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LUXEMBOURG LEGAL UPDATE
NOVEMBER 2021

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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 of the "**Topics Guides**" on our website to keep you up to date with the most recent developments:

Coronavirus: What are the legal implications?

Financial Toolkit

Fintech guide

Green and Sustainable Finance Topic Guide

Brexit Hub

ONLINE RESOURCES

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CONTENTS

CORONAVIRUS FOCUS

CSSF PRESS RELEASE ON BUSINESS CONTINUITY IN 2020 DESPITE COVID-19 AS WELL AS THE PUBLICATION OF ITS 2020 ANNUAL REPORT AND OF ITS PANORAMA 2020 WEBSITE

6 August 2021

On 6 August 2021, the CSSF issued a press release[1] on Business continuity in 2020 despite COVID-19, and the launch of the panorama website which includes, amongst others, the publication of its Annual Report for 2020.[2]

Amongst the highlights the CSSF draws attention to the following:

- **COVID 19:**
  - Until now, the financial systems have demonstrated resilience owing notably to the reforms implemented following the financial crisis of 2007-2008.
  - The supervised entities deployed their business continuity plans successfully and no major operational incident had to be reported. Thanks to new loans granted (with or without partial state guarantee) and to moratoria, the banks acted responsibly and helped cushion the economic shock caused by the pandemic. In June 2020, moratoria reached almost EUR 3.7 billion but decreased to EUR 446 million by the end of 2020.
- **Brexit:**
  - The CSSF teams made substantial efforts to support the entities concerned in their preparations for Brexit, in view of the end of the transitional period on 31 December 2020.
  - Thus, they provided a framework for the access of providers established in the United Kingdom to the Luxembourg market, determined the equivalence of the British regime in the context of the MiFID II/MiFIR third-country regime and reviewed a certain number of authorisation files received in the context of Brexit.
- **Sustainable Finance:**
  - The greening of finance is more topical than ever. The CSSF Director General, Claude Marx, states that "We adopted a tolerant and firm approach: tolerance with respect to certain open questions, pending notably a clarification by the European Commission, firmness with respect to those which do not prepare themselves and fail to comply with the standards" and "The CSSF will not use gold plating. There will not be additional national requirements, but the ambitious goals of the EU will have to be implemented in the Luxembourg financial sector which, given its importance, will significantly contribute to the transition towards and the financing of a more sustainable economy."
- **Digitisation of the Financial Sector:**
  - The digitisation of the financial sector, under way prior to the COVID-19 crisis, was accelerated as a result of the pandemic, due particularly to a significant number of employees having to work remotely during a long period. "The CSSF will remain vigilant as to cybercrime risks and the risks posed by business models of entities not sufficiently prepared for the digital era", stresses Claude Marx.

The press release refers, for additional information on these topics and more generally on the CSSF supervision work during 2020, to its detailed Annual Report 2020 published together with the press release. For further information the CSSF refers to its new website page www.panorama-cssf.lu, which contains a key facts summary of the CSSF's actions taken in 2020 as well as key figures for 2020, and notably [proposes]/[provides] video interviews on the following topics:

- the CSSF's priorities,
- management of COVID-19,

accompanying Brexit and financial innovation.

1 CSSF Press release 06.08.2021

2 CSSF Annual Report 2020

CSSF COVID-19 FAQ UPDATE: RECOMMENDATION ON THE RESTRICTION OF DISTRIBUTIONS DURING THE COVID-19 PANDEMIC

17 August 2021

On 17 August 2021 the CSSF updated its COVID-19 FAQ.[3]

The CSSF updated a number of its responses in light of the evolution of the COVID-19 pandemic and the related legal and regulatory texts. The CSSF clarifies, amongst others, that (i) the amending EBA Guidelines on payment moratorium (EBA/GL/2020/15) were not introduced in Luxembourg, as no new EBA-compliant general payment moratorium was granted at local level beyond 30 September 2020, and (ii) the CSSF recommendations on dividend distribution and variable remuneration will apply until 30 September 2021 and banks should refrain from distributing interim dividends out of their 2021 profits until 30 September 2021. The CSSF further draws the attention of supervised entities to the entry into force on 30 September 2021 of Circular CSSF 21/769 on governance and security requirements for supervised entities to perform tasks or activities through teleworking.

The CSSF also moved on this occasion certain questions and answers to other CSSF FAQ, such as the FAQ on the law of 17 December 2010 and the Swing Pricing Mechanism – FAQ, relating to undertakings in collective investment.

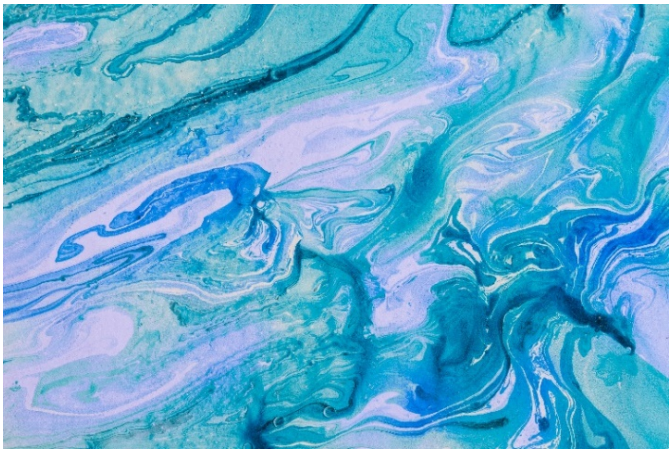
Finally, the CSSF repeals certain questions and answers, including on the remuneration benchmarking exercise, on the prudential treatment of payment moratoria or on transitional or temporary deadlines, which are no longer applicable.

CSSF COMMUNIQUÉ ON COVID-19: UPDATE ON OPERATIONAL WORKING ARRANGEMENTS

30 August 2021[4]

On 30 August 2021, the CSSF issued a *communiqué* to highlight that entities under the supervision of the CSSF should help prevent the spread of the virus, while ensuring their business continuity. The CSSF indicates that it is up to the supervised entities to define their operational working arrangements, on-site or remote. As regards on-site employees, their safety needs to be guaranteed, notably by observing protective measures.

Furthermore, the CSSF reminds that Circular CSSF 21/769[5] on teleworking, which was due to enter into force on 30 September 2021, will only apply as from the end of the pandemic, in accordance with Article 66 of the circular.



3 CSSF Circular FAQ Covid-19

4 CSSF Press release 30.08.2021

5 CSSF Circular 21/769

CSSF FAQ COVID-19 UPDATE: REPEAL OF QUESTION 13 ON BANKS' DISTRIBUTION POLICIES AND VARIABLE REMUNERATION IN THE COVID-19 CONTEXT

15 October 2021[6]

On 15 October 2021, the CSSF updated its COVID-19 FAQ, namely by repealing question 13 regarding banks' distribution policies aimed at remunerating shareholders, as well as on variable remuneration in the COVID-19 context.

That question 13 applied to banks that are non-significant under the Single Supervisory Mechanism, and the related specifying CSSF circular letter of 22 December 2020 referred to in question 13 is no longer applicable. The CSSF, as a consequence, returns to assessing banks' capital and distribution plans as well as their remuneration policies and practices in the context of the normal supervisory cycle.

The CSSF thereby follows ECB, EBA and ESRB recommendations which called on management bodies of the concerned entities to consider not distributing any cash dividends or conducting share buy-backs, or to limit such distributions, and expected these entities to adopt extreme moderation with regards to variable remuneration payments, especially those to material risk-takers. However, these recommendations and the corresponding CSSF recommendations in question 13 of its COVID-19 FAQ were temporary, and were stated to apply only until 30 September 2021.

6 CSSF FAQ Covid 19

FINANCIAL INSTITUTIONS

CSSF PRESS RELEASE REGARDING THE FORTHCOMING CESSATION OF ALL LIBOR SETTINGS

CSSF Press release of 25 June 2021[7]

On 25 June 2021, the CSSF issued a press release to inform the public of the publication of the Joint Public Statement on the forthcoming cessation of all LIBOR settings published by the European Commission, ESMA, the European Central Bank in its banking supervisory capacity (ECB Banking Supervision) and the European Banking Authority (EBA). The CSSF further highlights that in the Joint Public Statement, the European Commission, ESMA, the ECB Banking Supervision and EBA strongly encourage market participants to use the time remaining until the cessation or loss of representativeness of USD LIBOR, GBP LIBOR, JPY LIBOR, CHF LIBOR and EUR LIBOR to substantially reduce their exposure to these interest rates.

The Joint Public Statement can be found here.

CSSF CIRCULAR UPDATING CIRCULAR 14/593 ON SUPERVISORY REPORTING REQUIREMENTS APPLICABLE TO CREDIT INSTITUTIONS

CSSF Circular 21/774 of 29 June 2021[8]

On 29 June 2021, the CSSF has issued circular 21/774 amending CSSF Circular 14/593 on supervisory reporting requirements applicable to credit institutions (as amended).

The new circular updates CSSF Circular 14/593, following the publication of the following:

- Commission Implementing Regulation (EU) 2021/451 of 17 December 2020 laying down implementing technical standards for the application of Regulation (EU) 575/2013 of the European Parliament and of the Council with regard to supervisory reporting [of]/[by] institutions;
- Commission Implementing Regulation (EU) 2021/453 of 15 March 2021 laying down implementing technical standards for the application of Regulation (EU) 575/2013 with regard to the specific reporting requirements for market risk; and
- Regulation (EU) 2021/943 of the European Central Bank of 14 May 2021 amending Regulation (EU) 2015/534 on reporting of supervisory financial information.

7 CSSF Press Release 25.06.2021

8 CSSF Circular 21/774

CIRCULAR CSSF 21/776 ON THE CONDITIONS FOR THE APPLICATION OF THE ALTERNATIVE TREATMENT OF INSTITUTIONS' EXPOSURES RELATED TO TRI-PARTY REPURCHASE AGREEMENTS' FOR LARGE EXPOSURES PURPOSES (EBA/GL/2021/01)

CSSF Circular 21/776 of 6 July 2021[9]

On 6 July 2021, the CSSF issued a circular to inform the public that the CSSF, in its capacity as competent authority, applies the Guidelines of the EBA specifying the conditions for the application of the alternative treatment of institutions' exposures related to 'tri-party repurchase agreements' set out in Article 403(3) of Regulation (EU) 575/2013 for large exposure[s] purposes (EBA/GL/2021/01) (the Guidelines), published on 16 February 2021.

The Circular applies to Less Significant Institutions and to branches of non-EU credit institutions on an individual basis (In-Scope entities).

In-Scope entities may replace the total amount of their exposures to a collateral issuer due to tri-party repurchase agreements facilitated by a tri-party agent, using as an alternative treatment the full amount of the limits that the institution has instructed the tri-party agent to apply to those exposures.

When In-Scope entities decide to perform such a replacement, Article 403(3) of the CRR requires them to comply with specific conditions, which are further specified in the Guidelines.

Where an In-Scope entity intends to make use of the alternative treatment with a tri-party agent, it should notify the CSSF at least four weeks prior to the implementation of the alternative treatment. Further details related to the notification and the procedure related thereto are specified in the Circular.

9 CSSF Circular 21/776 of 6 July 2021

CIRCULAR CSSF 21/777 – IMPLEMENTATION OF ESMA GUIDELINES ON OUTSOURCING TO CLOUD SERVICE PROVIDERS

CSSF Circular 21/777 of 12 July 2021[10]

On 12 July 2021, the CSSF issued new Circular 21/777, which implements the guidelines of the European Securities and Markets Authority (ESMA) on outsourcing to cloud service providers (ESMA Guidelines) by amending the scope of CSSF Circular 17/654[11], as amended, on IT outsourcing relying on a cloud computing infrastructure (Circular 17/764).

In its Circular 21/777, the CSSF reminds that Circular 17/654 already contains certain regulatory requirements and guidelines equivalent to those provided for by ESMA Guidelines. However, the CSSF notes that the scope of Circular 17/654 is somewhat different to that of the ESMA Guidelines, in particular to the extent that Circular 17/654 does not apply to all the entities covered by ESMA Guidelines.[12]

To this end, Circular 21/777 extends the scope of CSSF Circular 17/654, so that it also applies to the following new entities:

1. Alternative investment fund managers as defined under Article 4(1)(b) of the AIFMD (i.e., not only those falling within the scope of CSSF Circular 18/698 on the authorisation and organisation of Luxembourg investment fund managers that were already subject to Circular 17/654) as well as depositaries of alternative investment funds as defined under Article 21(3) of the AIFMD;
2. UCITS and UCITS management companies as defined under Article 2(1)(b) of the UCITS Directive (i.e., not only those falling within the scope of CSSF Circular 18/698[13] that were already subject to Circular 17/654) as well as depositaries of UCITS as defined under article 2(1)(a) of the UCITS Directive;
3. Central counterparties as defined in Article 2(1) of EMIR, including central counterparties from Tier 2 third countries in accordance with article 25(2a) of EMIR which are subject to specific EMIR requirements;
4. Data reporting services providers within the meaning of Article 4(1), point 63 of MiFID and market operators of trading venues within the meaning of Article 4(1), point 24 of MiFID;
5. Central securities depositories within the meaning of Article 2(1), point 1 of CSDR; and
6. Administrators of critical benchmarks as defined in article 3(1)(25) of the Benchmarks Regulation.

Circular 21/777 applied as of 31 July 2021. However, in respect of the above new entities, the CSSF specifies that Circular 17/654 shall apply to all cloud outsourcing arrangements that are entered into, renewed or amended on or after 31 July 2021.

10 CSSF Circular 21/777

11 CSSF Circular 17/654

12 ESMA Guidelines

13 CSSF Circular 18/698

LUXEMBOURG CENTRAL BANK REGULATION 2021/N° 30 OF 12 JULY 2021 PUBLISHED

Regulation 2021/N° 30 of 12 July 2021[14]

On 12 July 2021, the Luxembourg Central Bank (BCL) has adopted a new Regulation 2021/N° 30 on payments statistics which repealed and replaced BCL Regulation N° 9 of 4 July 2011 as amended by BCL Regulation 2015/N° 20 of 24 August 2015 on the collection of data on payment instruments and transactions. The Regulation was published in the Luxembourg official journal (*Mémorial A*) on 14 July 2021, with a *corrigendum* on 15 July 2021 (the Regulation).

The Regulation amends the rules on reporting obligations of statistical information regarding payments to the BCL.

Amongst others, it clarifies that agents that are the subject of an ECB exemption also benefit from derogations under the Regulation and provides a detailed list of what information is the subject of collection.

It is supplemented by the "BCL Manual", which specifies the practical details concerning the implementation of the obligations set forth in the Regulation. The "BCL Manual" is published on the BCL website (www.bcl.lu) and may be regularly updated by the BCL.

The Regulation further highlights that the collection of elements of the payment statistics referred to in Regulation (EU) 2020/2011 are to be transmitted considering a reference period starting on January 2022. The first transmission of payment transaction data will take place in February 2022 and the first transmission of fraudulent payment transaction data will take place in April 2022 for data from January 2022.

The new Regulation entered into force on 14 July 2021.

[14] Regulation 2021/N° 30

LUXEMBOURG LAW IMPLEMENTING REGULATION (EU) 2018/1672 ON CONTROLS ON CASH ENTERING OR LEAVING THE EU PUBLISHED

Law of 16 July 2021[15]

On 16 July 2021, the Luxembourg law implementing Regulation (EU) 2018/1672[16] on controls on cash entering or leaving the EU (the Regulation) and repealing the law of 27 October 2010 on the organisation of controls on physical transport of cash entering, transiting or leaving the Grand Duchy of Luxembourg (the 2010 Law) was published, together with a related specifying regulation, in the Luxembourg official journal (*Mémorial A*) on 23 July 2021.

The law does not create a completely new legal framework given that the controls on cash entering, transiting or leaving the EU are already foreseen in the 2010 Law. The objective of the law is rather to update the existing regime by implementing in Luxembourg the Regulation and related FATF recommendations.

In particular, the law extends the scope of controls by adding prepaid cards and commodities used as highly liquid stores of value to the definition of "cash". Furthermore, the law follows the FATF interpretative notice on Recommendation 32 and foresees an obligation (which is foreseen as an option for competent authorities under the Regulation) to disclose unaccompanied cash with a value equal to or greater than EUR 10,000 entering or leaving the EU or entering, transiting or leaving the Grand Duchy of Luxembourg.

The law further foresees the appointment of the Luxembourg Customs and Excise Agency (*Administration des douanes et accises*) as the Luxembourg national competent authority for cash controls under the Regulation. In this context, the law confers certain powers on the officials of the Luxembourg Customs and Excise Agency, in particular, to control natural persons, their luggage, means of transport as well as any shipment, container or means of transport likely to contain unaccompanied cash. The implementing regulation provides further details, including on the training programmes for the officials of the Luxembourg Customs and Excise Agency.

The law entered into force on 27 July 2021.

15 Luxembourg law implementing Regulation (EU) 2018/1672

16 Regulation (EU) 2018/1672

LUXEMBOURG LAW ON AUTHENTICATION AND PROTECTION OF THE EURO AGAINST COUNTERFEITING

Law of 21 July 2021[17]

The Luxembourg law of 21 July 2021 implementing Council Regulation (EC) 44/2009 of 18 December 2008 amending Regulation (EC) 1338/2001 laying down measures necessary for the protection of the euro against counterfeiting and Regulation (EU) 1210/2010 of the European Parliament and of the Council of 15 December 2010 concerning authentication of euro coins and handling of euro coins unfit for circulation was published in the Luxembourg official journal (*Mémorial A*) on 26 July 2021.

The law is also adopted in the context of the European Central Bank's Decision ECB/2010/14 of 16 December 2010 on the authenticity and fitness checking and recirculation of euro banknotes.

Credit institutions and other institutions professionally engaged in the processing and distribution to the public of notes and coins are, under Article 6 of Regulation (EC) 1338/2001, subject to the double obligation to (i) control the authenticity of euro notes and coins which they receive and which they intend to put back into circulation, and (ii) hand over to the competent national authorities all euro notes and coins which they know or have sufficient reason to believe to be counterfeit. The Luxembourg Central Bank is designated as the national competent authority responsible for ensuring compliance by such institutions with the above obligations and is granted the necessary powers to investigate in order to assume this role.

The law adapts the Luxembourg legal framework governing the protection against counterfeits, taking into account the above EU texts, by amending, amongst others, the Luxembourg Criminal Code, the Luxembourg law of 5 April 1993 on the financial sector, the Luxembourg law of 10 November 2009 on payment services and the Luxembourg law of 20 April 1977 on the exploitation of gambling in the context of sports competitions. The law entered into force on 30 July 2021.

LUXEMBOURG LAWS RATIFYING THE AMENDMENTS MADE TO THE SRF AND ESM TREATIES

Laws of 21 July 2021[18]

On 21 July 2021, two Luxembourg laws ratified the amendments made to the agreement on the transfer and mutualisation of contributions to the single resolution fund (SRF) and to the Treaty Establishing the European Stability Mechanism (ESM), signed in Brussels on 27 January 2021 and 8 February 2021, respectively.

The amendments made to the agreement on the transfer and mutualisation of contributions to the SRF aim at organising the transfer and mutualisation of contributions to the SRF in order to implement the common backstop for the SRF in 2022.

In addition to ratifying the ESM treaty amendments, the ratifying law provides that debt instruments (*titres de créance*) that are issued by the ESM and are subject to Luxembourg law do not have to be remitted to a third party, and can be issued without consideration at the point in time of their issuance. The instruments and the claims they represent validly exist as of their issuance. As long as the ESM holds itself the instruments issued by it, all rights attached to the instruments are suspended. The suspension ends as soon as the instrument is transferred to a third party. The before-mentioned issuances and related features foreseen in the law are deemed essential to permit the ESM to effectively assume its new role in the framework of the common backstop mechanism for the SRF.

The two laws entered into force on 30 July 2021.

17 Law of 21.07.2021

18 Law ratifying the amendment to the agreement on the transfer and mutualisation of contributions to the SRF

LUXEMBOURG BILL AMENDING THE LUXEMBOURG LAW ON INDICES USED AS BENCHMARKS

Bill N° 7861[19]

On 22 July 2021, Bill N° 7861 was lodged with the Luxembourg Parliament.

The main purpose of the bill is to amend the Luxembourg law of 17 April 2018 on indices used as benchmarks (Benchmark Law) in order to reflect three European regulations amending Regulation (EU) 2016/1011 (Benchmark Regulation). The bill introduces, amongst others, a framework to anticipate the termination of benchmarks, in particular LIBOR by the end of 2021. The new rules are intended to reduce legal uncertainty and avoid risks to financial stability by ensuring that a legal replacement rate can be put in place before the benchmark ceases to exist.

In addition, the bill integrates into Luxembourg law the changes brought at the European level by Regulation 2019/2175 granting additional powers to the European Securities and Markets Authority (ESMA). ESMA will have direct supervisory powers over certain critical benchmarks and their administrators as of 1 January 2022, and in particular over recognised third-country benchmark administrators.

Finally, the bill also amends Article 4 of the Benchmark Law to include two new provisions in the list of provisions that are sanctionable under the Benchmark Law.

The lodging of bill N° 7861 with the Luxembourg Parliament constitutes the start of the legislative process.

[19] Law ratifying the amendment to the Treaty Establishing the ESM Bill N°7861

CIRCULAR CSSF 21/779 – REGARDING THE ADOPTION OF THE ESMA GUIDELINES ON CERTAIN ASPECTS OF THE MIFID II COMPLIANCE FUNCTION REQUIREMENTS

Circular CSSF 21/779 of 30 July 2021[20]

On 30 July 2021, the CSSF issued new Circular 21/779, which implements the guidelines of the ESMA on certain aspects of the MiFID II compliance function requirements (ESMA35-36-1952) (*the Guidelines*).[21]

In its Circular 21/779, the CSSF provides that all investment firms, credit institutions when carrying out investment services or investment activities or when selling or advising clients in relation to structured deposits, undertakings for collective investment in transferable securities management companies when providing the services referred to in Article 101(3) of the Law of 17 December 2010 relating to undertakings for collective investment in accordance with Article 101(4) of that Law, and alternative investment fund managers (AIFMs) when providing the services referred to in Article 5(4) of the Law of 12 July 2013 on alternative investment fund managers in accordance with Article 5(6) of that Law, shall duly comply with the Guidelines.

The Guidelines aim to enhance clarity and foster convergence in the implementation of certain aspects of the new MiFID II compliance function requirements, repealing the existing ESMA guidelines issued on the same topic in 2012 (ESMA/2012/388) (the 2012 guidelines).

The 2012 guidelines have been substantially confirmed by the Guidelines, albeit clarified, refined and supplemented where necessary. In addition, the Guidelines take into account new requirements under MiFID II and the results of supervisory activities conducted by national competent authorities on the application of the compliance function requirements.

Circular 21/779 applied with immediate effect and complemented Circulars CSSF 12/552, 18/698 and 20/758 (as applicable).

20 CSSF Circular 21/779

21 ESMA Guidelines

CSSF PRESS RELEASE REGARDING THE EUROPEAN COMMISSION ANNOUNCEMENTS RELATED TO REGULATION (EU) 2019/2088 – SFDR

CSSF Press Release of 30 July 2021[22]

On 30 July 2021, the CSSF issued a press release aimed at bringing to the attention of financial market participants and financial advisers some recent publications made by the European supervisory authorities (the ESAs) in respect of SFDR.

The following were mentioned in the press release:

- The ESAs published on 26 July 2021 the answers of the European Commission to the questions related to the interpretation of the SFDR.[23] It has been noted that the answers to the first two questions were swapped by mistake.
- The ESAs published on 23 July 2021 a letter sent by the European Commission[24] on 8 July 2021 to the European Parliament and Council announcing that it intends to bundle all 13 RTS under SFDR into a single delegated act and to defer the application of 1 January 2022 by six months to 1 July 2022.
- The Supervisory Statement[25] issued on 25 February 2021 by the ESAs on the application of the SFDR should be read in the light of the content of that letter, and on that basis the ESAs will revise this supervisory statement in due course to reflect this change in the RTS' date of application.

22 CSSF Press Release 30.07.2021

23 Answers of the European Commission

24 Letter sent by the European Commission

25 Supervisory Statement 25.02.2021

LUXEMBOURG STOCK EXCHANGE ISSUED GUIDELINES FOR LISTING SPACS

Guidelines of August 2021[26]

In August 2021, the Luxembourg Stock Exchange (LuxSE) issued guidelines for listing special purpose acquisition companies (SPACs) at the LuxSE (the Guidelines).

According to the LuxSE, Luxembourg presents an attractive offering for SPAC sponsors and the LuxSE acts as the meeting place for market players wishing to tap into the potential of these instruments. In this context, and in alignment with the ESMA's Public Statement regarding SPACs dated 15 July 2021 (ESMA32-384-5209), the LuxSE has released a framework to guide sponsors and other professional intermediaries to list SPACs on its markets, while protecting the interests of investors and market integrity.

In the Guidelines, the LuxSE encourages sponsors of SPACs to take into account the following recommendations during the SPAC structuring process:

- Funds raised by a SPAC should be placed in an escrow account with a regulated financial institution and issuers shall document an order of priority for outgoing payments.
- The issuer should grant redemption rights to the SPAC shareholders and describe the conditions under which the rights can be exercised.
- The majority of the shareholders should approve the business combination with the target company in a general meeting (the de-SPAC process) and the issuer shall provide the shareholders with the information necessary to make an informed decision about the exercise of their redemption rights.
- In the prospectus accompanying the admission to trading, the issuer should describe its business strategy to deliver insights on the target industries and geographies where it seeks acquisition opportunities.
- The timeframe for the consummation of the business combination shall be defined and limited in time.

The Guidelines specify that both the regulated *Bourse de Luxembourg* (BdL) market and the Euro MTF of the LuxSE operate professional segments, which allow SPACs that do not target retail investors to restrict the shareholding to professional or qualified/well-informed investors.

Finally, the LuxSE emphasises that while the Guidelines complement the general admission rules laid down in the Rules and Regulations of the LuxSE, they do not constitute an exhaustive or mandatory list of features that SPACs should meet to secure admission to the LuxSE.

26 Luxembourg SE Guidelines 08.2021

LUXEMBOURG CSSF SIGNS AML/CTF COOPERATION AGREEMENT WITH MONACO'S SICCFIN

CSSF Press Release of 2 August 2021[27]

On 2 August 2021, the CSSF issued a press release to inform the public of the signature of a cooperation agreement between the CSSF and Monaco's *Service d'Information et de Contrôle sur les Circuits Financiers* (SICCFIN) regarding AML/CTF on 23 July 2021.

The purpose of this cooperation agreement is to strengthen the authorities' supervisory action for the purposes of AML/CTF. In this context, the CSSF highlights that criminals often set up complex schemes at the international level to cover up their operations, and that cooperation agreements between competent national authorities are therefore deemed essential to combat money laundering and the financing of terrorism more effectively.

This agreement is in line with other agreements concluded by the CSSF with its counterparts abroad. In practice, these bilateral or multilateral agreements all make it possible to set up practical protocols to facilitate and improve the efficiency of the exchange of information, cooperation and mutual assistance between competent authorities. They also ensure better coordination within the framework of cross-border surveillance, particularly with regard to Luxembourg entities active in the co-signatory country or vice versa.

CSSF PRESS RELEASE ON TRANSFER TO THE CSSF OF COMPETENCE FOR AUTHORISATION

CSSF Press Release of 13 August 2021[28]

On 13 August 2021, the CSSF issued a press release on the transfer to the CSSF of competence for authorisation.

Amongst the aspects highlighted in the press release, the CSSF draws attention to the following:

- The Law of 21 July 2021 on the competence for authorisation transfer was published in the Official Journal and entered into force on 30 July 2021. Beginning on this date, the CSSF, instead of the Ministry of Finance, has competence to issue, refuse or withdraw the licence of certain entities under its supervision.
- The following entities are, amongst others, concerned by this change: (i) all professionals of the financial sector (PSF) (investment firms, Specialised PSF, Support PSF); (ii) branches of foreign law PSF other than investment firms; (iii) third-country branches of credit institutions; (iv) third-country entities providing investment services or performing investment activities; (v) payment and electronic money institutions; and (vi) regulated markets.
- As a result of the above, changes were brought to several legislative acts. Such changes relate only to the transfer of competence from the Ministry of Finance to the CSSF and do not change the conditions for issuance, refusal or withdrawal of an authorisation.
- For the supervised entities, this change is an advantage as there will no longer be a dual implication of two authorities (i.e., the CSSF and the Ministry of Finance). It is also to be noted that in recent years the CSSF has developed a series of online portals meant to render the exchanges with supervised entities more rapid and transparent.

27 CSSF Press Release 08.02.2021

28 CSSF Press Release 13.08.2021

CSSF COMMUNIQUÉ ON THE IFD/IFR PACKAGE

CSSF Press Release of 2 September 2021[29]

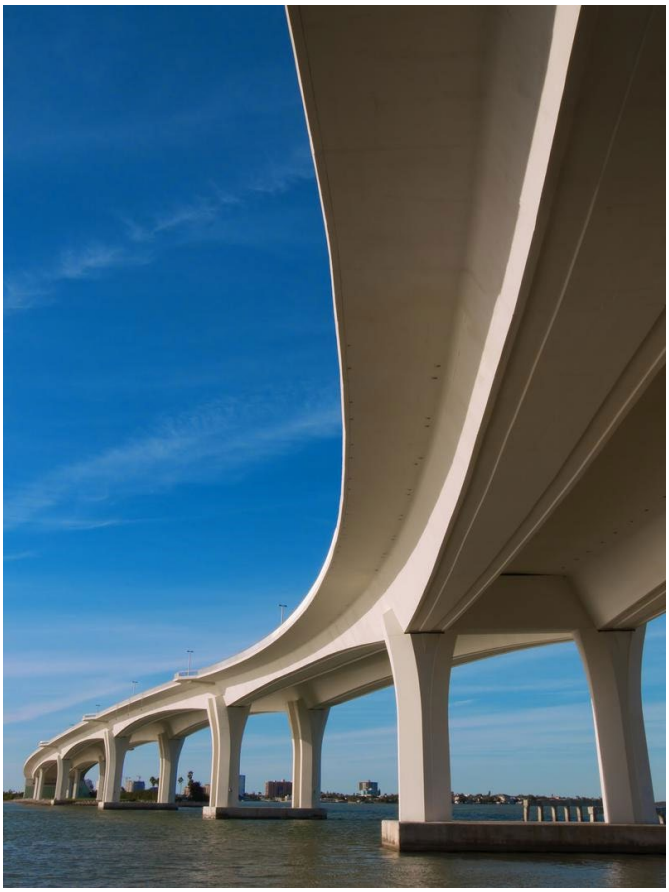
On 2 September 2021, the CSSF issued a *communiqué* on the entry into force of the new regulatory provisions applicable to investment firms under the IFD package, which includes (i) the national implementation of IFD and (ii) IFR.

The CSSF draws the attention of supervised entities to the main requirements of and changes brought by the IFD package, including, amongst others, the new categorisation of investment firms, minimum capital requirements with a phase-in compliance period for existing investment firms, liquidity rules and requirements in relation to concentration risk monitoring, remuneration and transparency, as well as the new European reporting framework.

The CSSF also indicates that, following a mapping exercise, about one third of the investment firms incorporated under Luxembourg law belong to "class 2", whereas the remainder belongs to "class 3" and that no "class 1" investment firm has been identified by the CSSF so far.

Further, the CSSF draws the attention of supervised entities already authorised to the revision and repeal of the investment firm statuses under the Luxembourg law of 5 April 1993 on the financial sector, as amended (the FSL) by the law of 21 July 2021. In this context, the regulator clarifies that these amendments do not nullify the authorisations of previously authorised investment firms. However, with a view to complying with the new legal provisions, the CSSF requires that an updated version of the articles of incorporation, reflecting the corporate objects that have been amended to be in line with the new provisions of the FSL, are filed with the Luxembourg Register of commerce and companies.

Finally, the CSSF informs supervised entities that any questions regarding the entry into force of the IFD package can be submitted via email to the dedicated email address: ifd@cssf.lu



29 CSSF Press Release 02.09.2021

CSSF CIRCULAR ON THE MANDATORY USE OF ECB'S IMAS PORTAL FOR BANKING QUALIFYING HOLDING AND PASSPORTING NOTIFICATIONS

CSSF Circular 21/781 of 23 September 2021[30]

On 23 September 2021, the CSSF issued its new Circular 21/781 on the mandatory use of the IMAS Portal for banking qualifying holding and passporting notifications.

Early this year the European Central Bank (ECB) and the national competent authorities (NCAs) launched the IMAS Portal as a digital gateway and communication channel for initiating authorisation processes. From 27 January 2021, the IMAS Portal became mandatory in Luxembourg for processing the fit and proper applications for all significant banks/groups under the Single Supervisory Mechanism. As from 27 September 2021, the mandatory use of the IMAS Portal will now be extended to the processing of passporting notifications from significant banks/groups (SIs) and less significant banks/groups (LSIs) and applications for the acquisition or increase of a qualifying holding in an SI or LSI. Those new modules will be open for receiving submissions from SIs, LSIs or other applicants.

Proposed acquirers shall use the IMAS Portal to submit their applications for banking qualifying holding assessments, track the status of these assessments and exchange related information with supervisors.

Supervised entities mentioned above shall also use the IMAS Portal for submitting their passporting notifications (new notification, change of notification or cancellation of notification).

The CSSF clarifies in relation to qualifying holding applications that the IMAS Portal should not be used for qualifying holdings applications for third-country banks operating a branch in Luxembourg, but only in relation to acquisitions (or increases) of qualifying holdings in Luxembourg incorporated credit institutions.

The Circular also provides further guidance on practical aspects relating to this new process including, amongst others:

- the website link to access the portal;
- the fact that the CSSF will no longer accept original paper documents or emails. Instead, the relevant documents and information (initial applications and the subsequent related exchange of information with supervisors) will need to be uploaded by the applicant on the IMAS portal. Communicating by emails outside the IMAS Portal may be unavoidable, but only an upload to the IMAS Portal will make the process move forward; and
- a recommendation that the proposed acquirers engage in pre-notification discussions with the CSSF, in order to clarify expected information requirements, timeline and coordination for other potentially related procedures.

Lastly, the Circular also provides details on account management and registration, as well as contact details for obtaining technical support.

30 CSSF Circular 21/781

CSSF-CODERES CIRCULAR ON THE CALCULATION OF THE 2022 EX-ANTE CONTRIBUTIONS TO THE SINGLE RESOLUTION FUND

CSSF Circular 21/13 of 23 September 2021[31]

On 23 September 2021, the CSSF and the Luxembourg Resolution Board (*Conseil de Résolution, CODERES*) on behalf of the Single Resolution Board (SRB) issued circular 21/13 dated 23 September 2021 on the data collection for the 2022 ex-ante contributions to the Single Resolution Fund (SRF) (the Circular).

The Circular is addressed to all credit institutions established in Luxembourg and subject to Regulation (EU) 806/2014, with the exception of Luxembourg branches of credit institutions established outside the EU. Luxembourg branches of credit institutions which have their head office in another Member State of the EU are covered by their head office.

In order to determine the annual contribution to be paid by each credit institution in 2022, the SRB requests the provision of a certain amount of information via a template attached to the circular (together with the relevant instructions on how the template has to be filled in and returned to the CSSF).

The requested data collection for the 2022 *ex-ante* contributions to the SRF has to be sent to the CSSF **by 14 January 2022 at 24:00 CET at the latest**.

In cases where all required information is not transmitted correctly within the indicated deadline, the SRB may use estimates or its own assumptions for the calculation of the 2022 contribution of the concerned credit institution and, in specific cases, it may assign the credit institution to the highest risk adjusting multiplier for the calculation.

The data required are identical to the data requested for the 2021 ex-ante contribution in Circular CSSF-CODERES 20/11. The transmission of data has to be performed this year via Excel sheet from the credit institutions to the CSSF.

Finally, each credit institution that directly or as part of a group falls under direct ECB supervision, unless it is subject to the lump-sum payment, must make available certain additional assurance documents which have to be sent to the CSSF **by 25 February 2022 at the latest**. The Circular notes in this respect that as from this year, upon instructions from the SRB, only Agreed Upon Procedures (*AUP*) where an external auditor confirms specific data (see Annex 5) is accepted. A sign-off by at least one of the members of the banks' authorised management is no longer sufficient for the banks concerned.

[31] Circular 21/13

CIRCULAR CSSF 21/782 ON THE ADOPTION, BY THE EBA, OF ITS REVISED GUIDELINES ON MONEY LAUNDERING AND TERRORIST FINANCING RISK FACTORS

CSSF Circular 21/782 of 24 September 2021[32]

On 24 September 2021, the CSSF issued its new Circular 21/782 (the Circular) on the adoption by the EBA of the revised guidelines[33] on customer due diligence and the factors credit and financial institutions should consider when assessing the money laundering and terrorist financing (*ML/TF*) risk associated with individual business relationships and occasional transactions (The ML/TF Risk Factors Guidelines) under Articles 17 and 18(4) of Directive (EU) 2015/849 (EBA/GL/2021/02) (the Guidelines).

The purpose of the Circular is to draw the attention of credit and financial institutions (the Professionals) to the adoption of the Guidelines.

The Guidelines were published by the EBA on 1 March 2021. They will become applicable as of 26 October 2021 and will repeal and replace the Joint guidelines previously issued by the three European Supervisory Authorities (the EBA, European Securities and Markets Authority and European Insurance and Occupational Pensions Authority) in June 2017.

According to the CSSF, the update of the Guidelines was made necessary by (i) the change of the applicable legislative framework in the EU following the entry into force of Directive (EU) 2018/843 (AMLD5) and (ii) the emergence of new ML/TF risks.

The CSSF states that the Guidelines continue to provide guidance on the different ML/TF risk factors the Professionals should consider when assessing their risks, and specify how the Professionals can adjust anti-money laundering and counter-terrorist financing customer due diligence measures commensurate with the level of risk associated with a business relationship or occasional transaction.

The CSSF indicates that the Guidelines:

- take account of the new and emerging risks (e.g., emerging risks related to the use of RegTech solutions for customer due diligence purposes or terrorist financing);
- contain more guidance on the identification of beneficial owners and enhanced customer due diligence related to high-risk third countries;
- stress that professionals enhance, in particular, their understanding of (risks related to) tax crimes;
- specify that an effective risk-based approach should not result in systematically exiting or discontinuing to offer services to certain categories of customers associated with higher ML/TF risk ("de-risking" approach), and that professionals should carefully balance the need for financial inclusion with the need to mitigate ML/TF risk; and
- contain additional (new) sectoral guidelines regarding crowdfunding platforms, providers of currency exchange services, corporate finance, payment initiation services providers and account information service providers.

The CSSF emphasises that the risk factors and the due diligence measures described in the Guidelines are not exhaustive. However, the Professionals should be able to take informed decisions commensurate with the ML/TF risks based on said Guidelines in order to efficiently manage their business relationships and occasional transactions.

The Professionals need to apply the changes (i) to future business relationships, and (ii) to existing customers at appropriate times in the context of the ongoing processes of risk assessment and mitigation.

32 CSSF Circular 21/782

33 EBA Guidelines

CSSF CIRCULAR ON THE APPLICATION OF THE ESMA GUIDELINES ON THE MIFID II/MIFIR OBLIGATIONS ON MARKET DATA

CSSF Circular 21/783 of 29 September 2021[34]

On 29 September 2021, the CSSF issued its new Circular 21/783, which informs the public that the CSSF fully applies the guidelines of the ESMA on the MiFID II/MiFIR obligations on market data (ESMA Guidelines).[35]

Circular 21/783 is addressed to and shall apply as from 1 January 2022 to all regulated markets, market operators, credit institutions, investment firms and market operators operating an MTF or an OTF, approved publication arrangements (APAs) and systematic internalisers (SIs) when making public market data for the purpose of the pre-trade and post-trade transparency regime under MiFID II/MiFIR.

The ESMA Guidelines aim to ensure a uniform understanding of the requirement to provide market data on a reasonable commercial basis including the disclosure requirements, as well as the requirement to provide the market data 15 minutes after publication (delayed data) free of charge.

The ESMA Guidelines are attached to the new circular.

CSSF REGULATION ON THE SETTING OF THE COUNTERCYCLICAL BUFFER RATE

CSSF Regulation 21-03 of 1 October 2021[36]

On 1 October 2021, the CSSF issued a new regulation 21-03 (the Regulation) on the setting of the countercyclical buffer rate for the fourth quarter of 2021. The Regulation was published in the Luxembourg official journal (*Mémorial A*) on 1 October 2021.

The Regulation follows the Luxembourg Systemic Risk Committee's recommendation of 6 September 2021 (CRS/2021/004) and maintains the countercyclical buffer rate for relevant exposures located in Luxembourg at 0.5% for the fourth quarter of 2021. This rate is applicable since 1 January 2021.

The Regulation entered into force on 1 October 2021.

34 CSSF Circular 21/783

35 ESMA Guidelines

36 CSSF Regulation 21-03

CSSF CIRCULAR ON THE PERIODIC PRUDENTIAL REPORTING OF INVESTMENT FIRMS

CSSF Circular of 1 October 2021[37]

On 1 October 2021, the CSSF announced the entry into force of the new regulatory provisions applicable to investment firms (IFs) under the EU-wide IFD/IFR package (as implemented in Luxembourg), which aim to subject IFs to a better suited and harmonised framework with respect to prudential supervision.[38]

The IFD/IFR package introduced, amongst others, a new EU harmonised framework for prudential reporting by IFs (IFR reporting), which includes information regarding the level, composition, requirements and calculation of capital requirements, level of activity, concentration risk and liquidity requirements. However, IFs also remain subject to the national reporting framework laid down in Circular CSSF 05/187, as amended.

Therefore, the CSSF issued, on 1 October 2021, Circular CSSF 21/784 to introduce the "Reporting Handbook for Investment Firms" (the Reporting Handbook[39]), which clarifies the applicable requirements by combining the reporting requirements pursuant to IFR reporting and the national reporting frameworks and related technical specifications.

The Reporting Handbook applies to (i) IFs incorporated under Luxembourg law, including their branches, (ii) Luxembourg branches of third-country IFs and (iii) as regards some national reporting requirements, Luxembourg branches of EU IFs.

Considering the classification of IFs adopted by the IFD/IFR package, the CSSF requires:

(i) Class 2 IFs to report prudential data for the reference period ending 30 September 2021 for the first time and on a quarterly basis thereafter; and

(ii) Class 3 IFs to report for the reference period ending 31 December 2021 for the first time and on an annual basis thereafter,

while large IFs, which are systemically important or exposed to the same type of risks as credit institutions (Class 1 IFs), continue to fall under the scope of the CRR and CRD and are, therefore, not subject to the Reporting Handbook, but to the credit institution reporting framework.

The CSSF also indicates that IFR reporting shall be communicated through the "Investment firms reporting" module in the CSSF's eDesk portal, while national reporting tables will continue to be submitted through the usual transmission mode in compliance with Circular CSSF 08/334 on encryption specifications for reporting firms.

37 CSSF Circular 21/784

38 CSSF Press-Release 01.10.2021

39 Reporting Handbook

CSSF CIRCULAR 21/785 AND RELATED COMMUNIQUÉ ON THE REPLACEMENT OF THE PRIOR AUTHORISATION OBLIGATION BY A PRIOR NOTIFICATION OBLIGATION IN THE CASE OF MATERIAL IT OUTSOURCING

CSSF Circular 21/785 of 14 October 2021[40]

On 14 October 2021, the CSSF issued Circular 21/785 dated 14 October 2021 on the replacement of the prior authorisation obligation by a prior notification obligation in the case of material IT outsourcing.

The new circular amends CSSF Circular 12/552 (as amended), CSSF Circular 17/656, CSSF Circular 20/758 and CSSF Circular17/654 (as amended), and provides that in the case of material IT outsourcing, a prior notification must be made to the competent authority using the appropriate forms at least three months prior to the effectiveness of the outsourcing (and one month for support PFS). At the end of the abovementioned period, if the authority has not reacted (by fully or partially objecting to the proposed IT outsourcing project or addressing requests for supplemental information to the professional) the IT outsourcing may be implemented. The CSSF may however decide to suspend the waiting period when reacting to the notification.

The new circular further specifies the requirements of the CSSF in relation to the contractual clauses in a cloud outsourcing agreement, notably as concerns the requirements to agree on an EU governing law and on the resilience of the cloud outsourcing services within the EU. Limited exceptions to these requirements exist for group cloud outsourcing agreements, and derogations can in justified cases be granted by the CSSF.

The circular is addressed to all credit institutions, all professionals of the financial sector (PFS), all payment institutions, all electronic money institutions as well as all managers of investment funds subject to CSSF Circular 18/698.

The new circular letter entered into force on 15 October 2021.

The CSSF circular further refers to transitional rules for authorisation requests filed before 15 October 2021 to a separate *communiqué* to be published by the CSSF. Such *communiqué* was published by the CSSF together with the new circular letter.

40 CSSF Circular 21/785
CSSF Press-Release 14.10.2021

CSSF COMMUNIQUÉ ON THE AGREED-UPON PROCEDURES' CONCLUSIONS ON KEY IFRS 9 AND CREDIT RISK-RELATED REQUIREMENTS

CSSF Press Release of 18 October 2021[41]

On 18 October 2021, the CSSF issued a *communiqué* on the agreed-upon procedures' conclusions on key IFRS 9 and credit risk-related requirements.

During 2021, the CSSF requested agreed-upon procedures to be performed by external auditors of credit institutions having a significant credit activity and publishing their annual accounts in Luxgaap on key IFRS 9 and other credit risk-related requirements.

The agreed-upon procedures highlighted room for improvement on requirements relating to:

- Governance
- Risk classification (including forbearance exposures and NPE & defaults exposures)
- Collateral valuations
- Staging and provisioning

The CSSF expects credit institutions to review the compliance of their policies and procedures with said requirements.

CSSF COMMUNIQUÉ ON THE PUBLICATION OF A NEW CSSF CIRCULAR ON THE OBLIGATION TO NOTIFY THE CSSF IN THE CASE OF MATERIAL IT OUTSOURCING

CSSF Press-Release of 20 October 2021[42]

On 20 October 2021, the CSSF issued a *communiqué* on the publication of a new CSSF Circular on the obligation to notify in the case of material IT outsourcing.

The prior notification obligation replaces the previous prior authorisation obligation in the case of material IT outsourcing. This review of the approach is explained in the CSSF *communiqué* by an increased use of IT outsourcing solutions by financial sector players and the willingness of the CSSF not to impede the proper execution of the projects of the supervised entities. In fact, the CSSF noted an increase of over 40% in authorisation applications for IT outsourcing between 2019 and 2021. In this category, the share of cloud outsourcing doubled.

The CSSF also emphasises that the new notification regime will not call into question the quality and thoroughness of its supervision. Notifications received will be subject to a differentiated treatment which might vary according to the risks linked to the outsourcing project. The CSSF may still intervene after the scheduled date of implementation of the project, through on-site inspections, for example.

41 CSSF Press-Release 18.10.2021

42 CSSF Press-Release 20.10.2021

CSSF AND MINISTRY OF FINANCE UPDATES ON FINANCIAL SANCTIONS

CSSF Press Release of 22 October 2021

On 22 October 2021, the CSSF draws in its Newsletter[43] and a dedicated *communiqué*[44] the attention of financial sector professionals to the redesign of the website of the Ministry of Finance, which is notably responsible for international financial sanctions, following the entry into force of the law of 19 December 2020 on the implementation of restrictive measures in financial matters. In this respect, the Ministry also updated its best practices guides on financial sanctions which are available in French and in English on the Ministry's website. These guides contain non-exhaustive general recommendations on the implementation of financial sanctions. For further details on their content, the CSSF recommends that financial sector professionals subscribe to the newsletter of the Ministry of Finance in order to receive all the updates in relation to financial sanctions.[45]

Furthermore, the Ministry of Finance posted a new template for the quarterly reporting of frozen funds available on its website for the natural and legal persons required to implement the restrictive measures and to inform the Ministry of Finance of the execution of each new restrictive measure without delay and without postponing the reporting until the end of the quarter.

Finally, the CSSF reminds the professionals falling under its supervision that it has the same supervisory and sanction powers in relation to such professionals in the area of financial sanctions under the new law of 19 December 2020 as it has in the area of anti-money laundering and counterterrorism financing control.

LUXEMBOURG BILL ON THE GRANTING OF THE STATE GUARANTEE TO CREDIT LINES CONTRACTED BY THE FGDL

Bill N° 7905 of 28 October 2021[46]

On 28 October 2021, a bill concerning deposit protection schemes (Bill N° 7905) was lodged with the Luxembourg Parliament.

The main purpose of the bill is to amend the Luxembourg law of 18 December 2015 on the failure of credit institutions and certain investment firms to introduce an additional safety net for the benefit of the Luxembourg Deposit Guarantee Fund (FGDL), and thus further strengthen depositor protection by means of a guarantee granted by the Luxembourg state to credit lines contracted by the FGDL.

The new guarantee will facilitate the implementation of financing mechanisms by the FGDL in the event of short-term needs by making it easier to obtain the funds necessary to honour its commitments.

The bill authorises the Government to grant a state guarantee for credit lines contracted by the FGDL in return for appropriate remuneration. The state guarantee is capped at a maximum total amount of EUR 1 billion.

With this bill, the Government also intends to address the concerns raised by the Luxembourg State Council (*Conseil d'Etat*) and the International Monetary Fund on the need for a special law and the establishment of adequate financing mechanisms for the FGDL.

The lodging of bill N° 7905 with the Luxembourg Parliament constitutes the start of the legislative process.

43 CSSF Newsletter

44 CSSF Press Release 22.10.2021

45 Ministry of Finance

46 Bill N°7905

CSSF COMMUNIQUÉ ON LUXEMBOURG TESTING FRAMEWORK FOR CONTROLLED CYBER-ATTACKS CALLED TIBER-LU

CSSF Press-Release of 3 November 2021[47]

On 3 November 2021, the CSSF issued a *communiqué* on the CSSF's and the *Banque Centrale du Luxembourg*'s decision to jointly adopt the testing framework for controlled cyber-attacks, named TIBER-LU.[48]

TIBER-LU will help achieve the objective for critical entities of the financial sector in Luxembourg to be able to adequately resist cyber-attacks in order to ensure their own resilience and thereby contribute to the resilience of the financial sector as a whole.

TIBER-LU corresponds at national level to the framework TIBER-EU adopted at EU level, by adapting its implementation to Luxembourg specificities.

The TIBER-EU framework was published in May 2018 by the European Central Bank and sets out a harmonised European approach for the conduct of threat-led penetration tests that mimic the tactics, techniques and procedures of real-life threat actors and that simulate a cyber-attack on critical functions and underlying systems of an entity.

47 CSSF Press Release 03.03.2021

48 TIBER-LU Implementation Guide

INSURANCE

LUXEMBOURG LAW MODERNISING THE AUTHORISATION REGIME FOR ENTITIES IN THE FINANCIAL AND INSURANCE SECTOR PUBLISHED

Law of 21 July 2021[49]

On 26 July 2021, the Luxembourg law of 21 July 2021 modernising the authorisation regime for entities in the financial and insurance sector was published in the Luxembourg official journal (*Mémorial A*).

The law modernises the authorisation regime in particular by granting the CSSF and the CAA directly the power to grant and withdraw the authorisation of entities subject to their respective supervision. The authorisation for these entities would hence no longer be granted by the Minister in charge of the financial and insurance sector (i.e., currently the Minister of Finance).

The law aims to take into account the evolution of the law of the European Union, which is increasingly advocating the allocation of authorisation powers to the competent national authorities in charge of prudential supervision and reflects analogous allocation of authorisation powers to the European Central Bank (with regard to Eurozone credit institutions within the scope of the Single Supervisory Mechanism Regulation (EU) 1024/2013) and the European Securities and Markets Authority (with regard to EU central counterparties) at the European level.

The law implements the change in approach in a series of Luxembourg sectorial laws relating to the financial sector, including the financial sector law, the CSSF law, the payment services law, the insurance sector law and the markets in financial instruments law.

The law provides for a transitory provision according to which already authorised entities continue to benefit from their existing ministerial authorisation.

The law entered into force on 30 July 2021.

CAA REGULATION N° 21/01 ON CERTAIN INSURANCE GROUP SUPERVISION ASPECTS

CAA Regulation of 22 July 2021

On 22 July 2021, the CAA adopted CAA Regulation N° 21/01 of 22 June 2021[50] regarding the transposition of article 2, points 4) and 5) of Directive (EU) 2019/2177 of 18 December 2019 and amending CAA Regulation N° 15/03 of 7 December 2015 on insurance and reinsurance undertakings.

CAA Regulation N° 21/01 amends article 77 (relating to group internal model) and article 82 of the CAA Regulation N° 15/03 (relating to decisions and cooperation between regulators in relation to minimum capital requirements for subsidiary companies in insurance groups). Amongst others, it is provided that, in certain cases, if EIOPA does not take a decision within a month, the CAA, if it is the controller of the group, takes the final decision.

CAA Regulation N° 21/01 entered into force on 1 August 2021.

49 Law of 21 July

50 CAA Regulation N° 21/01

CAA CIRCULAR LETTER ON IMPLEMENTATION OF THE EIOPA GUIDELINES ON PEPP SUPERVISORY REPORTING

CAA Circular Letter 21/14 of 3 August 2021[51]

On 3 August 2021, the CAA adopted CAA Circular Letter 21/14 on the EIOPA Guidelines on PEPP supervisory reporting (*the Guidelines*).

'PEPP' stands for pan-European Personal Pension Products which are regulated at the EU level by Regulation (EU) 2019/1238 of the European Parliament and of the Council of 20 June 2019 on a PEPP. The Guidelines foresee the details of the nature, scope and format of the information to be submitted by PEPP providers to the competent authorities at predefined intervals and upon the occurrence of predefined events, and shall apply from 22 March 2022.

The CAA has informed EIOPA of its intention to fully comply with the Guidelines.

Further to the Circular Letter, the CAA invites life insurance undertakings to take all the necessary measures to comply with the Guidelines.

51 CAA Circular Letter 21/14

CAA CIRCULAR LETTER – 21/15 ON THE AMENDMENT OF THE CAA CIRCULAR LETTER 20/13 ON OUTSOURCING TO CLOUD COMPUTING SERVICE PROVIDERS

CAA Circular Letter of 5 August 2021[52]

On 5 August 2021, the CAA adopted CAA Circular Letter 21/15 on the amendment of the CAA Circular Letter 20/13 on outsourcing to cloud computing service providers.

The CAA reminds the public that, by means of the CAA Circular Letter 20/13, the CAA has informed the insurance and reinsurance undertakings supervised by the former that it will apply the EIOPA Guidelines on outsourcing to cloud service providers (EIOPA-BoS-20-002) (*the Guidelines*). In this context, CAA Circular Letter 21/15 aims to incorporate the Guidelines as well as additional CAA-specific requirements into the legal framework.

Amongst others, the CAA Circular Letter 21/15 covers the following topics:

- general governance principles on the matter of cloud outsourcing;
- the setting up of a written policy in relation to outsourcing;
- provisions related to the notification of the CAA;
- documentation and prior analysis-related aspects;
- secrecy, security and audit; and
- certain valuations (e.g., risks).

The CAA Circular Letter 21/15 shall apply from 1 November 2021 to all the outsourcing agreements concluded or amended after said date.

By 31 December 2022, relevant undertakings shall have to revisit and amend existing cloud outsourcing agreements related to activities or functions of an important or critical nature so that they are compliant with the provisions of CAA Circular Letter 21/15. If the above does not happen by 31 December 2022, the relevant undertakings shall have to inform the CAA and indicate the measures taken to finalise the review or the eventual termination strategy.

Clifford Chance has produced a client briefing on these aspects which is available here.

52 CAA Circular Letter

CAA CIRCULAR LETTER 21/12 RELATING TO THE KEY FUNCTIONS DEFINED BY SOLVENCY II

CAA Circular Letter 21/12 of 3 August 2021[53]

On 3 August 2021, the CAA issued its new Circular 21/12 relating to the key functions defined by Solvency II (the Circular Letter).

The CAA states that since Solvency II tightened the governance rules applicable to Luxembourg insurance and reinsurance undertakings, it has recorded numerous notifications regarding key function holders. It thus appeared necessary to clarify to the insurance industry the requirements for the organisation of key functions, in particular with regard to their independence, the accumulation of several mandates or responsibilities, the competence expected from the key function holders, the continuous monitoring of fit and proper requirements, and the application of the proportionality principle.

The Circular Letter applies (i) to insurance and reinsurance undertakings subject to Solvency II and (ii) *mutatis mutandis* to insurance and reinsurance groups under the supervision of the CAA.

According to the Circular Letter, each key function has a single person in charge who is appointed by the board of directors. This requirement also applies at the group level supervised by the CAA. The responsibility for a key function cannot be outsourced to a third party.

The key functions shall be carried out independently and conflicts of interests shall be prevented. The independence of key functions and the prevention of conflicts of interest shall take into account:

- independence vis-à-vis the operational functions and notably those which are controlled by such key functions (either simultaneously or by controlling *ex-post* activities performed by such person during a past period where this person exercised operational activities);
- independence *vis-à-vis* persons in managerial positions who could affect the impartiality of the key function, without prejudice to the loyalty of the key function to the board of directors;
- independence from the other key functions, and especially the independence of the internal audit from the three other key functions; and
- the remuneration policy applicable to the key function holders, including variable remuneration elements that depend on individual performance or on the collective performance of the key function.

The Circular Letter also specifies that a key function holder should not be an executive of the undertaking. However, a key function holder other than the internal auditor could be an executive under the proportionality principle exemption. If (re)insurance undertakings wish to rely on such exemption, certain documentation requirements need to be fulfilled, including, *inter alia*, a board resolution justifying in detail the exemption and the absence of conflicts of interests.

The independence between each of the key functions requires that a different person be designated to be responsible for each of the four key functions. However, an exception exists under the proportionality principle (except for the internal audit function), provided that the independence and availability requirements are fulfilled.

The Circular Letter also states that the same person may be responsible for the same key function at the level of a group supervised by the CAA and of one or more undertakings belonging to that group, without invoking the principle of proportionality, provided that the person has the necessary competence and availability.

Moreover, the board of directors is responsible for defining the fit and proper requirements criteria for the key function holders, for evaluating the persons which it intends to nominate as key function holders before the notification to the CAA, and for their ongoing assessment. It documents this assessment on a periodic basis (the CAA may request to consult said documentation).

The fitness of the key function holders is demonstrated to the CAA at the time of the notification on the basis of the criteria mentioned in the Circular Letter, which can

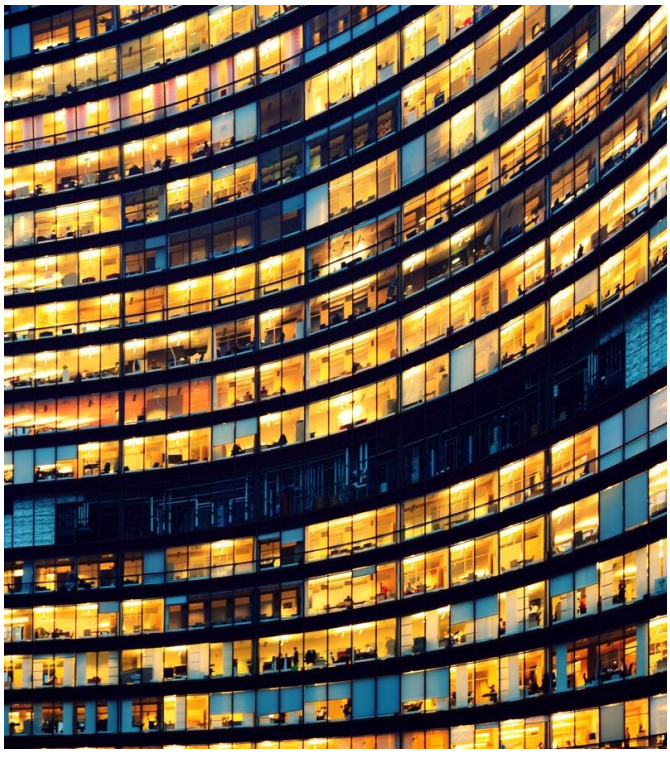
53 CAA Circular Letter 21/12

however be adapted to specific situations under the proportionality principle, in particular according to the undertaking's risk profile. The CAA may require an interview with the concerned person. If the mentioned criteria are not met, the undertaking shall demonstrate through factual and detailed evidence that said person has acquired an equivalent fitness.

The Circular Letter states that the CAA shall be notified of (i) the taking of responsibility as key function holder (in accordance with circular letter 19/5), (ii) the cessation of a mandate as key function holder, and (iii) an *ad interim* replacement.

Finally, the Circular Letter requires a written analysis by the insurance undertaking that the governance system remains sufficiently robust, if reliance on proportionality is to be be sought, and lists certain limited cases of factual elements that can justify such reliance.

The Circular Letter has been applicable since 1 October 2021, without prejudice to transitory rules for documentation of ongoing assessment of fitness and propriety by key function holders applicable from 1 January 2022 and certain filing requirements with the CAA regarding the application of the principle of proportionality by a (re)insurance undertaking beginning in 2022.



CAA CIRCULAR LETTER ON THE ADOPTION OF THE GUIDELINES ON MONEY LAUNDERING AND TERRORIST FINANCING RISK FACTORS

CAA Circular Letter 21/16 of 22 September 2021[54]

On 22 September 2021, the CAA issued its new Circular 21/16 on the adoption of the guidelines on money laundering and terrorist financing risk factors (the Circular).

The purpose of the Circular is to draw the attention of all undertakings and persons under supervision of the CAA who are subject to AML/CFT obligations (Professionals) to the adoption by the EBA of the revised guidelines on customer due diligence measures and the factors to be taken into account when assessing the risks of money laundering and terrorist financing associated with individual business relationships and occasional transactions (the Guidelines). The CAA informs the Professionals that it has notified its compliance with the Guidelines to EBA.[55]

The Guidelines became applicable as of 26 October 2021 and repealed and replaced the joint guidelines previously issued by the three European Supervisory Authorities (the EBA, ESMA and European Insurance and Occupational Pensions Authority) in June 2017 (JC/2017/37).

The CAA states that the purpose of the Guidelines is to provide guidance on the different factors that Professionals shall consider in the context of their money laundering and terrorist financing risk assessments. In addition, the Guidelines specify how Professionals can adjust AML/CFT due diligence measures according to the level of risk to mitigate money laundering and terrorist financing risks in order for these measures to be more appropriate and proportionate according to the associated risk level, in accordance with the execution of a risk-based approach.

The CAA indicates that the Guidelines:

- strengthen the requirements on individual and global money laundering and terrorist financing risk assessments and customer due diligence measures;
- add new guidance on the identification of beneficial owners, and on the use of innovative solutions to identify and verify customers' identities;
- stress the need for professionals to enhance their understanding of tax crimes; and
- provide more details on risk factors related to terrorist financing.

The CAA indicates that Title I of the Guidelines is applicable to all Professionals whilst Title II (which should be read in conjunction with Title I) provides sector-specific guidance for certain categories of Professionals, in particular life insurance undertakings in its orientation 14. This orientation may also be useful for intermediaries.

The CAA states that, on the basis of the Guidelines, the Professionals should be able to take informed decisions based on money laundering and terrorist financing risks in order to effectively manage their business relationships and transactions, while taking into account the expectations set out in the Guidelines as to how to fulfil their AML/CFT obligations.

The CAA emphasises that the risk factors and the due diligence measures described in the Guidelines are not exhaustive and that Professionals must regularly review and document their money laundering and terrorist financing risk assessments as part of the ongoing due diligence with respect to their business relationships and, where appropriate, take into account regulatory changes in this area.

Finally, the CAA indicates that money laundering and terrorist financing risk factors have already been taken into account with regard to life insurance in the context of the harmonised questionnaires regarding the assessment of the ML/TF risk exposure, which were introduced by Circular Letter 18/9.

54 CAA Circular Letter 21/16

55 EBA Guidelines

LUXEMBOURG CAA PUBLISHES ANNUAL REPORT 2020-2021

CAA Annual Report of 30 September 2021

On 30 September 2021, the CAA published its Annual Report for 2020-2021 (the Report).[56]

The Report contains statistical information in relation to the Luxembourg insurance and reinsurance sector and the CAA's exercise of its supervisory powers. It also contains an overview of the CAA's work and activities in relation to the main legal and regulatory developments of the last 12 months and the CAA's activities at a national, cross-sectorial and an international level.

The Report stresses that the COVID-19 pandemic has had a significant impact on the short- and medium-term development of the insurance sector. While the year 2020 ended with a 4.8% growth in non-life premium income, life insurance showed a 17.8% decrease compared to 2019. Nevertheless, in the first quarter of 2021, there was a recovery in the insurance sector which is reflected in an increase in premiums, all branches combined, of 16.4% compared to the same period of the previous year.

The Report also notes industrial groups' renewed interest in setting up captive reinsurance undertakings in Luxembourg. Moreover, the CAA has set the following supervisory priorities for the coming months:

- The review of the level of implicit and explicit prudence of technical provisions as well as the Solvency II balance sheets of certain operators for which the answers given to the CAA, following the audit of their annual reporting, were not satisfactory.
- Monitoring of the anti-money laundering and counter-terrorist financing measures put in place by life insurance companies and intermediaries regarding tax offences.
- The evaluation of compliance by insurance undertakings and intermediaries with conduct of business rules, mainly with regard to insurance-based investment products.

[56] CAA Annual Report
Key figures of 2020
Annexes to the Annual Report

FINTECH

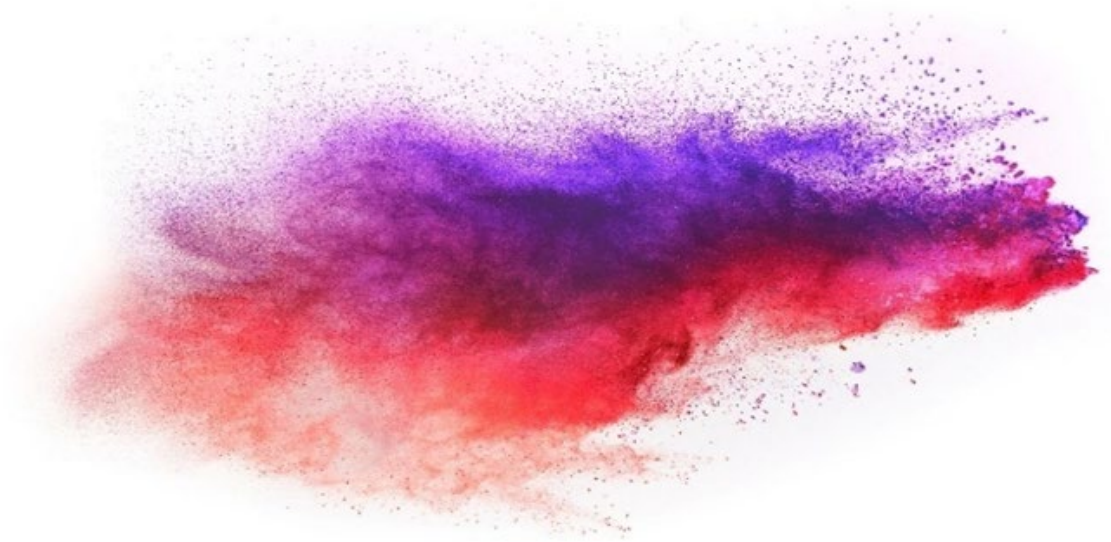
CSSF PRESS RELEASE - SEC THAILAND AND CSSF SIGN A FINTECH INFORMATION SHARING AGREEMENT

CSSF Press Release of 29 July 2021[57]

On 29 June 2021, the CSSF issued a press release to inform the public that the Securities and Exchange Commission, Thailand (SEC Thailand) and the CSSF have signed a Memorandum of Understanding on information sharing regarding Fintech and Innovation in their respective financial markets.

The Memorandum of Understanding provides a framework for cooperation between the two authorities with respect to promoting innovation in financial services. The CSSF and the SEC Thailand intend to exchange information about emerging trends and developments in the financial or capital markets and regulatory issues pertaining to new technologies and innovation in the provision of financial services.

The Memorandum took effect on 7 June 2021.



57 CSSF Press Release 29.07.2021

ESG

ESAs PUBLISH FINAL RTS ON TAXONOMY-RELATED DISCLOSURES UNDER SFDR

Final Report on draft Regulatory Technical Standards dated 22 October 2021[58]

The European Supervisory Authorities (ESAs), comprising the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA), and the European Securities and Markets Authority (ESMA), have published a final report setting out draft regulatory technical standards (RTS) on taxonomy-related product disclosures under the Sustainable Finance Disclosure Regulation (SFDR).

The draft RTS aim to establish a single rulebook for sustainability disclosures under the SFDR and the Taxonomy Regulation (TR) by amending the existing SFDR RTS on the content and presentation of pre-contractual and periodic disclosures to include additional specific taxonomy-related disclosure requirements for products making sustainable investments contributing to climate or other environmental objectives.

As well as some targeted revisions, the proposed changes broadly cover:

- information on environmental objectives to which the investment underlying the financial product contributes; and
- information on how and to what extent investments underlying the financial product are in economic activities that qualify as environmentally sustainable under the TR.

A consolidated version of the SFDR RTS incorporating the proposed amendments is set out in section 5 of the final report.

The draft RTS have been submitted to the EU Commission for endorsement, which is expected to take place within three months. The Commission intends to combine all the SFDR RTS, including those published on 4 February and 22 October 2021, into a single delegated act.

The ESAs have proposed an application date for the RTS of 1 January 2022, although they note that the EU Commission has indicated an expected application date of 1 July 2022.

For more information and resources on Green and Sustainable Finance, see the Topic Guide on the Clifford Chance Financial Markets Toolkit.

58 ESMA Communiqué

ASSET MANAGEMENT

MANDATORY DECLARATION OF PERFORMANCE FEE MODELS BY IFMS ON CSSF EDESK

CSSF Communiqué of 22 September 2021

In September 2021, the CSSF launched a new dedicated eDesk application ("**Application**") for every Investment Fund Manager ("**IFM**") of Luxembourg based AIFs and UCITS to declare their performance fee models.

The Application was developed in order for IFMs to comply with the Guidelines on performance fees in UCITS and certain types of AIFs ("**Guidelines**") issued by the European Securities and Markets Authority ("**ESMA**"), which aim to establish a common standard in relation to the disclosure of performance fee models to investors.

The declaration must be performed in the performance fee dashboard of the Application **for all Luxembourg based funds and sub-funds**, even when they are not subject to a performance fee, in the launching process or inactive following the full redemption of their interests, shares or units. A confirmation of compliance with the Guidelines will also be requested through the Application.

The starting date for performing the first declaration for each fund and sub-fund on eDesk and the corresponding deadline depend on the end date of the fund's financial year and have been scheduled by the CSSF as follows:

End of fund's financial year	Starting date	Deadline
Between July and September 2021	30 September 2021	30 November 2021
Between October and December 2021	30 September 2021	End of fund's financial year
Between January and June 2022	January 2022	End of fund's financial year

Following the first declaration, the IFMs will have to ensure their declarations be kept up to date in case of any change.

For more information, here are links to the CSSF announcement for the launch of the Application and the Guidelines.

IFMS MUST ENSURE THEIR MARKETING COMMUNICATIONS COMPLY WITH ESMA GUIDELINES

ESMA Guidelines on marketing communications under the Regulation on cross-border distribution of funds

In May 2021, The European Securities and Markets Authority ("**ESMA**") published the Guidelines on marketing communications ("**Guidelines**") in accordance with Regulation (EU) 2019/1156 on the cross-border distribution of funds ("**CBDF Regulation**").

The new principles governing marketing communications introduced by the CBDF Regulation and applicable to AIFMs, UCITS management companies, EuVECA managers and EuSEF managers have been effective since 2 August 2021. They set out that marketing communications addressed to investors and potential investors should:

- be identifiable as such;
- contain a description of risks and rewards in an equally prominent manner; and
- have only fair, clear and not misleading information.

The Guidelines, which specify and detail how to concretely apply the three above requirements, will become applicable six months after the date of their publication in all EU official languages. Such publication occurred on 2 August 2021 and thus set the Guidelines' effective date on **2 February 2022**. However, national competent authorities ("**NCAs**"), including the CSSF, have been asked to notify ESMA whether they comply or intend to comply with the Guidelines, and such answers by each NCA have not yet been communicated to the public.

The Guidelines contain, in particular, non-exhaustive lists on what should be considered as marketing communications and what should not. They also provide detailed indications on the format and content of compliant marketing communications, such as, for instance, the wording for disclaimers, the font and size of the description of risks (which should be at least equal to that of the rewards), the consistency with other fund documentation, the acceptable information on past and future performance, and on sustainability-related aspects.

THE IMPLEMENTATION OF CBDF RULES IN LUXEMBOURG

Luxembourg Law of 21 July 2021 implementing the Directive on cross-border distribution of funds

The Luxembourg law of 21 July 2021 ("**CBDF Law**"), which transposed the Directive (EU) 2019/1160 of 20 June 2019 ("**CBDF Directive**") into national legislation, entered into force on 2 August 2021.

Conditions for "pre-marketing"

The CBDF Law has transposed for Luxembourg AIFMs marketing in the EU and EU AIFMs marketing in Luxembourg the provisions of the CBDF Directive in relation to pre-marketing which set its definition, scope, limitations and notification process.

Pre-marketing consists of providing information to potential investors to test their interest in an AIF while such information should not be sufficient to allow potential investors to commit or subscribe for the AIF or consists of final forms of the fund documentation.

Further to the entry into force of the CBDF Law, the CSSF added a page to its website that details the procedure for notifying pre-marketing, which should be done imperatively within two weeks of the commencement of pre-marketing. The intranet page also makes forms available, which consist of the notification letters for pre-marketing.

Pre-marketing by non-EU AIFMs

The CSSF clarified on its website that the same notification procedure as for EU AIFMs applies to non-EU AIFMs when they engage in pre-marketing to potential investors in Luxembourg. It considers that if non-AIFMs were not subject to the same pre-marketing rules, EU AIFMs could be disadvantaged compared to non-EU AIFMs.

Discontinuation of marketing of AIFs

The CBDF Directive sets a de-notification procedure to be followed by authorised EU AIFMs that wish to discontinue the marketing of an EU AIF in one or more EU countries, provided that a list of conditions has been fulfilled.

The CBDF Law transposed the same procedure and conditions for the AIFMs established in Luxembourg with no gold plating.

It is important to note that within **36 months** of the de-notification, the AIFM cannot engage in pre-marketing in the countries identified in the de-notification in respect of

- interests, units or shares of the EU AIF(s) referred to in the de-notification; or
- similar investment strategies or investment ideas, thus potentially also excluding successor AIFs.

The CSSF has updated its web page on marketing of alternative investment funds to provide for the de-notification modalities and make forms available that consist of the de-notification letters.

Update about EFTA Countries

As of the date of this legal update, the CBDF Directive and the Regulation (EU) 2019/1156 of 20 June 2019 ("**CBDF Regulation**") have not yet entered into force in EFTA countries (Iceland, Liechtenstein, Norway and Switzerland) and, as a consequence, it is not yet necessary to notify pre-marketing performed in these countries. De-notification remains possible as it already was prior to the application of the CBDF rules.

CSSF PROVIDES CLARIFICATION ON HOLDING OF ANCILLARY LIQUID ASSETS BY UCITS

CSSF Press release 21/26 of 3 November 2021[59]

The Luxembourg financial sector supervisory authority (CSSF) has updated its FAQs on the law of 17 December 2010 on undertakings for collective investment and its FAQs concerning the Money Market Funds Regulation to clarify the circumstances and the extent to which UCITS are allowed to hold ancillary liquid assets.

Ancillary liquid assets should be limited to bank deposits at sight, such as cash held in current accounts with a bank accessible at any time, and should be held for the purpose of covering current or exceptional payments or for the time necessary to reinvest in eligible assets. They should be limited to a maximum of 20% of the net assets of a UCITS, and this limit can only be temporarily breached in case of exceptionally unfavourable market conditions.

Bank deposits, money market instruments or money market funds do not constitute ancillary liquid assets as they are eligible assets for a UCITS, and should be disclosed in the investment policy if the UCITS is authorised to invest in such instruments.

UCITS are expected to comply with the conditions described in these new questions of the FAQs as soon as possible and by 31 December 2022 at the latest, considering the best interests of investors.

59 CSSF Press-Release 03.11.2021

CORPORATE

FINANCIAL ASSISTANCE RULES NOT APPLICABLE TO A *SOCIÉTÉ À RESPONSABILITÉ LIMITÉE* (SARL)

Law of 6 August 2021 amending the Companies Law came into force on 16 August 2021

The law of 6 August 2021 amends article 1500-7, 2° of the Companies Law to rectify a clerical error which occurred during the parliamentary works in relation to the bill of law 5730, which led to the law of 10 August 2016 modernising the Companies Law.

In the initial versions of the bill of law 5730, the intention was to apply the financial assistance rules to a *société à responsabilité limitée* (SARL) through the introduction of new articles and of the reference to *parts sociales* under article 1500-7, 2° of the Companies Law pertaining to criminal sanctions. However, the position subsequently changed and the relevant new articles were removed accordingly from the bill of law 5730. However, it was omitted to remove the reference to *parts sociales* in article 1500-7, 2°.

The reference to *parts sociales* in article 1500-7, 2° resulted in difficulties of interpretation as to the applicability of the prohibition of the financial assistance to a SARL, especially in light of the principle of strict interpretation of the legal texts relating to criminal matters.

The law of 6 August 2021, which entered into force on 16 August 2021, aims precisely at removing the reference to *parts sociales* in article 1500-7, 2° of the Companies Law, and thus clarifies that the prohibition of financial assistance is not applicable to a SARL.

ESTABLISHMENT OF A NATIONAL SCREENING REGIME FOR FOREIGN DIRECT INVESTMENTS

Law of 6 August 2021

On 15 September 2021, the bill of law N° 7885 was introduced by the Luxembourg Minister for Foreign and European Affairs as part of the implementation of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the European Union.

The purpose of the bill is to establish a national regime of screening of the investments made by investors located outside the European Economic Area in a Luxembourg entity conducting activities in Luxembourg territory in various strategic sectors such as energy, health, defence, finance, telecoms, data, media, etc.

The regime of screening consists of the following:

- a prior notification process and screening procedure; and
- enforcement in the event of non-compliance with the prior notification obligation or the screening decision.

The prior notification process and screening procedure is introduced in the form of an *ex ante* procedure subject to the supervision of an inter-ministerial committee.

The foreign investor shall notify the minister of the economy of the contemplated investment. This prior notification does not have suspensive effect, meaning that the investor may proceed with the preliminary stages of the contemplated investment at its own risk.

The authorities will then perform a preliminary analysis, on a case-by-case basis, which may lead to a screening procedure to assess if the investment is likely to affect security or public order. Should a screening procedure be initiated, the ministry will notify the Member States and European Commission, and the investors may not proceed with the investment until a positive decision is issued. The screening procedure should not exceed 60 calendar days, although this period will be suspended if additional information is required until the receipt thereof.

After completion of the process, a decision will be taken to either prohibit or authorise the investment (authorisation may be subject to conditions).

The bill also provides for specific enforcement measures and sanctions where the prior notification and screening procedure is not complied with. The authorities may, amongst others, order the foreign investor to amend the contemplated investment or to restore the previous situation or they can decide to withdraw the authorisation. They can also impose a fine of up to EUR 1,000,000 on natural persons and EUR 5,000,000 on legal entities; this decision may be appealed to the administrative court within one month following notification thereof.

FILING RCS: NEW FORMALITIES UPCOMING FOR NATURAL PERSONS

LBR public notice dated 1 October 2021

As from the end of the first quarter of 2022, the RCS will introduce new RCS forms that will require, *inter alia*, that natural persons to be registered (or already registered) with the RCS in any capacity whatsoever, will need to provide their Luxembourg national identification number to the RCS or apply to obtain one as part of the filing process.

The adoption of these new RCS forms derives from article 12 *bis* of the law of 19 December 2002 on the register of commerce and companies and the accounting and annual accounts of companies, which was introduced by the law of 13 January 2019 establishing a register of beneficial owners.

Distinction should be made between new filings as from the application of these new measures and filing made before:

- For new filings as from the end of the first quarter of 2022: natural persons to be registered with the RCS should provide their national identification number or apply to obtain one during the filing process. No new filing of natural persons with the RCS will be possible without presenting a national identification number.
- For entities having natural persons already registered with the RCS, before end of first quarter 2022: a reasonable transitional period will be granted to entities to allow them to comply on a voluntary basis. In a second phase, the filing of the national identification number will become mandatory (precise timing to be confirmed).

The national identification number will not be publicly disclosed, it will not appear on documents to be issued by the entity, it will not appear on pre-filled requisition forms and will not be visible on the RCS extract of the entity.

Only the person for whom the number has been created will receive the number by mail from the State Information Technology Centre. If the depositor has a mandate from the person for whom such a number has been assigned to receive this information, and specifies this in their filing process, the depositor will be able to consult the information in the filing receipt.

All natural persons who are or will be registered with the RCS and who are not already in a possession of a Luxembourg national identification number should anticipate that additional information and supporting documents will need to be provided as part of their registration with the RCS[60].

[60] LBR public notice can be accessed here

TAX

COURT OF JUSTICE OF THE EUROPEAN UNION RENDERED A JUDGMENT ABOUT THE CONCEPT OF "FIXED ESTABLISHMENT" IN THE CONTEXT OF THE RENTAL OF IMMOVABLE PROPERTY

3 June 2021

On 3 June 2021, the Court of Justice of the European Union ("**CJEU**") gave its decision in Case Titanium Ltd v. Finanzamt Österreich (C-931/19)[61] based on a number of grounds.

On those grounds, the CJEU rules that "*a property which is let in a Member State, in the circumstance where the owner of that property does not have his or her own staff to perform services relating to the letting does not constitute a fixed establishment within the meaning of Article 43 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and of Articles 44 and 45 of Directive 2006/112, as amended by Council Directive 2008/8/EC of 12 February 2008*".

In other words, and according to the CJEU, an immovable property owned by a foreign company does not constitute a fixed establishment at the place where it is located when the company does not have its own staff to perform services relating to the letting.

The question referred to the CJEU related to the place of supply of a service. Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (the "**VAT Directive**") and the Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 (the "**VAT Regulation**") provide rules to locate supply of goods and/or services.

In the case at hand, the CJEU applied articles 44[62] and 45[63] of the VAT Directive and referred notably to:

- well-settled case law on the matter (Planzer Luxembourg[64] and ARO Lease[65] cases) according to which a minimum degree of performance and an adequate structure in terms of human and technical resources to supply the services on an independent basis is needed to qualify as a fixed establishment; and
- article 11 of the VAT Regulation confirming the degree of permanence and the need of human and technical resources.

On that basis, the CJEU concluded that the immovable property is not sufficient to constitute a fixed establishment within the meaning of articles 43, 44 and 45 of the VAT Directive since the lender did not have its staff to perform services relating to the letting. Consequently, the place of supply took place where the supplier was established (and not where the immovable property was located). The CJEU did not rely on article 47 of the VAT Directive which provides that services related to immovable property are located in the jurisdiction of the immovable property.

Even if for now, no changes are considered in domestic VAT legislation, Luxembourg operators active in the rental business abroad should carefully monitor their VAT situation in case of legislative modifications in that respect.

61 Judgement of the court

62 A supply of service between *VATable persons* takes place where the recipient is established or has a fixed establishment.

63 A supply of service between a *VATable* and a *non-VATable person* takes place where the supplier is established or has a fixed establishment.

64 CJEU, C-73/09 "Planzer Luxembourg", 28 June 2007, §54.

65 CJEU, C-190/95 "ARO Lease", 17 July 1997, §19.

NEGOTIATIONS FOR THE CONCLUSION OF A DOUBLE TAX TREATY BETWEEN AUSTRALIA AND LUXEMBOURG SCHEDULED FOR END OF 2021

15 September 2021

On 15 September 2021, the Australian Government announced that it will expand the Australian tax treaty network to support the economic recovery by offering new opportunities to Australian businesses.[66]

Within this framework, negotiations between Luxembourg and Australia are occurring this year and may obviously result in a long-awaited double tax treaty between those two countries.

66 Press Release 15.09.2021

LUXEMBOURG EXTENDS MUTUAL AGREEMENTS REGARDING THE TREATMENT OF CROSS-BORDER WORKERS IN THE CONTEXT OF COVID-19 WITH GERMANY, BELGIUM AND FRANCE

16, 23 and 24 September 2021

As a matter of principle, every worker pays income tax as well as social security contributions on the income they receive. The same applies for cross-border workers (i.e., people residing in a country while working in another). Since cross-border workers could be subject to two or more tax and social security regimes, conflict of law rules are thus applicable.[67]

Tax

In the field of taxation, double tax treaties are agreed bilaterally and allocate taxing rights between two countries. Luxembourg has double tax treaties into force with Germany, Belgium and France. Those double tax treaties foreseen that the country of residence may levy tax on income received by a resident unless this work is performed in the other country. In other words, the general rule grants taxing rights to the country where the work is performed.

Therefore, working from home imposed as a fighting measure against COVID-19 may have major consequences on tax treatment of cross-border workers. Indeed, the portion of work performed in the country of residence exceeding an annual threshold[68] should have been taxed in this country. Since May 2020, Luxembourg tax authorities have agreed mutually with tax authorities of Germany, France and Belgium to temporarily neutralise tax effects of remote working due to the COVID-19 situation.

Thanks to those agreements, working days during which work is carried out from the individuals' residence state (e.g. France) are not taken into account for the calculation of the 29-day limit (in case of France). Such working days will remain taxable in Luxembourg. In respect of Belgium, working days of cross-border workers during which work is carried out at home are not considered as working days in the country of residence (i.e., Belgium).

In September 2021, the Luxembourg tax authorities announced the extension of those tax measures. In accordance with the amicable bilateral tax agreements, the remote working measures applicable to cross-border workers remain thus effective until 31 December 2021 for Germany, Belgium and France.

Social security

In the area of social security, cross-border workers could rely on harmonisation measures provided at the European level, according to which individuals are in principle subject to social security of the country where they work. However, the social security of the country of residence would be applicable if more than 25% of the work is performed there. In order to avoid impact on the social security situation of cross-border workers, Luxembourg has agreed with Germany, Belgium and France to disregard days worked from home due to COVID-19 measures when computing the 25% threshold since May 2020.

Those agreements have also been extended until 31 December 2021 with Germany, France and Belgium. Based on those extensions, social security treatment of cross-border workers would not be affected by remote working.

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67 Client Briefing: Update on Luxembourg tax implications for companies and individuals (April 2020)

68 Currently, Germany: 19 days, France: 29 days and Belgium: 29 days. The threshold with Belgium has been extended to 34 days as of 2022. Agreement has also been reached to extend the threshold with France to 34 days but no date of enter into force has been settled yet.

FRENCH RESIDENT INDIVIDUALS MAY CLAIM BENEFITS OF FORMER DOUBLE TAX TREATY BETWEEN FRANCE AND LUXEMBOURG FOR INCOME EARNED IN 2020 AND 2021

1 October 2021

In a press release dated 1 October 2021, the French Ministry of Finances indicated that the change of method for the elimination of double taxation provided by the new Luxembourg-France double tax treaty (the "**Double Tax Treaty**"), dated 1958, as amended by the 2019 protocol and as applicable from 1 January 2020, might lead to an increase of the tax burden in France.

Double tax treaties are bilateral agreements that allocate taxing rights between two countries to avoid double taxation. Until the 2019 protocol, the former Double Tax Treaty provided for the exemption method according to which income taxable in Luxembourg was completely disregarded for French tax purposes. As of 2020, the new Double Tax Treaty provides for the credit method, according to which income taxable in Luxembourg would remain taxable in France by allowing deduction of taxes paid in Luxembourg. In other words, the income derived from Luxembourg will not be taxed a second time in France with the credit method as applied in France. However, this would result in an increase of the tax burden since the Luxembourg revenues are taken into account to compute the rate applicable to other household income in France[69].

On that basis, an additional assessment has been required to determine the exact consequences of the change of method for cross-border workers. In the meantime, French residents may benefit from an interim measure according to which the benefits of the former Double Tax Treaty may be granted with respect to income earned in 2020 and 2021.

A few days later, the French tax authorities published the practical details of the procedure that French resident individuals should follow to re-compute the income tax due for their income derived from Luxembourg in 2020[70].

69 E.g., income from the legal spouse working in France or other French-sourced income.

70 Practical details published by the French tax authorities

UPDATE OF THE LIST OF NON-COOPERATIVE JURISDICTIONS BY THE COUNCIL OF THE EUROPEAN UNION

5 October 2021

On 25 May 2016, the Council of the European Union (the EU Council) published conclusions on an external taxation strategy and measures against tax treaty abuse. Within this framework, the EU Council releases, on a regular basis, a list of non-cooperative jurisdictions that encourage abusive tax practices and erode Member States' tax revenues (the EU Blacklist) since December 2017.

As of 5 October 2021, the EU Blacklist includes American Samoa, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, US Virgin Islands and Vanuatu[71]. As a result of this update, Anguilla, Dominica and the Seychelles have been removed from the list while Hong Kong has been added to the so-called "greylist". This means that Hong Kong should change its tax legislation to comply with the settled international tax standards to avoid being added to the EU Blacklist at the next update.[72]

Encouraged by the EU Council, Luxembourg applies defensive measures against jurisdictions on the EU Blacklist. On 28 January 2021, the Luxembourg Parliament passed a law limiting the deductibility of certain interest and royalties paid to associated enterprises in those non-cooperative jurisdictions. Deduction will not be denied where the taxpayer is able to demonstrate that the interest or royalty payment was incurred in the context of transactions that were entered into for valid commercial reasons reflecting the economic reality.

For Luxembourg taxpayers, the update of the EU Blacklist may lead to a broadened tax base. Therefore, specific attention should be given when dealing with interest or royalty payments made to blacklisted jurisdictions.

71 Common EU list of third country jurisdictions for tax purposes

72 From 2020, the list is subject to update twice a year. The next update is expected by April 2022.

HISTORIC AGREEMENT ON GLOBAL TAX REFORM

8 October 2021

On 8 October 2021, 136 jurisdictions worldwide, including all EU Member States, G20 members and OECD members, reached an historic agreement on global tax reform, for a Two-Pillar solution to address the tax challenges arising from the digitalisation of the economy[73]. Only Kenya, Nigeria, Pakistan and Sri Lanka have not signed the agreement.

This unprecedented consensus does not sound the death knell of tax competition between states, but sets multilaterally agreed limitations on it.

Pillar One ensures that large multinational enterprises ("**MNEs**"[74]) will pay tax where their customers and users are located (regardless of any physical presence there) by a re-allocation of taxing rights. In return, participating countries will have to remove domestic measures such as digital service taxes. Pillar One will not impact professionals of the financial sector since a taxable nexus of those financial institutions is ensured where they serve their customers based on applicable regulations and business models.

Pillar Two introduces a global minimum corporate income tax rate of 15% for companies having a turnover higher than EUR 750 million. Concretely, so-called "Global anti-base erosion rules" (the "**GloBe rules**"[75]) will be provided domestically alongside a treaty-based rule[76].

In a press release dated 13 October 2021, Commissioner Gentiloni of the European Commission stated that the endorsement by the G20 finance ministers of the OECD global tax reform is a key step towards its implementation. The Commissioner stated that once the OECD has finalised the model rules for Pillar Two, the European Commission will propose a directive for its implementation in the European Union. For Pillar One, according to Gentiloni, the European Commission will examine whether a directive is needed to ensure its consistent and effective implementation at EU level.

The new rules are intended to become applicable in 2023 and constitute a fundamental evolution in the international framework for corporates.

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73 OECD Press-Release 08.10.2021

74 Multinational enterprises with global turnover of EUR 20 billion and profitability above 10%.

75 An Income Inclusion Rule (IIR) will top-up tax on a parent entity in respect of the low taxed income of a constituent entity while an Undertaxed Payment Rule (UTPR) will deny deductions or require equivalent adjustment to the extent the low tax income of a constituent entity is not subject to tax under an IIR.

76 A Subject to Tax Rule (STTR) will allow source jurisdictions to impose limited source taxation on certain related party payments subject to tax below a minimum rate.

GLOSSARY

"**AIF**": Alternative Investment Fund

"**AIFM**": 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

"**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 5**": Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 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 Directives 2009/138/EC and 2013/36/EU

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

"**BdL**": *Bourse de Luxembourg*

"**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

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

"**BRRD II**": Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms and Directive 98/26/EC

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

"**CJEU**": The Court of Justice of the European Union

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

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

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

"**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

"**CSSF Regulation 12-02**": CSSF regulation 12-02 of 14 December 2002 (as amended) on AML/CTF

"**EBA**": European Banking Authority

"**ECB**": European Central Bank

"**EEA**": European Economic Area

"**EIOPA**": European Insurance and Occupational Pensions Authority

Glossary

"**EMIR**": Regulation (EU) 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

"**ETFs**": Exchange-Traded Funds

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

"**FGDL**": *Fonds de garantie des dépôts Luxembourg* / Luxembourg Deposit Guarantee Fund

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

"**IFD**": Directive (EU) 2019/2934 on the prudential supervision of investment firms

"**IFR**": Regulation (EU) 2019/2033 on the prudential requirements of investment firms

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

"**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 Authority

"**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

"**SFDR**": Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector

"**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

"**Taxonomy Regulation**": Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088

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

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

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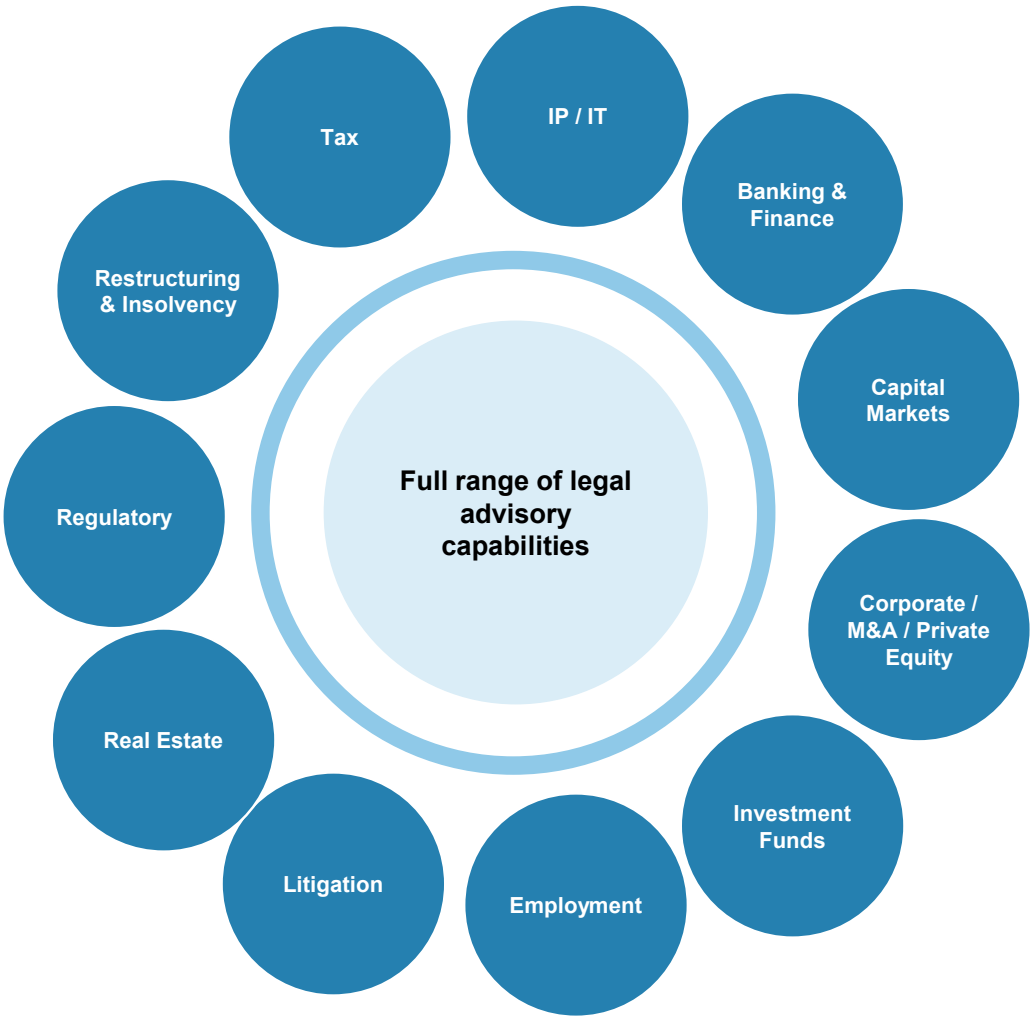

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CHANCE

YOUR CONTACTS

BANKING, FINANCE AND CAPITAL MARKETS

Steve Jacoby
Managing Partner
T +352 48 50 50 219
E steve.jacoby
@cliffordchance.com

Christian Kremer
Senior Partner
T +352 48 50 50 201
E christian.kremer
@cliffordchance.com

Marc Mehlen
Partner
T +352 48 50 50 305
E marc.mehlen
@cliffordchance.com

Martin Wurth
Partner
T +352 48 50 50 237
E martin.wurth
@cliffordchance.com

Stefanie Ferring
Partner
T +352 48 50 50 253
E stefanie.ferring
@cliffordchance.com

Audrey Mucciante
Counsel
T +352 48 50 50 409
E audrey.mucciante
@cliffordchance.com

Udo Prinz
Counsel
T +352 48 50 50 232
E udo.prinz
@cliffordchance.com

Isadora Rousselle
Associate
T +352 48 50 50 467
E isadora.rousselle
@cliffordchance.com

INVESTMENT FUNDS

Emmanuel-Frédéric Henrion
Partner
T +352 66 14 85 190
E emmanuelfrederic.henrion
@cliffordchance.com

Kristof Meynaerts
Partner
T +352 48 50 50 226
E kristof.meynaerts
@cliffordchance.com

Maren Stadler-Tjan
Partner
T +352 48 50 50 472
E Maren.StadlerTjan
@cliffordchance.com

Paul Van den Abeele
Partner
T +352 48 50 50 478
E paul.vandenabeele
@cliffordchance.com

Bart Denys
Counsel
T +32 2 533 5905
E bart.denys
@cliffordchance.com

Christian Lennig
Counsel
T +352 48 50 50 459
E christian.lennig
@cliffordchance.com

Matthias Kerbusch
Counsel
T +352 48 50 50 470
E matthias.kerbusch
@cliffordchance.com

Oliver Zwick
Counsel
T +352 48 50 50 476
E oliver.zwick
@cliffordchance.com

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CHANCE

Your Contacts

Sarra Mouhli
Knowledge Lawyer

T +352 48 50 50 483
E sarra.mouhli
@cliffordchance.com

CORPORATE

Katia Gauzès
Partner

T +352 48 50 50 205
E katia.gauzes
@cliffordchance.com

Christian Kremer
Senior Partner

T +352 48 50 50 201
E christian.kremer
@cliffordchance.com

Dunja Pralong-Damjanovic
Counsel

T +352 48 50 50 222
E dunja.pralong-damjanovic
@cliffordchance.com

Judit Stern
Counsel

T +352 48 50 50 426
E judit.stern
@cliffordchance.com

Sascha Nolte
Counsel

T +352 48 50 50 249
E sascha.nolte
@cliffordchance.com

Aurélien Le Ret
Knowledge Lawyer

T +352 48 50 50 446
E aurelien.leret
@cliffordchance.com

LITIGATION, EMPLOYMENT, IP/IT AND REAL ESTATE

Albert Moro
Partner

T +352 48 50 50 204
E albert.moro
@cliffordchance.com

Ada Schmitt
Counsel

T +352 48 50 50 435
E ada.schmitt
@cliffordchance.com

Isabelle Comhaire
Counsel

T +352 48 50 50 402
E isabelle.comhaire
@cliffordchance.com

Sébastien Schmitz
Counsel

T +352 48 50 50 455
E sebastien.schmitz
@cliffordchance.com

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CHANCE

Your Contacts

TAX

Geoffrey Scardoni
Partner

T +352 48 50 50 410
E geoffrey.scardoni
@cliffordchance.com

Josselin Badoc
Counsel

T +352 48 50 50 291
E josselin.badoc
@cliffordchance.com

Maxime Budzin
Counsel

T +352 48 50 50 465
E maxime.budzin
@cliffordchance.com

Aude Tusamba
Knowledge Lawyer

T +352 48 50 50 411
E aude.tusamba
@cliffordchance.com

www.cliffordchance.com

Clifford Chance, 10 boulevard G.D. Charlotte, B.P. 1147, L-1011 Luxembourg, Grand-Duché de Luxembourg

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