NEWSLETTER

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ASSET MANAGEMENT AND INVESTMENT FUNDS

1. AIFM

1. EU regulatory technical standards on types of AIFM

On 17 December 2013, the EU Commission adopted a Delegated Regulation (the "**Regulation**") supplementing the AIFMD with regard to regulatory technical standards determining types of alternative investment fund managers ("**AIFM**"). The Regulation determines whether an AIFM manages AIF(s) of the open-ended and/or closed-ended type.

The difference between AIFM of open- ended or closed-ended AIFs is important for the application of the rules on liquidity management, the rules on valuation and the transitional provisions.

In the absence of any objection by the EU Parliament within three months as from the notification of the technical standards by the EU Commission, the Regulation will be published in the Official Journal of the European Union and will enter into force as from the date stated therein.

2. ESMA reporting guidelines

On 15 November 2013, the European Securities and Markets Authority ("**ESMA**") published a revised version of the final guidelines on the reporting obligations for AIFM ("**Reporting Guidelines**"). Only minor changes have been brought to the initial version of 15 October 2013.

Due to their size, part of the Annex II of the Reporting Guidelines is included in separate documents. For a complete overview of the Reporting Guidelines with its annexes, see also:

- Annex II of the guidelines - Tables 1 to 7 doc. reference 2013/1586,
- Annex II of the guidelines - Tables 8 to 10, doc. reference 2013/1360.

See also the ESMA consolidated AIFMD reporting template (ESMA/2013/1359).

In addition to the Reporting Guidelines, ESMA also published an Opinion ("**Opinion**") on 1 October 2013 on collection of information for the effective monitoring of systemic risk under article 24(5), first sub-paragraph, of the AIFMD (ESMA/2013/1340). In this Opinion, ESMA provides details on a set of additional information that, in its view, national competent authorities could require AIFMs to report on a periodic basis pursuant to Article 24(5), first sub-paragraph of the AIFMD.

In the updated version of the FAQ on AIFM (see Section 5), the CSSF has indicated that the information referred to in the Opinion must be provided as part of the reporting obligation.

3. AIFM EU legislative documents table

We have prepared a table which gives an overview of the EU AIFMD-related legislative documents published to date.

4. EU list of cooperation arrangements (update)

On 18 October 2013, ESMA published a table showing the state of play of Memoranda of Understanding ("**MoUs**") or cooperation arrangements signed by EU national supervisors in the context of the AIFMD. The adoption process of these MoUs is as follows: as a first step, ESMA negotiates the template MoUs regarding the AIFMD with non-EU regulators and once the template is finalised, each EU national competent authority signs its own MoU, as negotiated by ESMA, with the relevant non-EU regulator. The table was

updated on 11 December 2013 (ESMA/2013/1491).

5. CSSF FAQ on Luxembourg Law on AIFM - Update

On 10 January 2014, the CSSF updated its FAQs on AIFM. Questions 11 to 14 on AIFMD marketing passport and reporting obligations have been added.

In addition, question 1 (Scope) has been supplemented by a section (see question 1 (e)) on the determination of the AIFM in respect of an AIF structured as *Fonds Commun de Placement* ("**FCP**") or as limited partnership.

Question 8 now confirms that Luxembourg AIFM which benefit from the one-year transition period are invited to submit an AIFM application file to the CSSF by 1 April 2014 at the latest. Luxembourg AIF are also invited to submit to the CSSF by 1 April 2014 at the latest, a file containing information as regards its compliance by 22 July 2014 with the AIFMD product rules (i.e. annual report, valuation rules, disclosure to investors, depositary rules).

The list of the MoUs or cooperation arrangements required under the AIFMD signed by the CSSF has also been updated further to the execution of a MoU with the competent financial authorities of New Zealand and South Africa (see Question 15 of the FAQ).

6. CSSF - Reporting obligations for AIFM

Further to the publication by ESMA of the Reporting Guidelines, the CSSF published Circular 14/581 on the new reporting obligations for AIFM on 13 January 2014 (the "**Circular**"). This Circular aims to clarify technical details that AIFM need in order to fulfil their reporting obligations.

7. EHP brochures

- The AIFMD and its implementation in Luxembourg – updated version November 2013

An update of the consolidated brochure of the AIFM Law with the AIFMD and all AIFM level 2 and 3 measures has been published on our website. It includes ESMA's Final Report on Guidelines on Reporting under Article 3 and Article 24 of the AIFMD (revised version) of 15 November 2013.

In addition to this brochure, the consolidated versions of the Luxembourg "product" laws which reflect the AIFM requirements, are available via the following links:

(i) The Law on Undertakings for Collective Investments (UCIs),
(ii) The Law on Specialised Investment Funds (SIFs),
(iii) The Law on Investment Companies in Risk Capital (SICARs).

- The new SIF regime

This brochure gives an overview of the key features of a SIF and outlines the main changes brought to the SIF regime further to the entry into force of the Luxembourg AIFM Law.

The impact of the EuVECA[1] and EuSEF[2] regulations is also highlighted.

[1] EuVECA refers to Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European Venture Capital Funds.
[2] EuSEF refers to Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17

- AIFMD key features and focus on Third Countries - updated version November 2013

This brochure focuses on the AIFM Directive with special attention given to the marketing provisions and the third country regime.

2. UCITS

1. First Luxembourg UCITS authorised by CSSF to invest 100% in China A shares under RQFII quota

For the first time, a UCITS (whose fund manager was advised by our firm) investing up to 100% of its net assets directly in the People's Republic of China equity markets through the use of a RQFII Quota has been approved by the CSSF. "RQFII Quota" is the quota set by the China Securities Regulatory Commission for renminbi qualified foreign institutional investor schemes.

See our Newsflash on this topic.

2. ESMA's Guidelines on ETFs and other UCITS issues

- On 11 July 2013, ESMA published an updated version of the Q&A on ESMA's Guidelines on ETF and other UCITS issues (the "**ESMA Guidelines**"). Two new questions have been added: Question 6m) on reinvestment by UCITS in cash collateral and Question 7i) on financial indices.

- On 20 December 2013, ESMA published a consultation on the revision of the provisions on diversification of collateral in the ESMA Guidelines (i.e. management of collateral received in the context of efficient portfolio management techniques and OTC transactions – Amendment of paragraph 43(e) of the ESMA Guidelines).

3. Out-of-court resolution of complaints: CSSF Regulation 13-02

CSSF Regulation 13-02 (the "**Regulation**") of 15 October 2013 relating to the out-of-court resolution of complaints (*résolution extrajudiciaire des réclamations*) filed with the CSSF was published in the *Mémorial A* on 28 October 2013. The Regulation is divided into three sections, the first of which deals with the procedure to be followed before the CSSF for the extrajudicial settlement of disputes, the second imposing on professionals the obligation to establish a procedure for handling complaints and the third determining the effective date of the foregoing.

The first section entered into force on 1 January 2014. The second section, which is applicable to all professionals, being defined as any person falling under the supervision of the CSSF, will enter into force on 1 July 2014. This section clarifies the obligations incumbent on professionals in relation to the procedure they need to implement in order to handle complaints and the disclosure requirements in relation to such a complaints-handling procedure. Most professionals will only need to fine tune their existing procedures. Others, such as UCIs having appointed a management company, will need to implement distinct complaints-handling procedures as they can no longer rely on the procedures implemented by their respective management companies.

April 2013 on European Social Entrepreneurship Funds.

BANKING, INSURANCE AND FINANCE

1. Towards a European Banking Union

In 2011, further to the Euro debt crisis, the EU Heads of States and Governments realised the importance of breaking the circle between banks and sovereign States. The uncoordinated national responses to the failure of banks have led to a fragmentation of the Single Market in lending and funding.

In 2012, in order to break that circle, EU authorities committed to setting up a "banking union", in addition to the reinforcement of the financial regulatory framework which had already been initiated in 2009.

The two pillars of the banking union are:

- a single supervisory mechanism ("**SSM**");
- a single resolution mechanism ("**SRM**").

1. SSM

Regulation 1024/2013 ("the **Regulation**")[3], which was adopted on 15 October 2013, deals with the first pillar: the SSM.

It confers specific supervisory tasks on the European Central Bank ("**ECB**") which are crucial to the coherent and effective implementation of the Union's policy relating to the prudential supervision of credit institutions.

Based on its extensive expertise in macroeconomic and financial stability issues, the ECB was considered to be well placed to carry out supervisory tasks with a focus on protecting the stability of the financial system of the Union.

The new functions of the ECB include (but are not limited to):

(i) The authorisation of credit institutions and the withdrawing of authorisations of credit institutions;

(ii) The prudential supervision of credit institutions in the areas of own funds requirements, securitisation, large exposure limits, liquidity, leverage, and reporting and public disclosure of information on those matters;

(iii) The supervision of the arrangements, strategies, processes and mechanisms put in place by credit institutions (including stress tests) and the own funds held by these institutions ensuring the sound management and coverage of their risks;

(iv) The supervision of parent companies (established in a participating Member State) of credit institutions on a consolidated basis, including the supervision of financial holding companies and mixed financial holding companies.

The scope of the ECB's competencies depends on the size and importance of the credit institutions.
For credit institutions which are considered less important on the basis of the criteria defined in the Regulation[4], the competence of

[3] Regulation 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, dated 15 October 2013.

[4] Article 6.4, first subparagraph of the Regulation.

national authorities is maintained for the tasks referred to above in points (ii) (iii) and (iv) (see also the other tasks referred to in Article 6.6 of the Regulation). They also remain entitled to adopt all relevant supervisory decisions with regard to these credit institutions.

The ECB may, for its part, issue regulations, guidelines or general instructions to national competent authorities in this respect, and it keeps the power, amongst other things, to request information, conduct investigations or on-site inspections (see Article 6.5 of the Regulation).

In specific circumstances and for credit institutions which are considered to be of significant relevance, the ECB enjoys all relevant powers.

The ECB must also carry out the tasks conferred on it by the Regulation in respect of the three most significant credit institutions in each of the participating Member States.

From a geographical perspective, the SSM covers the Eurozone as well as non-Eurozone countries (e.g. the UK) that choose to participate.

The ECB will assume its supervisory tasks as from 4 November 2014, subject to operational arrangements.

2. SRM

In order to avoid nationally conducted bank resolutions from having disproportionate impacts on the real economy, and in order to prevent bank runs and contagion to other parts of the Eurozone, the EU Commission proposed to implement an SRM in July 2013.

On 18 December 2013, an agreement was reached at the level of the EU Commission and EU Council on the SRM. The compromise includes a draft regulation on the SRM and a decision by Eurozone Member States and those non-Eurozone countries that wish to participate in the SRM, to negotiate an intergovernmental agreement on the functioning of the single resolution fund by 1 March 2014.

According to the Press Release published by the EU Council[5], the single resolution fund would be financed by bank levies raised at national level. It would initially consist of national compartments that would be merged gradually over ten years. During this ten-year period, mutualisation between national compartments would progressively increase.

The SRM would cover all banks of participating Member States and at the end of this ten-year period, the amount of bank contributions to the resolution fund would represent 1% of covered deposits.

This agreement between the EU Commission and EU Council opens the door to negotiations with the EU Parliament. The EU Parliament adopted its position on the SRM on 17 December 2013.

Although the two authorities are willing to reach an agreement early next year, divergence remains notably regarding the authority which should be empowered to initiate the decision process to wind down a bank.

2. Supervisory reporting requirements applicable to investment firms

CSSF Circular 13/575 of 18 November 2013 (the "**Circular**") aims to draw the attention of investment firms to the recent developments in respect of the supervisory reporting requirements applicable as from 2014 in the European Union.

[5] Press Release 17983/13, Economic and Financial Affairs, Brussels, 18 December 2013.

Pursuant to Regulation (EU) 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) 648/2012 ("**CRR**"), the European Banking Authority ("**EBA**") has developed draft implementing technical standards specifying uniform formats, frequencies, dates as well as definitions for supervisory reporting purposes ("**ITS**").

The Circular is supplemented by an Appendix which identifies the different categories of investment firms which are under the scope of the CRR, on the basis of the investment services that they are authorised to provide, and which describes the scope of their reporting obligations.

Insofar as investment firms are required to comply with the CRR provisions, the date of implementation of the new supervisory reporting scheme remains 1 January 2014, except for the reporting on financial information to be established on a consolidated basis (or on a sub-consolidated basis, respectively). Indeed, the draft ITS states that, for financial information, the date of application will be 1 July 2014.

The draft ITS is not yet formally adopted, however, and remains subject to amendment(s).
Shortly after the adoption of the ITS by the European Commission, the CSSF will publish on its website the reporting tables to be used.

3. Management of concentration risk

On 28 October 2013, the CSSF published Circular 13/574 on the Management of concentration risk.

CAPITAL MARKETS

1. CSSF Q&A on securitisation vehicles

On 23 October 2013, the CSSF issued an update to its Q&A on securitisation vehicles. The update addresses the consequences of the implementation of the AIFM Directive into Luxembourg law on securitisation vehicles governed by the Law of 22 March 2004 on securitisation, as amended (the "**Securitisation Law**").

The AIFM Directive was implemented into Luxembourg law by virtue of the Law of 12 July 2013 on alternative investment fund managers (the "**AIFM Law**").

The AIFM Law provides for an exemption in relation to "securitisation special purpose entities" within the meaning of Regulation (EC) n°24/2009 of the European Central Bank of 19 December 2008 concerning statistics on the assets and liabilities of financial vehicle corporations engaged in securitisation transactions (the "**ECB Regulation**") and the guidance note relating thereto[6]. Thus, an undertaking falling within the definition of "securitisation special purpose entities (*structures de titrisation ad hoc*) of the AIFM Law, meaning an entity whose sole object is to carry out one or more securitisation transactions within the meaning of ECB Regulation, will not constitute an AIF under the AIFM Law.

The Securitisation Law defines "securitisation" in broader terms than the ECB Regulation. Hence, certain transactions may qualify as securitisation transactions under the Securitisation Law but not under the ECB Regulation. As a consequence, the undertaking carrying out such a transaction may fall within the scope of the Securitisation Law but will fail to qualify as a "securitisation special purpose entity" under the AIFM Law and will not benefit from the exemption.

The CSSF's updated Q&A emphasises that each securitisation undertaking is required to carry out a self-assessment to determine whether it constitutes an AIF by reference to the criteria set out in the AIFM Law or whether it benefits from the exemption provided for by the AIFM Law in relation to "securitisation special purpose entities" as construed by the ECB Regulation.

The CSSF considers that the following undertakings, although they may qualify as securitisation undertakings under the Securitisation Law, do not, according to the ECB Regulation, constitute "securitisation special purpose entities" under the AIFM Law. They may, insofar as they meet the AIF criteria, constitute AIFs under the AIFM Law:

- securitisation undertakings acting primarily as first lenders (i.e. undertakings that originate new loans) since there is no transfer of assets (and therefore no credit risk) by such an entity;
- securitisation undertakings set up primarily to create or otherwise offer synthetic exposure to non-credit related assets, i.e. where the transfer of credit risk is only accessory to the principal activity of the entity.

The CSSF further considers that securitisation undertakings that issue debt instruments[7] only do not constitute AIFs.

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[6] Guidance note of the European Central Bank on the definitions of financial vehicle corporation and securitisation under regulation ECB/2008/30.

[7] See the European Commission's Questions on Single Market : Directive 2011/61/EU; ID 1169, Scope and exemptions, submitted on 25 March 2013) in which the European Commission considers that any instrument that does not

Finally, securitisation undertakings that are not managed in accordance with a defined investment policy[8] do not constitute AIFs. This would be the case for securitisation undertakings that issue structured products offering synthetic exposure to assets based on a pre-established formula and that acquire underlying assets and/or enter into derivative contracts for hedging purposes.

The positions expressed by the CSSF in the updated Q&A are subject to any future changes and clarifications at European level.

2. Derivatives – EMIR

ESMA published the following updates of the Q&A on the European Markets Infrastructure Regulation (EMIR):

- ESMA/2013/1527 on 22 October 2013 with respect to the identification codes which can be used to identify counterparties;
- ESMA/2013/1633 on 11 November 2013 with respect, amongst other things, to: (i) the calculation of the clearing threshold when the notional amount is updated, (ii) the obligations to report within the context of risk mitigation for OTC derivative contracts not cleared by a CCP, and (iii) segregation requirements for CCP;
- ESMA/2013/1959 on 20 December 2013 with respect, amongst others things, to: (i) the possibility for financial and non-financial counterparties to delegate the risk-management procedures to an asset manager, (ii) the frequency of the portfolio reconciliation, (iii) transparency of the CCP in terms of disclosure of price information and (iv) the reporting obligations.

3. Short Selling – Report of the European Commission

On 13 December 2013, the European Commission issued a report to the European Parliament and to the Council (COM (2013) 885 Final) regarding the evaluation of Regulation (EU) No. 236/2012 on short selling and certain aspects of credit default swaps (the “**Regulation on Short Selling**”).

This report (issued pursuant to Article 45 of the Regulation on Short Selling) was given the task of reporting on the appropriate character of this Regulation and the impact of some of its provisions. The report was established in light of discussions held with the competent authorities and ESMA. The European Commission concludes that the Regulation on Short Selling has had a positive impact in terms of increase of transparency of short selling and reduction in settlement failures, together with a relatively mixed impact economically. With regard to the level of liquidity of sovereign credit default swap (“**CDS**”), no sign of substantial adverse effect was found. The European Commission concludes, however, that it is too early to draw firm conclusions on the functioning of the Regulation on Short Selling which would justify a revision of the text. The European Commission has therefore deferred any new evaluation of this Regulation until 2016.

represent an ownership interest in the securitisation undertaking should be excluded from the scope of the AIFM Directive.

[8] See Article 4 (1)(a) of the AIFM Directive. To ascertain whether a securitisation undertaking is managed in accordance with a defined investment policy within the meaning of the AIFM Directive, please refer to ESMA’s “Guidelines on key concepts of the AIFMD” of 13 August 2013.

COMMERCIAL

1. Over-indebtedness Law

The Law of 8 January 2013 on over-indebtedness (*surendettement*) (the "**Law**"), which replaces the Law of 8 December 2000 (the "**2000 Law**"), was published in the *Mémorial A* on 13 February 2013 and will come into force on 1 February 2014.

The purpose of the Law is to introduce a civil bankruptcy regime for private persons and to amend some weak points of the 2000 Law, which did not contain enough safeguards, contained some procedural weaknesses and was not based enough on the idea of giving the debtor a second chance.

Traders within the meaning of Article 1 of the Luxembourg *Code de Commerce* are expressly excluded from the benefit of the Law, except if they have stopped their business activity for a minimum of 6 months or, in case of bankruptcy, if the closing of the bankruptcy has been pronounced.

The Law provides for three procedures, i.e (i) the conventional settlement stage (*phase de règlement conventionnel*), (ii) the receivership procedure (*procédure de redressement judiciaire*), both of which have been in operation under the 2000 Law, and, a new procedure, (iii) the civil bankruptcy procedure, known as the personal recovery procedure (*procédure de rétablissement personnel*).

The personal recovery procedure (civil bankruptcy) can be started on the initiative of the debtor, before the *Justice de Paix*, if the debtor is in an irremediably compromised situation, this being the case if the measures for conventional settlement and receivership were impossible to implement. The judge will finally decide if the conditions for opening the procedure are met or not. The judge draws up a report of the social and economic situation of the debtor, verifies the claims, estimates the assets and liabilities and then pronounces the judicial liquidation of the debtor's personal patrimony. The liquidation implies the divestment of the debtor and a liquidator is appointed. The liquidator has 6 months to sell the debtor’s goods. If there are sufficient assets, the personal recovery procedure is closed; if the assets are not sufficient, the closure of the procedure leads to the writing-off of all the non-professional debts of the debtor, unless the debtor makes a financial recovery in the 7 years after the judgment.

The Law also amends Article 2016 of the Civil Code in order to impose an information obligation on the professional creditor: any natural person standing as suretyship must be informed at least once a year by the professional creditor regarding the evolution of the claim and its accessories, at the risk of loss of all the debt’s accessories, costs and penalties.

The new Article 2016 also mentions that a professional creditor cannot rely on a contract of guarantee granted by a natural person if, when the contract was concluded, this engagement was obviously disproportionate to his property and income, unless the patrimony of that person is, at the moment he/she is summoned, sufficient to cover his/her obligation of payment.

CORPORATE

1. New consolidated versions of the legislation on commercial companies

An update of the consolidated version of the Law of 10 August 1915 on commercial companies (the "**1915 Law**") and of certain relevant chapters of the Law of 19 December 2002 on the register of commerce and companies and the accounting and annual accounts of undertakings (the "**RCS Law**") has been published on our website.

It reflects the amendments made by the Law of 6 April 2013 on dematerialised securities, the Law of 12 July 2013 on alternative investment managers and the Law of 30 July 2013 on the reform of the Commission accounting standards. The footnotes have also been updated.

The updated English translation of the legislation on commercial companies and comprising the 1915 Law, certain relevant chapters of the RCS Law and the Law of 24 May 2011 on the exercise of certain rights of shareholders in general meetings of listed companies, can be downloaded by clicking on the link below:
Law of 10 August 1915 on commercial companies (in force as at 16 December 2013)

An updated French version of the above legislation is available under the following link:
Loi du 10 août 1915 concernant les sociétés commerciales (en vigueur au 16 décembre 2013)

2. Reform of the CNC and modernisation of the accounting law

On 2 October 2013 the Law of 30 July 2013 reforming the *Commission des Normes Comptables* ("**CNC**") (the "**CNC Law**") was published in the *Mémorial A*. The purpose of the CNC Law is to complete the modernisation of the accounting legislation of undertakings following the entry into force of the Law of 10 December 2010 introducing international accounting standards for undertakings (the "**2010 Law**").

Three objectives were pursued:

1. Reform of the CNC

The CNC will take the form of an economic interest group (*groupement d'intérêt économique*) with legal personality and will be composed of all parties involved in the undertaking's accountancy (i.e. State, CSSF, *Commissariat aux Assurances*, *Chambre de Commerce*, *Institut des Réviseurs d'Entreprises* and *Ordre des experts comptables*).

Its tasks will be extended and will include in particular the participation in discussions on accounting and financial reporting at international and European Union levels.

The CNC will be financed (amongst other things) by an administrative tax (maximum 10 Euro) on the filings of the annual and consolidated accounts.

2. Clarifications for the determination of distributable reserves

Under the 2010 Law, undertakings may draw up their annual accounts by using either (i) the international financial reporting standards (IFRS) or (ii) Lux GAAP by applying (on an optional basis) the fair value measurement to certain categories of assets.

However, neither the European Law, nor the RCS Law nor the 1915 Law contained clear provisions for the determination of distributable reserves when using the fair value measurement.

A new Article 72ter has been introduced in the RCS Law which provides that unrealised gains and profits cannot be distributed and must be allocated to a non-distributable reserve (either directly in the opening balance sheet or indirectly at the time of the allocation of the results). The same article provides that this non-distributable reserve cannot be used for any other purpose (such as an increase of share capital by incorporation of reserves, allocation to the legal reserve, establishment of a non-distributable reserve for the acquisition of own shares).

It should be noted that these provisions apply to undertakings drawing up their annual accounts in IFRS or in Lux GAAP while using the fair value option and whose share capital represents a guarantee for third parties (i.e. S.A., S.à r.l., *société européenne* and cooperative companies) excluding investment companies (such as SICAV, SICAF, SICAR, SIF).
These provisions also do not apply to unlimited companies (SNC), common limited partnership (SCS), credit institution, insurance and re-insurance companies.

The claw-back provision of Article 72-4 of the 1915 Law has been extended i.e. any distribution made in infringement of Article 72ter of the RCS Law shall also have to be returned by the shareholders who have received it (but only insofar as the company can prove that the shareholders who received the dividend knew the irregularity of the distributions made in their favour or could not, in the circumstances, have been unaware of it).

3. Various amendments to the accountancy, annual accounts and consolidated accounts of certain types of companies

These amendments include, amongst other things:

- changes to the names of certain balance sheet and income statement headings,
- simplified disclosure requirements in the notes to the annual accounts for small and medium-sized companies,
- the possibility to file the annual accounts and consolidated accounts in English or German: this reform simply implements a well-established practice as many companies already filed their annual accounts in English and German. However the same language must be used for all documents which require filing.

For more detailed information as to the other amendments introduced by the CNC Law: http://www.legilux.public.lu/leg/a/archives/2013/0177/a177.pdf

See also CSSF Press Release 14/04 published on 17 January 2014.

The amendments introduced by the CNC Law are applicable to any financial year starting after the entry into force of this law (i.e. after October 2013).

For the preceding financial year (i.e. 2013 year), companies may choose to apply the new provisions directly, except those affecting balance sheet (Article 34) and income statement (Article 46) formats which have come into effect from 1 January 2014[9].

[9] Indeed, the standardised forms for balance sheet and income statements already available on the eCDF platform remained unchanged. Therefore, companies could not adopt these amendments for the 2013 financial year.

TAX

1. Mandatory automatic exchange of information

On 15 February 2011, the Council Directive 2011/16/EU on administrative cooperation in the field of taxation was adopted, repealing Directive 77/799/EC. The administrative cooperation in the field of taxation covers all taxes of any kind, whether direct or indirect, levied by or on behalf of a Member State. Value added tax, custom duties and excise duties covered by other EU legislation on administrative cooperation are however excluded; the Directive also does not apply to compulsory social security contributions.

The Directive retains three principal types of administrative cooperation:

- the exchange of information on request with respect to information that is foreseeably relevant to the administration and enforcement of the domestic law of the requesting Member State,
- the spontaneous exchange of information, and
- the mandatory automatic exchange of information.

The Luxembourg Law of 29 March 2013 had already transposed the exchange of information on request and the spontaneous exchange of information into national law.

On 17 December 2013, the government submitted the bill 6632 to the Parliament in order to implement the mandatory automatic exchange of information that has to be in effect from 1 January 2015.

According to Article 8 of the Directive, mandatory automatic exchange of information shall apply to information "that is available", regarding taxable periods as from 1 January 2014, concerning residents in another Member State, on the following specific categories of income and capital: (a) income from employment, (b) director's fees, (c) certain life insurance products, (d) pensions and (e) ownership of and income from immovable property.

"Available information" refers to information in the tax files of the Member States communicating the information, which is retrievable in accordance with the procedures for gathering and processing information in that Member State.

Luxembourg will exchange information with respect to (i) income from employment, (ii) directors' fees and (iii) pensions. The mandatory automatic exchange of information will not apply to (i) life insurance products and (ii) ownership of and income from immovable property, as this information is not available.

The first mandatory automatic exchange of information will take place before the end of June 2015 with respect to income from employment, directors' fees and pensions regarding the taxable period 2014.

2. Exchange of information upon request procedure

On 31 December 2013, the tax administration released a circular on the exchange of information upon request procedure.

The purpose of this circular is to clarify some points regarding the standard on transparency and exchange of information for tax purposes as developed by the Global Forum on Transparency and Exchange of Information for tax purposes and the OECD. A copy of the update to Article 26 of the OECD model tax convention and its comments, as approved by the OECD Council on 17 July 2012, has been

appended to the circular and constitutes an integral part thereof.

This circular has to be seen against the background of the November 2013 Phase 2 Peer Review report[10] (the "**Report**") that declared Luxembourg as not being compliant with this standard. In its press release of 19 November 2013, the Ministry of Finance regretted the rating considered as being excessively severe since only a limited number of replies to requests for information had been considered to be unsatisfactory: "It is important to note that Luxembourg responds to hundreds of requests for information each year (over a three-year period, Luxembourg received 832 requests, 785 of which were complied with). Moreover, the Global Forum's interim report from July 2013 duly recognised the volumes involved and the diligence of Luxembourg's responses. Whereas countries that have not received any requests or less than 5% of the volume of requests submitted to Luxembourg have been declared "largely compliant", the review and rating system lacks a proportionality criterion. Notwithstanding the preceding observations, Luxembourg will carefully review the recommendations submitted to it by its peer countries. It remains firmly committed to moving forward with transparency and the exchange of information for tax purposes, while ensuring that legal requirements and the protection of privacy are fully respected".

In this context, the circular addresses four specific points that gave rise to criticisms under the Report. The circular includes further clarifications with respect to the foreseeably relevant requirement and the principle of non-retroactive application of the treaty provision governing the exchange of information.

According to the Report, the Luxembourg interpretation of the foreseeably relevant standard is unduly restrictive and prevents it from engaging in effective exchange of information in line with the international standard in certain cases. The circular clarifies the concept of "foreseeable relevance" by reproducing an excerpt of the OECD commentary of Article 26, paragraph 1:
"The standard of "foreseeable relevance" is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting States are not at liberty to engage in "fishing expeditions" or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. In the context of information exchange upon request, the standard requires that at the time a request is made there is a reasonable possibility that the requested information will be relevant; whether the information, once provided, actually proves to be relevant is immaterial. A request may therefore not be declined in cases where a definite assessment of the pertinence of the information to an on-going investigation can only be made following the receipt of the information. The competent authorities should consult in situations in which the content of the request, the circumstances that led to the request, or the foreseeable relevance of requested information are not clear to the requested State. However, once the requesting State has provided an explanation as to the foreseeable relevance of the requested information, the requested State may not decline a request or withhold requested information because it believes that the information lacks relevance to the underlying investigation or examination".

Regarding the non-retroactive application of the treaty provision governing the exchange of information, the Report flagged Luxembourg's unwillingness to provide banking information preceding the effective date of the treaty with regard to requests that are relevant to a tax

[10] Global Forum on Transparency and Exchange of Information for Tax Purpose. Peer Review Report, Phase 2: Implementation of the Standard in Practice - Luxembourg, OECD, November 2013.

period subsequent to the effective date of the treaty. According to the circular, the tax authorities will adjust their practice and in the future they will comply with requests for (banking) information preceding the effective date of the treaty subject to the condition that the requested information is foreseeably relevant for a taxable period beginning after its effective date.

3. Important changes to taxation rules for pension and annuity payments under the new German-Luxembourg tax treaty of 23 April 2012

The new German-Luxembourg tax treaty of 23 April 2012 (the "**Treaty**") entered into force on 1 January 2014. Article 17 of the Treaty especially contains fundamental changes in allocation of taxation rights between the two contracting States compared to the former German-Luxembourg tax treaty.

Indeed, Article 17 Paragraph 2 of the Treaty now provides that "payments received by an individual who is a resident of a Contracting State from the statutory social insurance of the other Contracting State shall be taxable only in that other State." This means that pension and annuity payments received by German tax residents working in Luxembourg but living in Germany are now subject to taxation in Luxembourg and not as before in Germany[11].

Nevertheless, for tax practitioners presumably the most important new rule is Article 17 Paragraph 4 of the Treaty that provides that "pensions and other similar remuneration (including lump-sum payments) arising in Luxembourg and paid to a resident of Germany shall not be taxed in Germany, provided that such payments arise from contributions, provisions or insurance premiums paid to a pension scheme by the recipient or on his behalf or from endowments made by an employer to a company pension scheme, and that these contributions, provisions, insurance premiums or endowments have been taxed in Luxembourg."

This typically also concerns premium payments by employees and/or employers for pension schemes set up under the Law of 8 June 1999 on private pension schemes (so-called "*régimes de pension complémentaire*") and complying with the requirements spelt out in Tax circular L.I.R. – N° A 03 / 1 of 13 August 2003.

The annual amount of tax deductible contributions by an employee totals 1,200 Euro. Those of the employer can total up to 20% of the annual gross salary of the paid employee (for simplification purposes this amount is set at 14.4-times the monthly gross salary of the employee concerned). In accordance with Article 115-17a. of the Luxembourg Income Tax Law of 4 December 1967, both the employee and the employer premium payments are subject at the time of their payment to a 20% withholding tax which is borne by the employer and which is the final Luxembourg tax burden on both payments into and out of the qualifying private pension scheme.

The breaking news for German tax resident beneficiaries working in Luxembourg but living in Germany is that in accordance with Article 17 Paragraph 4 of the Treaty both payments into, but more importantly future payments out of the qualifying private pension scheme shall not be taxed in Germany. This means that pension schemes set up under the Law of 8 June 1999 are for German tax resident frontier workers an interesting tax and pension planning tool, bearing in mind especially that the employer premium payments (and the 20% withholding tax), are

[11] Article 17 Paragraph 3 of the Treaty contains the same rule for the much less frequent reverse situation of Luxembourg tax residents working in Germany but living in Luxembourg.

in principle tax deductible for the Luxembourg employer**.**

4. Risk management for investment funds and VAT exemption

On 7 November 2013, the Luxembourg indirect tax authorities (*Administration de l'enregistrement et des domaines*) issued a circular letter 723 *ter* concerning the scope of the VAT exemption on the management of investment funds.

The VAT exemption covers the management of UCITS, other UCIs, specialised investment funds, alternative investment funds, securitisation vehicles and pension funds.

In this circular, the indirect tax authorities stated that the risk management function is part of the management of investment funds covered by the VAT exemption.

This circular also confirms that, in the case of outsourcing, the VAT exemption of risk management services will be subject to the same conditions as other outsourced services. Accordingly, in this kind of situation, in order to be VAT exempt, it will be necessary for the outsourced risk management functions to correspond to a distinct whole appreciated globally, being specific and essential to the management of the considered fund. Therefore, the exemption of outsourced risk management services will apply to the full or substantial outsourcing of the risk management function, but will not apply to the sole outsourcing of purely technical services.

5. Increase in the Luxembourg VAT rates

On 2 December 2013, the new Luxembourg government released the main points of its fiscal plans for the next few years. As far as VAT is concerned, these plans provide for an increase in the VAT standard rate. The Luxembourg VAT standard rate is currently 15%. The standard VAT rate should be increased up to 17%, and would therefore remain the lowest VAT standard rate within the European Union. Furthermore, on 14 January 2014, the Luxembourg Minister of Finance confirmed to the Luxembourg Parliament that the other VAT rates may also be increased.

6. Tax treaties news

1. Singapore

On 9 October 2013, the Minister of Finance of the Grand-Duchy of Luxembourg and the Deputy Prime Minister of Finance of the Republic of Singapore signed a new treaty aiming at avoiding taxation and preventing tax evasion with respect to taxes on income and on capital.

This new treaty comes after Luxembourg requested an amendment to Article 26 on the exchange of information to bring it in line with OECD standards. It provides for an exchange of information upon request. In addition, the new treaty clarifies the situation of UCIs, which benefit from this new treaty provided the UCI is a resident of a Contracting State within the meaning of Article 4 of the New Treaty (as supplemented by the accompanying protocol). Luxembourg SICAV/Fs currently already benefit from treaty protection.

Once effective, this new treaty will replace the current treaty of 6 March 1993.

2. Sri Lanka

On 26 November 2013, Sri Lanka also ratified the new Luxembourg-Sri Lanka double tax treaty concluded on 31 January 2013. Luxembourg had already ratified this new treaty on 14 June 2013 (see our Newsletter of October 2013). To the extent that the instruments of ratification are exchanged during the course of this year, the treaty will be effective as of 1 January 2015.

3. Ireland

According to information published by the Irish Revenue, negotiations on a protocol to the current Irish-Luxembourg treaty have been concluded and will be signed "shortly".

4. Treaties effective since 1 January 2014

4.1 Kazakhstan

The treaty signed on 26 June 2008 with Kazakhstan never came into force in its initial version as it did not contain a provision on the exchange of information in line with the OECD standards. On 3 May 2012, Luxembourg and Kazakhstan signed a protocol aiming specifically at amending the treaty on this point. Both came into force on 11 December 2013 and have been effective since 1 January 2014.

The key features to the amending protocol were highlighted in our Newsletter of October 2013.

4.2 Germany

The new tax treaty with Germany was signed on 23 April 2012 and came into force on 30 September 2013. It has been effective since 1 January 2014.

See our Newsletter of July 2012 to see the main changes introduced by this new treaty.

4.3 Macedonia

The new tax treaty signed on 15 May 2012 with Macedonia came into force on 23 July 2013. It has been effective since 1 January 2014.

4.4 Tajikistan

The new tax treaty signed on 9 June 2011 with Tajikistan came into force on 27 July 2013. It has been effective since 1 January 2014.

4.5 Seychelles

The new tax treaty signed on 4 June 2012 with the Seychelles came into force on 19 August 2013. It has been effective since 1 January 2014.

See our Newsletter of October 2013, which highlights the key features of this treaty.

5. Protocols effective since 1 January 2014

5.1 Canada

The Protocol on exchange of information upon request signed on 8 May 2012 with Canada came into force on 10 December 2013 and has been effective since 1 January 2014.

5.2 Republic of Korea

The amending protocol signed on 29 May 2012 with South Korea came into force on 4 September 2013. It has been effective since 1 January 2014.

5.3 Poland

The protocol of 7 June 2012 amending the double tax treaty of 14 June 1995 with Poland came into force on 25 July 2013. It has been effective since 1 September 2013 as far as withholding taxes are concerned and since 1 January 2014 for all other taxes.

See our Newsletter of November 2012 on the key features of this protocol.

5.4 Russia

The amending protocol to double tax treaty of 28 June 1993 signed with Russia came into force on 30 July 2013. It has been effective since 1 January 2014.

See our Newsletters of March 2013 and December 2011 on this topic.

6. Bill 6633 ratifying new tax treaties and protocols

On 17 December 2013, Bill 6633 ratifying the double tax treaties signed with Saudi Arabia, Guernsey, Jersey, the Isle of Man and the Czech Republic and protocols to existing tax treaties with Slovenia and Denmark was submitted to the Luxembourg Parliament. All these treaties are in line with the OECD Model Tax Convention.

Details on the key features of these treaties and protocols can be found in our Newsletters of October 2013, June 2013 and September 2009.

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