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ASSET MANAGEMENT AND INVESTMENT FUNDS

1. Alternative investment funds (AIF)

1. RAIF: a new type of AIF is coming soon

Over the last 12 months, Luxembourg industry practitioners, with the support of the Luxembourg government, have been designing the legal framework for a new type of Luxembourg alternative investment fund ("**AIF**") managed by an authorised AIFM, and this project is nearing completion so that the legislative process can start imminently.

This new type of AIF, referred to in the working documents as reserved alternative investment fund ("**RAIF**"), has substantially the same characteristics (and flexibilities) as a SIF[1]-AIF, the main difference being that the RAIF will not be subject to the supervision of the Luxembourg supervisory authority (the "**CSSF**").

Contrary to a SIF, there will be no need for CSSF approval for the creation and launch of a RAIF and, similarly, no authorisation will be required from any supervisory authority in the event of changes to a RAIF's constitutional documents, information documents or other documents governing the functioning of the RAIF. Investors in a RAIF will thus not have the benefit of the increased investor protection which the supervision by a supervisory authority entails, as is the case with the SIF, but the timeframe within which a RAIF can be set up and launched will be more attractive from a time-to-market perspective.

Because the RAIF is an AIF managed by an authorised AIFM (based in Luxembourg or in another EU Member State), the AIFM will ensure that the RAIF complies with all requirements of the AIFMD. Indirect supervision of the RAIF is therefore ensured through the supervision performed on its AIFM by the latter's supervisory authority.

In all other respects, the RAIF will have the same characteristics as a SIF-AIF, notably as regards the various different legal forms (corporate and contractual) which are available, no limitation as regards eligible assets or investment policies, the possibility to have multiple compartments and multiple classes, flexible subscription, redemption and distribution features and the tax regime of the *taxe d'abonnement* at the 0.01% rate (or nil rate in certain circumstances).

If a RAIF restricts its investment policy in its constitutive documents to investments in risk capital, it is not required to operate under the principle of risk spreading and it will be subject to the same tax regime that currently applies to SICARs[2].

As the RAIF is an AIF managed by an authorised AIFM, it will have the benefit of the European passport granted by the AIFM Directive for marketing to professional investors in the EU.

Assuming the legislative process will take approximately six months, it can be expected that this new type of AIF will be available over the course of Q2 in 2016.

2. AIFM: update of the CSSF FAQ

Additional questions have been added to the August 2015 update of the CSSF FAQ on the AIFMD and its application in Luxembourg. The responses to these questions clarify two important aspects of the AIFMD regime: the

[1] SIF refers to Specialised Investment Fund, as regulated by the Law of 13 February 2007 relating to SIFs, as amended.

[2] SICARs refer to investment companies in risk capital (*Sociétés d'Investissement en Capital à Risque*), as regulated by the Law of 15 June 2004 relating to SICARs, as amended.

marketing of AIFs and the reverse solicitation exemption.

Marketing action

According to the FAQ, a marketing action takes place "when the AIF, the AIFM or an intermediary on their behalf seeks to raise capital by actively making units or shares of an AIF available for firm purchase by a potential investor".

Does a single presentation of draft documents in relation to an AIF by an AIFM to investors constitute marketing and require prior notification to the CSSF? The answer to this question is no, provided that the draft documents cannot be used by investors to formally subscribe or commit to subscribe for shares or units of the AIF. Any subsequent subscription to the AIF shares and units by the investors to whom draft documents relating to this AIF were presented cannot benefit from the reverse solicitation exemption (see point 2).

Regarding the means, marketing can be performed by offering or placing AIF shares and units in various forms, e.g. advertisement, distribution of AIF documents to prospective investors, road shows, provided the material delivered to investors can be used to formally subscribe or commit to subscribe for shares or units of the AIF. The physical presence of the AIFM on Luxembourg territory is not required; means of distance marketing and use of Luxembourg-based intermediaries (e.g. management companies, credit institutions or professionals of the financial sector authorised under the Law of 1993[3]), are also allowed. Distance marketing qualifies as marketing in Luxembourg when the investors are domiciled or have their registered office in Luxembourg.

[3] Law of 1993 refers to the Law of 5 April 1993 on the financial sector, as amended.

Reverse solicitation

The concept of reverse solicitation which allows investors to subscribe for AIF shares and units without prior obligation for its AIFM to comply with the AIFMD marketing requirements is characterised by the absence of any solicitation by the AIF or its AIFM (or an intermediary acting on their behalf) in relation to this AIF.

Two cumulative conditions must be met:

- the investor (or an agent of the investor) has approached the AIFM or the AIF on its own initiative with the intention of investing in or, initially, receiving information regarding AIF(s) managed by such AIFM;
- neither the AIFM nor the AIF (nor any intermediary acting on their behalf) has solicited the investor to invest in this AIF.

The CSSF takes the view that the AIFM must be able to prove the investor's initiative. In this respect, the CSSF states that written confirmation by the investor that he/she has decided on his/her own initiative to invest in (or, initially, request for information on) the relevant AIF(s) can be produced.

Investments made in AIFs in the context of discretionary portfolio management, advisory agreement and collective management of UCI/AIF (on the initiative of the investment manager, the adviser, the UCI/AIF, its portfolio manager, or another agent, respectively) do not constitute marketing.

The FAQ also clarifies a few additional points:

- the possibility for an investment firm and a credit institution to combine the status of investment firm or credit institution and registered AIFM;

- the scope of permitted activities for professional depositaries of assets other than financial instruments; and
- the reporting obligation by a non-EU AIFM in the case where it manages or markets a feeder AIF (whether EU or non-EU) in Luxembourg.

3. AIFMD passport extension to non-EU jurisdictions

On 30 July 2015, ESMA published an Advice and an Opinion[4] on the extension of the AIFMD passport to non-EU jurisdictions.

ESMA assessed 6 non-EU jurisdictions (Guernsey, Hong Kong, Jersey, Singapore, Switzerland and the USA) that were selected on the basis of a number of factors including, but not limited to, the amount of activity already being carried out by entities from these countries under the national private placement regimes and EU national authorities' knowledge and experience of dealing with their counterparts.

In its Advice, ESMA concludes that no obstacles exist to the extension of the passport to Guernsey and Jersey, while Switzerland still needs to enact new legislation in order to become eligible for the extension of the passport.

In relation to Hong Kong, Singapore and the USA, ESMA concludes that no definitive view has been reached on these three jurisdictions due to concerns related to competition, regulatory issues and lack of sufficient evidence to assess the relevant criteria properly.

It is now up to the European Commission, the European Parliament and the Council (together the "**EU Institutions**"), to extend the passport to Jersey and Guernsey through a delegated act.

In this context, more recently, at a meeting of the Economic and Monetary Affairs Committee of the European Parliament, ESMA recalled[5] that they only assessed these jurisdictions from a regulatory standpoint and did not touch on other issues, such as fiscal matters or anti-money laundering rules, (these might be considered by the EU Institutions when deciding on the passport extension). They also suggested the EU Institutions should wait until ESMA has delivered positive advice on a larger number of non-EU countries before triggering the relevant legislative procedures, taking into account factors like the potential impact on the market that a decision to extend the passport might have.

As regards the next steps, ESMA identified three actions: first, they will continue their assessment of Hong Kong, Singapore and the US with a view to reaching a definitive conclusion on whether to extend the passport to those countries, secondly, they will start to assess a second group of non-EU countries comprising Australia, Canada, Japan, the Cayman Islands, the Isle of Man and Bermuda, and thirdly, they will focus on putting in place an extensive framework foreseen by the co-legislators in the event that the passport is indeed extended to one or more non-EU countries.

2. China: RQFII quota for Luxembourg

On 30 September 2015, the Association of the Luxembourg Fund Industry ("**ALFI**") published an FAQ on the application for a Qualified Foreign Institutional Investor ("**RQFII**") licence and quota for Luxembourg investment funds.

[4] References: ESMA Advise: ESMA 2015/1236 and ESMA Opinion ESMA 2015/1235.

[5] ESMA Statement, Economic and Monetary Affairs Committee of the European Parliament, 13 October 2015,ESMA/2015/1535.

The publication of this FAQ follows the announcement by the People’s Bank of China end April 2015 to grant an RMB 50 billion RQFII quota to Luxembourg. The RQFII scheme was launched in Hong Kong in 2011 and has been expanded to other jurisdictions since 2013, allowing an increased volume of offshore RMB to be reinvested into the Mainland securities markets.

ALFI's FAQ notably provides clarifications on the use of RQFII quota by a UCITS management company.

EMPLOYMENT

1. Social dialogue reform

The Law on Social Dialogue[6] constitutes a significant reform in relation to staff representation and the powers granted to staff delegations.

It will partly enter into force on 1 January 2016 and partly following the next social elections scheduled in 2018.

From 1 January 2016 onwards, the most significant amendments provided by the Law on Social Dialogue will be as follows:

- the staff delegation will be established within the company and no longer within its establishments,
- the delegation will be able to consult advisers and external experts as soon as the company has at least 51 employees,
- the age limit for taking part in the election of the delegation will be lowered from 18 to 16,
- the general duties of the delegation will increase and in particular the delegation's right to information and consultation on the life of the company with regard to rates of absence, vocational training, prevention of harassment and violence at work, working hours, internal reassignments, temporary employees, etc.,
- the safety delegate will now be known as the "health and safety delegate", his right to consultation will be increased and he will be entitled to training leave,
- the deputy delegates will also be entitled to training leave and delegates elected for the first time will have their right to training leave increased,
- the posting of delegation notices can be made via electronic means accessible to staff,
- delegates will have more freedom for contact with the company's employees and they will be entitled to a dedicated space with computer equipment and means of communication,
- credit hours paid and granted to delegates will increase considerably in companies with at least 150 employees,
- the head of the company will be required to release any delegate from work once the company has reached a workforce of 250 employees (currently 501 employees),
- in the event of an amendment to an essential clause in the employment contract, the delegate will have the possibility to file an application, before the chairman of the employment tribunal, to have such an amendment cancelled,

[6] Law on Social Dialogue refers to the Law of 23 July 2015 on the reform of social dialogue within companies and amending the Labour Code and the amended Law of 19 December 2002 regarding the Register of Trade and Commerce as well as the accountability and annual accounts of companies.

- the special protection against dismissal for the delegate will remain but, in the event of dismissal the delegate will be able to choose to apply for:
  - his dismissal to be invalidated and thereafter his reinstatement, or
  - for the recognition of the termination of his employment contract and of punitive damages,
- complete remodelling of the procedure for laying off a staff delegate in the event of serious misconduct,
- a mediation committee may be established.

After the next social elections scheduled in 2018:

- the divisional, central and young employee delegations will disppear,
- the joint committees will disappear and their powers in relation to technical, economic and financial information and consultation and those relating to the participation in some company decisions will pass to the delegations in companies with at least 150 employees; delegations will also be granted the right to take part in company decisions and in the implementation of any programme or joint action for ongoing vocational training,
- companies which constitute an economic and social entity may establish a delegation within the economic and social entity in order to simplify the exchange of information between the different delegations,
- an office reorganisation will be performed with regard to the operation of the delegation.

2. Major amendments to the Social Security Code and to the Labour Code

By the Law of 23 July 2015[7] coming into force on 1 January 2016, the procedure on internal and external redeployment has been changed. More information on the content of this Law will be available in an article published on our website.

By the Law of 7 August 2015[8] entered into force on 1 September 2015, the duties and powers of the Social Security Medical Inspectorate have been redefined and the provisions on protection against dismissal for a sick employee, i.e. Articles L. 121-6 (3) and (5) of the Labour Code have been amended.

Indeed, the Law of 7 August 2015 amends, in particular, the provisions relating to:

- the length of the period of protection against dismissal for a sick employee, and
- the payment by the employer to the employee of the salary and other benefits during the period of sickness,

pending the possibility for the National Health Fund (*Caisse Nationale de Santé*) (the "**CNS**") to issue a refusal decision and for the employee to appeal against such a decision.

Under the terms of Article L. 121-6 (3), first sub-paragraph, of the Labour Code (which remains unchanged) an employer who is informed or in possession of a medical certificate is not authorised, even on serious grounds, to notify an employee of the termination of his employment contract or of the invitation to the prior interview, if any, for

[7] Law of 23 July 2015 amending the Labour Code and the Social Security Code with regard to internal and external redeployment measures.
[8] Law of 7 August 2015 amending the duties and powers of the Social Security Medical Inspectorate.

a period of up to 26 weeks from the day the incapacity for work occurred.

During this period of incapacity for work, the employer must pay the employee the full amount of his salary and other benefits arising under his employment contract until the end of the calendar month in which the 77th day of incapacity for work falls, over a reference period of twelve successive calendar months.

Pursuant to the Law of 7 August 2015, a second sub-paragraph has now been added to Article L. 121-6 (3) of the Labour Code which states that the entitlement to full salary and other benefits arising under the employment contract shall cease for the employee in the event of a decision of refusal issued by the CNS. Under the terms of the Law of 7 August 2015, the refusal decision by the CNS shall be imposed on the employer such that he will therefore have to stop paying the sick employee.

However, from the notification of the refusal decision by the CNS to the employee, the latter will have a period of 40 days to lodge an appeal against this decision.

If the employee does not lodge an appeal within this period of 40 days against the refusal decision by the CNS, the period of protection of the employee will expire at the end of the 40-day appeal period in accordance with sub-paragraph 2 of Article L. 121-6 (3) of the Labour Code. It can be deduced from this provision that the employer may dismiss the employee at the end of the 40-day appeal period without having to wait until the end of the 26 weeks provided for in sub-paragraph 1 of Article L. 121-6 (3) of the Labour Code.

If, on the contrary, the employee lodges an appeal against the refusal decision, the CNS shall inform the employer and the period of restriction for the notification of the termination of the employment contract or the invitation to the prior interview shall remain.

The entitlement to full salary and other benefits arising under the employment contract shall be restored in the event of revision of the refusal decision by the CNS. The employer shall be so informed by the CNS and will have to make retroactive payments.

In accordance with Article L. 121-6 (5) of the Labour Code, as amended, the employer shall regain his right to terminate the employment contract of the employee after expiry of the periods referred to in sub-paragraphs 1 and 2 of Article L. 121-6 (3) of the Labour Code.

Unfortunately, the additions made to Article L. 121-6 (3) and (5) of the Labour Code pursuant to the Law of 7 August 2015 bring with them many grey areas, particularly with regard to the maximum period of restriction on the notification of termination of the employment contract or the invitation to the prior interview in the event of an appeal lodged by the employee against the refusal decision by the CNS. Indeed, the Law of 7 August 2015 does not specify how long the employee will ultimately be protected against dismissal in the event of an appeal. More importantly, the provisions of Article L. 121-6 (3) and (5) are clearly self-contradictory.

There will have to be clarification on this subject, either on the part of the legislator or by the courts in case of a litigation being brought forward by the parties involved.

DISPUTE RESOLUTION

1. Modernisation of EU public procurement and concession contracts rules / Les nouvelles directives européennes sur les marchés publics et les concessions

*One of the major objectives of Directives 2014/23/EU on the award of concession contracts, 2014/24/EU on public procurement and 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors is the lessening of the administrative burdens for contracting authorities and economic operators. A key element of that effort is the European Single Procurement Document ("**ESPD**"). The ESPD consists of a formal statement by the economic operator that the relevant grounds for exclusion do not apply, that the relevant selection criteria are fulfilled and that it will provide the relevant information as required by the contracting authority.*

Moreover, a turnover cap has been introduced so that contracting authorities will not be able to set the minimum yearly turnover of potential suppliers at more than twice the estimated contract value, unless there is justification.

Dans le cadre de la stratégie Europe 2020, les directives 2014/23/UE sur l'attribution des contrats de concession (ci-après, la "**Directive Concessions**"), 2014/24/UE sur la passation des marchés publics et 2014/25/UE relative à la passation de marchés par des entités opérant dans les secteurs de l'eau, de l'énergie, des transports et des services postaux (ci-après, les "**Directives Marchés Publics**") du 26 février 2014 modifient les règles applicables aux marchés publics et aux concessions.

Alors que la commande publique représente près de 19% du PIB dans l'Union européenne, ces directives européennes ont pour objectif la simplification, l'assouplissement, la flexibilité et la modernisation des procédures.

Ces textes, qui doivent être transposés dans les Etats membres pour le 18 avril 2016[9] au plus tard, prévoient notamment la généralisation du système de déclaration sur l'honneur et la limitation du chiffre d'affaires exigible.

1. Généralisation du système de déclaration sur l'honneur

Afin d'alléger les charges administratives des entreprises qui participent aux procédures d'attribution, les Directives Marchés Publics généralisent le système de la déclaration sur l'honneur « à titre de preuve a priori en lieu et place des certificats délivrés par les autorités publiques ou des tiers ».

Cette attestation supposera l'utilisation d'un formulaire européen uniformisé, le document unique marché européen, dénommé "**DUME**", dont le projet a été mis en ligne par la Commission européenne. Le volume de ce document (22 pages) suscite cependant des doutes quant à la simplification recherchée.

Le DUME devra être rempli exclusivement de manière électronique mais les Etats membres peuvent reporter l'utilisation du format électronique jusqu'au 18 avril 2018.

Cette « auto-déclaration » permettra au candidat ou soumissionnaire, de démontrer qu'aucune interdiction de soumissionner ne lui est applicable[10] et qu'il

[9] Pour le 18 octobre 2018 en ce qui concerne la soumission des offres par voie électronique.

[10] A ce sujet, on notera que les Directives Marchés Publics et la Directive Concessions prévoient de nouveaux motifs d'exclusion facultatifs tels que le défaut d'exécution au cours des trois années précédentes, la conclusion d'ententes ou encore les situations de conflit d'intérêt.

satisfait aux critères de sélection relatifs à la capacité économique, financière, technique et professionnelle.

Par la suite, seul le soumissionnaire auquel il est prévu d'attribuer le marché (ou les candidats admis à présenter une offre) devra effectivement fournir des certificats et documents à jour.

Cependant, le pouvoir adjudicateur peut, à tout moment, demander à un soumissionnaire de fournir les certificats ou documents justificatifs requis. Si l'utilisation du DUME évite certes aux candidats et soumissionnaires dans un premier temps de devoir remettre au pouvoir adjudicateur les documents en question, ils devront cependant en disposer afin d'être en mesure de les transmettre à tout moment au pouvoir adjudicateur et, en tout état de cause, en cas d'attribution du marché.

Lorsque, pour déposer une offre complète, le soumissionnaire a recours aux prestations d'autres entreprises, il devra remettre un DUME le concernant et un DUME pour chacune des entreprises concernées (par exemple, celui de son sous-traitant) et, en cas de groupement d'opérateurs économiques (y compris dans le cadre d'une association momentanée), un DUME distinct devra être remis pour chacun des opérateurs économiques participants.

Les opérateurs économiques pourront utiliser un DUME existant, à condition de confirmer la validité des informations y figurant.

On notera toutefois que la Directive Concessions ne reprend pas le concept de DUME mais indique seulement que « les pouvoirs adjudicateurs et entités adjudicatrices vérifient les conditions de participation relatives aux capacités professionnelles et techniques et à la capacité économique et financière des candidats ou des soumissionnaires sur la base de déclarations sur l'honneur […] ». Il est donc permis de penser que le DUME sera également utilisé pour l'attribution des concessions.

2. Limitation du chiffre d'affaires exigible

Les Directives Marchés Publics prévoient également un plafonnement des exigences relatives à la capacité financière requise pour participer à la procédure afin de favoriser l'accès des petites et moyennes entreprises aux marchés publics.

Ainsi, le chiffre d'affaires annuel exigé par les pouvoirs adjudicateurs ne pourra pas être supérieur au double de la valeur du marché, sauf cas particuliers. Cette limitation n'existe pas dans la Directive Concessions.

Enfin, les Directives Marchés Publics et Concessions encouragent les pouvoirs adjudicateurs à allotir leurs marchés, sans pour autant en faire une obligation.

INTELLECTUAL PROPERTY

1. Transfer of personal data – ECJ judgment

On 6 October 2015, the European Court of Justice (the "**ECJ**") rendered a landmark judgment regarding the Safe Harbour principles that represent a key element in the transfer of personal data from the European Union to the United States (Case C-362/14, *Maximillian Schrems v. Data Protection Commissioner*). As a principle, personal data shall not be transferred to a third country (i.e. non EU Member State) if that third country does not ensure an adequate level of protection (that is a level of protection for individuals equivalent to that granted by European data protection legislation deriving from Directive 95/46/EC).

Following preliminary questions raised by the Irish High Court, the ECJ reaffirmed the powers of the national supervisory authorities (such as the *Commission Nationale pour la Protection des Données* in Luxembourg) in their mission of controlling the proper compliance of national data protection legislation by individuals and companies. Accordingly, even if a prior favourable decision from the European Commission exists as to the adequate level of protection in a third country – such as Decision 2000/520 in relation to the Safe Harbour principles in the United States - the national supervisory authorities shall investigate and render a decision when a complaint is lodged before them regarding the processing of personal data in that third country.

In the *Schrems* case, the complaint lodged before the Irish Data Protection Commissioner dealt with the processing in the United States of personal data collected in Ireland and the transfer of those data from Facebook Ireland to Facebook, Inc. The Data Protection Commissioner had dismissed the complaint arguing that, in its Decision 2000/520, the European Commission had ruled that the U.S undertakings adhering to the Safe Harbour principles (such as Facebook, Inc.) were granting an adequate level of protection in its Decision 2000/520.

On 6 October 2015, the ECJ disagreed with that reasoning and declared invalid the Decision 2000/520 in relation to the Safe Harbour principles. The reasoning of the ECJ and the impact of the ruling for business players working in or with the United States will be further detailed in an article that will be published on our website.

TAX

1. Exchange of tax rulings

On 6 October 2015, the EU Council (the "**Council**") reached a unanimous political agreement on mandatory automatic exchange of advance cross-border rulings (the "**Rulings**") and advance pricing arrangements (the "**APAs**", together with the Rulings the "**Tax Agreements**"). This political agreement will be established in a proposal for a directive amending the existing Directive 2011/16/EU on administrative cooperation in the field of taxation (the "**Draft Proposed Directive**").

The Draft Proposed Directive is in line with the proposals on automatic exchange of information of tax rulings laid down in Action 5 of the BEPS project, entitled Countering Harmful Tax Practices[11].

The Council agreed upon a wide definition of the Tax Agreements which makes it possible to capture all similar instruments (in particular any communication, agreement, or any other action or instrument with similar effects) to the extent that the tax payer is entitled to rely on it.

The Draft Proposed Directive presents several definitions, which allows the determination of the scope of the automatic data exchange. Firstly, the text covers any Tax Agreement issued, amended or renewed by or on behalf of a public authority (i.e. the government or the tax authority of a Member State).

Secondly, the draft distinguishes between Rulings and APAs:

[11] For more information on the BEPS project, see the article "Base Erosion and Profit Shifting" in the present Tax section.

1. Rulings

Rulings deal with the "application or interpretation of legal or administrative tax provisions" in the context of a cross-border transaction or with the question of whether or not activities carried out by a person in another jurisdiction create a permanent establishment in that jurisdiction.

"Cross-border transaction" refers to a transaction where:

- not all the parties to the transaction are resident for tax purposes in the Member State issuing, amending or renewing the Ruling; or
- any of the parties to the transaction is simultaneously resident for tax purposes in more than one jurisdiction; or
- one of the parties to the transaction carries on business in another jurisdiction through a permanent establishment and the transaction forms part of the whole of the business of the permanent establishment. A cross-border transaction also includes any arrangement made by a person in respect of business activities in another jurisdiction which that person carries on through a permanent establishment; or
- the transaction has a cross-border impact.

2. APAs

APAs lay down an appropriate set of criteria for the determination of the transfer pricing of cross-border transactions between associated enterprises or to determine the attribution of profits to a permanent establishment.

In this context a "cross-border transaction" refers to a transaction involving associated enterprises which are not all resident for tax purposes in the territory of a single jurisdiction or where a cross border impact can be identified.

3. Timing of scope of information

It should be noted that the automatic exchange will apply to:

- Tax Agreements issued on or after 1 January 2017;
- Tax Agreements issued, amended or renewed between 1 January 2012 and 31 December 2013 under the condition that they are still valid on 1 January 2014;
- Tax Agreements issued, amended or renewed between 1 January 2014 and 31 December 2016 irrespective of whether or not they are still valid.

The Member States will communicate specific elements on the considered Tax Agreements, including in particular the addressees, a summary of the Ruling or APA, identification of Member States which are likely to be affected. The information will then be made available to all other EU Member States through a centralised directory. The European Commission will only have partial access to the Tax Agreements, the nominal information being excluded.

Nevertheless, Member States will have the possibility to exclude from information exchange Tax Agreements issued to small and medium-sized companies with an annual net turnover of less than EUR 40 million at group level, if such Tax Agreements were issued, amended or renewed before 1 April 2016. This exemption will not, however, apply to companies conducting mainly financial or investment activities.

2. Omnibus bill 6891

Bill of law 6891 (the "**Bill**") was submitted on 13 October 2015 to the Luxembourg Parliament.

1. Introduction of a digressive scale of rates for net wealth tax

Luxembourg corporations are currently subject to a uniform tax rate of 0.5% assessed on the company's net wealth.

The Bill introduces a reduced rate of 0.05% for a net wealth base exceeding EUR 500 million, without cap.

2. Abolition of the alternative minimum tax and introduction of a minimum wealth tax

The Bill abolishes the alternative minimum tax for corporations and replaces it by a minimum wealth tax as of 2016 ("**Minimum Wealth Tax**"). Securitisation vehicles and SICARs will also be subject to the Minimum Wealth Tax.

The Minimum Wealth Tax will be at a rate of EUR 3,210 for entities with financial assets, transferable securities and cash at bank exceeding 90% of their total gross assets plus EUR 350,000.

For all other companies subject to net wealth tax, the Minimum Wealth Tax will be determined according to a progressive tax scale in accordance with their balance sheet.

Total Assets	Minimum Wealth Tax (including solidarity surcharge)
≤ EUR 350,000	EUR 535
> EUR 350,000 and ≤ 2,000,000	EUR 1,605
> EUR 2,000,000 ≤ and EUR 10,000,000	EUR 5,530
> EUR 10,000,000 and ≤ 15,000,000	EUR 10,700

> 15,000,000 and ≤ 20,000,000	EUR 16,050
> 20,000,000 and ≤ 30,000,000	EUR 21,400
> 30,000,000	EUR 32,100

3. Step-up for substantial participation owned by individual immigrating to Luxembourg

The Bill introduces a step-up rule for non-resident individuals immigrating to Luxembourg.

The Bill introduces a step-up rule for (i) substantial shareholdings, which are participations in a company of more than 10% and for (ii) profit-sharing loans issued by a company in which a non-resident owns a substantial shareholding. Under this new rule, a non-resident migrating to Luxembourg may revalue those assets at their fair market value.

The Bill provides, however, that this step-up will not benefit individuals who were Luxembourg tax resident for more than 15 years and non-Luxembourg tax resident for fewer than 5 years before the date of migration to Luxembourg.

The step-rule will apply from the assessment year 2015.

4. Tax adjustment for individuals arriving in or departing from Luxembourg in the course of the year

The Bill introduces an option for taxpayers who are only resident in Luxembourg for part of the year to be taxed as if they were resident in Luxembourg for the full year. Potentially, excessive taxes withheld on salaries or pensions paid in Luxembourg may therefore be reimbursed.

This option will apply as from the assessment year 2016.

3. 2016 budget

On 14 October 2015, the Luxembourg government submitted the bill of law 6900 relating to the 2016 budget (the "**Budget Bill**") to the Luxembourg Parliament.

The two main tax measures under the Budget Bill are:

- the repeal of the Luxembourg favourable tax regime applicable to intellectual property rights provided for under (i) Article 50bis of the income tax law ("**ITL**") pursuant to which revenues from and capital gains realised upon the disposal of intellectual property rights are 80% tax exempt and (ii) Article 60bis of the net wealth tax valuation law pursuant to which intellectual property rights are fully exempt from any net wealth tax (the "**IP Regime**").
- the introduction of a tax amnesty for resident taxpayers who reveal non-declared income or assets between 1 January 2016 and 31 December 2017 (the "**Tax Amnesty**").

1. Repeal of the IP Regime

The IP Regime will be repealed with effect from 1 July 2016 for corporate income tax and from 1 January 2017 for net wealth tax purposes.

However, the Budget Bill introduces a grandfathering period for intellectual property rights acquired or developed before 1 July 2016 during which taxpayers may continue to benefit from the IP regime until 30 June 2021 for corporate income tax purposes and 1 January 2021 (included) for net wealth tax purposes.

Notwithstanding the above, intellectual property rights acquired after 31 December 2015 from a related company (within the meaning of Article 56 ITL) will only continue to

benefit from the IP Regime until 31 December 2016 for corporate income tax and 1 January 2018 (excluded) for net wealth tax purposes, unless the intellectual property rights qualified for the IP Regime or benefited from a similar foreign tax regime at the date of the acquisition.

The Luxembourg tax authorities will automatically exchange information with foreign tax authorities on the identity of taxpayers who benefit from the IP Regime in relation to intellectual property rights acquired or developed after 6 February 2015.

2. Tax Amnesty

Further to the introduction of the Tax Amnesty, the taxpayers concerned will not be subject to penalties for fraud but the amount of the avoided taxes will be increased by an amount of 10% for any filing made during the 2016 tax year and by an amount of 20% for any filing made during the 2017 tax year.

4. Tax treaties news

Andorra

Details have been published on the double tax treaty signed between Andorra and Luxembourg on 2 June 2014.

The following withholding tax rates apply under the new treaty:

Dividends: The treaty provides for a standard withholding tax rate of 15% which can be reduced to 5% if the beneficial owner is a company (other than a partnership that is not liable to tax) which directly holds at least 10% of the capital of the company paying the dividends or to 0% if the beneficial owner holds, directly and uninterruptedly, for at least one year, at least 10% of the share capital of the company paying the dividends or a participation with an acquisition cost of at least EUR 1.2 million in the company paying the dividends.

Interest: The treaty provides for a 0% rate on interest payments.

Royalties: The treaty provides for a 0% rate on royalties.

Luxembourg and Andorra apply both the exemption and credit methods for the avoidance of double taxation.

Brunei

Details have been published on the double tax treaty between Brunei and Luxembourg on Income and Capital signed in Brussels on 14 July 2015.

The following withholding tax rates apply under the new treaty:

Dividends: The standard withholding tax rate is 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 standard withholding tax rate of 10% on interest payments, which can be reduced to 0% on interest paid to financial institutions, mutual funds or government bodies, among others.

Royalties: The treaty provides for a 10% rate on royalties.

Luxembourg applies the credit and exemption-with-progression methods for the avoidance of double taxation whereas Brunei applies the credit method for the avoidance of double taxation.

Colombia

On 7 October 2015, Colombia and Luxembourg expressed their intention to negotiate and sign a tax treaty. Further details will be reported in a later edition, once available.

Hungary

Details have been published on the tax treaty between Hungary and Luxembourg on Income and Capital signed on 10 March 2015.

The treaty generally follows the OECD standard and the following withholding tax rates apply under the new treaty:

Dividends: The standard withholding tax rate is 10% which can be reduced to 0% if the beneficial owner is a company (other than a partnership that is not liable to tax) which directly holds at least 10% of the capital of the company paying the dividends.

Interest: 0% on interest

Royalties: 0% on royalties

The treaty provides that both states apply the credit and exemption-with-progression methods for the avoidance of double taxation.

Once in force, the treaty will replace the double tax treaty of 15 January 1990.

Moldova

On 26 August 2015, the Luxembourg and Moldovan governments entered into negotiations in order to revise the double tax treaty between Moldova and Luxembourg on Income and Capital signed on 11 July 2007. Details will be reported subsequently.

Spain

The double tax treaty concluded by Luxembourg and Spain on 3 June 1986 was complemented by a protocol of the same date (the "**First Protocol**") and a protocol dated 10 November 2009 on exchange of information (the "**Protocol**").

The First Protocol provides that the treaty is not applicable to so-called "1929 holding companies", subject to the Law of 31 July 1929 (since repealed).

The Luxembourg tax authorities issued the Circular L.G.-Conv. D.I. n°52 (the "**First Circular**") dated 10 May 2000 according to which the treaty applies to UCITS (as defined under Section VIII of the Council Directive 85/611/CEE dated 20 December 1985).

Following an exchange of letters between the Spanish and Luxembourg tax authorities, the Luxembourg tax authorities issued a new Circular on 21 July 2015 which replaces the First Circular and confirms that the treaty does not apply to SICAVs and SICAFs subject to part II of the Law of 17 December 2010 on UCIs or SICAV/SICAF which are specialised investment funds (SIFs) subject to the Law of 13 February 2007, as amended. The Circular further confirms that the treaty does not apply to SPFs (*sociétés de gestion de patrimoine familial*), subject to the Law of 11 May 2007, which replaced the 1929 holding companies.

However, the treaty and its Protocol remain applicable to SICAFs/SICAVs regulated by part I of the Law of 17 December 2010 on UCIs.

Ukraine

On 22 September 2015, Luxembourg and Ukraine initialled a new double tax treaty on Income and Capital. The first treaty signed between Luxembourg and Ukraine on 6 September 1997 never came into force. Details on this new tax treaty will be highlighted in a later edition.

United Arab Emirates

Details have been published on the protocol amending the double tax treaty between Luxembourg and United Arab Emirates signed on 26 October 2014.

The protocol provides that gains derived from the alienation of shares, bonds and any other securities or similar instruments which are listed on a recognised stock exchange in a contracting state shall be taxable only in the residence state of the alienator.

However, all other gains derived from the alienation of shares in a company which are not in the scope of paragraphs 1 to 4 of Article 13 of the treaty on capital gains, such as bonds and similar instruments, shall be taxable only in the state of residence of the seller.

The protocol further provides that Luxembourg will not grant any tax credit in order to avoid double taxation in the case of business profits and capital gains resulting from agricultural, industrial, infrastructure or tourist activities derived from a permanent establishment based in the United Arab Emirates.

Article 4, the protocol expands the list of financial institutions which are exempt from dividend withholding tax.

Article 26 of the treaty is replaced by a new provision on exchange of information in line with Article 26 of the OECD Model Standard of 2014.

This protocol was submitted to the Luxembourg Parliament for ratification and approved by the United Arab Emirates earlier this year. This protocol will become effective on 1 January of the calendar year following the year of its entry into force.

5. BEPS

On 5 October 2015, the OECD released the final set of measures on international tax planning and an explanatory statement.

Following the preliminary reports of September 2014, the Base Erosion and Profit Shifting (“**BEPS**”) project provides recommendations on fifteen areas of focus. The BEPS initiative was launched in July 2013 at the request of the G20 countries and is currently supported by 90 States, including Luxembourg.

The final package of BEPS includes recommendations in order to achieve the following objectives:

- address the tax challenges of the digital economy (Action 1);
- neutralise the effects of hybrid mismatch arrangements (Action 2);
- strengthen controlled foreign company rules (Action 3);
- limit base erosion via interest deductions and other financial payments (Action 4);
- counter harmful tax practices more effectively, taking into account transparency and substance (Action 5);
- prevent treaty abuse (Action 6);
- prevent the artificial avoidance of permanent establishment status (Action 7);
- reinforced transfer pricing rules with a revised OECD transfer pricing guidelines (Actions 8-10);
- measuring and monitoring BEPS (Action 11);
- require taxpayers to disclose their aggressive tax planning arrangements (Action 12);
- re-examine transfer pricing documentation (Action 13);

- make dispute resolution mechanisms more effective (Action 14); and
- develop a multilateral instrument (Action 15).

The final reports were presented on 8 October 2015 by the Secretary General of the OECD, Mr Angel Gurría, at the meeting of ministers of finance of the G20 countries held in Lima, Peru. During the annual summit of the G20 heads of government to be held on 15-16 November in Antalya, Turkey, the focus will be on supporting the implementation of BEPS measures.

Some of the recommendations are immediately applicable, for instance the revision of the transfer pricing guidelines, and some other recommendations will need to be implemented through tax treaties or through domestic law modification. Furthermore, the participating States are working on a multilateral instrument to implement the treaty-related measures in order to sign it in 2016.

The OECD and G20 countries will continue their work to complete the areas requiring further works in 2016 and 2017, including the finalisation of the revised transfer pricing guidelines, discussing the rules for the attribution of profits to permanent establishments and the finalisation of the provisions on the limitation on benefit rule.

They will also extend their cooperation to develop a framework for monitoring and supporting the implementation by countries of the BEPS measures by early 2016 and continue working together until at least 2020.

Attention should now turn to those countries which have to decide how to implement the recommendations. Some countries have already begun taking action in anticipation but the main developments will take place in the coming months.

Further details will follow on the above in later editions of our Newsletter.

6. Common reporting standard

On 14 August 2015, bill of law 6858 (the "**Bill**") concerning the automatic exchange of financial account information in the field of taxation was submitted to the Luxembourg Parliament.

The Bill aims *inter alia* at implementing Directive 2014/107/EU[12] (the "**EU CRS Directive**").

The EU CRS Directive aligns the European legislation on automatic exchange of information with the Common Reporting Standard for the automatic exchange of tax information ("**CRS**"), developed by the OECD, which draws in many aspects of FATCA and which is sometimes referred to as Euro FATCA.

In this respect, the EU CRS Directive extends the scope of the automatic exchange of information for tax purposes among EU Member States to interest, dividends, account balances and sales proceeds from financial assets by way of amendment of the Directive 2011/16/EU on administrative cooperation in the field of direct taxation.

It is expected that the EU CRS Directive will repeal and supersede Directive 2003/48/EC as amended, which already provides for the automatic exchange of information on savings income in the form of interest payments, as of 1 January 2016.

The Bill should be applicable as from 1 January 2016. Luxembourg, as an "early adopter", will implement the exchange of information for the

[12] Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.

first time in 2017 for information relating to the year 2016.

7. Omnibus bill 6847

On 5 August 2015 the bill of law 6847 (the "**Bill**") introducing major corporate tax measures was submitted to the Luxembourg Parliament. This Bill aims mainly:

- to transpose into Luxembourg domestic tax law anti-hybrid and anti-abuse rules amending the Luxembourg parent subsidiary regime;
- to amend the Luxembourg tax unit regime so that it is in line with the case law of the European Court of the European Union;
- to amend the Luxembourg exit tax regime; and
- to introduce certain other tax measures.

More information on the content of the Bill is available in the article: "Major corporate tax measures in Luxembourg - Bill of Law 6847" published on our website."

8. Tax exempt kilometric allowance

On 1 September 2015, the Luxembourg tax authorities replaced the Circular L.I.R. 104/1 of 10 March 2015 on the valuation of certain benefits granted by an employer to its employees (the "**Existing Circular**") with a new circular (the "**New Circular**"), to be effective immediately, the sole purpose of which is to reduce the amount of the tax exempt kilometric allowance granted to employees using their private cars for professional travel from 0.40 EUR/kilometre to 0.30 EUR/kilometre.

The amendment was required as a result of the approval of (i) a Grand Ducal regulation dated 14 June 2015 on travel and accommodation expenses and relocation allowance for civil servants and Government officials and (ii) a government regulation dated 19 June 2015 determining the kilometric allowance for vehicles used for business trips. These regulations reduced the amount of the allowance for civil servants and Government officials from 0.40 EUR/kilometre to 0.30 EUR/kilometre.

It should be recalled in this respect that pursuant to Article 115 (3) of the Income Tax Law and the related Grand Ducal Regulation dated 3 December 1969, allowances received by an employee in compensation for professional travel expenses are tax exempt provided that the allowance does not exceed the same granted to comparable civil servants.

Therefore, as of 1 August 2015, kilometric allowances granted by employers to their employees are tax exempt for an amount of 0.30 EUR/kilometre. Any amount paid in excess of that sum will be considered as benefit in kind and taxed as such.

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