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UNFAIR TERMS IN FOCUS I KEY AMENDMENTS TO LUXEMBOURG'S CONSUMER CODE

On 10 September 2024, the Luxembourg Consumer Code was amended by a Law of 27 August 2024 (the "**Amending Law**").

The Consumer Code regulates, amongst other things, contracts concluded between professionals and consumers (i.e. natural persons who are acting for purposes outside of a commercial, industrial, craft or self-employed activity). Its primary goal is to protect consumers and to promote balanced relationships between professionals and consumers.

Article L. 211-2 of the Consumer Code deals with unfair terms (*clauses abusives*). It provides that any clause or combination of clauses that creates an imbalance in the parties' rights and obligations arising under a contract between a consumer and a professional, to the detriment of the consumer is abusive, void and deemed to be non-existent. Article L.211-3 contains a list of terms that are deemed unfair.

Key amendments under the amending Law

The Amending Law strengthens the protection of consumers under the Consumer Code by, *inter alia:*

Automatic setting aside of unfair terms by judges

- providing that when judges have the necessary legal and factual information, and after having heard the observations of the parties, they must automatically set aside the application of an unfair term. Whilst this amendment aligns with the position taken by EU courts, it goes a step further than the position previously taken by Luxembourg courts which held that a judge had the right (but not the obligation) to automatically raise the unfairness of a contractual term and as a result set aside such term

Irrefutability of unfair terms listed in Article L.211-3

- providing that the unfair terms listed in Article L. 211-3 of the Consumer Code are to be irrefutably deemed unfair. Whilst a lot of practitioners agreed with this understanding, certain legal authors argued that this was unclear under the former Article L. 211-3 of the Consumer Code.

Nullification of excessive penalty clauses

- adding to the list of unfair terms, excessive penalty clauses (i.e. contractual provisions that assess against a defaulting consumer an excessive penalty). Whilst previously a judge was able to reduce the penalties under such clauses, they are now void in their entirety in contracts with consumers.

Restrictions on termination clauses in contracts of indefinite duration

- adding to the list of unfair terms contained in Article L. 211-3 of the Consumer Code, termination clauses allowing a professional to terminate an agreement concluded for an undetermined duration with a consumer without a reasonable notice period, except in the event there are serious grounds for termination.

The Amending Law further strengthens the position of Luxembourg consumers. Professionals should update their contractual documentation to the extent necessary to avoid being adversely affected by these changes.

EU LISTING ACT | PACKAGE ADOPTED BY THE EU COUNCIL

On 8 October 2024, the Council of the EU adopted a package of new measures which are commonly referred to as the "Listing Act" consisting of:

- an amending regulation amending Regulation (EU) 2017/1129 (the "**Prospectus Regulation**"), Regulation (EU) 600/2014 ("**MiFIR**") and Regulation (EU) 596/2014 ("**MAR**").
- an amending directive amending Directive 2014/65/EU ("**MiFID II**") and repealing Directive 2001/34/EC (the "**Listing Directive**").
- a new directive on multiple-vote shares for small and medium-sized enterprises ("**SMEs**").

In our previous newsletter, we provided an overview of of the key aspects of the proposed new measures as adopted by the European Parliament. The final version of the Listing Act which has been adopted by the Council of the EU remains largely unchanged from that which was adopted by the European Parliament.
The approval of the Listing Act by the Counsil of EU marked the final step in the legislative process. The Listing Act will enter into force 20 days after publication in the EU Official Journal, with certain provisions regarding the Prospectus Regulation and MAR taking effect 15 months later (provisions related to EU Follow-On prospectus and EU Growth Issuance Prospectus) or 18 months later (e.g. the new regime on public disclosure of inside information for protracted processes). Member States will have 18 months to implement changes to MiFID II, and two years to adopt the directive on multiple-vote shares for SMEs.

MIFID II AND MIFIR | ESMA UPDATES

New Q&As

Shortly after our last newsletter, in which we reported on recent developments in MiFID II and MiFIR, ESMA published a new Q&A on MiFID II and the topic of **EMIR reporting**. This Q&A clarified that derivatives on emission allowances not recognized under the EU ETS are included, in the financial instruments listed in Annex I, section C (4) of MiFID II, thus making them reportable under EMIR. The link to this Q&A can be found here.

More recently, on 11 October 2024, ESMA published a new Q&A on the topic of **secondary markets and position limits**; as regards lot sizes and position limits, ESMA has now clarified how the open interest in lots should be calculated for gas derivatives, for the application of position limits in Article 57(1) of MiFID II. The link to this Q&A can be found here.

Updated Q&A and other ESMA guidance

On 16 October 2024, ESMA published updates to various existing Q&A on **transparency and market structure issues**. A list of the specific Q&A which have been updated is available in the footnotes to the ESMA press release which is available here.

On the same day, ESMA also published updated versions of its Manual on post-trade Transparency and its Opinion on the assessment of pre-trade waivers considering MiFIR Review Transitional Provisions.

MICA | RECENT EU DEVELOPMENTS

The Markets in Crypto-Assets Regulation ("**MiCAR**") continues to evolve, reflecting the European Union's efforts to provide a comprehensive regulatory framework for crypto-assets. This article reviews the latest developments from the European Securities and Markets Authority ("**ESMA**") and the European Banking Authority ("**EBA"**), including newly issued Q&As, final reports on redemption plans, and updates to regulatory technical standards ("**RTS**"). We also highlight key opinions from ESMA regarding adjustments to the draft RTS proposed by the European Commission, ensuring that stakeholders remain informed on the dynamic regulatory landscape.

New Q&As

In our last newsletter, we reported on recent EU and Luxembourg developments in MiCA, in particular regarding the entry into force of Regulation (EU) 2023/1114 of 31 May 2023 on markets in crypto-assets ("**MiCAR**"). Shortly after that newsletter, ESMA published updates to various existing Q&A on topics including the treatment of staking services, grandfathering clauses with AML laws, Article 60 notifications during the CASP transitional phase, simplified authorisation procedures, crypto-asset transfers as standalone or integrated services, and the status of entities not authorised or refused authorisation as CASPs by the transition period's end. These Q&As can be consulted here.

More recently, on 2 October 2024, ESMA published a new Q&A on the status of entities providing crypto-asset services as part of the grandfathering regime, clarifying how crypto-asset service providers that provided their services in accordance with applicable law before 30 December 2024 can continue to do so until the end of the applicable transition period (and not later than 1 July 2026), or until they are granted an authorisation, in accordance with MiCAR. This Q&A can be found here.

Final Report

On 9 October 2024, the EBA published a final report (the "**Final report**") on guidelines on redemption plans under Articles 47 and 55 of MiCAR.

MiCA requires issuers of asset referenced tokens ("**ART**") and e-money tokens ("**EMT**") to create a redemption plan to ensure tokens can be redeemed if the issuer cannot meet its obligations.

Pursuant to Article 47(5) of MiCAR EBA is mandated to issue guidelines to specify:

- the content of the redemption plan and the periodicity of its review, and
- the triggers for the implementation of such a plan.

Furthermore, Article 55 of MiCAR envisages that 'Title III, Chapter 6 shall apply *mutatis mutandis* to issuers of e-money tokens'. In the light of this cross-reference which also covers Article 47 of MiCAR, the guidelines which are the subject of the Final Report shall also be applied by issuers of EMTs

The guidelines will be published on the EBA website in all EU languages and take effect two months later.

Delegated Regulation

On 10 October 2024, the EC adopted a Delegated Regulation (Ref: C(2024)6766) (the "**Delegated Regulation**") containing regulatory technical standards ("**RTS**") on the information to be exchanged between competent authorities under MiCAR.

Article 95 of MiCAR requires authorities to work together and share relevant information while supervising crypto markets. The Commission can set rules specifying what information should be exchanged.

The new Delegated Regulation outlines what authorities need to share, including details on:

- the type of asset (EMT, ART, or other crypto assets),
- crypto asset service providers (CASPs),
- suspected market abuse,
- precautionary measures.

The Council of the EU and the European Parliament will review the regulation. If there are no objections, it will take effect 20 days after being published in the Official Journal of the EU.

Opinion

On 16 October 2024, ESMA published an opinion

(ESMA35-1872330276-195) (the "**ESMA Opinion**") on the European Commission's amendments to draft RTS on authorisations and notifications under MiCAR. In our April newsletter, we reported on the ESMA final report of 25 March 2024 (the "**March 2024 Final Report**") on various RTS and implementing technical standards ("ITS") including in respect of the following RTS (the "**Relevant RTS**"):

- notification requirements, the information referred to in Article 60(7) of MiCAR, to be included in a notification by certain financial entities of their intention to provide crypto-asset services (Article 60(13) of MiCAR);
- authorization requirements, the information referred to in Article 62(2) and (3) of MiCAR, to be included in an application for authorisation as crypto-asset service provider (Article 62(5) of MiCAR).

The link to this newsletter can be found here. In September 2024, the Commission responded on the aforementioned March 2024 Final Report, stating it would adopt the RTS but with amendments to the RTS relating to Article 60(13) and Article 62(5) of MiCAR.

In ESMA's Opinion, ESMA did not fully amend the RTS to comply with the European Commission's recommendations. While ESMA acknowledged some of the proposed amendments and accepted changes in certain areas, such as the scope of information related to the good repute of management body members, it maintained some reservations. ESMA supported keeping the original proposal for mandatory third-party cybersecurity audits, even though the Commission suggested making them optional. ESMA recommended that the Commission update the MiCAR text to include these requirements, stressing their importance for properly assessing crypto-asset service providers' ICT systems.

The next step will be for the Commission to decide whether to adopt the Relevant RTS in the form proposed by ESMA.

DORA | LATEST DEVELOPMENTS

Since our last newsletter in which we reported on the Digital Operational Resilience Act Regulation (EU) 2022/2554 ("**DORA**") and Directive (EU) 2022/2556 (the "**Directive**"), in particular the enactment of the Luxembourg national law to transpose same, there have been several developments concerning the efforts to achieve DORA's main objective of greater digital operational resilience in the financial sector of the European Union.

Second batch of policy products

Shortly after our last newsletter, on 17 July 2024, the EBA, EIOPA and ESMA (the "**ESAs**") published the second batch of policy products under DORA, including **Regulatory Technical Standards** (RTS), **Implementing Technical Standards** (ITS) and **Guidelines,** whereby the guidelines have already been adopted by the Boards of Supervisors of each of the ESAs. The final draft RTS and ITS have been submitted to the European Commission (EC) for review, with the aim of formally adopting them in the coming months, ahead of DORA's application deadline, which is 17 January 2025. The aim of these policy products is to strengthen the digital operational resilience of the EU's financial sector, while ensuring the continuous delivery of financial services and safeguarding customers data, with particular focus on the **reporting framework for Information and Communication Technology** (ICT) **related incidents** and **threat-led penetration testing**.

The ESAs have published the following:

- RTS & ITS on **reporting major ICT-related incidents** and significant cyber threats
- RTS on:
  - harmonization of rules regarding **oversight activities**
  - composition criteria of the **joint examination team (JET)**
  - **Threat-Led Penetration Testing (TLPT)**
- Guidelines on:
  - **the estimation of aggregated costs/losses** caused by **major ICT-related incidents**
  - **oversight cooperation**

Final report

On 26 July 2024, the ESAs issued their **final set of RTS** in form of a joint Final Report, completing the regulatory framework under DORA. The standards aim to enhance the digital operational resilience of the EU's financial sector by improving **ICT risk management practices** in relation to **subcontracting**, including requirements for financial entities to establish and manage contractual agreements for subcontracting ICT services that **support critical or important functions**, as outlined in DORA. Financial entities must assess risks during the pre-contractual phase, conduct appropriate due diligence, and maintain effective oversight throughout the subcontracting lifecycle.

Rejection of ITS on register of information (first batch of policy products)

The ESAs have issued an opinion in response to the EC's rejection on the draft ITS on registers of information concerning contractual arrangements with ICT third-party service providers as introduced by Art. 28 DORA. The rejection was based on the requirement for financial entities to exclusively use the Legal Entity Identifier (LEI) to identify ICT third-party service providers, with the EC proposing the additional use of the **European Unique Identifier (EUID)**. Considering that the ITS will affect how financial entities manage and update their ICT service contracts, the ESAs expressed concerns that introducing the EUID alongside the LEI would add additional complexity to the identification process and reporting conditions, as well as unnecessary implementation costs. They also expressed concerns about the potential negative impact on the designation of CTPPs as envisaged in 2025. Should the EUID be adopted, the ESAs propose that LEI should remain the primary identifier to ensure consistency, particularly within financial groups. ESMA launched a survey to gather insights from financial market participants regarding their use of LEIs, especially under DORA and other EU regulations.

The ESAs urge financial entities to prepare for DORA's reporting requirements.

TIBER-EU framework

The European Central Bank (ECB) published a paper

on the TIBER-EU framework, which offers tailored, intelligence-led tests that simulate real-life cyberattacks on financial entities' key systems in a controlled environment. The framework is designed to assess and enhance cyber resilience of participating financial entities. According to the ECB, implementing the TIBER-EU framework will help national competent authorities and financial entities in meeting the requirements outlined in DORA, specifically threat-led penetration testing (TLPT).

Other developments

In addition to the above, there have been various other ancillary developments including:

- on 1 October 2024, the ESAs announced the appointment of Marc Andries as director to lead their joint oversight responsibilities under DORA. Andries will oversee critical third-party providers (CTPPs) at a pan-European level and will be responsible for implementing an oversight framework that ensures the resilience and stability of critical ICT CTPPs across the EU financial sector;
- the ESAs are establishing the **EU Systemic Cyber Incident Cordination Framework (EU-SCICF)** under DORA to improve the financial sector's response to cyber incidents that threaten financial stability. This framework will enhance coordination among EU financial authorities and international actors during cyber crises. A secretariat, forum, and crisis coordination body will be set up to implement and test the framework. They will also report any legal or operational challenges to the EC;
- the ECB published a revised version of the Eurosystem cyber resilience, expanding its scope beyond financial market infrastructures to include entities overseen under the PISA framework, the strategy seeks to enhance cyber resilience across the EU's financial sector. The updates align with DORA's broader goals of harmonizing IT security and rules on operational resilience. The new provisions aim to ensure continuous improvement and standardized implementation across jurisdictions.

The DORA legal and regulatory train is speeding ahead, showing no signs of slowing down. Financial institutions must stay sharp to navigate these significant changes and ensure compliance.

BLOCKCHAIN LAW IV I ADVANCING LUXEMBOURG'S LEGAL FRAMEWORK FOR DEMATERIALISED SECURITIES

On 24 July 2024 draft law No.8425 (the "**Draft Law**") was issued by the Luxembourg Parliament (*Chambre des députés)* with the purpose of modernising the regulatory framework for dematerialised securities and the financial sector, through targeted amendments to the amended Law of 6 April 2013 on dematerialised securities ("**Dematerialised Securities Law**").

The Draft Law aims to enable the Luxembourg financial sector to utilise modern technologies, particularly distributed electronic registers or databases (**DLT technology**), without compromising on legal certainty.

Luxembourg has already made great strides in the development of a modern legal framework for the use of secure electronic recording devised for the circulation of securities, through the previous adoption of the Blockchain I, II and III laws.

Introduction of a new role - a control agent for securities issuance - as an alternative to the existing two-tier holding chain

The Draft Law proposes the possibility for an issuer to appoint a **control agent** who may be tasked with maintaining an issuance account, monitoring the securities holding chain and reconciling issued securities. Importantly, the **control agent** will leverage DLT technology to **secure and share information about issued securities** across various market participants.

A control agent shall be an investment firm within the meaning of Article 1[er], point 9), of the amended Law of 5 April 1993 on the financial sector (the "**Financial Sector Law**"), a credit institution within the meaning of Article 1[er], point 12), of the Financial Sector Law or a clearing organisation within the meaning of Dematerialised Securities Law.

The current Dematerialised Securities Law requires the establishment of a two-tier holding chain between the central account keeper and secondary account keepers (depository-custodian model). This Draft Law provides an alternative framework whereby dematerialised securities registered in an issuing account held by a control agent can be maintained by account keepers in securities accounts held within a distributed register. The control agent shall maintain the issuing account but has not direct custody relationship with the secondary depositories.

The introduction of the control agent aims to enhance transparency and traceability in the securities market by centralising information management within a distributed register. This will reduce the administrative burden on issuers and ensure real-time monitoring of securities.

Ancillary amendments to other laws

The Draft Law proposes a minor amendment to Article 28-11 of the Financial Sector Law to carve out *control agents* from the provision stating that no person may carry out the activity of central account keep without being in possession of a CSSF authorisation.

It is also proposed to insert a new paragraph (10) in Article 2 of the amended Law of 23 December 1988 creating the Financial Sector Supervisory Commission ("**Law creating the CSSF**") whereby the CSSF shall monitor compliance by control agents of proposed new Article 21*bis* of the Dematerialised Securities Law.

What to expect

Luxembourg market players and related associations have shown significant interest in this Draft Law. Whether this attention will lead to substantial changes before its final adoption remains to be seen.

More on blockchain:

- Law of March 1st 2019 amending the law of August 1st 2001 on the circulation of securities
- Newsflash | New Luxembourg Law allows issuance of dematerialised securities using distributed ledger technology (DLT)
- Law on distributed ledger technology | Adopted

LUXEMBOURG STOCK EXCHANGE | UPDATED RULES & REGULATIONS & TRADING MANUAL

The **Luxembourg Stock Exchange** (“**LuxSE**”) has published on 2 September 2024:

- an updated version of its Rules and Regulations (*Edition 09/2024)* (“**R&R**”)
- an updated version of its Markets Trading Manual (“**Trading Manual**”) as well as an updated version of the appendix on LuxSE’s professional segments (the “**PS Appendix**”).

The updated versions of the above documents are available here on the LuxSE website.
These changes have been introduced to *inter alia* facilitate the migration of clearing services as well as to ensure compliance with EU regulations and market standards**.**

Migration of clearing services

The LuxSE has revised its R&R by updating and streamlining the **appointment process of clearing organisations**. Rule 2401.A.1 of its R&R no longer identifies the clearing organisation by name; instead the appointment of such institution will be communicated through a notice published on LuxSE’s website and a written notification addressed directly to its members.
In this context, LuxSE has published a notice that it is currently undergoing a migration process of the clearing services provider, concerning selected financial instruments admitted to its markets, from Banque Centrale de Compensation S.A. (LCH) to **Euronext Clearing,** the Euronext Group’s Central Counterparty (CCP). A new Notice will be issued once the migration’s effective date is confirmed, anticipated by the end of 2024. Until the migration is finalized, LCH will continue to serve as clearing service provider.

Compliance with CSDR

The LuxSE has updated the R&R and Trading Manual to align with the latest revisions to Regulation on improving securities settlement in the EU and on central securities depositories (the “**CSDR**”) and current market standards, particularly regarding the **settlement discipline regime** and **the buy-in process**. These updates relate mainly to Rule 5305.4, which defines the cases in which the settlement discipline regime, specifically the buy-in process, does not apply.
Additionally, the R&R has been simplified, whereby two new sections have been introduced into the TM:

1. Buy-in process, and
2. Sell-out process.

These sections mirror each other, addressing situations where potential failures are caused by either the seller or the buyer.

Further explanation

Further explanation by the LuxSE on the changes to the R&R and the Trading Manual is available here.

NON-PROFIT ASSOCIATIONS AND FOUNDATIONS I FROM SIMPLIFYING TO STRENGTHENING PROCEDURES

The legal framework for non-profit associations (ASBL) and foundations in Luxembourg is undergoing significant changes in 2024 with the introduction of three new legislative texts:

- **Draft Law n°8420** aims to simplify administrative procedures, including the abolishment of the homologation procedure and the extension of administrative dissolution without liquidation (*dissolution administrative sans liquidation*) to all insolvent organisations.
- **Draft Grand Ducal Regulation** introduces stricter financial transparency requirements for these entities.
- Lastly, **Draft Law n°8447** proposes stricter financial controls for organisations receiving public funds or donations, marking a shift towards greater accountability in the non-profit sector.

Draft Law n°8420 on non-profit associations and foundations

Draft Law n°8420 submitted by the Government of Grand Duchy of Luxembourg on 23 July 2024 (the "**Draft Law**") amending Article 7 and Article 77 of the Law of 7 August 2023 on non-profit associations and foundations (the "Law") aims to simplify and harmonise the legal framework regarding non-profit associations and foundations.

This Draft Law is part of the general drive to reduce the administrative burden and increase the efficiency of management procedures for ASBL and foundations. The key proposed modifications are outlined below.

Abolishment of the homologation procedure for all ASBL and foundations

Under the existing legal framework, the homologation procedure required ASBL and foundations to submit their decisions, such as amendments to their articles of association, to the district court (*tribunal d'arrondissement*) for approval if the minimum quorum of two-thirds of members is not reached at the second extraordinary general meeting.

The purpose of the Draft Law is to abolish the homologation procedure for all ASBL and foundations, including those who are currently subject to the former Law of 21 April 1928. This abolishment is intended to reduce bureaucracy and facilitate the settlement and management of ASBL and foundations.

Application of administrative dissolution without liquidation to insolvent ASBL and foundations

The administrative dissolution without liquidation (*dissolution administrative sans liquidation*), previously limited to ASBL and foundations established after the Law entered into force, will now be extended to all insolvent ASBL and foundations. This modification addresses the issue of older ASBL and foundations that may not update their articles of association before the end of a transition period of twenty-four months as provided for by the Law.

This amendment will avoid lengthy and costly judicial proceedings for insolvent organisations.

Correction of a material error in Article 7, paragraph 4 relating to the delegation of day-to-day management

The Law contains a material error regarding the delegation of day-to-day management of an ASBL or a foundation as it was omitted to specify that only the delegation to a director (*administrateur*) is subject to a prior authorisation requirement by the general meeting and a management report. The Draft Law aims to clarify that this obligation does not apply to other individuals, such as a managing director (*directeur salarié*), to whom management can be delegated without any prior authorisation.

The Council of State provided their opinions on the Draft Law on 24 September 2024, and the Chamber of Commerce followed up with a letter dated 30 September 2024.

Draft Grand Ducal Regulation establishing the annual financial statements' annex of ASBL and foundations

On 18 September 2024, the Government of Grand Duchy of Luxembourg approved the Draft Grand Ducal Regulation establishing the annex to be attached to the annual financial statements of ASBL and foundations. The intention of the proposed regulation is to determine the content of this annex, categorising

small, medium and large ASBL and foundations and ensure financial transparency, good governance, and compliance with international standards, such as anti-money laundering and countering the financing of terrorism.

The Council of State was formally requested on 2 October 2024 to submit its opinion on the proposed draft Grand Ducal Regulation, which has not yet been issued.

Draft Law n°8447 on financial governance of organisations and foundations managing public funds in Luxembourg

Draft Law n°8447 submitted on 10 October 2024 by a member of the Luxembourg Chamber of Deputies (the "**Caritas Draft Law**") amending the Law and the Law of 19 December 2002 on the register of commerce and companies and the accounting and annual accounts of undertakings aims to restore public trust and prevent future embezzlement by implementing stronger financial controls for organisations that receive public funds or donations.

The Caritas Draft Law has two main proposals, i.e. the establishment of a more stringent *ex-ante* approval mechanism for transactions exceeding EUR 10,000.-, and even more robust controls for those exceeding EUR 100,000.- and the disclosure of any funding agreements between the State and any association or foundation at the time of registration with the Luxembourg Trade and Companies Register (*Registre de commerce et des sociétés*). Approval shall be preceded by a discussion during a meeting held in person or by a documented telephone or video conference.

While the Caritas Draft Law still needs to go through the legislative process before being adopted, this initiative is a positive step towards increasing transparency and accountability in the non-profit sector.

LUXEMBOURG RCS I FILING FORMALISM: SUBSTANTIAL CHANGES AND A NEW FILING FRAMEWORK TO BE IMPLEMENTED AS OF 12 NOVEMBER 2024

Filings with the Luxembourg Trade and Companies Register ("**RCS**") must observe new substantial requirements and formalities as of 12 November 2024 (the "**Implementation Date**").

Change of format of the RCS filing forms from offline PDF to online HTML

In order to address the **practical issues** associated with the **PDF format** of the **RCS filing forms** that are well known by the users of the Luxembourg business registers portal, and implement a **more user-friendly interface** for such filings, the format of the RCS filing forms will change, as of the Implementation Date, from **PDF forms** that needed to be downloaded, filled out offline, and re-uploaded to the RCS portal, to **HTML forms** that will need to be directly filled out **online** via the RCS portal.

The RCS administrator already indicated in this respect that, as of the Implementation Date, any new filing request initiated via a new online HTML filing form will need to be filled out by the applicant **only**, i.e., the latter will **no longer** be able to **forward the request to a third party for data entry purposes** (*as opposed to the offline PDF forms previously used that could be passed along to third parties for such purposes*).

A new requirement for the natural persons registered with the RCS: the registration of a LNIN

Taking the opportunity of the change of format of the RCS filing forms from offline PDF forms to online HTLM forms, the authorities also decided that the persons and entities registered with the RCS will now have to communicate, as of the Implementation Date, the **Luxembourg national identification number** (the "**NIN**", a.k.a. *matricule number* or *CNS number*, as provided for by the amended law of 19 June 2013 relating to the identification of natural persons) for **any natural person registered with the RCS** that are related to such persons and entities.

Who is concerned?

Essentially all **natural persons registered within the file of an entity registered with the RCS** are concerned, in **any capacity whatsoever** (*e.g., as a partner, agent, auditor, etc…*) and **whether** such natural persons are **new natural persons** to be registered or **natural persons already registered** in the file of the entity concerned.

NIN will need to be requested and filled out when a **natural person registers themself** with the RCS, or **filing a modification with the RCS** (it will be **mandatory** when filing a modification for a change on natural persons and, during a **transitional period only**, **optional** when filing a modification not aiming at a change on natural persons).

A couple of exceptions will however exist where the **NIN shall not be communicated**, especially (**i.**) in case of a **judicial representative** appointed in the framework of **a procedure registered with the RCS** or when the natural person is an **agent** of a **foreign entity's branch** opened in the Grand Duchy of Luxembourg).

***Quid* for the persons who do not already hold a NIN?**

Although all the persons living and / or working in the Grand Duchy of Luxembourg have been granted a NIN, a number of natural persons registered with the RCS (*especially foreign natural persons*) do not.

In such a case, the creation of a NIN will have to be requested as part of the filing to be carried out with the RCS and the following information will need to be filled out in the requisition – *HTML!* – form:

1. Last Name;
2. First Name(s) (*as indicated in the supporting documentation*);
3. Date, Place and Country of Birth;
4. Gender (*male, female or unknown*);
5. Nationality; and
6. Private home address (*number, street, postal code, locality, country*).

It shall be noted that the authorities already confirmed that the information relating to the **gender**, **nationality**, and **private domicile** will **not be registered with or**

disclosed by the RCS but rather sent over to the State Center of Information Technologies (*Centre des technologies de l'information de l'Etat*) in order to be registered in the National Register of Natural Persons.

Likewise, the **NIN will not be publicly disclosed**.

Last but not least, it is also important to note that **supporting documentation must also be attached as proof** in order to:

1. **prove the identity of the person** - i.e., by providing a copy of a national identity card or passport, and
2. **prove the address of the private residence** - i.e., by providing **official certificates** of residency issued by a municipality, a **declaration of honor** from the person concerned **stamped or countersigned** by the regional authority responsible for confirming residential addresses such as an embassy, notary or police station, or, if none of these documents can be produced, a water, electricity, gas, telephone or internet access **bill**.

This seems to be a **strict list of supporting documents** and the authorities already confirmed that a number of other documents will **not be accepted** such as criminal records, lease contract, tax statement… which we sometimes see in practice in the framework of certain AML / KYC situations.

Changes that enable a control of the Luxembourg addresses

In addition to the above, another substantial change relates to the Luxembourg addresses of the **registered offices** of the entities registered with the RCS, and **persons and entities registered in a file and who are resident** in the Grand Duchy of Luxembourg, which will be **automatically checked and controlled** by the Luxembourg authorities.

Essentially, such a control will consist in the Luxembourg authorities **checking the consistency of the Luxembourg addresses** filed with the RCS, that will, from the Implementation Date on, need to comply with and match the information contained in the **National Register of Towns and Streets** (*Registre national des localités et des rues*) available at "https://www.services-publics.lu/caclr/building_listing_form.action".

Any Luxembourg address indicated in an RCS filing form will be **automatically checked** for consistency and, in the event of inconsistency, an error message will be displayed and the applicant will need to correct such address.

Useful links

- Luxembourg Business Registers – Filing Formalism – New Features as from 12th November 2024
- FAQ - Luxembourg national identification number

COMPANY LAW I UPGRADING USE OF DIGITAL TOOLS AND PROCESSES

On 24 November 2023, Draft law No. 8342 (the "**Draft Law**") was submitted to the Luxembourg Parliament, completing the transposition of Directive (EU) 2019/1151 of 20 June 2019 (the "**Directive**") by integrating its Article 13*decies* (the "**Article**") in Luxembourg Law. The Draft Law strengthens the protection of individuals interacting with companies by enabling the LBR to carry out verifications of persons proposed for a position as director and refuse, or even deregister, the ones subject to a management ban but also by improving the quality of information published in the the Luxembourg Trade and Companies Register (the "**RCS**").

This article provides additional insights and developments on the topics discussed in our January newsletter, particularly regarding corporate transparency and director verification.

Purpose of the Article

The Article lays down rules to protect individuals interacting with companies and to avoid any abusive or fraudulent behaviour by:

- requiring Member States to establish provisions in relation to the dismissal of directors; and
- allowing Member States to verify whether a person proposed for a position as director is subject to a management ban in another Member State.

Key propositions of the Draft Law

Verification by the Luxembourg Business Register of any person proposed for a position as director

The Draft Law proposes to enable the Luxembourg Business Register (the "**LBR**") to proceed with the verification, through the Business Registers Interconnexion System (the "**BRIS**"), of any person proposed for a position as director in a:

- public limited company (*société anonyme*);
- partnership limited by shares (*société en commandite par actions*); and
- limited liability company (*société à responsabilité limitée*).

Rejection and deregistration of directors subjected to a management ban in other Member States

The Draft Law proposes to enable the LBR to refuse, or deregister, the inscription in RCS of any person subject to a management ban in another Member State.

In its opinion published on 21 May 2024, the Council of State (*Conseil d'Etat*) contests § 4ter of the Draft Law and raises the issue of the recognition of foreign management bans, especially because the LBR will have to determine whether the foreign ban is 'comparable' to the conditions provided in Article 444-1 of the Code de Commerce, which creates legal insecurity.

Enhancing information quality in the RCS

In order to improve the quality of the information transmitted to the Member States by the LBR trough the BRIS, the Draft Law proposes to add additional details to the information already published in the RCS, such as the personal or professional address, the name and the surname as well as the place and date of birth of the person subject to a management ban in Luxembourg.

Scope of the Draft Law

The Draft Law's provisions may apply to the position of director, in a public limited partnership, but also to any position providing the power to bind a company, such as the position of manager, in a limited liability company, auditor (*commissaire*), statutory auditor (*réviseur d'entreprise*) or approved statutory auditor (*réviseur d'entreprise agréé*).

EU COMPETITION LAW I THE EU COURT OF JUSTICE DELIVERS A THIRD SETBACK FOR FIFA IN LESS THAN A YEAR

On 4 October 2024, in case C-650/22 *Fédération Internationale de Football Association (FIFA) v. BZ*, the Court of Justice of the European Union (the "**Court**") ruled on the interpretation of Articles 45 and 101 of the Treaty on the Functioning of the European Union (TFEU), relating to the free movement of workers and anticompetitive agreements respectively. In the ruling, the Court held that FIFA's rules governing unilateral contract termination between clubs and players, as well as the conditions for player transfers, breached the European Union (EU) rules by hindering the free movement of professional footballers seeking to develop their careers with a new club and by restricting cross-border competition among clubs within the Union.

Background to the dispute

In 2014, Mr. Lassana Diarra, a former Real Madrid professional football player, quit Lokomotiv Moscow amidst a dispute in which the club had accused him of terminating the contract without just cause. While the dispute was still being reviewed by FIFA's Dispute Resolution Body ("**DRB**"), Mr. Diarra failed to sign with Sporting du Pays de Charleroi. The club had promised to hire him conditional upon the player's being duly registered in the national federation and FIFA's confirmation that the club would not be held jointly liable to compensate Lokomotiv Moscow.

As FIFA refused to provide assurances on these two points, alleging that only the DRB would be competent to do it, Mr. Diarra could not satisfy any of the two requests. FIFA's Regulations on the Status and Transfer of Players (the "**Regulations**") actually provide that a certificate of international transfer, which is an essential requirement for a player's registration with a league affiliated with FIFA, could not be issued until the end of the dispute. Furthermore, the Regulations also stipulate that, in case of undue termination by a football professional, any new professional football club hiring the player would be held jointly and severally liable to compensate the player's former club, thereby having to share the financial harm of the player's decision to withdraw from the contract. The new club would also be presumed to have induced the professional to breach the contract, implying wrongdoing without requiring FIFA to prove that inducement actually occurred. As a result, the new club would face heavy sanctions.

Having lost the opportunity to sign for Sporting du Pays de Charleroi, Mr. Diarra was subsequently also sanctioned by the DRB to compensate Lokomotiv Moscow, whose claim on grounds of unjust contractual termination was upheld. In this framework, Mr. Diarra sought compensation before the Belgian courts, *inter alia*, for having been prevented from playing professionally during the 2014/2015 season in breach of the EU rules on the free movement of workers and competition. The Belgian courts' first instance judgment upheld Mr. Diarra's claim for compensation but was appealed by FIFA. Having to judge on the compatibility of the Regulations with Articles 45 and 101 TFEU, the Belgian Court of Appeal referred to the Court certain questions on the interpretation of the provisions.

The issues at stake

FIFA's stakes were particularly high, not only because of the legality of the pillar provisions in the Regulations being overtly questioned by a professional football player. On 21 December 2023, the Court had actually adopted two seminal judgments in the *Royal Antwerp Football Club* (judgment in case C-680/21) and *European Superleague Company* (judgment in case C-333/21), which cast a doubt on the compatibility of the rules devised by FIFA with the EU rules on competition, thereby upholding the challenges brought to FIFA's legal system. The risk of a third setback was therefore important, even more so considering that the legality of the Regulations was now being questioned with respect to the rules on the free movement of persons, thus recalling memories of the now long-standing *Bosman* ruling which revolutionized the then transfer system (judgment of 15 December 1995 in case C-415/93).

The Regulations, and FIFA's system in general, are generally aimed at preserving the legal and financial stability of clubs, the basic units forming national

federations. These need to enjoy the conditions to remain competitive, both in national and international competitions. Healthy clubs ready to compete would enhance the attractiveness of the competitions of the most loved sport in the world. This would attract billions of viewers worldwide and enhance the commercial appeal of football, boosting sponsorships, broadcasting and gambling deals, as well as other revenue streams in the wealthiest markets.

Undeniably, clubs also have to bear considerable expenses for the organisation and maintenance of competitive teams. This prompted FIFA (which, in the end, is the federation of the associations to which clubs are affiliated) to apply rules, such as the Regulations, embodying a certain contractual imbalance in favour of clubs, *inter alia*, in order to reduce, as far as possible, the risk of losing the players in which they invested in favour of other competing clubs. Unfortunately for FIFA, national football associations and clubs, such contractual imbalance also entails a breach of the EU internal market pillar rules, as was anticipated in the (non-binding) opinion of Advocate-General (AG) Maciej Szpunar, adopted on 30 April 2024, who had already authored the opinion in the *Royal Antwerp Football Club* case.

The findings of the Court

The Court found that the Regulations directly affect football players and the clubs possibly wishing to sign them, as well as the economic activities inherent therein, and, as such, are incompatible not only with the EU rules on competition, but with those on the free movement of workers. The twofold deterrent effect of FIFA's rules appears to be particularly harmful regarding players' mobility. On the one hand, under the Regulations, players would be discouraged from unilaterally terminating the contract with their club and sign with a new club, prior to expiration (or their being monetised by the clubs through transfers), in order to avoid the risk of their old club calling the termination unjust. On the other, the significant legal, financial and sporting risks inherent in the Regulations are such as to dissuade new clubs, though potentially interested in signing professional players in this condition, from hiring them.

From this standpoint, the case of Mr. Diarra, a French national failing to sign for Sporting du Pays de Charleroi, a Belgian club, signifies the importance of such deterrence mechanisms on the free interplay of the EU market forces.

The constraints inherent in the Regulations are further strengthened by the prohibition on the issuance of the transfer certificates for as long as there is a dispute. By delaying the registration of professional players with new clubs established in other member states, the relevant rules end up secluding players in their country of origin or residence, depriving their possible engagement by clubs established elsewhere in the EU and partitioning markets along national lines.

The Court also observes that the deterrence mechanics of the Regulations *per se* restrict competition between professional football clubs established in different member states vis-à-vis the recruitment of other players already signed by a given club. Despite this being an essential parameter of competition on the football market, unless the former club agrees to a negotiated transfer, the mere act of signing such a player would expose the new club to the risk of being held jointly and severally liable for compensation, as well as being sanctioned.

Moreover, the generalised restriction on cross-border competition between clubs diminishes the clubs' access to market of players under contract, both geographically, as this extends (at least) to all of the EU member states, and materially, as it covers the entire duration of each contract which players may sign. In practice, this restriction gives each club the virtual certainty of retaining its own players until the expiration of the contract concluded with them, a club's decision to terminate accepted by (or imposed to) the player, or a negotiated transfer of the player to another club, in return for payment of a transfer fee.

Of course, the Court is not unaware of the high requirements clubs, federation and, ultimately, FIFA need to meet in order to keep the entertainment at the highest level possible and that, notwithstanding their incompatibility with the internal market and competition rules, it recognises that their potential can be justified in light of, respectively, overriding reasons of public interest or the justifications per Article 101, par. 3, TFEU. However, if the stability of the football system can well be a valid justification to restrict the application of the provisions of the EU law, nonetheless such restrictions should not exceed what is strictly necessary to pursue such target. The assessment whether such draconian rules, as embodied in the Regulations, could meet the

proportionality principle, is left to the Belgian Court of Appeal competent for the national procedure. The Court, however, voices its doubts as to the outcome of such evaluation.

The way forward

The ruling marks a significant moment as it brings attention to the regulatory and legal challenges faced by FIFA, particularly considering that the case is the third major one – and the third setback for the federation – within less than one year. The undeniable wave of legal scrutiny underscores the growing pressure on FIFA to align its practices with European legal standards in the internal market. On this, the Court’s assessment of the Regulations in light of the free movement of persons creates an ideal continuity with the precedent in the *Bosman* case-law which, by the very nature of the provisions at stake, is stronger than in the *European Superleague Company* case.

It is predictable that FIFA's current framework for player transfers and compensation be subjected to further legal challenges, as the Court’s interpretation may encourage more stakeholders (essentially clubs and players, but maybe also other governing bodies), to challenge FIFA's authority. The federation may be compelled to reform its regulatory policies in ways that balance commercial interests with individual rights within the EU's legal framework. FIFA may need to align with EU principles in areas such as player mobility, compensation systems, and competition rules.

As this is the third major legal threat in less than a year, it suggests a growing willingness among European courts and institutions to challenge long-standing practices in sports governance. This could lead to reconsidering FIFA’s regulatory powers, driving reform towards more transparency, fairness, and alignment with EU internal market, competition and fundamental rights principles. In the long term, FIFA may need to strengthen its legal defences while adapting its structures to minimize future litigation risks.

SFDR I ESA UPDATES AND CONSOLIDATES Q&AS

Consolidation of questions and answers on the SFDR

On 25 July 2024, the European Banking Authority ("**EBA**"), European Securities and Market Authority ("**ESMA**") and the European Insurance and Occupational Pension Authority ("**EIOPA**"), published a consolidated questions and answers on the SFDR and SFDR Delegated Regulation ("Q&As"). The new version includes not only clarification on scope issues and definitions of sustainable investments but also fifteen new questions and answers.

Noteworthy updates of certain Q&As

Among the newly added questions, below are the main ones:

AIFMs must make Article 10 SFDR information available on a website

Section I, question 4 indicates that financial products categorised as Article 8 or 9 SFDR and made available by a registered AIFM must publish information on those financial instruments on a website. The website may belong to the financial product itself or to the group to which the registered AIFM belongs to. If neither is available a new website must be established, allowing the registered AIFM to comply with Article 10 SFDR.

Exposure to companies active in the fossil fuel sector – calculating the PAI indicator 4

Section IV, question 26 clarifies that companies are deemed to be active in the fossil fuel sector when they "derive any revenues from exploration, [...] of fossil fuels [...]", in accordance with point (5) of Annex I of the SFDR Delegated Regulation. As such the calculation of the PAI (Principal Adverse Impact) indicator 4 is to be performed on a pass/fail basis (and not on a look-through approach); and a company is considered to be active in the fossil fuel sector as soon as it derives any revenues from any of the activities mentioned in the definition.

Disclosure of the energy consumption intensity per high impact climate sector – PAI indicator 6 to be disclosed on an aggregated basis for all investments or should each high impact climate sector be disclosed separately?

Section IV, question 27 confirms that Table 1, Annex I of the current SFDR Delegated Regulation does require separate disclosures for each high impact climate sector (on an aggregated basis for each high impact sector). The calculation to be performed so that each high impact sector is aggregated and disclosed separately.

Calculating the exact share of sustainable investment that qualifies as environmentally sustainable under EU Taxonomy

Section V, question 20 presents an accurate illustration as to how calculations for EU Taxonomy-alignment should be made under the pre-contractual template (Annexes II and III) and the periodic disclosures (Annexes IV and V).

Disclosure on financial products passively tracking benchmarks

Section V, question 25 clarifies that the disclosure obligation applicable to financial products in the SFDR Delegated Regulation applies equally to financial products passively tracking Paris-aligned Benchmark or Climate Transition Benchmark.

SPVs following good governance practices

Section V, question 27 confirms that funds investing in assets such as car or real estate through Special Purpose Vehicules are not considered as "investee companies" for the purposes of the SFDR and are therefore not compelled to comply with the good governance checks under Article 8 SFDR.

ELTIF 2.0 I THE EU COMMISSION ADOPTS LEVEL 2 MEASURES

On 19 July 2024, the European Commission adopted a new Delegated Regulation implementing certain level two measures (the "**Level 2 RTS**") required pursuant to Regulation 2015/760 on European Long Term Investment Funds as amended by Regulation 2023/606 (the "**ELTIF 2.0 Regulation**"). By enhancing liquidity options, broadening eligible assets, improving risk management capabilities, and strengthening investor protection, the Level 2 RTS aim to make ELTIFs a more effective tool for channelling long-term investments.

Background

As we have previously discussed, the usual process of developing such measures (ESMA produces draft regulatory technical standards and the European Commission adopts them, usually without any significant change) has been far from smooth on this occasion.

ESMA's first draft in December 2023 was rejected by the European Commission, and, after ESMA had submitted a revised text in April 2024 at the European Commission's request, the European Commission has again not accepted all of ESMA's proposal.

The European Commission has now adopted the Level 2 RTS and sent them to the European Parliament and to the Council of the EU – these have three months to scrutinise them, extendable by a further three months by either institution.

The expectation is that Level 2 RTS is to be agreed and published in the EU Official Journal sometime in Q4 2024. It will enter into force the day following publication.

Key Changes in the Level 2 RTS

The Level 2 RTS supplement Articles 9(3), 18(6), 19(5), 21(3) and 25(3) of ELTIF 2.0 Regulation as specified hereafter.

Redemption policy and liquidity management

The new Level 2 RTS introduce greater flexibility to investment managers in building and calibrating their redemption policies.

ELTIF 2.0 provides that at the time of authorisation and throughout the life of the ELTIF, the manager of the ELTIF that allows redemptions during the life cycle of the fund should be able to demonstrate that an appropriate liquidity management system and effective procedures for monitoring the liquidity risk of the ELTIF are in place, which are compatible with investment strategy of the ELTIF and the proposed redemption policy.

In this regard, the fund manager must provide, the ELTIF's national competent authorities, at the time of authorisation of the ELTIF, with a comprehensive list of information, including on the redemption policy and those responsible for the management of the redemption process, on how the assets and liabilities are to be managed to meet redemption requests, on liquidity stress testing and the implementation of liquidity management tools.

Throughout the life of the ELTIF, changes to certain of the information provided on authorisation have to be notified to the competent authorities and they may request information on stress testing and activation of liquidity management tools.

The elements to be contained in a redemption policy are set out in Article 5 of the Level 2 RTS.

The percentage of an ELTIF's assets which can be redeemed is to be calibrated, at the fund manager's discretion, on the basis of either:

- the ELTIF's redemption frequency and notice period according to the options set out in Annex I; or
- the ELTIF's redemption frequency and minimum percentage of liquid assets as specified in Annex II.

Article 5 also provides that an ELTIF fund manager may (but does not have to) implement at least one anti-dilution liquidity management tool from among the following:

- anti-dilution levies;
- swing pricing; and
- redemption fees.

The fund manager may also at its discretion select and implement other liquidity management tools. In such a case, the fund manager shall upon request provide the

competent authority of the ELTIF with information on why, on the basis of the features of the ELTIF, the anti-dilution liquidity management tools referred above are not adequate for that specific ELTIF or why another set of liquidity management tools would be more appropriate, considering the interests of the ELTIF and of its investors.

Use of derivatives solely for hedging purposes

ELTIFs are prohibited from using financial derivative instruments, except where the use of such instruments solely serves the purpose of hedging the risks inherent to other investments of the ELTIF. Article 1 of the Level 2 RTS clarifies that such use is permitted where it is:

- "economically appropriate" for the ELTIF,
- consistent with the ELTIF’s risk-profile,
- aimed at a verifiable reduction of the risks, and (iv) the underlying of the financial derivative instruments are assets to which an ELTIF is exposed, or, where the financial derivative instruments to hedge the risks arising from the exposure to such assets are not available, the underlying of financial derivative instruments are of the same or economically similar asset class.

Life-cycle of the ELTIF and minimum holding period

Article 2 of the Level 2 RTS sets out the circumstances in which the life of an ELTIF is to be considered compatible with the life cycles of each of its individual assets.

The manager of an ELTIF should consider the liquidity profile of each of the ELTIF’s individual assets, the liquidity profile of the ELTIF’s portfolio on a weighted basis, the timing of acquisition of those individual assets, and the valuation of those individual assets. In those ELTIFs offering redemption the redemption policy of the ELTIF also needs to be considered.

Article 3 of the Level 2 RTS sets out a list of criteria to be considered when imposing a minimum holding period (i.e. the minimum period of time before an investor can redeem from an ELTIF. The ELTIF manager is required to consider, among other things:

- the long-term nature and investment strategy of the ELTIF;
- the ELTIF’s underlying asset classes, their liquidity profile, and their position in their life cycle;
- the ELTIF’s investment policy; and
- the ELTIF’s investor base.

ELTIF transfer request matching

Pursuant to Article 7 of the Level 2 RTS, if an ELTIF provides for the full or partial matching of transfer requests of units or shares in the ELTIF of existing and incoming investors, its matching policy must contain certain minimum criteria including:

- the format, process, and the timing of the matching;
- the frequency or periodicity of the matching window, and the duration of that window;
- the dealing dates;
- the requirements for the submission of purchase and exit requests, including the deadlines for submitting such requests; and
- the settlement and pay-out periods.

Cost transparency

ELTIF 2.0 provides that the prospectus shall prominently inform investors of the level of the different costs borne directly or indirectly by the investors and grouped into certain headings. Article 12 of the Level 2 RTS provides clarifications on what has to be included in each group. This focus on cost transparency aims to empower retail investors, allowing them to make informed decisions based on a thorough understanding of fees.

AIFMD I ESMA UPDATES Q&A ON CAPITAL AND NOTIFICATION RULES

New clarifications on capital requirements and notification processes for alternative investment fund managers (“**AIFMs**”) provided by ESMA.

Initial capital and own funds

ESMA has released a new question and answer (“**Q&A**”) on the alternative investment fund managers directive (“**AIFMD**”). One key area of focus is the **initial capital and additional own funds** requirements for internally managed alternative investment funds (“**AIFs**”) and self-managed undertakings for collective investment in transferable securities (“**UCITS**”) investment companies.

Summary of requirements

- **Internally managed AIFs and self-managed UCITS** must hold and maintain initial capital and additional own funds that are kept **separate** from the collective investment undertaking’s assets.
- These funds should not be included in the net asset value (“**NAV**”) calculation.
- These own funds must be used **exclusively** to cover professional liability risks and remain within the **minimum regulatory capital thresholds**.

Important considerations

- The **AIFMD Article 9 and UCITS Directive Article 29** establish that minimum capital requirements are designed to:
  - ensure the **continuity and regularity** of the AIFs' internal management and UCITS' self-management.
  - cover any potential **professional liabilities** arising from the above-mentioned manager’s activities.
- **Article 31 of the UCITS Directive and Article 18 of AIFMD** further distinguish the roles and purposes of an investment company’s own funds versus the fund’s assets:
  - **own funds** should remain within the company for liability purposes.
  - **fund assets** should be managed and invested according to the fund’s investment strategy and objectives.

The updated Q&A clarifies that **own funds must not be used** for investment purposes or to satisfy redemptions for investors. This distinction aims to maintain the **integrity** and **solvency** of AIFs and UCITS, ultimately enhancing investor protection.

Notification requirements for establishing a branch

The Q&A also addresses the **notification requirements** when an AIFM establishes a branch in another member state of the EU, providing a clearer understanding of when notifications are necessary.

Key points

Notification is **mandatory** when an AIFM:

- intends to manage EU AIFs established in another member state.
- establishes a branch to perform investment management functions listed under **point 1 of Annex I** to the AIFMD.

However, if the AIFM sets up a branch **solely for ancillary activities pursuant to point 2 of Annex I to the AIFMD**, no notification is required under **Article 33 (2) and (3)** of the AIFMD.

Ancillary activities cannot be performed independently of the core management functions outlined in **point 1 of Annex I**.

Additional information

Even if a formal notification is not required, the AIFM may still need to **inform the competent authorities** under other legal provisions.

The Q&A do not introduce new obligations but clarify the **application** of existing rules, contributing to a more **coherent regulatory environment**. These updates reinforce the importance of maintaining **adequate capital reserves** and complying with notification obligations when managing AIFs across different member states.

CBDF I UPDATE TO CSSF FAQ ON NOTIFICATION PROCEDURES

On 14 July 2024 the CSSF updated its FAQ on notification procedures related to Regulation (EU) 2019/1156 on facilitating cross-border distribution of collective investment undertakings (the "**CBDF Regulation**"). This update highlights significant changes affecting notifications submitted to the CSSF.

UCITS Notifications

The updated FAQ provides clarity on several key aspects for UCITS notifications:

Attestations

Concerning notifications for UCITS, question 2 has been deleted and question 9 of the FAQ has been updated clarifying that the CSSF UCITS attestations must no longer be requested when preparing the notification packages as part of the cross-border marketing and management activities. The attestations will be generated and added directly by the CSSF to the notification packages.

File Naming Convention

The updated question 15 the FAQ precises the file naming convention which shall be used for an additional version of the prospectus (such as a translation or a version with a country supplement):
DOCREP-ENNNNNNNN-CCCCCCCC-PPPP-YYYY-MM-DD-PC-LL-0000.pdf
instead of
DOCFDB-ENNNNNNNN-CCCCCCCC-PPPP-YYYY-MM-DD-PC-LL-0000.pdf

In parallel, the CSSF system has been modified and therefore it will not be accepting the earlier file naming convention (i.e. the "DOC FDB" version) for an alternative version of a prospectus, resulting in an automated rejection.

The **DOCFDB** (Feedback) prefix is solely used for documents with an electronic signature, which have been issued by the CSSF, such as the visa-stamped prospectus. Hence, alternative versions of a prospectus are required to use the **DOCREP** (Repository) prefix provided that these documents do not contain an electronic CSSF signature.

AIFM Notifications

Changes to the AIFM notifications are also addressed in the updated FAQ:

Attestations

As for the AIFM notifications, question 5 has been updated. Similar to UCITS, question 5 clarifies that the CSSF AIFM attestations must no longer be requested when preparing notification packages, as they will also be generated and added directly by the CSSF to the notification packages.

File Naming Convention

The updated file naming convention applies exclusively to UCITS. AIFM notifications are not impacted by this change. Simultaneously the CSSF updated its "Guidelines on cross-border marketing notification and de-notification procedures" in order to meet its obligations in relation to the reporting of cross-border marketing of AIFs and UCITS in accordance with Article 13 of the CBDF Regulation.

For further information please see our article entitled CBDF I Collection of new marketing information for UCITS and AIFs.

CBDF I COLLECTION OF NEW MARKETING INFORMATION FOR UCITS AND AIFS

On 11 September 2024 the CSSF updated its "Guidelines on cross-border marketing notification and de-notification procedures" ("**Guidelines**") in order to meet its obligations in relation to the reporting of cross-border marketing of AIFs and UCITS. This update is in accordance with Article 13 of the Regulation (EU) 2019/1156 on facilitating cross-border distribution of collective investment undertakings ("**CBDF Regulation**").

Key updates to the guidelines

The Guidelines now require the submission of the following additional information for cross-border marketing. The notifications have been updated to include the fields covering the following:

- **predominant AIF Type**
- **contact point(s)**
- **facilities for investors.**

Predominant AIF Type

From 11 November 2024 each notification relating to an AIF will have to indicate its predominant AIF Type i.e. Hedge fund, Private Equity Fund, Real Estate Fund, Fund of Funds, Other or none.

Submission procedure – contact point

During the submission of the application, as elaborated under section 4 of the Guidelines, within eDesk it will be possible now to name a contact point concerning the notification letter, and when applicable the contact point concerning invoices. The information on the contact point is however not available for pre-marketing requests.

Submission procedure - facilities to investors

Within the eDesk procedure, a section will also be provided enabling to define the contact(s) information concerning the facilities for investors which must coincide with the information in the notification letter document. However, this section is only available for UCITS initial notification.

The requirement to provide information on the predominant AIF type, contact point(s) and facilities to retail investors when submitting CBDF applications to the CSSF will be applicable as from **11 November 2024.**

AIF I CLARIFICATION BY THE CSSF ON CONTROLS FOR LUXEMBOURG DEPOSITARIES OF AIFS INVESTING IN ILLIQUID ASSETS

The CSSF issued on 24 July 2024 a clarification regarding the controls Luxembourg depositaries must implement when handling AIFs investing in illiquid assets. The CSSF has observed inconsistencies in how depositaries approach their safekeeping duties, particularly in ownership verification and record-keeping obligations.

Some depositaries have been conducting comprehensive checks and gathering necessary documents before investments in illiquid assets are made, while others have been relying primarily on ex-post (after the fact) checks. The CSSF has emphasized that all Luxembourg depositaries must carry out these checks and controls prior to the acquisition of illiquid assets (ex-ante). This approach ensures compliance with their safekeeping duties under Article 90 of Commission Delegated Regulation (EU) No 231/2013 (“**AIFMR**”) and their responsibilities regarding the timely settlement of transactions under Article 96 of the AIFMR.

The CSSF expects the following procedures to be implemented by depositaries:

Prior to payment

The depositary should receive prior notification of the transaction from the Alternative Investment Fund Manager (AIFM), along with supporting documents, even in draft form. This allows the depositary to verify the transaction's existence, the structure, and the involved counterparties before authorizing payments.

At the time of payment

The depositary should conduct consistency checks between the payment instructions and the earlier provided transaction documents.

After payment

The depositary must verify the AIF’s effective ownership of the assets based on the final executed transaction documents and external registers where applicable (e.g., land or commercial registers).

Additionally, AIFMs authorized in Luxembourg are required to provide all relevant information to depositaries in a timely manner to allow them to fulfil their safekeeping duties, as specified under Article 90(1) and (2) of the AIFMR. This includes adhering to the ex-ante controls emphasized by the CSSF.

This clarification serves as a critical reminder to ensure consistent and rigorous control measures across Luxembourg depositaries, thereby safeguarding the interests of investors and ensuring full regulatory compliance.

KEY COMPLIANCE REMINDERS FROM CSSF I CIRCULAR CSSF 22/811 FOR UCI ADMINISTRATORS

The CSSF issues a reminder to UCI Administrators on contract obligations and new annual reporting requirements under Circular CSSF 22/811.

Contractual compliance: essential elements and disclosures

The CSSF's recent 3 September communiqué underlines the importance of compliance with the contractual provisions outlined in Circular CSSF 22/811 for UCI Administrators (UCIAs). **Points 38 and 39** of the circular define the **mandatory elements** that contracts between UCIAs and UCIs (undertakings for collective investment) and/or IFMs (investment fund managers) must include.

Key requirements include:

- a comprehensive description of the services, functions, and tasks covered by the contract;
- clear articulation of the **roles, rights, and obligations** of each party;
- obligations regarding confidentiality and specified notice periods for changes.

While **updates to UCIA contracts do not require prior submission to the CSSF**, the regulatory body retains the right to request and review these contracts on a case-by-case basis.

Additionally, the communiqué highlights **Point 41** of the circular, which mandates that the **name of the UCIA must be disclosed** in the offering document of any UCI for which it acts. In instances where multiple entities are involved in the administration process, it is imperative that all entities are named, and their respective roles and functions are clearly identified.

New annual reporting module: deadlines and requirements

In line with the broader regulatory framework, the CSSF has introduced a **new annual reporting module** for UCI Administrators. The CSSF reminds the industry that under the provisions of Circular CSSF 22/811, UCIAs are required to submit the requested information within **five months of the relevant financial year-end**.

Failure to meet these deadlines could result in increased scrutiny or regulatory action.

For further information, you can access the full press release here.

AML/CFT I FAQ ON THE SRRC ON COMPLIANCE WITH AML/CFT OBLIGATIONS IN ACCORDANCE WITH CIRCULAR CSSF 24/854

Circular CSSF 24/854

Circular CSSF 24/854 was published on 29 February 2024. The purpose of the circular was to provide guidance on the Summary report dedicated to AML/CFT ("**SRRC**") to be prepared by the ‘’*responsable du contrôle*” ("**RC**") and submitted to the CSSF by the ‘’*responsable du respect*’’ ("**RR**") in accordance with Article 42(7) of CSSF Regulation No 12-02 of 14 December 2012 on the fight against money laundering and terrorist financing, as amended.

Scope

Two clarifications have been added to the FAQ on the AML/CFT Summary report on compliance with AML/CFT obligations in accordance with Circular CSSF 24/854, in relation to the scope of the circular.

Change in fund manager

If a Luxembourg investment fund originally managed by a foreign fund manager appoints a Luxembourg-based manager before the SRRC submission deadline, the fund will no longer fall under the scope of Circular 24/854. As a result, the SRRC is no longer required for that fund.

Entity no longer supervised by the CSSF

An entity that is removed from the CSSF’s list of supervised entities prior to the SRRC submission deadline is not required to submit the SRRC, even if it was within scope during the previous reporting period.

REAL ESTATE I INITIAL PERIOD OF VALIDITY OF BUILDING PERMITS EXTENDED

On 10 October 2024, the draft law n°8369 (the "**Draft Amendment Law**") amending the amended Law of 19 July 2004 on municipal planning and urban development (the "**Municipal Planning and Urban Development Law**"), which aims to extend the initial period of validity of building permits from one year to two years, has been voted.

Background

Following the National Housing Meeting, held on 22 February 2024 to discuss measures to remedy the slowdown in activity in the real estate sector, the Minister of Home Affairs presented initial proposals for administrative simplification with the aim of speeding up town planning procedures. The Draft Amendment Law was a first step in this direction.

The reform adopted

With the Draft Law, Article 37 of the **Municipal Planning and Urban Development Law** shall be amended to set the initial validity period of building permits at two years, instead of one. However, this authorisation can only be renewed once, for a maximum period of one year, bringing the total period of validity to a maximum of three years.

The new mechanism therefore doubles the amount of time available under existing legislation for the applicant to commence works in a meaningful way. Jurisprudence has clarified that the criterion of work undertaken in a meaningful way is constituted by the first act of execution that is carried out on the site, provided that the work undertaken is of sufficient importance.

Criticisms of the Draft Law

The proposed measure was welcomed by all the organisations who were consulted during the drafting of the Draft Law. Some, however, regretted that the extension was only for one year and not two. It is true that even if the initial validity period of building permits is extended, the total effective period remains the same, i.e. three years (new initial validity period of two years with the possibility of extending it once for one year, as opposed to the previous validity period of one year with the possibility of extending it twice, each time for one year).

VAT I IMPLEMENTATION OF AN ELECTRONIC VALUE ADDED TAX EXEMPTION CERTIFICATE

Introduction

On 8 July 2024, the European Commission (the "**Commission**") adopted a legislative package to amend key VAT regulations. This initiative aims at modernizing VAT procedures by introducing an electronic VAT exemption certificate, streamlining the process for businesses and aligning with the digital transformation across Member States.

Context of the proposal

The Commission's proposal specifically targets Council Directive 2006/112/EC (the "**VAT Directive**") and Council Implementing Regulation (EU) No 282/2011. The Commission's intention is to create an electronic VAT exemption certificate. This certificate would be designed to introduce an electronic exemption certificate confirming that a transaction qualifies for a specific exemption under first subparagraph of Article 151(1) of that VAT Directive. This proposal will therefore include an e-form in PDF format as well as the electronic procedure applicable to the VAT exemption certificate, allowing the use of advances electronic signatures.

Digital transformation and administrative efficiency

In order to enable Member States to keep pace with the increasing demands of the digital age and to reduce the administrative burden on businesses, the current paper certificate should be replaced by this new electronic certificate. Such electronic conversion will allow Member States to comply with their EU obligations to implement necessary technical means, thereby enabling the electronic processing of electronically signed documents when using an online service provided by or on behalf of a public sector body. In addition, this initiative serves to align with the area of excise duties, where electronic procedures are already possible.

Legislative amendments

To that end, Article 1 proposes to amend the VAT Directive by permitting the Commission, in consultation with Member States, to adopt implementing measures on the electronic certificate confirming that a transaction qualifies for a specific exemption under the first subparagraph of Article 151 (1) of the VAT Directive. The electronic certificate will be issued by the eligible body or person to whom the exempt supply of goods or services is made and who, together with the host Member State, will sign that certificate by electronic means. A comment will be added to the certificate if the conditions for exemption are not met or cease to apply. The eligible body or individual issuing the electronic certificate is the person liable to pay any VAT to the Member State where it is due.

Transitional period and legal certainty

Due to the large number of ongoing IT projects, Member States may alternatively use the paper version of the certificate for transactions carried out until 30 June 2030. For the sake of legal certainty and administrative simplification and for optimum cost-efficiency, no distinction will be made between national and international transactions within the electronic exemption certificate.

Implementation timeline

The Commission has established a clear timeline for Member States to adapt to the new system. Member States are required to implement the electronic procedures by 1 July 2026, ensuring sufficient time for a smooth transition to the new framework.

CBCR I PROPOSAL OF COMMON TEMPLATE AND ELECTRONIC REPORTING FORMATS

On 1 August 2024, the European Commission released a draft regulation to standardize multinational enterprises ("**MNEs**") income tax information for public Country-by-Country Reporting ("**CbCR**"), as required by Directive 2013/34/EU. The proposal introduces a common template and electronic formats to improve clarity and comparability of tax disclosures across the jurisdictions.

Key Highlights

Unified reporting template
A standardized format will be introduced to ensure that MNEs report tax information consistently across the EU, making it easier to compare data between jurisdictions.

Digital reporting formats
The regulation emphasizes the use of Extensible Hypertext Markup Language (XHTML) and Inline Extensible Business Reporting Language (Inline XBRL), enhancing both human-readable and machine-readable formats, ensuring precise and accessible reporting.

Scope of reportable data
The annexes detail the scope and structure of the data that must be reported, ensuring clarity about what needs to be disclosed for each financial year.
The adoption of the draft regulation is planned for third quarter 2024 with effect from 1 January 2025 and applicable to financial years starting on or after that date.

AML I CREATION OF A SEPARATE CONTROL OFFICE WITHIN THE INDIRECT TAX ADMINISTRATION

On 15 July 2024, the Luxembourg Parliament (*Chambre des députés*) published a Draft Law n°8340 (the "**Draft Law**") aimed at amending the Law of 10 August 2018 on the organisation of the indirect tax administration (*Administration de l'enregistrement, des domaines et de la TVA*).

The purpose of this Draft Law is to strengthen the fight against money laundering and the financing of terrorism, as well as the application of international financial sanctions. To this end, the Draft Law provides for the creation of a separate control office, entirely dedicated to the fight against money laundering, the financing of terrorism and the monitoring of the application of international financial sanctions, within the operational services of the indirect tax administration. Previously, the administration's powers in the field of anti-money laundering and fight against the financing of terrorism were carried out by its anti-fraud department (*service anti-fraude*), which however also focuses on the detection and prevention of VAT fraud as well as on registration duties and insurance tax.

The creation of the dedicated control office is also intended to go hand in hand with the allocation of additional human resources to the indirect tax authorities in order to allow for an appropriate exercise of its supervisory functions with respect to professionals to whom it acts as a supervisory authority.

DOUBLE TAX TREATY I LUXEMBOURG – COLOMBIA

Entry into force

On 19 January 2024, the Grand Duchy of Luxembourg and the Republic of Colombia have signed a convention for the elimination of double taxation with respect to taxes on income and on capital and the prevention of tax evasion and avoidance (the "**DTT**"). The ratification of the DTT is currently pending in Luxembourg.

The DTT will have effect on 1 January of the year following the exchange of notifications, between the contracting states, confirming that the procedures required by their respective legislations for the entry into force have been satisfied.

Dividend withholding tax

Withholding tax on dividends paid to beneficial owners resident in the other contracting state cannot exceed 5% if the beneficial owner is a company that holds, directly or indirectly, at least 20% of the capital of the paying company for a minimum of 365 days. A reduced withholding tax rate of 0% will however be available to distributions made to a pension fund. In all other cases, the withholding tax on dividend distributions shall not exceed 15%.

Interest withholding tax

Withholding tax on interest payments made to beneficial owners in the other contracting state cannot exceed 10%. The DTT also foresees a withholding tax exemption for interest payments in very limited situations (e.g. interest payments to financial institutions, to pension funds or to the state itself as well as to any of its political subdivisions).

Royalties withholding tax

Withholding tax on royalty payments made to beneficial owners in the other contracting state cannot exceed 10%. On this point, the DTT diverges from the OECD model convention, which provides for exclusive taxation of royalties in the residence state only.

Fees for technical services

The DTT also, quite uncommonly compared to the majority of Luxembourg's double tax treaties, includes a specific provision which deals with so-called fees for technical services. The latter are defined in the DTT as meaning payments in consideration for any service of a managerial, technical, technical assistance or consultancy nature. Teaching in or by an educational institution as well as services rendered by an individual for the personal use of another individual are explicitly carved out.

The source state may tax fees for technical services at a maximum rate of 10% of their gross amount, even in cases where the service provider does not carry out its business through a permanent establishment.

Independent personal services

The DTT also includes a specific provision for professional services of or other activities of an independent character, which shall especially include independent scientific, literary, artistic, educational or teaching activities, as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants. Any such income derived by a resident of one contracting state may be taxed in the other contracting state, in case the professional services are carried out through a fixed base regularly available to the taxpayer in that other contracting state or in case the taxpayer stays in that other contracting state for a period or several periods amounting to or exceeding in the aggregate 120 days in any twelve months period commencing or ending in the concerned fiscal year.

Capital gains

In line with the OECD model convention, the DTT generally provides that capital gains are taxed only in the contracting state where the alienator is a resident. However, notably the following capital gains derived by a resident of one contracting state may be taxed by the other state:

- gains from the alienation of immovable property situated in the other state;
- gains from the alienation of movable property forming part of the business property of a permanent establishment in the other state;
- gains from the alienation of shares (including comparable interests in a partnership or trust), if, at

any time during the 365 days preceding the alienation, these shares derived more than 50 % of their value directly or indirectly from immovable property situated in that other state; and

- gains from the alienation of shares (including comparable interests or other rights in a partnership or trust) of a company that is a resident of (or, in the case of partnerships or trust, that is located in) that other contracting state, may be taxed in that other state if the alienator at any time during the 365 days preceding such alienation owned, directly or indirectly at least 20% of the capital. However, the tax so charged cannot exceed 10 % of the amount of the gains. Exemptions may apply in very specific cases.

Elimination of double taxation

In general, Luxembourg will apply the exemption method for the purpose of eliminating double taxation for most types of income. In certain situations, like dividends, interests and royalties, Luxembourg will apply the credit method. However, concerned taxpayers may nevertheless rely on the domestic participation exemption provided they meet the conditions.

Certain collective investment vehicles may benefit from the DTT

The governments of Luxembourg and Colombia agreed, in a protocol to the DTT, that they will consider any collective investment vehicles which are established in a contracting state, and which are treated as a body corporate for tax purposes in that contracting state as residents for the purpose of the DTT. Consequently, Luxembourg corporate investment funds should thus benefit from the provisions of the DTT.

NEW CIRCULAR OF LUXEMBOURG TAX AUTHORITIES | CLARIFICATIONS ON THE TAX-EXEMPT RENT SUBSIDY FOR EMPLOYEES

On 27 September 2024, the Luxembourg tax authorities issued Circular n° 115/14 clarifying certain aspects of the partially tax-exempt rent subsidy which has been introduced by the law of 22 May 2024 and applicable since 1st June 2024 (see our previous newsflash).

Background

The rent subsidy mechanism grants a 25% exemption at the level of the employee on amounts paid by the employer in relation to rental cost borne by his employees.

Circular n° 115/14 (the "**Circular**") recalls the three main conditions to benefit from the 25% tax exemption of a rent subsidy: (i) the employee is less than 30 years old on 1st January, (ii) the eligible subsidy cannot exceed the rent (excluding expenses) nor EUR 1,000 (for a full time employee) and (iii) the employee's annual gross remuneration including benefits but excluding the subsidy should not exceed 30 times the monthly social minimum wage for skilled workers.

The exemption has been introduced in Article 115, 13c of the Luxembourg income tax law ("**LITL**") and a Grand-Ducal Decree has been issued on 22 May 2024.

Clarifications by the Circular

The Circular clarifies the following points:

- **Presence of income from employment**: There needs to be a work contract between the employee and the employer, and the remuneration paid needs to be considered as employment income as defined under Article 95 LITL. An employee which is also a shareholder is eligible for the exemption even when it is the sole employee of the company.
- **Change of employer** does not affect employee's eligibility if the relevant conditions are met.
- The **ceiling to compute the tax-exempt subsidy** (higher of EUR 1,000 or the effective rent) should be adjusted where the employee works an incomplete month, on a part-time basis or his employment income is partially tax exempt in Luxembourg due to a double treaty.
- **Rent to be considered** for the eligible subsidy cap only considers the rent paid excluding other costs such as housing expenses. Where the subsidy paid exceeds the ceiling, the 25% will only apply up to the relevant cap.
- **Employees in flat sharing** are eligible for the regime. The amount of the rent to be considered is the amount payable by the employee under the rental agreement and in the absence of allocation under the rental agreement, the total rent is split among parties to the rental agreement.
- **Rent must be paid in relation to the employee's main residence** located in Luxembourg or abroad. Rents for a secondary residence are excluded, as are situations where the employee owns his main residence or does not pay a rent.
- **To assess the applicable salary cap** in case of part-time work or where employees start during the year, the salary must be converted to a full-time basis or annualized to ensure the maximum of 30 times the monthly social minimum wage for skilled workers is not reached.
- **Annual revision and adjustment by the employer of the tax-exempt subsidy** must take place at the latest upon the year end salary payment.
- The **subsidy must be paid monthly** and cannot be paid more than a month after the rent due date. Annual or quarterly payments are excluded from the exemption mechanism.
- The Circular recalls that the **tax-exemption of the rent subsidy triggers the non-deductibility of social contributions in relation to the exempt amount** and provides for a simplified calculation rule of the non-deductible portion of social contributions to be considered when computing withholding tax on salary.
- **Procedure and documentation for employers**: No preapproval from the LTA nor year end notification to the LTA are required for the application of the rent subsidy. In the salary certificate (form 160), the employer must separate the amount of the subsidy from the gross salary and the exempt part must be

clearly designated ("**exempt rent subsid**y" or "**exemption under Article. 115, 13c LITL**"). The employer must clearly identify the subsidy amounts in its payroll book. The Circular recalls that employers are responsible for the correct application of withholding tax on wages and the subsidy exemption.

- **Documentation to be provided by employees to employers** to support the amount of their rent can consist, in principle, in any relevant documentation. According to the Circular, a rental agreement should be preferred to unequivocally designate the employee and amount of the rent.
- **First eligible payments** can take place for the payroll period ending in June 2024.

ECJ CASE LAW I ENFORCEABILITY OF LEGAL PROFESSIONAL PRIVILEGE VIS-À-VIS TAX AUTHORITIES CONFIRMED

In a case involving a Luxembourg law firm which had been ordered by the Luxembourg Tax Authorities to disclose all documentation relating to advice given to a client for the purpose of an exchange of information upon request with the tax authority of another EU Member State, the Luxembourg Higher Administrative Court (*Cour administrative*) decided to stay proceedings and to refer a number of questions to the Court of Justice of the European Union (the "**ECJ**") for a preliminary ruling on the compatibility of Directive 2011/16/EU and Luxembourg national legislation with the Charter of Fundamental Rights of the European Union and, more specifically, with the protection of lawyers' professional secrecy guaranteed by Article 7 of that Charter. Please refer to our October 2023 Newsletter for more details on the background of the case and the reference for preliminary ruling.

On 26 September 2024, the ECJ handed down its ruling, which in substance follows Advocate General Juliane Kokott's opinion, on which we reported in our July 2024 Newsletter.

The ECJ first of all points out that lawyers' professional secrecy enjoys special protection, guaranteed by Article 7 of the Charter and Article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is justified in particular by the fact that lawyers are entrusted with a fundamental task in a democratic society, namely the defence of litigants. Confirming its previous case law, the ECJ held that the protection of professional secrecy also covers legal advice and that the secrecy of such advice necessarily guarantees both its content and its existence. In addition, the ECJ states that the special protection of professional secrecy extends without distinction to all areas of law.

As a result of the foregoing, the Court concludes that an injunction decision, issued in the context of an exchange of information on request in tax matters, and requesting a law firm to disclose all documentation relating to advice given to a client in company law matters, constitutes an interference with the right to respect for communications between a lawyer and his client.

While legal professional privilege, like all the other fundamental rights enshrined in the Charter, is not an absolute prerogative, the ECJ points out that any limitation must be provided for by law, respect the essential content of the right in question and satisfy the principle of proportionality.

In that regard, the ECJ notes that current Luxembourg legislation (in particular § 177(2) of the *Abgabenordnung*) generally excludes from the protection of professional secrecy advice and representation provided by a lawyer in tax matters, with the exception of that which may fall within the scope of criminal tax law. In the ECJ's view, that provision and its application in the present case, far from being confined to exceptional situations, entail an infringement of the essential content of the right to respect for communications between lawyers and their clients, and thus an interference which cannot be justified.

It can thus be inferred from the ECJ's conclusions that the application of § 177 (2) of the *Abgabenordnung* is now invalid in the context of an exchange of information on request in tax matters with another Member State of the European Union. The case will now return to the Luxembourg Higher Administrative Court (*Cour administrative*), which will hand down a final ruling in the upcoming weeks.

ECJ CASE LAW I RULES IN FAVOUR OF THE COMMISSION IN APPLE STATE AID CASE

On 10 September 2024, the ECJ ruled in favour of the EU Commission in case C-465/20 P, *European Commission v Ireland and Apple Sales International* relating to State aid granted by Ireland to Apple. Contrary to other State aid decisions involving transfer pricing, the ECJ accepted OECD transfer pricing guidance as relevant to assess whether an advantage has been granted even if not integrated into domestic law.

Background

On 30 August 2016, the EU Commission ("**EC**") found that Ireland granted illegal State aid to Apple through two tax rulings in 1991 and 2007. The latter concerned the determination of taxable profits for the Irish branches of two Irish incorporated but non-tax resident companies, Apple Operations Europe ("**AOE**") and Apples Sales International ("**ASI**"), two indirect subsidiaries of Apple Inc, a US company. AOE and ASI had entered into a cost sharing agreement ("**CSA**") with Apple Inc under which the participants agreed to share the costs in relation to Apple's IP development and granted AOE and ASI a royalty free license outside of North and South America.

ASI's Irish branch engaged mainly in sales and procurement activities while AOE's Irish branch engaged in manufacturing IT related products. Under the tax rulings, the Irish tax authorities agreed that the taxable profit of the branches should be computed as a percentage of their operating costs.

The EC found that the tax rulings reduced the tax base of both branches and constituted a derogation from the relevant reference framework, the Irish tax law. In assessing the level of profits that should have been attributed to the branches, the EC relied on the arm's length principle and the Authorised OECD Approach ("**AoA**"), despite the latter being adopted only in 2010, thus posterior to the rulings.

Apple and Ireland challenged the EC decision before the Court of Justice of the European Union ("**CJEU**"). On 15 July 2020, the General Court ("**GC**"), delivered a decision in favour of Ireland and Apple. The GC found "*that there is essentially some overlap*" between applicable Irish tax law and the AoA, thus siding with the EC on the relevant framework, but considered that the EC misapplied these rules to conclude on the presence of an advantage. This decision was appealed by the EC.

Findings of the European Court of Justice ("ECJ")

In his opinion, delivered on 9 November 2023, Advocate General Pitruzzela recommended to set aside the GC judgment and refer the case back to the GC. The ECJ set aside the GC judgment but gave final judgement on the case, finding that:

- The GC was not correct in concluding that the EC relied on an exclusion approach to allocate the licensing income. While the GC retained that the EC allocated the IP income to the branches solely because the head offices had no substance, the ECJ considered that the EC had performed appropriate functional analysis to reach the allocation.
- The GC should not have relied on the functions exercised by Apple Inc. to allocate the profits realised by the Irish branches.
- The EC was entitled to rely on the content of board minutes and the absence of certain subjects to conclude that certain decisions were not taken by the entity and concluding otherwise like the GC did, would impose an excessive burden of proof on the EC.

The outcome of the case departs from the previous State aid cases involving transfer pricing where the ECJ dismissed the EC's decisions on the ground that it did not rely on domestic legislation as the applicable reference system to assess the existence of an advantage (*Fiat*, joined Cases C-885/19 P and C-898/19 P of 8 November 2022 and *Amazon*, C-457/21 P of 14 December 2023) and that the arm's length principle with related OECD guidance are to be considered within the reference system only if integrated into national law. In the Apple case, the ECJ relied on the GC's findings and the absence of cross-appeal on this aspect (applying the *res judicata* principle) to apply the OECD AoA as they "*corresponded in essence*" to the method applicable

under Irish tax law.

LUXEMBOURG CASE LAW I CLARIFICATION ON THE PRINCIPLE OF ADVERSARIAL PROCEEDINGS FOR THE TAX AUDIT

On 11 July 2024, the Higher Administrative Court (*Cour administrative*) delivered a significant ruling in a case between Mrs. (A) and the Direct Tax Administration (ACD), following a tax audit covering the fiscal years 2010 to 2015.

After rejecting the claim regarding the territorial incompetence of the tax office as inadmissible and providing clarifications on the procedures for dematerialised audits conducted by the administration, the Higher Administrative Court focused on the central issue of the case: whether the tax office respected the principle of adversarial proceedings as provided by § 205(3) of the General Tax Law (*Abgabenordnung*, AO).

Respect for the principle of adversarial proceedings

Mrs. (A) contested the tax reassessments, arguing that she was not given the opportunity to respond to the findings before the corrective assessments were issued. The Court examined two key documents in this regard: a report (*compte-rendu*) dated 23 October 2020, and an information letter sent on 2 November 2020.

The report which detailed the alleged accounting irregularities identified during the audit, was not communicated to Mrs. (A) before the reassessments were finalised. The Court ruled that this failure to provide the report violated her right to a fair defence. Furthermore, the information letter did not clearly inform Mrs. (A) of her right to respond before the tax assessments were issued, constituting another breach of § 205(3) AO.

Conclusion

Due to these procedural violations, the Court annulled the tax assessments for the years 2010 to 2015, concluding that the tax office failed to comply with the principle of adversarial proceedings. This ruling highlights the importance of procedural safeguards in tax audit processes, reminding the tax authorities of their obligation to provide taxpayers with a meaningful opportunity to contest reassessments before any final decisions are made.

LUXEMBOURG CASE LAW I HIGHER ADMINISTRATIVE COURT CONFIRMS NET WEALTH TAX VALUATION METHOD OF CONVERTIBLE BONDS

Key takeaways

In a decision (no. 50199C), dated 17 July 2024 the Higher Administrative Court (*Cour administrative*) upheld a decision by the Director of the Luxembourg tax authorities ("**LTA**"), who in a specific case denied the valuation of convertible bonds issued by a Luxembourg tax-resident company at their fair market value for Net Wealth Tax purposes.

Facts of the case

In the case at hand, the LTA decided to deviate from the plaintiff's corporate tax return (i.e., a tax resident capital company "**LuxCo**") by valuating securities receivables, mainly composed of residual quantum of stocks in Company B's ownership, held by LuxCo (the "**Securities**") at their respective fair market value ("**FMV**") rather than their nominal value for NWT purposes.

The plaintiff consequently claimed that the corresponding convertible bonds financing said Securities ("**Convertible Bonds**") should be symmetrically estimated at their FMV by virtue of § 14 of the Luxembourg valuation law (the "***BewG***") and for the purposes of the determination of LuxCo's unitary value. The valuation method of the Convertible Bonds particularly mattered in this instance since the Securities would not qualify for the purposes of any Net Wealth Tax ("**NWT**") exemption as per Lux domestic rules and therefore end up fully taxable at 0.5%.

As a reminder, Luxembourg levies an annual NWT at 0.5% based on the unitary value determined ("**UV** ") in accordance with the NWT law and the valuation law. The UV corresponds to the difference between the assets generally estimated at their nominal value (subject to certain exceptions) and the liabilities (as of January 1 of each year). § 14 *BewG* provides that debt claims are recorded at their nominal value, unless special circumstances ("*besondere Umstände*") justify a higher or lower value for the purposes of a taxpayer's UV.

In this instance, the terms of the Convertible Bonds would provide for various wind-up options:

- the Convertible Bonds may either be converted into shares to be issued by the LuxCo at FMV,
- bought back by company itself or,
- sold to a third party.

The plaintiff notably argued that the Convertible Bonds should be similarly valued at their FMV since the terms of the Convertible Bonds would embed the option of converting said debt into equity at FMV, and said debt would symmetrically finance assets recorded at FMV for NWT.

More particularly, the plaintiff relied on the judgment of the Lower Administrative Court (*Tribunal administratif*) of 15 March 2000 no. 11226 (the "**2000 TA Ruling**") that defined the special circumstances under which bonds can be recorded at a value higher than their nominal value in the context of determining a Luxembourg taxpayer's UV.

Outcome of Higher Administrative Court's ruling

However, the Higher Administrative Court ruled that both of the LTA and the Administrative Tribunal did retain the correct valuation method pertaining to the Convertible Bonds) based on the following arguments.

Lack of linkage between bonds and assets

The alleged linkage between the value of the Convertible Bonds, the plaintiff's shares and the Company B's stocks, is not apparent neither from the Convertible Bond's terms, nor from the key dates relevant for the determination of the plaintiff's UV, so that no special circumstances ("*besondere Umstände*") justify a valuation at FMV, by derogation from § 14 BewG.

Amendments of annual accounts

The amendments of the plaintiff's annual accounts for the accounting years subsequent to the fiscal years in scope of the litigation by booking the entry of a provision to prevent any potential losses to be incurred upon future conversion at FMV of the Convertible Bonds do not sufficiently evidence the upcoming

intention of LuxCo to proceed with a conversion of its debt payables at FMV.

Inapplicability of 2000 TA Ruling

The 2000 TA Ruling cannot be transposed to the present case, given that the situation that existed at the time was fundamentally different from the case at hand i.e., the bonds (i.e., covered by the 2000 TA Ruling) were assets held by the plaintiff and not liabilities, which were listed on a foreign stock exchange and therefore embed with liquidity features, so that the consequences thereof for their value constituted *special circumstances* that would justify a valuation method that diverged from the general principle of valuation at nominal value for NWT purposes.

LUXEMBOURG CASE LAW I APPLICATION OF THE SAAR LAID DOWN IN ARTICLE 166(2BIS) OF THE INCOME TAX LAW

On 31 July 2024, the Higher Administrative Court (*Cour administrative*) applied for the very first time, the special anti-abuse provision laid down in Article 166(2bis) of the Luxembourg income tax law dated 4 December 1967, as amended (the "**LITL**") (case n° 49080C).

Background

In the case at hand, a Luxembourg resident company ("L" or the **"Appellant"**) granted, back in 2011, a profit participation facility (the "**PPF**") to a Belgian resident company ("**B**"). According to the terms of the PPF the variable interest due by B corresponds to B's net profit less a margin of 1/8%.

While such instrument was considered as a debt instrument under Belgian law, the Luxembourg tax authorities granted a ruling to L, confirming the treatment as equity under Luxembourg tax law. As a result, any income derived from such instrument should be considered as income from participation in Luxembourg while tax deductible interest expenses in Belgium.

In 2018, the PPF was repaid in advance by B, in kind, via the allocation of promissory notes (the "**DUSH NOTES**") that B held toward a US resident company.

As admitted by the parties, the nominal value of the DUSH NOTES on the date of their transfer to the Appellant, i.e. 1 January 2018, was significantly lower than the market value of these securities.

On the same day, the Appellant transferred the DUSH NOTES acquired as part of the repayment of the PPF granted to B to a Swiss company ("**CH**").

The said sale of the DUSH NOTES, at their market value, enabled the Appellant company to generate, a gain in relation to the nominal value of these securities, qualified as a hidden distribution of dividends for which it claimed the benefit of the exemption provided for in Article 166 of the LITL.

The Luxembourg tax authorities denied to L the application of the Luxembourg participation exemption. Such denial was further confirmed by the Lower Administrative Court (*Tribunal administratif*).

The Higher Administrative Court should then determine whether the transfer and subsequent disposal of the DUSH NOTES, as described above, constituted an abuse of law within the meaning of one of the two alternative conditions set out in Article 166 (2bis) of the LITL.

Grounds for decision

The Higher Administrative Court first held that the first judges erred in analysing the requirement set out in the general anti-abuse rule, instead of the special anti-abuse provision laid down in Article 166(2bis) of the LITL.

As a reminder, Article 166(2bis) of the LITL provides that : "*By way of derogation from paragraph 2, point 1,* [of Article 166 of the LITL] *the exemption does not apply to income covered by Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, which derives from a holding held directly in the capital of a collective body which is a resident of another Member State of the European Union and covered by Article 2 of Directive 2011/96/EU, to the extent that they are deductible in that Member State or where they are allocated as part of a scheme or series of schemes which, having been put in place to obtain, as the principal objective or as one of the principal objectives, a tax advantage which runs counter to the object or purpose of that directive, is not genuine having regard to all the relevant facts and circumstances. For the purposes of this provision, a scheme, which may comprise several stages or parts, or a series of schemes shall be regarded as not genuine to the extent that the scheme or series of schemes is not put in place for valid commercial reasons which reflect economic reality.*"

Since, in the case at hand, the repayment in kind of the PPF did not constitute a deductible expense in Belgian, the first alternative condition of the Article 166(2bis) of the LITL was not met.

With respect to the second alternative requirement set out in Article 166, paragraph (2bis) of the LITL, the Higher Administrative Court held that: "*As for the concept of 'non-genuine', Article 166, paragraph (2bis),*

LITL defines it as referring to an arrangement or a series of arrangements that lack valid commercial reasons that reflect economic reality. In short, this condition is similar to the criterion measuring the existence of valid extra-tax reasons resulting from the application of § 6 StAnpG. In fact, as appears from the parliamentary work, the notion of 'non-authentic', included in paragraph (2bis) of Article 166 LITL, 'essentially reflects the approach taken in Luxembourg case law, which has already held that the absence of valid extra-tax reasons is a constitutive element of abuse in tax matters (...)."

In the case at hand, none of the arguments brought forward by the Appellant convinced the Higher Administrative Court that the arrangement was genuine. In fact, a direct sale of the DUSH NOTES from B to CH would have been the normal route. The interposition of the Appellant in the arrangement could only be explained by a tax advantage. Indeed, since the implementation of the special anti-abuse rule under Article 166(2bis) of the LITL, any income generated under the PPF was no longer entitled to the benefit of the Luxembourg participation exemption regime (i.e. since such income would have been tax deductible in Belgium), so that the arrangement was not based any valid economic reasons.

CONTRIBUTORS

Gaston Aguirre Draghi, Marc-Alexandre Bieber, Harun Cekici, Yunus Cekici, Mikail Ceylan, Grégoire Colson, Nuala Doyle, Gaëlle Felly, Diana Fernandes Lopes, Ali Ganfoud, Linda Harroch, Isabel Høg-Jensen, Chloé Kaizer, Michaël Kitai, Sophie Labruyère, Evelyn Maher, Camille Mascolo, Pol Mellina, Hervé Michel, Alessandro Morini, Elma Osmic, Ailyn Sandra Pérez Utria, Daniel Riedel, Olivier Schank, Elzbieta Tumko, Nicolas Widung

BSP