CLIFFORD CHANCE

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LUXEMBOURG LEGAL UPDATE

Dear Reader,

We are pleased to provide you with the latest edition of our Luxembourg Legal Update.

This newsletter provides a compact summary and guidance on the new legal issues that could affect your business, particularly in relation to banking, finance, capital markets, corporate, litigation, employment, funds, investment management and tax law.

You can also refer to some **Topics Guides** on our website to keep you up to date with the most recent developments:

Financial Toolkit

Fintech guide

Brexit Hub

ONLINE RESOURCES

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LUXEMBOURG LAW ON MEASURES TO BE TAKEN IN THE FINANCIAL, FUND AND INSURANCE SECTORS IN CASE OF A NO-DEAL BREXIT

The law of 8 April 2019 concerning measures to be taken in relation to the financial sector in case of Brexit, and amending relevant laws governing the financial sector, the investment fund industry and the insurance sector was published in the Luxembourg official journal (Mémorial A) on 11 April 2019

Law of 8 April 2018

The overall objective of the law is to ensure financial stability and the orderly functioning of the financial markets, as well as to protect the situation of all actors of the Luxembourg financial sector and their clients, including depositors, payment services users, electronic money holders, holders of insurance policies and their beneficiaries, and investment fund investors, in the scenario of a no-deal Brexit.

For these purposes, the law confers temporary powers (for a maximum of 21 months) to the CSSF and to the CAA to apply the legal provisions governing EU firms to UK firms carrying out licensable activities in Luxembourg under free provision of services or through a branch or a tied agent at the time of a no-deal Brexit. The measures which can be taken under such powers relate to contracts that were entered into by UK firms prior to Brexit as well as to contracts concluded thereafter to the extent they are closely linked to such prior continuing contracts.

Furthermore, the law amends the Luxembourg settlement finality regime, among others, by introducing certain provisions on the recognition of non-EU/EEA payment and securities settlement systems. These amendments are not specifically dealing with the situation created by a no-deal Brexit and are not temporary. They are intended to provide legal comfort to non-EU/EEA systems as to their recognition in Luxembourg so that they can admit participants established in Luxembourg to the system without unpredictable risk. The law also foresees the criteria and procedure for recognition of such systems and registration with the BCL.

As regards the investment fund sector, the law amends in particular the UCI Law and the AIFM Law by granting to the CSSF the temporary power to continue to apply (also for a maximum of 21 months), the EU management passporting

Key points

- Funds, financial and insurance sectors MIFIR, ESMA and MiFID2
- No-deal Brexit

provisions for the free provision of services and the free establishment of a branch (as set out in the UCI Law and the AIFM Law respectively) in favour of UCITS management companies based in the UK ("UK-UCITS ManCos") and alternative investment fund managers based in the UK ("UK AIFMs"). This will thus allow UK-based UCITS ManCos and AIFMs to continue managing Luxembourg UCITS and UK AIFs as they currently do under the EU management passport during a temporary transitional period after the no-deal Brexit.

The benefit of such EU management passporting provisions for UK-based UCITS ManCos and AIFMs after a no-deal Brexit is, however, subject to the following conditions:

- The relevant UK-based entity must already be duly authorised, prior to a no-deal Brexit, as a UCITS ManCo or AIFM by the UK Financial Conduct Authority ("FCA") in accordance with the provisions of the so-called UCITS Directive and AIFMD.

- The relevant UK-based UCITS ManCo or UK AIFM must exercise the following management activities in Luxembourg at the time of the no-deal Brexit either under the free provision of services or through a branch (i) so-called "collective portfolio management" services as referred to in Article 101(2) of the UCI Law Article 5(2) and Annex 1 of the AIFM Law, or (ii) so-called "additional and non-core MiFID" services referred to in Article 101(3) of the UCI Law and Article 5(4) of the AIFM Law.

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- The UCITS or AIFs in respect of which the above management services are provided by the relevant UK UCITS ManCo or UK AIFM must be Luxembourg UCITS or AIFs.

The law will enter into force on the date of withdrawal of the UK from the EU without a withdrawal agreement in accordance with Article 50 (2) of the Treaty on the European Union, with the exception of the new provisions in relation to third-country systems which entered into force on 15 April 2019.

We kindly refer you to the further CSSF guidance on the application of the new Brexit Law temporary permissions regime powers outlined in its Press Release 19/33, 19/34 and 19/41 summarised further below.

LUXEMBOURG LAW ON MEASURES TO BE TAKEN IN RELATION TO CERTAIN LUXEMBOURG AND UK FUNDS IN CASE OF BREXIT

The Luxembourg law of 8 April 2019 concerning the measures to be taken in relation to certain Luxembourg and UK funds in case of a UK withdrawal from the EU has been published in the Mémorial A on 11 April 2019.

Law of 8 April 2019

This second law (also dated 8 April 2019) is mainly intended to ensure the stability of financial markets and the protection of investors of Luxembourg UCITS, Part II UCIs and SIFs, and addresses the problem of breaches of investment policies, rules and restrictions resulting from Brexit by these Luxembourg UCITS, Part II UCIs and SIFs.

Indeed, after Brexit, those Luxembourg investment funds that are, amongst others, invested in assets located in the UK or issued by UK issuers may no longer be in compliance with the asset eligibility criteria and risk diversification requirements as set out in their prospectus, constitutional documents or by law. For these purposes, the law amends the UCI Law and the SIF Law to grant a maximum period of 12-months from the date the UK leaves the EU in favour of the relevant affected UCITS, Part II UCIs and SIFs in order to allow them to regularise the situation caused by such non-compliance with or breaches of their investment rules and restrictions, provided that such regularisation must be done while taking into account the stability of financial markets and the protection of investors and, as regards UCITS, it should also intervene as soon as possible without undue delay within the 12-month time frame. The benefit of the 12-month regularisation period will only be granted by the law in relation to the investment positions acquired by Luxembourg UCITS, Part II UCIs and SIFs before the date of the UK's withdrawal from the EU and only in relation to non-compliant situations caused by this withdrawal.

The law also contains specific temporary provisions in favour of UK UCITS, which are currently marketed to retail investors in Luxembourg under the UCITS marketing passport and which will lose the benefit of this passport as a result of Brexit. Therefore, in order to allow these UK UCITS to continue their marketing activities in Luxembourg and in order to protect the interests of their investors, the law amends the UCI Law by providing that:

- UK UCITS authorised by the FCA which are managed by a UK-based UCITS ManCo, and which are marketed to retail investors in Luxembourg at the date of the UK's withdrawal from the EU, will be ipso jure authorised to continue marketing to retail investors in Luxembourg under article 100 of the UCI Law (which article applies to the marketing of foreign open-ended UCIs other than EU UCITS to retail investors in Luxembourg) for a period of twelve months from the date the UK leaves the EU.

- UK UCITS authorised by the FCA, which are managed by a UCITS ManCo established in EU Member state other than the UK, and which are marketed to retail investors in Luxembourg at the date of the UK's withdrawal from the EU, will be only be allowed to continue marketing to retail investors in Luxembourg under article 46 of the AIFM Law for a period of 12-months from the date of the UK's withdrawal from the EU, provided that the relevant UCITS ManCo is also duly authorised and licensed as AIFM at the date of the UK's withdrawal from the EU.

The measures provided for by the law are expected to be taken in all possible cases of UK withdrawal from the EU (and not only in the case of a no-deal Brexit), and the law will enter into force on the date of the UK's withdrawal from the EU.

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BREXIT IMPLICATIONS ON MIFIR TRANSACTION REPORTING, ESMA DATABASES AND MIFID2 CALCULATIONS

CSSF Press Release of 13 February 2019

The CSSF issued on 13 February 2019 a communication regarding the ESMA statement of 5 February 2019 (ESMA70-155-7026) on the use of UK data in ESMA databases and performance of calculations in case of a no-deal Brexit (ESMA Statement) as well as on the implications of a no-deal Brexit on the transactions reporting regime under the MiFIR.

The CSSF highlights in its communication certain points in relation to the obligation to report transactions as foreseen by Article 26 MiFIR in the special context of the UK's withdrawal from the EU.

UK TEMPORARY PERMISSION REGIME IN CASE OF HARD BREXIT

CAA Information Notice of 23 March 2019

The CAA issued on 12 March 2019 an information notice regarding the UK temporary permission regime ("TPR") in case of a hard Brexit.

The notice informs the insurance sector that, in case of a hard Brexit, EU insurance undertakings will lose their passport rights as from 29 March 2019. These undertakings that wish to continue their activities in the UK after that date (and in a hard Brexit scenario) are required to hold the authorisation 4A within the meaning of the UK Financial Services and Markets Act.

In order to reduce the consequences on the economies of EU member states, the UK government has introduced a TPR with the objective to allow insurance undertakings to continue their activities in the UK during a limited period of time to allow them to obtain a permanent authorisation for their activities in the UK.

The notice further informs that the UK Prudential Regulation Authority ("PRA") has observed an important number of insurance undertakings, currently operating in the UK via the freedom of establishment and/or the freedom to provide services, which have not yet introduced their request to benefit from the TPR regime. This notice therefore invited Luxembourg insurance undertakings operating in the UK to submit their requests via the FCA's secured transmission channel "Connect system" until 28 March 2018 at the latest.

The CAA further specifies that insurance undertakings who have already introduced a request for authorisation by the PRA regarding the establishment of a third-country branch will be automatically registered for the TPR and no other formality is required for these undertakings.

Furthermore, for the undertakings which do not wish to subscribe new insurance policies and who limit their activities in the UK solely to the execution of existing insurance policies, the UK government has established the "Financial Services Contract Regime" dedicated to ensure an orderly run-off for existing insurance policies.

TEMPORARY PERMISSIONS REGIME UNDER THE BREXIT LAW AND MANDATORY NOTIFICATION FOR UK FIRMS UNDER CRD, MIFID II, PSD2 AND EMD

CSSF Press Release 19/33

The CSSF issued on 15 July 2019 Pess Release 19/33 providing further guidance on the temporary permissions regime and the process for authorisations for UK firms (currently authorised and passported under CRD, MiFID II, PSD 2 or EMD in the UK) in the event of a "hard Brexit" ((i.e. the UK leaving the EU without concluding a withdrawal agreement based on Article 50(2) of the TEU). The CSSF distinguishes between existing activities and new contracts (entered into after the "hard Brexit" date).

Existing activities are covered by the law of 8 April 2019 on Brexit allowing the CSSF to take temporary measures to ensure the orderly functioning and stability of the financial markets by allowing currently passported UK firms to continue to provide services in respect of existing contracts and closely related contracts after the date of "hard Brexit". The press release confirms that:

(a) the transitional period will apply for 12-months following the date of a "hard Brexit"; and

(b) UK firms that are planning to continue to service existing contracts in Luxembourg under the transitional regime will be required to notify such intention via the dedicated "Brexit Notification" portal on the CSSF website by no later than 15 September 2019.

The CSSF will assess each notification received with respect to the existence of the passporting rights and the

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information provided on the activities, and inform the firms individually as to whether they can benefit or not from the transitional regime.

UK firms intending to continue their business and conclude new contracts in Luxembourg following a "hard Brexit" are requested to apply for the required authorisations as soon as possible. The CSSF notes that authorisation procedures can take up to 12 months and that in case of "hard Brexit", a UK firm not holding the necessary authorisation will be required to cease its business as of the date of "hard Brexit".

We kindly refer you to the further CSSF guidance on the "Brexit Notification" portal outlined in its Press Release 19/41 summarised further below.

TEMPORARY PERMISSIONS REGIME UNDER THE BREXIT LAW AND MANDATORY BREXIT NOTIFICATION FOR UCIS AND UK MANAGERS UNDER UCITS DIRECTIVE AND AIFMD

CSSF Press Release 19/34

On 15 July 2019, the CSSF issued Press Release 19/34 concerning (i) the mandatory notification and (ii) the subsequent corresponding application for authorisation or, as the case may be, corresponding notification/information on actions taken, to be complied with by UCIs and their UK-based UCITS ManCos and/or UK AIFMs in the context of a no-deal Brexit.

In its press release, the CSSF reminds that, in the event of a no-deal Brexit, UK-based UCIs and UK-based UCITS ManCos/UK-AIFMs will be considered as "third-country entities" from an EU perspective and will thus lose the benefit of their passporting rights under the UCITS Directive and/or AIFMD. The CSSF also points out that the Luxembourg legislator has adopted the two Brexit laws of 8 April 2018 ("Brexit Laws, as further described above) which provide, in particular, for the possibility for UK UCIs and UK UCITS ManCos/AIFMs to benefit, under certain conditions and subject to CSSF's approval as the case may be, of a temporary transitional period following the date of the Brexit during which they may continue to use their current passporting rights under the UCITS Directive and/or AIFMD to access the Luxembourg market.

In this context, the CSSF has decided to set the temporary transitional period to 12-months following the date of no-deal Brexit, and requires that Luxembourg and UK-based UCIs and UK UCITS ManCos/UK-AIFMs that will be impacted by a loss of their current UCITS and/or AIFMD passporting rights:

- notify the CSSF by 15 September 2019 at the latest of their intention and way forward to continue providing services in Luxembourg in case of a hard Brexit, such notification to be done via the dedicated "Brexit Notification" forms available through the CSSF eDesk Portal accessible at www.cssf.lu/edesk; and

- submit to the CSSF as soon as possible but no later than 31 October 2019 the subsequent corresponding application for authorisation or, as the case may be, the corresponding notification or information regarding the actions taken to address the loss of their passporting rights (the scope of the relevant submission depending on the nature of the activities that the impacted entities intend to pursue after the occurrence of a hard Brexit and/or on the steps undertaken).

For the avoidance of doubt, the CSSF further indicates that UK-based UCITS ManCos/UK-AIFMs that are currently authorised in the UK under both the UCITS Directive and the AIFMD will be required to proceed with a Brexit notification for both licences, and that a Brexit notification will also be required for entities that have already submitted an application for authorisation with the CSSF in anticipation of a hard Brexit.

According to Press Release 19/34, the CSSF may, on a case-by-case basis, decide to grant the benefit of the 12-months transitional period to the impacted UCIs and/or their managers on the basis of the information received and will inform them within 10-business days of the submission of the required information to the CSSF. The press release further specifies that such benefit may only be granted by the CSSF under the condition that the required Brexit notification and subsequent application(s) for authorisation or notification(s) of information have been complied with within the relevant prescribed timeframe. This means that entities that have not submitted a notification through the eDesk Portal by 15 September 2019 may not be entitled to benefit from the transitional regime.

The CSSF also mentions that it will provide additional information in due course on any notification requirement applicable in relation to the possibility granted to

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Luxembourg UCIs to rectify any Brexit-related investment breaches under the transitional provisions applicable under the Brexit Laws.

We kindly refer you to the further CSSF guidance on the "Brexit Notification" portal outlined in its Press Release 19/41 summarised further below.

CSSF ANNOUNCES OPENING OF NOTIFICATION PORTAL

CSSF Press Release 19/41

The CSSF issued a press release on 2 August 2019 announcing the opening of the dedicated "Brexit Notification" portal. First announced by CSSF Press Releases 19/33 and 19/34 of 15 July 2019, the "Brexit Notification" portal was set up to permit (i) UK firms (currently authorised in the UK and passported under CRD, MiFID II, PSD 2 or EMD) and (ii) Luxembourg and UK UCIs as well as UK-based UCITS ManCos/UK-AIFMs to apply in order to become eligible to benefit from the 12-month transitional regime (regulated under the Brexit Laws) and further detailed by Press Release 19/33 and Press Release 19/34 respectively in respect of existing activities (further details about what is meant by this term are provided in the Brexit Laws and Press Releases 19/33 and 19/34).

The portal and relevant forms are available at: www.cssf.lu/edesk.

Applications must be made no later than 15 September 2019. Failure to do so will result in an inability to benefit from the transitional regime.

According to Press Releases 19/33 and 19/34, the CSSF will assess each notification received with respect to the existence of the passporting rights and the information provided on the activities and inform the firms individually as to whether they can benefit or not from the transitional regime.

DELEGATION OF INVESTMENT MANAGEMENT BY LUXEMBOURG UCIS AND USE OF UK TEMPORARY PERMISSIONS REGIME IN CASE OF BREXIT BY LUXEMBOURG FIRMS AND UCIS

CSSF Press Release 19/05

On 25 January 2019, the CSSF issued Press Release 19/05 concerning (i) the delegation of investment management in relation to Luxembourg investment funds to undertakings in the UK and (ii) the use of the "TPR" by firms and investment funds established in Luxembourg.

As regards the delegation of investment management/portfolio management and/or risk management activities, the CSSF reminds that Luxembourg fund legislation (in particular, Article 110 of the UCI Law as regards UCITS, Article 18 of the AIFM Law as regards AIFs, and Article 42b of the SIF Law of 13 as regards SIFs and non-AIFs) allows such delegations to undertakings in the UK (which would have third-country status in case of a no-deal Brexit), provided that (i) the relevant UK delegates are authorised or registered for the purpose of asset management and subject to prudential supervision and (ii) cooperation is ensured between the FCA and the CSSF. In this respect, the CSSF endeavours to ensure that the required cooperation between the FCA and the CSSF shall be in place in the event of a "no deal" Brexit.

As regards the use of the TPR, the CSSF reminds that this permission regime has been opened by the FCA since 7 January 2019 and allows relevant Luxembourg firms and investment funds that passport activities in the UK (e.g. under the AIFMD and UCITS passports) to continue new and existing regulated business within the scope of their current permissions in the UK for a limited period of time once the UK leaves the EU in a no-deal Brexit scenario. The initial deadline for notification for firms and funds that wish to enter into the TPR was 28 March 2019. However, in light of the delay to the process of the UK's withdrawal from the EU, the notification window for the TPR has been extended and will now close at the end of 30 October 2019. Any fund managers that, as a result of this extension, wish to update their notification before the notification window closes on 30 October 2019, should email the FCA by the end of 16 October 2019 at the very latest. For the avoidance of doubt,

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it has to be noted that, in order to benefit from the use of the TPR, Luxembourg UCITS/AIFs must:

- already be marketed in the UK under the UCITS/AIFMD passport before being able to make the TPR notification with the FCA, which means that a normal EU28 marketing notification must have been obtained and communicated from the CSSF to the FCA before making the UK TPR notification for the EU27 situation; and
- duly inform the CSSF of any notifications made to the FCA under the TPR by sending an email notification to the CSSF's dedicated address (opc@cssf.lu) as soon as they have submitted their notification to the FCA, which email notification must include the name of the firm, fund or sub-fund and a detail of the services/activities for which the TPR notification has been submitted as well as the date of the TPR notification.

EIOPA RECOMMENDATIONS FOR THE INSURANCE SECTOR IN LIGHT OF BREXIT

CAA Circular Letter 19/15

The CAA issued on 30 July 2019 circular letter 19/15 on the recommendations for the insurance sector in light of the United Kingdom withdrawing from the European Union (the "Recommendations") published by EIOPA.

The purpose of the circular is to announce that the CAA intends to fully comply with the Recommendations.

The Recommendations will apply from the date following that on which the EU treaties will cease to apply to the UK and on its territory pursuant to Article 50(3) of the Treaty on European Union.

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INTERNATIONAL AND EU DEVELOPMENTS

New International and EU Texts

Over the past few months, a number of new EU Regulations and Directives have been published. These include, amongst others, the following:

Banking Union Package

- N°2019/876 of 20 May 2019 amending CRR as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and EMIR (CRR 2).

Please refer to our Clifford Chance client briefing analysing the key changes introduced by CRDV to CRD IV remuneration provisions.

- N°2019/878 of 20 May 2019 amending CRD IV as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures (CRD V)
- N°2019/879 of 20 May 2019 amending BRRD as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC (BRRD 2)
- N°2019/877 of 20 May 2019 amending SRMR as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms (SRMR 2)

EMIR Refit

N°2019/834 of 20 May 2019 amending EMIR as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories.

For further details on these and other international developments and EU Regulations and Directives, as well as new Commission Delegated and Implementing Regulations and Directives, we kindly refer you to our Clifford Chance client briefings and alerts.

Legislation

Prospectus Regulation: Publication of a New Prospectus Law

Law of 16 July 2019

A new law of 16 July 2019 on prospectuses for securities was published in the Luxembourg official journal (Mémorial A) on 18 July 2019.

The new Prospectus Law repeals the law of 10 July 2005 on prospectuses for securities and implements the Prospectus Regulation into the Luxembourg law environment.

Under the Prospectus Law, offers of securities to the public not exceeding EUR 8,000,000 are exempted from the obligation to publish a prospectus. By doing so, the Luxembourg legislator opts for the maximum amount allowed to be exempted under the Prospectus Regulation. However, for offers to the public exceeding EUR 5,000,000 (but not exceeding EUR 8,000,000), the publication of an information note is required.

Furthermore, the Prospectus Law provides a set of less restraining rules on the preparation, the approval process and the distribution of prospectuses for public offers and for admissions to trading of securities that do not fall within the scope of the Prospectus Regulation. A similar regime already existed under the 2005 prospectus law.

The Prospectus Law entered into force on 21 July 2019, except for Article 4 thereof (setting out the aforementioned exemptions) which entered into force on 16 July 2019.

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SHRD 2: Publication of Implementing Law

Law of 1 August 2019

The Luxembourg law of 1 August 2019 modifying the Luxembourg law of 24 May 2011 on the exercise of certain rights of shareholders in listed companies (SHR Law) and transposing Directive (EU) 2017/828 (SHRD 2), which amends Directive 2007/36/EC with regard to the encouragement of long-term shareholder engagement, has been published in the Mémorial A on 20 August 2019.

The main objective of the SHRD 2, and hence the new law, is to improve the long-term viability of European companies and create a more attractive environment for shareholders. The law introduces new chapters into the SHR Law to implement the above measures into the Luxembourg legal environment.

The amendments that are introduced by the law are mainly relevant for Luxembourg companies the securities of which are admitted to trading on an EU-regulated market (within the meaning of Directive 2014/65/EU) and to their shareholders and intermediaries providing services to them. The new legal regime imposed by the law has to be read together with the EU Commission Implementing Regulation 2018/1212, dated 3 September 2018, which contains a prescriptive list of obligations for both issuers and intermediaries.

Administrative Fees: Publication of New Grand Ducal Regulation on the Fees to be Levied by the CSSF

Grand Ducal Regulation of 1 March 2019

A new Grand Ducal regulation dated 1 March 2019 amending the Grand Ducal regulation of 21 December 2017 on the fees to be levied by the CSSF has been published in the Luxembourg official journal (Mémorial A).

Besides amending several existing provisions concerning the fees applicable to undertakings for collective investment, alternative investment fund managers, pension funds, mortgage lending intermediaries, and securitisation structures, the regulation also adds a new section on the fees applicable to central securities depositories.

The new regulation entered into force on 9 March 2019.

AML/CTF: Grand Ducal Regulation on the Registration, Payment of Administrative Fees and Access to Information recorded in the Register of Beneficial Owners

Grand Ducal Regulation of 15 February 2019

A Grand Ducal regulation dated 15 February 2019 on the registration, payment of administrative fees and access to information recorded in the register of beneficial owners (RBE) has been published in the Luxembourg official journal (Mémorial A).

The new regulation further specifies (i) the registration process for the information that needs to be filed with the RBE and (ii) the conditions to access information contained in the RBE in accordance with the law of 13 January 2019 setting up the RBE. The new regulation also foresees the applicable administrative fees and the modalities for their payment.

The new regulation entered into force on 1 March 2019.

AML/CTF: Luxembourg Bill Implementing AMLD 5

Bill N°7467

A new bill n°7467 implementing certain provisions of Directive (EU) 2018/843 of 30 May 2018 amending AMLD 4 (AMLD 5), was lodged with the Luxembourg parliament on 8 August 2019.

The bill aims to implement certain AMLD 5 provisions related to professional obligations and powers of the supervisory authorities and self-regulatory bodies in the area of AML/CTF, as well as to reinforce and harmonise the treatment of high-risk third countries based on recommendations issued by the FATF. For this purpose, the bill foresees amendments in particular to the AML Law. Amongst others, the bill specifies the standard and enhanced customer due diligence obligations that professionals subject to the AML Law must apply, and extends the scope of such professionals explicitly to cover also providers engaged in exchange services between virtual currencies and fiat currencies, custodian wallet providers, and under certain circumstances persons trading or acting as intermediaries in the trade or the storing of works of art.

The publication of the bill constitutes the start of the legislative procedure.

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Restrictive Measures in Financial Matters: Luxembourg Bill Implementing Restrictive Measures in Financial Matters

Bill N°7395

A new bill n°7395 implementing restrictive measures in financial matters in respect of certain countries, persons, entities and groups, was lodged with the Luxembourg parliament on 15 January 2019. The bill aims to implement in Luxembourg restrictive measures in financial matters adopted by the United Nations Security Council resolutions in application of Chapter VII of the United Nations Charter and decisions and regulations adopted by the European Union since 1 December 2009 concerning prohibitions and restrictive measures in financial matters in respect of certain persons, entities and groups. Financial sanctions in the context of combat against terrorist financing are currently addressed in Luxembourg by the law of 27 October 2010 implementing United Nations Security Council resolutions as well as acts adopted by the European Union concerning prohibitions and restrictive measures in financial matters in respect of certain persons, entities and groups (2010 Law). The bill aims at extending the scope of the 2010 Law beyond the initial objective of counter terrorism financing to also cover actions against the proliferation of weapons of mass destruction, protection of the peace and international security, and violations of international law. Furthermore, the bill includes additional provisions to mirror those contained in the law of 27 June 2018 on export controls.

The following restrictive measures are foreseen in the bill:

- prohibition or restriction of any financial activities;
- freezing of funds, assets or other economic resources held or controlled, directly, indirectly or jointly with or by a person, entity or group in the scope of the present bill or by a person acting in their name or upon their instructions; and
- prohibition or restriction of providing financial services, training or advice technical assistance in respect of a country, natural or legal person, entity or group in the scope of the bill.

The restrictive measures in financial matters are intended to apply to (i) natural persons with Luxembourg citizenship, who reside or operate in or from the territory of Luxembourg or from abroad, (ii) legal persons having their registered office, permanent establishment or centre of main interests in the territory of Luxembourg and who operate in or from the territory of Luxembourg or from abroad, and (iii) any natural or legal person who operates in or from Luxembourg.

The bill foresees that the necessary execution measures in relation to the restrictive measures will be implemented by a Grand Ducal regulation which will specify which type of restrictive measure shall apply to which person, entity or group. The bill further foresees a possibility to implement temporary restrictive measures pending the referral of the matter by the Luxembourg Foreign Affairs Minister to the United Nations Organisation or European Union.

The natural or legal persons which are required to execute the restrictive measures shall inform the Luxembourg Finance Minister of the execution of each measure. The CSSF, the CAA and Luxembourg Registry (*Administration de l'Enregistrement et des Domaines*) are competent for monitoring the compliance of the professionals falling within their respective supervision with the provisions of the bill and may apply in this respect any measures and exercise any powers conferred to them, including sanctions.

The sanctions foreseen by the bill for responsible individuals include imprisonment from 8 days to 5 years and/or criminal fines ranging from EUR 12,500 to EUR 5,000,000. Criminal fines for legal persons may reach certain multiples of the range of fines foreseen for individuals. If the breach results in an important financial gain, the fine may amount to quadruple the sum gained by such breach.

The publication of the bill constitutes the start of the legislative procedure.

Export: Luxembourg bill Concerning the Office du Ducroire Luxembourg (Luxembourg Export Credit Agency)

Bill N°7408

A new bill n°7408 concerning the Luxembourg Export Credit Agency, Office du Ducroire Luxembourg (ODL), was lodged with the Luxembourg parliament on 13 February 2019.

The bill intends to replace the existing legal/regulatory regime of the ODL which consists of the law of 24 July 1995, the Grand Ducal regulation of 27 July 1997, and the Grand Ducal regulation of 11 November 2008.

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The bill responds to the increasing demand for new products by enlarging the scope of activities of the ODL. For instance, under the new bill, the ODL would be able to offer specific insurance products covering risks related to export activities which, in turn, would facilitate access to financing for Luxembourg enterprises pursuing such activities.

Furthermore, the support of Luxembourg exports by means of a partial contribution in the promotion, exhibition and export training expenses will be formally included in the missions of the ODL. Up to this date, this mission has only been conferred on the ODL by a convention concluded between the ODL and the Luxembourg government in 2002.

The second objective of the bill is to introduce an internal governance structure with a board of directors, a management, and own staff. While the board of directors holds the main decision-making powers, the management will be in charge of the day-to-day business of the ODL. Under the proposed regime, the board of directors will also have the power to create expert committees (e.g., credit committee, legal committee) which will advise the other bodies of the ODL in technical questions. Moreover, the bill intends to formally create the COPEL Committee (*Comité pour la Promotion des Exportations Luxembourgeoises* or Committee for the Promotion of Luxembourg Exports) as a decision-making body.

Finally, the bill foresees a capital increase of the ODL.

The lodging of the bill with the parliament constitutes the start of the legislative procedure.

REGULATORY DEVELOPMENTS

CRD IV/CRR: Setting of the Countercyclical Buffer Rate for the Second and Third Quarter of 2019

CSSF Regulations 19-01 and 19-07

The CSSF issued on 29 March 2019 regulation 19-01 on the setting of the countercyclical buffer rate for the second quarter of 2019 and on 28 June 2019 regulation 19-07 on the setting of the countercyclical buffer rate for the third quarter of 2019.

The regulations follow the Luxembourg Systemic Risk Committee's recommendation of 8 March 2019 (CRS/2019/002) and of 31 May 2019 (CRS/2019/005), and maintain the countercyclical buffer rate for relevant exposures located in Luxembourg to 0.25% for the second and third quarter of 2019.

The regulations entered into force on 1 April 2019 and 1 July 2019, respectively.

MiFID2/MiFIR: Provision of Investment Services or Performance of Investment Activities and Ancillary Services in Luxembourg by Third-Country Firms

CSSF Circular 19/716

The CSSF published on 12 April 2019 CSSF circular 19/716 dated 10 April 2019 on the provision of investment services or the performance of investment activities and ancillary services (Investment Services) in Luxembourg by third-country firms (TCF) in accordance with Article 32-1 of the Financial Sector Law.

The circular is addressed to TCF that (intend to) provide Investment Services or (intend to) propose ancillary services in Luxembourg. A TCF, before providing Investment Services or proposing ancillary services in Luxembourg, shall first identify:

- the type of service it intends to provide (Investment Services or any other service under the Financial Sector Law); and
- the type of clients it intends to serve according to the classification of clients under MiFID2, as transposed in the Financial Sector Law (i.e. retail clients, professional clients per i.e., professional clients "on request" or eligible counterparties).

Article 32-1 of the Financial Sector Law and Articles 46 et seq. of Regulation (EU) No 600/2014 on markets in financial instruments (MiFIR) will determine the applicable regime and any specific requirements. The CSSF also notes that following the entry into force of Article 32-1 of the Financial Sector Law and of the new circular, CSSF circular 11/515 dealing in point (4) of Part II with the regime provided for in Article 32(5) of the Financial Sector Law no longer applies to Investment Services provision by a TCF (but only to non-investment (banking) services) and is currently under review.

Part II of the circular provides detailed information on the different regimes under Article 32-1 of the Financial Sector Law.

For the provision of Investment Services in Luxembourg to retail clients or professional clients "on request", a TCF must establish a branch in Luxembourg, in accordance with Article 32-1 (2) of the Financial Sector Law and Chapter I of Part II of the circular.

Chapter II of Part II of the circular clarifies, inter alia, that the provision of Investment Services to "per se" professional clients per i.e. or eligible counterparties in Luxembourg may be conducted:

(a) through a branch established in Luxembourg, in accordance with Article 32-1 (1) of the Financial Sector Law; or

(b) from a third country on a cross-border basis without establishing a branch in Luxembourg, based on:

    (i) an equivalence decision taken by the European Commission and registration to the relevant ESMA register (European Regime); or

    (ii) a decision taken by the CSSF (National Regime).

The circular specifies the conditions (including as regards third-country supervision and authorisation equivalence, cooperation between the CSSF and the third-country supervisory authority, and third-country authorisation to provide Investment Services) and formalities that need to be fulfilled by a TCF wishing to provide Investment Services in Luxembourg to benefit from the National Regime.

The CSSF further specifies that where Investment Services are provided at the client's sole request (reverse solicitation), the TCF is not required to apply for an authorisation in Luxembourg or to establish a branch and refers for further guidance to the ESMA "Q&A on MiFID II and MiFIR investor protection and intermediaries topics" (ESMA35-43-349).

The circular applies with immediate effect.

MiFID2/MiFIR: Publication of CSSF TAF Handbook Version 2019.1

CSSF TAF Handbook Version 2019.1

On 29 April 2019, the CSSF issued a new version of its handbook on transactions in financial instruments ("TAF" or "*Transactions sur Actifs Financiers*"), version 2019.1.

The handbook describes the transaction reporting principles to be used by investment firms, market operators and approved reporting mechanisms (ARMs) in order to report transactions to the CSSF as the NCA for Luxembourg.

The new handbook updates a previous TAF handbook version dated 20 February 2018 (version 2018.1) by (i) restructuring it, (ii) adding some clarifications and several specific validation rules, as well as (iii) deleting details relating to the transitional phase.

MiFID2/MiFIR: Prohibition of the Marketing, Distribution or Sale of Binary Options to Retail Clients

CSSF Regulation 19-05

The CSSF issued on 26 June 2019 Regulation 19-05 prohibiting the marketing, distribution or sale of binary options to retail clients.

The regulation provides a detailed definition of a binary option, and prohibits the marketing, distribution and sale of such products to retail clients.

The regulation entered into force on 1 July 2019.

MiFID2/MiFIR: Restriction of Marketing, Distribution or Sale of Contracts for Differences to Retail Clients

CSSF Regulation 19-06

The CSSF issued CSSF Regulation 19-06 dated 26 June 2019 restricting the marketing, distribution or sale of contracts for difference (CFDs) to retail clients.

The regulation imposes a restriction on the marketing, the distribution or the sale of CFDs if certain criteria are met (such as, amongst others, where the provider of the CFD requests the retail client to pay the protection with respect to initial margins).

Furthermore, the regulation prohibits any activity aiming at circumventing the aforementioned restrictions.

The regulation will enter into force on 1 August 2019.

MiFID2/MiFIR: CSSF Circular on ESMA guidelines on the Application of the Definitions of Commodity Derivatives in Sections C6 and C7 of Annex I of MiFID2

CSSF Circular 19/723

The CSSF issued circular 19/723 dated 18 July 2019 on the implementation of the guidelines issued by the ESMA on the application of the definitions of commodity derivatives in

Sections C6 and C7 of Annex I of MiFID2 (ESMA-70-156-869).

The circular implements the guidelines into Luxembourg regulations and replaces circular CSSF 15/615. It is addressed to all financial market participants.

The guidelines relate to the application of the definitions of commodity derivatives and their classification under points 6 and 7 of section C (Financial Instruments) of Annex I of MiFID2, transposed into Luxembourg legislation by the law of 30 May 2018 on markets in financial instruments.

The aim of the guidelines is to ensure a common, uniform and consistent application of MiFID2 and potentially other directives and regulations that rely on MiFID2 definitions of financial instruments.

The guidelines represent an updated version of the ESMA guidelines published under MiFID (ESMA/2015/675) which were transposed into Luxembourg regulation by circular CSSF 15/615.

The circular entered into force on 18 July 2019.

MiFID2/MiFIR: Reporting Obligations under Article 26 MIFIR

CSSF Press Release 19/36

The CSSF issued press release 19/36 on 19 July 2019 regarding Article 26 of MiFIR.

Under Article 26 of MiFIR, credit institutions and investments firms which execute transactions in financial instruments are required to report complete and accurate details of such transactions to the competent authority.

The press release aims at clarifying the transition from the old format TAF reporting files towards the new XML format files to be submitted to the CSSF.

Starting from 20 September 2019 (15:00 Luxembourg local time), any transaction reports submitted must be provided in the new format.

PSD 2: Complaints about Infringements of the Payment Services Law

CSSF Press Release 19/08 of 6 February 2019

The CSSF issued a press release 19/08 dated 6 February 2019 on complaints about infringements of the Payment Services Law.

In the press release, the CSSF draws the attention of the public to the establishment of a formal procedure to allow, in particular, users of payment services, electronic money holders and other interested parties, including consumer associations, to submit complaints to the CSSF about an alleged infringement of provisions of the Payment Services Law by PSPs and e-money issuers (EMIs). PSPs in Luxembourg include banks, payment institutions, e-money institutions or Post Luxembourg (*Services Financiers Postaux*).

The CSSF further notes that a complaint about a PSP or EMI which a complainant suspects does not meet legal requirements under the Payment Services Law will be treated separately from individual disputes that customers may have with a PFS that is subject to the supervision of the CSSF. Such individual disputes are treated within the framework of the out-of-court resolution procedure of the CSSF.

Finally, the press release refers to its website for further information about the procedure that has to be followed in order to submit to the CSSF complaints about alleged infringements of the Payment Services Law and about the out-of-court resolution procedure.

PSD 2: Obligations Regarding Strong Customer Authentication and Common and Secure Open Standards of Communication for Payment Service Providers

CSSF Press Release of 28 February 2019

The CSSF issued on 28 February 2019 a press release on obligations regarding strong customer authentication and common and secure open standards of communication under Commission Delegated Regulation (EU) 2018/389 of 27 November 2017.

The press release draws the attention of PSPs supervised by the CSSF to a certain number of new obligations resulting from the regulation and from the PSD 2 which has been implemented in Luxembourg by law of 20 July 2018.

The regulation applies to the PSPs who offer payment accounts (including e money accounts) that are accessible online:

- regardless of whether this access allows consultative services only, transactional services only, or both; and

- irrespective of: a presumed lack of interest of ASPSP clients in using the account information and/or payment initiation services offered by third-party providers;
- the size of the ASPSP and the number of its clients;
- the fact that the ASPSP only has corporate clients;
- the fact that the payment account only allows transactions to its owner's account held at another ASPSP.

The press release reiterates certain key points of the regulation, in particular security standards (Strong Customer Authentication (SCA)), access interface modalities and related obligations, and the obligation to implement a contingency mechanism (or the possibility to obtain a contingency mechanism exception) and rewinds PSPs to comply with the regulation.

The press release further provides details with respect to the use of an access interface solution developed and managed by a third party and related outsourcing questions, including where a contingency mechanism exception is applied for.

Finally, the press release contains in an annex the timelines and deadlines to respect by PSPs with regards to access interfaces for third-party providers (such as, notably, account information service providers and payment initiation service providers) and to contingency mechanism exemptions. The CSSF also details of the forms available on its website that have to be used to apply for such an exemption.

PSD 2: Reporting Requirements for Fraud Data under Article 96(6) of PSD 2

CSSF Circular 19/712

The CSSF issued a new circular 19/712 dated 14 March 2019 on the EBA guidelines on reporting requirements for fraud data under Article 96(6) of the PSD 2 (Guidelines).

The circular is addressed to all PSPs for which the CSSF is the designated competent authority for supervisory purposes (except account information service providers) and aims to draw their attention to the Guidelines.

The Guidelines provide details with regard to the obligations of reporting fraud data related to different means of payment that PSPs have to report to their competent authorities as well as on the aggregated data that the competent authorities must share with the EBA and the ECB, in accordance with Article 96(6) of the PSD 2. The Guidelines define the types of payment transactions and the fraudulent payment transactions to be reported as well as the reporting frequency (every six months according to the applicable data breakdown(s) set out in Annex 2 to the Guidelines), the reporting timelines and the reporting periods.

The CSSF specifies that the fraud reporting is to be provided even if no fraud occurred during the reporting period. In particular, the data reported shall be submitted to the CSSF within 3 months after the end of the report period; the two half-yearly reporting periods are 1 January to 30 June and 1 July to 31 December respectively and the first reporting will be due by 30 September 2020. These instructions should also apply with regard to PSPs' obligation to report adjustments to data referring to any past reporting period, by submitting the respective revised reporting tables (and indicating the past reporting period they refer to). Such adjustments should be reported during the next reporting window after the information necessitating the adjustments is discovered.

Detailed technical instructions for sending the fraud reporting data will be published separately on the CSSF website at a later date.

The Circular applies as of 1 January 2020.

PSD 2: Security Measures for Operational and Security Risks of Payment Services under PSD 2

CSSF Circular 19/713

The CSSF issued a new circular 19/713 dated 14 March 2019 on the guidelines of the EBA on the security measures for operational and security risks of payment services under the PSD 2 (Guidelines).

The circular is addressed to all PSPs for which the CSSF is the designated competent authority for supervisory purposes and aims to draw their attention to the Guidelines.

The Guidelines provide details of the security measures that must be taken in order to manage the operational and security risks relating to the payment services provided. Such security measures need to be audited in accordance with point 2.6 of the Guidelines on an annual basis by the PSP's internal auditor.

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The Circular provides guidance in relation to the form and time frame for the submission to the CSSF of the updated and comprehensive assessment of the operational and security risks relating to the payment services that the PSP provides, and of the adequacy of the mitigation measures and control mechanisms implemented in response to those risks.

The Circular applied immediately upon its publication.

CSDR: Introduction of Quarterly Internalised Settlement Reporting Requirements pursuant to CSDR

CSSF Circular 19/709

The CSSF issued circular 19/709 dated 25 February 2019 on the introduction of quarterly internalised settlement reporting requirements pursuant to Article 9(1) of the CSDR.

The circular specifies that, all credit institutions who deal with settlements internally and are incorporated under Luxembourg law (with the exception of the credit institutions that have requested a CSD licence under Article 17 of the CSDR), and Luxembourg branches of non-EU credit institutions, as well as investment firms providing services listed at Annex II Section C(1) of the Financial Sector Law (with the exception of investment firms of this type that have requested a CSD licence under Article 17 of the CSDR), will need to submit to the CSSF one report for their activities in Luxembourg (including the activity of their branches in Luxembourg), separate reports for the activity of their branches per EU Member State, and one report for the activity of their branches in third countries.

For further information and technical details regarding the reporting requirements, the circular refers to (i) Commission Delegated Regulation (EU) 2017/391 of 11 November 2016, (ii) Commission Implementing Regulation (EU) 2017/393 of 11 November 2016 (which both entered into force as from 10 March 2019), (iii) the ESMA guidelines on internalised settlement reporting within its final report of 28 March 2018 (ESMA70-151-1258), as well as (iv) related IT technical documentation available on the ESMA website.

The first internalised settlement reporting should have been sent to the CSSF via the transmission channels E-File or SOFiE within 10 working days from the end of the first quarter following 10 March 2019, i.e. on 12 July 2019 at the latest.

The ensuing reports must be sent to CSSF on a quarterly basis via the transmission channels E-File or SOFiE within 10 working days from the end of the fourth quarter of a calendar year.

AML/CTF: Survey Related to the AML/CTF

CSSF Press Release 19/10 of 12 February 2019

The CSSF issued a press release stating that the annual online survey collecting standardised key information concerning money laundering and terrorist financing risks to which the professionals under its supervision are exposed, as well as, concerning the implementation of related risk mitigation and targeted financial sanctions measures, was launched on 12 February 2019.

The CSSF states that this cross-sector survey contributes to the CSSF's ongoing assessment of laundering and terrorist financing risks present in the financial sector and forms part of the AML/CTF risk-based supervision approach put in place by the CSSF over recent years.

AML/CTF: Qualitative Questionnaire for Brokers concerning AML/CTF

CAA Circular 19/8

The CAA issued on 5 March 2019 a new circular letter 19/8 introducing a qualitative questionnaire for brokers concerning AML/CTF.

The Circular has been issued in the context of the AML/CTF guidelines established by EBA, ESMA and EIOPA in 2017 (ESAs 2016 72).

The scope of the circular includes insurance brokers, insurance brokerage companies, reinsurance brokers and reinsurance brokerage companies.

The circular specifies that the AML Law applies to intermediaries (including brokers and brokerage companies) licensed or authorised to conduct business in Luxembourg when they act in respect of life insurance or other investment-related services and/or whenever they bring about credit and surety operations.

Nonetheless, all brokers and brokerage companies (regardless of their respective activities) have to comply with UN Security Council resolutions, as well as with any prohibitions and measures introduced at an EU level concerning financial restrictions with respect to certain persons, entities, or groups in the context of AML/CTF.

The questionnaire introduced by the circular aims at systematically collecting standardised and up-to-date information which will allow the CAA to assess the brokers'/brokerage companies' compliance and efficiency with regard to their AML/CTF obligations.

A template of the questionnaire (Excel format) was sent to the brokers and brokerage companies during March 2019. The completed questionnaire had to be returned to the CAA, electronically, to lbcft@caa.lu, and in paper copy via postal mail. It required the signature of the broker, or, in the case of a brokerage company, by the manager and the person in charge of the AML/CTF control.

The questionnaire had to be returned to the CAA by 31 May 2019 at the latest.

AML/CTF: Amendments to the AML Regulation regarding the Separate Report of the Statutory Auditor

CAA Circular 19/11

The CAA issued on 18 March 2019 circular 19/11 on the amendments to Article 47 of the CAA regulation n°13/01 of 23 December 2013 on AML/CTF concerning the report to be provided by statutory auditors with respect to insurance and reinsurance undertakings.

The circular aims at drawing the attention to the difference the special report (*rapport spécial*, previously *compte rendu analytique*) within the meaning of the regulation and the separate report (*rapport distinct*) within the meaning of CAA circular letters 09/1 and 09/2, which both have be drawn up by the statutory external auditor (*réviseur d'entreprise*) of the (re)insurance undertakings. The special report informs the corporate bodies of the undertaking about their compliance with its AML/CTF obligations, whereas the separate report informs the CAA about certain key elements controlled by the CAA's prudential supervision.

The management board of the undertaking is expected by the CAA to specifically review the findings of the special report in order to take appropriate measures addressing, as appropriate, potential finding of the report and the CAA will verify the content of the special report and the minutes of the board meeting as well as the implementation of the remedial action decided upon by the board of the undertaking through on-site inspectors.

Transparency Requirements for Issuers: Enforcement of the 2018 Financial Information published by Issuers subject to the Transparency Law

CSSF Press Release 19/02 of 10 January 2019

The CSSF issued a press release 19/02 dated 10 January 2019 on the enforcement of the 2018 financial information published by issuers subject to the Transparency Law.

Pursuant to the Transparency Law, the CSSF is monitoring that financial information published by issuers, in particular their consolidated and non-consolidated financial statements, is drawn up in compliance with the applicable accounting standards. The CSSF draws the attention of issuers and auditors on identified financial reporting topics they should particularly consider when preparing and auditing, respectively, the IFRS financial statements for the 2018 year-end and refers to the European common enforcement priorities (ECEPs) for such financial statements.

ECEPs have been identified by ESMA in collaboration with the European national accounting enforcers (including the CSSF). A more detailed press release issued by ESMA on this topic is available on the websites of ESMA and the CSSF.

The CSSF further informs that its forthcoming enforcement campaign will be governed by priorities which are described in more detail in the press release.

STS Regulation: STS Criteria for ABCP and for Non-ABCP Securitisation

CSSF Circular 19/719

The CSSF issued circular 19/719 dated 15 May 2019 on the implementation of the guidelines issued by the EBA on the STS criteria for non-ABCP securitisations and the STS criteria for Asset-Backed Commercial Paper (ABCP) securitisations.

The Circular is addressed to all originators, original lenders, sponsors, securitisation entities and investors, and third persons verifying STS criteria compliance of an STS securitisation.

The aim of the circular is to draw the attention of these professionals and entities to the guidelines with which the CSSF requires compliance.

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The Guidelines which entered into force on 15 May 2019 and are annexed to the circular.

Prospectus Regulation: Implementation of the Prospectus Regulation

CSSF Circular 19/724

The CSSF issued on 19 July 2019 circular 19/724 on technical specifications regarding the submission to the CSSF of documents under the Prospectus Regulation and the Prospectus Law as well as on the general overview of the regulatory framework on prospectuses, and which replaces CSSF circular 12/539.

The circular is addressed to all the persons and entities supervised by the CSSF and to everybody who falls under the scope of the Prospectus Regulation or of chapter I, part III of the Prospectus Law.

The circular gives an overview of the new Prospectus Regulation and sets out the main differences between the new regulatory framework and the old legislation.

The mission and competences of the CSSF are outlined in detail in the first part of the circular whereas, the second part of the circular aims at describing the exact technical procedures regarding the submission of documents to the CSSF as part of an approval/notification procedure.

Finally, the circular refers to Delegated Regulation (EU) 2019/980 which supplements the rules laid down in the circular.

Prospectus Regulation: Application and Entry into Force of the Prospectus Regulation

CSSF Press Release 19/37

The CSSF issued on 19 July 2019 press release 19/37 regarding the application and entry into force of the Prospectus Regulation.

The press release informs the public of the entry into force of the Prospectus Regulation and of the law of 16 July 2019 implementing the Prospectus Regulation into Luxembourg law. The latter replaces the law of 10 July 2005 on prospectuses for securities. Equally, taking into account the regulatory changes of the prospectus legislation, CSSF Circular 19/724 replaces CSSF Circular 12/539.

Finally, the press release draws professionals' attention to the publication of new ESMA Questions & Answers regarding the Prospectus Regulation and its application.

Prudential Reporting: Annual Reporting by Credit Institutions

CSSF Circular 19/710

The CSSF issued circular 19/710 dated 25 February 2019 updating circular CSSF 15/602 on the documents to be submitted on an annual basis by credit institutions.

Besides some minor amendments, the circular provides several specifications concerning the reporting by Luxembourg branches of credit institutions licensed in another EU member state in relation to areas for which the CSSF has supervisory competence as host country authority.

The circular entered into force with immediate effect.

Prudential Reporting: Complaints-Handling for the Securities and Banking Sectors

CSSF Circular 19/718

The CSSF issued circular 19/718 dated 30 April 2019 on the adoption of guidelines applicable to complaints-handling for the securities (ESMA) and banking (EBA) sectors issued by the Joint Committee of the European Supervisory Authorities (JC 2018 35).

The circular is addressed to all professionals subject to prudential supervision by the CSSF and all entities subject to public supervision of the audit profession by the CSSF.

The aim of the circular is to draw the attention of these professionals and entities to the guidelines with which the CSSF complies.

The new guidelines supplement the guidelines of 27 May 2014 for complaints-handling for the securities (ESMA) and banking (EBA) sectors issued by the Joint Committee (JC 2014 43) and rendered applicable through CSSF regulation 16-07 relating to out-of-court complaint resolution.

The content of the 2014 guidelines remains unchanged by the new guidelines, but the scope is extended to (i) credit intermediaries and non-credit institution lenders (as defined in Articles 4(5) and (10) of the Directive 2014/17/EU, respectively) and (ii) payment institutions providing only payment initiation services or account information services (as defined in Article 33 of the Directive 2015/2366/EU).

The Guidelines have been applicable since 1 May 2019.

Prudential Reporting: Publication of Q&A concerning CSSF Circular on the Introduction of a "semi-annual reporting" of Borrower-Related Residential Real Estate Indicators

Q&A concerning CSSF Circular on the Introduction of a semi-annual reporting of Borrower-Related Residential Real Estate Indicators

The CSSF issued a Questions and Answers document dated 9 April 2019 on CSSF circular 18/703 on the introduction of a semi-annual reporting of borrower-related residential real estate indicators.

In the Q&A, the CSSF synthesises its responses to questions it has received regarding the circular, including, inter alia, questions regarding details on reporting obligations under the circular and on the computation of the LTV-C for loans related to house saving contracts.

EMIR: EMIR REFIT and Related ESMA Q&As

CSSF Press Release 19/21

The CSSF issued a press release 19/21 regarding Regulation (EU) 2019/834 of 20 May 2019 (EMIR REFIT) amending EMIR, and the relevant ESMA Questions and Answers (Q&As).

The CSSF informed market participants of amendments and clarifications related to EMIR, notably with regards to clearing notification requirements for market participants, as well as to reporting obligations.

Furthermore, the CSSF drew the attention to the Q&As issued by ESMA which provide clarifications, in particular, the clearing obligation for financial counterparties and non-financial counterparties and the procedure for notification when a counterparty either exceeds or ceases to exceed the clearing thresholds or chooses not to calculate its positions against the clearing threshold.

EMIR: Interactive Form for the Notifications by Financial Counterparties and Non-Financial Counterparties Exceeding the Clearing Threshold

CSSF Press Release 19/27

The CSSF issued press release 19/27 dated 27 June 2019 regarding the EMIR interactive form for the notifications by financial counterparties and non-financial counterparties exceeding the clearing threshold.

The press release announces that a dedicated interactive form has been developed by the CSSF to simplify the notifications by financial counterparties and non-financial counterparties exceeding the clearing threshold that need to be provided to the CSSF in accordance with Articles 4a and 10 of EMIR.

Starting from 27 June 2019, all new notifications have to be provided using the interactive form available on the CSSF website (https://emirctn.apps.cssf.lu).

Benchmarks Regulation: ESMA Guidelines on Non-Significant Benchmarks

CSSF Circular 19/728

The CSSF issued circular 19/728 dated 1 August 2019 regarding the guidelines issued by the ESMA on non-significant benchmarks under the Benchmarks Regulation (ESMA 70-145-1209) (the Guidelines).

The circular is addressed to benchmark administrators and supervised contributors.

The Guidelines apply in relation to the provision of non-significant benchmarks and the contribution to non-significant benchmarks. The Guidelines relate to (i) the application of the procedures and characteristics of the oversight function, (ii) the input data, (iii) the transparency of methodology and (iv) the governance and control requirements for supervised contributors (Articles 5, 11, 13, and 16 of the Benchmark Regulation). The Guidelines aim to ensure the common, uniform and consistent application of those provisions.

The Circular entered into force on 1 August 2019.

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IORPs: Implementation of New Annual and Quarterly Reporting

CSSF Circular 19/726

The CSSF issued circular 19/726 dated 25 July 2019 on the implementation of new annual and quarterly reporting for Institutions for Occupational Retirement Provision (IORPs) intended for the EIOPA, the ECB, the BCL and the CSSF.

The circular implements the new annual and quarterly reporting requirements applicable to all IORPs subject to the law of 13 July 2005 on institutions for occupational retirement provision in the form of pension savings companies with variable capital (SEPCAVs) and pension savings associations (ASSEPs), as amended (IORP Law) and supervised by the CSSF.

The aim of the circular is to provide the IORPs supervised by the CSSF with the key principles, instructions and technical provisions for drawing up and submitting the reports. The reports must be submitted electronically to the CSSF within the reporting deadlines specified in the circular, starting from the third quarter of 2019 for the quarterly reporting and from the year 2019 for the annual reporting.

The current CSSF reporting for IORPs in force pursuant to Article 61 of the IORP Law is not affected and must continue to be submitted.

Digitalisation: Digitalisation of Requests to the CSSF

CSSF Circular 19/725

The CSSF issued circular 19/725 dated 29 July 2019 on the dematerialisation of requests to the CSSF through the use of the eDesk portal. The circular applies to all credit institutions and investment firms incorporated under Luxembourg law and to the Luxembourg branches of credit institutions and investment firms having their registered office in an EU country or a third country.

The circular informs the concerned professionals that the eDesk portal must be used for certain requests to the CSSF, which are specified and regularly updated on the webpage of the eDesk portal. Professionals must be responsible for keeping themselves informed of any update of such list of requests. Since the entry into force of the circular, no other means of communication will be accepted by the CSSF in this respect.

Finally, the circular details the steps (creation of a user account/advanced user status/identification means) that have to be taken to access the eDesk portal.

Digitalisation: New Modalities for Submission of Documents Required under CSSF Circular 19/544

CSSF Circular 19/727

The CSSF issued circular 19/727 dated 26 July 2019 on the new modalities for submission of documents to the CSSF for purposes of CSSF Circular 12/544.

The circular applies to all support professionals of the financial sector (Support PFS) exercising one or several of the activities defined in Articles 29-1 to 29-6 of the law of 5 April 1993 on the financial sector, as amended. In the interest of an optimisation of the supervision and simplification of treatment of documents, the circular sets out new modalities and deadlines for the submission of the documents required under CSSF Circular 12/544. Documents which must be supplied in the way prescribed in the new circular include the risk assessment report (RAR), the descriptive report (DR) and the account closure documents report. The Circular further lists, as a reminder, all supporting documents expected for the RAR, the DR and the account closure.

All documents must be submitted in a PDF file and allow the reader to select text or allow processing with an optical character recognition program. In addition, manually signed documents must be supplied on paper. Both the final version and an annotated version highlighting the changes undertaken since the previous year of the RAR and the DR must be supplied. All documents must be sent within seven months after the closing of the business year. The circular also includes a naming convention for the files to be submitted.

The Circular entered into force on 26 July 2019.

Solvency II: Exemption Conditions for the Submission of a Quarterly Report under Solvency II

CAA Circular 19/1

The CAA issued on 15 January 2019 circular 19/1, amending CAA circular 16/1 setting out the exemption conditions for the submission of a quarterly report under Solvency II.

The new circular amends CAA circular 16/1 setting out the exemption threshold under Solvency II for the last three years by raising the exemption threshold from 60 million to 90 million euro of gross annual premium income.

Pursuant to the new circular, non-life insurance undertakings and reinsurance undertakings having booked an amount of less than or equal to 90 million euro (or the equivalent in another currency) of gross premiums for 2017 are exempted from quarterly reporting under Solvency II for the years 2019 to 2021. However, a non-life insurance undertaking or reinsurance undertaking that is part of a group of several non-life insurance or reinsurance undertakings in Luxembourg cannot benefit from the exemption where the gross annual premium income of all Luxembourg activities crosses the above exemption threshold.

AML/CTF: Commission Delegated Regulation (EU) 2019/758

CAA Briefing Note

The CAA issued on 11 June 2019 a briefing note on the additional measures to be taken by financial institutions subject to CAA supervision pursuant to Commission Delegated Regulation (EU) 2019/758 of 31 January 2019 (the Delegated Regulation) supplementing AMLD 4.

The briefing note is addressed to CAA supervised financial institutions which have established, or are considering establishing, branches or majority owned subsidiaries in third countries to draw their attention to the content of the new Delegated Regulation. The Delegated Regulation aims at mitigating money laundering and terrorism financing (ML/TF) risks in the following situations:

- impossibility for the institution's group to implement policies and procedures against ML/TF at the level of the group as the third country does not allow for it;
- restrictions for supervisory authorities to supervise effectively the compliance by the group with the provisions of AMLD4 as they do not have access to the relevant information held at the level of such subsidiary or branch.

The CAA draws attention, in particular, to the minimum actions to be taken by financial institutions to mitigate ML/TF risk where the law of the third country does not allow the effective implementation of group-wide policies and procedures in accordance with Articles 4-1 (1) and (3) of the Law of 12 November 2004 on the fight against ML/TF.

The Delegated Regulation was applicable as of 3 September 2019.

CLIFFORD CHANCE

INSURANCE

INSURANCE

Legislation

IDD: CAA Regulation on Insurance and Reinsurance Distribution published

CAA Regulation N°19/01

Regulation N°19/01 on insurance and reinsurance distribution of the CAA was published in the Luxembourg official journal (Mémorial A) on 14 March 2019.

The regulation has three objectives:

- Consolidating all provisions on insurance and reinsurance distribution which were previously spread over different CAA and Grand Ducal regulations.
- Specifying the documents and information required to be provided in authorisation (*agrément*) requests or for registration with the distributors register.
- Implementing certain provisions of the Insurance Sector Law resulting from the IDD that entered into force on 1 October 2018, in particular, details on the initial professional knowledge and continuing professional training of different categories of intermediaries and staff of insurance and reinsurance undertakings directly involved in direct sale (*vente directe*) of insurance and reinsurance policies.

The regulation entered into force on 15 March 2019, with the exception of some of its articles.

Insurance: Extrajudicial Resolution of Disputes

CAA Regulation N° 19/03

Regulation N°19/03 of 26 February 2019 on extrajudicial resolution of disputes of the CAA was published in the Luxembourg official journal (Mémorial A) on 14 March 2019.

Pursuant to Article 2(1)(g) of the Insurance Sector Law, the CAA is competent to entertain complaints by clients of professionals subject to its supervision and to approach those professionals with a view to achieving an amicable settlement of such complaints.

The regulation introduces a procedure with respect to such extrajudicial resolution of disputes between consumers and professionals of the insurance sector.

To be admissible, no court of justice, arbitrator, or other dispute settlement body must be seized and no judgment, ruling or award must have been handed down with regard to the matter.

In addition, prior to introducing such claim with the CAA, the consumer must send a written complaint to the professional in question. Only if no agreement is found, or if the consumer does not receive a response within 90 days, may the consumer introduce a dispute resolution procedure with the CAA.

The regulation entered into force on 15 March 2019.

Regulatory Developments

MiFiD2/MiFIR: Investment Rules for Life Insurance Products linked to Investment Funds

CAA Circular 19/2

The CAA issued on 15 January 2019 a new circular 19/2 amending CAA circular 15/3 concerning investment rules for life insurance products linked to investment funds.

The new circular aims to adapt CAA circular 15/3 to the European regulatory environment (MiFID2, PRIIPS and UCITS), as well as to the ways of distribution of life insurance products linked to investment funds.

The circular amends, inter alia, the obligations related to the assessment of the customers' needs and to the information that needs to be provided to the customer prior to investing into (and while being invested in) internal or external funds.

Furthermore, the circular adapts the definition of 'financial instruments' by aligning it with the definition provided by MiFID2. It also specifies that account units (such as Bitcoin, Ether or Ripple), commonly called 'virtual currencies', are neither legal tender nor financial instruments and, thus, neither collective internal funds nor dedicated internal funds are allowed to invest in virtual currencies.

AML/CTF: Separate Report to be Provided by the Statutory Auditors of Direct Insurance Undertakings

CAA Circular 19/3

The CAA issued on 5 February 2019 a new circular 19/3 amending CAA circular 09/1 relating to the separate report (rapport distinct) to be provided by the statutory auditors of direct insurance undertakings.

The new circular aims to adapt CAA circular 09/1 following the changes to the law in the area of AML/CTF. It therefore adds to the existing questionnaire, in paragraph 17 of the separate report, additional questions to be treated by the statutory auditors to address AML/CTF law compliance by the insurance undertaking.

The CAA reminds that the responses given to the questions listed in paragraph 17 should not replace the necessary diligence that has to be applied by the approved statutory auditor in the context of the CAA regulation 13/01 of 23 December 2013 on the AML/CTF.

The circular specifies that non-life insurance undertakings which are not approved for "credit" or "caution" branches should only have to provide their response to question 17.7 dealing with sanctions legislation.

The provisions of the circular apply for the first time to the separate report relating to the 2018 financial year.

Solvency II: Setting of the Statements for Quarterly Non-Solvency II Reporting of Direct Insurance Undertakings and Pension Funds

CAA Circular 19/12

The CAA issued on 19 March 2019 circular letter 19/12 on the setting of the statements for quarterly non-Solvency II reporting of direct insurance undertakings and pension funds.

The circular aims at simplifying and providing more transparency to the current reporting regime concerning assets representing technical provisions. The circular therefore abolishes with immediate effect CAA circulars 03/4, 04/9, 10/10, 11/12, 13/10, 14/2, 16/4 and 19/6 containing the current reporting regime and consolidates the applicable requirements and specifications thereto in a single circular.

Three annexes are enclosed to the circular (available only on the CAA website) with respect to the new statements for quarterly reporting, one annex for each of (i) non-life insurance undertakings, (ii) life insurance undertakings, and (iii) pension funds.

Solvency II: Quarterly Reporting of Life Insurance Undertakings for Assets Representing Technical Reserves

CAA Circular 19/6

The CAA issued on 12 February 2019 circular letter 19/6 modifying and supplementing the quarterly reporting on assets representing technical reserves.

Following the amendments to the regime providing for the preference right of policyholders, insured persons and beneficiaries over the assets representing technical reserves introduced by the law of 10 August 2018 implementing IDD and amending the Luxembourg Insurance Sector Law, the circular requires life insurance undertakings to report the coverage by assets representing technical reserves per type of liability of the insurance undertaking, a global coverage report no longer being sufficient.

The circular further aims to align the information required in the quarterly reporting with that required in the annual reporting of assets representing technical reserves and to expand the collection of information to assets not allocated as cover for technical reserves.

The circular applies as from the reporting for the first quarter of 2019 which had to be made to the CAA before 30 April 2019. The relevant reporting templates were provided in February 2019.

Solvency II: Maximum Technical Interest Rates applicable to New Life Insurance Contracts

CAA Circular 19/7

The CAA issued on 6 March 2019 circular letter 19/7 on maximum technical interest rates applicable for new life insurance contracts.

The circular redefines the most common maximum technical interest rates being used for calculating the technical provisions for new life insurance contracts applicable as of 1 April 2019.

The CAA points out that it has observed a decrease of the Swedish Krona 10-year benchmark rate, whereas an increase has been observed for the US Dollar. For other currencies, no significant change has been recorded.

INSURANCE

IDD: Verification of the Honourability of Persons Directly Involved in the Distribution of Insurances or Reinsurances.

CAA Circular 19/13

The CAA issued on 30 April 2019 circular letter 19/13 on the regular verification of the honourability of insurance sub-brokers, insurance agents and persons who, within insurance and reinsurance undertakings are directly involved in the distribution of insurances or reinsurances.

Pursuant to Article 285-3 of the Insurance Sector Law, insurance undertakings, directly distributing their insurance and reinsurance products are required to regularly verify the honourability of their agents and any other person involved in such product distribution. Likewise, according to Article 49 of CAA regulation N°19/01, brokers and brokerage companies are required to periodically verify the honourability of their sub-brokers.

The circular introduces a specific form for a sworn statement (déclaration sur l'honneur) that needs to be signed by the party confirming its honourability in the context of the aforementioned procedures.

Insurance: Characterisation of Guarantee Extensions with regard to the Luxembourg Insurance Legislation

CAA Information Notice of 22 January 2019

The CAA issued on 22 January 2019 an information notice regarding the characterisation of guarantee extensions with regard to Luxembourg insurance legislation.

The notice relates exclusively to extensions of guarantees providing a right to reparation of damages in relation to the functioning of the good and service that is guaranteed.

The notice further specifies that it exclusively deals with the extension of such type of guarantee in relation to the duration of the guarantee coverage in addition to the legal minimum duration foreseen in the Consumer Code provisions implementing Directive 1999/44/EC.

The provision of such guarantee extension by an insurance company (necessarily required payment of a premium) is always an insurance operation. If the guarantee extension is provided by the seller of the guaranteed good, by its manufacturer or by a distribution intermediary (that is involved in the distribution of the good between the manufacturer and the seller), the CAA does not consider the guarantee extension as an insurance operation. Whether other third parties providing against consideration a guarantee extension carry out an insurance operation depends on whether they have a close link with the product or not.

The provider of the guarantee extension that qualifies as an insurance operation will be required to obtain a licence as an insurance undertaking whereas the seller of the insurance will be considered as an insurance intermediary and a licence as an insurance broker, an insurance sub-broker, an insurance agent, a representation of an insurance intermediary in an ancillary capacity or a representative of the latter (where it is a legal entity) will be needed.

Insurance: New Forms for the Notification of Natural Persons Subject to the Supervision of the CAA

CAA Circular 19/5

The CAA issued on 12 February 2019 circular letter 19/5 introducing new forms for the notification of natural persons subject to the supervision of the CAA.

The circular notes that, until now, notifications submitted to the CAA by persons subject to its supervision were submitted following different modalities, depending on the function performed and often deviating from the templates proposed or imposed by the CAA. Efforts to harmonise these requirements, notably regarding the good-repute condition, have been undertaken since the entry into force of the Insurance Sector Law (as amended, inter alia, by the IDD implementing law). Identifying and mitigating conflicts of interest is one of the novelties to be included in the application or notification files. In addition, with regard to insurance intermediaries, the IDD requires that IT tools are made available for the required notifications.

In light of these developments, the CAA decided to provide electronic forms (interactive PDF files) to all-natural persons subject to a notification requirement, harmonising their content and structure as far as possible. The forms are available for download on the CAA website. They will initially need to be printed and signed by the applicants, before being sent to the CAA in paper format (together with any required supporting documentation).

The circular and table annexed thereto provide additional guidance and information, among others, in relation to the content of the above notifications or authorisation request files, the person or entity obliged to notify or request authorisation and the formalities for filing in the templates.

The circular applies to authorisation requests and notifications as from 1 July 2019.

Insurance: 2018 Annual Reporting for Luxembourg Direct Insurance Undertakings

CAA Information Notice of 20 February 2019

The CAA issued on 20 February 2019 an information notice regarding 2018 annual reporting for direct insurance undertakings licensed in Luxembourg.

The notice informs direct insurance undertakings licensed in Luxembourg that the relevant documentation concerning the 2018 annual reporting programmes (other than Solvency II) as well as the information sheet will be sent out to them within a few days after the publication of the notice via SOFiE or E FILE. If direct insurance undertakings have one or more branches outside Luxembourg, a separate communication will be sent to the undertaking for each branch.

The notice emphasises that reporting standards have not significantly been changed since last year, except for certain provisions on AML/CTF and international sanctions.

The reports must be sent back to the CAA electronically (in compliance with the security standards set out in circular LC15/10) and via postal mail (signed by the insurance undertaking manager).

For undertakings for which the financial year ended 31 December 2018, the relevant reports must be submitted to the CAA at the latest on 19 April 2019, except for the separate report. The two parts of the separate report must be submitted one week later (at the latest).

Insurance: Statistical Reporting of Luxembourg Branches of Foreign Undertakings for 2018

CAA Information Notice of 20 February 2019

The CAA issued on 20 February 2019 an information notice regarding statistical reporting of Luxembourg branches of foreign undertakings for 2018.

The notice informs Luxembourg branches of foreign undertakings that the relevant documentation concerning the statistical report of 2018 and the information sheet was sent out to the concerned entities within few days after the publication of the notice.

The notice informs that reporting standards have not been changed since last year and reminds its addressees that any reporting documents must be sent to the CAA via encrypted email.

Furthermore, the notice requests the general manager of the branch to sign the different duly filled-in forms and send them to the CAA via email and postal mail to arrive at the CAA on 19 April 2019.

Insurance: Extrajudicial Resolution of Disputes

CAA Regulation N° 19/03

Regulation N°19/03 of 26 February 2019 on extrajudicial resolution of disputes of the CAA was published in the Luxembourg official journal (Mémorial A) on 14 March 2019.

Pursuant to Article 2(1)(g) of the Insurance Sector Law, the CAA is competent to entertain complaints by clients of professionals subject to its supervision and to approach those professionals with a view to achieving an amicable settlement of such complaints.

The regulation introduces a procedure with respect to such extrajudicial resolution of disputes between consumers and professionals of the insurance sector.

To be admissible, no court of justice, arbitrator, or other dispute settlement body must be seized and no judgment, ruling or award must have been handed down with regard to the matter.

In addition, prior to introducing such claim with the CAA, the consumer must send a written complaint to the professional in question. Only if no agreement is found, or if the consumer does not receive a response within 90 days, may the consumer introduce a dispute resolution procedure with the CAA.

The regulation entered into force on 15 March 2019.

ASSET MANAGEMENT

EU Developments

UCITS/AIFMD

Cross-border Regulation 2019/1156 and Cross-border Directive 2019/1160 published in Official Journal

Regulation 2019/1156 of 20 June 2019 on facilitating cross-border distribution of UCIs and Directive 2019/1160 of 20 June 2019 amending the UCITS Directive and AIFMD with regard to cross-border distribution of UCIs have been published in the Official Journal on 12 July 2019 and have entered into force on 1 August 2019.

These two legislative texts form part of the EU Capital Markets Union (CMU) action plan, which was launched in 2015 and is being implemented through different proposals designed to stimulate capital markets activity in the EU, namely by addressing the fragmentation in the capital markets, removing the regulatory barriers to the financing of the economy and increasing the supply of capital to all businesses in the EU. For the avoidance of doubt, it has to be noted that these texts focus on cross-border distribution of UCITS and AIFs within the EU only, with the view to harmonise and facilitate the use of the cross-border UCITS and AIFMD marketing passports. Consequently, for the time being, the question of cross-border marketing of non-EU funds (i.e. non-EU AIFs) and/or by non-EU fund managers (i.e. non-EU AIFMs), namely under the national private placement regimes, has not been addressed by the cross-border directive and regulation.

Member States have two years from that date to transpose the Directive's provisions into national law, whilst the Regulation is applicable directly in all Member States, except for certain provisions which will also apply in two years, such as those concerning (i) the pre-marketing of EUVECAS/EuSEFs, (ii) the marketing communications, and (iii) the publication by NCAs of national provisions concerning marketing requirements.

Cross-Border Directive in a Nutshell

More concretely, the new cross-border directive (Directive) amends certain provisions of the UCITS Directive and AIFMD in order to remove perceived regulatory barriers to the cross-border distribution of UCITS and AIFs within the EU, including in particular:

- A harmonisation of the cumulative conditions to be fulfilled by UCITS and EU AIFs to de-notify and cease marketing in a Member State.

- A modification of the notification procedures contained in the UCITS Directive in case of change of the information initially notified to national competent authorities (NCAs) or regarding the shares or units to be marketed. Thus, written notice of such change will now have to be given to the NCAs of both the home Member State and host Member State of the UCITS (as opposed to the previous UCITS regime, that has required the notice to be sent directly by the UCITS to the NCAs of its host Member State) at least one month before implementing the change. This will also apply to the registration of new share classes, meaning that both the home and host Member State NCAs must be notified at least one month in advance of the new share classes being marketed. The Directive further requires that the relevant NCAs of the UCITS home Member State notify the UCITS within 15 working days if it is not authorised to implement the envisaged change if these NCAs are of the view that, as a result of such change, the UCITS would no longer comply with the UCITS Directive. In such a case, the NCAs of the UCITS home Member State are obliged to inform the NCAs of the UCITS' host Member State accordingly.

- New requirements regarding the provision of local facilities in each Member State where UCITS and AIFs are marketed to retail investors, without imposing a physical local presence in the relevant host Member State(s). Thus, UCITS ManCos and any AIFM (EU or non-EU) marketing to retail investors will now be allowed to use electronic or other means of distance communication with investors for, among others, (i) the processing of subscriptions, payment, repurchase and redemption of orders, (ii) the handling of information relating to the investors' exercise of their rights arising from their investment in the UCITS/AIF in the Member State where the UCITS/AIF is marketed, and (iii) making available information and documents to investors about the UCITS/AIF.

- A new harmonised definition of "pre-marketing" in the AIFMD as well as conditions under which an EU AIFM can engage in pre-marketing activities. Thus, according to the Directive, "pre-marketing" means a direct or an indirect provision of information or communication on investment strategies or investment ideas by an EU AIFM or on its behalf to potential professional investors domiciled or registered in the EU in order to test their interest in an AIF or a compartment which is not yet established, or which is established but not yet notified for marketing in accordance with article 31 or 32 of the AIFMD in that Member State where the potential investors are domiciled or have their registered office and which in each case does not amount to an offer or placement to the investor to invest in the units or shares of that AIF or a compartment. The Directive further provides that pre-marketing may be accepted without the need for notification to NCAs under the AIFMD passport, provided that the EU AIFM does not propose information to potential professional investors that (i) is sufficient to enable investors to commit to acquiring units or shares of a particular AIF, (ii) amounts to subscription forms or similar documents whether in a draft or a final form, or (iii) amounts to constitutional documents, a prospectus or offering documents of a not-yet-established AIF in a final form. If draft prospectus/offering documents are provided to potential professional investors, they shall not contain all relevant information allowing investors to take an investment decision and they shall clearly state that (i) the documents do not constitute an offer or an invitation to subscribe to units/shares of an AIF, and (ii) the information presented in those documents should not be relied upon because it is incomplete and may be subject to change.

- In connection with pre-marketing, the Directive also provides that any subscription by professional investors, within 18 months after the EU AIFM engaged in pre-marketing, to units/shares of an AIF referred to in the information provided in the context of pre-marketing, or of an AIF established as a result of the pre-marketing, shall be considered as the result of marketing and shall be subject to the applicable AIFMD notification procedures, and consequently the EU AIFM will not be able to invoke reverse solicitation in such cases.

Cross-Border Regulation in a Nutshell

The new cross-border regulation (Regulation) aims at improving transparency by harmonising and standardising certain aspects of the cross-border distribution of UCIs within the EU, and introduces, in particular:

- A new "pre-marketing" definition in the EuVECA and EuSEF Regulations as well as new conditions for pre-marketing of EuVECAs and EuSEFs, which definition and conditions are similar to the ones introduced for AIFs in the AIFMD.

- New common principles (based on the current version of Article 77 of the UCITS Directive) which marketing communications to UCITS' and AIFs' investors must fulfil, including (i) the communications must be identifiable as such, (ii) they must present the risks and rewards of purchasing units or shares of AIFs and UCITS in an equally prominent manner and (iii) all information included in marketing communications must be fair, clear and not misleading.

- A standardisation for any notification, notification letter, written notice or any information referred to in certain articles of the UCITS Directive and AIFMD to ESMA.

- New requirements regarding the regulatory fees and charges levied by NCAs in relation to cross-border activities of UCITS ManCos, AIFMs and EuVECA/EuSEF managers, including the obligation for such fees or charges to be consistent with the overall cost relating to the performance of the functions of the NCAs. The Regulation also requires that NCAs publish and maintain on their websites central databases on the fees or charges levied, or relevant calculation methodologies, where applicable, in at least a language customary in the sphere of international finance, and further entrusts ESMA with the task of publishing and maintaining online an interactive central database with the fees or charges levied by the NCAs or, where applicable, with the calculation methodologies used. As part of this interactive central database, the Regulation provides for an interactive tool on fees and charges to be developed and made available by ESMA on its website in at least a language customary in the sphere of international finance and that will allow the user to perform online calculations of regulatory fees for each Member State.

- Enlargement of NCAs and ESMA's currently existing databases for easy access of information on national provisions on marketing requirements (including information on applicable national laws, regulations and administrative provisions) and obligation for ESMA to publish and maintain on its website a central database publicly available and listing all UCITS ManCos, AIFMs and EuVECA/EuSEF managers and all UCITS and AIFs that those UCITS ManCos, AIFMs and EuVECA/EuSEF managers market as well as the Member States in which those funds are marketed.

ESMA Updated UCITS and AIFMD Q&A regarding depositary functions

On 4 June 2019, ESMA published an updated version of its Q&A documents on the application of the UCITS Directive and the AIFMD, in which ESMA clarifies, in particular, the distinction between the delegation of depositary functions *stricto sensu* (which is only possible under certain conditions in relation to the safekeeping functions) and the delegation of mere supporting tasks that are linked to depositary tasks such as administrative or technical functions (that are not subject to the delegation requirements set out in the UCITS Directive and AIFMD).

In this respect, ESMA indicates that supporting tasks that are linked to depositary tasks such as administrative or technical functions performed as part of the depositary oversight and cash flow monitoring functions could be entrusted to third-party service providers where all of the following conditions are met:

- the execution of the tasks does not involve any discretionary judgement or interpretation by the third party in relation to the depositary functions;
- the execution of the tasks does not require specific expertise in regard to the depositary function; and
- the tasks are standardised and pre-defined.

In addition, ESMA also clarifies in its updated Q&A how the performance and supervision of depositary functions of UCITS and AIFs will be ensured in the case of branches in other EU Member States, and further confirms that the delegation by a UCITS/AIF depositary of its depositary functions to another legal entity within the same group has to be considered as a delegation subject to the delegation requirements set out in the UCITS Directive and AIFMD.

For the sake of completeness, the question of the possibility of, and the required conditions for, the mere outsourcing of the depositary's operational tasks, activities or (support) services to an external service provider, other than delegation *stricto sensu*, has also been addressed in Luxembourg by the CSSF in its Circular 16/644 as regards the depositaries of Luxembourg UCITS funds and in its Circular 18/697 as regards the depositaries of Luxembourg non-UCITS funds. In this respect, it has to be noted that Circular 16/644 and Circular 18/697 contain some other conditions to be complied with by the depositaries of Luxembourg UCITS and non-UCITS funds in addition to those imposed by ESMA. In particular, and without limitation, the CSSF requires that any outsourcing of operational tasks by the depositary must be documented by a contract between the depositary and its service provider and that any outsourcing of a material activity receives prior authorisation by the CSSF (it being understood that a notification to the CSSF confirming compliance with the conditions set forth in the texts applicable to the depositary is sufficient where the depositary uses a Luxembourg credit institution or a support PFS pursuant to Article 29-1, 29-2, 29-3 or 29-4 of the financial Sector Law (i.e., a client communication agent, an administrative agent of the financial sector, a primary IT systems operator of the financial sector or a secondary IT systems and communication networks operator).

ESMA Updated UCITS Q&A regarding benchmark disclosure

On 29 March 2019, ESMA published an updated version of its Q&A on the application of the UCITS Directive, in which ESMA clarifies the scope of the benchmark disclosure obligations for UCITS in accordance with the so-called "UCITS KIID Regulation" (i.e. Regulation (EU) 583/2010 implementing the UCITS Directive implementing as regards key investor information and conditions to be met when providing key investor information or the prospectus in a durable medium other than paper or by means of a website).

Further to this updated ESMA Q&A, the CSSF has confirmed that it will follow the ESMA position and has already required Luxembourg UCITS ManCos to complete and return a benchmark questionnaire by 31 May 2019 in order to assess and have a gap analysis for Luxembourg-domiciled UCITS regarding the additional guidance provided by ESMA in terms of benchmark disclosure in the KIID and prospectus of UCITS.

Below is a summary of the benchmark disclosure requirements applicable to UCITS under the UCITS KIID Regulation, as clarified by ESMA in its updated Q&A. For information, ESMA requires the relevant disclosures to be made to the KIID and the prospectus of UCITS as soon as practicable or by the next KIID update following the publication of its Q&A.

UCITS KIID disclosure requirements

According to ESMA, article 7(1) (d) of the UCITS KIID Regulation requires that a UCITS (or its relevant sub-fund(s), the case may be) indicates clearly in its KIID if the relevant UCITS'/sub-fund's strategy is "active" (or "actively managed") or "passive" (or "passively managed").

Generally speaking, an actively managed UCITS is one where the manager has discretion over the composition and selection of the UCITS portfolio, subject to the stated investment objectives and policy. As opposed to a passive UCITS, an active UCITS does not have an index-tracking objective even if it may include a reference to a benchmark. A wide spectrum exists regarding the level of discretion active UCITS may wish to take or be permitted to take against a benchmark index. Some active UCITS take a lower level of risk against a benchmark index than others, and some are managed without any reference to a benchmark index at all.

In its Q&A, ESMA clarifies the UCITS KIID benchmark and past performance obligations as follows:

(a) **If a UCITS/sub-fund is passively managed:**

(i) *The objectives and investment policy section of the KIID should explicitly*:

(A) use the terms "passive" or "passively managed" and, as the case may be, also include any additional wording considered relevant by the UCITS ManCo to ensure that the meaning of these terms is clear to investors (thus, in the case of index-tracking UCITS, using the terms "passive" or "passively managed" in addition to "index-tracking" is recommended in practice in order to assist investor understanding);

(B) mention the name of the benchmark index.

(ii) *The past performance section of the KIID should explicitly:*

(A) show the past performance of the benchmark index in addition to the performance of the UCITS.

(b) **If a UCITS/sub-fund is actively managed:**

(i) *The objectives and investment policy section of the KIID should explicitly*:

(A) use the terms "active" or "actively managed" and, as the case may be, also include any additional wording considered relevant by the UCITS ManCo to ensure that the meaning of these terms is clear to investors;

(B) make clear whether the UCITS/sub-fund is being "managed in reference to a benchmark index" or not;

(C) in the case of a UCITS/sub-fund managed in reference to an index, the objectives and investment policy section of the KIID should also:

(1) mention the name of the benchmark index;

(2) indicate the "degree of freedom from the benchmark index" to allow investors to understand how actively the benchmark index is used.

According to ESMA, a UCITS/sub-fund "managed in reference to a benchmark index" is a UCITS/sub-fund where the benchmark index plays a role in the management of the UCITS/sub-fund, for example, in the explicit or implicit definition of the portfolio's composition and/or the UCITS' performance objectives and measures. In this respect, ESMA considers that it is the responsibility of the UCITS ManCo to ultimately identify whether the UCITS/sub-fund is in practice managed in reference to a benchmark index or not. However, ESMA gives a non-exhaustive and non-cumulative list of examples of where an approach may include or imply reference to a benchmark index and where a UCITS/sub-fund should therefore disclose that it is managed in reference to that benchmark index. These examples include, without limitation, the cases where (i) a benchmark index is used by a UCITS/sub-fund as a universe from where securities are selected to make up the UCITS/sub-fund portfolio (ii) a UCITS/sub-fund holds units in other UCITS/AIFs in its portfolio with a view to achieve similar performance to a benchmark index (iii) a benchmark index is used by a UCITS/sub-fund to calculate the performance fees (iv) the internal or external goal of a UCITS/sub-fund is to outperform a benchmark index (v) the contracts between the UCITS ManCo and third parties, such as the investment management agreement, stipulate that the portfolio manager must seek to outperform a benchmark index (vi) the portfolio manager has a remuneration element dependent on relative performance to the benchmark; (vii) the marketing materials of the UCITS/sub-fund compare fund performance with a benchmark index.

Furthermore, ESMA considers that the "<u>degree of freedom from the benchmark index</u>" means that investors should be provided with a clear and understandable indication of how actively managed the UCITS/sub-fund is in comparison with its reference benchmark index. In this respect, the following elements should at least be taken into account by a UCITS ManCo when indicating in the KIID the degree of freedom from the benchmark index for actively managed UCITS whose investment approach includes or implies a reference to a benchmark index:

- the description of the underlying investment universe of the UCITS should indicate to what extent the target investments are part of the benchmark index or not;
- the KIID should describe the degree or level of deviation of the UCITS as regards the benchmark index, thereby considering, where applicable, the quantitative and/or qualitative deviation limitations underlying the investment approach (e.g. risk limits defined by reference to the benchmark index such as tracking error) as well as the narrowness of the investment universe. In this context, UCITS may, when necessary for investor understanding, also disclose quantitative metrics (e.g. precise internal limits on tracking error, etc.).

(ii) <u>*The past performance section of the KIID should explicitly*</u>:

- show the past performance of the benchmark index in addition to the performance of the UCITS, in the case of UCITS/sub-fund managed in reference to an index;
- show the past performance of the UCITS only, in the case of UCITS/sub-fund not managed in reference to an index.

UCITS prospectus and other document disclosure requirements

In its Q&A, ESMA recalls that, in accordance with article 7(1) (d) of the UCITS KIID Regulation, the information disclosed in UCITS KIID should be consistent and not misleading:

- across offering documents and marketing documents, meaning that the information disclosed in the UCITS KIID should be consistent with the UCITS' investment objectives and policy in the prospectus;
- across distribution channels; and
- across investor types, meaning that all types of investors should receive consistent and equivalent information regarding whether or not a UCITS/sub-fund has a benchmark index (for instance, it would be inconsistent if some benchmark disclosures are disclosed to professional investors).

ESMA Updated AIFMD Q&A regarding leverage calculation

On 29 March 2019, ESMA published an updated version of its Q&A on the application of the AIFMD, including new questions and answers on the calculation of leverage under AIFMD and providing clarification on (i) the treatment of short-term interest rate futures for the purposes of AIFMD leverage exposure calculations according to the gross and commitment methods, and (ii) the required frequency of the calculation of leverage by an AIFM managing an EU AIF which employs leverage.

In particular, ESMA indicates that:

- The calculation of leverage exposure of an AIF resulting from a short-term interest rate future should not be adjusted for the duration of the future the treatment of short-term interest rate futures for the purposes of AIFMD leverage exposure calculations according to the gross and commitment methods.
- An AIFM should calculate the leverage of each AIF that it manages as often as is required to ensure that the AIF is capable of remaining in compliance with leverage limits at all times. Consequently, leverage should be calculated at least as often as the NAV is calculated, or more frequently, if required, it being understood that circumstances which may lead to increased frequency of leverage calculation include material market movements, changes to portfolio composition and any other factors the AIFM believes require calculation of leverage more frequently than NAV in order for the AIF to remain in compliance with leverage limits at all times.

ESMA Consultation regarding guidelines for UCITS performance fees

On 16 July 2019, ESMA launched a consultation on draft guidelines on performance fees under the UCITS Directive, with a view to harmonising how performance fees can be charged to the UCITS and its investors while ensuring common standards of disclosure.

As a reminder, at the beginning of 2018, ESMA conducted a mapping exercise among NCAs analysing the current practices in different Member States in relation to some aspects of performance fees. ESMA found a lack of harmonisation among EU jurisdictions and decided to carry out further convergence work, leading to the development of the consultation paper.

ESMA's draft guidelines set out common criteria promoting supervisory convergence on the following areas:

- general principles on performance fee calculation methods;
- consistency between the performance fee model and the fund's investment objectives, strategy and policy;
- frequency for the crystallisation of the performance fee;
- the circumstances where a performance fee should be payable; and
- disclosure of performance fee model.

Responses to the ESMA's consultation are due by 31 October 2019. Thereafter, ESMA will consider the feedback it receives with a view to finalising the guidelines for publication.

PRIIPs

PRIPPs KID deadline extended for UCITS and Retail AIFs

The 31 December 2019 transitional period deadline as provided for by the PRIIPs KID Regulation, and during which UCITS and certain retail AIFs issuing a UCITS KIID-like document may be exempted from the obligation to have a PRIIPs KID, has been postponed to 31 December 2021. Article 32 of the PRIIPs KID Regulation has indeed been amended in this way by Article 17 of Regulation 2019/1156 of 20 June 2019 on facilitating cross-border distribution of UCIs.

PRIIPs Delegated Regulation on aligning transitional arrangement for PRIIP manufacturers

On 3 July 2019, the EU Commission adopted a delegated regulation amending Delegated Regulation (EU) 2017/653 to align the transitional arrangement for PRIIP manufacturers offering units of funds referred to in Article 32 of the PRIIPS KID Regulation as underlying investment options with the prolonged exemption period under that Article.

As the transitional period deadline provided for by the PRIIPs KID Regulation in favour of UCITS and certain retail AIFs has been extended until 31 December 2021 (see above), the PRIIPs KID Regulation requirements in respect of those funds will be complied with as of 1 January 2022. The new delegated regulation adopted by the EU Commission lays down a transitional arrangement under Delegated Regulation (EU) 2017/6533 concerning the presentation and content of the PRIIPs KID that is consistent with the new 31 December 2021 transitional deadline. This will allow manufacturers of PRIIPs that offer UCITS or AIFs as the only underlying investment options, or alongside other investment options, to continue using, for the purposes of drawing the PRIIPs KIDs, a UCITS KIID-like document in respect of such funds.

Benchmark Regulation

ESMA Updated Q&A on Benchmark Regulation

On 23 May and 11 July 2019, ESMA updated its Q&A document on the implementation of the Benchmark Regulation by providing clarification on, among others, the following issues:

- the information to be included in the field "contact info" of the ESMA register of administrators of benchmarks, which should, where available, include the website of the administrator and, in particular, the link to the web page where the administrator publishes or will publish the benchmark statements pursuant to Article 27 of the Benchmark Regulation;
- the relevant time for the determination of the Member State of reference of non-EU administrator for the purpose of applying for recognition in accordance with Article 32(4) of the Benchmark Regulation, which should be the date of such non-EU administrator's application for recognition;
- the role of IOSCO principles and of external audit in the recognition of non-EU administrators by the NCAs of the Member State of Reference;
- the scope of the definition of commodity benchmarks for the purposes of the Benchmark Regulation, which is not identical to the scope of the definition of commodity derivatives for the purposes of MiFID2/MiFIR.

MiFID2/MiFIR

Please refer to the [Banking, Finance and Capital Markets] section of this Luxembourg Legal Update for further details on MiFID2/MiFIR.

EMIR

Please also refer to the [Banking, Finance and Capital Markets] section of this Luxembourg Legal Update for further details on EMIR.

Please also note that Clifford Chance has analysed the impact of the so-called "EMIR REFIT" for investment fund managers in the July 2019 edition of its Global Investment Management Briefing.

AML/CTF

Please refer to the [Banking, Finance and Capital Markets] section of this Luxembourg Legal Update for further details on AML/CTF.

Prospectus Regulation

Please refer to the [Banking, Finance and Capital Markets] section of this Luxembourg Legal Update for further details on the Prospectus Regulation.

MAR

ESMA Updated Q&A on MAR

On 29 March 2019, ESMA published an updated version of its Q&A on the application of Regulation 596/2014 on market abuse (MAR), which provides some clarifications for UCIs under Articles 7 and 17 of the MAR.

As a reminder, the MAR came into effect on 3 July 2016 and contains rules on insider dealing, unlawful disclosure of inside information and market manipulation in relation to MiFID2 financial instruments that are admitted to trading, or for which a request for admission to trading has been made on a regulated market, a multilateral trading facility (MTF), an organised trading facility (OTF), or in relation to MiFID2 financial instruments the price or value of which depends on, or has an effect on, the price or value of a financial instrument traded on a regulated market, an MTF or an OTF (for example, credit default swaps and contracts for differences). MAR also contains an explicit prohibition on manipulating the calculation of benchmarks.

For the avoidance of doubt, several provisions of the MAR apply to UCIs in their role as issuers of financial instruments or, as the case may be, on their ManCo or AIFM, including (i) the prohibition from engaging in insider dealing and unlawful disclosure of information (Article 14 of MAR), (ii) the prohibition from engaging in market manipulations (Article 15 of MAR), (iii) the obligation to publicly disclose inside information and to draw up lists of insiders (Articles 17 and 18 of MAR), as well as (iv) the obligation for any person professionally arranging or executing transactions — "those professionally arranging or executing transactions", including buy-side firms, such as investment management firms (AIFs and UCITS managers) — to detect and report market abuse, which includes the requirement for those professionally arranging or executing transactions to establish and maintain effective arrangements, systems and procedures to detect and report suspicious orders and transactions.

In its updated Q&A on the application of MAR, ESMA clarifies the following points:

- The obligation imposed by Article 17 of MAR on an issuer that has requested or approved admission of its financial instruments to trading on a regulated market, an MTF or an OTF in an EU Member State to inform the public as soon as possible of inside information which directly concerns that issuer, is a general obligation that does not exempt any kind of issuer. Therefore, this obligation also applies to UCIs without legal personality (such as FCPs or SCSp) as such UCIs without legal personality meet the definition of issuer contained in Article 3 (1) (21) of MAR regardless of the fact that the relevant issuance of the UCI's shares/units and any obligations arising from MAR are discharged by the relevant UCI's manager.

- The obligation to publicly disclose inside information under Article 17 of MAR is different from any other disclosure requirements under the UCITS directive or the AIFMD, as it strictly refers to cases involving inside information (as defined in Article 7 of MAR) that directly concern the relevant issuer.

- The cases of inside information that may arise in respect of UCIs admitted to trading or traded on a trading venue under Article 17 of MAR, by providing some examples (non-exhaustive list) but by stressing, however, that the final assessment has to be made on a case-by-case basis and that the examples provided may not necessarily constitute inside information in all cases. These examples include (i) any situation with significant impact (appreciation or depreciation) on the valuation of the UCI's assets and, as a result, on the value of the UCI's units (ii) cases where the UCI has been affected by fraud, theft or an adverse tax ruling, (iii) unexpected circumstances in the creation/ redemption of units of a UCI (including any situation under which the UCI cannot issue/redeem its units or creation of excessive or insufficient units due to a material mistake) (iv) events that will directly affect the liquidity of the market in units of an ETF arising from events impacting the entities acting as counterparties in the secondary market, (v) failures or delay of a counterparty to an OTC derivative impacting the return or the risk of the UCI, (vi) failures or delay of a counterparty in a securities lending transaction, and (vii) issues related to the total or partial liquidation of the UCI's assets (such as imminent insolvency or termination of the UCI, or a sub-fund where the UCI is an umbrella fund, partial liquidation of the UCI's units; modalities and payment terms preceding the liquidation or delisting of the UCI). ESMA also indicates that, for real estate UCIs admitted to trading/traded on a trading venue, inside information may also arise in the context of significant events related to the acquisition, sale or management of its real estate assets, including rent renegotiation or possible relevant losses derived from legal disputes.

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CRD V

CRD V and CRRII published in the Official Journal

On 7 June 2019, the so-called "CRD V" and "CRR II" were published in the Official Journal of the European Union. These new pieces of legislation, which entered into force on 27 June 2019, amend the current Capital Requirements Directive (CRD IV) and Capital requirements Regulation (CRR), which were adopted in 2013 and set out prudential requirements for credit institutions and investment firms as well as rules on their governance and supervision, including, more particularly, several remuneration principles in order to curb excessive risk-taking and short termism in the financial services sector. Member States will have until 28 December 2020 to amend their local CRD remuneration rules in order to reflect the new CRD V provisions.

It has to be noted that, in principle, CRD remuneration rules are essentially relevant for CRD firms (i.e. credit institutions and investment firms), but they have sometimes appeared problematic in the fund industry. In particular, in accordance with CRD IV, CRD firms have been required to apply CRD IV remuneration requirements at group, parent and subsidiary levels, including to their subsidiaries that are not themselves subject to CRD IV, such as UCITS ManCos or AIFMs already subject to other specific sectoral remuneration rules under UCITS V or AIFMD. However, CRD V now confirms that, if a subsidiary is subject to other sectoral remuneration regulations (for example, AIFMD or UCITS V), then the relevant UCITS/AIFMD sector-specific provisions will apply to the material risk-takers of the subsidiaries, rather than the CRD V provisions.

This new rule means that a CRD firm's subsidiaries (including UCITS ManCo/AIFM, asset managers, brokers, advisers, insurance intermediaries, etc.) within banking groups will no longer be subject to the CRD V remuneration rules, including the bonus cap, thus levelling the playing-field with stand-alone investment firms that are not CRD firms. However, CRD V provides a limitation on this rule by requiring to continue to apply the CRD V remuneration provisions (as it was the case under CRD IV) to the staff members of the relevant subsidiaries if these staff members have a direct material impact on the risk profile of the banking group as a whole (including through delegation or outsourcing arrangements). CRD V also permits local regulators to continue to require the CRD V provisions to apply to entities which would otherwise have been able to take advantage of this exemption. This could mean that level playing field issues persist due to local gold-plating.

Clifford Chance has prepared a client briefing analysing the key changes introduced by CRD V to CRD IV remuneration provisions. Please also refer to the [Banking, Finance and Capital Markets] section of this Luxembourg Legal Update for further details on CRD.

Luxembourg Developments

Implementation of EuVECA/EuSEF, ELTIF, MMF and Securitisation Regulations and Modification of RAIF Law

Law of 16 July 2019

New sanctions powers of the CSSF in relation to the EuVECA/EUSEF Regulations, ELTIF Regulation, Money Market Regulation and Securitisation Regulation and specific amendments of the RAIF Law

The Luxembourg law of 16 July 2019 implementing the EuVECA Regulation (N°345/2013), EuSEF Regulation (N°346/2013), ELTIF Regulation (N°2015/760), Money Market Regulation (N°2017/1131) and Securitisation Regulation (N°2017/2402) and amending the RAIF Law and Financial Sector Law has been published in the Mémorial A on 18 July 2019.

The main purpose of the law is to make the EuVECA Regulation, EuSEF Regulation, ELTIF Regulation, Money Market Regulation and Securitisation Regulation operational in Luxembourg by introducing into the Luxembourg legal framework new provisions in relation to (i) the appointment of the CSSF and case may be the CAA, as competent authorities to ensure compliance with the above EU regulations in Luxembourg, and (ii) the control and investigation powers of the CSSF, and as the case being the CAA, that are necessary for the exercise of their respective competences within the framework of the above EU regulations. In that respect, the law specifies a set of sanctions and penalties that may be applied by the CSSF, and as the case may be the CAA, for certain breaches of the EuVECA Regulation, EuSEF Regulation, ELTIF Regulation, Money Market Regulation and Securitisation Regulation, including pecuniary fines for both natural and legal persons and the publication of the imposed sanctions on the respective CSSF/CAA website.

In addition, the law also introduces the following amendments to the RAIF Law in relation to RAIFs set up under the contractual form of a mutual fund or "FCP":

- Article 8 of the RAIF Law is amended to make clear that, according to the current practice, a FCP-RAIF may be managed not only by a so-called Chapter 16 ManCo (i.e. a management company governed by Chapter 16 of the UCI Law), but also by a so-called Chapter 15 ManCo (i.e. a UCITS management company governed by Chapter 15 of the UCI Law) or by a Chapter 18 ManCo (i.e. a multilateral development bank which is permitted by its statutes to perform collective portfolio management services). For the avoidance of doubt, a Chapter 15 ManCo or Chapter 16 ManCo which is acting as management company of an FCP-RAIF may also act as the designated external AIFM of that FCP-RAIF, provided that the relevant ManCo is duly authorised and licensed as, AIFM by the CSSF. If this is not the case, the relevant ManCo will have to appoint another entity, which is duly authorised as an AIFM in Luxembourg or in another EU Member State, to act as the external AIFM for the relevant FCP-RAIF.

- Article 49 of the RAIF Law is amended to include the possibility for an FCP-RAIF to convert itself into a SICAV-RAIF and to bring its constitutive documents into harmony with the provisions of Chapter 3 of the RAIF Law applicable to SICAV-RAIFs. Such conversion will be subject to the same conditions as those provided by article 70 of the SIF Law for the conversion of FCP-SIFs into SICAV-SIFs, i.e. the conversion of an FCP-RAIF into a SICAV-RAIF will have be decided by a resolution of a general meeting of the FCP-RAIF's unitholders passed at a majority of two thirds of the votes of the unitholders present or represented regardless of the portion of the net asset value of the FCP-RAIF represented.

PRIIPs KID Deadline for Luxembourg UCITS and Retail AIFs

CSSF Updated FAQs on UCI Law and AIFM Law

On 11 April 2019, the CSSF published a revised version of its FAQ on the UCI Law, respectively its FAQ on the AIFM Law, in order to clarify that the 31 December 2019 deadline as provided for by the PRIIPs KID Regulation, and during which UCITS and certain retail AIFs issue a UCITS KIID-like document may be exempted from the obligation to have a PRIIPs KID, may be postponed to a later date.

In particular, the CSSF indicates that:

- Luxembourg UCITS will remain exempted from the obligation to have in place a PRIIPs KID until 31 December 2019, or later, if the period of exemption provided for in article 32(1) of the PRIIPs Regulation is extended to a later date;

- Luxembourg retail AIFs issuing a UCITS KIID-like may also benefit from the 31 December 2019 transitional period, or later if the period of exemption provided for in article 32(1) of the PRIIPs Regulation is extended to a later date if these AIFs issue a UCITS like-KIID document complying with the conditions listed in question 23b) of the CSSF FAQ on the AIFM Law.

For the sake of completeness, the 31 December 2019 deadline has now be postponed to 31 December 2021 by the so-called Cross Border Fund Distribution Regulation, which has amended the PRIIPs KID Regulation accordingly.

In addition to the above, the CSSF also clarifies in its FAQ on the AIFM Law that it does not have to be notified with the final form of a PRIIPs KID of a Luxembourg AIF the units of which are advised on, offered or sold to retail investors, nor with the final form of a UCITS KIID-like KIID produced by Luxembourg AIFs, it being understood that the CSSF reserves the right to request such documents on a case-by-case basis.

AML/CTF and Register of Beneficial Owners (RBE)

Please refer to the [Banking, Finance and Capital Markets] section of this Luxembourg Legal Update for further details on AML/CTF and RBE, including, in particular, bill of law n°7467 implementing certain provisions of AMLD 5 and the Grand Ducal regulation of 15 February 2019 on the registration, payment of administrative fees and access to information recorded in the register of beneficial owners.

As regards the RBE, please note that ALFI, ALCO, LPEA and LuxReal have published a document on 9 August 2019 providing an illustration of examples (which are neither exhaustive nor exclusive) on an approach to identify the beneficial owner(s) in investment funds depending on the distribution strategy used. This document is available on the ALFI website for the attention of its members, and ALFI recall as that there is no one-size-fits-all solution and that

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the identification of the beneficial owner(s) in investment funds must thus be assessed on a case-by-case basis.

Implementation of Shareholders Rights Directive 2

Law of 1 August 2019

Transposition of Shareholders Rights Directive 2

The Luxembourg law of 1 August 2019 transposing Directive (EU) 2017/828 (SHRD 2), which amends Directive 2007/36/EC (SHRD 1) with regard to the encouragement of long-term shareholder engagement, and modifying the Luxembourg law of 24 May 2011 on the exercise of certain rights of shareholders in listed companies (SHR Law) was published in the Mémorial A on 20 August 2019.

As regards investment funds, UCITS and AIFs are explicitly exempted from the scope of application of the SHRD 2 and of the law of 1 August 2019. However, these UCITS and AIFs, as well as their asset managers (i.e. UCITS ManCos, AIFMs and MiFID investment firms providing portfolio management services), may nevertheless be impacted by the new SHRD 2 engagement policy and transparency requirements to the extent that these UCITS and AIFs hold shares in EU listed companies. Thus, the main new requirements for asset managers (defined by the SHRD 2 to include UCITS ManCos, AIFMs and MiFID investment firms providing portfolio management services) are (i) to develop and publicly disclose an engagement policy that describes how they integrate shareholder engagement in their investment strategy and how they monitor the investee companies and (ii) to publicly disclose, on an annual basis, how their engagement policy has been implemented. If these asset managers chose not to do so, they must explain why.

Apart from asset managers, EU and non-EU intermediaries (such as investment firms, credit institutions and central securities depositories which provide services of safekeeping and administration services or maintenance securities accounts on behalf of shareholders) are also required by the SHRD 2 and the law of 1 August 2019 to provide certain information, including cross-border information, along the chain between the EU listed companies and their shareholders. For instance, intermediaries must confirm to the shareholders of the relevant listed companies that they will exercise their shareholder rights in a general meeting and must also transmit to the listed companies upon request information on the identity of the shareholders.

Please refer to the [Banking, Finance and Capital Markets] section of this Luxembourg Legal Update for further details on the Law of 1 August 2019.

Implementation of Prospectus Regulation

Please refer to the [Banking, Finance and Capital Markets] section of this Luxembourg Legal Update for further details on the new Prospectus Law of 16 July 2019, CSSF Circular 19/724 on technical specifications regarding the submission to the CSSF of documents under the Prospectus Regulation and the Prospectus Law and CSSF Press Release 19/37 regarding the application and entry into force of the Prospectus Regulation.

Implementation of MiFID2/MiFIR

Please refer to the [Banking, Finance and Capital Markets] section of this Luxembourg Legal Update for further details on CSSF Circular 19/716 on the provision of investment services or the performance of investment activities and ancillary services (Investment Services) in Luxembourg by third-country firms (TCF) in accordance with Article 32-1 of the Financial Sector Law and CSSF Circular 19/723 on the implementation of the guidelines issued by the ESMA on the application of the definitions of commodity derivatives in Sections C6 and C7 of Annex I of MiFID2.

Implementation of EMIR REFIT

Please refer to the [Banking, Finance and Capital Markets] section of this Luxembourg Legal Update for further details on EMIR REFIT, including, in particular, CSSF Press Release 19/21 regarding EMIR REFIT and the relevant ESMA Q&As and CSSF press release 19/27 dated 27 June 2019 regarding the EMIR interactive form for the notifications by financial counterparties and non-financial counterparties exceeding the clearing threshold.

Implementation of Securitisation Regulation

Please refer to the Banking, Finance and Capital Markets section of this Luxembourg Legal Update for further details on CSSF Circular 19/719 on the implementation of the guidelines issued by the EBA on the simple, transparent and standardised (STS) criteria for non-ABCP securitisations and the STS criteria for asset-backed commercial paper (ABCP) securitisations as set out in the Securitisation Regulation.

Digitalisation of Communications and Request with CSSF for UCIs and IFMs

CSSF Circular 19/708

Electronic transmission of documents

On 29 January 2019, the CSSF issued Circular 19/708 concerning the electronic transmission of documents to the CSSF by:

- Luxembourg regulated investment funds, including UCITS, Part II UCIs, SIFs and SICARs; and
- Luxembourg investment fund managers (IFMs), including management companies governed by Chapter 15 and Chapter 16 of the UCI Law, external and internally-managed AIFMs authorised under the AIFM Law, and Luxembourg branches of foreign non-UCITS management companies governed by Chapter 17 of the UCI Law.

The main purpose of Circular 19/708 is to clarify the documents that must be transmitted electronically by the above entities to the CSSF as from 1 February 2019, as well as the procedures and nomenclature to be complied with in this respect. The circular also aims to extend the electronic transmission of documents to (i) pensions funds governed by the law of 13 July 2005 on institutions for occupational retirement provision in the form of pension savings companies with variable capital (SEPCAVs) and pension savings associations (ASSEPs), and (ii) securitisation undertakings governed by the law of 22 March 2004 on securitisation.

The relevant documents that must be transmitted to the CSSF by electronic means include, without limitation, the prospectus/offering documents, the constitutive documents, the annual and other reports, the risk management procedure and certain tables such as the table listing the professional activities and the mandates performed by the members of the management body and the conducting officers of the entities concerned. A complete list of these documents is enclosed in an Annex to Circular 19/708, which will be kept up-to-date on the CSSF's website and which shall be consulted regularly by the entities concerned as the CSSF no longer expects to receive these documents by other means since 1 February 2019.

As regards the technical procedure, the CSSF notes that the relevant documents shall be transmitted in their final form, in principle in PDF-text format, by using only the secured channels that have been accepted by the CSSF, i.e. for the moment 'e-file' and 'SOFIE'. The circular also emphasises that the applicant (*déposant*) will be responsible for the content and format of the transmitted file, and it is its particular responsibility to ensure that the documents transmitted by electronic means correspond to the official and final paper version.

Circular 19/708 replaces Circular 08/371 on the electronic transmission of prospectuses and financial reports of UCIs and SIFs to the CSSF and Circular 09/423 on the electronic transmission to the CSSF of long form reports and management letters.

CSSF Circular 19/721

Digitalisation of requests to the CSSF

On 1 July 2019, the CSSF issued Circular 19/721 the purpose of which is to informs all Luxembourg IFMs and UCIs (including, but not limited to, UCITS, Part II UCI, SIF, SICARs, Luxembourg UCITS ManCos and AIFMs) as well as some other supervised entities (including, but not limited to, ASSEP and SEPCAVs and securitisation undertakings) of the establishment of the "eDesk Portal" ("eDesk Portal") available on the CSSF website (www.cssf.lu/edesk) and which must be used for all the requests to the CSSF as listed on the homepage of the eDesk Portal because the use of other means of communication in this respect will no longer be accepted by the CSSF.

For the time being, a "PRIIPs Declaration" and some "Attestation Requests" can only be requested via the eDesk Portal, but the list of requests will be updated on a regular basis and should, in particular, include requests for approval of new UCITS, Part II UCIs, SIFs and SICARs by the end of September 2019 or beginning of October 2019 (meaning that the current Excel questionnaires should no longer be used). In this respect, the CSSF indicates that it is the responsibility of all the entities referred to in Circular 19/721 to check this list of requests regularly on the homepage of the eDesk Portal in order to be informed of any update and to ensure that all the available requests that are applicable to them are completed appropriately and in due time via the eDesk Portal.

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Additional information on the access to the eDesk Portal is provided for in Circular 19/721 and in the "Authentication User Guide" available on the eDesk Portal homepage.

CSSF Press Release 19/28

New PRIIPs Declaration Request

On 1 July 2019, the CSSF issued Press Release 19/28 in the context of the dematerialisation of CSSF requests whereby all Luxembourg SIFs, Part II UCIs and SICARs are required to complete the new online "PRIIPs Declaration" request available on the eDesk Portal by 31 October 2019 at the latest.

The CSSF indicates that the new "PRIIPs Declaration" replaces the previously published self-assessment confirmation on the exclusive professional investor status under the PRIIPs KID Regulation, and also clarifies that SIFs, Part II UCIs and SICARs which have already provided the CSSF with the previous self-assessment confirmation are not exempted from the obligation to complete and send the new "PRIIPs Declaration" to the CSSF as this new document contain further questions on various issues.

Swing Pricing

CSSF FAQ on swing pricing mechanism

On 30 July 2019, the CSSF published a FAQ document in relation to swing pricing, in which the CSSF reaffirms the principles to be complied with by Luxembourg regulated UCIs (e.g. UCITS, Part II UCIs and SIFs) that apply the swing pricing mechanism.

In brief, swing pricing is a pricing mechanism which is designed to protect an investment fund's performance, and thus to protect also the interests of existing investors of that fund, against the negative impact of dilution caused when the fund invests or disinvests as a result of investors' activity. Swing pricing is part of the net asset value calculation process and consists in including security dealing and transaction costs in the net asset value in the event of investors entering or exiting the fund (i.e. the net asset value is then adjusted to include this dilution impact).

In its FAQ document, the CSSF recalls the governance, organisational and transparency requirements to be complied with by UCIs (and their managers) when applying the swing pricing mechanism. In particular, the CSSF clarifies and confirms:

- the minimum level of information to be disclosed in the fund documents (articles of association or management regulations, prospectus and annual reports (and semi-annual reports, as the case may be) in relation to the use of the swing pricing mechanism. In this respect, the CSSF indicates that where changes are required to the UCI's prospectus, articles of association or management regulation, these should be included at the next update;

- the obligation for UCIs to establish and implement a detailed swing pricing mechanism policy to be approved by the management body of the UCI manager and, if applicable, by the management body of the UCI as well as specific operational procedures governing the day-to-day application of the swing pricing mechanism;

- the scope of application of CSSF Circular 02/77 if an administrative error in relation to the application of the swing pricing mechanism leads to a NAV calculation error (e.g. the swing factor applied was not the one approved by the governing body, or the UCI was swung in the wrong direction). In particular, in the case of material NAV calculation error, the CSSF indicates that the procedures relating to the correction of NAV calculation errors as set forth in Circular 02/77, including the determination of the financial impact of the NAV calculation error and the compensation of the prejudice which results from the calculation error for the UCI and/or its investors, have to be followed. If the impact of the swing pricing mechanism error is below the materiality threshold as determined in accordance with Circular 02/77, the CSSF still considers that the UCI should be compensated when it was not protected from the level of dilution it should have been.

It is worth mentioning that most of the questions and answers addressed by the CSSF in its FAQ document had already been commented on by ALFI in the third edition of its Swing Pricing Guidelines in 2015, in which ALFI also provides additional clarification on a number of other technical points to be considered by UCIs and their managers when they decide to implement a swing mechanism.

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INTERNATIONAL AND EU DEVELOPMENTS

New International and EU Texts

- FSB Crypto assets regulators directory of 5 April 2019
- Joint Advice of the European Supervisory Authorities of 10 April 2019 to the European Commission on the need for legislative improvements relating to ICT risk management requirements in the EU financial sector (JC 2019 26)
- Joint Advice of the European Supervisory Authorities of 10 April 2019 to the European Commission on the costs and benefits of developing a coherent cyber resilience testing framework for significant market participants and infrastructures within the whole EU financial sector (JC 2019 25)
- EBA Central Register of payment and electronic money institutions
- EBA Report of July 2019 on the impact of FinTech on payment institutions' and e-money institutions business models
- ESMA Report of 12 July 2019 on Licensing of FinTech business models (ESMA50-164-2430)
- EBA report of 18 July 2019 on regulatory perimeter, regulatory status and authorisation approaches in relation to fintech activities

LUXEMBOURG DEVELOPMENTS

DLT: Luxembourg Law recognising the Use of Distributed Ledger Technology by Securities Depositories

Law of 1 March 2019

A new law of 1 March 2019 amending the law of 1 August 2001 on the circulation of securities (2001 Law) was published in the Luxembourg official journal (Mémorial A) on 5 March 2019.

The law introduces a new Article 18bis into the 2001 Law providing for the possibility for Luxembourg securities depositories to hold and register securities in securities accounts within or by virtue of a secured electronic recording system (*dispositif d'enregistrement électronique sécurisé*), be it either centralised or distributed. The law thereby seeks to modernise the Luxembourg legal framework and promote more legal certainty on the use of distributed ledger technology in this area.

The law entered into force on 9 March 2019.

Cloud Computing: Revised CSSF Circular on Cloud Computing

CSSF Circular 19/714

The CSSF issued circular 19/714 dated 27 March 2019 updating CSSF circular 17/654 (Cloud Circular) on IT outsourcing relying on a cloud computing infrastructure. The circular applies to credit institutions, professionals of the financial sector, payment institutions and electronic money institutions, as well as to investment fund managers (IFMs) subject to CSSF Circular 18/698 concerning the substance and organisational requirements applicable to Luxembourg IFMs.

The purpose of the new circular is to amend and also clarify some requirements of the Cloud Circular, taking into account the experience gained by the CSSF and the supervised entities since its entry into force in May 2017. The CSSF notices that since then:

- many authorisation or notification requests for cloud computing outsourcing have been addressed to the CSSF (two-third-relating to non-critical or non-material activities);
- a significant number of questions about this topic have been addressed to the CSSF, leading the CSSF to the conclusion that more guidance is needed;
- the guidelines on outsourcing to the cloud service provider of the EBA (EBA/REC/2017/03) have been published which are less strict and more flexible than the Cloud Circular; and
- CSSF circular 18/698 has been published and has made the Cloud Circular (applicable to credit institutions, professionals of the financial sector, payment institutions and electronic money institutions) also applicable to investment fund managers.

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For these reasons, the new circular:

(a) adds IFMs, including UCITS ManCos and AIFMs, to the scope of the Cloud Circular (in line with CSSF Circular 18/698 that already requires IFMs that use cloud computing infrastructure outsourcing to designate a cloud officer among their employees who will be responsible for the use of cloud computing services) and clarifies that IFMs subject to Circular 18/698 which have used cloud computing infrastructure outsourcing before 27 March 2019 (i) do not need to file an authorisation request or to notify such cloud infrastructure to the CSSF, and (ii) benefit from a one-year transitional period to comply with the new requirement to maintain a register of cloud computing infrastructure outsourcings,

(b) emphasises the proportionality principle and in this context introduces optionality for some requirements for non-material activities only,

(c) introduces the obligation for supervised entities to maintain a register of all their cloud computing infrastructure outsourcings (based on the specific form available on the CSSF website and regardless of whether the relevant cloud computing outsourcing relates to material or to non-material activities), which register must be provided to the CSSF upon request. This register must be established and completed (i) by 27 September 2019 for credit institutions, professionals of the financial sector, payment institutions and electronic money institutions, and (ii) by 27 March 2020 for IFMs that are already using cloud computing infrastructure outsourcing on 27 March 2019,

(d) repeals the necessity to notify the CSSF of a cloud computing outsourcing relating to non-material activities and recalls that it is possible to rely on the proportionality principle in order to disapply some requirements as listed in the Cloud Circular for non-material activities, provided that this is justified and proportional to the nature, scale, complexity and related risk of the relevant IT outsourcing relying on a cloud computing infrastructure. For the avoidance of doubt, however, the proportionality principle cannot be invoked to waive the requirement to appoint a cloud officer within the resource operator even in the case of outsourcing of non-material activities,

(e) replaces the "compliance table" by more specific and pragmatic forms, and

(f) rewords and reorganises some paragraphs of the Cloud Circular for more clarity.

Finally, the CSSF also published two FAQ documents on its website to provide assistance for understanding of the cloud computing topic, namely (i) a FAQ on the concept of materiality designed to assist supervised entities in assessing the materiality of their IT outsourcing projects, and (ii) a FAQ on the Cloud Computing Circular designed to assist entities in their analyses and procedures in order to comply with the Cloud Computing Circular Requirements.

A blacklined version of the Cloud Circular reflecting the amendments is attached to the new circular.

Cloud Computing: Continued Access to Cloud Computing Outsourcing Resellers to be Avoided

CSSF Press Release

The CSSF issued on 23 August 2019 a press release warning PFs of the requirement to restrict the continued access of resellers of cloud computing services to their outsourcing projects.

The CSSF points out that when PFs use cloud computing solutions for outsourcing projects, resellers commonly retain access to the client interface even after completing its initial configuration. The CSSF considers that such practice must be avoided as it generates unauthorised access to a PFS' cloud computing resources and creates an increased risk for the financial sector, particularly where resellers with access to the cloud computing resources of several clients are exposed to cyber-attacks.

The CSSF therefore requires PFs to restrict access to the client interface to the resource operator only, and to withdraw the reseller's access after completion of the initial configuration of the client interface.

CORPORATE

The Luxembourg Law Of 1 August 2019

It is modifying the Luxembourg law of 24 May 2011 on the exercise of certain rights of shareholders in listed companies (SHR Law) and transposing Directive (EU) 2017/828 (SHRD 2), which amends Directive 2007/36/EC with regard to the encouragement of long-term shareholder engagement, has been published in the Mémorial A on 20 August 2019 and came into force on 24 August 2019.

Mainly, the new law (i) gives issuers the right to identify their shareholders — intermediaries being required to communicate to the company information relating to shareholders; (ii) ensures that institutional investors and asset managers publicly disclose information about the implementation of their engagement policy and the exercise of their voting rights; (iii) subjects proxy advisors to transparency requirements, including disclosure of potential conflict of interests; (iv) provides for the disclosure of both the company's remuneration policy and individual directors' remunerations as well as enshrines the "say on pay" principle; (v) increases the transparency of material related parties transactions and establishes their approval by the administrative or supervisory body and; (vi) introduces the joint and several liability of the directors for any damages resulting from the violation of their obligations arising under this law.

This new legal regime has to be read together with the EU Commission Implementing Regulation 2018/1212, dated 3 September 2018 and laying down minimum requirements implementing the provisions of SHRD 2 as regards shareholder identification, the transmission of information and the facilitation of the exercise of shareholders rights. The Regulation 2018/1212 shall enter into force on 3 September 2020.

EMPLOYMENT

EMPLOYMENT

LAW OF 12 APRIL 2019

The law of 12 April 2019 relating to the creation of a time-saving account ("TSA") amending (i) the Luxembourg Labour Code, (ii) the Luxembourg Civil Code and (iii) the Law of 4 December 1967 on income tax (the "Law") was published in the Luxembourg Official Gazette on 24 April 2019

Key points

- Time-saving Account
- Trade secret Law

The key aspects of the Law are the following:

Establishment of the TSA

The TSA becomes voluntary on both sides: even though a TSA may be created by the employer, employees are not obliged to use it (article L.235-1 of the Luxembourg Labour Code).

The implementation of a TSA is further dependent on collective bargaining. TSAs are either provided for by a collective bargaining agreement or by a national or sectoral inter-professional agreement (in which case, their implementation within a particular undertaking must be decided on jointly by the employer and his/its staff delegation, and must also be notified to, and approved by, the Labour Minister) (article L.235-2 of the Luxembourg Labour Code).

Supply of the TSA

The TSA is supplied in hours, up to a maximum of 1800, hours (article L.235-5 of the Luxembourg Labour Code).

Hours that can be affected to the TSA are the following (article L.235-4 of the Luxembourg Labour Code):

- additional days of leave (either those granted in the context of a work organisation plan (*plan d'organisation du travail*) by virtue of the applicable reference period exceeding one month, or those exceeding the legal minimum provided by article L.233-4);
- overtime;
- excess balances stemming from the reference period applicable within a work organisation plan or from a mobile timetable (horaire mobile);
- compensatory rest periods (granted in exchange for work on Sundays or on a public holiday); and/or
- a maximum of five days of paid leave that have not been taken within a relevant calendar year due to illness, maternity leave or parental leave.

Obligations of employers and employees

Several obligations must be respected by both parties. On the one hand, employees must have at least two years of seniority in order to benefit from the TSA (article L.235-1 of the Luxembourg Labour Code) and they also have to submit a written request a minimum, of one month in advance from the desired use of hours registered in the TSA (article L.235-6 of the Luxembourg Labour Code).

On the other hand, employers must guarantee the provision of a system enabling an accurate and detailed record of TSAs; they must ensure that employees may at all times consult the TSA and provide employees with a monthly overview statement. As hours registered in the TSA will be used as paid leave, employers must provision the corresponding financial compensation, including employer contribution, and adapt it, if appropriate, to variations in the costs of living (article L.235-9 of the Luxembourg Labour Code).

New guarantees

Leave taken by using the time from TSAs is equal to effective working time for the determination of annual leave entitlement and an employee's length of service.

In addition, employees that make use of hours registered in a TSA are considered to be on paid leave, and employers must keep their employment or, a similar with an equal wage (article L.235-7 of the Luxembourg Labour Code).

Bankruptcy

In the event of bankruptcy of the employer, debts resulting from the TSA's liquidation are guaranteed by the Employment Fund (*Fonds pour l'emploi*) up to a threshold equal to the double of the minimum social wage (article L.126-1 of the Luxembourg Labour Code).

Liquidation of the TSA

TSAs may be liquidated via a compensatory indemnity in the following cases (article L.235-8 of the Luxembourg Labour Code):

- cessation of the employer's activities or automatic termination of the employment contract (for example, when the employee become eligible for an old-age pension or a disability pension);
- termination of the employment contract by the employer, resignation by the employee or termination of the employment contract by the mutual consent of the employer and the employee; and/or death of the employee.

Collective bargaining agreements already providing for a TSA

Finally, a transitional provision enables companies to maintain the application of existing provisions already in force by virtue of a collective bargaining agreement. However, if a new collective bargaining agreement is signed, the existing provisions will need to be adapted to comply with the Law.

To sum up, the Law introduces a general legislative framework for TSAs - which already existed in the public sector - for the private sector.

LAW OF 26 JUNE 2019

The law of 26 June 2019 relating to the protection of undisclosed know-how and business information (trade secrets) against their unlawful procurement, use and disclosure (the "Trade Secrets Law") was published in the Luxembourg Official Journal on 28 June 2019.

The key aspects of the Trade Secrets Law are the following:

Definition

"**Trade secret**" covers any information that meets the following characteristics:

- it is secret because it is not, as a whole or in the precise configuration and assembly of its components, generally known among, or readily accessible to, people within the circles that normally deal with the kind of information in question;
- it has commercial value because it is secret; and
- it is subject to reasonable measures by the person lawfully possessing it to keep it secret (article 2 of the Trade Secrets Law).

Procurement, use and disclosure of trade secrets

The Trade Secrets Law distinguishes licit procurement (e.g. in the case of independent discovery or creation, or exercise of information and consultation rights of employees or their representatives) and illicit procurement (e.g. in the case of unauthorised access, appropriation or copy of any document, object, material or electronic folder without the consent of the holder of the trade secret) of trade secrets.

The Trade Secrets Law further distinguishes licit use or disclosure of trade secrets (e.g. permitted by national or by E.U. law) from their illicit use or disclosure (e.g. use or disclosure of illicitly obtained trade secrets) (articles 3 and 4 of the Trade Secrets Law).

Exemptions

Measures, proceedings and/or compensation claimed on the basis of the Trade Secrets Law will be denied where, for instance, the procurement, the use or the disclosure alleged of trade secrets has taken place to exercise the right to freedom of expression and information (as provided by the Charter of Fundamental Rights of the European Union), or to expose a fault, a reprehensible act or illegal activity, and provided that the defendant acted to protect the public interest (article 5 of the Law).

Jurisdiction over claims based on the Trade Secrets Law

The District Court (*tribunal d'arrondissement*), sitting in commercial matters, is the competent jurisdiction to deliver a decision on the merits of a case. The judge presiding, at the District Court may grant interim measures (article 6 of the Law).

Interim measures

The holder of a trade secret can obtain interim orders (*ordonnances de référé*) from the judge presiding at the District Court, for instance in order to temporarily cease or prohibit the use or disclosure of a trade secret, or prohibit the production, offer, marketing, import, export, stock or use of goods. When assessing requests for interim measures, the judge presiding the District Court will consider the specific circumstances of the case, such as the trade secret's value, the defendant's behaviour, and/or legitimate third-party interests.

Interim measures granted by the judge presiding at the District Court may be withdrawn if the plaintiff does not bring, in due time, an action on the merits of the case (article 9 of the Law).

Corrective measures

In the case of illicit procurement, use or disclosure of a trade secret, the District Court, when trying the merits of the case, can order corrective measures, such as the destruction of the good containing or materialising the trade secret, or restoration of the good to the holder of the trade secret (article 10 of the Law).

Damages

A right of compensation exists for the trade secret's holder for any harm suffered as a result of illicit procurement, use or disclosure. For the determination of the amount of damages, the District Court can consider negative economic consequences (e.g. unfair profits or moral damage). Alternatively, the District Court can fix a standard amount corresponding, at least, to the royalties or duties that would have been due if permission to use the trade secret had been requested (article 12 of the Law).

Protection of trade secrets' confidentiality

Parties, their lawyers, judicial staff, witnesses, experts and other people participating in court proceedings relating to illicit procurement, use or disclosure of a trade secret are subject to specific confidentiality obligations as regards the relevant trade secret (article 14 of the Trade Secrets Law).

Time-bar

Actions based on the Trade Secrets Law are time-barred two years from the moment when the trade secret's holder became aware of the illicit obtention, use or disclosure and of the identity of the offender. This time-bar can be interrupted by an injunction to cease served by a bailiff, by an application for interim measures or by an action on the merits brought in accordance with the Trade Secrets Law (article 16 of the Law).

DATA PROTECTION

NATIONAL UPDATE

Bill n°7427

A new bill n°7427 ("Bill 7427") was issued in April 2019 by the Luxembourg government. Bill 7427 aims at transposing the Regulation (EU) n°910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions (the "eIDAS Regulation") in the internal market by amending the Law of 14 August 2000 relating to electronic commerce (the "Law on Electronic Commerce").

If Bill 7427 mostly ensures that the definitions used in the Law on Electronic Commerce are aligned with the ones in the eIDAS Regulation, it also designates the Luxembourg Institute of Standardisation, Accreditation, Safety and Quality of Products and Services ("ILNAS") as the competent authority to supervise the trust service providers that are established in the Grand Duchy of Luxembourg. To fulfil its mission, ILNAS will be provided with ex ante and ex post control powers as well as sanctioning powers.

CNPD

In March 2019, the CNPD published a list of processing activities triggering the requirement to carry out a data protection impact assessment. According to Article 35 of the GDPR, where a processing operation is likely to result in a high risk to the rights and freedoms of natural persons, the company shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data.

Between January and June 2019, the CNPD published several guidelines, that in particular, relate to:

- the consequences of Brexit with regard to international data transfers (guidance for companies which transfer (or will transfer) personal data to the United Kingdom after the Brexit); and

- electoral campaigns (recommendations and good practices in the field of digital election campaigns, awareness of the risks related to the collection and processing by political actors of voters' personal data for electoral purposes).

INTERNATIONAL UPDATE

Guidelines and opinions of the EDPB

Between February and June 2019, the EDBP published several guidelines and opinions, in particular:

- opinion 4/2019 on the draft Administrative Arrangement for the transfer of personal data between EEA Financial Supervisory Authorities and non-EEA Financial Supervisory Authorities (the draft Administrative Arrangement aims to frame the transfers of personal data between EEA Financial Supervisory Authorities, including the European Securities and Markets Authority (ESMA) and their non-EU counterparts);

- opinion 5/2019 on the interplay between the ePrivacy Directive and the GDPR, in particular regarding the competencies, tasks and powers of data protection authorities;

- guidelines (open to public consultation) on the scope and application of Article 6(1)(b) GDPR (i.e. on the legitimate basis that "processing is necessary for the performance of a contract") in the context of information society services (i.e. "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services" or in other words "online services"); and

- guidelines on Codes of Conduct (the aim of these guidelines is to provide practical guidance and interpretative assistance in relation to the submission, approval and publication of codes of conduct (which are one of the mechanisms available to companies to demonstrate compliance with the GDPR)).

During its seventh plenary session in February 2019, the EDPB adopted an information note addressed to commercial entities and public authorities on data transfers under the GDPR in the event of a no-deal Brexit:

- Data flows from the EEA to the UK: the UK will become a third country, therefore, all transfers will have to be based on one of the following instruments: Standard or ad hoc Data Protection Clauses, Binding Corporate Rules, Codes of Conduct and Certification Mechanisms,

DATA PROTECTION

or one of the other appropriate safeguards, derogations (subject to strict conditions), or specific transfer instruments available to public authorities.

- Data flows from the UK to the EEA: the UK Government announced that it will continue to permit free flow of personal data from the UK to the EEA.

CJEU CASE-LAW AND OPINION

New judgment of the CJEU

On 16 January 2019, the CJEU rendered a judgment in Case C-496/17 following a request for a preliminary ruling brought by the Finanzgericht Düsseldorf (Germany) which concerned the conformity of a German legal provision with the GDPR.

The national provision at stake provided that legal persons which apply for "authorised economic operator" status ("AEO Status") had to send tax identification numbers of certain of their employees to the customs authorities. The CJEU stated that, since the information gathered was limited to information on individuals who were in charge of the applicant, or who exercised control over its management, and to those who were in charge of the applicant's customs matters, and since these personal data were collected and processed, for specified, explicit and legitimate purposes (i.e. to ensure that the authorities were in a position to obtain information on the reliability of the applicant with regard to compliance with the customs legislation and on the reliability of the specified individuals with regard to their compliance with the customs legislation and the tax rules applicable to them, and in particular to enable the authorities to determine if the natural persons had committed any serious or repeated infringements of custom legislation or tax rules), the processing of the personal data was lawful.

New opinion of an Advocate General of the CJEU

*On 21 March 2019, Advocate General Szpunar issued an opinion on cookie consent, information obligations regarding cookies and consent bundling in Case C-673/17 Planet49 GmbH v. Bundesverband der Verbraucher-zentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V., which is currently pending before the CJEU.

This case is a typical example of a consent which is not validly given due to the fact that one of the boxes (related to cookies) which the internet user was supposed to tick to provide his or her consent was already ticked (so called "pre-ticked box"), and the other box (related to direct marketing) had to be ticked in order to benefit from the service offered by the company.

The Advocate General recalled that, as provided by the GDPR, consent must be freely given, be specific, be informed and be an unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.

In relation to first box, since it was already pre-ticked, the Advocate General considered that there was no "active" consent (i.e. no affirmative act), therefore, consent was not valid.

In relation to the second box, the Advocate General recalled that for consent to be 'freely given' and "informed", it must not only be active, but also separate. Therefore, "bundled consent" (e.g. where users, to benefit from free services, have to provide their personal data) is prohibited. For the Advocate General, consent is not freely given (i) where it does not allow for separate consent to be given to different personal data processing operations, or (ii) where the performance of a contract is conditioned on consent to process additional personal data not necessary for the performance of the contract.

Finally, the Advocate General recalled that clear and comprehensive information must be given to internet users, including in relation to the functioning of cookies, which implies that a user must be in a position to easily determine the consequences of any consent he or she might give.

REAL ESTATE

BUILDING PERMIT – ADMISSIBILITY OF AN ACTION FOR ANNULMENT

Standing of the direct neighbour

Administrative Tribunal, 28 November 2018, n°39898

In this case, claimants filed an action for annulment directed against a building permit authorising the construction of a six-unit condominium on the neighbouring property.

The municipality, as defendant, asserted that claimants do not have sufficient standing in order to challenge the building permit. It conceded that the proximity of the authorised building may be one of the indicators for standing but could not suffice in itself. Thus, the municipality insisted that claimants had to prove, in addition, to what extent the alleged violation of the urban regulation worsens their situation as neighbours.

The Administrative Tribunal rejected the reasoning of the municipality. It held that the claimants have sufficient standing to challenge the building permit based on the sole fact that they are direct neighbours of the future building/construction site. The Administrative Tribunal reasoned that, as direct neighbours, their standing arises out of their legitimate concerns regarding loss of property value as well as decrease in their quality of life.

Standing of the nearby neighbour

President of the Administrative Tribunal, 17 August 2018, n°41549

In a summary procedure for interim measures, claimants filed a request for suspension of execution of a building permit. A request for annulment of the building permit on the merits had already been introduced by the claimants.

Arguing that the claimants do not have sufficient standing, the municipality, as defendant, insisted that this request should be ruled out of court.

The President of the Administrative Tribunal held that a request for annulment of a building permit is not admissible based on the sole fact that the claimant who brought it to court is a nearby neighbour. The claimant must prove a violation or a damage in relation to the occupation, utilisation or enjoyment of his or her property.

Key points

- Building permit
- Vested rights
- Pre-emption rights

These questions are to be evaluated based on the distance between the neighbour and the future construction site, the nature and the size of the project as well as the configuration of the area.

VESTED RIGHTS - MATERIAL DURABILITY OF THE BUILDING

Administrative Tribunal, 13 July 2018, n°39461

A resident wanted to expand its housing, which had been built under a previous version of the urban planning regulation and did not respect the lateral setback margin currently applicable. The envisaged expansion of the housing was, in itself, compliant with the current regulation.

The municipality refused the extension and invoked the urban planning regulation that provided that no building may be expanded, reconstructed or modified without respecting the current version of the urban planning regulation.

The Administrative Tribunal held that, even though the urban planning regulation contained such a provision, it cannot be laid out in such a manner. The consequence would be that an existing building, duly authorised in the past, could not be modified or expanded as soon as it stopped being in conformity with the currently applicable urban planning regulation. Such an interpretation would challenge the vested rights principle applicable to legal subjects.

The Administrative Tribunal further held that new constructions have to be in conformity with the current urban planning regulation. However, for new constructions on an existing building, the owner has a vested right in the sense that, in case of a modification of the urban planning regulation, that modification may not challenge the material durability of the construction (N.B. material durability of the construction means the implantation, the setback margins and the gauging) as it had existed under the previous (and yet no longer applicable) urban planning regulation. If the

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current urban planning regulation challenges the material durability of an existing building built in conformity with the previous one, the owner has the right to make new constructions or modifications according to the previous urban planning regulation.

PRE-EMPTION RIGHT - ABSENCE OF AN ADMINISTRATIVE ACT SUBJECT TO APPEAL BEFORE ADMINISTRATIVE JURISDICTIONS

Administrative Tribunal, 18 April 2018, n°40915

In this case, claimants filed an action for annulment against the decision of the Fonds du Logement to exercise its right of pre-emption in order to build accommodation on the land where the claimants, as purchasers of this land, wanted to build a house.

The Fonds du Logement challenged the competence of administrative jurisdictions to hear the action, arguing that its decision to exercise its pre-emption right was not an administrative act and did not cause as it a serious and definitive harm to the claimants.

The Administrative Tribunal held that, by exercising its pre-emption right within the statutory period of one month following the confirmation of the receipt of the file, the Fonds du Logement agreed at the same time with the seller on the conditions and price of the land, and therefore acquired the full ownership of the land. The Administrative Tribunal acknowledged the exercise of the pre-empting right as a means to acquire land, without any further administrative act needed, and therefore ruled that the decision of the pre-empting entity is not to be considered as an administrative act subject to appeal before administrative courts.

TAX

LUXEMBOURG 2019 BUDGET LAW

On 25 April 2019, the Luxembourg Parliament approved the 2019 budget law which entered into force on 1 May 2019. Amongst others, the new law will lead to a reduction in the corporate income tax rate and implement the interest limitation rule applicable to the tax unity regime.

Key points

- Luxembourg 2019 Budget Law
- Tax rate and tax measures
- Fiscality

Corporate income tax rate reduction

A significant highlight of the Budget Law is the reduction of the Luxembourg corporate income tax ("CIT") rate by one percentage point, from 18% to 17%, leading to an aggregate CIT rate of 24.94% (previously 26.01%) for taxpayers resident in Luxembourg City. Moreover, the threshold under which a company can benefit from the reduced CIT rate of 15% is raised from EUR 25,000 to EUR 175,000.

These changes will apply as from the tax year 2019 and may impact investment activities in the Luxembourg market. For instance, German investors may be affected, as the reduced overall tax rate of less than 25% could lead to the application of German CFC rules (*Hinzurechnungsbesteuerung*). This could (subject to further requirements) result in the allocation of certain passive income items from Luxembourg capital companies to German investors and consequently lead to additional taxation at the investor level. Relocation of holdings to other municipalities in Luxembourg with a higher communal tax rate, resulting in an overall rate greater than 25%, may become a subject for discussion.

It is worth noting that, at least under the current statutory rules, German CFC rules do not apply to Luxembourg corporations that qualify as alternative investment funds (e.g. S.A. SICAV-SIFs). It is expected that the German CFC rules will be reformed (presumably with effect from 1 January 2020).

Interest limitation for fiscal unities

For tax years starting on or after 1 January 2019, a new version of article 164bis of the Luxembourg income tax law (LITL) will impact the Luxembourg fiscal unity regime. Besides clarifying the rules applicable to fiscal unities as such, the new provision will also implement the EU Anti-Tax Avoidance Directive (ATAD 1), allowing group entities under the fiscal unity regime to apply the interest limitation rule at the level of the fiscal unity itself, and thus determining the exceeding borrowing costs and fiscal EBITDA on an aggregated basis.

This computation is, however, optional and the application of the interest limitation rule on an entity-by-entity basis will remain.

The practical application of the computation and further clarification (e.g. concerning Luxembourg securitisation vehicles) remains uncertain.

Minimum social salary tax credit

A minimum social salary tax credit (crédit d'impôt salaire social minimum) effective as of 1 January 2019 is created in order to increase the minimum social salary by EUR 100 net per month.

Value Added Tax measures

Applicable from 1 May 2019, the law foresees the extension of the super-reduced Value Added Tax (VAT) rate of 3% to certain new items including electronic books, online publications and essential hygiene-related items. In addition, a reduced VAT rate of 8% will now apply to specific plant protection products used for organic agriculture.

TAX

THE MULTILATERAL INSTRUMENT ENTERS INTO FORCE

On 14 February 2019, the Luxembourg Parliament adopted bill of law 7333 ratifying the Multilateral Convention ("MLI") which implements Tax Treaty Related Measures preventing Base Erosion and Profit Shifting ("BEPS") that might impact all 81 double tax treaties ("DTT") concluded by Luxembourg.

Purpose of the MLI

The purpose of the MLI is to fight BEPS and to ensure that the income is taxed in the jurisdiction where economic activity generates profits and where value is created. The MLI will allow the different jurisdictions to meet the requirements foreseen by the BEPS action plan by establishing one single legal framework that can apply to all existing DTTs.

Impact on the Luxembourg DTT

The MLI has already entered into force in 15 jurisdictions, including Australia, Austria, Finland, France, Guernsey, the Isle of Man, Israel, Japan, Jersey, Lithuania, New Zealand, Poland, the Slovak Republic, the United Kingdom, Serbia, Slovenia and Sweden. By the time the MLI enters into force in Luxembourg, this list will be extended by six others (i.e. Finland, Guernsey, Ireland, Malta, Monaco and Serbia).

In respect of Luxembourg, the MLI will enter into force on the first day of the month following a three-calendar-month period after the deposit date of the ratification instrument with the OECD, e.g. since Luxembourg deposited its ratification instrument on 9 April 2019, the MLI will enter into force on 1 August 2019.

Although Luxembourg has notified all 81 of its DTT to the OECD as treaties falling within the scope of the MLI, the Luxembourg tax treaty network will not immediately be entirely affected, since only Covered Tax Agreements ("CTAs"), i.e. treaties where both jurisdictions have been notified to the depositary as listed agreements under the MLI, will be impacted. Moreover, provisions and amendments of a specific tax treaty will only enter into force where both parties to a treaty have deposited their instrument of ratification or approval of the MLI. Therefore, when the MLI enters into force in Luxembourg, DDT will be impacted with all the above-listed countries except for Australia and New Zealand.

Nevertheless, even when the MLI has entered into force, it will take some more time for its provisions (inter alia the principal purpose test) to have effect as regards the different types of taxes.

For withholding taxes, the MLI will become effective on the first day of the year following the latest date of entry into force of the MLI. For instance, since Luxembourg deposited its instrument of ratification in April 2019, the MLI provisions will then affect withholding taxes as of 1 January 2020.

Provisions as regards all other taxes will apply in the first taxable period, after a six-months period following the entry into force. Taxpayers with taxable periods corresponding to a calendar year will thus need to apply the provisions as of 1 January 2021.

Functioning of the MLI

The flexibility of the MLI allows its signatories to express reservations, i.e. to opt out of certain provisions, either entirely or partly, provided they are not subject to a BEPS minimum standard (e.g. the prevention of treaty abuse, the dispute resolution and the preamble clause). Optional provisions can also be chosen by signatories, but these would only apply where both parties have chosen identical options (Matching Principle).

Finally, the MLI requires each signatory to deposit its very own MLI position with the OECD and to set out any reservations and optional provisions therein.

Luxembourg's position

In addition to the mandatory minimum standards which must be complied with by each signatory, Luxembourg has opted into, and made reservations on, several provisions as follows.

Transparent entities - Article 3 MLI

The objective of this provision is to introduce the new article 1(2) of the OECD Model Tax Convention which addresses income earned through transparent entities (the approach is in line with the OECD's Partnership Report)

Luxembourg opted into Article 3 by choosing to apply the transparent entities provision which denies treaty benefits on payments via reverse hybrid instruments. In addition, a reservation has been made on Article 3(2), leading to non-application of this part of the provision, which denies relief for double taxation where the other state's tax is levied solely on the basis of residence.

For purposes of tax treaty benefits, the provision disregards a transparent entity and grants such benefits directly to the entity's holder (partner) if the latter is taxed in its home country. Consequently, income derived by a partner, resident in one state, through a transparent entity (e.g. partnership) established in the other state, will be considered as income of that partner, if that income is treated as such for tax purposes in its residency state.

Elimination of double taxation - Article 5 MLI

Luxembourg opted for option A of Article 5 which provides that the residency State, in order to eliminate double-taxation, should apply the credit method instead of the exemption method where income is, pursuant to the CTA, tax-exempt or treated at a lower tax rate in the source State. Therefore, Luxembourg would not grant an exemption (e.g. as foreseen by a double-tax treaty) but rather a tax credit, where the other State applies the tax treaty to exempt such income from taxation.

Since this provision is not subject to the "Matching Principle" it will still apply to Luxembourg residents even when the other State has not chosen the same option, to the extent that it has not made a reservation not to apply the provision. However, as this could lead to asymmetrical application disrupting the balance of certain treaties, Luxembourg has chosen, with respect to several identified CTAs, not to permit the other contracting jurisdiction to apply option C; option C being the credit method for the elimination of double taxation.

Ensuring the minimum standard - Article 6 MLI

Luxembourg has decided to include the preamble wording in all of its 81 CTAs setting out a minimum standard clarifying the intention of the parties to ensure that CTAs are being interpreted in a coherent manner. Where Luxembourg's treaty partners notify the same wording, any previous wording will be replaced. In all other cases, the preamble wording will be added to the existing one.

Prevention of treaty abuse - Article 7 MLI

All treaties concluded by Luxembourg will contain the principle purpose test ("PPT"), pursuant to which tax treaty benefits will be denied where one of the main purposes of an arrangement or a transaction is to obtain the treaty benefits.

However, Luxembourg opted to include a competent authority relief provision, under which a person who has been denied the benefit of the treaty shall nevertheless benefit from it if the competent authority determines that such benefits would have been granted to that person in the absence of the transaction or arrangement.

It is noteworthy that Luxembourg did not opt for the simplified limitation on benefits clause (the "simplified LOB") which denies treaty benefits where the claimant is not a qualified person under a CTA (such as an individual or a company whose shares are traded on a recognised stock exchange).

It is expected that Luxembourg's choice will have substantial impact on treaty eligibility in new and existing holding and financing structures, increasing requirements on substance and functionality.

Artificial avoidance of PE status - Article 13 MLI

Finally, Luxembourg opted into a provision aiming at preventing artificial avoidance of permanent establishment ("PE") status through specific activity exemptions. Luxembourg chose option B, according to which activities currently listed in a CTA (such as the use of facilities for the purpose of storage or delivery of goods referring to warehouses) do not need to be of a preparatory or auxiliary character to not constitute a PE. Conversely, any other activity or the combination of all activities needs to be of a preparatory or auxiliary character in order to not constitute a PE. In practice, even though this provision should only be

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relevant where both parties have chosen the same option, structures relying on a specific activity exemption should be reviewed.

Conclusion

As the MLI has now been ratified by parliament and proposed to the OECD, it will enter into force. When it comes to applying the MLI between Luxembourg and one of its 81 treaty partners, all the reservations and their impact on the relevant CTAs must be analysed on a case-by-case basis. Given the straightforward timeframe, it is crucial to understand, in advance, the potential impact of the new provisions on current structures in order to mitigate risks by the time they become applicable.

By choosing the PPT to apply to its DTT network, Luxembourg has clearly taken the road to promote onshore set-ups demanding an adequate level of substance and a valid business rationale for structures established in the Grand Duchy. Securing treaty access, concerned taxpayers must ensure that they demonstrate appropriate substance in order to meet the PPT requirements and benefit from the DTT.

LUXEMBOURG GOVERNMENT APPROVES THE ATAD 2 BILL AND INCLUDES MOST WELCOME CLARIFICATIONS FOR THE LUXEMBOURG FUND INDUSTRY

The new directive addresses hybrid mismatches with third countries, adds cases not covered by ATAD 1, and expressly refers to the OECD's BEPS report (Action 2) as its source. The Luxembourg government approved the transposition bill (the Bill) on 26 July 2019 and filed it on 8 August 2019 with the Luxembourg Parliament.

Background

The Anti-Tax Avoidance Directive "ATAD 1", adopted in July 2016 and transposed into Luxembourg law last year, contained measures to prevent hybrid mismatches amongst EU Member States. On 29 May 2017, the Council of the EU unanimously adopted an amendment to this directive, named ATAD 2.

ATAD 2 extends the scope of ATAD 1, which applied to situations of double deduction or deduction without inclusion resulting from the use of hybrid financial instruments or hybrid entities. The new directive now includes situations involving permanent establishments, reverse hybrids, imported mismatches, hybrid transfers and dual residence.

The Bill provides for helpful clarifications, either in the text itself or in the commentaries. Certain aspects remain however uncertain and will hopefully be clarified within the next steps of the legislative process.

Key elements

There are three different types of hybrid mismatches which are particularly relevant for the fund industry:

Hybrid mismatches that result from payments under a financial instrument ("the Financial Instrument Rule")

In order to fall within the Financial Instrument Rule, the following two conditions must be fulfilled: (i) the payment under the financial instrument is not included within a reasonable period of time; and (ii) the mismatch outcome is attributable to differences in the characterisation of the financial instrument or the payment made under it.

Hybrid mismatches that result from payments to hybrid entities ("the Hybrid Entity Rule")

A payment to a hybrid entity gives rise to a deduction without inclusion outcome, and such outcome is the result of differences in the allocation of payments to the hybrid entity under the laws of the jurisdiction where the hybrid entity is established or registered and the jurisdiction of any person with a participation in that hybrid entity. Under the Hybrid Entity Rule, a hybrid entity is an entity or arrangement that is regarded as a taxable entity under the laws of one jurisdiction and whose income or expenditure is treated as income or expenditure of one or more other persons under the laws of another jurisdiction.

Tax treatment of reverse hybrid entities (the Reverse Hybrid Rule)

ATAD 2 foresees that, as from 1 January 2022, the additional anti-hybrid mismatch rule will take effect in situations involving reverse hybrid entities, i.e., entities treated as transparent in their home jurisdiction and opaque in the jurisdiction of associated investors. In such situation, a Luxembourg reverse hybrid entity will have to be treated as tax-opaque by Luxembourg and be taxed on its income provided it has not already been taxed at the investor level.

ATAD 2 also mentions that such provision shall not apply to collective investment vehicles, i.e. investment funds or vehicles that are widely held, hold a diversified portfolio of securities and are subject to investor-protection regulations in the country in which they are established.

Clarifications brought by the Bill and outstanding questions

Concept of associated enterprises and acting together Generally speaking, the three rules will only apply between related or associated parties or in the case of a structured arrangement (defined as an arrangement that has been designed to produce a hybrid mismatch outcome, thus requiring the existence of intention - which should generally not be the case for a fund platform). For the purpose of the Financial Instrument Rule, a non-resident entity will be considered as an associated entity if it holds a direct or indirect interest of 25% or more of the voting rights, capital interests or rights to share a profit in the taxpayer. For the purpose of the Hybrid Entity Rule and the Reverse Hybrid Rule, the threshold becomes 50%.

With respect to the calculation of the threshold requirement, ATAD 2 makes reference to the OECD concept of "persons acting together", pursuant to which "a person who acts together with another person in respect of the voting rights or capital ownership of an entity shall be treated as holding a participation in all of the voting rights or capital ownership of that entity that are held by the other person". The OECD Report on Action 2 (Hybrid mismatches) clarifies the concept of "persons acting together" in further detail: in particular, the OECD Report mentions that the interests of persons who are managed by the same person should be aggregated for the purpose of the "persons acting together" test. Example 11.5 of the OECD Report on Action 2 (Hybrid mismatches) specifically deals with a set-up similar to a fund set-up, and concludes that the investors investing through a tax transparent partnership / fund would be considered as related parties to the underlying company held by the partnership/fund.

Such approach could, in practice, lead to extremely problematic situations as a fund managers usually cannot monitor the tax treatment of all of its investors in their various respective jurisdictions. Whilst the BEPS example 11.5 takes the situation of a partnership with four investors, we may in a fund context often deal with many more investors with relatively small stakes in the fund (and for which the concept of acting together does not make much sense considering the lack of intuitu personae between them). This is why the government clarified that an investor having a minority stake (less than 10%) in a fund will not be deemed to be acting together with the other investors (unless proved otherwise). This will lead to a practicable, much more acceptable outcome where managers would only have to assess the hybrid risk towards their main investors (those with 10% or more) but not for all minority ones.

In this regard, we may regret the lack of explicit confirmation that the concept of acting together only applies to the Financial Instruments Rule. There are indeed reasonable arguments to consider that investors in a fund should not be considered as "persons acting together" towards the fund itself, but only towards the underlying investments (as mentioned in the BEPS report). Indeed, it would be difficult to argue that the investors in the fund should be considered as acting together towards the fund, as they are not expected to act in accordance with the wishes of the other investors; they typically do not agree to act together in respect of their voting rights and, more importantly, they typically do not agree that a third person can act on their behalf in respect of voting rights or interests that they hold in the fund. In conclusion, investors in a fund should only be aggregated for the purpose of the computation of the 25% threshold for financial instruments subscribed for by the fund.

Non-inclusion due to the status of the recipient

The Bill confirms that no hybrid mismatch rules should apply when the non-inclusion at the level of recipient is only due to its tax status (e.g. an exempt fund).

Timing of inclusion for payments to hybrid entities and included at a later stage by the investor

One point which remains unclear is the situation of a deductible payment to a reverse hybrid entity (leading therefore to a deduction without inclusion) when such entity (like most funds) distributes immediately the income received to its investors (which then include that as taxable income). If this situation would lead to the non-deductibility at the level of the payor, this would create in many fund platforms a potential double-taxation liability as soon as the income is distributed by the fund.

Reverse Hybrid Rule - entry into force

The Bill confirms that whilst it already contains the reverse hybrid provision, this provision will only apply as from 1 January 2022. This is very helpful in the sense that this will help the industry to anticipate the entry into force of this provision without having to wait until 2022 to have the final version of the text.

Reverse Hybrid Rule - the carveout for funds

The Bill further confirms that Part I UCITS, Part II UCIs, specialised investment funds (SIFs) and reserved alternative investment funds (RAIFs) will be considered as collective investment vehicles and fall outside of the scope of the reverse hybrid provision. Other alternative investment funds (AIFs) can also be excluded provided that they are widely held, hold a diversified portfolio of securities and are subject to investor-protection regulations. One attention point is that SICARs are not included in the general carveout (but may still be excluded if the other criteria are met).

Reverse Hybrid Rule - practical implications

The Bill confirms that whilst a reverse hybrid entity would become taxable on (part of) its income, it will remain exempt from net wealth tax (as the Directive is silent on this point).

In this respect, we note the absence of clarification in terms of withholding tax. Whilst such withholding tax on dividends would, in principle, not apply to Luxembourg-regulated funds even if they would be treated as opaque pursuant to the reverse hybrid rules, an explicit exemption for all AIFs would have been welcome.

As this text will certainly evolve during the next steps of the legislative process, we will continue to update you on any significant changes or further clarifications.

GLOSSARY

ABBL: Luxembourg Banks and Bankers' Association

ACA: *Association des Compagnies d'Assurance*, Luxembourg Association of Insurance Undertakings

AIF: Alternative Investment Fund

AIFM: Alternative Investment Fund Managers

AIFM Law: Luxembourg law of 12 July 2013 (as amended) on alternative investment fund managers

AIFMD: Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on alternative investment fund managers

AIFMD Level 2 Regulation: Commission-delegated regulation (EU) 231/2013 supplementing the AIFMD with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision

ALFI: Association of the Luxembourg Fund Industry

AML Law: Luxembourg law of 12 November 2004 (as amended) on the fight against money laundering and terrorism financing

AML/CTF: Anti-Money Laundering and Counter-Terrorism Financing

AMLD 4: Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing

AMLD 5: Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC

Bank Resolution Law: Luxembourg law of 18 December 2015 on the failure of credit institutions and of certain investment firms implementing the BRRD and DGSD 2

BCBS: Basel Committee on Banking Supervision

BCL: *Banque Centrale du Luxembourg*, the Luxembourg Central Bank

Benchmarks Regulation: Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts

Blocking Regulation: Council Regulation (EC) 2271/96 of 22 November 1996 protecting against the effects of extraterritorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom

Brexit: The withdrawal of the United Kingdom from the European Union

BRRD: Directive 2014/59 of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms

CAA: *Commissariat aux assurances*, the Luxembourg insurance sector regulator

CCCTB: Common Consolidated Corporate Tax Base

CESR: Committee of European Securities Regulators (replaced by ESMA)

CGFS: Committee on the Global Financial System

CJEU: the Court of Justice of the European Union

CNPD: the Luxembourg data protection authority (*Commission Nationale de la Protection des Données*)

Collective Bank Bargain Agreement: La convention collective du travail applicable aux banques

Companies Law: Luxembourg law of 10 August 1915 (as amended) on commercial companies

Consumer Act: Luxembourg law of 25 August 1983 (as amended) concerning the legal protection of the Consumer

Consumer Code: *Code de la consommmation*, the Luxembourg Consumer Code

CPDI: Depositor and Investor Protection Council/Conseil de Protection des Déposants et des Investisseurs

CRA: Credit Rating Agencies

CRD: Capital Requirements Directives 2006/48/EC and 2006/49/EC

CRD III: Directive 2010/76/EU amending the CRD regarding capital requirements for the trading book and for resecuritisations, and the supervisory review of remuneration policies

Creditors Hierarchy Directive: Directive (EU) 2017/2399 of 12 December 2017 amending Directive 2014/59/EU as regards the ranking of unsecured debt instruments in the insolvency hierarchy

CRR/CRD IV Package: Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC and Regulation (EU) 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms, and amending Regulation (EU) 648/2012 text with EEA relevance

CSDR: Regulation (EU) 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) 236/2012

CSSF: *Commission de Surveillance du Secteur Financier*, the Luxembourg supervisory authority of the financial sector

Data Protection Law: the law of 1 August 2018 on the organisation of the National Data Protection Commission and the general regime on the protection of personal data

DGSD 2: Directive 2014/49 of 16 April 2014 on deposit guarantee schemes

EBA: European Banking Authority

ECB: European Central Bank

EDPB: the European Data Protection Board (successor to the Article 29 Working Party as of 25 May 2018)

EDPS: the European Data Protection Supervisor (independent supervisory authority responsible for monitoring the processing of personal data by the EU institutions and bodies)

EEA: European Economic Area

EIOPA: European Insurance and Occupational Pensions Authority

EMIR: Regulation (EU) No 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories

ESAs: EBA, EIOPA and ESMA

ESMA: European Securities and Markets Authority

ESRB: European Systemic Risk Board

ETDs: Exchange Traded Derivatives

ETFs: Exchange Traded Funds

EU: European Union

EUIR: European Union Insolvency Regulation: Council regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings

EUIR (Recast): Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings

FATF: Financial Action Task Force/*Groupe d'Action Financière* (FATF/GAFI)

FATF 2: Regulation (EU) 2015/847 of the European Parliament and of the Council of 20 May 2015 on information accompanying transfers of funds and repealing Regulation (EC) 1781/2006

FCP: *Fonds Commun de Placement* or mutual fund

FGDL: *Fonds de garantie des dépôts Luxembourg*

Financial Collateral Directive: Directive 2002/47/CE of 6 June 2002 on financial collateral arrangements

Financial Collateral Law: Luxembourg law of 5 August 2005 (as amended) on financial collateral arrangements

Financial Sector Law: Luxembourg law of 5 April 1993 (as amended) on the financial sector

FSB: Financial Stability Board

GDPR: EU Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data

ICMA: International Capital Market Association

IDD: Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast)

Insolvency Regulation: Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings

Insurance Sector Law: Luxembourg law of 6 December 1991 (as amended) on the insurance sector

IORP Directive: Directive 2003/41 of the European Parliament and the Council dated 3 June 2003 on the activities and supervision of institutions for occupational retirement provision

IRE: *Institut des Réviseurs d'Entreprises*

KIID: Key Investor Information Document (within the meaning of the UCITS Directive) that aims to help investors understand the key features of their proposed UCITS investment

Law on the Register of Commerce and Annual Accounts: Luxembourg law of 19 December 2002 (as amended) relating to the register of commerce and companies

Law on the Registration of Real Estate: Luxembourg law of 25 September 1905 (as amended) on the registration of real estate rights in rem (*loi du 25 septembre 1905 sur la transcription des droits reels immobiliers*)

Market Abuse Regulation: Regulation (EU) No 569/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse

MIF Regulation: Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions

MiFID: Directive 2004/39/EC of the European Parliament and of the Council dated 21 April 2004 on markets in financial instruments, amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council, and repealing Council Directive 93/22/EEC

MiFID2: Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments

MiFIR: Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments

ML/TF: Money laundering and terrorist financing

NCA: National Competent Authoriy

New Prospectus Regulation: Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC text with EEA relevance

NIS Directive: Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union

Part II UCIs: undertakings for collective investment subject to the provisions of Part II of the UCI Law

Payment Accounts Directive: Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features

Payment Services Law: Luxembourg law of 10 November 2009 on payment services (as amended)

PFS: Professional of the Financial Sector, other than a credit institution and subject to CSSF's supervision in accordance with the Financial Sector Law

PRIIPs Delegated Regulation: EU Commission-Delegated Regulation (EU) 2017/653 of 8 March 2017, supplementing the PRIIPs KID Regulation by laying down regulatory technical standards (RTS) with regard to the presentation, content, review and revision of KIDs and the conditions for fulfilling the requirement to provide such documents

PRIIPs KID Regulation: Regulation (EU) 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products

Prospectus Regulation: Regulation (EC) 809/2004 of 29 April 2004 implementing the Directive as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and the dissemination of advertisements

PSD 2: Directive 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market

PSP: Payment Service Provider

Public Contracts Law: Luxembourg law of 25 June 2009 (as amended) on government contracts

Public Contracts Regulation: The Grand-Ducal Regulation of 3 August 2009 implementing the Law of 25 June 2009 on public contracts

Public Interest Entities:

(a) entities governed by the law of an EU member state, whose securities are admitted to trading on a regulated market of a member state within the meaning of article 4, paragraph 1, point 21 of Directive 2014/65/EU

(b) credit institutions as defined under article 1, point 12 of the law of 5 April 1993 on the financial sector as amended, other than the institutions covered by article 2 of directive 2013/36/EU

(c) insurance and reinsurance undertakings as defined under article 32, paragraph 1, points 5 and 9 of the law of 7 December 2015 on the insurance sector, to the exclusion of the entities covered by articles 38, 40 and 42, of the pension funds covered by article 32, paragraph 1, point 14, of the insurance captive companies covered by article 43, point 8 and reinsurance captive companies covered by article 43, point 9 of the law dated 7 December 2015 on the insurance sector

RAIF: reserved alternative investment fund

RAIF Law: Luxembourg law of 23 July 2016 (as amended) relating to reserved alternative investment funds

Rating Agency Regulation: Regulation (EC) 1060/2009 of the European Parliament and Council on credit rating agencies

RCSL or Register of Commerce: Luxembourg register of commerce and companies (*Registre de commerce et des sociétés de Luxembourg*)

REMIT: Regulation (EU) 1227/2011 of 25 October 2011 on wholesale energy market integrity and transparency

SFTR: Regulation (EU) No 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of their reuse and amending Regulation (EU) No 648/2012

SHRD II: Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement

SICAR Law: Luxembourg law of 15 June 2004 (as amended) on investment companies in risk capital

SIF Law: Luxembourg law of 13 February 2007 (as amended) relating to specialised investment funds

Solvency II: Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance

SRB: the Single Resolution Board

SRF: the Single Resolution Fund

SRM: the Single Resolution Mechanism

SRMR: Regulation (EU) 806/2014 of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of an SRM and an SRF and amending Regulation (EU) 1093/2010

SSM: the Single Supervisory Mechanism

SSM Regulation: Council Regulation (EU) 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions

Statutory Audit Directive: Directive 2014/56/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts

Statutory Audit Regulation: Regulation (EU) 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding, statutory audit of public-interest entities

STS Regulation: Regulation (EU) 2017/2402 laying down a general framework for securitisation and a dedicated framework for simple, transparent and standardised securitisation

Takeover Law: Luxembourg law of 19 May 2006 on public takeover bids

Transparency Law: Luxembourg law of 11 January 2008 (as amended) on the transparency obligations concerning information on the issuers of securities admitted to trading on a regulated market

UCI Law: Luxembourg law of 17 December 2010 (as amended) on undertakings for collective investment

UCITS: undertakings for collective investment in transferable securities that are "harmonised" within the meaning of and governed by the UCITS Directive and subject to the provisions of Part I of the UCI Law

UCITS Directive: Directive 2009/65/EC of 13 July 2009 of the EU Parliament and of the Council on the coordination of laws, regulations and administrative provisions relating to UCITS, as amended

UCITS V Delegated Regulation: Commission Delegated Regulation (EU) 2016/438 of 17 December 2015 supplementing the UCITS Directive with regard to obligations of depositaries

UCITS V Directive: Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC as regards depositary functions, remuneration policies and sanctions

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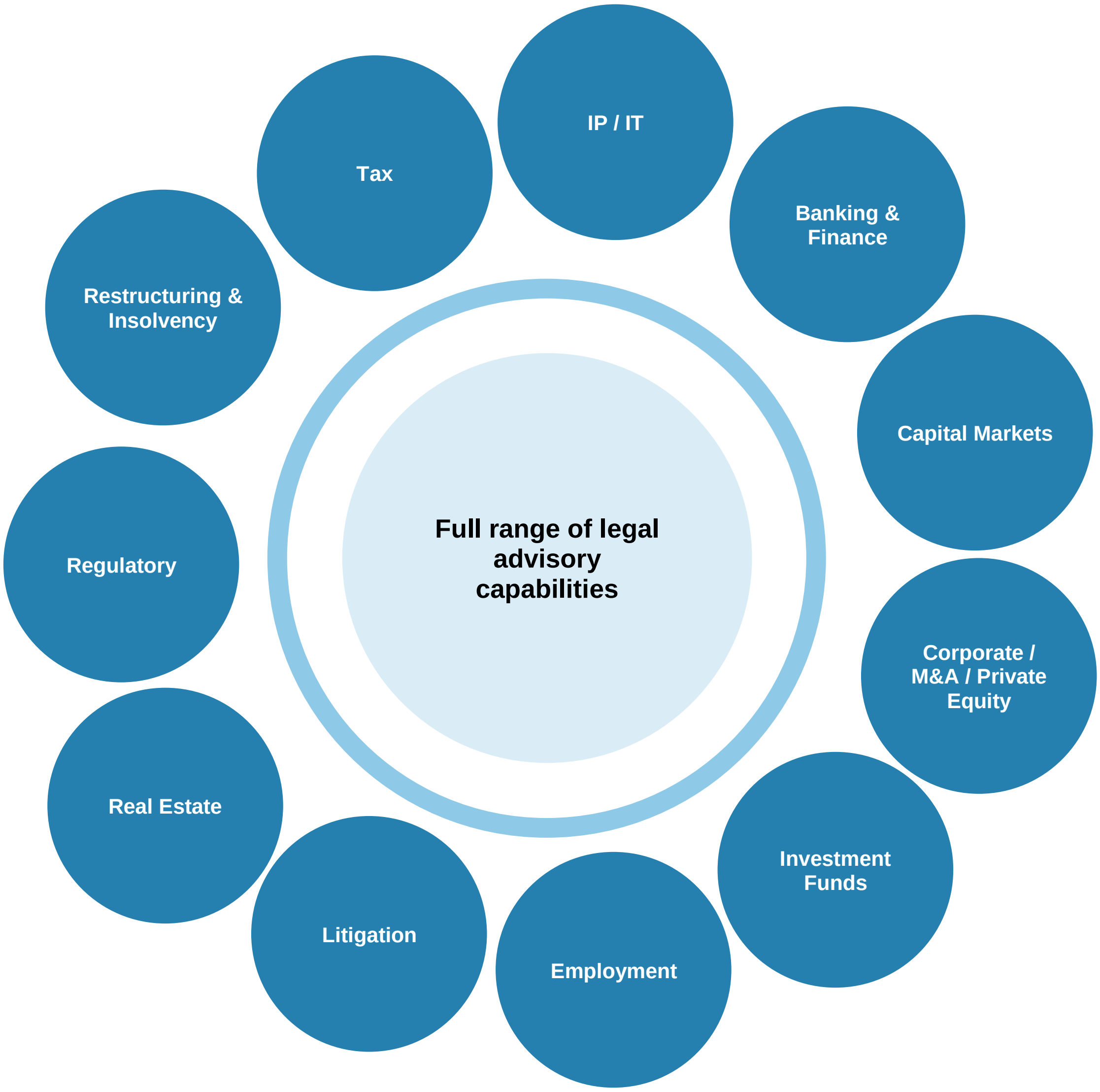

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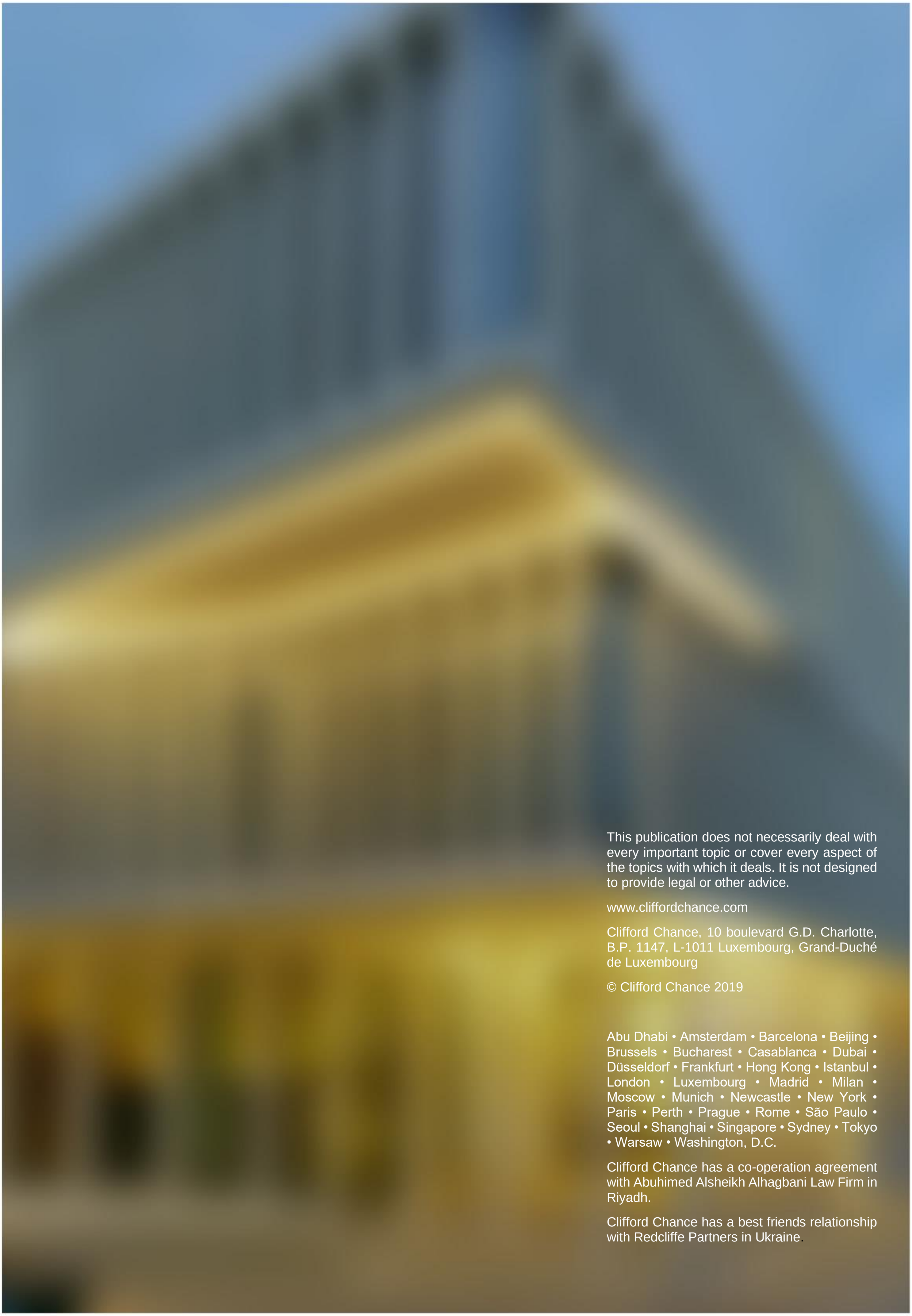

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