NEWSLETTER

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ELVINGER, HOSS & PRUSSEN
LUXEMBOURG LAW FIRM

CONTENTS

ASSET MANAGEMENT AND INVESTMENT FUNDS

1. AIFM - Recent publications

1. Luxembourg AIFM Law

The Law of 12 July 2013 on Alternative Investment Fund Managers ("**AIFM Law**") which implements the AIFM Directive ("**AIFMD**") into Luxembourg law has been applicable since 15 July 2013.

As explained in a previous Newsflash, the AIFM Law not only implements the AIFMD but it also introduces a number of innovations which are designed to improve the legal and regulatory framework applicable to Luxembourg investment funds and fund managers (see our article "Implementation of AIFMD-Tax consequences" on page 16 of this Newsletter). The "product" laws, i.e. the Laws on (i) Undertakings for Collective Investments (UCIs), (ii) Specialised Investment Funds (SIFs) and (iii) Investment Companies in Risk Capital (SICARs) have been amended in order to reflect the new requirements.

A brochure presenting the AIFM Law in consolidation with the AIFMD is available on our website (http://www.ehp.lu/legal-topics/all-legal-topics/legal-topics-detail/article/the-alternative-investment-fund-managers-directive-and-its-implementation-in-luxembourg/).

This brochure can be printed and/or used as an electronic version. The electronic version gives direct access to the corresponding article in the AIFMD, together with links to the AIFM implementing and executing measures (European Commission AIFM delegated regulations and Q&A, ESMA AIFM technical standards, guidelines…).

2. AIFM EU legislative documents table

On 1st October 2013, the European Securities and Markets Authority ("**ESMA**") published the final guidelines on the reporting obligations for alternative investment fund managers ("**AIFM**"). These Guidelines will now be translated into the official languages of the EU and national competent authorities will then have two months from the date of the publication of the translations on ESMA's website, to confirm to ESMA whether they comply or intend to comply with the Guidelines by incorporating them into their supervisory practices.

On the same date, ESMA also published an Opinion which proposes to introduce additional periodic reporting requirements, including such information as Value-at-Risk of alternative investment fund ("**AIF**") or the number of transactions carried out using high frequency algorithmic trading techniques.

The Guidelines and the Opinion can be viewed under:
http://www.esma.europa.eu/page/Investment-management-0

The table below gives an overview of the EU AIFMD-related legislative documents published to date and includes the changes occurred since the publication of our last Newsletter.

Level 1	**Alternative Investment Fund Managers Directive** 2011/61/EU of 8 June 2011
Level 2	Commission Delegated Regulation (EU) 231/2013 of 19 December 2012 supplementing the AIFMD with regard to

	exemptions, general operating conditions, depositaries, leverage, transparency and supervision
	Commission (EU) AIFMD Q&A published in March 2013
	Commission Implementing Regulation (EU) 448/2013 of 15 May 2013 establishing a procedure for determining the **Member State of reference of a non-EU AIFM**
	Commission Implementing Regulation (EU) 447/2013 of 15 May 2013 establishing the procedure for AIFMs which choose to **opt in** under Directive 2011/61/EU
Level 2,5	ESMA revised draft of 13 August 2013 on regulatory technical standards on **types of AIFM** (ESMA/2013/1119)
Level 3	ESMA Guidelines of 3 July 2013 on sound **remuneration** policies under the AIFMD (ESMA/2013/232)
	ESMA Guidelines of 13 August 2013 on **key concepts** of the AIFMD (ESMA/2013/611)
	ESMA Final Report of 1 October 2013 - Guidelines on **reporting obligations** under Article 3 and Article 24 of the AIFMD (ESMA/2013/1339)

3. CSSF Guidance

On 18 July 2013, the CSSF published the Press Release 13/32 which gives practical guidance in relation to the registration or authorisation under the AIFM Law of AIFM established in Luxembourg.

On 19 July 2013, the CSSF updated its FAQs on AIFMD by adding a section on depositary aspects and by updating the list of authorities (44 in total) with which the CSSF has signed cooperation agreements as required under the AIFMD.

4. Guidelines on the model MoU concerning consultation, cooperation and the exchange of information related to the supervision of AIFMD entities

On 18 July 2013, ESMA published Guidelines on the model Memorandum of Understanding ("**MoU**") concerning consultation, cooperation and the exchange of information related to the supervision of AIFMD entities.

This document can be viewed under:
http://www.esma.europa.eu/node/66691

2. Venture capital funds and social funds: EuVECA & EuSEF regulations

On 2 August 2013, the CSSF published the Press Release 13/36 which gives guidance in relation to Regulation (EU) 345/2013 on European Venture Capital Funds ("**EuVECA**") and Regulation (EU) 346/2013 on European Social Entrepreneurship Funds ("**EuSEF**").

The two regulations create two new fund labels "EuVECA" and "EuSEF".

These regulations aim to facilitate capital-raising for start-ups and for companies which develop social business by introducing a European marketing passport for EuVECA and EuSEF managers.

They apply to AIFM which (i) are subject to registration pursuant to Article 3.2 (b) of the

AIFMD[1] and (ii) manage AIF which may qualify as EuVECA or EuSEF. They apply to these registered AIFM on a free basis, i.e. the AIFM have the possibility (but are not obliged) to be compliant with these regulations.

Luxembourg registered AIFM who wish to use the "EuVECA" or "EuSEF" label in relation to the marketing of their funds in the European Union are invited to inform the CSSF of their intention and to provide the CSSF in writing with the information that is required in Articles 14 and 15 of the regulations.

3. UCITS: Q&A on ESMA's Guidelines on ETF 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.

This document can be viewed under:
http://www.esma.europa.eu/content/ESMA%E2%80%99s-Guidelines-ETFs-and-other-UCITS-issues-0

[1] The targeted AIFM are AIFM whose total assets under management do not exceed EUR 500 million and whose portfolio of AIF consists of AIF that are unleveraged and have no redemption rights exercisable during a period of five years following the date of the initial investment in each AIF.

BANKING, INSURANCE AND FINANCE

1. Banks issuing mortgage bonds

The Law of 27 June 2013 relating to banks issuing mortgage bonds (the "**Law of 2013**") has entirely restated the provisions related to banks issuing mortgage bonds (i.e. Section 3 of Chapter 1 of Part 1 of the Law of 5 April 1993 on the financial sector, as amended (the "**Law of 1993**")) by introducing a revised mortgage bank regime in Luxembourg. However, the Law of 2013 maintains the existing special purpose principle that only banks issuing mortgage bonds, as defined in the Law of 1993, are authorised to issue such bonds.

1. Segregation of the activities of the bank issuing mortgage bonds in cases of insolvency

The Law of 2013 has revised the regime of mortgage banks in the case of insolvency proceedings, especially by introducing the possibility of segregating their activities in two different parts in the case of suspension of payment proceedings or judicial liquidation proceedings affecting the mortgage bank. The amendments are inspired by the recent developments in Germany and are designed to enhance bondholders' protection so as to allow favourable ratings to the bonds to be issued.

The first part is constituted by the different categories of covered bonds, including their collateral and reserves deposited with the central bank, each category representing a separate patrimonial compartment. This activity will be maintained and limited to the management of the patrimonial compartments until the complete reimbursement of the holders of the covered bonds. The second part encompasses insolvent activities (which are incidental and ancillary activities of the bank such as provided under Article 12-2 of the Law of 1993) which will be (swiftly) liquidated. In the case of liquidity shortfalls or where the obligations towards the holders of the covered bonds cannot be satisfied, the relevant patrimonial compartment may be declared in suspension of payments or liquidation. The bank will then continue its activity with the remaining compartments other than the activities of the issuing bank of mortgage bonds in situations of insolvency. The bank will maintain its licence for the sole purpose of its limited activity.

The management of the patrimonial compartments representing the limited activity will be entrusted to a judicially appointed administrator. The administrator has to inform the CSSF on a regular basis about the status of its mission and the CSSF, in turn, supervises the compartments of the bank in limited activity.

2. Mutual bonds

In addition to the real estate mortgage bonds, the public sector covered bonds and the movable assets covered bonds, the Law of 2013 has introduced the category of mutual covered bonds, which represent loans secured by other credit institutions being members of an institutional guarantee scheme.

3. Extension to non-OECD Member States collateral

Finally, the geographical field of the authorised investments of banks issuing mortgage bonds was extended in order to allow the granting of loans which are secured by public authorities established in a non-Member State of the OECD but benefiting from an advantageous rating and thus a high solvency.

The Law of 2013 can be viewed under: http://www.legilux.public.lu/leg/a/archives/2013/0111/a111.pdf

2. Supervisory reporting requirements applicable to credit institutions

The CSSF Circular 13/570 (29 July 2013) aims to draw the credit institutions' attention to the recent developments with respect to the supervisory reporting requirements applicable as from 2014 in the European Union.

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

The draft of the ITS is currently being reviewed by the European Commission. Once adopted, the ITS on Supervisory Reporting will be published in the form of an European Regulation directly applicable in all EU Member States.

3. The Law of 12 July 2013 introducing Professionals of the Insurance Sector

By a law of 12 July 2013 (the “**Law**”), Luxembourg introduced a new category of professionals acting in the insurance sector, namely the Professionals of the Insurance Sector (“**PSA**”). The introduction constitutes a response to a need felt by small- and medium-sized insurance companies, having difficulties meeting certain organisational regulatory requirements. Such companies are now allowed to outsource certain functions to a duly licensed PSA. The Law anticipates the implementation of the Solvency II[2] rules, in particular, by introducing service providers that offer governance-related services to insurance and reinsurance undertakings.

The new PSA regime is based on the regime applicable to the professionals of the financial sector (“**PSF**”) laid down in the Law of 5 April 1993 relating to the financial sector. Just like PSF, PSA must comply with minimum capital requirements, must have their central administration in Luxembourg, must put adequate internal governance arrangements in place and must have all of their accounting records and documents stored in Luxembourg. Their annual accounts must be reviewed by an external auditor, listed in the public register of approved statutory auditors (*réviseurs d’entreprises agréés*) and their management must have the required professional standing and experience.

PSA are submitted to anti-money laundering provisions and also to professional secrecy, which allows insurance and reinsurance undertakings to communicate certain confidential information to PSA, under an outsourcing service agreement.

There are eight different categories of PSA:

1. Management companies of captive insurance undertakings (this type of PSA provides day-to-day management services to one or more captive insurance undertakings)
2. Management companies of run-off insurance undertakings (this type of PSA provides day-to-day management services to one or more insurance undertakings that have ceased to accept subscriptions for new insurance contracts)
3. Management companies of reinsurance undertakings

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[2] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II).

4. Management companies of pension funds that are subject to the supervision of the insurance regulator, the *Commissariat aux Assurances*
5. Actuarial service providers
6. Management companies of insurance portfolios
7. Providers of governance-related services for insurance and reinsurance undertakings
8. Insurance claim handlers (this type of PSA provides services relating to the indemnification of beneficiaries of insurance contracts).

Certain categories of PSA are allowed to provide not only those services covered by their licence, but also others that the Law authorises them to offer, without having to apply for an additional licence. For example, insurance claim-handling services can also be provided by insurance undertakings, management companies of captive and run-off insurance undertakings as well as management companies of insurance portfolios. Furthermore, management companies of captive and run-off insurance undertakings (listed under points 1 and 2) are allowed to provide insurance portfolio management services and are also authorised to offer ancillary domiciliation services to clients that are captive and run-off insurance undertakings, provided that their authorised manager holds the required professional qualification.

Management companies of insurance portfolios (listed under point 6) are defined as companies whose activity consists in carrying out the day-to-day management of insurance portfolios of one or more insurance company. They must have an in-house actuarial department or benefit from the assistance of an actuarial service provider.

Each PSA must be managed by a person duly licensed by the Minister of Finance. This requirement is also applicable to insurance undertakings, reinsurance undertakings, Luxembourg branches of non-EU insurance and reinsurance undertakings, pension funds and brokerage firms, which must all have an approved manager (*dirigeant agréé*). The Law gives a list of licences of approved managers that are available, and details the requirements relating to the professional standing and experience that those persons wishing to be approved must fulfill.

Apart from introducing the concept of PSA and a list of approved managers, the Law also modifies the legislation on insurance intermediation, clarifying certain points. Professionals providing insurance or reinsurance mediation are not regrouped in a PSA category, as they are subject to specific legislation implementing EU directives, relating in particular to consumer protection.

At this stage, the professionals licensed as PSA cannot benefit from an EU passport, but are not prevented from providing their services, from Luxembourg, to clients located outside of Luxembourg. The new PSA categories are not being presented as competitors to the existing PSF, but rather as completing the catalogue of professionals carrying out activities in the financial and insurance sector that shall be subject to supervision by a regulatory authority.

The Law can be viewed under: http://www.legilux.public.lu/leg/a/archives/2013/0129/a129.pdf

4. Short Selling: Law of 12 July 2013

On 1 November 2012, Regulation (EU) 236/2012 on Short Selling and Certain Aspects of Credit Default Swaps ("**EU Regulation on Short Selling**") entered into force - see our Newsletter of November 2012.

By the Law of 12 July 2013 on short selling of financial instruments (the "**Law**"), Luxembourg authorities confirmed that in the context of the application of the EU

Regulation on Short Selling, the CSSF is the competent authority in Luxembourg and has all the supervisory and investigatory powers that are necessary for the exercise of its functions.

The Law also establishes the penalties and administrative measures which shall apply in case of infringements of the EU Regulation on Short Selling.

The Law can be viewed under:
http://www.legilux.public.lu/leg/a/archives/2013/0126/a126.pdf

5. Determination of stressed value at risk - Determination of incremental default and migration risk charge

On 4 September 2013, the CSSF published Circular 13/572 on the determination of Stressed Value at Risk (sVaR) and determination of incremental default and migration risk charge. The Circular applies to investment firms and credit institutions.

CAPITAL MARKETS, STRUCTURED FINANCE AND SECURITISATION

1. Securitisation: CSSF's refusal to grant a licence

On 21 August 2013, the Luxembourg Administrative Court of Appeal confirmed the judgment of the Luxembourg Administrative Court of First Instance concerning the CSSF's refusal to grant a licence to a Luxembourg company ("**Luxco**") as a regulated securitisation undertaking under the Luxembourg Law of 22 March 2004 on securitisation (the "**Law of 2004**").

Amongst the reasons given by the CSSF to justify its refusal to register the Luxco on the official list of regulated securitisation undertakings, the following may be pointed out:

(a) Need for prior authorisation

Article 19 of the Law of 2004 provides that « *securitisation undertakings which issue securities to the public on a continuous basis* (*«authorised securitisation undertakings »*) *must be authorised by the CSSF to exercise their activities*».

Luxco challenged the CSSF's interpretation according to which approval should be obtained prior to the issue of bonds, arguing that this requirement was not the result of any legal provision.

In its ruling, the Administrative Court specifies that the Luxembourg legislator intended[1] to give the terms "*issue to the public*" and "*on a continuous basis*" the same meaning as those deriving from Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 regarding access to the activity of credit institutions and the exercise thereof, which provides specifically in its Article 6 that "*Member States require that credit institutions obtain the authorisation prior to the commencement of their activities*".

Furthermore, the Court specifies that this "*prior to*" requirement derives from Article 9 of the Law of 2004 which expressly provides that "*securitisation undertakings (…) must be authorised (…) to exercise their activities*".

(b) Concepts of "*continuous issue*" and "*to the public*"

The two concepts of, "*continuous issue*" and "*to the public*", which within the context of the Law of 2004 determine whether a securitisation undertaking must apply for a licence, are not defined in either the Law of 2004 or in Directive 2006/48. Moreover, the Court points out that in the absence of any Community case-law on the subject, it is for the competent national authority (in this case the CSSF) to interpret these terms and apply them in each individual case on the basis of the specific factors of each file.

In this particular case, the Court points out that, as it appears from the facts of the file, the distribution of bonds was addressed largely towards individual investors without any restriction to a limited and predefined circle of investors. The Court specifies that the fact that the distribution was carried out largely through institutional investors acting as intermediaries has no impact. Indeed, according to the Court, the term "*to*" (*à destination de*) comprised in Article 19 of the Law of 2004 "*should be interpreted, from a realistic and effective economic point of view, as targeting the effective end-investor*".

[1] Pursuant to the commentary of the *Chambre de Députés* of the provision of Article 19 of the Law of 2004.

Consequently, the Court finds that the criterion "*to the public*" is fulfilled in this particular case.

With regard to the criterion "*continuous issue*" the Court deems that this is also clearly fulfilled given the numerous and repeated issues, and as such there is no need to further analyse the interpretation of this criteria.

(c) Need for adequate organisation and adequate resources

Article 20 (1) of the Law of 2004 provides that « *securitisation companies and management companies of securitisation funds must have an adequate organisation and adequate resources to exercise their activities and be supervised by the CSSF* ».

In this particular case, the duties of administrative agent of the securitisation company, originally entrusted to a Luxembourg company, had been transferred, without the CSSF's approval, to an Irish company. The CSSF considered that following the take-over of administrative agent duties by an Irish service provider, the securitisation company no longer had the adequate organisation and resources in Luxembourg for it to carry out its supervision, as provided by the Law of 2004.

The management of Luxco argued that the Law of 2004 contains no requirement as to the location of the registered office of the administration agent and, in making the relocation a criterion for assessing the quality of the organisation and whether the resources were adequate for its supervision, the CSSF has violated the principle of freedom to provide services. The plaintiff also asked the Court to seek a ruling on this point from the Court of Justice of the European Union.

The Court notes that the transfer of the duties of paying agent and registrar agent had an impact on the substance of the Luxco. Furthermore, the Luxco never explained how it would ensure that the CSSF could perform its legal supervision duties (particularly through the communication of information or carrying out on-site investigations) as laid down in Article 24 of the Law. In addition, this delegation of services occurred without the CSSF's approval which is clearly contrary to its supervision duty.

Given that on appeal the plaintiff no longer has an administrative agent, the Court finds that the company does not have adequate organisation or resources and deduces that the question of the possibility or not of appointing an administrative agent established in another Member State is no longer relevant.

(d) Activity incompatible with the status of a securitisation undertaking

The Court agrees with the CSSF's position in that a loan transaction to another company using funds raised from investors goes beyond the corporate object of a securitisation company, as laid down in Article 1 of the Law of 2004.

(e) Suspension of payments: application in case approval is refused

Following its decision to refuse approval, the CSSF informed the company that an automatic suspension of payments regime would be applied, and of the establishment of a supervisory commissioner, as provided in Articles 28 and 29 (1) of the Law of 2004.

The plaintiff challenged the application of Article 28 in this case claiming that these provisions were only applicable in the case of withdrawal from the list of securitisation undertakings but not in the case of an initial refusal of approval by the CSSF.

The Court confirms the CSSF's position by specifying that *"the suspension of payments regime and the establishment of a supervisory commissioner are only excluded in the event of an initial refusal of approval taken against an undertaking that has not yet commenced the activity which is the subject of the application and that this regime shall, however, be applied as soon the existence of ongoing operations requires the protection of investors and contracting parties".*

The complete decision can be viewed under the website:
http://www.ja.etat.lu/31952C.doc.

2. Derivatives – EMIR

1. CSSF Press Release 13/26

On 24 June 2013, the CSSF issued Press Release 13/26 to remind of the obligations which financial counterparties (clearing obligation and exchange of collateral, reporting requirements to a trade repository and implementation of risk management requirements for OTC derivatives which are not centrally cleared) and non-financial counterparties (implementation of operational risk management requirements and reporting obligations to a trade repository and for those which are above the clearing threshold, clearing obligation and exchange of collateral) must fulfill.

The CSSF also draws the concerned entities' attention to the timing of several upcoming EMIR obligations, being noted that some of the dates are not definitive yet.

2. Postposal of the reporting date for ETDs

On 6 August 2013, ESMA proposed to the EU Commission an amendment to Article 5 of the Commission Implementing Regulation (EU) 1247/2012 (ITS on reporting) (ESMA/2013/1087) to postpone the reporting date for exchange traded derivatives ("**ETDs**") to January 2015 (rather than the currently foreseen date of January 2014).

Indeed, ESMA pointed out that Article 5 specifies the reporting start dates of derivatives to trade repositories but does not include a specification of exchange traded derivatives. This specification would be useful as there is currently a risk that reporting of ETDs is not harmonized unless further regulatory guidance is issued. The EU Commission has three months to decide whether to endorse ESMA's draft implementing technical standards.

3. Updated Q&A

On 5 August 2013, ESMA updated its Q&A (last update was published on 4 June 2013) in order to promote common supervisory approaches and practices in the application of EMIR. It provides responses to questions raised by the general public, market participants and competent authorities in relation to the practical application of EMIR (ESMA/2013/1080).

The updated Q&A can be viewed under:
http://www.esma.europa.eu/content/Implementation-Regulation-EU-No-6482012-OTC-derivatives-central-counterparties-and-trade-rep

3. Prospectus: disclosure requirements for convertible and exchangeable debt securities

On 8 August 2013 was published in the OJEU Commission Delegated Regulation (EU) 759/2013 of 30 April 2013 amending Regulation (EC) 809/2004 as regards the disclosure requirements for convertible and exchangeable debt securities.

The purpose of this Regulation is to extend the application of the share registration document schedule (currently applicable to shares and other transferable securities equivalent to shares) to other securities giving access to the capital of the issuer by way of conversion or exchange where the underlying shares are not already admitted to trading on a regulated market.

Consequently, when securities with warrants or derivative securities, debt securities exchangeable or convertible into shares will be issued by the issuer of the security or by an entity belonging to its group and that these underlying shares are not already admitted to trading on a regulated market, investors shall receive the same information on the ability of the issuer of the underlying shares to continue as a going concern and on its indebtedness compared to its capitalization as would be available when investing in shares directly.

This Regulation shall not apply to the approval of a supplement to a prospectus or base prospectus where the prospectus or base prospectus was approved before the entering into force of the Regulation (Article 3).

CORPORATE AND M&A

Reform of the Commission of accounting standards: Law of 30 July 2013

On 2 October 2013, the Law of 30 July 2013 was published reforming the Commission of accounting standards (the "**Law**") and amending various provisions relating to the accounting and annual accounts of undertakings as well as consolidated accounts of certain forms of companies. The Law modifies various provisions of (i) the Commercial Code, (ii) the Law of 19 December 2002 relating to the register of commerce and companies as well as to the accounting and annual accounts of undertakings and (iii) the Law of 10 August 1915 on commercial companies.

In particular, the Law includes (i) the reform of the Commission of accounting standards which will now exist under the form of an economic interest group (*groupement d'intérêt économique*) with extended powers, (ii) the determination of the distributable reserves for undertakings using the method of fair value and (iii) various amendments and clarifications relating to the accounting of annual accounts and consolidated accounts.

INFORMATION AND COMMUNICATION TECHNOLOGIES

1. A new right of claim of data in the context of outsourcing

The law amending Article 567 of the Commercial Code, awaited since last year, was finally voted on 9 July 2013 (the "**Law**"). This Law substantially modifies Article 567 of the Commercial Code in order to adapt it to the new situations deriving from the latest technology developments.

Article 567 dealing with property claims in the case of a third party's bankruptcy now states that tangible and intangible fungible property in the bankrupt's possession at the time of the bankruptcy may be claimed by the person who has entrusted this property to the bankrupt or by their owner, provided that this property complies with certain requirements. Prior to that, only "goods", as tangible property, were subject to such a claim which, consequently, cast into doubt the possibility for the owner to claim these data.

This reform comes at a time when offers of outsourcing (including cloud computing) are growing involving numerous data transfers towards third party providers or suppliers. Conscious of these new practices, Luxembourg wished to establish a favourable legal framework enabling, in particular, companies which choose to use this type of service to be assured of being able to claim their data in the case of bankruptcy of the provider or supplier.

The data can be claimed from the bankrupt provided that they can be separable from other intangible assets at the time of the bankruptcy. Which means, in the context of outsourcing services, that company's data must be separable from the data of another company also hosted in the supplier servers.

This new right of claim can be analysed as a right of reversibility of data which had not previously been regulated by law. Nonetheless, this right of claim is only established for the moment in the event of bankruptcy of the depository. Companies can continue to claim their data pursuant to a reversibility clause, up to the end of the service contract, terminated for any reason whatsoever.

The Law can be viewed under:
http://www.legilux.public.lu/leg/a/archives/2013/0124/a124.pdf

2. The notification procedure of personal data breaches

On 24 June 2013, European Commission adopted Regulation (EU) 611/2013 regarding the measures applicable to the notification of personal data breaches under Directive 2002/58/EC (the "**Regulation**"), which came into force on 25 August 2013 and which is directly applicable in all Member States.

Indeed, pursuant to Article 4 of Directive 2002/58/EC[3] ("**E-privacy Directive**"), "*In the case of a personal data breach*[4]*, the provider of publicly available electronic*

[3] The Directive 2002/58/EC has been amended by the Directive 2009/136/EC of 25 November 2009 modifying, in particular, Article 4 in respect to "Security processing".

[4] Pursuant to Article 1(i) of the Directive 2002/58/EC: « personal data breach means a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed in connection with the provision of a publicly available electronic communications service in the Community."

communications services shall, without undue delay notify the personal data breach to the competent national authority". In addition, *"When the personal data is likely to adversely affect the personal data of privacy of a subscriber or individual, the provider shall also notify the subscriber or individual of the breach without undue delay*".

The E-privacy Directive supplemented by the Regulation provides a strict legal framework in order to ensure coherent implementation of the technical measures related to personal data breaches across all Member States.

1. Notification to the competent national authority

The Regulation details the purpose of the notification, the period of notification and the information to be included in this notification. Thus, pursuant to Article 2 of the Regulation:

- all data breaches are concerned ;
- the provider has to notify the personal data breach to the national authority no later than 24 hours after the detection of a personal data breach ;
- the notification shall contain information regarding the identification of the provider, initial information on personal data breach, possible additional notification to subscribers and possible cross-border issues.

Moreover, the Regulation obliges national authorities to implement "*electronic means for notification of personal data breaches and information on the procedures for its access and use*."

In Luxembourg, electronic communications service providers have been obliged to notify the National Data Protection Commission (*Commission Nationale pour la protection des données,* "**CNPD**") of all personal data breaches which have occured in their systems since 2011[5]. In this regard, the CNPD did not wait for the Regulation to come into force to implement an electronic procedure enabling the providers to proceed to this notification. Indeed, the CNPD provides an electronic form which is available on its website. However, it falls, now, to the CNPD to supplement this form in order to comply with the new requirements covered by the abovementioned Regulation and to enhance the information related to this notification in order for the providers to have easier access and use of it.

2. Notification to the subscriber or the individual

In certain cases, providers have to notify the subscriber or the individual of a personal data breach when it is "*likely to adversely affect the personal data or privacy*". This notification shall be made without undue delay.

The Regulation provides an exemption to this principle and specifies that, in certain circumstances, the provider is entitled to postpone the notification to the subscriber or the individual upon the agreement of the national authority. Indeed, when personal data breaches require investigation, and when the notification to the subscriber or the individual "*may put at risk the proper investigation of the personal data breach*" such as criminal investigation, the disclosure to the subscriber or the individual by the provider may be postponed.

[5] The "E-privacy Directive", as amended (see footnote 3), was effectively transposed into Luxembourg Law on 28 July 2011 modifying the Law of 30 May 2005 regarding electronic communications.

TAX

1. Implementation of AIMFD - tax consequences

The Law of 12 July 2013 transposing the Directive 2011/61/EU on alternative investment fund managers ("**AIFMD**") was published in the *Mémorial* on 15 July 2013 (the "**AIFM Law**"). The AIFM Law also includes several tax measures which improve the tax regime of Luxembourg investment structures.

1. Tax treatment of the "*société en commandite*" (Limited partnership)

In addition to the implementation of the AIFMD, Luxembourg took the opportunity to improve its competitiveness by modernising the regime of certain types of companies such as the *société en commandite simple* ("**SCS**") and by introducing the *société en commandite spéciale* ("**SCSp**"). The SCSp is quite similar to the Anglo-Saxon limited partnership whose success can be attributed to its flexibility and its tax transparency. The main difference between SCS and SCSp is that the SCS has a legal personality whereas the SCSp has no legal personality. However, in any case the SCSp has its own assets and liabilities.

From a tax perspective, the SCS and SCSp (together referred to as the "**LPs**") are:

- Tax transparent for income tax and net wealth tax purposes. Consequently, they should not be entitled to benefit from tax treaties, however their partners can claim access to those tax treaties.
- Before the AIFM Law, Luxembourg SCS were subject to the Luxembourg municipal business tax ("**MBT**") as soon as the general partner was a corporation, (at the rate of 6.75% in the city of Luxembourg), as a consequence, the SCS lost part of their tax transparency. The AIFM Law has now solved this issue and all LPs, i.e. SCS or SCSp, acting as an investment vehicle, remain fully tax transparent without being subject to the MBT as long as the GP does not hold more than 5% of the partnership interest, without the LP itself carrying out a business activity. However, an LP will not be subject to this rule when incorporated under the form of a venture capital company ("**SICAR**") or a specialised investment fund ("**SIF**").

One more important feature is that the Luxembourg LP can be used by regulated or non-regulated entities. The result is that SICAR, SIF or unregulated investment vehicles can be established under the legal form of an SCS/SCSp.

2. The carried interest tax regime

The AIFM Law introduces a favourable tax regime for "carried interest" (as defined therein) realised by employees of management companies of AIFs or AIFM ("**Qualifying Persons**").

Under this new regime, Qualifying Persons may benefit from a reduced rate corresponding to 25% of the normally applicable personal income tax rate, leading to a maximum tax rate of 10.7% or 10.9% providing the following conditions are met:

- The Qualifying Person has not been resident in Luxembourg nor been subject to non-resident Luxembourg taxation in the five years prior to the AIFM Law entering into force;
- The Qualifying Person must be tax resident in Luxembourg either within the first year following the entry into

force of the AIFM Law or within five years thereafter;

- The new provisions apply to only one category of carried interest which is profit-share (*intéressement aux plus-values*) attached to the capital gains made by the AIF granted to Qualifying Persons. In this respect, those Qualifying Persons may be paid carried interest only if the other investors have recouped their initial capital contributions beforehand; and
- No advance payments for carried interest must have been paid to the Qualifying Person.

The tax incentive applies only for a period of ten years after the year during which the relevant professional activity started in Luxembourg.

The above regime does not apply to capital gains derived from the sale of shares or units in the AIF. Such gains are subject to ordinary tax provisions. In any case, this regime provides for a specific treatment for specific situations and does not challenge the existing structuring of carried interest. The carried interest scheme can still be structured outside this regime.

3. VAT exemption applicable

The AIFM Law has amended and extended the scope of the VAT exemption applicable to the management of investment funds.

The exemption now covers the management of:

- UCIs and UCITS, SIFs, SICARs, Luxembourg-regulated pension funds (ASSEP, SEPCAV and pension funds regulated under insurance law);
- funds comparable to funds listed above from other EU Member States and regulated in another EU Member State;
- Luxembourg securitisation vehicles; and
- AIFs.

4. Exclusion of Luxembourg tax liability for foreign AIFs

Article 214 of the AIFM Law specifies that AIFs established outside Luxembourg will not be subject to Luxembourg corporate income tax, municipal business tax or net wealth even though their centre of effective management or their central administration is located in Luxembourg.

2. Tax treaties news

1. Saudi Arabia

On 7 May 2013, Luxembourg and Saudi Arabia signed an income and capital tax treaty and a protocol in Riyadh.

The treaty is generally based on the 2010 OECD Model Convention. However, there are a few exceptions, mainly in the definitions of permanent establishments, business profits, royalties, independent personal services and professors and researchers. The treaty does not contain a non-discrimination clause. However, the contracting States will negotiate the inclusion of such a provision if Saudi Arabia introduces an income tax on its residents.

The maximum withholding tax rates are:

- 5% on dividends;
- 0% on interests;
- 7% on royalties, but 5% if royalties are paid for the use of, or the right to use, industrial, commercial or scientific equipment.

The protocol confirms that an undertaking for collective investment is to be considered as a resident of the contracting State in which it is established and as beneficial owner of the income it receives. This means that a SICAV/F has treaty access.

2. Japan

On 19 July 2013, Luxembourg and Japan signed an amending exchange of notes to the Luxembourg double tax Treaty of 5 March 1992, as amended by the protocol on 25 January 2010. It results from these notes that the family wealth management company, i.e. "*société de gestion de patrimoine familial*" ("**SPF**") is not eligible for treaty protection.

The protocol entered into force on 13 August 2013 and has been effective since 18 August 2013.

3. Philippines

According to the Department of Foreign Affairs of the Philippines, the latter intends to negotiate for an exchange of information agreement with Luxembourg. Also, the Philippines have agreed that a treaty on avoidance of double taxation is "mutually beneficial" and "investor-friendly".

4. Treaties and amending protocols ratified and published

On 14 June 2013, the Luxembourg Parliament ratified several protocols and treaties. Please also see our Newsletter of March 2013 and Newsletter of June 2013 on this topic.

4.1 Kazakhstan

Luxembourg ratified the amending protocol signed on 3 May 2012 by Luxembourg and Kazakhstan. This amending protocol brings a few changes in the treaty signed on 26 June 2008. Specifically, the definition of permanent establishments is restated and applies also to construction or installation projects, supervisory services, provision of services (including consultancy services) which are delegated to employees or other personnel appointed by the enterprise of a contracting State, under the condition that they are held for more than twelve months in the other contracting State. A new Article 25 on the exchange of information is introduced in line with Article 26 of the 2010 OECD Model Convention.

The protocol should enter into force in 2014 if the instruments of ratification of the treaty itself are exchanged this year.

4.2 Macedonia

Luxembourg ratified the treaty with Macedonia signed on 15 May 2012 which generally follows the 2010 OECD Model Convention. It contains the following maximum withholding tax rates which are:

- 15% on dividends reduced to 5% if the beneficial owner is a company (except partnerships) which directly holds at least 25% of the capital of the paying company;
- 0% on interests;
- 5% on royalties.

The treaty entered into force on 23 July 2013.

4.3 Seychelles

Luxembourg ratified the treaty with the Seychelles signed on 4 June 2012. It contains the following maximum withholding tax rates:

- 15% on dividends reduced to 0% if the beneficial owner is a company (except partnerships), which directly holds a minimum of 25% of the capital of the company paying the dividends;
- 5% on interests, but 0% in certain cases (see Article 11 (3));

- 5% on royalties.

Article 25 of the treaty relating to the exchange of information is in line with the 2010 OECD standards.

The treaty entered into force on 19 August 2013.

4.4 Republic of Korea

Luxembourg ratified an amending protocol signed on 29 May 2012 to the treaty between Luxembourg and the Republic of Korea concluded on 7 November 1984. The protocol has not yet been ratified by Korea.

The following provisions of the treaty have been amended:

- 15% on dividend distributions reduced to 10% tax if the beneficial owner is a company (except partnerships) holding 10% (instead of the former 25%) of the capital of the distributing company;
- 10% on interest payments, reduced to 5% if the recipient is a bank;
- 10% on royalty payments, reduced to 5% if royalties are paid for the use of, or the right to use, industrial, commercial or scientific equipment.

Article 26 of the treaty concerning the exchange of information aligns with Article 26 of the 2010 OECD Model Convention.

Based on the amending protocol, a SICAV/F may benefit from treaty protection.

4.5 Switzerland

Luxembourg ratified the amending protocol signed on 11 July 2012 amending the double tax treaty between Switzerland and Luxembourg signed on 21 January 1993. The amending protocol entered into force on 11 July 2013. Article 26 of the treaty regarding the exchange of information has been restated in order to be in line with the OECD Model Tax Convention. For instance, the term “foreseeable relevance” which has to be interpreted as broadly as possible, is now included. Moreover, “fishing expeditions” in the exchange of information are prohibited.

4.6 Tajikistan

Luxembourg ratified the treaty signed with Tajikistan on 9 June 2011. It provides the following maximum withholding tax rates:

- 15% on dividends, reduced to 0% if the beneficial owner is a company (except partnerships) which directly holds at least 10% of the capital of the distributing company, for an uninterrupted period of a minimum of 12 years;
- 12% on interests, reduced to 0% in several case (see Article 11 (3));
- 10% on royalties.

The treaty is in line with OECD standards, concerning the exchange of information.

The treaty entered into force on 27 July 2013.

4.7 Malta

Luxembourg ratified the protocol of 30 November 2011 amending the double tax treaty between Luxembourg and Malta. It entered into force on 11 July 2013. The protocol amends the provision on the exchange of information which now aligns with Article 26 of the 2010 OECD Model Tax Convention.

4.8 Romania

Luxembourg ratified the protocol of 4 October 2011 amending the double tax treaty between Luxembourg and Romania concluded on 14

December 1993. It entered into force on 11 July 2013. The protocol amends the provision on the exchange of information which now aligns with Article 26 of the 2010 OECD Model Convention.

4.9 Lao People's Democratic Republic

Luxembourg ratified the Laos – Luxembourg Income and Capital Tax Treaty signed on 4 November 2012 which is in line with the OECD Model Tax Convention.

4.10 Sri Lanka

Luxembourg ratified the Sri Lanka – Luxembourg Income and Capital Tax Treaty signed on 31 January 2013. It provides the following maximum withholding tax rates:

- 10% on dividends, but 7.5% if the beneficial owner is a company (except partnerships) which directly holds at least 25% of the capital of the distributing company;
- 10% on interests;
- 10% on royalties.

The treaty is in line with OECD standards, concerning the exchange of information.

4.11 Germany

Luxembourg ratified the new Germany – Luxembourg Income and Capital Tax Treaty signed on 23 April 2012 which will replace, once in force and effective, the Germany – Luxembourg Income and Capital Tax Treaty signed on 23 August 1958.

4.12 Poland

Luxembourg ratified the amending protocol signed on 7 June 2012 to the Poland – Luxembourg Income and Capital Tax Treaty concluded on 14 June 1995.

The protocol entered into force on 25 July 2013.

5. Russia

In a letter dated 11 July 2013, the Russian Ministry of Finance brought clarifications on the treatment of interest paid to a non-related Luxembourg resident based on the Luxembourg Russia double Tax Treaty signed on 28 June 1993. In this respect, any interest arising in Russia paid to a Luxembourg resident would be exempt in Russia if the Luxembourg resident provides the Russian tax authorities with a certificate of residence to confirm his tax residency in Luxembourg.

6. Belgium

The amending protocol to the double tax treaty between Luxembourg and Belgium entered into force on 25 June 2013. The protocol introduces a new Article 26 on the exchange of information which is in line with OECD standards.

7. Mongolia

As a result of a meeting between Luxembourg and Mongolia held on 30 July 2013 in Ulan-Bator, Mongolia, the two States intend to start negotiations to conclude a new double tax treaty. The initial treaty signed on 5 June 1998 has indeed been terminated by Mongolia in accordance with Article 30 of the treaty and will no longer apply as from 1 January 2014.

8. Uruguay

On 27 August 2013, Luxembourg and Uruguay initialled a double tax treaty.

3. Minimum corporate income tax

On 1 August 2013, the Luxembourg tax authorities issued a circular letter (the "**Circular**") (Circulaire L.I.R. 174/1) with the aim of clarifying certain aspects of the minimum income tax for companies (the "**Minimum Tax**") (for more details please refer to EHP New Tax Measures January 2013). The Minimum Tax is the minimum amount of corporate income tax to be paid by Luxembourg corporate taxpayers. As from 2013, the Minimum Tax is extended to all types of companies.

Two different regimes now coexist:

- For Luxembourg collective entities for which qualifying holding and financing assets exceed 90% of their balance sheet ("**Holding companies**"), the minimum income tax is a flat tax of EUR 3,210 as for 2013 (including the 7% unemployment fund surcharge);
- For all other companies, the Minimum Tax will be determined following a progressive tax scale based on the total balance sheet of the company. In such a case, the Minimum Tax will range from EUR 535 to EUR 21,400 (including the 7% unemployment fund surcharge).

Furthermore, the Circular confirms and clarifies a series of uncertainties:

1. Scope of the Tax

The Minimum Tax is only applicable to collective entities having their registered office or their central administration in Luxembourg. The Circular excludes from its scope those companies exempt from corporate income tax (e.g. collective investment schemes, family wealth management companies).

2. Total balance sheet of the company

In international situations, the Circular states that the balance sheet of the company should not include assets which are taxable in another State according to a double tax treaty.

In this respect, the Circular clarifies the situation of Luxembourg Property companies. It specifies that assets and notably real estate assets and properties whose income is not taxable in Luxembourg according to a double tax treaty must not be part of the balance sheet when determining the Minimum Tax due.

The Circular also specifies that the same principle will apply to a foreign Luxembourg permanent establishment.

According to the Circular, the method used to determine the appropriate Minimum Tax due is as follows:

i. assets taxable only in the other contracting State should be eliminated from the balance sheet of the company;
ii. based on the restated balance sheet an analysis should be made to see if the company qualifies as a Holding Company or not, and then determine the Minimum Tax.

3. Tax consolidation

The Circular explains in detail how to determine the Minimum Tax due and specifies that the maximum amount of Minimum Tax should not exceed EUR 20,000.

4. The 90% ratio for Holding Companies

Interest in transparent entities will be taken into account to determine if the Luxembourg entity qualifies as a Holding Company.

5. Liquidation and absorption

The full amount of Minimum Tax will be due even if the company ceases to exist during the relevant accounting year, no pro rata should be applied.

6. The Minimum Tax is an advance on corporate income tax

The Minimum Tax paid is an advance which can be offset against future Luxembourg corporate income tax liabilities (without considering the municipal business tax). However, this advance payment will not be reimbursed by the Luxembourg tax authorities if it cannot be offset.

7. Tax credit and withholding taxes

Tax credit may not lower the Minimum Tax due. However, Luxembourg and foreign withholding taxes may be credited against the Minimum Tax.

4. Changes of rules for the right of deduction of the input VAT

1. Circular letter from the Luxembourg VAT authorities

In a circular letter 765 dated 15 May 2013 (the "**Circular**"), the Luxembourg VAT authorities (*Administration de l'enregistrement et des domaines*) changed the rules applicable to the determination of the amount of input VAT which is deductible, for those taxpayers which do not only carry out activities enabling full VAT deduction, as is the case for taxpayers of the financial industry.

The Luxembourg VAT Law of 12 February 1979 provides as a general rule that in that case, the taxpayer shall determine its right to deduct VAT by reference to a fraction determined by dividing its turnover deriving from activities giving the right to deduct the input VAT by its total turnover. However, the taxpayer is entitled to request from the VAT authorities the possibility to determine its right to deduct the input VAT according to the real allocation of the relevant goods or services triggering the input VAT. The Circular provides for a total change of this rule by establishing that the exception (i.e. taking into account the real allocation of the goods and services) becomes the principle, and the fraction mechanism is limited to the general expenses. Consequently, the taxpayers are requested to keep analytic accounting to be able to cope with this direct allocation.

Considering that the Circular provides a system which is the opposite of the VAT law, it would be relevant for the VAT authorities to provide further clarification on this Circular.

2. European Court of Justice case C-388/11 Le Crédit Lyonnais

On 12 September 2013, the European Court of Justice ruled the important question of the determination of the right to deduct VAT for banks having their registered office in one EU Member State and branches in other EU Member States and in countries other than EU Member States.

Generally, banks do not only carry out activities giving the right to deduct the input VAT. Accordingly, as mentioned above, the determination of the right to deduct the input VAT can be made either (i) by using a fraction equal to the turnover deriving from activities giving the right to deduct the input VAT divided by its total turnover; or (ii) by directly allocating the goods and services triggering the input VAT to the correct activity.

As per a geographical approach for a tax payer having branches in various jurisdictions, the Court has clearly ruled the solutions of the different situation as follows:

(i) The head-office may not take into account the turnover of its branches established in other Member States;
(ii) The head-office may not take into account the turnover of its branches established in third party States;
(iii) The turnover of a branch established in another country than the head office cannot be used to determine the fraction of the deductible VAT.

5. VAT: Adoption of special measures to combat fraud

1. Quick reaction mechanism

On 26 July 2013, the OJUE published Directive 2013/42/UE amending Directive 2006/112/EC on the common system of value added tax, as regards a Quick Reaction Mechanism ("**QRM**") against VAT fraud.

The amendment consists of empowering a Member State, in cases of imperative urgency (and under a certain procedure contained therein) to designate the recipient as the person liable to pay VAT as a QRM special measure to combat sudden and massive fraud liable to lead to considerable and irreparable financial losses.

2. Reverse charge mechanism

Within the same context, on 26 July 2013, the OJUE published Directive 2013/43/UE amending Directive 2006/112/EC on the common system of value added tax as regards an optional and temporary application of the reverse charge mechanism in relation to supplies of certain goods and services susceptible to fraud.

This Directive authorises, until 31 December 2018 and for a minimum period of two years, Member States to provide that the person liable for payment of VAT is the taxable person under the so-called "reverse charge mechanism" for an extended list of goods or services listed in the revised Article 199bis of the Directive 2006/112/EC.

6. Luxembourg estate management foundation (*fondation patrimoniale*)

Foundations have a long-standing tradition in Luxembourg. Their legal framework dates back to 1928. The existing framework is confined, however, to non-profit institutions which, essentially by means of income from capital received at or after the creation, aim at philanthropic, social, religious, scientific, artistic, pedagogic, sports or touristic objectives. In addition, the constitution of the foundation is subject to governmental approval to ascertain its non-profit character.

As a result, the Luxembourg foundation governed by the Law of 21 April 1928, has not become a rival to institutions known in other countries such as the Dutch Stichting or the Liechtenstein Stiftung, all of which may have multiple purposes including asset management and finance.

This might be about to change.

On 22 July 2013, the Luxembourg government submitted a Bill 6595 introducing the estate management foundation (*fondation patrimoniale*) (the "**Bill 6595**").

The major difference to existing Luxembourg estate management entities (such as the family wealth management company, the Soparfi, the SICAR, etc.) is the fact that the *fondation patrimoniale* is a legal entity without any members or shareholders. It is an orphan entity.

The objective of the foundation, which is reserved to private individuals or wealth management entities, is the administration and management of an estate for the benefit of one or more beneficiaries, excluding any commercial activity. The foundation might, however, have some charitable or non-profit activities as long as they remain incidental.

Following the models of the Dutch and Belgian foundations, the foundation may also be used to separate the legal ownership and the economic value of shares, by means of certification.

In order to comply with the standards set by the Financial Action Task Force for combating money laundering as well as the Global Forum on Transparency and Exchange of Information for Tax Purposes, while at the same time, protecting the legitimate needs of the founders for privacy, the setting-up of the foundation will require a notary deed and a publication in Luxembourg's *Mémorial* and Trade and Companies Register. Sensitive information, such as the identity of the founder or the beneficiaries and the amount of the contributed estate, will not, however, be revealed to the public.

According to the Bill 6595, the *fondation patrimoniale* is subject to corporate income tax. The foundation benefits, however, from tax exemption for the following types of income: investment income, capital gains on securities generating investment income, capital gains on tangible personal property realised after a six-month holding period, and capital and surrender value of some specific insurance contracts. In addition, the foundation will not be subject to Luxembourg net wealth tax.

Distributions by the foundation, while the founder is still alive, are subject to a gift duty. The amount of the gift duty will be computed as if the founder had made a direct donation to the beneficiary of the distribution.

At the time of the founder's death, the assets of the foundation will be subject to a registration duty of 0%, 12% or 40% depending on the degree of kinship between the founder and the beneficiaries of the foundation. Descendants, ascendants, spouses of registered partners of the founder will benefit from a 0% registration duty. If, however, at the time of death, the founder is not a resident of Luxembourg, the perception of a registration duty will be limited to real estate, if any, situated in Luxembourg.

The Bill 6595 was published on 16 August 2013 and can be viewed under: http://www.chd.lu/wps/PA_RoleEtendu/FTSByteServingServletImpl/?path=/export/exped/sexpdata/Mag/142/243/124412.pdf

7. Step-up in basis for substantial shareholdings granted to individuals immigrating to Luxembourg

In Luxembourg income tax law, capital gains on shareholdings being part of the shareholder's private holdings are only taxable if the capital gain qualifies either as speculative, meaning it is realised within six months of the acquisition or is realised after the six-month holding period on the disposal of a substantial shareholding. *A contrario*, a capital gain is not taxable, if it is realised after the six-month holding period on a non-substantial shareholding.

In essence, a shareholding is considered to be substantial, if the shareholder owned, alone or together with his/her spouse or registered partner and minor children, directly or indirectly, at any time in the last five years preceding the date of the transfer, more than 10 % of the share capital of the company.

Since the capital gain is defined as the difference between the selling price and the acquisition price, according to the existing legislation, a non-resident individual, owner of such a substantial shareholding and intending to immigrate to Luxembourg, is exposed to the taxation of any unrealised capital gain accrued in his former State of residence if the shareholding is realised after the transfer of his/her residence to Luxembourg.

The Bill 6595 (*fondation patrimoniale*) also introduces a so-called step-up in basis principle: in the case where a non-resident individual immigrates to Luxembourg, the acquisition price of his substantial shareholding is equal to the fair market value at the date of the transfer of residence to Luxembourg. As a consequence, in the case of a subsequent realisation of the substantial shareholding the individual will only be subject to taxation in Luxembourg with respect to the capital gain accrued while living in Luxembourg, any unrealised capital gain accrued in the former State of residence would not be subject to taxation in Luxembourg.

As currently drafted, the new provision will only apply to substantial shareholdings and convertible loans if the taxpayer has a substantial shareholding in the company issuing the loan.

We believe that this measure should be extended to all shareholdings even non substantial ones, as it cannot be excluded that the individual immigrating to Luxembourg might subsequently acquire additional shares with the consequence that the threshold of 10% is exceeded. In such a situation the individual should be in a position to benefit from the step-up in basis with respect to the shareholding in his/her possession at the date of the transfer of residence to Luxembourg.

8. Automatic exchange of information

On 9 July 2013, ABBL published its FAQ on the automatic exchange of information which can be consulted under the following link: http://www.abbl.lu/fr/node/61403