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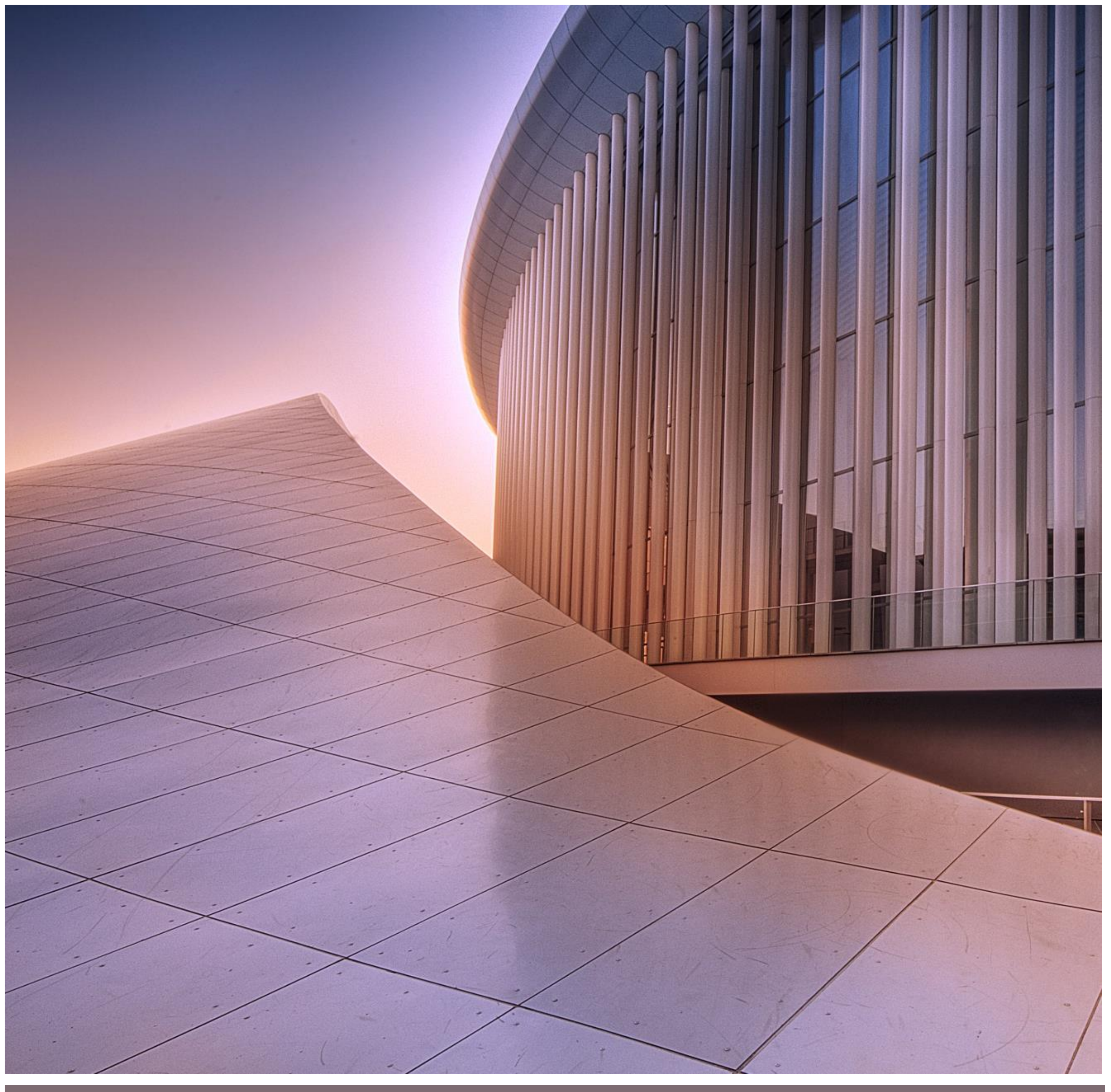

BONN STEICHEN & PARTNERS

NEWSLETTER

DATED

FEBRUARY 2018

BSP BONN STEICHEN & PARTNERS
LUXEMBOURG LAW FIRM

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AML

BENEFICIAL OWNERSHIP REGISTERS - UPDATE

The Luxembourg Parliament published two new draft laws (No. 7216 and No. 7217) on December 6th 2017, in order to implement provisions of Directive EU 2015/849 on the prevention and use of the financial system for the purposes of money laundering and terrorist financing (the "**4th AML Directive**"). The draft laws aim to implement the provisions of the 4th AML Directive concerning the establishment of registers of ultimate beneficial owners.

A beneficial owner is defined by the 4th AML Directive as any natural person(s) who ultimately owns or controls the customer (i.e. a corporate entity or other legal entity) and/or the natural person(s) on whose behalf a transaction or activity is being conducted. In respect of corporate entities, this definition of a beneficial owner is further specified as a natural person who ultimately holds a shareholding, controlling interest or ownership interest of at least 25% plus one share in a corporate entity. If no such person exists, then the person(s) holding the senior managerial positions in the relevant entity are considered to fall in the scope of the definition and should be recorded accordingly.

The two registries that will be implemented pursuant to the draft laws are as follows:

- A central register of the beneficial owners of entities that are registered with the Register of Commerce and Companies in Luxembourg except for those entities that are admitted to trading on a regulated market in Luxembourg or elsewhere (*registre des bénéficiaires effectifs* or REBECO);
- A central register of beneficial owners of fiduciary arrangements (*Registre des Fiducies*).

REBECO

The REBECO is to be established by and under the authority of the Minister of Justice. The Register of Commerce and Companies (RCSL) is responsible for the management, registration and safeguard of the information. The registration of the information on REBECO will be carried out in accordance with detailed rules to be laid down by Grand-ducal Regulation.

The draft law sets out a list of information on beneficial owners that must be provided and kept up to date in REBECO including name, date and place of birth and address.

In the case of a company winding up, REBECO will still retain the information for the following five years.

Access to REBECO will be given to national authorities such as the CSSF, the CAA and tax administration and the police. Self-regulatory bodies such as the bar association or the association of notaries will be allowed to access some information.

Limited access to the REBECO may also be granted to any person (s) who:

I. can demonstrate a legitimate interest in relation to AML;
II. is resident in Luxembourg; and
III. has made an official written and duly justified request in this respect.

Registre des Fiducies

Each fiduciary agent shall obtain and keep at its registered office information in relation to the beneficial owners of each fiduciary arrangement for which it acts as a fiduciary agent. Such information is to be kept for a period of five years

following the cessation of their activities in relation to such fiduciary arrangement.

The *Administration de l'Enregistrement et des Domaines* ("**AED**") shall maintain the *Registre des Fiducies.* Every fiduciary contract with a Luxembourg fiduciary agent that generates tax consequences must be inscribed in the register. A registration number will be assigned to each fiduciary contract. The draft law sets out a list of information on the various parties involved in the fiduciary contract (such as the constituent, fiduciary agent and beneficiaries) that must be provided and kept up to date in the register.

Access to the *Registre des Fiducies* will be given to the national authorities (as set out above).

BANKING & FINANCE

MIFID UPDATES

Since our article on the questions and answers of the European Securities and Markets Authority ("**ESMA**") regarding Markets in Financial Instruments Directive (recast) – Directive 2014/65/EU ("**MiFID II**") and Markets in Financial Instruments Regulation – Regulation 600/2014 ("**MiFIR**") in our May 2017 Newsletter, the following have been updated:

- Q&A on MiFID II and MiFIR investor protection and intermediaries topics;
- Q&A on MiFID II and MiFIR market structures topics;
- Q&A on MiFID II and MiFIR transparency topic;
- Q&A on MiFID II and MiFIR commodity derivatives topics; and
- Q&A on MiFIR data reporting.

We will focus here on just a few of the updates to the questions and answers on MiFID II and MiFIR investor protection and intermediaries topics (hereafter, the "**Q&A**").

As regards the recording of telephone conversations and electronic communications, ESMA has clarified that the record-keeping requirements set out in Article 16(7) of MiFID II should be construed broadly such that (i) the requirement applies separately to situations where firms receive and transmit a client order, irrespective of whether the execution and transmission of the order is allowed on that particular channel and (ii) conversations and communications that are "intended to result in" the provision of services (1), (2) and (3) included in Annex I, Section A of MiFID II, must be recorded.

ESMA has confirmed that the order record-keeping requirement under Article 16(6) of MiFID II (and further specified in Article 9 of the Commission Delegated Regulation (EU) 2017/1943 of July 14th 2016 supplementing MiFID II (the **"MiFID II Delegated Regulation**") does not provide for any exclusions and therefore applies to securities financing transactions.

Section 10 of the Q&A makes clear that shares in non-UCITs collective investment undertakings cannot, under any circumstances, be reassessed under the criteria set out in Article 57 of the MiFID II Delegated Regulation such that they could be potentially deemed non-complex financial instruments for the purposes of the appropriateness test.

ESMA has also confirmed that investment firms are only obliged to notify information regarding client categorisation to new clients and clients whose categorisation has changed under MiFID II from the categorisation those clients had under MiFID I (Markets in Financial Instruments Directive – Directive 2004/39/EC).

As regards inducements, ESMA has clarified in the Q&A (i) that the inducement restrictions in Article 24(9) of MiFID II apply also to the payments made, or benefits provided to, third parties by investment firms in connection with the provision of investment advice on an independent basis or of portfolio management and (ii) that any fee, commission or monetary benefit should be considered as a liability of the investment firm after it has been received by it as an inducement, and prior to it being transferred to the client.

Finally, ESMA has provided a number of clarifications on (i) the best execution requirements under RTS 27 and 28 of MiFID II, (ii) the post-sale reporting obligations under Article 62 of the MiFID II Delegated Regulation, and (iii) the costs and charges information requirements under Article 24 of MiFID II and Article 50 of the MiFID II Delegated Regulation.

MIFID II AND MIFIR | APPLICATION IN LUXEMBOURG

On January 3rd 2018 the majority of the provisions of Directive 2014/65/EU on markets in financial instruments ("**MiFID II**") and Regulation (EU) No. 600/2014 on markets in financial instruments ("**MiFIR**") became applicable. MiFIR (with the exception of Article 37 thereof which shall apply from January 3rd 2020) is directly applicable in Luxembourg. MiFID II will be transposed into Luxembourg Law upon the adoption of Draft Law No. 7157 (the "**Draft Law**"). We refer you to the previous article in our October 2017 Newsletter regarding the Draft Law and the related draft Grand-ducal Regulation.

The latest significant development on the Draft Law was the opinion issued on November 13th 2017 by the Chamber of Commerce. It is now undergoing review by the Budget and Finance Commission (*Commission des Finances et du Budget*).

In the context of the entry into force of MiFID II and MiFIR, whilst the Draft Law has not yet been adopted, the CSSF published Press Release 17/47 (the "**Press Release**") to clarify certain points regarding the application of the new MiFID II/MiFIR legislative framework during this interim period.

In the Press Release the CSSF draws attention to the fact that given the direct application of MiFIR, as from January 3rd 2018, credit institutions, investment firms and trading venue operators must respect the provisions of MiFIR as opposed to the corresponding provisions of the Luxembourg Law of April 5th 1993 on the financial sector (the "**Financial Sector Law**") and the Luxembourg Law of July 13th 2007 on markets in financial instruments (the "**Markets in Financial Instruments Law**").

The CSSF stressed that during this interim period, in accordance with fundamental EU principles, the Financial Sector Law and the Markets in Financial Instruments Law will need to be interpreted in a way which gives the fullest possible effect to the provisions of MiFID II which confer new rights or are more favourable than the applicable national rules (in particular those provisions of MiFID II which strengthen investor protection).

CSSF PUBLISHES Q&A ON MIFID II/MIFIR

On October 24th 2017, the CSSF published its first questions and answers on the Markets in Financial Instruments Directive (recast) – Directive 2014/65/EU ("**MiFID II**") and Markets in Financial Instruments Regulation – Regulation 600/2014 ("**MiFIR**") (the "**Q&A**"), addressing one issue related to data reporting and then on December 5th 2017, updated those Q&A to address a number of points regarding commodity derivative contracts.

As regards data reporting, the CSSF addressed the question whether the use of the services of a Luxembourg or foreign approved reporting mechanism ("**ARM**"), as provided for by MiFIR, is subject to an authorisation of the CSSF. The CSSF takes the view that using an ARM for the purpose of the reporting obligation under Article 26 of MiFIR is not outsourcing within the meaning of CSSF Circulars 12/552 and 17/654. The CSSF nevertheless requires to be notified by the investment firms and credit institutions that use an ARM, of the name and country of establishment of the designated ARM. On the other hand, the CSSF points out that when an investment firm or credit institution decides to use an ARM with the sole purpose of drafting the reporting which will be completed and sent by

the investment firm or credit institution to the competent authority, this will be considered as outsourcing within the meaning of CSSF Circulars 12/552 and CSSF 17/654 and an authorisation from the CSSF will be required.

MiFID II introduces a regime of limits applicable to net positions that a participant can hold at all times in commodity derivatives to prevent market abuse and to support orderly pricing and settlement conditions on the futures markets. Section 3 of the Q&A includes 11 questions and answers relating to commodity derivative contracts, a few of which we summarise below.

Of particular note is that the CSSF has provided some clarity on the types of financial instruments which are governed by the provisions of Article 57 (*Position limits and position management controls in commodity derivatives*) and Article 58 (*Position reporting by categories of position holders*) of MiFID II. Importantly, the CSSF has clarified to whom the position limits under Article 57 and 58 of MiFID II apply, specifically it is confirmed that they apply also to persons exempt from MiFID II under Article 2.1 thereof. The CSSF explains about the different types of exemptions available in the context of dealing in commodity derivatives and the fact that they may apply cumulatively. With respect to the ancillary activity exemption, details are provided as to which competent authority should be notified by an entity making use of that exemption and where the competent authority is the CSSF, specific details are provided on how the notification must be made. With respect to the position limits exemption requested by a non-financial entity under Article 57.1 *in fine* of MiFID II, it is confirmed that such request should be sent to the competent authority of the trading venue on which the relevant commodity derivative is traded and where that competent authority is the CSSF, the relevant email address to which such requests must be sent is provided.

TRANSPOSITION OF PAYMENT SERVICES DIRECTIVE 2

Directive (EU) 2015/2366 on payment services (“**PSD2**”) entered into force on January 12th 2016 and should have been transposed by all Member States, including Luxembourg, by January 13th 2018. PSD2 repeals Directive 2007/64/EC on payment services in the internal market (“**PSD1**”) and introduces considerable changes to the current framework on payment services in order to regulate diverse types of payment services, adapting the legislation to modern innovations. One of the aims of the new law is to secure a “level playing field” for credit institutions and fintech companies, better manage the macrosystemic risk in the financial market, and protect consumers. We refer you to our September 2013 Newsletter where we discussed the initial proposal for PSD2 put forward by the European Commission.

As regards transposition of PSD2 into Luxembourg Law, draft bill No. 7195 (the “**Draft Law**”) (which will substantially amend the Luxembourg Law of November 10th 2009 on payment services (the “**Payments Services Law**”)) was submitted to the Luxembourg Parliament on November 10th 2017. On December 14th the Luxembourg Chamber of Commerce (“**LCC**”) issued its opinion on the Draft Law. The Luxembourg regulator had indicated that Luxembourg would transpose PSD2 prior to the January 13th deadline and therefore, it is anticipated that the Draft Law will be finalised and approved very soon.

On the other hand, guidelines issued by the European Banking Authority (EBA) in respect of PSD2 are already applicable in Luxembourg. The EBA published (i) guidelines on the information to be provided for the authorisation of payment institutions and electronic money institutions and for the registration of account information service

providers under Article 5(5) of PSD2 (the "**Guidelines on Required Information for Authorisation**") and (ii) guidelines on the criteria on how to stipulate the minimum monetary amount of the professional indemnity insurance or other comparable guarantee under Article 5(4) of PSD2 (the "**Guidelines on Insurance/Guarantee Minimum Amount**"). On January 12th 2018, the CSSF published CSSF Circular 18/677 by which it adopted the Guidelines on Required Information for Authorisation that apply from January 13th 2018 (except for section 4.4. of those guidelines regarding the assessment of completeness of the application for authorisation and registration under PSD2, that will apply as from the date of entry into force of the Draft Law in its final form). Most recently, on January 24th 2018, the CSSF published CSSF Circular 18/681 by which it adopted the Guidelines on Insurance/Guarantee Minimum Amount that also apply from January 13th 2018.

CAPITAL MARKETS

LXSE AMENDS X PRINCIPLES OF CORPORATE GOVERNANCE

The Luxembourg Stock Exchange has revised for the third time in eleven years the X Principles of Corporate Governance (the "**X Principles**"), this time to include a new Principle 9 on corporate social responsibility (CSR) and to integrate Principle 6 (*Evaluation of the performance of the Board*) in Principle 2 (*The Board of Directors' remit*). This 4th version of the X Principles entered into effect on January 1st 2018 and applies to annual reports for financial years as from that date.

According to the new Principle 9, the company shall define its policy on corporate, social and environmental responsibility. It shall specify the measures taken to implement its policy and arrange for this to have adequate publicity.

The recommendations related to the new Principle 9 provide that the company shall integrate the CSR aspects in its strategy for the creation of long-term value and shall present the CSR information in a dedicated report or within its management report. It is recommended that the Board regularly consider the social and environmental risks and that the company should publish a methodical memorandum relating to the way in which significant factors have been identified.

The integration of the CSR Principle has knock-on effects elsewhere within the X Principles. Principle 2 regarding the Board of Directors' remit has been supplemented to state that the Board shall consider CSR aspects in their deliberation. Recommendation 2.3 has been amended to state that in defining the values of the company, the Board shall take into consideration all CSR aspects of the business. One of the recommendations relating to Principle 6 (*Executive Management)* has been amended to include a recommendation for members of the executive management to be responsible for preparing complete, timely, reliable and accurate CSR reports and to submit such reports to the board on a regular basis.

There have been some other changes to the X Principles unrelated to the CSR aspects. In particular some "guidelines" have been upgraded to "recommendations", which means that they are no longer just indicative and optional but are now mandatory save in exceptional justified circumstances (i.e. issuers must now comply or explain).

PROSPECTUSES | UPDATE OF ESMA Q&A

On October 20th 2017 the European Securities and Markets Authority ("**ESMA**") updated its Questions and Answers on Prospectuses ("**Q&A**") aligning them with those provisions of Regulation (EU) 2017/1129 (the "**New Prospectus Regulation**") which are in effect since July 20th 2017, specifically points (a), (b) and (c) of the first subparagraph of Article 1(5) and the second subparagraph of Article 1(5). For more information on the New Prospectus Regulation, please see our Newsflash – Publication of the New Prospectus Regulation and our October 2017 Newsletter.

Pursuant to Article 1(5)(a) of the New Prospectus Regulation, there is an exemption from the obligation to publish a prospectus prior to the admission to trading on an EU-regulated market of securities fungible with securities already admitted to trading on the same regulated market, provided that they represent, over a period of 12 months, less than 20% (increased from 10%) of the number

of securities already admitted to trading on the same regulated market. Previously, there was an exemption for the admission to trading of shares resulting from the conversion or exchange of other securities or from the exercise of rights conferred by other securities, provided that the said shares are of the same class as the shares already admitted to trading on the same regulated market. Article 1(5)(b) of the New Prospectus Regulation imposes a restriction (subject to the second sub-paragraph of Article 1(5)) on this exemption such that the resulting shares must represent over a period of 12 months, less than 20% of the number of securities already admitted to trading on the same regulated market. Finally, pursuant to Article 1(5)(c), there is a new exemption from the obligation to publish a prospectus prior to the admission to trading on an EU-regulated market of securities resulting from the conversion or exchange of other securities, own funds or eligible liabilities by a resolution authority pursuant to specific powers under Directive 2014/59/EU on bank recovery and resolution.

As a consequence, ESMA has amended the Q&A as set out below.

Question 27 has been deleted because Article 1(5) of the New Prospectus Regulation sufficiently clarifies the restriction on the exemption for convertible and exchangeable securities.

Answer 29 has just been amended to update the cross-reference to Article 1(5)(b) of the New Prospectus Regulation.

Answers 31 and 32 have been amended to update the cross-reference to Article 1(5)(a) of the New Prospectus Regulation and to reflect that the threshold for admission under this exemption has changed from 10% to 20%. The working examples in Answer 31 have been updated accordingly.

Finally, answer 44 has been updated to confirm that for securities issued on or after July 20th 2017, ESMA maintains its view that exemptions in relation to offers and exemptions in relation to admission to trading under the New Prospectus Regulation are stand-alone, i.e. an exempt offer will still require a prospectus for an admission to trading unless one of the exemptions set out in points (a) to (c) of the first subparagraph of Article 1(5) applies.

GRAND-DUCAL REGULATION ON CSSF FEES

The Grand-ducal Regulation of December 21st 2017 relating to the fees to be levied by the CSSF (the "**New Grand-ducal Regulation**") entered into force on January 1st 2018 and repealed the Grand-ducal Regulation of October 28th 2013. The New Grand-ducal Regulation (in the same way as its predecessor) sets out the fees to be levied by the CSSF which cover the operating costs for the financial sector supervision and the public oversight of the audit profession. Under the New Grand-ducal Regulation some of the CSSF fees have been increased while many remain the same.

The fees for persons asking for admission to trading on a regulated market, offerors and issuers requesting approval for a prospectus under Part II and Chapter I of Part III of the Luxembourg Law on prospectuses for securities (as amended) remain unchanged. Likewise, the fees have not been increased for natural or legal persons, governed by public or private Law, making a "takeover bid" or "bid" falling within the scope of the Luxembourg Law on takeover bids, where the CSSF is the competent authority to supervise the bid; although the New Grand-ducal Regulation now provides for a limit on those fees stating that they shall never exceed EUR 1,000,000.

Perhaps the most relevant fee increase under the New Grand-ducal Regulation for those with an interest in the Luxembourg capital markets, are those relating to issuers for which Luxembourg is the home Member State in accordance with the Luxembourg Law on transparency requirements for issuers of securities or for persons who have applied for the admission of securities to trading on a regulated market without the issuer's consent; the annual lump sum fees for all such persons have been increased.

LXSE | AMENDED RULES AND REGULATIONS

The Luxembourg Stock Exchange ("**LxSE**") has published Edition 01/2018 of the Rules and Regulations of the LxSE (the "**R&Rs**") which replaces version 07/2016 that entered into force on January 1st 2016. The LxSE has also, very helpfully, published questions and answers regarding the amendments to the Q&A which give background to, and a general overview of, the amendments (the "**Q&A**"). The majority of the amendments to the R&Rs are for the purposes of conforming them to the new legal regime under the Markets in Financial Instruments Directive (recast) – Directive 2014/65/EU ("**MiFID II**") and Markets in Financial Instruments Regulation – Regulation 600/2014 ("**MiFIR**").

Some of the MiFID II/MiFIR related amendments which may be of particular interest to issuers include the following:

1. An issuer must have an LEI (legal entity identifier) code and shall take all necessary measures to ensure its LEI is valid and updated and shall transmit it to the LxSE if its financial instruments are admitted to trading on the LxSE.
2. It is now confirmed that the marketing of UCIs is not a precondition for the admission to trading on the Euro MTF.
3. An additional rule was introduced to clarify that technical suspensions due to pending de-listings do not pose any risk or disorder to the market, and as such they will not fall under the usual reporting obligations for suspensions (which would require publication on the website of the LxSE and communication to the competent authority).

The LxSE seized the opportunity to also make some non-MiFID II/MiFIR related amendments to the R&Rs to align with current practice and market needs and expectations.

Some of the non-MiFID II/MiFIR related amendments which may be of particular interest to issuers include the following:

1. It has now been clarified that if the LxSE has received all the documents and information that the applicant has to provide in respect of an application for admission, the applicant shall receive a response within a maximum period of 10 business days (rather than one month as was previously stated).
2. An application for admission to the official list without an application for admission to trading on one of the securities markets of the LxSE is now possible subject to the conditions set out in the LxSE Securities Official List Rulebook.
3. In the situation where the LxSE decides to admit securities to trading without the issuer's consent (on the condition that the securities have already been admitted to trading on another EU regulated market not operated by the LxSE and meet the relevant conditions under the Law on prospectuses), it is now clarified that not only is the issuer not required to provide the LxSE with the documentation required by Article 401 of the R&Rs, but also the issuer has no obligation to provide the LxSE with any documentation

or information. However, the person who has sought the admission may, instead, provide the LxSE with any documentation or information required to facilitate the fair, orderly and efficient functioning of the market.

MARKET ABUSE | UPDATE OF ESMA Q&A

Since our last newsletter, the European Securities and Markets Authority ("**ESMA**") has twice updated its Questions and Answers ("**Q&A**") on Regulation (EU) 596/2014 of April 16th 2014 on market abuse (the "**Market Abuse Regulation**"), firstly to include two new questions and answers in Section 7 on managers' transactions and, most recently, on December 14th 2017, to add a new section 11 on emission allowances and emission allowances market participants ("**EAMPs**").

Pursuant to Article 19(11) of the Market Abuse Regulation, a person discharging managerial responsibilities ("**PDMR**") within an issuer shall not conduct any transactions on its own account or for the account of a third party, directly or indirectly, relating to the shares or debt instruments of the issuer or to derivatives or other financial instruments linked to them during a closed period of 30 calendar days before the announcement of an interim financial report or a year-end report (which the issuer is obliged to make public according to the rules of the trading venue where the issuer's shares are admitted to trading or national Law). However, pursuant to Article 19(12) of the Market Abuse Regulation, an issuer may allow a PDMR within it to trade on its own account or for the account of a third party during a closed period, as referred to above, either (i) on a case-by-case basis due to the existence of exceptional circumstances or (ii) due to the characteristics of the trading involved for transactions made under, or related to, an employee share or saving scheme, qualification or entitlement of shares, or transactions where the beneficial interest in the relevant security does not change.

In Section 7 of the Q&A, ESMA (i) has confirmed that when an issuer allows a PDMR to trade on its own account or for the account of a third party during a closed period (as referred to in Article 19(11) of the Market Abuse Regulation), the prohibition on insider dealing pursuant to Article 14 of the Market Abuse Regulation still applies and (ii) has confirmed that the transactions by a PDMR which are prohibited during a closed period under Article 19(11) of the Market Abuse Regulation, are of the same type as those which are subject to the notification requirement under Article 19(1) of the Market Abuse Regulation (noting that Article 19(1) also, however, applies to persons closely associated with a PDMR).

The new Q&A 11.1 provides some clarity on the time span for the calculation of whether the thresholds regarding CO_2 equivalent emissions and the rated thermal input have been exceeded in respect of the disclosure obligation under Article 17(2) of the Market Abuse Regulation on EAMPs to publicly, effectively and in a timely manner disclose inside information concerning emission allowances which it holds in respect of its business.

ENTRY INTO FORCE OF NEW EU SECURITISATION FRAMEWORK

A new EU securitisation framework came into being on January 17th 2018 with the entry into force of the following Regulations:

1. Regulation (EU) 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation (the "**Securitisation Regulation**"), and

2. Regulation (EU) 2017/2401 amending Regulation (EU) 575/2013 (the "**CRR Amendment Regulation**").

In our January 2016 Newsletter, we summarised some of the key provisions of the European Commission proposal for the abovementioned Regulations. The final text of those Regulations has changed from that initially proposed by the European Commission following two years of significant negotiation between the European Parliament, the European Council and the European Commission.

The Securitisation Regulation consolidates the applicable rules which will govern securitisations within the EU going forward, replacing the largely fragmented legal framework which has been in place to date. The CRR Amendment Regulation replaces the provisions of the Regulation (EU) 575/2013 (the "**Capital Requirements Regulation**") which relate to securitisations.

The Securitisation Regulation applies to institutional investors and to originators, sponsors, original lenders and securitisation special purposes entities. In its final form, in addition to defining securitisation and laying down a general framework for securitisation, the Securitisation Regulation imposes obligations on parties involved in securitisation with respect to due diligence, risk-retention and transparency; it also introduces a ban on re-securitisation subject to certain derogations. To enhance market transparency, the Securitisation Regulation establishes a framework for securitisation repositories to collect reports, primarily on underlying exposures in securitisations and sets forth the conditions and procedures for registration of a securitisation repository. Last, but certainly not least, a specific framework, for simple, transparent and standardised ("**STS**") securitisations, has been established. Chapter 4 of the Securitisation Regulation sets out the requirements which must be met to be considered as an STS as well as the STS notification requirements.

In addition to addressing shortcomings of the regulatory capital standards of securitisations (such as the mechanistic reliance on external ratings), the CRR Amendment Regulation amends the regulatory capital requirements laid down in the Capital Requirements Regulation for institutions originating, sponsoring or investing in securitisations in light of the establishment of the framework for STS securitisations under the Securitisation Regulation.

The majority of the provisions of the Securitisation Regulation and CRR Amendment Regulation shall apply from January 1st 2019. In the meantime, we can expect to see the publication of Level 2 legislation such as technical standards, which will provide further details on the implementation of this much anticipated new legislative framework.

UPDATE OF CSSF CIRCULAR ON TRANSPARENCY RULES

On January 23rd 2018 the CSSF published CSSF Circular 18/679 which amends CSSF Circular 08/337 (the "**CSSF Transparency Circular**") regarding the Luxembourg Law of January 11th 2008 and the Grand-ducal Regulation of January 11th 2008 on transparency obligations of issuers (as amended). There were only a few amendments and most of these were necessary to align the circular with changes introduced by Regulation (EU) 596/2014 on market abuse (the "**Market Abuse Regulation**").

In section 3 of the CSSF Transparency Circular concerning the notion of "regulated information" and elsewhere in the circular, reference is now made to the information which issuers are required to disclose under Article 17 (inside information) and 19 (managers' transactions) of the Market Abuse Regulation (whereas reference used to be to Article 6 of the Directive 2003/6/EC on insider dealing and market manipulation (the "**Repealed Market Abuse Directive**")).

Section 5(c) of the CSSF Transparency Circular, which deals with the process for filing regulated information with the CSSF, explains that an issuer may either make the filing itself or appoint a third party to make the filing on its behalf, noting however that the issuer will in any case remain entirely responsible for the compliance with its disclosure obligations. As regards the third party who may be appointed to make the filings on behalf of an issuer, this could be a company specialised in the distribution of regulated information or an integrated system of an officially appointed mechanism (OAM) such as FIRST, operated by the Luxembourg Stock Exchange.

TRANSPARENCY LAW | CSSF ENFORCEMENT

The CSSF has published Press Release 17/43 (the "**Press Release**") for the attention of issuers of securities subject to the Law of January 11th 2008 on transparency requirements for issuers of securities, as amended. The CSSF wishes to highlight to those issuers and auditors preparing and auditing, respectively, the International Financial Reporting Standards (hereafter referred to as "**IFRS**") financial statements for the year ending December 31st 2017, a number of points that shall be subject of specific monitoring by the CSSF during 2018. The European Securities and Markets Authority (the "**ESMA**"), together with the European national accounting enforcers, including the CSSF, have identified common enforcement priorities for the 2017 financial statements. Having assessed these common priorities, the CSSF declares in the Press Release, that its enforcement campaign will focus on the following:

- **Disclosure of the expected impact of implementation of major new IFRS standards in the period of their initial application**.
  The CSSF will monitor that the disclosures under new IFRS standards (in particular IFRS 9 *Financial Instruments* and IFRS 15 *Revenue from Contracts with Customers*, applicable as of January 1st 2018 and IFRS 16 *Leases* which becomes applicable as of January 1st 2019, with early application allowed) in the period of their initial application, are done with adequate qualitative and quantitative data.

- **Specific measurement and disclosure issues stemming from IFRS 3 Business Combinations**.
  Having already focused on the key aspects of accounting for a business combination under IFRS 3 in 2017, the CSSF will continue to

monitor the compliance with a number of significant aspects of IFRS 3, including but not limited to judgements and estimates made by management and the most meaningful disclosures.

- **Specific issues of IAS 7 Statement of Cash Flows**.
  The CSSF will closely examine the extent to which the additional presentation requirements under the amended IAS 7 are respected.

- **Fair value measurement and disclosure requirements provided for by IFRS 13**.
  The CSSF will continue to monitor that the requirements of IFRS 13 are well incorporated in the 2017 annual financial statements, and will take appropriate enforcement actions whenever material misstatements are identified.

- **Actions from the post-implementation of IFRS 8 Operating Segments**.
  The CSSF will scrutinise the implementation of IFRS 8 with particular regard to the issues identified in the *Exposure Draft on Improvements* to IFRS 8 released by the International Accounting Standards Board in March 2017.

- **Disclosure of non-financial and diversity information in the management report**.
  In light of the additional disclosure requirements under the Luxembourg Law of July 23rd 2016 on disclosure of non-financial and diversity information for certain large undertakings and groups, implementing Directive 2014/95/EU, the CSSF will pay close attention to how issuers provide information which is relevant and useful to users of financial statements, when purporting to comply with those additional disclosure requirements.

INVESTMENT FUNDS

EMIR| DRAFT RTS

On December 12th 2017 the European Supervisory Authorities ("**ESAs**") published draft regulatory technical standards amending Regulation (EU) 2016/2251 supplementing Regulation (EU) No. 648/2012 ("**EMIR**") with regard to regulatory technical standards on risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty.

In their final report the ESAs noted that the requirement to exchange variation margin for physically settled foreign exchange forwards is part of a globally agreed framework which aims to ensure safer derivative markets by limiting the counterparty risk from derivatives trading partners. This requirement has been implemented in the EU through Regulation (EU) 2016/2251. However, the ESAs have been made aware of certain difficulties and challenges faced by certain counterparties as the adoption of international standards in other jurisdictions (outside of the EU) via supervisory guidance (as opposed to a directly applicable Regulation) has led to a more limited scope of application than the scope proposed by Regulation 2016/2251.

The aim of the proposed amendments is to align the treatment of variation margin for physically settled foreign exchange forwards with the supervisory guidance applicable in other key jurisdictions and to limit the requirement to exchange variation margin to transactions between institutions i.e. credit institutions and investment firms.

As such the proposal is to amend Regulation (EU) 2016/2251 to specifically exclude physically settled foreign exchange forwards from the requirement to post or collect variation margin when at least one of the counterparties is not an institution. This is therefore of particular relevance to funds (both UCITs and AIFs) carrying out currency hedging.

Since the amended RTS will only enter into force after January 3rd 2018, when the requirement to exchange variation margin under Regulation (EU) 2016/2251 enters into force, the ESAs expect national competent authorities to apply the rules in a proportionate and risk-based manner until the amended RTS enter into force. As such it is expected that the CSSF will not insist on UCITs or AIFs exchanging variation margin for any foreign exchange forwards they may enter into.

CSSF FEES

The Grand-ducal Regulation of December 21st 2017 relating to the fees to be levied by the CSSF (the "**New Grand-ducal Regulation**") entered into force as of January 1st 2018 and has created a number of changes to the fees levied on investment fund vehicles and management companies. In general, almost every fee levied by the CSSF has been increased, including transformation charges, examination fees and annual charges in regards to investment funds.

Examination fees for funds have been increased by EUR 500 for stand-alone funds and by EUR 1,000 for umbrella funds. For internally managed funds (traditional or umbrella) the examination fee has been increased from EUR 10,000 to EUR 15,000.

A new fee has been introduced in the amount of a single flat rate of EUR 500 for each request for approval of a new compartment within an existing umbrella fund. The annual fees payable by funds have also increased.

The examination fees for chapter 15 management companies and AIFMs have been increased from EUR 10,000 to EUR 15,000.

The annual fee payable by chapter 15 management companies and AIFMs has been increased to EUR 35,000 as from the previous amounts of EUR 20,000 and EUR 25,000 respectively. In addition, the New Grand-ducal Regulation now provides for a fee of EUR 10,000 to be paid for each on-site inspection carried out by the CSSF.

UCITS UPDATED CSSF FAQ AND CSSF PRESS RELEASE 18/02

The CSSF's updated UCITS FAQ and the CSSF press release 18/02 dated January 5th 2018 relate to the deletion of section 1.4 of the UCITs FAQ which stated that "*Non-UCITS ETFs are eligible investments for UCITS if they effectively comply with all criteria of Articles 2(2) and 41(1)(e) of the Law 2010, notwithstanding that the offering documents of non-UCITS ETFs grant possibilities which are not equivalent to requirements applicable to UCITS.*

Given the specificities of each other ETF, an eligibility analysis must be carried out on a case-by-case basis and the UCITS must continuously ensure that the investment rules applied are equivalent to the investment rules applicable to UCITS, for example, via a system of compliance control or a written confirmation of the ETF or of the manager".

The foregoing has been deleted from the CSSF UCITS FAQ as of January 5th 2018.

Mere compliance controls or written confirmation of the ETF or of the manager are no longer acceptable.

For other UCIs to be eligible under Article 50(1)(e) of the UCITS Directive, such other UCIs:

1. shall be prohibited from investing in illiquid assets (such as commodities and real estate) in line with Article 1(2)(a) of the UCITS Directive;
2. shall be bound by rules on asset segregation, borrowing, lending and uncovered sales of transferable securities and money market instruments which are equivalent to the requirements of the UCITS Directive in line with Article 50(1)(e)(ii) of the UCITS Directive; mere compliance in practice shall not be considered sufficient;
3. the fund rules or instrument of incorporation shall include a restriction according to which no more than 10% of the assets of the UCI can be invested in aggregate in units of other UCITS or other UCIs in line with article 50(1)(iv) of the UCITs Directive; mere compliance in practice shall not be considered sufficient.

As a consequence, the UCITS subject to the Law of December 20th 2010 on undertakings for collective investment in transferable securities, as amended and which have invested in other UCIs following the policy laid down in CSSF's UCITS FAQ section 1.4 have to divest these UCIs as soon as possible taking into account the best interests of the investors. The CSSF will contact by March 31st 2018 the investment fund managers which have invested in such UCIs to check the compliance with the new policy. New investments in such UCIs are no longer allowed.

MONEY MARKET FUNDS | REGULATION'S FULL IMPACT IS FAST APPROACHING

On April 5th 2017, the European Parliament approved the Regulation (EU) 2017/1131 of June 14th 2017 on money market funds (the "**MMF Regulation**"). The MMF Regulation enters in effect on July 21st 2018.

On January 15th 2018 the European Commission, in preparation for the introduction of full compliance, has published a Roadmap initiative based on Articles 11(4), 15(7) and 22 of the MMF Regulation. This initiative's key aim is to better inform stakeholders about the ongoing work of the European Commission in relation to the MMF Regulation and to allow them to provide feedback and to participate in future consultation activities. What will follow now are delegated acts:

- one delegated act intended to ensure that MMF managers invest in assets with a favourable credit risk assessment, with respect to:
  - direct investments by the manager; and
  - the received collateral from a reverse repo agreement that must also receive a favourable assessment.
- another delegated act will aim to ensure full compliance of the provisions in the MMF Regulation with criteria for Simple Transparent Standardised Securitisation (STS) and Assets Back Commercial Papers (ABCP) under the Regulation 2017/2402 on Simple, Transparent and Standardised Securitisation of December 12th 2017.

In relation to the delegated act intended to ensure that MMF managers invest in assets with a favourable credit risk assessment, on November 13th 2017, the European Securities and Markets Authority ("**ESMA**") published a final report on the MMF Regulation (the "**Final Report**"). The Final Report contains final versions of the technical advice regarding the credit quality, draft implementing technical standards regarding the reporting template, and also guidelines on stress test scenarios carried out by MMF managers under the MMF Regulation. The key requirements relate to asset liquidity and credit quality, the establishment of a reporting template and stress test scenarios carried out by MMF managers.

In the cover letter of the Final Report ESMA sought the views of the legal services of the European Commission regarding the practice of share cancellation, also known as reverse distribution or share destruction.

On January 19th 2018 the European Commission reverted. They are of the opinion that the practice of share cancellation is not compatible with the MMF Regulation. ESMA is now assessing the consequences of the letter and considering possible next steps with a view to promoting convergent application of the MMF Regulation across the EU.

UCITS | ESMA UPDATED Q&A

Pursuant to Article 13 of Regulation (EU) 2015/2365 of November 25th 2015 on transparency of securities financing transactions ("**SFT**") and of reuse (the "**SFTR**"), UCITS management companies, and UCITS investment companies shall inform investors on the use they make of SFTs and total return swaps in annual and half-yearly reports. The information on SFTs and total return swaps shall include the data provided for in Section A of the Annex to SFTR.

ESMA's updated Q&A on the application of UCITS Directive dated October 5th 2017 clarifies that all data items should be reported as a snapshot (taken at the end of the reporting period) and not as aggregate data (with respect to the whole of

the reporting period), with the exception of (i) Cash collateral reinvestment returns to the UCITS and (ii) Data on return and cost for each type of SFT. The Q&A gives further detail on how these two data items should be disclosed. The Q&A includes a table clarifying the guidance.

AIFMD | ESMA UPDATED Q&A

On October 5th 2017 ESMA added three new questions to its AIFMD Q&A.

Regarding the impact of SFTR on alternative investment funds, ESMA adopts the same approach as for UCITS (see above). One difference being that for AIFMs, the information have to be disclosed to investors only in each annual report of the relevant AIF.

Regarding disclosure requirements around remuneration paid by the AIFM, ESMA clarified that the remuneration-related disclosure requirements under Article 22(2)(e) of the AIFMD also apply to the staff of the delegate of an AIFM to whom portfolio management or risk management activities have been delegated. ESMA provides with two different ways to comply with this requirement:

(i) Where the delegate is subject to regulatory requirements on remuneration disclosure that are equally effective as those under AIFMD, the AIFM should use the information disclosed by the delegate;

(ii) In other cases, appropriate contractual arrangements should be put in place allowing the AIFM to receive at least information on the total amount of remuneration for the financial year split into fixed and variable, paid by the AIF and/or the AIFM to the identified staff of the delegate - and number of beneficiaries, and, where relevant, carried interest, which is linked to the delegated portfolio. Disclosure should be done on a prorated basis for the part of the AIF's assets which are managed by the identified staff.

In both situations the disclosure may be provided on an aggregate basis i.e. by means of a total amount for all delegates of the AIFM in relation to the relevant AIF.

ESMA further clarified that it is not possible to insert in the annual report a link to another document in order to comply with the disclosure requirements of Article 22(2)(e) and (f) of AIFMD.

PRIIPS KID| FINAL PIECES

As a reminder, as from January 1st 2018, all entities advising on or selling a packaged retail and insurance-based investment product (PRIIP) to retail investors in the European Union are required to deliver a PRIIP compliant KID to their retail investors before any investment.

Regarding the implementation of the PRIIPs Regulation[1] in Luxembourg, the Draft Law No. 7199 was deposited with the Parliament on October 25th 2017 amending the Law of the December 17th 2010 on UCITS and the Law of the December 7th 2015 on the insurance sector. The Draft Law focuses on administrative sanctions and other administrative measures that may be imposed by the CSSF and the CAA (*Commissariat aux Assurances*) in case of non-compliance. In November 20th 2017, additional questions relating *inter alia* to multi-option products, derivatives and performance scenarios have been added to the European Supervisory Authorities Q&A with a view to promoting common supervisory approaches and practice in the implementation of the KID.

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[1] Regulation (EU) No 1286/2014 of the European Parliament and of the Council of November 26th 2014 on key information documents for packaged retail and insurance-based investment products.

TAX

EU PARENT SUBSIDIARY DIRECTIVE AND ANTI-ABUSE PROVISIONS: RULING OF THE ECJ

On December 20th 2017, the *Court of Justice of the European Union* ("**ECJ**") rendered its judgment in the joined cases of *Deister Holding AG* (Case C-504/16) and *Juhler Holding A/S* (Case C-613/16) v. Federal Central Tax Office of Germany (*Bundeszentralamt für Steuern*) concerning the refusal to exempt dividends from withholding tax received by these companies from their German subsidiaries.

In the first case, *Deister Holding* was the successor in title of *Traxx,* a Dutch company which held around a quarter of the capital of a German company. *Traxx* rented an office in the Netherlands which had two employees in 2007 and 2008. Its sole shareholder was a private person residing in Germany. In 2007, the German subsidiary paid dividends to *Traxx* and levied withholding tax on such dividends.

In the second case, *Juhler Holding* was a Danish holding company. *Juhler Services Limited*, a Cyprus company whose sole shareholder is a natural person residing in Singapore, held 100% of the capital in *Juhler Holding*. Since 2003, *Juhler Holding* held 100% of the capital in *temp-team Personal GmbH*, a German company. In July 2011, *Juhler Holding* which does not have its own office in Denmark, received dividends from its German subsidiary, which were subjected to withholding tax.

Under German domestic Law, the entitlement to exemption or a refund of withholding tax is precluded to a non-resident parent company which is, itself, held by shareholders who would not be entitled to the exemption or refund and:

1. there are no economic or other substantial reasons for the involvement of the non-resident parent company, or
2. the non-resident parent company does not take part in general economic commerce with a business establishment suitably equipped for its business purpose, or
3. the non-resident parent company does not earn more than 10% of its gross income from its own economic activity (there being no such activity, *inter alia*, if the foreign company earns its gross income from the management of assets).

If one of these conditions is met, the German tax code presumes, without it being possible to rebut such a presumption, that the arrangement is abusive and the exemption or refund is denied.

Although the EU Parent Subsidiary Directive includes a provision which authorises Member States to apply provisions required to prevent fraud and abuse, such provisions should only prevent the creation of a wholly artificial arrangement which does not reflect economic reality.

In its ruling, the ECJ states that the following elements cannot automatically indicate that there is a wholly artificial arrangement:

1. a parent company which is held by a person which itself would not be entitled to the withholding tax exemption, or
2. the economic activity of a non-resident parent company consists only in the management of its subsidiaries' assets or its income results only from such management.

The ECJ is of the view that in order to determine whether there is an abuse, a case-by-case analysis is required and legislation, like the German legislation, which introduces specific conditions which would automatically presume that there is an abuse, is not in line with the EU Parent

Subsidiary Directive and the EU freedom of establishment.

LUXEMBOURG BUDGET LAW | 2018 NEW TAX MEASURES

On December 15th 2017, the Law concerning the budget of State revenue and expenditure for the financial year 2018 (the "**Budget Law**") was passed. Listed below are the main measures of the Budget Law, which took effect on January 1st 2018, in relation to (i) natural persons and (ii) companies.

FOR NATURAL PERSONS:

- Non-resident married taxpayers realising taxable professional income in Luxembourg are now classified in tax class 1 (i.e. instead of 1a). On the other hand, the criteria to opt for tax class 2 have been made more flexible. Thus, to opt for tax class 2, either at least 90% of the worldwide income of one spouse is taxable in Luxembourg (by way of exception, the threshold with regards to Belgian residents is 50%), or the sum of the net income not subject to tax in Luxembourg is lower than EUR 13,000.
- Resident married taxpayers have been granted the option of being taxed individually. This application cannot be revoked.
- Incentives have also been put in place to encourage the purchase of clean vehicles. Thus, a lump sum deduction of EUR 2,500 for the purchase of a hybrid vehicle has been added to the already existing list of incentives.
- Finally, the period for which the reduction of the overall tax rate on capital gain realised by natural persons on real estate to one-quarter (when it is not their principal residence), originally scheduled to end on December 31st 2017, has been extended until December 31st 2018.
- The inheritance tax exemption between spouses or registered partners will, going forward, also be available in the absence of common descendants.

FOR COMPANIES:

- Although the corporate income tax rate is not changed by the 2018 Budget Law, the 2017 Budget Law introduced a transitional corporate income tax rate of 19% for 2017, which has been reduced to 18% as of the 2018 fiscal year. Therefore the aggregate income tax rate for companies (i.e. including the municipal business tax and the unemployment fund contribution) is currently 26.01% for Luxembourg-City.
- A tax credit of 8% has been introduced for the acquisition of software up to an acquisition price of EUR 150,000. If the acquisition price exceeds EUR 150,000, a 2% tax credit shall be applied to the remaining acquisition price.
- As for natural persons, incentives have also been put in place to encourage investment in clean vehicles.

NEW CIRCULAR ON THE TAXATION OF WARRANT AND STOCK OPTIONS

The Luxembourg tax administration issued a new circular L.I.R. 104/2 dated November 29th 2017 replacing the previous circular dated December 20th 2012 regarding the tax treatment of warrants and stock-options allocated to employees. The new circular changes the lump sum valuation method of tradable options, restrictsthe conditions for its application and introduces a new notification formality.

NEW LUMP SUM VALUATION

The taxable benefit in kind for tradable options (i.e. options that can be, immediately and without restriction, sold by the employee) not commonly traded on a stock-market can be determined according to a lump sum valuation method. According to the lump sum valuation method, the benefit in kind will be equal to 30% of the underlying asset value (17.5% for options granted until December 31st 2017).

NEW CONDITIONS FOR THE LUMP SUM VALUATION METHOD

- The allocated options should not exceed 50% of the gross annual remuneration. This threshold is analysed at the level of each employee.
- The option plan can only be granted to senior managers within the meaning of article L 211-27 of the Labour Code.
- The value of option should not exceed 60% of the underlying asset value.

The lump sum valuation method does not apply to tradable options granted as legal, contractual, judicial or transactional severance payment in case of termination of the employment contract.

NOTIFICATION

Employers have, to the extent they have not yet done so, to notify the tax authorities of the option plans that were granted in 2016 and 2017 before January 31st 2018 and March 31st 2018 respectively. A lack of notification within the required deadline could lead to an exclusion of the regimes set out in the circular. As of 2018, the notification has to be made to the tax authorities when the benefit in kind becomes taxable for the employee.

SYNDICATED PLANS

Option plans involving several employers are now explicitly mentioned in the circular. The tax treatment of these option plans remains the same.

EXCHANGE OF INFORMATION ON REQUEST | ADJUSTMENT OF LAW FURTHER TO BERLIOZ CASE

On December 19th 2017, the Minister of Finance of Luxembourg presented a draft bill to Parliament to amend the law of November 25th 2014, as regards the procedure applicable to the exchange of information on request (the "**Draft Law**"). The purpose of the Draft Law is to give full effect to the decision of the Court of Justice of the European Union ("**ECJ**") in the "Berlioz" case rendered on May 16th 2017 ("**Berlioz Case**" see BSP legal alert).

Until now, the Luxembourg tax authorities were only required to review a request with regards to its compliance with the formal conditions provided for in the relevant tax treaty or other applicable law. They were not obliged to verify the foreseeable relevance of the request. The Draft Law creates an obligation on the tax authorities to verify that the condition of foreseeable relevance is met before sending an order, to provide the information, to the holder of the requested information.

Furthermore, in view of the recent criticisms levelled by the Berlioz Case regarding the lack of an effective judicial remedy as required by the Charter of Fundamental Rights of the European Union, the Draft Law re-establishes a complete judicial remedy, i.e. an action for annulment against the request for information which, according to the taxpayer concerned, does not meet the principle of foreseeable relevance. This second amendment will mean that the Luxembourg courts will have to rule on the legality of the request, whereas previously, the taxpayer could only appeal against the fine that could be charged if he did not provide the requested information.

Regarding the procedure, appeals must be lodged within one month of notification of the request to the holder of the requested information. The Draft Law provides that the Luxembourg courts will have access to the request for exchange of information in order to determine whether the request for information meets the foreseeable relevance condition.

NEW CIRCULAR REGARDING RESIDENCY CERTIFICATES FOR FUNDS

On December 8th 2017, the Luxembourg tax authorities issued the new circular L.G.-A. No. 61 (replacing the previous Circular dated February 12th 2015, please see our previous newsletter dated March 2nd 2015) which aims to cover the procedure applicable to the request of tax residency certificates for collective investment funds (hereafter the "**Circular**").

The most important change is the inclusion of Reserved Alternative Investment Funds (hereafter "**RAIF**"), for which a specific procedure has been put in place. The procedure varies depending on whether a tax residency certificate is requested in the context of a specific double tax treaty or whether a domestic tax residency certificate is requested (residency solely according to domestic law). In the first case, the applicant (the RAIF itself or the appointed depository) needs to provide the tax number, the date of incorporation and the address of the RAIF (taking into account that the tax authorities might request any additional information they deem necessary to issue the certificate, such as the confirmation that the subscription tax owed by the RAIF has been paid). In the second case, the following additional information is required:

- Details of the reason why the domestic tax certificate is requested, including express reference to the foreign tax/legal provision that requires such a tax residency certificate;
- Detailed listing of the income earned by the RAIF and for which the certificate is requested (this can be provided at a later stage if the income has not yet been received).

RAIFs that have opted to fall within the provisions of article 48 of the RAIF Law dated July 23rd 2016 (and thus benefit from a treatment similar to a SICAR) are excluded from the scope of the Circular as they are fully taxable companies and thus subject to the standard procedure applicable to all fully taxable companies.

Lastly, the scope of double tax treaties covered by the Circular has been extended in order to cover amended as well as new double tax treaties entered into by Luxembourg recently (i.e. the double tax treaties with Andorra, Brunei, Croatia, Estonia, Serbia, the Seychelles, Singapore, Ukraine and Uruguay). All of the above mentioned double tax treaties, save for the one entered into with Ukraine, include a positive provision treating investment funds incorporated under the form of companies as "residents" under the double tax treaty.

IGP EXEMPTION | REPEAL OF THE GRAND-DUCAL DECREE

On November 23rd 2017, the Luxembourg government adopted a Grand-ducal Decree (the "**Grand-ducal Decree**") which abolished the Grand-ducal Decree dated January 21st 2004 regarding the VAT exemption of services supplied by independent groups of persons ("**IGP**") to their members.

The object of the Grand-ducal Decree is to align the Luxembourg VAT legislation with the conclusions of the ruling of the European Court of Justice (the "**ECJ**") dated May 4th 2017 (C-274/15), in which the ECJ considered the domestic implementation of the IGP exemption, as laid down in the now repealed decree, as too broad in both scope and conditions (please see our May 2017 Newsletter).

Furthermore, circular letter No. 783 dated December 7th 2017 (the "**Circular**"), issued by the Luxembourg VAT authorities specified that pursuant to the entry into force of the Grand-ducal Decree on December 1st 2017, the Luxembourg legislation is now fully in line with the Directive 2006/112/EC of November 28th 2006 on the common system of value added tax and that any further guidance on the interpretation of the IGP exemption by the ECJ's case Law should be followed in the future. Moreover, the Circular indicates that the Luxembourg VAT authorities have decided to withdraw their support of a memorandum published in December 2008 by a working group within the Market Observation Committee (*Comité d'observation des marchés*) concerning certain issues regarding the practical implementation of the IGP exemption.

As indicated by the Luxembourg Minister of Finance in a response to a parliamentary question, the Luxembourg government is currently exploring the idea of introducing VAT grouping in the Luxembourg domestic VAT legislation, with the main aim of providing the financial and insurance sector with an alternative to the now inapplicable IGP exemption (please refer to our October 2017 Article).

VAT – ECJ RULING ON ABUSIVE PRACTICES

In its judgement handed down on November 22nd 2017 in case C-251/16, the European Court of Justice (the "**ECJ**") had to rule on a reference for preliminary ruling by the Irish Supreme Court on the question of whether or not the principle of abuse of rights, as found applicable in the sphere of VAT by the ECJ in the *Halifax* case (C-255/02), is directly effective against an individual even in the absence of national measures, whether legislative or judicial, giving explicit effect to that principle.

In the case at hand, three individual appellants jointly owned a development site in the town of Baltimore, Ireland, on which they constructed fifteen holiday homes intended for sale. However, before selling the holiday homes, the appellants entered into a long term lease agreement under which a related party rented the properties for a term of twenty years. On the same day, the related party leased the properties back to the appellants for a term of two years.

One month after the lease agreements were entered into, both agreements were extinguished by mutual surrender of the parties. The appellants recovered full ownership of the properties and sold them to third parties immediately thereafter. Pursuant to Irish domestic VAT Law, no VAT was payable on those sales, as the properties had previously been the subject of a first supply on which VAT was chargeable, i.e. the long term lease.

However, the Irish VAT authorities took the view that the lease agreements were an artificial construction created solely to avoid the subsequent sales being liable to VAT, and therefore should be disregarded for the purposes of assessing VAT.

The appellants challenged the position of the authorities and argued that, in the absence of national legislation transposing the principle that abusive practices are prohibited, the principle cannot be deployed against them to remove their right to VAT exemption on the sale of the properties.

The ECJ however ruled in favour of the Irish VAT authorities and held that abusive practices are prohibited as a general principle of EU Law, and such principle may be relied upon against a taxable person even in the absence of provisions of national law prohibiting abusive practices.

The ECJ reasoned in line with previous case Law that the refusal of a right or an advantage on account of abusive practices or fraudulent acts is simply a consequence of the fact that in such case the objective conditions required to benefit from the advantage have not been met.

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