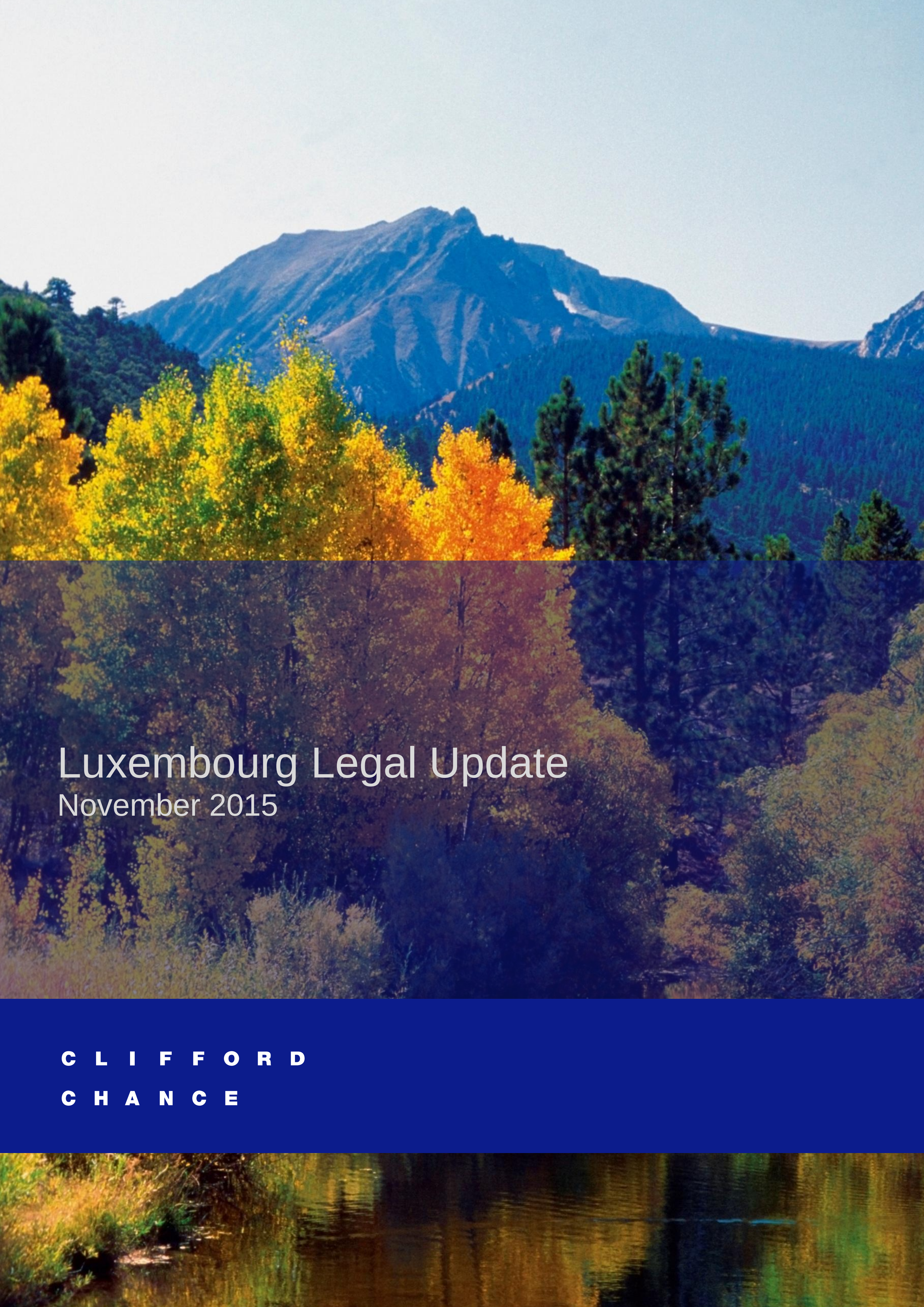

Luxembourg Legal Update

November 2015

CLIFFORD CHANCE

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 affect 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

Solvency II

On 14 September 2015, the European Insurance and Occupational Pensions Authority (EIOPA) published its second set of guidelines under Solvency II. The guidelines are addressed to national competent authorities (NCAs) or financial institutions, and cover:

- financial stability reporting
- the extension of the recovery period
- the exchange of information within colleges
- the implementation of long-term guarantee measures
- methods for determining market shares for reporting
- reporting and public disclosure
- recognition and valuation of assets and liabilities
- governance
- the own risk solvency assessment (ORSA).

These guidelines have been added to the list of guidelines on the EIOPA website. NCAs have until 14 November 2015 to confirm whether they comply, or intend to comply, with each set of guidelines.

Wolfsberg Group: New FAQs on risk assessments for AML/CTF, sanctions, and bribery and corruption

On 7 September 2015, the Wolfsberg Group published new FAQs on AML/CTF, sanctions, and bribery and corruption risk assessments. The FAQs are intended to promote effective risk management while supporting the prevention of abuse of the financial system for criminal purposes.

Other New Delegated, Implementing and other Regulations

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

CRD IV/CRR:

- N°2015/1278 of 9 July 2015 amending Implementing Regulation (EU) 680/2014 on implementing technical standards (ITS) with regard to the instructions, templates and definitions for supervisory reporting of institutions under the CRR
- N°2015/1555 of 21 September 2015 supplementing Regulation 575/2013 with regard to regulatory technical standards for the disclosure of information in relation to the compliance of institutions with the requirement for a countercyclical capital buffer in accordance with Article 440
- N°2015/1556 of 21 September 2015 supplementing Regulation 575/2013 with regard to RTS for the transitional treatment of equity exposures under the internal ratings-based (IRB) approach
- a corrigendum dated 21 September 2015 to N°2015/880 on the extension of the transitional periods related to own funds requirements for exposures to central counterparties set out in the CRR and Regulation 648/2012.

EMIR:

- N°2015/1515 of 5 June 2015, regarding the extension of the transitional periods relating to pension scheme arrangements (PSAs), has been published in the Official Journal.

Solvency II:

- N°2015/1602 of 5 June 2015 on the equivalence of the solvency and prudential regime for insurance and reinsurance undertakings in force in Switzerland, based on Articles 172(2), 227(4) and 260(3) of Solvency II.

BRRD:

- EBA Opinion N°2015/15 on technical advice on protected arrangements in a resolution situation.

Mortgage Credit Directive

- EBA Guidelines N°2015/19 on passport notifications for credit intermediaries under the Mortgage Credit Directive.

European System of Central Banks

- ECB Guideline (EU) 2015/1197 amending Guideline ECB/2010/20 on the legal framework for accounting and financial reporting in the European System of Central Banks (ECB/2015/24).

Securitisation Regulation Proposal

On 18 February 2015, the European Commission unveiled its long-expected plan to boost funding and growth across Europe by creating a Capital Markets Union ("CMU"), a true single market for capital across the 28 EU member states. The Commission's Green Paper on *Building a Capital Markets Union* ("Green Paper") was aimed at stimulating debate on the measures needed to identify and remove the many obstacles standing in the way of a deep and integrated single European capital market.

A technical consultation on "simple, transparent and standardised" ("STS") securitisation was launched alongside the Green Paper. The consultation closed on 13 May 2015 and led on 30 September 2015 to a proposal for a regulation of the European parliament and of the council laying down common rules on securitisation and creating a European framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EU and Regulation (EC) N°1060/2009 and (EU) N°648/2012 ("Proposal").

This Proposal aims to:

- restart markets on a more sustainable basis, so that simple, transparent and standardised securitisation can act as an effective funding channel to the economy
- allow for efficient and effective risk transfers to a broad set of institutional investors as well as banks
- allow securitisation to function as an effective funding mechanism for some longer term investors as well as banks
- protect investors and manage systemic risk by avoiding a recurrence of the flawed "originate to distribute" models.

The Proposal contains two main parts. The first is devoted to rules that apply to all securitisations, whilst the second part focuses only on STS securitisation.

Globally, under the Proposal, all of the sectoral legislation relating to due diligence and risk retention are replaced by a new uniform regime applying to all "institutional investors" a term defined to include credit institutions, investment firms, insurance undertakings, reinsurance undertakings, institutions for occupational retirement provision, alternative investment fund managers, UCITS management companies and internally managed UCITS. The new rules for risk retention will have a number of novel features compared with the existing Capital Requirements Regulation rules. The two principal changes are the introduction of a dual direct/indirect approach, and the exclusion of certain originators from being risk retention holders. Likewise, new transparency rules contained in the Proposal will replace those set out in Article 8b of the Credit Rating Agencies Regulation.

The other major impact of the Proposal is also to introduce the concept of STS. The STS standard means that the product complies with several criteria and that a prudent and diligent investor will be able to analyse the risk involved.

Please refer to our client briefing The Proposed Securitisation Regulation for further details on the above.

The New Market Abuse Regulation

The currently applicable Market Abuse Directive (the "MAD"), adopted in 2003, has established a pan-EEA framework as regards both insider dealing and market manipulation. This framework has been implemented into Luxembourg legislation by the law of 9 May 2006 on market abuse, as amended (the "Luxembourg Market Abuse Law"). A review of MAD in the wake of the financial crisis led the European Commission to propose an update of the framework. This resulted in the adoption of a new Market Abuse Regulation (the "MAR") and a new directive on criminal sanctions, also known as "MAD 2", in April 2014. The MAR will become applicable in Luxembourg on 3 July 2016.

Below is a summary of the principal points, amongst others, which will be amended or implemented, as the case may be, by the MAR.

Scope of the market abuse regime

The MAR will apply to a wider array of securities and derivatives than the current MAD, which is only applicable in relation to financial instruments admitted to trading on the EEA's regulated market within the meaning of the MiFID Directive. From 3 July 2016 onwards the MAR will also cover financial instruments admitted to trading on multilateral trading facilities (MTFs), such as the EuroMTF market in Luxembourg, and organised trading facilities (OTFs).

Obligation to disclose inside information to the public

The previous point will lead to the requirement that issuers of securities admitted to trading on an MTF or an OTF will have to publish inside information whenever such information arises, provided they have requested or approved the admission to trading. Furthermore, should an issuer opt to delay the disclosure of inside information it will have to inform the competent supervisory authority (i.e. the CSSF in Luxembourg) thereof and explain in writing why such delay should be viewed as permissible. So far, delay in the disclosure of inside information can be resorted to without the issuer having to notify, or in any other way involve, the CSSF in the process.

Market soundings

The MAR will recognise that inside information should be legitimately disclosed to potential investors in the context of market soundings undertaken to assess interest in potential transactions. The MAR will regulate market soundings in more detail by requiring, for instance, specific steps to be taken prior to conducting a market sounding and by imposing detailed record-keeping requirements.

Directors' transactions

The current MAD already requires persons discharging managerial responsibilities within an issuer (PDMRs) to report transactions in the issuer's securities to the issuer and the competent supervisory authority (Article 17 of the Luxembourg Market Abuse Law). However, this notification obligation has, so far, only been applicable to shares admitted to trading on a regulated market. Under the MAR the scope of this rule will be considerably extended in two ways. As of 3 July 2016 it will be applicable to persons discharging managerial responsibilities within issuers of debt securities. Furthermore, the scope will encompass issuers whose securities have been admitted to trading on an MTF or an OTF. The time period for the notification of such directors' transactions will be reduced from five to three business days. In order to mitigate this considerable extension a new threshold system will, however, be introduced. This means that transactions will only need to be reported once a threshold of EUR 5,000 is exceeded in a calendar year. However, EEA Member States may increase this threshold to EUR 20,000. (Whether that will be the case in Luxembourg is, however, not yet clear.)

Legislation

Transparency Law and Prospectus Law

Bill N°6860 dated 17 August 2015

Bill N°6860/00 amending the current Luxembourg legal framework regarding the transparency requirements for issuers of securities and prospectus for securities has been lodged with the Luxembourg Parliament. The Bill primarily implements EU Directive 2013/50 – amending the EU Transparency Directive 2004/109/EC – and the EU Prospectus Directive 2003/71/EC, and foresees corresponding amendments to the Transparency Law and the Prospectus Law. The proposed amendments include:

- clarifying and simplifying the determination of the home Member State of a third country issuer or of issuers that have not informed competent authorities of the choice of the home Member State within the three-month deadline
- reducing administrative fees related to the publication of information, by suppressing the requirements for publication of quarterly reports and by extending the deadline for publication of half-yearly reports to three months after half-year end
- strengthening the sanctioning powers of the Luxembourg competent supervisory authorities.

BRRD and DGSD 2 Implementation

Bill N°6866 dated 3 September 2015

The Luxembourg government's Bill N°6866/00 on the recovery and resolution of credit institutions and certain investment firms, implementing the BRRD, was lodged with the Luxembourg Parliament on 3 September 2015.

The Bill designates the CSSF as the competent Luxembourg resolution authority. In order to prevent any conflict of interest with the CSSF's supervisory powers, the CSSF's resolution powers would be exercised by a new internal body named "resolution council", supported in its tasks by a new resolution service.

The Bill further implements the DGSD 2 by adapting the Luxembourg deposit guarantee and investors' compensation system to the new institutional framework.

The main innovation consists in replacing the current private *ex post* financing system with a new public *ex ante* financing system. The new public system (the Luxembourg Deposits Guarantee Fund) would replace the current Luxembourg Deposits Guarantee Association (AGDL). The CSSF will be in charge of the deposit guarantee and investors' compensation systems through a new department, the "Council of protection of depositors and investors". Other changes relate to the term of repayment of depositors, which is reduced from 20 to seven working days, as well as to the elimination of any distinction between important and small/medium-sized companies, each benefiting from a guarantee of up to EUR 100,000.

CRD IV Implementation

Law dated 23 July 2015

The law dated 23 July 2015 implementing, inter alia, the CRD IV (CRD IV Law), has been published in the Memorial. The CRD IV Law mainly amends the existing Financial Sector Law, and provides most notably for:

- own capital buffers
- new prudential supervision tools for the CSSF
- modified pecuniary administrative sanctions
- consolidation of governance requirements in the financial sector
- revised arrangements for remuneration policies
- an amended scope of application, notably with respect to investment firms.

The CRD IV Law entered into force and became applicable from 4 August 2015.

FATCA Implementation

Law dated 24 July 2015

The law dated 24 July 2015 approved the agreement between the Government of the Grand Duchy of Luxembourg and the Government of the United States of America (USA) on improving compliance with tax obligations on an international level, and relating to the provisions of the USA on the exchange of information – the so-called Foreign Account Tax Compliance Act (FATCA) – including its two annexes and the Memorandum of Understanding in relation thereto. This was signed in Luxembourg on 28 March 2014, and this FATCA Law has been published in the Memorial. The FATCA Law entered into force and is applicable from 2 August 2015.

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

Aptitude Examinations of (Re-)Insurance Intermediary and (Re-)Insurance Manager Candidates

Grand Ducal Regulation dated 27 July 2015

The Grand Ducal Regulation dated 27 July 2015 modifying the Grand Ducal Regulation dated 8 October 2014 on licensing and operating conditions for insurance and reinsurance intermediaries, as well as professionals of the insurance sector, has been published in the Memorial.

The Regulation introduces an examination jury – which will be in charge of conducting the aptitude examinations for (re-)insurance intermediaries – and managers and provides for the composition of the examination jury and the nomination process for its prospective members. The new Regulation entered into force and became applicable from 2 August 2015.

AML/CTF Legislation

Grand Ducal Regulation dated 5 August 2015

The Grand Ducal Regulation dated 5 August 2015 modifying Grand Ducal Regulation dated 1 February 2010 providing details on certain provisions of the AML Law (2010 Regulation), has been published in the Memorial, and entered into force and became applicable from 14 August 2015.

The new Regulation amends the AML Law's simplified customer due diligence regime specifications in the 2010 Regulation. Professionals may henceforth reduce their identification measures and not verify the identity of their customers and, where applicable, the beneficial owner of the business relationship, when providing certain online payment services in relation to low amount transactions via accounts with other EU (or AML/CTF equivalent third country) payment services providers and where certain other conditions are met.

Electronic Archiving

Law dated 25 July 2015

The law dated 25 July 2015 on electronic archiving, together with two specifying Grand Ducal regulations, have been published in the Memorial.

The new law modernises the rules on dematerialisation of original documents and the conditions for their storage in digital form. It also introduces new rules on the recognition of the legal value of dematerialised documents and the presumption of conformity with the originals, subject to certain conditions. The law further sets out the rules applicable to the activity of dematerialisation or storage service providers. These new service providers need to be certified by a certifier (*certificateur*) registered with, and accredited or recognised by, the Luxembourg Institute for Standardisation, Accreditation, Security and Quality of Products and Services (ILNAS).

Dematerialisation or storage service providers to regulated financial sector professionals, including banks, investment firms, investment funds, insurance and reinsurance undertakings, will also be required to be licensed by the Luxembourg Minister of Finance in charge of the financial sector, as a form of support professionals of the financial sector (support PSF) and will be supervised by the CSSF.

The law has entered into force and became applicable as of 8 August 2015.

Please refer to the June 2013 edition of our Legal Update and the Litigation section of this Luxembourg Legal Update for further details on the above.

CRD IV/CRR: Calculation of Institution-Specific Countercyclical Capital Buffer Rates

CSSF Regulation N°15-01

CSSF Regulation N°15-01 dated 31 July 2015 providing details on the calculation of the institution-specific countercyclical capital buffer rates (*taux de coussin de fonds propres contracyclique spécifique*) implementing Article 140 of CRD IV was published in the Memorial on 14 August 2015.

The new Regulation applies to credit institutions and investment firms (CRR institutions) and to Luxembourg branches of such CRR institutions having their head office in a third country. The Regulation specifies the method of calculating the level of the institution-specific countercyclical capital buffer rates to be held by CRR institutions under Article 59-6 of the Financial Sector Law.

The new Regulation has entered into force and became applicable as of 18 August 2015.

CRD IV/CRR: Supervisory Review and Evaluation Process for CRR institutions

CSSF Regulation N°15-02

CSSF Regulation N°15-02 dated 31 July 2015 providing details on the supervisory review and evaluation process for CRR institutions was published in the Memorial on 14 August 2015. The new Regulation applies to CRR institutions within the meaning of Article 1(*11bis*) of the Financial Sector Law and to Luxembourg branches of CRR institutions having their head office in a third country.

The Regulation specifies the evaluation process for the adequacy of internal own funds and liquidities, the technical criteria concerning the organisation and the treatment of risks as well as the information that needs to be shared by CRR institutions that use an internal method for the calculation of own fund requirements. CSSF Regulation N°15-02 finally specifies the CSSF supervisory powers and process in relation to the aforementioned topics.

The Regulation has entered into force and became applicable as of 18 August 2015.

Regulatory Developments

DGSD 2: Information Requirements for Calculation of 2015 Contribution to Future National Resolution Fund

CSSF Circular 15/617

On 7 July 2015, the CSSF issued circular 15/617 regarding information requirements for the calculation of the 2015 contribution to the future national resolution fund to be paid by all Luxembourg credit institutions with the exception of branches of credit institutions that are established outside the European Union.

In order to determine the annual contribution to be paid in 2015, the CSSF, as the future Luxembourg resolution authority, has requested credit institutions to provide a certain amount of information which is not contained in the financial and prudential reporting by the credit institutions to the competent authorities currently in place.

The circular contains in its annex a spreadsheet (including explanatory notes) which had to be completed by credit institutions based on the data contained in their latest audited statutory financial statements or annual accounts available prior to 31 December 2014. The completed spreadsheet had to be approved by a member of the authorised management of the institution and then submitted to the CSSF by 1 September 2015 at the latest. In the event that no complete set of information was received by that date, the CSSF announces in its circular that it will use estimates or its own assumptions for the calculation including by using the highest possible risk multiplier.

CRD IV/CRR: EBA Guidelines on Materiality, Proprietary and Confidentiality and on Disclosure Frequency under Articles 432(1), 432(2) and 433 of CRR

CSSF Circular 15/618

On 22 July 2015, the CSSF issued circular 15/618 implementing the EBA guidelines on materiality, proprietary and confidentiality, and on disclosure frequency under Articles 432(1), 432(2) and 433 of the CRR in Luxembourg.

The Circular is addressed to all institutions subject to the disclosure requirements of Part Eight of the CRR and entered into force with immediate effect.

DGSD 2: Amount of Guaranteed Deposits

CSSF Circular 15/619

On 9 September 2015, the CSSF issued a new circular 15/619 concerning the amount of guaranteed deposits as of 31 July 2015.

The circular requests Luxembourg credit institutions and Luxembourg branches of non-EU/EEA credit institutions to provide information on their guaranteed deposits as of 31 July 2015. This request emanates from Article 20(4) of the Commission-delegated regulation N°2015/63 of 21 October 2014, completing DGSD 2 relating to the *ex ante* resolution financing system, and from Article 10(3) of the bylaws of the AGDL, which were recently amended in light of DGSD 2 before the AGDL will be replaced by a public deposit protection system. Circular 15/619 relates to the current reform of the Luxembourg deposit guarantee system by way of Bill N°6866 implementing, amongst others, DGSD 2.

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

This information had to be reported to the CSSF by 31 September 2015 using the format outlined therein, and in accordance with the detailed instructions annexed to the circular. A member of the authorised management of the credit institution, appointed as being in charge of AGDL matters, had to approve the information before it was reported.

CRD IV/CRR: Implementation of CRD IV

CSSF 15/620

On 6 October 2015, the CSSF issued circular 15/620 regarding the implementation of CRD IV in Luxembourg.

The circular is addressed to all persons subject to supervision by the CSSF in accordance with the Financial Sector Law and, essentially, is applicable to CRR institutions. The circular draws their attention to the CRD IV Law, CSSF Regulation N°15-01and CSSF Regulation N°15-02.

The circular further summarises the main innovations introduced by the CRD IV, and modifications of the Financial Sector Law being:

- the requirement to hold capital buffers (*cousins de fonds propres*) in addition to their own funds (new chapter 5 of part III of the Financial Sector Law supplemented by CSSF Regulation N°15-01)
- governance and remuneration policy requirements in the financial sector (new chapter 4*bis* of part II of the Financial Sector Law and CSSF Regulation N°15-02)
- specifications as to the scope of the CSSF's supervisory powers, strengthening of the CSSF's administrative sanction powers and a systematic publication of sanctions finally imposed.

The CSSF concludes with noting that it is currently in the process of modifying CSSF Circulars 06/273 and 07/290 regarding the definition of capital ratios pursuant to article 56 of the Financial Sector Law, CSSF Regulation N°14-01 on the implementation of certain discretions under the CRR and CSSF Circular 12/552 regarding central administration, internal governance and risk management.

EMIR: Conclusions of 2014 EMIR questionnaire

CSSF Press Release 15/36

On 11 August 2015, the CSSF published a press release setting out the conclusions of the responses it received on the EMIR questionnaire issued in September 2014 to a sample of entities subject to its supervision. The purpose of the questionnaire was to assess the compliance of those sample entities with EMIR.

In terms of main conclusions, the CSSF noted that management companies' AIFMs have to generally improve their EMIR compliance, and drew attention to some specific points relating to reporting, hedging derivatives, and adequate oversight in case of delegation of EMIR obligations. The CSSF announced that it will contact those potentially problematic sample entities, as well as certain entities with a significant number of rejection reports at trade repositories, before the end of 2015.

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

Solvency II: Secured Electronic Transmission of Reporting by (re-)insurance undertakings

Commassu Circular 15/10

On 15 July 2015, the Commassu issued circular 15/10 on the new secured electronic transmission of reporting by (re-)

insurance undertakings to the Commassu in light of the forthcoming entry into force of the Solvency II regime on 1 January 2016.

The new reporting by secured transmission channels will replace the current reporting via email. A test phase for the new transmission channels commenced 15 October 2015; in order to efficiently implement this new reporting system, insurance and reinsurance undertakings, as well as auditors were requested to:

- notify the Commassu of their Legal Entity Identifier by 31 July 2015
- request (as the case may be) a Commassu applicant code by 31 August 2015
- implement one of the transmission channels proposed by the Commassu and notify the Commassu of their choice by 30 September 2015.

The Commassu expects in its circular that the new reporting data transmission system will be fully operational by 15 December 2015.

Case Law

Default Interest – Penalty Clause

District Court, 6 May 2015, N°89/2015

Current Account – Limitation Period

Court of Appeal, 1 April 2015, N°39461

Financial Collateral Arrangements – Pledge – Enforcement

District Court (summary proceedings), 15 July 2015

Market Abuse Directive – Jean-Bernard Lafonta v *Autorité des Marchés Financiers*

Court of Justice of the European Union, 11 March 2015

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

Data Protection & Technology

Legislation

Law of 25 July 2015 on Electronic Archiving

In light of an effort to enhance the eco-friendliness of businesses and to maintain the pre-eminent position of Luxembourg as an IT centre, the newly adopted law on electronic archiving eliminates the need for companies in Luxembourg to keep their documents in paper format in order for them to be admissible as proof (in court). While the law of 14 August 2000 on electronic trade made it possible for new documents to be created solely in an electronic format if certain prerequisites were met, the novelty of this new law is the possibility to transform paper documents into electronic documents and to only retain the electronic versions, which will have probative value only if certain requirements are met.

The law defines the conditions under which paper documents may be digitised and/or stored, poses clear delimitations on a legal presumption of conformity of electronic documents to the original paper documents, and regulates the newly created profession of PSDC (*prestataire de services de dématérialisation ou de conservation)*.

The activity of PSDC is a regulated activity triggering a certification and registration with ILNAS (Luxembourg Institute for Standardisation, Accreditation, Security, and Quality of Products and Services). Furthermore, the activities of a PSDC are subject to a myriad of regulations and requirements, such as the integrity, confidentiality and availability of documents with probative value. Obligations of PSDCs include informing customers, prior to the digitisation and storage of their documents, on the process to be used, keeping secret any information available to them and that they will abide by a detailed procedure in the event that they cease to provide such services to a customer. Another important obligation is the guarantee that, at all times, there must be at least one copy of all the original electronic documents, and the copies with probative value, stored on hardware in the full possession and control of the PSDC, and over which no guarantee or security right has been granted.

The law of 25 July 2015 amends the Financial Sector Law and provides for two new PSF status (new Articles 29-5 and 29-6 of the Financial Sector Law). A PSDC which wants to operate in the Financial Sector must be a legal person holding a minimum capital amount of respectively EUR 50,000 (for dematerialisation service providers) and EUR 125,000 (for storage service providers).

The Law of 25 July 2015 on electronic archiving also amended Article 1333 Civil Code created an Article 1334-1 in this code and amended Article 16 of the Commerce Code.

Article 1333 of the Civil Code, which serves the purpose of ensuring that copies of documents handed to courts as proof are reliable, and states that such copies can only be seen as proof insofar as they replicate the content of the original document (which can still be demanded by the judge at any time), ends with a passage stating that this provision is not applicable to digital copies which are copies with probative value in the sense of the law.

Subsequent to Article 1334 of the Civil Code, which deals with the probative value of copies of original documents which no longer exist, Article 1334-1 provides that copies in a digital version which have been digitised by a PSDC have, unless there is proof to the contrary, the same probative value as the original or an authenticated document deemed equivalent to the original. This new provision further provides that a copy cannot be rejected by the judge on the sole ground that it is digital or that it has not been digitised by a PSDC.

Article 16 of the Commerce Code, which clarifies the types of documents an undertaking is entitled to retain only as a copy, ends with a paragraph which provides that :

- copies in a digital version which have been digitised by a PSDC have, unless there is proof to the contrary, the same probative value as the original or an authenticated document deemed equivalent to the original
- a copy cannot be rejected by the judge on the sole ground that it is digital or that it has not been digitised by a PSDC.

Case Law

Invalidation of the European Commission Decision 2000/250 ("Safe Harbor decision")

Court of Justice of the European Union, 6 October 2015

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

Employment

Legislation

Law of 23 July 2015

Remuneration Policies in the Financial Sector

The Law of 23 July 2015 implementing, amongst others, Directive 2013/36/EU of 26 June 2013 (CRD IV) on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, was published in the Memorial on 31 July 2015 and became applicable from 4 August 2015. As from the entry into force of this law, CSSF Circulars 06/273 and 07/290 were repealed.

This law notably introduced a new chapter 4 Bis "Governance arrangements and remuneration policies" into the Financial Sector Law. Article 38-5 of the Financial Sector Law now contains general provisions on remuneration policies while Article 38-6 of the Financial Sector Law contains provisions relating to the variable component of remuneration. The key changes introduced by this law are:

- the introduction of a limitation of the ratio between the variable and the fixed component of remuneration to 100% (where applicable, 200% with shareholders' approval) for the material risk-takers
- a definition of the fixed and the variable remuneration
- stricter requirements in terms of malus and clawback of up to 100% of the variable remuneration
- requirements to payout variable remuneration where possible also in other instruments are defined in the Commission-delegated Regulation 527/2014 of 12 March 2014 (specifying the classes of instruments that adequately reflect the credit quality of an institution as a going concern, and which are appropriate to be used for the purpose of variable remuneration).

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

Law of 7 August 2015

Social Security – Incapacity at work

The Law of 7 August 2015 amending the powers of the Social Security Medical Inspectorate (*contrôle medical de la sécurité sociale*), and notably amending the Labour Code and the Social Security Code, was published in the

Memorial on 13 August 2015, and became applicable from 1 September 2015.

This law strengthens the powers of control of the Social Security Medical Inspectorate over employees who are on sickness leave. It expressly foresees medical checks as being able to be carried out at any time, i.e. even during a period when the obligation to pay the sickness leave remuneration lies with the employer.

The law also significantly amends Article L.121-6 of the Labour Code which now expressly foresees that:

- the right for the employee to remain fully paid by his or her employer and to continue to benefit from all their contractual benefits (until the last day of the month during which the 77th day of sickness occurs calculated over a reference period of 12 successive calendar months) ceases where a decision of the president of the National Health Fund considers the employee to be fit for work (this decision can be appealed by the employee)
- the protection of the employee against dismissal while on sickness leave (which is 26 weeks as from the first day of sickness) ends at the expiry upon the period the employee has for appealing against the decision of the president of the National Health Fund (being 40 days from the date of notification of the decision).

Should the employee launch an appeal against the decision of the president of the National Health Fund, the employee's protection against dismissal will continue. In this hypothesis, the protection of the employee against dismissal may thus be extended beyond the 26 weeks' protection period.

Law of 23 July 2015

Internal and external redeployment

The law of 23 July 2015 amending the Labour Code and the Social Security Code with regard to internal and external redeployment was published in the Memorial on 27 July 2015 and will enter into force on 1 January 2016.

This law introduces a certain number of changes to the current mechanisms of internal and external redeployment. It notably introduces:

- restriction conditions to the redeployment procedure over employees
- new access to the redeployment procedure (occupational physicians will be in a position to initiate the procedure)
- enlargement of the categories of entities eligible for internal redeployment
- increased sanctions for employers which refuse to redeploy internally
- periodic medical examinations for the persons who have been redeployed.

Case Law

Fixed-Term Employment Contract – Motivation

Court of Appeal, 5 February 2015

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

Funds and Investment Management

EU Developments

AIFMD

ESMA Updated Q&A on AIFMD

ESMA/2015/1490

On 1 October 2015, ESMA published an updated version of its Q&A on the application of the AIFM Directive.

This update clarifies that when an AIF's depositary sub-delegates the custody of the AIF's assets to either an EU or a third country central securities depositary (CSD), that CSD must comply with the provisions on delegation under Article 21(11) of the AIFM Directive.

ESMA Advice on Extension of AIFMD Passport to non-EU Jurisdictions

ESMA/2015/12363 and ESMA/2015/1235

On 30 July 2015, ESMA published its advice, as required under the AIFM Directive, in relation to the application of the AIFMD passport to non-EU AIFMs and non-EU AIFs, together with its opinion on the functioning of the passport for EU AIFMs and the national private placement regimes (NPPRs).

In brief, ESMA considers that the AIFMD passport can be extended to Guernsey, Jersey and, potentially, Switzerland. However, no definitive view was reached in ESMA's advice on the US, Hong Kong or Singapore due to concerns related to competition, regulatory issues and a lack of sufficient evidence to properly assess the relevant criteria. ESMA has indicated that it aims to finalise the assessments of Hong Kong, Singapore and the US as soon as practicable, and to assess further groups of non-EU countries and dependencies (namely Australia, Canada, Japan, the Cayman Islands, the Isle of Man and Bermuda).

ESMA's advice and opinion will now be considered by the EU Commission, Parliament and Council to decide on whether to activate the relevant provisions in the AIFM Directive by extending the passport through a delegated act. However, the EU institutions may wish to consider waiting until ESMA has delivered positive advice on a sufficient number of non-EU countries before introducing the AIFMD passport. This would avoid any adverse market impact that a decision extending the passport to just a few non-EU countries might have.

Please refer to our client briefing ESMA issues advice on extending AIFMD marketing passport for further details on the above.

SFT Regulation

EU Parliament adopted Proposed Regulation on Securities financing transactions:

On 29 October 2015, the EU Parliament voted to adopt the proposed Regulation on reporting and transparency of securities financing transactions (SFT Regulation).

Securities financing transactions (SFTs) allow market participants to access secured funding, i.e. to use assets, such as the shares or bonds they own, to secure financing for their activities. This involves the temporary exchange of assets as a collateral for a funding transaction (e.g. the lending or borrowing of securities, repurchase or reverse repurchase transactions, buy-sell back or sell-buy back transactions, or margin lending transactions).

As a reminder, the SFT Regulation aims to enhance transparency by:

- introducing reporting of all SFTs to trade repositories, it being understood that, depending on their category, firms should start reporting at different stages from 12 to 21 months after entry into force of the relevant regulatory technical standards (RTS)
- requiring investment funds (including UCITS and AIFs) to disclose information on the use of SFTs and total return swaps to investors in their financial reports and in their pre-contractual documents from the entry into force of the SFT Regulation, while the existing funds will have 18 months to amend them
- introducing some minimum transparency conditions that should be met on the reuse of collateral, these applying six months after the entry into force of the SFT Regulation.

The SFT Regulation will now be formally adopted by the EU Council and then published in the Official Journal.

For further details on the ELTIF Regulation, please refer to the July 2015 edition of our Luxembourg Legal Update.

Luxembourg Legal and Regulatory Developments

Implementation of UCITS V Directive

Bill of Law N°6845

On 5 August 2015, the Minister of Finance submitted to the Luxembourg Parliament Bill N°6845, the main purpose of which is to implement the UCITS V Directive into Luxembourg law.

To a large extent, Bill 6845 is a faithful transcription of the UCITS V Directive and amends the current UCITS regime laid down in Part I of the UCI Law in the following three areas:

- the duties and liability of depositaries of UCITS
- the remuneration policies of UCITS management companies/self-managed investment companies
- the sanctions that the CSSF is empowered to apply by virtue of the UCI Law.

However, Bill 6845 also envisages introducing one amendment into Part II of the UCI Law that will go beyond the implementation of the UCITS V Directive. Indeed, Bill 6845 proposes to impose the new UCITS V depositary regime not only on Luxembourg UCITS (as required by the UCITS V Directive) but also on all Luxembourg Part II UCIs (independent of their assets under management, i.e. regardless whether they are below or above the EUR 100/500 million thresholds laid down in the AIFM Directive).

In addition to the amendments to the UCI Law, Bill 6845 also proposes some modifications to the AIFM Law, including:

- The obligation for Luxembourg-authorised AIFMs to have their accounting documents audited by an independent auditor, even if this is not required by the AIFM Directive. In practice, however, it has to be noted that so-called Luxembourg Chapter 15 and 16 management companies that are also acting and authorised as AIFMs by the CSSF already comply with this obligation, which was imposed on them by the UCI Law as a mandatory condition for their authorisation and licence as management companies by the CSSF.
- The explicit possibility for Luxembourg-authorised AIFMs to passport certain MiFID investment services (as set out in Article 6(4) of the AIFM Directive) on a cross-border basis, provided that they are duly authorised and licensed by the CSSF for the provision of these services. This amendment to the AIFM Law reflects an amendment introduced by MiFID2 into the AIFM Directive which had, in principle, to be applied by Member States from 3 July 2015 (although ESMA had recommended that NCAs could accept the passport notification for the MiFID services by an AIFM authorised under Article 6(4) of the AIFM Directive even before 3 July 2015). In Luxembourg, it should be recalled that the CSSF has already accepted, as per ESMA's recommendation, the passport of MiFID services under Article 6(4) of the AIFM Directive for both Luxembourg AIFMs passporting in the EU and EU AIFMs passporting into Luxembourg.

In terms of timing, the new UCITS V depositary and remuneration rules will apply by 18 March 2016. However, management companies/self-managed investment companies having appointed, before 18 March 2016, a depositary that does not meet the UCITS V eligibility requirements, have until 18 March 2018 to appoint a depositary that meets these requirements.

Please refer to the July 2014 and November 2014 editions of our Luxembourg Legal Update for further details on the UCITS V Directive.

New type of Luxembourg Non-Regulated Alternative Investment Fund

A new draft bill of law (Bill of Law) relating to so-called "Reserved Alternative Investment Funds" (RAIFs) is expected to be deposited soon with the Luxembourg Parliament.

The purpose of the Bill of Law is to allow the creation of a new type of Luxembourg AIF managed by an authorised AIFM (located either in Luxembourg, in another EU Member State, or in a third country once the AIFMD passport will be available for third countries).

In brief, RAIFs will have the same characteristics and structuring flexibilities as Luxembourg regulated SIF-AIFs managed by an authorised AIFM, except that RAIFs will be non-regulated investment funds. Thus, contrary to SIFs-AIFs, RAIFs will not be subject to prior authorisation of the CSSF for their creation and launching, nor to ongoing prudential supervision by the CSSF. However, an indirect supervision of the RAIF will be ensured by the competent supervisory authority of its AIFM, as each RAIF must necessarily be managed by an authorised AIFM that must ensure that the relevant RAIF complies with all the requirements of the AIFM Directive.

For the rest, RAIFs will have the same characteristics as SIF-AIFs, including the following:

- RAIFs will be reserved to well-informed investors, which means institutional investors, professional investors as well as any other sophisticated retail or private investors that invest a minimum of EUR 125,000 in the RAIF and fulfil some other conditions.
- RAIFs may be set up in the contractual form (FCP) or corporate form (SICAV/SICAF) in which case all corporate forms currently available to SIF-AIFs will also be available for RAIFs.
- RAIFs may be organised as umbrella funds, whereby the entire RAIF consists of one or more compartments or sub-funds, or as or stand-alone funds, in each case with multiple classes of shares/units or not.
- RAIFs will not be subject to any particular legal investment and borrowing rules or restrictions, which will allow for significant flexibility with regard to the assets in which RAIFs may invest, enabling RAIFs to be set-up investing in any kind of asset and pursuing any kind of investment strategy. Like SIF-AIFs, however, RAIFs created under the regime of the Bill of Law will, in principle, remain subject to the principle of risk diversification.
- RAIFs are, in principle, subject to annual subscription tax (*taxe d'abonnement*) at a rate of 0.01%. However, as it is the case for some SIF-AIFs, the Bill of Law exempts some RAIFs from the subscription tax (e.g. institutional money market RAIFs meeting certain criteria, RAIFs set up as a pension pool vehicle for a group and microfinance RAIFs).

Notwithstanding the above, it is worth mentioning that, if a RAIF restricts its investment policy in its constitutive documents to investments in risk capital only, it will be subject to the same tax regime that currently applies to SICARs and, like SICARs, will not be obliged to comply with principle of risk diversification.

For the avoidance of doubt, as they are AIFs managed by an authorised AIFM, RAIFs will benefit from the AIFMD passport in order to marketed to professional investors in the EU.

There is no precise indicative timing for the adoption and entry into force of the Bill of Law, but it is expected that RAIFs should be available as a new Luxemburg investment vehicle in the course of in 2016.

CSSF Updated FAQ on AIFM Law

On 10 August 2015, the CSSF published an updated version of its FAQ on the AIFM Law, which provides guidance and/or additional clarification or updates (as the case may be) on the following five points.

Definition of marketing and reverse solicitation of AIFs in Luxembourg

Marketing

The CSSF defines "marketing" within the meaning of the AIFM Law as taking place when the AIF, the AIFM or an intermediary on their behalf seeks to raise capital by actively making units or shares of an AIF available for firm purchase by a potential investor.

In this respect, the CSSF confirms that:

- The marketing activity can be performed by an offer or placement which may be materialised in various forms, including advertising, distributing AIF documents to prospective investors, road shows, distance marketing, etc. However, according to the CSSF, marketing can take place provided the relevant materials delivered to the investors can be used to formally subscribe or commit to subscribe for shares or units of the AIF.
- Marketing activity in Luxembourg does not require a physical presence of the AIFM on Luxembourg territory.

Reverse solicitation

The CSSF defines "reverse solicitation" as providing information regarding an AIF, and making units or shares of that AIF available for purchase to a potential investor following an initiative of that investor (or an agent of that investor) without any solicitation made by the AIF or its AIFM (or an intermediary acting on their behalf) in relation to the relevant AIF.

Activities not considered as "marketing"

In its revised FAQ on the AIFM Law, the CSSF provides that the following activities are not considered as marketing within the meaning of the AIFM Directive:

- Reverse solicitation, provided that the two components below are met:
  - the investor (or an agent of the investor) has approached the AIFM or the AIF on its own initiative with the intention of investing in (or, initially, receiving information regarding) AIF(s) managed by such AIFM
  - neither the AIFM, nor the AIF (nor any intermediary acting on their behalf) has solicited the investor to invest in the relevant AIF.

For the avoidance of doubt, the CSSF specifies that, in the case of reverse solicitation, the AIFM has the burden of proof as regards the investor's initiative to invest in an AIF managed by the AIFM. Evidence could be produced by means of written confirmation by the investor that he/she has decided on his/her own initiative to invest in (or, initially, request information regarding) the relevant AIF(s).

- Investments made in AIFs in the context of a discretionary mandate for the management of individual investment portfolios (at the initiative of the investment manager)
- Investments made in AIFs in the context of an investment advisory agreement (at the initiative of the investment adviser)
- Investments in targeted AIFs made in the context of collective portfolio management of a UCI or an AIF (at the initiative of such UCI/AIF or of its management company, AIFM, portfolio manager or other agent)
- Secondary trading of units or shares of an AIF, except where there is an indirect offering or placement through one or more intermediaries acting upon the initiative or on behalf of the AIFM or AIF
- Distribution of an AIF's draft documents to prospective investors so long as such documents cannot be used by investors to formally subscribe or commit to subscribe for shares or units in the AIF. However, the presentation of such documents at the initiative of the AIF or AIFM shall no longer allow the benefit of reverse solicitation by the investors to whom they have been presented.

Status of a credit institution or an investment firm under the Financial Sector Law and its compatibility with AIFM status under the AIFM Law

In this respect, the CSSF FAQ clarifies that credit institutions and investment firms can combine their status of credit institution or investment firm under the Financial Sector Law with that of "Registered AIFM" under the AIFM Law. By contrast, however, the combination of the status of credit institution or investment firm under the Financial Sector Law with that of "Authorised AIFM" continues to be prohibited.

Type of AIFs for which professional depositaries of assets other than financial instruments (PDAOFI) can act as depositary

In its revised FAQ on the AIFM Law, the CSSF clarifies that:

- The PDAOFI may be appointed as depositary for AIFs which:
  – have no redemption rights that can be exercised during five years as from the date of the initial investment
  – generally do not invest in assets that have to be held in custody according to AIFMD rules, or invest in non-listed companies in order to eventually acquire control.
- The PDAOFI will be responsible for the safekeeping of financial instruments that can be held in custody and will have to delegate the custody of these financial instruments to an eligible delegate under the AIFM Directive delegation rules. In addition, any cash of the AIF has to be held with an eligible entity. No cash of the AIF can be held directly with the PDAOFI.
- The PDAOFI can act as a delegate of the depositary of any type of AIF for the safekeeping of assets other than financial instruments.

Reporting obligations to the CSSF by non-EU AIFMs managing or marketing feeder AIFs under Article 24(1), (2) and (4) of the AIFMD

In this respect, it seems that the CSSF has decided to follow ESMA Opinion on the collection of information for the effective monitoring of systemic risk under Article 24(5), first sub-paragraph, of the AIFM Directive.

Thus, the CSSF requires that a non-EU AIFM that manages or markets a feeder AIF (whether EU or non-EU) in Luxembourg also reports to the CSSF under the requirements of Article 24(1), (2) and (4) of the AIFM Directive for the non-EU master AIF(s) of such feeder, even if the non-EU master AIF(s) is (are) not marketed in the EU. According to the CSSF, this requirement will only apply if the non-EU AIFM manages both the feeder AIF and the non-EU master AIF. The CSSF will require in such case that non-EU AIFMs submit a separate AIF reporting file for each concerned non-EU master AIF.

Definition of the value of the portfolios to be taken into consideration for the purpose of assessing the initial capital and own funds requirements applicable to AIFMs depending on whether they are licensed as AIFMs only or as AIFMs and UCITS management company

In this respect, the CSSF FAQ clarifies that:

- For external AIFMs which do not hold a licence as a UCITS management company, the value is to be understood as the sum of the net asset values of the managed portfolios (AIFs only, excluding investments by AIFs in other AIFs that are managed by the same AIFM).

- For external AIFMs which hold a licence as a UCITS management company, the value is to be understood as the sum of the net asset values of the managed portfolios (AIFs, UCITS and other UCIs which do not qualify as AIF).

Set-up of UCITS and Self-Assessment of certain AIFs

CSSF New Questionnaires

The following new questionnaires are available on the CSSF's website:

- Since 11 August 2015, a new application questionnaire must be used for submitting to the CSSF an application for approval to set up a UCITS. As with the previous form, the new application form aims at collecting the full set of information and documents required by the CSSF to open and examine the file for approval of a new Luxembourg law UCITS.
- Since 29 September 2015, a new questionnaire comprising eight distinct parts must be completed as appropriate in relation to the following investment vehicles in order to assess their respective status under the AIFM Law (i.e. accumulation of statuses being impossible):
  - Part A of the questionnaire must be filled out in respect of investment vehicles that do not qualify as AIF
  - Part B of the questionnaire must be filled out in respect of investment vehicles managed by an entity which is out of scope of the AIFM Law
  - Part C of the questionnaire must be filled out in respect of AIFs with an exempted external AIFM, which assesses that it benefits either from an exemption or from a transitional provision under the AIFM Law
  - Part D of the questionnaire must be filled out in respect of AIFs with an exempted internal AIFM, which assesses that it benefits either from an exemption or from a transitional provision under the AIFM Law
  - Part E of the questionnaire must be filled out in respect of AIFs managed by an AIFM as yet not authorised in Luxembourg, which assesses that it must be authorised by the CSSF under the AIFM Law
  - Part F of the questionnaire must be filled out by AIFs managed by an AIFM as yet not authorised in Luxembourg, which assesses that it must be registered by the CSSF due to its management of below threshold AIFs as referred to in Article 3(2) of the AIFM Law
  - Part G of the questionnaire must be filled out in respect of AIFs with an authorised/registered Luxembourg AIFM
  - Part H of the questionnaire must be filled out in respect of the appointment of a non-Luxembourg AIFM by a Luxembourg AIF.

Further guidance on how to complete the questionnaire on self-assessment of certain vehicles under the AIFM Law is given in the questionnaire itself.

EMIR Implementation

CSSF Press Release 15/36

On 11 August 2015, the CSSF issued a press release setting out the conclusions of the responses it received on the EMIR questionnaire issued in September 2014 to a sample of entities subject to its supervision in order to assess the compliance of those sample entities with EMIR.

In terms of main conclusions, the CSSF noted that management companies and AIFMs have to generally improve their EMIR compliance, and drew attention to some specific points relating to reporting, hedging derivatives, and adequate oversight in case of delegation of EMIR.

The CSSF has announced that it will contact those potentially problematic sample entities, as well as certain entities with a significant number of rejection reports at trade repositories, before the end of 2015.

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

Application of the Double Tax Treaty between Luxembourg and Spain to UCITS

Circular L.G. – Conv. D.I. N°52 of 21 July 2015

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

Case Law

No Right of Direct Action by Investor against the Depositary of a Luxembourg UCITS

Supreme Court, 2 July 2015

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

Litigation

Inappropriate Termination of Contracts, Exemption of Liability Clauses and their Impact

Court of Appeal, 11 February 2015, N°39543

A service provider had entered into a contract with a company. The contract had been concluded for an initial period of one year and was to be automatically renewed upon expiry in the absence of any prior notice of termination to the other party giving at least 90 days before any annual expiry date. The client company was subsequently bought by another company. Sixty days before an annual expiry date, it informed the service provider that the contract would be terminated on the next annual expiry date.

A dispute arose and the Court of Appeal declared that such termination by the client company was a violation of contract and that the client company's contractual liability was therefore engaged towards the service provider. The contract entered into between the parties included an exemption of liability clause, according to which liability was capped at a certain ceiling. The Court validated this clause and considered that it could only be disregarded if the client company had committed a wilful misconduct ("*dol*") (or any similar serious misconduct). The Court was of the opinion that "wilful misconduct" refers to any situation in which a party to the contract deliberately fails to perform its obligations arising from the contract and in which evidence of wrongful behaviour on its part is provided. In the case at hand, the Court considered that the termination, which was a violation of contract, was part of the client company's restructuring process resolved by its new shareholders in the aftermath of the buyout; and further that there was no evidence of gross negligence or obvious inability to execute the contract on the part of the company. As a consequence, the Court considered that the clause providing for a limitation of any damage likely to be redressed was fully applicable.

Banking, Finance and Capital Markets

Default Interest – Penalty Clause

District Court, 6 May 2015, N°89/2015

According to the general conditions of a bank, "if the borrower fails to pay when due any sum due or to become due hereunder […] it shall from and including the date when the sum fell due, pay interest on the unpaid sum up to and including the date on which the payment is actually received by [the bank] at a rate of four per cent per annum above the rate at which [the bank] may obtain the required amount for such period as it deems appropriate in the Eurocurrency Market or elsewhere as [the bank] may in its absolute discretion decide."

The bank's client asked for a diminution of the default interest as it considered that the default interest provided for repairing the damage suffered by the bank because of the non-payment was manifestly excessive with regard to the damage suffered by the bank.

According to the District Court, a clause providing for an increase of the interest in case of non-payment by the borrower is a penalty clause. Such a clause contains a conventional fixed-rate assessment of the contractual damages which aims to avoid the possible difficulties in case the damages are assessed in court, and to avoid any discussion regarding the reality and the extent of the damage suffered by the victim. In principle such a penalty clause, if inserted into a valid contract, becomes the law of the parties and has to be followed by a court. In particular, according to the court, in the absence of any fraud, the parties are free to determine the means of coercion used in order to ensure the performance of the contract, even in the absence of any damage. Given that the general conditions were known to and had been accepted by the borrower, the court had to reject the borrower's action for reduction of the increase of the interest.

Current Account – Limitation Period

Court of Appeal, 1 April 2015, N°39461

A client opened an account with a bank in 1991, and from 1998 onwards the client has given orders to the bank to invest in futures. The client acts for damages against the bank as it considers that it has suffered losses of revenue because the bank has not given the best possible investment advice with regard to the futures. The bank considered that the limitation period starts at the time of the conclusion of each future, which would mean in the case at hand, where the limitation period is 10 years, that the action for damages is time barred. The client considered that the transactions regarding futures were part of a number of transactions all being part of a current account and that the limitation period only started at the time of the closure of such account.

According to the Court of Appeal, when analysing the general conditions of the bank, all accounts of the same client, whether in the same currency or not, of the same nature or not, with the same interest rate or not, or immediately due or not, were part of one single current account and the final balance of such account would only be known once all the accounts were closed and the balance exchanged into the Luxembourg currency.

According to the court, any reciprocal debts between the bank and its client would be part of the current account, and the limitation period only starts to run as of the date of the closure of such current account and therefore the court found for the client.

Financial Collateral Arrangements – Pledge – Enforcement

District Court (summary proceedings), 15 July 2015

Following the occurrence of an event of default under a facilities agreement, a pledge over shares had been enforced. The borrower tried to obtain the cancellation of the enforcement in summary proceedings.

The judge sitting in summary proceedings decided that it appeared from preparatory works to the Financial Collateral Law that the enforcement of financial collateral arrangements was supposed to be protected by the law and that the only means left to the parties was to act for damages after enforcement. Thus, if the enforcement of a pledge under the law on financial collateral arrangements may not be stopped in summary proceedings, it may certainly not be challenged after it has taken place. However, according to the District Court, a judge sitting in summary proceedings may take urgent measures in case of obvious fraud.

Additionally, the borrower argued that at the time of the enforcement, there was no case for enforcement of the pledge. According to the court, under the Law on Financial Collateral Arrangements, the pledgee may not only enforce the pledge in the event of the debtor's failure to pay at maturity but also in different circumstances determined by contract. When checking the agreement, the court noted that it provided for enforcement in case of failure to pay at maturity and in certain other circumstances.

Finally, according to the court, Article 11(1) of the Law on Financial Collateral Arrangements does not require formal notice or any other kind of information of the debtor prior to enforcement. Such a requirement could, however, be explicitly provided for in a contract.

Market Abuse Directive – Jean-Bernard Lafonta v *Autorité des Marchés Financiers ("AMF")*

Court of Justice of the European Union, 11 March 2015

On 11 March 2015, the Court of Justice of the European Union (Second Chamber) published its judgment in Jean-Bernard Lafonta v. *Autorité des Marchés Financiers* (Case C-628/13).

This judgement was in a response to a request for a preliminary ruling concerning the interpretation of Article 1(1) of the Market Abuse Directive (2003/6/EC) ("MAD")[1] and Article 1(1) of MAD Implementing Directive 2003/124/EC ("Implementing MAD")[2].

The aforementioned directives regulated the misuse of non-public price-sensitive information which is of a "precise nature" (inside information). To be precise, this information must:

- indicate that circumstances exist or that an event had occurred or may reasonably be expected to come into existence or occur
- be specific enough to enable a conclusion to be drawn as to the "possible effect" of those circumstances or that event on the price of the relevant investments.

The facts of the case in summary

Mr. Lafonta was chairman of the Board of directors of Wendel. Between December 2006 and June 2007, Wendel entered into swap agreements whose underlying assets were shares in Saint-Gobain. Later in 2007 the swap agreements were unwound, and Wendel acquired shares in Saint-Gobain directly, declaring its acquisition to the AMF.

The AMF investigated these arrangements and found that Wendel had intended to acquire a significant shareholding in Saint-Gobain from the time when it had initially entered into the swap agreements, and had failed to make public that inside information. It sought to impose a penalty of EUR 1.5 million on both Wendel and Mr. Lafonta.

Mr. Lafonta argued that it had not been possible to anticipate what impact the arrangements would have on Wendel's share price, and that therefore the information relating to the arrangements should not be considered as "inside information".

The Lafonta decision

The French Court referred the following question:

- "Must point (1) of Article 1 of MAD and Article 1(1) of Implementing MAD be interpreted as meaning that only information in respect of which it may be determined, with a sufficient degree of probability, that, once it is made public, its potential effect on the prices of the financial instruments concerned will be in a particular direction and may constitute inside information?"

The ECJ answered that question as follows:

- "[36] The increased complexity of the financial markets makes it particularly difficult to evaluate accurately the direction of a change in the prices of those instruments…. In those circumstances – which can lead to widely differing assessments, depending on the investor – if it were accepted that information is to be regarded as precise only if it makes it possible to anticipate the direction of a change in the prices of the instruments concerned, it would follow that the holder of that information could use an uncertainty in that regard as a pretext for refraining from making certain information public and thus profit from that information to the detriment of the other players on the market."
- "[37]….. the answer to the question referred is that, on a proper construction of point (1) of Article 1 of MAD and Article 1(1) of Implementing MAD, in order for information to be regarded as being of a precise nature for the purposes of those provisions, it need not be possible to infer from that information, with a sufficient degree of probability, that, once it is made public, its potential effect on the prices of the financial instruments concerned will be in a particular direction."

Conclusion

The ECJ has significantly broadened the definition of "precise" as to how it was previously understood in this context, so widening further the scope of the definition of inside information and the scope of issuer's obligations to announce inside information.

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[1] 'Inside information' shall mean information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments and which, if it were made public, would be likely to have a significant effect on the price(s) of those financial instruments or on the price(s) of related derivative financial instruments."

[2] "… information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so and if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments."

Data Protection

Invalidation of the European Commission decision 2000/250 ("Safe Harbor decision")

Court of Justice of the European Union, 6 October 2015

In a decision dated 6 October 2015, the Court of Justice of the European Union declared the European Commission decision 2000/250 ("Safe Harbor decision") invalid with immediate effect.

It also ruled that data protection authorities must always have the possibility to investigate, with complete independence, a data subject's complaints in relation to the transfer of personal data to third countries (i.e. countries outside the EEA).

Please refer to our client briefing Safe Harbor declared invalid – what it means for your business for further details

Employment

Fixed-Term Employment Contract – Motivation

Court of Appeal, 5 February 2015, N°38506

An important rule of Luxembourg employment law is that employment contracts are, in principle, to be concluded for an indefinite duration. Fixed-term employment contracts can only be used in specific situations enumerated in the Luxembourg Labour Code, and the reason for the conclusion of a fixed-term contract must be expressly indicated in the employment contract.

By a decision dated 5 February 2015, the Court of Appeal recalled this principle, but insisted also on the point that the fixed-term employment contract must indicate *ab initio* and in detail the reasons entitling the parties to not conclude an employment contract for an indefinite duration.

In the case which had been submitted to the Court of Appeal, the fixed-term employment contract indicated that it had been concluded by reason of the reorganisation of the activities within the private banking business unit. The employment contract additionally indicated that the employee had been hired as project manager (*chargé de mission*). The employee subsequently challenged the qualification of the employment contract in court and argued that it should be requalified as an employment contract of indefinite duration, with the consequence that the expiration of the contract should be considered as an unlawful dismissal with immediate effect. The first instance labour court took the view that the information included in the fixed-term employment contract was sufficient and compliant with the provisions of the Luxembourg Labour Code, and hence refused to requalify the fixed-term employment contract as an employment of indefinite duration.

The Court of Appeal overruled this decision. The Court of Appeal took the view that the indication that the fixed-term employment contract had been concluded for the needs of a reorganisation within the private banking business unit was insufficient and that, on the contrary, the employer should have explained in the contract for what reason this activity had to be considered as being exceptional and not part of the normal activities of the company.

The Court of Appeal also ruled that the indication that the employee had been hired as "project manager" was again insufficient, and that the employer had, on the contrary the obligation to indicate to what extent and for what reason this function of "project manager" was not a permanent position in the company. The Court of Appeal hence requalified the fixed-term employment contract as an employment of indefinite duration.

In accordance with the majority of current case law, the Court of Appeal held that this requalification of a fixed-term employment contract as an employment contract of indefinite duration was in principle the only sanction foreseen by the Luxembourg Labour Code, as the aim of the statutory provision was not to enable the employee to be paid damages, but on the contrary to entitle the employee to continue the employment relationship beyond the contractual end date foreseen in the fixed-term employment contract.

In the case submitted to the Court of Appeal, the employer had, however, refused that the employee continue to work after the contractual end date. The Court of Appeal inferred from this behaviour of the employer that the employee had been dismissed verbally, i.e. in an unlawful manner, and therefore the Court of Appeal granted damages to the employee.

Employers will hence have to be increasingly careful when assessing whether they can use fixed-term contracts. In addition, any general wording to justify the use of a fixed-term contract has to be avoided. On the contrary, the reason(s) authorising the use of a fixed-term contract will have to be described in detail in the contract.

Funds and Investment Management

No Right of Direct Action by Investor against the Depositary of a Luxembourg UCITS

Supreme Court, 2 July 2015, N°67/15

On 2 July 2015, the Supreme Court confirmed a decision rendered by the Court of Appeal on 15 July 2014 declaring inadmissible the claims filed by an investor of a Luxembourg UCITS SICAV against the depositary bank of such SICAV.

In particular, the Supreme Court first confirmed that where an investor in a SICAV is only a shareholder of that SICAV, the investor can only engage the liability of the depositary bank of the SICAV pursuant to the national law of the investment company, and more precisely pursuant to the applicable company law. Secondly, the Supreme Court confirmed that a shareholder cannot act for his part in the collective damage suffered by the SICAV, unless it suffers a prejudice specific, distinct and independent from the prejudice actually and initially suffered by the SICAV.

Please refer to the March 2015 edition of our Luxembourg Legal Update for further details on the above.

Tax

VAT Treatment of Holding Companies – Input VAT Deduction Right for Holding Companies

European Court of Justice, Cases C-108/14 and C-109/14, 16 July 2015

The ECJ rendered its decision in the cases C-108/14 and C-109/14 on the VAT treatment of holding companies providing administrative and financial services to their subsidiaries.

In the first case, Larentia + Minerva, a German company, held shares issued by two German limited entities to which it provided administrative and business services for remuneration. In the second case, Marenave, another German company, participated in the management of four limited entities that were acquired through a share capital increase.

The ECJ had to rule on whether holding companies could deduct input VAT incurred on services relating to the acquisition of the shareholdings and whether a calculation method for the pro rata VAT deduction should be determined.

While observing that the mere acquisition and holding of shares is not an economic activity within the meaning of the VAT Sixth Directive, the ECJ recalled the principle that holding companies can be considered as VAT taxable persons to the extent they are involved directly or indirectly in the management of subsidiaries. Indeed, providing administrative, financial, commercial and technical services to subsidiaries constitutes an economic activity within the meaning of the Sixth Directive. Moreover, in light of its previous rulings, the ECJ reaffirmed that mixed-activity holding companies can deduct input VAT on acquisition costs in cases where the costs are part of the general expenditure of the holdings.

Consequently, the ECJ concluded that VAT paid on services connected with the acquisition of shareholdings would be fully deductible by holding companies if they themselves provide administrative and financial services to their subsidiaries. In contrast, when holding companies are only involved in the management of some subsidiaries, input VAT on expenditure linked to the acquisitions of shares would be deductible in proportion to economic activities (i.e. the services provided to the subsidiaries) to non-economic activities (i.e. the activity of holding). According to the Court, the general method for calculating such amount of deductible VAT should be determined by each Member State.

Eventually, the ECJ held that national legislation could not restrict the formation of VAT groups to entities with legal personality subordinated to the controlling company of that group. Such national VAT grouping scheme would be contrary to Article 4 of the Sixth Directive unless those two requirements are appropriate and necessary to prevent practices of abuse or to combat tax evasion.

Non-Deductible Costs and Expenses Relating to the Holding – French Tax Consolidation Regime

European Court of Justice, Case C-386/14, 2 September 2015

On 2 September 2015, the Court of Justice of the European Union ruled on whether a French tax provision providing for the deduction of a 5% proportion of costs and expenses in respect of dividends distributed by tax-integrated resident subsidiaries to their parent company(whilst such deduction would be denied where dividends are paid by EU non-resident subsidiaries) could constitute an infringement to the freedom of establishment, as laid down in Article 43 of the Treaty on the Functioning of the European Union.

Under French tax law, dividend payments made by qualified subsidiaries to their parent company are tax exempt, except for the proportion relating to those holdings' added back to the parent company's taxable profit. That proportion corresponds to 5% of the net amount of dividends received by the parent company. However, the French tax consolidation regime allows parent companies forming part of a tax-integrated group with their French subsidiaries to neutralise that proportion when receiving dividends from tax-integrated subsidiaries. In such a case, dividends would be completely exempt.

In this case, Groupe Steria, the parent company of a French tax-integrated group, sought to deduct the proportion in relation to dividends collected from its EU non-resident subsidiaries. Groupe Steria contended that distributions from its EU non-resident subsidiaries should be treated in the same way as distributions from its tax-integrated French subsidiaries. If the non-resident subsidiaries had been established in France, they would have been eligible for such a tax consolidation regime. The French tax authorities, followed by the Administrative Court of Montreuil, dismissed the claim. The case was then brought to the Court of Appeal of Versailles, which decided to stay the proceedings and to refer the question to the ECJ for a preliminary ruling.

The ECJ held that the French legislation constitutes a restriction of the freedom of establishment, since only dividends paid by tax-integrated resident subsidiaries are fully exempt from French corporate tax at parent company level. Such national provisions would discourage French parent companies from setting up subsidiaries in other EU countries, particularly given that non-resident subsidiaries could not belong to a French tax-integrated group. According to the ECJ, tax-integrated subsidiaries and EU non-resident subsidiaries are in a comparable situation, as the parent company, in each case, bears the costs and expenses with respect to its shareholding.

Opinion of Advocate General on the Taking into Account of Losses Incurred by a Permanent Establishment in Another Member State

European Court of Justice, Case C-388/14, 3 September 2015

On 3 September 2015, the Advocate General of the ECJ gave his opinion on the case C-388/14 regarding the deduction of losses of foreign Permanent Establishments (PE).

Timac Agro Germany, a company resident in Germany, sought to deduct the losses incurred by its Austrian PE from 1997 to 2005. This latter was transferred in 2005 to an Austrian company belonging to the same group of companies. Until 1998, under German law, foreign PE losses were deductible but could be recaptured, for instance in cases where PEs were transferred to another company. As from 2000, according to the double tax treaty concluded between Germany and Austria, PE profits may only be taxed in the PE State and exempt in the other contracting State.

In this respect, two issues have been raised:

- whether a domestic tax system providing for the recapture of foreign PE losses where such foreign PE is transferred to another EU company would be compatible with the freedom of establishment ; and
- whether a domestic tax system denying the deduction of foreign PE losses if foreign PE profits are exempt by such Member State pursuant to a double tax treaty would constitute a restriction of the freedom of establishment.

As regards the first question, the Advocate General took the view that a recapture mechanism of foreign PE losses provided for by German law constitutes a restriction of the freedom of establishment, since such mechanism would only apply in respect of foreign PEs. In such a case, domestic and foreign PEs would be in a comparable position. However, according to the Advocate General, the restriction could be justified by the necessity to guarantee the coherence of the German tax system as well as the safeguarding of a balanced allocation of powers of taxation.

As to the second question, the Advocate General opined that there is no restriction of the freedom of establishment, as German and foreign PEs are not in a comparable situation. Unlike German PEs, Germany cannot tax the profits of foreign PEs, which are only taken into account in the PE State. Thus, a domestic provision denying deduction of foreign PE losses should not be disproportionate.

Automatic Exchange of Information – Fine and Refusal to Provide Information

Administrative Court of Luxembourg, Case N°36452, 13 August 2015

On 13 August 2015, the Administrative Court had to rule on whether a fine imposed on a company by the Luxembourg tax administration for refusing to provide information on the basis of the law of November 2014 ("Law"), which introduced new measures on the exchange of information on request, would be excessive, disproportionate and contrary to the principle of the right to a fair hearing.

In the case at hand, certain information was requested by the Luxembourg tax authorities from a Luxembourg company under Article 2 of the Law including, namely, the names and addresses of the shareholders and the amount and percentage of capital held by them. The company refused to provide such information on the grounds that this information would not be foreseeably relevant to the request and would constitute a mere "fishing expedition". As a result, the Luxembourg tax administration imposed a fine of EUR 250,000. The company decided to bring an action against such decision before the Administrative Court. It argued that the fine would not be proportionate to the seriousness of the offence and would contravene the principle of a fair hearing as laid down in Article 6 of the European Convention on Human Rights, since Article 6forbids any proceedings against the request of information and the injunction decision.

The Court partially dismissed the action. First, the Administrative Court affirmed that the Court's analysis should be limited to the control of the legality and regularity of the Luxembourg tax administration's decision as well as the adequacy of the fine. In addition, in light of Article 6 of the Law, Courts should not undertake an analysis of the criterion of "foreseeable relevance". As regards the compatibility of the decision under Article 6 of the European Convention on Human Rights, it cannot be assessed to the extent that the injunction decision would be a preparatory fiscal decision. According to the Court, tax issues as well as preliminary decisions would fall outside the scope of Article 6 of the European Convention on Human Rights. However, the Court considered the fine as excessive and disproportionate and reduced it to EUR 150,000.

Tax

International Legislation

Political Agreement between Member States on the Automatic Exchange of Information on Tax Rulings

ECOFIN Council – Proposal to Repeal the Directive 2011/16/EU on Automatic Exchange of Information in the Field of Taxation

On 6 October 2015, at the ECOFIN Council, EU Member States reached a political agreement on the proposal for a Council Directive amending Directive 2011/16/EU on the mandatory automatic exchange of information in the field of taxation. The purpose of this legislative proposal is to introduce a mandatory automatic exchange of information on advance cross-border tax rulings as well as advance pricing arrangements between Member States. In addition to the information provided, Member States will be able to obtain further information upon request. Being centralised and recorded through a central directory developed by the European Commission, all information exchanged between Member States will be made available to all Member States.

By virtue of the proposal, the information to be communicated will notably include:

- the identification of the person or group of persons to which it belongs
- a summary of the content of the tax ruling or the APA
- the dates of issuance, amendment or renewal of the tax ruling or APA
- the start date of the period of validity of the tax ruling or APA, if specified
- the end date of the period of validity of the tax ruling or APA, if specified
- the type of tax ruling or APA
- the amount of the transaction or series of transactions of the tax ruling or APA, if specified
- in respect of APAs, the description of the criteria used for the determination of transfer pricing or the transfer price itself
- the identification of any person in the other Member States affected by the tax ruling or APA
- an indication as to whether the information communicated is based upon the tax ruling or APA itself, or upon bilateral or multilateral APAs with third countries.

The Directive will come into force on 1 January 2017. The automatic exchange of information will concern future tax rulings and APAs as well as those issued during the past five years, in particular:

- tax rulings and APAs issued, amended or renewed between 1 January 2012 and 31 December 2013 if they are still valid on 1 January 2014
- tax rulings and APAs issued, amended or renewed between 1 January 2014 and 31 December 2016.

It is of interest to note that the automatic exchange of information would not cover tax rulings and APAs (issued, amended or renewed before 1 April 2016) issued to companies with an annual net turnover of less than EUR 40 million at a group level.

Study on VAT Revenue Collection

Questions and Answers released by the European Commission – VAT Gap Report

This report focuses on the gap between the actual portion of VAT collected and the VAT total tax liability.

According to the report, the global VAT gap rose by EUR 2.8 billion to reach EUR 168 billion, while in terms of percentage, the overall VAT Gap remained at 15.2 percent.

This report also provides new and widened evidence on the Policy Gap for 26 EU Member States for 2013 in order to estimate the additional VAT revenue which is hypothetically collectable by a Member State applying the standard rate of VAT to all consumption of goods consumed and services supplied for consideration.

Pursuant to the report, the Policy Gap (ranging from 27 percent to 54 percent) was higher than the VAT Gap.

The results show a weakening of the impact of the reduced rates and exemptions and imply that any improvement of the VAT system should be reflected in better enforcement.

OECD – Base Erosion and Profit Shifting (BEPS) Project

Final reports on BEPS

On 5 October 2015, the OECD released its final BEPS reports proposing a host of changes to reform the international tax system. Certain measures have been identified in order to discourage aggressive tax planning and profit shifting from high tax jurisdictions to low tax jurisdictions.

Please refer to our client briefing BEPS – the Final Report for further details on the above.

OECD – Luxembourg rated Largely Compliant overall

According to the OECD press release and publication, Luxembourg is now rated Largely Compliant overall. The OECD report stated that "in 2013, The Global Forum evaluated Luxembourg for its implementation of the standard in practice. At the end of this evaluation, Luxembourg was rated Non-Compliant overall. This supplementary report evaluates the progress made by Luxembourg since then. This report concludes that Luxembourg is now rated Largely Compliant overall." See Supplementary Peer Review Report Phase 2 – Implementation of the Standard in Practice.

National Legislation

Implementation of the Amendments to the Parent-Subsidiary Directive into Luxembourg Law and Other New Tax Provisions

Bill of Law N°6847

On 5 August 2015, the Luxembourg Minister of Finance released the bill of law N°6847 implementing the amended Parent-Subsidiary Directive and introducing new tax measures relating to the Luxembourg tax consolidation regime, and the deferral of capital gains taxation upon the transfer of tax residence or the transfer of a permanent establishment. The draft law also extends the investment tax credit to the leasing of ships used in international traffic and grants a two-year extension (from 31 December 2014 until 31 December 2016) to the tax credit for hiring unemployed individuals.

Anti-hybrid rule

In line with the Base Erosion and Profit Shifting works, the first amendment to the Parent-Subsidiary Directive aims at preventing the use of financial hybrid instruments which are of a twofold nature of debt and equity, so the companies to benefit from a tax deduction in the country where dividends are paid and a dividend tax exemption in the parent company country. In order to prevent this phenomenon of double non-taxation, Article 166 ITL will be amended so that dividends received by a parent company from its subsidiary would not be exempt if they are deductible at the subsidiary level.

GAAR

In addition, the bill of law introduces under Articles 147 and 166 ITL a general anti-avoidance rule whereby the benefits of the Luxembourg participation exemption regime (no withholding tax on dividend payments, and exemption of the dividends collected by a Luxembourg parent company) would be denied to arrangements or series of arrangements that are contrary to the object and purpose of the Parent-Subsidiary Directive. This particularly concerns non-genuine arrangements (or series of arrangements), which are not *put into place for valid commercial reasons that reflect economic reality*.

Tax unity

In light of the ECJ jurisprudence, the bill of law enshrines in Luxembourg tax law the "horizontal tax consolidation" by allowing an European Economic Area ("EEA") parent company, or an EEA permanent establishment of a non-resident company subject to a tax comparable to Luxembourg corporate income tax, to form a consolidated group with its Luxembourg sister companies (95% of whose shares are directly or indirectly held by the foreign parent company or the foreign permanent establishment). However, the consolidated taxable profits would be determined at the level of the Luxembourg sister company having the closest ownership relationship with the foreign parent company (although the latter would not participate in the tax consolidation). The draft law further proposes that a Luxembourg permanent establishment of an EEA company subject to a tax comparable to Luxembourg corporate income tax could qualify as an integrated entity, and so form part of the Luxembourg "vertical tax consolidation".

Capital gains tax deferral

Furthermore, the bill of law extends the tax deferral regime for unrealised gains to Luxembourg companies, Luxembourg enterprises and permanent establishments, which transfer their tax residence to another EEA country.

Automatic Exchange of Information on Financial Accounts in Tax Matters

Bill of law N°6858

The bill of law N°6858 pertaining to the automatic exchange of financial account information in tax matters was submitted to the Luxembourg Parliament on 14 August 2015.

Such draft law, very similar in spirit to the law adopted on 24 July 2015 ratifying the US FATCA intergovernmental Agreement between the US and Luxembourg, is designed to intensify the automatic exchange of information with EU countries as well as with countries that signed the multilateral competent authority agreement ("MCAA") on 29 October 2014. In order to comply with the Standard for Automatic Exchange of financial account information in tax matters as endorsed by the G20, the draft law proposes to:

- implement the Directive 2014/107/EU amending the EU Savings Directive
- ratify the MCAA signed on 29 October 2014
- amend the Law of 29 March 2013 on administrative cooperation in the field of taxation.

The draft law broadens the scope of automatic information exchange of the Savings Directive and requires Luxembourg financial institutions to report the same information about account holders to the Luxembourg tax administration rather than under the FATCA law.

If this draft law is enacted by the Luxembourg Parliament, the automatic exchange of information mechanism would apply to EU Member States and to countries having ratified the MCAA, from 1 January 2016.

The adoption of the draft law would constitute a stepping-stone towards a more global approach to the automatic exchange of information between Luxembourg and the other countries, and would lead to greater transparency in the field of taxation.

Circulars/Regulatory Developments

Application of the Double Tax Convention between Luxembourg and Spain to UCITS

Circular L.G. – Conv. D.I. N°52 of 21 July 2015

On 21 July 2015, the Luxembourg tax authorities issued Circular L.G - Conv. D.I N°52 specifying to which category of investment funds the double taxation treaty between Luxembourg and Spain ("Convention") does and does not apply. In this respect, only entities covered by Paragraph 1 of the Protocol of the Convention would be excluded from the benefit of the provisions of the Convention.

Pursuant to the circular, Paragraph 1 of the Protocol covers the following vehicles:

- *Société de gestion de patrimoine familial* (SPF)
- SICAF/ SICAV regulated under Section II of the Law of 17 December 2010
- Specialised investment funds (SIF) created under the Law of 13 February 2007

Being regulated under Section I of the Law of 17 December 2010, UCITS under the form of SICAF/SICAV are entitled to benefit from the provisions of the Convention.

FATCA – Luxembourg and United States

Administrative Circulars ECHA N°2 and N°3

On 24 July 2015, the Luxembourg Parliament adopted on 24 July 2015 the law implementing the US FATCA intergovernmental Agreement between the US and Luxembourg ("IGA"). According to this FATCA legislation, foreign financial institutions will have to report information about US account holders directly to the Luxembourg tax administration which, in turn, provides the information to the Internal Revenue Service through an automatic exchange of information programme.

Please refer to the July 2015 edition of our Luxembourg Legal Update for further details on the above.

On 31 July 2015, the Luxembourg tax authorities issued the final version of the Circular letters ECHA 2 and ECHA 3. The Circular letter ECHA 2 details the legal requirements imposed on foreign financial institutions with regard to the exchange of information under the IGA, whilst the Circular letter ECHA 3 describes the technical implementation aspects of the exchange of information.

Car Allowance – Benefits in Kind Granted by Employers to their Employees

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

On 1 September 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. This replaced the circular released on 10 March 2015 (please refer to the July 2015 edition of our Luxembourg Legal Update for further details). Taking into account certain legislative developments, the circular reduces, as from 1 August 2015, the tax allowance for employees using their private car for professional purposes from EUR 0.40 to EUR 0.30 per driven kilometre. If the allowance granted by the employer exceeds the tax-free amount per driven kilometre, the difference between those two amounts would be taxed in the hands of the employee. By virtue of Article 136 ITL, the employer would be required to withhold and remit the amount of income tax due.

Interpretation of the Term "Rental Car Businesses" – Investment Tax Credit

Circular L.I.R. N°152bis/4 of 3 August 2015

On 3 August 2015, the Luxembourg tax authorities issued Circular L.I.R N°152bis/4 in order to provide an interpretation of the concept of rental businesses, as referred to in Paragraphs 4 and 7 of Article 152bis ITL. Pursuant to Article 152bis ITL, Luxembourg companies can benefit from an investment tax credit (*bonification d'impôt pour investissement*) if certain conditions are met. Article 152bis ITL is an incentive for Luxembourg enterprises to invest in certain qualifying assets. In this respect, motor vehicles would be excluded from the benefit of the regime unless such vehicles are part of the net assets of a rental car company.

According to the circular, to qualify as a rental car company within the meaning of Article 152bis/4 ITL, the following conditions must be fulfilled:

- the main object of the company has to be the short or medium-term rental of cars. It does not need to be the sole object of the company
- the company has a sufficient stock of cars in order to achieve its aims
- as the concept of cars refers to passenger vehicles (*voitures de tourisme*), the company has to obtain a trade permit from the Minister of Economy or an authorisation of establishment from the Luxembourg supervisory authority (*Commission de Surveillance du Secteur Financier*)
- the company has to be the legal and economic owner of the vehicles. In case the legal and economic ownership are separated, the company has to be at least the economic owner of the cars.

The circular also addresses the issue of car leasing contracts.

Since various types of leasing contracts exist, a case-by-case analysis is necessary to determine whether the cars are part of the net assets of the lessor. Indeed, such analysis would be required to attribute the economic ownership either to the lessor or the lessee. The company may qualify as a rental company only to the extent that the company is the economic owner of the cars subject to the leasing arrangement.

Pursuant to the circular, Circulars L.G.A. N°37 and N°40 (dated, respectively, 4 January 1974 and 24 April 1976) still apply with respect to leasing contracts.

A distinction should be made between operational and financial leasing contracts:

- In respect of financial leasing contracts, Article 2 of the Grand-Ducal Decree of 29 October 1987 provides that only the lessee may elect for the benefits of the investment tax credit set out in Article 152bis ITL, regardless of whether or not the cars are part of the lessor's net assets.
- As regards operational leasing contracts, the economic and legal ownership would be attributed to the lessor. Thus, a company whose main object is the operational leasing of cars should be considered as a rental car

company and as such should be entitled to the investment tax credit, provided that the conditions referred to in Article 152bis ITL are fulfilled.

Case Law

VAT Treatment of Holding Companies – Input VAT Deduction Right for Holding Companies

European Court of Justice, Cases C-108/14 and C-109/14, 16 July 2015

Non-Deductible Costs and Expenses Relating to the Holding – French Tax Consolidation Regime

European Court of Justice, Case C-386/14, 2 September 2015

Opinion of Advocate General on the Taking into Account of Losses Incurred by a Permanent Establishment in Another Member State

European Court of Justice, Case C-388/14, 3 September 2015

Automatic Exchange of Information – Fine and Refusal to Provide Information

Administrative Court of Luxembourg, Case N°36452, 13 August 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-Terrorism 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

BRRD: Directive 2014/59 establishing a framework for the recovery and resolution of credit institutions and investment firms

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 regardings capital requirements for the trading book and for re-securitisations, 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 the processing of personal data

DGSD 2: Directive 2014/49 of 16 April 2014 on deposit guarantee schemes

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 of 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

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 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 the 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 investment companies 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 of securities 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

UCITS V Directive*:* Directive 2014/91/EU of the European parliament and Council of 23 July 2014 amending Directive 2009/65/EC as regards depositary functions, remuneration policies and sanctions

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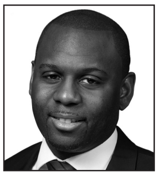

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