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LUXEMBOURG LAW

NEWSLETTER

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ASSET MANAGEMENT AND INVESTMENT FUNDS

1. AIFMD

1. Reserved alternative investment funds (RAIFs)

On 14 July 2016, Luxembourg Parliament voted on a new law ("**RAIF Law**"), introducing a new type of Luxembourg investment vehicle named the Reserved Alternative Investment Fund ("**RAIF**").

The RAIF will be regulated under Directive 2011/61/UE of 8 June 2011 on Alternative Investment Fund Managers ("**AIFMD**") and will benefit from the corresponding European Union ("**EU**") passport but will not be supervised by the *Commission de Surveillance du Secteur Financier* (CSSF), making it an attractive vehicle from a time-to-market perspective.

The introduction of the RAIF regime seeks to widen the range of investment vehicles available in Luxembourg, offering a new option to the initiators of Luxembourg AIF projects.

In order to be eligible for this new regime, the RAIF will have to be an Alternative Investment Fund ("**AIF**") managed by an external authorised Alternative Investment Fund Manager ("**AIFM**"), both within the meaning of the AIFMD. The AIFM may be established in Luxembourg or in another Member State of the EU.

The other features of this new Luxembourg investment vehicle are substantially identical to those of the specialised investment fund (SIF) and the RAIF Law has therefore been drafted drawing heavily from the text of the Law of 13 February 2007 on specialised investment funds, notably, in respect of the various legal forms (corporate (such as the public company) and contractual (such as the special limited partnership)) which are available, the absence of limitations as regards eligible assets or investment policies save for the requirement to invest in accordance with the principle of risk spreading, the possibility to have multiple compartments and multiple classes as well as flexible subscription, redemption and distribution features and, in principle, the tax regime of a *taxe d'abonnement* at a 0.01 per cent rate (or nil rate in certain circumstances). A different tax regime (similar to the one currently applicable to Luxembourg SICARs) applies if the RAIF invests exclusively in risk capital investments, in which case it will not have to invest in accordance with the principle of risk spreading.

The RAIF should become a vehicle of choice for managers and investors looking to combine contractual freedom and short time-to-market together with both the protection of the AIFMD framework and the RAIF Law, and the marketability of an investment vehicle benefiting from an EU passport.

The RAIF Law will come into force three days after its publication in the Luxembourg Gazette which is expected to occur before the end of July 2016.

More details on the RAIF can be found in our RAIF Brochure and in the full text (with an English translation) of the RAIF Law.

2. Luxembourg loan-originating funds

On 9 June 2016, the CSSF updated its FAQ concerning the amended Law of 12 July 2013 ("**AIFM Law**") on alternative investment fund managers ("**AIFMs**") by adding a new Section 22 to the FAQ composed of 4 questions. The purpose of this update is to clarify the CSSF's position as to loan-originating alternative investment funds ("**AIFs**").

The CSSF clearly states in question 22.a) of the FAQ that loan origination is a permitted activity for Luxembourg AIFs. This was merely a clarification, awaited by the industry, of the CSSF's regulatory practice over the last few years.

Indeed in recent years the CSSF has consistently approved loan-originating funds on the basis that lending funds to third parties is no longer deemed to be an activity reserved to credit institutions if it is not financed by repayable deposits gathered from the public,

and may therefore qualify as an acceptable investment activity for investment funds.

The development of loan-originating funds has been the subject of a positive assessment by the European Commission[1] in its Action Plan on Building a Capital Markets Union and ESMA[2], endorsing this view, has just rolled out a list of points that could be part of a possible European framework on loan-originating funds.

The CSSF indicates in the FAQ that an AIFM/AIF engaging in loan-origination activities should follow a number of key principles, including:

- properly assessing and monitoring the particular risks of engaging in loan origination, in particular credit and liquidity risks;
- having a proper organisational and governance structure (including appropriate processes and procedures regarding *inter alia* assets and investors – loan and investor categories – conflicts of interest, transparency, valuation, etc.);
- having the necessary expertise/experience in origination activities and appropriate technical and human resources.

The AIFM/AIF shall thus be responsible for implementing a robust and appropriate approach for its loan origination or investment activities. The CSSF has indicated that it will evaluate, in the context of its approval and on-going supervisory process, if applicable, on a case-by-case basis, the approaches implemented by the AIFMs/AIFs.

The FAQ further clarifies that loan participation and/or acquisition is also a permitted activity for AIFs, subject to the AIFM/AIF following the same key principles mentioned above.

It is worth noting that, although not covered by the FAQ, Luxembourg loan-originating funds may engage in a broad variety of sectors including infrastructure, real estate, SMEs etc. Moreover the FAQ is not prescriptive in the way in which loan-originating funds are structured provided that all relevant risks resulting from the structure (such as liquidity risk in case of an open-ended fund) are duly assessed and managed.

Moreover loan origination or loan participation/acquisition is currently not limited to AIFs and could be undertaken *inter alia* by specialised investment funds or investment companies in risk capital that may not qualify as AIFs.

3. Remuneration: ESMA Guidelines

On 31 March 2016, ESMA published the UCITS V Remuneration Guidelines which also include a proposal to amend the existing remuneration guidelines for AIFMs.

The amendment relates to AIFMs which are part of a group: the UCITS V Remuneration Guidelines clarify that in a group context, non-AIFM sectoral prudential supervisors of group entities may deem certain staff of the AIFM which is part of that group to be identified staff for the purpose of their sectoral remuneration rules.

4. ESMA Q&A on AIFMD: Updates

Over the past few months, ESMA has updated its Q&A on AIFMD several times.

The most recent update is dated 19 July 2016 (ESMA/2016/1136). The newly added question relates to the impact of the EMIR Regulation on AIFMD[3] and in particular, as regards the valuation of OTC financial derivative transactions that are centrally cleared and subject to the reporting obligation of EMIR.

Essentially, AIFMs must have in place a process for proper and independent verification of the value of the OTC financial

[1] Action Plan on Building a Capital Markets Union, 30 September 2015, COM(2015) 468 final.

[2] ESMA Opinion on key principles for a European framework on loan origination by funds, 11 April 2016, ESMA/2016/596.

[3] At the same time as this update of the AIFMD Q&A, ESMA updated its UCITS Q&A on the same topic by taking the same approach for UCITS management companies as the one taken for AIFMs.

derivative transactions and the valuation provided by the CCP (central counterparty) can therefore only serve as a point of reference for the verification performed by the AIFM.

New questions were also added in the ESMA Q&A on the AIFMD in April and June 2016.

The June 2016 update contains new questions on the notion of "committed capital" whereby ESMA clarifies that the "committed capital" must not be taken into account when (i) calculating the additional own funds requirement and (ii) calculating the total value of assets under management[4].

New questions and answers on requirements regarding (i) the domicile of EU AIFs which are marketed in the home Member State of the AIFM, and (ii) the marketing of EU feeder AIFs which have a non-EU master AIF are also addressed by ESMA.

In the April 2016 update, ESMA specifies in the AIFs notification section of the Q&A that if an EU AIF decides to offer additional fund units to investors, and the offer is limited to the investors already invested in the AIF, the AIFM does not have to submit a new notification to the national competent authority[5].

2. UCITS V

1. Remuneration: ESMA approach on proportionality

The UCITS V Remuneration Guidelines[6], which were published on 31 March 2016, clarify the remuneration policy requirements under the UCITS Directive for management companies and self-managed UCITS.

These guidelines aim to ensure a convergent application of the remuneration provisions and provide guidance on *inter alia*:

- management companies as part of a group: the guidelines clarify that in a group context, non-UCITS sectoral prudential supervisors of group entities may deem certain staff of the UCITS management company which is part of that group, to be "identified staff" for the purpose of their sectoral remuneration rules;
- application of different sectoral rules: the guidelines include proposals on how different rules, such as those set out in the AIFMD and in the CRD IV Directive, should apply where employees or other categories of personnel perform services subject to different sectoral remuneration principles;
- definition of performance fees;
- application of the rules to delegates;
- payment of variable remuneration in instruments.

In the UCITS V Remuneration Guidelines, ESMA did not take a firm position on the application of the proportionality principle to the remuneration requirements.

It provides that when taking measures to implement remuneration principles, EU Member States should take account of the size, nature and scope of financial undertakings' activities and that in taking measures to comply with the remuneration principles, management companies should comply in a way and to the extent that is appropriate to their size, internal organisation and the nature, scope and complexity of their activities. ESMA underlines also that it is primarily the responsibility of the management company to assess its own characteristics and to develop and implement remuneration policies and practices which appropriately align the risks faced and provide adequate and effective incentives to its staff and that competent authorities should review the ways management companies actually implement proportionality, taking into account the achievement of regulatory objectives and the need to preserve a level playing field among different management companies and jurisdictions.

In addition to the UCITS V Remuneration Guidelines, ESMA published a letter addressed

[4] Unless national rules require the inclusion of the committed capital in the assets under management.
[5] In accordance with Article 31(2) of AIFMD.
[6] Final report on sound remuneration policies under the UCITS Directive and AIFMD, 31 March 2016, (ESMA/2016/411).

to the EU Commission[7] ("**UCITS V Remuneration Letter**") which focuses on the application of the proportionality principle and remuneration rules in the financial sector.

In the UCITS V Remuneration Letter, ESMA goes one step further regarding the proportionality principle and regarding the possibility to waive specific remuneration requirements in certain cases. In this letter, ESMA also draws the attention of the EU Commission to the characteristics of the asset management sector in order to justify the application of the proportionality principle. It clarifies the ESMA approach on the proportionality principle, i.e. application to small and non-complex fund managers, application of the deferral rules and of the payments in instruments rules, application of the pay-out process rules to delegates and to portfolio managers who not only manage portfolios of UCITS.

The UCITS V Remuneration Guidelines will become applicable on 1 January 2017. However, the ESMA guidance on the pay-out process for variable remuneration for the calculation of payments relating to new awards of variable remuneration to identified staff will start applying for the first full performance period after 1 January 2017[8].

As regards the update of the fund documentation, the ESMA Q&A on UCITS[9] allows UCITS to update their KIID with the information on the remuneration policy[10] at the next annual update after 18 March 2016, or on the first occasion after 18 March 2016 on which the KIID is revised or replaced for another purpose.

[7] ESMA letter to the EU Commission on the proportionality principle and remuneration rules in the financial sector, 31 March 2016, (ESMA/2016/412).

[8] This is without prejudice to the application of the requirements stemming from the UCITS V Directive by 18 March 2016.

[9] ESMA Q&A on the application of the UCITS Directive, 5 April 2016, ESMA/2016/569.

[10] i.e. with a statement indicating that all information regarding the updated remuneration policy is available by means of a website (and the indication of the website) and that paper copies are available free of charge upon request.

2. ESMA Q&A on UCITS: Update

On 19 July 2016, ESMA updated its Q&A on UCITS (ESMA/2016/1135) by adding a new question on the impact of the EMIR Regulation on UCITS[11].

Essentially, as regards the valuation of OTC financial derivative transactions that are centrally cleared and subject to the reporting obligation of EMIR, ESMA states that AIFMs must have in place a process for proper and independent verification of the value of the OTC financial derivative transactions.

The valuation provided by the CCP (central counterparty) can therefore only serve as a point of reference for the verification performed by the AIFM.

3. CSSF Annual Report 2015

The CSSF has just published its Annual Report for the year 2015. The publication of its Annual Report always represents an opportunity for the CSSF to confirm and to clarify its position, where necessary, on certain points. A selection of relevant topics for the investment fund industry will be presented in a future publication.

[11] At the same time as this update of the UCITS Q&A, ESMA updated its AIFMD Q&A on the same topic by taking the same approach for AIFMs as the one taken for UCITS management companies.

BANKING, INSURANCE AND FINANCE

1. New market abuse legislation

On 3 July 2016, the market abuse obligations and prohibitions provided in the updated EU legislation became applicable[12]. The new set of legislation is composed at level 1 of a Regulation ("**MAR**") and of a Directive ("**MAD 2**").

Although many concepts used in the previous market abuse directive[13] ("**MAD 1**") continue to be covered in MAR and MAD 2, there are some important changes.

The extended scope of application is one of these novelties. The new market abuse legislation applies to financial instruments admitted to trading, not only on the EU-regulated markets (e.g. the Luxembourg Stock Exchange), but also on the MTF[14] and OTF[15]. The scope of coverage also expands to certain financial instruments traded over-the-counter (OTC) and financial instruments traded pursuant to the EU Regulation on emission allowance[16]. Any transaction, order or behaviour concerning the financial instruments referred to above is targeted, even if any such transaction, order or behaviour does not take place on a trading venue.

[12] Some provisions related to organised trading facilities (OTFs), SME growth markets and emissions allowances will only become applicable on 1 January 2017.

[13] Directive 2003/6/CE on insider dealings and market manipulations is repealed as from 3 July 2016.

[14] "**MTF**" refers to multilateral trading facilities, which are the local trading venues regulated at the national level.

[15] "**OTF**" refers to organised trading facilities that may be formed under the recast MiFID Directive (2014/65/EU).

[16] MAR also partially applies to certain spot commodity contracts and to other types of financial instruments (including derivative contracts and instruments which will have an effect on the price or value of a spot commodity contract).

MAD 1 was transposed into Luxembourg law by the Law dated 9 May 2006 on market abuse ("**Market Abuse Law**").

Although the repealing of MAD 1 by MAR, the Market Abuse Law is not yet formally repealed. As a consequence, the Market Abuse Law and MAR coexist and the new requirements provided by MAR must be complied with as from 3 July 2016. In the Press Release 16/31, the CSSF has inserted a link to a substitution table, which lists the relevant provisions of the Market Abuse Regulation and of the Market Abuse Law.

In addition, in the same Press Release, the CSSF indicates that new circulars and/or FAQs could be issued in the future in order to detail the application of the new market abuse framework by the CSSF in Luxembourg.

This clarification exercise by the CSSF is awaited by the industry and by the investment fund industry in particular. Indeed, in Circular 07/280 (as amended by Circular CSSF 07/323), flexibility was given to certain listed UCIs and their management as regards the compliance with obligations of the Market Abuse Law, such as the obligations (i) to publicly disclose inside information, (ii) to draw up lists of insiders, (iii) to notify managers' transactions, and (iv) to report suspicious transactions. In this particular Circular, published in 2007, the CSSF stated that the practical impact of such obligations should remain limited for largely diversified UCIs which publish their NAV on a daily or very frequent basis where, as a result, the market price is closely linked to the applicable NAV.

Given that MAR is a regulation (with direct application) which extends and strengthens the previous MAD 1 requirements, investment funds falling within the scope of the new market abuse legislation and their management may no longer benefit from the flexibility expressed in the aforesaid CSSF Circular 07/280 and may need to take measures in order to comply with the MAR obligations applying to them, e.g.:

- to detect and report market abuse[17];
- to adopt a Dealing Policy and/or to amend it;
- to set up an Insider List Policy and/or complete it.

Also, persons discharging managerial responsibilities (including board members) and persons closely associated with them will have to comply with the transactions notification obligation when they invest in shares or other instruments issued by the investment fund.

2. EMIR Law

The Law of 15 March 2016 on OTC derivatives, central counterparties and trade repositories and amending different laws relating to financial services entered into force on 21 March 2016 ("**EMIR Law**").

The EMIR Law clarifies the respective powers granted to the CSSF and the *Commissariat aux Assurances* in the context of the EMIR Regulation[18].

The CSSF is responsible for granting and withdrawing approval and for the supervision of central counterparties established in Luxembourg. The CSSF is also in charge of ensuring that those entities respect the EMIR requirements.

The EMIR Law also specifies that the CSSF and the *Commissariat aux Assurances* are invested with powers of supervision, intervention, inspection and investigation to the extent defined in the EMIR Regulation and may impose sanctions.

[17] In the MAR Q&A published in June 2016, ESMA confirms that UCITS management companies and AIFMs must comply with this obligation.

[18] EMIR Regulation refers to Regulation (EU) 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

COMPETITION

1. Ex-post-merger control: Competence of the Competition Council

On 17 June 2016, the Luxembourg Competition Council adopted a decision in which it asserts, on the basis of Article 5 of the Law of 23 October 2011 on Competition and Article 102 of the Treaty on the Functioning of the European Union, its competence to scrutinise and, as the case may be, sanction transactions between businesses which create or strengthen a dominant position on the relevant market.

In the case at hand, a cinema operator active in the Grand Duchy of Luxembourg ("**Cinema Operator**") acquired, in 2013, a multiplex cinema situated in the south of Luxembourg ("**Multiplex Cinema**"). According to the Competition Council, the Cinema Operator occupied a dominant position in the market for operating cinemas even before acquiring the Multiplex Cinema. It considers that after the acquisition, the Cinema Operator has a quasi-monopoly on the market, whether on national or on local level.

On the basis of the judgement of the Court of Justice in *Continental Can*[19], the Competition Council states that the acquisition of the Multiplex Cinema may constitute an abuse of a dominant position if it affects the structure of the market to such an extent that the Cinema Operator faces no competitive pressure from its remaining competitors as they do not represent a real counterweight.

Nevertheless, the Competition Council closed the case without further action on the grounds that the acquisition of the Multiplex Cinema did not have anti-competitive effects. The Competition Council applied the "failing firm defence" according to which an otherwise problematic merger is nonetheless compatible with the common market if the deterioration of the competitive structure that follows the merger cannot to be said to be caused by the merger. This is the case when the following three cumulative conditions are met: (i) one of the undertakings involved in the transaction would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking; (ii) there is no less anti-competitive alternative purchase; and (iii) in the absence of a merger, the assets of the failing firm would inevitably exit the market. In the case at hand, the three cumulative conditions were met.

By this decision, the Competition Council stressed its authority to exercise an ex-post control of mergers which could create or strengthen a dominant position by using, in the absence of a specific merger control regime at national level, the provisions prohibiting the abuse of a dominant position.

[19] CJEU, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, 21 February 1973, Case 6/72.

2. Compensation for Competition Law infringements: New bill of law

The Bill n°6968 on certain rules governing actions for damages for infringements of the Competition Law provisions amending the amended Law of 23 October 2011 on competition ("**Bill**") was filed with the Luxembourg Parliament on 18 March 2016. Its purpose is to implement the Directive 2014/104/EU of 26 November 2014 ("**Directive**") which has to be implemented into national legislation no later than 27 December 2016.

The Bill aims at facilitating actions for damages for infringement of national and EU competition rules thanks to the introduction of specific procedural rules. Thus, the exercise of such actions is simplified by a set of presumptions:

- irrebuttable presumption of fault in the event of infringement found by a final decision of the Competition Council or prima facie evidence of civil fault when the infringement is established by decisions taken in another Member State;

- rebuttable presumption of damage resulting from the existence of a cartel; and
- reduction of the burden of proof for the indirect purchasers who are deemed to have demonstrated the passing-on of overcharges provided they prove that:
  - the defendant has committed an infringement of competition law;
  - the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and
  - the indirect purchaser has purchased the goods or services being the object of the infringement of competition law, or have purchased goods or services derived from or containing them.

Upon request of the claimant the judge may, under certain conditions, order the disclosure of information included in the file of a competition authority and necessary for the action for damages. However, the statements made by companies for the purpose of a leniency application and settlement submissions shall not be subject to a disclosure order. In this respect, the Bill states that the proof related thereto obtained solely through access to the file of a competition authority are inadmissible in actions for damages. In addition, the production of the confidential data ordered by the judge is subject to protective measures suggested by the Directive (concealment of sensitive passages in documents, conduct of hearings *in camera*, restriction of the number of persons allowed to see the evidence, and recourse to experts to produce summaries of the information in an aggregated or otherwise non-confidential form). Some data, including those established by a competition authority and sent to the parties in the course of the proceedings, shall be disclosable only after the competition authority has closed its proceedings.

Furthermore, consensual dispute resolution is encouraged by the suspension of the limitation period to bring an action for damages for the duration of the consensual dispute resolution process and by the suspension of the proceedings relating to the action for damages during a maximum period of two years. Following a consensual settlement, the claim of the settling injured party is reduced by the settling co-infringer's share of the harm. Any remaining claim shall be exercised by the settling injured parties only against non-settling co-infringers, except in cases in which the co-infringers cannot pay the damages that correspond to the remaining claim of the settling injured party. Non-settling co-infringers are not permitted to recover contribution for the remaining claim from the settling co-infringers.

This alternative avenue of redress has many advantages, such as rapidity, reduction of costs, simplicity and discretion linked to such methods for settling disputes. It is regrettable, however, that unlike the Directive, the Bill does not expressly provide that if the Competition Council contemplates imposing a fine, it may take into consideration as a mitigating factor the consensual compensation already paid.

CORPORATE

1. Company Law reform

On 13 July 2016, the Bill of Law 5730 modernising the Law on commercial companies of 10 August 1915 and amending *inter alia* relevant articles of the Civil Code was adopted by the Luxembourg Parliament.

For a first insight on the key changes brought by this new Bill, see our Newsflash.

2. New capital markets transparency legislation

The Luxembourg Law of 10 May 2016 ("**Amending Law**") implementing amendments to the Luxembourg transparency law for issuers of securities entered into force on 15 May 2016.

The Amending Law implements Directive 2013/50/EU and Article 1 of Directive 2014/51/EU, amends the Luxembourg Law of 11 January 2008 on transparency requirements of issuers and, on one point only, the Luxembourg Law of 10 July 2005 on prospectuses for securities. The Grand Ducal Regulation dated 11 January 2008 on transparency requirements of issuers of securities is also amended by a new Grand Ducal Regulation, dated 10 May 2016.

By way of its Circulars 16/637 and 16/638 issued on 22 June 2016, the CSSF has updated and amended its previous Circular 08/337 and Circular 08/349.

The CSSF also updated its Q&A on "The Transparency Law and the Grand-Ducal Transparency Regulation" on 27 June 2016.

Key changes

- For issuers for which Luxembourg is the home Member State: reduction of administrative burden by the removal of certain transparency requirements.
- For foreign issuers for which Luxembourg is the home Member State and which are active in extractive industries or the logging of primary forests: new requirement to publish a report on payments to governments.
- For investors: notification obligations are now imposed on investors taking exposure on shares via a much wider range of financial instruments, the definition of which is considerably widened, and introduction of aggregation rules.
- The CSSF receives significant new injunction and sanction powers.
- Changes are also introduced with respect to the disclosure of the home Member State.

More information on the key changes brought to the Luxembourg capital markets transparency legislation is available in the article "Entry into force of amendments to capital markets transparency legislation" published on our website.

3. Trade and Companies Register reform

The legal publications regime concerning companies and associations in Luxembourg has been amended by the Law of 27 May 2016, published on 30 May 2016[20].

The main purpose of the reform is to implement a new central electronic platform of publication for companies in Luxembourg. A new registration obligation is also provided for mutual funds ("**FCP**" or *Fonds Commun de Placement*)[21].

The new publication regime entered into force on 1 June 2016.

New electronic platform of publication

The *Mémorial C, Recueil des Sociétés et Associations* (the Luxembourg official gazette), which was the previous official newspaper for publications is replaced by a central electronic

[20] In this respect, the *Registre de Commerce et des Sociétés* ("**RCS**") has also issued a circular giving an overview of the main points (Circular 16/01 dated 24 March 2016).

[21] In the past, only investment funds incorporated in the form of a company where subject to the obligation to be filed with the Trade and Companies Register.

platform called *Recueil électronique des sociétés et associations* (“**RESA**”).

The RESA is integrated into the website of the RCS. In a similar way to the procedure previously in place with the *Mémorial*, the documents to be published in the RESA must first be filed electronically with the RCS.

- Date of publication

The date of publication corresponds in principle, to the date of filing of the documents with the validation by the RCS.

However, in case of abundant requests, a more flexible timeframe of three working days is given to the RCS for the processing and publication.

Subject to certain conditions, it is also possible to choose a specific date for the publication.

- Fees for late deposit of annual and consolidate accounts

The fee to be paid for depositing annual and consolidated accounts is fixed at 19 euros. If these accounts are not filed within the legal deadline, the following increased fees will apply as from 1 January 2017:

- 50 euros, if the deposit is made in the eighth month following the closing date of the financial year;
- 200 euros, if the deposit is made between the ninth and the eleventh month following the closing date of financial year; and
- 500 euros, if the deposit is made from the twelfth month following the closing date of the financial year.

An exception is provided for savings-pension associations and savings-pension companies with variable capital, special limited partnership (SCSp), non-profitmaking association (asbl), foundations and agricultural associations. These entities are not subject to late filing fees.

New obligations for FCPs

Any new FCP established in Luxembourg after 1 June 2016 will have to request an RCS number, regardless of the fact that they are managed by a Luxembourg or foreign management company.

However, a six-month transition period is provided for existing FCPs, starting from 1 June 2016.

DISPUTE RESOLUTION

1. Public procurement: New bill of law

The bills of law on public procurement and concession contracts were presented to the Luxembourg Parliament last May to implement Directives 2014/24/EU on public procurement, 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and 2014/23/EU on the award of concession contracts. These bills seek to promote a strategy for "smart, sustainable and inclusive growth". For that purpose, the new public procurement rules should increase the efficiency of public spending, by facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement, and enable procurers to make better use of public procurement in support of common societal goals.

Le 3 mai 2016, le Ministère du Développement durable et des Infrastructures a déposé à la Chambre des députés le projet de loi sur les marchés publics (n°6982) qui abrogera la loi du 25 juin 2009 sur les marchés publics.

Ce projet de loi transpose en droit luxembourgeois deux directives européennes relatives aux marchés publics : la directive 2014/24/EU du 26 février 2014 sur la passation des marchés publics et abrogeant la directive 2004/18/CE et la directive 2014/25/EU du 26 février 2014 sur la passation des marchés par des entités opérant dans les secteurs de l'eau, de l'énergie, des transports et des services postaux et abrogeant la directive 2004/17/CE.

Cette réforme des marchés publics vise trois objectifs principaux : simplifier les procédures et les formalités liées à l'attribution des marchés publics, promouvoir la qualité de l'achat public en favorisant l'innovation et l'achat écologiquement et socialement « responsable » et, enfin, renforcer la concurrence et la lutte contre les discriminations. La Commission européenne estime que les marchés publics doivent jouer un rôle essentiel dans la stratégie pour une *« croissance, intelligente et inclusive »* même si la réalisation de ces objectifs semble un jeu d'équilibriste.

Le projet de loi prévoit notamment les règles suivantes :

- simplification des procédures pour faciliter l'accès des PME : la volonté affichée est de réduire les lourdeurs administratives, notamment par l'utilisation de simples déclarations sur l'honneur pour les critères de sélection et d'exclusion (voir notre newsletter d'octobre 2015). En témoigne également la généralisation de la dématérialisation des procédures avec la mise à disposition complète des documents du marché par voie électronique et l'utilisation des enchères électroniques, dont les modalités pratiques devraient néanmoins faire l'objet d'un règlement grand-ducal ;
- formalisation des consultations préalables entamées par le pouvoir adjudicateur en vue de préparer la passation du marché et d'informer les opérateurs économiques du projet du pouvoir adjudicateur et de ses exigences en la matière. Dans ce cas, le pouvoir adjudicateur devra veiller à ce que la concurrence ne soit pas faussée en communiquant aux autres soumissionnaires les informations utiles échangées dans le contexte de la préparation de la procédure ;
- intégration des dimensions sociales et environnementales : la politique de développement durable passe par l'introduction de caractéristiques sociales, environnementales et innovantes aux différents stades de la procédure d'attribution, tant au niveau des spécifications techniques pour lesquelles les soumissionnaires pourront faire valoir des labels, qu'au niveau des critères de sélection et d'exclusion mais également au niveau des critères d'attribution qui permettent de prendre en compte le coût du cycle de vie des travaux, services ou fournitures projetés. L'originalité de cette approche est de tenir compte de l'ensemble des

impacts liés au cycle de vie des travaux, services ou fournitures tels que les coûts liés à l'utilisation, comme la consommation d'énergie et d'autres ressources, les frais de maintenance, les coûts liés à la fin de vie comme les coûts de collecte et de recyclage ainsi que les coûts imputés aux externalités environnementales (coût des émissions de gaz à effet de serre et autres coûts d'atténuation du changement climatique) ; et

- lutte contre le "dumping social": à ce titre, on peut citer les dispositions relatives à l'exclusion des candidats et attributaires ne respectant pas la législation sociale et ceux ayant conclu des accords anti concurrentiels (art. 29) et celles relatives aux offres anormalement basses (art. 38) même si le projet de loi ne contient aucune définition de l'offre anormalement basse.

En ce qui concerne l'attribution des contrats de concession, le législateur luxembourgeois a opté pour une transposition séparée de la directive 2014/23/UE du 26 février 2014 sur l'attribution de contrats de concession qui fait l'objet d'un projet de loi autonome (n°6984).

À la différence du projet de loi sur les marchés publics qui consiste principalement en une modernisation et en une clarification des règles, le projet de loi relatif à l'attribution des contrats de concession constitue une véritable innovation dans un domaine jusque-là encore peu régulé par le droit européen. Le projet de loi sur l'attribution des contrats de concession instaure un ensemble de règles dédiées aux spécificités des contrats de concession, auparavant confuses et éparpillées.

2. Prorogation clauses of jurisdiction: Validity and enforceability

In a recent ruling (Judgment C-366/13 of 20 April 2016) the CJEU, on questions for preliminary ruling submitted by the Court of Milan, gave some clarification on the conditions of validity and enforceability against third parties of the clauses of prorogation of jurisdiction contained in a bond issue prospectus, in respect of Article 23 of the Regulation (EC) No. 44/2001, the "Brussels 1 Regulation" (Article 25 of the recast Regulation No. 1215/2012 – Brussels 1a).

The case pending before the Italian court relates to a litigation between the Commerzbank (originally Dresdner Bank), issuers of credit-linked bond securities, Redi, a financial intermediary approved by the UK financial authority and subscriber of bond securities on the primary market, and Profit, an Italian company and the acquirer of the disputed bond securities on the secondary market

The general rule of the programme and conditions of issue of securities had been defined by Dresdner Bank in a prospectus, approved by the Irish Stock Exchange, which contained a clause conferring jurisdiction to the English courts for any dispute arising out of or related to the securities issued.

Following a default of payment by the reference entity, Profit was put into liquidation and it brought an action before the Court of Milan against, in particular the issuer, Commerzbank, the financial intermediary, Redi, and its parent company, Profit Holding, in order firstly, to obtain the cancellation of the contract by which the disputed securities were acquired and secondly to recognise the liability of Profit Holding and Redi.

The jurisdiction of the Court of Milan having been challenged, it has referred to the CJEU for several preliminary rulings, one of which is on the form and scope of the clause conferring jurisdiction.

On the question of whether the insertion of a clause conferring jurisdiction in a bond securities issue prospectus met the written form requirements required by the Brussels 1 Regulation, the CJEU responded that this was only the case if the contract signed by the parties at the time of issue of the securities on the primary market mentioned the acceptance of this clause or contained an express reference to this prospectus.

With regard to the enforceability of the clause on the third party purchaser of the securities issued on the basis of the prospectus, the CJEU has accepted such enforceability if (i) it is established on the one hand, that the clause is valid in the relationship between the issuer of the securities and the financial intermediary,

and on the other hand, that the third party and (ii) the third party by subscribing on the secondary market for the securities in question has been subrogated in the rights and obligations attached to these securities under national law of the said intermediary and, finally, (iii) such third party had the opportunity to familiarise themselves with the prospectus containing the clause.

The CJEU, assuming the response to these two first questions to be negative, has specified that the insertion of a clause conferring jurisdiction in a bond issue prospectus could be admitted following the usage of international trade rules under the Brussels 1 Regulation, assuming the consent of the other party to which it is opposed. However such admission is only recognised for operators of the branch do conclude contracts of this type and, secondly, whether the parties maintained a prior business relationship between each other or with other parties operating in the sector under consideration, or whether the conduct in question is sufficiently known to be able to be considered as an established practice.

The ruling also clarified the concept of contract under Article 5-1 of the Brussels 1 Regulation (Article 7-1 of the Brussels Regulation 1a) by indicating that actions for obtaining the cancellation of a contract and the restitution of sums unduly paid on the basis of that contract, also fall under the scope of contract matters. The CJEU has indeed taken the view that it would be inappropriate for a party to avoid the application of Article 5-1 simply by claiming that the contract does not exist.

The Court also specified the conditions of application of Article 6-1 of the Brussels 1 Regulation (Article 8-1 of the Brussels Regulation 1a) on the rules of jurisdiction with regard to co-defendants and the concept of associated applications.

INFORMATION AND COMMUNICATION TECHNOLOGY

1. Internal digital market: New European framework

The adoption of the Regulation (EU) 910/2014 on electronic identification and trust services for electronic transactions in the internal market[22] (“**Regulation**”) aims to strengthen public confidence in relation to online transactions and thus contribute to their development. The main provisions are applicable as from 1 July 2016. Main changes can be summarised as follows:

The electronic identification schemes ensuring the required level of guarantee and notified to the European Commission ("**Commission**") by the Member States will be recognised in other Member States to facilitate authentication and cross-border online administrative procedures for citizens.

Qualified trust service providers (“**TSP**”) will be subject to security requirements which may be specified by the Commission. The qualified TSPs will be published on a trusted list mentioning the services provided. They will be audited every 24 months by an accredited conformity assessment body. Unqualified TSPs will also be required to take adequate security measures. In any case, all TSPs must notify the supervisory body and the data protection authority within 24 hours any breach of security or loss of integrity having a significant impact on the trust services or on the personal data processed.

The so-called ‘qualified’ electronic signature had already been recognised as equivalent to a handwritten signature by the Luxembourg Law of 14 August 2000 on electronic commerce ("**2000 Law**"). It will from now on be specifically recognised in all the Member States. The Regulation provides guarantee requirements in its annexes in relation to qualified electronic signature creation devices. Certification of compliance with these requirements is based on a security assessment process in accordance with standards established by the Commission Implementing Decision (EU) 2016/650 of 25 April 2016.

The qualified electronic seal guarantees that an electronic document has been delivered by a legal person subject to it containing certain information. The creation device will be subject to the same requirements as that of the qualified electronic signature. The qualified electronic time stamp presumes exact dates and times of certain data while the qualified electronic registered delivery presumes exact dates and times of sending and receiving by identified persons. The Regulation also provides for the possibility to use the qualified website authentication which allows the authentication of the entity owning the website. For all these services, the Commission may establish reference standards to be complied with.

The principle of mutual recognition provided by the Regulation shall apply as from September 2018. It aims to overcome obstacles to public confidence in online services and transactions with public bodies. Thus a means of electronic identification used in one Member State may be recognised in another Member State.

In accordance with the internal market principle, a qualified TSP established in a Member State could always propose trust services in other Member States. By contrast, those established outside the European Union could provide services equivalent to qualified trust services only if a reciprocal agreement were to exist between the European Union and such a third country.

Trust services also obey the principle of non-discrimination: a judge may not disclaim their legal effect or rule out their admissibility as evidence in court because of their electronic form or because they are not ‘qualified’. An equivalent provision already exists for electronic signatures in Article 18 of the 2000 Law.

To conclude, the 2000 Law already contained provisions relating to electronic signatures and to certification service providers. These provisions may be retained in national legislation insofar as they are not completely

[22] Known as "eIDAS".

harmonised with the Regulation and do not prevent the free circulation of trust services in the European Union. However, it should be noted that as a transitional measures, the electronic signature creation devices and qualified certificates which complied with the Directive 1993/93/EC prior to its repeal will be considered as qualified under the Regulation. With regard to the qualified certificate, it will be considered as qualified only until its expiry. Similarly, certification service providers which were issuing qualified certificates in accordance with the Directive 1999/93/EC will remain qualified under the Regulation until their compliance is assessed. The submission of the conformity assessment report to the supervisory body must be carried out no later than 1 July 2017.

2. Modernisation of the European trademark system

Regulation (EU) 2015/2424 amending Council Regulation 207/2009 on the Community trade mark ("**New Regulation**") and Directive (EU) 2015/2436 to approximate the laws of the Member States relating to trade marks of 16 December 2015 ("**Directive**", together with the New Regulation, the "**European Trademark Package**") have been adopted with a view to modernising and harmonising the national and European trademark legislations.

The main changes of the New Regulation already entered into force in March 2016. Other specific provisions mainly relating to procedural aspects will be applicable starting from 1 October 2017. The Directive must be transposed into national laws at the latest by January 2019 (or 2023 for revocation and invalidity procedures).

The Directive's main aim is to align the various national trademark legislations with the new European trademark framework imposed by the New Regulation. Thus, the changes introduced by way of the European Trademark Package concern Community trademarks and national or Benelux trademarks.

More information on the content of the European Trademark Package is available in the article "Modernisation of the European trademark system" published on our website.

1. Tax treaties news

1. Tunisia

On 3 March 2016, the amending protocol signed on 8 July 2014 to the Luxembourg - Tunisia Income and Capital Tax Treaty of 1996 was approved by the Tunisian Parliament. The protocol provides for a new Article 26 in line with Article 26 of the OECD model convention. In Luxembourg, the treaty has been ratified by the Law of 7 December 2015. The protocol will enter into force once the formal conditions for the entry into force are met.

2. Andorra

On 7 March 2016, the double tax treaty on income and capital signed between Andorra and Luxembourg on 2 June 2014 entered into force. The treaty will apply as of 1 January 2017.

The following withholding tax rates apply under the new treaty:

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

Interest: 0%

Royalties: 0%

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

3. Serbia

On 24 February 2016, the double tax treaty on income and capital between Serbia and Luxembourg signed on 15 December 2015 was ratified by Serbia. Luxembourg has not ratified the treaty yet. Details on this new tax treaty have not been published yet but will be highlighted in a later edition, once available.

4. Estonia

The Luxembourg authorities announced that the conditions for the entry into force of the new double tax treaty between Estonia and Luxembourg signed on 7 July 2014 were fulfilled on 11 December 2015. The new treaty has been applicable since 1 January 2016 and the following withholding tax rates apply under the new treaty:

Dividends: The treaty provides for a standard 10% withholding tax on dividends which can be reduced to 0% if the beneficial owner is a company directly holding at least 10% of the capital in the company paying the dividends.

Interest: 0%

Royalties: 0%

Both States provide for the credit method and the exemption-with-progression method for the avoidance of double taxation. Luxembourg provides for the credit method to relieve double taxation of dividends.

5. Senegal

Details were published on the new double tax treaty signed between Senegal and Luxembourg on 10 February 2016. The treaty generally follows the OECD standard and the following withholding tax rates apply under this treaty:

Dividends: The standard withholding tax is 15% and can be reduced to 5% if the beneficial owner is a company (other than a partnership) that directly holds at least 20% of the capital of the company paying the dividends.

Interest: 10%

Royalties: 10% that can be reduced to 6% for the use of, or the right to use, industrial, commercial or scientific equipment.

Both States provide for the credit and exemption-with-progression methods to avoid double taxation.

2. Tax authorities circulars on net wealth tax

The Luxembourg tax authorities have published two circulars:

The first circular published on 2 June 2016 ("**Circular 1**") clarifies the legal provisions of the minimum wealth tax introduced as of 1 January 2016, following the abolition of the minimum corporate income tax. Circular 1 explains the 2016 rates and provides for calculation examples.

The second circular published on 16 June 2016 ("**Circular 2**") explains the impact of the introduction of the minimum wealth tax, following the abolition of the minimum corporate income tax, on the conditions to reduce net wealth tax as provided for by §8a VStG (Vermögenssteuergesetz). Circular 2 provides for a certain number of practical calculation examples.

3. EU Directive on country-by-country reporting

On 25 May 2016, the European Council adopted a Directive (EU) 2016/881 amending Directive 2011/16/EU as regards mandatory automatic exchanges of information in the field of taxation ("**Directive**").

The Directive entered into force on 3 June 2016 and requires Member States to transpose the Directive into their domestic law by 4 June 2017. However, the law is required to have effect for accounting periods starting on or after 1 January 2016.

The Directive introduces into EU Law the so-called country-by-country reporting of information by multinationals to tax authorities as foreseen under Action 13 of BEPS[23] by the OECD[24].

Multinational enterprise groups ("**MNE Group**") are required to report country-by-country information to the tax authority of the Member State in which the ultimate parent entities are resident for tax purposes. The country-by-country report has to be made annually.

[23] Base Erosion and Profit Shifting Action Plan.
[24] Organisation for Economic Development and Cooperation.

The reporting requirements apply to MNE Groups with consolidated group revenue exceeding EUR 750 million. An entity will be regarded as a constituent entity of an MNE Group if:

- it is a separate unit that is included in the consolidated financial statements of the MNE Group for financial reporting purposes or would be if equity interests in such a business unit of an MNE Group were traded on public securities exchanges; if it is a permanent establishment of a separate business unit of the MNE Group or if the business unit is excluded from the MNE Group's consolidated financial statements solely on size or materiality grounds;
- it is a business unit that is excluded from the MNE Group's consolidated financial statements solely on size or materiality grounds;
- it is a permanent establishment of a separate business of the MNE Group.

The competent authority of a Member State where the country-by-country report was received shall communicate the country-by-country report, by means of automatic exchange, to any other Member State in which, on the basis of the information in the country-by-country report, one or more constituent entities of the MNE Group of the reporting entity are either resident for tax purposes or subject to tax with respect to the business carried out through a permanent establishment. The country-by-country report shall contain the aggregate information with regard to each jurisdiction in which the MNE Group operates.

For each jurisdiction in which the MNE Group operates, the reporting shall cover:

- profit/loss before income tax ;
- income tax paid and accrued ;
- stated capital ;
- accumulated earnings ;
- number of employees ;
- tangible assets other than cash and cash equivalents.

The companies concerned will have to establish the country-by-country report within twelve months following the last day of the

tax year to which the report relates. The objective of the reporting according to the Directive shall be to assess high-level transfer pricing risks and other risks related to base erosion and profit shifting.

The application of the report by obligation can lead to some technical difficulties that are not solved by the Directive. Notably, issues may arise due to the diverging tax analysis from one country to the other, for example the entities concerned can be regarded as being tax transparent in one state and fully taxable in other states. The difficulty here will be in determining in which country the profit of the firm should be allocated.

Furthermore, multinational companies that are part of the same group may have divergent fiscal years resulting in difficulties in determining which period the subsidiaries with a different accounting year from the rest of the group will need to prepare the information to be reported to the parent company.

For any further information please contact us or visit our website at www.elvingerhoss.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.