NEWSLETTER

2015

July

50 YEARS ELVINGER, HOSS & PRUSSEN
LUXEMBOURG LAW FIRM

CONTENTS

ASSET MANAGEMENT AND INVESTMENT FUNDS

1) CSSF Annual report 2014: Selected items
2) AIFMD: Update of the ESMA Q&A
3) Pension schemes: Extension of the transitional relief from EMIR

Read more on page 2

BANKING, INSURANCE AND FINANCE

1) Fourth Anti-Money Laundering Directive and Wire Transfer Regulation
2) Implementation of the Capital Requirements Directive (CRD IV)

Read more on page 5

INFORMATION AND COMMUNICATION TECHNOLOGY

1) Adoption of the Law on electronic archiving

Read more on page 8

TAX

1) Adoption of the FATCA Law
2) Upcoming tax changes
3) Belgium’s Circular on the taxation of cross-border commuters
4) Tax treaties news

Read more on page 9

ASSET MANAGEMENT AND INVESTMENT FUNDS

1. CSSF Annual report 2014: Selected items

The publication of its annual report always represents an opportunity for the CSSF to confirm and to clarify, where necessary, its position on certain points. In June 2015 (and July 2015 for the English version), the CSSF published its annual report for the year 2014.

Among the items addressed in this report, we have selected the following:

1. UCITS

- Eligible assets: The CSSF confirms that, despite the implementation of the new AIFMD framework, SIFs[1] do not qualify as "other UCIs" within the meaning of Article 41(1)(e) of the Law of 17 December 2010 (the "**2010 Law**") even if they qualify as AIF and are managed by a full scope AIFM;

- Prospectus transparency: The CSSF recalls the importance of investment and underlying risk policy transparency in UCITS prospectuses to comply with Articles 47 and 151 of the 2010 Law. After a similar position illustrated in its Annual Report 2012 regarding UCITS having a high level of leverage, the CSSF again insists on providing sufficiently granular detail of the information to be provided regarding (i) investment strategies, (ii) investment decision-making processes (including, in particular, aspects on selection, allocation, weighting, diversification and possible risk budget), (iii) the use of derivative financial instruments, and (iv) the risk profile for all UCITS. On the basis of the information contained in the prospectus, the investor must be able to anticipate and to understand the profile of the positions which will be taken by the manager, their purpose and the risks which arise therefrom. The transparency requirement is enhanced for UCITS which (i) use sophisticated strategies or intensively use financial derivative instruments, or (ii) invest in complex products;

- Investments in Chinese markets: The CSSF confirms its position on investments on the China Interbank Bond Market and the Shanghai Hong Kong Stock Connect by UCITS. For a useful reminder (see also our article on the Shanghai Hong Kong Stock Connect, in our February 2014 Newsletter);

- Counterparty risk (Art. 43(1) of the 2010 Law): The CSSF specifies that when a disinvestment in a UCITS resulting in a cash inflow causes the 20% limit in deposits placed with the same entity to be exceeded, it shall be deemed to constitute an active breach within the meaning of CSSF Circular 02/77 (due to the predictable character of a cash inflow following a disinvestment). This implies

[1] SIFs mean specialised investment funds within the meaning of the Law dated 13 February 2007, as amended.

that the reporting requirements under the Circular apply, even if the UCITS has not, as is frequently the case in such situation, incurred any financial loss.

2. UCIs

- Errors in the calculation of fees and costs and CSSF Circular 02/77: any surplus levied on the assets of a UCI must be reimbursed to the UCI in all cases and irrespective of whether or not the overpayment exceeds the tolerance threshold set in CSSF Circular 02/77. Recalculation of the net asset value (NAV) is necessary only if the reimbursed amount exceeds the materiality threshold applicable in accordance with CSSF Circular 02/77;

- First annual and half-yearly report by newly created UCIs: the CSSF recalls that the starting date for the first reports must correspond (i) to the date of its incorporation before a notary in the case of a UCI incorporated in the form of a commercial company, and (ii) to the date of entry into force of the FCP[2] management regulation in the case of a UCI incorporated in the form of an FCP.

3. AIFMs

AIFM authorisation files: the CSSF highlights the fact that when carrying out the qualitative analysis of an authorisation file, it pays particular attention to the following points:

- transparency of the direct and indirect shareholder structure of the AIFM;

- quality of the shareholders that have a qualifying holding in the AIFM;

- persons comprising the AIFM bodies;

- internal organisation of the AIFM with the number of persons (including the managers, employed by the AIFM in Luxembourg, the setting-up of an administrative centre and a decision-making centre at the level of the AIFM, the internal governance framework of the AIFM);

- extent of delegated activities in relation to portfolio management and risk management; and

- risk management method.

The CSSF applies the rules on the authorisation and organisation of UCITS management companies contained in its Circular 12/546 to those of AIFMs.

The CSSF also insists on the importance for AIFMs established in Luxembourg (or which have to adapt to the AIFM Law[3]), to set up the necessary substance in order to enable them to assume their responsibilities and to deliver quality services to the AIF they manage.

For further information, see the CSSF Annual Report 2014.

[2] FCP refers to *Fonds Communs de Placement* (common fund).

[3] AIFM Law refers to the Law of 12 July 2013 on Alternative Investment Fund Managers.

2. AIFMD: Update of the ESMA Q&A

On 21 July 2015, ESMA published an updated version of its Q&A on AIFMD. New questions and updates mainly clarify AUM[4] calculation (conversion of foreign currencies, counting of short non-derivative positions) and reporting to national authorities (e.g. in the case where a Member State applies the ESMA Opinion on collection of additional information issued in October 2013 (ESMA/2013/1340)).

3. Pension schemes: Extension of the transitional relief from EMIR

The three-year exemption from the clearing obligation for pension scheme arrangements meeting certain criteria (Art. 89(1) Regulation 648/2012 ("**EMIR**")) is extended by two years, i.e. until 16 August 2017 (see Regulation amending EMIR as regards the extension of the transitional periods related to pension scheme arrangements dated 5 June 2015).

[4] AUM stands for assets under management.

BANKING, INSURANCE AND FINANCE

1. Fourth Anti-Money Laundering Directive and Wire Transfer Regulation

Having been published on 5 June 2015, the latest anti-money laundering Directive (EU) 2015/849 ("**AMLD IV**"), which shall be transposed into national law and which shall become applicable on 26 June 2017, foresees a stronger framework for combating money laundering and terrorism financing.

On the same date, the revised Wire Transfer Regulation (EU) 2015/847 ("**WTR**") was also published in the Official Journal. This regulation sets out the minimum obligations to be fulfilled in order to ensure the traceability of transfer of funds. The WTR will become applicable on the same date as the AMLD IV.

Luxembourg has been a leading country in the early implementation of a number of measures contained in AMLD IV. There are two main novelties of particular interest for the Grand-Duchy.

Firstly, obliged entities incorporated within the territory of a Member State, including trustees, shall obtain and hold adequate, accurate and current information on their beneficial ownership (i.e. those who ultimately own or control a company). Beneficial ownership information shall be stored in a central register located outside the company using, for that purpose, a central database which collects beneficial ownership information (which could be organised under the Trade and Companies Register or another central register). Member States may decide that obliged entities are responsible for filling in the register.

In all cases that information should be made available to (i) competent authorities and Financial Intelligence Units, (ii) obliged entities when taking customer due diligence measures, and (iii) other persons who are able to demonstrate a legitimate interest with respect to money laundering, terrorist financing, and the associated predicate offences, such as corruption, tax crimes and fraud.

Secondly, under AMLD IV, "criminal activity" is considered, among other serious crimes, as all offences, including tax crimes relating to direct and indirect taxes as defined in national law, which are punishable by deprivation of liberty or a detention order for a minimum of more than six months. In the case of Luxembourg, given that the penalty for tax fraud (*escroquerie fiscale*) is established at a minimum of 1 month, tax fraud would remain out of scope of money laundering. It is very likely, however, that in the course

of implementation of AMLD IV, Luxembourg will take specific legal measures (as foreseen in CSSF Circular 15/609) to ensure that tax fraud as a predicate offence is included and thereby render punishable money laundering of tax fraud benefits.

2. Implementation of the Capital Requirements Directive (**CRD IV**)

On 2 July 2015, the Luxembourg Parliament adopted the law implementing, amongst others, the CRD IV[5] into Luxembourg law (the "**Law**") which, together with CRR[6], forms the supervisory framework for credit institutions and investment firms, adopted at the European Union level to implement the Basel III Agreement.

Among the numerous goals of the CRD IV, some should be highlighted, especially the determination to have a more balanced liquidity, more and better capital, and a more efficient and strengthened cross-border supervision. As Luxembourg is late in its implementation which was required for 31 December 2013, the CSSF has already applied most of the requirements since then.

[5] Directive 2013/36/EU of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC.

[6] Regulation (EU) 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investments firms and amending Regulation (EU) No 648/2012.

Besides repealing long-established CSSF Circulars (e.g. CSSF Circulars 06/273 and 07/290), the CRD IV implementation required a substantial and overall amendment of the Law on the Financial Sector (*Loi sur le Secteur Financier*) (the "**LSF**").

The key alterations, or even innovations introduced in the LSF can be summarised as follows:

- Elementary definitions laid down in Article 1 of the LSF have been amended and adjusted so as to reflect the CRR alterations and, amongst others things, a new subcategory of investment firm has been created, i.e. "investment firm within the meaning of the CRR" (the "**CRR Investment Firm**")[7];

- The Law strengthens the internal governance requirements applicable to "**CRR Institutions**" in order to substantiate the sound and prudent management culture (Part II, new Chapter 4bis of the LSF). Article 38-1 of the LSF therefore lays down certain principles and standards which aim to promote the efficiency of the CRR Institutions' overall supervision by the managing body;

- The Law implements specific provisions with respect to remuneration policies (which were already partially covered by the CSSF

[7] Article 1 (9bis) of the LSF.

Circulars 14/594, 15/601 or 14/585), in particular the requirement to establish a maximum ratio between the variable and the stable components of the total remuneration, so as to prevent excessive risk-taking[8];

- CRR Institutions are required to establish and hold, in addition to other existing own fund requirements, capital buffers, such as (i) the capital conservation buffer, (ii) the institution-specific countercyclical capital buffer, (iii) the systemic risk buffer, and (iv) the combined buffer requirement (Part III, new Chapter 5, Article 60 of the LSF);

- Besides strengthening the CSSF's overall supervising powers, the Law allows the CSSF, under certain circumstances, (i) to inflict specific administrative fines on CRR Institutions, the amounts of which have been increased (in relation to the previous thresholds), and harmonised at European level, or (ii) to impose other administrative measures, in accordance with Articles 63-1 and 63-2 of the LSF; and

- The Law further implements several provisions into the LSF as regards the so-called "Systemically Important Institutions", in particular the criteria which allow identification of the Systemically Important Institutions (Article 59-3 of the LSF), as well as the subsequent regulatory impacts resulting from this legal status.

[8] Article 38-6 of the LSF.

INFORMATION AND COMMUNICATION TECHNOLOGY

1. Adoption of the Law on electronic archiving

Luxembourg has taken a crucial step towards a "paperless office".

On 2 July 2015, after two years of discussions, the Chamber of Deputies finally adopted the Law relating to electronic archiving and amending Article 1334 of the Civil Code, Article 16 of the Commercial Code and the amended Law of April 5, 1993 in relation to the financial sector (the "**Law**").

In the wake of electronic signatures implemented in Luxembourg law as from August 2000, the Law aims at boosting the dematerialised economy and electronic services while maintaining a high level of security, confidentiality and technical requirements.

Legal certainty in the area of electronic archiving has long been awaited by business players in Luxembourg for the full implementation of new archiving policies while the country already has the necessary infrastructure facilities to host the dematerialised documents (cutting-edge datacentres, high-speed Internet connections).

The Law has three main objectives:

- defining the conditions under which original documents may be dematerialised and electronic originals and electronic copies may be stored;
- defining the conditions under which electronic copies may benefit from a legal presumption of conformity to the original document; and
- setting the applicable rules of the new activity of digitisation and storage service provider as well as creating a status for this new activity.

This new legal framework will render Luxembourg more attractive than the other European countries with regard to electronic archiving and attract multinational companies that seek to centralise their e-archiving management in a single European country.

More information on the content of this Law is available in the article "The newly adopted Luxembourg Law on electronic archiving" published on our website.

TAX

1. Adoption of the FATCA Law

On 1 July 2015, the Luxembourg Parliament adopted the Law for the ratification of the Intergovernmental Model 1 Agreement signed between the United States and Luxembourg on 28 March 2014 (the "**FATCA Law**").

As stressed in our May 2015 Newsletter, the FATCA Law provides explicitly that the reporting institution should inform its client that certain information will be reported to the Luxembourg Tax Administration. In this context, the FATCA Law provides that the individual has the right to rectify the information reported.

In order to comply with the FATCA Law, the Luxembourg Tax Administration has postponed the date of the first reporting to the 31 July 2015.

It is now contemplated that the Luxembourg Tax Administration will issue a circular on the topic in the coming weeks.

For further details please refer to our February 2015 Newsletter on the draft circular.

2. Upcoming tax changes

On 10 July 2015, the Government council adopted a bill containing various new tax measures (the "**Bill**"). The Bill itself has not yet been published but a press release has been published on the Government website.

The most important tax aspects of the Bill may be summarised as follows:

- transposition into domestic law of Directive 2014/86/EU on anti-hybrid instruments and Directive 2015/121/EU on anti-abuse rules amending the parent subsidiary Directive 2011/96/EU (the "**Directive**"). In a nutshell, income from a participation will no longer be exempt in Luxembourg if such income is tax deductible in another EU Member State and the benefits of the Directive would no longer be granted if the transaction is deemed abusive based on the new wording of the Directive;
- modification of the Luxembourg tax consolidation regime to allow sister companies to form a tax unity;
- enlargement of the investment tax credit ("*bonification d'impôt pour investissement*") to allow a lessor to benefit from this provision for ships used in international traffic; leasing of ships used in international traffic;
- extension until December 2017 of tax credits for hiring unemployed persons; and
- possibility to obtain a tax deferral upon transfer of a company or a permanent

establishment outside Luxembourg to a third country having concluded an exchange of information agreement with Luxembourg that complies with the OECD principles. Currently, a deferral of payment is only open for transfers to the EU/EEA.

Further details will follow on the above once the Bill has been published.

3. Belgium's Circular on the taxation of cross-border commuters

On 16 March 2015, Belgium and Luxembourg signed a mutual agreement (the "**Mutual Agreement**") regarding the problem of the right of taxation of salaries, wages and other similar remunerations in bilateral cross-border situations.

On 1 June 2015, the Belgian tax authorities issued a circular letter (Circular AAFisc No. 22/2015 – No.Ci. 700.520) (the "**Circular**") explaining and clarifying the Mutual Agreement.

The Circular:

- reaffirms that the right of taxation under the tax treaty shall not be affected when the professional activities are exercised outside the State where they are usually exercised for 24 days or fewer per year (*24-day threshold*);
- clarifies that the Mutual Agreement is limited to cross-border employment under a single employer/employee relationship and details the conditions to be applied in order for employees to prove their physical presence in the territory of the other contracting State; and
- reaffirms that the Mutual Agreement applies as of 1 January 2015.

See our May 2015 Newsletter on the key features of this Mutual Agreement.

4. Tax treaties news

Austria

On 18 June 2015, Austria and Luxembourg signed an amending exchange of notes regarding adjustments concerning the new exchange of information procedures under the double tax treaty concluded between Austria and Luxembourg on Income and Capital, as amended. Details on the notes have not yet been published.

France

On 1 July 2015, the French Government approved the amending protocol signed on 5 September 2014 to the double tax treaty between France and Luxembourg on Income and Capital of 1958, as amended (the "**Protocol**"). The Protocol was submitted to the French National Assembly for ratification.

The Protocol adds a new paragraph to Article 3 of the tax treaty relating to the disposal of shares in companies holding mainly real estate. Please refer to our

October 2014 Newsletter on the Protocol for further details.

In Luxembourg, the bill ratifying the Protocol was submitted to Parliament on 9 June 2015.

Hungary

On 23 June 2015, Hungary ratified the new double tax treaty between Hungary and Luxembourg on Income and Capital signed on 10 March 2015. However, Luxembourg has not yet ratified the treaty. Once in force and effective, the new treaty will replace the current double tax treaty of 1990. Details on this new tax treaty have not been published yet but will be highlighted in a later edition, once available.

Brunei

On 14 July 2015, the double tax treaty between Brunei and Luxembourg on Income and Capital, initialled on 13 December 2012 was signed by the two States in Brussels.

Details on this tax treaty, once available, will be reported in a future Newsletter.

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.