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NEWSLETTER

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Asset management and investment funds

Virtual currencies and initial coin offerings

The CSSF (*Commission de Surveillance du Secteur Financier*) has recently published two warnings on its website regarding in particular the significant risks linked to **investments in initial coin offerings ("ICOs") and tokens** and **virtual currencies** (also called "VCs", "cryptocurrencies" or "virtual money").

As the CSSF considers that these investments are not suitable for all types of investors and investment objectives they prohibit direct and indirect investments in virtual currencies and/or tokens through ICOs by UCITS, UCIs addressing non-professional customers[1] and by pension funds. Only investment funds restricted to professional investors are therefore allowed to invest directly or indirectly in these investments provided that they take into account the relevant risks identified by the CSSF.

The CSSF highlights in particular the fact that virtual currencies and ICOs are not subject to a specific regulation and do not benefit from any guarantee. They are highly volatile and speculative investments, bearing a number of risks including total loss of investment.

> 1. Even though it is not expressly confirmed, the reference to non-professional investor should be understood as covering any type of investors which do not qualify as a professional investor within the meaning of MIFID.

Implementation of PRIIPs Regulation

As a reminder, on 1 January 2018, the PRIIPs Regulation entered into force in the EU. As regards the implementation of the PRIIPs Regulation in Luxembourg law, an implementing law was published on 19 April 2018 ("**PRIIPs Law**").

The PRIIPs Law designates the CSSF (*Commission de Surveillance du Secteur Financier*) and the CAA (*Commissariat aux Assurances*) as the competent authorities responsible for the supervision of compliance with the PRIIPs Regulation in the Grand Duchy of Luxembourg and, in this context, gives them specific supervisory and investigation powers. In addition, it details administrative sanctions and measures that can be imposed in case of violation of the PRIIPs Regulation, such as the prohibition or suspension of the marketing of the PRIIP, administrative fines that can amount to (i) EUR 5,000,000 or 3% of the revenues for a legal person and EUR 700,000 for a natural person or (ii) twice the profits made or the losses avoided because of the violation, if they can be determined.

The PRIIPs Law also allows SICARs and UCIs other than UCITS to establish a KID in the UCITS format (i.e. not a PRIIPs KID but a UCITS KIID prepared in accordance with the UCI Law), provided that this KID expressly states that the SICAR or UCI, as the case may be, does not qualify as a UCITS. In this case, the PRIIPs manufacturer is exempt from the obligations stated in the PRIIPs Regulation. Pursuant to the provisions of the PRIIPs Regulation, this exemption will be valid until 31 December 2019, subject to an extension of this transitional regime by the EU authorities.

Banking and financial services

Banking secrecy

Article 41 of the Law of 5 April 1993 on the financial sector ("**LFS**"), as amended, provides for an obligation of professional secrecy with regard to information confided to institutions of the financial sector and their employees or representatives in the context of their professional activities ("**Banking Secrecy Obligation**"), subject to certain exemptions also provided for in this Article.

Substantial amendments to this provision were adopted on 27 February 2018 in order to allow these institutions to make more extensive use of outsourcing solutions including transfers of confidential information.

Previously, only the communication of information to credit institutions and duly authorised support financial sector professionals within the meaning of the LFS under a service agreement was exempt from the Banking Secrecy Obligation. Several circulars of the *Commission de Surveillance du Secteur Financier* ("**CSSF**") completed the legal framework in practice by admitting the client's consent under certain conditions as a legitimate reason for the transfer of confidential information.

Under the new regime, the exemption is extended without further conditions for outsourcing to entities established in Luxembourg and supervised by the CSSF, the European Central Bank or the *Commissariat aux Assurances* and whose professional secrecy obligation is subject to criminal sanctions.

As regards the outsourcing of activities to all other types of entities (whether they are situated inside or outside Luxembourg or whether or not they belong to the same group), information covered by the Banking Secrecy Obligation may be transferred (or given access to) under the condition that the client has agreed, in accordance with the law or pursuant to a method of providing information agreed between the parties, to (i) the outsourcing of the relevant services, (ii) the type of information that would potentially be disclosed in the context of such outsourcing, and (iii) the country in which the provider of the outsourced services is established. The relevant entity must also be subject to a professional secrecy obligation or bound by a non-disclosure agreement.

The means of obtaining client consent (i.e. through provisions of the general terms and conditions) are thus facilitated. Furthermore, a mere contractual confidentiality undertaking will be sufficient at the level of the recipient of the information.

The new regime is also introduced for insurance companies and payment service providers, subject to similar professional secrecy obligations, by way of amendments to the relevant provisions of the respective laws regulating their activities.

Dispute resolution

ECJ : Clarification on the ne bis in idem principles

On 20 March 2018, the Court of Justice of the European Union relaxed its rules on the *ne bis in idem* principle. It may be limited for the purpose of protecting the financial interests of the European Union and the financial markets thereof. However, such a limitation must not exceed what is strictly necessary to achieve those objectives.

More information on these judgments is available in the **Press release 34/18** published by the Press and Information Unit of the Court.

EU law, competition and antitrust

Brexit : Update

On 23 March 2018, the European Council approved the text of the Draft Agreement on the UK's withdrawal from the EU as proposed by the Commission on 19 March 2018 ("**Withdrawal Agreement**"). At this stage, the most relevant points of the Withdrawal Agreement relate to the transition period. It shall run from the date of its entry into force until 31 December 2020. The following agreed elements are worth noting regarding the transition period:

- Subject to certain limited exceptions, EU law will be applicable to the UK so it will continue to benefit from the rights and be bound by the obligations arising from EU law governing the internal market, meaning also that the UK financial services sector will be under the continued supervision of the EU supervisory authorities.
- Subject to certain limited exceptions, the UK will no longer benefit from its institutional rights under the treaties and, in particular, will no longer be able to nominate, appoint or elect members of EU institutions, bodies and agencies, participate in their decision-making or attend their meetings.
- Although the UK remains bound by obligations stemming from existing international agreements entered into by the EU and by the duty of sincere cooperation, it is explicitly allowed to negotiate international agreements in areas of exclusive EU competence, such as international trade. The UK thus receives the right to start negotiating future trade agreements with third countries.
- The Court of Justice of the European Union will have continued jurisdiction in relation to the UK, including as regards the interpretation and application of the Withdrawal Agreement.

Also important is the agreement on the continued application of the Rome I and Rome II Regulations regarding, respectively, contracts concluded before the end of the transition period and events giving rise to damages which occurred before the end of that period.

Finally, on the same day, the European Council also adopted **Guidelines** for the negotiations on the framework of the future relationship between the EU and the UK, i.e. for the period post-December 2020. After recalling the indivisibility of the four freedoms, the European Council confirmed its readiness to work towards an ambitious free trade agreement with the UK, subject to sufficient guarantees for a level playing field. This agreement would also address trade in services, with the aim of allowing market access to provide services under host state rules, including as regards the right of establishment, but to an extent consistent with the fact that the UK will become a third country and will no longer share a common regulatory and supervisory framework with the EU (which means that there will be no more passporting rights).

Tax

Tax treaty news

France

On 20 March 2018, a new double tax treaty together with an associated protocol ("**New DTT**") were signed by the French and Luxembourg governments. It is expected that the New DTT, implementing the OECD/G20 BEPS new approaches, will replace the current double tax treaty dated 1 April 1958 ("**Current DTT**"). It will enter into force after the completion of the ratification process by each State, which may be as early as January 2019.

The most important changes can be summarised as follows:

- **Anti-abuse rules**: A new general anti-avoidance rule based on the Principal Purpose Test is included to deny treaty benefit if such benefit is one of the main purposes of a given arrangement or transaction. The New DTT also contains an uncommon clause allowing France to apply its domestic anti-abuse provisions to situations covered by the New DTT.
- **Permanent establishment**: The New DTT contains a wider definition of permanent establishment in line with BEPS under the new rules. Situations where contracts are substantially negotiated in France by a dependent agent and are merely authorised in Luxembourg may give rise to a permanent establishment in France.
- **Withholding taxes on dividend distribution made by French *Organismes de Placement Collectif Immobilier* ("*OPCIs*")**: A major point of attention regarding the New DTT is the withholding tax rate applicable to distributions made by a French OPCI. Luxembourg investors owning more than 10% in French exempt real estate vehicles will be subject to the French withholding tax of 30% (as opposed to the previous rate of 5% under the Current DTT). However, according to §2 of the Protocol, a reduced treaty rate of 15% may, under certain conditions, apply to distributions made to Luxembourg investment funds considered as similar to French investment funds.
- **Withholding taxes on other passive income**:

  Dividends (other than distributed by a French *OPCI*): the treaty provides for a standard withholding tax rate of 15% which can be reduced to 0% if the beneficial owner is a company owning directly at least 5% of the capital of the company paying the dividends for a 365-day period including the day of the payment.

  Interest: 0%.

  Royalties: 5%.

- **Employees**: Employees residing in France but working for a Luxembourg employer will be subject to tax in Luxembourg on their whole wages provided that they performed their functions in another State (France or a third State) for a period not exceeding 29 days in total per year.

- **Elimination of double taxation**: France applies the credit method for the avoidance of double taxation, while Luxembourg applies the credit method (with respect to dividends, royalties and directors' fees) and the exemption-with-progression method for other income. It is no longer possible, under the New DTT, for a French distributing company which is neither listed in the parent subsidiary directive nor fully taxable to benefit from the participation exemption. Distributions made by OPCIs should thus be fully subject to tax in Luxembourg.

Senegal

On 15 February 2018, Senegal ratified the double tax treaty on income and capital signed between Luxembourg and Senegal on 10 February 2016. The treaty will be in force after the completion of the notification process by each State.

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.

Oman

Based on recent public information, Luxembourg and Oman have expressed their intention to swiftly sign the already initialled double tax treaty.