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THIS NEWSLETTER IS INTENDED ONLY AS A GENERAL DISCUSSION OF THE TOPICS WITH WHICH IT DEALS. IT SHOULD NOT BE REGARDED AS LEGAL ADVICE.
IF YOU WOULD LIKE TO KNOW MORE ABOUT THE TOPICS IN THIS NEWSLETTER OR OUR SERVICES, PLEASE CONTACT US.

SUSTAINABLE FINANCE | CSSF SUPERVISORY PRIORITIES

On 6 April 2023, the CSSF published a press release in order to give a general overview of their supervisory priorities in relation to sustainable finance (the "**Press Release**"). The CSSF, in support of the long-term objective of integrating sustainability into financial strategies, have determined their supervisory priorities with the objective of fostering a cohesive implementation of the sustainable finance framework across the financial sector. This Press Release sets out the supervisory priorities of the CSSF for credit institutions, the asset management industry, investment firms and issuers.

Supervisory priorities for credit institutions

The three main supervisory priorities for credit institutions are:

- Transparency and disclosures:

This will ensure supervision of disclosure obligations for credit institutions under Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector (the "**SFDR**") through the long form report, as revised by Circular CSSF 22/821.

- Risk management and governance:

One of the priorities for the supervision of the banking sector will be climate-related and environmental risks integration and mitigation. The CSSF plans to repeat its self-assessment exercise on climate related and environmental risks with a new sample of approximately 15 to 20 less significant institutions and third-country branches.

The CSSF will also carry out on-site inspections in relation to themes such as governance, business models and credit risks. In addition, the CSSF intends to carry out on-site inspections specifically focused on climate-related on environmental risks, from the end of 2023 or the beginning of 2024.

Credit institutions should also note the CSSF's intention to conduct a sample-based review of remuneration policies and practices, to gain an understanding of how such policies have been updated to ensure consistency with the integration of sustainability risks in their governance and business models.

- MiFID rules related to sustainability:

The CSSF's focus in this context will be on gaining an understanding of where the industry stands in the practical implementation of the sustainability rules under MiFID II. These supervisory measures will include carrying out on-site inspections with an updated MiFID control plan, integrating, among other elements, new sustainability-related obligations in the areas of product governance, sustainability assessments, conflicts of interest, information to clients and internal control functions.

Supervisory priorities for the asset management industry

The CSSF has five main supervisory priorities for the asset management industry:

- Organisational arrangements of IFMs, including the integration of sustainability risks by financial market participants:

Under SFDR, investment fund managers' ("**IFM**") are required to comply with a set of rules regarding the integration of sustainability risks in their activities, and SFDR outlines mandatory website disclosures in this regard. The CSSF requires IFM's organisational arrangements to account for the integration of sustainability risks, with particular reference to terms of human resources and governance, investment decision or advice processes, remuneration and risk management processes and policies, and management of conflicts of interest as required under SFDR. The CSSF's supervisory approach, in this regard, involves the verification of these provisions in the IFM's organisational arrangements.

- Verification of the compliance of pre-contractual and periodic disclosures:

In order to verify this compliance, the CSSF will continue to assess the compliance of pre-contractual and periodic disclosures of investment funds with the SFDR regulatory provisions.

- Verification of the consistency of information in fund

documentation and marketing material:

The CSSF plans to continue verifying the consistency of sustainability-related disclosures across the fund documentation and marketing material.

- Verification of the compliance of product website disclosures:

The supervisory actions of the CSSF in this regard will see the continuation in verifying that IFMs comply with their obligations regarding the publication and maintenance, on their website, of SFDR related information for the investment funds they manage.

- Portfolio analysis:

This supervisory duty will be fulfilled by the CSSF, by ensuring that portfolio holdings reflect the name, the investment objective, the strategy, and the characteristics displayed in the documentation to investors. In order to carry out the aforementioned verifications and to fulfil its general supervisory duties in this regard, the CSSF launched a dedicated SFDR data collection exercise, which we discussed in a previous newsflash.

Supervisory priorities for investment firms

The supervisory priorities for investment firms include transparency and disclosures, risk management and governance, and MiFID rules related to sustainability.

- Transparency and Disclosures:

Supervision by the CSSF of investment funds under this heading will involve the establishment of a self-assessment questionnaire in relation to the disclosure obligations, applicable under SFDR, to investment firms providing investment advice and portfolio management services. This questionnaire will be addressed to all investment firms and will form part of the contemplated reform of the long-form report.

- Risk management and governance:

The CSSF expects to implement a gradual approach to its supervision of ESG risks for investment firms, the priority being the recognition of ESG risks in their strategies and governance arrangements.

- MiFID rules related to sustainability:

The supervisory priorities for the CSSF in relation to MiFID sustainability rules for investment firms will replicate that of credit institutions, as described above.

Supervisory priorities for issuers

ESMA together with the European national accounting enforcers, including the CSSF, have identified European common enforcement priorities for the 2022 annual reports.

Particular attention will be paid to climate-related matters and the information required under Article 8 of Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment (the "**Taxonomy Regulation**") with regards to issuers.

For further information on this topic, please refer to our previous newsflash on CSSF enforcement priorities.

MARKETS IN CRYPTO-ASSETS (MICA) | EU FRAMEWORK

The MiCA Regulation

On 9 June 2023, Regulation (EU) 2023/1114 of 31 May 2023 on markets in crypto-assets was published in the Official Journal of the EU (the "**MiCA Regulation**"), thus establishing a harmonised regulatory framework for the crypto-assets market within the EU.

The MiCA Regulation aims to protect investors, preserve financial stability and market integrity whilst still supporting innovation in the crypto-asset sector.

The MiCA Regulation will apply to a wide range of crypto-assets, which will include cryptocurrencies such as bitcoin and utility tokens, which are intended to provide access to goods or services. Certain crypto-assets which aim to retain a stable value will also be in scope of the MiCA Regulation, including e-money tokens and asset referenced tokens.

The key provisions of the MiCA Regulation which apply to those persons who issue and trade crypto-assets, deal with transparency, authorisation and supervision of transactions, as well as disclosure. In addition to this, the MiCA Regulation will implement measures which target market manipulation and prevent money laundering, terrorist financing and other unlawful activities. The key provisions of the MiCA Regulation are discussed in more detail in our previous article on this matter.

The MiCA Regulation entered into force on 29 June 2023; the provisions relating to asset-referenced tokens and e-money tokens will apply 12 months thereafter whereas all other provisions (including those related to crypto-asset service providers) will apply 18 months thereafter.

The Travel Rule

In addition to the MiCA Regulation, Regulation (EU) 2023/1113 of 31 May 2023 on information accompanying transfers of funds and certain crypto-assets was also published in the Official Journal of the EU on 9 June 2023 (the "**Travel Rule Regulation**"). The Travel Rule Regulation sets forth rules on the information on payers and payees accompanying the transfer of funds and on the information on originators and beneficiaries accompanying the transfer of crypto-assets. The purpose of these rules is to prevent, detect and investigate money laundering and terrorist financing. These rules apply where at least one of the payment service providers or the crypto-asset service providers involved in the transfer is established or has its registered office in the EU.

The Travel Rule Regulation entered into force on 29 June 2023 and will apply from December 2024.

DLT | MOST RECENT DEVELOPMENTS

ESMA Q&A Updates

On 27 March 2023, ESMA updated its questions and answers on the implementation of Regulation (EU) 2022/858 of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology ("**DLT Regulation**") (the "**DLT Pilot Regime Q&A**"). With this update, ESMA clarifies how the tentative market capitalisation of DLT shares should be calculated. Where DLT shares are not yet admitted to trading or traded on a trading venue, the tentative market capitalisation should be calculated by multiplying the final offer price or the maximum offer price with the total number of shares outstanding immediately after the share offer to the public.

Circular CSSF 23/832 – Application of ESMA Guidelines

On 5 April 2023, the CSSF published Circular CSSF 23/832 (the "**Circular**") concerning the application of the ESMA guidelines (published on 8 March 2023) on standard forms, formats and templates to apply for permission to operate a DLT market infrastructure (the "**Guidelines**"). Please refer to our previous article for more information on these Guidelines. The purpose of the Circular is to confirm that the CSSF applies the Guidelines in its capacity as competent authority under the DLT Regulation. The Circular applies to all entities intending to apply for specific permissions to operate a DLT market infrastructure, as defined in the DLT Regulation.

The Guidelines apply as from 23 March 2023 and the Circular applies as from 5 April 2023.

CROWDFUNDING REGULATION | NEW ESMA Q&A

On 26 May 2023, ESMA updated its Questions and Answers ("Q&As") in relation to Regulation (EU) 2020/1503 of 7 October 2020 on European crowdfunding service providers for business (the "**Crowdfunding Regulation**"). Three new questions and answers have been added to the Q&As.

In this latest update, ESMA clarifies the following with respect to the use of special purpose vehicles ("**SPVs**"):

- an entity should be considered as an SPV within the meaning of Point (q) of Article 2(1) of the Crowdfunding Regulation when it is (i) created for the purpose or used for the purpose of the transaction (i.e. financing of the project) and (ii) separated from the project owner, is (iii) interposed between the crowdfunding project and investors and (iv) this entity receives, directly or indirectly, from the project owner a transfer of legal title or beneficial interest over the crowdfunding project;
- noting that Article 8(1) of the Crowdfunding Regulation provides that crowdfunding service providers ("**CSPs**") shall not have any participation in any crowdfunding offer on their platform, the holding by a CSP of a participation in a SPV or any other entity interposed between the crowdfunding project and investors is not possible under the Crowdfunding Regulation, unless it is demonstrated by the CSP to the national competent authority that such participation does not equal a participation in the underlying crowdfunding offer and, as such, does not impair its neutrality vis-à-vis its clients. The Q&A also provides criteria by which the national competent authority may consider that a participation taken or held by the CSP does not equal a participation in the underlying crowdfunding offer and that the neutrality of the CSP is not impaired.

As regards the authorisation and supervision of CSPs, ESMA provides some further explanation on the proofs of own funds that existing undertakings can provide to the relevant authorising authority when applying for authorisation as a CSP, for the purpose of Point (i) of Article 12(2) of the Crowdfunding Regulation and Field 10 of the Annex to the Delegated Regulation 2022/2112.

MIFID II AND MIFIR | ESMA GUIDELINES AND FAQ

ESMA Guidelines on MiFID II product governance requirements

On 27 March 2023, ESMA published its final report on guidelines on Directive 2014/65/EU of 15 May 2014 on markets of financial instruments ("**MiFID II**"), regarding product governance requirements (the "**Guidelines**"). The objectives of the Guidelines are to establish consistent, efficient and effective supervisory practices within the European System of Financial Supervision and to ensure the uniform and consistent application of the MiFID II requirements regarding product governance.

The main amendments to the Guidelines include:

- the determination of a compatible distribution strategy where a distributor considers that a more complex product can be distributed under non-advised sales;
- the specification of any sustainability-related objectives a product is compatible with;
- identifying a target market per cluster of products rather than per individual product; and
- the periodic review of products, including the application of the proportionality principle.

The Guidelines will be translated in all official EU languages and published on ESMA's website. The publication of the translations in all official languages of the EU will trigger a two-month period during which the national competent authorities must notify ESMA whether they comply or intend to comply with the guidelines.

ESMA Guidelines on certain aspects of the MiFID II suitability requirements

On 3 April 2023, ESMA published on their website in all official EU languages guidelines on certain aspects of the MiFID II suitability requirements (the "**Guidelines on Suitability Requirements**"). The following aspects are addressed in these guidelines:

- information to clients about the purpose of the suitability assessment and its scope;
- know your client and know your product;
- matching clients with suitable products; and
- other related requirements, which includes qualifications of firm staff and record-keeping.

The Guidelines on Suitability Requirements shall apply from 3 October 2023.

On 16 May 2023, the CSSF published Circular CSSF 23/835 (the **"Circular"**) by which they confirmed that the CSSF would apply the Guidelines on Suitability Requirements from 3 October 2023.

ESMA Guidelines on certain aspects of the MiFID II remuneration requirements

On 3 April 2023, ESMA published on their website in all official EU languages guidelines on certain aspects of the MiFID II remuneration requirements (the "**Guidelines on Remuneration Requirements**"). The Guidelines on Remuneration Requirements discuss the following topics:

- the design of remuneration policies and practices;
- governance; and
- controlling risks related to remuneration policies and practices.

The Guidelines on Remuneration Requirements shall apply from 3 October 2023.

ESMA Q&A on MiFID II and MiFIR

Since our last newsletter, ESMA has updated (on 31 March 2023) the following questions and answers on MiFID II and Regulation (EU) 600/2014 on markets of financial instruments ("**MiFIR**"):

- Questions and answers on MiFID II and MiFIR transparency topics
- Questions and answers on MiFIR data reporting

GENERAL COURT OF THE EU REAFFIRMS PRIMARY SUBSTANTIVE RIGHT OF ACCESS TO DOCUMENTS

On 22 March 2023, in its judgment T-72/20 Satabank v. European Central Bank, the General Court of the EU (the "**General Court**") annulled a decision of the European Central Bank (the "**ECB**") rejecting access to a file requested by Satabank plc (the "**Bank**"). At the time the complaint was lodged, Satabank was a credit institution under the law of Malta, which had been classified as a "less significant institution" under Council Regulation (EU) No. 1024/2013 of 15 October 2013 (the "**Regulation**"). As such, it was directly supervised by the Malta Financial Services Authority (the "**Maltese Authority**").

Background to the dispute

In the context of an inquiry started in 2018 by the Maltese Authority under the Regulation, the Bank had requested to access the ECB's administrative file. However, as, in conformity with the Regulation, the Maltese Authority was in charge of such inquiry, on 26 November 2019, the ECB denied access on grounds that Article 22 of the Regulation grants a right of access to an administrative file only in the framework of an ongoing ECB investigation, whereby the parties should be granted their right of defence.

At the end of its enquiry, in conformity with the Regulation, the Maltese Authority submitted to the ECB a draft decision of withdrawal of the Bank's authorisation as a credit institution. The ECB notified such draft decision to the Bank, pursuant to which the Bank eventually obtained access to the file. Following formal adoption of the withdrawal decision on 30 June 2020, the Bank sought its annulment, which it subsequently discontinued, the action for the annulment of the ECB's decision denying access to the administrative file being still pending.

The issues at stake

The judgment of the General Court focuses on composite administrative decision-making, combining actions carried out and acts adopted at both the EU and national levels, and the difference between the right of access to an administrative file and the more general access to documents of EU institutions and authorities.

The latter has actually a procedural nature, as it is intended to preserve the rights of defence and due process before the EU, as it is the case of Article 22 of the Regulation. Conversely, the purpose of the former is to ensure the principle of transparency, as set out in Article 15 of the Treaty on the Functioning of the EU (the "**TFEU**"), in turn enacted in Decision 2004/258/EC of the ECB of 4 March 2004 on public access to ECB's documents (the "**ECB Access Decision**"). The general regime also aims at protecting the fundamental right to access documents of the EU institutions and authorities, as embodied in Article 42 of the Charter of Fundamental Rights of the EU (the "**CFR**").

The argument of the ECB to dismiss the Bank's access request relied on the definition of an administrative file, as the set of documents collected by the ECB in the context of a supervisory procedure under the Regulation. Since, at the time the access request was lodged, the ECB had not been implied in the supervisory procedure (yet), the documents held by the ECB could not be considered as included in the administrative file.

However, given the ongoing national enquiry, the Bank needed to access the information held by the ECB. In accordance with the Regulation, national authorities are competent to investigate on entities of less significant importance established in their jurisdiction. This, in turn, may culminate in the proposal of a draft decision of withdrawal, which, under the Regulation, the ECB itself should approve and notify to its addressee, prior to confirming and adopting it, thereby holding the ultimate say in decision-making heavily relying on the Maltese Authority.

Despite the ECB's power to adopt the final decision, the fact the Maltese Authority was solely competent for the investigation prevented the Bank from accessing the information held by the ECB, in conformity with Article 22 of the Regulation, until they notified the draft decision of withdrawal.

The findings of the General Court

The General Court acknowledged that the right to access an administrative file and the documents of the

institutions (Article 15 of TFUE), though distinct from a legal standpoint, are functionally and structurally comparable. Both legal bases actually ensure the right to access a file to obtain all documents submitted to institutions by the parties concerned and third parties.

The General Court noticed that the ECB Access Decision, enacting the general principle of access to documents expressed in Article 15 of TFEU, gives all EU citizens, or enterprises having a registered office in a EU Member State, a right of access to ECB documents without having neither to justify such request nor to demonstrate any specific interest thereto.

In light of this, the court acknowledged that the sole fact that the Bank could not access the information contained in the administrative file would not prevent them from accessing the documents held by the ECB on grounds of general access to documents. As the ECB did not examine the access request under the ECB Access Decision, the court upheld the Bank's plea and annulled the ECB's decision.

The way forward

Notwithstanding the rules in place in the EU transnational administrative space, the risk still persists that protection of rights could be impaired. By restating the primary substantive right of access to documents, based on Article 15 of TFEU and Article 42 of CFR, the General Court showed that EU law offers all the instruments required to protect the rights of individuals before EU institutions, which otherwise would not be granted.

ENTERPRISES' DUTY OF CARE WITH REGARD TO SUSTAINABILITY

On 16 May 2023, draft law No. 8217 on enterprises' duty of care with regard to sustainability (the "**Draft Law**") has been submitted to the Luxembourg Parliament (*Chambre des Députés*).

Which enterprises have a duty of care?

The Draft Law's provisions will apply:

- to enterprises when two of the following three thresholds are reached:

1° at least 250 employees,
2° annual turnover of more than EUR 50 million,
3° a balance sheet total of more than EUR 43 million;

- to small and medium-sized enterprises when they are active in risky economic activities, the list of which is to be established by a grand-ducal regulation.

The Draft Law is to apply to all entities irrespective of its legal form exercising an economic activity, not just companies.
The duty of care is to apply two years after the adoption of the Draft Law.

What are the duty of care obligations for enterprises?

The duty of care requires enterprises to:

- examine whether its own activities, those of its subsidiaries or those of its "**business relations**" may have or are having ***negative impacts on human rights or the environment*** in countries other than the Grand Duchy of Luxembourg, and to draw up an ***inventory of these actual or potential impacts***;
- take all ***necessary measures to prevent or end the negative impacts*** identified;
- ***mitigate impacts*** that cannot be totally avoided and provide measures to remedy them;
- if, despite these measures, these impacts cannot be sufficiently mitigated to avoid serious harm to stakeholders, the climate or the environment, ***refrain from the activity concerned or terminate the relationship*** within a reasonable period of time.

"**Business relations**" is very broadly defined as meaning not only suppliers and sub-contractors of an enterprise but also all other entities in its upstream and downstream chain of activities in any way linked to the activities of the enterprise, including its financing, insurance and re-insurance.
Enterprises must also:

- establish through public consultation and effectively implement a ***vigilance plan*** involving all levels of management; and
- ***provide a complaints service on its website***, whereby the company responds to complaints within one month and works diligently to remedy potential violations.

What are the consequences of a breach of the duty of care?

A breach to comply with the obligations of duty of care gives rise to civil liability on the part of the perpetrator, who is obliged to ***compensate for the damage caused***. Trade unions and civil society organisations acting in the public interest can bring collective actions before the courts on behalf of and for the protection of the interests of victims. By way of a reversal of the burden of proof, an enterprise is deemed to be liable for a breach of duty of care if it cannot prove that it had taken all necessary measures reasonably in its powers to prevent or preclude negative impacts. Account is, however, to be taken of the actual power of the enterprise to control or influence its subsidiaries or other entities in its value chain.
In addition, the Draft Law creates a duty of care supervisory authority, the "**regulator**", entitled to:

- open an investigation on its own initiative or following a complaint from any natural or legal person;
- ask enterprises to provide all the information needed to carry out these tasks within a reasonable timeframe;
- impose an **administrative fine** not exceeding 10% of the net turnover of the non-compliant company.

NEW DIRECTIVE ON TRANSPARENCY AND EQUAL PAY FOR MEN AND WOMEN

Directive (EU) 2023/970 of 10 May 2023, aimed at strengthening the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, was published in the Official Journal of the EU on 17 May 2023 and entered into force on 7 June 2023 (the "**Directive**").

The Directive imposes **transparency and reporting obligations on both public and private sector employers.** It applies not only to all employees but also to job applicants in selection processes.

New obligations for employers

Information on the transparency of remuneration

The Directive addresses the issue of pay transparency, both during the employment relationship and prior to recruitment. In particular, employers will have to:

- provide job applicants with information on the initial pay level or a corresponding range (based on objective and gender-neutral criteria) in relation to a specific position or job. Employers will not be able to ask applicants about their pay history during their former employment relationship;
- make available to workers a description of the gender-neutral criteria used to define their pay and career progression.

Reporting on the gender pay gap

Employers will also have to make available to all their employees and to the employees' representatives information on the gender pay gap, including in particular:

- the gender pay gap;
- the gender pay gap in complementary or variable components;
- the median gender pay gap;
- the median gender pay gap in complementary or variable components;
- the proportion of female and male workers benefiting from complementary or variable components;
- the proportion of female and male workers in each quartile pay band;
- the gender pay gap between workers by categories of workers broken down by ordinary basic wage or salary and complementary or variable components.

Frequency of the report will depend on the number of workers:

- **employers with 250 or more workers** should provide information on the gender pay gap by 7 June 2027 and *every year* thereafter.
- **employers with between 150 and 249 workers** should provide this information by 7 June 2027 and *every three years* thereafter.
- **employers with between 100 and 149 workers** should provide this information by 7 June 2031 and *every three years* thereafter.
- **employers with fewer than 100 workers** should provide information on pay when required by Member States.

Workers 'rights

Right to information

The Directive also deals in-depth with workers' right to information during the employment relationship. Workers will be able to request, through their representatives, information concerning their individual pay levels, average pay levels, broken down by gender, for categories of workers performing the same work or work of equal value to that which they do.

Defence of rights

Better access to justice for victims of pay discrimination will include:

- judicial procedures to enforce the rights and obligations relating to the principle of equal pay;
- the *right for equality bodies and workers' representatives or other legal entities to act on behalf or in support of a worker, and for them to bring collective claims to court*;
- the *shift of the burden of proof* to the employer when employees who consider themselves wronged establish facts from which it can be presumed that

there has been direct or indirect discrimination, or where an employer has not implemented the above-mentioned pay transparency obligations;
- the limitation period for bringing a claim should be at least three years;
- specific penalties for infringements of the equal pay rule, including fines.

Right to compensation

Any worker who has suffered damages as a result of a breach of a right or obligation relating to the principle of equal pay will have the right to claim and obtain full compensation or reparation.

Protection against reprisals

It is explicitly stated that workers and their representatives shall not be treated less favourably and shall be protected against dismissal or other adverse treatment by an employer in response to a complaint within the employer's organisation or to any administrative procedure or court proceedings aimed at enforcing rights or obligations relating to the principle of equal pay.

Next step

Luxembourg must transpose the Directive into national law by **7 June 2026** at the latest. We will keep you informed when a draft law will be submitted to the Luxembourg Parliament (*Chambre des Députés*).

ADOPTION OF THE LAW INTRODUCING INTO THE LABOUR CODE A RIGHT TO DISCONNECT

On 13 June 2023, the Luxembourg Parliament (*Chambre des Députés*) adopted the law amending the Labour Code with a view to introducing a provision on the right to disconnect (the "**Law**").

Background

Before the adoption of the Law, a right to disconnect was not expressly addressed in the Luxembourg legislation, although many provisions of the Labour Code already provided safeguards (e.g. the rules protecting employees in terms of working hours, the general obligation of the employer to ensure the safety and health of all employees, etc.).

Moreover, the Luxembourg Court of Appeal recognised the right of an employee (in that case, a restaurant manager) to disconnect during a paid leave period in a decision dated 2 May 2019.

The Luxembourg Economic and Social Council ("**ESC**") also recommended to put in place mechanisms encouraging compliance with the right to disconnect and its implementation within companies.

The Law essentially incorporates into the Labour Code the provisions suggested by the ESC.

Obligation to set up a scheme ensuring compliance with the right to disconnect outside working hours

The Law provides for the introduction of a new Section 8 "*Respect for the right to disconnect*" under Book 3 "*Protection, security and safety of employees*", Title 1 "*Safety at work*", Chapter 2 "*Obligations of employers*" of the Labour Code. Two new Articles are added under this new Section 8, Articles L.312-9 and L.312-10.

Article L.312-9 of the Labour Code provides that where employees use digital tools for work purposes, a scheme ensuring compliance with the right to disconnect outside working hours must be set up. The regime must in particular set out:

- the practical arrangements and technical measures for disconnecting from digital devices;
- awareness and training measures; and
- compensation arrangements in the event of exceptional derogations to the right to disconnect.

The scheme must be adapted to the specific situation of the company or sector, and be set up by way of a collective bargaining agreement or a subordinate agreement. In the absence of a collective bargaining agreement or a subordinate agreement, the specific scheme is to be defined at company level, in compliance with the relevant legal requirements in terms of information and consultation of the staff delegation, if any. Thus:

- in companies with less than 150 employees, the staff delegation should be informed and consulted on the introduction or modification of a scheme ensuring respect for the right to disconnect outside working hours;
- in companies with at least 150 employees, there must be a mutual agreement between the employer and the staff delegation on the introduction or modification of said scheme.

Article L.312-10 provides that any breach of the obligation to implement a right to disconnect scheme is liable to an administrative fine of between EUR 251 and EUR 25,000 imposed by the Director of the Labour and Mines Inspectorate. The amount of the fine will be assessed on a case-by-case basis, and will depend on the circumstances and seriousness of the breach, as well as on the behaviour of the perpetrator. An injunction to comply with the legal requirements may be issued before a fine is imposed on the employer.

Entry into force

With regard to new Article L.312-9 of the Labour Code, the Law does not provide for a specific date of entry into force. In the absence of specific provisions, Article L.312-9 will come into force according to the classical rules applicable in Luxembourg, i.e. four days after the publication of the Law in the Official Gazette of the Grand Duchy of Luxembourg, on 04 July 2023.

However, the Law provides for a delayed entry into force of Article L.312-10 regarding the sanctions applicable in the event of infringement to the obligation to implement a right to disconnect scheme.

Article L.312-10 will enter into force three years after the date of publication of the Law in the Official

Gazette, i.e. on 30 June 2026 which gives sufficient time to companies to implement a right to disconnect scheme in collaboration with the staff delegation, if any.

Conclusion

The introduction of a right to disconnect into the Labour Code is welcome and necessary, at a time when employees' rights in terms of working hours can easily be undermined by the exponential use of telework. In any case, this right to disconnect must be applied in the same way for employees teleworking as for employees working at the premises of a company. Indeed, the new telework agreement which came into force on 2 February 2021 specifies that any provision relating to the right to disconnect applicable to a “classic” worker shall also apply to a teleworker.

UCIS AND VIRTUAL ASSETS | CSSF FAQ

On 6 April 2023, the CSSF updated their frequently ask questions ("**FAQ**") on virtual assets addressed to undertakings for collective investment ("**UCIs**"), (the "**FAQ**"). This update involved the modification of the existing Question 2 and the addition of a new Question 3A.

The update of Question 2 clarifies that investments in financial instruments such as derivatives or transferable securities with underlying virtual assets, are to be considered as indirect investments in virtual assets. Without prejudice to the answer given in respect of the new Question 3A, should such an AIF be managed by a Luxembourg authorised AIFM, the latter must obtain an authorisation extension from the CSSF for this new investment strategy.

Question 3A clarifies that the "Other-Other Fund-Virtual assets" license is not required in the case of a Luxembourg investment fund manager ("**IFM**") managing an AIF investing in target funds with underlying virtual assets. However, when the AIF invests more than 20% of its net asset value ("**NAV**") in one or several target funds, an IFM authorisation for the "fund of funds" strategy is required. The CSSF however, requires that the IFM undertakes an assessment of the ability of the target fund's manager to identify and manage the risks pertaining to investments in virtual assets, in relation to each target fund with virtual assets as the main underlying exposure. The IFM is responsible for determining whether a target fund has virtual assets as main exposure.

In addition, Question 3A notes that an investment in virtual assets through one or more target funds constitutes an indirect investment in virtual assets, subject to all other conditions contained in the FAQ.

SFDR DATA COLLECTION FOR LUXEMBOURG INVESTMENT FUNDS | UPDATE

On 30 June 2023, the CSSF published a press release on the SFDR data collection exercise for investment fund managers ("**IFMs**") and institutions for occupational retirement provision ("**IORPs**"), on periodic reporting in relation to Regulation (EU) 2019/2088 on sustainability reporting in the financial services industry (the "**SFDR**") and Regulation (EU) 2020/852 on the establishment of a framework to promote sustainable investments (the "**Taxonomy Regulation**") (the "**Press Release**"). The Press Release follows up on those published on 27 July 2022 and on 24 March 2023. For further information on these communications, see our previous article.

The objective of the Press Release is to provide industry participants with information regarding the launch of the data collection exercise, relating to the disclosures in periodic reports, for financial products disclosing under Article 8 or Article 9 of the SFDR.

Scope

The CSSF requires the following financial market participants ("**FMPs**") to participate in this data collection exercise:

- UCITS management companies, based in Luxembourg and subject to Chapter 15 of the Law of 17 December 2010 relating to undertakings for collective investment (the "**2010 Law**") or in another Member State of the European Union, in relation to all Luxembourg-domiciled UCITS they manage;
- UCITS investment companies which did not designate a management company within the meaning of Article 27 of the 2010 Law;
- authorised alternative investment fund managers ("**AIFMs**"), based in Luxembourg and subject to Article 4 of the Law of 12 July 2013 on alternative investment fund managers (the "**2013 Law**"), in relation to all Luxembourg-domiciled regulated and unregulated AIFs (including ELTIFs) that they manage;
- internally managed alternative investment funds within the meaning of point (b) of Article 4(1) of the 2013 Law;
- authorised AIFMs, based in another Member State of the European Union, in relation to all Luxembourg-domiciled regulated AIFs, as well as Luxembourg-domiciled unregulated AIFs (only when they qualify as ELTIFs) they manage;
- registered AIFMs, subject to Article 3(3) of the 2013 Law, based in Luxembourg or in another Member State of the European Union, in relation to all Luxembourg-domiciled regulated AIFs they manage; and
- IORPs, subject to the Law of 13 July 2005.

FMPs, who are subject to Articles 2(2) or 3(1) of the 2013 Law, can participate in this data collection exercise on a voluntary basis, in relation to any Luxembourg-domiciled regulated AIFs that they manage.

On that basis, FMPs are required to provide information relating to disclosures in periodic reports included in the annual reports issued as from 1 January 2023, and with a financial year-end on or after 30 September 2022, for each financial product in the scope as defined above.

Deadline for submission

- For periodic reports issued in accordance with the legal deadline to publish the annual report or to make it available to investors, between 1 January 2023 and 31 December 2023, the aforementioned information must be provided to the CSSF by 31 January 2024 at the latest.
- For periodic reports issued as from 1 January 2024, the SFDR information shall be provided to the CSSF, at the latest, one month after the legal deadline to publish the annual report, or to make it available to investors.
- Accordingly, the SFDR data must be submitted to the CSSF at the latest five months after the relevant financial year-end for UCITS, and seven months after the financial year-end for AIFs and IORPs.

Methods of submission

The SFDR data can be submitted to the CSSF via the following channels:

- a solution based on the submission of a structured

file through the simple storage service protocol, which is already availableM;

- an online solution via eDesk for manual input by IFMs/IORPs for each fund/sub-fund they manage. This solution will be made available as of 30 November 2023.

Further Information

A user guide, which provides clarifications on the content and the format of the information to be reported, as well as technical details on the data collection process, is available under SFDR UCI periodic data collection – Practical and technical guidance.

ESMA UPDATED Q&A ON THE APPLICATION OF THE AIFMD

On 26 May and 13 June 2023 ESMA published its updated Q&A on the application of the AIFMD (the "**Q&A**"). The answers to the questions in the June update were provided by the European Commission.

Pre-marketing of AIFs

In it May update ESMA clarified that non-EU AIFMs are not allowed to carry out pre-marketing activities pursuant to Article 30a of the AIFMD. ESMA further stated that national laws, regulations and administrative provisions may allow non-EU AIFMs to carry-out pre-marketing activities at national level and where this is the case, non-EU AIFMs do not benefit from a passport allowing them to carry out these activities in other Member States. ESMA also reminded that such national laws, regulations and administrative provisions should not in any way disadvantage EU AIFMs *vis-à-vis* non-EU AIFMs.

The European Commission clarified that the pre-marketing obligations applicable to AIFMs pursuant to article 30a of the AIFMD are applicable to third parties who conduct pre-marketing on behalf of an authorised EU AIFM.

The updated Q&A further clarifies that registered sub-threshold AIFMs are not subject to the obligation to notify pre-marketing unless national rules provide otherwise.

In the last update to the section regarding notification of AIFs, the European Commission stated that even in the case where there are no investors in a host Member State, for all AIFs that are not closed-ended or not an ELTIF, AIFMs wishing to de-notify the arrangements previously made for marketing the shares or units of an AIF in that Member State, have to comply with the obligations set out in Article 32 a(1) of the AIFMD (i.e. publication of a blanket offer to repurchase, intention to terminate arrangements is made public, contractual arrangements with financial intermediaries or delegates are modified or terminated).

Notification of AIFMs

A new question was added asking whether an AIFM that has passported management activities to a host Member State may passport in that host Member State only the other functions that an AIFM may additionally perform in the course of management of an AIF which are referred to in Point (2) of Annex I to the AIFMD. It was confirmed that they cannot. The activities referred to in Annex I, Point 2 (which includes administration, marketing and activities relating to the assets of AIFs) are ancillary to the activities referred to in Annex I, Point 1 and cannot be exercised independently from those including in the case when an AIFM passports their services in another Member State.

Calculation of leverage

The response to a new question 8 in the Section "Calculation of leverage" makes clear that when calculating leverage of an AIF whose core investment policy is to invest in real estate directly or indirectly, the AIFM shall include the exposure contained in financial or legal structures involving third parties controlled by the AIF. Thus an AIFM must include the exposure contained in structures such as special purpose vehicles controlled by the AIF and put in place to acquire real estate assets.

REVITALIZING EU CAPITAL MARKETS: NEW RULES FOR RETAIL INVESTORS

Introducing the retail investment package to enhance trust and participation in EU Capital Markets

On 24 May 2023, the European Commission adopted a retail investment package (the "**RIP**"), announced in the 2020 capital markets union action plan, which seeks to create a **safer environment for individuals to invest their savings in the long term** within the EU. The package focuses on empowering consumers to make informed decisions that align with their preferences and needs while ensuring **fair treatment and protection**. By enhancing trust in capital markets and promoting better investment outcomes, the package aims to **encourage retail investor participation** and contribute to the success of the capital markets union.

Currently, EU retail participation in capital markets remains relatively low compared to other advanced economies, with a **significant portion of financial wealth held in low-yield bank deposits**. Factors such as low trust, concerns about risks and complexity, and a preference for alternative investments induced by social media and digital marketing channels contribute to this trend. Moreover, retail investors often face higher fees and commissions, diminishing their investment returns.

The RIP intends to **streamline and modernize rules**, placing **consumer interests at the forefront** and promoting equal treatment and protection across investment products and distribution channels. It recognizes the **potential of long-term capital market investments** to generate sustainable returns and complement retirement income, especially in the context of an aging EU population and longer life expectancy.

The current legislative framework also presents difficulties for retail investors in accessing relevant investment information. It leads to an increase of the exposure of the investor to a misleading marketing area, but also to potential conflicts of interest in product distribution, and unjustifiably high costs. Increasing financial literacy is crucial to empower retail investors in making informed investment decisions.

Key measures and objectives of the RIP

Empowering retail investors through transparency and protection

The RIP consists of a proposal for an amending directive, which will revise the existing rules set out in the directive 2014/65/EU on markets in financial instruments ("**MiFID II**"), the directive 2016/97/EU on insurance distribution ("**IDD**"), the directive 2009/65/EC on UCITS ("**UCITS Directive**"), the directive 2011/61/EU on AIFMs ("**AIFMD**"), and directive 2009/138/EC on the taking-up and pursuit of the business of insurance and reinsurance ("**Solvency II**"), as well as a proposal for an amending regulation, which will revise the packaged retail and insurance-based investment products ("**PRIIPs**") Regulation.

Modernizing disclosures and standardizing transparency:

- enhancing disclosures for digital distribution;
- standardizing transparent cost disclosures and investment performance;
- implementing risk warnings;
- adding a summary dashboard for key cost and risk information in Packaged Retail Investment and Insurance-based products key information documents ("**KIDs**").

Improving "value for money" for retail investors:

- measures to ensure better investment decision-making and assessment of product appropriateness and suitability;
- addressing conflicts of interests;
- enhancing marketing communication clarity and fairness, especially with social media and influencers.

Enhancing knowledge of actors:

- improving financial literacy of retail investors;
- enhancing knowledge and competence of investment advisors.

Reducing costs and increasing access:

- reducing administrative burdens;
- improving accessibility of products and services for sophisticated retail investors;
- enhancing cross-border supervision and enforcement mechanisms.

The package's path to accessibility in EU capital markets

The RIP represents a significant step towards empowering retail investors and enhancing their trust in capital markets within the EU. The proposed changes, ranging from improved disclosures to standardized information documents, aim to provide retail investors with clearer, transparent, and easily understandable information about investment products.

The RIP is open for feedback until 16 August 2023.

NAVIGATING THE PATH TO ESG TRANSPARENCY: JOINT CONSULTATION PAPER ON REVIEW OF SFDR DELEGATED REGULATION

European supervisory authorities ("ESAs") release draft regulatory technical standards ("RTS") for sustainability disclosures: proposed changes to principal adverse impacts ("PAIs") and financial product disclosures

The ESAs recently published a Joint Consultation Paper on the review of the Commission Delegated Regulation (EU) 2022/1288 of 6 April 2022 supplementing Regulation (EU) 2019/2088 ("**SFDR**"). This paper, released on 12 April 2023, focuses on the proposed RTS for the content, methodologies, and presentation of sustainability disclosures in particular the sustainability indicators in relation to principal adverse impacts referred in Article 4(6) and 4 (7) SFDR, the pre-contractual and periodic documents in Article 6(3) and 11(2) SFDR and the website product disclosures for financial products in Article 10(1) SFDR.

The Joint Consultation Paper aims to address the need for further guidance and clarification regarding sustainability disclosures in financial products. The review seeks to ensure consistency and comparability in disclosures, enhance investor protection, and promote sustainable finance practices.

Proposed changes to sustainability disclosures

The consultation paper outlines proposed **regulatory technical standards for the content of sustainability disclosures**. It covers various aspects, including environmental, social, and governance ("**ESG**") factors, PAIs, and the use of sustainability indicators. The aim is to provide clear guidelines on the information that should be disclosed by financial market participants and financial advisers.

Key points of the paper:

- Article 4(6) SFDR: clarifies the **criteria for determining** whether a financial product **promotes ESG**;
- Article 4(7) SFDR: adds **requirements regarding sustainability claims** made by financial products;
- Article 6(3) SFDR: additional disclosure obligations for market participants regarding the consideration of adverse impacts in the **investment decision-making process**;
- Article 11(2) SFDR: extends disclosure requirements for financial advisers to cover **additional information related to the consideration of sustainability risks** and the impact of sustainability factors on investments recommendations; and
- Article 10(1) SFDR: requires the disclosure of the **criteria used to determine the sustainability of the investments** and the information on how ESG factors are considered in the investments process.

The consultation paper proposes standardised templates, symbols, and visual aids to facilitate comparability and comprehensibility of the information provided to investors.

Key implications for financial market participants

The proposed changes aim to improve the **transparency of sustainability-related disclosures**, enabling investors to make informed decisions. Market participants will need to review and potentially revise their current disclosure practices to align with the new regulatory requirements.

The consultation paper emphasises the **importance of protecting investors' interests** by providing them with accurate and comprehensive sustainability information.

The consultation is open until 4 July 2023.

CSSF SFDR FAQ | ADDRESSING FUND NAME CONSIDERATIONS AND EFFICIENT PORTFOLIO MANAGEMENT TECHNIQUES

Key SFDR clarifications on fund names (Question 7) and efficient portfolio management (Question 8)

The sustainable finance disclosure regulation ("**SFDR**") has introduced a new era of transparency and sustainability in the financial industry. The CSSF has recently provided important clarifications through its FAQ as updated on 13 March 2023 ("**CSSF FAQ**"). In this article, we explore the recently added questions 7 and 8 of the CSSF FAQ, shedding light on fund name considerations and efficient portfolio management ("**EPM**") techniques under SFDR.

Question 7: ESG and sustainability considerations for fund names

When it comes to fund names, according to the ESMA supervisory briefing on sustainability risks and disclosure in the area of investment management, there are specific environmental, social and governance criteria ("**ESG**") and sustainability related considerations that financial market participants ("**FMPs**") should be aware of. *"The use of terms such as "ESG", "green", "sustainable", "social", "ethical", "impact" or any other ESG-related terms should be used only when supported in a material way by evidence of sustainability characteristics, themes or objectives that are reflected fairly and consistently in the fund's investment objectives and policy and its strategy as described in the relevant fund documentation.".* The key insights include:

- **Fund name accuracy and clarity:** FMPs must ensure that ESG and sustainability related terminology used in fund names accurately reflects the underlying investment strategy.
- Transparency and clarity are crucial to avoid any misleading information for investors.
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- **ESG and sustainability integration:** FMPs should consider integrating ESG and sustainability factors into the investment process to support the usage of ESG and sustainability related terminology in fund names.
- A robust ESG integration framework strengthens the credibility and authenticity of the fund's sustainability claims.
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- **Marketing material alignment:** CSSF emphasizes the importance of aligning marketing materials with the ESG and sustainability factors considered in the fund's investment strategy.
- FMPs should ensure consistency between the fund's name, marketing materials, and actual investment approach.

Question 8: Efficient portfolio management techniques for hedging purposes which play a significant role in managing investment portfolios

CSSF provides valuable guidance on efficient portfolio management techniques ("**EPM techniques**") used for hedging purposes under SFDR:

- **EPM techniques within the "remaining portion":** CSSF clarifies that EPM techniques used solely for hedging purposes can be considered part of the "remaining portion" of the investment portfolio.
- FMPs should disclose the relevant information on these techniques in line with Article 9 SFDR requirements.
- **Transparency and Risk Management:** FMPs must ensure transparency and proper disclosure regarding the use of EPM techniques for hedging purposes.
- Comprehensive risk management practices should be in place to mitigate potential risks associated with these techniques as set forth by CSSF Circular 08/356.

ADVOCATE GENERAL OPINION IN AMAZON STATE AID CASE

On 8 June 2023, Advocate General ("**AG**") Juliane Kokott of the Court of Justice of the EU ("**CJEU**") delivered her opinion in case C-457/21 P (the "**Opinion**"), concerning a tax ruling granted in 2003 (the "**Tax Ruling**") by the Luxembourg tax authorities ("**LTA**") to Amazon in relation to its intellectual property licencing structure and considered as State aid by the European Commission ("**EC**").

According to the AG the EC did not rely on the correct reference framework for its review of a selective advantage and on that basis, the appeal is unfounded. In addition, AG Kokott proposed a restricted standard of review to assess the presence of a selective advantage.

Background to the EC State aid decision

The Luxembourg structure involved a Luxembourg limited partnership ("**LuxSCS**") held by US entities and a Luxembourg private limited liability company ("**LuxOpCo**") entirely held by LuxSCS. The latter held intangible assets licensed to LuxOpCo.

The Tax Ruling, supported by a transfer pricing analysis, notably confirmed the calculation method of the annual tax-deductible royalty payable by LuxOpCo to LuxSCS and the arm's length remuneration to be retained by LuxOpCo.

On 4 October 2017, the EC decided that Luxembourg granted State aid to Amazon through the Tax Ruling as the transfer pricing agreement was inconsistent with the OECD transfer pricing guidelines ("**OECD TPG**") and LuxOpCo's tax base was unduly reduced resulting in an individual selective advantage.

On 12 May 2021, the General Court of the EU (the "**GCEU**") annulled the EC's decision considering that it did not demonstrate the existence of an advantage. The EC filed an appeal.

AG Kokott's Opinion in favour of annulling the EC's decision

The AG started with restating the correct reference system. Per the Opinion, the EC's decision is to be annulled, as it did not rely on applicable Luxembourg law and relevant administrative practice. By "*basing its review of the appropriate amount of the royalty exclusively on the OECD Transfer Pricing Guidelines from 1995, 2010 and even 2017, the Commission as a result applied a different arm's length principle from that established in Luxembourg law – as it had done before, in Fiat Chrysler Finance Europe v Commission*" (Point 73).

Should the CJEU follow the reference system set by the EC, AG Kokott puts forward a restricted standard of review in the selectivity analysis for individual tax assessments (including tax rulings). The approach builds on (i) the fiscal autonomy of EU Member States, (ii) the threshold set by the CJEU to scrutinize compliance of Member States' general taxation decisions with regards to State aid ("*manifestly discriminatory with the aim of circumventing the requirements of EU law on State aid*") and (iii) the CJEU position in the *Fiat Chrysler Finance Europe* case that "*any fixing of the methods and criteria for determining an 'arm's length' outcome falls within the discretion of the Member States*".

Based on this line of reasoning, "*not every incorrect tax ruling but only those which are manifestly erroneous in favour of the taxpayer constitute a selective advantage. Derogations from the applicable national reference system are manifestly erroneous if they cannot be plausibly explained to a third party, such as the Commission or the Courts of the European Union, and are therefore equally evident to the taxpayer concerned*" (Point 94).

The Opinion continues that only "*the manifest derogation in favour of the taxpayer of a tax ruling (or tax assessment) from the reference system can constitute a selective advantage*" (Point 96). The focus is not on which method should have been applied but whether the method applied in the Tax Ruling was manifestly incorrect which, in the AG's view, was not the case.

Conclusion

The notable addition of this Opinion is the definition of the standard of review the EC must apply (also raised in the opinion given in *Luxembourg* v *Commission* and *Engie Global LNG Holding and Others* v *Commission*,

C-454/21 P and C-451/21 P), setting a limit to the EC's intervention in Member States' tax autonomy through State aid.

LUXEMBOURG LOWER ADMINISTRATIVE COURT RULES ON CONSTITUTIONALITY OF LOCAL PROPERTY TAX

On 10 February 2023, the Luxembourg Lower Administrative Court (*Tribunal administratif*) handed down a judgment regarding the constitutionality of a decision by the municipal council of the town of Diekirch to increase its local property tax rate.

In 2021, the Diekirch municipal council decided to increase the property tax multiplier rate from 750% to 15,000% for certain properties, namely "vacant land designated for residential use" (*terrains à batir à des fins d'habitation*"). A group of landowners affected by the increase challenged this decision in front of the Lower Administrative Court. The Diekirch municipal council justified the increase by invoking the need to address the housing shortage in the area, the need to dissuade landowners from hording vacant plots and the need to increase the number of planning permit requests.

First of all, the Lower Administrative Court recalled that following a combined reading of the Luxembourg Constitution and the European Charter of Local Self-Government, municipalities are fiscally autonomous and may determine the constitutive elements of their property tax, including the tax base and the tax rate. However, municipalities' taxing powers are limited by the Luxembourg Constitution, and in particular the **principle of equality of citizens before the tax law** and the **principle of proportionality**.

Second, the Lower Administrative Court ruled that the municipality was entitled to increase the rate for a certain category of land, in line with the constitutional principle of municipal autonomy under Luxembourg law. However, the Lower Administrative Court took the view that the increase from 750% to 15,000% was not proportionate. In particular, the Diekirch municipality had failed to present convincing arguments that such a yearly increase was a proportionate response to the stated objectives of the measure. The Lower Administrative Court remarked that (i) the increase did not take into account the fact that landowners may wish to gift the land to their children, (ii) that landowners may not be able to afford the sudden tax increase, or (c) that no delay period was granted to landowners to introduce planning permit requests or sell their land.

The Lower Administrative Court concluded that the increase of the multiplier rate from 750% to 15,000% amounted to an exorbitant increase contrary to the constitutional principle of proportionality.

The Lower Administrative Court therefore annulled the decision of the Diekirch municipal council deciding the increase, and partially annulled the ministerial order to the extent that it approved the increase.

BELLEGEN AKT | INCREASE IN REDUCTION OF REGISTRATION AND TRANSCRIPTION DUTIES FOR THE ACQUISITION OF THE PRINCIPAL RESIDENCE

On 16 May 2023, the Luxembourg Parliament (*Chambre des Députés*) has passed the law amending the law of 30 July 2022 setting out various tax measures designed to encourage the marketing and acquisition of building land and residential property (the "**Law**").

The purpose of the Law is to increase, with retroactive effect as of 7 March 2023, from EUR 20,000 to EUR 30,000 the amount of registration and transcription duties' reduction granted to purchasers of property acquired and used as their principal residence (i.e. the so-called *Bellëgen Akt*).

The Law implements one of the measures of the "Solidaritéitspak 3.0" agreed upon by the Tripartite Coordination Committee in March 2023 in the context of a growing inflation.

DECISION OF THE HIGHER ADMINISTRATIVE COURT ON THE OBLIGATION OF THE TAX AUTHORITIES TO RESPECT THE ADVERSARIAL PRINCIPLE

In a judgment of 15 June 2023, the Higher Administrative Court upheld a judgment of the Lower Administrative Court, which had annulled tax returns issued against a taxpayer on the grounds that the tax authorities had failed to respect the taxpayer's rights of defence arising from the adversarial principle. During the course of 2019, the taxpayer was subject to a joint audit by the Luxembourg Registration Duties, Estates and VAT Authority (*Administration de l'enregistrement, des domaines et de la TVA*) ("**AEDT**") and the Luxembourg Tax Authorities (*Administration des contributions directes*) ("**LTA**") relating to the tax years 2016 to 2018. Following the audit, the LTA issued a letter informing the taxpayer that they intended to reassess his income tax returns on the grounds that the margins declared by him cannot be correct because they were allegedly lower than the margins of restaurants comparable to his restaurant. Given that the LTA did not specify how they determined the margins of comparable restaurants, the taxpayer was unable to explain what differentiated him from the restaurants that have been taken into account by the LTA. As the taxpayer was unable to convince the LTA that its margins were correct, the LTA issued rectifying tax assessments in order to tax the taxpayer on the basis of the margins that are considered adequate by the LTA.

In its judgement of 28 September 2022, the Lower Administrative Court annulled the rectifying tax assessments on the grounds that compliance with the contradictory principle would have required the LTA to explain to the taxpayer how it had determined the allegedly usual margins in order to allow him to defend himself before the assessments were issued. In its appeal against the judgment of the Lower Administrative Court, the State tried to argue that the reference to "usual margins" was a misunderstanding and that in fact the reassessment was based on clearly established facts. However, the Higher Administrative Court rejected the State's argument and upheld the first instance judgment on the grounds that it was clear from the documents in the file that the basis for the reassessment was the usual margins, the details of which had not been communicated to the taxpayer prior to the issue of the tax slips and the details of which were also not in the file filed with the Court.

OPINION OF THE ADVOCATE GENERAL OF THE EUROPEAN COURT OF JUSTICE IN THE ENGIE FISCAL STATE AID CASE

In the opinion delivered on 4 May 2023 regarding cases (i) *Engie Global LNG Holding* (the "**Engie Group**") and Others v Commission (C-454/21 P) and (ii) Luxembourg v Commission (C-451/21 P), the Advocate General Kokott considers that Luxembourg, through tax rulings, did not grant State aid to the Engie Group in breach with the EU rules.

In this respect, the Advocate General Kokott **invalidates the decision of the European Commission** (the "**Commission**") dated 20 June 2018 and the subsequent confirmation of the General Court of the EU (the "**General Court**") dated 12 May 2021.

Background and legal context

In its decision dated 20 June 2018, the Commission recognised an illegal State aid granted to Engie Group by Luxembourg. According to the Commission's decision, this State aid was granted in the form of tax rulings issued by the Luxembourg Tax Authorities confirming two financial transactions involving Luxembourg subsidiaries of the Engie Group.

One aspect of these tax rulings was the confirmation of different tax treatment of convertible loans granted by Luxembourg holding companies (the "**Holdings**") to their respective Luxembourg subsidiary companies (the "**Subsidiaries**"). Indeed, at the level of the Subsidiaries (i.e. borrowers), the convertible loans were treated as debt, allowing tax deduction on any increase in their repayment obligations. At the level of the Holdings (i.e. lenders), the income derived from these convertible loans was treated - ultimately upon conversion into shares - as income from equity which was exempt under the Luxembourg participation exemption regime (Article 166 of the Luxembourg income tax law). As per the rulings, the borrowers were only taxed on a margin. However, the Commission concluded that this discrepancy in tax treatment conferred a selective advantage to Engie Group constituting an illegal State aid. According to the Commission, the selectivity of the measure resulted from the fact that an exemption was applied to income at Holdings level which **economically corresponds** to amounts deducted as expenses at Subsidiary level. This outcome was in contradiction with both the general objective of the tax system, which is to tax the profit of all the companies subject to tax in Luxembourg, and the objective of the participation exemption, which is to relieve double economic taxation. Furthermore, the Commission also argued that **the non-application of the general anti-abuse rule** as implemented in the Luxembourg tax law (Paragraph 6 of the *Steueranpassungsgesetz*) should also be considered as a State aid granted by Luxembourg to Engie Group.

On these bases, the Commission ordered Luxembourg to recover the aid, i.e. approximately EUR 120 million. Following an appeal lodged by Engie Group and Luxembourg, the General Court confirmed the Commission's decision (see details here for Commission's decision).

The Advocate General of the European Court of Justice invalidates the decision of the Commission recognising a fiscal State aid of Luxembourg for the benefit of Engie Group.

In her opinion, the Advocate General concludes that since the Commission **failed to fulfil its obligation to provide all the necessary elements to demonstrate the existence of a selective advantage**, the decision can be annulled in its entirety without referral back to the General Court.

In her opinion, several key points have been considered by the Advocate General:

- **Tax rulings are not automatically deemed illegal State aid** if they are available to all taxpayers and comply with the applicable national tax legislation. Only tax rulings that are **manifestly erroneous in favour of the taxpayer** might be seen as granting a selective advantage in violation of State aid law.
- In that respect, both the Commission and the General Court assumed that the Luxembourg tax law in force at the time incorporated a principle of correspondence which required the taxation of the underlying profits of the Subsidiaries for the Holdings to benefit from the participation exemption regime. However, the Advocate General argues that such correspondence is not indicated in the Luxembourg

law and **it cannot be constructed solely from the fact that it might be preferable**.

- The review of the anti-abuse rules under State aid rules should also be reduced **to a plausibility check**. In this context, a manifest misapplication can only be assumed when there is no plausible explanation as to why the specific case should not be considered a matter of abuse. However, in the present case, the Commission has not established the existence of abuse of legal structural possibilities under Luxembourg law.

The Advocate General argues also that the **national tax law forms the sole reference framework** and the EU institutions cannot **use State aid law to shape an ideal tax law**.

Conclusion

The Advocate General supports Engie Group and Luxembourg in their positions. While, it is worth noting that **the opinion of the Advocate General is not binding** on the European Court of Justice, the courts tend to follow the Advocate General's opinion. The final decision on this case will be taken by the Court in its judgment, which will be delivered at a later date. This is a positive development for Luxembourg and aligns with preceding case law in this matter.

DRAFT LAW NO. 8207: NEW REPORTING OBLIGATIONS FOR PAYMENT SERVICE PROVIDERS TO PREVENT VAT FRAUD

On 5 May 2023, a draft law No. 8207 on the transparency of online payments (the "**Draft Law**") has been submitted to the Luxembourg Parliament (*Chambre des Députés*). The purpose of the Law is to introduce a new electronic system to fight against VAT fraud.

The Law transposes Directive (EU) 2020/284 of 18 February 2020 (the "**Directive**") amending Directive 2006/112/EC as regards the introduction of certain requirements for payment service providers by amending the Luxembourg VAT Law of 12 February 1979.

The Draft Law aims to set up a central electronic system called *Central Electronic System of Payment Information* ("**CESOP**") to prevent VAT fraud in e-commerce within the European cross-border market. The general idea behind the introduction of the CESOP is that, each time a customer established in the EU makes an online purchase via a payment service provider, the CESOP is used to collect information relating to consumer payments. The data collected is used to facilitate checks of supplies of goods and services subject to VAT in the EU.

The Draft Law introduces the obligation for payment service providers established in Luxembourg or providing payment services in Luxembourg to keep a detailed register, in an electronic form, of all payments and the related beneficiaries, carried out in the context of the services provided by it. The obligation applies to payment service providers through which at least 25 cross-border payments to the same beneficiary have been carried out.

The information to be recorded by the payment service provider in its electronic register includes notably the identification of the payment service provider and the beneficiary (including, if available, the VAT identification number or any other national tax identification number of the beneficiary), the date and time of the payment or reimbursement, the amount and currency of the payment or reimbursement of the payment, as well as the Member State of origin of the payment received by the beneficiary. It needs to be communicated, on a quarterly basis, to the Luxembourg Registration Duties, Estates and VAT Authority (*Administration de l'enregistrement, des domaines et de la TVA*) ("**AEDT**"), via the use of an electronic form. The AEDT will in turn feed the data collected into the CESOP, through which an exchange of information with other EU Member States will take place.

The Draft Law also introduces the possibility of administrative fines, that may be imposed by the Director of the AEDT after an unsuccessful prior warning.

The provisions of the Draft Law are meant to apply as of 1 January 2024.

IMPLEMENTATION OF DAC 7 INTO LUXEMBOURG LAW

On 16 May 2023, the Luxembourg Parliament (*Chambre des Députés*) adopted a law (the "**DAC 7 Law**") implementing Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation ("**DAC 7**"), effective as of 1 June 2023 (save for the joint audit procedure that applies as from 1 June 2024).

The DAC 7 Law introduces new rules on mandatory automatic exchange of information reported by digital platform operators. To that effect digital platform operators are under the obligation to (i) register with the Direct Tax Administration (*Administration des contributions directes*) (the "**DTA**") and (ii) notify the DTA of any changes as from the initial registration. The DAC 7 Law sets out the due diligence procedures that platform operators are required to comply with to identify sellers using the digital platform and to declare any income received by these sellers.

Furthermore, the DAC 7 Law introduces (i) automatic and mandatory exchange of information on persons resident in other Member States with respect to their ownership of real estate assets (for taxable periods starting from 1 January 2025) and (ii) a framework for conducting joint audits with other EU Member States.

Finally, the DAC 7 Law amends the CRS (common reporting standard) regulation by introducing the obligation for reporting financial institutions to notify each individual holder that their personal information will be shared and, allow them to access their data and exercise their data protection rights prior to any transmission of information to the DTA.

When it comes to digital platform operators, the following elements are to be noted:

Relevant entities

The DAC 7 Law applies to digital **platform operators**, defined as entities having a contractual relationship with sellers and making all or part of a platform available to them.

The activities falling within the scope of the DAC 7 Law encompass the rental of immovable property, the personal services, the sale of goods and the rental of any mode of transport, carried out through platforms.

A **platform**, within the meaning of the DAC 7 Law, is any software, website or mobile application that is accessible to users and enables sellers to be connected to other users in order to carry out, directly or indirectly, a relevant activity intended for these other users.

The obligation to register with the DTA extends not only to reporting digital platform operators but also to non-reporting digital platform operators meaning platform operators demonstrating in advance and on an annual basis that according to its overall business model the platform has no reporting sellers.

The DAC 7 Law defines a **reporting digital platform operator** as any platform operator that is resident in Luxembourg for tax purposes or, in the absence of tax residence in the EU, (i) has been incorporated in accordance with the laws of Luxembourg, (ii) has its place of management in Luxembourg or (iii) has a permanent establishment in Luxembourg.

Any non-EU digital platform operator not having a link with Luxembourg or another EU Member State but facilitating the carrying out of a relevant activity by reporting sellers or a relevant activity consisting of the rental of real estate located in a Member State might also be concerned.

Obligation to register with the DTA

Digital platform operators must register with the DTA unless they are registered with and report to another Member State (assuming the conditions are met).

Digital platform operators must, in principle, register before 31 December 2023, or no later than the date on which the activities start if after the 31 December 2023. They shall also notify the DTA of any information changes within one month.

Reporting obligation

In order to comply with their reporting obligations, digital platform operators must provide certain information about themselves as well as about the reporting sellers (in particular information collected as part of the due diligence procedures) and the real estate in the case of rentals. Information must be provided no later than 31 January of the year following the calendar year in which the seller is identified as a

reporting seller. For example, the first declaration concerns information relating to the year 2023 and must be filed with the DTA before 31 January 2024.

Obligation to comply with due diligence procedures

Digital platform operators must comply with due diligence procedures, in particular by determining sellers qualifying as excluded sellers, collecting and verifying information on sellers and determining the Member State(s) of residence of sellers.

The completion of the due diligence procedures is due by 31 December of the reportable period (i.e. by 31 December 2023 for the first time).

Penalties

Digital platform operators failing to (i) register or notify their choice within the legal deadline, (ii) inform the DTA of any changes within the legal deadline, (iii) declare the information relating to the declaration period within the legal deadline or providing incomplete or incorrect information may suffer a fixed fine of EUR 5,000.

It may also be subject to a penalty of up to EUR 250,000 if, upon an audit, the DTA discovers that the digital platform operator has not complied with its obligations in terms of performing due diligence procedures and fulfilling its reporting obligations.

CONTRIBUTORS

Marc-Alexandre Bieber, Fahri Can Dogan, Yunus Cekici, Nuala Doyle, Gaëlle Felly, Ali Ganfoud, Sabine Hinz, Isabel Høg-Jensen, Claire Jordan-Dandrau, Chloé Kaizer, Evelyn Maher, Camille Mascolo, Pol Mellina, Anne Morel, Alessandro Morini, Harmonie Méraud, Marylou Poncin, Ailyn Sandra Pérez Utria, Daniel Riedel, Olivier Schank, Laura Simmonds, Elzbieta Tumko, Pauline Wirtzler

BSP