Luxembourg Legal Update

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CLIFFORD CHANCE

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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

SFTR

On 23 December 2015, Regulation (EU) N°2015/2365 on transparency of securities financing transactions and of reuse (SFTR) was published in the Official Journal.

Among other things, the SFTR introduces new information and execution conditions on the reuse of financial collateral, disclosure requirements on the use of securities financing transactions (SFTs) and total return swaps by collective investment schemes, and new requirements to report SFTs to a trade repository.

Transitional provisions foresee that there will be a phased implementation of most requirements, although some requirements will apply from the entry into force of the SFTR, including record-keeping requirement for SFTs (Article 4(4)), transparency requirements for pre-contractual documents for new funds (Article 14) and an obligation to establish internal procedures for reporting breaches (Article 24(3)).

The Regulation entered into force on 12 January 2016.

Please find further information on the SFTR in the related Clifford Chance Commentary.

Payment Services

On 23 December 2015, the recast Payment Services Directive (EU) 2015/2366 (PSD 2) was published in the Official Journal. PSD 2 entered into force on 12 January 2016 and must be transposed by Member States into their national law by 13 January 2018, which is the date from which the rules will apply. PSD 2 will repeal the Payment Services Directive 2007/64/EC (PSD 1) and includes rules on:

- emerging payment services, including internet and mobile payments
- payment security
- harmonisation of the supervisory framework by national competent authorities (NCAs).

Insurance Distribution

On 2 February 2016, the Insurance Distribution Directive (EU) 2016/97 (IDD) was published in the Official Journal. The IDD introduces rules that apply when a product is bought directly from an insurance company as well as through a broker or intermediary and replaces the 2002 Insurance Mediation Directive 2002/92/EC (IMD). The IDD is intended to increase policyholder protection, enhance the information consumers receive and ensure effective conduct of business rules. Among other things, the IDD introduces:

- requirements for all insurance distributors to register with a competent authority in their home Member State
- more comprehensible information for consumers, including standardised Product Information Documents for non-life insurance products
- a requirement to allow consumers to choose whether to purchase insurance or not when it is offered as an ancillary product to other services or goods
- independent out-of-court complaint and redress procedures in all Member States
- further transparency measures
- mutual recognition of professional knowledge and ability across Member States.

Member States have until 23 February 2018 to transpose the IDD into their national laws and regulations.

Banking Union

Intergovernmental Agreement establishing the SRF ratified

The intergovernmental agreement (IGA) on the transfer and mutualisation of contributions to the SRF under the SRM has been ratified by enough Member States before the midnight deadline on 30 November 2015 to enable full resolution powers to be granted to the SRB on 1 January 2016.

The EU Council decided in December 2013 to use an IGA to establish the rules on transferring funds to the SRF to provide maximum legal certainty. Under the IGA, funds will be built up over eight years to reach a target level of at least 1% of the amount of covered deposits of all credit institutions authorised in all the participating Member States. The IGA entered into force on 1 January 2016.

Transparency Directive

ESMA publishes Updated Q&A and Disclosure Forms

On 22 October 2015, ESMA published four new documents intended to promote the implementation of the amended Transparency Directive 2013/50/EU, which had a transposition deadline of 26 November 2015. The documents include updated Q&A, which now include seven additional Q&A, four revised answers and ten deletions. Amongst other things, ESMA sets out clarifications on:

- the definition of a home Member State
- the division of responsibilities between home and host Member States
- the disclosure and dissemination of regulated information
- the aggregation rule for the calculation of notification thresholds of voting rights.

Alongside the Q&A, ESMA also published two standard forms for:

- Issuers whose securities are admitted to trading on an EU regulated market to disclose their home Member State to:
  - their home Member State competent authority
  - all host Member State competent authorities
  - the competent authority of the Member State where the issuer has its registered office.

The new standard form (ESMA/2015/1596) is intended to reduce the administrative burden on issuers by simplifying different types of disclosure into one single document and ensuring the consistency of the information disclosed.

- Shareholders notifying major holdings of voting rights to competent authorities and issuers. The new standard form (ESMA/2015/1597) includes key information about the notification and detailed information on the voting rights attached to shares and breakdown of voting rights by type of financial instrument.

ESMA recommends the use of both standard forms, but their use is not mandated under the Transparency Directive.

ESMA also re-published its indicative list of financial instruments subject to notification requirements. The list was previously published in Annex V of ESMA's final report on draft regulatory technical standards (RTS) on major holdings in order to provide effective guidance to the market.

Other New Delegated, Implementing and other EU Regulations and Texts

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

CRD IV/CRR:

- N°2015/2197 of 27 November 2015 laying down implementing technical standards (ITS) with regard to closely correlated currencies in accordance with the CRR
- N°2015/2326 of 11 December 2015 on the extension of the transitional periods related to own funds requirements for exposures to central counterparties set out in the CRR and Regulation (EU) N°648/2012 of the European Parliament and of the Council
- N°2015/2344 of 15 December 2015 laying down ITS with regard to currencies with constraints on the availability of liquid assets in accordance with the CRR
- N°2016/98 of 28 January 2016 on regulatory technical standards for specifying the general conditions for the functioning of colleges of supervisors
- N°2016/99 of 28 January 2016 laying down ITS with regard to determining the operational functioning of the colleges of supervisors according to CRD 4

- N°2016/100 of 28 January 2016 specifying the joint decision process with regard to the application for certain prudential permissions pursuant to the CRR
- N°2016/101 of 28 January 2016 with regard to RTS for prudent valuation under Article 105(14) of the CRR
- N°2016/313 of 1 March 2016 amending Implementing Regulation (EU) N°680/2014 with regard to additional monitoring metrics for liquidity reporting under the CRR
- N°2016/322 of 10 February 2016 amending Implementing Regulation (EU) N°680/2014 laying down ITS with regard to supervisory reporting of institutions of the liquidity coverage requirement
- EBA Recommendations (EBA/Op/2015/20) of 14 December 2015 for the sound prudential regime for investment firms under the Capital Requirements Directive (CRD 4)
- EBA Opinion (EBA/Op/2015/24) on the trigger, calculation and transparency of the maximum distributable amount (MDA) under CRD 4, clarifying that the MDA should be calculated by taking into account both minimum (Pillar 1) and additional (Pillar 2) capital requirements as well as the combined buffer requirement.

DGSD 2:

- EBA has published final guidelines on cooperation agreements between deposit guarantee schemes, as provided for under DGSD 2. The guidelines specify details of the sequence of events when a local deposit guarantee scheme (DGS) makes a payout on behalf of a DGS in another Member State and the objectives and minimum content of cooperation agreements in relation to:
  - repayments to depositors by a local DGS at branches of banks established in other Member States
  - transferring contributions from one DGS to another in cases where a credit institution ceases to be a member of a DGS and joins another DGS
  - mutual lending between DGSs.

The guidelines are intended to facilitate the EBA's mediation role as set out in DGSD 2, in instances where DGSs cannot reach an agreement or are in dispute. The guidelines will be translated into the official EU languages and will apply six months after the translations are published on the EBA's website. National competent authorities will have two months following publication to inform the EBA whether they intend to comply with the guidelines.

EMIR:

- N°2015/2205 of 6 August 2015 supplementing the EMIR with regard to RTS on the clearing obligation for interest rate swaps (IRS) in the G4 currencies.

MAR:

- N°596/2014 of 17 December 2015 on reporting infringements under the MAR to competent authorities
- N°2016/347 laying down ITS on the precise format of insider lists and keeping insider lists up to date under the MAR. The ITS relates to requirements under Article 18 of the MAR for issuers, emission allowance market participants, auction platforms, auctioneers and auction monitor, or any other persons acting on their behalf or on their account, to draw up insider lists, which should identify specific pieces of inside information and should be submitted to competent authorities through specific electronic formats. The Regulation entered into force on 12 March 2016 and shall apply from 3 July 2016.

MiFID 2:

ESMA's final report (ESMA/2015/1783) on guidelines for complex debt instruments and structured deposits under MiFID2, intending to promote greater convergence in the classification of complex or non-complex financial instruments or structured deposits for the purposes of Article 25(4) of MiFID2, under which investment firms may provide investment services in certain circumstances that only consist of execution or reception and transmission of orders without obtaining client information necessary to assess the appropriateness of the service or product for the client. The guidelines will apply from 3 January 2017.

Solvency II:

- N°2015/2450 of 2 December 2015 laying down ITS with regard to the templates for the submission of information to the supervisory authorities
- N°2015/2451 of 2 December 2015 laying down ITS with regard to the templates and structure of the disclosure of specific information by supervisory authorities
- N°2015/2452 of 2 December 2015 laying down ITS with regard to the procedures, formats and templates of the solvency and financial condition report
- N°2016/165 of 5 February 2016 on the risk-free rate setting out technical information to be used by

insurance companies when calculating technical provisions and basic own funds for reporting with reference dates from 1 January to 30 March 2016. The Implementing Regulation is applicable from 1 January 2016.

SSM, SRB, and SRM:

- Inter-institutional Agreement between the EU Parliament and the SRB on practicalities for oversight of the tasks conferred on the SRB within the SRM under the SRM Regulation, including:
  - accountability, access to information and confidentiality
  - procedures for selection of members to the SRB to ensure diversity in its composition
  - the SRB's code of conduct, and
  - the adoption of acts by the SRB.

  The Agreement entered into force on 17 December 2015.
- ECB recommendation (ECB/2015/49) on banks' dividend distribution policies within the SSM. The recommendation applies the same method as set out in recommendation ECB/2015/2 of 28 January 2015 and is addressed to significant entities and significant groups supervised directly by the ECB and NCAs and designated authorities that supervise less significant supervised entities and less significant supervised groups. The ECB recommends an approach to dividend distributions in 2016 for the financial year 2015 that distinguishes between three categories of bank:
  - category 1 banks, which fulfil capital requirements as at 31 December 2015 and have already reached their 'fully loaded' capital ratios for January 2019 requirements, which should conservatively distribute dividends
  - category 2 banks, which fulfil capital requirements as at 31 December 2015 but are yet to reach their 'fully loaded' capital ratios for January 2019 requirements, which should conservatively distribute their net profit in dividends even in cases of deteriorated economic and financial conditions, but only to the extent that the path towards the required fully loaded ratio is secured
  - category 3 banks, which neither satisfy Pillar 1 requirements under the CRR, capital requirements beyond Pillar 1 imposed as a result of the supervisory review and evaluation process (SREP), nor satisfy countercyclical capital and systemic buffers under CRD 4, and should in principle not distribute dividends.

Significant credit institutions that are not able to comply due to a legal requirement to pay dividends should immediately contact their joint supervisory team, while less significant supervised entities should contact their national supervisory authority.

Legislation

Solvency II Implementation

The Luxembourg acts implementing the Solvency II Directive 2009/138/EC (as amended) were published in the Memorial on 9 December 2015. The implementing acts consist of:

- the law of 7 December 2015 on the insurance sector, constituting a complete redraft of and replacement for the former Luxembourg insurance sector law of 6 December 1991 (as amended)
- the law of 7 December 2015 amending the law of 27 July 1997 on insurance contracts and the law of 8 December 1994 on annual accounts and consolidated accounts of Luxembourg insurance and reinsurance undertakings
- the CAA regulation N°15/03 of 7 December 2015 on insurance and reinsurance undertakings.

The Solvency II implementing acts entered into force on 1 January 2016, subject to limited exceptions and the transitional regime as foreseen under Solvency II.

The implementation of Solvency II will lead to a paradigm shift in the Luxembourg insurance sector legislation. Insurance sector undertakings will, in the future, have to:

- adopt a much more detailed and exhaustive analysis of the risks they are exposed to
- develop economic and mathematical models enabling them to correctly assess these risks and the financial resources to enable them to confront them
- regularly adapt their minimum and solvency capital to the risks actually encountered
- develop precise internal and external control rules
- subject themselves to more constraining internal governance rules
- report to supervisory authorities all of their activities in a more extensive and frequent manner than in the past.

The implementing acts also replace the Insurance Sector Law, that was previously in force, with a new law

representing a unique and coherent codification of legal texts governing insurance and reinsurance activities. While the implementation of the Solvency II Directive provisions will lead to a substantial change in the regulatory regime of the insurance sector, many existing provisions remain unaffected.

In the future, numerous implementing measures are expected to supplement the new Solvency II Directive framework, both at European Union level (European Commission regulations and mandatory technical standards issued by the EIOPA) and at national level (Grand-Ducal regulations and regulations issued by the CAA). The implementing acts also foresee integration into the new European supervisory architecture by providing for a wider coordination and, at least in part, sharing of competences by the CAA with EIOPA and, indirectly, the ESRB.

We also kindly refer you to the summary of the main features of the new law as provided for in the June 2013 edition of the Luxembourg Legal Update.

BRRD and DGSD 2 Implementation

Law dated 18 December 2015

The law of 18 December 2015 implementing the BRRD and DGSD 2 (Bank Resolution Law) and the law of 18 December 2015 approving the agreement on the transfer and mutualisation of contributions to the single resolution fund (SRF) signed in Brussels on 21 May 2014 were published in the Memorial on 24 December 2015. Both laws entered into force on 28 December 2015, subject to limited exceptions and the transitional regime foreseen in the Bank Resolution Law.

The Bank Resolution Law designates the CSSF as the competent Luxembourg resolution authority. In order to prevent any conflict of interests with the CSSF's supervisory powers, the CSSF's resolution powers are exercised by a new internal body called a "resolution council", supported in its tasks by a new resolution service.

The Bank Resolution Law 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.

Further summary points on the Bank Resolution Law may also be found in the June 2013 edition of the Luxembourg Legal Update.

Implementation of Article 1(5) of Regulation (EU) 2015/751 on Interchange Fees for Card-based Payment Transactions

Grand-Ducal Regulation dated 18 December 2015

A new Grand-Ducal Regulation dated 18 December 2015 implementing Article 1(5) of Regulation (EU) 2015/751 on interchange fees for card-based payment transactions (Regulation 2015/751) has been published in the Memorial.

In accordance with the Member State option foreseen in Article 1(5) of Regulation 2015/751, the new Regulation exempts three party payment card schemes in relation to payment transactions made in Luxembourg from the obligations set forth in Chapter II of Regulation 2015/751 until 9 December 2018, provided that card-based payment transactions made in Luxembourg under such scheme do not exceed a certain threshold.

The new Regulation entered into force on, and is applicable from, 28 December 2015.

CRD IV/CRR: Setting of a Countercyclical Buffer Rate

CSSF Regulation N°15-04

On 30 November 2015, the CSSF published Regulation N°15-04 on the countercyclical capital buffer rate (*taux de coussin de fonds propres contracyclique spécifique*).

Following the Luxembourg Systemic Risk Committee's recommendation of 16 November 2015 (CRS/2015/001), the new Regulation fixes the countercyclical capital buffer rate to 0% for relevant exposures located in Luxembourg.

The new Regulation entered into force on 1 January 2016.

CRD IV/CRR: Exemption from the Requirements of Countercyclical Capital Buffer and Capital Conservation Buffer

CSSF Regulation N°15-05

On 30 November 2015, the CSSF published Regulation N°15-05 on the exemption from the countercyclical capital buffer rate (*taux de coussin de fonds propres contracyclique spécifique*) and capital conservation buffer (*coussin de conservation de fonds propres*) requirements.

The new Regulation applies to investment firms that qualify as small- and medium-sized enterprises (SME) as referred to in paragraph 1 of Article 59-1 of the Financial Sector Law.

Following the Luxembourg Systemic Risk Committee's recommendation of 16 November 2015 (CRS/2015/001), the CSSF exempts SMEs from the countercyclical capital buffer rate and capital conservation buffer obligations in relation to relevant exposures located in Luxembourg.

The Regulation states that the decision is justified by the fact that the aggregated balance sheet of concerned SMEs is less than 0.02% of credit institutions' aggregated balance sheet and such an exception, in accordance with the Recommendation, does not threaten the national financial system's stability, in accordance with paragraph 2 of Article 59-1 of the Financial Sector Law.

The new Regulation entered into force on 1 January 2016.

CRD IV/CRR: CSSF Regulation on Systemically Important CRR Institutions authorised in Luxembourg

CSSF Regulation N°15-06

On 30 November 2015, the CSSF published Regulation N°15-06 on systemically important institutions authorised in Luxembourg.

The CSSF confirms therein that none of the institutions (within the meaning of the CRR) authorised in Luxembourg is identified as a "global systemically important institution" (G- SII), within the meaning of the Financial Sector Law.

The new Regulation further identifies six CRR institutions authorised in Luxembourg as "other systemically important institutions" (O-SIIs), as well as the capital buffer rate applicable to them with a gradual implementation over three years, as of 1 January 2016.

The new Regulation entered into force on 1 January 2016.

Regulatory Developments

CRD IV/CRR: Reporting Requirements of Credit Institutions

CSSF Circular 15/621

On 21 October 2015, the CSSF issued circular 15/621 updating CSSF circular 14/593 on reporting requirements applicable to credit institutions. The update reflects the latest developments and requirements on EU level for credit institutions in relation to prudential reporting.

Furthermore, the new circular specifies the CSSF's new requirements for financial information reporting (FINREP; ITS) on an individual basis, subject to certain reporting rules continuing to apply for a transitional period. Following the entry into force of the Liquidity Coverage requirement in accordance with the Delegated Act of the European Commission (EU) N°2015/61 of 10 October 2014, the new circular further repeals CSSF circular 07/316 and 07/331 for the part concerning the liquidity ratio reporting table B 1.5 and IML circular 93/104 as of 1 October 2015.

CRD IV/CRR: Higher Ratio Notification Procedure applicable to Remuneration Policy pursuant to CRD IV Implementation

CSSF Circular 15/622

On 21 October 2015, the CSSF issued circular 15/622 on the higher ratio notification procedure applicable to remuneration policy according to Article 94(1)(g)(ii) of CRD IV following its transposition into Luxembourg law.

The CRD IV implementing law permits Luxembourg incorporated CRR institutions, that do not benefit from a derogation granted by the CSSF by virtue of Article 7 of the CRR (CRR Institutions), to set the ratio between the fixed remuneration and the variable remuneration for material risk takers of the institution to a maximum of 200%. This higher ratio needs to be approved (and renewed) annually

by the shareholders, owners or members of the relevant institution.

In Luxembourg, any such approval of an increased ratio needs to be notified to the CSSF and exercised in accordance with the two-step procedure foreseen in the Luxembourg Financial Sector Law. Once a detailed recommendation has been submitted to the shareholders, the CSSF has to be informed without delay of such recommendation. Once the shareholders have taken the decision, the CSSF has to be informed without delay of such decision. For such purposes, the circular provides notification forms to be completed with the information regarding the higher ratio, before being sent electronically and in a signed paper version to the CSSF.

For significant institutions under the SSM for Eurozone banks, any approval of a ratio above 100% shall be sent to the ECB Joint Supervisory Team of the relevant institution, with a copy to the CSSF, and follow the same two-step process set out above and use the forms attached to the new circular.

The circular repeals and replaces CSSF circular 15/601 and enters into force with immediate effect.

CRD IV/CRR: CSSF issues Circular on Electronic Transfer of Documents to the CSSF

CSSF Circular 15/624

On 10 November 2015, the CSSF issued circular 15/624 introducing the electronic transmission of certain documents to the CSSF via one of the secured transfer channels E-file or *SOFiE*. The circular entered into force on 31 December 2015 and is addressed to all Luxembourg credit institutions as well as to Luxembourg branches of non-EU credit institutions.

The electronic transfer is complementary to the submission in paper form and concerns:

- the reports on annual accounts
- the Internal Capital Adequacy Assessment Process (ICAAP), as defined in CSSF circular 07/301
- the summary reports of the internal control functions, as defined in CSSF circular 12/552 (point 116) as well as the statement of the authorised management on compliance with that circular (point 61)
- the statement of the authorised management on compliance with CSSF circular 13/555
- the recovery plans laid down in the BRRD for the credit institutions subject to this obligation.

Furthermore, the circular sets out certain requirements and details for the electronic transmission to the CSSF related to, amongst other, the files' name conversion and format as well as the possibility to carry out *ad hoc* research, cross-sectional analyses and comparison over time.

CRD IV/CRR: CSSF Circular providing Guidance on Countercyclical Capital Buffers

CSSF Circular 15/625

On 1 December 2015, the CSSF issued circular 15/625 providing guidance on the countercyclical capital buffer (CCyB).

The circular provides guidance with respect to, amongst other things, the calculation of the institution-specific CCyB rates for exposures to counterparties in more than one jurisdiction, the geographical distribution of relevant credit exposures, as well as the disclosure requirements of key elements of the calculation of the CCyB.

The circular entered into force with immediate effect and the CCyB regime is fully applicable in Luxembourg as of 1 January 2016. The circular is addressed to all Luxembourg credit institutions and investment firms subject to capital buffer requirements as referred to in Article 59-1(1) of FSL, as well as to Luxembourg branches of equivalent institutions incorporated in a third country. Pursuant to CSSF Regulation 15-05 dated 30 November 2015, investment firms which qualify as small- and medium-sized enterprises are excluded from the CCyB requirements.

SRF: CSSF Circular on Collection of Data for Calculation of 2016 Ex-ante Contributions to Single Resolution Fund

CSSF Circular 15/626

On 1 December 2015, the CSSF issued circular 15/626 on the information requested by the SRB for the calculation of the 2016 contribution to the SRF according to Articles 4 and 14 of the Commission Delegated Regulation (EU) N°2015/63. The circular is addressed to all credit institutions incorporated under Luxembourg law. Luxembourg branches or foreign (EU or non-EU) credit institutions do not fall within the scope of the circular.

The circular provides a link to the template developed by the SRB which must be used for the purpose of data-gathering. The completed template had to be sent to the CSSF, at the latest, by 1 February 2016 at 24:00. In cases where all the required information was not transmitted correctly by that date, the SRB has had to use estimates or its own assumptions for the calculation of the

2016 contribution of the concerned credit institution to the SRF (Article 17 (1) of the Delegated Regulation). In specific cases, the SRB assigns the credit institution concerned to the highest risk adjusting multiplier for the calculation of the institution's contribution to the SRF (Article 17 (2) Delegated Regulation). The circular also sets out certain requirements on the file's format and name which must be complied with when sending the completed template to the CSSF.

Finally, the circular sets out the obligation for each credit institution to make available to the resolution department of the CSSF (which will ensure transmission to the SRB) a document certifying that the submitted template complies with the general instructions. For this purpose, the circular provides a link to a template which has to be:

- completed
- signed by at least one of the members of the banks' authorised management
- sent to the CSSF at the latest by 1 February 2016, either by mailing a hard copy or by e-mailing a scanned copy to the addresses provided in the circular.

National Resolution Fund: CSSF Circular regarding Information on/Announcement of raising 2015 Ex-ante Contributions to the National Resolution Fund

CSSF Circular 15/628

On 14 December 2015, the CSSF issued circular 15/628 on information on/announcement of raising 2015 ex-ante contributions to the national resolution fund according to Articles 4, 13 and 20 of the Commission Delegated Regulation (EU) N°2015/63.

The circular is addressed to all Luxembourg established credit institutions subject to the Delegated Regulation. Luxembourg branches or foreign EU or non-EU credit institutions are not targeted by the circular. Branches established in Luxembourg by a non-Luxembourg EU credit institution are covered by its head office.

Based on the sum of covered deposits as reported further to circular CSSF 15/619, the aggregate amount to be raised from the Luxembourg credit institutions in 2015 is EUR 28.550.229.

The corresponding individual notices have been sent to the credit institutions by 15 December 2015. The 2015 contributions are payable via bank transfer within two weeks and without charges for the CSSF.

The 2015 contributions received from credit institutions falling in the scope of application of Regulation (EU) N°806/2014 of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund had to be transferred to the Luxembourg compartment in the Single Resolution Fund (SRF) by 31 January 2016 pursuant to Article 3(3) of the Agreement on the transfer and mutualisation of contributions to the SRF.

From 2016 onwards, the contributions of these institutions will be calculated by the Single Resolution Board (SRB). In the following years, when calculating the individual contributions of each credit institution, the SRB shall take into account the 2015 contributions by deducting them from the amounts due from each credit institution.

Financial Conglomerates: CSSF Circular on Supplementary Supervision applicable to Financial Conglomerates

CSSF Circular 15/629

On 10 December 2015, the CSSF issued circular 15/629 on supplementary supervision applicable to financial conglomerates and the definition of structure coefficients to be complied with regulated entities belonging to financial conglomerates.

The circular is addressed to all Luxembourg based credit institutions, investment firms, portfolio management companies and alternative investment fund managers.

The circular entered into force with immediate effect.

The aim of the circular is:

- to repeal CSSF circular 06/268 on supplementary supervision of financial conglomerates which became partly obsolete following the adoption of the Luxembourg CRD 4 implementing law
- to transpose the modifications made by Article 2(24) of Directive 2011/89/EU to annex I of the Financial Conglomerates Directive 2002/87/EC in respect of capital adequacy for regulated entities in a financial conglomerate.

The circular first recalls the main principles of supplementary supervision of financial conglomerates contained in the FSL. Second, the circular provides details on the supplementary supervision of capital adequacy at the level of the financial conglomerate.

Credit institutions and investment firms belonging to a financial conglomerate for which the CSSF assumes the role of a coordinator, have to ensure that their own funds are available at the level of the financial conglomerate, and that they are always at least equal to the capital adequacy requirements. The circular sets out the technical methods and principles for calculating the supplementary requirements in terms of capital adequacy.

SRB/SRF: CSSF Circular on Amount of Guaranteed Deposits as on 31 December 2015

CSSF Circular 15/630

On 21 December 2015, the CSSF issued circular 15/630 regarding the amount of guaranteed deposits as of 31 December 2015.

The circular requests all Luxembourg incorporated credit institutions to provide information in relation to the guaranteed deposits as on 31 December 2015. The purpose of the data collection request is to enable the SRB to determine the annual target level of the SRF for 2016. The purpose of the circular is therefore identical with the purpose of the previous CSSF circular 15/619 concerning the amount of guaranteed deposits as of 31 July 2015, except that it relates to the wider context of the banking union. Credit institutions are required to include in their data (guaranteed) deposits with their branches established in other Member States of the European Union.

The information was required to be reported to the CSSF by 29 January 2016 within the format foreseen 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 deposit protection scheme matters has to approve the information before it is reported.

Dormant or Inactive Accounts

CSSF Circular 15/631

On 28 December 2015, the CSSF issued circular 15/631 on dormant or inactive accounts.

The circular is primarily addressed to banks, but also to all other financial sector professionals subject to CSSF supervision who hold or manage third party assets and deposit them with banks or other financial institutions and who open, to this effect, accounts in their books for the beneficiaries of these assets.

The circular summarises relevant legal provisions and restates regulatory obligations that apply to the professionals in relation to such dormant accounts.

Upcoming Changes to Luxembourg Transparency Rules

CSSF Press Release 15/49

On 27 November 2015, the CSSF issued a press release clarifying the provisions of the Transparency Directive Amending Directive (2013/50/EU). This Directive introduced amendments to the Transparency Directive and had to be implemented into national law by 26 November 2015.

In anticipation of transposition in Luxembourg, the CSSF has drawn the attention of issuers of securities for which Luxembourg is the home Member State, as well as shareholders who fall under the provisions of the Luxembourg Transparency Directive implementing law, to certain points relating to the publication of regulated information, the determination of the home Member State, and notifications of major holdings.

Under Directive 2013/50/EU, issuers are no longer required to (a) publish quarterly financial information, (b) make public new loan issues and in particular any guarantee or security in respect thereof, or (c) communicate to the CSSF any amendments to the instrument of incorporation or statutes of the issuers. The CSSF will not take measures against issuers which do not fulfil their publication or communication obligations falling under (a) for a period ending on or after 30 September 2015, under (b) in relation to loans issued after 26 November 2015 and under (c) for amendments foreseen after 26 November 2015.

The CSSF has further invited issuers who can choose their home Member State and who have not already done so, to publish their choice and to inform the concerned authorities within the required three-month period starting from 27 November 2015.

Finally, with regard to the notification of major holdings, the CSSF has invited and encouraged the persons subject to the notification requirements to refer to the new provisions from 27 November 2015 onwards when making notifications.

The CSSF also accepts the new ESMA standard forms for such notifications of choice of home Member State or major holdings.

CSSF issues Practical Guidance on EMIR Intragroup Exemptions from Clearing

CSSF Newsletter N°178 for November 2015

The November 2015 CSSF Newsletter provided practical guidance on how to make notifications/applications for intragroup exemptions from the clearing obligations under EMIR.

The Newsletter provides information on the first Commission Delegated Regulation (EU) N°2015/2205 with regard to RTS on the clearing obligations for certain interest rate swaps that entered into force on 21 December 2015.

Financial counterparties established in Luxembourg and where the CSSF is the competent authority, and non-financial counterparties established in Luxembourg, as defined in Article 4(2) of EMIR, can make use of the exemptions from the clearing obligations for intragroup transactions in OTC derivatives contracts. These counterparties have to notify or apply to the CSSF not less than 30 calendar days before the intended use of the exemption.

The CSSF draws also attention to the publication of interactive forms on its website, after the entering into force of the RTS, permitting the submission of such notifications/applications for intragroup exemptions to the CSSF.

The CSSF Newsletter further indicates e-mail addresses to which written notice will have to be sent if changes to the information submitted in the notification/application occur after exemption.

For more information and resources on EMIR, see the Topic Guide on the Clifford Chance Financial Markets Toolkit.

Enforcement of the 2015 Financial Information published by Issuers of Securities subject to the Transparency Law

CSSF Press Release 16/02

On 11 January 2016, the CSSF issued a new press release on the 2015 financial information published by issuers of securities subject to the Luxembourg Transparency Law.

The purpose of the press release is to provide information on the financial reporting topics identified by ESMA together with national accounting enforcers, including the CSSF, which will be specifically monitored during their enforcement campaign.

In addition to these common priorities, the CSSF has decided to also identify and include in its 2016 enforcement campaign a few other topics, as set out in more detail in the press release, in relation to:

- the application of IFRS standards on consolidation
- the recognition and measurement of deferred tax assets
- the quality of disclosures in financial statements.

Statuses of PSF (part II)

CSSF Q&A Paper on the Statuses of PSF (part II)

The CSSF has updated its Q&A paper on the statuses of PSF (part II) (version of 30 November 2015). The updated Q&A paper introduces a new section D5 and new questions 79 to 87 in relation to financial sector dematerialisation and conservation service providers which have been introduced as new forms of support professionals of the financial sector by the law dated 25 July 2015 on electronic archiving.

The new Q&A specifies, amongst other things, the definition of a financial sector dematerialisation and conservation service provider and the difference between both regulated activities. It further provides practical guidance on the meaning of dematerialisation, probative value and on the equipment required for carrying on the activity of a dematerialisation service provider and a conservation service provider.

Publication of the Luxembourg Law of 18 December 2015 and the Grand Ducal Regulation of 18 December 2015 in relation to Annual Accounts and Consolidated Accounts

CSSF Press Release 16/07

On 10 February 2016, the CSSF issued a press release drawing the attention of finance professionals on the publication of the law of 18 December 2015 and the specifying Grand Ducal regulation of 18 December 2015 in relation to annual accounts and consolidated accounts.

The law of 18 December 2015 on annual accounts and consolidated accounts implements into Luxembourg law:

- the new provisions foreseen by chapter 10 of the new accounting directive 2013/34/EU concerning transparency of companies' payments to governments (the "country-by-country" reporting)
- the aforementioned directive's mandatory accounting provisions (*a minima*) amending Luxembourg general accounting law.

Changes in the Institutional Architecture of the Deposit Guarantee and Investor Compensation Schemes in Luxembourg

CSSF Press Release 16/09

On 25 February 2016, the CSSF issued a press release in relation to the changes in the institutional architecture of the deposit guarantee and investor compensation schemes in Luxembourg following the entry into force of the Bank Resolution Law.

The CSSF further announces that a new website is under construction, dedicated to the information of depositors and investors, to provide more detailed information on the functioning of the new deposit guarantee and investor protection schemes in Luxembourg as well as on procedures and conditions relating to the guarantee of deposits and claims resulting from investment operations.

Finally, the CSSF provides an e-mail address for questions in relation to the new deposit guarantee and investor protection schemes.

Technical Interest Rates applicable to Reinsurance companies

CAA Circular 15/12

On 10 November 2015, the CAA issued circular 15/12 modifying CAA Circular 13/12 on technical interest rates applicable to reinsurance undertakings.

Technical interest rates have to be used by reinsurance undertakings for drawing up the financial balance as provisioned for fluctuations in claims rates. Following its annual review of registered currency interest rates, the CAA has decided to fix lower new maximum technical interest rates for all currencies reviewed.

The new technical interest rates have been applicable since 1 December 2015.

Compliance with EIOPA Solvency II Guidelines

CAA Circular 15/13

On 15 December 2015, the CAA issued circular 15/13 on supplementary Solvency II Guidelines published by EIOPA on 14 September 2015. These concern all three pillars of Solvency II and are further listed in the new circular. Some of the Solvency II Guidelines apply to the supervised entities only while others are addressed to the national competent supervisory authorities. The CAA confirms that it has informed EIOPA that it will fully apply the Solvency II Guidelines.

The CAA invites direct insurance and reinsurance undertakings to take all necessary measures to comply with the Solvency II Guidelines. Depending on the individual situation of each company, direct insurance and reinsurance undertakings are allowed to apply the principle of proportionality which may exempt them from the total or partial application of the relevant guidelines if these guidelines are not in line with the nature, complexity and size of their risks. In this case, the internal procedures need to contain relevant justifications to this effect.

Exemption Conditions for Quarterly Reports under Solvency II

CAA Circular 16/1

On 9 January 2016, the CAA issued circular 16/1 on exemption conditions for quarterly reporting obligations under Solvency II following the entry into force of the Luxembourg implementing acts. The circular aims to specify the practical ways in which insurance and reinsurance undertakings can benefit from these exemptions, namely:

- quarterly reporting exemption conditions for "solo" undertakings
- quarterly reporting exemption conditions for groups of insurance undertakings.

The CAA clarifies that these exemptions do not extend the required minimum capital, which should be computed and reported by all undertakings.

The CAA further sets out that, except for extraordinary circumstances, the status "exempted" or "non-exempted" applicable to reinsurance undertakings based on their collection volume for 2014 will continue to apply for the next three reporting periods (2016 to 2018), with a re-evaluation of their situation at the earliest on 1 January 2019. With regard to newly created insurance or reinsurance undertakings, their "exempted" or "non-exempted" status will be determined based on collection forecasts for the first three years.

The circular is addressed to all insurance and reinsurance undertakings as well as groups of undertakings.

Financial Intelligence Unit 2014 Annual Report

The Financial Intelligence Unit (*Cellule de Renseignement Financier*, CRF) of the State Prosecutor's office to the Luxembourg District Court has published its annual report for 2014.

The report sets out statistics on the CRF's activity during 2014 and main trends and phenomena in the area of money laundering. The report emphasises an increase in the number of files opened by the CRF as compared to 2013, as well as certain volatility in the evolution of the number of files opened, mostly due to the establishment in Luxembourg of European platforms for electronic payments.

The 2014 report further highlights that given the implementation of a new IT tool the electronic transmission of suspicious transaction reports is now possible.

Introduction of a Statistical Data Collection System for Insurance Corporations

CBL circular 2015/239

On 9 November 2015, the CBL issued circular N°2015/239 on the introduction of a statistical data collection system for insurance corporations developed on the basis of the ECB's statistical activities legal framework, and particularly ECB Regulation 2014/50.

The circular is addressed to insurance corporations incorporated and resident in Luxembourg, including branches registered in the Luxembourg Commercial Register whose parent entities are located abroad. If an insurance corporation does not have legal personality under Luxembourg law, the persons legally entitled to represent the insurance corporation or the persons that, under the applicable national laws are liable for acts of the insurance corporation, are responsible for reporting.

The definition of "insurance corporation" comprises both direct (life and non-life) insurance undertakings and reinsurance undertakings.

In view of the reporting to be made by the CBL to the ECB, reporters have to provide the CBL with:

- on a monthly basis, securities holdings reported individually security-by-security
- on a quarterly basis, end-of-quarter stock data on the assets and liabilities of insurance undertakings and quarterly revaluation adjustments and financial transactions, where applicable
- on a quarterly basis, end-of-quarter stock data on non-life insurance technical reserves broken down by line of business and geographical zone
- on an annual basis, data on premiums, claims and commissions.

The circular provides a link to instructions published for establishing the statistical information.

Limited derogations to the reporting obligations may, under certain conditions, be granted by the CBL.

The transmission of information is mandatory from 2016 onwards.

On its website the CBL publishes a list of the exact reporting dates on which statistical reports must be submitted to the CBL.

Case Law

Securitisation Undertaking – Withdrawal of Licence – Liquidation

District Court, 11 May 2012

Bank Liquidation – Filing of Claims – Action for Damages after Rejection of Claims

Court of appeal, 23 October 2013

Banks' Duty to Warn Surety

Supreme Court, 21 January 2016

Banks' Liability – Informed Investors

Supreme Court, 4 February 2016

Evidence – Testimony by the Person who is the Sole and Unique Beneficiary of a Legal Entity

Supreme Court, 25 February 2016

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

For more resources visit the Financial Markets Toolkit

The Clifford Chance Financial Markets Toolkit gives you – in one place – the cutting edge knowledge you need for your financial markets business. Simple and effective. Available 24/7. Easy to access online http://financialmarketstoolkit.cliffordchance.com/en/home.html.

Corporate

Legislation

Law of 18 December 2015

On 18 December 2015, the Luxembourg Parliament adopted a new law amending certain provisions of the Companies Law, the Law on the Register of Commerce and Annual Accounts and the Luxembourg commercial code, in order to adapt Luxembourg legislation to the new requirements contained in the UE directive 2013/34/UE dated 26 June 2013 on annual financial statements, consolidated financial statements and related reports of certain forms of companies.

This law was published on 28 December 2015 in the Memorial and its provisions are applicable to annual accounts and consolidated accounts of companies relating to financial exercises starting on 1 January 2016 or during the course of the year 2016.

The main changes introduced by the law of 18 December 2015 may be summarised as follows:

- The thresholds set forth in the Companies Law for being exempted to prepare consolidated accounts are increased. Thus, a parent company may be exempted from preparing consolidated accounts, if at the closing date of its financial year, the totality of the companies which should be subject to consolidation, does not exceed two of the three following criteria:
  - Total balance sheet: EUR 20 million
  - Net sales: EUR 40 million
  - Number of full time employees: 250
- The thresholds set forth in the Law on the Register of Commerce and Annual Accounts, offering Luxembourg companies the possibility to prepare a simplified profit and loss account are increased. Thus, a Luxembourg company may establish a simplified profit and loss account if, at the closing date of its financial year, it does not exceed two of the three following criteria:
  - Total balance sheet: EUR 20 million
  - Net sales: EUR 40 million
  - Number of full time employees: 250
- Companies exceeding two of the three criteria mentioned above, as well as public interest entities, operating in the extractive industry or exploiting primary forests must establish each year a report regarding any payment made to governments (i.e. to any national or local authorities of any country, including any state agencies, public administration or state companies), and this report must be filed with the RCSL within twelve months of the closing of the financial year to which it relates and shall be published in the Memorial. Only payments exceeding EUR 100,000 per financial year (either on an individual basis or on a collective basis) must be mentioned in the report. The report must indicate the total amount of the payments made to each government and the form of these payments (e.g. dividends distribution, payments of royalties, etc.). The management of the company is responsible for the establishment and publication of this report, and criminal sanctions may be applied to managers who fail to publish this report in the Memorial.
- Parent companies may also be required to establish a consolidated report on payments to governments. This report must be established by the management of the parent company and must also be published in the Memorial. Only payment exceeding EUR 100,000 (either on an individual or collective basis) must be referred to in this consolidated report.
- Prior to the law of 18 December 2015, Luxembourg SCS and Luxembourg SNC, whose net sales did not exceed EUR 100,000 were able to decide not to apply the Luxembourg Standard Chart of Accounts (*plan comptable généralisé*) and the provisions of the Law on the Register of Commerce and Annual Accounts, for the preparation of their annual financial statements. The law of 18 December 2015 has slightly clarified the accounting regime applicable to such SCS and SNC, and therefore, SCS and SNC in which all unlimited shareholders are either SA, SE, SCA or SARL (or companies of similar forms), must now prepare their financial statements in compliance with the Luxembourg Standard Chart of Accounts (*plan comptable généralisé*) and the provisions of the Law on the Register of Commerce and Annual Accounts, irrespective of the amount of their net sales.

Case Law

Commercial Companies – Liquidator's Liability

Court of Appeal, (civil), 2 April 2014

Commercial Companies – Manager's liability

Court of Appeal, 28 January 2015

Fictitious Company

Court of Appeal, 11 February 2015

Redemption of CPECs

District Court of Luxembourg, 23 December 2015

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

Investment Funds

EU Developments

UCITS V

EU Commission Delegated Regulation Depositaries' Obligations

EU Commission delegated regulation 2016/438 of 17 December 2015 (Delegated Regulation) concerning the obligations of depositaries under the UCITS V Directive has been published in the Offical Journal on 24 March 2016.

In brief, the Delegated Regulation specifies the following issues with respect to the duties and liabilities of UCITS depositaries:

- the minimum requirements that need to be included in the written depositary agreement between the management company or investment company and the depositary
- the depositary's obligations with respect to its oversight duties, cash monitoring duties and safekeeping duties
- the depositary's due diligence duties when selecting and appointing third parties as well as its segregation obligation and insolvency protection of UCITS assets when delegating custody functions
- the conditions and circumstances in which financial instruments held in custody are considered to be lost and how the depositary can discharge its liability
- the independence requirements for management companies, investment companies and depositaries.

The Delegated Regulation will enter into force on 13 April 2016 and apply from 13 October 2016.

ESMA Q&A on UCITS

On 1 February 2016, ESMA published a consolidated version of its Q&A on the application of the UCITS Directive[1]. The new Q&A consolidates the following four existing ESMA Q&As on:

- the KIID for UCITS
- ESMA Guidelines on ETFs and other UCITS issues
- the notification of UCITS and exchange of information between national competent authorities (NCAs)

[1] 2016/ESMA/181.

- the risk measurement and calculation of global exposure and counterparty risk for UCITS.

The consolidated Q&A also includes a new section relating to the update of UCITS' documents under the UCITS V Directive. In this respect, ESMA confirms that the UCITS V Level 1 provisions, and especially the new depositary and new remuneration regimes, are applicable as from the 18 March 2016 deadline. However, some extended deferral dates are envisaged by ESMA for the implementation of the UCITS V Level 2 measures, as summarised below:

- UCITS management companies or investment companies have to implement the remuneration policy principles required by the UCITS V Directive and already make available information about their remuneration policy on a website as soon as possible after 18 March 2016.
- The prospectus of UCITS does not need to be updated on 18 March 2016 to include the remuneration information prescribed by the UCITS V Directive, but such information has to be included on the first occasion the prospectus is revised for another purpose after 18 March 2016 and no later than 18 March 2017.
- The KIID of UCITS should be updated to include the remuneration information prescribed by the UCITS V Directive either on the first occasion the KIID is revised/replaced or at the next annual update after 18 March 2016 (i.e. in February 2017, as KIIDs must be updated annually within 35 days following 31 December of each year).
- The annual report of UCITS relating to a financial year that ended before 18 March 2016 does not need to include the remuneration information prescribed by the UCITS V Directive. As regards the annual report relating to a financial year that ends on or after 18 March 2016, but before the UCITS management company has completed its first annual performance period in which it has to comply with Articles 14a and 14b of the UCITS V Directive, the remuneration-related information should be inserted in the annual report on a best-efforts basis and, to the extent possible, explaining the basis for any omission.
- The depositary agreements of UCITS should be revised promptly in accordance with any transitional arrangements outlined in the Delegated Act, which provides for a six-month transitional provision after the date of its entry into force.

In Luxembourg, the CSSF confirmed in its Press Release 16/10 that it will generally apply the timelines outlined in the consolidated version of ESMA Q&A on the application of the UCITS Directive. For further information on CSSF Press Release 16/10, see the presentation of the "UCITS V Implementation" in the section dedicated to Luxembourg Legal and Regulatory Developments below.

AIFMD

EU Commission Negative Answer on the Extension of AIFMD Marketing Passport to non-EU AIFMs and AIFs

On 19 January 2016, the EU Commission published its response to ESMA's opinion on the functioning of the EU passport and on the national private placement regimes (NPPRs) and its advice on the extension of the AIFMD marketing passport for non-EU AIFMs and AIFs.

The EU Commission concluded that the AIFMD marketing passport should not be extended to non-EU AIFMs and AIFs at the present time, so the EU Commission is deferring its decision on whether to extend the passport, and to whom, until a "sufficient number" of countries have been appropriately assessed by ESMA. The EU Commission further asked ESMA to complete, by 30 June 2016:

- the assessment of the USA, Hong Kong and Singapore, which were selected for the first wave of assessments, but for which to date no advice has been provided
- the assessment of six further jurisdictions, being Japan, Canada, Isle of Man, Cayman Islands, Bermuda and Australia.

With regard to third country enforcement of AIFMD rules, the EU Commission also invites ESMA to provide a more detailed assessment of the capacity of supervisory authorities and their track record in ensuring effective enforcement, and a preliminary assessment of the expected inflow of funds by type and size into the EU from relevant third countries.

In its response, the EU Commission also welcomed ESMA's suggestion of another opinion on the functioning of the EU passport and NPPRs once the AIFMD has been transposed in all Member States, and suggested that it would be helpful for the opinion to be available prior to the planned review of the AIFMD in 2017.

For further information on ESMA's opinion and advice on the AIFMD passport and NPPRs, please refer to the November 2015 edition of our Luxembourg Legal Update. Clifford Chance has also prepared a client briefing providing an update on the EU Commission's response to ESMA.

ESMA Updated Q&A on AIFMD

On 2 and 15 December 2015, ESMA published updated versions of its Q&A on the application of the AIFMD[2].

These updates include new questions and answers relating to the reporting to NCAs and the depositary liability regime. In particular, the ESMA Q&A clarifies that the depositary's liability regime shall apply to those assets for which a depositary has safekeeping duties on a look-through basis according to Articles 89(3), first sub-paragraph, and 90(5), first sub-paragraph of the AIFMD Level 2 Regulation.

ELTIF Regulation

As a reminder, Regulation (EU) 2015/760 of the EU Parliament and Council of 29 April 2015 on European long-term investment funds (ELTIFs Regulation), which came into force on 8 June 2015, is now applicable from 9 December 2015.

The ELTIF Regulation establishes a new type of collective investment vehicle called an ELTIF that must, among other things, be managed by an authorised AIFM and meet minimum eligible assets and risk diversification requirements.

For further details on the ELTIF Regulation, please refer to the July 2015 edition of our Luxembourg Legal Update. See also the presentation of the "CSSF Application Form for Authorisation for ELTIF" in the section dedicated to Luxembourg Legal and Regulatory Developments below.

Benchmark Regulation

EU lawmakers are now finalising the text of the new regulation on financial benchmarks (Benchmark Regulation), which is expected to be published in mid-2016 and to apply in early 2018, subject to some limited transitional provisions.

As a reminder, the Benchmark Regulation will impose:

- authorisation/registration and other requirements on EU entities that provide benchmarks
- new rules on contributions of input data to benchmarks
- restrictions on banks, investment firms, investment funds (including UCITS or AIFs), asset managers and other supervised entities using benchmarks, unless the provider of the benchmark is authorised or registered in the EU or, in the case of benchmarks provided by non-EU providers, the use is permitted under the third country regime.

The Benchmark Regulation also includes a broad definition of what constitutes a benchmark and it seems likely that this will have an impact on a wide range of activities of market participants.

In addition to the Level 1 text of the Benchmark Regulation, consultations have also already begun with ESMA which published a discussion paper on 15 February 2016 on the technical implementation of the incoming Benchmark Regulation[3]. In particular, the consultation paper seeks input to inform ESMA's future proposal on draft regulatory technical standards and technical advice to the EU Commission in the following areas: the definition of benchmarks, the requirements for the benchmark oversight function, the requirements for the benchmark input data, governance and control requirements for supervised benchmark contributors, the authorisation and registration of an administrator and the transparency requirements regarding the benchmark methodology. Comments on ESMA's discussion paper are due by 31 March 2016 and feedback received will be used to develop detailed implementing measures on which ESMA aims to publish a follow-up consultation in Q3 2016.

Please find further information on the Benchmark Regulation in the separate client briefing prepared by Clifford Chance.

SFT Regulation

Regulation (EU) 2015/2365 on transparency of securities financing transactions and of reuse (SFT Regulation) was published in the Official Journal on 23 December 2015 and entered into force on 12 January 2016.

In brief, the SFTR aims to reduce risks by improving transparency in the securities financing markets in three ways:

- by imposing conditions on the reuse of financial instruments which have been provided as collateral, so that clients and counterparties understand the risks involved and give their consent to the reuse

[2] ESMA/2015/1786 and ESMA/2017/1873.

[3] ESMA/2016/288.

- by requiring managers of UCITS and AIFs to disclose to investors the use of securities financing transactions (SFTs) and total return swaps both in the UCITS' and AIFs' periodical reports and through pre-contract disclosures, so supplementing the disclosure requirements applicable to EU AIFMs under Article 23 of the AIFMD and to the prospectus content requirements under Article 69 of the UCITS Directive
- by requiring counterparties (including UCITS management companies/investment companies and AIFs managed by authorised or registered AIFMs within the meaning of the AIFMD) to report SFTs to a trade repository by T+1, and to keep a record of their SFTs for five years from the termination of the transaction.

The SFTR contains transitional provisions, meaning that there will be a phased implementation of most requirements. However, some requirements apply from 12 January 2016, including the record-keeping requirement for SFTs (Article 4(4)), the transparency requirements for pre-contractual documents for new funds (Article 14) and an obligation to establish internal procedures for reporting breaches (Article 24(3)).

For information, the transitional period to comply with the transparency requirements for pre-contractual documents for existing UCITS and AIFs will be running until 13 July 2017, meaning that there is no need to update the offering document of an existing AIF or UCITS until then. For new AIFs or UCITS created after 12 January 2016, however, the disclosure requirement applies immediately from 12 January 2016. Interestingly, in Luxembourg, the CSSF accepts that the July 2017 transitional provision will apply at umbrella fund level, meaning that an existing umbrella UCITS or AIF created before 12 January 2016 could benefit from the grandfathering provisions until 13 July 2017 also with regard to its new sub-funds created after 12 January 2016.

Please find further information on the SFT Regulation in the separate client briefing prepared by Clifford Chance.

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

EMIR

EMIR Delegated Regulation

The EU Commission delegated regulation (EU) 2015/2205 laying down the regulatory technical standards (RTS) on the clearing obligation under the European Markets Infrastructure Regulation (EMIR) entered into force on 21 December 2015 (EMIR Delegated Regulation).

EMIR Delegated Regulation requires that financial and non-financial counterparties in the OTC derivative markets clear via a central counterparty, a clearing member of a central counterparty, a client of a clearing member or through an indirect clearing arrangement with a client of a clearing member the following types of interest rate derivatives denominated in the G4 currencies (GBP, EUR, JPY and USD) as of the application date of their respective clearing category.

- basis swaps
- fixed-to-float interest rate swaps
- forward rate agreement;
- overnight index swaps.

Counterparties subject to the clearing obligation are divided into four categories, into which UCITS and IAFs may fall.

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

MIFID II

ESMA Final Report on Complex Debt Instruments and Structured Deposits

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

Savings Directive and Directive 2014/107/EU

On 10 November 2015, the EU Council has repealed Directive 2003/48/EC regarding the taxation of savings income in the form of interest payments (Savings Directive) with effect from 1 January 2016.

The measures of cooperation provided by the Savings Directive will be progressively replaced by the implementation of Directive 2014/107/EU on administrative cooperation in the field of direct taxation which provides for automatic exchange of financial account information between Member States. The scope of Directive 2014/107/EU has been extended to include interest, dividends and other types of income entered into force on 1 January 2016, and this Directive was implemented in Luxembourg by the Law of 18 December 2015.

See the presentations of the "Law of 18 December 2015" in the sub-section relating to Luxembourg Legal and

Regulatory Developments below as well as in the Tax section of this Luxembourg Legal Update.

Luxembourg Legal and Regulatory Developments

UCITS V Implementation

Bill of Law N°6845

The legislative process for bill of law N°6845 (Bill 6845), which will transpose the UCITS V Directive into Luxembourg law, has progressed since its first consideration by Luxembourg Parliament on 5 August 2015.

For the time being, the *Chambre de Commerce*, the *Conseil d'Etat* and the *Commission des Finances et du Budget* have provided their comments on the bill.

As a reminder, Bill 6845 is, to a large extent, 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 liabilities 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).

For further information on Bill 6845, please refer to the November 2015 edition of our Luxembourg Legal Update.

CSSF Press Release 16/10

On 2 March 2016, the CSSF issued Press Release 16/10 on practical issues in relation to the UCITS V regime and the depositary aspects in relation to Part II UCIs.

UCITS V – Timing for Update of UCITS Documentation

In its press release, the CSSF confirms that it will generally apply the timelines outlined in the updated version of ESMA Q&A on the application of the UCITS Directive regarding the updating of KIIDs, prospectuses and depositary contracts of Luxembourg UCITS in relation to all aspects under the forthcoming UCITS V regime. For further information on these timelines, see the presentation of the "ESMA Q&A on UCITS" in the section dedicated to EU Developments below.

The CSSF further indicates that it will put in place a fast-track procedure for the approval of changes to UCITS prospectuses which are limited to the remuneration and depositary aspects under UCITS V. In this respect, the CSSF clarifies that UCITS can include in their prospectus a summary of the remuneration policy and a reference to a website where the details of the remuneration policy − in line with the legal framework − are available and that a paper copy will be made available free of charge upon request. Furthermore, with regards to the requirement to include a list of the delegates and sub-delegates of the UCITS depositary, the CSSF clarifies that such requirement can be satisfied by including a reference to a website where such list is available.

In relation to the above, the CSSF also indicates that it will, in the coming months, submit to Luxembourg UCITS management companies and self-managed investment companies a questionnaire regarding the key aspects of the revised remuneration policies that they will implement in order to comply with the requirements of the UCITS V regime.

UCITS V – Depositary Bank Aspects

Without prejudice to the clarifications it gave on the timing for updating UCITS prospectuses, KIIDs and depositary contracts in view of UCITS V, the CSSF recalls that CSSF Circular 14/587 regarding the provisions applicable to credit institutions acting as UCITS depositary banks entered into force as of 18 March 2016.

However, the CSSF indicates that Circular 14/587 will be reviewed and adapted, by the end of September/beginning of October 2016, to the depositary-related provisions of Bill 6845 and of the UCITS V Delegated Regulation adopted by the EU Commission on 17 December 2015. In the meantime, in the event of a conflict between the provisions of CSSF Circular 14/587 and Bill 6845 (e.g. aspects related to the notion of safekeeping of assets), the provisions of Bill 6845 shall prevail as from the time Bill 6845 is passed into law and enters into effect.

Please refer to the November 2014 edition of our Luxembourg Legal Update for further details on Circular 14/587.

Part II UCIs – Depositary Bank Aspects

As regards the depositary regime of Part II UCIs that Bill 6845 envisages to align with the depositary regime applicable to UCITS, the CSSF clarifies that such new depositary regime shall be applicable to all Part II UCIs and their depositary banks as of the date of entry into force of Bill 6845 when it is passed into law.

Upon amendment of Circular 14/587, the CSSF will also clarify to what extent the provisions of such Circular, as amended, will apply to Part II UCIs.

Luxembourg Reserved Alternative Investment Funds

Bill of Law N°6929

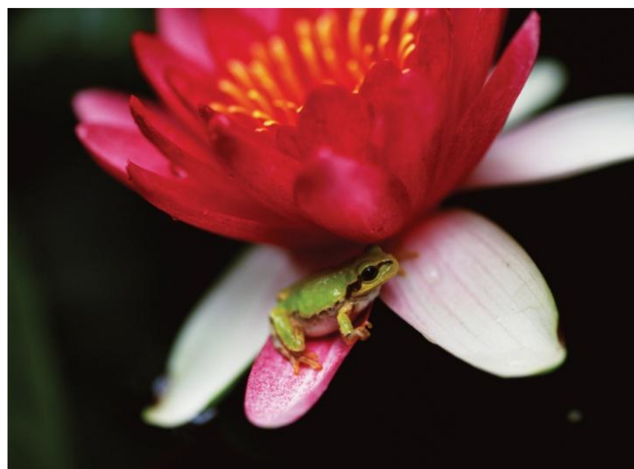
Bill of law N°6929 (Bill 6929) relating to so-called "Reserved Alternative Investment Funds" (RAIFs) was deposited with the Luxembourg Parliament on 14 December 2015.

The purpose of Bill 6929 is to allow the creation and structuring of a new type of Luxembourg investment vehicle that will be restricted to AIFs subject to the full AIFMD requirements and managed by an authorised external AIFM, which can be located either in Luxembourg, in another EU Member State, or in a third country once the AIFMD passport is available for third countries.

In brief, the new RAIF vehicle will combine the characteristics and structuring flexibilities of Luxembourg regulated SIFs and SICARs qualifying as AIFs managed by an authorised AIFM, except that RAIFs will be non-regulated investment funds. Thus, in contrast to a SIF-AIF or SICAR-AIF, the RAIF will not be subject to prior authorisation by the CSSF before it can be launched and carry out its activities, nor to ongoing prudential supervision by the CSSF. Other than that, the new RAIF vehicle will have the same characteristics as a SIF/SICAR-AIF, including the different legal corporate and contractual forms available for its creation, the type of its eligible investors (i.e. well-informed investors only), the possibility to have multiple compartments and classes of shares/units and the flexibility as regards its eligible assets and investment policies.

Although the full legislative process is still to be completed, it is anticipated that Bill 6929 will be passed into law by mid-2016. This means that the new RAIF regime should be available over the course of 2016.

Please find further information on Bill 6929 in the separate client briefing prepared by Clifford Chance.



Eligible Assets of SIFs/Part II UCIs and Other Changes to UCI Law, SIF Law and SICAR Law

Bill of Law N°6936

Bill of law N°6936 (Bill 6936) amending the SIF Law, UCI Law, SICAR Law and AIFM Law has been deposited with the Luxembourg Parliament on 18 January 2016.

The main purpose of Bill 6936 is to revise, with the view to enhance investors' protection, the scope of the SIF Law by limiting SIFs investing in so-called "atypical assets" only to professional investors within the meaning of Annex II of MiFID II, such as credit institutions, investment firms, collective investment schemes, pension funds, etc. Atypical assets include, among other things, wine, diamonds, insurance contracts, economic rights of football players, artworks, etc. As investments in such assets are usually illiquid and may entail substantial risks, the legislator considers that they should be restricted to SIFs reserved to professional investors only, as these investors are deemed to have the necessary experience and knowledge to make an informed judgement of the investments proposed to them and, in particular, of the risks attached thereto.

Consequently, Bill 6936 proposes to amend the SIF Law so as to allow the CSSF to determine, by means of a regulation, the types of assets into which SIFs accessible to investors other than professional investors within the meaning of MiFID II can invest. By contrast, the legal regime of SIFs, which restrict their securities to professional investors within the meaning of MiFID II, will remain unchanged and these SIFs can continue to invest in any kind of assets, including atypical assets.

Following the same idea, Bill 6936 envisages to amend the UCI Law by giving authority to the CSSF to determine, also by means of a regulation, the types of assets into which

Part II UCIs can invest. Bill 6936 provides that such CSSF regulations may contain exemptions for SIFs and Part II UCIs, or their sub-funds, which would have been authorised by their offering documents to invest into non-eligible assets before the entry into force of the CSSF regulations.

In addition, Bill 6936 also proposes the following modifications to the UCI Law, SIF Law, SICAR Law and AIFM Law:

- Amendment of the UCI Law in order to allow closed-ended Part II UCIs to issue their shares/units at a price determined in accordance with their constitutive documents (and no longer at the NAV as currently required by Articles 90 and 95 of the UCI Law). The concept of closed-ended Part II UCIs as used by Bill 6936 refers to funds that do not redeem their shares/units, directly or indirectly, upon request of their investors, which Part II UCIs are usually listed funds or non-listed funds with a limited duration and investing in illiquid assets, such as real estate, infrastructure or private equity funds. Such amendment to the UCI law is, in particular, designed to promote the development of ELTIF funds in Luxembourg.
- Amendment of the SIF Law and SICAR Law in order to require that SIFs and SICARs that do not qualify as "Full Scope AIFs" have sound administrative and accounting procedures as well as adequate control arrangements for the exercise of their activities, taking into account the nature, scope and complexity of their activities.
- Amendment of the SICAR Law in order to align it, to a large extent, with the provisions of the SIF Law. In particular, SICARs will have to comply with the following obligations already applicable to SIFs: to implement a risk management process, to comply with strict conditions for the delegation of their functions, to have their investment managers approved by the CSSF, to have a statutory auditor's report in case of in-kind contributions to the SICAR, and to notify the CSSF of any change regarding the substantial information on which the CSSF based itself to grant its approval to the SICAR. Supervisory and investigative powers of the CSSF are also reinforced.
- Amendments to the AIFM Law in order to clean up some definitions, namely further to the repeal of Directive 83/349/EEC by Directive 2013/34/E on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings.

EMIR

Law of 15 March 2016

The law of 15 March 2016 on OTC derivatives, central counterparties and trade repositories and amending different laws relating to financial services (EMIR Sanction Law) has been published in the Memorial on 17 March 2016 and entered into force on 21 March 2016.

The objective of the EMIR Sanction Law is to ensure the transposition of Directive 2013/14/EU into Luxembourg laws and the effective implementation of Regulation (EU) N°648/2012 on OTC derivatives, central counterparties and trade repositories and Regulation (EU) N°462/2013 on credit rating agencies. Besides confirming that the CSSF is the Luxembourg supervising authority for central counterparties in Luxembourg as well as, together with the CAA, where relevant, ensuring the correct application of certain specific provisions of EMIR in Luxembourg (along with a sanction power vetted in the respective authorities), the EMIR Sanction Law also provides for modifications in, *inter alia*, the UCI Law and the AIFM Law as well as the credit rating agencies legislation in order to reduce the risk of over-reliance on credit ratings by asset managers of AIFs and UCITS.

In particular, new provisions are introduced in Article 42 of the UCI Law and Article 14 of the AIFM Law to require UCITS management companies/self-managed SICAVs and AIFMs to make their own credit risk assessment and not to rely solely or mechanistically on credit ratings for assessing the creditworthiness of the assets of the funds they manage or using them as the only parameter when assessing the risk involved in the investments made by UCITS and AIFs i.e. (external credit ratings may be used as one factor among others in this process but shall not prevail).

The CSSF shall, by taking into account the nature, scale and complexity of the activities of UCITS and AIFs, monitor the adequacy of the credit assessment processes of UCITS management companies/self-managed SICAVs and AIFMs, assess the use of references to credit ratings issued by credit rating agencies in their investment policies and, where appropriate, encourage mitigation of the impact of such references, with a view to reducing sole and mechanistic reliance on such credit ratings.

Further, when UCITS management companies/self-managed SICAVs and AIFMs are part of financial conglomerates, they will be subject to the supplementary

supervision of CSSF as provided under the Financial Sector Law.

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

Implementation of Common Reporting Standard

Law of 18 December 2015

The OECD common reporting standard for the automatic exchange of financial information between tax authorities (CRS) has been implemented into Luxembourg laws by the Law of 18 December 2015 concerning the automatic exchange of information on financial accounts in tax matters and transposing Directive 2014/107/UE.

It is worth mentioning that the Law of 18 December 2015, which entered into force on 1 January 2016, may impose new reporting obligations on Luxembourg tax authorities to be complied with by Luxembourg regulated investment funds if they are considered as "Reporting Financial Institutions" under the CRS. In such a case, these funds could be required to conduct due diligence and obtain (among other things) confirmation of the tax residency, tax identification number and CRS classification of their shareholders in order to fulfil their own legal reporting obligations according to the Law of 18 December 2015.

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

Marketing of Foreign AIFs to Retail Investors in Luxembourg

CSSF Regulation N°15-03

On 26 November 2015, the CSSF adopted Regulation N°15-03 (Regulation 15-03) outlining the modalities of application of Article 46 of the AIFM Law concerning the marketing by authorised Luxembourg, EU or non-EU AIFMs of non-Luxembourg based AIFs (Foreign Law AIFs) to retail investors in Luxembourg.

Regulation 15-03 was published in the Memorial on 2 December 2015 and came into effect on 4 January 2015.

Background

The marketing of AIFs to retail investors is not regulated in the AIFMD in the same way as the marketing of AIFs to professional investors. Indeed, there is no passport as such for the marketing of AIFs to retail investors under the AIFMD, but Article 43 of the AIFMD provides that Member States may allow AIFMs to market to retail investors in their territory the AIFs they manage in accordance with the AIFMD.

In Luxembourg, Article 46 of the AIFM Law thus permits duly authorised and licensed AIFMs established in Luxembourg, in another Member State or in a third country to market to retail investors in Luxembourg the units or shares of the AIFs they manage in accordance with the AIFMD. Such marketing is irrespective of whether the relevant AIFs are marketed on a cross-border basis or not, or whether they are EU or non-EU AIFs but is subject to the following preliminary conditions laid down in Article 46 of the AIFM Law:

- The relevant AIFs, be they established in Luxembourg, in another Member State or in a third country, must be subject in their home State to a permanent supervision performed by a supervisory authority set up by law in order to ensure the protection of investors. For Luxembourg AIFs, this condition is deemed fulfilled by Part II UCIs (while the scope of eligible investors of SIFs and SICARs only covers well-informed investors as defined in these laws).
- In the case of Foreign Law AIFs, the relevant AIFs must be subject in their home State to regulation providing investors guarantees of protection at least equivalent to those provided by Luxembourg laws governing AIFs authorised to be marketed to retail investors in Luxembourg. The relevant Foreign Law AIFs must also be subject in their home State to supervision considered by the CSSF to be equivalent to that provided in Luxembourg laws governing AIFs authorised to be marketed to retail investors in Luxembourg. In such case, cooperation between the CSSF and the supervisory authorities of the relevant Foreign Law AIFs must also be ensured.

Scope of Application of Regulation 15-03

Regulation 15-03 applies to the marketing of the following Foreign Law AIFs to retail investors in Luxembourg:

- Foreign Law AIFs managed by an authorised AIFM established in Luxembourg
- Foreign Law AIFs managed by an authorised AIFM established in a Member State of the EU
- Foreign Law AIFs managed by an authorised AIFM established in a third country (only applicable once the AIFMD passport will be available for third countries).

For the avoidance of doubt, Regulation 15-03 does not apply to the marketing of AIFs to professional investors in Luxembourg, including well-informed investors as defined in the SIF Law and SICAR Law and eligible investors under the EuVECA, EuSEF and ELTIF Regulations.

Authorisation Procedure by the CSSF

Each Foreign Law AIF intending to market its units/shares to retail investors in Luxembourg must be authorised by the CSSF prior to starting such marketing activities and will be registered on the CSSF's official list of Foreign Law AIFs authorised for the marketing to retail investors in Luxembourg pursuant to Article 46 of the AIFM Law.

In order for a Foreign Law AIF to receive such prior approval of the CSSF and be registered on the CSSF's official list of Foreign Law AIFs, the following conditions must be complied with:

- The notification procedure required for the marketing of the relevant Foreign Law AIF to professional investors as provided for in the relevant dispositions of the AIFM Law and the AIFMD must be completed, which also includes the communication to the CSSF of all relevant information and documents required within the framework of such notification procedure.
- In addition to the notification procedure and information required for marketing to professional investors, a specific application for authorisation to market the relevant Foreign Law AIF to retail investors must be sent to the CSSF together with the additional mandatory information and documentation required by the CSSF in Regulation 15-03, including, among other things:
  - the attestation of the national competent authorities of the Foreign Law AIF certifying that it is authorised and subject to prudential supervision in its home State
  - the prospectus or addendum to the prospectus of the Foreign Law AIF containing relevant information for the marketing of its shares/units in Luxembourg as well as information necessary for investors to be able to make an informed judgment of the investments proposed to them, such as the risks related to the investment policy and the fees and commissions that may be charged to them
  - the last annual report of the Foreign Law AIF
  - the biography notes of the directors (*dirigeants*) of the Foreign Law AIF.
- The Foreign Law AIF must determine at fixed and sufficiently close intervals, and in any case at least once a month, the issue and redemption price of its shares/units.
- The Foreign Law AIF must ensure sufficient risk diversification of its investments, which will be deemed to be the case if it complies with the following investment restrictions and limits laid down in Regulation 15-03, provided that the CSSF reserves the right to grant derogations to some investment restrictions on a case-by-case basis if it is justified as regards the specific investment policy of the Foreign Law AIF:

  Investment restrictions

  - Maximum 10% of the Foreign Law AIF's assets can be invested in non-listed securities or securities that are not traded on another regulated market operating regularly, recognised and opened to the public.
  - The Foreign Law AIF may not acquire more than 10% of the securities of the same type issued by the same issuer.
  - Maximum 20% of the Foreign Law AIF's assets can be invested in securities of the same issuer.

  These investment restrictions do not apply

  - Where the securities are issued or guaranteed by a Member State of the OECD, by its local authorities, by the supranational institutions and organisations with EU, regional or global scope
  - To investments in target UCIs subject to investment restrictions which are at least as stringent as those included in Part II of the UCI Law.

  Borrowings

  - The Foreign Law AIF cannot be engaged in borrowings for more than 25% of its net assets except for the purpose of investing in Real Estate assets.

  Real Estate asset

  - The Foreign Law AIF is not allowed to invest more than 20% of its assets in one single property and the sum of the Foreign Law AIF's borrowings cannot exceed, on average, 50% of the valuation of all its properties.

Use of derivatives

- When using derivatives, the Foreign Law AIF must ensure an appropriate risk spreading of the underlying assets.
- In addition, the Foreign Law AIF must be subject to risk spreading rules and investment restrictions equivalent to those applying to funds subject to Part II UCIs when they are following so-called alternative investment strategies.

- The AIF must appoint a credit institution to ensure that facilities are available in Luxembourg for making payments to unitholders/shareholders and ensuring subscription and redemption for shares/units in Luxembourg.
- The AIF must take necessary measures to ensure that the information and documents to be made available to retail investors in Luxembourg are provided in French, German, English or Luxembourgish, it being understood that such information and documents may be provided by means of a website.
- Finally, the Law of 8 April 2011 concerning the Consumer Code must be complied with.

It is worth mentioning that the above list is not exhaustive and that the CSSF may at any time request any other information or documents if it deems that this is necessary to grant its prior approval for the marketing by a Foreign Law AIF of its units/shares to retail investors in Luxembourg.

Risk Management and Management of Conflicts of Interest for SIFs non-AIFs

CSSF Regulation N°15-07

On 31 December 2015, the CSSF adopted Regulation N°15-07 (CSSF Regulation 15-07), laying down the application measures of Article 42a of the SIF Law as regards the requirements applicable in relation to risk management and conflicts of interest for SIFs which do not qualify as "Full-Scope" AIFs.

In brief, CSSF Regulation 15-07 incorporates and mirrors the existing provisions of CSSF Regulation N°12-01 of 13 August 2012 that had laid down, prior to the entry into force of the AIFM Law, the application measures of Article 42a of the SIF Law as regards risk management and conflicts of interest for all SIFs. In fact, the sole difference between the two CSSF Regulations is that the new CSSF Regulation 15-07 now expressly clarifies that its scope of application is limited to SIFs that are not Full-Scope AIFs. This clarification is not surprising as both the risk management and conflict of interest policies and procedures of SIF-AIFs must be established and maintained in accordance with the specific AIFMD and AIFM Law requirements.

CSSF Regulation 15-07 was published in the Memorial on 13 January 2016 and came into effect on 1 February 2016. As a consequence, CSSF Regulation N°12-01 has now been repealed.

Management of Conflicts of Interest for SICARs non-AIFs

CSSF Regulation N°15-08

On 31 December 2015, the CSSF adopted Regulation N°15-08 (CSSF Regulation 15-08), laying down the application measures of Article 7a of the SICAR Law as regards the requirements applicable in relation to conflicts of interest for SICARs which do not qualify as "Full-Scope" AIFs.

For information, CSSF Regulation 15-08 is aligned with the provisions of CSSF Regulation 15-07 concerning the conflicts of interest requirements applicable to SIFs non-AIFs.

As a result, SICARs are now expressly required by CSSF Regulation 15-08 to establish in writing, implement and maintain an effective conflict of interest policy. This conflict of interest policy will take into account the nature, size and complexity of the SICAR's business and will identify the circumstances which constitute, or may give rise to, a conflict of interest entailing a material risk of damage to the interests of the SICAR.

The conflict of interest policy of a SICAR will also have to describe the procedures to be followed and measures to be adopted in order to manage the conflicts. These procedures will ensure that any relevant persons engaged in different business activities involving a conflict of interest carry on those activities independently. Moreover, such procedures must be appropriate to the size and activities of the SICAR and of the group to which it belongs as well as to the materiality of the risk of damage to the SICAR's interests.

In addition, a SICAR must keep and regularly update a record of the types of collective portfolio management activities undertaken in which a conflict of interest entailing a material risk of damage to its interests has arisen or may arise.

Finally, CSSF Regulation 15-08 requires that SICARs establish, implement and maintain a policy aimed at preventing any relevant person from carrying out personal transactions that may give rise to a conflict of interest.

Moreover, SICARs must develop adequate policies aimed at preventing or managing any conflict of interest resulting from the exercise of voting rights attached to the securities in their portfolio.

CSSF Regulation 15-08 has been published in the Memorial on 13 January 2016 and came into effect on 1 February 2016. Existing SICARs have until 31 March 2016 to comply with the requirements of CSSF Regulation 15-08. For the avoidance of doubt, SICAR-AIFs are not subject to CSSF Regulation 15-08 as their conflict of interest policies and procedures must, as is the case for SIF-AIFs, be established and maintained in accordance with the specific AIFMD and AIFM Law requirements.

New Monthly Reporting to CSSF for UCITS, Part II UCIs, SIFs and SICARs

CSSF Circular 15/327

On 3 December 2015, the CSSF issued Circular 15/627 concerning new monthly reporting to the CSSF (so-called "U 1.1 reporting" in the Circular) in the regulatory framework applicable to all Luxembourg-regulated investment fund vehicles, i.e. UCITS, Part II UCIs, SIFs and SICARs.

The aim of Circular 15/627 is mainly to extend to SICARs the scope of the existing monthly reporting that has to be submitted to the CSSF by UCITS, Part II UCIs and SIFs, as well as to enhance the content of the reporting in terms of financial, functional and descriptive information and to change the format to Extensible Markup Language (XML).

The new "U 1.1 reporting" is largely based on the monthly financial information (the so-called "table O 1.1"), which is currently submitted to the CSSF in accordance with CSSF Circular 97/136 "*Financial information for the LMI and STATEC*" and CSSF Circular 07/310 "*Financial information to be provided by specialised investment funds*", as amended by CSSF Circular 08/348. For information, the CSSF will continue to use the new reports for statistical and supervisory purposes.

Circular 15/627 has entered into force with immediate effect and all UCITS, Part II UCIs, SIFs and SICARs must provide the U 1.1 reporting for the first time as at 30 June 2016 for the period covering June 2016. The requirement to provide the monthly financial information pursuant to CSSF Circular 97/136 and CSSF Circular 07/310 ("table O 1.1"), as amended by CSSF Circular 08/348, will be repealed as at 30 June 2016.

Financial Information to be reported on a Quarterly Basis by Luxembourg Management Companies and AIFMs

CSSF Circular 15/633

On 29 December 2015, the CSSF issued Circular 15/633 concerning the financial information to be reported on a quarterly basis to the CSSF by Luxembourg investment fund managers and their branches.

The investment fund managers referred to by CSSF Circular 15/633 are the following entities:

- Luxembourg UCITS management companies governed by Chapter 15 of the UCI Law
- Luxembourg non-UCITS management companies governed by Chapter 16 of the UCI Law
- Luxembourg external AIFMs governed by the AIFM Law.

According to Circular 15/633, all the above investment fund managers, including their branches, must report their financial information to the CSSF on a quarterly basis, the reference date being the end of each quarter, and the report must be sent by the 20th day of following month.

Concerning Chapter 16 management companies and AIFMs, the first financial data information to report are those at 31 December 2015 and the reporting is due by 29 February 2016 at the latest. Concerning Chapter 15 management companies, they must continue to report as normal, i.e. no extension is provided for by Circular 15/633.

The final yearly reporting in line with the audit annual accounts as provided for by CSSF Circular 10/467 must be filed by investment fund managers with the CSSF one month after the approval of these annual accounts by the annual general meeting.

Circular 15/633 contains links to the reporting templates to be used and also information on the practical details for the transmission of the data to the CSSF.

Circular 15/633 has entered into force with immediate effect and abrogates Chapter VI of CSSF Circular 12/546 concerning the prudential supervision of Chapter 15 management companies.

Dormant or Inactive Accounts

CSSF Circular 15/631

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

CSSF Practical Guidance on EMIR Intragroup Exemptions from Clearing

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

CSSF FAQ on UCITS

On 8 December 2015, the CSSF published a new FAQ document, which aims at highlighting some of the key aspects of the laws and regulations governing UCITS from a Luxembourg perspective and which is primarily addressed to UCITS management companies and UCITS funds that are established in Luxembourg (UCITS FAQ).

For the time being, the UCITS FAQ document contains clarifications on eligible assets and diversification rules applicable to UCITS, most of which confirm the previous CSSF regulatory practice and/or CSSF positions as communicated in the last CSSF annual reports. Interesting, though, is that the CSSF has now clarified that for the purpose of the control/holding limits laid down in Article 48(2) of the UCI Law, the term "UCITS" shall mean "sub-fund" and, consequently, the control/holding limits shall apply at sub-fund level.

The UCITS FAQ document is to be read in conjunction with the questions and answers published by ESMA with respect to the application of the laws and regulations governing UCITS. The UCITS FAQ document will be updated from time to time and the CSSF reserves the right to alter its approach to any matter covered by the FAQs at any time.

CSSF New Application Form for ELTIF

On 21 December 2015, the CSSF published on its website a specific form for authorisation of AIFs as European long-term investment funds (ELTIFs) and authorisation to manage ELTIFs.

The new online application form must be completed and submitted to the CSSF by each Luxembourg AIF (or its representative) requesting agreement as an ELTIF in accordance with the ELTIF Regulation.

The scope of information and documents to be sent to the CSSF will vary depending on whether the applicant Luxembourg AIF is managed by an external AIFM – which can be based in Luxembourg or in another European Member State – or if it is an internally managed AIF. In the latter case, the AIF has also to be authorised by the CSSF as an AIFM under the AIFMD. Additional documents must also be provided by applicant AIFs other than Luxembourg regulated SIFs, SICARs and Part II UCIs.

The application form for authorisation as an ELTIF and for approval to manage an ELTIF should be sent electronically to the email address setup.uci@cssf.lu. It will be considered as complete only once the applicant is constituted and the CSSF has received all the requested information and documents in their final versions.

ALFI New Edition of Swing Pricing Guidelines

On 10 December 2015, ALFI published the third edition of its Swing Pricing Guidelines, which reaffirm the key principles, reflect the evolution in working practice and provide clarification on a number of technical points in areas such as calculation of the swing factor, transparency and fund corporate actions.

The main purpose of these guidelines is to provide insight into, and practical guidance on, investment funds and their managers concerning the key elements to be considered should they decide to implement a swing mechanism, namely to protect existing shareholders/unitholders from dilution associated with share/unit purchases and redemptions and/or as an additional tool to help funds managing liquidity risks.

Luxembourg Caisse de Consignation FAQs on the Law of 28 July 2014

On 5 February 2016, the Luxembourg *Caisse de Consignation* published a FAQ document on the Law of 28 July 2014 on the immobilisation of bearer shares/units.

These FAQs provide some guidance on the practical steps that Luxembourg commercial companies and Luxembourg investment funds, which have been incorporated in the form of an SA, SCA or FCP, must take with respect to the cancellation of bearer shares/units that would not have been deposited with a depositary before the 18 February 2016 deadline.

In particular, the FAQs give some information on:

- the list of documents that the *Caisse de Consignation* must receive upon deposit of assets
- the level of fees and expenses charged during the period of deposit
- the procedure that the holder of certificates must follow when claiming a refund of assets that have been deposited with the *Caisse de Consignation*.

For further information on the Law of 28 July 2014 on the immobilisation of bearer shares and bearer units, please consult our client briefing on this Law.

Case Law

Fiscale Eenheid X NV cs

Court of Justice of the European Union, 9 December 2015

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

Litigation

Business Centres – Domiciliation of Companies

Court of Appeal, 16 December 2015[4]

A so-called business centre (*centre d'affaires*) had entered into a contract with a company for the provision of office areas and various services to this company, including in particular the provision of a professional address, a telephone hotline, a reception/hosting of visitors, etc.

Following a dispute regarding alleged arrears of fees due by the company to the business centre, the company was of the view that this contract should be legally regarded as a contract of domiciliation (*contrat de domiciliation*) within the meaning of the law of 31 May 1999 on domiciliation of companies, as amended, and should therefore be declared null and void given the absence of licence of the business centre to carry out domiciliation activities.

In its judgment the Court of Appeal referred to the definition of domiciliation of companies, which, pursuant to Article 1 of the law of 31 May 1999, consists of a situation where a company establishes a seat with a third party to carry out activities within the scope of its corporate objects and the said third party provides certain services associated with such activities. The Court also referred to article 28-9 of the Financial Sector Law which provides that corporate domiciliation agents (*domiciliataires*) are natural or legal persons who agree to the establishment at their address by one or more companies of a seat and who provide services of any kind connected with that activity. It finally referred to the comments included in the bill of law preceding the law of 31 May 1999 by pointing out, in particular, that a person becomes a corporate domiciliation agent as soon as his role goes beyond the role of a lessor of building/office areas, whether furnished or not.

In the case at hand and given the nature of the services provided by the business centre that enabled the company to carry out its professional activity, the Court of Appeal ruled that:

- the contract entered into between parties had to be reclassified as a contract of domiciliation within the meaning of the law of 31 May 1999
- as a result, it was null and void since the business centre was not licensed for domiciliation activities.

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[4] Court of Appeal, 16 December 2015, N°40444.

Banking, Finance and Capital Markets

Securitisation Undertaking – Withdrawal of Licence - Liquidation

District Court, 11 May 2012[5]

According to Article 39 (1) of the Securitisation Law, "the district court dealing with commercial matters shall upon request from the public prosecutor, acting ex officio or at the request of the CSSF, pronounce the dissolution and order the liquidation of authorised securitisation undertakings whose entry on the list provided for in Article 21 has been definitely refused or withdrawn".

According to the District Court, it follows from the wording of this article that the court does not have any discretion with regard to the liquidation of the securitisation undertaking, but that it is limited to checking whether the conditions of application of this article are fulfilled. The Court, however, retains full discretion as to the method of liquidation.

Bank Liquidation – Filing of Claims – Action for Damages after Rejection of Claims

Court of Appeal, 23 October 2013[6]

Claims which had been filed by a creditor of a bank in liquidation have been rejected by the bank's liquidator. Following this rejection of claims, the creditor acts for damages against the bank.

This action for damages is rejected by the Court of Appeal. In fact, Articles 452, 453 and 454 of the Commercial Code had been made applicable to the liquidation of the bank. Such articles provide that creditors have to file all their claims regarding the bank in liquidation with the liquidator. In particular, the court decides that when these articles are applicable all actions made by unsecured creditors have to be made through filing a claim in the liquidation proceedings. For this reason, an action for damages is necessarily inadmissible and has to be rejected.

[5] District Court, 11 May 2012, N°748/2012.
[6] Court of Appeal, 23 October 2013, N°38.124.

Banks' Duty to Warn Surety

Supreme Court, 21 January 2016[7]

A person, X, signed a surety agreement (*cautionnement*) according to which X was to pay the debts owed by a company, A, to a bank if A did not pay up to an amount of Flux 150,000,000. When A went bankrupt, the bank asked X to pay the debts of A up to an amount of EUR 1,306,300.42.

X asked not to be held to pay such amounts. X was a minority shareholder of A and considered that she had never been informed about the state of the accounts of A. Additionally, X considered that the bank had not fulfilled its duty to inform the surety (*caution*) as it had not informed X about the state of the accounts of A and its financial difficulties. Also, according to X, the bank had not taken into account the fact that the surety should be proportionate to the assets and the revenue of the surety, which was not the case in the circumstances at hand. X considers that by not having respected these obligations, the bank was liable for wrongful action and/or gross negligence and that for this reason the surety was void.

The Court of Appeal[8] considered that the bank should enable a surety to give an informed consent, but that it was not held by an obligation to inform or to advise the surety of its debtor. It is the surety's duty to inform itself with regard to the financial situation of the debtor. The surety has to inform itself about the amounts owed by the principal debtor and its solvency. During the contract, the surety has to ensure the safeguarding of its proper interests. Additionally, with regard to the advisability to give a surety, the Court of Appeal held that it is not possible to impose on a bank an obligation to inform and to advise a surety who decides to sign a surety agreement knowing its assets and its financial possibilities as well as the secured amount.

This judgment has been quashed by the Supreme Court. It held that the Court of Appeal should have determined whether X was an uninformed surety and, if so, whether the bank, which then had a duty to warn the surety when concluding the contract, was justified to have discharged this duty taking into account the financial capacity of the surety and the risk of indebtedness caused by such surety agreement.

[7] Supreme Court, 21 January 2016, N°13/16.
[8] Court of appeal, 21 January 2015, N°40.587.

Bank's Liability – Informed Investors

Supreme Court, 4 February 2016[9]

Clients acted for damages against a bank further to the losses suffered because of the liquidation of investment funds they had invested in.

The Supreme Court held that, with regard to the documents that were submitted to the Court of Appeal, the clients were sophisticated investors ready to take a certain risk and that the investment funds the clients had invested in were aimed at:

- prudent investors
- sophisticated investors accepting a controlled risk level.

Taking this into account, the Supreme Court held that the Court of Appeal was right to decide that the bank had not committed any fault when recommending such products, and that, given that the bank was only held by an obligation of means (*obligation de moyens*), the clients had to prove that the information provided to them during meetings with the bank did not correspond to the true nature of the product on offer.

Evidence – Testimony by the Person who is the Sole and Unique Beneficiary of a Legal Entity

Supreme Court, 25 February 2016[10]

The Supreme Court decided that where a legal entity has been created for the sole purpose of acting officially for one specific natural person, there is identity between the natural person and the legal entity with regard to Article 399 of the New Code of Civil Procedure which provides that a witness has to be a third party to the court proceedings.

For this reason, the testimony of the natural person may not be accounted for as evidence when the legal entity is one of the parties to court proceedings.

Corporate

Commercial Companies – Liquidator's Liability

Court of Appeal, (civil), 2 April 2014

Liquidators of a commercial company may only proceed to the distribution of the corporate assets after payment or consignment of the amounts required for the payment of the debts of which liquidators either have knowledge or should have had knowledge, even if such debts are not certain yet. Thus the liquidator should take into consideration even potential debts of the company in liquidation in the liquidation accounts. Not doing so constitutes a fault on the liquidators' part and triggers their liability. A liquidator may not escape his liability by arguing that he could not assess the amount of the provision that should have been made as it is of the essence of a provision to be made on the basis of an approximate assessment of the incurred liabilities.

Commercial Companies – Manager's liability

Court of Appeal, 28 January 2015[11]

It has been confirmed that the liability of a director or a manager of a Luxembourg company may be sought by reason of (i) a violation of the respective company's articles of association or the law of 10 August 1915 on commercial companies, as amended (Article 59, para. 2, of such law), or (ii) the director's or manager's execution of his/her mandate given by said company and for any misconduct in the management of the affairs of such company (Article 59, para. 1, of said law).

In addition to such specific liability rules, a director or manager of a Luxembourg company may be held liable vis-à-vis such company or third parties on the basis of general law, including any tortious liability under Articles 1382 and 1383 of the Luxembourg Civil Code for wrongful acts or omissions which exceed the concept of mere management faults and do not necessarily constitute a breach of the aforementioned law or the relevant articles of association.

Fictitious Company

Court of Appeal, 11 February 2015[12]

Absent any *affectio societatis* between the shareholders of a Luxembourg company, such company may be qualified as being fictitious by the court taking into consideration elements existing at the company's incorporation or arising in the course of its existence in which cases the claimant bears the burden of proof.

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[9] Supreme Court, 4 February 2016, N°16/16.
[10] Supreme Court, 25 February 2016, N°19/16.
[11] Court of Appeal, 28 January 2015, N°39446
[12] Court of Appeal, 11 February 2015, N°39648

Redemption of CPECs

District Court of Luxembourg, 23 December 2015[13]

It has been ruled that convertible preferred equity certificates (CPECs) issued by a Luxembourg company are to be considered as debt instruments even though they are convertible into shares of such company.

The upstream of funds through the redemption of CPECs by a Luxembourg company to the holders of such CPECs (being in the case at hand the same persons as the company's shareholders), despite the insufficiency of the company's funds (as required under Luxembourg law for the distribution of dividends), does not constitute a fictitious dividend distribution as prohibited by Articles 72-1 and 167 of the Luxembourg law of 10 August 1915 on commercial companies, as amended, since such provisions are applicable to the distribution of shares rather than debt instruments. The fact that such instruments were convertible into shares and were held by the company's shareholders did not mitigate the judge's conclusion even though the aforementioned provisions are of public order (*ordre public*) and any violation thereof would be sanctioned by an absolute invalidity. An appeal is pending in this matter.

Investment Funds

Fiscale Eenheid X NV cs

Court of Justice of the European Union, 9 December 2015[14]

On 9 December 2015, the CJEU rendered its judgement in *Fiscale Eenheid X NV cs*. In its judgment the ECJ has decided that the management of property funds that are subject to specific state supervision shall benefit from the VAT exemption for fund management services and that the VAT exempt management does not, however, encompass the actual management of the real property.

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

[13] District Court of Luxembourg, 23 December 2015, N°1645/2015
[14] Court of Justice of the European Union, 9 December 2015, C-595/13.

Tax

Challenge of a Ruling Based on the Abuse of Law Theory – Amortisation of a Goodwill

Administrative Court of Luxembourg, 16 December 2015[15]

On 16 December 2015, the Administrative Court of Luxembourg ruled on the challenge by the Luxembourg tax authorities of an advance tax agreement granted to a Belgian tax resident in 2013 admitting the tax recognition/amortisation of a goodwill (the Agreement).

In 2012, a Belgian tax resident had contributed its know-how to a newly incorporated Luxembourg company. Pursuant to the Agreement, the contribution was regarded tax-wise as a hidden capital contribution valued at 80% of the business profit of the company. Consequently, 80% of the dividend distributions were to be treated as capital reimbursements, hence withholding tax was exempt pursuant to domestic legislation.

Despite the Agreement, the Luxembourg tax authorities challenged the tax treatment so applicable. According to the Luxembourg tax authorities, the valuation of the contribution would notably be constitutive of an abuse of law such that the Agreement would not be binding anymore.

The administrative court however ruled that the factual background described upon the request of the Agreement was sufficiently precise and comprehensive. Concurrently, no new elements have been revealed since the issuance of the Agreement. Therefore, the Luxembourg tax authorities were not in a position to challenge the Agreement or the valuation of the hidden capital contribution based on the abuse of law theory.

VAT Exemption on Management Services to Real Estate Investment Funds

European Court of Justice, 9 December 2015[16]

On 9 December 2015, the ECJ ruled on the VAT treatment of management services rendered to collective investment funds. The question from the Netherlands was whether the VAT exemption granted to the management of special investments funds would also apply to the management of real estate investment funds.

[15] Administrative Court of Luxembourg16 December 2015, N°35489,
[16] European Court of Justice, 9 December 2015, C-595/13

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

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

Although the Advocate General concluded positively in relation to both questions, the ECJ ruled that management services do not cover the actual exploitation of immovable property. Concurrently, the ECJ notably held that the VAT exemption on management services only applies to investment undertakings that are subject to specific supervision at national level.

While this decision has no direct impact on the Luxembourg tax legislation, further decisions/discussions at EU level may influence the scope of the domestic VAT exemption in relation to management services within the coming years.

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

Automatic exchange of information – Compatibility of the Absence of Effective Remedy with the EU Charter of Fundamental Rights

Administrative Court of Appeal, 17 December 2015[17]

On 17 December 2015, the Administrative Court of Appeal had to rule on whether the absence of appeal procedure against a decision of the Luxembourg Tax Authorities ordering the taxpayer to deliver the requested information pursuant to the law of 25 November 2014 (the Law) is compliant with the provisions of the EU Charter of Fundamental Rights, notably its Article 47 as regards the right to an effective remedy and to a fair trial.

In the case at hand, certain information was requested by the Luxembourg Tax Authorities to a Luxembourg company under Article 2 of the Law, including the names and addresses of the shareholders and the amount and percentage of capital held by the latter. The company refused to provide such information on the grounds that such information would not be foreseeably relevant for the request and would constitute a mere "fishing expedition". As a result, the Luxembourg tax administration imposed a fine of EUR 250,000, which was further reduced to EUR 150,000.

Since the present exchange of information procedure was based, notably, on an EU Directive (namely the EU Directive 2014/107/EU), the Court concluded that the provisions of the EU Charter of Fundamental Rights might be applicable. Due to the absence of relevant ECJ case law, the Court has referred to the ECJ for a preliminary ruling as regards, particularly, the compatibility of the absence of effective remedy pursuant to the Law in light of Article 47 of the EU Charter of Fundamental Rights.

Should the ECJ rule that the absence of effective remedy against a decision of the Luxembourg Tax Authorities ordering the taxpayer to deliver the requested information is not compliant with the EU Charter of Fundamental Rights, several similar litigations could be expected in the near future.

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

Tax Treatment of Losses Incurred by a Permanent Establishment in another Member State

European Court of Justice, 17 December 2015[18]

On 17 December 2015, the ECJ ruled on the tax treatment applicable to losses incurred by a foreign permanent establishment (PE) confirming the opinion of the Advocate General.

A company resident in Germany sought to deduct the losses incurred by its Austrian PE from 1997 to 2005. The latter was transferred in 2005 to an Austrian company belonging to the same group of companies. Until 1998, under German law, foreign PEs' losses were deductible but could be recaptured (i.e. added back into the taxable base

[17] Administrative Court of Appeal, 17 December 2015, N°36893C

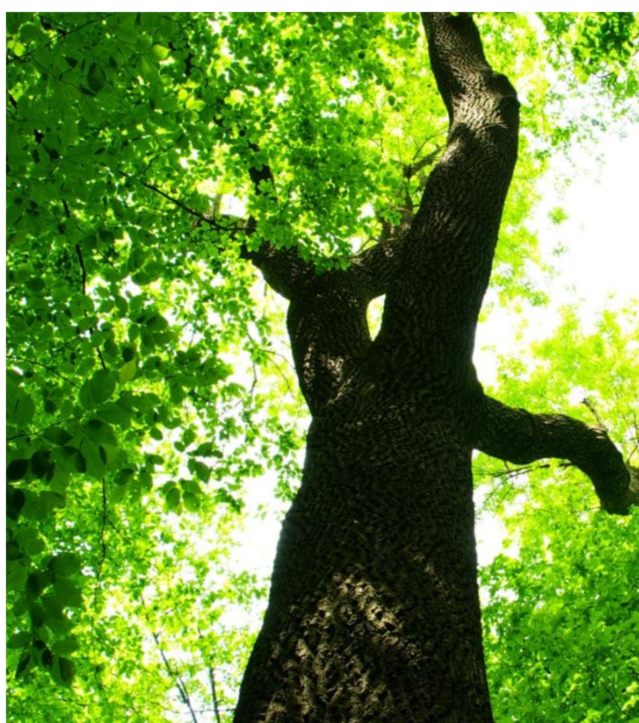
[18] European Court of Justice, 17 December 2015, C-388/14

of the transferring company), 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, PEs' profits may only be taxed in the PE State and are exempt in the other contracting State.

The ECJ concluded that, in the event of transfer by a resident company to a non-resident company within the same group of a foreign PE:

- The PE's losses previously deducted can be subject to a recapture mechanism where, under a double tax treaty, the income of such a PE is exempt from tax in the Member State in which the company to which that establishment belonged has its seat. Such a recapture mechanism would ensure a balanced allocation of the power to impose taxes between the Member States concerned.
- A domestic tax system can deny the deduction of foreign PEs' losses if foreign PEs' profits are exempted by such Member State pursuant to a double tax treaty. Further, this denial would not constitute a restriction to the freedom of establishment as German and foreign PEs are not in a comparable situation.

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



Tax

International Legislation

Publication of an Anti-Avoidance Package

European Commission – Anti-Avoidance Measures

On 28 January 2016, the EU Commission published an anti–avoidance package, the purpose of which is to:

- ensure effective taxation in the EU
- increase tax transparency
- secure a level playing field internationally.

The key objective is to ensure that companies are taxed where their profits are generated and that they cannot avoid paying their fair share of tax through aggressive tax planning. In this respect, the anti-avoidance package includes, notably, the following elements:

- proposal for an anti-tax avoidance directive (Draft Directive) that complements and reinforces the OECD's work as regards Base Erosion and Profit Shifting (BEPS)
- recommendation on double tax treaties to EU Member States in order to prevent treaty abuses and to reinforce the permanent establishment concept as per BEPS Actions 6 and 7
- proposed revision to the Directive 2011/16/EU on mandatory automatic exchange of information in the field of taxation (as amended by Directive 2014/107/EU) in order to implement country-by-country reporting between tax authorities, as recommended by BEPS Action 13
- actions to foster fair taxation globally based on international standards.

Under the Draft Directive, a set of legally binding anti-avoidance measures would apply within the EU. Such measures mainly reflect the BEPS initiative (namely Action 2 on hybrid mismatches, Action 3 on Controlled Foreign Company rules, Action 4 on interest limitation rules and Action 6 on general anti-abuse rule) and cover the following items:

- Introduction of a Controlled Foreign Company rule (so-called CFC rule) to deter profit shifting and to allow taxation where the profit is actually generated
- Introduction of a switchover rule to circumvent double non-taxation

- Introduction of an exit taxation to avoid non-genuine re-location of taxable assets
- Limitation of the tax deduction of interest to prevent the creation of artificial debt arrangements. Such a limitation should be based on a fixed ratio of the earnings of the taxpayer.
- Re-characterisation of a hybrid instrument in case of mismatch
- Introduction of a general anti-abuse rule to combat artificial tax arrangements where no other specific rule applies.

The Draft Directive and the proposed revision to Directive 2011/16/EU should be submitted to the EU Parliament and to the EU Council, respectively, for consultation and adoption (upon a unanimous vote). No specific agenda has been set yet, but a swift adoption could be anticipated.

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

In the meantime, work on the Common Consolidated Corporate Tax Base (CCCTB) at the EU level remains underway. Based on the latest developments, a two-phase approach should be held such that the consolidation regime should follow the stand-alone common corporate tax base.

Please refer to the May 2011 and July 2015 editions of our Luxembourg Legal Update for further details on the above.

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

European Council – Repeal of the EU Savings Directive

On 10 November 2015, the EU Council repealed the EU Savings Directive (Council Directive 2003/48/EC). The repeal applies as from 1 January 2017 in the case of Austria and from 1 January 2016 in the case of all other EU member states (subject to on-going requirements to fulfil administrative obligations such as the reporting and exchange of information relating to, and accounting for withholding taxes on, payments made before those dates).

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

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

European Council – Mandatory Exchange of Information

On 8 December 2015, the EU Council adopted a Directive introducing a mandatory automatic exchange of information on advance cross-border tax rulings as well as advance pricing arrangements between Member States.

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 last 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.

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

Financial Transaction Tax – Update

Negotiation Progress on the Financial Transaction Tax (FTT)

On 3 December 2015, an announcement has been released by the Luxembourg President of the Council of the EU pointing out the technical progress reached over the last year.

Concurrently, on 8 December 2015, Austria, Belgium, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia and Spain (hereafter referred to as the "Participating Member States") set out in a joint statement their agreement on certain features that should be included in the final version of the FTT (the "Statement"). Although initially part of the enhanced cooperation, Estonia declined to further participate in the implementation of the FTT. According to the Statement, the FTT as regards shares should notably have the following features:

- all transactions including intra-day should be subject to the FTT
- all transactions in a chain should be subject to the FTT, except where agent and clearing members act as facilitators
- a narrow market-making exemption "might be required"

- the territorial scope of the FTT should be based on the residence of the parties to the financial transaction, combined with the so-called "issuer basis" (i.e. location of the issuer of the shares used in the financial transaction), as per the EU Commission's proposal dated February 2013.

In addition, the FTT as regards derivatives should be based on the principle of the "widest possible base and low rates". Unlike shares, no exemption for market making activities should be granted but the territorial scope should be similar.

Despite the technical progress realised by the Participating Member States, the Luxembourg President of the Council of the EU emphasised the remaining work to be done on certain open issues (e.g. determination of tax rates for different version of derivatives) before the FTT is effectively implemented.

Please refer to the January 2012, October 2012, October 2013, July 2014 and March 2015 editions of our Luxembourg Legal Update for further details on the above.

State Aid Decision in the Fiat Case

On 21 October 2015, the EU Commission announced, through the issuance of a press release, that Luxembourg has granted illegal selective tax advantages to Fiat Finance.

According to the press release, Fiat Finance would have artificially eroded its taxable base by computing its taxes on a small portion of its actual accounting capital, at a very low remuneration. Due to confidential information, the decision of the EU Commission has not yet been published.

On 4 December 2015, the Luxembourg Government filed an appeal to the decision of the EU Commission. Moreover, the Luxembourg Government criticises the use by the EU Commission of "unprecedented criteria in establishing the alleged State aid" constituting "an innovation undermining the usual interpretation of transfer pricing".

In the meantime, the EU Commission also declared that the Netherlands have granted illegal selective tax advantages to Starbucks.

EU Commission to Investigate on Rulings Granted by Luxembourg Tax Authorities to McDonald's

On 3 December 2015, the EU Commission announced, through the issuance of a press release, the opening of a formal investigation in order to determine whether Luxembourg has granted an illegal selective tax advantage to McDonald's.

This investigation relates to two rulings issued by the Luxembourg Tax Authorities to McDonalds, respectively on March and September 2009. According to the EU Commission press release, these rulings may have allowed McDonald's not to pay any corporate income tax from 2009 either in Luxembourg or in the U.S., thus creating a double non-taxation situation. This conclusion remains, however, subject to an in-depth analysis from the EU Commission.

The EU Commission also emphasised that this investigation does not call into question the general tax regime of Luxembourg, nor the tax rulings practice.

Further information should be communicated within the next few months. Concurrently, the non-confidential version of the decision to open the investigation shall be published once confidentiality issues have been solved.

National Legislation

Luxembourg Tax Reform for 2017

On 29 February 2016, the Luxembourg Government presented a long-awaited tax reform that should be introduced in Luxembourg law by year-end, applicable as from 2017. This reform relates to both individual and corporate taxation.

The main individual tax aspects can be summarised as follows:

- Annual taxable income between EUR 150,000 and EUR 200,000 will be subject to individual income tax at a rate of 41% while a rate of 42% will apply to the portion of income exceeding EUR 200,000.
- The 10% withholding tax levied on certain income derived from savings will be increased to 20% where the annual interest income received exceeds EUR 250 per taxpayer.
- The assessment of the benefit in kind granted by an employer in relation to company cars will now depend on the vehicle's emission category and its fuel type. Currently set at 1.5% of the value of the new vehicle (VAT included), the benefit in kind will now range between 0.5% and 1.8% of the said value.
- Capital gains realised on real estate assets between 1 July 2016 and 31 December 2017 will be subject to Luxembourg personal income tax at a rate corresponding to 25% of the normal progressive rate.

Concurrently, the corporate tax proposals notably relate to the following elements:

- The corporate income tax (*impôt sur le revenu des collectivités*) rate should be progressively decreased from 21% to 19% in 2017 and, subsequently, to 18% as from 2018. The municipal business tax (*impôt commercial communal*) rate will not be modified (e.g. 6.75% for a company having its statutory seat in Luxembourg-city). Therefore, the aggregate rate (currently 29.22%) should amount to 27.08% in 2017 and 26.01% as from 2018.
- The reduced corporate income tax rate of 20% should be decreased to 15% as from 2017 and should apply to companies with a taxable base below EUR 25,000 (currently, the 20% reduced rate only applies to companies with a taxable base below EUR 15,000).
- The minimum net wealth tax recently introduced should be increased to EUR 4,815 as regards Soparfis (*sociétés de participations financières*).
- Companies will be able to carry forward the losses realised as from 2017 for a ten-year period only, while no time limit is currently set. In addition, the use of the losses will be capped at 80% of the company's taxable base.
- Potential capital gains on real estate assets (including the land) recognised upon the transmission of a family business should not be taxable where the transmission occurs to the next generation of the same family.
- The 0.24% registration duty levied upon the transfer of certain loan-type agreements will be abolished.

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

Bill of Law N°6847

On 18 December 2015, the Luxembourg Parliament formally adopted the law (bill N°6847) implementing the amended Parent-Subsidiary Directive and introduced new tax measures relating to:

- the Luxembourg tax consolidation regime
- the deferral of capital gains taxation upon the transfer of tax residence or the transfer of a permanent establishment.

The law also extends the investment tax credit to the leasing of international ships and grants a two-year extension (from 31 December 2014 until 31 December 2016) to the tax credit for hiring unemployed individuals.

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

Automatic Exchange of Information on Financial Accounts in Tax Matters

Bill of Law N°6858

On 18 December 2015, the Luxembourg Parliament formally adopted the law (bill N°6858) pertaining to the automatic exchange of financial account information in tax matters and implementing the EU Directive 2014/107/EU.

The automatic exchange of information mechanism applies to certain reportable Luxembourg financial institutions from 1 January 2016. Concurrently, the first reporting as regards financial information gathered during the year 2016 will occur by 30 June 2017.

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

Adoption of Various Tax Measures

Bill of Law N°6891

On 18 December 2015, the Luxembourg Parliament formally adopted the law (bill N°6891) amending several existing tax laws.

Repeal of the minimum annual corporate income tax and introduction of a minimum annual net wealth tax

Introduced as from 2013 in a progressive manner, the minimum annual corporate income tax has been repealed as from 1 January 2016 and replaced by a minimum annual net wealth tax charge. Such a net wealth tax charge will be:

- assessed under the same mechanism (i.e. a EUR 3,210 lump sum or a progressive charge ranging from EUR 535 to EUR 32,100 depending on the company's total gross assets)
- capped at EUR 32,100 in case of a tax consolidated group.

Concurrently, certain entities normally exempted from net wealth tax will become liable to the minimum annual net wealth tax charge. The following entities are concerned:

- Securitisation companies incorporated as a public limited liability company (*société anonyme*), a private limited liability company (*société à responsabilité limitée*), a corporate partnership limited by shares (*société en commandite par actions*) or a cooperative company set up as a public limited liability company (*société coopérative organisée sous forme de société anonyme*)

- SICARs incorporated as a public limited liability company (*société anonyme*), a private limited liability company (*société à responsabilité limitée*), a corporate partnership limited by shares (*société en commandite par actions*) or a cooperative company set up as a public limited liability company (*société coopérative organisée sous forme de société anonyme*)
- Pension savings companies with variable capital (or SEPCAVs) incorporated as a cooperative company set up as a public limited liability company (*société coopérative organisée sous forme de société anonyme*)
- Pension savings associations (*association d'épargne-pension*).

Amendment to the net wealth tax rate

Applicable as from 1 January 2016, net wealth tax is now computed pursuant to the following sliding scale:

- 0.5% of the rounded unitary value below EUR 500 million
- 0.05% of the portion of rounded unitary value exceeding EUR 500 million.

Introduction of a "step-up" principle for individuals becoming Luxembourg tax residents

Applicable as from the fiscal year 2015, individuals who move their fiscal residence to Luxembourg will have the opportunity to apply a tax-free mark-to-market on the securities or certain convertible loans they hold. Such a regime will, however, be limited to:

- securities representing a participation of at least 10% of the share capital of a company
- convertible loans issued by a company in which the taxpayer already holds at least such a 10% participation.

Finally, this regime does not apply if, before the transfer of its fiscal domicile to Luxembourg, a taxpayer has been a:

- Luxembourg tax resident for a 15-year period
- non-Luxembourg tax resident for less than five years thereafter.

Budget Law

Bill of Law N°6900

On 18 December 2015, the Luxembourg Parliament formally adopted the Budget law (bill N°6900) amending existing tax laws.

Phase-out of the Intellectual Property regime

The favourable Luxembourg Intellectual Property (IP) regime has been repealed as from 1 July 2016 for corporate income tax and municipal business tax purposes and will be repealed from 1 January 2017 for net wealth tax purposes.

Pursuant to the phase-out of the current IP regime, assets already held that qualify for the IP regime may, however, continue to benefit from this regime until 30 June 2021. Concurrently, qualifying assets acquired as from 1 January 2016 may also benefit from the IP regime until 30 June 2021 to the extent they have been, among other conditions, acquired or developed before 1 July 2016.

As already indicated by the Ministry of Finance on 26 February 2015 in its response to Parliamentary question N°896, a new Luxembourg IP regime can be anticipated but would necessarily comply with the modified nexus approach for IP regimes as elaborated under Action 5 of the BEPS initiative.

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

Introduction of a temporary regularisation procedure for individuals

Individuals that may have evaded income and inheritance taxes as well as registration duties can temporarily avoid sanctions normally applicable to the extent they have:

- filed spontaneously a sole amending tax return, together with the relevant attachments, by 31 December 2017
- paid the evaded taxes within the month of the issuance of the amending tax bulletin (*bulletin d'impôt rectificatif*).

A 10% increase computed on the evaded taxes so paid would, however, remain applicable for filings occurring before 31 December 2016. Such an increase would represent 20% of the evaded taxes in case of filings occurring between 1 January and 31 December 2017.

In any event, individuals who faced an administrative/judicial procedure with respect to taxes evaded before filing the amending tax return are excluded from the benefit of the regularisation so introduced.

Creation of the Reserved Alternative Investment Funds

Bill of Law N°6929

On 27 November 2015, the Council of Ministers released the draft bill of law N°6929 creating a new Luxembourg investment vehicle (*"Reserved* Alternative Investment Fund" or RAIF) that will not be subject to the approval or supervision of the CSSF.

According to the draft bill, the RAIF should only be subject to a subscription tax computed on its net assets, calculated and payable at the end of each calendar quarter, the rate of which is 0.01% per annum. Concurrently, distributions carried out by the RAIF should not be subject to Luxembourg withholding tax.

RAIFs should not be subject to net wealth tax but would remain liable to the minimum annual net wealth tax when incorporated as a:

- public limited liability company (*société anonyme*)
- private limited liability company (*société à responsabilité limitée*)
- corporate partnership limited by shares (*société en commandite par actions*)
- cooperative company set up as a public limited liability company (*société coopérative organisée sous forme de société anonyme*).

The RAIF may, however, be regarded as a fully taxable company if it only invests in risk capital. In such case:

- its taxable base would be subject to the regular income tax rate of 29.22%, save qualifying risk capital income and gains that would be excluded from its tax base
- its unitary value would be subject to the regressive net wealth tax
- distributions carried out by the RAIF would be subject to regular Luxembourg withholding tax.

Finally, domestic VAT exemption on qualifying management fees would also apply to this vehicle.

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

Double Tax Treaties

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

Double Tax Treaty between Luxembourg and Senegal – Signed

On 10 February 2016, Luxembourg and Senegal signed a DTT. Further to national implementations in both countries, the DTT should enter into force on the day of receipt of the last notification of implementation given by one of the two states. The DTT differs from the OECD Model Convention on several points including, notably:

- the extension of the definition of "permanent establishment"
- the inclusion of a subjective main purpose test (i.e. denial of the DTT provisions) as regards dividends, interest, royalties and other income
- the limitation of the attribution of the right to tax capital gains realised upon disposal of real estate companies' shares where the real estate assets are located.

Concurrently, withholding tax rates are as follows:

- 15% on dividend distributions, unless the 5% reduced rate applies (save the application of the main purpose test)
- 10% on interest paid (save the application of the main purpose test)
- 10% on royalties, unless the 6% reduced rate applies (save the application of the main purpose test).

The exchange of information clause (Article 27) is in line with the applicable international OECD standard for the exchange of information upon request.

Double Tax Treaty between Luxembourg and Serbia – Signed

On 15 December 2015, Luxembourg and Serbia signed a DTT. On 24 February 2016, Serbia ratified the DTT. Further

to national implementations in both countries, the DTT should enter into force on the day of receipt of the last notification of implementation given by one of the two states. The DTT is based on the OECD Model Convention and the exchange of information clause (Article 27) is in line with the applicable international OECD standard for the exchange of information upon request.

Double Tax Treaty between Luxembourg and Uruguay – Ratified by Uruguay

On 18 December 2015, Uruguay ratified the DTT signed on 10 March 2015. Further to national implementations in both countries, the DTT should enter into force 15 days following the last notification of implementation given by one of the two states.

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

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

On 7 December 2015, Luxembourg ratified the amending protocol signed on 8 July 2014. The amending protocol shall enter into force on the day of receipt of the last notification of implementation given by one of the two states.

Please refer to the November 2014 and July 2015 editions of our Luxembourg Legal Update for further details on the above.

Double Tax Treaty between Luxembourg and Andorra entered into force

On 7 March 2016, the DTT signed on 2 June 2014 entered into force further to the reciprocal implementation by both countries of the DTT within their domestic laws. The DTT shall, in principle, have effect on 1 January 2017.

Please refer to the July 2014 and July 2015 editions of our Luxembourg Legal Update for further details on the above.

Double Tax Treaty between Luxembourg and Croatia entered into force

On 13 January 2016, the DTT between Luxembourg and Croatia signed on 20 June 2014 entered into force further to the reciprocal implementation by both countries of the DTT within their domestic laws. The DTT shall, in principle, have effect on 1 January 2017.

Please refer to the July 2014 and July 2015 editions of our Luxembourg Legal Update for further details on the above.

Double Tax Treaty between Luxembourg and Estonia entered into force

On 11 December 2015, the DTT signed on 7 July 2014 and replacing the existing DTT signed on 23 May 2006 entered into force further to the reciprocal implementation by both countries of the DTT within their domestic laws. The DTT shall have effect on 1 January 2016.

Please refer to the November 2014, March 2015 and July 2015 editions of our Luxembourg Legal Update for further details on the above.

Double Tax Treaty between Luxembourg and Singapore entered into force

On 28 December 2015, the DTT between Luxembourg and Singapore signed on 9 October 2013 and replacing the DTT signed on 6 March 1993 (save for Article 23(1)(c) which remains applicable until 31 December 2020) entered into force further to the reciprocal implementation by both countries of the DTT within their domestic laws. The DTT shall, in principle, have effect on 1 January 2017.

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

Protocol to Double Tax Treaty between Luxembourg and France entered into force

On 1 February 2016, the protocol signed on 5 September 2014 amending the DTT between Luxembourg and France entered into force further to reciprocal implementation by both countries of the protocol within their domestic laws. The protocol shall have effect on 1 January 2017.

Please refer to the November 2014, March 2015 and July 2015 editions of our Luxembourg Legal Update for further details on the above.

Protocol to Double Tax Treaty between Luxembourg and Ireland entered into force

On 11 December 2015, the protocol signed on 27 May 2014 amending the DTT between Luxembourg and Ireland entered into force further to reciprocal implementation by both countries of the protocol within their domestic laws. The protocol shall have effect from 1 January 2016.

For further details on the above, please refer to the July 2014 and July 2015 editions of our Luxembourg Legal Update.

Protocol to Double Tax Treaty between Luxembourg and Lithuania entered into force

On 11 December 2015, the protocol signed on 20 June 2014 amending the DTT between Luxembourg and Lithuania entered into force further to reciprocal implementation by both countries of the protocol within their domestic laws. The protocol shall have effect from 1 January 2016.

Please refer to the November 2014, March 2015 and July 2015 editions of our Luxembourg Legal Update for further details on the above.

Protocol to Double Tax Treaty between Luxembourg and Mauritius entered into force

On 11 December 2015, the protocol signed on 28 January 2014 amending the DTT between Luxembourg and Mauritius entered into force further to reciprocal implementation by both countries of the protocol within their domestic laws. The protocol shall have effect from 1 January 2016.

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

Protocol to Double Tax Treaty between Luxembourg and United Arab Emirates entered into force

On 11 December 2015, the protocol signed on 26 October 2014 amending the DTT between Luxembourg and the United Arab Emirates entered into force further to reciprocal implementation by both countries of the protocol within their domestic laws. The protocol shall have effect from 1 January 2016.

Please refer to the November 2014 and July 2015 editions of our Luxembourg Legal Update for further details on the above.

Regulatory Developments

Electronic VAT Filing

Regulation N°211 issued by the Ministry of Finance

On 1 November 2015, the Ministry of Finance signed a regulation amending, in a gradual manner, the current electronic filing system (eTVA). Effective since 1 January 2016, the new electronic platform (eCDF) will be the only electronic filing platform as from 2017.

Net Wealth Tax Reduction

Circular I. Fort. N°47bis

On 18 November 2015, the Luxembourg Tax Authorities issued Circular I. Fort. N°47bis on the net wealth tax reduction set forth by §8a VStG, as from 2015 onwards. Concurrently, the Circular I. Fort. N°47 dated 20 May 2014 remains applicable before 2015.

The new Circular seeks to reflect the changes arising from the law dated 25 November 2014 which amended the VStG and modified, notably, the base of the net wealth tax reduction. Effective as of 2015, the net wealth tax reduction is limited to the income tax (reduced by the minimum annual corporate income tax in 2015 or the minimum annual net wealth tax as from 2016) owed by the taxpayer for the preceding tax year, instead of the tax owed for the same tax year previously.

Please refer to the February 2014 and March 2015 editions of our Luxembourg Legal Update for further details on the above.

Functional Currency for Tax Purposes

Circular L.G.-A N°60

On 24 November 2015, the Luxembourg Tax Authorities issued Circular L.G.-A N°60 clarifying the use of a non-Euro functional currency for tax purposes and replacing the following circulars dated 16 June 2014:

- Circular L.G.-A N°60
- Circular L.I.R. N°23/3
- Circular ICC N°39
- Circular Eval. N°59
- Circular I. Fort. N°49.

The new Circular seeks to adjust the base of the above-mentioned net wealth tax reduction.

Please refer to the November 2014 edition of our Luxembourg Legal Update for further details on the above.

Determination of the Unitary Value for Net Wealth Tax Purposes

Circular I. Fort. N°50

On 25 November 2015, the Luxembourg Tax Authorities issued Circular I. Fort. N°50 in relation to the determination of the unitary value for net wealth tax purposes.

This Circular reflects the changes arising from the law dated 25 November 2014 which amended the VStG and

modified, notably, the assessment period of the unitary value. Effective as of 2015, the unitary value shall now be assessed on a yearly basis instead of the three-year period previously used.

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

Minimum Corporate Income Tax

Circular L.I.R. N°174/1

On 30 November 2015, the Luxembourg Tax Authorities issued a new Circular L.I.R. N°174/1 on the minimum annual corporate income tax. This Circular replaces the former Circular L.I.R. N°174/1 of 1 August 2013 for 2015 but the provisions of the latter remain applicable before that date. Due to the repeal of the minimum annual corporate income tax as from 1 January 2016, these two circulars should however not apply anymore as from 2016.

The new Circular seeks to adjust the changes arising from the State Budget Law dated 19 December 2014 which amended, notably, the computation of the minimum annual corporate income tax.

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

Taxation of Stock Options and Warrants

Circular L.I.R. N°104/2bis

Parliamentary Question N°1651

Parliamentary Question N°1662

On 28 December 2015, the Luxembourg Tax Authorities issued a new Circular L.I.R. N°104/2bis on the taxation of stock options and warrants which complements the Circular L.I.R. N°104/2 of 20 December 2012.

According to the new circular and applicable as from 1 January 2016, stock option plans as elaborated under Circular L.I.R. N°104/2 of 20 December 2012 as well as a list of the beneficiaries shall be communicated to the relevant tax office at least two months before the implementation of the said plans.

Stock option plans implemented before 1 January 2016 shall also be communicated to the competent tax office as soon as possible to the extent (some) options have not yet been granted to the beneficiaries.

Please refer to the February 2013 edition of our Luxembourg Legal Update for further details on the above.

Concurrently, two Parliamentary questions have been addressed to the Ministry of Finance about the taxation of stock options and warrants on 18 December 2015 and 5 January 2016. These questions were sought to obtain clarification on changes that may be required as regards the favourable tax treatment of such instruments and potential abuses in their use.

The Ministry of Finance indicated in its responses, respectively on 13 January and 4 February 2016, that the new reporting obligations laid down under Circular L.I.R. N°104/2bis will enable:

- the Luxembourg Tax Authorities to better monitor the (abusive) implementation of stock option plans
- the Luxembourg Parliament to envisage adjustments to the current tax treatment if need be.

At this stage, it is therefore not envisaged to amend the tax treatment applicable to stock options and warrants. Further tax audits as regards the use of stock option plans could, however, be anticipated within the coming years.

Case Law

Challenge of a Ruling Based on the Abuse of Law Theory – Amortisation of a Goodwill

Administrative Court of Luxembourg, 16 December 2015

VAT Exemption on Management Services to Real Estate Investment Funds

European Court of Justice, 9 December 2015

Automatic exchange of information – Compatibility of the Absence of Effective Remedy with the EU Charter of Fundamental Rights

Administrative Court of Appeal, 17 December 2015

Tax Treatment of Losses Incurred by a Permanent Establishment in another Member State

European Court of Justice, 17 December 2015

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

Glossary

ABBL: The Luxembourg Bankers' Association

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

AIFM: Alternative Investment Fund Manager

AIF: Alternative Investment Fund

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

Bank Resolution Law: Luxembourg law of 18 December 2015 law on the failure of credit institutions and of certain investment firms implementing the BRRD and DGSD 2

BCBS: Basel Committee on Banking Supervision

BCL: Banque Centrale du Luxembourg

BRRD: Directive 2014/59 of 15 May 2014 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)

CAA: *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 regarding 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 and 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

EIOPA: the European Insurance and Occupational Pensions Authority

ESMA: European Securities and Markets Authority

ESRB: European Systemic Risk Board

ETFs: Exchange Traded Funds

ETDs: Exchange Traded Derivatives

EUIR: European Union Insolvency Regulation: Council regulation (EC) N°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 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 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

SRB: the Single Resolution Board

SRF: the Single Resolution Fund

SRM: the Single Resolution Mechanism

SSM: the Single Supervisory Mechanism

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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