Newsletter

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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.

CAPITAL MARKETS

TRANSPARENCY LAW – CSSF ENFORCEMENT

The CSSF has published Press Release 15/01 to the attention of issuers of securities subject to the law of January 11th 2008 on transparency requirements for issuers of securities, as amended (hereafter referred to as the "Transparency Law"). The CSSF wishes to highlight to those issuers preparing their 2014 financial statements in accordance with International Financial Reporting Standards ("IFRS") a number of points that shall be the subject of specific monitoring by the CSSF during 2015, more specifically:

- the new consolidation standards which are effective since January 1st 2014, specifically IFRS 10 "Consolidated Financial Statements", IFRS 11 "Joint Arrangements" and IFRS 12 "Disclosure of Interests in Other Entities";
- the recognition and measurement of deferred assets;
- the impairment of intangible assets;
- the quality of information disclosed on the methods and assumptions used for measuring fair value in accordance with the IFRS requirement of "Fair Value Measurement"; and
- the relevance and completeness of the sensitivity analyses disclosed in the financial statements.

The Press Release is available at http://www.cssf.lu/en/documentation/publications/press-releases/news-cat/524.

DIRECTIVE FOR DISCLOSURE OF NON-FINANCIAL AND DIVERSITY INFORMATION

On September 29th 2014, the Council of the European Union adopted a directive (following the European Parliament which had done so on April 15th 2014) for the disclosure of non-financial and diversity information by certain large companies (the "Disclosure Directive"). The Disclosure Directive was published in the Official Journal of the European Union on November 15th 2014 and introduces a number of amendments to the Directive 2013/34/EU on annual financial statements, consolidated financial statements and related reports of certain types of undertakings.

The Disclosure Directive introduces additional non-financial disclosure requirements for large public interest entities (this would include listed companies as well as some unlisted companies, such as banks, insurance companies and other companies so designated by the Member States because of their activity, size or number of employees) with more than 500 employees to include a non-financial statement in their management report containing information on environmental matters, social and employee related aspects, respect for human rights, and anti-corruption and bribery issues. The statement should include a brief description of the undertaking's business model, a description of its policies, including due diligence processes implemented, the outcomes of those policies, related risks and how the undertaking manages same and non-financial key performance indicators relevant to the undertaking.

An undertaking that does not pursue policies in one or more of these areas is required to explain why this is not the case. Furthermore, the Disclosure Directive provides undertakings with flexibility to disclose relevant information in the way that they consider most useful, or in a separate report. Undertakings may use international, European or national guidelines which they consider appropriate (various examples are listed in the Disclosure Directive including the UN Global Compact, OECD

Guidelines for Multinational Enterprises and the Global Reporting Initiative).

The Disclosure Directive also requires large listed public interest undertakings to disclose their diversity policies in relation to their administrative, management and supervisory bodies, including information on the age, gender, educational and professional backgrounds of their members. The diversity related information should be included in the corporate governance statement and should contain the objectives of such a policy, its implementation and the results obtained. If no such policy is applied, it should be explained why this is the case.

Member States will have two years to transpose the Directive into national legislation. Therefore, companies concerned will have significant time to adapt to the new requirements, and will start reporting as of their financial year 2017. The Commission shall prepare non-binding guidelines on methodology for reporting non-financial information which shall be published by December 6th 2016. The Commission shall also submit a report to the European Parliament and to the Council on the implementation of the Disclosure Directive which shall be published by December 6th 2018 and shall be accompanied, if appropriate, by legislative proposals.

The text of the Disclosure Directive is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0095&from=EN

CORPORATE

BEARER SHARE REGIME – MAIN FEATURES AND UPCOMING DEADLINES

The law on the immobilisation of bearer shares (the “Law”) entered into force in Luxembourg on August 18th 2014 (the “Effective Date”). The Law aims to facilitate anti-money laundering efforts by improving transparency with regard to the identity of shareholders in Luxembourg companies.

The Law applies to bearer shares or units issued by the following commercial entities:

(i) SAs (*société anonyme*);
(ii) SCAs (*société en commandite simple*); regulated investment funds (SICAVs (*société d'investissement à capital variable*) and SICAFs (*société d'investissement à capital fixe*); and
(iii) contractual co-ownership schemes (*fonds commun de placement*).

Main features

The Law requires shares or units issued in bearer form to be deposited with a depositary authorised under the Law (the “Depositary”). Persons authorised to act as a Depositary include: credit institutions; asset managers; domiciliation agents; lawyers; auditors; accountants; and notaries.

The Depositary is responsible for maintaining the register of bearer shares in Luxembourg which shall include:

(i) details of the holder of the bearer shares;
(ii) date on which the shares were deposited; and
(iii) details of any transfers of such shares, or their conversion into registered form. The Depositary may not be a shareholder of the company.

The Depositary is responsible for holding the bearer shares on behalf of the shareholders and it is not authorised to transfer those shares, except to the company (in specific instances) or to a successor Depositary.

The holding of a bearer certificate is no longer sufficient evidence of ownership. Ownership of bearer shares is evidenced by a registration in the bearer share register.

The Law amends the law of 5 August 2005 on financial collateral arrangements in providing for the granting of security over bearer shares by way of the registration of a share pledge in the bearer share register.

Upcoming deadlines

The issuers of bearer shares issued prior to the Effective Date are subject to a transitory regime under the Law. **They are required to appoint a Depositary by February 18th 2015**. This includes having filed with the Luxembourg commercial register (*Registre de Commerce et des Sociétés*) and published in the legal gazette (*Mémorial C*) an extract of the decision to appoint the Depositary.

The bearer shares must be deposited with the appointed Depositary by no later than February 18th 2016. Voting rights attaching to bearer shares not deposited within this timeframe shall be suspended until such time as they are deposited.

Bearer shares issued after the Effective Date must comply immediately with the new regime. Therefore, the above mentioned deadlines are not applicable to such shares.

For further information on mandatory immobilisation of bearer shares and units, please see our dedicated Newsflash of January 2015.

SIMPLIFIED PRIVATE LIMITED LIABILITY COMPANY

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

In compliance with the Luxembourg governmental program presented in December 2013, the Draft Law 6777 intends to stimulate the development of the entrepreneurial spirit by creating, for entrepreneurs that are natural persons, a legal structure that not only offers a protection in terms of personal liability, but also enhances their visibility.

Indeed, one of the toughest hurdles to overcome for young entrepreneurs or those that have access to limited resources is constituted by the minimum required capital necessary for the setting up of a company. Henceforth, the Luxembourg government wished to provide, through the creation of the SàrlS, entrepreneurs with a legal structure that will enjoy a simplified, fast and efficient setting-up process and allow for the reduction of costs that the incorporation of a company usually implies.

The main characteristics of the Draft Law 6777 are as follows:

- only natural person(s) shall be authorised to incorporate a SàrlS, which may be created for a limited or unlimited period of time;
- the subscribed corporate capital shall be comprised between Euro 1 and Euro 12,394.68; and
- the management shall be reserved to natural person(s) only.

For further information on the SàrlS please see our dedicated Newsflash of February 2015.

DISPUTE RESOLUTION

BRUSSELS 1 REGULATION – RECAST

Regulation (EC) 44/2001 of December 22nd 2000 on jurisdiction and the regulation and enforcement of judgments in civil and commercial matters (the "Brussels 1 Regulation") has been recast to further facilitate the free circulation of judgments and to further enhance access to justice. Regulation (EU) No 1215/2012 of December 12th 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (the "Recast Regulation") applies from January 10th 2015 (with the exception of Articles 75 and 76 thereof which apply since January 10th 2014).

The Recast Regulation has introduced four notable changes.

Firstly, the Recast Regulation has removed the requirement to obtain a declaration of enforcement (an *exequatur*). Under the Recast Regulation a judgment creditor is only required to present a copy of the judgment and a certificate (as detailed in Annex 1 to the Recast Regulation). However, the Recast Regulation still provides for the various grounds for refusal of recognition and/or enforcement of judgments upon the application of an interested party.

Secondly, the Recast Regulation has strengthened choice of court agreements. Under the Brussels 1 Regulation, where proceedings involving the same cause of action between the same parties were brought in the courts of different Member States, any court other than the court first seised, had to stay its proceedings until such time as the jurisdiction of the court first seised was established. However, under the Recast Regulation, where a court of a Member State on which an agreement confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of that agreement declares that it has no jurisdiction under the agreement.

Thirdly, a rule of international *lis pendens* has been introduced by the Recast Regulation which will allow the courts of a Member State to stay and eventually dismiss proceedings in a situation where a court of a third state has already been seised, either in proceedings between the same parties involving the same cause, or in a related action, at the time the court of a Member State is seised.

Fourthly and finally, while arbitration matters had been excluded from the Brussels 1 Regulation, the Recast Regulation has confirmed the absolute exclusion of arbitration from its scope. When seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, the courts of a Member State may refer the parties to arbitration, stay or dismiss the proceedings or examine whether the arbitration agreement is null and void, inoperative or incapable of being performed in accordance with their national law.

The Recast Regulation is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:En:PDF

INVESTMENT FUNDS

EUSEF AND EUVECA - UPDATE

On September 26th 2014 the European Securities Markets Authority ("ESMA") issued a consultation paper (the "Consultation Paper") on ESMA's technical advice to the European Commission on the implementing measures of the Regulations on European Social Entrepreneurship funds ("EuSEF") and European Venture Capital Funds ("EuVECA").

A number of provisions in the EuSEF and EuVECA Regulations empower the European Commission to adopt Level 2 measures.

For EuSEFs, Regulation 346/2013 provides for Level 2 measures specifying:

- the types of goods and services or methods of production for goods and services embodying a social objective, taking into account the different kinds of qualifying portfolio undertakings and those circumstances in which profits may be distributed to owners and investors to ensure that any such distribution of profits does not undermine its primary objective;
- the types of conflicts of interest managers of qualifying social entrepreneurship funds need to avoid and the steps to be taken in that respect;
- the details of the procedures to measure the social impacts to be achieved by the qualifying portfolio undertakings;
- the content and procedure for provision of information for investors.

For EuVECAs, Regulation 345/2013 provides for Level 2 measures specifying the types of conflicts of interest that managers of qualifying venture capital funds need to avoid and the steps to be taken in that respect.

The Consultation Paper sets out the proposed advice to the European Commission on all of the above items and invited interested stakeholders to submit their responses by December 10th last. The aim is that ESMA will submit their technical advice to the European Commission during April 2015.

Of note in the Consultation paper is the fact that ESMA have allowed the inclusion of some environmental funds into the scope of the EuSEF. The definition of qualifying portfolio undertaking (being an entity in which a EuSEF may invest) does not refer to undertakings concerned with environmental protection but recital 14 of Regulation 346/2013 refers to activities which "*may also concern environmental protection with a social impact.*" ESMA have interpreted this broadly to propose that where an enterprise produces goods or services that have a positive environmental impact like, for example, biodiversity conservation, pollution prevention and waste management and water resources management, it be considered an enterprise embedding a social objective and therefore may be considered (provided certain other conditions are met) as a qualifying portfolio undertaking.

In relation to the steps to be taken to avoid conflicts of interest the Consultation Paper differentiates between the EuSEF and the EuVECA. Since, generally, EuVECA managers are very active in the management of the companies in which the EuVECA is invested the specific conflicts of interest arising from such situation should be taken into account. Therefore ESMA proposes specific rules on the strategies for the exercise of voting rights held in the EuVECA portfolio, similar to those set out in article 37 of the Level 2 AIFM Regulation.

The text of the Consultation Paper can be found at:
http://www.esma.europa.eu/system/files/2014-1182.pdf

CCPS - EQUIVALENCE DECISIONS

Under article 25 of Regulation (EU) No 648/2012 of the European Parliament and of the Council of July 4th 2012 on OTC derivatives, central counterparties and trade repositories ("EMIR") a central counterparty ("CCP") established outside the European Union is entitled to provide clearing services under EU law to EU clearing members and trading venues where it has been recognised by ESMA.

In order to be recognised the non- EU CCP shall meet the following conditions:

- it must be able to perform the clearing obligations of EU counterparties and will also obtain qualifying CCP (QCCP) status across the European Union under Regulation (EU) No 575/2013 (CRR).
- the European Commission must have adopted a positive equivalence decision with regard to the regulatory framework applicable to such CCPs in the third country. ESMA considers regimes equivalent where the legal provisions and the level of supervision and enforcement is similar to that of EMIR.
- at the moment of the request the central counterparty must be authorised and supervised by a regulatory framework considered as equivalent.
- the third country where the CCP is established or authorised must be considered as having equivalent systems for anti-money-laundering and combating the financing of terrorism to those of the EU in accordance with the criteria set out in the common understanding between Member States on third-country equivalence under Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.
- cooperation arrangements must exist between ESMA and the relevant third country supervisory authorities covering supervisory arrangements and the sharing/notification of information.

Within this frame the European Commission started its equivalence assessment in relation to such non-EU CCPs which have applied to receive recognition from ESMA and on October 30th 2014, it adopted four "equivalence" decisions (implementing acts) for the regulatory regimes for CCPs in Australia, Hong Kong, Japan and Singapore.

Following publication of the implementing acts in the Official Journal, CCPs in each of the four jurisdictions will be able to obtain recognition in the EU and be used by market participants to clear standardised OTC derivatives as required by EU legislation, but will nonetheless remaining subject to the sole supervision of their home jurisdiction.

The press release is available at: http://europa.eu/rapid/press-release_IP-14-1228_en.htm?locale=en

EUROPEAN COMMISSION ENDORSES DRAFT RTS ON IRS CLEARING

The European Securities and Markets Authority (ESMA) issued, on October 1st 2014, its final draft regulatory technical standards (RTS) for the central clearing of Interest Rate Swaps (IRS) which it was required to develop under the European Markets Infrastructure Regulation (EMIR) and it submitted them to the European Commission (the "Commission"), for endorsement.

On December 18th 2014 the Commission published a letter making public its decision to endorse the RTS with certain amendments.

The draft RTS define those types of IRS contracts which will have to be centrally cleared, the types of counterparties covered by the obligation and the dates by which central clearing of IRS will become mandatory for them.

Amongst the changes proposed by the Commission the following ones are of most relevance.

Postponement of the starting date of the frontloading requirement

The Commission proposes to postpone the frontloading requirement until the moment where counterparties will have certainty on whether the contracts they enter into are subject to such requirements.

The proposal is to postpone the requirement until two months after the date of entry into force of the RTS for the counterparties falling into Category 1 of the RTS and five months for the counterparties falling into Category 2 of the RTS.

To summarise the main features of the categories above mentioned:

- Category 1 represents the counterparties that are participants in a clearing house, as long as they participate in the clearing of at least one of the classes of IRS subject to the clearing obligation and the CCP of which they are a member has been authorised or recognised under EMIR to clear at least one of those classes of IRS.
- Category 2 comprises counterparties other than Category 1 counterparties, who belong to a group whose aggregate month-end average of outstanding gross notional amount of non-centrally cleared derivatives exceeds €8 billion.

The proposed postponement will allow the Category 1 counterparties to understand whether they benefit from an exemption from the clearing obligation pursuant to article 4.2(a) of the Regulation 648/2012, and, for the Category 2 counterparties, it will give them the necessary time to calculate their threshold to determine whether they are subject to such category.

Clarification of the calculation of the threshold for investment funds

The Commission proposes to include a recital in the draft RTS to clarify that the thresholds for investment funds shall be calculated at the level of a single fund and not at the group level provided that the funds are distinct legal entities that are not collateralised, guaranteed or supported by other investment funds.

Excluding from the scope of the clearing obligation non-EU intragroup transactions

The Commission would like OTC derivatives entered into between two counterparties belonging to the same group to be exempt from the clearing obligation for a period of three years where one of the counterparties is located outside the EU on the basis that equivalence decisions with third parties may only be adopted once the RTS enter into force.

The letter from the Commission is available at www.esma.europa.eu/system/files/rts_for_irs_-_lettre_signee.pdf

And the text of the amended RTS is available at: www.esma.europa.eu/system/files/rts_for_irs_annexe_acte_autonome_nlw_part1_v1.doc

UCITS V - ESMA TECHNICAL ADVICE

On November 28th 2014 the European Securities and Markets Authority ("ESMA") released its final report ("Final Report") in respect of the delegated

acts which shall be adopted by the European Commission within the context of Directive 2014/91/EU ("UCITS V Directive") amending Directive 2009/65/EC ("UCITS Directive").

The UCITS V Directive entered into force on September 17th 2014 and shall be implemented by national parliaments on or before March 18th 2016.

As a reminder, the UCITS V Directive focuses on the remuneration of management bodies, the role of the fund depositaries and on regulatory sanctions.

The UCITS Directive, as amended by the UCITS V Directive, empowers the European Commission to adopt delegated acts in respect of:

(i) the insolvency protection of fund assets when delegating safekeeping tasks and
(ii) the independence requirement.

The aim of the Final Report is to set out ESMA's opinion on the future delegated acts regarding the above issues.

Insolvency protection of fund assets when delegating safekeeping

The principle of insolvency protection, as stated in article 22a(3)(d) of the UCITS Directive, consists in ensuring that "*all necessary steps to ensure that in the event of insolvency of the third party, assets of a UCITS held by the third party in custody are unavailable for distribution among, or realisation for the benefit of, creditors of the third party*".

In this respect, the Final Report proposes, among other things, that the delegated act requires such third party (the "Sub-Custodian") and the main depositary to gather proper legal advice on the jurisdiction where the Sub-Custodian is located, whenever such Sub-Custodian is located outside of the European Union.

In any case, the relevant legal regime, to which the fund assets are subject, must guarantee the proper segregation of assets in case of insolvency of the third party acting as sub-custodian.

The proposed delegated act would also require the Sub-Custodian to report the information in respect to the insolvency protection to the main depositary.

In addition, the investment company or the management company acting on behalf of the fund, would also be required to immediately notify their supervisory authority whenever the jurisdiction of the Sub-Custodian no longer recognises the concept of asset segregation.

Independence requirement

In respect of the independence requirement stated in article 25(2) and 26(b)(h) of the UCITS Directive, as amended by the UCITS V Directive, it is required that the members of the investment company/management company and of the depositary respectively are "*independent*" from each other within the meaning of the UCITS Directive.

In order to enforce such independence, the proposed delegated act, as suggested by the Final Report, prohibits certain compositions of the management board of the investment company/management company and of the depositary. For example, a member of the management body of the depositary cannot be appointed as a member of the management body of the investment company or the management company acting on behalf of a fund.

In addition, situations of cross-shareholdings between the investment company/management company and the depositary will also be regulated in order not to challenge the above principle of independence.

The Final Report is available on ESMA's website: http://www.esma.europa.eu/system/files/2014-1417.pdf

CSSF CIRCULAR 14/598 - COMMON DEFINITION OF EUROPEAN MMFS

On December 2nd 2014 the CSSF issued Circular 14/598 adopting the opinion issued by the European Securities and Markets Authority ("ESMA") on August 22nd 2014 (the "Opinion") on the application of guidelines issued by the Committee of European Securities Regulators ("CESR") in May 2010, on a common definition of European money market funds ("MMF") (Ref. CESR/10-049, hereafter the "CESR guidelines"). The CESR guidelines entered into force on July 1st 2011.

The Opinion was commented upon in a previous article dated August 2014. Circular 14/598 makes the amendments to the CESR guidelines introduced by the Opinion mandatory in Luxembourg.

Thus, when performing its own assessment of whether a money market instrument is of high quality, a management company shall take into account previous ratings of the instrument, carried out by credit rating agencies registered and supervised by ESMA and while there should be no mechanistic reliance on such external ratings, a downgrade below the two highest short-term credit ratings of any agency registered and supervised by ESMA should lead to a new assessment of the credit quality of the money market instrument.

CSSF Circular 14/598 is available at http://www.cssf.lu/fileadmin/files/Lois_reglements/Circulaires/Hors_blanchiment_terrorisme/cssf14_598.pdf

CROWDFUNDING - UPDATE

On December 18th 2014 the European Securities and Markets Authority ("ESMA") published an Opinion (the "Opinion") and an Advice (the "Advice") on investment-based crowdfunding.

The Opinion

The Opinion is addressed to national competent authorities and its aim is to build a common understanding of the main business models of investment-based crowdfunding and the related risks and issues. It clarifies which EU legislation is applicable to the typical business models and under which conditions to provide a basis for consistent supervision.

The Opinion sets out the various actors and business models applicable to investment-based crowdfunding and then goes on to assess the risks and issues that should be considered by regulators in assessing such business models. It is noted that while there are some platforms keen to be within an appropriate regulatory framework in order to increase confidence among users and enable pan-European crowdfunding there are others which structure themselves so as to be outside any applicable regulatory regime.

Regulators need to consider the issues in relation to both the issuance of securities and their distribution. Thus not only the crowdfunding platform may be subject to regulation but also the issuer of the securities.

The Opinion then goes through the various legal provisions which may potentially be applicable to crowdfunding. This analysis covers, inter alia, the Prospectus Directive, MIFID, the Market Abuse Directive, the AIFMD, the EuVECA Regulation and the Distance Marketing of Financial Services Directive.

The Advice

The Advice is addressed to the EU Institutions – the Commission, Parliament and the Council and highlights gaps and issues in the current applicable regime where policymakers could consider taking action. These gaps and issues include:

- The impact of the Prospectus Directive thresholds.
  Currently there are incentives for project sizes to be kept below certain thresholds and for the projects to be limited to certain types of investors in order to avoid coming within the full scope of the Prospectus Directive. This can reduce the viability of the project and reduce the pool of potential investors. ESMA considers that the Commission should consider further the extent to which such points are a problem and options for potential solutions.
- Capital Requirements and the use of the MIFID optional exemption.
  Certain national regimes have considered that the crowdfunding platforms fall within the MIFID exemption thus dis-applying initial capital requirements but also removing the possibility of relying on the EU passport. In addition as business models evolve there could be situations where an activity may in practice be within the scope of multiple requirements. ESMA feels consideration should be given as to how to solve these issues including dis-applying or reducing cumulative capital requirements.
- The potential development of a specific EU crowdfunding regime for those platforms currently operating outside the scope of MIFID.

The text of the Advice and the Opinion can be found at:
http://www.esma.europa.eu/hu/system/files/2014-1378_opinion_on_investment-based_crowdfunding.pdf

http://www.esma.europa.eu/hu/system/files/2014-1560_advice_on_investment-based_crowdfunding.pdf

PRIIPS REGULATION - UPDATE

The European Parliament issued on November 26th 2014 Regulation number 1286/2014 (the "Regulation") on key information documents ("KID") for packaged retail and insurance-based investment products ("PRIIPs"). The Regulation can be found at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2014_352_R_0001&from=EN

The Regulation applies to all products regardless of their form that are manufactured to provide investment opportunities to retail investors where the amount repayable to the investor is subject to fluctuation because of exposure to reference values or subject to the performance of one or more assets which are not directly purchased by the investor.

It sets out uniform rules on the form and information of the KID and on the provision of the KID to retail investors, in order to enable retail investors to understand and compare the key features and risks of the PRIIP. The KID shall be prepared and distributed by PRIIP manufacturers and shall fulfil certain requirements as to the format and content. The aim of the Regulation is to provide retail investors with sufficient and clear information of a similar nature in terms of both content and quality thus increasing competition in the market and transparency for investors.

The Regulation came into force on December 29th 2014 and its provisions will apply as of December 31st 2016 (the "Application Date").

UCITS and non-UCITS for which a document comparable to the UCITS KIID is produced are exempt from complying with the terms of the Regulation at least until December 31st 2019. Other non-UCITS that are sold to retail investors will have to produce a PRIIPs KID as from the Application Date. The European Commission will conduct a review by end of 2018, based on which it will decide whether the transitional arrangements for UCITS should be prolonged or whether the UCITS KIID should be replaced by or considered equivalent to the PRIIPs KID.

The Regulation entitles the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority (the "ESAs") to prepare Regulatory Technical Standards ("RTS") which will contain detailed rules. On November 17th 2014 the ESAs published a discussion paper as a preparatory step for the adoption of RTS. This discussion paper will be followed by a more technical discussion paper and two further consultations in 2015. In parallel, the Commission is launching a market survey. The final level 2 measures will apply from December 31st 2016.

A copy of the discussion paper can be found at http://www.esma.europa.eu/system/files/jc_dp_2014_02_-_priips_discussion_paper.pdf

ESMA – SHARE CLASSES OF UCITS

On December 23rd 2014 the European Securities Markets Authority ("ESMA") issued a discussion paper (the "Discussion Paper") on share classes of UCITS.

Due to diverging national practices as to the types of share class that are permitted in a UCITS, ESMA sees a case for developing a common understanding in this area.

The Discussion Paper sets out ESMA's views on what constitutes share classes, how to distinguish share classes from compartments and provides possible approaches to the extent of differentiation between share classes that should be permitted.

ESMA identified three principles that should be used in assessing the legality of different share classes:

- Share classes of the same UCITS should have the same investment strategy;
- Features that are specific to one share class should not have a potential (or actual) adverse impact on other share classes of the same UCITS; and
- Differences between share classes of the same UCITS should be disclosed to investors when they have a choice between two or more classes.

ESMA's view is that a UCITS or management company seeking to offer different investment strategies should create a separate sub-fund or UCITS for each strategy.

The Discussion Paper sets out a non-exhaustive list of types of share classes that would be compatible with the above principles, including:

- Share classes that differ according to the maximum or minimum investment amounts, or values of holdings allowed to be retained;
- Share classes that differ in terms of the type of investor (e.g. institutional or retail);
- Share classes that differ according to the currency in which they are denominated;
- Share classes that provide currency hedging when share classes are denominated in different currencies from the base currency.

ESMA points out that currency hedging is compatible with the principle of a common investment strategy as such hedging

arrangements are intended to ensure that investors receive as nearly as possible the same results of the investment strategy even though their exposure is through a different currency. However currency hedging should only be possible if it cannot have an adverse impact on the unit-holders of the other share classes of the UCITS and the costs of hedging should only be borne by the unit-holders of the hedged share class.

The Discussion Paper also sets out a non-exhaustive list of types of share classes that do not appear to be compatible with the three principles above, including:

- Share classes that are exposed to different pools of underlying assets;
- Share classes whereby the same underlying portfolio is swapped against different portfolios of assets; and
- Share classes that differ in terms of leverage.

ESMA believes that interest rate hedging performed at the level of share classes does not comply with the principle of having the same investment strategy, because it modifies the investment strategy of the share class.

Via a series of questions ESMA seeks feedback from interested stakeholders. The deadline for responding is March 27th 2015.

The consultation paper is available at http://www.esma.europa.eu/system/files/2014-1577_dp_on_share_classes_for_publication.pdf

AIFMD

ESMA GUIDELINES - ASSET SEGREGATION

Asset segregation is one of the provisions of more relevance when it comes to depositaries under Directive 2011/61/EU of the European Parliament and of the Council of June 8th 2011 on Alternative Investment Fund Managers (the "AIFMD") and it is aimed at improving investor protection.

Under AIFMD, a single depositary must be appointed for each AIF managed by an AIFM and such depositary shall ensure that the assets of the AIFs are held in segregated accounts. However, the segregation rules not only impact the depositary itself but are also of relevance at the level of its delegates, prime brokers and collateral managers.

On December 1st 2014 the European Securities and Markets Authority ("ESMA") issued a Consultation Paper on Guidelines on asset segregation under AIFMD.

The purpose of the paper is to clarify how the segregation requirement shall be complied with at the level of the delegates in case of delegation of the safe-keeping duties by the depositary to a third party.

Indeed, for ESMA, the segregation requirement provided for under Article 99(1)(a) of the AIFMD Level 2 Regulation implies that in case of delegation of safe keeping duties to third parties such third party has to distinguish assets of AIF clients from:

(i) its own assets,
(ii) the assets of any other client of the third party,
(iii) the assets belonging to the depositary itself as well as,
(iv) the assets belonging to clients of the depositary which are not AIFs.

ESMA clarifies that the delegated third party may not hold non-AIF assets in the same account as assets of AIFs.

However questions have been raised as to whether the assets that can be held in the

account are only those coming from the same delegating depositary or, alternatively, whether the account can hold assets for AIF clients coming from different delegating depositaries.

In the consultation paper, ESMA seeks views on two alternative options:

- 1st option. The account in which the AIF's assets are to be kept by the delegated third party (including a prime broker or collateral manager) may only comprise assets of the AIF and assets of other AIFs of the same delegating depositary; or
- 2nd option. A delegated third party holding assets for multiple depositary clients would not be required to have separate accounts for the AIF assets of each of the delegating depositaries.

Via a series of questions ESMA seeks feedback from interested stakeholders. The deadline for responding was January 30th 2015. ESMA intends to finalise the guidelines and publish a final report in the second quarter of 2015.

The consultation paper is available at http://www.esma.europa.eu/system/files/2014-1326_cp_-_guidelines_on_aifmd_asset_segregation.pdf

CSSF FAQ RELATING TO AIFMD - UPDATE

On December 29th 2014 the CSSF issued an update of its Frequently Asked Questions concerning the Luxembourg Law of 12 July 2013 on alternative investment fund managers as well as the Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage transparency and supervision (the "FAQ").

Question 14 relating to "Reporting Aspects" has been updated. The CSSF has clarified that the first reporting shall be submitted by all AIFMs who have been authorised by December 31st 2014 for January 31st at the latest.

The FAQ is also completed with two new sections dedicated to

(i) the marketing of non-EU AIFs to professional investors in Luxembourg without a passport by EU AIFMs on the basis of article 37 of the Law of 2013 and to

(ii) the notification to the CSSF of the acquisition of major holdings and control of non-listed companies on the basis of article 25 of the Law of 2013.

The CSSF has clarified that the marketing of non-EU AIFs to professional investors in Luxembourg without a passport by EU AIFMs, on the basis of article 37 of the Law of 2013, is permitted and is subject to informing the CSSF prior to such marketing and the respect of the Luxembourg Consumer Code. For the purposes thereof the CSSF has made available a special information form on its website. The information provided must also allow the CSSF to identify the entity appointed to carry out the "Depo Lite services" under articles 21(7), (8) and (9) of AIFMD. The FAQ also clarify that a number of different entities could carry out the safe-keeping functions for the same non EU-AIF but that, in the case of the cash monitoring and oversight of operational functions the number of entities per non-EU AIF that can be appointed is limited to a maximum of one entity per duty.

It has been clarified that the requirement to notify the acquisition of major holdings and control of non-listed companies on the basis of article 25 of the Law of 2013 includes, not only every authorised Luxembourg AIFM, but also all non-EU AIFMS marketing AIFs to professional

investors in Luxembourg without a passport. Question 20 further clarifies the definition of a non-listed company and provides the different scenarios under which a notification is required and the information to be notified. For the purposes of making the notification the CSSF has made available a special information form on its website.

Expressly excluded from the information to be notified is any information relating to the acquisition of major holdings and control of non-listed companies which are:

(i) small and medium-sized enterprises falling under the definition of article (2) (1) of the Annex to commission recommendation 2003/361/EC, and
(ii) special purposes vehicles with the purpose of purchasing, holding or managing real estate.

In case where a notification is required same shall occur within 10 working days after the AIF has reached, exceeded or fallen below the relevant threshold.

The FAQ are available at:
www.cssf.lu/fileadmin/files/AIFM/FAQ_AIFMD.pdf

ESMA –UPDATED AIFMD Q&A

On January 9th 2015, the European Securities and Markets Authority ("ESMA") issued an updated version of its Q&A on the application of AIFMD (the "Q&A").

New questions have been added to Section III of the document relating to "Reporting to national competent authorities under Articles 3, 24 and 42 (of AIFMD)" to clarify the data to be reported under the consolidated reporting template.

In relation to subscription and redemption orders the Q&A clarifies that AIFMs should report their value and not their number. Therefore information should be reported for the month of the cash-flows and not the month when the subscription and redemption orders happen unless they happen in the same month.

In relation to the reporting on the change in NAV per month (questions 243 to 254 of the consolidated reporting template) and on the percentage of gross and net investment returns per month (questions 219 to 242 of the consolidated reporting template) the Q&A clarifies that AIFMs should report the information for each month of the reporting period. If no official NAV is available for the calculation, AIFMs should use estimates of the NAV. In some cases (e.g. for AIFs investing in illiquid assets), the best estimate may be the previous NAV.

Finally the Q&A clarifies that where an AIFM manages both funds and funds of funds, aggregated information at the level of the AIFM and information on the AIFs that are funds of funds should be reported no later than 45 days after the end of the reporting period. Information on AIFs that are not fund of funds should be reported one month after the end of the reporting period.

The updated Q&A is available at www.esma.europa.eu/system/files/2015-11_qa_aifmd_january_update.pdf

CSSF URGENT REMINDER - REPORTING DEADLINE

The CSSF issued on January 13th 2015 its press release 15/04 in order to draw the attention of all Luxembourg domiciled AIFMs and of all non-EU AIFMs under article 42 of the AIFMD (i.e. non-EU AIFMs marketing AIFs in Luxembourg without using a passport) to the reporting deadline applicable to them.

Pursuant to the implementing provisions of the AIFMD (including the Law of July 12th 2013 and the CSSF's FAQ concerning AIFMs), the AIFMs which have received their authorisation before December 31st 2014 had until January 31st 2015 at the latest to comply with their first reporting obligation, regardless of their reporting frequency. AIFMs managing AIFs qualifying as "fund of funds" benefit from an additional delay of 15 days.

The reporting file to be submitted by the AIFMs shall comply with the format and the guidelines stated in CSSF Circular 14/581.

The CSSF reminds all impacted AIFMs, or the entity acting on behalf thereof, that they must register a certificate with the CSSF prior to filing their report.

The press release is available at www.cssf.lu/fileadmin/files/Publications/Communiques/Communiques_2015/PR1504_AIFMD_reporting_130115_EN.pdf

CSSF FAQ - IMMOBILISATION OF BEARER SHARES

On December 30th 2014, the Luxembourg Supervisory Authority for the Financial Sector ("CSSF") published its "Frequently Asked Questions in relation to investment funds established in Luxembourg concerning the Law of July 28th 2014 regarding immobilisation of bearer shares and units" (the "FAQ").

The purpose of the FAQ is to draw the investment fund sector's attention to the implications of the law of July 28th 2014 regarding the immobilisation of bearer shares and units (the "2014 Law") for regulated investment fund structures and for investors.

Pursuant to the 2014 Law, all regulated investment funds (which include UCITS, Part II UCIs, SIFs and SICARs) under the corporate form of a *société anonyme* or a *société en commandite par actions* and those which are constituted as *fonds commun de placement* and which issue or have issued bearer shares/units (hereafter the "Impacted Investment Funds") must appoint a depositary which shall keep those bearer shares/units in custody (the "Depositary").

Impacted Investment Funds shall appoint a Depositary **before February 18th 2015** in respect of those bearer shares/units in existence as of the date of entry into force of the 2014 Law (i.e. August 18th 2014).

Impacted Investment Funds issuing bearer shares/units after August 18th 2014 are required to appoint a Depositary **immediately**.

The Depositary can be any entity from the list of regulated professionals enumerated in article 42 (2) of the law of August 10th 1915 on commercial companies as amended by the 2014 Law.

Such list includes, among others, traditional investment fund service providers. Impacted Investment Funds may therefore appoint their current service providers (such as the registrar and transfer agent or the custodian bank).

Non-compliance with the 2014 Law may result in criminal prosecutions against the persons composing the management board of the Impacted Investment Funds.

Investors on their side are required to deposit their bearer shares/units with the Depositary. Bearer shares/units which are not deposited on February 18th 2015 with the Depositary shall have their voting rights suspended and payment of distributions will be deferred. On February 18th 2016, in case of non-compliance with the obligation to deposit, such shares/units shall be cancelled by the Impacted Investment Fund and their value deposited with the Luxembourg *Caisse de Consignation*.

Impacted Investment Funds are required to inform their investors about the deadlines and implications of the 2014 Law by amending their prospectus and also by other adequate means such as the usual means used by the fund to communicate with its unit-/shareholders.

The FAQ are available at the CSSF's website: http://www.cssf.lu/fileadmin/files/Metier_OPC/FAQ/FAQ_Law__28_July_2014_v1.pdf

ESMA - UPDATED Q&A ON ETFS AND OTHER UCITS ISSUES

On January 9th 2015, the European Securities and Markets Authority ("ESMA") issued an updated version of its Q&A on the ESMA guidelines on ETFs and other UCITS issues (the "Q&A").

An additional sub-question has been issued under Question 5 relating to "Financial derivative instruments".

The purpose of such question is to clarify the scope of paragraph 39 of the guidelines on ETFs and other UCITS issues (ESMA/2012/832) (the "Guidelines") which provides that where the counterparty has discretion over the composition or management of the UCITS' investment portfolio or of the underlying of the financial derivative instrument, the agreement between the UCITS and the counterparty should be considered as an investment management delegation arrangement and should comply with the UCITS requirements on delegation.

The updated Q&A indicates that in the case where the role of the counterparty only involves implementing a set of rules and this set of rules is agreed in advance with the UCITS management company and does not allow the exercise of any discretion, the counterparty to the financial derivative instrument will not be considered as having any discretion over the composition of the underlying assets of the financial derivative instrument for the purpose of paragraph 39 of the Guidelines.

The updated Q&A is available at www.esma.europa.eu/system/files/2015-12_qa_etf_guidelines_january_update.pdf

TAX

THE LUXEMBOURG 2015 BUDGET LAWS

The Luxembourg Parliament passed several laws in the framework of the 2015 Budget (hereafter collectively referred to as the "Budget Laws") on December 19th 2015. The Budget Laws include a series of amendments related to direct tax law, indirect tax law and social security law.

Most notably, they include a new procedure for tax clearance letters ("TCL"), the so-called rulings, the increase of certain VAT rates, changes to the minimum corporate income tax, the creation of a temporary 0.5% budget balancing tax for individuals and changes with regard to certain transfer pricing aspects, an overview of which is provided below.

NEW PROCEDURE FOR TAX RULINGS

The Budget Laws introduced a new paragraph (§29a) in the General Tax Law, the *Abgabenordnung*, detailing the TCL procedure applicable from now on, both for tax clearance letters regarding general tax aspects and transfer pricing matters. Paragraph §29a has also been completed by a Grand-Ducal Decree (hereafter the "GDD") dated December 23rd 2014.

As from January 1st 2015, TCLs (that provide for the confirmation of the correct application of tax laws and do not grant moderation or an exemption of the tax due, in accordance with article 101 of the Constitution) filed with the Luxembourg Tax Authorities (hereafter the "LTA") are valid for a period of no more than five years.

The LTA is bound by the TCL, unless it turns out:

(i) that the situation and operations described in the TCL were incorrect or incomplete,

(ii) that the situation and operations finally implemented by the taxpayer differ from the ones on which the TCL was based, or

(iii) that the TCL stops being compliant with domestic, European or international tax laws.

The GDD specifies that, as was previously the case, the TCL needs to be addressed to the Tax Inspector of the relevant tax office or to the Head of the LTA in case no or several tax offices are concerned. The TCL needs to include the following information:

- a precise designation of the taxpayer requesting the TCL , the parties involved as well as their respective activities;
- a detailed description of the seriously envisaged operations that have not yet produced their effects;
- a detailed analysis of the legal issues as well as a motivated opinion on the tax treatment from the taxpayer; and
- a confirmation that all the indications and facts given by the taxpayer are complete and accurate.

The TCLs concerning corporate tax matters are now transmitted to a newly created *Commission des décisions anticipées* (hereafter the "TCL Commission"), whose aim is to assist the tax offices in the uniform application and execution of the tax law.

The TCL Commission can give the possibility to the taxpayer to orally present his case to the Commission, in case it is deemed necessary. Once a decision is reached, it is transmitted by the TCL Commission to the relevant Tax Inspector for execution.

All TCLs will now be published anonymously and in a summarised way in the annual report of the LTA.

It is also to be noted that all TCLs introduced prior to January 1st 2015 that are currently still pending approval will be subject to the same procedure described above.

All TCLs concerning the taxes levied on business income that are introduced starting January 1st 2015 will be subject to a fee ranging from EUR 3,000 to EUR 10,000, depending on the complexity of the TCL, as decided by the Head of the LTA upon receipt of the request. The fee, which is payable within one month, is not refundable and the TCL Commission will start reviewing the request only once payment is received.

The question whether the above fee should be deductible for Luxembourg tax purposes emerged during the discussions around the draft law and it seems that based on the final wording, the fee should be considered as tax deductible for Luxembourg tax purposes, given that its deductibility is not expressly disallowed.

While the formalisation of the TCL procedure is more than welcome, uncertainties still remain with regard to certain aspects of the GDD and especially concerning the exact scope of the restriction regarding operations having not yet produced their effects.

MINIMUM CIT - AMENDMENT

The Minimum Corporate Income Tax (hereafter "Min CIT**"**) as applicable from the year 2013 introduced a two stage approach to determine to which Min CIT a taxpayer was subject.

In a first step, the composition of the balance sheet is analysed, in order to assess whether more than 90% of the assets of the taxpayer are composed of financial assets (financial assets being defined as assets included in the accounts 23, 41, 50 and 51 of the Luxembourg accounting scheme, the *Plan Comptable Normalisé)*.

In case this threshold is met, the taxpayer was subject to a Min CIT amounting to EUR 3,210 (solidarity surcharge included). If not, the taxpayer was subject to a Min CIT depending on the total balance sheet and ranging from EUR 535 (solidarity surcharge included) to EUR 21,400 (solidarity surcharge included).

As of January 1st 2015, the legislator introduced an additional condition, mainly in order to promote start-ups and small enterprises. From now on, in order to be subject to the EUR 3,210 Min CIT (solidarity surcharge included), the taxpayer not only has to have a balance sheet composed of more than 90% of financial assets, but those financial assets also need to amount to more than EUR 350,000.

If the financial assets amount to less than EUR 350,000, the taxpayer now falls into the variable Min CIT. A Min CIT of EUR 535 (solidarity surcharge included) is due where the total balance sheet is equal or lower than EUR 350,000 or a Min CIT of EUR 1,605 (solidarity surcharge included) is due where the total balance sheet is higher than EUR 350,000 and equal to or lower than EUR 388,888.

TEMPORARY BUDGET BALANCING TAX

A temporary budget balancing tax has been introduced starting January 1st 2015. This new tax only concerns individuals and will be levied at a rate of 0.5% on professional and substitute income as well as the income generated from a taxpayer's personal wealth.

This budget balancing tax that is levied jointly by the LTA and the Social Security Centre will be computed on the basis of the income, as taken into account by the Social Security Centre for the

purposes of determining the social security contributions and will, in most cases, be withheld at source.

LIMITATION TO WHT REFUND

In order to bring Luxembourg legislation in line with recent case law of the ECJ (Tate & Lyle Investments Ltd/Belgique, C-384/11 and Com/Allemagne, C-284/09), the possibility to receive a refund of Luxembourg dividend withholding taxes that were in excess of the effective tax due on such income, which was solely available to Luxembourg resident taxpayers, has now been abolished.

From now on, only taxpayers for whom the dividend withholding tax was applied due to the minimum holding period criteria not being met (as required for the application of the domestic dividend withholding tax exemption regime) can still request the refund once such minimum holding period is met.

LUXEMBOURG ADOPTS NEW TRANSFER PRICING LEGISLATION

With the Law of December 19th 2014, known as the "Package for the future", the Grand-Duchy of Luxembourg amended and updated its tax legislation with respect to transfer pricing. In particular, article 56 of the Luxembourg Income Tax Law ("LITL") has been amended and a new paragraph 171 section 3 has been introduced in the General Tax Law (*Abgabenordnung*, "AO"). With the adoption of these two legislative changes, Luxembourg has acknowledged the increasing importance of transfer pricing matters, as recently outlined by the OECD Base Erosion and Profit Shifting project.

The amended article 56 LITL explicitly refers to the arm's length principle to be applied between associated enterprises and contained in article 9 paragraph 1 of the OECD Model Tax Convention on Income and on Capital. The new legislation covers associated enterprises that are in a cross-border situation but also those that are in a purely domestic situation. In both cases, the profits of the associated enterprises are to be determined in accordance with conditions that unrelated parties would have agreed on and be taxed accordingly.

The newly introduced paragraph 171 section 3 AO extends the information, collaboration and documentation requirements of a taxpayer to transactions between associated enterprises. The tax authorities are entitled to request from the taxpayer general information about the transactions involving associated enterprises, and transfer pricing documentation detailing how the arm's length remuneration was determined. The goal of appropriate documentation is to justify that the income and expenses of the Luxembourg entities involved in intra-group transactions and declared in the tax return are comparable to similar transactions between unrelated parties.

Both legislative changes in the transfer pricing area are applicable as from January 1st 2015. If confirmation of the appropriateness of the transfer pricing remuneration, also known as the "margin", is sought with the Luxembourg tax authorities, the new procedure for tax rulings is also applicable to advance pricing agreements ("APAs").

EVALUATION OF CERTAIN BENEFITS-IN-KIND GRANTED BY AN EMPLOYER TO ITS EMPLOYEES

The Luxembourg tax authorities issued a new circular n° 104/1 on November 20th 2014 (hereafter the "Circular"), setting forth the

evaluation rules for certain benefits-in-kind granted by an employer to his employees and replacing the circular of February 18th 2009 on the same topic.

The Circular mainly focuses on the evaluation rules concerning company cars owned or leased by the employer and made available for free or at a reduced cost to his employees for business, as well as private use. Cars owned or leased by the employee himself, even if part or all of the costs are borne by the employer, do not fall within the scope of the Circular.

The benefit-in-kind to be taxed in the hands of the employee is determined by reference to the actual private mileage. The employee has to keep a logbook, recording all private journeys, as well as its home-work route. The private mileage multiplied by the cost price per mile, to be determined by the employer with respect to the type of car, equals the benefit-in-kind granted to the employee.

This valuation rule may however be replaced by a flat-rate method, according to which the monthly benefit in kind shall be deemed to amount to 1.5% of the global purchase price of the vehicle as new, including accessories and VAT.

In case the employee has to contribute towards the costs incurred by the employer, any lump-sum contribution is generally deductible from the value of the benefit in kind, as determined according to the above mentioned rules. However, where the contribution of the employee varies depending on the private mileage, it will only be deductible from the value of the benefit-in-kind if the latter has been assessed on the basis of a logbook.

Any contribution by the employee towards the purchase price of the car will not have any consequences on the flat-rate valuation method of the benefit-in-kind, as described above. It may however, within certain limitations, be deductible, as amortisation costs, from the monthly benefit-in-kind to be taxed in the hands of the employee.

In the event that the employee purchases the car at a preferential price after the period of it having been made available by his employer, an additional advantage might be taxable in the hands of the employee. As compared to the previous circular, the Circular now covers this additional advantage and provides for a simplified valuation, depending on the age of the vehicle. Such valuation is to be compared with the purchase price paid by the employee in order to determine the existence of a possible advantage.

In addition to the rules concerning company cars, the Circular also covers cost-free housing of employees.

NEW PROCEDURE APPLICABLE TO EXCHANGE OF INFORMATION ON REQUEST

On November 25th 2014, the Luxembourg parliament approved the draft law amending the procedure applicable to the exchange of information on request (the "Law") which supersedes the procedure applicable to the exchange of information on request within the frame of double tax treaties of March 31st 2010.

The Law applies to any requests of exchange of information from a tax authority based on:

- a double tax treaty. The procedure is applicable to a request deriving from any treaty country and hence is not limited to the requests deriving from a treaty country where article 26 was amended and extended to information held by banks (for the latter countries the Law does however not provide for an exchange of information held by banks);

- the EU Directive of March 16th 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures;
- the EU Directive of February 15th 2011 on administrative cooperation in the field of taxation and,
- the convention on mutual administrative assistance in tax matters developed jointly by the OECD and the Council of Europe.

Pursuant to the new procedure, the Luxembourg tax authorities are only required to review a request as regards its compliance with the formal conditions provided for in the relevant tax treaty or applicable law. They will no longer control, "*a priori"*, the foreseeable relevance of the request. A control "*a posteriori*" once the information has been collected and before it is communicated to the requesting State is however possible.

The Law aims at ensuring an exchange of information as broad as possible. The holders of information must provide all the information requested without any alteration. An exchange of information for a period before the entry into force of the double tax treaty or the applicable laws is allowed if the requested information is foreseeably relevant for the determination of the taxable income of a year post-entry into force of such double tax treaty or such laws.

The Law also provides that, upon demand from the requesting State, the holder of the information will be forbidden to inform the taxpayer about the existence of the request of exchange of information. In the draft law submitted on April 3rd 2014 (the "Draft Law"), such ban was limited to certain circumstances where the holder of the information was a bank.

Taxpayers are no longer able to appeal against a request of information. The Draft Law did initially allow claims relating to the formal conditions of the request of information; such article has eventually been removed as well as article 6 allowing the Luxembourg tax authorities to decline a request of exchange of information where such an exchange would have led to the disclosure of:

(i) a commercial, industrial or professional secret,
(ii) a commercial process or
(iii) information whose disclosure would be contrary to public policy.

FURTHER STEPS TOWARDS TRANSPARENCY

Since January 1st 2015, the withholding tax on interest income paid by Luxembourg paying agents to individuals resident in another EU Member is abolished and Luxembourg applies the automatic exchange of information as provided for by the EU Savings Directive.

In 2014, the OECD released a global standard for automatic exchange of information in tax matters (the "Global Standard") the purpose of which is the implementation of a mechanism for automatic exchange of financial account information. The Global Standard is built on the intergovernmental agreements ("IGA") concluded between the United States of America (the "USA") and several other countries to implement FATCA.

In this context, on October 29th 2014, 51 jurisdictions including Luxembourg signed a multilateral competent authority agreement (the "MCAA") to automatically exchange information based on article 6 of the convention on mutual administrative assistance in tax matters.

At the European level, the EU Council adopted, on December 9th 2014, a directive revising the directive 2011/16/EU of February 15th 2011 on administrative cooperation in the field of taxation (the "DAC"). Pursuant to the most favoured nation clause included in the DAC, EU Member

States having concluded an IGA with the USA relating to FATCA are under the obligation to provide other EU Member States with the same wider cooperation as the one in place under the IGA. The aim of the revised DAC is to ensure a cooperation between EU Member States as wide as the cooperation with the USA under FATCA and to avoid the conclusion of parallel and uncoordinated agreements by the EU Member States under the most favoured nation clause of the DAC which could lead to distortions detrimental to the functioning of the internal market.

In order to achieve this objective, the financial institutions' reporting and due diligence rules foreseen in the Global Standard have been introduced in the DAC and the scope of the mandatory automatic exchange of information has been expanded to other sources of income such as dividends, capital gains and other financial income and account balances.

The DAC shall be applicable as from January 1st 2016. First reporting under the DAC and the MCAA are expected in 2017.

BEPS - ACTION POINT 4: INTEREST DEDUCTIONS AND OTHER FINANCIAL PAYMENTS

The OECD released its public discussion draft on Action Point 4 of the Action Plan on Base Erosion and Profit Shifting (hereafter "BEPS") concerning interest deductions and other financial payments. According to the OECD, tackling BEPS requires a broader approach to the definition of "interest", in order to limit the risks of new rules being circumvented. As such, the OECD believes that payments:

(i) on all forms of debt,
(ii) that are linked to the financing of a company and
(iii) that are determined by applying a fixed or variable percentage to an actual or notional principal over time,

should be included.

This broader concept also includes so-called "economically equivalent payments" such as arrangement fees and guarantee fees as well as the non-limitative list below:

- amounts equivalent to interest paid under derivative instruments related to an entity's borrowings;
- foreign exchange gains and losses on borrowings; or
- amounts under alternative financing arrangements, such as Islamic finance.

The OECD believes that the most appropriate way to tackle BEPS is to set rules that limit interest deductibility (interest cap rules) based on the amount of interest expenses. In addition, the OECD deems the use of the net position as the interest cap criteria (i.e. that the interest income should also be taken into account) to be the most sensible. In other words, solely the part of the interest expenses that exceeds the interest income should be taken into account for the interest cap. As a result, net interest income recipient entities, such as banks, may remain unconstrained by such cap.

Taking an entity's worldwide group into account for an interest cap rule is also favoured by the OECD, as it allows limiting the shifting of interest expenses into high tax jurisdictions given that each company's ability to deduct intra-group financing expenses will be capped by reference to the wider group's third party interest expenses allocated to it. This leads to the question of how the group's allowable interest expenses should be:

(i) determined and then
(ii) apportioned within the group.

The OECD proposes several approaches to the determination of the allowable interest, such as:

- applying a so-called interest allocation rule (allocation of a group's net third party interest expenses between group entities);
- a group ratio rule (by comparing relevant financial ratios of an entity to its group's ratios);
- a fixed ratio rule; or
- a combination of the above.

With regard to the apportionment, the OECD proposes that a part of the group's net third party debt is allocated to each entity (by reference to either its earnings or its assets values). It is likely that such an allocation would be based on earnings (whether EBIT or EBITDA is still unanswered).

The OECD also favours a time limited carry-forward of the disallowed interest expenses instead of a re-characterization into dividends.

DOUBLE TAX TREATY - CZECH REPUBLIC

An Income tax treaty between Luxembourg and the Czech Republic (the "Treaty") was signed in Brussels on March 5th 2013 and it is applicable on income received after January 1st 2015. It replaces the previous tax treaty dating back to 1991 concluded between the Grand Duchy of Luxembourg and the Czech and Slovak Federative Republic. The new Treaty is largely based on the OECD model tax convention except that the standard withholding tax on dividends is 10%. Moreover, it is 0% of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which directly holds for an uninterrupted period of at least one year at least 10% of the capital of the company paying the dividends.

No withholding tax applies on interest payments. Withholding tax on royalties is 10% but the Protocol to the Treaty provides that if the Czech Republic signs a convention with any other EU Member State which limits the taxation of royalties arising in the Czech Republic to a rate lower than 10%, then this lower rate will automatically apply also to Luxembourg - Czech relations. Further, no withholding tax applies on copyright royalties.

One final interesting point is that the Protocol to the Treaty now complements its article 25 on exchange of information by providing for some further details on the conditions for making a request for information.

The entire text of the Treaty is available in English at the following link: http://www.impotsdirects.public.lu/legislation/legi14/Memorial-A---N_-126-du-18-juillet-2014.pdf and under http://aplikace.mvcr.cz/sbirka-zakonu/SearchResult.aspx?q=51/2014&typeLaw=mezinarodni_smlouva&what=Cislo_zakona_smlouvy in Czech.

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