NEWSLETTER

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50 YEARS
ELVINGER, HOSS & PRUSSEN
LUXEMBOURG LAW FIRM

CONTENTS

ASSET MANAGEMENT AND INVESTMENT FUNDS

1. UCITS

1. New CSSF Circular on UCITS depositaries

On 11 July 2014, the CSSF published a new Circular 14/587 ("**Circular**") that applies to all UCITS and their depositaries. For a first insight into the new depositary regime, please see our Newsflash.
More detailed information on the subject and an English translation of this new Circular will soon be available on our website (www.ehp.lu).

2. UCITS V in a nutshell

In April 2014, the European Parliament finally approved the new UCITS directive following the agreement reached with the Council last February ("**UCITS V**"). UCITS V will amend the current EU Directive 2009/65. It will enter into force on the twentieth day following that of its publication in the Official Journal of the European Union. UCITS V is not yet published as it is being translated into all the relevant EU languages.

UCITS V focuses on 3 main pillars:

- revision of the depositary regime;
- introduction of rules on remuneration;
- harmonisation of administrative sanctions.

2.1 Depositary

- Prior to UCITS V, the UCITS rules gave a certain degree of discretion to the EU Member States in relation to the types of entities eligible to act as a depositary of a UCITS. Now UCITS V sets out eligibility criteria and provides that (i) national central banks (ii) EU authorised credit institutions or (iii) entities (a) authorised under the laws of the Member State to carry on UCITS depositary activities; (b) subject to specific capital requirements; and (c) subject to prudential regulation and ongoing supervision and (d) satisfying minimal requirements (in terms, inter alia, of infrastructure sound management and control, various procedures and policies) are eligible to act as depositary.

- UCITS V requires that the depositary shall properly monitor the cash flows of the UCITS and ensure subscription monies are properly received by the UCITS. Additionally, the depositary shall ensure that all cash is properly booked in accounts opened with eligible banks in the name of the UCITS, the management company of the UCITS acting on its behalf or in the name of the depositary acting on its behalf. Where assets are held in the name of the depositary acting on the UCITS behalf, they must be segregated and held in an account separate from that of its own cash.

- UCITS V aligns the liability of a depositary with the higher standard of liability of a depositary under AIFMD.

The depositary of a UCITS will be liable for any losses of financial instruments held in custody suffered by the UCITS or its investors, unless it can prove that the loss has arisen as a result of an external event beyond its reasonable control (the consequences of which would have been unavoidable despite all reasonable efforts to the contrary). In addition, the depository will be liable for all other losses suffered by the UCITS or its investors as a result of the depositary's negligent or intentional failure to properly fulfill its legal obligations.

Depositaries will remain liable for the loss of assets, even where part or all of its safekeeping tasks have been delegated to a third party. Their liability cannot be excluded

or limited by agreement. No liability discharge is allowed unlike in the AIFMD regime.

UCITS V provides that the safekeeping functions (not the oversight functions) can be delegated by the depositary to third parties (including to a Central Securities Depository to the extent that it is has been entrusted with the safekeeping of the securities of the UCITS) subject to certain conditions. Among these conditions there is a requirement for (i) an objective reason for the delegation and (ii) adequate initial due diligence by exercising due skill, care, and diligence in the selection of the delegates. In addition, the depositary is also subject to ongoing due diligence duties and must ensure that the delegate meets a range of conditions when exercising its functions. The segregation of assets must be ensured even in the case of delegation. Depositories and their delegates will not be allowed to reuse assets of the UCITS except if it is executed on behalf of the UCITS and provided other specific conditions are met.

UCITS V requires that the prospectus of a UCITS must contain, amongst other information relating to the depository, the list of its delegates and sub-delegates which may be difficult to manage in practice.

On 11 July 2014, the *Commission de Surveillance du Secteur Financier* issued a circular on the rules applicable to UCITS depositaries (Circular CSSF 14/587; see point 1) which anticipates the application of UCITS V in relation to certain aspects, mainly rules relating to (i) the segregation of UCITS' assets throughout the delegation chain, (ii) the initial and ongoing due diligence in case of delegation, (iii) the identification, resolution and avoidance of conflicts of interest, (iv) adequate booking and monitoring of cash flows. It also details organisational rules and rules of conduct that a credit institution should comply with to be approved as a UCITS depository.

2.2 Management company remuneration

UCITS V introduces a requirement that UCITS management companies put in place remuneration policies and practices broadly for senior management and persons whose professional activities have a material impact on the risk profile of the management company or the UCITS. Such policies and practices must be consistent with and promote sound and effective risk management and discourage disproportionate risk-taking by the UCITS. The remuneration policy requirements are very detailed on variable remuneration and broadly replicate the corresponding provisions in AIFMD.

Certain disclosures will be required to be made in the UCITS annual report in relation to fixed and variable remuneration paid by the management company or the self-managed UCITS to its staff.

In addition, the key investor information shall include a statement that the details of the up-to-date remuneration policy are available by means of a website (including a reference to that website) and that a paper copy will be made available free of charge upon request.

ESMA shall draw up guidelines to support its remuneration requirements and UCITS V stipulates that such guidelines should, where appropriate, "*be aligned, to the extent possible*" with the ESMA AIFMD remuneration guidelines.

2.3 Sanctions

UCITS V also imposes common standards for the administrative sanctions which should be published (save in certain specific circumstances) and reported to ESMA with maximum penalties of €5 million (or 10% of annual turnover) for a company or €5 million for individuals. UCITS V sets out a detailed list of breaches of the UCITS Directive which will trigger sanctions including non-compliance

with provisions relating, *inter alia*, to (i) authorisation of UCITS or their management company, (ii) delegation, (iii) rules of conduct, and (iv) rules on investment policies, etc. If Member States already have criminal sanctions in place for the same breaches they may not apply these administrative sanctions under certain conditions.

2.4 Implementation and transitional provisions

In terms of timing, UCITS V is expected to be published in the Official Journal of the EU shortly, following Council approval, and it will come into force 20 days thereafter. Member States will then have a period of 18 months to introduce implementing legislation. However, UCITS which have not appointed a depositary in line with the eligibility criteria set forth by UCITS V will have a grandfathering period of 42 months to ensure compliance with UCITS V.

2. AIFMD

1. Update on applications for AIFM in Luxembourg

In Luxembourg, as at 22 July 2014, 215 applications for authorisation as AIFM under Article 5 of the AIFM Law[1] have been received by the CSSF: 151 Luxembourg entities have been authorised so far (of which 74 are already on the official AIFM list published on the CSSF website) and the remaining 64 application files are currently being reviewed by the CSSF. The majority of the applicants are existing management companies authorised as UCITS management companies or non-UCITS management companies which seek to extend their licences to be authorised to manage AIFs.

Furthermore, a total of 487 entities have been granted the status of registered AIFM under the provisions of Article 3(2) of the AIFM Law as at 22 July 2014.

See also CSSF Press Release 14/40.

2. CSSF – AIFMD FAQ update

On 18 July 2014, the CSSF updated its frequently asked questions ("**FAQ**") on the Law of 12 July 2013 on Alternative Investment Fund Managers ("**AIFM**") and the AIFM delegated regulations by adding a new question 17 on requirements of initial capital and own funds applicable to AIFMs as well as a new question 18 on the marketing by non-EU AIFMs of AIFs to professional investors in Luxembourg without the passport.

The updated FAQ is available on the CSSF's website.

On the same day and in relation to the newly introduced question 18 of the FAQ, the CSSF published guidance on the procedure to be followed in order for a non-EU AIFM to market its AIFs to professional investors in Luxembourg without the passport and the marketing information form to be used in this respect.

For more information on this latter point, please see our dedicated Newsflash.

3. ESMA – AIFMD Q&A update

On 27 June 2014 and 21 July 2014, ESMA published an updated version of its Q&A on AIFMD (ESMA/2014/714).

In the version of its Q&A published in June, ESMA confirmed the possibility for an AIFM to benefit from the passport not only for the management and marketing of AIF in the EU

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

but also for the MiFID[2] services provided in Article 6(4) of the AIFMD ("**MiFID Services**").

MiFID Services cover the following functions:

- discretionary portfolio management,
- investment advice;
- safe-keeping and administration in relation to shares or units of collective investment undertakings; and
- reception and transmission of orders in relation to financial instruments.

ESMA therefore anticipates the entry into force of the new MiFID II Directive[3] which includes an amendment to Article 33 of the AIFMD. This ESMA's position is based on the principle of sincere cooperation which is provided for in Article 4(3) of the Treaty of the Functioning of the European Union (TFEU) and which requires the Member States to facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

In addition to this point on the MiFID Services which can be performed by an AIFM, the Q&A published in June 2014 includes a new section on notifications and additional information on remuneration and reporting obligations are also provided.

In July 2014, the Q&A was complemented further by a new section on the obligations for depositaries and the calculation of leverage (ESMA/2014/868).

3. PRIPS - regulation on key information documents for investment products

In April 2014, the European Parliament finally approved the Regulation on key information documents for investment products ("**PRIPS Regulation**") proposal following the agreement reached with the Council. The PRIPS Regulation will enter into force on the twentieth day following that of its publication in the Official Journal of the European Union. The PRIPS Regulation is not yet published as it is being translated into all the relevant languages of the European Union.

The purpose of the PRIPS key information document ("**PRIPS KID**") is to help retail investors to understand, compare and use information that is made available to them about different investment products. The PRIPS Regulation will therefore require the provision of basic information about investment products, the risk and return that can be expected, as well as the overall aggregate cost that will arise in making the investment. This information must be provided in a consistent manner and therefore the PRIPS Regulation lays down uniform rules on the format and content of the PRIPS KID and its provision to retail investors.

The PRIPS Regulation will apply where "investment products" (such as investment funds including UCITS, insurance-based instrument products, structured securities, structured term-deposits) are sold to "retail investors" and therefore not where a product is restricted to institutional investors.

The PRIPS Regulation introduces two separate obligations:

- Firstly, product manufacturers must prepare and publish a PRIPS KID and take responsibility for its content.

  Before a PRIP is made available to retail investors, the PRIP manufacturer must produce a KID and publish the latter on its website. The manufacturer may delegate the production of the document, but remains ultimately responsible for its content. The KID shall constitute pre-contractual information. It shall be accurate, fair, clear and not misleading.

[2] MiFID refers to the Market in Financial Instruments Directive 2004/39/EC dated 21 April 2004.
[3] MiFID II refers to Directive 2014/65/UE dated 15 may 2014 which amends MiFID.

It may contain cross-references to certain documents such as a prospectus where applicable but shall not contain cross-references to marketing materials.

The KID shall be drawn up as a short document written in a concise manner (maximum of three sides of A4-sized paper when printed) which promotes comparability and is focused on the key information that retail investors need before investing.

- Secondly, sellers (for instance the distributor or the product manufacturer in the case of direct sales) must ensure that the PRIPS KID is provided, free of charge, to retail investors.

  As a matter of principle, the provision shall be made in good time before the conclusion of the transaction.

As the PRIPS proposal is in the form of a regulation, it will be directly applicable in Member States of the European Union without the need for implementing legislation. As such, although domestic implementing regulations are likely, Member States will not have the ability to put their own interpretation on the provisions. Details of the method, timing and conditions for the provision of the disclosure to a retail investor will be clarified by delegated acts.

Manufacturers of PRIPS and those advising or selling will have 2 years after its entry into force to prepare before the PRIPS Regulation becomes applicable.

A transitional provision is included to allow UCITS management companies and persons selling units of UCITS to continue to use the UCITS KIID in accordance with Directive 2009/65/EC for five years from the entry into force of the PRIPS Regulation.

4. Statistical data collection: SICARs are now also required to report

The CSSF, in agreement with the *Banque Centrale du Luxembourg* (BCL), has recently published a new circular (Circular CSSF 14/588) which modifies the data collection system for money market funds ("**MMF**") and non-MMF investment funds.

In comparison with the current statistical data collection, the modifications consist of new versions of the current reports as well as an extension of the reporting population. As regards this latter point, investment companies in risk capital (SICAR) are added to the current reporting population.

So the investment vehicles subject to this reporting obligation now include the following entities:

- undertakings for collective investment (UCI) governed by the Law of 17 December 2010;
- specialised investment funds (SIF) governed by the Law of 13 February 2007;
- investment companies in risk capital (SICAR) governed by the Law of 15 June 2004.

The investment vehicles are subject to the following reporting:

- all compartments of MMF are invited to provide the required reports for the reference period of December 2014 at the latest on 15 January 2015;
- all compartments of investment vehicles are invited to provide the required reports for the reference period of December 2014 at the latest on 30 January 2015.

The whole set of instructions for the statistical reporting is published and can be downloaded from the BCL's website under the heading "Regulatory reporting".

The Circular replaces and repeals BCL Circular 2013/231 - CSSF Circular 13/564 "Modification of the statistical data collection for money market funds and investment funds" with effect from 1 January 2015.

5. EuVECA/EuSEF: implementing regulations

On 4 June 2014, two implementing regulations were published in the Official Journal of the European Union.

- Commission implementing Regulation 593/2014 of 3 June 2014 laying down implementing technical standards with regard to the format of the notification according to Article 16(1) of Regulation 345/2013 on European venture capital funds ("**EuVECA**");

- Commission implementing Regulation 594/2014 of 3 June 2014 laying down implementing technical standards with regard to the format of the notification according to Article 17(1) of Regulation 346/2013 on European social entrepreneurship funds ("**EuSEF**").

For more information on the EuVECA and EuSEF regulations, see our Newsletter of October 2013.

See also "Dispute Resolution" section, point 1.

BANKING, INSURANCE AND FINANCE

1. MiFID II – key changes

On 15 May 2014, the Directive 2014/65/EU ("**MiFID II**") and the Regulation 600/2014/EU ("**MiFIR**"), both on markets in financial instruments, were adopted, recasting the legal framework previously implemented by MiFID I.

The Directive contains provisions governing the authorisation of the business, the acquisition of qualifying holding, the exercise of freedom of establishment and of the freedom to provide services, the operating conditions for investment firms to ensure investor protection, the powers of supervisory authorities of home and host Member States and the regime for imposing sanctions. On the other hand, the Regulation provides for trade and regulatory transparency requirements, product intervention powers of competent authorities, and requirement for third-country firms servicing professional clients.

This new legislation aims at establishing a safer, sounder, more transparent and more responsible financial system that works for the economy and society as a whole. The key changes introduced to achieve these objectives are as follows:

1. Scope

The scope of MiFID II is expanded, both in terms of the type of firms that will be subject to MiFID's requirements (such as commodity traders, data reporting services providers and EU branches of third-country firms) and the types of financial instruments that are within the scope (such as structured deposits, commodity and exotic derivatives and emission allowances).

2. Market structure framework

In terms of market structure, MiFIR introduces:

- a new trading venue for non-equities, the organised trading facility ("**OTF**"), which is defined as any facility or system (other than a regulated market or multilateral trading facility ("**MTF**") operated by an investment firm or operator that, on an organised basis, executes or arranges transactions based on multiple third-party orders (e.g. broker-crossing networks, inter-dealer broker system, system trading clearing-eligible derivatives); and is subject to the same core requirements for the operation of a trading venue as other existing platforms;
- an obligation for all derivatives sufficiently liquid and eligible for clearing to be traded on eligible platforms (regulated markets, MTFs or OTFs);
- a harmonised EU regime for non-discriminatory access to trading venues and central counterparties (CCPs).

3. Technological innovation

MiFID II introduces new requirements for firms engaging in algorithmic and high-frequency trading, for those that provide their clients with direct electronic market access and for the regulated markets on which they trade. All must have effective systems and risk controls in place and report the activity to regulators.

4. Commodities

MiFID II provides for strengthened supervisory powers and a harmonised position-limit regime for commodity derivatives. Under this

system, competent authorities will impose limits on positions in accordance with the methodology for calculation to be set by ESMA and a position-reporting obligation by category of trader will apply.

5. Transparency and transaction reporting

MiFIR expands the existing pre- and post-trade transparency rules to equity like instruments (such as depositary receipts, exchange traded funds and certificates), to non-equities instruments (such as bonds and derivatives traded on trading venues) and to other trading venues (such as OTFs).

The quality and availability of post-trade information is addressed by the introduction of the Approved Publication Arrangement (APA) and the launch of a European consolidated tape.

6. Investor protection

MiFID II contains several measures designed to strengthen investor protection and therefore increase investor confidence.

- *"Independent" Advisors*

Financial advisors describing themselves as "independent" should carry out a market analysis sufficiently large and diversified in terms of products and issuers, and the advice must not be limited to financial instruments issued or provided by entities having close links with the investment firm.

- *Information to clients*

A firm providing investment advice must inform the client, in advance, whether (i) the advice is provided on an independent basis, (ii) it is based on a broad or more restricted analysis of different types of instruments, and (iii) it will provide the client with the on-going assessment of the suitability of the financial instruments recommended to the client.

When an investment service is offered together with another service or product as part of a package, the investment firm must inform the client of the possibility of buying the products separately, together with the associated costs and charges and the associated risks of buying the products together or separately.

- *Reporting Obligations*

Investment firms must send communications and reports to clients taking into account the type and the complexity of the financial instrument involved and the nature of the service provided to the client.

If the firm provides portfolio management services to retail clients, it shall also communicate an updated statement to clients of how the investments meet the client's preferences, objectives and characteristics.

When providing investment advice to retail clients, the investment firm shall provide clients with a prior statement of suitability in a durable medium specifying the recommendation and how the advice given meets the personal preferences, objectives and characteristics of the client.

- *Inducements*

Firms providing independent advice or portfolio management services will not be allowed to accept and retain fees, commissions or any monetary or non-monetary benefits paid by any third party in relation to the provision of the services to clients, with the exception of minor non-monetary benefits capable of enhancing the quality of services provided, not impairing compliance with the firms' duty to act in the best interest of the clients and after a clear disclosure to them thereon.

The previous regime regarding the inducements will continue to apply to firms providing other investment services.

- *Execution-Only Services*

The definition of complex instruments is expanded, e.g. structured UCITS, and investment firms will thus be required to test the appropriateness of such instruments.

- *Best Execution*

The investment firm must provide clients with its best execution policy through clear information, in sufficient detail and in a way that can be easily understood on how clients' orders will be executed, and shall require clients' consent on this execution policy.

It must also publish annually the top five execution venues used the previous year for each class of financial instruments.

Receiving remuneration, discount or non-monetary benefit for routing client orders to a specific trading or execution venue is prohibited.

7. Third-country access to the EU

A third-country investment firm is allowed to provide services in the EU only if:

- it is authorised and supervised in its home jurisdiction;
- an equivalence assessment is made by the European Commission regarding the regulatory and tax regime of the non-EU firm's home state; and
- information exchange arrangements and tax information exchange agreements are signed between the home supervisor and the competent authority in the relevant Member State.

If the services are provided to retail or professional clients on request, the non-EU firm must establish a branch in each EU country in which it wishes to operate.

If the services are provided to eligible counterparties or professional clients *per se*, the firm shall only be registered with ESMA and does not need to establish a branch in the EU.

8. Others

MiFID II sets out a new regime for recordings of telephone conversations and electronic communications.

It also prohibits investment firms from concluding title transfer financial collateral arrangements with retail clients for the purpose of securing or covering present or future, actual or contingent or prospective obligations of clients.

Furthermore, it introduces the obligation for the directors of the management body of the investment firm to commit sufficient time to perform their duties and thus to limit the number of parallel directorships.

Finally, it strengthens the existing regime to ensure effective cooperation between authorities and harmonised administrative sanctions in order to detect and deter breaches of MiFID II.

9. Timetable

- Entry into force on 2 July 2014.
- Implementing measures of the European Commission and ESMA to follow.
- National implementation for 3 July 2016 (MiFID II).
- Application from 3 January 2017.

2. New deposit guarantee schemes Directive

On 12 June 2014, Directive 2014/49/EU on deposit guarantee schemes (the "**DGS Directive** ") was published in the Official Journal of the European Union. It forms part of the measures adopted in the aftermath of the financial crisis in an effort to establish a banking union and aims to further strengthen

the protection of depositors. This simplification and harmonisation will contribute to more transparency for depositors, faster verification of claims by the deposit guarantee schemes ("**DGSs**") and speedier reimbursement in the event of a bank failure. The main changes brought by the DGS Directive to the existing system resulting from the original Directive on Deposit Guarantee Schemes 94/19/EC (the "**1994 Directive**") and the Directive of March 2009 (the "**2009 Directive**"), amending certain key elements (i.e. coverage level, pay-out delay, deletion of the co-insurance system) of the 1994 Directive are summarised herein.

1. Scope

DGSs may be defined as schemes funded by credit institutions which aim to guarantee, up to a certain level, the repayment of deposits from account holders in the event of failure of one of its members.

The DGS Directive broadens the scope of protected depositors to any enterprises whatever their size. The 1994 Directive indeed provided an option for Member States to exclude large enterprises, which Luxembourg had chosen to implement.

The DGS Directive applies to cash deposits only and not to the investors-compensation scheme. A proposal to amend the Directive 97/9/EC on investor-compensation schemes (which included the same possibility to exclude large enterprises) was submitted in 2010 but has not yet been adopted. This proposal also suggests including all enterprises whatever their size within the scope of protected investors.

The DGS Directive confirms that €100,000 is an appropriate level of protection in case of bankruptcy and that deposits are covered per depositor per bank. This means that the limit of €100,000 applies to all aggregated accounts at the same bank. If a bank operates under different brand names, the coverage level applies to the aggregated amount of all deposits of the same depositor held at this bank. Depositors must be informed that deposits held under different brand names of the same bank are not covered separately. However, deposits by the same depositor in different banks all benefit from separate protection. This extension from a limit of €20,000 to a limit of €100,000 had been anticipated by the Luxembourg legislator in 2008.

2. Payment conditions and timeframe

In addition, access to the guaranteed amount will be easier and faster. At least 70 % of this payment must be made in cash and repayment deadlines will be gradually reduced from the current 20 working days to 7 working days in 2024. The measures set by the DGS Directive ensure that this faster pay-out will be achieved in practice: DGSs will be informed at an early stage by supervisory authorities if a bank failure becomes likely. The DGS will have prompt access to information on deposits at any time. Banks will be required to tag eligible deposits, provide single customer views, and maintain their records up to date. The verification of claims is simplified by abandoning time-consuming set-off procedures, although Member States may decide that due liabilities of the depositor to the bank are taken into account for calculation of the amount to be repaid by the DGS. If a bank fails, no application from depositors will be needed: the DGS will pay on its own initiative.

Another change is that for branches established in other Member States, repayment to depositors of those branches shall be made by the DGS of the host Member State under the instructions of the DGS of the home Member State. The latter shall also provide the necessary funding prior to payout.

3. Depositors' information

The DGS Directive improves depositors' information to ensure that depositors are aware of the key aspects of protection of their deposits by the DGS. When entering into a deposit agreement with a bank, depositors will countersign a standardised information sheet containing all relevant information about the coverage of the deposit by the competent DGS. The updated standardised information sheet will be sent by banks to their customers at least once a year. Prospective depositors should be provided with the same information by way of a standardised information sheet, of which they should acknowledge receipt. In addition, banks will be required to inform their depositors about the DGS protection of their deposits on the statements of account.

4. Ex-ante financing

For the first time since the introduction of DGSs in 1994, the DGS Directive sets out financing requirements for the schemes in three steps. In principle, the first step consists of an ex-ante financing: the banks are required to make biannual contributions to their deposit guarantee scheme. If the ex-ante financing is insufficient to repay depositors in the event of a bank failure, additional contributions may be required from the member banks of the DGS, up to a maximum amount of 0.5% of the covered deposits. If these additional contributions are not sufficient, the scheme would have access to alternative funding arrangements and would also have the right to borrow from all other DGSs within the European Union under certain conditions.

DGSs should reach a total amount of financing equal to at least 0.8% of the total covered deposits of their members by 3 July 2024.

5. Implementation deadline

The DGS Directive should, for the most part, be implemented and effective from 3 July 2015.

3. Recovery and resolution of credit institutions and investment firms

On 12 June 2014, Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations 1093/2010 and 648/2012 was published in the Official Journal of the European Union.

4. Single supervisory mechanism ("SSM")

On 14 May 2014, two regulations issued by the European Central Bank ("**ECB**") within the framework of the SSM were published in the Official Journal of the European Union:

- Regulation 468/2014 of 16 April 2014 establishing the framework for cooperation within the SSM between the ECB and national competent authorities and with national designated authorities;
- Regulation 469/2014 of 16 April 2014 amending Regulation 2157/1999 on the powers of the ECB to impose sanctions.

For more information on the SSM, see our Newsletter of January 2014.

See also "Dispute Resolution" section, points 1 and 2.

CAPITAL MARKETS

1. Publication of supplements to the prospectus

The Law dated 10 July 2005 on the prospectuses for securities (the "**Law**"), implementing the Directive Prospectus of 2003/71/EC (as amended by Directive 2010/73/EC) requires every significant new factor, material mistake or inaccuracy relating to the information included in the prospectus which is capable of affecting the assessment of the securities and which arises or is noted between the time when the prospectus is approved and the final closing of the offer to the public or, as the case may be, the time when trading on a regulated markets begins, whichever occurs later, to be mentioned and published in a supplement to the prospectus.

No further clarification in this regard was contained in the Directive or the Law.

In order to ensure consistent harmonization between the EU member states, the European Commission published its Delegated Regulation N°382/2014 (which is directly applicable in all members states) specifying the minimum situations[4] where publication of supplements to the prospectus is required.

For example, a supplement to the prospectus shall be required in the following circumstances: a change of control of the issuer; when the financial position or the business of the issuer is likely to be affected by a significant financial commitment; any amendments to implicit or explicit figures constituting profit forecasts or profits estimates which are already included in the prospectus, etc.

[4]The preamble of the Delegated Regulation mentions that it is not possible to identify all the situations in which a supplement to the prospectus is required as this may depend on the issuer and securities involved. In other words, supplements to the prospectus may be required in situations other than those stipulated in this Delegated Regulation.

2. Market abuse: a new framework in the European Union

A new framework applicable to market abuse prohibition and prevention has been adopted by the European institutions. It consists of Regulation 596/2014 on market abuse (the "**MAR**") and of Directive 2014/57/EU on criminal sanctions for market abuse (the "**Sanctions Directive**"), both of which were published in the Official Journal of the European Union on 12 June 2014. These two instruments replace and repeal Directive 2003/6/CE on insider dealing and market manipulation (the "**MAD**"), which had been implemented into Luxembourg by the Law of 9 May 2006 on market abuse.

The decision to adopt a regulation instead of a directive emphasises the necessity to harmonise core concepts and rules on market abuse in order to ensure effective and efficient enforcement of the rules. Revision of the MAD was also necessary to keep pace with market innovations and fill in the regulatory gaps developed over the course of more than ten years under the former regime. The main differences between the MAD and the new framework are highlighted below.

1. Expanded coverage of financial instruments

The scope of the MAR covers insider dealing on and market manipulation of financial instruments traded on a regulated market, a multilateral trading facility ("**MTF**") or an organised trading facility ("**OTF**") as defined under MiFID II (see related article in this newsletter), or for which admission to a

regulated market or MTF has been requested. It also extends to OTC financial instruments the price or value of which depends on or has an effect on a traded instrument, including credit default swaps and contracts for differences. Under the MAD, the related instruments prohibition applied only to insider dealing. The MAR also forbids market manipulation of benchmarks such as the LIBOR or EURIBOR and of spot commodity contracts. Its regime further captures emissions allowances.

2. Further guidance on the definition of inside information

Inside information is defined as "information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments".

The MAR explicitly includes the guidance provided by the European Court of Justice on the definition of insider dealing, and more particularly on the "precise nature" criteria. According to the MAR, in the case of a protracted process that is intended to bring about or that results in particular circumstances or a particular event, those future circumstances or that future event, and the intermediate steps of the protracted process may be deemed to be sufficiently precise to constitute inside information. In particular, an intermediate step will be deemed to be inside information if, by itself, it satisfies all criteria of inside information.

3. New market manipulation offences

Market manipulation under the MAR includes any behaviour, not limited to transactions or order placing, that may give a false or misleading signal to the market with respect to the supply of, demand for or price of a financial instrument or other instrument within the MAR's scope. The MAR gives a non-exhaustive list of behaviours that may qualify as market manipulation and expressly includes spreading false or misleading rumours through the media, including the internet. The manipulation of benchmarks is also expressly prohibited, as is any attempt to engage in market manipulation and insider dealing. National competent authorities are competent for defining which behaviours are accepted market practices in line with the conditions laid out in the MAR, which fall outside the scope of the prohibition.

4. Reduced disclosure burden for SMEs

The MAR maintains the preventive measures existing under the MAD, including obligations for issuers to publish inside information and to draw up lists of insiders. However, in order to reduce the administrative burden on SMEs, the MAR adapts these measures for issuers whose securities are traded on an SME growth market (as defined under MiFID II). In particular, they are not required to draw up a list of insiders if they take all reasonable steps to ensure that any person with access to inside information acknowledges the legal and regulatory duties entailed and is aware of the sanctions applicable to insider dealing and unlawful disclosure of inside information, and if they may provide such a list upon request from the competent authority.

In addition, SMEs must disclose inside information as any other issuer is required to do. However they may publish the information on the trading venue's website, instead of their website, if the trading venue chooses to provide this facility for issuers on that market.

5. Harmonised criminal sanctions

Without prejudice to the administrative sanctions laid out in the MAR, the Sanctions Directive requires all Member States to criminally reprehend the most serious offences of market manipulation, insider dealing and unlawful disclosure of inside information, when they are committed intentionally. The Sanctions Directive gives guidance as to what constitutes "serious" offences, e.g. based on the impact on the integrity of the market, the actual or potential profit derived or loss avoided or the level of damage caused to the market. The Sanctions Directive also gives more specific criteria for each category of offence.

Under the Sanctions Directive, the maximum term of imprisonment should be no less than four years for market manipulation and insider dealing, and two years for unlawful disclosure of inside information. In addition, the Sanctions Directive requires Member States to introduce criminal sanctions for legal persons, including fines or other measures such as a judicial winding-up.

These criminal sanctions may be imposed in addition to potential administrative sanctions, as is explicitly stated in the MAR.

6. Entry into force and implementation

The MAR is immediately applicable as of 3 July 2016, save for the provisions related to OTFs, SME growth markets and emissions allowances which shall become applicable on 1 January 2017. In addition, Member States should implement the Sanctions Directive and take the necessary measures to grant national competent authorities the powers deriving from the MAR by 3 July 2016.

3. EMIR : updated Q&A

ESMA published updated versions of its Q&A on 21 May 2014 (ESMA/2014/550) and on 10 July 2014 (ESMA/2014/815).

CORPORATE

1. Floating financial year

The Luxembourg Accounting Standards Board (CNC) recently published a general notice (CNC 01/2014) in which it stated its opinion regarding the possibility for a Luxembourg company which prepares its accounts under Lux GAAP to adopt a floating financial year[5] (such a practice is already explicitly authorized for IFRS).

The CNC affirmed the use of this practice in stating that a Luxembourg company may adopt a floating financial year, as long as the following conditions are met:

- the financial year's length must be near to a civil year;
- the length of the successive financial years must be similar;
- the dates of the opening and the closing of the financial year must be predictable and determinable.

The CNC considers that, in practice, a floating financial year should have a duration period consisting of between 52 and 53 weeks.

Furthermore, the Luxembourg trade and companies registry (RCS) currently requires that the calendar dates of the beginning and end of each financial year be filed with it, consequently, a modification filing will have to be made with the RCS each year, with specific mention of the calendar date upon which the company's financial year will end.

[5]For example by stipulating that the financial year will end on the last Friday of the month of June, rather than on a fixed date such as 30 June.

DISPUTE RESOLUTION

1. Out-of-court resolution of complaints: new CSSF circular 14/589

The CSSF has recently clarified the measures to be taken by professionals of the financial sector in Luxembourg in order to comply with the obligations provided in the CSSF Regulation 13-02 relating to out-of-court resolution of complaints ("**Regulation**") (see our Newsletter of January 2014 for more information on the Regulation).

Since 1 July 2014, all professionals must have a complaint handling policy in place, which must be set out in a written document and must be formalised in an internal complaint settlement procedure.

Circular 14/589 focuses on (i) the characteristics and scope of the complaint settlement procedure, (ii) the obligations and responsibilities of the management board in this respect, and (iii) the information to be provided to the CSSF on an annual basis. A table is attached to the Circular 14/589 which can be used as a sample template for communicating the complaints recorded by a professional to the CSSF.

Circular 14/589 also provides for the repeal of the previous IML Circular 95/118 on customer complaint handling.

In relation to UCITS SICAVs that have appointed a Management Company, we understand that the CSSF accepts that it is sufficient for the procedure to be adopted by the Management Company and that the UCITS SICAV is not required to adopt a separate procedure.

2. Establishment of an European account preservation order

On 27 June 2014, Regulation 655/2014 of the European Parliament and the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters was published in the Official Journal of the European Union (the "**Regulation**").

This Regulation establishes a Union procedure enabling a creditor to obtain a European Account Preservation Order (*saisie conservatoire sur compte bancaire*) as an alternative to preservation measures under national law. The text applies to pecuniary claims in civil and commercial matters in cross-border cases.

The creditor may obtain a Preservation Order in the following cases:

- before the initiation of proceedings against the debtor on the substance of the matter in a Member State or during such proceedings up until the issuing of the judgment, the approval or the conclusion of a court settlement, or
- after the issuing of a judgment, court settlement or authentic instrument, in a Member State, which forces the debtor to pay the creditor's claim.

In the first case, the Preservation Order shall be issued by the courts of the Member State which have jurisdiction to rule on the substance of the matter within 10 working days after the creditor's application and in the second case, by the courts of the Member State in which the judgment was issued, the settlement approved or concluded or the instrument was drawn up within 5 working days after the creditor's application.

The condition for the issuing of a Preservation Order is that the creditor has sufficiently proved to the court that there is an urgent need for a Preservation Order because there is a real risk that the subsequent enforcement of the creditor's claim against the debtor will be impeded or made substantially more difficult

without such a measure. If the creditor had not yet started proceedings before applying for a Preservation Order or has not yet succeeded on the substance of his claim, he shall submit sufficient evidence to satisfy the court that he is likely to succeed on the substance of his claim against the debtor.

As a guarantee for the surprise effect, the debtor shall not receive any notification of the creditor's application for the Preservation Order and he shall not be heard before the issuing of the Order.

If the creditor has not yet succeeded in his claim or when the court finds it necessary and appropriate, the creditor shall be asked to provide security for an amount sufficient to prevent abuse and to ensure compensation of any damage suffered by the debtor as a result of the Preservation Order to the extent that the creditor is liable for such damage, the burden of proof lying with the debtor, except in the cases where the creditor's fault is presumed.

When the creditor, having obtained a judgment, court settlement or authentic instrument, has reason to believe that the debtor holds one or more accounts with a bank in a Member State but has no information whatsoever, he may ask the court, with which the application for the Preservation Order is lodged, to request that the information authority of the Member State of enforcement obtain the information necessary to allow the identification of the bank(s) and the debtor's account(s).

The creditor may make the same request where the judgment, court settlement or authentic instrument obtained is not yet enforceable and the amount to be preserved is substantial. In this case, he has to submit sufficient evidence to the court that the information is necessary because of the risk that the subsequent enforcement could be jeopardised without such information, leading to a substantial deterioration of the creditor's financial situation.

The Preservation Order shall be recognised in the other Member States without any additional procedure nor declaration of enforceability being required and shall have the same rank as an equivalent national order, if any, in the Member State of enforcement.

The debtor is granted different remedies against the Preservation Order and its enforcement.

The Regulation will enter into force on 18 January 2017.

INFORMATION AND COMMUNICATION TECHNOLOGIES

1. The first recognition of the right "to be forgotten"

By judgement rendered on 13 May 2014, the European Court of Justice (ECJ) affirms the right "to be forgotten" by acknowledging that a person may require the removal of the links indexing information relating to such person from the list of results of a given search engine. This judgement creates the right "to be forgotten".

The judgment was rendered by the ECJ following prejudicial questions raised by the Spanish National High Court (*Audiencia Nacional*), in the context of two separate actions brought by Google Spain and Google Inc. against the decision of the "Agencia Espanola de Proteccion de Datos. Such decision upheld the claim of a Spanish citizen ("**Claimant**") who requested that the relevant operators of search engines be required to remove or conceal personal data relating to the Claimant so that they ceased to appear in the search results when typing the Claimant's name. Indeed, the Claimant deplored that an internet user which entered the Claimant's name in the search engine of Google group, received links to two pages of a Spanish newspaper on which an announcement mentioning the Claimant's name in connection with a real-estate auction related with attachment proceedings for the recovery of social security debts.

One of the prejudicial questions asked to the ECJ was the following:

"*Must it be considered that the rights to erasure and blocking of data, provided for in Article 12(b), and the right to object, provided for by [subparagraph (a) of the first paragraph of Article 14] of the Directive 95/46/EC [of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the "Directive")], extend to enabling the data subject to address himself to search engines in order to prevent indexing of the information relating to him personally, published on third parties' web pages, invoking his wish that such information should not be known to internet users when he considers that it might be prejudicial to him or he wishes it to be consigned to oblivion, even though the information in question has been lawfully published by third parties*?"

The ECJ indicated first that the operations performed by the search engine operator, in the scope of its indexing activities, must be classified as "processing of personal data". The ECJ then considered that, to the extent that the operator of a search engine itself determines the purposes and means of that indexing activity (and thus of the processing of personal data that it carries out), it must be regarded as a "controller". In these circumstances, the operator of the search engine must ensure that the activity meets the requirements of the Directive in order "*that the guarantees laid down by the directive may have full effect and that effective and complete protection of data subjects, in particular of their right to privacy, may actually be achieved*".

In this respect, pursuant to Article 12 b) of the Directive, it must grant the data subject the right to request "*the rectification, erasure or blocking of data for which the processing does not comply with the provisions of the Directive, in particular because of the incomplete or inaccurate nature of the data*". According to the ECJ, the incompatibility "*may result not only from the fact that such data are inaccurate but, in particular, also from the fact that they are inadequate, irrelevant or excessive in relation to the purposes of the processing, that they are not kept up to date, or that they are kept for longer than is*

necessary unless they are required to be kept for historical, statistical or scientific purposes".

It follows that "*even initially lawful processing of accurate data may, in the course of time, become incompatible with the directive where those data are no longer necessary in the light of the purposes for which they were collected or processed*".

Under these circumstances, the ECJ considered that "*having regard to the sensitivity for the data subject's private life of the information contained in those announcements and to the fact that its initial publication had taken place 16 years earlier, the data subject establishes a right that that information should no longer be linked to his name by means of such a list*". Consequently, the data subject may, in particular, pursuant to the abovementioned Article 12(b), require the removal of the links mentioned in the results list.

It should be noted that the solution may have been different if "*particular reasons*" had existed "*substantiating a preponderant interest of the public in having, in the context of such a search, access to that information*". On that point, the ECJ underlines that the role played by the person in public life may be analysed as "a particular reason" substantiating "*the interference with his fundamental rights by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question*".

2. Law approving the convention on cybercrime and its additional protocol on xenophobia and racism

The law approving the Convention on cybercrime signed in Budapest on 23 November 2001 and its additional protocol on xenophobia and racism signed in Strasbourg on 28 January 2003 was voted into law by the Luxembourg parliament on 4 June 2014 (the "**Law**"). The Law will be enacted and published in the *Mémorial* (the official gazette) within the next following weeks after which it will become effective.

In addition to approving the Budapest Convention and its protocol, the Law is adapting the national substantive and procedural criminal law to the specific needs of combating cybercrime.

The Law introduces certain new criminal offences into the Penal Code, including in particular:

- the misuse of identity regardless of whether it occurs in the real world or on online communications networks and as long as the offence is committed either in public or with the intent to harm a third party in one way or another;
- "phishing" describing the manoeuvre to obtain information fraudulently, (such as passwords), by appearing as a trustworthy person in an electronic communication, in order to commit other criminal offences;
- illegal interception of computer data supplementing the legal instrument of computer-related crimes, which includes the illegal access of computer data, the illegal hacking of computer data and the illegal deletion of computer data.

The Criminal Procedure Code is also amended by the Law in order to achieve the requirements of the Convention relating to the prompt preservation of stored computer data and traffic data. For that purpose, new procedural provisions are introduced in the Criminal Procedure Code extending, in particular, the powers of:

- the State prosecutor who may require the investigating judge to carry out tracking of electronic communication of call information and locate the origin or destination of the communication without any preliminary hearing;

- the investigating officer who may, with the authorization of the public prosecutor or the investigating judge, preserve stored computer data where there are grounds to believe that such data is particularly vulnerable to loss or modification, during a period of 90 days.

3. Data theft – Supreme Court decision of 3 April 2014

The *Cour de cassation*, Luxembourg's highest court in civil and criminal matters, rendered an important decision on 3 April 2014 regarding data theft.

The matter before the *Cour de cassation* was a criminal case against a former bank employee. The employee had downloaded and photocopied confidential documents belonging to the bank. He then resigned on the basis of what he alleged to be gross misconduct of the bank. In the ensuing proceedings before an employment tribunal, he produced the confidential documents he had downloaded and photocopied as evidence. Thereupon, the bank filed a criminal complaint for (i) theft and (ii) violation of professional secrecy obligations.

Pierre Elvinger of EHP acted for the bank.

- In a judgment of 26 June 2012, the Luxembourg District Court considered that the employee had committed both the offences of (i) theft and (ii) violation of professional secrecy. The District Court did not distinguish between the downloaded and the photocopied documents, thus recognising that the taking of incorporeal property such as data downloaded from a server constitutes theft.

However, the District Court upheld a justification defence based on the defendant's procedural rights in the employment tribunal proceedings. Applying French precedent, the District Court considered that theft and violation of professional secrecy by an employee were justified if the employee's aim in performing these acts was to gather evidence necessary for his defence against his employer before a court of law.

As a result, the defendant was acquitted.

- By a decision of 10 July 2013, the Court of Appeal confirmed the defendant's acquittal, but gave partly different reasons from the Luxembourg District Court.

Regarding theft, the Court of Appeal made a distinction between the downloading of electronic data and the photocopying of paper documents.

The Court of Appeal held that an object of theft can only be an item of moveable corporeal property. According to this interpretation of the law, data cannot be stolen, because it is not a "thing" that can be stolen. The defendant could therefore not be guilty of theft on the basis of having downloaded confidential data.

As for the photocopies, the Court of Appeal held that the *mens rea* element was missing. In merely making photocopies of confidential documents, the defendant did not display an intent to act as if he were the owner of the originals or to usurp the possession of the originals unbeknownst to and against the will of the rightful owner.

Regarding violation of professional secrecy, the Court of Appeal upheld the District Court's reasoning and added that the justification defence invoked by the District Court is a consequence of Article 6 of the European Convention of Human Rights, which has priority over domestic law. The line of case-law established in France regarding a justification defence to theft on the basis of Article 6 can be extended to the offence of violation of professional secrecy.

- The *Cour de cassation*'s decision of 3 April 2014 partly strikes down the decision in the context of the civil request submitted.

Regarding theft, the *Cour de cassation* followed the Court of Appeal's distinction between the downloading of electronic data and the photocopying of paper documents. However, it provided a radically different ruling on these points.

The *Cour de cassation* held that "*electronic data stored on the bank's server and which is legally its* [i.e. the bank's] *exclusive property constitute incorporeal property which can be apprehended by way of downloading*". In other words, electronic data stored on a server qualifies as a "thing" ("*chose*") that can be stolen. This wide interpretation of the definition of theft marks a break with the Court of Appeal's case-law as well as with the French *Cour de cassation*'s case-law. Henceforth, under Luxembourg law, data theft is theft.

Regarding the photocopying of documents, the *Cour de cassation* held that "*the employee who makes, for his personal ends, unbeknownst and against the will of the owner, photocopies of documents belonging to his employer and which he only has in his possession precariously, commits an act of apprehension of said documents, thus fulfilling the material conditions of theft.*" The *Cour de cassation* thus considers that taking a document to make an unauthorised photocopy constitutes the *actus reus* of theft.

As for the *mens rea* element, the *Cour de cassation* held that the Court of Appeal failed to provide sufficient legal basis for its decision when it stated that the defendant did not display an intent to act as if he were the owner of the originals or to usurp the possession of the originals unbeknownst to and against the will of the rightful owner. The Court of Appeal should have looked into the question of whether the documents were strictly necessary for the defendant's defence before the employment tribunal.

Finally, the *Cour de cassation* upheld the Court of Appeal's acquittal of the defendant on the count of violation of professional secrecy.

The matter will now return to the Court of Appeal, which will have to decide whether theft is to be retained in order to analyse thereupon whether justification causes do exist in order to conclude whether the civil claim is to be admitted in light of the *Cour de cassation*'s decision.

The *Cour de cassation* ruling brings legal certainty to an area of law that has been ridden with conceptual difficulties since the advent of information technology. Debates around the question of whether data is a "thing" ("*chose*") that can be stolen abound in civil law jurisdictions. In Luxembourg, the question is settled, for now. This is particularly relevant in the financial industry, where a significant proportion of the work population has access to confidential data on a daily basis.

Moreover, it is significant that the *Cour de cassation* has narrowed the justification defence to theft based on an employee's need to gather evidence for his defence in the context of a dispute with his employer by holding that criminal courts must examine whether the stolen documents were "strictly necessary" for the employee's defence. The *Cour de cassation* thus strikes a delicate balance between the competing rights to confidentiality of the employer and to a fair trial of the employee.

PROPERTY, CONSTRUCTION AND ADMINISTRATIVE

1. Marchés publics: une stratégie bien pensée pour les aborder

Participate in a public procurement and submit an offer accordingly is a significant achievement for an undertaking. It must be prepared and aware of the constraints and benefits of the Luxembourg legal regime. This article focuses on the necessary preparation of the bidding undertakings and the judicial actions and remedies available to them before and after the auction.

1. Nécessité d'une préparation efficace des procédures de marchés publics par les entreprises soumissionnaires

La participation à une procédure de passation d'un marché public au Grand-Duché de Luxembourg est régie par un corps de règles encadrant la liberté des pouvoirs adjudicateurs et des entreprises soumissionnaires. Cet arsenal législatif a pour objectif de permettre aux pouvoirs publics de contracter avec des entreprises privées tout en assurant une concurrence efficace et saine entre celles-ci.

Face à la complexité et à la technicité de ces règles, la rédaction de dossiers de soumission et les décisions d'adjudication qui en découlent donnent lieu à un contentieux de plus en plus important devant les juridictions administratives et judiciaires.

L'entreprise, qui entend participer à la passation d'un marché public au Grand-Duché de Luxembourg, doit être doublement vigilante. D'une part, elle est astreinte à un ensemble de règles dont le respect limite nécessairement son action sur le marché. D'autre part, l'entreprise a à sa disposition des règles de protection, dont elle a tout intérêt à connaître le contenu afin de pouvoir les mettre en œuvre en temps utile.

Le recours aux règles de protection permettant aux soumissionnaires lésés de contester l'action du pouvoir adjudicateur doit se faire rapidement et efficacement, a fortiori lorsque le contentieux concerne une décision d'adjudication. Dans cette hypothèse, le soumissionnaire évincé doit agir au plus vite au fond et en référé, afin de suspendre la procédure de passation du marché avant la signature du contrat entre le pouvoir adjudicateur et le soumissionnaire retenu.

En pratique, nous conseillons à toute entreprise désireuse de participer à un marché de s'adjoindre l'aide d'une équipe juridique dès la réception du dossier de soumission. L'avis d'un spécialiste du droit permettra ainsi à l'entreprise de :

- vérifier sa bonne compréhension du dossier de soumission et plus particulièrement du cahier des charges ;
- faire usage, le cas échéant, du droit laissé à tout opérateur économique, en amont du dépôt de son offre, de poser des questions au pouvoir adjudicateur ou à la commission des soumissions quant au contenu du dossier de soumission ; et
- préparer l'esquisse du recours contentieux en cas d'éviction de l'entreprise, et permettre ainsi une action judiciaire rapide et efficace.

2. Complexité du contentieux en matière de marchés publics

Plusieurs types de recours en matière de marchés publics s'offrent au soumissionnaire.

Dans le cadre de la passation d'un marché public dit « classique » (livre I de la loi du 25 juin 2009 sur les marchés publics), des mécanismes de réclamation et des actions judiciaires sont organisées à plusieurs moments-clés de la procédure.

Dans un premier temps, un soumissionnaire peut agir en amont du dépôt de son offre, au moment de la préparation de celle-ci, dès lors qu'il estime que le dossier de soumission contient une erreur, omission ou ambiguïté constituant une illégalité. Une telle illégalité existe notamment en cas de confusion dans le cahier des charges des critères de sélection et d'adjudication, de clause discriminatoire (clause du cahier des charges détaillant une spécification technique avec un degré de précision tel que, *de facto*, un seul produit, marque ou fournisseur est possible, à l'exclusion de tout autre), ou encore en cas d'exclusion de l'indemnisation de l'adjudicataire suite à une modification du contrat initiée par le pouvoir adjudicateur.

Dans ces situations, le soumissionnaire lésé peut notamment déposer, au plus tard sept jours avant l'ouverture des offres, une réclamation écrite au pouvoir adjudicateur signalant l'illégalité. Face à une jurisprudence administrative ne précisant pas clairement si l'absence de réclamation entraîne la forclusion du soumissionnaire à se prévaloir de cette illégalité devant le juge administratif, nous conseillons à nos clients de procéder systématiquement par voie de réclamation écrite en cas de doute quant à la légalité d'une clause contenue dans un dossier de soumission.

Dans un deuxième temps, dès l'ouverture des offres et la réception du courrier d'éviction, le soumissionnaire lésé a le droit d'introduire un recours en annulation devant le Tribunal administratif en vue de contester la légalité de la décision d'adjudication. Afin de suspendre l'exécution de la décision d'adjudication et bloquer ainsi la signature du contrat d'adjudication, un recours en sursis en exécution doit être déposé devant le Président de la juridiction.

Le pouvoir adjudicateur a l'obligation d'attendre un délai minimal de quinze jours entre l'information donnée aux soumissionnaires évincés quant à leur éviction et la signature du contrat avec l'adjudicataire. En conséquence, le soumissionnaire évincé doit agir très vite pour, endéans ce délai, saisir le Président d'une demande de sursis à exécution, voire obtenir une ordonnance, afin de suspendre la procédure d'adjudication et éviter la signature du contrat.

Après la conclusion du contrat d'adjudication, il n'est plus possible de remettre en cause l'existence de ce contrat, qui sera donc exécuté. Le soumissionnaire irrégulièrement évincé ne pourra plus prétendre qu'à l'octroi de dommages et intérêts par le juge judiciaire, en réparation du préjudice subi.

Enfin, à ces procédures de base, viennent s'ajouter pour certains marchés publics dits « de grande envergure » (livre II) et « secteurs spéciaux » (livre III) la possibilité d'introduire des recours spécifiques. Ces recours sont régis par la loi du 10 novembre 2010 instituant les recours en matière de marchés publics.

Pendant la préparation du dossier de soumission, un soumissionnaire s'estimant lésé par une violation du droit communautaire ou du droit national transposant le droit communautaire en matière de marchés publics de grande envergure ou secteurs spéciaux, peut initier un référé particulier, dit « précontractuel ». Le Président du Tribunal administratif saisi d'un tel recours dispose de compétences étendues pour prendre toute mesure nécessaire en vue de corriger la violation alléguée jusqu'à la décision d'adjudication. Il peut, par exemple, en cas de confusion des critères de sélection et d'adjudication dans le cahier des charges, suspendre la procédure de passation du marché public et ordonner au pouvoir adjudicateur de modifier les critères choisis.

TAX

1. Luxembourg ratifies the multilateral convention on mutual administrative assistance in tax matters

In 2013, automatic exchange of information was endorsed as the new global standard for exchange of information. Earlier this year, the OECD released the Standard for Automatic Exchange of Financial Account Information (also called GATCA (Global Account Tax Compliance Act), in reference to a globalisation of FATCA). The standard has two components: (i) the Common Reporting Standard ("**CRS**") detailing the reporting and due diligence rules to be imposed on financial institutions; and (ii) the Model Competent Authority Agreement (Model CAA) that will link the CRS and the legal instrument that will serve as a legal basis for the automatic exchange of information.

One of the legal instruments that will allow the implementation of the global standard is the Multilateral Convention on Mutual Administrative Assistance in tax matters developed jointly by the OECD and the Council of Europe. This multilateral agreement, already signed by 66 countries, is currently the "*most comprehensive multilateral instrument available for tax cooperation and exchange of information",* covering various forms of administrative assistance (such as exchange of information on request, spontaneous exchange of information, automatic exchange of information and simultaneous tax examinations), assistance in the recovery of tax claims and the service of documents.

Luxembourg signed the Convention on 29 May 2013. Just one year later, on 26 May 2014, the Luxembourg Parliament adopted the law approving the Convention and the protocol signed by Luxembourg. The Convention enables Member States to limit their participation in the provision of mutual assistance by formulating reservations regarding the taxes covered and the type of assistance provided. Luxembourg has already made use of this facility and will not grant any form of assistance in respect of taxes listed in article 2, § 1, b of the Convention including, *inter alia*, estate, inheritance or gift taxes, general consumption taxes and compulsory social security contributions.

Conversely, administrative assistance, assistance in the recovery of tax claims (except tax claims in existence at the date of entry into force of the Convention) and the service of documents will be provided by Luxembourg with respect to: (i) taxes on income or profits; (ii) taxes on capital gains which are imposed separately from the tax on income or profits; and (iii) taxes on net wealth.

If the Convention enters into force in respect of Luxembourg before the end of the year (the Convention will enter into force on the first day of the month following the expiry of a period of 3 months after the date of deposit of the instrument of ratification) administrative assistance could be provided with respect to taxable periods beginning on or after January 2015.

However for tax matters involving intentional conduct liable to prosecution under criminal law of the requesting Member State, and still supposing that the Convention enters into force in respect of Luxembourg before the end of the year, Luxembourg reserves administrative assistance for taxable periods beginning on or after 1 January 2011 or where there is no taxable period, for administrative assistance related to tax charges arising on or after 1 January 2011.

2. The tax authorities officially accept the use of a foreign currency as functional currency

On 16 June 2014, the Luxembourg direct tax authorities (*Administration des contributions*

directes) released a circular letter L.G.-A n°60 (the "**Circular**") formalising the well-established Luxembourg practice of the foreign functional currency (*devise fonctionnelle*) and specifying the rules applicable to this system.

The Circular applies to resident companies having their share capital and keeping their books in a currency other than the euro. These companies can opt to use this foreign currency as their functional currency for tax purposes also.

In the case of a consolidated tax group (*intégration fiscale*), all companies forming part of the tax group have to determine their taxable basis in the same currency.

The Circular provides the possibility for companies to opt for submitting their tax return in the foreign currency but taxes will still be expressed and collected in euros.

The Circular states some principles and recalls the aim to prevent companies from having foreign exchange differences:

- Luxembourg companies willing to declare their taxable income in a foreign currency must send a written request to the direct tax authorities. That request must be made at the latest three months before the end of the first tax year for which the option for the foreign currency is required. For companies being in their first tax year, the request may be made at any time but before the end of that first tax year. The Circular specifies the details to be stated in the request;

- the option to exercise the foreign currency is binding for all subsequent tax years as long as the company's share capital is expressed in that foreign currency;

- the conversion from the foreign currency into euro (or *vice-versa*) must only be done on the basis of the exchange rates published by the European Central Bank;

- the conversion of the taxable basis from the foreign currency into euro may be made either at the closing foreign exchange rate or at the average foreign exchange rate for the tax year concerned. That choice is irrevocable and binding for all subsequent tax years. For that moment, Luxembourg taxpayers willing to establish the conversion have to fill out an annex to the tax return ; and

- taxes still have to be paid in euros and tax assessments will continue to be issued in euros.

Specific provisions regarding tax credits, net wealth tax and municipal business tax exist.

3. Exit tax

In September 2012, the European Commission introduced an infringement procedure against Luxembourg as certain provisions of Luxembourg tax law concerning taxation of businesses upon exit from Luxembourg were found to infringe EU fundamental freedom principles as construed by the ECJ especially in the *National Grind Indus* case of 29 November 2011 (C-371/10).

Indeed, the incriminating provisions of the Luxembourg Income Tax Law, mainly articles 38, 44 and 172, provide for exit taxation both in the case of transfer of the registered office and of the effective place of management of a company abroad as well as in the case of transfer of business assets abroad (the "**Exit Taxes**").

On 26 May 2014, the Luxembourg Parliament amended the existing tax law to provide for an unconditional deferral of the Exit Taxes levied in the case of transfer of the registered office and of the effective place of management of a

company abroad. Indeed, the newly introduced Luxembourg tax deferral provisions of § 127 of the Luxembourg General Tax Law of 21 May 1931 allow Luxembourg to proceed with the definitive establishment of the amount of tax at the time when the company transfers both the registered office and effective place of management Luxembourg abroad. Such payment deferral of the Exit Taxes will be granted unconditionally upon simple request by the taxpayer without late interest and without any guarantee deposit or other security, subject however to annual reporting obligations. Still, it is a mere payment deferral of a tax charge that is definitively crystallised upon exit from Luxembourg and whose payment will be merely deferred until transfer or disposal of the assets or upon migrating out of the EEA.

Such a tax deferral mechanism does seem to comply with ECJ case law though. However, the findings in the more recent *Valle* case of the ECJ of 6 September 2012 (C-380/11) (which interestingly concerned Luxembourg tax legislation) in our view raise the question of whether the new proposed mechanism of tax deferral under §127 of the Luxembourg General Tax Law is not itself again at odds with EU law principles in that even though it permits the deferral of taxation from the moment of relocating abroad to the moment of effective transfer or disposal of an asset (or to the moment of relocation outside the EEA), the fact is that the new proposed legislation nevertheless crystallises definitively the deferred tax charge at the time of the migration from Luxembourg to another EU Member State without leaving the possibility to take into account subsequent events that, had the company maintained its registered office and its effective place of management in Luxembourg, would have permitted a lower tax charge than that crystallised upon relocation. It is worth noting that this concern had also been raised by the State Council when commenting on the proposed legislation that has now become law.

The same unconditional deferral of the Exit Taxes applies if EEA-resident individuals transfer an enterprise established in Luxembourg within the EEA.

Finally, the Law of 26 May 2014 also extends the roll-over relief applicable upon transfer of certain qualifying assets (e.g., immovable property) in case the re-investment of the sales proceeds, which formerly had to be made in an entity established in Luxembourg, is made in an entity established within the EEA.

4. Tax treaties news

1. France

On 19 May 2014, the Luxembourg Government issued a press release stating that Luxembourg and France have agreed to continue talks to negotiate and sign an amending protocol to the France-Luxembourg double tax treaty of 1 April 1958, as amended.

2. Republic of Slovenia

On 28 April 2014, the Parliament of Slovenia ratified an amending protocol to the Luxembourg-Slovenia double tax treaty, signed on 20 June 2013. This amending protocol contains the OECD standard of exchange of information provision.

3. Ireland

On 28 May 2014, Luxembourg and Ireland signed an amending protocol to the Luxembourg-Ireland double tax treaty of 14 January 1972. This amending protocol contains the OECD standard of exchange of information provision.

4. Croatia

On 20 June 2014, a double tax treaty was signed between Luxembourg and Croatia. We will report the details of this new treaty in a later issue.

5. Andorra

On 2 June 2014, a double tax treaty was signed between Luxembourg and Andorra.

6. Czech Republic

On 5 June 2014, the Czech Republic ratified the new Income and Capital Tax Treaty signed on 5 March 2013. Once in force, this Treaty will replace the former Tax Treaty of 1991. The new treaty is broadly inspired by the OECD Model.

The following withholding tax rates apply under the new treaty:

- *Dividends:* The standard withholding tax rate is of 10%. However, if the beneficial owner of the dividends is a company (other than a partnership) and holds a direct holding of at least 10% of the share capital of the company paying the dividends for an uninterrupted period of at least one year, the treaty provides for a 0% rate.
- *Interest*: The treaty provides for a 0% rate on interest payments.
- *Royalties*: The treaty provides for a 10% withholding tax on royalties. The definition of royalties includes films or tapes for television or radio broadcasting, computer software or industrial, commercial or scientific equipment. However, copyright royalties are subject to a 0% rate.

7. Russia

On 7 April 2014, the Russian Minister of Finance issued a guidance letter No.03-08-05/15476 which clarifies the tax treatment of income from securities paid by a Russian depositary to a Luxembourg investment fund.

According to the Luxembourg-Russia Income and Capital Tax Treaty concluded in 1993, as amended by the protocol of 21 November 2011, a reduced dividend withholding tax rate of 5% applies if the beneficial owner directly holds at least 10% of the capital of the company paying the dividends and the price of acquisition of the holding is at least €80,000 or its equivalent amount in RUB. In all other cases, a 15% dividend withholding tax applies.

It was not clear whether the Russian Tax Authorities are willing to apply the reduced treaty rates to Luxembourg investment funds deriving income from securities paid by a Russian depositary.

The guidance letter of 7 April 2014 issued by the Russian Minister of Finance now clarifies that the reduced tax rates are only available when paid to the *beneficial owners* of the income. For Russian tax purposes, a Luxembourg investment fund is characterised as a foreign *nominee* holder. For that reason, any securities income paid to a Luxembourg investment fund by a Russian depository may be subject to a withholding tax at a rate of 30%. This 30% rate will not apply, however, if the investment fund can provide evidence of the residence of its investors.

8. Taiwan

Luxembourg has ratified on 12 July 2014 the double tax treaty with Taiwan and its Protocol, which were signed in Luxembourg on 19 December 2011.
Taiwan has already ratified the treaty and, provided the instruments of ratification are exchanged within the course of this year, the treaty will come into force as 1 January 2015.

The key features of the treaty have been highlighted in our Newsletter of June 2013.