NEWSLETTER

2015
May

50 YEARS
ELVINGER, HOSS & PRUSSEN
LUXEMBOURG LAW FIRM

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ASSET MANAGEMENT AND INVESTMENT FUNDS

1. UCITS

1. Updated ESMA Q&A on Key Investor Information Document (KIID) for UCITS

On 26 March 2015, ESMA published an updated version of its Q&A on the KIID.

In summary, the new question/answer 4g on past performance confirms a position taken in the past by the CSSF on the use of past performance data in cases of mergers.

In a situation where a receiving UCITS has no performance history, the past performance of the merging UCITS can be used in the KIID of the receiving UCITS, subject to an assessment by the competent authorities of the receiving UCITS that the merger does not affect the UCITS' performance.

ESMA illustrates its position by stating that, in its opinion, the performance of a UCITS may be affected by a change to the investment policy or a change of investment manager. A note indicating that the past performance is the performance of the merging UCITS should be included in the updated KIID.

On this point too (i.e. KIID update) and in view of the application of the UCITS V Directive, the next update due in February 2016 will be a good opportunity to reflect the new remuneration requirements (see Article 1 (14) b) of UCITS V Directive, i.e. Directive 2014/91/EU, which amends Article 78.4 of Directive 2009/65/EC).

2. Depositary – Compliance with Circular 14/587

In its Circular 15/608, the CSSF has extended the deadline for compliance with Circular CSSF 14/587 until 18 March 2016 (instead of 31 December 2015) in order to align it with the application date of the UCITS V Directive. In its Circular 15/608, the CSSF has also informed that its Circular 14/587 will be amended as of 18 March 2016 to reflect the UCITS V Directive and relevant delegated acts.

More information on the content of Circular 14/587 as amended by Circular 15/608 is available in the article "CSSF Circular 14/587 on UCITS depositaries in a nutshell (updated with Circular 15/608)" published on our website.

2. AIFM

1. Authorised and registered AIFM: additional information to be submitted to the CSSF

On 5 May 2015, the CSSF released a new circular (Circular 15/612) (the "**Circular**") on the information to be submitted to the CSSF by Luxembourg authorised AIFM and Luxembourg registered AIFM (together referred to as "**Targeted AIFM(s)**").

The CSSF clarifies the reporting obligations in relation to unregulated alternative investment funds (established in Luxembourg, in another EU Member State or in a third country) and/or regulated alternative investment funds established

in a third country (both are referred to as "**Additional AIFM**").

This follows the observation that the reporting obligations imposed by the AIFMD and the implementing legislation in Luxembourg are not sufficient to enable the CSSF to fulfil its reporting obligation towards the ESMA (European Securities Market Authority).

In order for the CSSF to have up-to-date information, Targeted AIFMs must complete the form attached to the Circular. The form can also be downloaded from the CSSF website.

This additional information must be sent to the CSSF within 10 working days following the date on which the Targeted AIFM started managing an Additional AIFM.

2. Updated ESMA Q&A on AIFMD

In March and more recently on 12 May 2015, new questions were added to the ESMA Q&A on the application of the AIFMD:

- Notification of AIFM (Section IV): the question relates to the notifications required in the case where an AIFM is already managing AIFs in a host Member State under Article 33 of the AIFMD and wishes to manage a new AIF in that host Member State.

  ESMA confirms that the original notification by an AIFM under Article 33(2) of the AIFMD is valid for all the AIFs it intends to manage in a given Member State and that a new notification is not required. In this case, however, the AIFM must update the information given to the competent authority of its home Member State in accordance with Article 33 (6) of the AIFMD.

- Additional own funds required at the level of the AIFM in the case of cross-investment between AIFs managed by the same AIFM (Section X):

  ESMA clarifies that an AIFM may exclude investments by AIFs in other AIFs it manages for the calculation of additional own funds under Article 9(3) of the AIFMD.

  These investments, however, must be included in the calculation of additional own funds to cover potential liability risks arising from professional negligence under Article 9(7) of the AIFMD given that, according to ESMA's Q&A, they increase the operational risk.

- Scope (Section XI) - Master feeder structures: in a master feeder structure where an EU feeder AIF invests in a non-EU master AIF managed by a non-EU AIFM, the non-EU AIFM of the non-EU master AIF is not required to be authorised on the basis of Article 36 AIFMD.

  ESMA, however, confirms that Member States may impose stricter rules on the AIFM in respect of the application of Article 36 of the AIFMD and may therefore, on the basis of their national law, require the non-EU AIFM of the non-EU master AIFs to be authorised.

  Finally, further information is provided on reporting (Section III) and on leverage (Section VII).

3. EHP brochure: The AIFMD and its implementation in Luxembourg – updated version April 2015

This brochure presents the Luxembourg Law of 12 July 2013 on alternative investment fund managers (the "**AIFM Law**") in consolidation with the AIFMD and the Level 2 AIFM Regulation, as well as consolidating, in a single document, all relevant AIFM legislation and guidelines (including the CSSF FAQ on the AIFM Law and the Level 2 AIFM Regulation).

The April 2015 update includes the March 2015 update of the ESMA Q&A on the AIFMD. This brochure will be further amended shortly in order to reflect the May 2015 update of the ESMA Q&A.

This brochure can be printed and/or used as an electronic version.

3. Pension funds

1. EMIR requirements: clarification in the updated ESMA Q&A

Implementation of the Regulation (EU) 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR) ESMA/2015/775 (the "Q&A").

ESMA updated its Q&A on 31 March 2015 and 27 April 2015. In particular, the Q&A sheds some light on the conditions regarding intra-group transactions and pension scheme arrangements' transitional exemptions from the clearing obligation – in questions 6, 13 and 16.
More specifically, ESMA clarifies that the exemption is granted to the pension scheme arrangements, in consideration of the nature of the activity, therefore the fact that the assets are not managed wholly and directly by the pension scheme arrangement does not prejudice the status of that exemption. ESMA further clarifies when a third party asset manager manages assets from an exempted pension scheme arrangement, it should comply with the following conditions:

- it does not comingle exempt and non-exempt assets;
- the derivative contract clearly identifies that it is concluded for an exempt pension scheme;
- it should keep the assets and records in a way to allow regulators to check that the derivative contract reduces investment risks directly related to the financial solvency of the pension scheme.

4. Immobilisation of bearer shares: update of the CSSF FAQ on the Law of 28 July 2014 regarding immobilisation of bearer shares and units (the "2014 Law") to investment funds

On 6 May 2015, the CSSF updated its Frequently Asked Questions in relation to investment funds established in Luxembourg concerning the 2014 Law, to reflect the expiry of the transitional deadlines (on 18 February 2015) regarding the suspension of voting rights attached to bearer shares but more importantly to remove references (see Question 9) to the requirements for investment funds to update their prospectus to disclose the implication for shareholders and the deadlines of the 2014 Law. Thus, the CSSF no longer requires investment funds to insert this information in their prospectus.

See also the article on the immobilisation of bearer shares and units in the "Corporate" section.

5. The European Long-Term Investment Fund (ELTIF) Regulation

On 20 April 2015, the European Council formally approved a new regulation aiming at creating a new investment vehicle channelling European investment directly to the real economy (the "**Regulation**"). The ELTIF project was initially announced by the European Commission back in October 2012 in the Single Market Act II communication and in the Green Paper on Long-Term Financing of the European Economy.

The ELTIF vehicle stands halfway between the AIFM and the UCITS rules.

An ELTIF must be an EU AIF and must be managed by an EU-authorised AIFM. As an alternative investment vehicle it will mainly invest (at least 70% of its capital) in illiquid assets such as shares of non-listed companies, certain loans and infrastructure projects.

Although subject to the AIFMD regime, ELTIFs may be granted a passport for marketing to retail investors in European Union under certain strict conditions such as the completion of an assessment of the retail investor patrimonial situation, the suitability of the ELTIF for that investor or the appointment by the ELTIF or its AIFM of a UCITS-compliant depositary. In order to offer managers a certain degree of flexibility, ELTIFs are also allowed to hold liquid assets (so-called UCITS eligible assets) up to 30% of their capital.

The Regulation will enter into force on the 20th day following its publication in the European Union Official Journal and will be applicable 6 months thereafter.

More information on the content of this Regulation is available in the article "The European Long-Term Investment Fund ("ELTIF") Regulation in a nutshell" published on our website.

BANKING, INSURANCE AND FINANCE

1. Recast of Commissariat aux Assurances circular letters relating to investment rules and deposit obligation

On 24 March 2015, the *Commissariat aux Assurances* ("**CAA**") issued two new circular letters.

Circular letter 15/3 on investment rules for insurance products linked to investment funds :

This circular letter[1] sets out rules relating to investments for life insurance products linked to investment funds (the "**Investment Rules Circular**") and repeals the amended circular letter 08/1 of the CAA. Where the majority of the contents of the Investment Rules Circular remain identical to the circular letter 08/1, a few points are worth noting.

The Investment Rules Circular introduces a new type of internal fund being the "specialised insurance fund" ("**SPIF**") defined as an internal fund other than a dedicated fund, with direct or indirect lines, without a guarantee of return and serving as support for a single contract. Accordingly, specific rules applicable to SPIFs have been introduced. SPIFs may for instance be used as a basis for unit-linked insurance based contracts and are not subject to minimum premium and wealth requirements. Each asset of a SPIF is directly chosen by the subscriber either at the moment of the investment of the initial or subsequent premium or during an arbitrage process.

The Investment Rules Circular also specifies that the investment limits for a specific asset must be inferred in light of limits applicable in Annex 1 and will depend on the categorisation of client pursuant to the Investment Rules Circular's provisions. Interestingly and contrary to dedicated funds, assets of SPIFs may be deposited with multiple depositaries and need not be deposited in a particular account or sub-account for each fund.

Moreover, the Investment Rules Circular also slightly amends the minimum investment and wealth requirements for two categories of subscribers. As such, the amount of minimum wealth in transferable securities for category C subscribers has been lowered from EUR 2.5 million to EUR 1.25 million whereas the minimum investment amount for category D subscribers was lowered from EUR 2.5 million to EUR 1.25 million.

The Investment Rules Circular now also defines the notion of wealth in transferable securities by specifying that it corresponds to the aggregate of (i) the value of financial instruments of the subscriber, any bank deposits and the

[1] Circular letter 15/3 of the CAA relating to investment rules for insurance products linked to investment funds dated 24 March 2015.

value under any life insurance and capitalisation contract diminished by (ii) any debts of any nature. The insurer should refuse the declared value relating to the wealth if, based on the information received by the subscriber, he has doubts on such declaration. The Investment Rules Circular furthemore specifies under which conditions a subscriber may be categorised into a higher category.

The provisions of the Investment Rules Circular entered into force on 1 May 2015. Certain transitional provisions apply, however, such as those for dedicated funds existing prior to that date, which shall continue to be governed by the appendix to the insurance contract specified by the circular letters 95/3, 01/8 or 08/1. Regarding the new classification rules, the Investment Rules Circular specifies that such rules may be applied to existing contracts by way of an amendment deed. Should the application of these new rules result in a dedicated fund being categorised in a higher category, the appendix setting out the investment policy of the dedicated fund will need to be amended as a consequence.

Circular letter 15/4 to the deposit of transferable securities and liquidities used as assets representing technical provisions of direct insurance undertakings and pension funds subject to the supervision of the Insurance Commission :

This circular letter[2] relates to the deposit of transferable securities and liquidities used as assets representing technical provisions (the "**Deposit Circular**") of direct insurance undertakings and pension funds subject to the supervision of the CAA and repeals the amended circular letter 09/7.

In addition to some clarifications in respect of the entities with whom assets representing technical provisions located within the European Economic Area ("**EEA**") must be deposited, the Deposit Circular introduces a new provision in case of a change in the status of the credit institution. As such, where the credit institution changes its independent status to become a subsidiary of another credit institution or vice versa, the deposit agreement will need to be either amended or replaced by a new deposit agreement at the latest six months after the relevant change of status. Any changes to existing deposit agreements will need to be approved by the CAA.

Furthermore, the Deposit Circular slightly amends the tripartite model deposit agreement appended to the Deposit Circular. The revised deposit agreement now requires credit institutions to undertake to carry out without delay any blocking instruction from the CAA including in cases where the accounts to be blocked have been opened with agencies or subsdiaries located in the country of the addressee of the notification but at different addresses than that of the addressee. Moreover, credit institutions are now required to confirm that they have internal processes

[2] Circular letter 15/4 of the CAA relating to the deposit of transferable securities and liquidities used as assets representing technical provisions of direct insurance undertakings and pension funds subject to the supervision of the Insurance Commission.

and means of communications allowing to carry out any blocking instruction without delay.

The Deposit Circular is also applicable as from 1 May 2015 and contains a few transitional provisions relating to (i) certain agreements linked to dedicated funds with deposit outside the EEA and entered into prior to 31 December 2010 and (ii) certain accounts regulated by deposit agreements pursuant to circulars 04/5 and 01/7 respectively which are no longer compliant with the up-to-date model deposit agreement appended to the Deposit Circular.

2. PSF: CSSF specifications on company incorporation and management services and on debt recovery activities

On 4 February 2015, the CSSF published its updated Questions and Answers on the status of professionals of the financial sector, (“**PFS**”).

- One of the main changes resides in the amendment of Question 63 relating to the activities of the professional providing company incorporation and management services (“**PIMs**”).

  PIMs, as specialised PFS, need to be authorised by the Minister responsible for the CSSF. The CSSF clarifies the concepts of Article 28-10 of the Law on the Financial Sector (the “**LFS**”) establishing the status of PIMs.

  PIMs shall carry out activities other than those defined in its status only on an ancillary basis. Activities that are not described in Article 28-10 of the LSF should be limited or transferred to a distinct entity.

  The activities a PIM may carry out are company incorporation services and company management services. The CSSF considers that if a PIM performs the sole provision of company incorporation services, excluding any company management services, it does not require PIM status.

  Company incorporation services consist of performing all kinds of steps to set up the type of company requested. Company management services consist of making available to third party companies independent administrators, directors or managers, who actively intervene in the management of the client company by the fact that they have power of commitment and effective responsibilities.

  This latter activity falls under Article 28-10 of the LFS if it complies with two conditions: (i) it is a regular occupation or business activity (ii) performed in a professional capacity. That criterion means that the activity must be based on a contractual relationship between the PIM and its client. To establish if the activity is regular, the CSSF takes into account the number of mandates and the time requirements. All situations are analysed on a case-by-case basis but the general rule is that authorisation is required when the activity covers at least two mandates as director of a financial sector entity simultaneously and at least 20 work hours per week for these mandates.

- The other amendment is the addition of Question 47 relating to debt recovery. The CSSF defines the debt recovery activity as consisting of contacting a defaulting debtor in order to request him to pay his debts. The CSSF specifies that this activity falls under Article 28-3 of the LSF and requires authorisation when exercised through an amicable procedure based on a mandate from the creditor.

  The professional is neither allowed to represent the creditor in justice nor to proceed with the enforcement of a judgment.

3. CSSF procedure for approval for holders of key functions within banks and investment firms

On 6 February 2015, the CSSF published its prudential authorisation procedure for the approval of holders of key functions within banks and investment firms, according to Circular 12/552 on central administration, internal governance and risk management (the “**Circular**”).

Article 17 of the Circular provides that, for the appointment and succession of individuals with key functions, an institution shall comply with the CSSF prudential authorisation procedure and the requirements of the guidelines published by the European Banking Authority (“**EBA**”) on 22 November 2012[3].

The key functions are defined in point 1 of the Circular as any function whose exercise may have a significant influence on the conduct or monitoring of activities. Those functions include the directors, authorised managers and the chief risk officer, the chief compliance officer and the chief auditor (the “**Relevant Person**”).

To nominate new Relevant Persons, the institution shall (i) define internal policies and procedures for selecting key function holders which comply with the principles of robust internal governance, and (ii) complete an authorisation file to be sent to the CSSF for approval.

That file shall provide a list of the following documents:

- certified copies of valid ID/passport;
- dated and signed CV;
- recent copy of the police report (no more than three months old);
- declaration of honour for natural persons published on the CSSF’s website to be duly completed and signed.

In the case of resignation or removal of a holder of key functions, the institution has to notify the CSSF at short notice, attaching to the notification the reasons for the decision as well as the letter of resignation/removal. The institution shall specify if it intends to replace the resigning person and in what period of time.

The appointment of directors as authorised managers, requires prior written authorisation from the CSSF.

[3] Guidelines on the assessment of the suitability of members of the management body and key function holders – EBA/GL/2012/06.

4. Scope of Capital Requirements Regulation[4] and Directive[5] in relation to investment firms

Circular CSSF 15/606 (the "**Circular**") defines the criteria according to which an investment firm is considered to fall within the definition of "CRR investment firm" as defined in the Bill of Law 6660 implementing the CRD IV, which will amend the Law on the Financial Sector (the "**LFS**") by introducing an investment firm subcategory, i.e. "investment firm within the meaning of the Regulation (EU) 575/2013" (the "**CRR Investment Firm**").

CRR Investment Firms will not only have to apply the Implementing Technical Standards on Supervisory Reporting as described in Circular 13/575, but will also be required to comply with the conditions imposed by the CRD IV regarding supervision on a consolidated basis, governance and remuneration.

CRR Investment Firm's definition includes all investment firms as defined in Article 1(9) of the LFS excluding those satisfying the **cumulative** criteria of Article 4(1)(2) of the CRR. Any investment firm is deemed to meet such criteria if:

(i) it is not authorised for the "safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management" (Section C (1) of the **Annexe II of the LFS** (the "**Auxiliary Service 1**")); and

(ii) it is authorised exclusively to provide one or several of the following investment services: "reception and transmission of orders in relation to one or more financial instruments", "executions of orders on behalf of clients", "portfolio management" and "investment advice" (points 1, 2, 4 and 5 of Section A of Annexe II of the LFS, the "**Annex**"); and

(iii) it is not authorised to hold funds or securities from its clients and accordingly, cannot be considered to be in a debit position towards them.

As for point (iii), since only an investment firm authorised to provide the Auxiliary Service 1 will be authorised to hold assets pertaining to its clients, all investment firms holding assets from their clients will have to be authorised to offer the Auxiliary Service 1 and will thus be indistinctly considered as CRR Investment Firms.

Thus, investment firms exclusively authorised to provide one or several of the services described under point (ii) above, but not authorised to provide the Auxiliary Service 1, do not fall within the scope of the CRR. On the contrary, investment firms authorised to provide one or several of the services under points 3, 6, 7 and 8 of the Annex, as well as those authorised to provide the Auxiliary Service 1, are considered CRR Investment Firms

[4] Regulation (EU) 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) 648/2012.

[5] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC .

and fall within the scope of application of the CRR.

Regarding the definition of holding assets (*détention d'avoirs*) in the sense of point (iii) above, the CSSF considers that an investment firm holds assets from its clients when:

- it receives assets from its clients and itself assumes their actual custody (e.g., by means of a safe) or delegates their custody to a third entity, by virtue of a sub-deposit established in the name of the investment firm;
- clients' assets are placed in accounts from a third party under the name of the investment firm. *A contrario*, if clients' assets are placed with a third party under their name, the investment firm shall not be considered as holding the assets pertaining to its clients;
- in the case of registered securities, the investment firm is registered with the issuer's register (e.g., register of shareholders) in its own name, as holder of the securities (also when the investment firm acts on behalf of the client).

The Circular recalls investment firms' obligations regarding the protection of clients' assets as derived from Article 37-1(7) and (8) of the LFS, and Articles 18, 19 and 20 of the Grand Ducal Regulation of 13 July 2007 on organisational requirements and rules of conduct in the financial sector. The CSSF also recalls that investment firms holding accounts in their own name on behalf of their clients shall put in place efficient processes of detection, management, control and declaration of risks, as well as adequate internal control mechanisms, including administrative, accounting and IT procedures allowing an exact and continuous separation of the clients' assets.

With the objective of classifying investment firms as possessing or not possessing assets from their clients, which is instrumental in determining the necessity to obtain an authorisation as provider of the Auxiliary Service 1, the CSSF will require the form attached to the Circular to be completed. This form will be required in all cases for demands of new authorisations and, when the CSSF deems it appropriate, for previously granted authorisations.

Investment firms which are not currently holding their clients' assets, but are authorised Auxiliary Service 1 may choose to maintain this authorisation. In that case, however, they will be considered CRR Investment Firms as well, and will thus fall within the scope of application of the CRR.

5. Credit institutions

1. Ad hoc data collection within the context of Directive 2014/59/EU (BRRD)

Within the context of the Banking Recovery and Resolution Directive, (BRRD), the CSSF requests information and data to be provided to it by credit institutions and Luxembourg branches of foreign credit institutions (see Circular 15/610 dated 7 April 2015).

An appendix is attached to the Circular which contains the tables to complete.

Due to the importance of this data collection, the electronic files containing all the information must be endorsed by a

member of the management board of the credit institution before they are sent to the CSSF.

The deadline to send the requested information is 30 May 2015.

2. Circular CSSF 15/613 on supervisory reporting requirements

On 6 May 2015, the CSSF released a new circular (Circular 15/613) which updates CSSF Circular 14/593 by including the latest developments as regards the reporting obligations which apply to credit institutions.

6. Establishment of a Systemic Risk Board

The Law of 1 April 2015 establishing the Systemic Risk Board and amending the Law of 23 December 1998 concerning the monetary status and the Luxembourg Central Bank (the "**Law**") became effective on 7 April 2015.

According to the recommendation of the European Systemic Risk Board (the "**ESRB**") of 22 December 2011 on the macro-prudential mandate of national authorities (ESRB/2011/3), Member States are invited to designate an authority responsible for the conduct of macro-prudential policy. In view of the second recommendation of the ESRB of 4 April 2013 on intermediate objectives and instruments of macro-prudential policy (ESRB/2013/1), governments are asked to assign the "first" role to the national central banks in the macro-prudential supervisory framework.

To meet these two ESRB recommendations, the Law of 1 April 2015 has established the Systemic Risk Board (the "**Board**"), consisting of the authorities involved in the regulation and supervision of the financial system, namely the Minister of Finance, the Luxembourg Central Bank, the Commission for the Supervision of the Financial Sector and the insurance regulator "*Commissariat aux Assurances*".

The Board is responsible for coordinating the implementation of the macro-prudential policy by the authorities represented in the Board. The ultimate aim of this policy is to help in maintaining the stability of the Luxembourg financial system by strengthening the resilience of the financial system and by reducing the build-up of systemic risks, thereby ensuring a sustainable contribution of the financial sector to economic growth.

The Board determines intermediate objectives and is entitled to recommend the use of any macro-prudential instrument that it deems necessary, taking into account the structure and vulnerability of the national financial system and the cyclical dimension of systemic risks.

The Board promotes cooperation between national authorities represented on the Board and ensures the exchange of information and cooperation across borders with the ESRB as well as with foreign macro-prudential authorities.

The Board is able to issue opinions and warnings and make recommendations on corrective actions in relation to the identified financial risks.

Finally, the Board is empowered to request the authorities represented on the Board as well as any other national body to disclose all relevant economic and financial information necessary for the fulfilment of its mission in the best way.

Regarding the Luxembourg Central Bank, a new provision "civil liability" is inserted in the Law. Under this section, the civil liability of the Central Bank may be initiated only if the defendant proves that the damage suffered was caused by serious negligence in the selection and application of resources used for the fulfilment of public duties of the Central Bank.

CORPORATE

1. Immobilisation of bearer shares and units: CSSF guidance on scope and actions to be taken by holders and issuers of bearer shares and units

On 26 January 2015, the CSSF published Press Release 15/09 in which Luxembourg issuers of bearer shares and units were reminded of the final deadline for appointing a depositary in accordance with the Law of 28 July 2014 concerning the compulsory deposit and immobilisation of shares and units in bearer form (the "**Law**").

On 27 March 2015, the CSSF published its Press Release 15/16 (the "**Press Release**") alerting holders and issuers of bearer shares and units regarding further action to be taken by each of them pursuant to the Law.

The following is a summary of the key points addressed in the Press Release:

- **Bearer instruments credited to a securities account:** Holders of shares or units in bearer form which are credited to their securities account with a financial institution are not required to take any action. These shares or units are indeed immobilised, typically in a clearing and settlement system, and their holder can therefore be identified. If the relevant financial institution physically holds the bearer instruments it has credited to its clients, it will need to ensure compliance with the Law.

- **In-scope securities:** The securities listed below existing in physical individualised bearer form and issued by an issuer having its registered office (*siège*) in Luxembourg are within the scope of the Law:

  - shares and units issued by public limited liability companies (*sociétés anonymes*, including where they have adopted the form of a European Company) and corporate partnerships limited by shares (*sociétés en commandite par actions*);

  - shares in UCITS, alternative investment funds (AIFs), specialised investment funds (SIFs) and investment companies in risk capital (SICARs) which do not qualify as AIFs (together, "**UCIs**")) incorporated as an investment company with variable capital (SICAV) or an investment company with fixed capital (SICAF) and organised as a public limited liability company (*société anonyme*) or of a corporate partnership limited by shares (*société en commandite par actions*);

  - units in UCIs set up as an FCP (*Fonds Communs de Placement*).

- **Out of scope securities:** The following securities are outside the scope of the Law:

  - units issued by securitisation funds;

  - depositary receipts representing bearer shares or units (eg. American Depositary Receipts (ADR), American Depositary Shares (ADS) or Global Depository Receipts (GDR)), as such

depositary receipts are not *per se* shares or units;

- shares or units in bearer form deposited with a securities settlement system and represented by a global certificate or by securities under individualised physical form, as these securities effectively no longer are to the bearer or able to circulate by physical transfer but can only circulate by book entry.

We also remind that bearer bonds are outside the scope of the Law.

- **Investors who physically hold in-scope bearer shares or units need to take action no later than 17 February 2016:**

  - they can deposit their shares or units in an account with a financial institution, with this option being generally only available if the relevant shares or units are cleared within a clearing and settlement system ; or

  - they can elect to convert their bearer instruments into registered form (which option is always available) and/or, but only where the relevant issuer issues its shares or units in that form, in dematerialised form; or

  - they can deposit their bearer instruments with the depositary appointed for that purpose by the issuer.

Holders are recommended to enquire with the issuer (and/or in the case of investors in UCIs, with the agent of the relevant UCI identified in its prospectus for obtaining information) regarding the identity of the appointed depositary and on how to effect the deposit of their bearer instruments.

The sanctions for failing to comply with the above requirements is the suspension of the voting rights and of the dividends rights attached to the relevant shares or units and this suspension will apply until compliance is achieved. Ultimately, bearer shares or units which are not immobilised before 18 February 2016, must be cancelled.

- **Issuers of in-scope bearer shares or units and issuers of units in UCIs**[6]:

  These issuers should:

  - ensure holders of their bearer shares or units receive clear and complete information on the implementation of the Law;

  - inform the holders of the option to convert their securities into registered and/or, where available, dematerialised form and on the practical steps to be taken to that end;

  - assist the holders in bearer form in the deposit of their securities with the appointed depositary.

  The CSSF does not indicate how the information on the implementation of the Law should be communicated to holders except for issuers of units of UCIs which are required to either publish a notice in at least two newspapers (one of which at least must

[6] UCIs in corporate form and management companies of FCPs.

be a Luxembourg newspaper) with adequate dissemination or make an adequate insertion in the convening notices published with respect to the upcoming annual general meeting.

- **CSSF monitoring:** The CSSF will monitor compliance with the Law by those professionals which are under its supervision (credit institutions, private portfolio managers, distributors of units in UCIs, specialised professionals of the financial sector (PFS) approved as Family Office, corporate domiciliary agents, professionals providing company incorporation and management services, registrar agents, professional depositaries of financial instruments, *réviseurs d'entreprises* (statutory auditors) and *réviseurs d'entreprises agréés* (approved statutory auditors)) and which have been appointed as depositary of bearer shares or units under the Law. The CSSF will by separate communication specify to those professionals its particular requirements including in terms of reporting. The CSSF will act in the same manner with respect to the issuers of securities within the scope of the Law and which are under its supervision.

See also the article on the update of the CSSF FAQ on the Law of 28 July 2014 regarding immobilisation of bearer shares and units in the "Asset Management and Investment Funds" section.

2. The new simplified S.à r.l. – Bill of Law

The Bill of Law 6777 (the "**Bill of Law**"), the purpose of which is to introduce a simplified limited liability company (*société à responsabilité limitée simplifiée* ("**S.à r.l.-S**")) and amending (i) the amended Law of 10 August 1915 on commercial companies (the "**Law of 1915**") and (ii) the amended Law of 19 December 2002 on the Trade and Companies Register as well as company accounts and annual statements, was introduced in the *Chambre des députés* on 2 February 2015.

This Bill of Law is intended for the creation of a new vehicle in order to encourage "entrepreneurship by facilitating access to business start-ups", particularly by reducing the setup costs but also by favouring a quick and easy incorporation process.

Specific setup conditions for a S.à r.l.-S:

- **A company open only to individuals :** Only one or several individuals may become member(s) of a S.à r.l.-S. Therefore, no legal entities may hold corporate units in a S.à r.l.-S, or the S.à r.l.-S. would be void.

  An individual may become a member of only one S.à r.l.-S at any one time. Failure by an individual to comply with this provision will entail an extension of his personal responsibility. This person will stand as collateral security (*caution solidaire*) for the obligations entered into by this second S.à r.l.-S, that he will be a shareholder despite this prohibition. The Bill of Law limits the collateral security liability for the contracted obligations after the individual has become a member of a second S.à r.l.-S. The individual member will cease to stand as collateral security as from (i) the transformation of the second S.à r.l.-S into a "classic" S.à r.l. or

(ii) the publication of the dissolution of the second S.à r.l.-S.

One exception to the above provision, however, is expressly provided in the Bill of Law: it concerns the transfer of corporate units of a S.à r.l.-S in the event of death. Thus, in this particular case, an individual may hold corporate units in several S.à r.l.-S without having a special personal liability as described above.

Finally, it should be noted that this prohibition only applies to an S.à r.l.-S and not to a “classic” S.à r.l. Therefore an individual may be a member of one or several “classic” S.à r.l. and a member a S.à r.l.-S.

This desire to encourage the presence of individuals within this new company also applies to managers since, contrary to “classic” S.à r.l., they have to be individuals.

- **A corporate object restricted by law:**
  The corporate object of the S.à r.l.-S will necessarily fall within the scope of Article 1 of the Law of 2 September 2011 regulating access to the professions of craftsmen, traders, industrial and certain other free professions. Use of the S.à r.l.-S will therefore be reserved solely to those requiring commercial authorisation.

  Upon registration of the S.à r.l.-S with the Trade and Companies Register, the S.à r.l.-S shall submit a copy of its business authorisation.

- **A company established with a share capital of one euro:**
  The minimum amount of share capital has been reduced to 1 euro and may not exceed EUR 12,394.68 (corresponding to the minimum share capital of a “classic” S.à r.l.). As for a “classic” S.à r.l., this minimum share capital must be fully subscribed and paid-up at the time of incorporation of the company and a deposit of at least 5% of the net annual profits must be allocated to the establishment of a reserve which will be unavailable until it has achieved the amount of the difference between the subscribed and paid-up capital and the amount of EUR 12,394.68.

  Contributions in cash and in kind are authorised, contrary to contributions in the form of services which are excluded.

- **A simplified incorporation:**
  The S.à r.l.-S may be set up through a special deed, notarised or under private seal. Whatever the form chosen by the member(s), the articles of incorporation must be published in full.

- **An unlimited duration:**
  The Bill of Law does not impose a maximum duration for a S.à r.l.-S. so as not to pressurise the entrepreneur and limit the use of this vehicle. The only obligation shall be that the maximum amount of share capital must never be exceeded during the existence of the S.à r.l.-S.

- **A clear indication of the corporate form:**
  The corporate form must appear after the name of the company and on all the

documents referred to in Article 187 of the Law of 1915.

Finally, for the purpose of maintaining the attractiveness of the S.à r.l.-S, certain regulated costs have been revised downwards. This is particularly the case for disbursements and notarial fees for which no minimum is required or for registration with the Trade and Companies Register, the amount of which has been set at EUR 15 (instead of EUR 121,80 for a "classic" S.à r.l.).

Similar operating rules to a "classic" S.à r.l.:

The S.à r.l.-S is not a new corporate form but a variation of a pre-existing corporate form, the S.à r.l. Thus, the Bill of Law proposes to divide the current Section XII of the Law of 1915 into two sub-sections: a first relating to "general provisions" and a second to "provisions applying particularly to simplified limited liability companies (*société à responsabilité limitée simplifiée)"*. Unless otherwise provided in the second sub-section, the provisions relating to a "classic" S.à r.l. will apply to a S.à r.l.-S.

The law resulting from the Bill of Law is expected to be enacted within the upcoming months.

DISPUTE RESOLUTION

1. Introduction of the plea bargaining procedure in Luxembourg law / Introduction de la transaction en matière pénale en droit luxembourgeois

The first criminal case on the basis of the newly adopted plea bargaining procedure in Luxembourg called « judgment upon consent » has been settled by a lawyer within our firm. This procedure provides that an agreement can be reached between the public prosecutor and the accused person for criminal offences that are subject to less than 5 years of imprisonment. The agreement contains a recognition of guilt as well as the offences and sanctions agreed upon. Criminal courts must approve the agreement at a final stage.

Le premier accord en matière pénale dans le cadre de la procédure du « jugement sur accord » vient d'être conclu par un avocat membre de notre étude.

La transaction en matière pénale a été introduite au Luxembourg par une loi du 24 février 2015 modifiant le Code d'instruction criminelle afin d'y introduire le jugement sur accord, publiée au Mémorial A – N°33 du 4 mars 2015.

Cette loi permet dorénavant de raccourcir les délais des procédures en matière pénale en offrant la possibilité aussi bien au Ministère public qu'à la personne poursuivie de proposer à l'autre partie un accord à tout stade de la procédure aussi longtemps qu'une chambre correctionnelle du tribunal d'arrondissement n'a pas statué sur l'action publique.

Peuvent faire l'objet d'un tel accord les délits et les crimes qui sont susceptibles d'être punis, en raison de circonstances atténuantes, à titre principal d'un emprisonnement inférieur ou égal à 5 ans ou d'une amende correctionnelle.

L'accord doit notamment contenir un résumé de la procédure, un exposé des faits qui en font l'objet, leur qualification pénale, les circonstances atténuantes le cas échéant, la(les) peine(s) proposée(s) et la décision sur les restitutions et les frais, ainsi que les demandes indemnitaires le cas échéant. Il est transmis à l'autre partie par lettre recommandée avec avis de réception.

L'assistance d'un avocat est obligatoire tout au long de la procédure de l'accord et le dossier peut être communiqué.

La proposition d'accord peut être refusée discrétionnairement aussi bien par la personne poursuivie que par le procureur d'Etat. Elle devient caduque en cas de refus complet, transmis par lettre recommandée avec avis de réception, ou à l'expiration d'un délai d'un mois suivant sa réception, auquel cas toutes les pièces y relatives devront être détruites. La loi ne dit mot sur la question de savoir si la proposition émise peut être retirée.

Si l'accord est signé, le procureur d'Etat cite les parties intéressées devant la chambre correctionnelle pour que celle-ci statue sur l'accord. Le Président de la chambre interroge la partie poursuivie sur les faits qu'elle reconnaît avoir commis. L'avocat, les parties intéressées et le procureur d'Etat sont également entendus.

Après avoir contrôlé la légalité et l'adéquation des peines, la chambre correctionnelle statue sur la culpabilité de la personne poursuivie et la condamne aux peines retenues dans l'accord par un jugement motivé. Si elle considère notamment que la culpabilité n'est pas établie ou que les peines ne sont pas adéquates, l'accord est caduc. Les voies de recours ordinaires sont applicables.

Le jugement met fin à l'action publique contre la personne poursuivie concernant les faits visés dans l'accord, mais n'a pas d'influence sur l'action civile intentée par une personne dont les prétentions n'ont pas été réglées par l'accord.

INFORMATION AND COMMUNICATION TECHNOLOGY

1. Circular CSSF 15/603 on security of internet payment

Concerned about the increase in frauds related to internet payments, the European Banking Authority ("**EBA**") has published guidelines on 19 December 2014 in relation to the security of internet payment (the "**EBA Guidelines**") based on the recommendations that had been developed by the European Forum on the Security of Retail Payments (SecuRe Pay) published in January 2013. In order to give effect to the EBA Guidelines within the Luxembourg regulatory framework, the CSSF has issued on 9 February 2015 a circular 15/603 on security internet payments.

All Payment Services Providers as defined in Article 1 (37) of the law of 10 November 2009 on payment services ("**PSPs**") (the "**PSPs Law**") have to apply the EBA Guidelines as from 1 August 2015 until the implementation of any potentially more stringent requirements set in the forthcoming Payment Services Directive 2 to come in 2017/2018.

Scope of the EBA Guidelines:

Who is concerned?

The EBA Guidelines are applicable to all PSPs as defined in Article 1(37) of the PSPs Law namely:

- credit institutions;
- electronic money institutions;
- payment institutions;
- European and national central banks;
- Member States or their regional or local public authorities; and
- post office giro institutions (the *Entreprise des Postes et Télécommunications*).

Payment integrators offering payment initiation services may also be considered as PSPs.

For which services?

The EBA Guidelines aim at defining common minimum requirements for the following internet payment services:

- cards payments (including virtual card payment and registration of card payment data for use in wallet solutions);
- credit transfers;
- direct debit electronic mandates (e-mandates); and
- transfer of electronic money (e-money).

On the contrary, the EBA Guidelines are not applicable to:

- other internet services provided by a PSP via its payment website;
- payments where the instruction is given by post, telephone order, voice mail or using SMS-based technology;
- mobile payments other than Internet browser-based payments;
- credit transfers where a third party accesses the customer's payment account;
- payment transactions made by an enterprise via dedicated networks;
- card payments using anonymous and non-rechargeable physical or virtual pre-

paid cards where there is no ongoing relationship between the issuer and the cardholder; and

- clearing and settlement of payment transactions.

Main requirements of the EBA Guidelines:

The EBA Guidelines aim at boosting e-commerce across the European Union and at strengthening consumers' confidence in internet payments. EBA Guidelines are part of the European framework for the effective implementation of a Digital Single Market. In that respect, Regulation (EU) 910/2014 regarding electronic identification and trust services for electronic transactions in the internal market was adopted on 23 July 23 2014. Most of the provisions of this Regulation will be applicable as of 1 July 2016. However some others will only be applicable after the adoption of implementing acts by the European Commission.

The EBA Guidelines first provide for definitions in addition to the definitions provided in the Payment Services Directive (such as Authentication, Strong Customer Authentication or Credentials). Then the EBA Guidelines lists the set of minimum requirements that should be complied with by PSPs as from 1 August 2015. EBA Guidelines establish measures falling within three main categories: General control and security environment, Specific control and security measures for internet payments and Customer awareness, education and communication. Each category deals with many sub-topics, as detailed below:

- **General control and security environment:**
  - **Governance**: a formal security policy for internet payments services should be implemented by PSPs and regularly reviewed. The security policy shall define security objectives, the risk appetite as well as roles and responsibilities. It should also implement some reporting measures.
  - **Risk Assessment**: PSPs should carry out and document detailed risk assessments for internet payment and related services, notably with respect to access to, use and storage of sensitive payment data.
  - **Incident monitoring and reporting**: PSPs should establish a consistent and integrated monitoring of security incidents, and have in place a procedure for reporting incidents to management and/or to the competent authorities.
  - **Risk control and mitigation**: PSPs should implement security measures in order to mitigate identified risks, incorporating multiple layers of security defense ("**defense in depth**"). Attention shall be paid to the adequate segregation of duties in information technology environments. Appropriate security solutions to protect networks, websites, servers and communication links against abuse or attacks are required. The security measures shall be tested and periodically audited to ensure their robustness and effectiveness. PSPs must ensure that e-merchants comply with the required security measures.

Otherwise failure to do so may impact their contractual relationship.

- **Traceability**: PSPs shall be equipped with processes in order to appropriately trace all transactions.

- **Specific control and security measures for internet payments:**

- **Initial customer identification, information**: customers should be properly identified in line with the European anti-money laundering legislation and confirm their willingness to make internet payments before being granted access to such services. PSPs should give prior information to customers about the requirements for performing secured internet payment transactions and the inherent risks. Customers should also be contractually informed that the PSP may block a specific transaction or the payment instrument on the basis of security concerns.

- **Strong customer authentication**: authentication is key to the prevention of Internet fraud. PSPs are requested to implement a strong customer authentication procedure in order to verify the user identity prior to the initiation of a payment order. This procedure is defined by the EBA Guidelines as a procedure based on the use of two or more of the following elements: (a) something only the user knows (such as a password), (b) something only the user possesses (such as a token or a mobile phone) and (c) something that defines the user (such as fingerprints). At least one element should be non-reusable, non-replicable (except for (c)) and not capable of being surreptitiously stolen via the internet.

- **Enrolment for, and provision of, authentication tools and/or software delivered to the customer:** customer enrolment for and the initial provision of the authentication tools required to use the internet payment service and/or the delivery of payment-related software to customers should be carried out in a safe and trusted environment.

- **Log-in attempts, session time out, validity of authentication**: PSPs should limit the number of log-in or authentication attempts, define rules for internet payment session "time - out" and set time limits for the validity of authentication.

- **Transaction monitoring**: mechanisms designed to prevent, detect and block fraudulent payment transactions before the PSP's final authorization should be implemented. Suspicious or high-risk transactions should be subject to a specific screening and evaluation procedure.

- **Protection of sensitive data**: PSPs should ensure appropriate security to sensitive payment data when stored, processed or transmitted. PSPs shall take measures against theft and unauthorized access or modification with regard to data used to identify and authenticate customers. They should also encourage their e-merchants not to store any sensitive payment data or contractually require

them to have the necessary measures in place to protect these data.

- **Customer awareness, education and communication:**

  - **Customer education and communication:** PSPs should provide assistance and guidance to customers with regard to the secure use of the internet payment services. They should communicate with their customers in such a way as to reassure them of the authenticity of the messages received (i.e. through a secured channel). They should inform customers about updates in security procedures, and provide them with assistance for all questions, complaints, requests for support and notifications of anomalies regarding internet payments. They should also initiate customer education and awareness programs.

  - **Notification, setting of limits**: PSPs should set limits for internet payment services (e.g. a maximum amount for each individual payment).

  - **Customer access to information on the status of payment initiation and execution**: PSPs should confirm to their customers the payment initiation and provide them in good time with the information necessary to check whether the payment transaction has been correctly initiated/executed.

Best practice examples:

The EBA Guidelines also provide for many examples of best practices that PSP are encouraged, but not required to adopt. As examples: the security policy shall be laid down in a dedicated document; the PSPs could sign a dedicated service contract for conducting internet payment transactions with the customer, rather than a broader general service contract.

2. The EUCJ Ryanair: a useful clarification on the use of unprotected databases

At the beginning of 2015, the Court of Justice of the European Union ("**The Court**") rendered a judgment (EUCJ, aff. C-30/14) which should serve to reassure database owners irrespective of the nature of these databases. In response to a preliminary ruling posed by the Supreme Court of the Netherlands, the Court has indeed confirmed that the owners of databases which do not fall under the legal protection regime may limit their use by third parties through the adoption of general terms and conditions.

- **Context:**

We must attribute this useful clarification to Ryanair. Noticing that an Internet flight search engine had used data (flight times and ticket prices) reproduced from the Ryanair website, even allowing users to reserve a Ryanair flight through this search engine, Ryanair referred the matter to the Dutch courts.

Ryanair pleaded both an infringement of its rights on the collection of data in relation to its flights and a breach of its general terms and conditions. Indeed, the terms and conditions published on the Ryanair website could not be clearer as to the impossibility for any third party to use Ryanair flight data for commercial purposes.

Following the dismissal of its claims by the first courts, Ryanair filed an appeal before the Supreme Court of the Netherlands which considered it necessary to request the Court to rule on the scope of application of the European Directive on the legal protection of databases (the "**Directive**").

- **Double legal protection of databases:**

The Directive, which was to be transposed into the national law of each Member State, has in fact established a double legal protection regime for databases. In Luxembourg, this transposition was made through the Law of 18 April 2001 on copyright, related rights and databases, as amended by the Law of 18 April 2004.

In short, a database may benefit from protection under copyright law when, by the selection or arrangement of the elements it contains, it can be seen as the author's own intellectual creation. Copyright applies here to the lay-out, to the structure of the database and not to its content.

The protection of the content of a database is provided by a new right (entitled *sui generis* right) when the obtaining, verification or presentation of the contents of the database demonstrates a substantial qualitative or quantitative investment by the producer of the database. The investment may take different forms (financial, technical or human). Where applicable, the copyright and the *sui generis* right may of course be applied cumulatively to the same database. When a database is protected, both its author and producer benefit from exclusive rights which they may exploit themselves or grant to third parties through a licence (such as reproduction and translation rights, the right to distribute the database to the public, or the right to extract or re-use all or a substantial part of the contents of the database).

In consideration for these exclusive rights, the author and producer cannot object to a legitimate user (namely an authorised third party or a third party with access to a publicly available database decided at the initiative of the producer or author) performing certain actions in relation to the database. Thus, the producer of a database which will be made available to the public may not prevent a legitimate user from extracting and/or re-using insubstantial parts of the contents of the database, regardless of the purpose of this action.

In order to maintain the balance between the authors' and producers' exclusive rights and the rights of legitimate users, the European legislator ensured that the provisions on the rights of legitimate users were mandatory and that any contractual provision to the contrary would be considered null and void. This provision is at the heart of the judgment rendered by the Court on 15 January 2015.

- **The lesson and impact of the Ryanair judgment:**

In the Ryanair judgment, the Court intelligibly states that the legal regime implemented by the Directive only applies to those databases which benefit from copyright and/or *sui generis* right protections and that consequently the mandatory provisions in relation to the rights of legitimate users of databases do

not apply to "simple" databases, i.e. unprotected. The owner of such an unprotected database is entitled to limit the rights of third parties by way of imposing general terms and conditions, provided that these terms and conditions comply with the applicable national law. This solution should be welcomed.

Indeed, when the owner of a simple database does not have exclusive rights conferred by law, there is no need to guarantee a balance with potential third party rights. On the contrary, the only means available to the owner of the database to restrict its use by third parties is by way of a contract. A contract may also be used to govern the use of databases whose legal protection has expired.

In practice, however, contractual limitations governing the use of unprotected databases may only be binding on third parties who were already aware of these limitations and who had accepted them, which the plaintiff must prove in the event of a dispute and which may be subject to interpretation by the courts.

In the Ryanair matter, the Court was careful to point out that the company that had copied Ryanair's flight data without authorisation had previously agreed to Ryanair's general terms and conditions by ticking the relevant box. If a third party had taken Ryanair data, not from the airline's website but from the price comparison website, Ryanair's general terms and conditions would not have applied. In principle, contracts are only effective between the contracting parties and are not binding on third parties who have not agreed to the contractual provisions.

Ultimately, the judgment rendered by the Court opens up new prospects for owners of databases not protected by the law (particularly those accessible online) and they cannot be advised strongly enough to define the use of their databases by way of general terms and conditions clearly presented to internet users. However, if data are copied in chain by third parties, the contractual freedom granted to owners of simple databases will not be as effective as the exclusive rights enforceable against all third parties that are granted to the author of an original database or to the producer of a database having benefited from a substantial investment.

3. Luxembourg joins the Unified Patent Court system that goes hand in hand with the creation of the European patent with unitary effect

Luxembourg has adopted the law that approves the Agreement on a Unified Patent Court (the "**Agreement**") on 12 April 2015, about two years after the signature of the Agreement by 25 Member States on 19 February 2013. Luxembourg is the seventh country which has ratified the Agreement (after Austria, France, Belgium, Denmark, Malta and Sweden). However, the Agreement will enter into force only upon ratification by 13 contracting Member States (including Germany, France and United Kingdom).

- **Relationships between the unitary patent and the Unified Patent Court:**

The implementation of a European unitary patent and of a Unified Patent Court (the "**UPC**") has been praised as the two major innovations in European Patent law since the signature of the European Patent Convention in Munich on 5 October 1973.

These two innovations go hand in hand. As provided for in Regulation (EU) 1257/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, the rules governing the new unitary patent title shall only apply from the date of entry into force of the Agreement on a Unified Patent Court. Only 25 EU Member States agreed on implementing a European patent with unitary effect (Italy, Spain and Croatia did not want to participate).

The UPC will have jurisdiction for cases in relation to (i) European patents with unitary effect ("**Unitary Patent(s)**") and (ii) current or future European patents not benefiting from the unitary status ("**European Patent(s)**"). However, with respect to European Patents, the Agreement provides for derogations to the exclusive jurisdiction of the UPC.

Finally, the Agreement on the Unified Patent Court may be signed by an EU Member State even if this Member State is not party to the Unitary Patent system, as Italy did. In this case, the UPC will have jurisdiction only for European Patents granted in the concerned territory.

- **Structure of the Unified Patent Court:**

There will be a Court of First Instance with central, local and regional divisions. The central division will have its seat in Paris and two sections in London and Munich (cases will be distributed according to the nature of the invention at stake). The Court of Appeal will be located in Luxembourg. This will contribute to further establish the reputation of Luxembourg as a key place for intellectual property.

- **Advantages of the Unitary Patent:**

When a European Patent is granted by the European Patent Office and a unitary effect registered in a specific registry, the European Patent will turn into a Unitary Patent and will thus provide uniform protection and have equal effects in all the Member States which participate in the Unitary Patent system and which have ratified the Agreement. There will be no need for a national separate validation and a single annual tax will be payable after the grant of the Unitary Patent. Quite to the contrary, when a "simple" European Patent is granted, it will, in each of the contracting States for which it is granted, have the effect of and be subject to the same conditions as a national patent granted by that State, unless otherwise provided in the European Patent Convention. A European Patent still needs to receive a national validation in every country where patent protection is sought and national taxes shall be annually paid in each country chosen to maintain the national title.

Advantages of the Unitary Patent are expected to be reduced costs, reduced administrative formalities and a more effective management of the patent.

As a consequence of the unitary protection of the patent and similarly to a Community trademark, a Unitary Patent may only be transferred, revoked or limited, or lapse, in a single block in all the contracting Member States.

- **Other side of the coin:**

A single action (i.e. an action for revocation in the main proceedings or a counterclaim for revocation within an infringement action) before the UPC may result in the

revocation of the Unitary Patent at a global level. It means that Unitary Patents will be more vulnerable compared to European Patents, the revocation of which only have effects at a national level.

The purpose of the UPC is to create a new court capable of harmonising and unifying the legal rules governing Unitary Patents and European Patents. The creation of the UPC should also facilitate prosecution for patent infringement acts. Upon ratification of the Agreement, legal certainty should be strengthened by the existence of this unique litigation resolution system binding on all the contracting Member States.

- **Forum shopping:**

The Agreement sets out the actions for which the UPC has jurisdiction. First, parties may **agree** to bring infringement actions or actions for revocation before the local or regional division of their choice or the central division. Then in case of patent infringement (actual or threatened infringements), the patentee shall either decide to bring the case before (i) the local division hosted by the contracting Member State where the infringement has taken or threatens to take place (or before the regional division in which that contracting Member State participates) or (ii) before the local division hosted by the contracting Member State where the defendant has its residence or principal place of business or in the absence of residence or principal place of business, its place of business (or before the regional division in which that contracting Member State participates). However, if the contracting Member State does not host a local division and does not participate in a regional division, the central division shall have jurisdiction. These provisions leave the patentee a wide degree of freedom regarding the choice of the division that will render the decision that will produce its effects in every contracting Member State. The risk of ***forum shopping*** is already put forward by some practitioners.

Another critical issue arises in relation to **counterclaims for revocation of patents** (either a Unitary Patent or a European Patent). The Agreement provides that if, in the course of a patent infringement case, a counterclaim for revocation of the patent is raised by the defendant (necessarily before the same regional or local division), such division has the discretion either (i) to rule on both matters, (ii) to refer the counterclaim for revocation to the central division (while suspending or proceeding with the infringement action), or, (iii) with the agreement of the parties, to refer the entire case for decision to the central division. Therefore, judges within a local or regional division could potentially, in the second scenario, rule on a patent infringement and then the central division could rule on the invalidity of the same patent. This could lead to **inconsistent decisions**.

- **Conclusion:**

In light of the above, the role of the Court of Appeal, will be hugely significant to unify the views of the different divisions within the Unified Patent Court. It remains to be seen in practice how the actors of the industry will respond to this new system composed of the Unitary Patent and of the UPC. The entering into force of the Agreement and the whole system shall not take place before 2016 or 2017.

TAX

1. Mutual agreement on treaty between Belgium and Luxembourg on the taxation of cross-border commuters

On 5 February 2015, the governments of Luxembourg and Belgium came to an agreement with respect to the right of taxation of salaries, wages and other similar remunerations in bilateral cross-border situations.

In a nutshell, the right of taxation under the tax treaty shall not be affected by the temporary performance of professional activities outside the State where the employment is usually exercised, to the extent that the duration of the said activities does not exceed twenty-four (24) days during a year. This agreement shall be followed by a revision of the double tax treaty between Luxembourg and Belgium. A similar agreement was reached in the past on the same issue with Germany where the tolerance is limited, however, to nineteen (19) days.

The mutual agreement (*accord amiable*) was signed on 16 March 2015 and is applicable as of 1 January 2015.

Employees residing in Belgium and employed in Luxembourg can refer to a *vademecum* prepared by the Belgian tax authorities and endorsed by the Luxembourg tax authorities via a circular letter from the tax director of 31 March 2015, updating the conditions to be applied in order to prove their physical presence in the territory of a contracting State.

According to the *vademecum*, proof of physical presence in the other contracting State can be provided by all means, except by oath. Documents that should be provided in evidence will depend on the type of activity the cross-border commuter performs, the distance between his residence and his place of work, the type of activity carried out by the employer and any particular characteristic that may directly affect the activity.

2. New Circular L.I.R. 104/1 on certain advantages in kind granted to employees

On 10 March 2015, the Luxembourg tax authorities released a new circular letter (the "**New Circular**"), taking effect immediately and cancelling Circular L.I.R. 04/1 of 20 November 2014 (the "**Old Circular**").

The Old Circular was initially introduced to amend Circular L.I.R. 104/1 of 18 February 2009, introducing the taxation of the recovery of a vehicle by the employee at the end of the leasing contract as an advantage in kind, since there was no taxation up to that point.

The New Circular and the Old Circular both have largely identical wording. The major difference between them are in the examples listed with respect to the advantage in kind resulting in the recovery of a vehicle by the employee at the end of the leasing contract concluded between the employer and the lessor and the determination of a tax ceiling.

The New Circular is more beneficial to the employee, since it includes the participation of the employee in the repurchase of the car after expiry of the leasing contract. The Old Circular did not

include this point for the determination of the tax ceiling.

3. Bill for ratification of the FATCA agreement submitted to Parliament

With respect to the Foreign Account Tax Compliance Act ("**FATCA**"), the first reporting by Luxembourg financial institutions is due on 30 June 2015 at the latest. This reporting concerns information pertaining to 2014.

On 6 March 2015, the Luxembourg Government adopted Bill of Law 6798 for the ratification of the Intergovernmental Model I Agreement signed between the United States and Luxembourg on 28 March 2014 ("**IGA**"). The Bill was submitted on 27 March 2015 to the Luxembourg Parliament. For further details please refer to our February Newsletter.

It should be stressed that reporting Luxembourg financial institutions are considered as data controllers according to Luxembourg data protection rules and must inform individuals falling within the scope of the automatic exchange of information under the IGA that the information will be collected and transferred in accordance with the IGA.

4. VAT on e-books

Since December 2012, Luxembourg has applied a super-reduced VAT rate of 3% on electronic books, which the European Commission considered to be in violation of EU law.

On 5 March 2015, in the Case C-502/13, the European Court of Justice held that by applying a reduced rate of VAT on the supply of digital books (or electronic books), Luxembourg had failed to comply with EU Directives.

Consequently, as of 1 May 2015, the regular 17% VAT rate applies to e-books.

The decision will only affect Luxembourg resident customers, as electronic services (including e-books) supplied to non-residents have been subject to VAT in the residence country of the customer since 1 January 2015.

5. Automatic exchange of information of tax rulings

In line with its agenda aiming to combat tax evasion or "aggressive" forms of tax planning, the European Commission (the "**Commission**") presented a first tax transparency package on 18 March 2015, which includes a proposal for a mandatory automatic exchange of information regarding advance cross-border rulings and advance pricing agreements (the "**Rulings**").

The Commission is of the opinion that a lack of transparency regarding advance tax rulings may have an impact on other countries which have links with the beneficiaries of the advance tax rulings and thus jeopardise the functioning of the internal market.

As a first step, the proposal provides that a basic set of information has to be provided to all EU Member States, which englobes the following:

- the identification of the taxpayer and where appropriate the group of companies to which it belongs;
- the content of the Rulings, including a description of the relevant business

activities or transactions or series of transactions;

- the identification of the other Member States likely to be directly or indirectly concerned by the Rulings;

- The identification of any person, other than a natural person, in the other Member State likely to be directly or indirectly affected.

As a second step, the Member States that can demonstrate that additional information is foreseeably relevant to them can request further information under the existing provisions of the Directive 2011/16/EU, to be amended (the "**Directive**").

A new Article 8a in the Directive will lay down the conditions and the scope for the mandatory exchange of information on Rulings. The obligation is intended to be retroactive, extending to Rulings issued within a ten-year period (and that are still valid on the date of entry into force of the Directive) prior to the date on which the amended Directive takes effect.

A possible creation of a secure central directory accessible by all Member States and the Commission, concerning the communicated information is foreseen.

The Commission aims at a first exchange of information in January 2016.

6. Recent tax circulars concerning treaty protection of Luxembourg investment funds

On 12 February 2015, the Luxembourg tax administration issued tax circular L.G. – A. 61 concerning the procedure and conditions for Luxembourg collective investment schemes to obtain a Luxembourg tax resident certificate (the "**Circular**"). The Circular applies to Luxembourg *Société d'investissement à capital variable* ("**SICAVs**")[7] and *Fonds Communs de Placement* ("**FCPs**") governed by the Laws of 13 February 2007 on specialised investment funds ("**SIFs**") and of 17 December 2010 on undertakings for collective investment. It sets out general principles for both SICAVs and FCPs but also deals with certain special situations, mainly applying to FCPs.

A few rare tax treaties apply to Luxembourg collective investment schemes without distinction; thus to both SICAVs and to FCPs (e.g., tax treaties with Saudi Arabia and Tajikistan).

1. SICAVs :

As regards SICAVs, in the Circular the Luxembourg tax authorities express the view that, in line with the modern approach of the "tax residency" concept under the OECD Model Tax Convention, a SICAV is a tax-resident entity in the sense of Luxembourg domestic tax laws and this despite the fact that it benefits from a subjective tax exemption as an entity as a whole (and not for certain items of income only). The Circular expressly specifies that the same reasoning applies to SICAVs set up as SIFs, despite their more "closed-end" character.

A list of the tax treaties that apply to SICAVs, is available on page 5 of the Circular.

[7] The developments made hereafter for SICAVs apply *mutatis mutandis* to SICAFs.

The developments on domestic law-based protection for SICAVs are perhaps the most surprising statements of the Circular. As we have seen above, SICAVs are considered by the Luxembourg tax authorities as tax resident entities in the sense of Luxembourg domestic tax laws and regulations. In the Circular, the Luxembourg tax authorities express the view that a tax resident certificate, based on Luxembourg domestic tax law (as opposed to a request for application under a given tax treaty concluded by Luxembourg) can be obtained by a SICAV whose statutory seat or central administration is based in Luxembourg, in the following three situations: first, a tax treaty exists under which the Other Contracting State grants treaty benefits to the SICAV; second, a tax treaty exists but the Other Contracting State denies treaty benefits to the SICAV; and third, no tax treaty exists between Luxembourg and the source State.

It would seem to us that the second scenario is breaking ground in that traditionally the Luxembourg tax authorities refused to grant a domestic law-based tax-resident certificate for a SICAV, in case the other Contracting State denied application of the respective bilateral tax treaty to SICAVs. This may open interesting perspectives.

2. FCPs :

Even though under Luxembourg domestic law, FCPs are not treated as fully tax transparent at least where the taxation of Luxembourg resident individual investors is concerned, the Circular clarifies that, due to their tax transparency, FCPs do not, from a Luxembourg tax perspective, benefit from treaty protection in their own right, with one historical exception being the tax treaty with Ireland.

More interestingly, the Circular sets out a certain number of special situations, mainly concerning FCPs, which are the following.

Certain tax treaties concluded by Luxembourg consider that an investment fund established in a Contracting State that is not a body corporate for domestic tax purposes is considered for the application of this tax treaty as a treaty-protected individual (and beneficial owner of the income concerned). Thus, an FCP benefits in the same way as a Luxembourg-resident individual from the provisions of the respective tax treaty (e.g., tax treaties with Guernsey, Isle of Man, Jersey, Seychelles). This means that the Luxembourg tax authorities will establish a tax-resident certificate for the Luxembourg investment fund concerned. This is in principle especially important with respect to capital gains taxation as it means that in principle taxation for non-substantial shareholdings and other financial assets should in these cases be allocated to Luxembourg, thus benefiting from an exemption, and no longer to the source State. Such a constructive approach which somehow puts traditional principles and concepts of international taxation at odds, and which should be considered as a compromise solution, is based on the updated Commentaries to Article 1 of the OECD Model Tax Convention, pursuant to the report “The Granting of Treaty Benefits with respect to the Income of Collective Investment Vehicles” from the Committee on Fiscal Affairs of 23 April 2010.

Another specific situation influenced by the above OECD report has been commented

on in more detail by Tax Circular L.G. Conv. D.I. 58 of 9 February 2015 which concerns the eligibility of Luxembourg FCPs for the application of reduced withholding tax rates for German source dividend and/or interest for the proportion of such income attributable to Luxembourg tax resident investors in the fund. Under the specific procedure provided for in the protocol to the new tax treaty with Germany, the FCP acts as a collecting agent collectively for the Luxembourg tax resident investors in the fund who conversely lose their entitlement to claim treaty for the same income. In this context it is unambiguously specified that the FCP is not entitled to treaty protection in its own right. Oddly, however, the Circular contains a statement to the contrary by confirming that under the treaty with Germany an FCP is to be considered as a resident and is to be granted a tax resident certificate. Last but not least one may question whether the fact that the collecting procedure under the protocol is limited only to investors who are tax resident in the same jurisdiction as the fund is not to be considered in violation of the findings of the ECJ in the Open Skies cases[8] and should normally be extended to any EU/EEA investors in the fund.

The procedural aspects of both tax-resident certificate applications are described on pages 6 and 9 of the Circular.

[8] C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98 all of 5 November 2002.

7. Tax treaty news

Approval by the Luxembourg government of several double tax treaties and protocols :

On 2 April 2015, the Luxembourg government approved the double tax treaties with Andorra, Croatia, Estonia, Singapore and the protocols to the tax treaties with Mauritius, Lithuania, Ireland, United Arab Emirates and Republic of Tunisia. The Luxembourg government also approved the amending protocol to the France-Luxembourg double tax treaty of 1 April 1958, signed on 5 September 2014. The new treaties and the protocols shall be submitted swiftly to the Parliament for ratification.

Hungary

On 10 March 2015, a new double tax treaty between Hungary and Luxembourg was signed in Brussels. The new treaty will replace the actual Hungary-Luxembourg double tax treaty of 15 January 1990. We will report on details of the new treaty in one of our next issues.

Uruguay

On 10 March 2015, a double tax treaty between Uruguay and Luxembourg was signed in Brussels. The key features of this new treaty will be analysed in one of our next issues.

The new double tax treaty with Uruguay is part of the Luxembourg government’s desire to increase its business relations with Latin America. Luxembourg currently has only double tax treaties with Brazil and Mexico in this region.

Since November 2014, Luxembourg for finance ("**LFF**") and the Association of the Luxembourg Fund Industry ("**ALFI**") have published several articles on their websites on the increase of business opportunities in Latin America. In this context, the Luxembourg Chamber of Commerce organised a business opportunities day in April 2015 in order to help Luxembourg investors to develop their businesses in Latin America and explain the available opportunities in each market (notably Uruguay, Cuba, Chili, Colombia, Mexico, and Argentina). ALFI will also organise a Latin America roadshow between 5-8 October 2015 in order to promote Luxembourg investment funds in Peru and Colombia.

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