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NEWSLETTER

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Asset management and investment funds

UCITS: Independence management company/depositary

The UCITS V Delegated Regulation (**Regulation (EU) 2016/438**) includes specific rules to ensure the independence of the UCITS management company ("**Management Company**") from the UCITS depositary. However, some of these rules require further clarifications.

For example, the question arises whether, in the case where a UCITS SICAV has appointed a Management Company, the independence requirements apply also to the UCITS SICAV or only to the Management Company. Another question is whether any cooling-off period shall apply in relation to the independence criteria for members of the management body set forth in the Regulation.

It is expected that later in the year the CSSF will clarify the scope of application of these independence requirements through an update of its FAQ.

Part II Funds: Amendment to depositary regime

The adoption process of the **Bill of Law 7024** is almost finalised. This Bill of Law includes amendments to the **Law of 17 December 2010 on undertakings for collective investment** ("**UCI Law**") and the **Law of 12 July 2013 on Alternative Investment Fund Managers** ("**AIFM Law**") to clarify the depositary regime applicable to Part II Funds (i.e. funds governed by Part II of the UCI Law).

In the recent government amendments published on 5 April 2017, no change is made to the distinction introduced by the initial proposal:

- Part II Funds whose offering documents prohibit marketing to retail investors on Luxembourg territory are subject to the AIFMD depositary regime, as implemented by Article 19 of the AIFM Law.
- Part II Funds that may be marketed to retail investors on Luxembourg territory are subject to the somewhat more stringent UCITS V Directive depositary regime, as implemented by Article 17 et seq. of the UCI Law.

The Bill is expected to be adopted in Q2 or Q3 2017.

New regulation on money market funds

In December 2016, after several years of negotiations, the European institutions agreed on a compromise text on how the money market fund landscape should be structured in Europe through a **Regulation** following the financial crisis. Further to the approval of the **compromise text** by the European Parliament on 5 April 2017, the adoption by the Council should come very soon.

The Regulation will apply to all UCITS and AIFs (and their sub-funds) investing in short-term assets and the investment objective of which is to (i) offer return in line with money market rates and/or (ii) preserve the value of their investment. It is worth noting that the scope is broader than the current CESR guidelines (ESMA predecessor) on money market funds **CESR/10-049** which is only applicable to funds which label or market themselves as money market funds.

Only three types of money market funds will be allowed, each subject to a strict corpus of rules:

- public debt constant net asset value funds;
- low volatility net asset value funds; and
- variable net asset value funds (VNAV) (which can be short-term VNAV and standard VNAV).

For the three types of funds, no sponsor support will be permitted in the future but on the other hand, the industry has avoided the implementation of a capital buffer to be maintained at the level of the fund.

Conceptually, the idea is to permit constant net asset value funds only for public debt investments (and to a limited extent to low volatility net asset value funds). As a default option, if liquidity features are not met, these funds may need to be moved to a variable net asset value fund structure.

The Regulation will come into force 20 days after its publication in the Official Journal of the EU which is expected for Q2 2017. It will be directly applicable in the Member States 12 months following its entry into force (i.e. expected to be Q2 2018). Existing money market funds in scope at the time of entry into force of the Regulation will have to provide the CSSF with satisfactory evidence (prospectus, amended articles of incorporation etc. …) that they comply with the Regulation within 18 months from its entry into force (i.e. expected to be Q4 2018).

The new regime will be monitored at European level and may be subject to a review by the European authorities after five years.

UCITS share classes

Further to the publication of two consultation papers on the use of share classes by UCITS (in December 2014 and April 2016), ESMA released its final **Opinion** on UCITS share classes on 30 January 2017 ("**Opinion**").

In this Opinion, ESMA focuses on the possibility for UCITS to use derivative overlays at share class level, while subjecting this practice to compliance with four principles: (i) common investment objective, (ii) non-contagion, (iii) pre-determination and (iv) transparency.

As regards the first principle, ESMA is of the opinion that hedging arrangements at share class level are not compatible with the requirement for a fund to have a common investment objective. The only exception is for currency-risk hedging arrangements. As a consequence, other derivative strategies such as duration hedging or beta hedging are not permitted at share class level for UCITS. Other main rules stemming from these four principles and affecting, in particular currency hedged share classes, are the following:

- the costs, profits and losses should be operationally and from an accounting perspective only attributable to the relevant share class;
- counterparty risks should be calculated at share class level;
- only systematic hedging is compliant with the pre-determination principle. Over-hedging and

under-hedging should be limited to 105% of the net asset value of the relevant share class and to 95% of the portion of the net asset value of the share class which is to be hedged against currency risk, respectively;

- adequate monitoring and stress testing should be made at share class level;
- adequate transparency in the prospectus and availability to shareholders of a list of share classes with contagion risk should be ensured.

To avoid too much disruption in the European fund market, share classes which were established before 30 January 2017 and which do not comply with the Opinion may continue to exist but will have to be closed for investment by new investors by 31 July 2017, and to additional investment by existing investors by 31 July 2018.

New share classes should comply immediately with the new rules.

In its **Press Release 17/06** which was published on 13 February 2017, the *Commission de Surveillance du Secteur Financier* ("**CSSF**") confirmed that it expects UCITS to take the necessary measures to comply with the transitional provisions set forth in the ESMA Opinion and that new share classes do henceforth have to comply with the common principle for setting up share classes in UCITS funds.

New PRIIPs RTS published

On 12 April 2017, the level 2 measures with regard to the PRIIPS[1] Regulation (**Regulation (EU) 2014/1286**) were published in the Official Journal of the European Union.

These level 2 measures are Regulatory Technical Standards ("**RTS**") and, as a reminder, the first draft was rejected by the European Parliament in September 2016.

The key changes brought about by the new version of the **RTS and its annexes** as opposed to the initial version (dated June 2016) are essentially the following:

- Multi-option products ("**MOPs**"): an option is given to MOPs offering the possibility to invest in a UCITS fund or in another type of fund exempted on the basis of Article 32 of the PRIIPS Regulation to use, at least partly, the information (risks/costs) and methods of calculation provided for the UCITS KIID;
- Comprehension alert: clarification of cases where the insertion of a comprehension alert for the investor is required;
- Performance tests: replacement of the 4th performance test (which was required when the manufacturer believed that the significant risk of loss was not adequately covered by the other scenarios) by a stress scenario to be systematically disclosed.

The RTS will become applicable on 1 January 2018, i.e. on the same date as the PRIIPS Regulation.

> 1. PRIIPs refer to packaged retail investment products and insurance-based investment products as defined in Article 4 of the **PRIIPs Regulation**.

EMIR collateral margin reform

Under EMIR and as part of the obligation to use risk-mitigation techniques, financial counterparties (including most investment funds) and large non-financial counterparties are required to exchange collateral where OTC derivatives are not centrally cleared.

In December 2016, the EU regulatory technical standards (**Commission Delegated Regulation 2016/2251**) supplementing EMIR with regard to the risk-mitigation techniques applicable to non-centrally cleared OTC derivatives ("**Margin RTS**") were published in the Official Journal of the EU.

The Margin RTS specify the various procedures that counterparties must include in their risk management procedure. They also set out the methodology to be used for calculating initial and variation margins as well as the eligibility and diversification criteria with which they have to comply.

The Margin RTS provide various phase-in dates for its application and exemptions.

In a nutshell:

- For initial margin: the implementation will vary depending on the size of the counterparties from 4 February 2017 (for the largest market participants with an aggregate average notional amount ("**AANA**") of non-centrally cleared derivatives above EUR 3 trillion) until 1 September 2020 (for counterparties with an AANA above EUR 8 billion). Counterparties whose AANA is below the EUR 8 billion threshold will be exempt from initial margin requirement.
- For variation margin, the obligation to calculate and provide variation margin applies:
  - as from 4 February 2017, where the two counterparties to a non-centrally cleared derivative have both, or belong to groups each of which has, an AANA above EUR 3 trillion;
  - as from 1 March 2017, for all other counterparties, including most investment funds.

- FX forwards, FX swaps, currency swaps are all in scope (which is not the case for instance in the US for certain FX derivatives). However, there is no obligation to collect initial margins for such derivatives. In addition, with respect to FX forwards only, the requirement to exchange variation margins is postponed until (presumably) 3 January 2018.

On 23 February 2017, the European Supervisory Authorities ("**ESAs**") published a **paper** (in the form of a communication) on variation margin exchange set out in the Margin RTS in which they acknowledged that the entry into force of the variation margin requirement as from 1 March 2017 appears mainly to pose a challenge for smaller counterparties. Although the ESAs stated that the postponement of this requirement would need to be implemented formally through EU legislation, they indicated that national competent authorities can take into account the size of the exposure to the counterparty and its default risk in assessing compliance of counterparties with Margin RTS requirements. The ESAs underlined that this approach does not entail a general forbearance, but a case-by-case assessment from the competent authorities on the degree of compliance and progress. On the same day, IOSCO also published a similar **statement**.

The *Commission de Surveillance du Secteur Financier* ("**CSSF**") has not yet formally taken a position on this new obligation; however, one may reasonably expect that that they will adopt a softer approach for smaller counterparties and will be less flexible with large counterparties.

In all cases, once the Margin RTS apply to them, management companies AIFM and, if applicable, investment managers, will need to take all necessary steps to comply with these new rules (in particular updating the relevant credit support documentation and establishing specific risk management procedures).

Alternative performance measures

On 27 January 2017, ESMA published a **Q&A on its Guidelines on Alternative Performance Measures** ("**APMs**"). These guidelines apply only to certain investment funds which fall within the scope of the **Prospectus Directive**[1] , i.e. certain closed-ended funds.

An APM is a financial measure of historical or future financial performance, financial position, or cash flows, other than a financial measure defined or specified in the applicable financial reporting framework. Examples of APMs include: operating earnings, cash earnings, earnings before one-time charges, earnings before interest, taxes, depreciation and amortisation (EBITDA), net debt, autonomous growth or similar terms denoting adjustments to line items of statements of comprehensive income, statements of financial position or statements of cash flow.

The objective of the Q&A is to promote common supervisory approaches and practices in the application of the ESMA Guidelines on APMs and to help give issues and persons responsible for the prospectus an indication of the correct implementation of the guidelines.

As a reminder, the **ESMA Guidelines on APMs** apply to APMs disclosed by issuers whose securities are admitted to trading on a regulated market and who are required to publish regulated information as defined by the Transparency Directive[2] or persons responsible for the prospectus when publishing regulated information or prospectuses for securities.

The guidelines set the principles that issuers should follow when disclosing APMs in the prospectus or other documents such as the labelling, presentation and explanations on the use of the APMs.

The guidelines entered into force on 3 July 2016 and were implemented into the Luxembourg regulatory framework by **CSSF Circular 16/636**. A CSSF Press Release was also issued in December 2016 (**Press Release 16/46**) which reminds the issuers or persons responsible for the prospectus of their obligations when they use APMs and in which the *Commission de Surveillance du Secteur Financier* ("**CSSF**") highlights the lack of information that it identified regarding APMs during the examination of the 2016 half-yearly financial reports.

1. "Prospectus Directive" refers to Directive 2003/71/EC of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading, as amended.
2. "Transparency Directive" refers to Directive 2004/109/EC of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are traded on a regulated market, as amended.

ESMA Q&A on UCITS and AIFM Directives

ESMA Q&A on UCITS Directive

In its last update of the **Q&A on the application of the UCITS Directive**, ESMA clarifies that a UCITS management company can notify cross-border activities (MiFID services, collective portfolio management of UCITS) without having to identify a specific UCITS in the notification letter.

The identification of a specific UCITS and its notification to the competent authorities of the home Member State of the UCITS can be done later, when it has identified a UCITS that it wants to manage on a cross-border basis.

ESMA Q&A on AIFM Directive

On 6 April 2017, a question on the categories of "professional investor" and "retail investor" was added in the **ESMA Q&A on the AIFMD**. The question raised was whether the AIF marketing passport could be extended to further categories of investors introduced by Member States (such as "qualifying investor", "informed investor", or "semi-professional investor"), knowing that by their definition, those categories of investors share some, but not all elements of the definition of "professional investor" pursuant to Article 4(1)(ag) of AIFMD.

In its answer, ESMA confirms that the AIF marketing passport may only be used for marketing to professional investors as defined in Article 4(1)(ag) of AIFMD, thus investors that meet all elements of the definition of "professional investor".

Our publications

Legislation: Compendium of investment fund laws and regulations (second edition)

The second edition of the compendium of Luxembourg investment fund laws and regulations that has been produced in cooperation with the Luxembourg Stock Exchange and the Association of the Luxembourg Fund Industry (ALFI) is published on our website: **www.elvingerhoss.lu**.

This compendium is made up of two separate publications, which are available in French, English and German.

The **first publication** is dedicated to undertakings for collective investment in transferable securities ("**UCITS**") established under Luxembourg law and contains the amended Law of 17 December 2010 on undertakings for collective investment ("**UCI Law**") as well as the main regulatory texts relating thereto.

The **second publication** is dedicated to alternative investment funds ("**AIFs**") established under Luxembourg law and other investment vehicles which are neither UCITS nor AIFs.

It contains the amended Law of 12 July 2013 on alternative investment fund managers (AIFM), the UCI Law, the new Law of 23 July 2016 on reserved alternative investment funds (RAIF), the amended Law of 13 February 2007 on specialised investment funds (SIF), the amended Law of 15 June 2004 on the investment company in risk capital (SICAR) as well as the main regulatory texts relating thereto.

Banking and financial services

Shadow banking exposures

Regulation (EU) 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms ("**CRR**") establishes a regime with more stringent provisions as regards large exposures.

Large exposures are defined under Article 392 CRR as an institution's exposure to a client or group of connected clients where its value is equal to or exceeds 10% of its eligible capital (i.e. Tier 1 capital plus Tier 2 capital). Large exposures are subject to reporting requirements and quantitative limits.

Under Article 395(2) CRR, the European Banking Authority ("**EBA**") was mandated to issue guidelines setting appropriate limits to exposures to shadow banking entities.

The **CSSF Circular 16/647** ("**Circular**") implements the EBA guidelines **EBA/GL/2015/20** (Limits on exposures to shadow banking entities which carry out banking activities outside a regulated framework) ("**Guidelines**") into Luxembourg law. Such implementation is done by updating Circular 12/552 on the central administration, internal governance and risk management.

The scope of the Guidelines and the new section of the Circular CSSF 12/552 implementing the Guidelines apply to credit institutions and investment firms (to the extent they are submitted to Part IV on Large Exposures of the CRR).

In the absence of a definition under the CRR, the Guidelines define "shadow banking entity" as an undertaking that carries out one or more credit intermediation activities (i.e. maturity transformation, liquidity transformation, leverage, credit risk transfer, etc.) and that is not an excluded undertaking (i.e. credit institutions, investment firms, central counterparties, payment institutions, entities which carry out intermediation activities on an intra-group basis only, etc.).

For the purposes of the Guidelines and the Circular, exposures to individual shadow banking entities are to be taken into consideration when they are equal to or in excess of 0.25% of the institution's eligible own funds (after taking into account credit risk mitigation and possible exemptions).

Where such threshold is exceeded, institutions shall, *inter alia*, identify their exposures to shadow banking entities; set out an internal framework to identify, manage, control and mitigate related risks; set its risk tolerance for exposures to shadow banking entities; and determine interconnectedness between the shadow banking entities and the institution.

The Guidelines and the Circular determine two approaches in order for the institution to limit their exposure to shadow banking entities: the principal approach and the fallback approach.

- The principal approach: institutions should set an aggregate limit to their exposures to shadow banking entities (considering, *inter alia*, their business model, risk appetite and size). Also, they should set tighter limits on their individual exposures to shadow baking entities based on a set of criteria predefined in the Guidelines.
- The fallback approach: if institutions are not able to apply the principal approach, their aggregate exposures to shadow banking entities should be subject to the general limits on large exposures in accordance with Article 395 CRR (i.e. 25% of this eligible capital).

If institutions cannot meet the requirements regarding effective processes and control mechanisms or oversight by their management board as set out in section 4 of the Guidelines, they should apply the fallback approach to all their exposures to shadow banking entities (i.e. the sum of all their exposures to shadow banking entities).

If they can meet said requirements, but cannot gather sufficient information to enable them to apply the principal approach, institutions should only apply the fallback approach to the exposures to shadow banking entities for which the institutions are not able to gather sufficient information. The principal approach should be applied to the remaining exposures to shadow banking entities.

Pillar 3 framework

Further to the release of a revised version of the Pillar 3 framework ("RPF") by the Basel Committee on Banking Supervision in January 2015, the European Banking Authority ("EBA") published a **final report on Guidelines on disclosure requirements** under Part Eight of **Regulation (EU) 575/2013** on prudential requirements for credit institutions and investment firms ("CRR").

These Guidelines provide guidance on these disclosures from a presentational aspect (tables and templates are provided). Indeed, due to the differences between the Basel Pillar 1 framework and the CRR, the RPF presents areas of misalignment with Part Eight of the CRR.

In a **Press Release** dated 19 January 2017, the *Commission de Surveillance du Secteur Financier* ("CSSF") draws the attention of the industry to this publication.

The CSSF also reminds the industry that these Guidelines will apply to Global Systemically Important Institutions (as set forth in the **Commission Delegated Regulation (EU) 1222/2014** and any subsequent amendment) ("G-SIIs") and Other Systemically Important Institutions (Article 131(3) of **Directive 2013/36/EU**) ("O-SIIs") from 31 December 2017. However, G-SIIs have been encouraged to comply with a subset of those Guidelines as soon as possible.

MiFID II delegated acts and ESMA Q&As

On 31 March 2017, **MiFID II delegated acts and technical standards** (Level 2) were published in the Official Journal of the European Union.

The delegated acts cover important topics including the organisational and product governance requirements, inducement regime, information to client and reporting, etc.

Alongside this publication, and in order to further clarify some concepts and obligations provided in MiFID II (Level 1 and Level 2), ESMA publishes and regularly updates various Q&A e.g.:

- ESMA Q&A on MiFID II and MiFIR investor protection topics - 4 April 2017 (**ESMA 35-43-349**)
- ESMA Q&A on MiFIR data reporting - 2 February 2017 (**ESMA 70-1861941480-56**)
- ESMA Q&A on MiFID II and MiFIR commodity derivatives topics - 5 April 2017 (**ESMA 70-872942901-28**)
- ESMA Q&A on MiFID II and MiFIR market structures topics (secondary markets) - 5 April 2017 (**ESMA 70-872942901-38**)
- Updated ESMA Q&A on MiFID and MiFIR transparency topics (secondary markets) - 5 April 2017 (**ESMA 70-872942901-35**).

Capital markets (debt and equity)

Law on market abuse

By a **Law dated 23 December 2016**, the Luxembourg legislator adopted Bill of law 7022 (a) implementing (i) Directive 2014/57/EU on criminal sanctions for market abuse as well as (ii) the Commission Implementing Directive 2015/2392/EU with regard to reporting to competent authorities of actual or potential infringements in relation to the market abuse regulation; (b) supplementing specific provisions of Regulation 596/2014/EU on administrative measures and sanctions and (c) amending the Law of 11 January 2008 on transparency requirements for issuers ("**Law**").

When implementing these provisions, the Luxembourg legislator did not go beyond what was required pursuant to the provisions of said directives.

Chapter 2 of the Law relates to the administrative sanctions and the powers conferred on the *Commission de Surveillance du Secteur Financier* ("**CSSF**") in that context. Chapter 3 relates to the criminal law sanctions and implements the relevant provisions of Directive 2014/57/EU.

To a large extent, Chapter 2 confirms the powers already provided under the Law of 9 May 2006 (repealed) given to the CSSF as competent administrative authority and provides for further precisions or extensions of the CSSF's investigative powers.

With the implementation of Article 32 of the Market Abuse Regulation 596/2014 ("**MAR**") in the Law, a specific regime for "whistleblowers" is put in place. The CSSF is hereby required to put into place procedures which allow the efficient notification to the CSSF of effective or potential violations of MAR. Employers are further required to implement appropriate internal procedures which allow their employees to notify any such violations of MAR.

In order to avoid any violation of the *ne bis in idem* principle, the Law maintains the mechanisms already introduced under the Law of 9 May 2006 (repealed), laying down a consultation procedure between the CSSF and the State prosecutor.

The Law was published in the Luxembourg official gazette on 27 December 2016.

In this context it should also be noted that ESMA provided a **non-exhaustive and indicative list** setting out examples where the legitimate interests of an issuer could justify the delay of disclosure of inside information. The guidelines have been applicable since 20 December 2016.

Our publications

Memoranda: Listing on Luxembourg Stock Exchange (updated versions)

The updated versions of our Capital Market brochures are published on our website: **www.elvingerhoss.lu**.

The first publication outlines some of the requirements applicable to a **listing of debt securities** on the Luxembourg Stock Exchange.

The second publication focuses on some of the requirements applicable to a **listing of shares** on the

Luxembourg Stock Exchange.

Tax

BEPS: Luxembourg Law of 23 December 2016

In the context of action 13 of the base erosion and profits shifting ("**BEPS**") action plan, Luxembourg Parliament adopted the **Law dated 23 December 2016** implementing country-by-country reporting requirements for entities that are part of a multinational enterprise group ("**MNE Group**") ("**CBCR Law**") implementing the Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.

A) MNE Groups concerned

MNE Groups are subject to the provision of the CBCR Law provided the total consolidated revenue of the MNE Group amounts to at least EUR 750 million as of January 2015 during the fiscal year preceding the reporting fiscal year.

MNE Groups with a consolidated group revenue lower than EUR 750 million are considered as excluded MNE Groups and are thus not subject to reporting.

B) Reporting entities

Luxembourg resident entities ("**Reporting Entity**") shall file a country-by-country-report ("**Report**") with the Luxembourg tax authorities if that entity is either:

1. The "**Ultimate Parent Entity**" of a MNE Group (meaning that it prepares consolidated financial statements under accounting principles generally applied in Luxembourg or would be required to do so if its equity interests were traded on a public securities exchange;

2. A "**Surrogate Parent Entity**" appointed by the MNE Group, as a sole substitute for the non-Luxembourg Ultimate Parent Entity when:

a. the Ultimate Parent Entity of the MNE Group is not obliged to file a Report in its tax residence jurisdiction; or

b. the jurisdiction in which the Ultimate Parent Entity is resident for tax purposes has no qualifying competent authority agreement in force with Luxembourg; or

c. there has been a systemic failure of the jurisdiction of the tax residence of the Ultimate Parent Entity that has been notified by the Luxembourg tax administration to the Luxembourg resident constituent entity[1] .

3. Any Luxembourg tax resident entity if one of the above conditions under 2.a. to c. applies.

C) Reportable information

The CBCR Law requires the Reporting Entity to provide (i) information on revenues (excluding, however, payments qualifying as dividends under the law of source of such dividend), profits, taxes paid, capital, earnings, employees, and tangible assets on a country-by-country basis (ii) the list by country of the entities forming part of the MNE Group and their principal activity and (iii) any other information that the MNE Group deems necessary.

D) Notification

Each Luxembourg resident constituent entity of an MNE Group shall, before the end of the relevant financial year (except for 2016 where the tax authorities postponed the notification to the 31 March 2017) notify its status to the Luxembourg tax administration, i.e. whether it is a Reporting Entity or is not a non-reporting entity, in which case it shall identify the Reporting Entity.

The notification must be performed by the relevant entities on an electronical platform via the government portal "**guichet.lu**".

E) Filing of the Report and exchange of information

The first Report relating to the 2016 fiscal year information is to be filed with the Luxembourg tax authorities within 12 months from the end of the relevant fiscal year (i.e. 31 December 2017 for a fiscal year-end on 31 December 2016).

The exchange of information by the tax authorities shall then be made within 15 months from the end of the relevant fiscal year (except for the exchange of information related to the 2016 fiscal year which shall be made within 18 months therefrom).

A Grand-Ducal decree listing the country with which Luxembourg will exchange the information is still to be published.

F) Penalties

Each Reporting Entity or constituent entity can incur a fine of up to EUR 250,000 in case of failure to file or late filing of the Report.

G) Automatic exchange of information

The Luxembourg tax administration shall then exchange the information so collected by means of automatic exchange.

> **1.** The term "constituent entity" is defined in Section 1, paragraph 6 of the annex of the CBCR Law and basically refers to every entity (separate business unit) that is included in the consolidated financial statements of the MNE Group for financial reporting purposes.

Tax treaties news

Austria

On 1 March 2017, the amending exchange of notes, which was signed on 18 June 2015, relating to Article 24 on the exchange of information of the double tax treaty of 1962 between Luxembourg and Austria, entered into force. The amended Article 24 shall apply with regard to taxable periods with retroactive effect as from 1 January 2011.

Belgium

On 29 March 2017, Luxembourg and Belgium signed an amending protocol to the Belgium-Luxembourg double tax treaty. The protocol implements the 2015 mutual agreement on frontier workers into the treaty. If a frontier worker spends less than 25 days outside the State where he usually carries out his/her work, that State will be authorised to tax the salary earned during those days. The new provision has been applicable since 1 January 2015.

Brunei

On 26 January 2017, the double tax treaty on income and capital signed between Luxembourg and Brunei on 14 July 2015 entered into force. The treaty will apply for Luxembourg from 1 January 2018 and for Brunei from 1 January 2018 for withholding taxes and 1 January 2019 for the other taxes.

The following withholding tax rates apply under the new treaty:

- Dividends: the treaty provides for a standard withholding tax rate of 10% which can be reduced to 0% if the beneficial owner is a company (other than a partnership) holding directly at least 10% of the capital of the company paying the dividends. An exemption applies to listed government bodies.
- Interest: the treaty provides for a withholding tax rate of 10% which can be reduced to 0% if paid to, *inter alia*, financial institutions, mutual funds or for interest paid to or by government bodies.
- Royalties: the treaty provides for a withholding tax rate of 10% on royalties.
- Technical service fees: the treaty provides for a withholding tax rate of 10% on service fees.

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

Hungary

On 23 December 2016, Luxembourg ratified the new double tax treaty on income and capital between Luxembourg and Hungary which, once in force and effective, will replace the double tax treaty.

The following withholding tax rates apply under the new treaty:

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

Both States apply the exemption and credit methods for the avoidance of double taxation.

Senegal

On 23 December 2016, Luxembourg ratified the double tax treaty on income and capital signed between Luxembourg and Senegal on 10 February 2016. As Senegal has not ratified the treaty yet, the treaty is not in force.

The following withholding tax rates will 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) owning directly at least 20% of the capital of the company paying the dividends.
- Interest: the treaty provides for a withholding tax rate of 10%, except for interest paid to the other State, one of its local bodies or the central banks.
- Royalties: the treaty provides for a withholding tax rate of 10% which can be reduced to 6% for the use of, or the right to use, industrial, commercial or scientific equipment.

Both States apply the exemption and credit methods for the avoidance of double taxation.

Serbia

On 27 December 2016, the double tax treaty on income and capital signed between Luxembourg and Serbia on 15 December 2015 entered into force. The treaty has been applicable since 1 January 2017.

The following withholding tax rates apply under the new treaty:

- Dividends: the treaty provides for a standard withholding tax rate of 10% which can be reduced to 5% if the beneficial owner is a company (other than a partnership) holding directly at least 25% of the capital of the company paying the dividends.
- Interest: the treaty provides for a withholding tax rate of 10% which can be reduced to 0% if paid to the other contracting State, to a political subdivision, a local authority or to the central or national bank.
- Royalties: the treaty provides, depending on the IP right in question, for a withholding tax rate of 5% or 10% on royalties paid.

Both States apply the exemption and credit methods for the avoidance of double taxation.

Tunisia

On 30 November 2016, the amending protocol, signed on 5 September 2014, to the double tax treaty on income and capital signed between Luxembourg and Tunisia of 1996, entered into force. The protocol has been applicable since 1 January 2017 and contains a new Article 26 on the exchange of information in line with Article 26 of the OECD model convention.

Ukraine

On 18 April 2017, the double tax treaty on income and capital between Luxembourg and Ukraine signed on 6 September 1997 finally entered into force, simultaneously with its amending protocol. The treaty and its protocol will apply for both States from 1 January 2018.

The following withholding tax rates will apply under the protocol:

- Dividends: the treaty provides for a standard withholding tax rate of 15% which can be reduced to 5% if the receiving company owns directly at least 20% of the capital of the company paying the dividends.
- Interest: the treaty provides for a withholding tax rate of 10% which can be reduced to 5% for interest paid under loans granted by banks or any other financial institutions including investment and savings banks.

- Royalties: the treaty provides for a withholding tax rate of 10% which can be reduced to 5% regarding copyright on scientific work, patent, trademark, secret formula or process information concerning industrial, commercial or scientific equipment.

Luxembourg applies the credit and exemption methods for the avoidance of double taxation.

Uruguay

On 11 January 2017, the double tax treaty on income and capital between Luxembourg and Uruguay signed on 10 March 2015 entered into force. The treaty will apply as of 1 January 2018.

The following withholding tax rates will 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) owning directly at least 10% of the capital of the company paying the dividends.
- Interest: the treaty provides for a withholding tax rate of 10% which can be reduced to 0% in certain situations (e.g. bank loans with a term of at least 3 years financing investment projects, interest paid to the government, local authority or the central bank, etc.).
- Royalties: the treaty provides for a withholding tax rate of 10% which can be reduced to 5% for the use of, or the right to use, industrial, commercial or scientific equipment.

Both States apply the exemption and credit methods for the avoidance of double taxation.

Corporate, mergers & acquisitions

Anti-money laundering: New primary offences and procedures

With effect from 1 January 2017, the **Law of 23 December 2016 relating to the implementation of the 2017 tax reform** has included aggravated tax evasion (*fraude fiscale aggravée*) and tax fraud (*escroquerie fiscale*) (or attempts to commit such offences) as criminal tax offences constituting primary offences (*infractions primaires*) of money laundering under Article 506-1 of the Luxembourg Criminal Code. This means that the re-investment of the proceeds resulting from criminal tax offences committed as from 1 January 2017 constitutes a money-laundering offence under the Law of 12 November 2004 relating to the fight against money laundering and financing of terrorism ("AML Law").

In this context, the Luxembourg financial supervisory authority (*Commission de Surveillance du Secteur Financier* ("CSSF")) issued **Circular CSSF 17/650** on 17 February 2017 for the attention of all professionals of the financial sector supervised by the CSSF. The Circular has been prepared by the CSSF together with the financial intelligence unit established at the public prosecutor's office ("CRF") and gives specific details on the practical application of the rules by professionals of the financial sector and providing also a list of situations and circumstances that may be indicators of tax related offence.

The Circular does not amend existing regulations but emphasises that professionals of the financial sector have to adapt their due diligence measures with respect to these new primary offences in tax matters, irrespective of whether the customers are Luxembourg tax resident or not.

It should be noted that the CRF has issued two new guidelines, effective as from 1 January 2017, for the attention of all professionals subject to the AML Law:

(a) The « *Déclaration des opérations suspectes* », replacing CRF Circular 22/10 dated 8 November 2010, requiring that declarations of suspicious transactions are to be made according to the procedure of the new electronic secured and standardised communication system, named "**goAML**", already used by several foreign financial intelligence units[1] .

A prior registration with goAML has to be made by the professionals which require the use of a so-called LuxTrust certificate for the professional to access the registration process. The guidelines describe the declaration process to goAML and refer to additional leaflets detailing how to complete the various standard forms.

(b) The guidelines with respect to the "*Blocage des transactions suspectes*", replacing CRF Circular 2015/01 dated 6 January 2016, provides guidelines with respect to procedure in case of suspicious transactions, the handling of blocked transactions and the interaction with the CRF.

> 1. Already used by 15 foreign financial units (among others, South Africa, Morocco, The Netherlands, Finland and Denmark) and to be put in place in (Germany, Ireland, Liechtenstein, Monaco, United Arab Emirates).

Dispute resolution

European account preservation order

Regulation (EU) 655/2014 of 15 May 2014 establishing a European Account Preservation Order procedure ("**Regulation**") became applicable on 18 January 2017. As of that date, creditors have a new instrument at their disposal to obtain cross-border collection of their pecuniary claims.

The procedure established by the Regulation is an additional and optional means for the creditor who remains free to make use of national measures, such as the attachment procedure under Luxembourg law. The European Account Preservation Order ("**EAPO**") can be an effective instrument as it allows creditors to freeze funds held in bank accounts that are located in several Member States by submitting a single application based on a standard form. Creditors may apply for an EAPO (i) prior to initiating proceedings on the substance of the matter, (ii) at any stage of such proceedings, and (iii) after having obtained a judgment.

However, the claimant will have to prove that there is an urgent need for protective measures due to a real risk that, without such a measure, the subsequent enforcement of the claim will be impeded or made substantially more difficult.

Furthermore, the Regulation establishes a mechanism allowing the creditor to request that the information needed to identify the debtor's account is obtained by the court, which is not possible under Luxembourg domestic law.

Banks upon which an EAPO has been served must implement it without delay. According to the Regulation, banks must (i) identify the account(s) subject to the EAPO, (ii) preserve the amount specified in the EAPO by ensuring that that amount is not transferred or withdrawn from the account(s) and (iii) issue a declaration within three working days following the implementation of the EAPO indicating whether and to what extent funds in the debtor's account(s) have been preserved.

Banks may be held liable if they fail to comply with their obligations under the Regulation, the liability of the notified bank being governed by the law of the Member State of enforcement.

The EAPO procedure only relates to the freezing of bank accounts, therefore creditors have to apply national enforcement measures in order to receive payment of frozen funds.

The Bill of Law 7083 aiming at implementing the Regulation (**Bill**") was submitted to the Luxembourg Parliament on 27 October 2016. The Bill has not been passed yet with the result that, thus far, no authority has been named for obtaining and transmitting account information at the request of a court of a Member State. Currently, the Bill provides for the banking authority (*Commission de Surveillance du Secteur Financier* ("**CSSF**")) to be named as the authority.

Employment and pensions law

Religious symbols at work: European Court decision

On 14 March 2017, the Court of Justice of the European Union ("**CJEU**") rendered two preliminary rulings concerning the interpretation of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ("**Directive**") by which it clarifies the power of employers to ban religious symbols in the workplace.

In relation to **Case C-157/15**, the CJEU found that the prohibition on wearing an Islamic headscarf, which arises from an internal rule of a private undertaking imposing a blanket ban on the visible wearing of any political, philosophical or religious sign in the workplace, does not constitute a direct discrimination prohibited by the Directive, i.e. where one person is treated less favourably than another person in a comparable situation, on the grounds, *inter alia*, of religion. The internal rules at issue cover any manifestation of political, philosophical and religious beliefs without distinction and must therefore be regarded as treating all employees of the undertaking in the same way.

The CJEU stressed, however, that it is not inconceivable that the internal rules at issue are an indirect discrimination, i.e. where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief at a particular disadvantage compared with other persons. Such rules are not, however, considered to be discriminatory if they are objectively justified by a legitimate aim that is pursued by appropriate and necessary means.

According to the CJEU, the employer's desire to display an image of neutrality towards customers is, in principle, legitimate, notably when the rule only applies to employees who are required to come into contact with customers.

The prohibition on wearing visible signs of political, philosophical or religious beliefs is appropriate, provided that the neutrality policy is genuinely pursued in a consistent and systematic manner. Furthermore, the prohibition must qualify as being strictly necessary if the prohibition covers only employees who interact with customers. The CJEU notes that the national court must assess whether it would have been possible for the employer to offer the employee a post not involving any visual contact with customers.

In **Case C-188/15**, the CJEU took a similar approach by stating that a rule prohibiting the wearing of any visible sign of political, philosophical or religious belief may constitute an indirect discrimination. The CJUE referred explicitly to the guidance given in Case C-157/15 for the assessment of the legitimacy, appropriateness and necessity of such a rule.

In the absence of an internal rule, the ban on wearing Islamic headscarves is a direct discrimination which could, however, be justified by a 'genuine and determining occupational requirement provided that the objective is legitimate and the requirement is proportionate'. The CJEU stressed that a 'genuine and determining occupational requirement' is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out and cannot cover subjective considerations, such as the willingness of the employer to comply with a request from a customer.

In conclusion, the CJEU recognises the legitimacy of general bans on religious symbols if they are part of a neutrality policy that is genuinely pursued in a consistent and systematic matter and applies to visible symbols of all kinds of political, philosophical or religious belief. Such bans may not, however, target specific faiths. Hence the importance for undertakings to establish a general and undifferentiated policy if they want to control the appearance of their employees.

It will be up to the national courts to analyse on a case-by-case basis, whether a direct or an indirect discrimination will be given in the context of the prohibition of wearing visible signs of political, philosophical or religious beliefs.

EU law, competition and antitrust

Commitment decision in public procurement context

By Decision 2017-E-01 dated 8 March 2017, the Luxembourg Competition Council has accepted commitments offered by two companies operating in the passenger transport market in response to concerns regarding the conformity of their tender for public procurement contracts with competition law.

On 3 May 2014, the Ministry of Sustainable Development and Infrastructures ("**Ministry**") launched a public tender for the transportation of passengers with special needs. The tender submitted by Transport Union Lëtzebuerg ("**TUL**"), a joint venture between the two most important companies operating in the Luxembourg passenger transport market, was the only one that met the requirements laid down in the tender documents.

On 16 July 2014, the Ministry cancelled the tender because of concerns that TUL's submission constituted an infringement of competition law.

Pursuant to the statement of objections issued by the Competition Council on 25 April 2016, TUL was placed under the sole and immediate control of its shareholders and had no autonomous decision-making power with the result that it was not an undertaking within the meaning of competition law. It further stated that an exchange of information took place between the undertakings participating in the tender submitted by TUL and that the creation of this joint venture company by them constituted an agreement between undertakings within the meaning of Article 3 of the Law of 23 October 2011 on competition ("**Competition Law**") and Article 101 of the Treaty on the Functioning of the European Union ("**TFEU**").

Without taking a definite position on possible justifications for the agreement within the meaning of Article 4 of the Competition Law and Article 101, paragraph 3, TFEU, as alleged by the two companies concerned, or on the existence of an infringement, the Competition Council has decided, in accordance with Article 13 of the Competition Law, to accept and make binding the commitments offered by these companies in order to address any competition concerns identified in the statement of objections. The companies have undertaken (i) to dissolve TUL at the latest before 1 July 2017, (ii) to organise information, training and awareness sessions in relation to competition law for their staff, and (iii) to keep data and information for 5 years which relate to negotiations and commercial exchanges with competitors in the context of their next submission with respect to the same public procurement contracts.

ICT, IP and data protection

Data Protection Regulation: Compliance starts today

The requirements imposed by the **General Data Protection Regulation 2016/679** ("**GDPR**") entail extensive work for undertakings processing personal data under the threat of heavy administrative sanctions (up to 4% of worldwide annual turnover or EUR 20,000,000, whichever is higher). This concerns data controllers (i.e. legal or natural persons who determine the purposes and the means of the processing) as well as data processors (i.e. legal or natural persons who process the data on behalf of the controller and upon his instructions). It also involves a profound change in the approach to personal data processing within businesses. For the accountability duty towards the authorities that will be of paramount importance to all concerned, this will affect their corporate internal organisation - starting next year on 25 May 2018.

The accountability principle means that the controller must comply with the GDPR. It also means that it must be able, at any time, to demonstrate such compliance to the competent authorities and notably to prove that all personal data it processes is under control, mapped, secured, lawfully transferred and only used for determined purposes in accordance with the GDPR.

Even though the prior filing of formalities with the *Commission Nationale pour la Protection des Données* ("**CNPD**") will be abandoned under the GDPR, controllers will have to meticulously document and monitor their data processing-related activities, notably by conducting impact assessments, i.e. in-depth analysis of the processing, where required. The management of the processing must be internalised rather than declared to the CNPD. Under the GDPR, these obligations will also, to a certain extent, be incumbent on data processors with respect to the data that they process on behalf of a controller under a servicing agreement. Until the GDPR applies, only the controllers are responsible for complying with the data protection law.

Given the extent of the task incumbent on controllers and processors, which starts with the identification of (i) the type of personal data that is processed, (ii) the data subjects, (iii) the legal grounds, (iv) the purposes of the processing, (v) the recipients of the data transfers and the guarantees for the data subjects, (vi) the retention period, (vii) the security applied, etc., it is essential to start planning the roadmap today in order to be prepared for and compliant with the GDPR when it becomes effective.

As a starting point, and on the basis of the formalities already filed with the CNPD (if any) controllers and processors should create an inventory of all personal data collected and processed and identify the purposes of that processing (bottom-up approach). If the personal data processed cannot be precisely identified, another approach would be to rely on the list of purposes published by the CNPD available on its **website**. Indeed, controllers and processors will have to keep a specific register of all their data processing activities stating detailed information, except in very limited situations (i.e. where (i) the undertaking employs fewer than 250 employees, (ii) the processing is occasional, (iii) the processing is not likely to result in a risk to the rights and freedoms of data subjects, (iv) the processing does not include special categories of data). The controllers and processors who are exempt from keeping such a register will, however, still be accountable towards the competent authorities for complying with the GDPR. They may therefore keep a register of their data processing activities on a voluntary basis.

Controllers and processors will under certain conditions (e.g. where the core activities consist of processing operations which require regular and systematic monitoring of data subjects on a large scale or consist in the processing of special categories of data on a large scale) have to designate a Data Protection Officer ("**DPO**"). Any company that qualifies as a "controller" or "processor" is allowed to designate a DPO on a voluntary basis. Undertakings may wish to consider the possibility of designating a DPO as of today to ensure an efficient and smooth transition to the GDPR regime. The **guidelines** of Article 29 Data Protection Working Group Party on DPOs adopted on 13 December 2016 (WP 243) give valuable and practical direction.

The changes introduced by the GDPR embrace the idea that businesses relying on and processing personal data will have to consider the processing of such data as an integral part of their business strategy. Businesses will thus be well advised to continue and reinforce their ongoing efforts in terms of compliance with data protection regulations and in particular with the forthcoming application of the GDPR and to take appropriate legal and technical advice in that respect.

Insurance and reinsurance

Life insurance court decision

On 18 January 2017, the Court of Appeal of Luxembourg dealing with commercial matters reversed the decision of the 15th chamber of the District Court of Luxembourg dated 1 April 2015, in relation to the permitted distribution of dividends to certain policyholders of Excell Life International S.A., a Luxembourg life-insurance company put in judicial liquidation on 12 July 2012 ("**Excell Life**").

The merit of this judgement is to provide guidance as to the scope of the concept of *patrimoine distinct* embodied under Article 39 of the law of 6 December 1991 on the insurance sector ("**Insurance Sector Law**")[1] [2]. The main question for the Court of Appeal was to determine whether - as retained by the Luxembourg District Court - each insurance policy constitutes a specific pool of underlying assets entitling the relevant policyholder to specific payments in relation therewith, or as the claimants argued, the concept of a distinct pool of assets under the Insurance Sector Law must be construed as a single pool of assets common to *all* insurance claims and benefiting all insurance claimants (thus excluding any type of payments benefiting certain insurance claimants out of this common pool).

Through a literal construction of Article 39 of the Insurance Sector Law and analysis of the legislator's intention regarding the concept of a distinct pool of assets under Article 39 (including its various use in previous laws preceding the Insurance Sector Law), the Court of Appeal reversed the decision from the Luxembourg District Court by confirming that the concept of distinct pool of assets should be understood as a single (global) pool of assets and that any distribution out of such single pool should benefit all insurance claimants. The Court of Appeal thus rejected the defendants' selective policy-by-policy interpretation of the first paragraph of Article 39 of the Insurance Sector Law by establishing that all insurance claimants should benefit, in proportion to their rights, from all the assets of Excell Life underlying technical provisions as at 12 July 2012. It follows that in addition to the confirmations brought by this judgement, the solution adopted by the Court of Appeal implements the legislator's true intention to establish a concept of distinct pool of assets per insurance branch (here life insurance) and not within the same branch. This solution furthermore comforts our previous findings made in our commentary of the Luxembourg District Court's decision of 1 April 2015 (**ALJB n°58, pages 36-44, also quoted in the Court of Appeal's decision**).

> **1.** The Insurance Sector Law was repealed and replaced by the Luxembourg Law of 7 December 2015 on the insurance sector and the first paragraph of Article 39 of the Insurance Sector Law now broadly corresponds to the first paragraph of Article 118 of the Law of 7 December 2015.
> **2.** According to the first paragraph of Article 39 of the Insurance Sector Law, all assets representing technical provisions constitute a distinct pool of assets allocated preferentially to guaranteeing payment of insurance claims.

Urban zoning

What remains of the Omnibus Bill of Law?

Announced as a pioneering bill of law when it was submitted to the Luxembourg Parliament on 16 July 2014, the so-called **Omnibus law** ("**Omnibus Law**") was finally adopted by the Luxembourg Parliament on 8 February 2017.

What was presented as the strength of the bill of law, i.e. the bringing together of several disparate legislative changes into a single text, has proved to be its major weakness. As a consequence, the Omnibus Law was only adopted more than two years after it was deposited with the Luxembourg Parliament.

One of the aims of the Omnibus Law is to reduce administrative complexity, notably in the field of urban planning. The most significant changes can be summarised as follows:

- Municipalities having a technical service department with at least one urban planner or urban developer are, from now on, themselves allowed to draft general or special development plans (*plans d'aménagement général ou particulier*), without having to use the services of an external person;
- The initiative to draft a special "new district" development plan (*plan d'aménagement particulier "nouveau quartier"*) can come from any person with a qualification for such a purpose. This entitlement must be consented to in writing by at least half of the landowners, together holding at least half the surface of the land concerned. Thus, it is no longer necessary to obtain the consent of all the landowners concerned in order to draft a special "new district" development plan;
- For every special "new district" development plan which envisages more than 25 housing units, at least 10% of the gross constructed area dedicated to housing must be reserved for low-cost housing;
- The deadline within which the assessment unit (*cellule d'évaluation*) has to issue its opinion with a view to adopting special development plans is reduced from three months to one month;

- The Omnibus Law introduces a simplified procedure for specific amendments to a special development plan. It also introduces the principle of tacit authorisation concerning the Minister's approval of the municipal council's decisions relating to the implementation agreement (*convention d'exécution*) and implementation project (*projet d'exécution*) of a special "new district" development plan;
- In their municipal regulation on buildings (*règlement sur les bâtisses*), municipalities may define smaller-scale works for which no building permits are required. The municipal regulation on buildings may provide that some or all of these works have to be notified to the mayor;
- The fixed term of a building permit can be extended twice, each time for a maximum period of one year. Before the Omnibus Law, the fixed term could only be extended once.

The Omnibus Law entered into force on 1 April 2017.

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