Newsletter

July 2016

BSP BONN STEICHEN & PARTNERS

Avocats - www.bsp.lu

SUMMARY

AML **2**

NEW RULES AMENDING 4TH AML DIRECTIVE 2

CAPITAL MARKETS **3**

TRANSPARENCY REGIME - AMENDMENTS 3

DISTRIBUTED LEDGER TECHNOLOGY - IMPACT ON SECURITIES MARKETS 4

MIFID II AND MIFIR - LEVEL II REGULATIONS AND EXTENSION OF APPLICATION DATE 4

MARKET ABUSE 5

APPLICATION OF THE MARKET ABUSE REGULATION 5

LUXEMBOURG STOCK EXCHANGE AND CHANGES REGARDING MARKET ABUSE 6

ESMA PUBLISHES Q&A ON THE MARKET ABUSE REGULATION 6

RECENT MARKET ABUSE DELEGATED REGULATIONS 6

COMMERCIAL LAW **7**

PROTECTION OF TRADE SECRETS - DIRECTIVE 2016/943 7

CORPORATE **9**

THE REFORM OF THE LUXEMBOURG COMPANY LAW 9

THE SIMPLIFIED SÀRL, AN INSTRUMENT FOR STARTUPPERS 9

INVESTMENT MANAGEMENT **10**

BREXIT: UCITS AND AIFM DIRECTIVES 10

UCITS V - LAW OF MAY 10TH 2016 11

EUSEF AND EUVECA - ESMA Q&A 11

FCP - CHANGES TO REGISTRATION AT RCS 12

LISTING OF FUNDS - LUXSE FAQ 12

AIFMD - UPDATED ESMA Q&A 14

AIFMD - CSSF Q&A ON LOAN ORIGINATION 14

ELTIF - FINAL REPORT ON RTS 15

MONEY MARKET FUNDS - UPDATE 16

LABOUR LAW **17**

LABOUR CODE AMENDMENTS - DRAFT LAW N°6989 17

TAX **18**

ANTI-TAX AVOIDANCE DIRECTIVE 18

USA/LUXEMBOURG DTT: NEW RULES FOR THE TAXATION OF PERMANENT ESTABLISHMENTS 19

EU DIRECTIVE – CBC REPORTING 19

CRS : CLARIFICATIONS BY THE LUXEMBOURG TAX AUTHORITIES 21

REDUCED TAX RATE APPLICABLE TO CAPITAL GAINS ON REAL ESTATE 21

VALIDITY OF TAX RULINGS 22

CASE LAW: DETERMINATION OF TAX RESIDENCE OF AN INDIVIDUAL 22

THIS NEWSLETTER IS INTENDED ONLY AS A GENERAL DISCUSSION OF THE TOPICS WITH WHICH IT DEALS. IT SHOULD NOT BE REGARDED AS LEGAL ADVICE. IF YOU WOULD LIKE TO KNOW MORE ABOUT THE TOPICS COVERED IN THIS NEWSLETTER OR OUR SERVICES PLEASE CONTACT US.

AML

NEW RULES AMENDING 4TH AML DIRECTIVE

The European Commission adopted a proposal to further strengthen European rules against money laundering and terrorist financing on July 5th 2016.

Pursuant to its action plan for strengthening the fight against terrorist financing which the Commission adopted on February 2nd 2016, and less than one year after the adoption of the fourth AML Directive ("the Fourth AMLD"), the European Commission proposes a set of reinforced rules that will amend the Fourth AMLD, which has to be implemented by European Union Member States into their national legislation by June 26th 2017. The European Commission, on the basis of its action plan decided, after the terrorist attacks, to expedite the process of implementation of the Fourth AMLD, which should now occur by the end of the year 2016.

Four measures aim at tackling terrorist financing:

- Enhancing the powers of EU Financial Intelligence Units (the "FIUS's") and facilitating their cooperation. FIU's will share widened information, especially those relating to bank account holders;
- Including risks linked to virtual currencies. Virtual currency exchange platforms and custodian wallet providers will fall into the scope of activities subjected to AML-CTF prevention, when they exchange virtual for real currencies;
- Addressing the risks regarding anonymous pre-paid instruments. Customer due diligence requirements will be enhanced and thresholds for identification will be lowered from EUR 250 to EUR 150;
- Stronger checks on risky third countries. Banks will be subject to additional checks on financial flows from these countries. The list of countries, mirroring the FATF list, has been adopted on July 14th 2016.

Other measures are proposed to reinforce the provisions introduced by the Fourth AMLD:

- Member States will make public certain information on the beneficial ownership registers on companies incorporated on their own territory (and, where applicable, for business-related trusts). For some kind of companies, the threshold of ownership will be set at 10%).
- Those national registers will be directly interconnected (this interconnection should have been implemented by June 26th 2019 at the latest).
- In response to the Panama Papers scandal, bank accounts (be they existing or newly opened) held by passive companies and trusts, will also be subject to greater scrutiny and tighter rules.

A draft law to implement the above changes is not as yet available. We will keep you posted about the coming developments.

CAPITAL MARKETS

TRANSPARENCY REGIME - AMENDMENTS

The Luxembourg law of May 10th 2016 (the "Amendment Law") amending the law of January 11th 2008 on transparency requirements for issuers (the "Transparency Law"), and the Grand-ducal regulation of May 10th 2016 (the "Amendment Grand-ducal Regulation") amending the Grand-ducal regulation of January 11th 2008 on transparency requirements for issuers (the "Grand-ducal Regulation"), entered into force on May 15th 2016.

For a summary of the principle provisions of the Amendment Law, please refer to our article "Transposition of the Transparency and Prospectus Amendment Directive", which was prepared on the basis of draft law No 6860 (which is substantially the same as the adopted version of the Amendment Law).

The Amendment Grand-ducal Regulation deletes a few provisions of the Grand-ducal Regulation, in particular those provisions which relate to:

(i) quarterly financial reports/interim management statements previously required under Article 5(2) of the Transparency Law,
(ii) the procedural requirements for disclosure of the choice of home Member State (as these are now set out in Article 2 of the Transparency Law, as amended) and
(iii) the types of financial instruments that result in an entitlement to acquire, on the holder's initiative alone, shares to which voting rights are attached (as the Transparency Law as amended has been expanded to sufficiently cover this point).

In light of the entry into force of the Amendment Law, the CSSF has issued CSSF Circular 16/637 and CSSF Circular 16/638. CSSF Circular 16/637 modifies CSSF Circular 08/337 relating to the Transparency Law and the Grand-ducal Regulation. The modifications clarify, *inter alia*, what is now covered by the notion of "regulated information" and what are now the periodic and on-going disclosure requirements which are applicable to issuers. More detailed instructions are given in CSSF Circular 08/337 on the procedure for filing documents with the CSSF. Furthermore, annexed to the amended CSSF Circular 08/337 is the ESMA standard form for the notification of an issuer's home Member State.

CSSF Circular 16/638 modifies CSSF Circular 08/349 which provides details regarding the information to be notified with respect to major holdings in accordance with the Transparency Law, as amended. The modifications clarify various points in light of the Amendment Law, Amendment Grand-ducal Regulation and the Commission Delegated Regulation (EU) 2015/761 with regard to certain regulatory technical standards on major holdings. A new standard form for the notification of major holdings is attached to the circular as Annexe A and Annexe A bis contains a new complement to Annexe A.

The CSSF also updated its frequently asked questions on June 27th 2016 by dealing with the topics related to, inter alia, the choice of home Member States, disclosures regarding major holdings, publication of documents made available in connection with general meetings and the new obligation to report on payments to governments.

Finally, we refer you to the CSSF Press Release 16/23 regarding the entry into force of the Amendment Law and Amendment Grand-ducal Regulation which clarifies certain points regarding the changes to the disclosure obligations under the Transparency Law.

DISTRIBUTED LEDGER TECHNOLOGY - IMPACT ON SECURITIES MARKETS

On June 2nd 2016, the European Securities and Markets Authority ("ESMA") published a discussion paper on the possible benefits, risks and challenges of the application of distributed ledger technology ("DLT") to securities markets. ESMA seeks stakeholders' views on the analysis set out in the publication.

Distributed ledgers or 'blockchains' are records of electronic transactions, similar to accounting ledgers, which are shared and maintained by a network of participants. A key feature of DLT is that encryption techniques are used to store transaction records and validate transactions. Distributed ledgers are also characterised by decentralisation, which means that there is no central authority which validates the transactions. Distributed ledgers can be permission-based, which means that authorisation is needed to use or modify the ledger, or "permission-less".

In its discussion paper, ESMA sets out possible benefits of DLT in securities markets, such as accelerating the clearing and settlement of financial transactions, facilitating the recording of ownership and efficient collateral management. Key challenges, according to ESMA, include technological issues (such as scalability of the technology), governance and privacy issues (such as participant liability and publicity of information), as well as regulatory and legal issues. Key risks include market operation failure, money laundering and fair competition.

Given the primary focus of DLT applications to post-trading activities, ESMA sets out issues which could arise under the European Market Infrastructure Regulation (EMIR), the Settlement Finality Directive (SFD) and the Central Securities Depositories Regulation (CSDR). Under EMIR, certain OTC derivatives must be cleared through central counterparties and risk mitigation obligations apply to those that are not so cleared. Anyone willing to set up a DLT network to provide clearing services would need to comply with these requirements. Similarly if the DLT network is designed as a securities settlement system it will have to comply with one or both of the SFD or the CSDR.

As DLT is still in its early stages, ESMA seeks stakeholder input to develop a position on the application of DLT in securities markets in order to assess whether regulations are needed and if so, what the design parameters of those rules should be. We will closely follow the developments in this regulatory process and those of other European institutions, in particular the European Central Bank and the European Commission.

MIFID II AND MIFIR - LEVEL II REGULATIONS AND EXTENSION OF APPLICATION DATE

In the past months, the European Commission has adopted several measures, in accordance with the provisions of Directive 2014/65/EU on markets in financial instruments ("MiFID II") and the Regulation (EU) No 600/2014 on markets in financial instruments ("MiFIR"):

- On April 7th 2016 the Commission adopted a delegated directive supplementing MiFID II with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits;
- On April 25th 2016 the Commission adopted a delegated regulation supplementing MiFID II with regard to organisational requirements and operating conditions for investment firms and defined terms for the purposes of MiFID II; and

- On May 18th 2016 the Commission adopted a delegated regulation supplementing MiFIR with regard to definitions, transparency, portfolio compression and supervisory measures on product intervention and positions.

The Commission also endorsed, provided that certain changes are made, draft regulatory technical standards ("RTS") on the non-equity transparency (RTS 2), the ancillary test (RTS 20) and position limits (RTS 21) as proposed by the European Securities Markets Authority ("ESMA"). Further to these endorsements, the Commission adopted a series of RTS and implementing technical standards ("ITS") under the MiFID II/MiFIR package, among the most notable of which are: the trading obligation for clearable derivatives (RTS 4), the ratio of unexecuted orders to transactions (RTS 9), the requirements to ensure fair and non-discriminatory co-location services and fee structures (RTS 10), the determination of a material market in terms of liquidity in relation to notifications of a temporary halt in trading (RTS 12), the admission of financial instruments to trading on regulated markets (RTS 17) and the content and format of the description of the functioning of multilateral trading facilities and organised trading facilities (ITS 19).

Meanwhile, the Council of the European Union has formally adopted legislation to delay the application of MiFID II and MiFIR by one year, due to the technical implementation challenges of the rules. Directive (EU) 2016/1034 and Regulation (EU) 2016/1033 were published in the Official Journal on June 30th 2016 confirming that MiFID II now only needs to be transposed into national law by July 3rd 2017, and both MiFID II and MiFIR will become fully applicable as from January 3rd 2018.

MARKET ABUSE

APPLICATION OF THE MARKET ABUSE REGULATION

The provisions of Regulation (EU) 596/2014 on market abuse ("MAR") (with the exception of the provisions relating to Article 39(2)) apply in Luxembourg since July 3rd 2016, replacing the legal framework established pursuant to the Luxembourg law of May 9th 2006 on market abuse, as amended, which transposed Directive 2003/6/EC (the "Former Market Abuse Framework").

MAR is a framework "Level 1 Regulation" which has been supplemented by a number of EU Commission delegated regulations, an EU Commission implementing directive, as well as ESMA questions and answers (together, the "New Market Abuse Framework").

The New Market Abuse Framework extends the scope to new markets and trading strategies and introduces new requirements. We outline a few of the major changes below.

The New Market Abuse Framework not only applies to regulated markets but also to multilateral trading facilities (such as Luxembourg's Euro MTF) and, as from the entering into effect of Directive 2014/65(EU) (MiFID II), to organised trading facilities.

The definition of financial instruments in MAR cross-refers to the broad definition under MiFID II. MAR also applies to OTC (over-the-counter) financial instruments, the price or value of which depends on or has an effect on a traded instrument, and to emission allowances.

MAR gives more clarity to the definition of inside information; it echoes the position of the European Court of Justice in Markus Geltl v

Daimler AG, that intermediate steps may be precise enough to qualify as inside information.

Furthermore, the Regulation introduces a new definition of "attempting to engage in market manipulation" and provides a non-exhaustive list of specific acts which constitute market manipulation.

The CSSF has helpfully issued Press Release 16/31 to clarify certain points regarding the application of MAR.

LUXEMBOURG STOCK EXCHANGE AND CHANGES REGARDING MARKET ABUSE

The Luxembourg Stock Exchange has deleted articles 1001(i) and 1004(i) of its Rules and Regulations (the "R&Rs") in the context of the entry into force of Regulation (EU) 596/2014 on market abuse (the "Market Abuse Regulation").

The deleted articles relate to the obligation on issuers whose shares or debt securities are admitted to trading on the Euro MTF, to promptly publish information on any major new developments within its sphere of activities which are not of public knowledge and which may, by their impact on its assets or financial position or on the general course of its business, lead to substantial movements in the price of its shares or units. Given that the Market Abuse Regulation applies to issuers of shares/securities on the Euro MTF (and not only the Regulated Market), the disclosure requirement under articles 1001(i) and 1004(i) of the R&Rs is now sufficiently covered by the disclosure requirement regarding inside information under the Market Abuse Regulation.

ESMA PUBLISHES Q&A ON THE MARKET ABUSE REGULATION

On May 30th 2016 the European Securities and Markets Authority ("ESMA") published questions and answers (the "Q&A", ESMA/2016/738) on Regulation (EU) 596/2014 on market abuse ("MAR") in order to promote the consistent application of MAR and its implementing measures.

The first, and currently, the only question, deals with the prevention and detection of market abuse and specifically, who does the obligation to detect and, notify suspicious orders and transactions under Article 16(2) MAR apply to. Article 16(2) puts this obligation on "persons professionally arranging or executing transactions", which ESMA has interpreted broadly, deeming that it covers buy side firms, such as investment management firms (AIFs and UCITS managers), as well as firms professionally engaged in trading on own account (proprietary traders).

The Q&A, which are specifically aimed at competent authorities, will be updated as and when new issues arise.

RECENT MARKET ABUSE DELEGATED REGULATIONS

On June 17th 2016, three EU Commission delegated regulations and one EU Commission implementing regulation supplementing Regulation (EU) 596/2014 on market abuse ("MAR") were published in the Official Journal.

Commission Delegated Regulation (EU) 2016/957 sets out regulatory technical standards for the appropriate arrangements, systems and procedures as well as notification templates to be used for preventing, detecting and reporting

abusive practices or suspicious orders or transactions.

Commission Delegated Regulation (EU) 2016/958 sets out regulatory technical standards for the technical arrangements for the objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest.

Commission Delegated Regulation (EU) 2016/960 sets out regulatory technical standards for the appropriate arrangements, systems and procedures for disclosing market participants conducting market soundings.

Commission Implementing Regulation (EU) 2016/959 lays down implementing technical standards for market soundings with regard to the systems and notification templates to be used by disclosing market participants and the format of the records in accordance with MAR.

As with MAR, the above delegated regulations and implementing regulation are applicable since July 3rd 2016.

We refer you to our April 2016 Newsletter for a summary of other EU Commission implementing/delegated regulations which supplement MAR.

COMMERCIAL LAW

PROTECTION OF TRADE SECRETS - DIRECTIVE 2016/943

Directive (EU) 2016/943 of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (hereinafter the "Directive") was formally adopted by the Council on May 27th 2016.

On June 15th 2016, the Directive was published in the Official Journal and entered into force on July 5th 2016. Member states have to transpose the Directive into their national law by June 9th 2018.

In the European Union, some Member States do not have legislation addressing the misappropriation of trade secrets, such as, Luxembourg, Belgium and France, whereas others only have a widely and an ineffective protection for trade secrets. The Directive therefore aims at creating a uniformity of protection for trade secrets within the EU.

1. The Directive introduces a new definition of "trade secret", covering know-how, business information and technological information that:

    (i) "*is secret in the sense that it is not (...) generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question*",

    (ii) "*has commercial value because it is secret*" and

    (iii) "*has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret*" (Article 2 (1) of the Directive).

2. The Directive requires that Member States shall provide the measures, procedures and remedies necessary to ensure the availability of civil redress against the unlawful acquisition, use and disclosure of trade secrets (Article 6 (1) of the Directive). This means that the Member States shall provide the legitimate holder an *ius prohibendi* enforceable before the civil jurisdiction.

3. Besides the possibility for the trade holder to obtain compensation as a result of the misappropriation of his/her trade secret, the Directive foresees more measures in the case of unlawfully acquired, used or disclosed trade secrets:

   (i) the prohibition of the importation, exportation or storage of infringing goods and
   (ii) the seizure and prohibition on sale or marketing of infringing goods.

   Also, the trade holder, e.g. any natural or legal person lawfully controlling a trade secret, may obtain compensation as a result of the misappropriation.

4. The Member States shall lay down rules on the limitation periods applicable to substantive claims and actions for the application of the measures, procedures and remedies necessary to ensure the availability of the redress against the unlawful acquisition, use and disclosure of trade secrets, without exceeding a limitation period of six years (Article 8 of the Directive).

5. Finally, the Directive obliges Member States to ensure that no person participating in legal proceedings relating to the unlawful acquisition, use or disclosure of a trade secret (e.g. parties, lawyers, court officials, witnesses, experts) is permitted to use or disclose any trade secret or alleged trade secret that has been identified as confidential by the competent judicial authorities.

Hence, the Member States shall ensure that the competent judicial authorities may take specific measures necessary to preserve the confidentiality of any trade secret or alleged trade secret, such as restricting the access to any document containing trade secrets or alleged trade secrets, as well as restricting the access to hearings, when trade secrets or alleged trade secrets may be disclosed (Article 9 of the Directive).

CORPORATE

THE REFORM OF THE LUXEMBOURG COMPANY LAW

Company law matters are currently regulated by the Luxembourg company law of August 10th 1915 on commercial companies, as amended from time to time ("the Law 1915") as well as certain provisions of the Luxembourg civil code relating to certain Luxembourg legal entities.

On July 13th 2016, the Luxembourg Chamber of Deputies has finally adopted the expected bill of law 5730 aimed at modernizing the Law 1915 and amending some provisions of the Luxembourg civil code as well as of the law of December 19th 2002 on the register of commerce and companies and accountancy and annual accounts of companies.

Further to this vote, the amended Law 1915 will become effective three days after the publication of the law in the Mémorial A (official gazette) in Luxembourg. Considering the size of the law and the number of amendments, we have no clear view on when this shall take place but we expect this to occur in the course of July or most probably in August.

We refer you to our dedicated Newsflash for more detailed information on the amended Law 1915.

THE SIMPLIFIED SÀRL, AN INSTRUMENT FOR STARTUPPERS

In 2003, the European Commission issued a green paper on European Entrepreneurship and acknowledged the need for Europe to foster entrepreneurial drive more effectively. The capacity to adapt to economic changes is crucial for competitiveness. Hence, entrepreneurship is relevant for firms in all sectors, technological or traditional. New entrepreneurial initiatives boost productivity, increase competitive pressure, forcing other firms to react by improving efficiency or introducing innovation.

It is in 2007 that the Luxembourg Chamber of Commerce launched the idea of the simplified Sàrl, which was not followed with immediate effect. Taking into consideration the solutions implemented by the neighbouring countries, Belgium ("*Société privée à responsabilité limitée Starter" or "SPRL Starter"*), France ("*Entreprise Individuelle à Responsabilité Limitée" or "EIRL")* and Germany ("*Mini-GmbH"* or *"Unternehmergesellschaft mit beschränkter Haftung"* or *"UGG"*), Luxembourg wanted to react quickly and efficiently in order to foster entrepreneurship in Luxembourg.

On February 2nd 2015, the bill of law 6777 (the Bill 6777) having the purpose of creating a simplified private limited liability company ("*Société à responsabilité limitée simplifiée" or "*SàrlS") amending the law of August 10th 1915, on commercial companies, as amended (the Law 1915) was filed.

On July 13th 2016, the Luxembourg Chamber of Deputies adopted the Bill 6777, consequently introducing the SàrlS as a variant of the currently existing private limited liability company ("*Société à responsabilité limitée"* or "Sàrl") in Luxembourg.

We refer you to our dedicated Legal Alert for more detailed information on the Bill 6777.

INVESTMENT MANAGEMENT

BREXIT: UCITS AND AIFM DIRECTIVES

On June 23rd 2016, the people of the United Kingdom ("UK") expressed their will to have the UK leave ("Brexit") the European Union ("EU") pursuant to the result of the United Kingdom European Union membership referendum ("Referendum").

Brexit will have an impact on those entities in the UK relying on Directive 2009/65/EC ("UCITS Directive") relating to undertakings for collective investment in transferable securities ("UCITS") and on Directive 2011/61/EU on Alternative Investment Fund Managers ("AIFMD").

CURRENT STATE OF LEGISLATION AS OF 2016

For the time being and considering the advisory nature of the Referendum, the UK is still a member of the EU and the British Financial Conduct Authority ("FCA") clarified in its statement of June 27th 2016 that financial actors in the UK "*must continue to abide by their obligations under UK law, including those derived from EU law and continue with implementation plans for legislation that is still to come into effect*".

In addition, the FCA further clarified that: "*Consumers' rights and protections, including any derived from EU legislation, are unaffected by the result of the referendum and will remain unchanged unless and until the Government changes the applicable legislation*".

From a Luxembourg point of view, this means that UCITS management companies ("UCITS ManCo") and alternative investment fund managers ("AIFM") based in the UK may still manage Luxembourg funds on a cross-border basis (the opposite being also true) and UK UCITS and UK alternative investment funds ("AIFs") may still be marketed on a cross-border basis in the markets of the remaining EU Member States.

Things will change with the triggering of article 50 of the Treaty on European Union ("TEU") which will start a transitional period (the "Transitional Period") where the UK is still a member of the EU but will negotiate its new relationship with the EU. The Transitional Period will end at the earlier of (i) the expiry of a two years' term starting from the triggering of article 50 of the TEU or (ii) the entry into a withdrawal agreement by the UK and the EU.

FUTURE IMPACT OF BREXIT

At the expiry of the Transitional Period, there are a number of different scenarios which might occur. We examine the three most likely below and their impact on the applicability of the UCITS Directive and the AIFMD.

- **Norway Option**

In this scenario, the UK would leave the EU but join the European Economic Area ("EEA") in order to keep its access to the European single market. From a legal point of view, this would mean that UK managers could still rely on the UCITS Directive and the AIFMD and the situation would be legally equivalent to being an EU member (except that the UK would not be involved in the shaping of any future amendments to EU law).

In theory, UCITS, UCITS ManCos and AIFMs based in the UK would still be able to operate as if no Brexit had occurred and the relationship of the UK financial actors with Luxembourg entities would remain the same.

However, the Alternative Investment Management Association stresses that the cooperation between financial supervisory

authorities may not be ensured to the same extent as between EU members (e.g. certain powers conferred to European supervisory authorities cannot be exercised in the EEA countries) which could mean that in the worst case, access to the single market could be threatened.

- **Switzerland Option**

Switzerland is not a party to the EEA treaty but ensures, to a certain extent, access to the European single market by entering into bilateral agreements with the EU on a sector by sector basis.

The bilateral approach would give the UK the flexibility to choose the EU initiatives in which it wishes to participate, including financial services (Switzerland does not have a bilateral treaty with the EU in relation to financial services). As with membership of the EEA, the UK would have little influence in the design of such EU rules.

There is no guarantee that the UK would be able to secure a bilateral treaty with the EU.

- **Third Country Option**

Should the UK not join the EEA or enter into some sort of bilateral treaty, then the UK would be treated as a third country. This would have the following impact:

(i) **UCITS:** UK UCITS, like their Swiss counterparts, would not be able to be distributed to investors located in the EU (including Luxembourg) under the UCITS marketing passport. This would require UK promoters to establish their UCITS or UCITS ManCos in an EU Member State, as there is no UCITS passport for third countries.

(ii) **AIFMD:** unlike the UCITS Directive, the AIFMD provides for a passport for third countries. This would require the UK internal laws and regulations to keep their alignment with the AIFMD. In addition, a cooperation agreement between the FCA and the EU financial supervisory authorities will need to be put in place. As of now, the third country passport regime has not been granted to any foreign jurisdiction as regulatory discussions on EU level are still ongoing.

UCITS V - LAW OF MAY 10TH 2016

The law of May 10th 2016 transposing Directive 2014/91/EU of the European Parliament and of the Council of July 23rd 2014 into national law was published in the Luxembourg official gazette on May 12th 2016 (the "Law").

The Law amends the law of December 17th 2010 on undertakings for collective as well as the law of July 12th 2013 on alternative investment fund managers and is described in more detail in our dedicated article "*Transposition of the UCITS V Directive into Luxembourg Law - Law of May 10th 2016*". The Law entered into force on June 1st 2016.

EUSEF AND EUVECA - ESMA Q&A

The European Securities and Markets Authority ("ESMA") published on May 31st 2016 an update of its questions and answers document ESMA/2016/774 ("EuVECA-EuSEF Q&A") on the Implementation of the Regulations No 345/2013 and No 346/2013 covering respectively European Venture Capital Funds ("EuVECA") and European Social Entrepreneurship Funds ("EuSEF").

The update of the EuVECA-EuSEF Q&A discusses whether EuVECA and EuSEF funds are allowed to use their designations "EuVECA" and "EuSEF" in the case where such funds are only marketed in

the country of their establishment. ESMA confirmed that the designations "EuVECA" and "EuSEF" are granted to funds on the basis of their compliance with the qualitative requirements of the respective Regulations and that accordingly the place of marketing shall not be taken into account. As a result, such designations may be used even if there are no cross-border marketing activities.

The EuVECA-EuSEF Q&A is at the moment quite limited as it only contains four questions (the above update covering the fourth one) but it is expected that this document will be continually edited and updated as and when new questions are received. Additional questions to ESMA may be sent to the following email address: euvecaeusef@esma.europa.eu.

FCP - CHANGES TO REGISTRATION AT RCS

On March 24th 2016 the Luxembourg trade and companies registry ("RCS") published Circular RCSL 16/01 listing the main legal and regulatory changes applicable to the procedures at the RCS ("Circular") arising pursuant to the anticipated publication of the law of May 27th 2016 on the publication of legal notices in Luxembourg (the "Law"). The Law entered into force on June 1st 2016.

Among the changes, the Circular and the Law clarify the new obligations in terms of registration for funds structured as *fonds commun de placement* ("FCPs").

With effect as of June 1st 2016, FCPs established in Luxembourg, whether managed by a Luxembourg management company or another Member State management company will be obliged to register with the RCS.

The information to be provided is the following:

- the name of the FCP and its date of creation;
- the name of the management company;
- the registered office of the management company;
- the trade and companies registration number of the management company, if available, and the name of such register.

For existing FCPs, which have previously filed their management regulations under the name of their management company, the RCS will not automatically transfer their files and keep their history. Management companies of such FCPs shall therefore request the registration of the existing FCPs they manage before December 1st 2016. For the purposes of such registration the last coordinated version of the management regulations shall also be deposited together with the form requesting the registration of the FCP.

A new division "K" has been created for the purposes of dealing with the new filing requirements for FCPs. The management regulations shall be deposited under the file of the FCP maintained at the RCS and no longer under the file of the management company who manages the FCP.

The Circular further provides for new publication obligations for FCPs. FCPs are now required to publish in its entirety the decision leading to their liquidation, the date of their liquidation as well as the name of the liquidator appointed. When the liquidation derives from a decision taken by the CSSF, the decision of the CSSF to put the fund into liquidation shall also be published.

LISTING OF FUNDS - LUXSE FAQ

On June 1st 2016, the Luxembourg Stock Exchange ("LuxSE") published the first version of its Frequently Asked Questions ("FAQ") concerning the Rules and Regulations (the "Rules") applicable

to the Euro MTF market (the “Euro MTF”). The FAQ aims at highlighting some of the practical questions and interpretations arising when applying the Rules to the listing of various securities on the Euro MTF.

As a reminder, the Euro MTF is the alternative market operated by the LuxSE in parallel to the Regulated Market (as defined in Directive 2014/65/EU on markets in financial instruments, “MiFID II”) which is the “BdL” market. Although not qualifying as a Regulated Market, the Euro MTF offers multiple benefits to issuers such as less stringent disclosure requirements (the so-called “Transparency Directive” is not applicable), the acceptance of local GAAP and a faster listing process.

The major topics covered by the FAQ and impacting the listing of investment funds can be summarised as follows.

GENERAL PRACTICAL QUESTIONS

The FAQ clarifies that:

- documents required for the listing of any securities are the application form, the undertaking letter (in case of first listing) and the draft prospectus. In addition, articles of incorporation and audited financial statements may also be required on a case by case basis;
- no listing agent nor Transfer/Registration agent are required;
- debt issues split into several ISINs are admitted to trading on separate quotation lines;
- no requirement to have a paying agent in Luxembourg but financial services must be provided to the holders of securities;
- time frame for receiving first comments from the LuxSE upon submission of an application file is three business days;
- maintenance fees for bond issues are calculated on the basis of the maximum amount of the issue.

UNDERTAKINGS FOR COLLECTIVE INVESTMENT (“UCI”)

In respect to the listing of investment funds, the FAQ clarifies as follows:

- the LuxSE is the responsible entity in respect of the review of the prospectuses (for the purpose of listing on the Euro MTF) of (i) foreign and Luxembourg domiciled, closed-ended UCIs and of (ii) foreign, open-ended UCIs, not being distributed in Luxembourg. The prospectuses of open-ended UCIs accepted by the CSSF for distribution in Luxembourg are not subject to review by the LuxSE and are not subject to additional requirements;
- investment funds (e.g. SIFs or SICARs), which can only be marketed to certain types of investors like well-informed investors, must have a compulsory redemption mechanism;
- closed-ended SIFs and SICARs are subject to Appendix III, Schedule A of the Rules;
- on the listing date, the prospectus shall contain a detailed description of the actual portfolio of investments (this is applicable to existing UCIs);
- commitments to subscribe for shares/units remain binding on the relevant subscribers and such commitments cannot be transferred on the secondary market.

The FAQ also covers questions raised on the listing of debt securities, shares and depositary receipts in general. Any additional questions may be sent directly to the LuxSE at bolide@bourse.lu.

AIFMD - UPDATED ESMA Q&A

On June 3rd 2016, the European Securities and Markets Authority ("ESMA") published an updated version of its questions and answers ("Updated Q&A") on the application of the Alternative Investment Fund Managers Directive ("AIFMD"). The update of the Q&A contains clarifications on notifications of alternative investment funds ("AIF"), on calculation of the total value of assets under management ("AuM") and on additional own funds.

NOTIFICATION OF AIFS

The Updated Q&A clarifies that for the purpose of marketing units or shares of EU AIFs in the home Member State of the AIFM, and in relation to art. 31 of the AIFMD, it does not make any difference whether the EU AIF is domiciled in the home Member State of the AIFM or in another Member State.

It has also been confirmed that pursuant to art. 31 of the AIFMD an authorised AIFM is allowed to market an EU feeder in its home Member State only if the master fund is an EU master AIF which is managed by an authorised EU AIFM. It was pointed out that marketing of an EU feeder AIF with a non-EU master AIF is subject to art. 36(1) of the AIFMD (marketing without a passport of non-EU AIFs managed by EU AIFMs) provided that it complies with all the requirements set forth in that article.

CALCULATION OF THE TOTAL VALUE OF AUM

The Updated Q&A answers the question whether "committed capital" should be taken into account when calculating the AuM pursuant to art 3(2) of the AIFMD and art. 2 of Commission Regulation No 31/2013 ("Level 2 Regulation"). ESMA points out that, as a general rule committed, capital does not contribute to the actual assets of the AIF for which it was pledged as long as it has not been drawn down by the AIFM. However, the Level 2 Regulation refers to national rules on valuation of the AIF and to valuation rules set out in its articles of incorporation. Committed capital should therefore be taken into account in the calculation of total AuM if national rules foresee it.

ADDITIONAL OWN FUNDS

It has also been clarified that when calculating the additional own funds pursuant to art. 9(3) of the AIFMD and art. 14(2) of the Level 2 Regulation, the committed capital should not be taken into account, since it does not contribute to the actual assets of the AIF for which it was pledged, as long as it has not been drawn down by the AIFM.

AIFMD - CSSF Q&A ON LOAN ORIGINATION

On June 9th 2016, the *Commission de Surveillance du Secteur Financier* (CSSF) issued an updated version- version 10- of its 'Questions & Answers' document on the Alternative Investment Fund Managers Directive (AIFMD).

The updated version provides additional guidance to be taken into consideration by Luxembourg law based and duly authorised alternative investment fund managers of alternative investment funds engaging in loan origination, loan participation and/or loan acquisition activities in and from Luxembourg.

The new guidance provides an official and anticipated confirmation that Luxembourg based AIFs may engage in loan origination, loan acquisition or loan participation activities. The CSSF confirms that the loan origination activity is permitted for AIFs in Luxembourg since neither the law transposing the AIFMD ("AIFM Law") nor the different laws applying to alternative investment funds, if applicable, prohibit such activity. Funds engaging in loan origination activities must comply with the AIFM Law and

where applicable, with their respective product laws.

Although this guidance does not apply to non-Luxembourg AIFMs or Luxembourg based AIFs not subject to Luxembourg fund product regulation, it provides comfort to those ready to embrace loan originating RAIF's and loan origination Luxembourg partnerships.

The CSSF emphasises the importance for AIFMs to recognise and address all aspects and risks of loan origination activity. It sets out the following principles to be adhered to:

1. they should ensure to address all aspects and risks of the activity;
2. they should particularly avail of proper organisational and governance- structures;
3. they should hire sufficient staff with the required expertise on the matter and have adequate technical resources in place;
4. they should have certain policies in place regarding assets and investors and ensure proper disclosure and transparency.

It is the responsibility of the AIFM to ensure the implementation of a robust and appropriate approach to the above.

Due to the recent publication of the ESMA opinion on loan origination, the European Commission has been urged to consider establishing an EU approach to the matter. If this happens, the laws on this matter may develop and evolve even further.

ELTIF - FINAL REPORT ON RTS

On June 8th 2016, the European Securities and Markets Authority ("ESMA") published its final report containing the Regulatory Technical Standards ("RTS") under the European Long-Term Investment Fund Regulation ("ELTIF Regulation").

The final draft differs from the draft proposal (see our newsletter of September 2015) in a number of respects.

In considering the criteria to establish the circumstances in which the use of financial derivative instruments solely serves hedging purposes ESMA decided to drop the reference to IFRS.

A financial derivative instrument shall be considered as serving the purpose of hedging if all of the following criteria are met:

- a financial derivative instrument shall only be used for hedging risks arising from exposures to assets referred to in the ELTIF Regulation. The purpose of using such instruments shall be a verifiable and objectively measurable reduction of risks at the ELTIF level;
- the use of the financial derivative instruments aimed to provide a return for the ELTIF shall not be deemed to serve the purpose of hedging the risks; and
- the manager of the ELTIF shall take all reasonable steps to ensure that the financial derivative instruments used lead to a verifiable reduction of risks at the ELTIF level and are efficient in stressed market conditions.

With regard to the circumstances in which the life of an ELTIF is considered sufficient in length, the final RTS provide that the ELTIF should align the date for the end of its life to the date of the end of the investment horizon of the individual asset within the ELTIF portfolio which has the longest investment horizon (rather than referring to the life-cycle of such asset).

ESMA deleted the reference to IFRS in valuing assets to be divested as being more appropriate for liquid markets and assets but not for the illiquid assets in which ELTIFs will typically invest.

It was decided to postpone the delivery of the RTS on cost disclosure to be able to take into account more fully the work on cost disclosure under the PRIIPs Regulation. Article 5 and the corresponding annex was therefore removed from the draft RTS.

Finally, with regard to the provisions on the facilities to be made available to retail investors (for subscriptions, redemptions etc), ESMA agreed with the proposal to allow the facilities to be provided through physical, telephone or electronic means and also clarified that the facilities may be provided by one or more entities which are either the manager of the ELTIF or a third regulated entity.

The Commission has three months from the date of submission of the draft RTS to decide whether it wishes to endorse ESMA's proposal.

MONEY MARKET FUNDS - UPDATE

On June 17th 2016 the European Council agreed the text of the draft regulation on Money Market Funds (the "MMF Regulation").

As previously mentioned in our newsletter of March 2015, on March 4th 2015, ECON issued its report on the draft MMF Regulation. The text of the proposal has been negotiated since then. Following the Council's approval the next step is for the European Parliament to vote the text.

Taking into account that money market funds ("MMFs") are an important source of short term funding for banks, corporates and governments, the draft MMF Regulation intends to make those MMFs safer as well as secure their viability and stability in the future.

The draft MMF Regulation regulates the composition of the MMFs' portfolios and the valuation of their assets, to ensure the stability of their structure and to guarantee that they invest in well-diversified assets of good credit quality.

There are currently two types of MMFs:

(i) variable net asset value MMFs ("VNAV MMF"); and
(ii) constant net asset value MMFs ("CNAV MMF") that offer share purchases and redemptions for a fixed price.

As previously explained in our newsletter of April 2016, the MMF Regulation will create a third category of MMF: the low volatility net asset value MMFs ("LVNAV MMFs"). The LVNAV MMFs may display a constant net asset value under certain conditions. It is intended that the LVNAV MMFs replace the majority of the existing CNAV MMFs, within 24 months of entry into force of the MMF Regulation.

The draft MMF Regulation prohibits external support for all MMFs to avoid the risk of contagion. The draft MMF Regulation provides certain rules to ensure that the fund manager has a good understanding of his/her investors, and provides investors and supervisors with adequate and transparent information.

The draft MMF Regulation also obliges MMFs to diversify their portfolio assets and provides for redemption gates and liquidity and concentration requirements to ensure that they can face sudden redemption requests when market conditions are stressed. With the aim of discouraging investor runs, liquidity fees will be introduced. MMFs will have to invest in higher quality assets and assess internally the credit quality of money market instruments.

LABOUR LAW

LABOUR CODE AMENDMENTS - DRAFT LAW N°6989

Since in some of the newer EU Member States wage levels and social protection are considerably lower than in other Member States, a review of directive 94/71 EC of December 16th 1996 concerning the posting of workers in the framework of the provision of services was necessary. Thus, a new directive, directive 2014/67/EU of the European Parliament and of the Council of May 15th 2015, on the enforcement of the directive (hereinafter the "Directive") has been adopted.

Draft law n°6989, aiming at transposing the Directive into national law (hereinafter the "Draft law") and amending the Labour Code and the law of June 17th 1994 determining the measures to maintain employment, price stability and business competitiveness, will result in ensuring decent working conditions for posted workers, an effective social protection system, and with the purpose of fighting against social dumping.

The key points of the Draft law are the following:

RESPONSIBILITY OF THE UNDERTAKINGS IN THE CASE OF SUBCONTRACTING

The Draft law sets up a joint and several liability mechanism for every undertaking involved in the process of posting (i.e. temporarily posting workers to carry out work in order to provide services in another Member State), no matter whether they are the undertaking making the posting or the user undertaking, in the case where the posted employee will not receive his/her due remuneration from the undertaking making the posting. The user undertaking must inform the Labour and Mines Inspectorate (*Inspection du travail et des mines*, hereinafter "ITM") immediately after having found out that the posted employee is not paid by the undertaking making the posting.

Moreover, the user undertaking must send the undertaking making the posting an injunction to stop the non-payment. If the user undertaking fails to do so, it will be held liable together with the undertaking making the posting, and may be punished with an administrative fine.

UPDATE OF THE LIST OF DOCUMENTS TO BE PRODUCED BY THE POSTING UNDERTAKING

The Draft law aims to expand the list of documents to be produced by the posting undertakings to enable an effective control allowing the posted workers to be paid in relation to the actual worked hours.

STRENGTHENING OF THE ADMINISTRATIVE COOPERATION

At national level, the administrative cooperation for the implementation of the provisions concerning the posting of workers will be strengthened by combining the Directorate of Immigration (*Direction de l'immigration*), the Department of Public Works (*Département des travaux publics*), the Road Administration (*Administration des ponts et chaussées*) and the Public Works Administration (*Administration des bâtiments publics*) with the missions assigned primarily to the ITM.

INTRODUCTION OF EFFECTIVE REDRESS MECHANISMS ALLOWING posted WORKERS TO COMPLAIN OR TO ENGAGE IN JUDICIAL PROCEEDINGS

Effective legal actions are introduced by the Draft law to enable the posted workers to complain or to sue directly in the case of non-compliance with the provisions about the posting of workers.

For example in the case where the concerned posted worker has already left the territory of the

Grand-Duchy of Luxembourg, he/she may consent that a trade union asserts his/her rights before the court.

INTRODUCTION OF ADMINISTRATIVE SANCTIONS AND CROSS-BORDER ENFORCEMENT OF THE SANCTIONS

The Draft law provides an effective and proportionate system of sanctions in the case of infringements of the provisions about the posting of workers, with fines going from EUR 2,500 to a maximum of EUR 50,000, and introduces a new chapter to the Labour Code governing the cross-border recognition and enforcement of such sanctions.

TAX

ANTI-TAX AVOIDANCE DIRECTIVE

On June 17th 2016, the Economic and Financial Affairs Council of the European Union (*ECOFIN*) reached a political agreement on the proposal for a Council Directive laying down new rules against tax avoidance practices that directly affect the functioning of the internal market, i.e. the so-called "anti-tax avoidance directive" ("ATAD"). The initial proposal by the European Commission was made in January 2016 (the "Commission Proposal"). Please refer to our April 2016 Newsletter.

The Commission Proposal has been amended on several points in order to reach Member States' unanimous consent. The switch-over-clause has been deleted in the final compromise text. Moreover, with respect to the remaining five items in the ATAD, the following amendments to the Commission Proposal have been agreed upon by the Member States:

1) Interest limitation rules: exceeding borrowing costs will be deductible up to 30% of the company's EBITDA or, optionally, up to a EUR 3m threshold (this upper limit would apply to a group if the taxpayer is part of a consolidated group). Member States may further allow (i) standalone entities to fully deduct exceeding borrowing costs, (ii) carrying forward the non-deductible exceeding borrowing costs indefinitely and (iii) carry them back for a limited period of time.

2) Exit taxation rules: in the compromise text of June 17th 2016, the exit taxable rules are applicable to certain cross-border transfers of assets or residence within the EU or to a third country. For transfers within the EU or EEA countries, the rule includes a tax deferral mechanism that broadly reflects EU case-law in this field;

3) General anti-abuse rule (GAAR): this broad provision follows now the GAAR inserted in the EU Parent-Subsidiary Directive and tackles arrangements within the EU and vis-à-vis third countries that are considered as non-genuine due to the lack of valid commercial reasons that reflect economic reality;

4) Controlled foreign company (CFC) rules: as opposed to the Commission Proposal, CFC rules are applicable if the corporate income tax paid by the CFC is lower than 50% of tax that would have been charged in the home/controlling jurisdiction; A carve-out for companies with substantive economic activity is applicable but Member States may limit this carve-out to companies resident in the EEA.

5) Rules on hybrid mismatches: this provision tackles cross-border arrangements (within the EU only) that result in either (i) a double deduction or (ii) a deduction without inclusion between national tax systems.

The ATAD has been formally adopted at the ECOFIN Council meeting on July 12th 2016 and is to be transposed by the Member States by the end of 2018, taking effect as of 2019. As regards exit taxation and interest limitation rules, the implementation might be delayed in certain circumstances.

USA/LUXEMBOURG DTT: NEW RULES FOR THE TAXATION OF PERMANENT ESTABLISHMENTS

Luxembourg and the USA are currently negotiating a protocol to amend the existing double tax treaty ("Protocol"). The new provisions should put an end to situations where US source income realised by a Luxembourg company but allocated to a US permanent establishment is neither taxed in Luxembourg nor in the USA.

Within the frame of these negotiations, a draft law was submitted to the Luxembourg parliament, on June 22nd 2016 (the "Draft Law"). The Draft Law provides that where an enterprise of a Contracting State derives income from the other Contracting State and the first Contracting State treats that income as profit attributable to a permanent establishment located outside of that Contracting State, the benefits of the treaty will not be applicable to:

- The income allocated to the permanent establishment if such income is subject, in the State in which the permanent establishment is situated and in the State of residence of the enterprise ("Head-office State"), to a cumulated income tax which is inferior to the lowest of i) 15% or ii) 60% of the corporate income tax rate applicable in the Head-Office State, or;
- The income allocated to a permanent establishment located in a third country that does not have a comprehensive tax treaty with the country where the benefits of the treaty are being claimed, unless such income is included in the taxable basis of the head office.

The Draft Law provides for a retroactive application of the new provisions of the double tax treaty to the income paid or credited as of the third day (included) following the publication of the draft law once approved (the "Law") in the Luxembourg Official Gazette (Memorial) if (i) the provisions of the Protocol are exactly the same as those mentioned in the Law and (ii) the Protocol expressly provides for a retroactive application.

EU DIRECTIVE – CBC REPORTING

On May 25th 2016, the European Council adopted a directive amending the 2011/16/EU Directive regarding mandatory automatic exchange of

information in the field of taxation (hereafter the “Amending Directive”).

In line with the Organisation for Economic Development and Cooperation’s recommendation included in the action point 13 of the Base Erosion and Profit Shifting action plan, the European Council introduced Country-by-Country (hereafter **“**CbC**”**) reporting obligations, whose aim is to provide key figures (such as number of employees, revenue and taxes paid) for each of the countries in which a multinational enterprise is active.

CbC reporting obligations will however solely apply to multinational enterprise groups, who with respect to any fiscal year, have total consolidated group revenues of more than EUR 750,000,000 (hereafter the “MNE Group”).

The ultimate parent entity of such an MNE Group (or any other group entity appointed thereto as further detailed below) will have to file a CbC report in its country of tax residency. Such report will then be subject to the automatic exchange of information with the Member States in which the subsidiaries of the MNE are tax resident or subject to tax through a permanent establishment.

The CbC report will have to contain the following information about the subsidiaries that are part of the MNE Group:

- Identification of each entity of the MNE Group, together with the respective country of tax residency (and, if different, the laws under which they are incorporated) and the nature of the main business activities.
- Aggregate information relating to the revenue, profit/loss before income tax, income tax paid, income tax accrued, stated capital, accumulated earnings, number of employees and tangible assets other than cash or cash equivalents, for each jurisdiction in which the MNE operates.

The scope of the subsidiaries to be included in the CbC report is wider than the scope of subsidiaries generally included in the consolidated financial statements prepared in accordance with the GAAP (Generally Accepted Accounting Principles) of the jurisdiction of tax residence, as subsidiaries excluded solely on materiality or size grounds as well as permanent establishments have to be included in the CbC report.

For CbC reporting purposes, the figures can be taken from a wide array of sources available (internal management accounts, the respective statutory financial statements, consolidated reporting packages), provided that the same source is used consistently and it is not necessary to reconcile the revenue, profit and tax figures used in the CbC report with the figures of the consolidated financial statements.

According to the Amending Directive, the aim of the automatic exchange of the CbC report is to allow the Member States to assess high-level transfer-pricing risks and other risks related to base erosion and profit shifting as well as, where appropriate, use the information for economic and statistical analysis. While it is confirmed that no transfer-pricing adjustments should be made by the Member States on the sole basis of the information provided in the CbC report, said report can nonetheless be used as a basis for further enquiries into the arrangements of the MNE Group, that could result *in fine* in transfer-pricing adjustments.

An anti-abuse provision has also been included in the Amending Directive, requiring that all the other entities of the MNE Group become obliged to produce a CbC report, in case the ultimate parent entity is either (i) not required to file a CbC report in its country of tax residency, or (ii) it is obliged to do so, but the country in which it is tax

resident did not sign an automatic exchange of CbC report agreement, or (iii) the country of residency signed such an agreement but either suspends the automatic exchange or persistently fails to exchange the information. In case the above anti-abuse provision applies, the MNE Group is allowed to name a single entity that will take over the obligations of the ultimate parent entity and prepare the CbC report for the overall MNE Group, thus releasing the other MNE Group entities from their respective reporting obligations.

MNE Groups will have a 15 month deadline, starting from the end of the relevant fiscal year, to file the CbC report. Exceptionally for the first year, i.e. for the tax year 2016, the filing deadline is extended to 18 months.

CRS : CLARIFICATIONS BY THE LUXEMBOURG TAX AUTHORITIES

On April 28th 2016, the Luxembourg tax administration published Frequently Asked Questions ("FAQ") addressing certain queries in the matter of automatic exchange of information in the framework of the Common Reporting Standard ("CRS").

The FAQ mainly provide clarifications with respect to the definition of investment entities:

- Entities qualifying as investment entities under FATCA shall also be defined as such under the CRS even though the definition of the investment entity is not strictly identical under FATCA and the CRS.
- An entity is defined as an investment entity if its main activity is performed for commercial purposes and in the name of a client and consists in investment, administration or management of financial assets.
- An entity also qualifies as an investment entity when its financial assets are managed on a discretionary basis by a financial institution provided that its gross income derives mainly from investment, disinvestment or trading of financial assets. However, if such an entity is not a financial institution according to the definition of the Financial Action Task Force, the entity will qualify as a non-financial entity for the purpose of the CRS.

Entities which perform individual or collective portfolio management for or on behalf of customers qualify as investment entities under the CRS. The FAQ specify that investors in investment funds are considered as customers of an investment entity. Investment funds meet therefore the definition of the investment entities under the CRS.

It is also mentioned in the FAQ that Luxembourg applies the wider approach which means that the Luxembourg reporting financial institutions must apply the due diligence procedure to all the financial accounts open with them.

REDUCED TAX RATE APPLICABLE TO CAPITAL GAINS ON REAL ESTATE

By a law dated June 29th 2016, the Luxembourg parliament implemented the first of the announced new tax measures (for more information on several other announced measures, please refer to our April 2016 newsletter): capital gains realised during the period from July 1st 2016 until December 31st 2017 by an individual taxpayer upon disposal of immovable property will be taxed at a quarter (instead of half) of the taxpayer's global tax rate.

The new temporary reduced tax rate does not apply to speculative gains, *i.e.* capital gains

realised upon disposal within two years as from the acquisition of the immovable property.

The new tax incentive has been introduced in order to increase housing market dynamics and encourage the disposal of developed and undeveloped real estate.

It should be noted that the new measure does not apply to real estate held by individual taxpayers in their enterprise (business assets).

VALIDITY OF TAX RULINGS

In a decision dated May 23rd 2016, the Lower Administrative Court (*Tribunal Administratif* hereinafter the "Court") reversed the position taken by the Luxembourg tax administration that denied a ruling when assessing a tax payer. The Court confirmed that the tax administration is bound by the confirmation they gave in the tax ruling regarding the tax treatment applicable to a specific situation.

The Court outlined that although at the time the ruling was signed the procedure for obtaining an advance tax clearance letter was not defined by the law, the conditions and scope of tax rulings could be determined on the basis of the principles of legitimate expectations and legal certainty which are general principles of law.

In line with existing case law, the Court concluded that the tax authorities are bound by the decision they have given when certain conditions are met: the taxpayer gives a (i) clear and complete explanation of his case (ii) in writing so that (iii) the qualified tax inspector can give (iv) an individual confirmation of the tax treatment applicable to the taxpayer. The confirmation given by the tax authorities was made (v) without restrictions or reserves and has had (vi) a decisive influence on the decision of the taxpayer. The Court concluded that in the case at hand the required conditions were met and therefore the tax administration has to apply the ruling.

CASE LAW: DETERMINATION OF TAX RESIDENCE OF AN INDIVIDUAL

In 2012, a Luxembourg individual taxpayer informed the tax authorities that he would be seconded to Hong-Kong for a period of 7 months. The individual did not file an income tax return in 2012 assuming that, in application of the Luxembourg-Hong Kong double tax treaty, he was not considered as a Luxembourg tax resident but as a resident of Hong Kong. The Luxembourg tax authorities considered instead that the individual was a Luxembourg tax resident in 2012 and proceeded to the discretionary tax assessment of his 2012 income.

The Lower Administrative Court (the "Court") considered that pursuant to the §13 *Steueranpassungsgesetz* the fiscal domicile of the individual was in Luxembourg because the taxpayer was the owner of a house in Luxembourg he occupied before leaving for Hong Kong and after coming back: such house being only temporarily unoccupied when he was in Hong Kong. The Court concluded that in application of the Luxembourg income tax law, the individual was a Luxembourg tax resident in 2012 and therefore subject to Luxembourg income tax on his worldwide income. The Court noted that the Hong Kong tax authorities also considered the individual as a Hong Kong taxpayer in 2012 because he spent more than 180 days of the fiscal year in Hong Kong. The individual was therefore considered as a tax resident in both Hong Kong and Luxembourg.

The Court concluded that, in application of article 4§2 of the Luxembourg-Hong Kong double tax treaty, the fiscal domicile of the individual had to

be determined by reference to the criteria of “centre of his vital interests”.

Considering that the individual (i) was the exclusive owner of a house in Luxembourg and that his accommodation in Hong Kong was only temporary, (ii) came back to Luxembourg before the end of the fiscal year, (iii) had his permanent home in Luxembourg since 2003, the Court concluded that he maintained the centre of his vital interests in Luxembourg and could thus be considered as a Luxembourg tax resident.

AML
BANKING & FINANCE
CAPITAL MARKETS
CORPORATE
DISPUTE RESOLUTION
EMPLOYMENT, COMPENSATION & BENEFITS
IP, IT & GENERAL COMMERCIAL
INVESTMENT FUNDS
PRIVATE WEALTH & BUSINESS PLANNING
REAL ESTATE, CONSTRUCTION
TAX

THANKS TO THOSE WHO CONTRIBUTED TO THIS NEWSLETTER:
ANN ANDRE-OLMES, CHRISTINE BEERNAERTS, LUC COURTOIS, PIERRE-ALEXANDRE DEGEHET, NUALA DOYLE, ELODIE GIRAULT, ALEKSANDRA GUCWA, PEIK HEIRMAN, NATALIA HERNANDEZ, HELEN LIU, ORIANA MAGNANO, EVELYN MAHER, POL MELLINA, ANNE MOREL, MAGDALENA PIETRAS, THIERRY POULIQUEN, ROLAND PLIGER, DANIEL RIEDEL, VIKTORIA SOURLAGKA, MELVIN TJON AKON.

BSP BONN STEICHEN & PARTNERS

Avocats
2, rue Peternelchen I Immeuble C2 I L-2370 Howald I Luxembourg
T. +352 26025-1 I F. +352 26025-999
mail@bsp.lu I www.bsp.lu
www.twitter.com/BSP_Luxembourg I www.linkedin.com/company/bonn-steichen-&-partners