Luxembourg Legal Update

July 2015

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Contents

We are pleased to provide you with the latest edition of our Luxembourg Legal Update.

The newsletter provides a compact summary and guidance on the new legal issues which could impact your business, particularly in relation to banking, finance, capital markets, corporate, litigation, employment, funds, investment management and tax law.

Banking, Finance and Capital Markets

EU Developments

AMLD 4 and FATF 2 Regulation

The fourth Anti-money Laundering Directive (AMLD 4 – Directive (EU) 2015/849) and the Regulation on information accompanying transfers of funds (FATF 2 Regulation – Regulation (EU) 2015/847) have been published in the Official Journal.

The new rules will implement recommendations by the Financial Action Task Force and include:

- a greater scope than the previous AMLD, such as a lower cash payment threshold, the inclusion of traders in goods and provisions to include providers of gambling services
- tighter rules on customer due diligence, including a risk-based approach and requirements for gambling service providers on transactions of EUR 2,000 or more except in strictly limited circumstances
- setting up central registers of information on beneficial ownership of companies which will be accessible to competent authorities, financial intelligence units and obliged entities such as banks—Member States will have the option to set up public registers, if they wish
- rules on sanctions which establish a maximum pecuniary fine of at least twice the amount of the benefit derived from a breach or a minimum of EUR 1 million, with a higher minimum for breaches involving credit or financial institutions.

The FATF 2 Regulation is intended to improve the traceability of payors and payees and their assets.

Both the Directive and the Regulation came into force on 25 June 2015. Member States have until 26 June 2017 to transpose and comply with AMLD 4. The FATF 2 Regulation will become directly applicable in Member States from 26 June 2017.

MIF Regulation

The Regulation on Interchange Fees for Card-based Payment Transactions (MIF Regulation) was published on 19 May 2015 in the Official Journal.

The Regulation sets maximum levels for interchange fees for transactions using:

- credit cards
- debit cards
- domestic debit cards
- universal cards, i.e. domestic payment transactions which are not distinguishable as debit or credit cards.

The Regulation came into force and applies from 8 June 2015, except for certain provisions which will apply either six months or one year after this date. Rules capping interchange fees for consumer debit and credit card transactions will apply from 9 December 2015.

Eurosystem Monetary Policy Framework: New ECB Guideline on Eligibility of Assets

The ECB's Guideline (Guideline ECB/2015/510) on the implementation of the Eurosystem monetary policy framework, setting out the eligibility of assets for ECB open market operations, was published on 2 April 2015 in the Official Journal. The new Guideline replaces the current framework on Eurosystem monetary policy instruments and procedures (Guideline ECB/2011/14). The new Guideline seeks to consolidate, simplify and improve the clarity of the Eurosystem's existing general framework for monetary policy implementation. For this purpose, it consolidates several amendments to the Eurosystem framework made since 2011 and updates cross-references to several EU legal acts, such as the CRR and CRD IV. In addition, all provisions previously laid down in Annexes I and II to

Guideline ECB/2011/14 (in particular Annex I, also known as the General Documentation) have now been incorporated into the new Guideline.

The Guideline applies from 1 May 2015, with the exception of Article 142 on liquidity support in respect of asset-backed securities, which will apply from 1 November 2015.

Other New Delegated, Implementing and other Regulations

Over the last few months, a number of other new Commission Delegated, Commission Implementing and other EU Regulations and texts have been published. These include the following, among others:

CRD IV/CRR:

- N°2015/227 of 9 January 2015 amending Regulation (EU) N°680/2014 with regard to supervisory reporting of institutions according to the Capital Requirements Regulation
- N°2015/233 of 13 February 2015 with regard to currencies in which there is an extremely narrow definition of central bank eligibility under the CRR
- N°2015/488 of 24 March 2015, amending Regulation (EU) N°241/2014 with regard to own funds requirements based on fixed overheads so that all RTS on own funds are included in one Regulation. This establishes the methodology for calculating fixed overheads for firms under the CRR
- N°2015/585 of 18 December 2014 supplementing the CRR with regard to regulatory technical standards for the specification of margin periods of risk
- N°2015/850 of 30 January 2015 with regard to own funds requirements for institutions
- N°2015/880 of 4 June 2015 on the extension of the transitional periods related to own funds requirements for exposures to central counterparties set out in CRR and EMIR
- N°2015/923 of 11 March 2015, amending N°241/2014 with regard to RTS for own funds requirements for institutions
- N°2015/942 of 4 March 2015, amending N°529/2014 with regard to RTS for assessing the materiality of extensions and changes of internal approaches when calculating own funds requirements for market risk
- EBA update of 22 May 2015 of the CEBS guidelines on technical aspects of the management of interest rate risk arising from non-trading activities under the supervisory review process
- EBA Final Report of 29 May 2015 on monitoring of Additional Tier 1 capital instruments issued by EU institutions.

SSM and Banking Union:

- ECB Regulation (EU) 2015/534 on reporting of supervisory financial information under the CRR
- ECB Decision (EU) 2015/656 of 4 February 2015 on the conditions under which credit institutions are permitted to include interim or year-end profits in Common Equity Tier 1 (CET1) capital under the CRR.

BRRD:

- EBA Final Guidelines of 26 May 2015 relating to the interpretation of the different circumstances when an institution shall be considered as failing or likely to fail under the BRRD.

Solvency II:

- N°2015/460 of 19 March 2015 with regard to the procedure concerning the approval of an internal model
- N°2015/461 of 19 March 2015 with regard to the process to reach a joint decision on the application to use a group internal model
- N°2015/462 of 19 March 2015 with regard to the procedures for supervisory approval to establish SPVs, for the cooperation and exchange of information between supervisory authorities regarding SPV. This will also set out formats and templates for information to be reported by SPV
- Corrigendum to Directive 2014/51/EU amending Directives 2003/71/EC and 2009/138/EC and Regulations (EC) N°1060/2009, (EU) N°1094/2010 and (EU) N°1095/2010 with regard to the powers of EIOPA (European Insurance and Occupational Pensions Authority) and ESMA.

Transparency Directive:

N°2015/761 of 17 December 2014, supplementing the Transparency Directive 2004/109/EC with regard to certain regulatory technical standards on major holdings.

Legislation

Law Establishing a Systemic Risk Committee

The 1 April 2015 Law establishing a Systemic Risk Committee (SRC) in Luxembourg and implementing the European Systemic Risk Board (ESRB) Recommendation of 22 December 2011 on the macro-prudential mandate of national authorities (ESRB/2011/3) and the ESRB

Recommendation of 4 April 2013 on intermediate objectives and instruments of macro-prudential policy (ESRB/2013/1) has come into force.

The SRC comprises four members, namely the member of the Luxembourg government responsible for the financial sector (currently the Minister of Finance), the director general of the BCL, the director general of the CSSF and the director general of the Commassu. The SRC is entrusted with coordinating the implementation of macro-prudential policy by the authorities represented in it. Its ultimate objective is to contribute to the safeguarding of the Luxembourg financial system by strengthening the resilience of the financial system and decreasing the build-up of systemic risks, ensuring a sustainable contribution of the financial sector to economic growth. The SRC is established as a board contributing to cooperation between those authorities which are responsible for micro- and macro-prudential supervision. Amongst other things, the SRC is intended to identify, monitor and assess risks in relation to financial stability and to issue opinions, warnings and recommendations in order to prevent and mitigate those risks.

CSSF Annual Activity Report for 2014

The CSSF has published its Annual Activity Report for 2014. In addition to statistical information concerning the Luxembourg financial sector and information on legal and regulatory developments in the last twelve months, the report contains information on the CSSF's exercise of its regulatory powers. The following points are of particular interest for banks and other actors of the financial sector.

The report also contains a section on investment funds and SICARs, which will be discussed in the Funds and Investment Management section, as well as a section on client complaints which will be discussed in the Litigation section of this Luxembourg Legal Update.

Prospectus Law

The CSSF clarifies how to calculate the 7% threshold for the calculation of the summary of a prospectus, base prospectus or final terms. According to the Amended Prospectus Regulation (EC) N°809/2004, such summary shall take into account the complexity of the issuer and of the securities offered, but shall not exceed 7% of the length of the prospectus or 15 pages, whichever is longer. The CSSF considers that, in order to determine the total length of the prospectus, only the information directly included in the prospectus and the information incorporated into it by reference pursuant to the cross-reference list has to be taken into account. In contrast, information incorporated by reference solely for information purposes must not be taken into account for the threshold calculation.

Furthermore, the CSSF states that it accepts the drawing up of a single supplement relating to several CSSF-approved prospectuses when the following conditions are met:

- the supplement relates to only one type of prospectus (i.e. stand-alone prospectus or base prospectus)
- the supplement mentions on its first page all the prospectuses to which it relates
- the amendments are substantially the same for all the documents modified by the supplement. Such point needs to be assessed on a case-by-case basis by the CSSF.

Takeover Law

In the new Activity Report, the CSSF confirms its interpretation of Article 15 of the Takeover Law. This Article 15 applies to a takeover bid addressed to all holders of securities in a target company for all their securities. Following such a bid, the bidder is allowed to require all the holders of the remaining securities to sell him/her those securities at a fair price when the bidder holds securities representing not less than 95% of the capital carrying voting rights and 95% of the voting rights in the target company. The CSSF considers that this squeeze-out procedure cannot be considered as a completely autonomous procedure from the overall takeover bid procedure, and that holders of securities will have to be given the necessary time to take a free decision on the way in which to divest. In other words, Article 15 of the Takeover Law cannot be applied independently, but has to be considered as a subsequent right which only arises as a result of a prior takeover bid, provided the relevant requirements are met, including that such right can only be exercised after the end of the acceptance period of the takeover bid. Therefore, a person who has not been a shareholder but acquires a shareholding above 95% of voting rights cannot immediately thereafter exercise a squeeze-out right bypassing the main takeover bid procedure under the Takeover Law.

In a case where a Luxembourg company announced its intention to make a public offer for the repurchase of all its shares in free float and for these to be delisted, it admitted to trading on the regulated market in Luxembourg and in Belgium. Where the offer was outside the scope of the Takeover Law, the CSSF, based on its general supervisory powers regarding the capital markets, specified that it nevertheless requested to review the information document formalising the offer and to supervise the proceeding of such offer and the subsequent delisting, in coordination with the Belgian regulator.

Sell-out/Squeeze-out Law

In relation to the Sell-out/Squeeze-out Law, the CSSF recalls that the publication obligations of a majority shareholder under this law, in particular under Articles 4 and 5 thereof, are not satisfied by simply storing such information with the Luxembourg Officially Appointed Mechanism for Transparency Law/Directive purposes or publishing it on the Internet. In contrast, such a majority shareholder has to disclose the relevant information actively to the different media.

Furthermore, according to Article 4(1) of the Sell-out/Squeeze-out Law, a majority shareholder deciding to exercise his squeeze-out right must make sure that he will be in a position to deliver the required consideration (i.e. the fair squeeze-out price) entirely in cash. The CSSF specifies that, in order to ensure effective compliance with such requirement, the majority shareholder has to provide the CSSF with the details, in writing, of the measures taken to this effect. The CSSF specifically requires in its administrative practice that the majority shareholder provide a blocking certificate or a bank guarantee issued by a credit institution evidencing that the necessary cash amount will be available during the entire squeeze-out procedure.

Finally, the Sell-out/Squeeze-out Law obliges the management or directing bodies of a company to take a clear and substantiated position on the price proposed by the majority shareholder in a squeeze-out procedure. The CSSF specifies that such position may be concise, but mandatorily has to take a direct position on the fair and equitable character of the proposed price or the absence thereof. The CSSF further asks any company concerned to publish the position taken by its management or directing bodies.

Supervision of IT Systems

The CSSF Activity Report contains some explanations on the regulator's practice and requirements on several issues in the area of IT systems, including, among others, the following topics:

Use of External Messaging System for Order Transmission

The CSSF considers that a professional in the financial sector must not propose that its clients use the external messaging system for the transmission of sensitive instructions, and in particular execution orders for financial transactions. In cases where the clients are themselves requesting such a service, the professional may consent thereto, subject to the following conditions:

- its clients sign a specific agreement informing them of the risks involved with such type of communication
- the professional puts in place controls to verify the reliability and the origin of an email (e.g. by contacting the client by telephone to receive confirmation of the order).

VoIP Systems: Confidentiality and Outsourcing

The CSSF recalls that telecommunications operators in the financial sector are subject to two different professional confidentiality duties, i.e. the duty arising out of Article 41 of the Financial Sector Law (FSL) and the general telecommunications confidentiality duty. Accordingly, when outsourcing IT activities, if the telecommunications operator may host a VoIP system in its cloud in accordance with the regulation in force applicable to IT outsourcing, only a duly licensed support PSF may be appointed for managing such a system.

Systems Permitting the Compilation, Distribution and Consultation of Board of Directors Documentation

The CSSF confirms that the use of systems permitting the compilation, distribution and consultation of documentation by the board of directors falls, by its nature, within the scope of the core activity of corporate domiciliation agents under Article 28-9 of the FSL. Accordingly, for such type of professional, the service provider needs to comply with the requirements of CSSF Circular 05/178 on IT outsourcing.

The information stored on such systems is, in principle, not confidential information relating to clients of such entities, within the meaning of Article 41 of the FSL. However, the CSSF draws attention to the potentially sensitive character of this data, due to its strategic and non-public nature. The entities themselves using such systems will need to conduct their own detailed due diligence on the security level of the service provider before using the system and are liable if they do not disclose information covered by Article 41 of the FSL (i.e. specific client or investor names mentioned in the board of directors' documents or the minutes of board meetings) to a third party, such as a service provider, unless such service provider is a Luxembourg credit institution or support PFS covered by the confidentiality exemption of Article 41(5) of the FSL.

IT Infrastructure Vulnerability Scanning Services

The provision of IT infrastructure vulnerability scanning services to financial institutions is not considered by the CSSF to be the regulated activity of a financial sector IT system operator where the service provider has no means of intervention on the supervised equipment and, in such case, does not have to be licensed as a support PFS.

The CSSF nevertheless recalls that data from financial institutions is sensitive in nature and that contracting with a support PFS enables it to be ensured that the service provider is itself subject to professional confidentiality under the FSL.

Where the financial institution uses such support PFS for the service and the support PFS wishes to use third parties for providing the service, the contract between the financial institution and the support PFS shall provide that the support PFS remains liable for compliance with its professional confidentiality duty under the FSL (including for compliance therewith by the third party service provider used) vis-à-vis the financial institution. Therefore, the support PFS has to undertake, in the contract with the financial institution, that the data made available to the third party service provider does not contain business data or data linked to clients of the financial institution.

Internet Threats

The CSSF finally draws the financial sector professional's attention to the increase in threats resulting from the use of the Internet and the evolution of attack profiles and defence systems. The CSSF requests that entities take preventive steps so that qualified personnel trained for the correct use of the relevant technology can detect whether they have been a victim of an attack, and if so, the start date and duration of the attack. The CSSF further requests that the finance professional be able to collect the indicators of intrusion during attacks and to establish a precise report of its security situation, of its integrity and of the impact of the incident in order to correctly deal with the detected problem and restore the situation to normal.

Regulatory Developments

Payment Services: EBA Guidelines on the Security of Internet Payments

CSSF Circular 15/603

On 9 February 2015, the CSSF published circular 15/603 on the implementation of the EBA Guidelines on the security of internet payments (EBA/GL/2014/12) into the Luxembourg regulatory framework.

The EBA Guidelines, which are appended as an annex to the circular, set out the minimum security requirements which payment services providers in the EU will be expected to implement and apply to the provision of payment services offered over the Internet. The circular states that Luxembourg payment services providers have to apply the EBA Guidelines from 1 August 2015.

CRR: Publication Requirements for Information on Unencumbered Assets

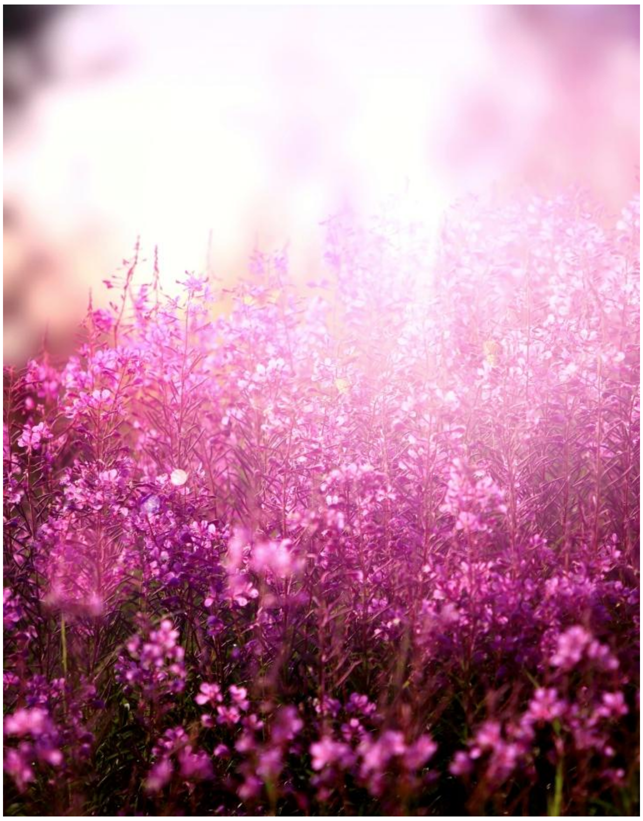
CSSF Circular 15/605

On 20 February 2015, the CSSF issued circular 15/605 on the publication requirements for information on unencumbered assets. The circular is addressed to credit institutions subject to disclosure requirements in Part Eight of the CRR.

The circular implements the EBA Guidelines on the disclosure of encumbered and unencumbered assets (EBA/GL/2014/03) into the Luxembourg regulatory framework. Credit institutions will have to disclose information on their encumbered and unencumbered assets, as well as collateral received in accordance with the three disclosure templates planned for in the EBA Guidelines.

The EBA Guidelines are the first step in the framework for the disclosure of asset encumbrance. They will be reviewed after one year and will form the basis of the binding technical standards on more extensive disclosure which the EBA will have to develop and submit to the Commission by 1 January 2016.

The circular came into force with immediate effect and applies until the EBA Guidelines have been replaced by the regulatory technical standards to be developed by the EBA and endorsed by the Commission.



CRD IV/CRR: Clarifications for Investment Firms in the Framework of the Implementation into Luxembourg Law of the CRD IV and of the Entry into Force of the CRR

CSSF Circular 15/606

On 23 February 2015, the CSSF published circular 15/606 relating to clarifications for investment firms in the framework of the implementation into Luxembourg law of the CRD IV and the entry into force of the CRR.

The purpose of the circular is to provide investment firms with certain clarifications in relation to their categorisation following the entry into force of the CRR and the submission of the CRD IV implementing Bill 6660 to the Luxembourg Parliament. One of the innovations of the Bill is to introduce the new sub-category of CRR investment firms into the FSL. The circular provides guidance on which types of Luxembourg investment firms will and will not fall within the new category of CRR investment firms subject to the CRR. The circular further explains that each investment firm holding client assets (funds or securities) is required to be licensed for the ancillary service of safekeeping and administration of financial instruments on behalf of clients, including custodianship and related services such as cash/collateral management. They will therefore be considered as CRR investment firms being subject to the CRR. Moreover, the circular specifies the meaning of holding client assets and reminds all investment firms of their obligations to protect client assets.

To enable it to categorise investment firms, the CSSF has requested, as part of any new application file for an investment firm or in the context of an extension of an existing licence, for the questionnaire attached to the circular to be completed and submitted.

Automatic Exchange of Tax Information and Money Laundering Repression in Tax Matters

CSSF Circular 15/609

Please refer to the Tax section of this Legal Update for further details on the above.

BRRD Implementation

CSSF Circular 15/610

On 7 April 2015, the CSSF issued circular 15/610 relating to an ad hoc survey in the context of the BRRD.

The purpose of the circular is to solicit certain information from credit institutions as well as Luxembourg branches of credit institutions having their head office in a non-member country in preparation of the CSSF's role and work as a future resolution authority in the framework of the BRRD, and for the purpose of:

- establishing resolution plans under Articles 10 and 12 of the BRRD
- the calculation of the minimum requirement for own funds and eligible liabilities (MREL) under Article 45 of the BRRD.

The circular contains in its annex spreadsheets which had to be completed and submitted to the CSSF by 30 May 2015.

The CSSF further notes that such information requests will be made regularly in the future and that the resolution plans will be updated regularly.

Management of Risks of Outsourcing of Systems relating to Management Board and Strategic Documents

CSSF Circular 15/611

On 16 April 2015, the CSSF published a new circular 15/611 on managing the risks related to the outsourcing of systems for the compilation, distribution and consultation of management board/strategic documents.

When an entity subject to supervision by the CSSF decides to outsource the compilation, distribution and consultation of such documents to service providers which do not have a support PFS licence under Luxembourg law and/or are not located in Luxembourg, the CSSF considers that the entity, after performing a thorough due diligence, can decide whether or not to store its data on a system hosted at and operated by such a service provider.

Given that management board/strategic documents may contain sensitive data, the CSSF reminds entities of their obligation not to disclose any information which is considered confidential under Article 41 of the FSL to a service provider who is not subject to Luxembourg professional secrecy obligations.

This includes situations where documents are stored in so-called data rooms during a merger/acquisition process. When the outsourcing entity is a Luxembourg domiciliation agent, it would be considered to outsource a core activity and would need to choose a service provider which complies with the conditions set out in CSSF Circular 05/178 concerning the outsourcing of IT functions to a third party.

CRR/SSM: Reporting Requirements of Credit Institutions

CSSF Circular 15/613

On 6 May 2015, the CSSF issued circular 15/613 updating the previous CSSF circular 14/593 on reporting requirements applicable to credit institutions for the 2014 reporting period.

The update reflects the latest developments and requirements on the EU and SSM level for credit institutions in relation to prudential reporting, starting from the 2014 reporting period, and provides practical details and the CSSF's requirements in this respect.

The CSSF further draws the attention of credit institutions to the fact that the requirements in relation to European prudential reporting may change in the future, and asks credit institutions to monitor the draft implementing and/or regulatory technical standards and consultation papers published on EBA's website in this area and the implementing technical standards adopted by the European Commission and published under: http://ec.europa.eu/finance/bank/regcapital/acts/its/index_en.htm in relation to prudential reporting.

Payment Institutions and E-Money Institutions: Reporting

CSSF Circular 15/614

On 13 May 2015, the CSSF published circular 15/614 regarding documents to be submitted to the CSSF by payment institutions and electronic money institutions after the closure of the financial year.

The circular applies with effect from the financial year closing 31 December 2015. In terms of timing, the circular distinguishes between documents which need to be submitted to the CSSF as soon as possible and:

- after the closure and at the latest two weeks prior to the ordinary general meeting (short form report on annual accounts, proposed results allocation and final version of the periodic reporting tables)
- at the latest on the last day of the third month after the closing date (summary report drawn up and signed by the internal auditor, management report on internal control signed by the authorised management and signed annual report by the compliance officer)
- at the latest one month after the ordinary general meeting (annual long form external auditor report and the minutes and attendance list of the ordinary general meeting).

ESMA Guidelines on Application of Commodity Derivatives Definition under MiFID

CSSF Circular 15/615

The CSSF issued a circular (15/615) to implement ESMA guidelines on the application of the definitions of commodity derivatives in Sections C6 and C7 of Annex I of Directive 2004/39/EC (MiFID) in Luxembourg regulations.

The circular is addressed to all financial market participants and comes into force on 7 August 2015.

Update of CSSF Q&A Paper on the Statuses of PFS

On 4 February 2015, the CSSF published an updated version of its Q&A paper on the statuses of PFS, Part II.

The CSSF specifies, in relation to acceptable shareholders of a Luxembourg PFS (Q&A N°12), that private equity structures and SICARs are, in principle, not acceptable as shareholders of a Luxembourg PFS or of another supervised entity, unless they plausibly justify that their presence in the shareholder structure does not threaten the stability of the entity: for example, by committing to remain for an extended period in the shareholder structure or through an agreement concluded with other shareholders or partners of this entity (shareholders' agreement).

The CSSF further clarifies the scope of the debt recovery activity regulated under Article 28-3 of the FSL (Q&A N°47). It is specified in this respect, among others, that the activity does not apply to the debt recovery activity in a judicial capacity. Debt recovery companies may therefore neither assist nor represent their clients in court. Article 28-3 of the FSL does not apply to the enforcement of debt recovery either, which is reserved to bailiffs. The CSSF further recalls that debt recovery professionals contacting a defaulting debtor requesting him to pay his debt shall refrain from any abusive use of these reminder practices. Repeated and intrusive phone calls or harassment through written or other messages are considered by the CSSF as privacy protection law breaches.

Finally, the CSSF provides further clarifications on the scope of the activity of professionals providing company incorporation and management services (PIM) (Q&A N°63). Among others, the CSSF specifies that PIMs shall carry out activities other than those defined in the FSL only on an ancillary basis, i.e. this should not be their main activity. The CSSF also clarifies that, if a mandate as administrator in a company is carried out based on a personal relationship between the mandating company and the agent, no PIM authorisation is required. A PIM authorisation is however required where the company management activities are performed regularly and in a professional capacity, based on a contractual relationship between the PIM and its client. The CSSF also provides useful guidelines on when a professional PIM activity is carried out on a regular basis, and thus requiring authorisation, and when this is not the case.

REMIT – Registration of Market Participants

CSSF Press Release 15/18

On 3 April 2015, the CSSF published its press release 15/18 on the registration of market participants under Regulation (EU) N°1227/2011 of 25 October 2011 on wholesale energy market integrity and transparency (REMIT). REMIT contains a notification requirement for transactions on wholesale energy products (including derivatives therefrom).

The CSSF reminds market participants, including those subject to prudential supervision by the CSSF, who enter into transactions for which such notification is mandatory and who are established in Luxembourg of their obligation to register with the *Institut Luxembourgeois de Régulation* (ILR) at the latest by 7 October 2015, in accordance with Article 9 of REMIT.

For further information on REMIT and the registration process, the CSSF refers to the related ILR press release available on the ILR website (http://www.ilr.public.lu/electricite/REMIT/Communication/Communique_de_presse_ILR_REMIT.pdf).

Law on Bearer Share Immobilisation

CSSF Warning 15/16

On 27 March 2015, the CSSF published a press release informing holders and issuers of bearer shares/units of the next steps to comply with the Luxembourg law of 28 July 2014 on the immobilisation of bearer shares and units. For further info on the Law of 28 July 2014, please refer to our client briefing.

The press release describes the bearer shares/units within and outside the scope of this new law. The CSSF expresses the view that bearer shares/units deposited in a Securities Settlement System (SSS), such as Clearstream or Euroclear, and represented by a global certificate or physical individualised certificates are outside the scope of the new law since the shares/units lose their bearer character upon deposit in an SSS.

For further information on the CSSF press release and the warning and recommendations expressed therein, please refer to the Funds and Investment Management Section of this Luxembourg Legal Update.

Transparency Law – Exemption from Publication of Half-yearly Financial Reports

CSSF Press Release 15/23

The CSSF issued a press release informing issuers for whom Luxembourg is the home Member State, pursuant to the law of 11 January 2008 on transparency requirements (Transparency Law), that the exemption from publication of half-yearly financial reports set out under Article 30(6) of the Transparency Law for issuers of debt securities admitted to trading on an EU regulated market prior to 1 January 2005 ended on 1 January 2015.

Issuers who benefited from the exemption will now be required to publish half-yearly financial reports in accordance with Article 4 of the Transparency Law for financial years starting on or after 1 January 2015.

Life Insurance: Investment Rules for Unit-linked Life Insurance Products

Commassu Circular 15/3

On 27 March 2015, the Commassu published a new circular 15/03 regarding investment rules for unit-linked life insurance products. The new circular repeals circular 08/1 on the same topic, subject to a transitional regime, with effect from 1 May 2015.

Among other areas, the circular combines among others new rules on investments in “specialised insurance funds”, being internal funds other than dedicated funds without a guaranteed return and linked to one underlying contract only. Further changes include the introduction of a five-category classification of subscribers on the basis of their wealth and the amount of premiums paid. The circular also modifies the rules for investments in alternative investment funds and structured deposits. Finally, it widens the scope of products into which collective internal funds available to high-net worth individuals may invest.

Life- and Non-life Insurance and Pension Funds: Deposit of Assets Representing Technical Reserves

Commassu Circular 15/4

On 24 March 2015, the Commassu published circular 15/4 on the deposit of securities and liquid assets used as assets representing technical reserves of direct insurance undertakings and pension funds subject to supervision by the Commassu.

The new circular repeals circular 09/7 on the same topic, subject to a transitional regime. The new circular further introduces certain new rules in respect of assets located with branches outside the deposit bank's home country and for deposit banks turning into branches of other credit institutions or turning back into independent institutions. The template deposit convention annexed to the circular reflects these revised rules.

The new circular came into force on 1 May 2015.

Life Insurance: ACA Charter of Quality

Commassu Circular 15/8

On 25 June 2015, the Commassu issued circular 15/8 on the adoption of the Life Insurance Charter of Quality prepared by the Luxembourg Association of Insurance Undertakings *(Association des Companies d'Assurances)* in 2013 and updated in 2015.

The ACA Life Insurance Charter of Quality is inspired by the ICMA Private Wealth Management Charter of Quality and is in line with the Luxembourg government's transparency policy.

The Commassu welcomes this initiative and strongly encourages all insurance undertakings to adopt and implement this Charter. The circular therefore invites the management of the insurance undertakings to inform the Commassu by 15 July whether their undertaking has signed up to the Charter. Where an insurance undertaking has not signed up to the Charter, the management will need to explain the reasons for this.

Other Publications concerning the Insurance Sector

The Commassu further issued the following documents:

- Circular 15/5 concerning the first set of Solvency II Guidelines published by EIOPA on 2 February 2015
- Circular 15/6 on the reporting of professionals in the insurance sector
- Circular 15/7 modifying and supplementing the amended circular letter 98/1 on technical interest rates
- Information notice on the implementation of the “Joint Guidelines on the convergence of supervisory practices relating to the consistency of supervisory coordination arrangements for financial conglomerates” issued by the Joint Committee of the European Supervisory Authorities on 22 December 2014.

The Recast of the EU Insolvency Regulation

Regulation N°2015/848 of the European Parliament and of the Council (“the EUIR (Recast)”) amending the Regulation 1346/2000 on Insolvency Proceedings was published in the Official Journal of the EU on 5 June 2015. It came into force on the twentieth day after publication and most of its provisions will apply two years after the official publication.

The main changes are as follows.

The notion of centre of main interest (COMI)

In order to diminish the risk of abuse, the EUIR (Recast) modifies the scope of the presumption for the COMI to be located at a company' registered office (which is rebuttable). If the office has been relocated, and hence the COMI shifted, 3 months prior to the request for the opening of insolvency proceedings, the presumption does not apply.

The widened scope of the EUIR (Recast): pre-insolvency proceedings and secondary proceedings

The EUIR (Recast) has a wider scope than the initial, now including pre-insolvency rescue proceedings. With regard to secondary proceedings, the scope of the EUIR was limited to winding up proceedings. The EUIR (Recast) removes this limitation.

Cooperation and communication

The EUIR (Recast) provides for further cooperation and communication between insolvency practitioners and courts, as well as between the insolvency practitioners in the main insolvency proceedings and the insolvency practitioners in the secondary insolvency proceedings.

Member States are required to set up publicly accessible electronic insolvency registers and such national insolvency registers will be interconnected at an EU level.

The creation of group proceedings

The EUIR (Recast) provides for a new concept of group coordination proceedings in cases where more than one member of a group is affected by insolvency. Such proceedings involve the appointment of a group coordinator who will produce a group coordination plan.

Case Law

Bank's Liability – Limitation of Liability Clause

Court of Appeal, 8 February 2012, N°36360

Usurious Interest Rates – Validity of Clause regarding Margin Call

District Court, 19 February 2014, N°134611 and 137139

Violation of Rules of Conduct in the Financial Sector – Civil Liability

Supreme Court, 26 March 2015, N°3420

Please refer to the Litigation section of this Luxembourg Legal Update for further details on the above.

Corporate and M&A

Legislation

Amendment of Companies Law and Modification of Title IX Luxembourg Civil Code

Bill N°5730 of 8 June 2007

Bill N°5730 seeks to introduce significant changes which, if implemented, would affect the activities of all Luxembourg companies, especially private limited liability companies (*société à responsabilité limitée,* SARL) and public limited liability companies (*société anonyme,*SA). The Parliament's legal committee (*commission juridique)* adopted amendments to the Bill on 2 April 2015. In the context of the reform foreseen by the Bill, changes will also be made to the Luxembourg Civil Code, e.g. through the introduction of the mechanism of "tracking shares" (Article 1853). With the proposed reforms, the government expects to adapt the legal framework to the economic realities of the country and to boost the effectiveness and the consistency of Luxembourg corporate law.

The key points of the reform are as follows:

- Introduction of so-called "tracking shares" for all types of companies; their issuance would need to be provided for in the relevant company's articles of association, either ab initio or upon amendment.
- Introduction of rules in the Luxembourg Civil Code governing voting and economic rights of the shares bearing usufruct.
- Any type of company may issue bonds; the issuance of convertible securities by companies other than SAs is subject to statutory restrictions for the transfer of shares.
- Possibility to issue shares in an SA without nominal value having a par value below the accounting par value of the shares of the same category, subject to the production of reports prepared respectively by the board of directors (or the management board, in case of dual structure in an SA) and an auditor appointed by the board of directors (the issuance of such shares shall be possible within the framework of the authorised capital provided certain conditions have been fulfilled).
- Introduction of a simplified public limited liability company (*société par actions simplifiée*, SAS), mainly inspired by French law.

- An SA's board of directors may issue shares "for free" to employees and managers, as well as employees and managers of group companies.
- Non-voting shares in an SA may account for more than 50% of the SA's share capital and the rights of non-voting shares must be expressly set out in its articles of association (however, the holders of non-voting shares have a right to vote on any changes affecting their rights at shareholders' meetings deciding on share capital reductions or on the anticipated dissolution of the company).
- Introduction of the concept of a "General Director" (*directeur général*) and of an "Executive Committee" (*comité de direction*). The board of directors may delegate powers (except for those which would interfere with the general policy of the company or those reserved to the board of directors by law) to a General Director or an Executive Committee, in such a case, the board of directors will take on a merely supervisory function.
- Minority shareholders or holders of interests (*parts bénéficiaires*) holding at least 10% of the voting rights at the general meeting of shareholders resolving on the discharge of the directors/supervisory board members, may bring an action in the name of the company against the directors/supervisory board members.
- In SAs, SCAs and SARLs, the articles of association may provide for the suspension of the exercise of a shareholder's voting rights in case of a breach by such a shareholder of an obligation towards the company set out in the company's constitutional document or in another document setting out the rights and obligations of the shareholder towards the company (including subscription agreements or contribution agreements). Alternatively, a shareholder may voluntarily give up all or part of his voting rights either temporarily or permanently.
- The articles of association may provide that the change of registered office of SAs and SARLs within the Grand Duchy of Luxembourg may be carried out upon decision of the management body; a change of company's nationality by way of shareholders' resolution is subject to the same quorum and majority rules as the amendments of the company's articles of association
- Minimum number of members of a *société cooperative* is reduced from 7 to 2.
- *Sociétés cooperatives* and SARLs may issue interests referred to as *parts bénéficiaires*.
- The maximum number of shareholders of an SARL to be increased to 100. The additional legal formalities (e.g. details of the annual general meeting of shareholders to be provided for in the articles of association, supervision by auditor, etc.) which currently apply to SARLs with more than 25 shareholders would in the future apply to SARLs with more than 60 shareholders (i.e. the threshold in this respect shall be increased).
- The minimum share capital of a SARL would be reduced to EUR 12,000.-, divided into share(s) with or without a nominal value.
- Statutory recognition in the Companies Law of the possibility to repurchase shares in a SARL.
- SARLs may hold shareholders' meetings by conference/video conferencing call as set out in the company's articles of association (however, at least one shareholder or its representative should be physically present at the company's registered office).
- Statutory recognition of the possibility for a SARL to pay advance dividends.
- Shareholders may enter into voting undertakings whereby they expressly agree to the exercise of their voting rights subject to certain restrictions set out in the Companies Law, e.g. such voting undertaking should not be contrary to the Companies Law or the company's corporate interest and shareholders must not be required to accept voting instructions from the company itself or a subsidiary or their respective management bodies.

The Recast of the EU Insolvency Regulation

Please refer to the Banking, Finance and Capital Markets section of this Luxembourg Legal Update for further details on the above.

Case Law

Decision to File for Bankruptcy – Decision Taken at the Majority Set Out in the Articles of Association – Enforcement of the Decision of the Board of Managers to Delegate the Power to File for Bankruptcy

Court of Appeal, 28 March 2012

Joint and Several Liabilities of Directors – Mismanagement Fault – Exception

District Court, 23 May 2013

Filling of Claim Declaration by Proxyholder of Creditor – Obligation to Append Proxy to Claim – Inadmissibility of Claim Declaration – No Distinction whether Proxyholder is a Lawyer or not

Court of Appeal, 29 January 2014

Please refer to the Litigation section of this Luxembourg Legal Update for further details on the above.

Employment

Case Law

Extension of Trial Period (Sickness Leave) – Termination of Contract during Extended Trial Period

Court of Appeal, 30 April 2015

Long Term Sickness Leave – Distinction between Absences due to Sickness and due to Work Accident

Court of Appeal, 18 November 2014

Please refer to the Litigation Section of this Luxembourg Legal Update for further details on the above.

Funds and Investment Management

EU Developments

UCITS

ESMA Draft Guidelines on UCITS V Remuneration Policies

On 23 July 2015, ESMA published a consultation on proposed guidelines on sound remuneration under UCITS V.

The proposed guidelines aim to provide guidance on proportionality, governance of remuneration, requirements on risk alignment and disclosure. The draft guidelines are based on those already issued on remuneration under the AIFM Directive, as the principles under UCITS V broadly reflect those under the AIFM Directive. Key elements of the draft guidelines include:

- management companies as part of a group
- definition of performance fees
- application of different sectoral rules
- application of the rules to delegates
- payment in instruments.

The draft guidelines also proposes a revision of the existing AIFMD remuneration guidelines by clarifying that in a group context, non-AIFM sectoral prudential supervisors of group entities may deem certain staff of an AIFM in that group to be identified staff for the purposes of their sectoral remuneration rules.

Comments are due by 23 October 2015 and ESMA will aim to publish its final report guidelines by Q1 2016.

ESMA Updated Q&A on KIID

On 26 March 2015, ESMA published an updated version of its Q&A (ESMA/2015/631) on the Key Investor Information Document (KIID) for UCITS.

The revised Q&A contains a new question and answer in relation to the past performance to be disclosed in the KIID in case of UCITS's merger. It clarifies that, in the case of a merger where the receiving UCITS is a newly established UCITS with no performance history, UCITS should use the past performance of the merging UCITS in the KIID of the receiving UCITS if the competent authority of the receiving UCITS reasonably assesses that the merger does not impact the UCITS' performance. In this respect, ESMA indicates that it expects the performance of the UCITS to be impacted if there is, inter alia, a change to the investment policy or to the entities involved in the investment management. ESMA further stresses that it should also be made clear in the KIID of the receiving UCITS that the performance is that of the merging UCITS.

By adding this new question, ESMA has accepted the principle already provided for in ALFI's Q&A document on KIID implementation.

ESMA Opinion on Impact of EMIR on UCITS Directive

On 22 May 2015, ESMA published an opinion (2015/ESMA/880) to the EU institutions on the impact of EMIR on the UCITS Directive.

In its opinion, ESMA calls for a modification of the UCITS Directive to take into account the clearing obligations for certain types of OTC financial derivative transactions under EMIR. Under EMIR, certain OTC derivative transactions are subject to the clearing obligation. This raises the question of how the limits on counterparty risk in centrally cleared OTC financial derivative transactions should be calculated by UCITS, and whether UCITS should apply the same rules to both centrally cleared OTC financial derivative transactions and ETDs.

ESMA's opinion is that counterparty risk limits should be calibrated to the different types of segregation arrangements taking into account elements such as the portability of the position in the case of a default by the clearing member. In particular, ESMA believes that, under individual segregation, UCITS should not apply counterparty risk limits to clearing members whereas under omnibus client segregation UCITS should apply some counterparty risk limits.

AIFMD

Delegated Regulation on Information to be provided to ESMA published in the Official Journal

The AIFMD delegated regulation (EU) 2015/514 of 18 December 2015 was published in the Official Journal on 27 March 2015 and it came into force on 16 April 2015.

This regulation sets out the information which national competent authorities (NCAs) of Member States are required to report each quarter to ESMA pursuant to Article 67(3) of the AIFMD on the AIFMs which are managing and/or marketing AIFs under their supervision, either under the application of the passport regime or under their national regimes.

The aim of this reporting exercise is to allow ESMA to evaluate the functioning of the passport for EU AIFMs managing or marketing EU AIFs in the EU, the operating conditions for AIFs and their managers and the potential impact of an extension of the passport to non-EU AIFM and non-EU AIFs.

ESMA Updated Q&As on AIFMD

On 26 March and 12 May 2015, ESMA published updated versions of its Q&A[1] on the application of the AIFMD, in which a few more questions and answers have been added and/or updated, as summarised below.

- On the issue of reporting to NCAs:
  - One question is updated to provide that AIFMs shall take into account all the AIFs they manage as well as AIFs they market in the EU in order to calculate their reporting frequency.
  - A new question and answer is added concerning how AIFMs should report information on long and short term value exposures before currency hedging, where it is stipulated that information should be provided in the base currency of the AIF.
  - A new question and answer concerning non-EU AIFMs obligation to report stress test results is also inserted, providing that they should report if this is required by the national regime of the Member State where they market their AIFs or if the non-EU AIFMs have already carried out such stress tests.
- On the issue of notification of AIFMs:
  - A new question and answer is added and clarifies that a new notification is not necessary when an AIFMF wishes to manage a new AIF established in a Member State where it already manages AIFs.
- On the calculation of leverage issue:
  - A new question and answer is added on the exclusion of the value of all cash held in the base currency of the AIF when calculating the exposure of an AIF under the gross method. It clarifies that the exclusion of cash held in the base currency applies to both cash and cash equivalents which meet the requirements of Article 7(a) of the AIFMD.
  - A new question and answer is added on which positions AIFMs should take into account when calculating their exposure under the commitment approach.
- On additional own funds:
  - A new response makes clear that AIFMs should exclude investment by AIFs in other AIFs they manage for the calculation of additional own funds under Article 9(7) of the AIFMD. Additionally, investments in other AIFs managed by the same AIFM should not be used to cover potential liability risks arising from professional negligence, as this would increase operational risk.
- On the issue of scope:
  - It is clarified that the determining factor on whether or not a non-EU AIFM (managing the non-EU master AIFs) has to be authorised under the AIFMD depends on the national law of the MS transposing AIFMD.

ELTIFs Regulation

ELTIFs Regulation published in the Official Journal

Regulation (EU) 2015/760 of the EU Parliament and Council of 29 April 2015 on European long-term investment funds (ELTIFs Regulation) was published in the Official Journal on 19 May 2015. The ELTIFs Regulation came into force on 8 June 2015 and will apply from 9 December 2015.

Clifford Chance has prepared a client briefing describing the main characteristics of the ELTIFs Regulation. To view a copy of this client briefing, please click here.

EuVECAs and EuSEFs

ESMA Final Report on EuSEFs and EuVECAs Regulations

On 3 February 2015, ESMA published the final report containing its technical advice to the EU Commission on the delegated acts to be adopted in relation to the European Social Entrepreneurship Funds (EuSEF) and European Venture Capital Funds (EuVECA) Regulations (2015/ESMA/227).

ESMA's final report is divided into five parts addressing the following topics:

- The first part contains advice on the types of goods and services, the methods of production for goods and services and the financial support embodying a social objective in the EuSEF qualifying portfolio undertakings. In this respect, ESMA indicates that having a positive

[1] ESMA/2015/630

social or environmental impact, including a Corporate Social Responsibility plan, is not sufficient to become a EuSEF qualifying portfolio undertaking.

- The second and third parts deal with advice to EuSEF and EuVECA managers on conflicts of interest. In particular, both EuSEF and EuVECA are required to establish a written conflicts of interest policy appropriate to the size and organisation and to the nature, scale and complexity of their business. In addition, EuVECA managers must develop strategies in relation to the exercise of voting rights and must provide information to investors on those strategies and the actions taken on the basis of these.
- The fourth part details the methods and procedures required for the measurement of the committed social impact of EuSEF qualifying portfolio undertakings. Such measurement shall be performed by the EUSEF manager or by third parties, including the qualified portfolio undertakings themselves, on the basis of a methodology in line with the size and the complexity of the business. It also takes into consideration the qualifying portfolio undertakings, the target beneficiaries, the stakeholders and a set of indicators.
- The fifth part specifies the information which EuSEF managers should provide to investors prior to making an investment decision and enhances the process to disclose such information. In particular, EuSEF managers shall provide investors with information on the types of qualifying portfolio undertakings, the social sector where the qualifying portfolio undertakings are active, the geographical area where the activities take place, the sector of society to which the activities are addressed, the legal form of the target companies, the type of eligible assets, the investment techniques and any applicable investment restrictions. Such information shall be presented in a clear and understandable manner for investors.

ESMA will now provide input to the EU Commission as necessary on the development of the delegated acts to be prepared and adopted by the latter on the basis of ESMA's technical advice.

Money Market Funds Regulation

Proposed MMFs Regulation voted by the ECON Committee

On 29 April 2015, the EU Parliament voted its report which contains a legislative resolution on the proposal for a regulation on money market funds (MMFs Regulation), which had been filed initially by the EU Commission on 4 September 2013.

The implementation deadline of the proposed MMFs Regulation is uncertain for the time being.

As a reminder, the aim of the proposed MMFs Regulation is to provide common rules concerning the financial instruments eligible for investment by UCITS and AIFs qualifying as MMFs and established, managed or marketed in the Union, their portfolio and valuation, and their reporting requirements. These rules are intended to improve MMFs' liquidity profile and stability to make them more resilient in times of financial crisis.

In brief, under the proposed MMFs Regulation:

- MMFs would be required to diversify their asset portfolios, follow strict liquidity and concentration requirements and have in place sound stress testing processes. With regard to liquidity management, the proposed MMFs Regulation provides that MMFs should have at least 10% of their portfolio in assets which mature within a day and another 20% which mature within a week. This requirement is intended to allow MMFs to repay investors who want to withdraw funds at short notice. In order to avoid a single issuer bearing undue weight in the net asset value of an MMF, exposure to a single issuer would be capped at 5% of the ST MMF's portfolio (in value terms), whilst for standard MMFs, a single issuer could account for 10% of the portfolio
- MMFs would have to have a rigorous internal assessment procedure in place to determine the credit quality of money market instruments
- the assets of an MMF would have to be valued at least once a day and the result would have to be published daily on the MMF's website
- an MMF should not receive external support from a third party, including from its sponsor, if any
- MMFs would have to report the following information to their investors on a weekly basis: the liquidity profile, credit profile and portfolio composition, weighted average maturity (WAM) of the portfolio, weighted average life (WAL) of the portfolio, and concentration of the top five investors in the MMF.

Under the text approved in February 2015, the ECON Committee indicated that constant net asset value (CNAV) MMFs (i.e. MMFs which maintain an unchanging value NAV per unit or share, where income in the fund is either accrued daily or can be paid out to the investor, and where assets are generally valued according to the amortised cost method or the NAV is rounded to the nearest percentage point or its equivalent in currency terms) would be limited to three types only:

- retail CNAV which would be available for subscription only for charities, non-profit organisations, public authorities and public foundations
- public debt CNAV which would invest 99.5% of its assets in public debt instruments
- low volatility NAV MMF which might display a constant net asset value but under strict conditions.

Benchmark Regulation

Proposed Benchmark Regulation voted by COREPER and ECON Committee

On 13 February 2015, the EU Council' COREPER agreed on and published a text reflecting its negotiating position regarding the proposed regulation on indices used as benchmarks in financial instruments and financial contracts (Benchmark Regulation), which was initially filed by the EU Commission on 18 September 2013. At the EU Parliament, on 7 May 2015, the ECON Committee published its report on the proposed Benchmark Regulation, which report was voted on by the EU Parliament on 19 May 2015. This vote consolidates the EU Parliament's position for trilogue negotiations with the EU Council and the EU Commission. The formal adoption and entry into force of the Benchmark Regulation is now expected by the end of 2015 and its rules should then come into effect one year later, i.e. the end of 2016.

Although not yet entirely finalised, the proposed Benchmark Regulation will introduce new rules to complement other EU directives and regulations—such as the UCITS Directive, MiFID, Prospectus Directive and PRIIP KID Regulation—which already cover certain aspects of certain benchmarks, but which do not address all the vulnerabilities in the process of producing all benchmarks and do not cover all uses of financial benchmarks in the financial industry.

The proposed Benchmark Regulation shall apply to the provision of benchmarks, the contribution of input data to a benchmark and the use of a benchmark within the Union. In particular, the new rules will:

- cover a wide range of indices, including not only interest rates, such as LIBOR, but also currencies, commodities and many other less obvious benchmarks (such as weather) by reference to which the amount payable under a financial instrument or financial contract, or the value of a financial instrument is determined. It also covers any index used to measure the performance of an investment fund (including UCITS or AIFs) with the purpose of tracking the return of such index or to define the asset allocation of a portfolio or to compute the performance of fees
- regulate benchmark administration by introducing extensive record-keeping obligations and a requirement for benchmark administrators to obtain authorisation from national regulators
- restrict the use in the EU of benchmarks provided by administrators located in non-EU jurisdictions by introducing a non-member country regime.

While the most onerous requirements under the Benchmark Regulation will affect benchmark administrators, entities which contribute data to, or which simply use, benchmarks (including UCITS and AIFs) may potentially also fall within and be impacted by the new regulation's perimeter. In particular, the proposed Benchmark Regulation prohibits supervised entities (such as hedge funds and other regulated investment funds) from using benchmarks provided by an unauthorised EU or non-EU administrator.

Clifford Chance has prepared a client briefing describing the main characteristics of the Benchmark Regulation. To view a copy of this client briefing, please click here.

SFTs Regulation

Final Compromise Text for Securities Financing Transactions Regulation

The final compromise text on the proposed regulation on reporting and transparency of securities financing transactions (SFTs Regulation), was published on 26 June 2015. This compromise text follows the political agreement reached on 17 June 2015 by the EU Commission, the EU Parliament and the Council on the proposal for a SFTs Regulation initially filed by the EU Commission on 29 January 2014. The formal adoption of the SFTs Regulation is now expected later this year.

Broadly speaking, SFTs are any transaction where securities are used to borrow cash, or vice versa. In practice, this mainly includes repurchase agreements (repos), securities or commodities lending or borrowing activities, sell/buy-back transactions, collateral swaps and reuse of financial instruments received as collateral.

The proposed SFTs Regulation seeks to improve the transparency surrounding SFTs and reuse and limit the perceived risks of SFTs and reuse by introducing new rules in the following four areas in relation to the risks created by SFTs:

Central reporting and recordkeeping of SFTs

As the complex and opaque nature of SFTs makes it difficult to identify counterparties and for supervisors to monitor risk concentration, the proposed SFTs Regulation requires that:

- all counterparties (including UCITS management companies/investment companies and AIFs managed by authorised or registered AIFMs within the meaning of the AIFMD) report to a trade repository authorised or recognised under the proposed SFTs Regulation the details of any SFT carried out by no later than the working day after the SFT is entered into, modified or terminated
- all counterparties keep a record of their SFTs for five years from the termination of the transaction.

Disclosure of the use of SFTs and total return swaps to investors

The proposed SFTs Regulation requires that :

- UCITS management companies/investment companies disclose to investors their use of SFTs and total return swaps in the relevant UCITS' annual and half-yearly reports
- AIFMs disclose to investors their use of SFTs and total return swaps in the annual reports of the relevant AIFs they manage
- UCITS' prospectuses and AIFs' offering memorandum/disclosure of information to investors as referred to in Article 23 of AIFMD disclose the SFTs and total return swaps that UCITS management companies/investment companies respectively AIFMs are authorised to use (by including all the data as prescribed by Annex B of the SFTs Regulation) and include a clear statement that these techniques are used.

Minimum requirements for reuse of financial instruments received as collateral

The proposed SFTs Regulation restricts the cases in which counterparties are permitted to reuse financial instruments received as collateral and specifies the conditions to be fulfilled when financial instruments received as collateral may be reused. In particular, the following conditions will have to be complied with:

- The providing counterparty must be informed by the receiving counterparty about the risks and consequences involved in granting a right to use collateral provided under a security collateral arrangement or transferring a title to it, such as the risks arising in the event of the receiving counterparty defaulting.
- The providing counterparty must grant its prior express consent, evidenced by signature in writing or in a legally equivalent manner, of the providing counterparty to a security collateral arrangement or must have expressly agreed to provide collateral by way of title transfer collateral arrangement.
- Any exercise by counterparties of their right to reuse shall be subject to the condition that the reuse is undertaken in accordance with the terms specified in the collateral arrangement and that the financial instruments received under a collateral arrangement are transferred from the account of the providing counterparty.

For the avoidance of doubt, the way reuse is regulated by the SFTs Regulation is without prejudice to stricter sectoral legislation, such as the UCITS Directive and AIFMD and national law aimed at ensuring a higher level of protection of providing counterparties.

Minimum requirements relating to haircuts applicable to SFTs

The proposed SFTs Regulation introduces various requirements relating to the calculation and receipt of haircuts which are seen as necessary to mitigate the perceived systemic risks associated with SFTs and reuse.

While the effect of the above new rules on current practices should be marginal, the structuring and pricing of SFTs is nevertheless likely to be impacted by the requirements relating to minimum haircuts, and market participants, including UCITS management companies/investment companies and AIFMs, will need to put in place appropriate measures for disclosure and reporting, with similar challenges to those faced in the reporting of OTC derivatives under EMIR.

However, the disclosure and reporting obligations impacting UCITS management companies/investment companies and AIFMs will be subject to the following grandfathering provisions:

- the disclosure obligation in half-yearly and annual reports of UCITS and AIFs shall apply from 12 months after the date of entry into force of the SFTs Regulation
- the disclosure obligation in the prospectuses or offering memorandums of existing UCITS and AIFs shall apply

from 18 months after the date of entry into force of the SFTs Regulation

- the reporting obligation for UCITS management companies/investment companies respectively AIFMs shall apply from 18 months after the date of entry into force of the delegated acts to be adopted by the EU Commission in order to specify the detail of the reporting obligation.

Clifford Chance has prepared a client briefing describing the main characteristics of the SFTs Regulation. To view a copy of this client briefing, please click here.

AML Directive

Please refer to the Banking, Finance and Capital Markets section of this Luxembourg Legal Update for further details on the above.

Luxembourg Legal and Regulatory Developments

Establishment of Systemic Risk Committee

Law of 1 April 2015

Please refer to the Banking, Finance and Capital Markets section of this Luxembourg Legal Update for further details on the above.

FATCA

Bill N°6798

Please refer to the Tax section of this Luxembourg Legal Update for further details on the above.

UCITS Depositaries

CSSF Circular 15/608

On 23 March 2015, the CSSF issued Circular 15/608, which modifies the deadline for compliance by depositaries of Luxembourg UCITS with the requirements laid down in Circular 14/587 of 11 July 2014.

As a reminder, Circular 14/587 clarifies the depositary regime of Luxembourg UCITS by defining new organisational arrangements, which must be put into place within depositaries of UCITS established in Luxembourg as well as within Luxembourg UCITS themselves in relation to the duties, obligations and rights concerning the UCITS depositary function. As far as is possible, these clarifications anticipate the standardisation of the depositary regimes of both Luxembourg UCITS and AIFs with regard to their common elements, as they are due to emerge further to the forthcoming implementation of the UCITS V Directive into Luxembourg law.

In order to be consistent with the implementation deadline of the UCITS V Directive, Circular 15/608 provides that credit institutions established in Luxembourg acting as depositaries of Luxembourg UCITS as well as Luxembourg UCITS, where appropriate represented by their management company, must comply with the provisions of Circular 14/587 by 18 March 2016 (instead of 31 December 2015, as initially required).

In Circular 15/608, the CSSF also reconfirms that the regime set out in Circular 14/587 will be amended in due time in order to be aligned with the full depositary requirements imposed by the UCITS V Directive and the delegated acts to be adopted later

Automatic Exchange of Tax Information and Money Laundering Repression in Tax Matters

CSSF Circular 15/609

Please refer to the Tax section of this Luxembourg Legal Update for further details on the above.

Managing the Risks Related to the Outsourcing of Systems Allowing Compilation, Distribution and Consultation of Management Board/Strategic Documents

CSSF Circular 15/611

Please see the presentation made in this respect in the Banking, Finance and Capital Markets section of this Luxembourg Legal Update.

Information to be Submitted by Luxembourg AIFMs in relation to EU/non-EU Unregulated AIFs and/or -EU Regulated

CSSF Circular 15/612

On 5 May 2015, the CSSF issued Circular 15/612 dated 5 May 2015 relating to the information to be submitted by Luxembourg AIFMs in respect of any additional EU/non-EU unregulated AIFs and/or any additional non-EU regulated AIFs managed by them.

The new circular applies to all Luxembourg AIFMs authorised by the CSSF under Article 5 of the Luxembourg law of 12 July 2013 on alternative investment fund managers (AIFM Law) as well as to so-called “small” or “sub-threshold” Luxembourg AIFMs, which have been registered by the CSSF under Article 3 of the AIFM Law, when these AIFMs start to manage additional unregulated

AIFs established in Luxembourg, in another EU Member State or in a non-member country and/or additional regulated AIFs established in a non-member country. For the avoidance of doubt, Circular 15/612 does not apply to Luxembourg AIFMs managing regulated EU AIFs.

According to Circular 15/612, an AIF is “unregulated” when it is not subject to prior authorisation and/or prudential supervision by a competent supervisory authority. Moreover, an AIF will qualify as “additional AIF” within the meaning of Circular 15/612 when it has not been notified to the CSSF at the time of either the AIFM's authorisation/registration procedure with the CSSF or of the update of the AIFM's authorisation/registration file with the CSSF.

The information will be communicated to the CSSF using a specific information form (available on the CSSF website) and will include, among others, the name of the AIFM as well as various information on the relevant additional AIF managed, such as its name, nationality, address, national competent supervisory authority (if applicable), reference currency, type of shares/units, investment strategy, country(ies) where it is marketed to professional investors, name and address of its depositary bank, etc. Additional information is also required on the master AIF in the case of master-feeder AIFs and, in the case of multiple compartment AIFs, the relevant information will have to be communicated for each new compartment. In addition, the last updated instruments of incorporation, issue document (where applicable) and annual report (if already produced) of the relevant AIF will have to be annexed to the information form.

The information form and complementary documents must be sent to the CSSF to the following e-mail address: aifm@cssf.lu, within 10 business days following the date on which a Luxembourg AIFM starts to manage an additional unregulated AIF and/or non-EU regulated AIF. In this respect, the CSSF considers that an AIFM starts to manage an AIF at the latest on the date of signature or entry into force of the agreement whereby the AIFM is designated as the manager of the relevant additional AIF, even if such AIF is not launched yet.

For the avoidance of doubt, Luxembourg AIFMs must also inform the CSSF if they stop managing unregulated AIFs and/or non-EU regulated AIFs. Such notification must be done within 10 business days following termination of the management mandate, also by using a specific information form available on the CSSF website.

Immobilisation of Bearer Shares

CSSF Press Release 15/16 and Updated FAQ on the Law of 28 July 2014

Press Release

On 27 March 2015, the CSSF issued a press release informing holders and issuers of bearer shares/units of the next steps to comply with the Luxembourg Law of 28 July 2014 on the immobilisation of bearer shares and units.

The press release describes the bearer shares/units within and outside the scope of the Law. The CSSF expresses the view that bearer shares/units deposited in a securities settlement system (SSS) such as Clearstream or Euroclear and represented by a global certificate or physical individualised certificates are outside the scope of the Law since the shares/units lose their bearer character upon deposit in an SSS.

The CSSF strongly recommends that holders of physical individualised bearer shares/units covered by the Law:

- deposit them in an account with a financial institution
- obtain information from the issuer on the ways of transforming the units/shares into nominal or dematerialised units/shares
- obtain information from UCI documentation with respect to UCI shares/units
- obtain information from the issuer on the appointed depositary, where they can immobilise shares/units. Timely immobilisation is necessary to avoid suspension of voting rights and, with effect from 18 February 2016, annulment of shares/units not duly immobilised.

The CSSF further strongly recommends that issuers:

- unambiguously and fully inform holders on the implementation of the Law
- offer the possibility of transforming the bearer shares/units into nominal or dematerialised shares/units
- offer any assistance to holders with respect to the immobilisation of the shares/units with their appointed depositary. Similar recommendations are provided for UCI issuers.

The CSSF will monitor with all available instruments whether entities appointed as depositaries under the Law subject to its supervision comply with the Law. The CSSF will specify its requirements, notably with respect to reporting, directly vis-à-vis the entities. The supervision by the CSSF is without prejudice to potential criminal law sanctions under the Law.

Updated FAQ

On 5 May 2015, the CSSF issued an updated version of its FAQ on the Law of 28 July 2014.

The only real difference introduced in the revised FAQ is that the CSSF no longer requires regulated UCITS, Part II UCIs, SIFs and SICARs, which are incorporated under the form of an FCP, SA or SCA and have issued bearer shares/units, to amend their prospectus in order to inform their shareholders/unitholders on the implications and deadlines of the Law of 28 July 2014. This information can be obtained by all the usual means, including the usual information sources used by the relevant regulated investment fund as stated in its prospectus.

Other changes to the FAQ are grammatical amendments to reflect the fact that the final deadline for appointing a depositary of bearer shares/units, i.e. 18 February 2015, has now passed. Consequently, voting rights related to bearer shares/units which were not deposited by that deadline have been automatically suspended and distributions have been deferred since then. For the avoidance of doubt, bearer shares/units which would not be duly deposited with the appointed depositary will be cancelled by 18 February 2016 at the latest.

CSSF Annual Report 2014

The CSSF published its annual report for 2014 in May 2015. In addition to statistical information concerning the Luxembourg financial sector, the report contains some information on the exercise by the CSSF of its regulatory powers. In particular, the following points, without being exhaustive, are relevant for Luxembourg UCITS and SICARs.

Shareholding of PFS (SICARS and PE structures)

The annual report recalls that the CSSF provided an updated Q&A paper on the status of PFS in February 2015 clarifying, among other points, that private equity structures and SICARS are in principle not acceptable as shareholders of a Luxembourg PFS or of another supervised entity, unless they plausibly justify that their presence in the shareholding structure does not threaten the stability of the entity.

UCITS

With regard to the investment policy of UCITS funds, the CSSF annual report recalls that:

- SIFs do not qualify as “other UCIs” within the meaning of Article 41(1) sub-paragraph (e) of the UCI Law.
- The China Interbank Bonds Market (CIBM) and the Shanghai-Hong Kong Stock Connect (SHSC) programme can be considered as regulated markets within the meaning of Article 41(1) sub-paragraph (c) of the UCI Law. However, Luxembourg UCITS which intend to invest part or all of their assets in financial instruments listed or traded on the CIBM or through the SHSC must comply with or ensure that the following conditions are complied with:
  - the UCITS' prospectus and KID must clearly indicate that the relevant UCITS invests in financial instruments listed or traded on the CIBM or through the SHSC and must furthermore contain specific disclosure to inform investors of the specific risks linked to such investments
  - the UCITS' risk management policy must cover in an appropriate manner the specific risks linked to investments in financial instruments listed or traded on the CIBM or through the SHSC
  - the liquidity of financial instruments listed or traded on the CIBM or through the SHSC cannot compromise the global liquidity of the UCITS' portfolio in order to meet redemption orders
  - the UCITS investment manager must demonstrate specific experience in the management of financial instruments listed or traded on the CIBM or through the SHSC
  - accounts opened by the UCITS' depositary bank of with a sub-custodian in Hong Kong are segregated at the level of the UCITS' sub-funds or structured as UCITS client assets omnibus accounts of the Luxembourg depositary with that sub-custodian
  - the broker model involving delivery versus payment settlement must be chosen in order to limit counterparty risk
- UCITS whose manager is authorised as Renminbi Qualified Foreign Institutional Investor (RQFII) may, in principle, invest up to 100% of their net assets on the CIBM (vs. 35% only for UCITS, the manager of which is accredited as Qualified Foreign Institutional Investor (QFII)).

Please refer to the Banking, Finance and Capital Markets section of this Luxembourg Legal Update for further details on the above.

Luxembourg RQFII Quota Granted by PBOC

On 29 April 2015, the People's Bank of China (PBoC) announced that the Renminbi Qualified Foreign Institutional Investor (RQFII) scheme was expanded to Luxembourg with an initial total investment quota of RMB 50 billion.

The RQFII scheme was launched in China on 16 December 2011. So far, it has been expanded to 12 countries/regions, including Hong Kong (RMB 270 billion), U.K. (RMB 80 billion) Taiwan (RMB 100 billion), Singapore (RMB 50 billion), France (RMB 80 billion), South Korea (RMB 80 billion), Germany (RMB 80 billion), Qatar (RMB 30 billion), Canada (RMB 50 billion), Australia (RMB 50 billion), Switzerland (RMB 50 billion) and Luxembourg (RMB 50 billion).

The RQFII programme in Luxembourg offers another channel for foreign investors to enter China's capital markets and is a welcome step in the continued internationalisation of the RMB.

ALFI Technical Guidelines on Infrastructure Funds

In May 2015, ALFI issued new technical guidelines regarding Luxembourg infrastructure investment vehicles. The document provides general information on legal and taxation aspects of regulated and un-regulated infrastructure investment vehicles domiciled in the Grand Duchy of Luxembourg and sets out some of the relevant considerations which need to be taken into account when contemplating infrastructure investments.

In particular, ALFI's guidelines state that the CSSF allows relaxed risk-diversification requirements for SIFs investing in infrastructure assets. These are considered as appropriately diversified by the CSSF if they hold at least two investments, with no investment representing more than 75% of their total assets, subject to certain conditions.

Tax Circular L.G. – A. N°61

Issuance of residency Certificates for Luxembourg Investment Funds

Please refer to the Tax section of this Luxembourg Legal Update for further details on the above.

Case Law

VAT Exemptions Applicable to the Management Services Provided to UCIs.

European Court of Justice, Case C-595/13

Please refer to the Litigation section of this Luxembourg Legal Update for further details on the above.

Litigation

CSSF Annual Report 2014

In its report, the CSSF puts forward a certain number of complaints which it had to handle in the course of 2014.

For instance, it had to deal with client complaints regarding the application of early repayment penalties or indemnities to borrowers who made or intended to make an early mortgage credit repayment. The CSSF noted that many borrowers, upon signature of a credit agreement, do not realise that early repayment clauses may place a very heavy financial burden on them. The CSSF first rejected claims from clients who were duly informed about the penalty at the time of entering into their mortgage credit agreement. According to the CSSF, these clients had no grounds to dispute the rate set by the bank. However, where the rate has not been set in advance, the CSSF asks the bank to explain the situation and checks whether the calculation method used by the bank to determine the early repayment indemnity amount is really intended to cover the loss incurred by the bank as a result of its incapacity to set rates which are as attractive for the bank as those agreed with the parties upon conclusion of the loan agreement.

In addition, the CSSF was involved in various disputes in which clients complained about being advised to invest in inappropriate financial products. In order to settle these disputes, the CSSF first considered whether the binding contractual documents were clear as to the scope of the mission entrusted to the banker, resulting in a good understanding of each party's potential liabilities. It then considered the features of the management as agreed between the parties. In one specific case, the CSSF noted that the assisted management contract clauses were ambiguous, if not incompatible. Indeed, although there was a clause stating that, in any event, the banker would undertake not to place any investment order, nor carry out any investment without seeking and obtaining the prior consent of the client, there was another clause stating that the client authorised the professional to conduct, on its own initiative, a long list of certain transactions. The CSSF also pointed out that the client in question wished for a prudent management of its assets and allowed a low exposure to market fluctuations and that the products advised did not match the client's profile; the description of the product clearly indicated that it was a high-risk and complex financial instrument. The CSSF concluded that the professional had not made all the arrangements the claimant was entitled to expect from a professional in the financial sector within the framework of assisted management.

The CSSF also receives complaints from persons who face difficulties in opening an account with a bank.

The CSSF first recalls that the decision to accept or refuse a client generally falls under the bank's commercial policy, an area in which the CSSF does not generally intervene. However, it emphasises that the European Commission has issued a recommendation regarding access to a basic payment account in order to make it easier for the persons concerned to access a payment account. Moreover, such a right has been reinforced by a European Directive introducing the right to access to a basic payment account. In concrete terms, where the CSSF receives a complaint from persons about their incapacity to open an account with a Luxembourg bank, the CSSF invites them to get in contact with the "*Entreprise des Postes et Télécommunications*" which is, in principle, legally obliged to open a current account for any person.

Use of Client List of Competitor and Act of Unfair Competition

Supreme Court, 6 November 2014[2]

A former insurance agent used the client list of the insurance company he used to represent in order to inform its clients of the end of their collaboration. He did this by means of a letter to which was attached an advertising document issued by another insurance company, sending to most of these clients pre-prepared existing insurance policy termination forms. As a result of this, the insurance company he used to represent sued him in order to stop this "unfair practice". The Court of Appeal declared the claim unfounded because it considered that this behaviour was in no way contrary to good commercial practice, since there was no evidence that the client list had been fraudulent obtained, either on the basis of the number of insured persons who terminated their insurance contract or by the fact that the client list or the insurance contracts had been consulted by the intermediary after termination of the general agent contract. The Supreme Court quashed this judgment. It first recalled the definition of "act of unfair competition" (any act contrary to good commercial practices by which a trader takes or seeks to take clients away from his competitors or prejudices or seeks to prejudice their

[2] Supreme Court, 6 November 2014, N°70/14

ability to compete). The Supreme Court then ruled that the Court of Appeal, in considering that the agent had used the client list of the insurance company he used to represent but that such behaviour was not unfair because the first had not been fraudulently obtained, had added "fraudulently obtaining" as a precondition for “unfairness” and, in doing so, had created a condition not foreseen by law.

Decision of Urgent Proceedings for Provision of Costs and Cessation of Payments

Supreme Court, 12 February 2015[3]

A company had been sued in urgent proceedings for provision of costs and had been ordered to pay the sum of EUR 83,000 to another company. The creditor then appointed a court bailiff entrusted to enforce the decision, but the latter issued a statement of insolvency (*procès-verbal de carence*). Subsequently, the debtor company was summoned for bankruptcy and two courts (including the Court of Appeal) declared it bankrupt. The bankrupt company in question lodged an appeal before the Supreme Court, claiming that the order approved by the court in urgent proceedings was not irrevocable and sufficient alone to justify the debtor's bankruptcy and therefore court could only declare the debtor bankrupt after checking itself whether the bankrupt company was indeed the creditor's debtor. The Supreme Court rejected the bankrupt company's claim after considering that the Court of Appeal had the option to take into consideration a decision of urgent proceedings for provision of costs (which is a writ of execution) when considering the cessation of payments, without having to check whether the decision was well-founded.

Banking, Finance and Capital Markets

Bank's Liability – Limitation of Liability Clause

Court of Appeal, 8 February 2012[4]

A client gave instructions to his bank by telephone. Unfortunately, such orders were not executed by the bank and the client asked for damages. The general terms and conditions of the bank provided for a non-liability clause with regard to damages resulting from instructions through telephone. Additionally, according to the terms and conditions, the bank is only held by obligations of means towards the client, with no performance obligations. Limitations of liability or non-liability clauses are, in principle, valid. They cannot, however, cover intentional misconduct or gross negligence. In this case, the failure to execute a client order could not be considered as gross negligence.

With regard to the onus of proof, in principle, when transmitting client orders, a bank is bound by performance obligation and a bank's liability would be engaged by the sole fact of a non-performance of such obligation. However, in this case, the bank's general terms and conditions provide that the bank is only held by an obligation of means. For this reason, a client cannot rely on the sole fact that the bank has not performed its contractual obligations properly. If the client wants to obtain damages from the bank, in presence of a non-liability clause, it has to establish gross negligence by the bank.

Usurious Interest Rate – Validity of Margin Call Provisions

District Court, 19 February 2014[5]

Luxembourg law does not set a threshold over which an interest rate would be qualified as a usurious interest rate (*taux d'intérêt usuraire*). According to Article 1907-1 of the Luxembourg Civil Code, if a lender knowingly takes advantage of the borrower's discomfort or inexperience, in order to obtain for himself or others interest or other benefits which clearly exceed interest which would be normal with a view to the risk regarding the loan, a judge may, at the request of the borrower, reduce the borrower's obligations to the repayment of the principal and payment of the legal interest rate. According to the District Court, in such a demand, the applicant has to demonstrate that the interest rate is clearly excessive. In this case, it had not been demonstrated by the applicant that an 8.93% per annum rate was clearly excessive.

The District Court also took a position with regard to the validity of contractual clauses regarding margin calls or the determination of security margins with a view to the prohibition of certain types of potestative condition under Luxembourg law. According to Article 1170 of the Luxembourg Civil Code, “a potestative condition is a condition which makes the fulfilment of the agreement dependent upon an event which one or the other of the

[3] Supreme Court, 12 February 2015, N°11/15
[4] Court of Appeal, 8 February 2012, N°36360
[5] District Court, 19 February 2014, N°134611 and 137139

contracting parties has the power to make happen or to prevent from happening". If the condition depends on the will of the creditor, the condition is valid. However a condition which depends on the will of the debtor is void, according to Article 1174 of the Luxembourg Civil Code, which provides that "an obligation is void where it was contracted subject to a potestative condition on the part of the one who binds himself". According to the Court, clauses regarding margin calls are valid, as they depend on the will of the creditor.

Violation of Rules of Conduct in the Financial Sector – Civil Liability (yes)

Supreme Court, 26 March 2015[6]

In recent years, the Court of Appeal had to decide a number of times whether the non-compliance with certain rules of conduct resulting e.g. from the Financial Sector Law, the AML Law or certain rules of conduct by banks or other players in the financial sector could be considered as a basis for an action for damages by a client of such entity if it has suffered a loss because of the violation of such rules.

With few exceptions, the Court of Appeal considered, as a general principle, that rules of conduct in the financial sector were only designed for general interest. Thus, these provisions did not constitute a legal basis which could be raised by individuals in an action for damages.

However, recently, the position of case law has evolved. Firstly, the Court of Appeal admitted that a client may base a claim for damages on the violation of conduct rules if such rules have been provided for in the clients' interest. And very recently, the Supreme Court stated that the fact that a provision was specifically provided for in order to protect the general interest does not exclude that it could also protect private interests and give rise to compensation for individuals affected by the breach of such rule.

[6] Supreme Court, 26 March 2015, N°3420

Corporate and M&A

Decision to File for Bankruptcy – Decision Taken at the Majority Set Out in the Articles of Association – Enforcement of the Decision of the Board of Managers to Delegate the Power to File for Bankruptcy

Court of Appeal, 28 March 2012[7]

On 28 March 2012, the Court of Appeal considered that the decision to file for bankruptcy shall be taken by the board of managers of a SARL, when there is one in place, in accordance with the majority rules provided in its articles of association.

In this case, the board of managers of a SARL decided on 2 January 2012, in accordance with the majority rules provided in its articles of association, to authorise the class B and C managers of the company, each acting individually, to file for bankruptcy in the name of and on behalf of the company. This power to file for bankruptcy has been exercised by a class B Manager.

The Court of Appeal recalled that a distinction shall be made between the provisions of the articles of association concerning the board of managers' rules of majority for internal management decisions (*actes de gestion)* on the one hand and the representation of the company towards third parties on the other hand (*actes de représentation*). As the company was managed by the board of managers, the decision to file for bankruptcy was adopted in accordance with the rules on the board of managers provided for in the articles of association. As a result, in accordance with the articles of association and the decision of the board of managers, the Company was validly bound and represented towards third parties by the individual decision of a class B or C manager. These two sets of provisions in the company's articles of association on the board of managers' majority rules and power of representation are complementary and not conflicting.

Furthermore, the Court of Appeal also pointed out that the filing of the bankruptcy petition does not necessarily trigger the commencement of bankruptcy proceedings. In principle, before starting bankruptcy proceedings, a court should determine whether a company has actually ceased its payments, which was indeed the case for the SARL under consideration.

[7] Court of Appeal, 28 March 2012, N°38171

Joint and Several Liability of Directors – Mismanagement – Exception

District Court, 23 May 2013[8]

On 23 May 2013, the District Court declared that the directors may only be held liable in solidum provided that they committed a common fault without any possibility of clarifying the individual involvement of each director.

In 2001, a Luxembourg SA (the SA) granted a loan to a Bahamian company for an aggregate amount which included the full amount of the share capital of the SA. The loan agreement was signed by one of the directors of the SA, being the SA's Managing Director (*administrateur-délégué*).

In 2006, the SA was put into compulsory liquidation and the liquidator made a claim against the SA's directors alleging mismanagement entailing their joint liability, claiming that they granted a loan of an amount which included the company's capital, without requesting any guarantee.

The District Court considered that a directors' decision to grant a loan without any guarantee does not constitute a failure in the management of the company because the SA failed to prove that the liquidation was caused by the loan. The SA continued to operate and meet its financial commitments for 3 years after having entered into such loan agreement. In addition, the accounts for the financial year 2001 were approved by the shareholders of the SA and valid discharge was granted to its directors. Therefore, the District Court declared that the claimant did not establish that the directors committed mismanagement by granting this loan.

Filing of Claim Declaration by Proxyholder of Creditors – Obligation to Append Proxy to Claim – Inadmissibility of Claim Declaration – No Distinction whether Proxyholder is a Lawyer or not

Court of Appeal, 29 January 2014

Following the commencing of the liquidation of Landsbanki Luxembourg S.A., creditors filed their claim (*déclaration de créance*) in order to participate in the proceeds of the liquidation. The liquidator declared that their claim was ineligible on the grounds that the person who signed it did not specify that he was acting in his capacity as proxyholder of the creditors.

On 16 February 2011, the District Court confirmed the liquidator's decision and rejected the claims pursuant to Article 498 of the Luxembourg Code of Commerce: the creditors can nominate a proxyholder to sign the claim, provided that the proxy is attached to the claim. This statutory provision is a public policy rule (*d'ordre public*).

The creditors lodged an appeal against the decision of the District Court by relying on a decision of the French Supreme Court which applied a distinction between ordinary proxyholders and lawyers. The claimants held that lawyers were not required to comply with the formalities of Article 498 of the Luxembourg Code of Commerce.

The Court of Appeal[9] confirmed the decision of the District Court and rejected the application of the French decision in Luxembourg. The Court of Appeal indicated that required formalities of Article 498 shall be applied in all cases whether the proxyholder is a lawyer or not.

Employment

Extension of Trial Period (Sickness Leave) – Termination of Contract during Extended Trial Period

Court of Appeal, 30 April 2015

The Court of Appeal has upheld the decision rendered by the Labour Court on 25 October 2013 (see our newsletter of July 2014).

The Court of Appeal has confirmed that, when an employee is on sickness leave, the employer only recovers the right to terminate the contract during the trial period on the very last day on which a valid termination of the contract may occur (taking into consideration the extension of the trial period).

The Court of Appeal has ruled that the form, procedure and consequences of the termination must be assessed on the date the termination letter is sent to the employee and hence the notice period starts on that date and not on the following day.

The sole fact that the very last day to notify the termination of the contract was a Saturday (i.e. a day where the employer's offices were closed) is irrelevant for the Court of

[8] District Court, 23 May 2013, N°122872

[9] Court of Appeal, 29 January 2014

Appeal. A termination letter can indeed be sent on a Saturday, whether or not it is a working day at the company.

As the employer sent the termination letter to the employee at a time the employee was still protected against dismissal, and as the employer sent the termination letter on a date which was not the very last possible date for notifying the termination, the Court of Appeal confirmed that this termination had to be considered as unlawful (for having been made in violation of Article L.121-6 of the Labour Code).

Long Term Sickness Leave – Distinction between Absences Due to Sickness and Due to Work Accident

Court of Appeal, 18 November 2014[10]

In a judgment of 9 July 2012 the Labour Court of Diekirch ruled that the termination of an employment contract for reasons of long-term sickness absences was valid, thus finding for the employer who had argued that the employee's numerous absences,, even if they were due to sickness reasons, was disruptive to the proper running of the business.

In its decision of 18 November 2014 the Court of Appeal overruled this judgment. It held that a distinction must be made between those absences which are due to sickness and those which are the consequence of a work accident. Regarding the latter, they may not justify the termination of an employment contract as the employer has to bear the risks related to the running of his business. The Court of Appeal reached therefore the conclusion that a certain number of absences during 2006 and 2007 had to be disregarded, and decided that, as a consequence, the remaining absences were not numerous enough to create a disruption in the running of the business. The dismissal was hence declared as being unfair and the employer was ordered to pay damages.

To our knowledge, this is one of the first decisions that states that the courts must verify the cause at the origin of the sickness leave when assessing whether a dismissal based on numerous absences for sickness reasons is fair or not.

Funds and Investment Management

VAT Exemption Applicable to the Management Services Provided to UCIs

European Court of Justice, Case C-595/13

Please see the presentation made in this respect in the Tax section of this Luxembourg Legal Update.

Tax

Super-Reduced VAT Rate on Electronic Books – Incompatible with EU VAT Directive

European Court of Justice, 5 March 2015[11]

On 5 March 2015, the ECJ ruled against Luxembourg by considering that it failed to fulfil its obligations under the EU Directive 2006/112/EC on the common system of VAT in relation to the application of the super reduced VAT rate of 3% to the supply of electronic books.

The Commission had brought an action before the ECJ for infringement of EU law on the grounds that the application of the super reduced rate to the sale of electronic books was incompatible with Articles 96 to 99, 110 and 114 of the VAT Directive. The ECJ followed the reasoning of the Commission by considering that the reduced VAT rate was applicable only to transactions consisting in the supply of a physical book and not electronic books. The ECJ was of the view that the supply of electronic books has to be considered as an “electronically supplied service” within the meaning of Article 98(2) of the VAT Directive, and not as a tangible property subject to reduced VAT rate.

Following such decision, the Luxembourg Tax Authorities issued Circular L.I.R. N°756bis on 16 March 2015. For further information see Circulars/Regulatory Developments above.

Opinion of Dutch Advocate General on Luxembourg SICAVs

Dutch Supreme Court – AG Opinion – 3 April 2015

On 3 April 2015, in a case pending before the Dutch Supreme Court, the Dutch Advocate General took the position that a Luxembourg investment fund (SICAV) cannot benefit from the exemption of withholding tax granted to certain Dutch investment funds in relation to

[10] Court of Appeal, 18 November 2014, N°40229

[11] European Court of Justice, 26 March 2015, Case C-595/13

dividends distributed by Dutch companies. Since the Luxembourg SICAV would not be comparable to Dutch investments funds referred to in Article 10(1) of the Dutch Dividend Withholding Tax Law, the 15% Dutch withholding tax should not be refundable.

This was the position supported by the Dutch lower courts (the Court of Zeeland-West Brabant and the Court of Appeal's-Hertogenbosch). Although it was argued by the Luxembourg SICAV that there was a restriction to the free movement of capital (Article 63 TFEU), the Dutch judges ruled that the Dutch and Luxembourg funds could not be compared. While Luxembourg SICAVs can maintain their earnings (i.e. no mandatory upstream distributions), Dutch funds must distribute a portion of their profits after a certain period of time. For this reason, the withholding tax levied on dividend payments deriving from participations in Dutch companies would be replaced by a withholding tax borne by Dutch funds' investors. In contrast, in the case of Luxembourg SICAVs, distributions made by a Luxembourg fund would not be subject to Dutch withholding tax. As such it would only have been subject to tax if the fund had been established in the Netherlands.

To the extent that the Dutch Supreme Court's decision follows the Advocate General's opinion, this may have tax implications for Luxembourg SICAVs investing directly in Dutch companies.

Opinion of Advocate General on in-put VAT Deduction Right for Holding Companies

European Court of Justice, 26 March 2015[12]

On 26 March 2015, the Advocate General (AG) of the ECJ rendered his opinion on the joined cases C-108/14 and C-109/14 regarding two questions submitted by Germany, being:

- the VAT deduction right of holding companies
- the VAT grouping rules.

With respect to the first question raised by Germany, the AG concluded that expenditure incurred by a holding company in relation to the acquisition of shareholdings in subsidiaries for the benefit of which it would provide management services should be considered as connected only to its economic activity. As a result, input VAT on expenditure linked to the acquisitions of shares should be VAT deductible for holding companies. However, the AG indicated that it is not up to the ECJ to determine a calculation method for the pro-rata of VAT deduction.

Such an opinion is rather favourable to holding companies and may have implications in Luxembourg to the extent that the ECJ's decision follows the AG's opinion, which should be rendered in principle before year-end.

Opinion of Advocate General on VAT Exemption on Management Services to Real Estate Investment Funds

European Court of Justice, 20 May 2015[13]

On 20 May 2015, the AG of the ECJ rendered his opinion on case C-595/13 regarding the VAT treatment of management services to collective investment funds. The question from the Netherlands was whether the VAT exemption granted to the management of special investments funds would also apply to the management of real estate investment funds.

In this case, three companies were set up by pension funds in order to undertake a number of activities in relation to the acquisition, sale and exploitation of immovable properties. These activities were delegated to another Dutch company, including the acquisition and disposal of immovable properties as well as the management of immovable properties. The ECJ was asked to rule on:

- whether the group of Dutch companies should be regarded as special investment funds for the purpose of the VAT exemption and, if so
- whether the actual exploitation of immovable property as performed by a third party on behalf of the real estate fund would fall within the scope of “management” within the meaning of the VAT exemption.

The Advocate General concluded that property investment companies should qualify as special investment funds within the meaning of the VAT Directive to the extent that they are supervised by the Member State where they are located. In addition, the Advocate General further concluded that the term “management” should also include the effective exploitation of immovable property made by or on-behalf of the real estate investment fund, this specific

[12] European Court of Justice, 26 March 2015, Joined Cases C-108/14 and C-109/14

[13] European Court of Justice, 20 May 2015, Case C-595/13

task being essential in order to generate a return for the investors.

Such opinion is rather favourable to investment vehicles investing directly in real estate properties and may have implications for real estate funds operating in Luxembourg, to the extent that the ECJ's decision follows the AG's opinion.

Withholding tax – State of Kuwait

Administrative Court of Appeal, 5 May 2015[14]

On 5 May 2015, the Administrative Court of Appeal ruled on whether withholding taxes levied on dividends paid by Luxembourg companies to a foreign State, whilst similar distributions to the Luxembourg State or its autonomous bodies would be exempted from similar taxes, could constitute a restriction to the free movement of capital, as provided by Article 63 of TFEU.

In this case, the State of Kuwait claimed the reimbursement of withholding taxes levied on dividends distributed by Luxembourg companies on the basis of Article 147 2. c) ITL. This provision provides for a withholding tax exemption on dividend payments made to the Luxembourg State or its entities. The claim was successively dismissed by the Head of the Luxembourg Tax Administration and then by the Administrative Court. Consequently, the State of Kuwait decided to appeal before the Administrative Court of Appeal on the grounds of breach of the TFEU.

The Administrative Court of Appeal confirmed the Administrative Court's judgment and held that the State of Kuwait was not eligible for the benefits of Article 147 2. c) ITL and the withholding tax applied did not constitute an infringement to the free movement of capital. According to the judgment, the economic activity conducted by the Luxembourg State could not be comparable to the one exercised by the State of Kuwait. Although both States can act as investors in Luxembourg companies from which they may receive dividends, only the Luxembourg State also holds prerogatives of fiscal sovereignty on distributions made by Luxembourg companies. These twofold functions of the Luxembourg State would preclude the State of Kuwait from being in a comparable situation, which is a necessary condition for invoking the protection of freedoms guaranteed by the TFEU.

As a result, the State of Kuwait is not entitled to reimbursement of withholding taxes paid on the dividends received. Such withholding taxes represent a final tax burden for the State of Kuwait, since the related dividends are not subject to taxes in Kuwait.

[14] Administrative Court of Appeal, 5 May 2015, Cases N°34319C/34320C/34321C

Tax

International Legislation

Tax Transparency Package to Fight Tax Evasion and Avoidance

European Commission – Communication (136) on Tax Transparency

On 18 March 2015, the EU Commission presented a package of tax transparency measures aimed at tackling corporate tax avoidance and harmful tax competition in the EU and creating more cooperation between EU member states on corporate tax issues.

The package includes the following proposals:

- introducing the automatic exchange of information between member states on their tax rulings
- assessing possible new transparency requirements for multinationals
- reviewing the Code of Conduct on Business Taxation
- repealing the EU Savings Directive
- quantifying the scale of tax evasion and avoidance.

This package is the first step in the EU Commission's ambitious agenda for 2015 to fight tax evasion and avoidance. An action plan on corporate taxation, including a strategy to re-launch the work on the introduction at EU level of a Common Consolidated Corporate Tax Base (CCCTB), should follow in the coming month.

In this respect, on 27 May 2015, the college of commissioners held an orientation debate on measures to make corporate taxation fairer, more growth-friendly and transparent. It was agreed that a new EU approach to corporate taxation is needed to successfully address tax abuse, ensure sustainable revenues and foster a better business environment in the internal market.

The key objective is to ensure that companies are taxed where their profits are generated and cannot avoid paying their fair share of tax through aggressive tax planning.

Proposal to Repeal the EU Directive 2003/48/EC on Taxation of Savings Income in the Form of Interest Payments

European Commission – Repealing the EU Savings Directive

According to its communication of 18 March 2015, the EU Commission is proposing to repeal the EU Savings Directive (Council Directive 2003/48/EC) with effect from 1 January 2017 for Austria and from 1 January 2016 for all other EU member states (subject to on-going requirements to fulfil administrative obligations such as the reporting and exchange of information relating to, and accounting for withholding taxes on, payments made before those dates).

This is to prevent overlap between the EU Savings Directive and a new automatic exchange of information regime to be implemented under Directive 2011/16/EU on mandatory automatic exchange of information in the field of taxation (as amended by Directive 2014/107/EU). The proposal also provides that, if it proceeds, member states will not be required to apply the new requirements of the Directive 2014/48/EU. For further information, see the July 2014 edition of our Luxembourg Legal Update.

Proposal for Automatic Exchange of Information between EU Member States on Cross-Border Tax Rulings

European Commission – Mandatory Exchange of Information

Among the proposals made in its communication of 18 March 2015 (see above), the EU Commission is proposing to introduce a mandatory automatic exchange of information on cross-border tax rulings within the EU by amending Directive 2011/16/EU relating to mandatory automatic exchange of information in the field of taxation.

Such directive already provides for an exchange of tax rulings between member states which are considered as relevant for each tax administration, as far as can be foreseen. However, this new proposal provides for an automatic exchange by each EU member state, with all other member states and the EU Commission, of pre-defined information on their tax ruling practice. The information would be made available quarterly in a standard format and would include all tax rulings and advance pricing agreements issued to private investors by the tax authorities.

EU Commission Increases its Investigation in the Review of the Tax Ruling Practice

State Aid – EU Commission Seeks Information on certain Tax Practices

On 8 June 2015, the EU Commission announced that it was taking a further step into the investigation conducted EU-wide on the tax ruling practice. In this respect, it:

- issued information injunctions to Estonia and Poland

- requested additional information from 15 EU member states on their tax ruling practices.

Such an announcement confirms the position taken by the EU Commission on 17 December 2014 which is now willing to gather, at an EU level, all information on tax practices in order to assess compliance with the EU state aid rules. Luxembourg, with six other EU countries (namely the Netherlands, UK, Cyprus, Malta, Ireland and Belgium), was already under scrutiny by the EU Commission. For further information, see the July 2014 edition of our Luxembourg Legal Update.

In the meantime, the EU Commission confirmed in its press release that the tax ruling practice is not, as such, a problem under EU state aid rules, unless it grants a selective advantage to specific companies or group of companies with the effect of distorting competition within the EU.

Action 3 of the Action Plan on Base Erosion and Profit Shifting

Public Discussion Draft on Strengthening CFC rules

On 3 April 2015, the OECD released a public discussion draft on BEPS Action 3, focusing on recommendations for the design of controlled foreign company (CFC) rules to combat base erosion and profit shifting. The discussion draft considers all the relevant requirements for CFC rules and lists a number of issues for which input would be required.

Actions 6 and 7 of the Action Plan on Base Erosion and Profit Shifting

Public Discussion Drafts on Preventing Treaty Abuse and Preventing the Artificial Avoidance of Permanent Establishment

On 22 May 2015, the OECD published the revised BEPS report on Action 6 (Treaty Abuse). The previous Action 6 drafts included a US-style “limitation on benefits” article excluding securitisation issuers and many other SPVs from claiming treaty relief—see the March 2015 edition of our Luxembourg Legal Update. Following representations made by industry bodies and other interested parties, the revised report unfortunately does not bring significant changes. Concurrently, on 15 May 2015, the OECD published the revised BEPS report on Action 7 preventing artificial avoidance of permanent establishment. Such Action focuses on perceived avoidance of permanent establishment status using either agency or similar (e.g. commissionaire) arrangements, or on reliance on exemption from the current permanent establishment definition, particularly those relating to “preparatory and auxiliaries” activities.

The revised discussions draft now propose changes to:

- agency permanent establishment rules, including additional guidance
- include additional requirements to fall within one of the exemptions.

One of the main changes which could have wide implications for cross-border trade and business is that mere negotiation should create a taxable permanent establishment. The OECD has invited comments on the revised discussion draft by mid-June 2015.

The OECD has invited comments on the revised discussion draft by mid-June 2015. For further information, see our client briefings on Action 6 and Action 7.

National Legislation

FATCA – Luxembourg and United States

FATCA Bill N°6798 adopted by the Luxembourg Parliament

On 24 July 2015, the Luxembourg Parliament formally adopted the law (Bill N°6798) on the ratification of the US FATCA intergovernmental agreement. By adopting the law, the Luxembourg Intergovernmental Agreement (IGA) has been transposed into national law. As a result, Luxembourg is now fully FATCA compliant and will be ready to proceed with the first automatic exchange of information on FATCA.

On 28 March 2014, Luxembourg and United States signed an IGA to improve tax compliance between both countries and to implement FATCA. The IGA is based on the reciprocal Model 1A agreement. Accordingly, foreign financial institutions (FFIs) in Luxembourg will be required to report tax information about US account holders to the Luxembourg Tax Authorities, which will in turn relay that information to the US Internal Revenue Service. The United States will also provide similar tax information to Luxembourg regarding residents of Luxembourg with accounts in the United States. For further information, see the July 2014 edition of our Luxembourg Legal Update.

The Luxembourg Tax Authorities confirmed on 24 July 2015 that the deadline applicable for the reporting of the information to be collected by reporting Luxembourg FFIs relating to 2014 will be postponed from 30 June 2015 to 31 August 2015. Finally, it is expected that the Luxembourg Tax Authorities will also review and finalise their two draft circular letters published in January 2015. For further information, see the March 2015 edition of our Luxembourg Legal Update.

Double Tax Treaties

On 18 June 2015, Luxembourg signed a total of 76 Double Tax Treaties (DTT), most of them being in line with the OECD exchange of information standard. In addition, negotiations with other states are under way to either amend existing DTTs or to adopt new DTTs.

Double Tax Treaty between Luxembourg and Hungary – Signed

On 10 March 2015, Luxembourg and Hungary signed a new DTT which, once in force and effective, replaces the DTT signed on 15 January 1990. Further to national implementations in both countries, the DTT should come into force 30 days following the last notification of implementation given by either of the two states. The new DTT is based on the OECD Model Convention and the exchange of information clause (Article 26) is in line with the applicable international OECD standard for the exchange of information upon request.

Double Tax Treaty between Luxembourg and Uruguay – Signed

On 10 March 2015, Luxembourg and Uruguay signed their first DTT. Further to national implementations in both countries, the DTT should come into force 15 days following the last notification of implementation given by either of the two states. The DTT is based on the OECD Model Convention and the exchange of information clause (Article 25) is in line with the applicable international OECD standard for the exchange of information upon request.

Double Tax Treaty between Luxembourg and Andorra – Approved by Luxembourg

On 2 April 2015, the Council of Ministers of Luxembourg approved the DTT signed on 2 June 2014. The DTT is now submitted to Parliament for final approval in order to be implemented in domestic law. Further to national implementations in both countries, the DTT should come into force on the day of receipt of the last notification of implementation given by either of the two states. The DTT is based on the OECD Model Convention and the exchange of information clause (Article 25) is in line with the applicable international OECD standard for the exchange of information upon request. For further information, see the July 2014 edition of our Luxembourg Legal Update.

Double Tax Treaty between Luxembourg and Croatia – Approved by Luxembourg

On 2 April 2015, the Council of Ministers of Luxembourg approved the DTT signed on 20 June 2014. The DTT is now submitted to Parliament for final approval in order to be implemented in domestic law. Further to national implementations in both countries, the DTT should come into force 30 days following the last notification of implementation given by either of the two states.

Double Tax Treaty between Luxembourg and Estonia – Approved by Luxembourg

On 2 April 2015, the Council of Ministers of Luxembourg approved the DTT signed on 7 July 2014 and replacing the DTT signed on 23 May 2006. The DTT is now submitted to Parliament for final approval in order to be implemented in domestic law. Further to national implementations in both countries, the DTT should come into force on the day of receipt of the last notification of implementation given by either of the two states. For further information, see the November 2014 and March 2015 editions of our Luxembourg Legal Update.

Protocol to Double Tax Treaty between Luxembourg and France – Approved by Luxembourg

On 2 April 2015, the Council of Ministers of Luxembourg approved the fourth amending protocol signed on 5 September 2014. The protocol is now submitted to Parliament for final approval. The amending protocol shall come into force on the first day of the month following the day of the last notification of implementation given by either of the two states. For further information, see the November 2014 and March 2015 editions of our Luxembourg Legal Update.

Protocol to Double Tax Treaty between Luxembourg and Ireland – Approved by Luxembourg

On 2 April 2015, the Council of Ministers of Luxembourg approved the amending protocol signed on 27 May 2014. The protocol is now submitted to Parliament for final approval. The amending protocol shall come into force on the day of receipt of the last notification of implementation given by either of the two states. For further information, see the July 2014 edition of our Luxembourg Legal Update.

Protocol to Double Tax Treaty between Luxembourg and Lithuania – Approved by Luxembourg

On 2 April 2015, the Council of Ministers of Luxembourg approved the amending protocol signed on 20 June 2014. The protocol is now submitted to Parliament for final approval. The amending protocol shall come into force on the day of receipt of the last notification of implementation given by either of the two states. For further information, see the November 2014 and March 2015 editions of our Luxembourg Legal Update.

Protocol to Double Tax Treaty between Luxembourg and Mauritius – Approved by Luxembourg

On 2 April 2015, the Council of Ministers of Luxembourg approved the protocol signed on 28 January 2014 amending the DTT signed on 15 February 1995 and replacing the exchange of information provision (clause 27) by the OECD exchange of information standard. The protocol is now submitted to Parliament for final approval. The amending protocol shall come into force on the day of receipt of the last notification of implementation given by either of the two states.

Double Tax Treaty between Luxembourg and Singapore – Approved by Luxembourg

On 2 April 2015, the Council of Ministers of Luxembourg approved the DTT signed on 9 October 2013 and replacing the DTT signed on 6 March 1993. The DTT is now submitted to Parliament for final approval in order to be implemented in domestic law. Further to national implementations in both countries, the DTT shall come into force on the day of receipt of the last notification of implementation given by either of the two states.

Protocol to Double Tax Treaty between Luxembourg and Tunisia – Approved by Luxembourg

On 2 April 2015, the Council of Ministers of Luxembourg approved the amending protocol signed on 8 July 2014. The protocol is now submitted to Parliament for final approval. The amending protocol shall come into force on the day of receipt of the last notification of implementation given by either of the two states. For further information, see the November 2014 edition of our Luxembourg Legal Update.

Protocol to Double Tax Treaty between Luxembourg and United Arab Emirates – Approved by Luxembourg

On 2 April 2015, the Council of Ministers of Luxembourg approved the amending protocol signed on 26 October 2014. The protocol is now submitted to Parliament for final approval. The amending protocol shall come into force on the day of receipt of the last notification of implementation given by either of the two states. For further information, see the November 2014 edition of our Luxembourg Legal Update.

Mutual agreement to Double Tax Treaty between Luxembourg and Belgium – Signed

On 16 March 2015, a mutual agreement was concluded between Luxembourg and Belgium on the application of the DTT of 17 September 1970 and as amended by the 2002, 2009 protocols and exchange of notes. The mutual agreement provides for a 24-day tolerance regarding taxation of the days physically worked outside the state of employment.

Circulars/Regulatory Developments

Certificate of Residence for UCITS and Specialised Investment Funds

Circular L.G. – A N°61 of 12 February 2015

On 12 February 2015, the Luxembourg Tax Authorities issued Circular L.G. – A N°61 on certificates of residence for undertakings for collective investments in transferable securities (UCITS) and specialised investment funds (SIFs) established in Luxembourg.

The Circular replaces previous information about obtaining certificates of residence by Luxembourg investment companies with variable capital (*sociétés d'investissement à capital variable, SICAVs)* and investment companies with fixed capital (*sociétés d'investissement à capital fixe, SICAFs*) published on the Luxembourg administration for direct taxes website.

The Circular clarifies that collective investment funds having a legal cooperative structure, such as SICAVs, SICAFs, and SIFs, are treated as non-transparent vehicles and can therefore directly claim for double tax treaty benefits by requesting a certificate of residence as long as their legal headquarters or place of central administration is located in Luxembourg. In this respect, a tax certificate would be delivered under:

- the DTTs with Denmark, Indonesia, Ireland, Morocco and Spain, based on an agreement
- the DTTs with Armenia, Austria, Azerbaijan, Bahrain, Barbados, China, Czech Republic, Germany, Georgia, Guernsey, Hong Kong, Isle of Man, Israel, Jersey, Laos, Liechtenstein, Macedonia, Malaysia, Malta, Moldova, Monaco, Panama, Poland, Portugal, Qatar, Romania, San Marino, Saudi Arabia, Seychelles, Slovenia, Sri Lanka, Taiwan, Tajikistan, Trinidad and Tobago, Tunisia, Turkey, Uzbekistan, United Arab Emirates and Vietnam, as investment vehicles are classified as resident for the purposes of those treaties

- the DTTs with Finland, Kazakhstan, Singapore, Slovak Republic and Thailand, based on an interpretation by the Luxembourg tax administration.

Such a request must be submitted with a certificate from the CSSF that the relevant collective investment fund is supervised by that Commission.

No treaty benefits can be obtained under the DTTs with Belgium, Brazil, Canada, Estonia, France, Hungary, India, Iceland, Latvia, Lithuania, Japan, Mauritius, Mexico, Norway, the Netherlands, South Africa, Sweden, Switzerland, the United Kingdom and the United States.

Under the treaties with Bulgaria, Greece, Italy and Republic of Korea, the situation is still unclear.

Clarification of the Term *Investmentvermögen* under the Protocol to the Double Tax Treaty between Luxembourg and Germany

Circular L.I.R. N°58 of 9 February 2015

On 9 February 2015, the Luxembourg Tax Authorities issued Circular L.I.R. N°58 on the interpretation of the term *Investmentvermögen* under the Protocol to the DTT between Luxembourg and Germany in application since 1 January 2014.

The Circular clarifies that Luxembourg *fonds commun de placement* (FCP) and German collective investment funds can request the application of reduced withholding tax rates for dividends (Article 10) and/or interest (Article 11) under the DTT on behalf of their investors, provided that these investors are residents of the same contracting state (instead of each investor requesting it separately). Giving the example provided by the Circular, upon distribution of dividends made by a Luxembourg fully taxable company to a German *Investmentvermögen*, the reduced withholding tax rate of 5% on dividend distributions is only applicable for investors in the *Investmentvermögen* who fulfil the condition of Article 10, i.e. corporate investor holding at least 10% of the share capital of the Luxembourg distributing company (through the tax transparent *Investmentvermögen*) unless a withholding tax exemption is already granted under Article 147 ITL.

Refund of Withholding Tax no longer applicable

Circular L.I.R. N°154/2 of 13 February 2015

On 13 February 2015, the Luxembourg Tax Authorities issued Circular L.I.R. N°154/2 in respect of Article 154 ITL and the non-refund of withholding tax levied on income from capital.

Article 154 ITL has been modified by the law of 19 December 2014 on the Budget Law (bill N°6720) in order to end possible discriminations of non-resident taxpayers receiving dividend income subject to withholding tax in Luxembourg. Before such amendment, Luxembourg resident taxpayers were able to offset withholding tax on dividends against their income tax liabilities and claim a refund for the excess, whereas non-resident taxpayers were denied a refund of any Luxembourg withholding tax. With this amendment, withholding tax on income from capital will no longer be refundable for Luxembourg tax residents unless Article 149, al. 4a ITL is applicable, i.e. where dividends were paid before the 12 month holding period under the Luxembourg participation exemption regime.

Abolition of Super-Reduced VAT Rate Applicable to Electronic Books

Circular L.I.R. N°765bis of 16 March 2015

On 16 March 2015, the Luxembourg VAT Authorities issued Circular L.I.R. 765bis following the decision of the ECJ of 5 March 2015 in which it was held that the application of a super-reduced VAT rate to electronic books was incompatible with the provisions of the Directive 2006/112/EU on the common system of value added tax (VAT).

The Circular confirms that the 3% super-reduced rate for the supply of electronic books will be abolished from 1 May 2015. The supply of electronic books will thus be subject to the standard VAT rate of 17%.

Benefits in Kind Granted by Employers to their Employees

Circular L.I.R. N°104/1 of 10 March 2015

On 10 March 2015, the Luxembourg Tax Authorities issued a new Circular L.I.R. N°104/1 on the assessment of benefits in kind granted by an employer to its employees, in particular company cars. This Circular replaces the former Circular L.I.R. N°104/1 of 20 November 2014 by clarifying the elements to be taken into account for the computation of the benefit in kind linked to the grant of a company car to the employee and especially when the latter purchases the car at the end of the leasing period. In this respect, the Circular introduces a tax ceiling, i.e. a cap for the overall reportable benefit in kind which cannot exceed 100% of the acquisition price of the car.

Patent Boxes – Luxembourg Intellectual Property Regime

Parliamentary Question N°896 of 10 February 2015

On 10 February 2015, a parliamentary question to the Ministry of Finance about patent boxes sought to obtain clarification on:

- Luxembourg's position in relation to the OECD on-going discussions on BEPS Action Plan 5 and the nexus-based approach
- the implications on the existing Luxembourg IP regime.

The Ministry of Finance indicated in its response on 26 February 2015 that Luxembourg is supporting the so-called “nexus approach” as proposed by Germany and the United Kingdom. Under this approach, there is an emphasis on the substantial activity requirement. In this respect, income and gains deriving from eligible IP rights may benefit from favourable tax treatment only in proportion to the research and development expenditure borne by the taxpayer. In other words, tax benefits of an IP regime on IP income could only be claimed by a taxpayer having itself incurred expenditure (e.g. research & developments costs) to obtain such IP income.

This “nexus approach” seeks to create a level-playing field in the area of IP taxation. A consensus has been reached at OECD level in order for each members, not being compliant with such an approach, to implement the new regime into domestic law as from 2015. In addition, it is envisaged that, by June 2015, the OECD would provide further guidelines on this new approach and eligible IP rights.

At Luxembourg level, the legislative process should start during 2015 to implement a new IP tax regime in line with the nexus approach which involves amending the existing Article 50bis ITL. However, it is envisaged that a grandfathering clause would allow all taxpayers benefitting from the current IP regime to keep such an entitlement until 30 June 2021.

Exchange of Information between Tax Authorities – Tax Rulings

Parliamentary Question N°864 of 29 January 2015

On 29 January 2015, a Parliamentary question was submitted to the Ministry of Finance about the exchange of tax rulings between Luxembourg and Belgium.

The Ministry of Finance indicated that Belgium and Luxembourg have agreed, in accordance with Directive 2011/16/EU on the administrative cooperation in the field of taxation (as implemented in Luxembourg by the law of 29 March 2013), to include tax rulings as information to be exchanged upon request. He also indicated that Luxembourg and France are still negotiating the terms of exchange of information and formalities for cooperation.

Application of Article 15 of Double Tax Treaty between Luxembourg and Belgium

Circular L.G. – Conv. D.I. N°59 of 31 March 2015

On 31 March 2015, the Luxembourg Tax Authorities issued Circular L.G. – Conv. D.I. N°59 further to a mutual agreement signed on 16 March 2015 between Luxembourg and Belgium on the application of the DTT and especially in relation to the application of Article 15 and the tax treatment of dependent personal services (e.g. employees). For further information, see the above Double Tax Treaties section. The Circular includes

- the mutual agreement dated 16 March 2015
- a vademecum for the documents evidencing the physical presence of a taxpayer in one of the two contracting states and which should be produced to the tax authorities.

Automatic Exchange of Tax Information and Money Laundering Repression in Tax Matters

CSSF Circular 15/609

On 27 March 2015, the CSSF issued Circular 15/609 on developments relating to the automatic exchange of tax information and money laundering repression in tax matters.

Following up on its circular dated 3 December 2012 on, amongst other things, the ICMA Private Wealth Management Charter of Quality, the CSSF stresses that all entities subject to its supervision, together with their day-to-day management, board of directors and employees will need to continue their efforts to put in place the necessary procedures and infrastructures for the automatic exchange of tax information with EU member states (under the revised EU Savings Directive and the revised Directive 2011/16/EU on the administrative cooperation in the field of taxation) and non-member countries, such as the USA, within the framework of FATCA.

In addition, the CSSF highlights a number of future modifications in the field of anti-money laundering and counter terrorist financing through the adoption of AMLD 4, including the extension of the scope of the primary offences to include certain criminal tax offences.

Against this background, the CSSF has requested that the relevant supervised entities operating in Luxembourg comply proactively and without delay with the upcoming changes, fully cooperate with competent authorities and, generally, act with integrity, transparently and professionally.

Case Law

Super-Reduced VAT Rate on Electronic Books – Incompatible with EU VAT Directive

European Court of Justice, Case C-502/13, 5 March 2015

Opinion of Dutch Advocate General on Luxembourg SICAV

Dutch Supreme Court – AG Opinion – 3 April 2015

Opinion of Advocate General on in-put VAT Deduction Right for Holding Companies

European Court of Justice, Joined Cases C-108/14 and C-109/14, 26 March 2015

Opinion of Advocate General on VAT Exemption on Management Services to Real Estate Investment Funds

European Court of Justice, C-595/13, 20 May 2015

Withholding tax – State of Kuwait

Administrative Court of Appeal, Case N°34319C/34320C/34321C, 5 May 2015

Please refer to the Litigation section of this Luxembourg Legal Update for further details on the above.

Glossary

ABBL: Luxembourg Banks and Bankers Association

ACA: *Association des Compagnies d'Assurance,* Luxembourg Association of Insurance Undertakings

AIFM: Alternative Investment Fund Managers

AIFs: Alternative Investment Funds

AIFM Directive: Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on alternative investment fund managers

ALFI: Association of the Luxembourg Fund Industry

AML Law: Luxembourg law of 12 November 2004 (as amended) on the fight against money laundering and terrorism financing

AML/CTF: Anti-Money Laundering and Counter-Terrorist Financing

AMLD 4: Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

BCBS :Basel Committee on Banking Supervision

BCL: Banque Centrale du Luxembourg

CCCTB: Common Consolidated Corporate Tax Base

CESR:Committee of European Securities Regulators (replaced by ESMA)

Commassu: *Commissariat aux assurances*, the Luxembourg insurance sector regulator

Companies Law: Luxembourg law of 10 August 1915 (as amended) on commercial companies

Consumer Act: Luxembourg law of 25 August 1983 (as amended) concerning the legal protection of the Consumer

Collective Bank Bargain Agreement:*La convention collective du travail applicable aux banques*

CRA: Credit Rating Agencies

CRD: Capital Requirements Directives 2006/48/EC and 2006/49/EC

CRD III: Directive 2010/76/EU amending the CRD as regards capital requirements for the trading book and for re-securitizations, and the supervisory review of remuneration policies

CRR/CRD IV Package: Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC <u>and</u> Regulation (EU) N° 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) N°648/2012 Text with EEA relevance

CSSF: *Commission de Surveillance du Secteur Financier,* the Luxembourg supervisory authority of the financial sector

Data Protection Law: Luxembourg law of 2 August 2002 (as amended) on the protection of persons with respect to processing's of personal data

EBA: European Banking Authority

ECB: European Central Bank

ECJ: European Court of Justice

ESMA: European Securities and Markets Authority

ETFs: Exchange Traded Funds

ETDs: Exchange Traded Derivatives

EUIR: European Union Insolvency Regulation : Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings

EUIR (Recast): Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings

FATF: Financial Action Task Force / *Groupe d'Action Financière* (FATF / *GAFI*)

FCP: *Fonds Commun de Placement* or mutual fund

Financial Collateral Directive: Directive 2002/47/CE of 6 June 2002 on financial collateral arrangements

Financial Sector Law: Luxembourg law of 5 April 1993 (as amended) on the financial sector

Financial Collateral Law: Luxembourg law of 5 August 2005 (as amended) on financial collateral arrangements

ICMA: International Capital Market Association

Insolvency Regulation: Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings

Insurance Sector Law: Luxembourg law of 6 December 1991 (as amended) on the insurance sector

IORP Directive: Directive 2003/41 dated the European Parliament and the Council dated 3 June 2003 on the activities and supervision of institutions for occupational retirement provision

IRE: *Institut des Réviseurs d'Entreprises*

KIID: Key Investor Information Document (within the meaning of the UCITS Directive) that aims to help the investors to understand the key features of their proposed UCITS investment

Law on the Registration of Real Estate: Luxembourg law of 25 September 1905 (as amended) on the registration of real estate rights *in rem* ("*loi du 25 septembre 1905 sur la transcription des droits réels immobiliers*")

Law on the Register of Commerce and Annual Accounts: Luxembourg law of 19 December 2002 (as amended) relating to the register of commerce and companies as well as the accounting **RCSL or Register of Commerce**: Luxembourg register of commerce and companies *(Registre de commerce et des sociétés de Luxembourg)*

MiFID: Directive 2004/39/EC of the European Parliament and of the Council dated 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC

PFS: Professional of the Financial Sector other than a credit institution and subject to CSSF's supervision in accordance with the Financial Sector Law.

and the annual accounts of companies

Public Contracts Law: Luxembourg law of 25 June 2009 (as amended) on government contracts

Public Contracts Regulation: The Grand-Ducal Regulation of 3 August 2009 implementing Law of 25 June 2009 on the public contracts

Prospectus Regulation: Regulation (EC) N°809/2004 of 29 April 2004 implementing the Directive as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements

Rating Agency Regulation: Regulation (EC) N°1060/2009 of the European Parliament and the Council on credit rating agencies

REMIT: Regulation (EU) N°1227/2011 of 25 October 2011 on wholesale energy market integrity and transparency

SICAR Law: Luxembourg law of 15 June 2004 (as amended) on the investment company in risk capital

SIF Law: Luxembourg law of 13 February 2007 (as amended) relating to specialised investment funds

Takeover Law: Law of 19 May 2006 on public takeover bids

Transparency Law: Luxembourg law of 11 January 2008 (as amended) on the transparency obligations concerning information on the issuers whose securities are admitted to trading on a regulated market

UCI Law: Luxembourg law of 17 December 2010 (as amended) on undertakings for collective investment

UCITS Directive: Directive 2009/65/EC of 13 July 2009 of the EU Parliament and of the Council on the coordination of laws, regulations and administrative provisions relating to UCITS

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