



Association Luxembourgeoise
des Compliance Officers
du Secteur Financier

Le Bulletin d'informations

N°22

DECEMBRE 2011

Editorial



Chers membres de l'ALCO, chers amis lecteurs,

L'année 2011 a été particulièrement stressante avec des périodes d'espoir quant à la stabilisation des marchés suivies généralement d'un retour parfois brutal de la crise. Notre dixième anniversaire fêté en janvier est depuis longtemps oublié. La pression internationale reste forte et le premier stade de concrétisation de MiFID 2 nous rappelle que la volonté de réglementation se poursuit alors que les marges bénéficiaires se réduisent. La concurrence nationale et internationale s'intensifie.

La fonction Compliance n'en est que plus complexe et lourde à exercer. L'objet social de notre association est de favoriser les échanges entre les membres afin de les aider. Le bulletin de l'ALCO est le support le plus formel de cette communication. C'est pourquoi le 22^{ème} bulletin souhaite aussi vous rappeler les autres opportunités d'échanger que le conseil d'administration soutient et suit dans chacune de ses réunions mensuelles.

Les tables rondes sont devenues des événements recherchés. Elles sont vraiment l'occasion d'aborder sans contraintes excessives les sujets de vos principales préoccupations. Vous trouverez dans ce N°22 un bilan après le dixième thème abordé ainsi que la synthèse la table ronde consacrée à l'équivalence de pays tiers en matière de lutte contre le blanchiment et le financement du terrorisme.

Le Bulletin

Certaines problématiques auxquelles vous êtes confrontés nécessitent des réflexions et des travaux plus approfondis. Ils sont alors traités dans des groupes de travail transversaux comme le GT35 dénommé Doctrine pour marquer son côté normatif ou des groupes thématiques comme le GT36 qui a remis ses conclusions sur les obligations en matière de rémunérations et sur le rôle du Compliance Officer en ce domaine.

Vous pouvez aussi adresser vos questions au GT33 qui s'efforcera d'y répondre au mieux et au plus tôt. La plupart des GT recherchent encore des participants. N'hésitez pas à poser spontanément votre candidature ou à répondre aux sollicitations qui vous parviendront encore prochainement.

En matière de mise en conditions, tous ces articles sont précédés de deux documents établis par des étudiants qui ont été primés par l'ALCO et qui ont reçu une bourse pour faciliter leurs études.

Il me reste en cette période de fêtes de fin d'année de vous plonger dans l'ambiance amicale ou familiale de circonstance et d'oublier un peu vos soucis professionnels pour entrer dans une année nouvelle que je vous souhaite déjà, non pas facile, mais riche d'expériences et de réalisations personnelles et collectives.

Bonne lecture à toutes et tous.

Jean Noël Lequeue
Président de l'ALCO

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Essai des étudiants bénéficiaires de la bourse ALCO

Tin- The New Blood Diamonds?

“It came from the heart of the earth, to test the heart of men. The stone so rare; men will do anything to possess it. Wars will be fought in search of it, and all who touch it are left with blood on their hands”. People were startled at the origins of the precious jewels on their fingers when the film Blood Diamond came out in 2006 starring Leonardo DiCaprio. Now people start to realize that they are facing the same situation when they work with their computers or when they open a can of beer, but why?

To answer the question, first let us take a closer look at the computers and retail food cans in general. Computers, cell phones or any other electronic product contain a set of circuit boards of some kind. On the electronic boards, a familiar metal called Tin is used to join the circuits together. Tin is also extensively used in food and drink packaging, because it does not corrode and is harmless to the human body. The cans of beer you buy from the supermarket are coated with a thin layer of Tin.

Where does Tin come from? Tin is produced from Tin Ore which is also commonly referred to as Cassiterite. The Democratic Republic of Congo (DR Congo) is one of the countries with immense Cassiterite resources. Because of this, there may be a small part of DR Congo on your dinner table or as part of your newest electronic gadget. With the increasing demand from the electronic sector, Tin is becoming one of the hottest commodities on the London Metal Exchange, and is currently being traded at a stunning price of more than 30,000USD/t. As a consequence, military personnel in DR Congo have been battling intensely over these valuable natural resources for decades.



From rock to laptop and beer can – the Tin supply chain in DR Congo

The Tin supply chain starts from the high mountains of Kivu in eastern DR Congo where most Tin mines are located. Mining is usually performed manually without the use of any machinery. The miners use iron stakes and simple shovels to dig for Cassiterite. The mine shafts are so small that the miners must crawl on their hands and knees to gain access. As a result of these poorly built mine shafts, the miners face little light, very poor air quality and even collapse of the mine shaft itself. Death is a frequent visitor in the mines.

Le Bulletin

Once the Cassiterite has been extracted from the mines, it is then carried by porters to various trade locations. Each porter carries a 50kg sack of Ore, which is usually heavier than they are. It is a long way from the mountain, crossing the primary forests, to the trade locations. The porters can make 5USD per day if they are lucky, while the sack they carry can be sold on the international market for more than 400USD.

The middle men, or traders collect Cassiterite from the porters and it is further transported to Goma, the Tin capital of DR Congo or other smaller Tin trading cities. Often the Ore is smuggled to neighboring countries such as Rwanda, where it is made into Tin concentrates and exported to all over the world. The Tin becomes “legal” here, despite of the origin. Tin concentrates are further refined to produce Tin metal. Tin metal is then sold to manufactures of electronic products or packaging companies. Finally, through distributors such as big supermarkets, the MP3 players, smart phones and so on, reach the homes of the final consumers.



FDLR – DR Congo’s most potent rebels

So far, except for the completely manual system, the Tin supply chain in DR Congo does not seem too different from other countries. The big difference however, lies in the conflicts over the control of DR Congo’s mineral resources. Conflicts have dominated the country’s history. The profits from the trade of metals are directly used to purchase armory and weapons. Wars are fought. The Second Congo War from 2004 to 2008 alone resulted in the deaths of more than 5.4 million people, the largest war in modern African history, the deadliest conflict since World War II.

Even today, when most of the country is enjoying peace as the central government re-asserts control, the eastern part of the country, where the Tin and other mineral resources are, is still plagued by military violence between the government troops and the rebels. The most potent and notorious of these rebels is FDLR - Forces démocratiques de libération du Rwanda.

FDLR is the primary remnant Rwandan Hutu Power rebel group who committed the Genocide against the Rwandan minority Tutsi in 1994. Other major accusations of FDLR include violence, looting, rape and the employment of child soldiers. The soldiers force local villagers into mining and take the findings by force. The miners work not for money but for just enough food needed to survive. Women are raped. Children are forced to kill. As a former FDLR officer said “we have been losing a lot of soldiers we have to go to schools to get more soldiers. We have no choice”. People are just like lambs facing wolves. Civilians continue to die.



To ban or not to ban - Ethical dilemma

The situation posts a big ethical question to all Tin buyers and all consumers alike. Should we ban Tin that originates from DR Congo? “Yes” would be an obvious answer. In July 2010, President Obama put into law a provision requiring companies to label products made with minerals from Congo and the surrounding countries. “The legislation promises to make it easier for consumers to choose products made without conflict minerals that support violence, rape, human trafficking, and other serious crimes”. In Europe, labeling products has not been made law but big manufacturers are required more and more by conscious customers to be “conflict free”.

However, is the answer really that simple? Why the richness of mineral resources has become a curse rather than a blessing for people in DR Congo? Will people in DR Congo really be better-off if a total ban of Tin with DR Congo origin is raised? Will the consumers be better-off if the ban creates material shortage, drives up the price of the product and forces people to switch to an inferior substitute? Will a total ban of Tin from DR Congo and other “conflict materials” be the real solution to the problem?

The answer is by no means simple. In fact, people realized this point and are currently working on a better solution than simply a ban. ITRI - International Tin Research Institute, the world's foremost authority on Tin, is currently working on a project called iTSCi. The idea of this project is to introduce a tracking system to increase the traceability of material along the supply chain.

It starts by enforcing due diligence procedures to ensure the legitimacy of suppliers and the mineral which they export focusing on the immediate supply chain from the DRC exporter to smelter. A new industry procedure for recording a range of export documents as well as a new certificate recording physical description of the material, mine origin and transport route will be introduced. Security bag tags, stickers and paper seals, together with IT system will allow automated checks.

Unfortunately, before the success of the project, the enforced de-facto embargo of Tin from DR Congo is likely to happen.

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A long way to go - corruption, fraud and other risks

Let's say, traceability along the supply chain is finally achieved one day, will the story stop here? The answer is no, there is still a long way to go.

Unlike certain substances which have unique chemical characteristics that can be recorded to the very beginning of existence via a chemical test, Tin does not have this traceability. Once Tin Ore is mixed with Tin Ore from other mines, there is no way of telling the origin. This means, if not well controlled, people can dishonestly put any ID tag they wish to a shipment of Tin Ore.

Certificate of origin can be forged. Bribes can transfer illegal Ore to legal ones. With a turnover of 120 million USD per year, nothing seems impossible. That is why the iTSCi project does not stop and can not stop at traceability. Its ultimate goal is to introduce a comprehensive system covering traceability and most importantly, business ethics.

In 2010, DR Congo was ranked 164 out of 178 countries by Transparency International in the Corruption Perception Index. The mining sector is one of the worst sectors suffering from corruption and mismanagement. One example is the lack of regular salary of the government's

armed forces due to corruption. Government soldiers have no choice but do the same as the rebels do, and commit crimes to civilians whom they are supposed to protect.

There is still a long way to go to find a solution to satisfy all parties in the supply chain of Tin in DR Congo and to implement transparent and effective systems that will satisfy international markets.

Implications - What should and can I do?

I work for large manufacturer as the global buyer of Tin. It is not hard to understand as an employee that a company never stands alone. Its actions have an impact on the society. Companies should manage their business processes to produce a positive impact on society. To be socially responsible, first and foremost, a company needs to comply with the law.

In the US, the new conflict mineral provision requires all the companies to provide a description of the source and country of origin of minerals. Even though it comes at a cost, a company needs to act because it has to be compliant with law. However, the new US law does not require the companies to stop purchasing or using conflict materials, and in Europe, there is no law currently requiring reporting the origin of the material. So it is up to the company to choose whether it wants to use conflict material or not.

In the company where I work, we choose a corporate responsibility strategy that focuses on sustainability and to be first-class in the sector in terms of social and environmental responsibilities. More specifically, we have a “Code of Responsible Sourcing” that all buyers need to comply with. Even though we lose competitive advantage as we have fewer alternative sources of Tin, a material always in shortage, we choose to be committed to using raw materials of legal and sustainable origin. Not only do we follow closely with the Code of Responsible Sourcing, we also encourage our suppliers to promote the requirements of this code within their own supply chain.

We are also working closely with technical departments within the company on projects to increase the efficiency of Tin usage in the production process, and promote the use of recycled Tin.

As a buyer of Tin for the company, I use “responsible sourcing practices” as a pre-requisite when selecting suppliers. I promote our code and give recognition to suppliers who promote responsible sourcing along their supply chain.

Finally, as an end consumer myself, I ask, where possible, the origin of Tin inside electronic products before buying.

I believe that one day with continued efforts worldwide, the rich resources of DR Congo can be used to great effect for the Tin industry and for the good of the people of DR Congo.

Yu CHEN

“Cross-border compliance: the double-edged sword of banking secrecy”

The topic of my essay has lately been subject to a lot of controversy. I have chosen it because banking secrecy has played an important role in the development of Luxembourg as a financial centre, notably as regards private banking. The origin of the latter goes back to the mid-1960s when Belgian and French banks established themselves in the Grand Duchy. However, it was not before 1981 that the sector really took off due to the formal inscription of banking secrecy in law, further attracting German and Swiss banks. Introduction of a withholding tax in Germany in 1982 was also a contributing factor. The financial professionals in Luxembourg have been under a legal obligation of professional secrecy ever since, with any breach constituting a criminal offence.

Today, Luxembourg is the number one private banking centre in the euro area and boasts the second largest investment fund industry after the US, representing the biggest banking concentration in the European Union. Luxembourg is also a significant destination for non-resident (offshore) assets at global level with approximately 15% of the overall market share¹. France, Belgium and Germany are its traditional service markets, accounting for roughly half the assets in private banking, while Europe as a whole accounts for some 85%. According to Ernst & Young, about 70% of clients have less than €250,000 in assets under management and the majority of them chose Luxembourg due to its banking secrecy laws.

While the offshore business has traditionally been an essential part of private banking, it has recently come under increasing scrutiny. Influenced by the G20 decision to crack down on tax havens, offshore locations are implementing comprehensive tax cooperation standards and softening their banking secrecy laws. This is accelerating changes in the competitive landscape induced by the crisis and affects both offshore and onshore locations. While the offshore model will continue to exist for asset segregation and privacy protection purposes, the G20 countries have made it clear that they will no longer tolerate tax evasion.

For example, the US is adjusting its Qualified Intermediary regime to reverse the burden of proof regarding compliance. Even fund managers could become subject to this regime, if classified as intermediaries. Moreover, 800 additional tax agents have been recruited to focus solely on international tax enforcement and clampdown on tax havens. Any non-compliance would be punished by withholding tax (WHT) rates, ranging from 20% to 30%. In February 2009, Switzerland had to hand over to the US authorities data on some 300 clients of UBS in an unprecedented move to avoid a criminal indictment on charges that it helped American citizens evade taxes. UBS later agreed to pass on additional information relating to 4,450 further accounts. Increased cross-border cooperation is already contributing to repatriation of offshore funds, particularly in Europe. The recent events in Liechtenstein are another example of increasingly tough stance on tax evasion. This trend is likely to continue, with tax amnesties putting further pressure on offshore centres and resulting in significant repatriation of offshore assets². Thus, offshore management of tax-neutral money is increasingly becoming a thing of the past. The traditional competitive advantages of offshore centres are steadily eroding and there is an

¹ Switzerland is number one with some 30% of the market share.

² According to Italian government data, approximately €95 billion were declared between September and April 2010, with some 85% of the assets physically repatriated as part of a two-step tax amnesty programme. The UK runs a programme, which is especially severe on repatriation of funds from Liechtenstein: payment of tax arrears for the previous 10 years plus interest, and 10% of tax load (alternatively flat 40% penalty tax) upon self-indictment before 2015. After 2015, account holders risk total loss.

increasing shift towards tax-transparent services and expertise, which in many ways resemble the onshore model.

The transition will be painful for many clients and the private banks need to provide appropriate assistance by becoming declared players that ensure full cross-border compliance. Given the international regulatory context, as well as the rather poor fiscal outlook in the developed world, it would be reasonable to expect continued pressure towards more transparency in financial services. This could one day mean abolishment of banking secrecy altogether. However, even if such a day never comes, Luxembourg has to respect the legislative framework of other jurisdictions, if it wishes to continue playing a significant role in the cross-border provision of financial services.

The compliance function is, thus, coming to the fore and will have an important role to play in enabling this transition. The compliance risk is a risk of incurring financial losses as a result of failure to comply with applicable laws, rules and regulations. The latter include anti-money laundering and anti-terrorism issues, as well as confidentiality of information and banking secrecy. As already mentioned, banking secrecy in Luxembourg is enshrined in law and thus must be respected. It may also be an important decision factor for clients that cherish the highest privacy standards. However, Luxembourg's EU membership and the particular cross-border context of its financial sector operations require that the right balance is found in complying with the national and extra-territorial legal requirements.

Luxembourg has committed to the OECD model agreement on information exchange upon request that provides for a WHT (*henceforth – the OECD model*), as has Switzerland. I will refer to the Swiss situation continuously, since it is essentially facing a similar dilemma, except for not being an EU member state. The latter constitutes a notable difference in the context of the 2005 EU Taxation of Savings Directive, which prescribes automatic information exchange on interest income from savings of non-resident EU citizens. Belgium, Luxembourg and Austria were allowed to levy a WHT instead during a transition period, which was supposed to end as soon as the EU concludes bilateral agreements with Switzerland and four other countries³ based on the OECD model, and the Council of the EU establishes that the US is also committed to this model.

The 2005 directive is currently under review. Following a European Commission report in September 2008, the Council reached a political agreement in November 2009 to extend the directive's scope to intermediate investment vehicles and to all financial products equivalent to debt claims (applying the "*substance over form*" principle), non-UCITS and other investment income⁴. Its application was also extended to all legal persons, entities and arrangements (e.g. trusts), and it was decided to apply anti-money-laundering laws to identify the beneficial owners of transfers to non-EU countries (instituting a "*look-through*" approach)⁵. Income from the newly included securities, non-UCITS and life insurance contracts would be subject to the directive only if they were first issued, accrued or subscribed to after 1 July 2010. An agreement on several other issues was still pending.

In May 2010, the EU member states discussed the issue again, recognising that fighting tax fraud is more important than ever. Consequently, the EU presidency presented a new proposal for a deal on the two outstanding political issues that were blocking the agreement. January 2014 was proposed as the unconditional date to end the transition period and an external conditionality clause was added, whereby equivalent measures to the changes brought about by the review would simultaneously enter into force in Switzerland and the other four countries concerned. The Commission also recommended discussing with them the possibility of moving towards automatic information exchange.

Austria and Luxembourg objected to a specific date for ending the transition period, as well as to the third countries in question applying only the OECD model. The EU presidency confirmed

³ Andorra, Liechtenstein, Monaco and San Marino.

⁴ I.e. dividends, capital gains, income from structured products, life insurance contracts and pension schemes.

⁵ Although the 2010 Financial Action Task Force (FATF) report on the compliance of Luxembourg with anti-money-laundering and anti-terrorism principles was very critical, Luxembourg has recently been removed from the FATF grey list in recognition of a legislative package of amendments to 21 laws, adopted in October 2010.

some flexibility as regards the exact date, but not the principle itself that the transition period would have to end. Belgium, in the meantime, had already voluntarily ended its transition arrangements as of January 2010. Thus, only two EU member states were still holding out. It should be noted that both the original directive and its review are unambiguous about the fact that the transition period will come to an end and that the automatic information exchange will apply to all EU member states. Thus, it would seem next to impossible for Luxembourg to backtrack and achieve a return to the OECD model.

In December 2010, the Council achieved another milestone by agreeing on a step-by-step approach to ensure unconditional exchange of information for eight categories of income and capital⁶. As of 2015, the EU member states will have to communicate automatically information for a maximum of five categories provided that such information is readily available. They will also not be required to send more information than they receive in return. The Commission will report on implementation by July 2017 and, if need be, submit a further proposal. When examining the latter, the Council will consider the possibility of removing the condition on information availability and of extending the number of categories from five to cover all eight.

Given Switzerland's position as number one global destination for offshore assets, it is very informative also to look at its strategy. The recent incidents with client data transmission to the US represented a tectonic shift as regards banking secrecy in Switzerland. To prevent this from reoccurring, it has been negotiating international double-taxation agreements and drafting guidelines for money managers on the code of conduct as regards non-residents. UBS, in turn, took disciplinary action against some two dozen employees and trained more than 17,500 staff on cross-border compliance. It also virtually exited the US cross-border business altogether, with some 90% of client accounts terminated by the end of July 2010. As of November 2010, UBS requires new clients to sign a declaration stating whether they or any other beneficial owner of the deposited funds are US nationals or residents.

Switzerland is moving away from tax-neutral business at full speed and tax-compliant wealth management is becoming the norm. An official banking strategy has even been framed, focusing on taxed funds and helping irregular clients come clean. The 2015 Financial Centre Strategy of Switzerland envisages value creation by attracting taxed assets and assisting in regularising untaxed assets, whilst at the same time protecting privacy and enhancing growth and diversification. Swiss banks themselves are in the midst of a transformation both culturally and operationally: all large private banks have started building onshore banking capabilities in key markets. The Banker magazine noted that Credit Suisse and UBS are the only global players that have done so. The Swiss brokerage house Helvea estimates that about a quarter of the Swiss \$3.7 trillion private banking sector could be tax non-compliant.

The Geneva office of the law firm Withers LLP has seen an increase in European clients looking for assistance in unwinding structures that banks no longer accept, and in building fully transparent ones. It has assisted clients in going through fresh due-diligence procedures and there are good incentives for clients to engage. For example, Bank Sarasin clients who are suspected of avoiding taxes are no longer allowed to invest in the bank's full range of investment products and face limits on how actively their accounts can be traded. If clients refuse to come clean after a certain period of time, the bank has closes their accounts.

To conclude, the benefits of shielding client assets from taxes by holding them offshore are fading. The best response to this market reality is to become a declared multi-shoring player, since offshore wealth will continue to move towards a declared status and the appeal of onshore investment will grow. Private banks need to approach this change proactively and support those offshore clients whose governments are applying pressure. The goal is to serve as a truly trusted

⁶ I.e. income from employment, directors' fees, dividends, capital gains, royalties, certain life insurance products, pensions, and ownership of and income from immovable property.

Le Bulletin

advisor and coordinator, helping clients repatriate their money and shift assets to onshore locations.

The future of private banking holds the need to ensure full cross-border compliance, whilst pure offshore banking may remain attractive only for a selected number of domiciles. Hybrid business models that combine offshore and onshore value propositions based on holistic client needs will be the norm in large mature markets, such as Germany and France. Overall, cross-border compliance seems to be the name of the game in the 21st century and Luxembourg should not fall behind in turning this into a competitive advantage.

By Gundars Ostrovskis, MSBF student at LSF

Le GT Tables Rondes : Des tables rondes, pourquoi faire ? -Bilan et projets-

Le GT34 organisant les tables rondes vient de passer le cap des 10 thématiques traitées. Un bon moment pour faire le point et tourner notre regard vers l'avenir.

L'équipe : comment fonctionnons-nous ?

Un GT ne peut que fonctionner grâce au dévouement d'une équipe. C'est la grande chance de notre groupe de travail : avoir reçu au fil de son existence, des offres de services variées. **Chacun qui est prêt à retrousser ses manches est le bienvenu** au sein de l'équipe, que ce soit pour un travail ponctuel ou à plus long terme.

Le nombre de co-équipiers actifs fluctue dès lors naturellement en fonction des disponibilités et des priorités de chacun. Pour toute précision sur notre mode de travail ou si vous souhaitez vous joindre à nous, n'hésitez surtout pas à venir nous en parler. L'équipe est toujours ouverte à accueillir de nouveaux membres, surtout si ceux-ci ont un profil complémentaire au reste de l'équipe.

L'équipe complète se réunit plusieurs fois par an (à midi autour d'une table) pour faire le bilan des thèmes finalisés et, surtout, pour parler des projets à venir. Le compte-rendu de ces réunions et des décisions prises est transmis au CA.

Les participants : qui participe aux tables rondes ?

Les participants aux tables rondes sont la raison d'être de notre GT. Ce sont eux qui, en effet, donnent du contenu aux discussions. Il est donc essentiel que les sujets choisis soient proches de leurs préoccupations et touchent une très grande variété de matières. A ce jour, plus de 375 marques d'intérêts ont été adressées au GT pour les différentes discussions. Plus de 160 questionnaires ont été complétés pour nous aider à les préparer. Le nombre cumulé des participants est de 228. Soit, en moyenne, 16 personnes autour de la table lors des 14 sessions organisées à ce jour. **Merci à vous tous !**

Nous sommes encore loin d'avoir pu accueillir l'ensemble des membres de l'ALCO à nos tables rondes. Toutefois, **nos comptes-rendus sont mis à disposition des membres sur le site de l'ALCO**. Il semblerait que chaque publication d'un compte rendu encourage une centaine de membres à venir la consulter. Les comptes rendus plus anciens font quant à eux l'objet de 50 à 100 consultations par mois. Certains comptes rendus ont fait l'objet d'une publication dans le Bulletin de l'ALCO (p.ex. [Bulletin 20](#) d'octobre 2010)

Quels sujets ont déjà été traités (et les liens vers les publications en français) ?

Comme vous constaterez en lisant la liste ci-dessous, les tables rondes ont pour vocation de traiter tous les secteurs de la Compliance (Banques, Assurances, OPC, Domiciliation...) et les différents domaines (AML, Protection des investisseurs, Intégrité, Abus de marchés...)

RT1-MiFID Suitability

avec Xavier Leydier (rédacteur), Vincent Salzinger & Tim Geyens (réfèrent)

RT2 Compliance & Risk Management dans les OPC

avec Pierre Hennericy (modérateur), Mike Sommer (rédacteur) & Xavier Zaegel (réfèrent)

RT3 AML Filtering

avec Xavier Leydier (rédacteur), Charles van Doorslaer (modérateur) et Serge Wagener (réfèrent)

RT4 Market Abuse

avec Pierre Hennericy (modérateur), Charles van Doorslaer (rédacteur) et Cyril Mathieu (réfèrent)

RT5 Assurances

avec E. Liesens, X. Leydier (rédacteur), Ch. van Doorslaer (modérateur), N. Limbourg & Th. Flamand (réfèrents)

RT6 Nouveaux produits

avec Charles van Doorslaer (rédacteur et modérateur) et Tim Geyens (réfèrent)

RT7 AML-Risk Based approach (2 sessions)

avec Pierre Hennericy (modérateur), Xavier Leydier & Charles van Doorslaer (rédacteurs) et Patrick Schott (réfèrent)

Le Bulletin

RT8 MiFID Best Execution

avec Jean-Michel Righi (modérateur), Xavier Leydier & Ch. van Doorslaer (rédacteurs) et Stéphane Cairic (réfèrent)

RT9 Protection du preneur d'assurance

avec Eef Liesens, (rédacteur), Charles van Doorslaer (modérateur) et Thierry Flamand (réfèrent)

RT10 AML Pays équivalents (2 sessions)

Avec Sylvain Aubry (rédacteur), Charles van Doorslaer (modérateur) et Eric collard (réfèrent)

Comment développer de nouvelles idées ?

Plusieurs dizaines de sujets nous ont été proposés par les membres. Ils sont consignés dans un réservoir à idées qui est régulièrement mis à jour et complété par de nouvelles suggestions. En fonction de l'actualité et des demandes, nous y puisons les idées des prochaines tables rondes.

C'est le chemin suivi par la table ronde du 8 décembre : **RT11 Prévention de la fraude et rôle de la Compliance** avec Sylvain Aubry, Charles van Doorslaer et Vafa Moayed (réfèrent technique)

Dans certains cas c'est le CA qui nous propose une thématique pour laquelle il ressent un besoin.

N'hésitez surtout pas à nous faire part de vos idées et de vos souhaits. Plusieurs participants pourront vous témoigner que leur idée a été à la base d'une table ronde déjà organisée. En outre, les tables rondes aiment être considérées comme terrain d'essai pour rassembler les personnes intéressées à la création d'un groupe de travail. En effet, il peut être utile pour des personnes intéressées de créer un GT permettant un traitement plus en profondeur d'une thématique. Une table ronde permettra de s'assurer que le sujet est porteur. Cela peut aussi se faire de façon spontanée : des participants peuvent, à l'issue d'une table ronde s'échanger leurs coordonnées afin d'envisager ensemble la création d'un GT sur le sujet qui leur tient à cœur.

Rappel des origines.

Au sein du GT16 en charge de la rédaction et de la publication du bulletin, le souci de rapprocher l'association de ses membres s'est fait sentir. Une des pistes était d'y inclure des articles proches des préoccupations des Compliance Officers de la place, tout horizon confondu.

Avec le support de Jean-Marie Legendre et de Vincent Salzinger, une première expérience a été lancée début 2009. Une quinzaine de nouveaux membres de l'ALCO se sont réunis le 30 janvier pour discuter les résultats d'un sondage sur les attentes des nouveaux membres quant à leur association professionnelles préférée. (RT0 brainstorming et sondage nouveaux membres).

Le résultat du sondage et du brainstorming avait été remis au CA et, ensuite, publié dans le Bulletin 17.

Le CA avait ensuite encouragé la création d'un GT : le GT34 'Tables Rondes'.

Une charte a jeté les bases du projet en choisissant de privilégier les **4 objectifs suivants** :

- **rassembler** : réunir membres aux profils différents (nouveaux & anciens, grandes & petites structures, ...) ;
- **approfondir des sujets concrets** par échanges d'expériences, de connaissances et de questions concrètes ;
- **informer** : par le biais de résumés de discussions et de sondages (mis à disposition des membres via site) ;
- **dynamiser** : généraliser au sein de l'ALCO une dynamique de discussion et de partage d'expérience.

Le 30/06/2009, le GT34 lançait ainsi sa 1^{ère} table ronde.

Au plaisir de vous voir prochainement autour de la table !

Charles van Doorslaer
Coordinateur du GT34

Résumé de Table Ronde

Third country AML equivalence

Meetings of 14 and 21 June 2011

Some forty members had expressed an interest in participating in a roundtable on the subject. Accordingly, a 2nd meeting was organised the week after the first meeting.

These 3rd and 4th roundtables in 2011 were organised by Sylvain Aubry, Xavier Leydier and Charles van Doorslaer for the ALCO Working Group 34.

The aim of this summary is not to reflect the points of views of participants, but only the discussions between the participating compliance officers from different professions in the financial sector.

Introduction

Numerous professionals, representing different business lines (custodian banks, private banks, registrars, lawyers, ManCo's and fund administrators, portfolio managers, life insurance sector) have participated. It was an opportunity to share views on the concept of equivalent countries, following the abolition of Grand-Duchy Regulation of 29 July 2008 establishing the list of third countries recognised as having "equivalent" AML systems.

It is now the individual responsibility of professionals to explain the reasons why they consider certain countries as being equivalent to Luxembourg. Moreover, because of the withdrawal of clause 108 related to letters of comfort, the solution involves drawing up a list of equivalent countries based on a detailed analysis to demonstrate their equivalence.

The significant consequences of the abolition of the aforementioned Grand-Duchy Regulation and its list concern all members of the financial community in Luxembourg at different levels. The wide range of business lines represented during the two roundtables enabled participants to take stock of not only the challenges faced but also the different impacts on the business lines in question.

The legislative changes related to AML (of which the abolishment of the list is a part) still requires a new Regulation and/or CSSF circular to be issued. The main theme of these two roundtables will probably be addressed in any such instrument.

We wish to thank the ALCO members who kindly completed the preparatory questionnaires which provided input for the discussions and, above all, Mr Eric COLLARD, Advisory

Partner with KPMG⁷ who agreed to act as technical facilitator and provided a quality presentation.

DISCUSSION

The majority of the participants have drawn up a list of countries considered as equivalent. One of the obstacles for professionals belonging to groups is that the decision centres of these groups are not familiar with the concept of “equivalent countries”, which has given rise to many, not always conclusive discussions.

To draw up a list of equivalent countries, the professionals (having answered the questionnaire) use the following sources (of exclusion):

- FATF list of countries with deficiencies (89%)
- UN and EU embargo lists distributed by the CSSF (89%)
- Lists determined by the group to which they belong (56 %)
- Transparency International’s country rating (56 %)
- Reports published by diplomatic services of countries such as France and Belgium (11%).

Although the analysis is generally carried out in-house, some professionals use the services of law firms. Producing these lists is far from easy and it is widely agreed that countries which are considered as having deficiencies in their anti-money laundering processes by specialised organisations (FATF), or by States (embargos, CSSF list), can hardly be regarded as having an ‘equivalent country’ status.

On the other hand, European Union Member States, because of their obligation to comply with the 3rd European Money Laundering Directive, are potential candidates for equivalent country status. However, this is not always systematic, as in the case of Greece⁸, which some time ago was the subject of increased vigilance among professionals as a result of fears expressed by the CSSF. For the record, and to demonstrate, if necessary, that lists can in no event be considered as static, Luxembourg was perceived by the parent companies of certain institutions as a medium risk because of the doubts expressed by the FATF during a certain period.

Countries are usually classified in 3 to 5 categories: low, medium & high risk, non-equivalent, top risk. The rating criteria are based on numerous factors, including in particular the lists of so-called ‘at risk’ countries, as determined by the group to which the professional belongs.

⁷ KPMG Forensic & Investigative Services

⁸ At the time of the roundtable, circular 11/502 was still in force. In the meantime, it has been replaced by circulars 11/516 and 11/525: Greece is no longer on the grey list; numerous countries have been added to it (e.g. Argentina, Cuba, Ukraine, etc.) or have changed category. It is also to be noted that the European Commission published, just after our roundtables, its “Common understanding between Member States on third country equivalence”. However the list it contains does not exempt us from carrying out our own risk analysis. http://ec.europa.eu/internal_market/company/financial-crime/index_en.htm.

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For reasons of language, culture and time, it is not easy to carry out an in-depth analysis by reviewing the legal provisions in force in the countries targeted by us and comparing them with the system in force in Luxembourg. Using the services of law firms, although expensive, can be useful in certain cases. However, irrespective of the quality of the evaluation of the correspondence of national laws, any such evaluation needs to be put into perspective and take account of the way in which laws are implemented by all the parties concerned in the country in question, the effectiveness of law enforcement, the absence of corruption etc.

Moreover, any such list must be managed in a dynamic way, which requires a significant legal monitoring effort. How can we monitor regulatory changes in 10, 15 or even 30 countries?

Although for a large number of professionals, all new relationships must be approved by an acceptance committee (50 %), the risk of the relationship in the light of the country of residence of the beneficial owner is systematically taken into account (95 %) when deciding whether or not to submit a proposed new relationship to the acceptance committee for its approval.

Life insurance companies look at the problem in a different way and their analysis focuses on the countries in which the company distributes its products.

The AML risk is analysed on the basis of the geographical origin of the funds, the quality of the policy holder and the origin of the intermediary, but there is no overall analysis of equivalent countries.

In general, the UCI sector is faced with several KYC/AML challenges, in particular the following:

- significant proportion of off-shore type deposits
- remote account opening (High Risk according to the FATF and local regulations)
- the documentation of the delegation of client identification

For the transfer agent business line too, KYC & KYT requirements have been considerably reinforced in recent years. In the case of retail investors, it would be beneficial to draw up an increasingly detailed profile. Moreover, the information sheets used for this type of investor have become considerably more extensive.

Account application forms have been improved to bring them into line with the new requirements. A copy of the applicant's passport is often required in order to eliminate a hit in a world check type search, but a copy on its own is not enough; checks must also investigate the investor's profession and the origin of the funds, and supporting documentation obtained if necessary.

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The problems generated by these changes concern existing investors, since institutions that note that the KYC details in their database are not in line with current standards are obliged to embark on expensive “repapering” exercises, with the difficulties inherent in this exercise (old clients, etc.).

Mr Collard reminded us that professionals are required to put in place “risk based approaches”, adapted to each of the business lines of our institutions. These differentiated approaches need to be appropriately documented by the financial professionals. It would appear that the same AML risk criteria are often used for different business lines. In 83% of the answers received, country risk is ranked in the same way for all the business lines of the professionals. This means that levels of vigilance are not reduced for certain activities.

CONCLUSION

As we have seen, professionals have started to work intensively on drawing up a list of equivalent countries, but numerous challenges still remain, in particular as regards updating the list. Another major challenge is the need to ensure that the methodology used is suitable for the level of analysis required to grant equivalent country status. Do we need to go as far as an in-depth analysis of laws? Can professional associations help in the preparation of this analysis? As the problem is also one of means, pooling the efforts and means implemented could facilitate rapid progress and ensure continuity in terms of monitoring.

For WG34⁹, Sylvain Aubry

ANNEX: summary of the answers to the questionnaire

⁹ Charles van Doorslaer, Sylvain Aubry, Eef Liesens, Jean-Michel Righi, Xavier Leydier, Pierre Hennericy, Vincent Salzinger

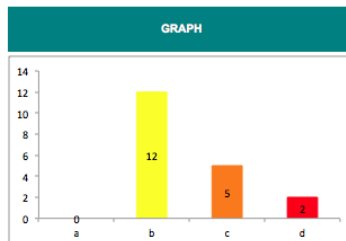
AML COUNTRY RISK "Equivalent Country" vs "Risky Country"

19 compliance officer from banks, manco, or funds administration answered our questionnaire related to equivalent country, we established the related statistics below:

I COUNTRY RISK CLASSIFICATION METHODOLOGY

a) How many country risk categories do you work with ?

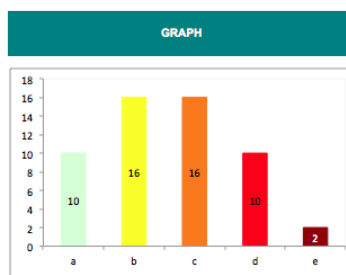
ANSWER		
a	- 2 / Low / Equivalent risk / High risk	0
b	- 3 / Low Risk (authorising simplified vigilance) / Medium Risk (normal vigilance) / High Risk (enhanced vigilance)	12
c	- 4 / Low Risk / Medium Risk / High Risk / Unacceptable Risk	5
d	- Any other risk grading (precise number & wording)	2



COMMENTS
<p><u>General comments:</u></p> <ul style="list-style-type: none"> - all person who replied declare that they have a risk based classification per country, generally there are 3 risk categories being low/medium/high <p><u>Other risk grading classification :</u></p> <ul style="list-style-type: none"> - medium / high / embargo - low / medium low / medium high / high

b) Among the following indicators / criteria, which one(s) do you feel to include in your country risk rating ?

MULTIPLE ANSWER POSSIBLE		
a	The compulsory internal list of the group you belong to	10 56%
b	CSSF/UN/EU communication on countries under embargo	16 89%
c	FATF (long) list of Countries with deficiencies	16 89%
d	Country ranking of Transparency International	10 56%
e	Public reports of Diplomatic Services from any country (France, Belgium...)	2 11%



COMMENTS
<p><u>General comments:</u></p> <ul style="list-style-type: none"> - almost everybody is quoting official sources (UN/EU/CSSF) as one of the criteria driving the risk classification of the country - other sources less used are transparency international and the compulsory group list (explainable as some of the answerer are not part of a group) <p><u>Other source proposed by participants:</u></p> <ul style="list-style-type: none"> - depositary bank list - Egmont group membership

c) How do you think these criteria should be cumulated / balanced

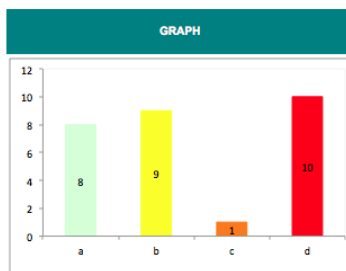
FREE TEXT ANSWER		
	see comments	

GRAPH		
	n/a	

COMMENTS
<p><u>General comments:</u></p> <ul style="list-style-type: none"> - the criteria used are generally mixed together to rank the country, different methodology are being used (addition/subtraction of points...) but show the same kind of approach. - some are more restrictive as they suggest that the strictest should be applied meaning that one degradation factor could drive the rating alone to a bad rating - other are combining the country criteria but balanced with the quality of the counterparty including the quality of the head office when applicable

d) Does the country risk classification has, at least indirectly an impact on business process

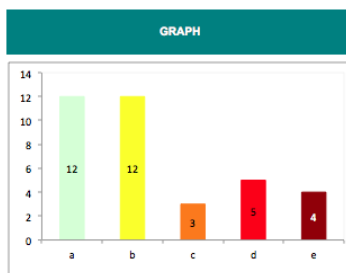
MULTIPLE ANSWER POSSIBLE		
a	New relationships need, even for low risk countries, to be approved by an "acceptance comite"	8
b	The acceptance process depends on the risk ranking (determined by level of country risk)	9
c	The monitoring is not influenced by the same country risk ranking	1
d	The monitoring is influenced by the same country risk ranking as the applying for the acceptance	10



COMMENTS
<p><u>General comments:</u></p> <ul style="list-style-type: none"> - not everybody answered this question explaining the low level of answer however the trend is that the monitoring of relationship is affected by the country risk rating of the client - for the start of the relationship this is more mixed, on the one hand a lot replied that there is an AOC which will anyway review all new relationship even if those are considered as low risk, on the other hand at the same level of answer, country risk determine the acceptance process

e) What kind of indicator of equivalence do you feel most appropriate in order to consider the status of "equivalent country"

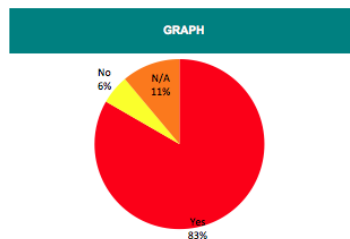
MULTIPLE ANSWER POSSIBLE		
a	EU/EE member state	12
b	EEA/EEE member state	12
c	OECD/OCDE	3
d	as determined by the group you belong to	5
e	any other ?	4



COMMENTS
<p><u>General comments:</u></p> <ul style="list-style-type: none"> - being a member of EU/EEA is recognised as a key element to determine the equivalence to Luxembourg, this makes sense considering that more and more harmonisation within europe <p><u>Other:</u></p> <ul style="list-style-type: none"> - FATF acceptance is one of the other - some third part countries have been assessed as eq or not by nature : US, CA, CH, SG, AML legislation of each individual country

f) Is a same country ranking list applicable to all your business line

UNIQUE ANSWER		
a	Yes	15
b	No	1
c	N/A	2



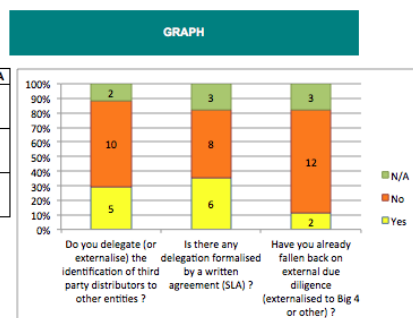
COMMENTS
<p>General comments:</p> <ul style="list-style-type: none"> - the country risk applies for all business lines (83 %), we have a no reply and 2 n/a as there is only one business line where the people are working

AML COUNTRY RISK "Equivalent Country" vs "Risky Country"

II DUE DILIGENCE

a) Due diligence related questions

UNIQUE ANSWER				
		Yes	No	N/A
a	Do you delegate (or externalise) the identification of third party distributors to other entities ?	5	10	2
b	Is there any delegation formalised by a written agreement (SLA) ?	6	8	3
c	Have you already fallen back on external due diligence (externalised to Big 4 or other) ?	2	12	3

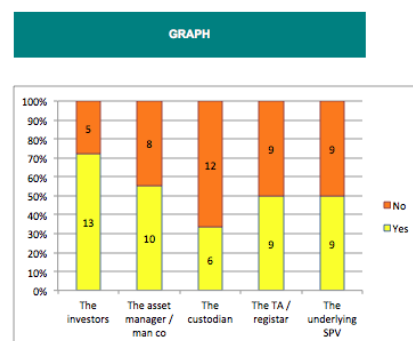


COMMENTS
<p>General comments:</p> <ul style="list-style-type: none"> - delegation for the identification of 3rd party distributor is generally not done - in case of delegation a SLA can be signed but most of the time a comfort letter is asked - a reduced number are using external DD those cases were identified with small entities

b) Do you think a Due Diligence should be performed on:

MULTIPLE ANSWER POSSIBLE

		Yes	No
a	The investors	13	5
b	The asset manager / man co	10	8
c	The custodian	6	12
d	The TA / registrar	9	9
e	The underlying SPV	9	9
f	Any other	3	



COMMENTS
<p>General comments:</p> <ul style="list-style-type: none"> - this was one of the less answered question; by default when not replied we put "NO" <p>Any other :</p> <ul style="list-style-type: none"> - some suggested to do a DD on: distributors, brokers, other intermediaries, or trustee

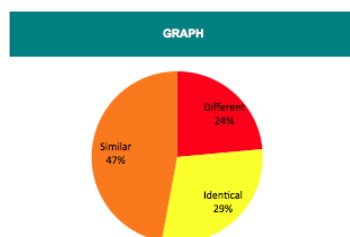
c) Is the approach :

UNIQUE ANSWER		
a	Different	4
b	Identical	5
c	Similar	8

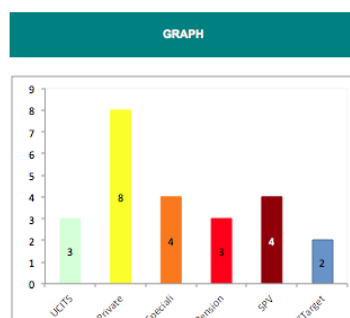
Main differences ?
Custodian and TA are regulated, SPV are not / type of client
Depends if they are clients

d) Do you have specific internal rules for

ANSWER		
a	UCITS	3
b	Private equity fund	8
c	Specialised Investment Funds	4
d	Pension funds	3
e	SPV used by any such fund	4
f	"Target companies" from any such	2



COMMENTS
<p>Others: distributors, brokers, other intermediaries</p>



COMMENTS
<p>General comments:</p> <ul style="list-style-type: none"> - It seems that no specific rules have been defined except in terms of Private Equity which seems to be an important concerns for the answerers

e) Under which conditions might you accept a register mentioning only nominees and not the UBO ?

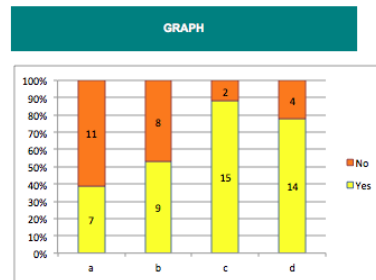
Most important answer was: can be accepted if:

- 1) Institutional investors under the supervision of a financial authority of an equivalent country
- 2) their wholly owned subsidiaries by a mother company except if
- 3) Nominee under an outsourcing agreement

Le Bulletin

f) Miscellaneous

ANSWER			
		Yes	No
a	Do you consider branches or subsidiaries operating in risk countries as equivalent as long as their head office/mother company is based in an equivalent country ?	7	11
b	UCITS investing in emerging markets : is the country risk of the investment to be taken into account ?	9	8
c	Do you feel a TA or custodian needs to have the right to obtain the identity of any Ultimate Beneficial Owner, even in country with a real banking secrecy ?	15	2
d	Are comfort letter of any help ?	14	4



COMMENTS
<p>a) if we have parent company letter of comfort, not in AML risk b) yes but does not cover DD c) Confirmation of the execution of the due diligence on investors and engagement to have access to their documentation of identification - lot of administrative work without any value added</p>

Other:

I would appreciate if ALCO would maintain a list and alert the members in case of changes
Concerning these AML comfort letter the European regulators should stop this waste of time and energy between banks funds or other financial actors
ALCO or ABBL should address a request in this sense to the CSSF
ABBL should ask its members dfor whic
To discuss RBA approach for Luxembourg

Rapport du Groupe de Travail ALCO – GT36

Lignes directrices concernant les politiques de rémunération dans le secteur financier **(circulaires CSSF 10/437, CSSF 10/496, CSSF 10/497 et CSSF 11/505)**

Introduction

Parmi les efforts faits au plan international pour stabiliser l'environnement économique depuis 2009, une attention particulière a été apportée aux politiques et pratiques de rémunération dans le secteur financier qui ont été identifiées comme étant un élément susceptible d'encourager une prise de risque excessive.

Le Comité Européen des Contrôleurs Bancaires (CEBS) a ainsi publié, en avril 2009, le document intitulé « High-level principles for Remuneration Policies » tandis que la Commission Européenne émettait, quelques jours plus tard, sa recommandation 2009/384/CE sur les politiques de rémunération dans le secteur des services financiers.

La mise en œuvre de ces dispositions s'est traduite par la publication, par la CSSF, de la circulaire CSSF 10/437 (la « Circulaire ») relatives aux lignes directrices concernant les politiques de rémunération dans le secteur financier. Ces dispositions font référence, à plusieurs reprises, au Compliance Officer des entités luxembourgeoises visées. Il a donc été décidé de lancer, au sein de notre Association, un groupe de travail sur le sujet afin d'assister le Compliance Officer dans son rôle relatif à ces nouvelles exigences, et favoriser une certaine harmonisation des pratiques de la Place.

Le groupe de travail n°36, constitué de 17 personnes représentantes du secteur financier et dont les noms sont repris en Annexe 2, s'est ainsi réuni à plusieurs reprises au cours des derniers mois afin de travailler plus spécifiquement sur les thèmes qui ont été considérés comme relevant et nécessitant des échanges. Ces thèmes sont les suivants :

1. les personnes visées,
2. la partie variable de la rémunération,
3. le Comité de rémunération (nouveau introduite par la Circulaire),
4. les critères non financiers de performance,
5. le monitoring du Compliance Officer.

Les thèmes développés ci-après se veulent être un outil d'aide à la compréhension des nouvelles exigences réglementaires pour le Compliance Officer. Ils n'ont pas vocation à être considérés comme des prescriptions obligatoires, chacun étant libre de considérer et d'adapter les propos ci-après à la taille, aux activités, aux risques et à l'organisation interne de son entreprise.

Le Bulletin

L'ALCO considère que le Compliance Officer a effectivement une valeur ajoutée à apporter au processus de rémunération des acteurs du secteur financier. Les dispositifs prévus par la Circulaire sont un moyen important dans la maîtrise des risques des établissements de la Place et notamment des risques de Compliance. A ce titre, le Compliance Officer doit certainement pouvoir apporter sa contribution dans l'établissement de la politique de rémunération et contribuer à la mesure objective des critères non financiers de performance qui doivent être intégrés dans les dispositifs de rémunération variable.

L'ALCO est convaincue qu'il s'agit là d'une nouvelle étape décisive dans le renforcement de la maîtrise des risques de Compliance.

Le rapport complet sera disponible prochainement sur le site de l'Alco : www.alco.lu

Questions de membres

*** What is your approach to apply CSSF 02/77 to non UCITS Funds ? Have you had feedback from the CSSF on this subject?**

In principle, CSSF circular 02/77 related to the “Protection of investors in case of NAV calculation error and correction of the consequences resulting from non-compliance with the investment rules applicable to undertakings for collective investment”, only applies to investment funds subject to the law of December 20, 2002 relating to UCI. Thus, such circular applies to so-called Part I and Part II funds, but not vis-à-vis other investment funds products such as SIF.

Notwithstanding the above, representatives or service providers of a SIF may wish to apply contractually the CSSF circular 02/77 or resolve to put in place specific rules in respect of the treatment of NAV errors and investment breaches. In practice, this is possible when the investment policy of the SIF considered is very similar to the one of a UCI, while on the other hand, it may be very difficult to apply to a real estate fund pricing once a year for instance.

It is actually the position of CSSF as reflected under its annual report for the year 2008 concerning SIF (§ 3.2 p. 66). CSSF confirmed that its circular 02/77 does not apply to SIF, however, CSSF considers that representatives of the SIF have the obligation to define their own guidelines applicable in case of NAV calculation error in line with the SIF's investment policy, while such guidelines may be the application of the 02/77 circular, if so decided.

In a nutshell, what is recommended, is first to evaluate the need for a policy addressing NAV calculation errors, and then, if needed, representatives of the SIF should decide to apply either the CSSF circular 02/77 or specific guidelines, while requesting, as the case may be, the auditors of the fund to validate the methodology to be applied.

Disclaimer

It should be noted that the information obtained in answers provided by the GT 33 is of general nature and is not necessarily comprehensive. Besides, any answer released by the GT 33 should not be interpreted as providing legal advice or legal opinion whatever its nature. ALCO accepts no responsibility for any loss or damage, whether direct or indirect that you may suffer as a result of your use of or reliance on any information contained in answers from the GT 33 or accessed via the ALCO website.

Clause d'exonération

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*** Quelle est la vision de la communauté financière Luxembourgeoise et en particulier celle de la CSSF sur le business en provenance d'Uruguay?**

Pensez-vous que la CSSF accepte comme asset manager d'un fonds Luxembourgeois un asset manager régulé comme Financial Advisor (Circular 2046/2010 under the Mercado de Valores Law), under the Uruguayan Central Bank.

Avez-vous des expériences sur le sujet?

Nous pouvons vous fournir les éléments de réponse suivants, tout en vous recommandant de vous adresser directement à la CSSF sur cette question.

1. La délégation de la gestion d'un fonds de droit luxembourgeois à un gestionnaire étranger est possible ; à condition

- que ce gestionnaire soit « régulé », i.e. qu'il ait une licence pour exercer ce métier et qu'il soit supervisé par une autorité de tutelle ; et
- que la CSSF ait conclu avec cette autorité de tutelle un MOU (Memorandum of Understanding), soit un accord bilatéral de coopération et d'échange d'information.

Si un MOU est en place, la CSSF adressera un requête officielle à l'autorité du pays du gestionnaire du type « confirmation de non sanction à l'encontre de celui-ci », cette demande peut prendre du temps et retarder le processus d'agrément du fonds.

Ces conditions sont reprises aux articles 110 (1) c. - d. et 125 (1) c. - d. de la nouvelle loi OPC du 17 décembre 2010.

2. Ensuite, La CSSF exigera une copie du contrat mis en place, les copies des statuts, licences, rapports financiers, etc... voire tout autre information permettant de juger de la substance du gérant délégué. Des CVs peuvent également être exigés, voire un minimum d'actifs sous gestion. En fait, tout dépendra du fonds considéré, si ce fonds est destiné à des investisseurs de type retail (e.g. un OPCVM), la CSSF sera très exigeante, en revanche, elle sera plus indulgente si le fonds est destiné à des professionnels (e.g. un SIF) .

En conclusion, merci de vous adresser directement à la CSSF pour trancher cette question, soit la personne en charge du dossier d'agrément et de la surveillance du fonds considéré.

*** Lorsque un BE est un fond d'investissement**

- Lorsque il s'agit d'une société cotée sur un marché financier

quels sont les documents et diligences à effectuer (KYC) par le compliance officer.

I. Dans le cadre d'organismes de placements collectifs, les bénéficiaires effectifs sont "in fine" les porteurs de parts/investisseurs détenant plus de 25% des parts de fonds. Or, c'est le teneur de registre ou administrator, nommé contractuellement par l'OPC, qui a un rôle essentiel dans la détermination de l'actionnariat.

A. Conformément à l'article 3-1 (1) de la loi modifiée du 12 novembre 2004, les exigences visées à l'article 3 paragraphe (2) a) et b) peuvent être réduites lorsque le teneur de registre est un établissement financier établi et régulé dans un pays de l'Union Européenne ou dans un pays de l'Espace Economique Européen ou dans un pays tiers équivalent.

B. Par contre, lorsque, le teneur de registre n'est pas établi et régulé dans un pays de l'UE ou dans un pays de l'EEE ou dans un pays tiers imposant des obligations équivalents en matière d'AML/CTF, le professionnel ne saurait réduire son obligation de vigilance.

Dans cette hypothèse, il convient de différencier les OPC dits « fermés » de ceux de type « ouverts ».

B.1. Dans une structure de type fermée, l'actionnariat peut être remonté étant donné que le capital ne bouge pas puisque fixé lors de la constitution de l'OPC. Il convient donc de réclamer le registre des actionnaires afin, d'une part de vérifier si les investisseurs figurent ou non sur des listes de terroristes et, d'autre part de déterminer si un investisseur détient une participation de contrôle dans le fonds c'est à dire une participation supérieure à 25% du capital et de procéder à son identification. Nous recommandons également de procéder à une identification du teneur de registre. Il s'agit, notamment, de la preuve de régulation auprès de l'autorité de tutelle locale, la liste des actionnaires du teneur de registre et l'identification des actionnaires détenant plus de 25% du capital du teneur de registre. L'objectif étant de mesurer, autant que faire se peut, la qualité du TA "non équivalent", sa notoriété, et d'adopter une approche risque.

B.2. Dans une structure dite ouverte, les parts peuvent être émises ou rachetées, par l'organisme, à tout moment, en fonction de l'entrée et du retrait des investisseurs. Nous recommandons d'être extrêmement vigilant et d'appliquer une approche risque rigoureuse avec ce type de structure dans la mesure où, d'une part, le registre des actionnaires est rapidement « obsolète » et d'autre part, il est matériellement impossible d'identifier tous les investisseurs en lieu et place du TA "non équivalent" eu égard aux risques, aux coûts et à la charge de travail liée. Dans ce contexte, une « due diligence » sur place peut s'avérer être utile.

II. Lorsque le client est une société dont les valeurs sont admises à la négociation sur un marché réglementé au sens de l'article 1er point 11 de la loi du 13 juillet 2007 relative aux marchés financiers dans un État membre et les sociétés cotées de pays tiers qui sont soumises à des exigences de publicité compatibles avec la législation communautaire (2007/14/CE), nous faisons face à une des situations où les professionnels luxembourgeois ont la possibilité de réduire leurs obligations de vigilance décrits aux § 2 et 4 de l'article 3-1 de la loi modifiée du 12 novembre 2004.

Le site web www.fibv.com (association de stock exchanges) peut être une première approche dans l'analyse de due diligence. Dans les faits, la plupart des places boursières ne fournissent pas automatiquement des garanties en matière d'AML/CTF. Lorsque l'on évalue si la société cliente est bien cotée sur un marché réglementé, il faut faire preuve de jugement et entreprendre une approche des risques.

Cette approche se voit simplifiée pour les pays GAFI (hors pays à sensibilité élevée Groupe) dans la mesure où on considère que ceux-ci appliquent les principes et recommandations du GAFI avec des procédures AML en place. Par contre, pour les pays non-GAFI, l'approche risque doit toujours

Le Bulletin

être privilégiée dans la compréhension de la nature des activités de la société cliente et de ses parties prenantes.

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Les informations fournies dans le cadre des réponses du GT 33 ne sont pas nécessairement exhaustives. Par ailleurs, une réponse formulée par le GT 33 ne saurait en aucun cas constituer un avis, une consultation ou une opinion juridique de quelque nature qu'il soit. L'ALCO décline dès lors toute responsabilité en cas de pertes ou de dommages directs ou indirects subis par les utilisateurs des informations contenues dans les réponses données par le GT 33 ou accessibles sur le site internet de l'ALCO ainsi que pour toute action ou omission fondée sur ces informations.

Vie associative

VIE ASSOCIATIVE

GROUPES DE TRAVAIL ACTUELS

Groupe de travail 11

Site Internet

Responsable Olivier GILSON
Téléphone +352 48 48 80 51 08
olivier.gilson@efa.eu

Groupe de travail 16

Commission permanente juridique et relations publiques

Responsable Claudine FRUTSAERT
Téléphone +352 44 24 24 43 15
claudine.frutsaert@axa.lu

Groupe de travail 20

Funds practices and recommendations AML

Responsable Guillaume BEGUE
Téléphone +352 26 96 22 31
guillaume.begue@bnpparibas.com

Groupe de travail 21

Interprétation pratique des restrictions d'investissements de fonds

Responsable Tim WINFIELD
Téléphone +352 34 10 23 85
tim.winfield@jpmorgan.com

Groupe de travail 27

Formations IFBL

Coordinateur Sundhevy GOÏOT
Téléphone +352 621 30 23 63
sundhevy.goiot@maycoso.lu

Groupe de travail 30

Domiciliation de société

Coordinateur Sophie RASE
Téléphone +352 40 25 05 408
sophie.rase@maitlandgroup.com

Coordinateur Marie-Hélène CLAUDE
Téléphone +352 48 18 28 39 03
marie-helene.claude@alterdomus.lu

ASSOCIATION ACTIVITIES

CURRENT WORKING GROUPS

Working group 11

Website

Owner Olivier GILSON
Phone +352 48 48 80 51 08
olivier.gilson@efa.eu

Working group 16

Legal and public relations

Owner Claudine FRUTSAERT
Phone +352 44 24 24 43 15
claudine.frutsaert@axa.lu

Working group 20

Funds practices and recommendations AML

Owner Guillaume BEGUE
Phone +352 26 96 22 31
guillaume.begue@bnpparibas.com

Working group 21

Practical interpretation of fund investment restrictions

Owner Tim WINFIELD
Phone +352 34 10 23 85
tim.winfield@jpmorgan.com

Working group 27

Training IFBL

Coordinator Sundhevy GOÏOT
Phone +352 621 30 23 63
sundhevy.goiot@maycoso.lu

Working group 30

Domiciliary agent

Coordinator Sophie RASE
Phone +352 40 25 05 408
sophie.rase@maitlandgroup.com

Coordinateur Marie-Hélène CLAUDE
Téléphone +352 48 18 28 39 03
marie-helene.claude@alterdomus.lu

Le Bulletin

Groupe de travail 33

Réponses aux questions des membres

Coordinateur Christophe BECUE
Téléphone +352 48-48-80-80
cbecue@efa.lu

Groupe de travail 34

Tables rondes

Coordinateur Charles VAN
 DOORSLAER
Téléphone +352 47 97 39 09
charles.van-doorslaer@kbl-bank.com

Groupe de travail 35

Doctrine

Coordinateur Guillaume BEGUE
Téléphone +352 26 96 22 31
guillaume.begue@bnpparibas.com

Groupe de travail 38

Assurance

Coordinateur Rob SONNENSCHNEIN
Téléphone +352 319 911 313
rob.sonnenschein@luxglobal.lu

Groupe de travail 39

Problématique de l'outsourcing

Coordinateur David RENAUD
Téléphone +352 26 05 21 81
david.renaud@rbcdexia-is.net

Groupe de travail 40

Responsabilité du CO dans les sociétés de gestion

Coordinateur Bernard PONS
Téléphone +352 26 39 86 54
bpons@purecapital.eu

Coordinateur Sundhevy GOÏOT
Téléphone +352 621 30 23 63
sundhevy.goiot@maycoso.lu

Groupe de travail 41

Gouvernance

Coordinateur Jean Noël Lequeue
Téléphone +352 26 63 86 27
jean-noel.lequeue@icesa.lu

Working group 33

Answers to questions of members

Coordinator Christophe BECUE
Phone +352 48-48-80-80
cbecue@efa.lu

Working group 34

Round tables

Coordinator Charles VAN
 DOORSLAER
Phone +352 47 97 39 09
charles.van-doorslaer@kbl-bank.com

Working group 35

Doctrine

Coordinator Guillaume BEGUE
Phone +352 26 96 22 31
guillaume.begue@bnpparibas.com

Working group 38

Insurance

Coordinator Rob SONNENSCHNEIN
Phone +352 319 911 313
rob.sonnenschein@luxglobal.lu

Working group 39

Outsourcing's issues

Coordinator David RENAUD
Phone +352 26 05 21 81
david.renaud@rbcdexia-is.net

Working group 40

CO responsibilities for a Man Co

Coordinator Bernard PONS
Phone +352 26 39 86 54
bpons@purecapital.eu

Coordinateur Sundhevy GOÏOT
Téléphone +352 621 30 23 63
sundhevy.goiot@maycoso.lu

Working group 35

Governance

Coordinator Jean Noël Lequeue
Phone +352 26 63 86 27
jean-noel.lequeue@icesa.lu

Le Bulletin

MEMBRES ET VIE ASSOCIATIVE

MEMBERS AND ASSOCIATION ACTIVITIES

Nombre de membres (au 30/11/2011):

Banques	241
Fonds	114
Fonds / Banques	24
Assurances	50
Consultants / Réviseurs	51
Admin. et domiciliation de sociétés	19
Avocats	12
PSF	55
Gestion de fortune	24
Autres	20
Effectif total:	610

Membres effectifs 490

Membres d'honneur 120

Effectif total: 610

Réunions et activités:

Mensuellement	Réunions du conseil d'administration
1 / 2 x par an	Réunions plénières
2 / 3 x par an	Rencontres informelles autour d'un thème

Number of members (as per 30/11/2011):

Banking sector	241
Funds sector	114
Funds / Banking sector	24
Insurance sector	50
Consultants / Auditors	51
Admin. and company domiciliation	19
Law firms	12
SFP	55
Asset management	24
Other	20
Total number:	610

Active members 490

Honorary members 120

Total number: 610

Meetings and activities:

Monthly	Board meetings
1 / 2 x per year	Plenary assemblies
2 / 3 x per year	Informal meetings on a subject

– **Conseil d'administration:**

Jean-Noël LEQUEUE	Président
Claudine FRUTSAERT	Vice-Président, section assurances
Patrick WATELET	Vice-Président, section fonds
Vincent SALZINGER	Vice-Président, section banques
Marie-Hélène CLAUDE	Trésorière
Guillaume BEGUE	Administrateur
Patrick CHILLET	Administrateur
Rolland DILLIEN	Administrateur
Olivier GILSON	Administrateur
SUNDHEVY GOÏOT	Administrateur
Thierry GROSJEAN	Administrateur
Rob SONNENSCHNEIN	Administrateur
Emmanuelle HENNIAUX	Conseiller
Bernard PONS	Conseiller
Patrick SCHOTT	Conseiller
Jeanne RANAIVOSON	Conseiller
David RENAUD	Conseiller
Tim WINFIELD	Conseiller

– **Secrétariat de l'ALCO:**

Emilie Schmitt
secretariat@alco.lu
2 rue de l'Eau
L-1449 Luxembourg
Tél: 26-63-86-25

– **Secrétariat du Bulletin:**

Emilie Schmitt
secretariat@alco.lu

VISITEZ NOTRE SITE WEB : www.alco.lu
