NEWSLETTER

2015
February

50 YEARS
ELVINGER, HOSS & PRUSSEN
LUXEMBOURG LAW FIRM

CONTENTS

ASSET MANAGEMENT AND INVESTMENT FUNDS

1) The Shanghai-Hong Kong Stock Connect
2) Immobilisation of bearer shares - CSSF FAQ and Reminder
3) UCITS IV: Updated ESMA Q&A on its guidelines on ETFs and other UCITS issues
4) UCITS V: New independence requirement UCITS management company/depositary
5) AIFMD:
   - Updated CSSF FAQ on AIFMD
   - CSSF reminder – AIFMD reporting obligations
   - Updated ESMA Q&A on AIFMD

Read more on page 2

BANKING, INSURANCE AND FINANCE

1) New CSSF Circular on central administration, internal governance and risk management
2) New practices concerning accounting documents to be submitted on an annual basis by the credit institutions
3) Updated ESMA Q&A on implementation of the EMIR Regulation
4) CSSF Press release on EMIR

Read more on page 8

CAPITAL MARKETS

1) Updated ESMA Q&A on prospectuses

Read more on page 10

COMPETITION

1) Directive on certain rules governing actions for damages for infringements of the competition law provisions / Directive relative à certaines règles régissant les actions en dommages et intérêts pour les infractions aux dispositions du droit de la concurrence

Read more on page 11

CORPORATE

1) Immobilisation of bearer shares and units: deadlines for compulsory deposit on 18 February 2015

Read more on page 13

DISPUTE RESOLUTION

1) Brussels I bis Regulation

Read more on page 14

INTELLECTUAL PROPERTY

1) Three-dimensional trademarks and flagship stores: the European Court of Justice's position

Read more on page 15

TAX

1) Minimum corporate income tax
2) Clarification of the Luxembourg tax treatment of an SCS/SCSp
3) The Luxembourg implementation of FATCA
4) Advance tax agreements
5) Transfer pricing
6) New value added tax rate
7) Temporary 0.5 % income tax
8) Automatic exchange of information on interest payments from savings income
9) Tax Treaty News

Read more on page 17

ASSET MANAGEMENT AND INVESTMENT FUNDS

1. The Shanghai-Hong Kong Stock Connect

The Shanghai-Hong Kong Stock Connect (the "**Stock Connect**") is a securities trading and clearing program developed by Hong Kong Exchanges and Clearing Limited, Shanghai Stock Exchange (the "**SSE**") and China Securities Depository and Clearing Corporation Limited (the "**ChinaClear**") with the aim to achieve mutual stock market access between mainland China and Hong Kong.

The Stock Connect comprises a Northbound Trading Link and a Southbound Trading Link. Under the Northbound Trading Link, Hong Kong and overseas investors (including Luxembourg investment funds), through their Hong Kong brokers and a securities trading service company established by the Stock Exchange of Hong Kong (the "**SEHK**"), may be allowed, subject to rules and regulations issued/amended from time to time, to trade certain China A-Shares listed on the SSE.

Elvinger, Hoss & Prussen has liaised with the Luxembourg Commission for the Supervision of the Financial Sector (the "**CSSF**") on the use of Stock Connect on behalf of a number of clients. The CSSF considers that, under certain conditions and subject to adequate disclosures in the prospectus and the KIID[1], Stock Connect is an eligible channel for the acquisition of China A-Shares for Luxembourg UCITS. The main conditions imposed by the CSSF are:

- the use of a delivery versus payment ("**DVP**") settlement process avoiding additional counterparty risks;
- ensuring that accounts opened by the Luxembourg depositary with the Hong Kong sub-custodian are segregated at the level of UCITS sub-funds or structured as UCITS assets omnibus accounts of the Luxembourg depositary with the Hong Kong sub-custodian; and
- the disclosure in the prospectus and KIID has to cover the specific legal risks of compulsory use of the local central securities depositaries, Hong Kong Securities Clearing Company Limited and ChinaClear for custody of securities on a cross border basis and other specific risks.

As a matter of principle, the CSSF mentioned that disclosures in the prospectus and KIID are required irrespective of the proportion of invested assets through Stock Connect. However, the CSSF indicated a certain flexibility in relation to the timing of updating prospectuses for those investment funds already permitting direct investment in mainland China and limiting such investment to 5 % of their net assets.

Stock Connect on its own or in combination with QFII[2]/RQFII[3] quota is a new channel available to Luxembourg UCITS and also AIFs to maximize their direct investments in Chinese securities.

2. Immobilisation of bearer shares - CSSF FAQ and Reminder

On 30 December 2014, the Luxembourg Commission for the Supervision of the Financial Sector (the "**CSSF**") published its first FAQ concerning the Law of 28 July 2014 regarding immobilisation of bearer shares and

[1] KIID means the key investor information document referred to in Article 78 Directive 2009/65/EC of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

[2] Qualified Foreign Institutional Investor.

[3] Renminbi Qualified Foreign Institutional Investor.

units (the "**Law**") and its application to Luxembourg investment funds.

The key points covered in this FAQ can be summarised as follows:

- Details as to Luxembourg investment funds falling within the scope of the Law: all Luxembourg investment funds (SIFs[4], SICARs[5], UCITS[6] or UCIs[7]), incorporated in the form of an S.A. (*société anonyme*), S.C.A (*société en commandite par actions*) or FCP (*Fonds Commun de Placement*), if they have issued or intend to issue bearer shares or units.

- Timelines for the appointment of the depositary and the immobilisation of the bearer shares or units:

Last date to appoint a depositary	18 February 2015
Compulsory suspension of voting rights linked to the bearer shares and units held by shareholders failing to deposit their bearer shares and units and deferral of payment distributions	18 February 2015
Last date for deposit of bearer shares and units	18 February 2016
Start of cancellation procedure for bearer shares and units which have not been deposited	18 February 2016

- Information on the entity responsible for the appointment of the depositary: the management company for a Luxembourg FCP or the board of directors or management board for a Luxembourg investment fund set up in the form of an S.A. or an S.C.A.

- CSSF requirements in terms of information of the shareholders regarding this depositary appointment: this is a key point in this FAQ which clearly indicates the expectations of the CSSF in this respect whereas the Law was silent in relation thereto. The prospectus of the relevant investment funds will need to be updated and adequate information will need to be made available to the shareholders or unit holders of the relevant investment fund. This information will include the name of the depositary. It will also describe the implications and the deadlines to be met in order to comply with the new obligations provided by the Law.

- Eligible means for the communication of the information to shareholders: informing shareholders (in addition to the amendment of the prospectus) can be achieved by all means, including the following:

  - the usual information means disclosed in the prospectus;

  - the website of the investment fund or its management company;

  - a notice published in at least two newspapers with adequate circulation, one of which at least being a Luxembourg newspaper. A global notice covering all investment funds managed by the same management company or AIFM would be acceptable as long as these

[4] SIFs mean specialised investment funds within the meaning of the Law of 13 February 2007 on specialised investment funds.

[5] SICARs mean investment companies in risk capital within the meaning of the Law of 15 June 2004 on investment companies in risk capital (SICARs).

[6] UCITS mean undertakings for collective investment in transferable securities within the meaning of Part I of the Law of 17 December 2010 on undertakings for collective investment.

[7] UCIs mean undertakings for collective investment within the meaning of Part II of the Law of 17 December 2010 on undertakings for collective investment.

investment funds are clearly identified; and

- information circulated through the distribution channel of the relevant investment fund.

- Possibility for the depositary to enter the name of an entity acting as a nominee into the register of bearer shares or units: the CSSF expressly allows the depositary appointed under the Law to register an entity acting as nominee as bearer shareholder, to the extent that this nominee entity is subject to professional obligations concerning the fight against money laundering and terrorist financing and directive 2005/60/EC or equivalent legislation.

On 26 January 2015, the CSSF published the Press Release 15/09 "Urgent reminder to companies: 18 February 2015, final deadline for appointing a depositary of bearer shares and units" (only available in French).

The main purposes of this Press Release are (1) to remind the legal entities concerned of the legal deadline for the appointment of the depositary and (2) to highlight the obligations of a domiciliary agent under the law of 31 May 1999 on the domiciliation of companies to take appropriate actions if it becomes aware that the board of directors or managers of a company (in scope of the Law) for which it acts as domiciliary agent has failed to appoint a depositary.

For additional information on the Law, see our Newsflash of 18 August 2014.

3. UCITS IV: Updated ESMA Q&A on its guidelines on ETFs and other UCITS issues

On 9 January 2015, ESMA published an updated version of its Q&A on its guidelines on ETFs and other UCITS issues. In summary:

- "Question 5: Financial derivative instruments" specifies that if the role of counterparty to a financial derivative instrument only involves implementing a set of rules agreed in advance with the UCITS, such arrangement shall not be constitutive of investment management delegation.

- "Question 6: Collateral management" specifies that the requirement of Article 50(e) (iv) of the UCITS Directive[8] implies that a UCITS can reinvest cash collateral only in short-term money market funds that invest themselves not more than 10 % of their assets in other money market funds.

4. UCITS V: New independence requirement UCITS management company/depositary

During the discussions between the European ("**EU**") legislative authorities on the UCITS V Directive[9], a mandate was granted to the EU Commission to specify the conditions to be fulfilled in order to comply with the independence requirement between a management company and a depositary.

[8] UCITS Directive refers to Directive 2009/65/EC of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

[9] UCITS V Directive refers to Directive 2014/91 of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions.

As part of the work to be done on the UCITS V Level 2 measures, the EU Commission requested the European Securities and Markets Authority ("**ESMA**") to provide it with technical advice on the content of the delegated act on depositaries[10].

In its advice to the EU Commission (the "**Final Advice**")[11], ESMA envisages two situations which may jeopardise the independence of the management company/investment company and the depositary (the management company/investment company and the depositary are hereafter each referred as a "**Relevant Entity**" and together as the "**Relevant Entities**"):

- Common management/supervision
- Cross-shareholdings/group inclusion

a) Common management/supervision: in relation to common management and/or supervision, ESMA recognises that the independence could be lost if any of the Relevant Entities, by means of executive power or supervision, could control the action of the other Relevant Party and suggests various means in order to ensure the separation of the management bodies of the Relevant Entities.
In its Final Advice, ESMA prohibits any member of the management body of the management company/investment company from being a member of the management body of the depositary and no member of the management body of one of the Relevant Entities can be an employee of the other Relevant Entity. In addition, certain restrictions apply at the level of the members of the body in charge of the supervision of the Relevant Entities in order to ensure their effective and impartial supervision.

b) Cross-shareholdings/group inclusion: in relation to cross-shareholdings, ESMA refers to the notion of 'qualifying holding'[12]. Two options were initially detailed in the first ESMA draft advice[13] and the second option was finally retained. The first option was to consider that the Relevant Entities are not independent when they are linked by a qualifying holding or when they are part of the same group.

The second option which has been selected by ESMA in its Final Advice has more nuance and requires, in the case where the Relevant Entities are (i) linked by a qualifying holding or (ii) part of the same group, specific governance and organisational arrangements and measures to be set up.

Amongst the measures to be taken in order to preserve the independence of the Relevant Entities, ESMA's recommendations include the obligation to put in place:

- a robust decision-making process for choosing the depositary; and
- specific arrangements in the case where (i) one of the Relevant Entities has a direct or indirect holding in the other Relevant Entity which represents 10 % or more of the capital or of the voting rights or which makes it possible to exercise a significant influence over this other Relevant Entity, or

[10] The EU Commission mandate is broad and covers also other requirements of UCITS V Directive. This note focuses on the independence requirement between management company/investment company and the depositary only.

[11] Final Report - ESMA's technical advice to the European Commission on delegated acts required by the UCITS V Directive, ESMA/2014/1417, dated 28 November 2014.

[12] According to Article 2(1)(j) of UCITS IV Directive (Directive 2009/65/EC), a qualifying holding is defined as a direct or indirect holding in a management company which represents 10 % or more of the capital or of the voting rights or which makes it possible to exercise a significant influence over the management of the management company in which that holding subsists.

[13] Consultation Paper - ESMA's technical advice to the European Commission on delegated acts required by the UCITS V Directive, ESMA/2014/1183, dated 26 September 2014.

(ii) where the Relevant Entities are part of the same group.
These arrangements include conflict of interest provisions, transparency towards the investors as regards the link between the management company/investment company and the depositary, justification of the choice of the depositary to investors and the demonstration to competent authorities that the appointment of the depositary is made in the sole interests of the UCITS and the investors of the UCITS.

In addition, in the case where the Relevant Entities are part of the same group, ESMA requires a certain percentage of independent members at the level of the management body of the Relevant Entities:

- at least one-third (33 %) or two (persons), whichever is the lesser, of the members of the management body of the Relevant Entities must be independent;

- where the management body of the Relevant Entities is not in charge of the supervisory functions, at least one-third (33 %) or two (persons), whichever is the lesser, of the members of the body in charge of the supervisory function must be independent.

ESMA's Final Advice clarifies the notion of "independent": members of the management body of the Relevant Entities shall be deemed independent where they are not members of the management body or the body in charge of the supervisory function nor employees of any of the other undertakings within the group and are free of any business, family or other relationship with Relevant Entities and any of the other undertakings within the group that creates a conflict of interest so as to impair their judgment.

Next steps:

The EU Commission will now finalise and adopt its delegated act on the Level 2 UCITS V Directive measures. It must be noted that **the ESMA Final Advice is not binding to the EU Commission** and that it may, therefore, define other criteria and/or add other requirements in order to preserve the independence of the Relevant Entities.

In terms of timing, the EU Commission has indicated that the delegated act was expected to be adopted in April 2015, i.e. well before the end of the transition period. The UCITS V Directive must indeed be implemented and shall apply as from 18 March 2016.

5. AIFMD

1. Updated CSSF FAQ on AIFMD

On 29 December 2014, the CSSF updated its frequently asked questions ("**FAQ**") on the Law of 12 July 2013 on Alternative Investment Fund Managers ("**AIFM Law**") and the AIFM delegated regulations by adding two new questions:

- Question 19 on the marketing of non-EU alternative investment funds (AIFs) to professional investors in Luxembourg by EU AIFMs on the basis of Article 37 of the AIFM Law;

- Question 20 on 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 AIFM Law.

In addition, and as indicated in the Article below "CSSF Reminder of the AIFMD reporting obligations", the CSSF also supplemented its answer to question 14(d) point I, by requiring Luxembourg AIFMs established before 22 July 2014 and authorised between 1 October 2014 and 31 December 2014 to submit their first reporting - covering the period from 1st October 2014 to 31 December 2014 - by 31

January 2015 at latest (15 February 2015 at the latest where the AIF is a fund of funds) whatever their reporting frequency is.

2. CSSF reminder – AIFMD reporting obligations

In a Press Release published on 13 January 2015 (Press Release 15/04), the CSSF reminded all Luxembourg domiciled Alternative Investment Fund Managers ("**AIFMs**") and all non-EU AIFMs which market Alternative Investment Funds ("**AIFs**") under Article 42 of the AIFMD[14] to assess their reporting obligations.

This assessment must be made:

- for Luxembourg registered AIFMs: as set out in Article 3 (3)(d) of the AIFM Law[15];
- for Luxembourg authorised AIFMs as set out in Article 22 (1), (2) and (4) of the AIFM Law; and
- for non-EU AIFMs: as set out in Article 24 (1), (2) and (4) AIFMD.

The CSSF also pointed out that all AIFMs have at least an annual obligation for the submission of the AIFMD reporting which is due for 31 January 2015 at the latest (except for AIFs which are considered as funds of funds and for which the submission is accepted with a delay of 15 supplementary days).

AIFMs are requested to submit their files as described in CSSF Circular 14/581 which deals with the technical aspects of the AIFMD reporting.

Information regarding the operational issues on the reporting (e.g. reporting frequency, reporting periods, first reporting period for existing, registered and authorised AIFMs …) can be found either in the final ESMA Guidelines on reporting obligations for AIFMs (ESMA/2014/869), in the ESMA Q&A on AIFMD (ESMA/2013/1359) or in the CSSF AIFM FAQ published on the CSSF website.

It is important to note also that the CSSF AIFM FAQ has recently been updated and on this occasion, the CSSF supplemented its answer to question 14(d) point I, by requiring Luxembourg AIFMs established before 22 July 2014 and authorised between 1 October 2014 and 31 December 2014 to submit their first reporting - covering the period from 1st October 2014 to 31 December 2014 - by 31 January 2015 at latest (15 February 2015 at latest where the AIF is a fund of funds), whatever their reporting frequency is.

The CSSF has confirmed orally that the reporting requirement also applies to Luxembourg AIFMs established before 22 July 2014 which filed an application for authorisation but where the authorisation has not yet been granted.

3. Updated ESMA Q&A on AIFMD

On 9 January 2015, ESMA published an updated version of its Q&A on the application of the AIFMD.

Section III on reporting to national competent authorities under Articles 3, 24 and 42 of the AIFMD is supplemented by additional questions. All of the newly introduced questions deal with the information and data to be entered into the ESMA consolidated reporting template (ESMA/2013/1359).

[14] AIFMD refers to Directive 2011/61/EU of 8 June 2011 on Alternative Investment Fund Managers.
[15] AIFM Law refers to the Law of 12 July 2013 on Alternative Investment Fund Managers.

BANKING, INSURANCE AND FINANCE

1. New CSSF Circular on central administration, internal governance and risk management

On 24 November 2014, the CSSF published its Circular 14/597 (the "**Circular**") updating and amending CSSF Circular 12/552 on central administration, internal governance and risk management.

The main amendment resides in the addition of a new Chapter 6 to Part III (risk management) of CSSF Circular 12/552, implementing the recommendation (ESRB/2012/2) of the European Systemic Risk Board on funding of credit institutions, namely recommendation B on the implementation of a risk management framework as regards asset encumbrance.

According to the new Chapter 6, which only applies to credit institutions, the latter shall put in place risk management policies to define their approach to asset encumbrance as well as procedures and controls that ensure that the risks associated with collateral management and asset encumbrance are adequately identified, monitored and managed.

Credit institutions shall also conceive a general monitoring framework, with the aim of providing timely information, at least once a year, to the authorised management and to the board of directors on the level, type, evolution and amount of asset encumbrance.

Moreover, the Circular adjusts point 182 of CSSF Circular 12/552 in relation to the general outsourcing requirements, which stated previously that if an institution intends to outsource a material activity it should obtain prior authorisation from the CSSF.

The Circular now adds that where the institution outsources to a Luxembourg credit institution or a support PSF governed by Articles 29-1, 29-2, 29-3 and 29-4 of the Law on the financial sector of 5 April 1993 as amended, a notification to the CSSF stating that the conditions laid down in CSSF Circular 12/552 are complied with is sufficient.

The amendments adopted by the Circular to CSSF Circular 12/552 entered into force on 31 December 2014.

2. New practices concerning accounting documents to be submitted on an annual basis by the credit institutions

By means of Circular CSSF 14/596 dated 28 November 2014, the CSSF has decided to abolish the VISA procedure for published annual accounts for all credit institutions (significant and less significant). In its Circular 15/602, dated 15 January 2015, the CSSF specifies the new practices concerning the various accounting documents to be submitted on an annual basis by the credit institutions.

Different situations are distinguished depending on the type of credit institution: significant institutions, less significant institutions, branches of EU credit institutions and branches of non-EEA credit institutions.

3. Updated ESMA Q&A on implementation of the EMIR Regulation

On 24 October 2014, ESMA published an updated version of its Q&A on the implementation of the Regulation (EU) 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR).

4. CSSF Press release on EMIR

On 19 January 2015, the CSSF published the press release 15/06 which states that a section "Non-financial counterparties" has been created under the heading "EMIR" on the CSSF's website. It contains a summary of the obligations applicable to non-financial counterparties under Regulation (EU) 648/2012 on OTC derivatives, central counterparties and trade repositories (“**EMIR**”).

CAPITAL MARKETS

1. Updated ESMA Q&A on prospectuses

On 21 October 2014, ESMA published an updated version of its Q&A on prospectuses.

This update concerns:

- the summaries in relation to proportionate disclosure regimes;
- the format for the individual summary relating to several securities;
- the presentation of selected historical key financial information in the summary;
- the minimum information required in Section D of Annex XXII of the Prospectus Regulation; and
- the inclusion of "extra" information in individual summaries.

COMPETITION

1. Directive on certain rules governing actions for damages for infringements of the competition law provisions / Directive relative à certaines règles régissant les actions en dommages et intérêts pour les infractions aux dispositions du droit de la concurrence

The directive 2014/104/UE on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union was adopted on 26 November 2014 and published on 5 December 2014. This directive seeks to promote and address obstacles to successful antitrust damages claims before national courts. Member States have two years to implement it into national law.

Après plus de dix années de travaux, consultations et négociations, la directive relative à certaines règles régissant les actions en dommages et intérêts en droit national pour les infractions aux dispositions du droit de la concurrence des États membres et de l'Union européenne a été adoptée le 26 novembre 2014 et publiée le 5 décembre 2014 (*Directive 2014/104/UE 26 novembre 2014 relative à certaines règles régissant les actions en dommages et intérêts en droit national pour les infractions aux dispositions du droit de la concurrence des États membres et de l'Union européenne*[16]).

Cette directive contient un arsenal de dispositions visant à faciliter l'action en justice des victimes d'infractions aux règles de concurrence en vue d'obtenir réparation du préjudice subi. La directive prévoit notamment les règles suivantes :

[16] JOUE, L 349, 5 décembre 2014, pp. 1-19.

- **Communication des éléments de preuve facilitée :** la directive confère aux juges nationaux le pouvoir d'enjoindre aux entreprises de communiquer des éléments de preuve nécessaires à la mise en œuvre d'une action en dommages et intérêts par la victime de pratiques anticoncurrentielles.

  La directive reconnaît toutefois expressément la protection absolue des déclarations de clémence d'une entreprise, dont la communication ne pourra en aucun cas être enjointe. Les informations recueillies par le Conseil de la concurrence au cours de sa procédure (ex. communication des griefs) ou données par une partie dans le cadre de cette procédure (ex. réponses à une demande de renseignements) ne pourront quant à elles faire l'objet d'une injonction de communication qu'à compter de la clôture de la procédure devant l'autorité de concurrence.

- **Présomption irréfragable de faute :** grâce à la directive, une décision définitive d'une autorité nationale de concurrence constatant une infraction constituera automatiquement une preuve de l'existence d'une faute civile devant un juge du même Etat membre saisi d'une action en dommages et intérêts.

- **Présomption réfragable de préjudice résultant de l'existence d'une entente :** une fois la directive transposée en droit luxembourgeois, une entente constatée par le Conseil de la concurrence entraînera une présomption réfragable de préjudice dans le chef des clients des entreprises ayant participé à l'entente. En guise de défense, il appartiendra alors à l'entreprise concernée, comme le prévoit la directive, de démontrer que la demanderesse a elle-

même répercuté le surcoût qu'elle a subi le long de la chaîne de distribution en augmentant les prix facturés à son propre client. Dans ce cas, la réparation ne sera due qu'aux victimes indirectes qui, en bout de chaîne, auront subi le préjudice conséquence de l'entente.

Par ailleurs, le texte de la directive allège considérablement l'exercice de quantification du préjudice dans le chef de la victime. Ainsi, face à un préjudice en pratique impossible ou excessivement difficile à quantifier de manière précise par la partie demanderesse (par exemple, parce que celle-ci ne dispose pas des données nécessaires ou parce que la quantification du préjudice implique une analyse économique approfondie), il reviendra au juge d'estimer le montant de ce préjudice. Le juge pourra, si nécessaire, avoir recours à l'autorité de concurrence nationale qui a condamné l'entreprise.

Les Etats membres doivent transposer la directive en droit national pour le 27 décembre 2016 au plus tard.

CORPORATE

1. Immobilisation of bearer shares and units: deadlines for compulsory deposit on 18 February 2015

The Law of 28 July 2014 concerning the compulsory deposit and immobilisation of shares and units in bearer form (the "**Law**") imposes the compulsory deposit and immobilisation of shares and units in bearer form and provides transitory provisions in order to appoint a depositary and to proceed with the deposit.

The last date for appointing a depositary is 18 February 2015 and the compulsory suspension of voting rights failing the deposit of the shares or units enters into force on the same date. In addition, upon expiry of this period, the distributions shall be deferred until the immobilisation date without payment of interest, provided that the distribution rights are not time-barred. The CSSF has published a Press Release 15/09 in which it reminds this deadline to all limited liability companies (*sociétés anonymes*), partnerships limited by shares (*sociétés en commandite par actions*) and UCI management companies (*sociétés de gestion d'OPC*) constituted under the form of common funds (FCP) which have issued shares or units in bearer form. The CSSF stresses in particular that, with regard to domiciliation agents pursuant to the Law of 31 May 1999 governing the domiciliation of companies, if a domiciliation agent should notice that the statutory bodies and representatives of a domiciled company have contravened the legal provisions governing commercial companies and the right of establishment, and therefore also the Law, the appropriate conclusions will be drawn.

See our Newsflash of 18 August 2014 for more details on this Law. See also our article on the CSSF FAQ and Reminder published in the Asset Management and Investment Funds Section of this Newsletter.

DISPUTE RESOLUTION

1. Brussels I bis Regulation

The Regulation (EU) 1215/2012 which replaces Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) became totally applicable on 10 January 2015.

See our Newsletter of March 2013 for more details on the most important changes introduced by Brussels I bis regulation.

INTELLECTUAL PROPERTY

1. Three-dimensional trademarks and flagship stores: the European Court of Justice's position

In a judgment rendered on 10 July 2014[17], the European Court of Justice (the "**Court**") confirmed that the protection conferred by a trademark could extend to the interior design of a store, in this case the flagship store of the company, *Apple*. This Court judgment should be highlighted in that it opens the way for a revival of three-dimensional trademarks and offers new perspectives to undertakings whose sales outlets reflect the brand image of the products and services offered by those undertakings in the eyes of the public. Questions remain pending, however, and close attention should be given to the practical consequences of this judgment.

After having obtained registration of the trademark with the United States Patent and Trademark Office in 2010, Apple sought to extend, by way of the international trademark, the protection of the interior architecture of its flagship store in several countries, including Germany, the Benelux countries and France.

The services associated with this three-dimensional trademark fall under Class 35 and are designated as *"Retail store services featuring computers, computer software, computer peripherals, mobile phones, consumer electronics and related accessories, and demonstration of products relating thereto."*

In January 2013, the German Patent and Trademark Office refused to register the extension of this three-dimensional trademark to German territory arguing that the representation of space intended for the sale of products of an undertaking would be nothing other than the representation of an essential aspect of that undertaking's business and that if consumers could perceive that the space was designed as an indication of the quality and price bracket of the products, they would not see the design as an indication of the origin of the products. The German Office added that in this particular case, the design of Apple's flagship store was not sufficiently distinguishable from the stores of other providers of electronic products. Similarly, the Benelux Office for Intellectual Property issued a provisional refusal of protection for Apple's three-dimensional trademark.

Apple appealed the German decision before the German Patent Federal Court (*Bundespatentgericht)* and, believing that the dispute would require preliminary questions to be asked on the subject of the interpretation to be given to Articles 2 ("*Signs capable of constituting a trademark*") and 3 ("*Grounds for refusal or invalidity*"), of paragraph 1 of the Directive 2008/95/EC of 22 October 2008, the *Bundespatentgericht* referred four preliminary questions to the Court.

The Court responded to the first three preliminary questions posed by the national court as a whole and declared the fourth question inadmissible.

Thus the Court declared that the articles mentioned above of Directive 2008/95/EC ***"must be interpreted as meaning that the representation, by a design alone, without indicating the size or the proportions, of the layout of a retail store may be registered as a trademark for services consisting in services relating to those goods but which do not form an integral part of the offer for sale thereof, provided that the sign is capable of distinguishing the services of the applicant for registration from those of other undertakings and that registration is not***

[17] CJEU (3rd Chamber), 10 July 2014, C-421/13, Apple Inc. c/ Deutsches Patent und Markenamt.

***precluded by any of the grounds for refusal set out in that directive*”.**

The impetus of the Court for development of a new class of three-dimensional trademarks alongside those which more classically protect the packaging or form of a product (such as the *Coca-Cola* bottle or the *Toblerone* chocolate bar) is clear. This judgment allows undertakings from now on to consider another mode of protection for the layout of their sales outlets in addition to an action for unfair competition which requires proof of the harm suffered – sometimes hard to demonstrate – and in addition to the protection by the author’s right which could prove uncertain. This aspect of the judgment of 10 July 2014 is to be welcomed.

Obviously, if the representation of the layout of a flagship store of an undertaking can constitute a sign which is likely to be protected as a trademark, this sign should be sufficiently distinctive to allow the average consumer to relate the products and services concerned to a given undertaking, thereby providing the trademark with its function of “guarantee of origin”. According to the Court, this function is fulfilled when the layout depicted departs significantly from the norm or customs of the economic sector concerned. The assessment *in concreto* will naturally fall within the competence of the national offices of trademarks and of the Office for Harmonisation in the Internal Market. The Court again stresses that the assessment criteria should be identical to those used for other signs (word signs and complex signs).

In practice, however, it is questionable whether many interior designs of stores would qualify for trademark protection, particularly those layouts intending not to distinguish the products but the services of an undertaking. Indeed the scope of services which could be identified by such trademarks remains unclear. According to the Court, the services covered by these three-dimensional trademarks must correspond to services relating to the products marketed in the sales outlet without forming an integral part of the sale thereof.

Still, apart from the after-sales services offered to consumers, it may be unrealistic to separate the sale and the offer for sale of products from related services which are offered simultaneously by the undertaking but which maintain the purpose of the sale of products to consumers in the flagship store. In the case at hand, the services that Apple refers to in its application for a three-dimensional trademark consist of carrying out demonstrations of its products to the public by means of seminars. These demonstrations are intended only to induce the consumer to buy the products displayed and Apple products used at these seminars are in fact the ones that enable the public to identify the origin of the services. In this respect, the distinction made by the Court is debatable.

It remains to be seen what the impact of this judgment will be on business life and the type of interior design that will be protected as a three-dimensional trademark. Heated discussions are expected on the distinctive character or lack of distinctive character of these three-dimensional trademarks for the products and services concerned.

To date, we are awaiting the decision of the *Bundespatentgericht* which must now decide on the distinctive character of the trademark application from Apple in light of the judgment of the Court. Following this judgment of 10 July 2014, the Benelux Office for Intellectual Property withdrew its provisional refusal to register Apple’s trademark and has indicated that the protection of the trademark was granted for all the services referred to in the application for Belgium, the Netherlands and Luxembourg.

TAX

1. Minimum corporate income tax

As from the tax year 2015, the two different regimes for the minimum corporate income tax will apply as follow:

- For Luxembourg collective entities for which the sum of financial assets, transferable securities and bank deposits exceeds 90 % of their total assets (“**SOPARFI**"), the minimum corporate income tax of EUR 3,000 (EUR 3,210 including the 7 % solidarity surcharge) is only due by entities having a total balance sheet exceeding EUR 350,000;

- For all other Luxembourg collective entities, the minimum corporate income tax is determined following a progressive tax scale depending on the total assets of their balance sheet at the end of the fiscal year :

Total assets	Minimum tax (including the solidarity surcharge)
≤ EUR 350,000	EUR 535
> EUR 350,000 and ≤ EUR 2,000,000	EUR 1,605
> EUR 2,000,000 and ≤ EUR 10,000,000	EUR 5,350
> EUR 10,000,000 and ≤ EUR 15,000,000	EUR 10,700
> EUR 15,000,000 and ≤ EUR 20,000,000	EUR 16,050
> 20,000,000	EUR 21,400

Hence, as from tax year 2015 all collective entities with total assets not exceeding EUR 350,000, including the SOPARFI, are only liable to the minimum corporate income tax of EUR 535 (including the 7 % solidarity surcharge).

2. Clarification of the Luxembourg tax treatment of an SCS/SCSp

On 9 January 2015, the Luxembourg tax authorities (*administration des contributions directes*) published Tax Circular L.I.R. n° 14/4 (the “**Circular**”) on the Luxembourg tax treatment of income realised by Luxembourg law limited partnerships set up as *société en commandite simple* (“**SCS**”) or as *société en commandite spéciale* (“**SCSp**”).

The Circular discusses principally the question of the commerciality of an SCS/SPSp. Indeed, the tax transparency applicable to the SCS/SCSp for Luxembourg income tax law does not apply for the municipal business tax (*impôt commercial communal*) which is thus due at the level of the SCS/SCSp insofar as the SCS/SCSp is considered to be carrying on a trade or business in Luxembourg. The municipal business tax rates vary depending on the municipality in which the SCS/SCSp is established. In Luxembourg-City, municipal business tax is due at a rate of 6.75 %.

The Circular aims at clarifying the situation in which an SCS/SCSp could be considered as carrying on a trade or business.

In relation thereto, the most important confirmation of the Circular is that an SCS/SCSp that is an alternative investment fund (“**AIF**”) [18] is deemed never to carry on such a trade or business and is therefore never subject to Luxembourg municipal business tax, to the extent that the general partner (the “**GP**”) holds an interest of less than 5 % in the SCS/SCSp.

[18] AIF refers to alternative investment fund as defined in Article 4.1 (a) of Directive 2011/61/EU of 8 June 2011 on alternative investment fund managers.

The same holds true, for different reasons though, for SIFs[19], SICARs[20] and Part II SICAFs[21] set up as SCS/SCSp and also for foreign AIFs that are managed by a Luxembourg-based AIFM.

For an SCS/SCSp that does not have AIF status[22], the Circular sets out a series of tests and examples in the form of published court precedents that give useful guidance to taxpayers as to when, how and why an activity is deemed commercial and the SCS/SCSp subject to municipal business tax (e.g., numerous and quick sales with the purpose of enhancing the value of the estate). The Circular correctly points out that the sole fact that an SCS/SCSp holds an important estate or realises assets after short holding periods does not in itself amount to a commercial activity.

3. The Luxembourg implementation of FATCA

On 6 January 2015, the Luxembourg tax authorities (*administration des contributions directes*) released a draft version of the first administrative circular (ECHA – n°2) on the Foreign Account Tax Compliance Act (“**FATCA**”), (the “**Circular**”). The Circular deals with the automatic exchange of information between Luxembourg and the United States of America.

Under the Model 1 intergovernmental agreement (the “**IGA**”) signed on 28 March 2014 by Luxembourg and the United States, Luxembourg financial institutions (within the meaning of the IGA) have to exchange information concerning the assets held by U.S. citizens or U.S. tax residents with the Luxembourg direct tax authorities which will transfer the information provided to the U.S. Tax Administration, the Internal Revenue Service (the “**IRS**”).

The Circular recalls the legal requirements imposed on Luxembourg under the IGA and states expressly that an additional circular defining the technical aspects of the exchange of information should be provided later on.

While under the Luxembourg legislative procedure, the IGA will enter into force once it has been ratified by a law. The Circular is however only a draft version for the time being which provides a French translation of the main points and the key definitions of the IGA and its annexes.

According to Article 10 of the IGA combined with the Memorandum of Understanding, Luxembourg has until 30 September 2015 to ratify it. Furthermore, in the event Luxembourg is not able to complete its ratification process by 30 September 2015, the US Department of Treasury may accept a delay of one additional year – i.e. until 30 September 2016. If the IGA enters into force after 30 September 2015, reporting for 2014 and 2015 would be due on 30 September 2016.

The key points of the Circular are as follows:

- the information is to be reported to the Luxembourg direct tax authorities by 30 June at the latest following the calendar year-end to which the information refers;
- in the case of missing, late, incomplete or false reporting, the Luxembourg reporting financial institution risks a maximum penalty of 0.5 % of the amounts that should have been reported;

[19] SIFs mean specialised investment funds within the meaning of the Law of 13 February 2007 on specialised investment funds.
[20] SICARs mean investment companies in risk capital within the meaning of the Law of 15 June 2004 on investment companies in risk capital (SICARs).
[21] Part II SICAF refers to an undertaking for collective investment regulated by the provisions of Part II of the Law of 17 December 2010 on undertakings for collective investment, incorporated in the form of a société d’investissement à capital fixe (SICAF).
[22] The assumption in all cases is that the GP holds an interest of less than 5 % in the SCS/ SCSp.

- the Luxembourg direct tax authorities authorise reporting Luxembourg financial institutions to identify whether an account should be reported or not pursuant to the due diligence procedures prescribed either by the Luxembourg IGA or by the U.S. Treasury regulations;

- dormant accounts should be reported if relevant information that is mandatory for the exchange of information is available;

- an entity should be considered a "Financial Institution" by reference to the information listed in the *Registre de Commerce et des Sociétés* or by reference to the list established by the *Commission de Surveillance du Secteur Financier* or by the *Commissariat aux Assurances*;

- regarding the definition of an "Investment Entity", the Luxembourg direct tax authorities confirm that the definition should be interpreted in a manner consistent with a similar language set forth in the definition of "financial institution" in the Financial Action Task Force Recommendations;

- the Circular confirms that an entity should not qualify as a non-financial foreign entity if the entity functions as an investment fund.

Furthermore, on 8 January 2015, the Luxembourg bankers' association (*Association des Banques et Banquiers, Luxembourg*, the "ABBL") published a template for entity self-certification that can be used in the context of the FATCA due diligence requirements applicable to Luxembourg financial institutions. The aim of this document is to provide Luxembourg financial institutions with a valid alternative to the IRS W-8 series forms in the context of the FATCA classification of Luxembourg entities that are not investing in US assets.

4. Advance tax agreements

The Law of 19 December 2014 on the first part of the future package (*paquet d'avenir*) introduced into Luxembourg tax laws a clear legal basis for the advance tax agreement ("**ATA**") process and formalised the existing procedure. A new provision was introduced into the general tax law ("***Abgabenordung***", "***AO***").

§29a (2) AO provides that an ATA may not exempt or moderate the tax due. An ATA may merely give prior written confirmation of the correct application of national and international tax laws. This is in line with the prior practice.

An ATA is binding for a period of 5 years unless the description of the situation/operations for which the ATA was introduced are incomplete, inexact, have changed, or are no longer in line with domestic, European or international laws. The 5 years limit was also applicable before the introduction of the new provisions.

Furthermore, on 23 December 2014, a Grand Ducal decree was adopted in order to give further details on the procedure and the conditions required to obtain an ATA (the "**ATA Decree**").

The ATA Decree provides that the ATA request must be introduced in writing to the tax inspector (*préposé*) of the tax office in charge, must be duly motivated and must contain at least the following details:

- precise identification of the applicant;

- detailed description of the operation or description of the operation(s) seriously and effectively under consideration and which have not yet produced their effects;

- detailed analysis of the tax issues arising from this operation with motivated tax position from the applicant; and

- the applicant must confirm that the facts and analysis given are complete and true.

Article 2 of the ATA Decree provides that where the ATA request concerns corporate tax issues, the tax inspector (*préposé*) submits the ATA request to a commission for advance tax agreements (*commission des décisions anticipées*; the "**Commission**").

The ATA Decree states that the purpose of the Commission is to assist the tax office in the uniform execution and implementation of tax laws. ATAs will be published anonymously and in a synthetic manner in the annual report of the Luxembourg Revenue.

Finally, §29a (4) AO provides that corporate taxpayers will henceforth be subject to a fee ranging from EUR 3,000 to EUR 10,000 in order to obtain an ATA. The fee will depend on the complexity of the request and the amount of work involved. The fee will be set by the director of the Luxembourg Revenue upon filing of the ATA request and is payable within one month from the date on which the fee has been set. Finally, the fee is non-refundable if the ATA request is withdrawn, declined or answered negatively.

This new procedure described above is applicable since 1 January 2015 and all ATAs under examination are transmitted without any other formalities to the Commission.

The tax administration is currently preparing a circular as to certain formal requirements under the new ATA procedure. The circular should be issued in the coming weeks.

5. Transfer pricing

The Law of 19 December 2014 on the future package (*paquet d'avenir*) also amended Article 56 of the Luxembourg Income Tax Law (the "**LITL**") in order to clarify in Luxembourg the tax legislation on transfer pricing. The new wording is very similar to the first paragraph of Article 9 of the OECD Model Tax Convention dealing with profit adjustments between associated enterprises.

Under the new Article 56 LITL, conditions agreed between related parties must correspond to arm's length market conditions agreed between independent businesses. If these conditions are not met, taxation will be adjusted (upwards or downwards) to arm's length conditions. No distinction is made between cross-border and domestic transactions. Enterprises are deemed associated if one enterprise takes part directly or indirectly in the management, control or capital of another enterprise or the same persons are directly or indirectly involved in the management control or capital of the two enterprises.

It is expected that the tax administration should also issue a new administrative circular in this respect, dealing *inter alia* with requirements in terms of transfer pricing documentation.

6. New value added tax rate

Since 1 January 2015, the applicable VAT rates are increased by 2 percentage points. The standard VAT rate rises from 15 % to 17 %. This still remains the lowest VAT rate within the EU.

The 2 % raise also applies to the *reduced* VAT rates, bringing the reduced VAT rates from 6 % to 8 % and from 12 % to 14 % respectively. The super-reduced 3 % rate remains unchanged, except for the supply of alcoholic beverages consumed in restaurants and construction work made for housing used as a principal residence by a third party (with a transitional period until 31 December 2016).

7. Temporary 0.5 % income tax

As of 1 January 2015, an additional 0.5 % (*impôt d'équilibrage budgétaire temporaire*) income tax is due by individuals.

This additional tax applies to:

- Individuals subject to the Luxembourg State social security scheme in relation to their professional and capital income. The tax is assessed by the social security authorities on the uncapped income after deduction of a rebate; and

- Resident and non-resident taxpayers in relation to their taxable assets income in Luxembourg (such as but not limited to dividends, interests and capital gains). The tax is assessed by the Luxembourg tax administration and will not be due if it does not exceed EUR 25 on an annual basis.

8. Automatic exchange of information on interest payments from savings income

On 25 November 2014, Luxembourg enacted a law modifying the Law of 21 June 2005 transposing into Luxembourg domestic law the European Directive 2003/48/CE related to the taxation of savings income in the form of interest payments (the "**Exchange of Information Law**").

On 19 January 2015, the Luxembourg tax administration (*administration des contributions directes*) issued a circular specifying the modifications introduced by the Exchange of Information Law. The most relevant modification introduced by the Exchange of Information Law is the abolishment of the transitional period during which Luxembourg was entitled to levy a 35 % withholding tax on interest payments from savings income made to EU individual tax residents in the case where no exchange of information was made by the paying agent.

As from 1 January 2015, Luxembourg applies the automatic exchange of information on interest payments made by a Luxembourg paying agent to individuals resident in other EU Member States. No exchange of information is to be made when the recipient of the interest payment is a legal entity, a Luxembourg tax resident or an EU third country tax resident.

The Luxembourg paying agent must transmit the relevant information to the Luxembourg tax authorities which will liaise directly with the competent foreign authority. The automatic exchange of information between authorities must be made at least once a year and no later than 30 June of the year following the relevant period.

If no reporting is made by the Luxembourg paying agent, it may receive an administrative penalty up to 0.5 % of the amount of interest payment that the paying agent should have reported to the Luxembourg tax authorities. Paying agents must report to the tax authorities no later than 20 March of the following year. The first reporting for the year 2015 is therefore to occur before 20 March 2016.

9. Tax Treaty News

Croatia

On 24 October 2014, Croatia ratified the double tax treaty between Croatia and Luxembourg on Income and Capital signed on 20 June 2014. Luxembourg has not yet ratified the treaty.

See our Newsletter of October 2014 on the key features of this treaty.

Denmark

On 28 December 2014, the amending protocol to the Denmark – Luxembourg tax treaty on Income and Capital, signed on 9 July 2013, entered into force. The protocol has applied since 1 January 2015.

Estonia

On 8 December 2014, Estonia approved the new double tax treaty between Estonia and Luxembourg on Income and Capital, signed on 7 July 2014. Luxembourg has not yet approved the new treaty.

See our Newsletter of October 2014 on the key features of this treaty.

Guernsey

The tax treaty between Guernsey and Luxembourg on Income and Capital and its protocol entered into force on 8 August 2014 and have been effective since 1 January 2015.

For details of this new treaty, please see our Newsletter of June 2013.

Ireland

On 22 October 2014, Ireland ratified the amending protocol to the Ireland-Luxembourg double tax treaty signed on 27 May 2014. The protocol will introduce a new article 27 on exchange of information, in line with OECD standards. Luxembourg has not yet ratified the amending protocol.

Italy

On 25 October 2014, the amending protocol and exchange of letters (relating to the exchange of information), signed on 21 June 2012, to the Italy-Luxembourg tax treaty on Income and Capital entered into force. The amending protocol and exchange of letters apply from 25 October 2014.

Lithuania

On 8 December 2014, Lithuania ratified the amending protocol to the Lithuania-Luxembourg tax treaty on Income and Capital signed on 20 June 2014. Luxembourg has not yet ratified this protocol.

Mauritius

Details of the amending protocol to the Mauritius-Luxembourg tax treaty on Income and Capital, signed on 28 January 2014, have been published.

The protocol extends article 26 of the treaty on the mutual agreement procedure with an arbitration clause and provides for a new article 27 on exchange of information in line with current OECD standards

Singapore

Details of the new Singapore-Luxembourg double tax treaty on Income and Capital have been published. The treaty is not yet in force. Once in force and effective, this new treaty will replace the 1993 Singapore-Luxembourg tax treaty.

The new treaty is generally in line with the OECD standards.

The following withholding tax rates will apply under the treaty:

Dividends: 0% withholding tax rate on dividends.

Interest: 0% withholding rate on interest payments.

Royalties: 7% maximum withholding tax on royalties. The definition of royalties also includes films or tapes used for radio or television broadcasting.

Under this new treaty, however, certain articles deviate from the OECD model convention, in substance:

- the provision on independent services is based on the UN Model (2011);
- pensions and other payments made under a social security scheme of a contracting state will be taxable only in that state;
- the mutual agreement procedure does not contain an arbitration clause and the treaty does not include an article on assistance in the collection of taxes.

South of Africa

In November 2014, Luxembourg and South Africa installed an amending protocol to the South Africa-Luxembourg tax treaty. Details on this amending protocol have not been yet published.

United Arab Emirates

On 26 October 2014, an amending protocol to the UAE United Arab Emirates Luxembourg tax treaty was signed. Details on this amending protocol have not been yet published.

For any further information please contact us or visit our website at www.ehp.lu. The information contained herein is not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific legal advice concerning particular situations. We undertake no responsibility to notify any change in law or practice after the date of this document.