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ASSET MANAGEMENT AND INVESTMENT FUNDS

1. New UCITS collateral diversification requirements

ESMA Guidelines 2014/937 (the "**Guidelines**") amend the guidelines on ETFs and other UCITS issues dated 18 December 2012 and provide new rules on the collateral diversification requirement and on the content of the UCITS annual report in the context of OTC financial derivative transactions and efficient portfolio management techniques.

Specifically, the new guidelines allow UCITS to derogate from the application of the rule according to which a basket of collaterals with an exposure to a single issuer may not exceed 20% of the net asset value inventory. The UCITS must, in this case, be fully collateralised in different transferable securities and money market instruments issued or guaranteed by a Member State, one or more of its local authorities, a third country, or a public international body to which one or more Member States belong and the UCITS must receive securities from at least six different issues where securities from any single issue cannot exceed 30% of the UCITS' net asset value.

The introduction of the derogation includes the obligation to ensure adequate transparency in the prospectus and in the annual report (points 43(e) and 48 of the Guidelines).

These new transparency obligations as well as the new rules on the collateral diversification requirement apply from 1 October 2014. Transitional provisions are provided for UCITS which exist before the application of the Guidelines.

On 30 September 2014, the CSSF issued Circular 14/592 (the "**Circular**") which implements the Guidelines and confirms that the securities and money market instruments referred to in the derogation provision must, among other things, be of very high quality and very liquid in order to allow the exposure of the UCITS to counterparty risk to be reduced in OTC derivative transactions and efficient portfolio management techniques.

As a general rule, the CSSF also restates that point (43) (f) of the Guidelines imposes on management companies and self-managed investment companies the requirement to identify, manage and reduce the risks linked to collateral through the risk management policy that they are required to employ according to Article 42, first paragraph of the Law of 17 December 2010, as amended, and as further specified by CSSF Regulation 10-4 (Articles 10, 13 and 43) and CSSF Circular 11/512.

2. Revision of the definition of European money market funds

ESMA Opinion 2014/1103 (the "**Opinion**") aims at amending the guidelines issued by CESR (CESR/10-049) in 2010 on a common definition of European money market funds (the "**2010 Guidelines**"). Management companies which manage European money market funds (as defined in the 2010 Guidelines and hereinafter referred to as "**MMF**") can no longer rely solely on the external credit rating given by recognised rating agencies to assess the credit quality of the money market instrument ("**MMI**") in which a MMF wishes to invest but are required to make their own assessment of the credit quality of this MMI.

In addition, while there should be no mechanistic reliance on such external credit ratings, a downgrade, by any recognised agency, below the two highest short-term

credit ratings for short term MMI (paragraph 7 of the Opinion), and below investment grade or equivalent for sovereign issuance (paragraph 8 of the Opinion), should trigger a new assessment of the credit quality of the MMI.

This change occurs in the context of the application of a European regulation commonly called "**CRA3**" (CRA stands for Credit Rating Agency), specifically Regulation (EU) 462/2013 on credit rating agencies and Directive 2013/14/EU on over- reliance on credit ratings (see the information on this Directive below).

3. Over-reliance on credit ratings Directive

Directive 2013/14/EU (the "**Directive**") amends different pieces of EU legislations including, but not limited to, the UCITS directive and the AIFMD. According to the Directive, UCITS management companies and AIFM (including self-managed investment companies) will be required, in the context of the risk management process that they must implement, not solely or mechanically to rely on credit ratings issued by recognised credit rating agencies for assessing creditworthiness of the UCITS and/or AIF' assets.

National competent authorities are in charge of the monitoring of the adequacy of the credit assessment processes of UCITS and AIFMs. They will have to assess the use of references to credit ratings in the UCITS or AIF's investment policies, and where appropriate, encourage mitigation of the impact of such references with a view to reducing sole and mechanistic reliance on credit ratings.

The Directive will also amend the IORP Directive[1] to introduce similar principles.

Member States are required to implement and apply the provisions of the Directive by 21 December 2014 at the latest. At this stage, Luxembourg has not yet implemented the Directive.

4. Investor protection in the event of a material change to an open-ended UCI

CSSF Circular 14/591 (the "**Circular**") confirms the administrative practice of the CSSF in the case of a material change to investors' interests in an open-ended undertaking for collective investment ("**UCI**") governed by the Luxembourg Law of 17 December 2010 relating to UCIs and further clarifies the procedure and timing requirements.

The current notification practice consists of requiring a minimum notification period of one month to notify investors of a significant change to the UCI they are invested in during which time investors are given the right to request the redemption of their units without any redemption charge.

Subject to appropriate justification duly notified in advance to the CSSF, the latter may agree to impose only a notification period to duly inform the investors of the relevant change before it becomes effective, but without the ability for investors to redeem or convert their holdings free of charge.

The CSSF also reminds that the content of the Circular is without prejudice to the specific requirements of other competent authorities in jurisdictions (within and outside the

[1] IORP Directive refers to Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision.

European Union) where the UCI is registered for distribution.

5. UCITS V Directive

The UCITS V Directive (Directive 2014/91/EU of 23 July 2014 on UCITS as regards depositary functions, remuneration policies and sanctions) ("**UCITS V**") was published in the Official Journal of the European Union on 28 August 2014.

UCITS V focuses on 3 main pillars:

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

UCITS V must be implemented into national law by 18 March 2016 and it will become applicable from the same date, i.e. 18 March 2016.

For more information, please see our Newsletter of July 2014.

6. ESMA Guidelines on AIFM reporting obligations

On 8 August 2014, ESMA published the translation of the Guidelines on reporting obligations under Articles 3(3) d and 24(1), (2) and (4) of the AIFMD into the official EU languages (ESMA/2014/869) (the "**Guidelines**"). This publication follows the issue in November last year of ESMA's final report on these Guidelines.

The purpose of the Guidelines is to ensure common, uniform and consistent application of the reporting obligations to national competent authorities ("**NCAs**") stemming from Articles 3(3)(d) and 24(1), (2) and (4) of the AIFMD. They provide clarification on the information that alternative investment fund managers ("**AIFMs**") must report to NCAs, the timing of the reports and the procedures to be followed when AIFMs move from one reporting obligation to another.

The Guidelines apply from two months after their publication, i.e. from 8 October 2014.

See also our Newsletter of January 2014 for additional information on this topic.

7. Updated ESMA Q&A on AIFMD

On 30 September 2014, ESMA published an updated version of its Q&A on the application of the AIFMD.

Section III on reporting to national competent authorities under Articles 3, 24 and 42 of the AIFMD is supplemented by additional questions. Two of these additional questions relate to the reporting obligations applying to a non-EU AIFM:

- the answer to Question 36 confirms that the reporting obligations of a non-EU AIFM to national competent authorities of an EU Member State does not depend on the actual marketing period of the AIF in this EU Member State but rather on the existence of investors in the AIF in the jurisdiction of this EU Member State.

  Therefore, a non-EU AIFM must continue to report to national competent authorities after the marketing period has ended unless it confirms that no investors in the jurisdiction of the authority concerned are invested in the AIF(s).

- the answer to Question 37 indicates that the reporting frequency applying to a non-EU AIFM must be calculated on the basis of (i) all the EU AIFs managed by this non-EU AIFM and (ii) all the AIFs it markets in the European Union. Therefore, a unique reporting frequency must be calculated and applied in all

Member States where the non-EU AIFM markets its AIFs.

A new Section VII on Delegation has also been added and Question 1 of this Section deals with the case of an AIFM which manages multiple AIFs "*When assessing whether any delegation of portfolio management and/or risk management by the AIFM results in the AIFM becoming a letter-box entity as referred to in Article 20 of the AIFMD, should the assessment be made at the level of the AIFM or at the level of each AIF*?" ESMA confirms that the assessment must be carried out at the level of each individual AIF and not on the basis of a group of AIFs.

BANKING, INSURANCE AND FINANCE

1. Collection of statistical data from financial companies by the Luxembourg Central Bank

Within the framework of its tasks, the "*Banque centrale de Luxembourg*" (the Luxembourg Central Bank) has to transmit comprehensive and reliable statistics on the balance of payments and the international investment position to the European Central Bank ("**ECB**").

In order to comply with Guideline ECB/2011/23 of 9 December 2011 repealing from 1 June 2014 Guideline ECB/2004/15, the "*Banque centrale de Luxembourg*" has adopted a new Regulation 2014/17 of 21 July 2014 concerning the collection of statistical data from financial companies amending its Regulation 2011/8 concerning the collection of statistics from companies which grant loans or issue debt securities or financial derivatives to affiliates.

The two main purposes of this new Regulation 2014/17 are to widen the scope of the entities subject to Regulation 2011/8 and to create a new exemption for financial companies already subject to data collection.

Now fall within the scope of the Regulation 2011/8 every company (defined as a "**Financial Company**") located in Luxembourg whose object includes at least one of the following elements:

- "the investment in any society for any kind of investment;
- the acquisition by subscription, purchase, exchange or in any other way of securities, shares and other equity investments, bonds, receivables, certificates of deposit and other debt instruments and generally all securities and financial instruments issued by a public or private entity;
- to invest directly or indirectly in the acquisition and management of a real estate portfolio, of patents or other intellectual property rights whatever the nature or the origin;
- to borrow in any form whatsoever;
- to lend funds to its shareholders, subsidiaries, affiliated companies, and/or any other entity".

Then every Financial Company whose quarterly balance sheet total exceeds € 500 million shall inform within one month the "*Banque centrale de Luxembourg*" of the overrun of this threshold. Such Financial Company shall therefore be subject to the statistical reports obligations to the "*Banque centrale de Luxembourg*" which include inter alia a quarterly statistical balance sheet report, a quarterly report on transactions and a monthly security by security report.

Financial companies with a balance sheet of less than € 500 million are exempt from the reporting obligations with the "*Banque centrale de Luxembourg*". In addition, are also exempt the financial companies which are currently subject to the data collection that covers the inherent needs in external statistics such as credit institutions, collective investment undertakings, venture capital firms, securitisation vehicles and insurance and reinsurance companies.

The new Regulation 2014/17 will enter into force on 1 December 2014.

Reporting agents, subject to the obligations of Regulation 2011/8 must provide the first transmission of information defined in the new Regulation 2014/17 relating to the period from December 2014 to 21 January 2015.

Reporting agents not already subject to the obligations of Regulation 2011/8 benefit from an additional 6-month period to provide the first reports; the reports from December 2014 to May 2015 must be transmitted by 26 June 2015 at the latest.

CAPITAL MARKETS

1. First sovereign Sukuk in Luxembourg

The Law of 12 July 2014 approved the issue of a sovereign Sukuk in the amount of € 200 million by a special purpose vehicle ("**SPV**") wholly owned by the Luxembourg State.

This first sovereign Sukuk was fully subscribed on 30 September 2014 and the Luxembourg State issued the sovereign Sukuk on 7 October 2014.

The specific conditions of this first sovereign Sukuk, such as its duration, the interest rate and the conditions of repayment are set out in an *Arrêté ministériel* of 30 September 2014.

The first sovereign Sukuk will benefit from a guarantee by the Luxembourg State in the principal amount of the issue. The Sukuk issue relates to an investment in 3 buildings acquired by the SPV from the Luxembourg State. The SPV will apply the rental income of those assets to the payment to investors, under conditions which are Sharia-compliant.

2. Central securities depositories Regulation

Regulation (EU) 909/2014 on improving securities settlement in the European Union and on central securities depositories ("**CSD Regulation**") was published in the Official Journal of the European Union on 28 August 2014.

The CSD Regulation constitutes the third pillar of the EU initiatives which affect the financial market value chain.

The three pillars of the new regulatory framework for securities market infrastructures and their respective implementation timelines are briefly described in the table below.

Value Chain	New Legislations	Entry into Force	Applicable
Trading	MiFID II[2]	2 July 2014	As from 3 January 2017
Clearing	EMIR[3]	16 August 2012	As from 13 March 2013[4]
Settlement	CSD Regulation	17 September 2014	As from December 2014[5]

The CSD Regulation mainly introduces (i) an obligation of dematerialisation for securities traded via an organised trading facility or posted as collateral, (ii) harmonised settlement periods for transactions in these securities, (iii) settlement discipline measures, and (iv) common rules for central securities depositaries ("**CSDs**"), including, but not limited to, new organisational requirements, conduct of business rules and prudential requirements and authorisation regime.

The harmonisation of the settlement periods requires, among other things, a settlement date no longer than the second business day after the trading takes place ("**T+2**"), for most of the transactions in transferable securities which are executed on trading venues and settled in a securities settlement system.

[2] See the article dedicated to MiFID II (i.e. Directive 2014/65/EU (MiFID II) and Regulation (EU) 600/2014 (MiFIR), both on markets in financial instruments) in our last Newsletter of July 2014.
[3] EMIR refers to the European Market Infrastructure Regulation, i.e. the Regulation (EU) 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.
[4] The effective implementation of the provisions of the CSD Regulation is phased in over different periods starting in March 2013.
[5] The effective implementation of the provisions of the CSD Regulation is phased in over different periods starting in January 2015.

Another part of the CSD Regulation deals with the provision by CSDs of a limited number of banking- ancillary services to CSD participants. The prudential and supervisory requirements applying to the CSD which provide these banking services are increased.

The implementation timeline of the CSD Regulation varies depending on the obligation covered, e.g. the dematerialisation obligation shall apply from 1 January 2023 to transferable securities issued after that date and from 1 January 2025 to all transferable securities, and the T+2 requirement shall apply from 1 January 2015[6].

Today, CSDs operating in Luxembourg include LuxCSD, which is a national CSD and Clearstream Banking Luxembourg (CBL), which is the international ICSD[7].

[6] Subject to the derogation provided in Article 76.3 of the CSD Regulation.

[7] ICSDs are the only ones empowered to provide post-trade and securities services for the Eurobond market and for securities issued in a currency different from the national currency of the bond issuer.

DISPUTE RESOLUTION

1. New European Regulation in matters of succession – Nouveau règlement européen en matière de successions

The EU has adopted a new Regulation on successions (Regulation (EU) 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession).

Successions with cross-border elements are usually characterized by their high complexity because succession law varies considerably from one EU country to another. The Regulation will make it easier for European citizens to handle the legal side of their international succession.

The Regulation provides for several improvements and particularly harmonization of the rules on the jurisdiction and applicable law governing matters of succession. The connecting criterion is the one of the deceased's habitual residence at the time of death. The Regulation also provides for a limited choice of the law and jurisdiction of the deceased's nationality.

These new rules are applicable to successions as of 17 August 2015 but according to the transitional provisions it is already possible to designate the applicable law to the succession.

Une (r)évolution en matière de successions…

L'Union européenne poursuit son travail pour la création « d'un espace de liberté, de sécurité et de justice » pour les ressortissants de ses Etats membres.

Dernière avancée, le Règlement (UE) 650/2012 du 4 juillet 2012 relatif à la compétence, la loi applicable, la reconnaissance et l'exécution des décisions, et l'acceptation et l'exécution des actes authentiques en matière de successions et à la création d'un certificat successoral européen, (le « **Règlement** »), deviendra applicable le 17 août 2015.

Ce Règlement a notamment pour finalité d'uniformiser les règles de conflits de lois et de juridictions en matière de droit des successions.

Il apporte des solutions concrètes aux multiples problèmes juridiques rencontrés dans le cadre de successions transfrontalières de ressortissants des Etats membres. Ces successions, dont le nombre ne cesse de croître, sont, en effet, soumises non seulement à différentes législations nationales disparates, mais également à différents critères de rattachement, en fonction du caractère mobilier ou immobilier des biens entrant dans l'assiette de la succession. Ainsi, au Luxembourg comme en France et en Belgique, la dévolution de la succession portant sur un immeuble est régie par la loi du pays de situation de cet immeuble tandis que le partage des meubles est soumis à la loi du dernier domicile du défunt.

Le Règlement en cause constitue une véritable révolution en matière de successions au regard de cette complexité antérieure, les deux innovations les plus remarquables étant les suivantes :

I. Tout d'abord, le Règlement institue un **principe d'unité** : unité des règles de conflits de lois et de juridictions d'une part, unité de la loi applicable tant aux biens meubles qu'aux biens immeubles, d'autre part.

Il sera désormais possible de choisir de son vivant à quelle loi et juridictions nationales l'on entend soumettre sa succession, comme cela sera évoqué au point II. Mais, à défaut d'un tel choix, la loi applicable et les juridictions compétentes pour l'ensemble des biens, meubles ou immeubles, composant la

succession, seront celles du pays de la dernière résidence habituelle du défunt.

Toutefois, à titre exceptionnel, si le défunt présentait des liens manifestement plus étroits avec un autre Etat, le Règlement précise que la loi de cet Etat s'appliquera (article 21, § 2 du Règlement).

II. Le Règlement repose également sur le **principe de l'autonomie de la volonté** (articles 7 et s. et 22 et s. du Règlement). Il offre la possibilité de choisir un droit applicable et des juridictions compétentes autres que ceux qui s'appliqueraient d'office comme énoncé au point I. Ce choix est cependant limité à la loi nationale et aux juridictions de l'Etat d'origine de la personne opérant le choix.

Si la personne possède plusieurs nationalités, elle pourra choisir la loi d'un de ses pays d'origine, et éventuellement les juridictions de ce pays, pour connaître de sa succession. Le choix devra se faire par une déclaration revêtant la forme d'une disposition à cause de mort. Ce choix pourra ultérieurement être modifié ou révoqué par le biais d'une nouvelle déclaration.

Le Règlement comporte encore d'autres innovations telles que la création d'un certificat successoral européen dont l'objectif est double : justifier de la qualité d'héritier et des pouvoirs des administrateurs de la succession sur l'ensemble du territoire de l'Union européenne (article 63 du Règlement). Ce certificat circulera sans formalité de légalisation (article 69 du Règlement). Le Règlement facilite également la reconnaissance des déclarations faites en vue du règlement d'une succession.

Il faut encore noter que le Règlement exclut de son champ d'application certaines matières qui, bien qu'étant liées à la succession, gardent leur autonomie comme, notamment, les régimes matrimoniaux et les libéralités. Malgré la simplification opérée par ledit Règlement, se poseront, en cas de successions transfrontalières au sein de l'Union européenne, encore un certain nombre de questions relatives notamment à la concordance avec d'autres actes effectués par le passé tels que contrats de mariage ou libéralités.

De plus, le Règlement ne s'applique pas aux questions fiscales, chaque Etat membre conservant le droit d'imposer la transmission d'éléments d'une succession sis sur son territoire.

Enfin, même si le Règlement ne sera applicable qu'à compter du 17 août 2015, l'on peut d'ores et déjà, en vertu de ses dispositions transitoires, choisir la loi applicable à sa succession en cas de décès … après le 17 août 2015.

CORPORATE

1. Confirmation of mechanism of capital restructuring, Court of Appeals, Luxembourg, 10 July 2014

On 10 July 2014, the Court of Appeals confirmed the conditions set forth mainly by the French courts regarding the mechanism of capital restructuring consisting of the reduction of share capital below the legal minimum by absorption of losses followed by an increase of capital to get the share capital above the legal minimum.

In the matter at hand, a Luxembourg public limited liability company (*société anonyme*) was held by two shareholders, the majority shareholder owning 75% of the share capital of the company and the minority shareholder 25%. At an extraordinary general meeting, the shareholders resolved to (i) increase the share capital of the company by incorporation of reserves, (ii) reduce the share capital to nil by absorption of losses, and (iii) increase the share capital through the contribution of a substantial amount of cash. Since, as a result of the share capital reduction, all the shares then issued by the company had been cancelled, and as the shares issued in the subsequent capital increase had only been subscribed by the former majority shareholder, the minority shareholder sued the company and the shareholder which, further to the above capital restructuring, became the sole shareholder of the company, in order to have the capital reduction declared null and void. On 22 December 2011, the Court of First Instance rejected the plaintiff's request and on 10 July 2014 the Court of Appeals confirmed the judgement.

The restructuring of the share capital by the reduction of share capital by absorption of losses, thus reducing the share capital to below the legal minimum, followed by a cash injection to get the share capital above the minimum (nicknamed in French "*coup d'accordéon*"), is envisaged by Article 69, paragraph 5 of the Law of 10 August 1915 on commercial companies, as amended, which provides that "where the reduction of capital results in the capital being reduced below the legally prescribed minimum, the meeting must at the same time resolve to either increase the capital up to the required level or transform the company."

Despite this legal ground, the Luxembourg courts have indicated that the validity of such capital restructuring was subject to two conditions, which were already set forth by the French Supreme Court in a judgement of 18 June 2002 (Société Lamy): (i) the restructuring is necessary for the company to survive and not to be declared insolvent, which would allow it to comply with the company's interests and (ii) it cannot be considered as an abuse of majority, in other words its goal is not to exclude any shareholder from the company: all the shareholders are to be treated equally.

As to the first condition, relating to the compromised financial situation of the company, a report was presented to the extraordinary general meeting of shareholders. Dismissing the arguments of the former minority shareholder, which claimed that said report did not reflect the actual financial situation of the company, the Court of Appeals considered that this report contained the reasons for the increase of capital as well as the information on the importance and necessity of the capital restructuring. According to the Court, no legal provision requires specific documentation to be sent to the shareholders in advance of the shareholders' meeting at which the capital restructuring is to be resolved upon. The minority shareholder also asked the courts to appoint an expert in order to check if the capital restructuring was necessary and whether alternative measures which were

more protective for the minority shareholder could not have been implemented by the company. The Court of Appeals rejects this request on the grounds that if the conditions for the validity of the capital restructuring are met, it is not up to the judge to determine the opportunity of measures to be implemented to secure the survival of the company.

The second condition is satisfied if, on the one hand, the shares held by the majority shareholder and of the minority shareholder(s) are being cancelled in the same proportions in the framework of the capital reduction and, on the other hand, all the shareholders are being offered the right to subscribe for the new shares in the capital increase. This subscription right is the "guarantee" against an abuse of majority: if the shareholder decides not to exercise its subscription right, it is this decision which leads to its exclusion from the company.

Finally, the Court of Appeals confirmed that the capital restructuring was to be carried out by a capital reduction followed by a capital increase and not in the reverse order.

2. Law concerning the compulsory deposit and immobilisation of shares and units in bearer form

The Law of 28 July 2014 concerning the compulsory deposit and immobilisation of shares and units in bearer form (the "**Law**") was published in the *Mémorial* (the Luxembourg Official Gazette) on 14 August 2014. The Law entered into force on 18 August 2014.

The Law follows the recommendations of the Financial Action Task Force and the Global Forum on Transparency and Exchange of Information for Tax Purposes relating to the identification of holders of bearer shares and bearer units and adopts the compulsory deposit and immobilisation of shares and units in bearer form with a depositary allowing identification of the holders thereof.
For more details on this subject, please see our Newsflash of August 2014.

3. New procedures concerning filings with the RCS

As from 1 November 2014, all filings with the Trade and Companies Register (*registre du commerce et des sociétés*) ("**RCS**") must be done electronically through their website (www.rcsl.lu). After this date, the RCS will no longer accept filings in paper form. A helpdesk comprising RCS employees will be available at the RCS premises in order to help users prepare their electronic filings. It should be noted that this helpdesk will only be accessible by appointment and that filings made through the helpdesk will in turn increase in price.

In accordance with Article 1 of the Law of 28 July 2014 concerning the compulsory deposit and immobilisation of shares and units in bearer form, extracts from documents relating to the appointment and termination of the functions of depositaries of public limited companies (*sociétés anonymes*) and limited partnerships with share capital (*sociétés en commandite par actions*), must be filed with the RCS electronically through the RCS website.

TAX

1. European Commission investigates on a potential State aid to Fiat Finance and Trade

On 30 September 2014, the European Commission (the "**EC**") published the non-confidential version of a decision taken on 11 June 2014 launching a formal in-depth investigation in relation to transfer pricing arrangements on corporate income taxation ("**CIT**") of Fiat Finance and Trade ("**FFT**") in Luxembourg.

In the tax administrative practice, two different kinds of rulings exist: tax rulings confirming the interpretation of a legal provision in a given situation and tax rulings related to a transfer pricing analysis confirming an economic analysis ("**advance pricing agreements**").

FFT is a member of the Fiat group and carries out cash pooling and intragroup financing activities for the group in Luxembourg.

In order to ascertain for tax purposes the remuneration that FFT would receive in relation to these operations, FFT had submitted an analysis to the Luxembourg direct tax authorities including a transfer pricing study prepared by an external professional adviser. The conclusions of this analysis had been confirmed by the Luxembourg direct tax authorities in an advance pricing agreement.

In its communication, the EC challenges the substance of the tax ruling by challenging the content of the transfer pricing report itself.

Indeed, the EC questions the appropriateness of the transfer pricing method chosen to calculate the taxable basis of FFT as well as the calculation itself. The EC considers that the remuneration derived from the transfer pricing does not correspond to an arm's length remuneration but that a selective advantage has been provided to FTT through the advance pricing agreement.

Consequently, the EC concludes on the existence on an unlawful State aid incompatible with the European market.

The opening of that in-depth investigation gives interested third parties and especially Luxembourg an opportunity to submit comments. Luxembourg has one month to make observations relevant to the investigation.

In the event of absence of or a non-satisfactory response from Luxembourg, the EC has a discretionary power in deciding whether or not to commence infringement proceedings and to refer the case to the Court of Justice of the European Union.

The Luxembourg's Ministry of Finance has stated that Luxembourg has submitted all information requested by the EC and fully cooperated with it in its investigation.

2. European Commission investigates on a potential State aid to Amazon

On 7 October 2014, the European Commission (the "**EC**") announced the opening of a formal in-depth investigation in relation to transfer pricing arrangements on corporate income taxation ("**CIT**") of Amazon in Luxembourg.

The EC will examine whether the tax ruling given by the Luxembourg's direct tax authorities regarding the CIT to be paid by Amazon falls within the scope of European provisions on State aid.

This tax ruling was issued on 2003 and is still in force.

Amazon EU S.à r.l., a subsidiary of Amazon located in Luxembourg, records most of the European benefits of Amazon. Amazon EU S.àr.l. pays tax-deductible royalties to a Luxembourg limited partnership which is tax transparent and therefore not subject to corporate taxation in Luxembourg. Indeed, under Luxembourg tax law, its shareholders

are themselves taxable on their share of the profits of the partnership.

Consequently, most of the European profits of Amazon are recorded in Luxembourg but are exempt from any taxation.

Therefore, the EC considers that this payment lowers the taxable profits of Amazon EU S.à r.l., which, according to the EC, could not be in line with the normal market conditions.

The EC recalls that tax rulings on transfer pricing arrangements could constitute State aids if they are used in order to provide selective advantages to a specific company or group of companies.

3. Latest developments on automatic exchange of information within the EU

Automatic exchange of information ("**AEOI**") has been a hot topic on the international scene for more than a decade now. Besides the FATCA turmoil, the following EU directives currently provide for an AEOI for certain items of income.

On the one hand, Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (the "**Savings Directive**"), implemented into Luxembourg domestic law by the Law of 21 June 2005, ensures that Member States collect information on savings income in the form of interest and similar income of non-resident individuals and automatically provide such information to the tax authorities of the State of residence of the interested recipient. In this context, Luxembourg has now decided to switch to an automatic exchange of information system, as from 1 January 2015, thereby ceasing the possibility to apply a 35% withholding tax in lieu of exchanging information.

On the other hand, Directive 2011/16/EC of 15 February 2011 on administrative cooperation in the field of taxation (the "**Directive**") has provided so far for an AEOI procedure as from 1 January 2015 for income from employment, director's fees, pensions, life insurance products, and income from ownership of immovable property. The Directive was implemented into Luxembourg domestic law by the Law of 26 March 2014 which considers the three first items of income (i.e., income from employment, director's fees and pensions) are subject to the AEOI but not yet the two last items of income (i.e., life insurance products and income from ownership of immovable property) as those, due to professional secrecy obligations embedded into Luxembourg domestic laws and statutes, do not qualify as reportable income covered by the concept of "*Available Information*", defined by the Directive as "*information in the tax files of the Member State communicating the information, which is retrievable in accordance with the procedures for gathering and processing information in that Member State*". This should however be the case as from 2017 when the AEOI under the Directive will be extended to dividends, capital gains, sales proceeds from financial assets and account balances, as it had been decided during the ECOFIN meeting in Luxembourg on 14 October 2014.

Concerning the date of application of the Directive on these categories of income, no consensus has been found between the EU Member States. Finally, after the ECOFIN meeting, Luxembourg together with all other EU Member States, except Austria, agreed to apply the AEOI under the Directive as from 2017, thus relating to income earned or generated in 2016. Following the Directive, the EU Member States shall mutually and automatically exchange as much information as they have undertaken to exchange with the United States of America under FATCA.This enlargement of the material scope of the Directive obviously questions the relevance of maintaining the Savings Directive or, on the contrary to repeal it, in order to have only one single standard of AEOI procedure.

4. Tax treaties news

Croatia

Details concerning the Croatia - Luxembourg Income and Capital Tax Treaty signed on 20 June 2014 have been published. This treaty generally follows the standards of the OECD Model. The following withholding tax rates apply: a 15% standard rate on dividends, which may be reduced to 5% if the beneficial owner is a company directly holding at least 10% of the capital in the company paying the dividends. The treaty provides for a 10% withholding tax rate on interest, with some exceptions, and a 5% withholding tax on royalties.

Czech Republic

The new Czech Republic - Luxembourg Income and Capital Tax Treaty of 2013 has come into force. This new treaty will apply as of 1 January 2015 and replace the former Czechoslovakia - Luxembourg Income and Capital Tax Treaty of 1991.

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

Estonia

Details concerning the new treaty signed on 7 July 2014 between Estonia and Luxembourg have been published. This new treaty, which will replace the current treaty from 2006, generally follows the OECD Model.

The new treaty provides for a standard 10% withholding tax on dividends. This rate is reduced to 0% if the beneficial owner is a company directly holding at least 10% of the capital in the company paying the dividends. The new treaty provides for a 0% withholding tax on interest and royalties.

France

On 5 September 2014, France and Luxembourg signed a Fourth Protocol to the Tax Treaty of 1 April 1958 (the "**Treaty**").

This protocol adds a new paragraph to Article 3 of the Treaty specific to the disposal of shares of companies said to be "mainly real estate", on the basis of the OECD Model. The protocol also provides that "Profits from the disposal of shares, units or other rights in a company, trust or any other institution or entity, whose assets or property are made up of more than 50% of their value or hold more than 50% of their value - directly or indirectly through one or more other companies, trusts, institutions or entities – of real estate situated in a Contracting State or of rights in such property shall be taxable only in that State."

Capital gains realised by a Luxembourg company on the sale of shares of a company directly or indirectly holding mainly real estate in France, including through chains of companies, will no longer be subject to tax in Luxembourg, where they could benefit under certain conditions from an exemption under the parent-subsidiary regime, but from now on will be taxable in France.

With this clarification, the Treaty thus embraces the conventional practice of France.

The protocol states specifically that this new provision does not contravene the application of Council Directive 2009/133/EC relating to cross-border mergers, or the transfer of the registered office of a European Company or a European Cooperative Company between Member States. This must therefore be taken into account in the event of a restructuring.

The protocol will enter into force the calendar year following the ratification of the instruments, at the earliest on 1 January 2015.

Guernsey

The tax treaty between Guernsey and Luxembourg on Income and Capital Tax Treaty (2013) entered into force on 8 August 2014. The treaty will be effective as of 1 January 2015. For details of this new treaty, please see our Newsletter of June 2013 on the key features of this treaty.

Isle of Man

The double tax treaty signed on 8 April 2013 with the Isle of Man came into force on 5 August 2014. It will be effective as of 1 January 2015. The treaty generally follows the OECD Model.

Ireland

An amending protocol to the double tax treaty concluded between Ireland and Luxembourg on income and capital of 1972 was signed on 27 May 2014. The amending protocol provides for a new Article 27 on exchange of information in line with current OECD standards.

Under the amending protocol, exchanged information may be disclosed only to bodies (including courts and administrative bodies) which are involved in the assessment, collection, enforcement, prosecution or determination of appeals in relation to the taxes covered by the treaty. This information can be disclosed before public court proceedings or during judicial decisions.

Paragraph 3(a)-(c) of the new Article 27 limits the required action on behalf of the contracting States under certain circumstances.

According to paragraph 4, a contracting State may not decline to supply information only because it has no domestic interest in such information.

Paragraph 5 provides that a State cannot decline to supply information because this information is held by a bank or other financial institution.

Jersey

The double tax treaty between Luxembourg and Jersey signed on 17 April 2013 came into force on 5 August 2014. It will generally apply as from 1 January 2015. The treaty generally follows the OECD Model.

Lithuania

On 20 June 2014, an amending protocol to the 2004 Lithuania - Luxembourg Income and Capital Tax Treaty was signed.

The amending protocol provides for a new Article 27 on exchange of information in line with current OECD standards.

Saudi Arabia

On 1 September 2014, the Luxembourg - Saudi Arabia Income and Capital Tax Treaty (2013) entered into force. The treaty will be effective as of 1 January 2015.

See our Newsletter of October 2013 on the key features of this treaty.

Slovenia

The amending protocol signed on 20 June 2013 to the Luxembourg - Slovenia Income and Capital Tax Treaty (2001), entered into force on 22 August 2014. It will generally apply as from 1 January 2015.

Tunisia

On 8 July 2014, an amending protocol to the 1996 Tunisia-Luxembourg Income and Capital Tax Treaty was signed. The protocol provides for a new Article 26 on exchange of information in line with current OECD standards.

Taiwan

The Luxembourg - Taiwan Income and Capital Tax Agreement and protocol of 19 December 2011 entered into force on 25 July 2014. The tax agreement will be effective as from 1 January 2015. This new tax agreement generally follows the OECD Model, but with some deviations, in particular with respect to Article 5 (Permanent establishments). The tax agreement also includes a limitation on benefits (LOB) clause providing that the tax benefits are not granted if it is established that the main purpose or one of the main purposes of the conduct of operations by a resident was to obtain the benefits under the agreement.

The tax agreement provides for a standard withholding tax rate of 10%. However if the beneficial owner is a corporate collective investment vehicle, a 15% rate applies. No withholding tax applies if the interest is paid to a political subdivision, a local authority or the relevant Central Bank; on loans made by banks; in respect of loans granted, guaranteed or insured by an approved instrumentality of the other territory.

The tax agreement provides 10% of withholding tax on royalties.

Concerning the exchange of information, this tax agreement is in line with the OECD Model.

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