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BONN STEICHEN & PARTNERS

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SUMMARY

BANKING & FINANCIAL SERVICES

EUROPEAN COMMISSION PROPOSAL FOR A NEW SECURITISATION FRAMEWORK

On September 30th 2015, the European Commission adopted its Securitisation initiative, consisting of a proposal for a Securitisation Regulation (the "Regulation") and a proposal to amend the Capital Requirements Regulation (the "CRR"). The Council of the European Union amended the drafts of these texts, the final form of which was approved on December 8th 2015.

The purpose of the proposed Regulation is to provide a single framework for all securitisation transactions, partially replacing current rules in sector-specific regulation, such as the Credit Rating Agency Regulation and the Alternative Investment Fund Managers Directive. In addition, the proposed Regulation introduces "Simple, Transparent and Standardised" ("STS") securitisations, which would be granted some relief from regulatory capital requirements under the CRR.

The proposed Regulation imposes due diligence rules on the "institutional investor", a definition which includes a broad range of undertakings, such as UCITS management companies, alternative investment fund managers, insurance undertakings and credit institutions. These investors must verify certain information before acquiring a position in a securitisation.

The proposed Regulation also introduces a dual approach risk retention regime. The risk retention requirement is directly imposed on originators, sponsors or original lenders. Absent an agreement, the originator should retain risk (a material net economic interest of at least 5%). The institutional investor should check whether the originator, sponsor or lender has retained risk.

In addition, the proposed Regulation sets out transparency requirements. Originators, sponsors and special purpose entities of a securitisation must provide investors, at a minimum, with certain information, such as a transaction summary and details on the underlying exposures. One of these entities must be designated as responsible for supplying the necessary information to holders of securities and competent authorities.

As mentioned, the proposed Regulation introduces STS securitisations. Securitisations (as defined in the Regulation) are STS if they satisfy certain criteria relating to simplicity, standardisation and transparency. Originators, sponsors and special purpose entities must jointly notify ESMA of compliance with the STS requirements and ESMA publishes the notification on its website. Since STS securitisations are to be supervised by national competent authorities, Member States shall ensure that competent authorities have the necessary supervisory, investigatory and sanctioning powers. For the investors, one of the benefits of the STS status is that regulatory capital requirements for exposures to STS are reduced under the proposed amendments to the CRR.

With some exceptions, the proposed Regulation will apply to securitisations, the securities of which are issued on or after the date it enters into force.

As the next step in the EU legislative process, the Commission's proposals will now go to the European Parliament for its consideration. The three European institutions, the Commission, the Council and the Parliament, will then negotiate a common position, which is expected to take place in the second half of 2016.

EBA RECOMMENDS NEW PRUDENTIAL FRAMEWORK FOR INVESTMENT FIRMS

On December 14th 2015, the European Banking Authority (the "EBA") published a report with recommendations, in response to the European Commission's call for advice on the suitability of certain aspects of the prudential regime for investment firms.

The report highlights three key deficiencies of the current prudential regime, which consists of the Markets in Financial Instruments Directive (MiFID), the Capital Requirements Directive (CRD) and the Capital Requirements Regulation (CRR). These deficiencies are (1) divergent implementations of MiFID rules across Member States, (2) insufficient sensitivity to risk stemming from the size and systemic importance of investment firms, and (3) overly complex and inconsistent categorisations of investment firms under the CRD/CRR regime. As a result, prudential requirements vary widely between firms that conduct similar activities and pose similar risks to market participants, while the differences in nature, scale and complexity of investment activities are only partially captured by the different categorisations.

To remedy these deficiencies, the EBA recommends replacing the activities-based approach with a categorisation that centres around indicators related to systemic importance and financial stability risks. The EBA identifies three categories or 'tiers':

- systemic and 'bank-like' investment firms, to which all CRD/CRR requirements should be applied (tier 1);
- 'non-systemic' investment firms with a more limited set of prudential requirements (tier 2); and
- very small firms with 'non-interconnected' services (tier 3).

In addition, the EBA recommends designing a modified prudential regime for firms in tiers 2 and 3. That regime should include adequate quantitative and qualitative parameters, simplified and proportionate to the specific systemic risks these firms pose. This regime must also pursue the aim of improving the Single Rulebook, which is to provide a set of harmonised prudential rules across the European Union.

The third recommendation of the EBA is to extend the waiver for commodity trading firms from the CRD/CRR framework until the new categorisation is put in place or, at the latest, until December 31st 2020. Under the current rules, commodity firms are exempt from CRR provisions on large exposures and capital adequacy until December 31st 2017. The EBA recommends that regulators assess whether a more proportionate prudential framework would be suitable for these firms.

If the EBA's recommendations are followed by the European Commission, some investment firms could face more stringent prudential requirements, whereas other investment firms could be subject to lighter prudential requirements. The impact of a new prudential regime will also depend on the degree to which it provides Member States with the flexibility to set quantitative or qualitative parameters at the national level.

On December 16th 2015, the European Commission issued a proposal adopting the recommendation to extend the waiver for commodity firms. In this proposal, the Commission stated that finalising the review of the prudential regime and adopting new legislation, to the extent required, will not be done before the end of 2017.

ADOPTION OF THE SECURITIES FINANCING TRANSACTIONS REGULATION

On December 23rd 2015, Regulation (EU) 2015/2365 of the European Parliament and of the Council of November 25th 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) N° 648/2012 (the "Regulation") was published in the Official Journal

of the EU. The Regulation aims to improve the transparency of securities lending and repurchase transactions and applies from January 12th 2016.

As described in one of our previous newsletters regarding the proposal for the Regulation, which was adopted by the European Commission in 2014, the financial crisis has highlighted the need to further regulate not only the traditional banking sector but also areas where bank-like credit intermediation known as “shadow banking” takes place, which may affect the rest of the financial sector.

The Regulation applies to counterparties to Securities Financing Transactions (“SFTs”) and counterparties engaged in reuse of financial instruments under a collateral arrangement established in the EU or (under certain conditions) in third countries, management companies of UCITS, UCITS investment companies and AIFMs.

Such entities shall report the details of SFTs that use assets belonging to the counterparty to generate financing. SFTs usually involve the lending or borrowing of securities or commodities, repurchase (repo) or reverse repurchase transactions, or buy-back/sell-back transactions.

The key requirements set out in the articles of the Regulation comprise:

- counterparties to SFTs having to report the details of any SFT they have concluded to a trade repository (article 4);
- UCITS management companies, UCITS investment companies and AIFMs being obliged to inform investors on the use of SFTs and total return swaps in their regular reports (article 13), as well as in their prospectuses and pre-contractual documents (article 14). This should ensure that investors understand and appreciate the inherent risks before they decide to invest in a particular UCITS or AIF. ESMA is empowered to provide draft Regulatory Technical Standards (“RTS”) specifying further details to be disclosed;
- parties reusing financial instruments received as collateral having to (i) disclose the potential risks in writing, for example those in the event of default of the receiving counterparty and (ii) obtain prior written consent for such assets to be reused. The financial instruments should be transferred from the account of the counterparty (i.e. the reuse should not take place on the counterparty’s own account) (article 15).

The key requirements mentioned above will apply on specific dates after the entry into force of the Regulation or after the adoption of RTS, depending upon the type of counterparty that has entered into a SFT, as follows:

- UCITS managers and AIFMs shall apply the reporting requirement under article 4 of the Regulation 18 months after the adoption of RTS;
- the disclosure requirement of SFTs in regular reports under article 13 shall apply from January 13th 2017;
- the disclosure requirement of SFTs in pre-contractual documents under article 14 will apply from July 13th 2017 in case of UCITS and AIFs constituted before January 12th 2016 (for those UCITS and AIFs constituted after this date the disclosure requirements apply immediately);
- article 15 regarding the reuse of financial instruments shall apply from July 13th 2016, including for collateral arrangements existing on that date.

Lastly, without prejudice to the right of Member States to impose criminal sanctions, Member States shall provide their competent authorities with the power to impose administrative sanctions in case of non-compliance with article 4 (Reporting) and 15 (Reuse) of the Regulation.

CAPITAL MARKETS

CSSF CIRCULAR 15/632 – SUBMISSION OF FINAL TERMS TO THE CSSF

On December 28th 2015, the CSSF published CSSF Circular 15/632 (the “New Circular”) which amends, with effect from January 1st 2016, Circular CSSF 12/539 concerning technical specifications regarding the submission to the CSSF of documents under the law on prospectuses for securities and general overview of the aforementioned law (the “Relevant Circular”), by taking into account changes introduced by the so-called “OMNIBUS II Directive”, Directive 2014/51/EU of April 16th 2014.

Previously, the onus was on the issuer to file the final terms of its base prospectus with the competent authority of the host Member State. Following the changes introduced by the OMNIBUS II Directive to Article 5(4) of the Directive 2003/71/EC of November 4th 2003 on the prospectus to be published when securities are offered to the public or admitted to trading (the “Prospectus Directive”), where the final terms of an offer are neither included in the base prospectus nor in a supplement, the final terms shall be made available to investors, filed with the competent authority of the home Member State and communicated, by that competent authority (rather than by the issuer), to the competent authority of the host Member State(s).

The CSSF has updated the Relevant Circular to reflect that the issuer is no longer required to file documents with the CSSF, if Luxembourg is only the host Member State under the Prospectus Directive. Furthermore, the Relevant Circular, as amended, sets out the specific information which must be included in the subject and body of the email when filing the final terms with the CSSF if Luxembourg is the home Member State. All such filings shall, as from January 1st 2016, be made to a new email address: FT.filing@cssf.lu.

LUXEMBOURG STOCK EXCHANGE - AMENDED RULES AND REGULATIONS

On January 1st 2016, amendments to the rules and regulations of the Luxembourg Stock Exchange (the “Rules”) entered into force. The amendments (which impact parts 1 and 2 and the appendices of the Rules) are the first of such amendments in a new process which has been undertaken by the Luxembourg Stock Exchange (“LxSE”) to update the Rules for the purposes of, *inter alia* making them compliant with the national and EU regulations (including the new Transparency Directive 2013/50/EU (the “Amending Transparency Directive”) and the Regulation (EC) 809/2004 (the “Transparency Regulation”)) and bringing them in line with new practices and requirements of the market and its operators.

Some of the more important amendments include the following:

1. References to repealed and obsolete laws and regulations have been removed. As a consequence, Appendix VI has been replaced in its entirety with a new schedule for investment funds,

2. Ambiguities and inconsistencies in the Rules have been rectified by updating the terminology in the Rules to reflect the wording of applicable laws and regulations (in particular the Transparency Regulation),

3. *The Banque Ouest Africaine de Développement* has been added in Appendix VII of the Rules, which lists the supranational institutions and organisations exempt from the obligation to publish a prospectus for the admission to trading on a market regulated by the LxSE,

4. Documents which under the Rules must be made available by issuers to investors need now only to be accessible in electronic format; the reference to “Luxembourg” as the place where such documents must be made available has been removed,

5. The requirement imposed on issuers trading on the Euro MTF to inform the public of new issues of debt securities traded on a market other than one operated by LxSE (including any related guarantee), is no longer applicable. The removal of this disclosure requirement is in line with a similar amendment to the disclosure requirements applicable to issuers of securities admitted to trading on a regulated market, pursuant the Amending Transparency Directive,

6. Special rules or exceptions have been introduced for securities with a denomination per unit of at least EUR 100,000 (in conformity with similar exceptions under the Transparency Regulation),

7. Certain disclosure obligations with respect to information which must be included in a Euro MTF listing prospectus have been reduced, to bring them closer in line with the disclosure obligations under the Transparency Regulation. The list of information (mostly set out in Appendices III and V of the Rules) to be included in (or attached to) a prospectus for the admission to trading of securities on the Euro MTF has been updated. Of particular note, an issuer is no longer required to attach both consolidated and non-consolidated annual accounts; if it prepares both, it is obliged to include only the consolidated annual accounts; Furthermore, the issuer no longer has to supply data on all companies in which it holds at least 10%, but instead only on its main subsidiaries.

The final text of the 2016 edition of the Rules is available here: Luxembourg Stock Exchange | Listing Requirements

TRANSPARENCY LAW – CSSF ENFORCEMENT

The CSSF has published Press Release 16/02 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 preparing their 2015 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 2016.

The first set of topics which will be included in the CSSF 2016 enforcement campaign are European common enforcement priorities which were defined by ESMA in a public statement on October 27th 2015. These topics are:

- the impact of the financial market conditions on the financial statements;
- the statement of cash flows and related disclosures; and
- the fair value measurement and related disclosures.

Also included in the CSSF's enforcement campaign are a number of topics identified directly by the CSSF as being items of interest.

These topics are the following:

- IFRS standards on consolidation
  Newly issued or amended standards relating to consolidation are mandatory since January 1st 2014 and based on 2015 campaign on the application of these standards, the CSSF identified some specific issues regarding these. These were, first, the growing importance of judgment in determining control according to IFRS 10 "Consolidated Financial Statements" especially when the analysis of other facts and circumstances is necessary; second, the investment entity's status and its impact on the consolidation of data and the adequacy of disclosures about, in particular, the fair values; or lastly, the potential difficulty in classifying joint arrangements as either joint operations or joint ventures based on existing rights and obligations and the impact on the accounting for these transactions. The CSSF will pay close attention again this year to how these standards are applied.

- Deferred tax assets according to IAS 12 "Income taxes"
  As it also did last year the CSSF will closely monitor the recognition and measurement of deferred tax assets, with a particular focus on the recognition of deferred tax assets following deductible tax losses as well as the existence and valuation of future taxable profits; and

- The quality of disclosures in financial statements
  The CSSF intends to pay special attention to the relevance and specificity of the information to be provided by issuers under IFRS in their financial statements. While ESMA and IASB (International Accounting Standards Board) have each taken initiatives through publishing statements and conducting projects to improve the quality of disclosures, the CSSF has confirmed that it considers that the existing IFRS already ensure the relevance and specificity of information to be provided.

EUROPEAN COMMISSION PROPOSAL FOR A PROSPECTUS REGULATION

On November 30th 2015, the European Commission published its proposal for a Prospectus Regulation (the "Regulation"), which will, if adopted, replace the existing Prospectus Directive (Directive 2003/71/EC). With this proposal, the Commission aims to make it easier for companies in Europe to raise funding on the capital markets, to provide all types of issuers with disclosure rules tailored to their needs, to make the prospectus a more relevant disclosure tool for investors and to achieve convergence between the prospectus regime and other disclosure regimes.

Key revisions of the proposed Regulation are:

- Increase of the threshold to determine when a company must issue a prospectus. Under the proposed Regulation, all capital raisings under EUR 500,000 (increased from EUR 100,000) will not require a prospectus. Furthermore, with respect to domestic offers for which no EU passport is sought, Member States may set higher thresholds up to EUR 10 million (increased from EUR 5 million).
- Smaller companies will only need to produce a lighter prospectus. The threshold for availing of this lighter prospectus has been increased from EUR 100 million market capitalisation to EUR 200 million market capitalisation.
- Widening of the range of situations where a lighter prospectus may be used by an issuer or an offeror who has already listed on a public market. Furthermore, no prospectus will be required for the admission to trading of securities fungible with securities already admitted on the same market if they represent less than 20% of the number of the already admitted securities, calculated over the last 12 months. Previously, the exemption only applied to shares and the threshold was set at 10%.
- Abolition of the exemption for non-equity securities (wholesale debt securities) with a denomination of EUR 100,000. While this exemption was originally introduced in order to protect retail investors, it incentivised investment-grade issuers to only issue non-equity securities with denominations of EUR 100,000 which had the unintended consequence of reducing secondary market liquidity and limiting the portfolio diversification of investors.
- Movement towards shorter and clearer prospectuses and avoidance of duplication of information already published: with respect to the summary of the prospectus, the length restriction will be reduced (6 sides of A4-paper) and shall be composed of four sections (an introduction containing warnings and three sections on key information on (i) issuer/offeror/person asking for admission (ii) the securities and (iii) the offer itself and/or the admission to trading. As regards the content of the rest of the prospectus, the risk factors shall be limited to those specific to the issuer and its

securities, and conditional on them being material (based on probability of occurrence and expected magnitude of impact) for taking an informed investment decision. The range of information that may be incorporated by reference will be expanded.

- Availability by ESMA of all approved prospectuses online to provide more choice and means of comparability for investors.
- For frequent issuers, the introduction of an annual universal registration document which will speed up approval times as the competent authority being able to review the remaining documents (securities note and summary) within 5 working days instead of 10.

Introduction of a new requirement for third-country issuers to designate a representative established in its home Member State (within the meaning of the proposed Regulation) who shall be the contact point of the issuer for purposes of, and shall be jointly responsible for ensuring compliance with, the proposed prospectus rules.

The proposed Regulation will be sent to the European Parliament and the Council for adoption under the co-decision procedure.

CORPORATE

LIABILITY OF LIQUIDATOR - CASE LAW UPDATE FROM THE "*COUR D'APPEL (CIVIL)*" OF APRIL 2ND 2014

The decision of the Court of Appeal *(Cour d'Appel)* is made upon referral back to the lower court following an order to re-try by the Supreme Court (*Cour de Cassation*) of February 7th 2013, which has already been discussed in the BSP Newsletter of September 2013.

The Court of Appeal had to consider whether the liquidator of a solvent construction company should have anticipated - by way of a provision or insurance coverage - a compensation obligation for possible construction defects appearing after the closing of the liquidation but within the ten-year constructor's warranty period.

It was held that the liquidator should not have distributed all remaining corporate assets if he has or should have had knowledge of contingent liabilities even though they might not be certain yet. In the case at hand, the liquidator was previously managing director of the construction company and was personally attending the acceptance of the relevant works back in June 1999. This is why the liquidator should have known about the liability risk in respect of potential defects of the works.

Therefore, the Court of Appeal concluded that, when the liquidator decided to distribute the assets of the company (in liquidation) in April 2003, he committed a fault in light of article 149 of the Law of August 10th 1915 on Commercial Companies, as amended (the "LSC") by not creating a reserve for contingent liabilities arising from the ten-year warranty granted by the constructing company prior to its liquidation.

It is irrelevant that articles 144 to 148 of the LSC do not expressly provide for a general obligation of

the liquidator to make a provision for contingent liabilities.

Moreover, the liquidator being aware of the scope of works carried out may not argue that he was unable to determine the exact amount to be set aside as he should have made an approximate estimation of any liability potentially arising under the constructor's warranty.

Finally, the Court considered that the liquidator may not be discharged from its obligation by the fact that the owners could get insurance for the same risk at the beginning of the construction and that subsequently insurance companies do not offer risk coverage anymore.

Consequently and before the appointment of the liquidator, his position within or towards the company to be put into liquidation should be carefully assessed, especially regarding his knowledge or potential knowledge of contingent liabilities of the company. Furthermore, the attention of liquidators should be drawn in any event to statutory and contractual warranty provisions or other pitfalls, which may be the source of liquidators' liabilities according to article 149 of the LSC.

DISPUTE RESOLUTION

PROPOSED AMENDMENT TO THE CODE OF CRIMINAL PROCEDURE

The Minister for Justice has proposed a new draft law N^{o} 6887, dated October 7th 2015 (the "Draft Law") to insert a new paragraph 6 to Article 3 of the Code of Criminal Procedure. This new provision provides that the absence of a criminal conviction does not preclude the exercise of an action before the civil courts to claim compensation for damages pursuant to the rules of civil law. In practice, this amendment will bring an end to the theory of the unicity of civil and penal offences which has prevailed in courts until now. Consequently, the Draft Law, if adopted, will significantly expand the range of situations where victims will be entitled to indemnification.

FUNDS

PRIIPS REGULATION – UPDATE

On November 11th 2015, the Joint Committee of the European Supervisory Authorities ("ESAs"), consisting of the European Banking Authority ("EBA"), the European Insurance and Occupational Pensions Authority ("EIOPA") and the European Securities and Markets Authority ("ESMA"), published its Joint Consultation Paper on Key Information Documents ("KIDs") for Packaged Retail and Insurance-based Investment Products ("PRIIPs") (the "Consultation Paper").

The purpose of this Consultation Paper is to collect stakeholder views on the Regulatory Technical Standards ("RTS") on the presentation and content of the KID in accordance with Regulation (EU) N° 1286/2014 (the "PRIIPS Regulation").

The draft RTS contained in the Consultation Paper refer to three articles of the PRIIPS Regulation: (i) the presentation and content of the KID, including the methodologies underpinning the presentation of risks, rewards and costs, under article 8(5); (ii) the requirements for the revision and republication of KIDs, under article 10(2); and (iii) the requirement for the KID to be provided in a timely fashion to retail investors, under article 13(5).

Regarding the presentation of the KID, the draft RTS include four annexes which contain a mandatory template for the KID and proposed methodologies underpinning the presentation of risks, rewards and costs.

A summary risk indicator is required in the risk and reward section of the KID, as a guide to the level of risk of the product. A methodology is also included for the assignment of each PRIIP to one of the seven classes contained in the summary risk indicator and for the inclusion of narrative explanations, and for certain PRIIPs, additional warnings. Further, the draft RTS include requirements and formats on the presentation of performance scenarios and costs.

For products offering multiple investment options ("MOP") that cannot be presented in a single stand-alone KID two options will be possible: (i) produce separate KIDs for each option containing information about the PRIIP in general and about the option in particular and (ii) produce a generic PRIIP and then in a separate document(s) produce the specific information about the options.

According to the draft RTS, the KID shall be reviewed and revised and re-published as necessary at least on a yearly basis and ad hoc revisions shall be conducted when necessary. The draft RTS provide that retail investors shall receive the KID in good time. The timing of the delivery of the KID may vary depending on the needs of retail investors and the PRIIP in question but it should be sufficiently early for the retail investor to read and consider it before being bound.

Once implemented, the KID aims to ensure that retail investors receive sufficiently clear and understandable information, in order to be able to compare PRIIPs across the EU and make better informed investment decisions.

The ESAs have also held a public hearing on KID for PRIIPs in Frankfurt on December 9th 2015 in support of the Consultation Paper. The closing date set in the Consultation Paper for stakeholder input is January 29th 2016.

The RTS and accompanying impact assessment will be submitted for endorsement by the European Commission by March 2016. The ESAs shall also publish their final feedback on the Consultation Paper at this time.

By January 1st 2017, PRIIPs manufacturers must prepare and publish KIDs for each PRIIP they manufacture and from that date, the entities

selling or advising on PRIIPs (banks, insurance or securities firms) must provide KIDs to retail investors.

A copy of the Consultation Paper is available at: https://www.eba.europa.eu/documents/10180/1268855/JC+2015+073+CP+PRIIPs+Key+Information+Documents.pdf

RESERVED ALTERNATIVE INVESTMENT FUND (RAIF)

On November 27th 2015 the Luxembourg Council of Government approved the draft law relating to Reserved Alternative Investment Funds (the "Draft Law"). The Draft Law was then approved by the Chamber of Deputies on December 14th 2015 and published on December 15th 2015. The next steps will be the approval of the Draft Law by the Luxembourg Parliament which is expected to be done smoothly at the beginning of 2016 with the new law ideally entering into force during the second quarter of 2016.

RAIFs are unregulated alternative investment funds, similar to specialised investment funds, which will have to appoint an authorised alternative investment fund manager ("AIFM"). RAIFs are designed to avoid a second layer of supervision at the level of the fund. Some investors feel that the level of regulatory supervision that comes with the appointment of an authorised AIFM already gives enough comfort. The Luxembourg legislature wishes to provide promoters with the possibility to create an investment vehicle swiftly without burdening it with further supervision requirements.

The idea is to provide Luxembourg with a flexible unregulated vehicle which does not need to go through the steps necessary to obtain CSSF authorisation and is not subject to on-going supervision requirements but, at the same time may be marketed by its authorised AIFM in other European jurisdictions. The units of a RAIF are restricted to well-informed investors, similar to a SIF or a SICAR.

A. RULES APPLICABLE TO RAIFS

RAIFs will not be subject to CSSF supervision. They will not go through the process of authorisation that regulated vehicles undergo.

RAIFs should appoint an authorised AIFM in Luxembourg or abroad.

RAIFs may be fiscally treated as SIFs (i.e. subject only to an annual subscription tax of 0.01% depending on their investment policy) if they respect the risk diversification limits applicable to SIFs. RAIFs may be fiscally treated as SICARs if they invest in risk capital. In that case RAIFs will not be subject to any risk diversification limits.

RAIFs should appoint a Luxembourg based central administrative agent, depositary bank and an external auditor.

RAIFs may be constituted with multiple compartments, each compartment corresponding to a distinct part of the assets and liabilities of the RAIF. As with SIFs and SICARs the assets and liabilities relating to one compartment are ring fenced from assets and liabilities relating to other compartments unless expressly stated otherwise.

RAIFs may be established as investment companies with variable share capital or with fixed share capital or mutual funds *(fonds commun de placement*).

B. MARKETING PASSPORT

The AIFM of a RAIF shall be able to market the units or shares of that RAIF to professional investors in its home Member State. Such AIFM shall also be able to market the units or shares of that RAIF to professional investors in Member States other than the home Member State of the AIFM upon complying with the same type of notification procedure as is applicable to AIFs pursuant to the AIFMD.

C. CONCLUSION

The creation of a new investment fund framework has been conceived to facilitate the set-up of alternative investment funds and to respond to the needs of promoters, without the disadvantages of being subject to supervision and regulation by the CSSF.

CSSF REGULATION 15/03 - MARKETING OF FOREIGN AIFS TO RETAIL INVESTORS

The CSSF released on December 2nd 2015 Regulation 15/03 (the "Regulation") laying down general rules for the application of article 46 of the law of July 12th 2013 on alternative investment fund managers (the "AIFM Law") in respect of the marketing of foreign alternative investment funds ("AIFs") to retail investors in Luxembourg (the "Retail Investors").

The purpose of the Regulation is to clarify the requirements to which foreign AIFs contemplating the marketing of their units or shares to Retail Investors are subject.

It shall apply to each AIF established in a Member State of the European Union ("EU") other than Luxembourg or in a third country, that wishes to market its units or shares to Retail Investors in Luxembourg and which:

- is managed by a Luxembourg alternative investment fund manager ("AIFM") authorised under the AIFM Law; or
- is managed by a EU AIFM authorised under the AIFMD; or
- is managed by a third country AIFM authorised under the AIFMD (once such authorisations are permitted).

In addition and for the purpose of the Regulation, investors shall not qualify as Retail Investors within the meaning of the Regulation, if such investors are well-informed investors within the meaning of Luxembourg fund laws or qualify as eligible investors within the meaning of either EU Regulation 345/2013 ("EUVECA Regulation"), EU Regulation 346/2013 ("EUSEF Regulation") or EU Regulation 2015/760 ("ELTIF Regulation").

Such foreign AIFs shall apply for authorisation with the CSSF in order to be marketed to Retail Investors by submitting an application file which shall include the following elements:

- Proof of authorisation and supervisory control of the AIF in its home country;
- An addendum which shall be appended to the AIF's issuing document or prospectus for the attention of Retail Investors. Such addendum shall include the information set out in article 5(1) §2 of the Regulation;
- The AIF's last annual report;
- Information on the AIF's managers;
- A draft agreement between the AIF and the Luxembourg paying agent;
- Information on the Master-feeder structure (if relevant);
- Any other information that the CSSF may deem useful.

The foreign AIF shall also comply, *inter alia*, with the following requirements:

- Redemption and subscription prices must be determined at least once a month;
- Risk spreading and borrowing requirements at least as stringent as those set out in the Regulation;
- Appointment of a Luxembourg-based credit institution which shall act as paying agent.

The above requirements are without prejudice to the notification requirements set out in the AIFM Law which are applicable to all foreign AIFs (including those that do not target Retail Investors) marketing their units or shares in Luxembourg.

The Regulation can be found on the CSSF's website at: http://www.cssf.lu/en/supervision/ivm/aifm/regulation/laws-regulations-and-other-texts/

CSSF CIRCULAR 15/627 – EXTENSION OF MONTHLY REPORTING TO SICARS

On December 3rd 2015, the CSSF published Circular 15/627 (the "Circular" or the "New Reporting Regime") the purpose of which is to replace the current monthly reporting obligations applicable to undertakings for collective investment within the meaning of the law of December 17th 2010 ("UCIs") and to specialised investment funds within the meaning of the law of February 13th 2007 ("SIFs") pursuant to IML Circular 97/136 and CSSF Circular 07/310, as amended by CSSF Circular 08/376 (the "Previous Reporting Regime") and to extend such requirements to SICARs (as defined below).

The New Reporting Regime enters into force immediately. Nonetheless, the transitional provisions of the Circular require that the first report drafted in accordance with the New Reporting Regime shall be submitted on **June 30th 2016**. At such date, the Previous Reporting Regime ceases to be applicable.

Investment companies in risk capital within the meaning of the law of June 15th 2004 ("SICARs"), which were out-of-scope of the Previous Reporting Regime, must now comply with the monthly reporting requirements laid down in the Circular in addition to the reporting requirements under Circular 08/376.

In respect to the content of the New Reporting Regime, the Circular requires reporting entities to henceforth use the U 1.1 reporting table which is appended thereto. The U 1.1 reporting table is largely inspired from the O 1.1 reporting table used under the Previous Reporting Regime. However, it increases the level of content required by the CSSF which shall use such data for statistical and supervisory purposes. More comprehensive information on net return per share/unit, distributions made to investors, the source of the entity's income, and more general information on the entity itself, is now required.

In addition, the U 1.1 reporting table shall now be provided electronically to the CSSF through the standard communication channels (such as E-file) by using the Extensible Markup Language ("XML") format for standardisation purposes. Technical details are further described in the guide provided by the CSSF on its website: http://www.cssf.lu/en/supervision/ivm/uci/legal-reporting/

Subject to the above transitional provisions, impacted entities shall provide the monthly reports under the New Reporting Regime within ten calendar days after the end of the relevant month. For umbrella entities, there shall be one report per sub-fund but no consolidated report is required for the umbrella entity itself.

The Circular can be found on the CSSF's website at: http://www.cssf.lu/en/supervision/ivm/uci/regulation/circulars/

CSSF FAQ ON UCI LAW

On December 8th 2015, the CSSF published the first version of Frequently Asked Questions ("FAQs") concerning the Luxembourg Law of December 17th 2010 relating to undertakings for collective investment (the "UCI Law"). The aim of the FAQs is to highlight some of the key aspects of the laws and regulations governing undertakings of collective investments in transferable securities ("UCITS") from a Luxembourg perspective.

The first section of the FAQs refers to the eligibility of assets for UCITS while the second section refers to diversification rules applied to UCITS.

SECTION 1- ELIGIBILITY OF ASSETS FOR UCITS

As confirmed in the FAQs, target UCITS are eligible investments for UCITS if such target UCITS do not themselves invest more than 10% in aggregate of their net assets in units of UCITS or other UCIs as foreseen under article 41 (1) e) 4th indent of the UCI Law.

The FAQs also include a chart, which explains the steps to be considered in determining if the investment in another UCIs is eligible for UCITS, taking into consideration whether such UCIs are closed-ended or open-ended, regulated or not, as well as their origin.

It is worth noting that open-ended SIFs and SICARs, which are AIFs, and Part II UCIs are eligible investments for UCITS within the 30% limit of article 46(2) of the UCI Law provided that such SIFs, SICARs and Part II UCIs comply with the requirements of article 2(2) and 41 (1) e) of the UCI Law. The same applies to regulated open-ended UCIs from other EEA states and third countries.

With respect to non-UCITS ETFs, they qualify as eligible investments as long as they comply with the requirements of article 2(2) and 41 (1) e) of the UCI Law, notwithstanding that their offering documents grant possibilities which are not equivalent to requirements applicable to UCITS. However, UCITS investing in such ETFs must continuously ensure that the investment rules applied at ETF level are equivalent to the investment rules applicable to UCITS. This can be done via a system of compliance control or a written confirmation of the ETF or its manager.

Regarding the eligibility of structured financial instruments, the FAQs describe the analysis that shall be performed in order to assess whether such instruments comply with the investment policy of UCITS.

Moreover, the CSSF confirms that the OTC bond markets such as the US OTC Fixed Income Bond Market, the Hong Kong OTC Corporate Bond Market and the China Interbank Bond Market and the OTC bond market organized by the International Capital Market Association (ICMA) are eligible markets for UCITS.

In addition, the FAQs clarify that the 10% limit of article 41 (2) of the UCI Law ("trash ratio") may include only investments in transferable securities and money market instruments other than those referred to in article 41 (1) a) to d) and h) of the UCI Law.

The FAQs further indicate the applicable provisions in order for a financial index to qualify as a financial index under article 41 (1) g) of the UCI Law.

SECTION 2 - DIVERSIFICATION RULES APPLIED TO UCITS

The CSSF now clarifies that the holding limits applicable to UCITS under article 48 (2) of the UCI Law shall apply at a sub-fund level and not at the level of the umbrella. This clarification will certainly be welcomed by fund actors as there has been a long lasting uncertainty on this subject.

ESMA UPDATES Q&A ON AIFMD

The European Securities and Markets Authority ("ESMA") published in December two updated versions of its questions and answers ("Updated Q&A") on the application of the Alternative Investment Fund Managers Directive ("AIFMD"). The primary focus of first update of the Q&A published on December 2nd 2015 relates to clarifications on the reporting requirements. The second, published on December 15th 2015 answers questions relating to the depositary liability regime.

REPORTING

ESMA has *inter alia* provided the following clarifications:

- When reporting on the jurisdictions of the three main funding sources, an AIFM should include all liquidity that is made available to an AIF, unless it originates from the payment of subscriptions related to units or shares of the AIF bought by investors.
- With regard to categorising loans as either leveraged or other loans, all leveraged loans should be classified as leveraged loans, whether syndicated or not.
- When reporting information on collateralised/secured cash borrowing – via (reverse) repo - the AIFM should also report cash from repurchase agreements as cash borrowings.
- ESMA clarified that AIFMs may exclude investments of AIFs in other AIFs they manage for the purpose of calculating the total value of AUM to ensure that there is no duplication of AUM.
- When reporting information on investment strategy, AIFMs should take into account the investment strategy of an AIF that has been disclosed to investors in the fund rules or other offering documents.
- AIFMs should determine the geographical focus of assets in which they invest such as stocks, bonds or financial derivatives. It has been confirmed that AIFMs should take into account the domicile of the company/entity to which the AIFs have an exposure. As an example, when an AIF invests in stock of a company domiciled in Europe but traded in the US, the geographical area would be Europe.
- When reporting information on leverage, AIFMs should report a percentage rather than a ratio.
- When reporting the investment strategy of a feeder AIF, ESMA expects that in most instances, feeder AIFs will have the same investment strategy as the master AIF, unless the investments made by the feeder AIF in other assets make the resulting strategy different.
- The disclosure of information on the liquidity profile of an AIF by the AIFM is mandatory.

DEPOSITARY LIABILITY

In the Updated Q&A of December 15th 2015 ESMA confirmed, that the depositary remains liable in the case of assets for which the depositary has safe-keeping duties on a look-through basis. For financial instruments held in custody to which the look-through requirements apply, the depositary is subject to the strict liability regime under article 21(12) AIFMD. For other assets to which the look-through requirements apply the depositary is subject to liability for losses suffered as a result of its negligent or intentional failure to properly fulfil its obligations. Neither the look-through approach nor liability provisions apply in the case of fund of funds or master-feeder structures provided they have a depositary which safe-keeps the fund's assets appropriately.

ESMA Q&A on reporting requirements is available at:
https://www.esma.europa.eu/sites/default/files/library/2015-1786_qa_aifmd_december_2015.pdf

ESMA Q&A on depositary liability regime is available at:
https://www.esma.europa.eu/sites/default/files/library/esma-2015-1873_qa_aifmd_15_dec_2015.pdf

UCITS V UPDATE – LEVEL 2 REGULATION ON DEPOSITARY OBLIGATIONS

On December 17th 2015, the European Commission adopted the long-awaited official draft of the Level 2 Regulation, supplementing Directive 2009/65/EC of July 13th 2009 (the "UCITS Directive") as amended by Directive 2014/19/EU of July 23rd 2014

(the “UCITS V Directive”) (the “Regulation”), with regard to the obligations of UCITS depositaries.

The aim of the Regulation is to ensure uniform and effective compliance with the UCITS Directive across EU Member States with regard to the rules applicable to UCITS depositaries.

In order to ensure consistency between the UCITS Directive and Directive 2011/61/EU, on alternative investment fund managers (the “AIFMD”), the provisions of the Regulation are as close as possible to the provisions contained in the Level 2 Regulation 231/2013 supplementing the AIFMD.

The aim of the Regulation is to ensure the highest protection of UCITS assets through the provision of precise and unequivocal rules on depositaries and third parties to whom the safekeeping functions have been delegated. By virtue of such rules, UCITS investors will enjoy the same level of protection across the EU when it comes to the safekeeping of their assets with a UCITS depositary.

More specifically, the Regulation sets out detailed rules for UCITS depositaries relating, *inter alia*, to:

- contractual provisions to be included in depositary agreements;
- general requirements on the depositaries’ oversight duties;
- cash flow monitoring;
- safekeeping duties with regard to assets held in custody;
- ownership verification and record keeping duties with regards to other assets (such as derivatives contracts);
- potential discharge of liability in case of loss of financial instruments held in custody;
- initial and ongoing due diligence requirements regarding the selection of sub-depositaries; and
- segregation of assets.

Furthermore, the Regulation sets out independence requirements at the level of the management company and the depositary. Thus, it is proposed that no person may be a member of the management body of the management company and a member of the management body of the depositary at the same time.

The Regulation also sets out rules on conflicts of interests in order to ensure that a UCITS asset manager and a UCITS depositary act independently. However, according to the principle of proportionality, more incisive measures, such as the requirement of a strict structural separation between an asset manager and its depositary are discarded in favour of less incisive, but equally efficient, requirements as to the independence of management boards of both entities. Equally, in relation to the “insolvency proofing” of assets in case of delegation to a third party, the strict requirement of an independent legal opinion is mitigated by allowing the sharing of such opinions between several members of an industry federation.

The Regulation will now be reviewed by the Council of the EU and the European Parliament. If the EU institutions do not raise any objections, the Regulation will be published in the Official Journal of the EU. The Regulation shall enter into force 20 days following the day of its publication and shall apply directly in all Member States 6 months after its entry into force without the need for transposing legislation.

ELTIF

On December 9th 2015, Regulation (EU) 2015/760 of the European Parliament and the Council of April 29th 2015 on European long-term investment funds (the “Regulation”) became directly applicable in each Member State of the European Union. The Regulation creates a new investment fund

framework - the European Long-Term Investment Fund ("ELTIF").

The Regulation establishes a new kind of long-term investment fund for professional/institutional and retail investors enabling them to invest in long-term infrastructure projects. The existence of ELTIFs should boost the finance available to companies in search of long-term capital for projects relating to energy, transport but also social housing, schools and hospitals. We refer you to our legal alert which provides further information in this regard.

On December 21st 2015, the CSSF released a dedicated application form on its website for an authorisation as a European Long-Term Investment Fund (ELTIF) and an authorisation to manage the ELTIF. The form can be accessed at the following link:
http://www.cssf.lu/en/supervision/ivm/eltif/forms.

ALFI, the Luxembourg funds association has also published a helpful explanatory brochure on ELTIFs available at:

http://www.alfi.lu/sites/alfi.lu/files/ALFI-ELTIF-final.pdf

CSSF CIRCULAR 15/633 – TRANSMISSION OF QUARTERLY FINANCIAL INFORMATION BY INVESTMENT FUND MANAGERS

On December 29th 2015, the CSSF issued CSSF Circular 15/633 (the "Circular") on the transmission of financial information to the CSSF by investment fund managers and their branches on a quarterly basis.

The Circular specifies that the investment fund managers concerned are (i) management companies subject to Chapter 15 of the UCI Law ("ManCos 15"), (ii) management companies subject to article 125-1 and 125-2 of Chapter 16 of the UCI Law ("ManCos 16") and (iii) alternative investment fund managers authorised pursuant to the law of July 12th 2013 on alternative investment funds managers ("AIFMs") (the "Managers").

Until the issue of the Circular, only ManCos 15 were obliged to provide the CSSF with quarterly financial information in accordance with CSSF Circular 10/467. According to the Circular, all Managers and their branches shall provide the CSSF with quarterly information.

Managers shall submit to the CSSF the financial tables that may be downloaded from the CSSF website. Managers having multiple authorisations shall submit such financial tables only once (for example managers having a double authorisation for managing both UCITS and AIFs).

The reference date for financial tables to be established is the last day of each calendar quarter and such tables must reach the CSSF on the 20th day of the month following the reference date.

The Circular further emphasizes the obligation of Managers under CSSF Circular 10/467 to provide definitive final tables which faithfully reflect the figures audited by an approved statutory auditor (*réviseur d'entreprises agréé*) at the end of each financial year. These tables shall be submitted to the CSSF one month after the annual general meeting that approves the annual accounts.

For ManCos 15 and ManCos 16, the transmission of financial information to the CSSF shall be done according to the technical instructions provided by CSSF Circular 10/467. For AIFMs this procedure is not yet applicable and their reporting should be submitted to aifm_reporting@cssf.lu

Lastly, the Circular repeals Chapter VI of CSSF Circular 12/546 regarding the prudential supervision of ManCos 15.

The Circular has entered into force with immediate effect as from its date of issue. The first reporting to be provided by ManCos 16 and AIFMs is for the period up to December 31st 2015 and must reach the CSSF by February 29th 2016.

The Circular is available on the CSSF website.

CSSF REGULATION 15-07 – SIFS – RISK MANAGEMENT AND CONFLICTS OF INTEREST POLICY

Regulation 15-07 (the "Regulation") of December 31st 2015 relates to article 42bis of the law of February 13th 2007 ("SIF Law") relating to specialised investment funds ("SIFs"), as amended.

The Regulation only applies to SIFs ("Impacted SIFs") which are not subject to part II of the SIF Law i.e. it only applies to SIFs which are not being managed by a fully authorised alternative investment fund manager ("AIFM") subject to Chapter 2 of the law of July 12th 2013 on alternative investment fund managers (the "AIFM Law") (both externally managed structures and internally managed structures are concerned).

The purpose of the Regulation is mainly to abolish Regulation 12-01 of September 6th 2012 which applied to all SIFs regardless of their status under the AIFM Law. The practical impact is that now SIFs which appointed a fully authorised AIFM are not required anymore to have their own risk management policy. The content of the Regulation (except for the scope) is nonetheless similar to the content of Regulation 12-01.

Article 42bis of the SIF Law requires Impacted SIFs to:

1. put in place appropriate risk management systems in order to identify, measure, manage and monitor the risks arising from positions and their contribution to the general risk profile of the portfolio; and

2. be structured and organised in such way as to minimise the risk of investors' interests being prejudiced by conflicts of interest.

The Regulation clarifies the requirements of article 42bis, as follows:

In respect to the risk management system, the SIF is required to:

- Establish and keep operational a risk management function (the "RMF");
- Such RMF shall, in principle, be independent and have access to all relevant information for the fulfilment of its tasks;
- Delegation of the RMF is allowed subject to the requirements of the Regulation but the managing bodies of the SIF remain liable in respect to the adequacy and the efficiency of the RMF;
- The activities of the RMF shall be adequately documented and the CSSF shall be kept informed;
- When establishing the RMF, the SIF shall pay attention to the nature, scale and complexity of the activities and structure of the SIF.

In respect to the conflicts of interest policy, the SIF is required to:

- Have due regard to the criteria enabling the SIF to spot potential conflicts of interest while keeping in mind the interests of the SIF, the SIF's group and services providers and the investors;
- Establish and keep operational a conflicts of interest policy (the "CIP");
- Ensure that the procedures put in place for the prevention or management of conflicts of interest shall be designed to ensure that the relevant persons engaged in different business activities involving a risk of conflict of interest carry out these activities with an appropriate degree of independence;

- Keep updated a register describing the type of investment management activities where conflicts of interest entailing a material risk of damage to the SIF have arisen or may arise ; and
- Inform investors of conflicts of interest where organisational or administrative measures taken by the SIF were not sufficient to handle those conflicts.

The Regulation enters into force immediately as it does not substantially add new requirements.

The Regulation can be found on the CSSF's website at: Regulation 15-07.

CSSF REGULATION 15-08 – CONFLICTS OF INTEREST POLICIES FOR SICARS

Regulation 15-08 (the "Regulation") of December 31st 2015 implements how article 7bis of the law of June 15th 2004 ("SICAR Law") relating to investment companies in risk capital ("SICARs"), as amended, is to be applied.

The Regulation only applies to SICARs ("Impacted SICARs") which are not subject to part II of the SICAR Law i.e. it does not apply to SICARs which are being managed by a fully authorised alternative investment fund manager ("AIFM") subject to Chapter 2 of the law of July 12th 2013 on alternative investment fund managers (the "AIFM Law") or internally managed SICAR's subject to the full scope of the AIFM Law.

The practical impact of the Regulation is that SICARs which have not appointed a fully authorised AIFM are henceforth required to have a conflicts of interest policy. SICARs which have a fully authorised AIFM do not need to have their own conflicts of interest policy in addition to the AIFM's.

Article 7bis of the SICAR Law requires Impacted SICARs to be structured and organised in such way as to minimise the risk of investors' interests being prejudiced by conflicts of interest.

The Regulation clarifies the requirements of article 7bis, as follows:

- it sets out certain criteria which would enable the SICAR to spot potential conflicts of interest while keeping in mind the interests of the SICAR, the SICAR's group and services providers and the investors;
- it requires the SICAR to establish and keep operational a written policy on managing conflicts of interests, on (the "CIP");
- the SICAR shall ensure that the procedures put in place for the prevention or management of conflicts of interest shall be designed to ensure that the relevant persons engaged in different business activities involving a risk of conflict of interest carry out these activities with an appropriate degree of independence;
- keep updated a register describing the type of investment management activities where conflicts of interest entailing a material risk of damage to the SICAR have arisen or may arise; and
- inform investors of conflicts of interest where organisational or administrative measures taken by the SICAR were not sufficient to handle those conflicts.

Existing SICARs are expected to comply with the Regulation by March 31st 2016.

LABOUR LAW

PART TIME WORK AND PRINCIPLE OF PRO-RATA TEMPORIS

By its decision of November 11th 2015 , the European Court of Justice (hereinafter the "ECJ") ruled that the periods during which a part-time employee had increased his working time should be taken into account, pro rata, for the calculation of his/her right to paid leave.

For this purpose, the ECJ stated that in the event of an increase in the number of hours of work performed by an employee, the Member States are not obliged to provide that the entitlement to paid annual leave already accrued, and possibly taken, must be recalculated retroactively according to that employee's new work pattern. A new calculation must, however, be performed for the period during which working time increased.

PARENTAL LEAVE REFORM – DRAFT LAW

The draft law on the reform of parental leave was validated by the Government on December 16th 2015. Its official publication is scheduled for the end of January 2016. The provisions of the draft law will come into force within 3 days of its publication in the Memorial.

The major innovations introduced by the reform are as follows:

A. INCREASE OF THE PARENTAL LEAVE ALLOWANCE

Currently, the parental leave allowance is fixed at EUR 1,778 per month. In the future, the amount of the parental leave allowance will be linked to the recipient's income and will become a replacement income in proportion to the earned income lost by the receiving parent of the parental leave. The allowance will be set between EUR 1,922.96 and EUR 3,200 per month. The parent earning less than EUR 3,200 per month will receive an equivalent replacement income to his/her salary. The parent earning more than EUR 3,200 per month will receive a maximum of EUR 3,200 per month. The exact amount of the allowance will be calculated over a 12 month period preceding the request for parental leave.

B. FLEXIBLE PERIODS

Concerning the first parental leave, no changes are anticipated.

As far as the second parental leave is concerned, a parent will be able to benefit from it until the age of 6 of the concerned child (12 years in the case of an adoption). In addition, the new reform will allow both parents to enjoy a parental leave of

- either 4 or 6 months, if full-time,
- or 8 or 12 months, if part-time.

Furthermore, a split leave will be introduced. This split leave may take two forms :

For the parent working full time (40h/week):

- either the parent will choose to reduce his/her weekly working time by 20%, over a maximum period of 20 months,
- orthe parent will decide to take 4 individual leaves, lasting 1 month each, spread equally over a period of 20 months.

For the parent working part-time: the weekly working hours will be reduced by 50%, provided that the parent works at least 20 hours per week.

The employer will be obliged to accept the request for a full-time parental leave, but it will be able to reject the request for a part-time parental leave or for a split leave, provided that an alternative is offered. If the parent rejects the alternative offered by the employer, the parent will still be able to benefit from the full-time parental leave.

C. OTHER MODIFICATIONS

Only parents working at least 10 hours per week will be eligible to a parental leave.

Both parents will have the option to take the parental leave at the same time.

It will be possible for the parent on parental leave to change employer during parental leave without being obliged to refund the allowance.

A parent who is working for multiple employers will be able to take parental leave if all employers give their consent and if the minimum of 10 hours of work per week is reached.

LAW OF DECEMBER 18TH 2015 - UNEMPLOYMENT COMPENSATION ARRANGEMENTS

So far, the Labour Code provided an apprenticeship for occupational reintegration purposes ("stage de réinsertion professionnelle") for every job seeker who was 30 years old or more, and who was registered at the "Agence pour le développement de l'emploi" (hereinafter the "ADEM") for at least 3 months.

The law of December 18th 2015 relating to unemployment compensation arrangements ("modalités d'indemnisation de chômage") (hereinafter the "Law") replaces the current system of the apprenticeship for occupational reintegration purposes by:

1. a professional training course ("stage de professionnalisation") (hereinafter the "Course"), and

2. a contract of occupational reinsertion ("contrat de réinsertion-emploi") (hereinafter the "Contract").

1.The Course

The employer is not obliged to pay any salary to the jobseeker during the Course.

The Course may not exceed the duration of 6 weeks (9 weeks if the jobseeker is highly qualified).

To benefit from the Course, the jobseeker must be registered at the ADEM for at least 1 month, and must satisfy at least one of the following conditions:

- being at least 45 years old, or
- having the status of an external redeployed employee, or
- having the status of a handicapped employee.

If a jobseeker, who benefits from an unemployment allowance, completes a Course, he/she will remain entitled to an unemployment allowance, which will be increased by a supplementary allowance of EUR 323 (index 775.17) on a monthly basis.

A jobseeker who does not benefit from any unemployment allowance will benefit from an allowance of EUR 323 (index 775.17).

The time spent on the Course is taken into account as a qualifying period giving entitlement to full unemployment benefits.

2.The Contract

The concept of the Contract provides alternating periods of practical training and theoretical training. The Contract is concluded between the employer, the jobseeker and the ADEM.

The employer must appoint a mentor whose task is to assist the jobseeker for the duration of the Contract.

To benefit from the Contract, the conditions are the same as those set for the Course.

The jobseeker is also entitled to the supplementary allowance of EUR 323 (index 775.17).

The time spent on the Contract is taken into account as a qualifying period giving entitlement to full unemployment benefits.

REDUNDANCIES – ECJ C-422/14

CRISTIAN PUJANTE RIVERA V GESTORA CLUBS DIR, SL AND FONDO DE GARANTIA SALARIAL

According to the Council Directive 98/59/EC dated July 20th 1998 on the approximation of the laws of the Member States relating to collective redundancies (hereinafter the "Directive"), the termination of an employment contract following the employee's refusal to accept a significant unilateral change to essential elements of the employment contract, operating to his/her detriment, constitutes a redundancy.

Two legal issues are at stake :

1. Whether a "collective redundancy", within the Directive's meaning, must be interpreted as relating solely to redundancies or as covering terminations of employment contracts that may be assimilated to redundancies, and

2. Whether the fact that an employer makes significant, unilateral changes to essential elements of an employee's employment contract, operating to his/her detriment, but not related to the individual employee (such as a significant decrease of salary), falls within the Directive's definition of "redundancy" or rather constitutes the termination of an employment contract that may be assimilated to such a redundancy.

The European Court of Justice (hereinafter the "ECJ") stated that only redundancies in the strict sense of the term fall within the scope of the Directive's definition of "collective redundancy". According to the ECJ, the wording of the Directive is absolutely clear and any other reading which has the effect of extending or restricting the scope of the Directive would directly deprive the Directive of its effectiveness.

According to the ECJ, redundancies are characterised by the lack of the employee's consent, which means that a significant and unilateral change to an essential element of the employment contract, operating to the employee's detriment, falls within the Directive's definition of a "redundancy". Therefore, the ECJ decided that in the present case, the termination of the employment contract by common consent with an employee where her salary had been decreased in a significant manner constitutes a redundancy under the Directive's meaning.

TAX

NEW TAX MEASURES APPLICABLE IN 2016

On December 18th 2015, the Luxembourg Parliament voted Draft Law n°6891 and the 2016 Draft Budget Law. The following new tax measures are, as a result, applicable as of January 1st 2016 :

• the minimum corporate income tax is replaced by a minimum net wealth tax;

• the Luxembourg intellectual property regime ("IP Box") is abolished with a phase-out period of up to five years;

• a step-up in basis is introduced for individuals becoming Luxembourg tax residents;

• a tax amnesty regime for voluntary disclosures is introduced for Luxembourg resident and non-resident taxpayers.

These measures are further detailed in our Tax Newsflash of October 2015.

At the same time, the Luxembourg Parliament voted draft law n°6847 (the "**Draft Tax Law**") which:

• transposes into domestic law the new general anti-abuse rule ("GAAR") and anti-hybrid instruments rule of the EU Parent-Subsidiary Directive; and

• enlarges the scope of the fiscal unity regime.

As a result of the new GAAR and anti-hybrid rules, distributions received by a Luxembourg company will no longer be tax exempt if such distributions are deductible in the country of the distributing company or if the transaction is considered as an abuse of the Parent-Subsidiary Directive. Furthermore, outbound distributions by a Luxembourg company to its EU corporate shareholders might be subject to Luxembourg withholding tax if the transaction is considered as abusive. With regard to the concept of abuse, Luxembourg law has adopted the definition of abuse found in the EU Parent-Subsidiary Directive. Thus, an abuse of law may be deemed to exist if "*an arrangement or a series of arrangements (i) has/have been put into place for the main purpose of or for one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the Directive and (ii) is/are not genuine having regard to all relevant facts and circumstances. An arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put in place for valid commercial reasons which reflect the economic reality*".

The GAAR is a *de minimis* rule which allows Member States to apply stricter national rules, as long as they meet minimum EU requirements.

As regards the fiscal unity, the Draft Tax Law enlarges the scope of the Luxembourg fiscal unity regime in order to comply with EU case law, by introducing the concept of horizontal tax consolidation, i.e. a consolidation between Luxembourg sister companies held by (i) a Luxembourg resident company or (ii) an EEA resident company subject to an income tax similar to the Luxembourg corporate income tax (iii) a Luxembourg permanent establishment of a non-resident company subject to an income tax similar to the Luxembourg corporate income tax or (iv) a permanent establishment of an EEA resident company located in another EEA country and subject in the latter country to an income tax similar to the Luxembourg corporate income tax. The initial Draft Tax Law has been amended to also include domestic permanent establishments of any foreign companies subject to income tax similar to the Luxembourg corporate income tax, whereas the initial Draft Tax Law only included in the fiscal unity, domestic permanent establishments of EEA resident companies fully subject to an income tax similar to the Luxembourg corporate income tax.

EU FATCA AND OECD CRS NOW APPLICABLE IN LUXEMBOURG

At the end of 2015, Luxembourg completed the final measures to introduce the tax transparency principles into Luxembourg law.

On December 9th 2015, the Luxembourg parliament approved the law (i) implementing Directive 2014/107/UE of December 9th 2014 (“DAC 2”) revising Directive 2011/16/EU of February 15th 2011 on administrative cooperation in the field of taxation and (ii) introducing the automatic and mandatory exchange of information on financial accounts as provided by the global standard for automatic exchange of information in tax matters (the “Global Standard”) released by the OECD (the “Law”).

Earlier, on November 10th 2015, considering that DAC 2 is broader in scope than the Directive 2003/48/EC on taxation of savings income in the form of interest payments (the “EU Savings Directive”) and that DAC 2 provides that in cases of any overlap in the scope, the DAC is to prevail, the Member States adopted Directive 2015/2060/EU which repeals the EU Savings Directive. In this respect, the Law expressly provides that the provisions of the DAC shall prevail over the EU Savings Directive.

As a result, the automatic exchange of information as provided by the EU Savings Directive shall only apply until December 31st 2015. Since January 1st 2016, the mandatory and automatic exchange of information is applicable with regards to interest income but also other sources of income such as dividends, capital gains and other financial income and account balances held on financial accounts by individuals and non-financial entities resident in any Member States and third-party countries having introduced the Global Standard in their domestic law.

In case of non-compliance with the due diligence and reporting rules as provided by the Law, the Luxembourg financial institutions may be subject to an administrative fine of at most EUR 250,000. In case of late and/or incomplete reporting, the Luxembourg financial institutions can be subject to a maximum fine of 0.5% of the amounts that should have been communicated and at least EUR 1,500.

The deadline for the first reporting of information by the Luxembourg financial institutions to the Luxembourg tax administration will be on June 30th 2017. Such information will be communicated by the Luxembourg tax authorities to the foreign competent authority before September 30th 2017.

MANDATORY AUTOMATIC EXCHANGE OF RULINGS AND APA IN THE EU

On October 6th 2015, the Member States agreed on a proposal for a council directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation (“DAC”). The proposal introduces a mandatory automatic exchange of information with regards to advance cross-border rulings (“Rulings”) and advance pricing arrangements (“APA”).

The mandatory automatic exchange of information should cover existing Rulings or APA issued, amended or renewed since January 1st 2012 and those that will be issued, amended or renewed after December 31st 2016. Rulings and APA issued, amended or renewed between January 1st 2012 and December 31st 2013 should only be subject to the communication if they are still valid on January 1st 2014.

The information that will be automatically exchanged should be basic information on the Ruling or APA. If on the basis of this basic information, a Member State is willing to obtain

the full text of the Rulings or the APA or any additional information, it will be authorised to do so within the framework of the DAC.

The initial information to be communicated by each Member State should include in particular:

- The persons to which the Ruling or APA belong;
- The persons in the other Member States likely to be affected by the Ruling or APA;
- The other Member States, if any, likely to be concerned by the Ruling or APA;
- A summary of the content of the Ruling or APA;
- The amount of the transaction;
- A description of the set of criteria used for the determination of the transfer pricing;
- The identification of the method used for the determination of the transfer pricing;
- The date of issuance, amendment or renewal of the Ruling or APA and their start and end dates or the period of validity, if specified.

The European Commission should also receive some limited basic information to be used exclusively by the Commission to monitor and evaluate the effective application of the mandatory automatic exchange of information on Rulings and APA. The information communicated to the Commission will therefore exclude any information that would allow the Commission to identify any of the persons involved or affected by the Rulings or APA.

The exchange of information should take place before September 30th of the year during which the Ruling or APA is issued, amended or renewed for Rulings and APA issued, amended or renewed after December 31st 2016 and before January 1st 2018 in all other cases.

VAT EXEMPTION FOR MANAGEMENT SERVICES OF REAL ESTATE FUNDS

On December 9th 2015, the European Court of Justice (the "ECJ") delivered its ruling in the Fiscale Eenheid X case (C-595/13). Whereas the Council Directive 2006/112/EC of November 26th 2006 on the common system of value added tax (the "VAT Directive") provides for a general exemption of management services of collective investment vehicles, the Dutch Supreme Court asked the ECJ for a preliminary ruling on the questions whether (i) a real estate investment fund falls within the definition of collective investment vehicle and whether (ii) the fund management exemption also covers the actual management of immovable property invested in by the fund.

In our June 2015 newsletter, we reported that Advocate General Juliane KOKOTT (the "AG") recommended in her opinion to the ECJ to respond affirmatively to both questions. The ECJ judges however only partly followed her recommendations.

On the first question, the ECJ agreed with the AG and ruled that the nature of the investments of the fund is not decisive. The Court recalled that the purpose of the exemption of services provisions connected with the management of investment funds is to facilitate investment in securities through investment undertakings by eliminating the cost of VAT and, in that way, ensuring that the choice between direct investment in securities and investment through collective investment vehicles remains VAT neutral.

The ECJ further held that, in order to qualify as a special investment fund within the meaning of the VAT Directive, a given fund must display characteristics identical to undertakings for collective investment as defined by the UCITS directive and carry out the same transactions, or display features that are sufficiently comparable

for them to be in competition with such undertakings.

Two criteria have been identified by the ECJ in order to appreciate the latter condition:

- On the one hand, in order to be considered as being in competition with UCITS, real estate funds have to be subject to specific State supervision. This new criterion, proposed by the AG, was met in the case at hand.
- On the other hand, real estate funds have to fulfil a series of characteristics previously identified by ECJ case law, i.e. the purchase of participation rights by investors, the existence of a performance related return, the requirement that the risk is borne by the investor as well as the risk-spreading principle. The ECJ ruled in respect to the latter that real estate funds which invest in different types of immovable property (e.g. residential and commercial) located in different geographical areas, comply with said test.

The first question referred to the ECJ was consequently answered affirmatively.

On the second question, contrary to the conclusions of the AG, the ECJ ruled that the actual management of properties is not specific to the management of a special investment fund. On the contrary, to the extent the property management is intended to preserve and build up the assets invested, it is to be considered as inherent to any type of investment.

The ECJ however also provided useful indications as to which kind of services could qualify as specific to the management of a special investment fund investing in real estate property, i.e. activities related to the selection, purchase and sale of immovable property as well as administration and accounting tasks.

GUIDELINES ON THE APPLICATION OF VAT TO CROWDFUNDING

In November 2015, the EU VAT Committee, a consultative body composed of representatives of the national VAT authorities of the EU Member States as well as of the EU Commission, issued guidelines on the application of VAT to the increasingly popular crowdfunding transactions.

It should be borne in mind that said guidelines are not binding but nevertheless very useful for taxpayers and practitioners.

The VAT Committee only contemplated situations of reward-based crowdfunding, where the contributor receives from the entrepreneur a reward in return for his contribution. On the contrary, merely donation-based crowdfunding projects, where contributors altruistically donate without receiving anything in return, should not fall within the scope of VAT.

The Member States' representatives unanimously agreed that reward-based crowdfunding should be seen as constituting a taxable transaction for VAT purposes, provided that two conditions are met :

(i) there is a direct link between the supply of goods or services (the reward) and the corresponding consideration, collected by way of crowdfunding ; and

(ii) the entrepreneur is a VAT taxable person acting as such.

Assuming that the contribution is typically made before any reward is supplied in exchange, the VAT Committee held that the contribution may be regarded as payment made on account, so that VAT should become chargeable upon receipt of said payment (provided that the goods or services to be supplied as reward are precisely identified at the time the payment is made).

Taking into account the well-established ECJ case law on the concept of “consideration” within the meaning of the VAT Directive, the VAT Committee also clarified that the VAT taxable base should correspond to the contribution made by the contributor under the crowdfunding project, notwithstanding the fact that the market value of the reward supplied by the entrepreneur may be lower than the amount of the contribution received. By way of exception, the VAT Committee almost unanimously agreed that the contribution could be considered as a donation out of the scope of VAT in cases where the benefit received by the contributor is negligible or totally unrelated to the amount of the contribution.

The VAT Committee further analysed the specific scheme of crowd-investing, where the reward takes the form of participation in future profits by means of intellectual property rights (taxable supply within the scope of VAT) or securities such as shares or bonds (VAT exempt supply).

Finally, the Member States’ representatives agreed that the activity of crowdfunding platforms supplying services to entrepreneurs, shall be subject to VAT, unless the services provided fall within the financial services exemption.

LUXEMBOURG RULES FOR EXCHANGE OF INFORMATION IN THE LIGHT OF THE EU FUNDAMENTAL RIGHTS CHARTER

Since December 1st 2014, Luxembourg applies new procedural rules regarding the exchange of information on request under *inter alia* the double tax treaties and the Council Directive 2011/16/EU of February 15th 2011 on administrative cooperation in the field of taxation (meanwhile amended by the Council Directive 2014/107/EU of December 9th 2014) (the “EU DAC”).

These new rules enacted in the law dated November 25th 2014 (the “2014 Law”) abolish any right for the taxpayer and/or the holder of the requested information to appeal against the order to exchange information. A fine up to EUR 250.000 may be imposed by the Head of the Tax Authorities to any recalcitrant information holder. For a more detailed overview of the content of the 2014 Law, please refer to our February 2015 newsletter.

In a ruling issued on December 17th 2015, the Luxembourg higher administrative Court decided to ask the European Court of Justice (the “ECJ”) for a preliminary ruling on the question of the compliance of the aforementioned abolition of any judicial remedies against the order to provide information with the EU Fundamental Rights Charter, proclaimed on December 7th 2000 in Nice and legally binding as from the entry into force of the Lisbon Treaty in December 2009 (the “Charter”).

Even though the taxpayer did not invoke a violation of the Charter in its appeal, the judges of the higher administrative court *ex officio* raised the issue. After having held that the request for exchange of information was *inter alia* based on the EU DAC and that the Charter applies to the national authorities when they are implementing EU law, the judges came to the conclusion that article 47 of the Charter, providing that “everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal”, might apply and defeat the prohibition of any judicial remedies as provided for by the 2014 Law. The rights and freedoms guaranteed by the laws of the EU at stake in the present case could, for example, be the respect for private and family life and/or the protection of personal data according to the Luxembourg judges.

Should the applicability of the Charter to the 2014 Law be confirmed, the ECJ is asked to rule on the

question whether a taxpayer might rely on article 47 of the Charter to have the legality of a request for exchange of information, addressed to its Member State of residence by another EU Member State, examined by an independent judicial authority notwithstanding the prohibition by the 2014 Law, notably with respect to (i) the criteria of foreseeable relevance of the information to be exchanged or (ii) exhaustion of all usual domestic sources of information.

The Luxembourg higher administrative court has asked the ECJ to rule according to an expedited procedure, given that an important number of similar disputes could potentially arise and that Luxembourg's obligation to sincere cooperation under the Treaty on the European Union might be affected.

NEW CIRCULAR ON STOCK OPTION PLANS

On December 28th 2015, the Luxembourg Tax Authorities issued a new circular on stock option plans (Circular n°104/2bis, the "**Circular**"), the third circular on this subject. According to the new Circular, any new stock option plan needs to be notified upfront to the competent Tax Office at least two months before implementing the plan. In particular, the Tax Authorities require a copy of the plan to be put in place as well as a list of the beneficiaries of said plan.

The Circular applies to all stock option plans that will be put in place as from January 1st 2016. In addition, Luxembourg employers shall communicate to the competent Tax Office, at their earliest convenience, all stock option plans that have been put in place before January 1st 2016 but whose stock options have not yet been granted to the beneficiaries.

Given the rising importance of employee remuneration under stock option schemes, the aim of the Circular is to enable the Luxembourg Tax Authorities to supervise the coherence between stock option plans put in place by the employers and the correct taxation of the options at the level of the beneficiaries. The taxation of stock options at the level of the beneficiaries remains unchanged (please refer to our Newsletter of January 2013).

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CORPORATE
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IP, IT & GENERAL COMMERCIAL
INVESTMENT FUNDS
PRIVATE WEALTH & BUSINESS PLANNING
REAL ESTATE, CONSTRUCTION
TAX

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