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NEWSLETTER

FEBRUARY 2018

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Asset management and investment funds

UCITS: CSSF's new position on investments in other UCIs

In a **Press Release** dated 5 January 2018, the CSSF announced a change in their position relating to the eligibility criteria of open-ended non-UCITS, ETFs and other UCIs ("**Target UCI**") in accordance with Article 41(1) (e) of the **UCI Law**[1].

The CSSF's new position ("**New Position**") provides that compliance with the eligibility criteria for a Target UCI (detailed below) needs to be assessed on the basis of the restrictions contained in the Target UCI's constitutional documents. Mere compliance in practice by the Target UCI is no longer sufficient. As an illustration, investments in US ETFs whose documents permit borrowings, investments in money market funds and reinvestment of cash collateral in money market funds beyond UCITS restrictions, are no longer permitted.

UCITS which have invested in Target UCIs which no longer comply with the New Position have to divest as soon as possible taking into account the best interests of investors. The CSSF announced that it will contact the investment managers of the relevant UCITS by 31 March 2018 to check compliance with its New Position.

More information on this New Position is available on our website (see our **Newsflash "CSSF Press Release 18/02 – Change of regulatory practice"**, 11 January 2018) and in the updated version of the **CSSF FAQ on the UCI Law**.

1. Law of 17 December 2010 on undertakings for collective investment, as amended.

Increase of CSSF fees

On 22 December 2017, the Grand Ducal Regulation of 21 December 2017 relating to the fees to be levied by the CSSF ("**Regulation**") which repeals the Grand Ducal Regulation of 28 October 2013 was published in the *Mémorial A* (Luxembourg's Official Journal).

The Regulation, which entered into force on 1 January 2018, increases the fees payable to the CSSF by all legal entities and natural persons subject to the CSSF's supervision. In particular, this increase affects the fees applicable to the submission of an application for approval by a UCI, a SIF, SICAR, or an IFM[1]. ("**Examination Charges**") as well as the annual maintenance charges ("**Annual Charges**").

The conversion charges which apply in case a stand-alone fund is converted into an umbrella fund or an FCP into a SICAV for instance as well as the additional lump sums for the establishment of branches of IFMs have been increased in a similar manner.

In addition, a single lump sum of EUR 500 for each authorisation request of a new sub-fund within an existing umbrella as well as a lump sum of EUR 10,000 for each on-site inspection have been introduced.

The Examination Charges and Annual Charges for foreign UCIs remain unchanged.

Extracts of the Regulation as well as a **description of the fees** to be levied with respect to UCIs, SIFs, SICARs, IFMs and foreign UCIs are published on our website. In the extracts, the French original text and the **English**/**German** translations appear in parallel.

The full version of the Regulation is currently available on the **CSSF's website**, in French only.

> **1.** "IFM(s)" stands for Investment Fund Manager(s) and refers to Luxembourg management companies and AIFMs.

Benchmark Regulation: Update

In the latest update of its **Q&A on the application of the Benchmark Regulation**, ESMA clarifies the concept of "use of a benchmark" by investment funds. In particular, Q&A 5.4. clarifies that ESMA considers that an index is used for the purpose of defining the investment fund's asset allocation only if the investment policy or investment strategy described in the investment fund documentation define constraints on the asset allocation of the investment fund's portfolio in relation to the index. In addition, Q&A 5.5. clarifies that the mere mentioning of indices in the investment fund documentation for performance measurement purposes (without any asset allocation constraint), is not considered as being "the use of a benchmark" within the meaning of the Benchmark Regulation and is therefore out of scope.

The above clarifications reduce the universe of investment funds that are affected by the Benchmark Regulation and therefore the number of investment funds that need to update their documentation to reflect this Regulation.

In addition, four Commission Delegated Regulations supplementing the Benchmark Regulation were published in the Official Journal of the EU on 17 January 2018 and will enter into force on 6 February 2018. Others will follow.

Corporate, banking and finance

Anti-money laundering: Amendments to legislation

Significant changes have been brought recently to the Anti-Money Laundering ("**AML**") legislation.

The Luxembourg Law of 13 February 2018 ("**Amending Law**"), which entered into force on 18 February 2018, introduces amendments to, amongst others, the Luxembourg Law of 12 November 2004 on the fight against money laundering and terrorist financing, as amended ("**2004 Law**").

The Amending Law partially transposes Directives 2015/849 (the "**4th AML Directive**"), inter alia aiming at aligning the European regulatory framework with the decisions taken by the Financial Action Task Force (FATF) in 2012. The qualification of certain tax crimes as predicate offences falling within the scope of the 2004 Law, as provided for by the 4th AML Directive, became effective as from 1 January 2017 (please see our **Newsletter May 2017**).

It should be noted that the provisions of 4th AML Directive regarding the implementation of a register of beneficial owners and a register of trusts are not covered by the Amending Law but are treated separately in two other bills of law which have not yet been adopted: Bill of Law 7217 (register of beneficial owners) and Bill of Law 7216 (register of trusts).

Key changes of the Amending Law are the following:

- Amended definition of beneficial owner of corporate entities and trusts;
- Setting of different thresholds with respect to the carrying out of customer due diligence measures;
- Enhanced requirement for professionals carry out a risk assessment;
- Requirements regarding (local and foreign) politically exposed persons;
- Emphasis on data protection requirements and employee training;
- Whistleblowing;
- Record-keeping of documents and information at the request of competent authorities;
- Increased sanctions and new injunction and sanction powers for Supervisory Authorities;
- Increase of criminal sanctions.

More detailed information on the amendments to AML legislation and the key changes mentioned above is available on **our website**.

MIFID II: Application in Luxembourg

In the context of the new regulatory framework established by MiFID II, the *Commission de Surveillance du Secteur financier* ("**CSSF**") issued a **Press Release** on 29 December 2017 which sets out the key aspects of MiFID II.

The CSSF also highlights that, in accordance with the fundamental principles of EU law (notably the principle of direct effect of EU law, the principle of precedence of EU law and the obligation to interpret national law in conformity with EU law), MiFID II provisions which confer new rights or which are more favourable than the applicable national rules and regulations would apply from 3 January 2018 and existing provisions of the Law on the Financial Sector[1] and of the Markets in Financial Instruments Law[2] have to be interpreted accordingly. This is notably the case for provisions of MiFID II which strengthen investor protection, such as the more stringent rules regarding organisational requirements, inducements and research.

In addition to the Press Release, the CSSF published an **FAQ on the application of the new markets in financial instruments framework** in Luxembourg. The FAQ will be updated by the CSSF from time to time.

1. "**Law on the Financial Sector**" refers to the Law dated 5 April 1993 on the Financial Sector, as amended.
2. "**Markets in Financial Instruments Law**" refers to the Law of 13 July 2007 on the markets in financial instruments, as amended.

EBA Guidelines on credit institutions' credit risk management practices and accounting for expected credit losses

On 20 December 2017, the *Commission de Surveillance du Secteur Financier* ("**CSSF**") released **CSSF Circular 17/675** ("**Circular**") in relation to the adoption of the EBA Guidelines on credit institutions' credit risk management practices and accounting for expected credit losses ("**EBA Guidelines**[1]"), which the CSSF intends to follow in its capacity as competent authority under the Single Supervisory Mechanism.

The purpose of the EBA Guidelines is to specify sound credit risk management practices for credit institutions associated with the implementation and ongoing application of expected credit loss ("**ECL**") accounting frameworks.

The key aspects of the EBA Guidelines are described in the Circular and the following points are worth mentioning:

(I) Introduction of eight principles on credit risk management practices and accounting of ECL:

- the management body and senior management responsibilities;
- the implementation of sound ECL methodologies, leading to appropriate and timely ECL accounting frameworks;
- the existence of processes relating to credit risk rating and the grouping of credit risk exposures;
- the adequacy of allowances in accordance with the applicable accounting framework;
- the existence of policies and procedures to appropriately validate models used to measure ECL;
- the use of experienced credit judgement while assessing credit risk and measuring ECL;
- the existence of common processes, systems, tools and data to assess credit risk and measure ECL for accounting purposes;
- the existence of public disclosures promoting transparency and comparability by providing, in particular, timely, relevant and decision-useful information.

(II) Specific guidelines in the context of the implementation of IFRS 9 on (i) the loss allowance at an amount equal to 12-month ECL, (ii) the assessment of significant increases in credit risk and (iii) the use of practical expedients.

Credit institutions shall comply with the requirements foreseen in the EBA Guidelines on an individual, sub-consolidated and consolidated basis.

The Circular has been applicable since 1 January 2018 and shall be read together with **CSSF Circular 14/593** on supervisory reporting requirements and **CSSF Circular 12/552** on central administration, internal governance and risk management, as amended (in particular its Chapter 3 on credit risk).

1. EBA/GL/2017/06.

Adoption of EBA Guidelines on liquidity coverage ratio disclosure

On 18 January 2018, the *Commission de Surveillance du Secteur Financier* ("**CSSF**") released **CSSF Circular 18/676** in relation to the adoption of the EBA Guidelines on Liquidity Coverage Ratio ("**LCR**") disclosure to complement the disclosure of liquidity risk management under Article 435 of the CRR[1], which the CSSF intends to follow in its capacity as competent authority under the Single Supervisory Mechanism.

The main purpose of the EBA Guidelines is to specify the general disclosure framework of risk management under Article 435 of the CRR in relation to liquidity risk by providing a harmonised structure for the disclosure of information required under Article 435, paragraph 1 of the CRR.

The EBA Guidelines are addressed to those credit institutions that are subject to the disclosure requirements of Part Eight of the CRR in accordance with Articles 6, 10 and 13 of this Regulation and which fall under the scope of the Commission Delegated Regulation (EU) 2015/61, i.e.:

- credit institutions identified as 'Other Significant Institutions' ("**O-SIIs**"[2]) or 'Globally Significant Institutions' ("**G-SIIs**"[3]) which must disclose all the information specified in Annexes I and II of the EBA Guidelines; and
- credit institutions other than those identified as O-SIIs or G-SIIs which must disclose all the information specified in Annex I of the EBA Guidelines but benefit from the possibility of disclosing a simplified version of the information specified in Annex II of the EBA Guidelines (lines 21 to 23).

In particular, it should be noted that the CSSF does not make use of the option granted to the competent authority under Article 13(1) second subparagraph of the CRR to extend, in all or in part, the disclosure requirements of Part Eight of the CRR to certain institutions, other than those identified as O-SIIs or G-SIIs, which are under its direct supervision.

CSSF Circular 18/676 became applicable from 18 January 2018 and the first application of the EBA Guidelines on the disclosure of the information required under Part Eight of the CRR shall be done with respect to the relevant credit institutions' situation as of 31 December 2017.

1. **Regulation (EU) 575/2013** of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 ("**CRR**").
2. According to Article 131 (3) of the Directive 2013/36/EU and the EBA/GL/2014/10.
3. Please refer to **Commission Delegated Regulation (EU) 1222/2014** of 8 October 2014.

Opinion of the EBA on transition from PSD1 to PSD2

On 19 December 2017, the European Banking Authority ("**EBA**") published an **Opinion** addressed to national competent authorities on the transition from the first payment service directive ("**PSD1**") to the revised payment service directive ("**PSD2**").

The intention of the EBA Opinion is to clarify transitional issues and their implications for payment service providers and competent authorities resulting from transitional periods provided for in PSD2 as well as from the delayed adoption of some of the guidelines and technical standards developed by the EBA under PSD2. The EBA also proposes certain supervisory actions to support the transition.

The Opinion clarifies in particular the exemptions from the immediate requirement for PSD2 authorisation. In a nutshell:

- providers that used to perform account information services and/or payment initiation service-like activities may continue to perform the same activities in the same territories before being authorised or registered under PSD2, but will not be able to benefit from the full set of rights under PSD2 (including the right to passport their services) until they obtain authorisation;
- existing payment institutions and electronic money institutions awaiting re-authorisation may continue to offer services during the transitional period until 13 July 2018. However, institutions that intend to provide payment services for which they were not authorised under PSD1 or account information services and/or payment initiation services under PSD2 will need authorisation under PSD2 from the date they start providing these additional services (unless they benefit from the first exemption above);
- payment institutions which benefited from an exemption under PSD1 have until 13 January 2019 to be authorised or to seek exemption under PSD2.

The Opinion also details the conditions for accessing payment account information during the transitional period starting on 13 January 2018 and ending from the application of the regulatory technical standards on strong customer authentication and common secure communication ("**RTS**").

During this transitional period, account information service providers and payment initiation service providers can access payment accounts even using existing methods such as screen scraping while not being subject to certain obligations and security measures required under PSD2. The EBA advises competent authorities to encourage all providers to comply early with the latest version of the RTS and relevant security measures under PSD2.

To avoid any gap in applicable security requirements during the relevant transitional period, the EBA intends to repeal in stages the guidelines on the security of internet payments adopted under PSD1. The Opinion provides a detailed table showing the instrument superseding each guideline and the application date.

In its Opinion, the EBA also addresses the issue of cross-border services offered by payment service providers established in Member States that have not transposed PSD2 by 13 January 2018 while these providers have already obtained a valid passport notification under PSD1.

EBA Guidelines on authorisation and registration

The EBA published **final Guidelines** dated 8 November 2017 on the information to be provided for authorisation as payment and electronic money institutions and for registration as account information service providers. In its **Circular 18/677** dated 12 January 2018, the CSSF confirms that it adopts these guidelines which apply from 13 January 2018 except for section 4.4 of the guidelines regarding the assessment of completeness of the application that will apply as from the date of entry into force of the law transposing PSD2.

Commercial

Bill of Law: Simplification of access to certain professions in Luxembourg

On 22 December 2017, the Luxembourg Minister of Economics filed **Bill of law 7228** ("**Bill**") aiming to amend the Law of 2 September 2011 on access to certain professions, as amended ("**2011 Law**") with the Luxembourg Parliament.

The 2011 Law provides for the requirements to be met by persons who contemplate pursuing certain activities such as commercial or handicraft activities, certain independent activities, as well as the running of a large-scale retail store (i.e. a retail store having a sales area exceeding 400 square metres).

The Bill provides for several measures to ease the current administrative burden with the aim of inducing entrepreneurship in Luxembourg, by notably providing for the deletion of the requirement to hold specific authorisation (*autorisation particulière*) in the case of running a large-scale retail store.

The purpose of the current delivery process of such specific authorisation is to ensure that the large-scale retail store complies with all applicable rules regarding land use and urban planning. It is a cost-heavy and time-consuming process, and the specific authorisation must be obtained prior to the delivery of any construction permits (where applicable).

Deleting the specific authorisation will thus significantly facilitate access to large-scale retail activities in Luxembourg and should consequently encourage investments in that field.

The Bill further provides for increased ease of access to the activity of economic adviser, which will no longer be a category by itself but will be considered as a commercial activity not otherwise regulated (*activité commerciale non autrement réglementée*).

If the current provisions of the Bill are adopted, persons wishing to pursue this activity, i.e. economic advisers who do not fall under the scope of investment advisers (a profession regulated under the Law of 5 April 1993 on the financial sector), must obtain a business permit for non-regulated commercial activities, which, pursuant to the Bill, will no longer require proof of professional qualification. Applicants will thus solely have to provide proof of good repute to be established in Luxembourg as economic adviser.

New Law on commercial leases

The **Law** of 3 February 2018 on commercial leases which significantly amends the regime applicable to commercial leases was published in the Memorial of 6 February 2018 .

The Law will enter into force on 1st March 2018.

Please refer to our **Newsflash of 18 January 2018** for an overview of the changes resulting from the Law on commercial leases.

Dispute resolution

Uber: Services in the field of transport

On 20 December 2017, the Court of Justice of the European Union ("**CJEU**") ruled that an intermediation service, such as Uber, the purpose of which, by means of a smartphone application and for remuneration,

is to put non-professional drivers using their own vehicles in contact with persons who wish to travel in the city, must be regarded as being inseparably linked to a transport service and as falling within the category of "services in the field of transport".

The preliminary question put to the CJEU stemmed from a Spanish court referred by a professional association of taxi drivers which accused Uber Systems Spain of misleading commercial practices and unfair competition. The applicant claimed that Uber and its drivers, who did not consider themselves bound by the regulation on taxi services in the urban area of Barcelona, should have had the licences and other approvals provided for in this regulation. Uber, on the other hand, were of the opinion that their activity falls within the scope of Article 56 TFEU (freedom to provide services) and the Directive 2006/123/EC on services in the internal market and the Directive 2000/31/EC on e-commerce .

The CJEU has ruled that a service such as the one offered by Uber is more than an information society intermediation service and has excluded the service provided by Uber from the scope of Article 56 TFEU, Directive 2006/123 and Directive 2000/31.

It considers that this service is linked to a service of transport and should therefore be classified as a "service in the field of transport" under EU law.

Member States are free to regulate the conditions under which such services may be provided.

EU law, competition and antitrust

Brexit: Update

Brexit negotiations have recently entered a new phase, crucial for defining the future relationship between the European Union ("**EU**") and the United Kingdom ("**UK**").

On 8 December 2017, a **Joint report** from the EU and UK negotiators and a **Communication** from the European Commission to the European Council detailed the state of progress made during the first phase of the Brexit negotiations. An agreement in principle was reached on three key areas: reciprocal protection for EU and UK citizens having exercised free movement rights by the time of the UK's withdrawal, practical aspects of the future cooperation between Ireland and Northern Ireland, and a financial settlement. The details of this agreement need to be included in the Withdrawal Agreement, which in turn needs to be coherent with the agreement on the transition period.

On 15 December 2017, the European Council adopted **Guidelines** for the future conduct of the negotiations, noting, in particular, that sufficient progress had been made to move to the second phase of the negotiations on transition and the framework for the future relationship. The European Council called on the EU negotiator and the UK to complete the work on all withdrawal issues in accordance with its Guidelines of 29 April 2017 (see our **Newsletter July 2017**). With regard to the transition period, the EU noted in particular:

- the fact that transitional arrangements must be in the interest of the Union, clearly defined and limited in time;
- the application of the whole of the EU acquis during that period, with changes applying to both the UK and the EU and the UK continuing to participate in the Customs Union and the Internal Market (with all four freedoms) and complying with EU trade policy;

- the fact that the UK, as a third country, would no longer participate in or nominate or elect members of EU institutions, nor participate in the decision-making of other EU bodies;
- the need for full applicability of the EU regulatory and enforcement instruments during that period, including the competence of the Court of Justice of the European Union;
- the UK's intention no longer to participate in the Customs Union and the Internal Market after the end of the transition period.

Our assessment is that it is unlikely that all of these demands of the European Council will be accepted as such by the UK.

On 29 January 2018, the Council of the European Union adopted **Supplementary directives** for the negotiation of the Withdrawal Agreement supplementing initial directives adopted on 22 May 2017 (see our **Newsletter July 2017**). These new directives further detail the principles for the transition period set out by the European Council. They specify that it should run from the date of entry into force of the Withdrawal Agreement and should not last beyond 31 December 2020.

It is expected that the European Council will decide on key principles of the transition period in March 2018.

ICT, IP and data protection

GDPR: relying on consent for processing personal data

As announced in our previous publications[1], all entities processing personal data should be prepared for the application of the General Data Protection Regulation ("**GDPR**") as from 25 May 2018. In particular, it is required that entities identify at least one of the six lawful grounds (i.e. consent, contract, legal obligation, vital interest, public interest and/or legitimate interest) to justify each personal data processing that they carry out as controller.

In order to clarify the conditions for the data subject's consent, the Article 29 Data Protection Working Party ("**Working Party**") issued draft Guidelines on Consent (WP259). The Working Party states that, as a general rule, a data processing carried out for one specific purpose (e.g. sending marketing communications), cannot be justified on multiple bases. Determining an appropriate lawful basis for a specific processing is thus of primary importance, keeping in mind that such a basis could not be substituted by another lawful basis in the course of processing. For instance, if a processing is based on the data subject's consent, which is subsequently withdrawn, that processing cannot continue on the basis of, for instance, the controller's legitimate interest. Where this approach may meet the data subjects' expectations that processing will cease after they withdraw consent, it may be considered as inconsistent with Article 6 of the GDPR, which gives the impression that several lawful bases could justify the same processing.

In practice, controllers must be careful when relying on the data subjects' consent as the Working Party considers that alternative bases cannot serve as a "back-up" justification. Controllers must also inform the data subjects of the lawful bases that are relied on for each processing of their personal data. The draft Guidelines on Consent were subject to public consultation (closed on 23 January 2018) i.e. any individual or organisation could submit comments that will be taken into account for finalisation. We can expect

that the final version of the Guidelines on Consent will clarify the conflicting position of the Working Party with the GDPR as regards the use of multiple grounds to justify a processing.

1. See our **Newsflash 3 January 2018** and our **Newsletter May 2017**.

GDPR: Time to get ready

The countdown has started: in less than five months, the **General Data Protection Regulation** ("**GDPR**") will become directly applicable within the European Union ("**EU**"). From 25 May 2018, all entities located in the EU which process personal data in the context of their activities will have to comply with the requirements of the GDPR, regardless of whether the processing takes place in the EU or not. Under certain circumstances, entities located outside the EU which process personal data of data subjects located in the EU will also have to apply the GDPR.

GDPR will entail substantial changes in the approach to personal data processing: the accountability of entities will become of paramount importance, the supervisory authorities will be granted stronger powers and the administrative fines will be clearly dissuasive.

By way of thorough data mapping, entities will in particular have to identify and document (i) the types of personal data processed, (ii) the capacity under which they process personal data (as controller, joint controller or processor), (iii) the data subjects targeted, (iv) the purposes and legal grounds for each processing, including for data transfers outside of the EU, and (v) the persons who have access to the personal data or to whom they are transferred. New obligations will concern, in particular, the implementation of appropriate procedures (for the purpose of providing the data subjects with the required information and for allowing them to exercise their rights under the GDPR, notifying data breaches to the relevant supervisory authority or to the data subjects, etc.), the designation of a data protection officer (where applicable) or the drafting and updating of detailed documentation (records of processing activities, data protection impact assessments, etc.).

The entities shall also review and amend all agreements in place or to be concluded (general terms, service agreements, employment agreements, etc.) in light of the new GDPR requirements.

Tax

Tax treaty news

Russia

Within the mutual agreement procedure provided for under Article 25(3) of the Luxembourg-Russia Double Tax Treaty, the tax authorities of both countries agreed on a uniform interpretation of Article 10 (2) of the treaty, which pertains to dividends.

The treaty provides for a standard withholding tax rate of 15% which can be reduced to 5%. Luxembourg

and Russia clarified that the reduced 5% rate applies provided that the two following conditions are met simultaneously:

(i) an investment of at least EUR 80,000 (or its equivalent in roubles) in the capital of the company paying the dividends; and
(ii) a direct holding of at least 10% of the capital of the company paying the dividends.

In this respect, the Russian authorities indicated that (i) "**holding**" shall mean that the holder is the legal and economic owner of the shares, (ii) "**investment**" includes, *inter alia*, acquiring the shares at the time of the initial placement, purchasing the shares from the previous owners, directly or on an organised market or stock exchange, or through a corporate reorganisation, and that (iii) the amount of the investment is determined on the initial arm's length acquisition cost of the shares.

Kosovo

On 8 December 2017, Luxembourg and Kosovo signed a double tax treaty on income and capital. Kosovo ratified the treaty on 16 January 2018. Further details on the treaty will be made available in a later edition.

Negotiations with Peru

Based on recent public information, Luxembourg and Peru have expressed their intention to negotiate and sign a double tax treaty.

Key changes for 2018

The most important changes can be summarised as follows:

- Extension of the investment tax credits to acquired software from unrelated parties and zero-emission cars;
- Amendment of Article 171 of the Luxembourg income tax law to clarify the tax exemption of capital gains realised in the context of a merger;
- Extension of the VAT exemption for management of investment fund services to include collective internal funds held by a life insurance undertaking whose investment risks are borne by the policyholders and which are subject to the supervision of the Luxembourg Insurance Authority (Commissariat aux assurances) or equivalent supervision in another EU Member State;
- Reduction of the corporate tax rate from 19% to 18%, leading to an effective combined tax rate of 26.01% for corporate entities established in Luxembourg City;
- Introduction of amendments to the current tax regime of stock option plans by way of the new circular letter LIR - No 104/2. In particular, the valuation of freely negotiable options has been increased as of 1 January 2018 from 17.5% to 30% of the value of the underlying stock;
- For sales of immovable property, the maximum tax rate is 10.5% (quarter of the overall rate) for income earned during the period from 1 July 2016 to 31 December 2018 (initially due to end on 31 December 2017); and
- Furthermore, the legislative process of draft Bill of law 7163 regarding a new preferential IP tax regime is on its way.

For further information, please refer to our **Newsletter December 2017**.

Administrative Court, 23 November 2017

Decision of the Luxembourg Administrative Court, No. 39193C, 23 November 2017

In 2008, a Luxembourg resident company redeemed its own shares, representing the balance of the shares owned by a shareholder. In 2012, the share capital of the company was reduced to cancel the redeemed shares. The Luxembourg tax authorities considered that the redemption by the company of the participation of a shareholder not followed by the immediate cancellation of such shares should not be treated as a partial liquidation of the company within the meaning of Article 101 of the Luxembourg Income Tax Law ("**LITL**") and should be subject to the dividend withholding tax at a rate of 15%.

Applying an economic approach, the Luxembourg Administrative Court held that the net proceeds received by a shareholder upon the redemption by the company of all or part of his/her shares without a corresponding cancellation of the shares so redeemed should not qualify as income from capital (i.e. dividend) falling under the scope of Article 97 (1) LITL, but as income from the realisation of a participation (i.e. capital gain) falling under the scope of Article 100 LITL or Article 99bis LITL. Thus, no dividend withholding tax is applicable to such redemption, except where the redemption price is not justified by sound economic reasons. In such latter case, any excessive amount paid to a shareholder may still be treated as a hidden distribution pursuant to Article 164(3) LITL and thus be subject to withholding tax.

Elvinger Hoss Prussen welcomes the decision of the Luxembourg Administrative Court which clarifies the tax treatment of the redemption of shares not followed by the immediate cancellation of such shares.

New circulars summary: January and February 2018

- **Tax Circular L.G. – 60bis/3 of 24 January 2018**: forex conversion rates of foreign currencies into EURO for fiscal year 2017.

  This tax circular publishes the official year-end and average forex conversion rates for Luxembourg tax purposes in 2017 for the use of a non-EUR functional currency for tax purposes.

- **Tax Circular 784 of 20 December 2017**: death duties concerning spouses or partners.

  This tax circular extends the exemption from death duties (except for real estate assets situated in Luxembourg) to spouses and partners, irrespective of whether or not they have common descendant(s) (subject to the condition that the partnership existed for at least 3 years).

- **Tax Circular 785 of 21 December 2017**: VAT exemption for management services rendered to (life-insurance) internal collective funds supervised by the CAA.

  This tax circular extends the VAT exemption for management services rendered to (life-insurance) internal collective funds supervised by the CAA.

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

The information contained herein is not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific legal advice concerning particular situations.

We undertake no responsibility to notify any change in law or practice after the date of this newsletter.