure that the information is made public, unless national law provides that the competent authority itself makes the information public.

The Commission Delegated Regulation (EU) 2016/522 of 17 December 2015 (the "**Delegated Regulation**")[2] provides a non-exhaustive list of particular types of transactions that should be notified, for example: acquisitions, assignment, short selling, subscription or exchange. The pledging, borrowing or lending of bonds or derivatives or other financial instruments that are associated is also covered.

Article 10 of the Delegated Regulation foresees that according to Article 19 of the MAR and in addition to the transactions pursuant to Article 17 of the MAR, PDMR and PCA, shall notify their transactions to the issuer and the CSSF.

The notification to the CSSF has to be made based on a form[3] (in English or in French) that has been made available on its website and to be sent to the following address: market.abuse@cssf.lu.

The following information shall be contained in a notification of transactions:

- the name of the person;
- the reason of the notification;
- the name of the relevant issuer or EAMP;
- a description and the identifier of the financial instrument;
- the nature of the transaction;
- the date and place of the transaction;
- the price and volume of the transaction.

With regard to the above, transactions to be notified shall also include:

- the pledging or lending of financial instrument by or on behalf of a PDMR or PCA;
- transactions undertaken by persons professionally arranging or executing transactions or y another person on behalf of a PDMR or PCA, including where discretion is exercised;
- transactions made under a life insurance policy.

The notifications shall be made promptly and no later than three business days after the date of the transaction once the total amount of the transactions has reached the threshold of EUR 5,000 within a calendar year.

It should be noted that a PDMR shall not conduct any transactions on its own account or for the account of a third party, directly or indirectly, relating to the debt instruments of the issuer or to derivatives or other financial instruments linked to them during a closed period of 30 calendar days before the announcement of an interim financial report or a year-end report which the issuer is obliged to make public according to (i) the rules of the trading venue where the issuer's shares are admitted to trading, or (ii) the national law.

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2 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2016.088.01.0001.01.ENG

3 https://www.cssf.lu/en/supervision/securities-markets/market-abuse/forms/

## 3 Conclusion

The entry into force of the MAR brought important changes such as, among others, the extension of the scope of the market abuse regime and further disclosure requirements for the issuers. Furthermore, manager’s transactions have been addressed and therein the relevant PDMR and PCA.

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# Reform of the Audit Profession: The Implications of New Luxembourg Legislation

In the wake of the EU audit reform, the much anticipated bill n°6969 on the audit profession (the "**Law**") was passed by the Luxembourg *Chambre des Députés* on 14th July 2016.

## 1 Audit reform, why now?

Following the 2008 financial crisis, audit professionals were caught in the spotlight with the profession being fiercely criticised amid concerns over the auditors' failure to raise the alarm well before the global markets crashed. A combination of a lack of confidence in the profession and the need to reinforce the rules regarding the statutory audit of annual and consolidated accounts triggered the European Commission to reform EU audit market legislation.

New European legislation was adopted on 16th April 2014 in the form of Directive 2014/56/UE concerning statutory audits of annual accounts and consolidated accounts (the "**Directive**"), and Regulation 537/2014 on the specific requirements regarding statutory audit of public interest entities (the "**Regulation**", together with the Directive, the "**EU Legislation**"). This EU Legislation provides, along with mandatory provisions, a number of baseline measures and affords each EU member state the flexibility to make further adaptations to the legislation within their local jurisdictions prior to the EU Legislation implementation deadline on 17th June 2016. This flexibility is restricted to three principle areas namely, the duration of the audit engagement; the definition of a public interest entity and the prohibition of the provision of certain non-audit services.

Thus the Law implements the EU legislation and repeals the Luxembourg law of 18th December 2009 on the audit profession (the "**Repealed Law**").

## 2 What's new?

### (a) Broader attributions for non-approved statutory auditors

As a reminder, the Repealed Law distinguished between two categories of auditors (i) approved statutory auditors and audit firms ("**Approved Statutory Auditors**") and (ii) non-approved statutory auditors and audit firms ("**Non-Approved Statutory Auditors**").

The distinction between these two categories resides in the fact that the Repealed Law specifically forbade Non-Approved Statutory Auditors from performing certain activities which are exclusively reserved for action by Approved Statutory Auditors. Thus the Repealed Law provided a much stricter regime regarding the access to the profession of Approved Statutory Auditors who are also submitted to rigorous controls by the *Commission de Surveillance du Secteur Financier*, the Luxembourg public financial supervision institution (the "**CSSF**"). However, this distinction was criticized by the *Conseil d'Etat* which highlighted the fact that the Repealed Law's restrictions on the nature of the tasks that Non Statutory Auditors may perform results in there being no real difference between the permitted activities of Non-Statutory Auditors and certified accountants.

Clearly the legislator has seized on the *Conseil d'Etat's* observations and has radically revised this distinction. Indeed, the Law now allows Non-Approved Statutory Auditors to exercise all audit activities except for one, the statutory audit of annual accounts, which shall remain the exclusive preserve of Approved Statutory Auditors. This is clearly in line with the Regulation, the main objective of which is the enforcement of much stricter controls on statutory audits.

Consequently, Luxembourg entities may now request the services of Non-Approved Statutory Auditors for contributions in kind, mergers / demergers, liquidations and interim dividend distribution.

### (b) Prohibition of certain non-audit services

With the independence of statutory auditors and the prevention of conflicts of interest being pillars of the European reform, a number of non-audit services provided by auditors have been specifically prohibited by the Regulation. This restriction applies in the areas of bookkeeping, payroll services, internal control and risk management, certain legal services, internal audit and tax services. However, Luxembourg opted for the ability to allow certain tax services, such as preparation of tax forms, calculation of direct, indirect and deferred tax and the provision of tax advice under certain cumulative conditions prescribed by the Regulation.

### (c) Luxembourg's take on mandatory firm rotation

One of the core requirements set by the EU Regulation is a ten year audit firm rotation for all public interest entities

("**PIEs**") allowing each member state the option to either (i) adopt a shorter term of rotation or (ii) extend the term once for a maximum of (a) ten years, if a tender is undertaken or (b) fourteen years, if a joint audit is chosen.

The definition of PIEs is clearly outlined in the Regulation and is also set out in the Law. By way of illustration, these include all credit institutions (whether listed or not), all insurance undertakings and any entity both governed by the law of an EU member state and listed on a regulated market.

Luxembourg opted for the option to set a 20-year maximum duration for an audit engagement by a PIE, with the obligation to perform a transparent tendering process after ten years. It should be noted that a 4-year cooling-off period follows the term of the audit engagement. It is only after such a period that the auditor may undertake the audit of the entity again.

### (d) Third-party claims to be filed with the CSSF

The Law also enforces the role of the CSSF by providing the option for this institution to receive third-party complaints regarding the statutory audit of accounts and to work with such third-parties to arrive at an amicable settlement. A 'third-party' entity may include all natural and legal persons, including the entity itself, having a claim regarding the statutory audit of accounts of the said entity.

In the comments provided by the legislator, it is emphasized that the CSSF shall not act as a mediator. This raises questions when read with the provisions of the Law, indeed, the role of the CSSF seems somewhat limited if it can only liaise with the plaintiff in order to come to a settlement.

## 3 When will it apply?

As the implementation deadline for the EU Legislation passed on 17th June 2016, the clock was ticking and pressure was on to pass the Law quickly. On July 14, 2016, the Law was adopted by the *Chambre des Députés* and will come into force following its publication which should take place in the very near future.

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