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LUXEMBOURG LEGAL UPDATE
JULY 2020

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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

To view the "**client briefings**" mentioned in this publication, please visit: www.cliffordchance.com

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CORONAVIRUS FOCUS

EXTENSION OF CERTAIN DEADLINES FOR THE PUBLICATION OF ANNUAL ACCOUNTS AND RELATED REPORTS IN THE FINANCIAL SECTOR DURING THE STATE OF CRISIS

Law of 12 May 2020[1]

The law of 12 May 2020 has introduced a three-month extension period for the publication of annual accounts and related reports of certain regulated financial, fund and insurance sector entities in order to anticipate the difficulties that these entities may encounter during the exceptional situation caused by the COVID-19 pandemic.

For further details on the scope of this law and on the possibility to benefit from the three-month extension period, please see our briefing titled: Extension of certain deadlines for the financial sector.

EXTENSION OF DEADLINE FOR THE APPROVAL AND FILING OF ACCOUNTS

Law of 22 May 2020[2]

To anticipate potential difficulties for companies in complying with legal deadlines in terms of approval and filing of annual accounts, consolidated accounts and related reports in the context of the coronavirus (COVID-19) pandemic, the Luxembourg Parliament adopted, on 22 May 2020, the law extending by three months the deadlines for the filing and publication of annual and consolidated accounts, as well as the relevant reports.

For more information on the extension of the legal deadline for the approval and filing of accounts, please see our briefing titled: Extension of deadlines for approval and filing accounts.

[1] http://legilux.public.lu/eli/etat/leg/loi/2020/05/12/a386/jo

[2] http://legilux.public.lu/eli/etat/leg/loi/2020/05/22/a467/jo

TAX MEASURES IN RESPONSE TO THE COVID-19 OUTBREAK

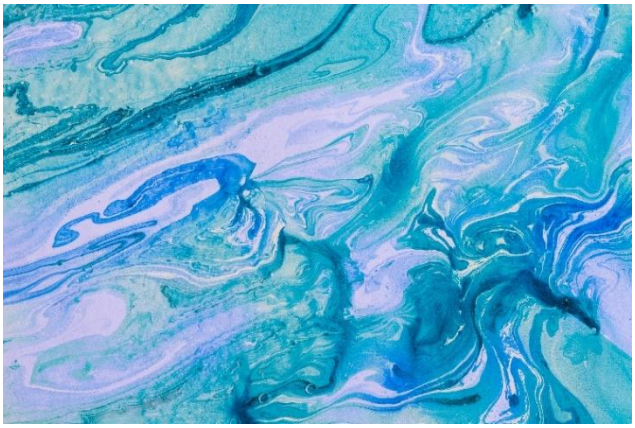
Law of 12 May 2020[3]

The Luxembourg Government has introduced several measures to deal with the spread of COVID-19 and to ensure the continuity of the Luxembourg economy. As part of the implementation of these measures, the Luxembourg Government announced, on 17 March 2020, specific direct tax measures applying to both legal entities (companies and self-employed individuals) and individual taxpayers (including cross-border workers[4])[5].

The Luxembourg VAT authorities also released some indirect tax measures.

Key elements
The abovementioned measures have been laid down in a bill on 7 April 2020 (the "**Bill**")[6] and adopted by the Luxembourg Parliament within the Law of 12 May 2020, which notably provides for:

- the extension of the deadline to file 2019 income tax (*impôt sur le revenu*), corporate income tax (*impôt sur le revenu des collectivités*), municipal business tax (*impôt commercial communal*) and net wealth tax (*impôt sur la fortune*) returns, for both legal and natural persons (resident and non-resident), to 30 June 2020;
- the extension of the deadline to opt for the individual taxation system for partners of married couples or for amendments/cancellations to the choice originally made, to 30 June 2020;
- the suspension, from 18 March 2020 until 30 June 2020, of the three-month deadline applicable for lodging a complaint (*réclamation*) within the meaning of paragraph 228 of the amended General Tax Act of 22 May 1931 (the "**AO**") and the three-month deadline applicable for contesting an administrative decision in tax matters (*recours hiérarchique formel*) within the meaning of paragraph 237 of the AO;
- the extension of the statutes of limitation (*délais de prescription*) for tax receivables owed to the Luxembourg tax authorities and for all tax receivables the collection of which is entrusted to the receiver of the Luxembourg direct tax authorities (*Administration des contributions directes*) to 31 December 2021.



3 https://impotsdirects.public.lu/fr/az/a/aidecovid19.html

4 https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2020/04/Tax-measures-for-cross-border-workers-in-times-of-Coronavirus.pdf

5 https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2020/03/coronavirus-luxembourg-tax-implications-for-companies-and-individuals.pdf

6 https://www.chd.lu/wps/portal/public/Accueil/TravailALaChambre/Recherche/RoleDesAffaires?action=doDocpaDetails&backto=/wps/portal/public/Accueil/Actualite&id=7555

MEASURES CONCERNING HOLDING OF MEETINGS IN LUXEMBOURG COMPANIES AND OTHER ENTITIES

Regulation of 20 March 2020[7]
Law of 20 June 2020[8]

On 20 March 2020, the Luxembourg government adopted a new regulation introducing measures regarding the remote adoption of corporate approvals so as to ensure business continuity of Luxembourg companies and other entities in response to the Coronavirus sanitary crisis.

The regulation extends the right to take decisions without physical presence of the participants to all companies and other legal entities, both at shareholders' and management body's levels, even if these possibilities are not provided for in their articles of association and notwithstanding any provisions to the contrary therein only as far as the management decisions are concerned.

The regulation was adopted on the basis of article 32(4) of the Luxembourg Constitution and therefore was only applicable during the state of emergency which ended on 24 June 2020. In order to extend these measures after such date, the law of 20 June 2020 entered into force on 25 June 2020, *inter alia* to enshrine these measures within the extended deadline provided by article 3 of the law of 22 May 2020, extending the deadlines for the filing and publication of annual accounts.

Accordingly, the companies and other legal entities have the possibility to convene meetings without physical presence of the participants, both at shareholders' and management body's levels, within nine months as from the end of their last financial year.

For more information on the options available for companies to adopt resolutions remotely, please see our briefing: Client Briefing regulation 20 March 2020.

MEASURES TAKEN BY THE FINANCIAL INTELLIGENCE UNIT IN THE CONTEXT OF CORONAVIRUS

Over the past months, the Luxembourg Financial Intelligence Unit (FIU) has published several documents on its website with respect to AML/CTF obligations in the context of the COVID-19 pandemic.

In particular, the FIU has published a note on COVID-19 typologies to inform professionals subject to the AML Law of the existence of publications by Europol, Interpol and FATF in the context of the COVID-19 pandemic. With this note, the FIU intends to raise awareness amongst professionals, in particular with regard to such typologies, share an initial set of fraud-related indicators regarding COVID-19 and obtain feedback to complete the list of such indicators.

The FIU has also published an information notice on communication with professionals to indicate, *inter alia*, that it continues to operate as usual during the pandemic and that professionals must notify the FIU if they are unable to reply in the usual time frame.

Please refer to our client briefing titled: Measures taken by the Financial Intelligence Unit in the context of coronavirus for further details on the above measures and guidance adopted by the FIU.

[7] http://www.legilux.lu/eli/etat/leg/rgd/2020/03/20/a171/jo

[8] http://www.legilux.lu/eli/etat/leg/loi/2020/06/20/a541/jo

LUXEMBOURG CENTRAL BANK TAKES MEASURES IN THE CONTEXT OF CORONAVIRUS PANDEMIC

Since the March 2020 issue of our Legal Update, the BCL has published a communication on its website regarding the notification of interest for first-time participation by banks in the monetary policy operations in the context of the financial support measures taken by the ECB in response to the COVID-19 pandemic.

The BCL has also stressed that it is implementing financial support measures taken by the ECB in the context of COVID-19. It has adopted a regulation to clarify haircuts applying to specific types of eligible assets and debt instruments and has implemented the ECB Guideline of 7 May 2020, which aims to mitigate the adverse impact on Eurosystem collateral availability of potential rating downgrades resulting from the economic fallout from the COVID-19 outbreak.

More recently, the BCL, together with the CSSF, has issued a press release on the European Systemic Risk Board (ESRB) COVID-19 related policy measures and the implications for investment funds.

Please refer to our client briefing titled: Luxembourg central bank takes measures in the context of Coronavirus pandemic for further details on the above regulatory measures.

LUXEMBOURG FINANCIAL SECTOR REGULATOR RESPONDS TO THE CORONAVIRUS PANDEMIC

Since the March 2020 issue of our Legal Update, the CSSF has issued a number of communiqués and published specific circular letters and FAQs, which are updated from time to time, to take into account, clarify and reduce the impact of the coronavirus pandemic on the entities subject to its supervision, including credit institutions, investment firms and other professionals in the financial sector as well as regulated investment funds and their managers.

In particular, the CSSF has clarified the actions and measures to be carried out by these supervised entities (e.g. in relation to security measures for personnel, fraud and IT security as well as to ensure that Luxembourg's financial system is not abused for money laundering and terrorism financing purposes) and has also provided guidance, *inter alia*, in the context of the implementation of cloud-based tools and solutions, AML/CTF as well as regulatory deadlines. Certain investment fund managers, including UCITS ManCos and AIFMs, have also been contacted directly by the CSSF, in view of the specific circumstances, and have been asked to complete, via the CSSF eDesk Portal, an online notification form on fund issues and/or larger redemptions as well as a weekly questionnaire on financial data and governance arrangements in relation to their activities.

Please refer to our client briefing titled: Luxembourg financial sector regulator responds to the coronavirus pandemic for further details on the above regulatory measures and guidance adopted by the CSSF.

Please also refer to our more detailed client briefings on the following topics:

- Swing pricing mechanism used by Luxembourg regulated funds in the context of Coronavirus;
- Distribution policies of credit institutions;
- Financial crime and AML/CTF implications; and
- Prudential treatment of private moratoria in Luxembourg.

LUXEMBOURG INSURANCE SECTOR REGULATOR RESPONDS TO THE CORONAVIRUS PANDEMIC

Since the March 2020 issue of our Legal Update, the CAA has issued several information notices to clarify measures taken in light of the coronavirus pandemic.

In particular, the CAA has informed the insurance and reinsurance undertakings under its supervision that it will follow the EIOPA recommendations on supervisory flexibility regarding the deadline of Solvency II supervisory reporting and public disclosure in the context of the COVID-19 pandemic.

The CAA has further published adapted calendars on its website regarding reporting to the CAA for Luxembourg life and non-life insurance companies, reinsurance companies and pension funds.

The CAA has also introduced a temporary licensing regime for insurance agents and sub-brokers, allowing certain candidates to practise under certain conditions without passing a licence exam in the current exceptional circumstances of the COVID-19 crisis.

The CAA has also created a dedicated COVID-19 information website referring additionally to the following EIOPA publications:

- EIOPA recommendations of 20 March 2020 on supervisory flexibility regarding deadlines of supervisory reporting and public disclosure by insurers.
- EIOPA statement of 17 March 2020 on actions to mitigate the impact of coronavirus/COVID-19 on the EU insurance sector.
- EIOPA statement of 1 April 2020 to insurers and intermediaries, urging them to take steps to mitigate the impact of coronavirus/COVID-19 on consumers.
- EIOPA statement of 2 April 2020 on dividends distribution and variable remuneration policies in the context of COVID-19.
- EIOPA press release of 30 April 2020 on publication of weekly information for Relevant Risk Free Interest Rate Term Structures and Symmetric Adjustment to Equity Risk with reference to 27 April 2020.

Finally, the COVID-19 website page of the CAA provides information on the changes to its modus operandi due to the exceptional circumstances of COVID-19 (including on communication with the CAA and relaxation of deadlines in out-of-court dispute resolution proceedings) and draws the attention of entities subject to its supervision to publications of the FIU and the FATF on anti-money laundering and counterterrorism financing-related matters.

Please refer to our client briefing titled: Luxembourg insurance sector regulator responds to the Coronavirus pandemic as well as to the Luxembourg section of the Clifford Chance Insurance sector global COVID-19 tracker for further details on the above regulatory measures and guidance adopted by the CAA.

FINANCIAL INSTITUTIONS

LUXEMBOURG MIFID THIRD COUNTRY FIRM REGIME: CSSF NATIONAL EQUIVALENCE DECISIONS AND CLARIFICATIONS ON THIRD COUNTRY REGIME PUBLISHED

CSSF Regulation N°20-02 of 29 June 2020[9]
CSSF Circular 20/743 of 1 July 2020[10]

The CSSF has issued a number of new publications in relation to Luxembourg's MiFID third country firm regime.

A new CSSF Regulation N° 20-02 of 29 June 2020 on the equivalence of certain third countries in matters of supervision and authorisation rules for the purpose of providing investment services or carrying out investment activities and ancillary services by companies from third countries has been published in the Luxembourg official journal (*Mémorial A*) and entered into force on 5 July 2020.

The regulation sets out the third countries for which the CSSF considers that the supervisory and authorisation rules applied by them are equivalent to those of the Financial Sector Law. This equivalence determination opens the possibility of an application for a firm of that third country to provide investment services or activities as well as ancillary services in Luxembourg to professional clients and eligible counterparties. These countries are Canada, Switzerland, United States, Japan, the special administrative region of Hong Kong of the Republic of China and Singapore.

In addition, a new CSSF Circular 20/743, dated 1 July 2020 and amending CSSF Circular 19/716 regarding the provision of investment services or the performance of investment activities and of ancillary services in accordance with Article 32-1 of Financial Sector Law has been published and has entered into force. Amongst other things, the new circular clarifies that Article 32-1 of the Financial Sector Law only applies to services provided in Luxembourg (*fournis au Luxembourg*).

It is presumed that the investment service is provided in Luxembourg (*fourni au Luxembourg*) if one of the following conditions is met:

- the third country firm has an establishment (for example, a branch) in Luxembourg;
- the third country firm provides an investment service to a retail client established or located in Luxembourg;
- the place where the 'characteristic performance' of the service (the essential service for which payment is due) is performed in Luxembourg.

The circular recognises that there may be particular situations where the third country firm provides an investment service to a client, other than a retail client, established or located in Luxembourg, and such service may be considered as not being rendered in Luxembourg.

[9] http://legilux.public.lu/eli/etat/leg/rcsf/2020/06/29/a563/jo

[10] https://www.cssf.lu/wp-content/uploads/cssf19_716_010720.pdf

LUXEMBOURG LAW IMPLEMENTING CERTAIN PROVISIONS OF AMLD 5

Law of 25 March 2020[11]

The law of 25 March 2020 implementing certain provisions of AMLD 5 was published in the Luxembourg official journal (*Mémorial A*) on 26 March 2020.

This law implements certain AMLD 5 provisions related to professional obligations and powers of the supervisory authorities and self-regulatory bodies in the area of anti-money laundering and counter terrorism financing. The law further reinforces and harmonises the treatment of high-risk third countries based on recommendations issued by the Financial Action Task Force. For these purposes, the law amends, in particular, the AML Law.

Amongst others, the law specifies the standard and enhanced customer due diligence obligations that professionals subject to the AML/CTF Law have to apply, and extends the scope of such professionals explicitly to cover also virtual asset service providers generally (such as service providers engaged in exchange services between virtual currencies and fiat currencies, and custodial wallet service providers) and, under certain circumstances, persons trading or acting as intermediaries in the trade or the storing of works of art.

The law entered into force on 30 March 2020.

LUXEMBOURG LAW INTRODUCING A CENTRALISED ELECTRONIC DATA SEARCH REGISTER CONCERNING IBAN ACCOUNTS AND SAFE-DEPOSIT BOXES

Law of 25 March 2020[12]

The law of 25 March 2020 introducing a centralised electronic data search register concerning IBAN accounts and safe-deposit boxes was published in the Luxembourg official journal (*Mémorial A*) on 26 March 2020.

This law implements, amongst others, certain provisions of AMLD 5. The new law introduces a centralised electronic register allowing the identification, in a timely manner, of any natural or legal persons holding or controlling payment accounts and bank accounts identified by IBAN, and safe-deposit boxes held with a Luxembourg credit institution. Such register will be set up and administered by the CSSF and will be made available to the Luxembourg financial intelligence unit, and other public authorities and self-regulatory bodies for their missions related to AML/CTF. Furthermore, the law follows recent FATF recommendations by introducing specific provisions (i) on VASP and (ii) on providers engaged in services related to companies and fiduciaries into the AML Law, making these two categories of service providers subject to the AML Law and imposing registration requirements with the CSSF (for VASP) or competent authorities or self-regulating bodies (for companies and fiduciaries service providers). Moreover, this law introduces an obligation for the CSSF, when acting as prudential supervisory authority in relation to CRR institutions, to inform the EBA of any reasonable grounds for suspicion of money-laundering or terrorist financing. Finally, this law amends the Law on the Register of Commerce and Annual Accounts in order to correct an inaccuracy in the law.

The new law entered into force on 30 March 2020, except for one technical provision (regarding tick size regimes) amending the law of 30 May 2018 on markets in financial instruments which entered into force on 26 March 2020.

[11] http://www.legilux.lu/eli/etat/leg/loi/2020/03/25/a194/jo

[12] http://www.legilux.lu/eli/etat/leg/loi/2020/03/25/a193/jo

CSSF ISSUES CIRCULAR ON LUXEMBOURG LAWS IMPLEMENTING AMLD 5

CSSF Circular 20/742 of 4 May 2020[13]

The CSSF has issued circular 20/742 dated 4 May 2020 on the entry into force of the law of 25 March 2020 amending the AML Law and the law of 25 March 2020 establishing a central electronic data retrieval system concerning IBAN accounts and safe-deposit boxes.

The circular's objective is to draw the attention of professionals under AML/CTF supervision of the CSSF, and falling within the scope of the AML Law, to the major changes that the new laws bring to the AML/CTF system applicable to the Luxembourg financial sector.

On the amendment of the AML Law, the CSSF stresses, in particular, the novelties in the following areas:

- new and amended definitions (e.g. virtual asset, VASP, financial institution, beneficial owner);
- scope of the AML/CTF requirements and in-scope professionals (e.g. tied agent, payment and e-money institution agents, VASP, real estate agents);
- broader CSSF supervision perimeter;
- new obligations in the context of the risk assessment;
- adaptation of the customer due diligence requirements;
- clarification of adequate internal management requirements;
- strengthening of the protection for certain individuals reporting suspicions of ML/TF; and
- reinforcement of the supervisory powers of the supervisory authorities and self-regulatory bodies as well as of the cooperation between authorities.

With respect to the law of 25 March 2020 establishing a central electronic data retrieval system concerning IBAN accounts and safe-deposit boxes, the CSSF emphasises, *inter alia*, the introduction of:

- new registration requirements for VASP and fiduciary and company service providers; and
- a new central electronic data retrieval system, allowing for identification, in real time, of any natural or legal person holding or controlling payment accounts, bank accounts identified by an IBAN number and safe-deposit boxes in Luxembourg. The CSSF announces the issuance of another circular dedicated to this specific aspect.

Finally, the CSSF informs that the new laws have implemented certain provisions of AMLD 5 only.

13 http://www.cssf.lu/fileadmin/files/Lois_reglements/Circulaires/Blanchiment_terrorisme/cssf20_742.pdf

CSSF ISSUES A Q&A ON THE PAYMENT ACCOUNT DEFINITION

CSSF Q&A of 3 June 2020[14]

On 3 June 2020, the CSSF issued a Q&A paper regarding the definition of payment account in accordance with the Payment Services Law, implementing the PSD2.

The Q&A clarifies the notion of payment accounts and the consequences of such a definition/classification under the Payment Services Law. This Q&A is therefore addressed to all payment service providers and electronic money institutions that offer payment accounts and are established in Luxembourg.

The Q&A further provides illustrative examples of accounts that would qualify as payment accounts and other account types typically not qualifying as such, clarifies the definition of "payment transaction" and deals, amongst other things, also with the questions of whether e-money accounts/wallets qualify as payment accounts, when a payment account may be considered "accessible online" and the consequences of such qualification.

The Q&A is to be read in conjunction with the questions and answers the European Commission and/or the EBA have published with respect to the application of the PSD2.

The CSSF announces that the Q&A will be updated from time to time when necessary.

[14] https://www.cssf.lu/wp-content/uploads/QA_payment_account_definition.pdf

INSURANCE

DRAFT CIRCULAR LETTER REGARDING THE TECHNICAL INTEREST RATES APPLICABLE TO REINSURANCE COMPANIES

CAA Information Notice of 25 February 2020[15]

On 25 February 2020, the CAA published an information notice appending a draft circular letter to be approved by mid-September and aiming at amending the existing circular letter 16/10 on technical interest rates applicable to reinsurance companies for calculating the net amount to be provisioned for variations in loss ratio (*solde financier dotable à la provision pour fluctuation de sinistralité*).

The draft circular redefines the most common technical interest rates applicable to reinsurance companies and will be applicable as of 1 October 2020.

The interest rate for Euros will be lowered to 1% (from 1.25% currently), that of the Danish Krone to 0.75% (from 1% currently) and that of the Pound Sterling to 1.75% (from 2% currently). For other currencies, no significant change in interest rate has been recorded.

SEPARATE REPORT TO BE PROVIDED BY REINSURANCE UNDERTAKINGS

CAA Circular Letter 20/4 of 3 March 2020[16]

On 3 March 2010, the CAA issued circular letter 20/4 amending CAA circular letter 09/2 regarding the separate report (*rapport distinct*) to be provided by the external auditor of reinsurance undertakings.

The circular inserts a new section 14 on beneficial owners into circular letter 09/2. This change has become necessary due to the entry into force of the law of 13 January 2019 establishing a Register of beneficial owners.

Furthermore, the new circular replaces the questionnaire attached to circular letter 09/2 with a revised one, addressing the above change.

The changes to be carried out by this circular are applicable starting with the separate report to be established for the 2019 financial year.

15 http://www.caa.lu/uploads/documents/files/Note_d_information_relative_aux_taux_d_interets_techniques_2019_reass_v3_apres_ACA_comments.pdf

16 http://www.caa.lu/uploads/documents/files/Circ09_2coord.pdf

THE ANNUAL REPORT OF REINSURANCE UNDERTAKINGS

CAA Circular Letter 20/5 of 10 March 2020[17]

On 10 March 2020, the CAA issued circular letter 20/5 amending CAA circular letter 99/6 regarding the annual report of reinsurance undertakings.

The new circular amends circular letter 99/6 to delete the annual report items concerning the status of the solvency margin calculated pursuant to chapter 2 of the Grand Ducal Regulation of 5 December 2007 relating to the authorisation and the operation of reinsurance undertakings (as amended).

The circular is applicable starting with the annual report for the 2019 financial year.

REPORTING OBLIGATIONS OF INSURANCE BROKERS

CAA circular letter 20/7 of 17 March 2020[18]

On 17 March 2020, the CAA issued circular letter 20/7 amending CAA circular letter 17/4 on reporting obligations of insurance brokers (legal and natural persons). In light of the legislative changes in the AML/CTF field, the CAA decided to amend its circular letter 17/4 in order to (i) adapt it to the terminology used by the modified AML Law and (ii) improve the statistical use of data provided by insurance brokers.

This circular sets out a list of additional reporting obligations with respect to, *inter alia*, insurance brokers' activities, written policies, AML risk evaluation and implementation of financial sanctions. The CAA also now requires insurance brokers to indicate the activities which are subject to approval, authorisation, licensing or registration with an authority other than the CAA as well as the nature of these activities and the name of the competent authority concerned in order to improve coordination with other competent authorities in Luxembourg. Furthermore, insurance broker companies are now also required to communicate to the CAA the following documents when submitting their annual report:

- an up-to-date organisational chart as at the date of the annual report, dated and signed by the authorised manager, stating direct and indirect shareholders up to the beneficial owner(s) of the insurance broker company as well as its holdings and branches, if applicable;
- an up-to-date extract from the Trade and Companies Register (not older than three months); and
- an up-to-date extract from the Register of Beneficial Owners (not older than three months).

The circular is applicable starting with the reporting for the 2019 financial year.

[17] http://www.caa.lu/uploads/documents/files/Circ99_6_coord_2020-12.pdf

[18] http://www.caa.lu/uploads/documents/files/LC_17-4_version_coordonnee_17_mars_2020_doc.pdf

THE IMPACT OF BREXIT ON THE APPLICATION OF CAA CIRCULAR LETTER 16/9

CAA Information Notice of 2 April 2020[19]

On 2 April 2020, the CAA issued an information notice regarding the impact of Brexit on the application of CAA circular letter 16/9 concerning the rules applicable to the deposit of securities and liquid assets used to cover the technical provisions of direct insurance undertakings under the supervision of the CAA.

The notice explores the consequences of a no-deal Brexit on the validity of deposit agreements with credit institutions located in the UK or in its dependent territories, which are to be treated as third countries from 1 January 2021 pursuant to the UK/EU Withdrawal Agreement. As such, the deposit of securities and liquid assets in the jurisdictions above will have to comply, as from that date, with the provisions applicable to deposits in non-EEA countries in the above circular.

According to the notice, one of the expected consequences of a no-deal Brexit is that insurance undertakings will only be permitted to place deposits with the head offices of credit institutions located in the UK or any of its dependent territories (deposits placed with branches located in non-EEA countries not being authorised) and only under certain conditions.

A no-deal Brexit would also require insurance undertakings to prove the existence of a legitimate reason for making a deposit outside the EEA.

The Circular cites *inter alia* two possible legitimate reasons:

- for all insurance classes, the obligation to comply with a deposit obligation resulting from the application of a foreign law;
- for life insurance, that depositing the assets with a non-EEA credit institution is an essential requirement (*condition essentielle*) for the conclusion of the contract for which the assets representing technical provision are deposited.

In order to ensure the proper application of the provisions of LC 16/9, the CAA will contact the relevant insurance undertakings individually.

Please refer to our client briefing titled: Luxembourg insurance regulator analyses implications for deposit of assets representing provisions in the UK for further details on the above regulatory measures.

19 http://www.caa.lu/uploads/documents/files/note_inf_Brexit_20_2.pdf

CAA CIRCULAR LETTER REGARDING THE EIOPA GUIDELINES ON INSURANCE-BASED INVESTMENT PRODUCTS THAT INCORPORATE A STRUCTURE WHICH MAKES IT DIFFICULT FOR THE CUSTOMER TO UNDERSTAND THE RISKS INVOLVED

CAA Circular Letter 20/9 of 7 April 2020[20]

On 7 April 2020, the CAA issued circular letter 20/9 regarding the EIOPA guidelines under the IDD on insurance-based investment products that incorporate a structure which makes it difficult for the customer to understand the risks involved (EIOPA-17/651).

The circular is addressed to professionals which intend to distribute insurance-based investment products (IBIP) under the "execution-only" regime.

In accordance with paragraphs 1 and 2 of Article 30 of the IDD, an assessment of the suitability or appropriateness of an IBIP for the customer by the insurance intermediary or insurance undertaking is generally required as part of the sale of an IBIP. Article 30(3) of the IDD allows Member States to derogate from these obligations and not require either a suitability or an appropriateness test to be conducted for the distribution of an IBIP where several conditions are satisfied. This type of sale is often referred to as "execution-only" as a transaction is merely executed without any advice or assessment of the customer's personal situation.

One of the conditions under the IDD that has been implemented in Luxembourg into Article 295-20, paragraph 3, of the Insurance Sector Law concerns IBIP that incorporate a structure which makes it easy for the customer to understand the risks involved. The IDD has tasked EIOPA to develop the guidelines which provide criteria for the evaluation of such IBIP structures and their difficulty level for the identification of the risks involved.

The CAA has informed EIOPA that it intends to apply such guidelines, except for guidelines 5 and 8. Thus, the CAA urges all professionals which intend to distribute IBIP under the "execution-only" regime to take all measures necessary to comply with guidelines 1 to 4, 6 and 7.

[20] http://www.caa.lu/uploads/documents/files/LC_-_20-9.pdf

THE IMPLICATIONS OF BREXIT ON THE APPLICATION OF CAA CIRCULAR LETTER 15/3

CAA Information Notice of 8 April 2020[21]

On 8 April 2020, the CAA issued an information notice regarding the implications of Brexit on the application of CAA circular letter 15/3 concerning the investment rules for unit-linked life insurance products.

The notice explores the consequences of a no-deal Brexit on the different types of unit-linked life insurance products (ULIP), which offer exposure to external or internal funds (collective, dedicated or specialised funds).

Regarding external funds, ULIP offering exposure directly to external investment funds located in the United Kingdom will be treated, starting from 1 January 2021, as investments made in external funds located in a zone A jurisdiction (OCDE non-EEA countries). As such, their use shall therefore be limited to 25% for UCITS or open-ended alternative funds of funds and to 0% for all other types of funds.

The exemption allowing for the application of the investment limits prescribed by the national law of the policyholder shall only apply to open-ended real estate funds (for other funds, the exemption only concerns policyholders situated in the EEA).

However, these new limitations triggered by a potential no-deal Brexit will not automatically have an impact on insurance contracts concluded before 1 January 2021. Insurance undertakings, however, need to communicate the impact of a no-deal Brexit on the investment restrictions application to policyholders as a new important risk element. The communication should be accompanied by a proposal of alternative investments in similar EEA fund structures. The CAA deems it appropriate that the insurance undertaking also propose revised investment rules, taking into account the resulting status of the United Kingdom and its dependent territories.

Regarding internal funds (collective, dedicated or specialised funds), issuers located in the UK shall be treated as issuers from a zone A jurisdiction (OCDE non-EEA countries). However, issuers located in a dependent territory of the UK will be treated as issuers from non-zone A countries. Internal funds created after 1 January 2021 will be required to take into account the new classification of these territories and the new applicable limits. Internal funds created before 1 January 2021 may continue to be managed according to the pre-Brexit classification, unless otherwise requested by, or agreed with, the clients. However, they cannot be used as support for new insurance contracts, unless certain requirements are fulfilled.

The notice contains further details in relation to communications to be made to clients, the CAA and, as the case may be, investment managers or advisers and the use of internal funds existing before a no-deal Brexit for contracts concluded thereafter and the impact of a no-deal Brexit on the applicable investment restrictions depending on the various types of internal funds.

Please refer to our client briefing titled: Luxembourg insurance regulator analyses implications for unit-linked life insurance product investments for further details on the above regulatory measures.

21 http://www.caa.lu/uploads/documents/files/note_inf_Brexit_20_11.pdf

COLLECTION OF INFORMATION REGARDING INSURANCE AND REINSURANCE DISTRIBUTION

CAA Circular 20/11 of 26 May 2020[22]

On 26 May 2020, the CAA issued circular letter 20/11 on the collection of information regarding insurance and reinsurance distribution.

This circular follows up on the CAA circular letter 20/1 issued earlier this year on the same topic and is addressed to the following entities that are licensed and registered as such in the CAA distributor register (hereinafter the "Liable Entities"):

- insurance undertakings using insurance agents and agencies;
- insurance and reinsurance brokers working on their own account, whether having sub-brokers or not; and
- insurance and reinsurance brokerage companies having brokerage company managers and, as the case may be, sub-brokers.

This circular aims to collect information for the purposes of:

- verifying whether all agents, insurance and reinsurance brokers working on their own account and brokerage company managers whose reference period began on 1 January 2019 have complied with their obligation to undergo training and continuous professional development of a minimum of 15 hours during the year 2019;
- verifying that, on the day on which the Liable Entities sent out the electronic record, all agents, managers of brokerage firms and sub-brokers listed in the register of distributors are still working for their respective insurance undertakings or brokers acting as mandators and that their licence is to be maintained; and
- verifying and updating the data available to the CAA concerning all intermediaries listed in the register of distributors.

In order to carry out these assessments, the Liable Entities have received an Excel file which is to be filled in and returned by 31 August 2020 at the latest to the CAA using the same means of communication as that by way of which it was received by the Liable Entities. Liable Entities are requested to read carefully the explanations provided for in this circular before filling in the electronic record. The electronic record consists of five different tables, the content of which is described and explained in this circular.

CAA ADOPTS THE EIOPA GUIDELINES ON CLOUD OUTSOURCING

CAA Circular Letter 20/13 of 24 June 2020[23]

On 24 June 2020, the CAA issued circular letter 20/13 with respect to the EIOPA Guidelines on outsourcing to cloud service providers.

By this circular, the CAA informs that it fully adopts the EIOPA Guidelines and invites insurance and reinsurance undertakings to take all necessary measures to comply with them. The circular further specifies that the EIOPA Guidelines apply without prejudice to professional confidentiality rules provided for in Article 300 of the law of 7 December 2015 on the insurance sector (as amended).

[22] http://www.caa.lu/uploads/documents/files/LC_-_20-11_final.pdf

[23] http://www.caa.lu/uploads/documents/files/LC_20-13.pdf

PUBLICATION OF CAA CIRCULAR LETTER ON THE APPLICATION OF RESTRICTIVE MEASURES IN FINANCIAL MATTERS (INTERNATIONAL FINANCIAL SANCTIONS)

CAA Circular letter 20/12 of 9 June 2020[24]

On 9 June 2020, the CAA issued circular letter 20/12 on the application of restrictive measures in financial matters (international financial sanctions).

The CAA reminds all operators falling within the CAA prudential supervision that they are required to apply and implement:

- interdictions and restrictive measures set out in Article 1(2) of the law of 27 October 2010 relating to the implementation of the United Nations Security Council resolutions and acts adopted by the European Union containing prohibitions and restrictive measures in financial matters against certain persons, entities and groups as part of the fight against the financing of terrorism; and
- interdictions and restrictive measures in financial matters introduced in Luxembourg by means of EU Regulations directly applicable in national law, which are listed on the Ministry of Finance's website.

The CAA welcomes the initiative launched by the ACA on the minimum guidelines to be followed by non-life insurance companies and reinsurance companies (other than companies performing (re)insurance operations in the credit/surety (*crédit/caution*) branches) in the context of international financial sanctions. The insurance regulator urges all concerned non-life insurance companies and reinsurance companies to follow these minimum guidelines.

This circular further points out that life-insurance companies as well as non-life insurance and reinsurance companies performing in the credit/surety (*crédit/caution*) branches are already required, under the AML/CTF legislation, to apply vigilance measures and to have a mechanism for control going beyond the minimum recommendations mentioned therein. It is understood that these mechanisms must also effectively include the implementation of international financial sanctions.

The CAA also specifies that for all operators falling within the CAA prudential supervision, other than the abovementioned (re)insurance companies, and without prejudice to any AML/CTF obligations which may apply to them, the ACA guidelines (even if not directly) may validly serve as a source of inspiration in their efforts to ensure compliance with the legislation on international financial sanctions applicable to them.

The CAA additionally draws the attention of operators to the Bill N°7395[25] relating to the implementation of restrictive measures in financial matters and repealing the abovementioned law of 27 October 2010. The main objective of the bill is to adapt the current national legislative and regulatory system, which presently only aims at combating the financing of terrorism, in order to meet the requirements for a holistic implementation of financial sanctions in accordance with the country's international obligations.

Finally, the CAA invites all operators under its supervision to subscribe directly to the Newsletter of the Ministry of Finance in order to stay up to date with the latest news in this area and to be able to fulfil their obligations in this matter.

[24] http://www.caa.lu/uploads/documents/files/LC20_12.pdf

[25] https://www.chd.lu/wps/PA_RoleDesAffaires/FTSByteServingServletImpl?path=EF1B240D71770DEDE6925E0AA2BDDD29E822307036CC2951A8BFCCB73ACC3F75B468F87D1E8B9F16FBB4A5324E35100C$68D9BAE1768211F19B0F471A729604D6

FINTECH

CSSF COMMUNIQUÉ ON VIRTUAL ASSETS, VIRTUAL ASSET SERVICE PROVIDERS AND THE RELATED REGISTRATION PROCESS

CSSF Communiqué of 9 April 2020[26]

On 9 April 2020, the CSSF issued a new Communiqué on virtual assets, virtual asset service providers and the related registration process.

The CSSF refers therein to its previous communiqué of 15 January 2020 relating to (i) the modified interpretive note to the FATF recommendation 15 on new technologies taking account of VASP and (ii) two bills amending the AML Law. The CSSF asked VASP in this communiqué to start preparations for compliance with the new framework as soon as possible.

With the adoption of the two bills amending the AML Law by the laws of 25 March 2020, the different types of VASP have become subject to the AML Law and the CSSF has become the AML/CFT supervisory authority for VASP. However, the CSSF's role for VASP registered in Luxembourg is limited to registration, supervision and enforcement for AML/CFT purposes only.

The CSSF informs VASP that they need to comply, since 30 March 2020, with the professional obligations under the AML Law, as well as under FATF 2.

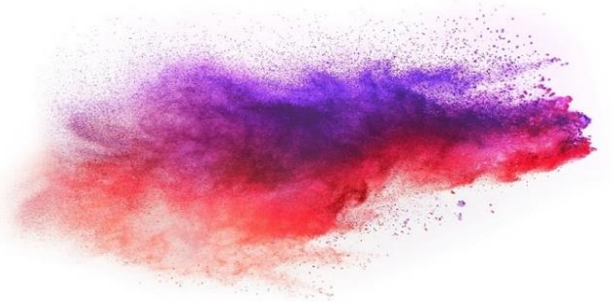
Entities which are established or provide services in Luxembourg must register with the CSSF if they are providing one or more of the following services on behalf of their clients or for their own accounts:

- exchange between virtual assets and fiat currencies, including the exchange between virtual currencies and fiat currencies;
- exchange between one or more forms of virtual assets;
- transfer of virtual assets;
- safekeeping and/or administration of virtual assets or instruments enabling control over virtual assets, including custodian wallet services; and/or
- participation in, and provision of, financial services related to an issuer's offer and/or sale of virtual assets.

Furthermore, the CSSF informs any entity (including any entity already licensed/registered by a competent authority and, in particular, licensed financial institutions) which already offers any of the virtual asset services described above as of 30 March 2020, that it has to (i) promptly notify the CSSF thereof (only if the relevant entity already offers such services), (ii) submit a registration file to the CSSF to be registered as a VASP as soon as possible and at the latest by 30 May 2020, and (iii) comply with the professional obligations and the conditions described in the AML Law, as from 30 March 2020.

Any entity which offers, or intends to offer, any of the virtual asset services described above as from 30 March 2020 has to (i) register beforehand as a VASP and (ii) comply with the professional obligations and the conditions described in the AML Law. The Communiqué refers to forms and contains further practical details on the registration processes.

Finally, the Communiqué emphasises that (i) the requirement of registration for applicants who are established or provide services in Luxembourg is without prejudice to any other licence/registration or other status required either in Luxembourg or by other European or third countries for any other activities performed by the applicant, and (ii) registration does not imply a statement on the quality of services and may not be invoked or used for advertising or possible solicitations for business.



26 http://www.cssf.lu/fileadmin/files/Publications/Communiques/Communiques_2020/C_virtual_assets_090420.pdf

ESG

SUSTAINABLE FINANCE: TAXONOMY REGULATION PUBLISHED IN THE OFFICIAL JOURNAL

Regulation (EU) 2020/852 of 18 June 2020[27]

On 22 June 2020, 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 (Taxonomy Regulation) was published in the Official Journal of the European Union.

The Taxonomy Regulation forms the centrepiece of the previous European Commission's Sustainable Finance Action Plan, and is likely to continue to play a prominent role under the current Commission's new Green Deal, more details of which are expected to be announced during the autumn. The Taxonomy Regulation establishes a set of conditions and a framework to create a unified classification system (or "taxonomy") on what can be considered an environmentally sustainable activity.

Under the Taxonomy Regulation, an economic activity shall be environmentally sustainable where that activity complies with all of the following criteria:

- it contributes substantially to one or more of the environmental objectives set out in the Taxonomy Regulation;
- it does not substantially harm any of the environmental objectives set out in the Taxonomy Regulation;
- it is carried out in accordance with certain minimum social safeguards, based on the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights and the International Labour Organisation's declaration on Fundamental Rights and Principles at Work; and
- it complies with certain minimum technical screening criteria.

The Taxonomy Regulation[28] advances six broad environmental objectives that form the basis of the taxonomy:

- Climate change mitigation
- Climate change adaptation
- Sustainable use and protection of water and marine resources
- Transition to a circular economy, waste prevention and recycling
- Pollution prevention and control
- Protection of healthy ecosystems

The Taxonomy Regulation enters into force on the twentieth day following that of its publication, i.e. on 12 July 2020. Moreover, in accordance with the Taxonomy Regulation, the European Commission shall set up a Platform on Sustainable Finance in order to advise the Commission on the technical screening criteria referred to above, as well as on the possible need to update those criteria.

[27] https://eur-lex.europa.eu/eli/reg/2020/852/oj

[28] https://www.cliffordchance.com/client-portal/alerters/alerter-finance/2020/06/sustainable-finance--eu-parliament-adopts-taxonomy-regulation.html

EU DELEGATED LEGISLATION INTEGRATING SUSTAINABILITY INTO UCITS DIRECTIVE, AIFMD, MIFID2, IDD AND SOLVENCY II FRAMEWORKS

EU Commission draft delegated acts of 8 June 2020 on the integration of sustainability factors under the UCITS Directive, AIFMD, MiFID2, IDD and Solvency II

On 8 June 2020, the EU Commission published for consultation two draft delegated directives and four draft delegated regulations as part of the EU's action plan on sustainable finance with a view to integrating sustainability factors in the UCITS Directive, AIFMD, MiFID2, Solvency II and IDD frameworks.

These draft acts are intended to clarify the duties of asset managers (including UCITS ManCos / UCITS self-management investment companies and AIFMs), insurance companies, and investment or insurance advisers to provide their clients with clear advice on the social and environmental risks and opportunities attached to their investments, to the extent that sustainability risks, where they occur, could cause an actual or potential material negative impact on the value of an investment.

The consultation will close on 6 July 2020, but the EU Commission has not yet announced a timetable for adopting the delegated legislation. For the time being, the draft delegated acts provide for application 12 months after they enter into force.

Please refer to our more detailed client briefing titled: "European Commission consults on how insurers and asset managers integrate 'sustainability' into their operations"[29].

29 https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2020/06/sustainable-finance-european-commission-consults-on-how-insurers-and-asset-managers-integrate-sustainability-into-their-operations.pdf

ASSET MANAGEMENT

DISCLOSURE OF PERFORMANCE FEE, INVESTMENT MANAGEMENT FEE AND INVESTMENT ADVISORY FEE TO INVESTORS OF UCITS

CSSF FAQs on UCI Law of 10 March 2020[30]

On 10 March 2020, the CSSF published an updated version of its FAQs on the UCI Law, in which the CSSF clarifies the following points in relation to the disclosure of performance fee, investment management fee and investment advisory fee to the investors of UCITS:

- **Disclosure of performance fee** – The CSSF indicates that the investment manager of UCITS is responsible and accountable for the investments of the relevant UCITS and its related performance, and that the UCITS' prospectus shall disclose (i) the performance fee model and the investment manager receiving such performance fee, and (ii) where applicable, the existing performance fee sharing arrangement with any investment adviser(s) contractually linked to the UCITS.
- **Disclosure of investment management and/or advisory fees** – In accordance with Annex I, Section A, point 6 of the UCI Law, the CSSF indicates that the fees to be paid to the UCITS' investment manager(s) and/or any investment adviser(s) contractually linked to the UCITS shall also be disclosed in the UCITS' prospectus by distinguishing between the fees to be paid by the unitholders and those to be paid out of the assets of the UCITS, **provided that** (i) in the case of payment of the investment management and/or advisory fees out of the assets of the UCITS, the method of calculation or the rate of the fee applied to each recipient shall also be disclosed in the UCITS' prospectus, (ii) the investment management and/or advisory fees shall only pay for investment management or investment advice, respectively, and (iii) the investment advisory fee is expected to be at a lower level than the investment management fee.
- **Disclosure of other fees and expenses paid to investment manager(s)/adviser(s)** – According to the CSSF, other fees and expenses paid out of the assets of the UCITS to the investment manager(s) or investment adviser(s) that are beyond the direct scope of their investment management or advice shall be disclosed separately in a way that clearly informs investors about the nature of such fees or expenses.
- **Disclosure of "all-in" fee services** – In the case of an all-in fee services payment (which implies that only one compensation amount is paid out of the assets of the UCITS to a recipient (commonly the management company)) who will afterwards pay the other service providers of the UCITS, the CSSF indicates that the prospectus shall clearly state the scope and nature of such an all-in fee by specifying, ideally, each contractual recipient of this all-in fee so that the investors are allowed to compare UCITS and make an informed judgement about the investment proposed.

30 http://www.cssf.lu/fileadmin/files/Metier_OPC/FAQ/FAQ_Law_17_December_2010_100320.pdf

ESMA GUIDELINES APPLICABLE TO THE COMPLIANCE FUNCTION OF UCITS MANCOS AND AIFMS WITH A "TOP-UP" MIFID LICENCE

ESMA final guidelines of 5 June 2020 on certain aspects of the MIFID2 compliance function[31]

On 5 June 2020, ESMA published its final guidelines on certain aspects of the MiFID2 compliance function requirements, which replace ESMA's previous guidelines on the same topics (as published in 2012) and include updates that aim to enhance clarity and foster greater convergence in the implementation and supervision of the new MiFID2 compliance function requirements.

Entities concerned
ESMA guidelines are addressed to the following entities, which are required to have and maintain an efficient compliance function in accordance with MiFID2 requirements:

- **credit institutions and investment firms** providing investment services and activities, or selling or advising clients in relation to structured deposits; and
- **UCITS ManCos and AIFMs** providing investment services and activities under a top-up MiFID licence in accordance with the UCITS Directive and AIFMD.

Content of the guidelines
While the objectives of the compliance function of the entities concerned as well as the key principles underpinning the applicable regulatory requirements have remained unchanged, the obligations of the compliance function have been further strengthened, broadened and detailed under MiFID2.

Therefore, the purpose of ESMA guidelines is to provide additional clarifications on certain of these MiFID2 obligations, such as:

- the "**risk assessment**" to be conducted and "**risk-based monitoring programme**" to be established by the compliance function, ESMA providing, *inter alia*, for some examples of suitable tools and methodologies for monitoring activities that could be used;
- the "**reporting obligations**" of the compliance function, ESMA specifying, *inter alia*, the information and matters to be included in the mandatory compliance reports and further stressing that these reports should cover all business units involved in the provision of investment services, activities and ancillary services provided by the entities concerned; and
- the "**advisory and assistance obligations**" of the compliance function, ESMA focusing, *inter alia*, on the support to be provided by the compliance function in the organisation of staff and management training and in the establishment of internal policies and procedures within the entities concerned.

As regards the "**organisational requirements**" of the compliance function, ESMA generally follows the general principles contained in the guidelines it published in 2012, but these principles are amended and restated, where applicable, to reflect the changes introduced by MiFID2.

Next steps
Once the translations of the guidelines into the official EU languages have been published, NCAs have a two-month period to notify ESMA as to whether they comply or intend to comply, or not, with these guidelines.

For more information and resources on MiFID2, see our Topic Guide on the Clifford Chance Financial Markets Toolkit[32].

[31] https://www.esma.europa.eu/sites/default/files/library/esma35-36-1952_guidelines_on_mifid_ii_compliance_function_requirements.pdf

[32] https://financialmarketstoolkit.cliffordchance.com/en/topic-guides/mifid2-and-mifir.html

ESMA GUIDELINES APPLICABLE TO PERFORMANCE FEES IN UCITS AND AIFS

ESMA final guidelines of 3 April 2020 on performance fees in UCITS and certain types of AIFs[33]

On 3 April 2020, ESMA published its final guidelines on performance fees in UCITS and certain types of AIFs, the main objective of which is to establish harmonised common standards in relation to the manner in which investment fund managers charge performance fees to retail investors and the circumstances in which performance fees can be paid, in such a way as to prevent undue costs being charged to the relevant UCITS/AIF and its investors. Also, ESMA guidelines aim at promoting convergent supervision of performance fees models by NCAs and common criteria for disclosure across the EU.

Entities concerned
ESMA guidelines apply to "**all UCITS**" and "**certain types of AIFs**", but only in Member Sates (such as Luxembourg) allowing for the marketing of AIFs to retail investors in accordance with article 43 of AIFMD and with the exceptions of (i) closed-ended AIFs and (ii) open-ended AIFs that are EuVECAs (or other types of venture capital AIFs), EuSEFs, private equity or real estate AIFs.

Content of the guidelines
In its guidelines, ESMA sets out common standards and criteria in relation to the following items:

- **Performance fee calculation method** – It should be verifiable and not open to the possibility of manipulation, and should also include some minimum elements as listed in ESMA guidelines, it being understood that a fund manager should always be able to demonstrate how the performance fee model of a fund it manages constitutes a reasonable incentive for the relevant manager and is aligned with the investors' interests.
- **Consistency between the performance fee model chosen and the fund's investment objectives, strategy and policy** – Such consistency will be reviewed periodically by the fund's manager and assessed in light of the criteria and parameters set out in ESMA guidelines.
- **Frequency for crystallisation of the performance fee** (and for the subsequent payment of the performance fee) – It should not be more than once a year, maximum, subject to certain exemptions for certain fee models.
- **Circumstances where a performance fee should be payable** – They are limited to circumstances where positive performance has been accrued during the performance reference period, meaning that any underperformance or loss previously incurred during the performance reference period should be recovered before a performance fee becomes payable. However, in the case of performance fee models based on a benchmark index, a performance fee could also be payable if the fund has overperformed the reference benchmark but had a negative performance, as long as a prominent warning to the investor is provided.
- **Duration of the performance reference period** – It should be equal to at least five years on a rolling basis for performance fee models based on benchmark or for high water-mark models where the performance reference period is shorter than the whole life of the fund. The performance reference period should not apply to the fulcrum fee model and other models which provide for a symmetrical fee structure.
- **Disclosure of the performance fee model –** Appropriate and adequate disclosure should be made both *ex-ante* in the fund's prospectus and KIID in order to enable investors to understand properly the performance fee model and the computation methodology used as well as *ex-post* in the fund's annual and semi-annual reports, as further specified in ESMA guidelines.

[33] https://www.esma.europa.eu/sites/default/files/library/esma_34-39-968_final_report_guidelines_on_performance_fees.pdf

Timing
ESMA guidelines will be translated into the official EU languages and published on the ESMA website, which will trigger a two-month period during which NCAs must notify ESMA whether they comply, or intend to comply, or not, with the guidelines.

ESMA guidelines will apply from the end of this two-month period, it being understood that managers of funds with a performance fee existing before the date of application of the guidelines should only comply with these guidelines in respect of those funds by the beginning of the financial year following six months from the application date of the guidelines. By contrast, new funds created after the date of application of the guidelines with a performance fee, or any funds existing before the date of application that introduce a performance fee for the first time after that date, should comply with the guidelines immediately.

REMINDER OF DEADLINE FOR APPLICATION OF ESMA GUIDELINES ON LIQUIDITY STRESS TESTING FOR UCITS AND AIFS

ESMA final guidelines of 2 September 2019 on liquidity stress testing for UCITS and AIFs[34]

ESMA final guidelines regarding liquidity stress testing (LST) of UCITS and AIFs, as published in September 2019, will apply as from **30 September 2020**.

Entities concerned
ESMA guidelines apply to:

- UCITS ManCos, AIFMs and MMFs managers (Fund Managers);
- Depositaries; and
- NCAs,

in respect of "**UCITS**" and "**AIFs**", including ETFs and leveraged closed-ended AIFs.

Content of the guidelines
The purpose of ESMA guidelines is to increase the standard, consistency and, in some cases, frequency of LST already undertaken as well as to promote convergent supervision of LST by NCAs, it being understood that the requirements set out in ESMA guidelines are supplementary to the existing requirements to implement and carry out LST under the UCITS Directive and AIFMD.

According to ESMA guidelines:

- "**Fund Managers**" should have a strong understanding of the liquidity risks arising from the assets and liabilities of the UCITS'/AIFs' balance sheets, and their overall liquidity profile, in order to employ LST that is appropriate for the UCITS/AIFs they manage as a tool to mitigate these risks. Furthermore, ESMA guidelines provide that Fund Managers should, inter alia, ensure that LST:
  - is documented in an LST policy within the UCITS/AIF risk management policy, which includes at least the points and requirements set forth by ESMA guidelines;

[34] https://www.esma.europa.eu/sites/default/files/library/esma34-39-882_final_report_guidelines_on_lst_in_ucits_and_aifs.pdf

- is carried out at least annually, although quarterly or more frequent LST is recommended by taking into account the relevant UCITS'/AIF's nature, scale, complexity and liquidity profile;
- is appropriately adapted to each UCITS/AIF (in particular, ESMA provides for specific provisions relating to funds investing in less liquid assets (such as real estate AIFs), which have distinct risks emanating from both assets and liabilities, compared to funds investing in more liquid securities); and
- employs hypothetical and historical scenarios and, where appropriate, reverse stress testing.

- "**Depositaries of UCITS/AIFs**" should, *inter alia*, set up appropriate verification procedures to check that the relevant Fund Manager of these UCITS/AIFs has in place documented procedures for its LST programme, but such verification does not, however, require the depositary to assess the adequacy of the LST.
- "**NCAs**" should, in particular, be notified by Fund Managers of material risks and the actions taken to address them.

ALFI QUESTIONS AND ANSWERS IN RELATION TO THE SECOND SHAREHOLDER RIGHT DIRECTIVE

ALFI Q&A on SHRD II of 11 May 2020

On 12 June 2020, ALFI published a new Q&A document (available on ALFI's website for its members only), which contains ALFI's answers to questions in relation to the application of SHRD II, as implemented into national law, to Luxembourg asset managers, including "**UCITS ManCos**"," **AIFMs**" and" **MiFID investment firms providing portfolio management services**" (Asset Managers).

As a reminder, SHRD II has been implemented by the Luxembourg law of 1 August 2019[35] transposing SHRD II and modifying the Luxembourg law of 24 May 2011 on the exercise of certain rights of shareholders in listed companies (SHR Law). Although UCITS and AIFs are explicitly exempted from the scope of application of SHRD II and of the SHR Law, these UCITS and AIFs, as well as their Asset Managers, may nevertheless be impacted by certain SHRD II requirements if they invest in shares of EU listed companies.

In this context, ALFI's Q&A describes the following provisions and requirements of the SHR Law that apply to Luxembourg Asset Managers:

- **Engagement Policy** – Comply or explain requirement for Luxembourg Asset Managers to develop and publicly disclose an engagement policy describing, *inter alia*, how they integrate shareholder engagement in their funds' investment strategy (article 1 *sexies* (1) point 1 of SHR Law).
- **Implementation disclosure** – Comply or explain requirement for Luxembourg Asset Managers to publicly disclose annually how their engagement policy has been implemented, including, *inter alia*, a general description of voting behaviour, an explanation of how significant votes were cast and the use of proxy advisers' services (article 1 *sexies* (1), point 2 of SHR Law).
- **Transparency on strategy** – Requirement for Luxembourg Asset Managers to make annual

[35] http://data.legilux.public.lu/file/eli-etat-leg-loi-2019-08-01-a562-jo-fr-pdf.pdf

disclosures to institutional investors (as defined in the SHR Law and including life insurers and pension funds) about how their investment strategy complies with arrangements agreed between the relevant Asset Manager and institutional investor and contributes to the medium- to long-term performance of the institutional investor's assets or of the funds (article 1 *octies* (1), point 2 of SHR Law).

ALFI's Q&A further addresses specific questions in relation to each of the above SHR Law requirements, such as the possibility and conditions for Luxembourg Asset Managers to have a single group engagement policy and to delegate their engagement policy and implementation disclosure obligations to a third party (e.g. EU/non-EU investment manager).

For the avoidance of doubt, ALFI's Q&A has not been validated by any regulator and only represents ALFI's view at the time of publication. It is worth noting that ALFI will review and revise its Q&A to incorporate new material and to amend previously published material, where appropriate.

CORPORATE

CASE LAW : INVALIDITY OF SHAREHOLDERS' MEETING: CONVENING NOTICE AND PREFERENTIAL SUBSCRIPTION RIGHT

District Court, sitting in commercial matters, 26 June 2019 2019TALCH15/00940

A majority shareholder holding 51% of a Luxembourg public limited liability company (*société anonyme*) brought an action to declare several extraordinary general meetings null and void arguing that, *inter alia*, the majority shareholder received the convening notices pertaining to these meetings after the date of their holding and preferential subscription rights were violated. Indeed, such general meetings were held solely in the presence of the minority shareholder and the latter decided upon, *inter alia*, the increase of the share capital by contribution of a portion of a receivable held by the minority shareholder against the company.

The minority shareholder upheld that the majority shareholder had been duly convened to the general meetings, that the action in nullity was prescribed and that the contribution made to share capital was a contribution in kind not giving rise to preferential subscription rights of the other shareholders(s).

The District Court of the city of Luxembourg, sitting in commercial matters, reminded that with regard to the convening formalities, previous case law[36] already confirmed that the date to be taken into account to assess whether the eight-day convening period has been respected is the date of dispatch of the convening notices and that the date of their receipt is irrelevant.

The court further held that the request for invalidity of the majority shareholder regarding the general meetings was not prescribed as the six-month time period provided in article 1400-6 of the Law on Commercial Companies starts as from the publication of the general meeting in the official gazette and shall be postponed in cases of concealment, until the day on which the concealment is discovered, unless the interested party obtained knowledge of the resolution at an earlier date.

As to the pre-emptive subscription rights, the court reminded that contributions made to the share capital by set-off with unquestionable, liquid and due receivables held against the company are to be considered as contributions in cash subject to preferential subscription rights.

The entitlement to preferential subscription rights is a rule of public order and if a shareholders' meeting intends to limit or waive such rights, an express mention hereof should be included in the convening notice and should also be resolved upon on the occasion of the shareholders' meeting. As a result, the District Court decided that the share capital increase was null and void.

[36] Cass.fr. ch. mixte 16 décembre 2005, n°04-10986

DATA PROTECTION

AMENDMENTS TO AML LAW: IMPACT ON DATA PROTECTION AND WHISTLEBLOWING

Law of 25 March 2020[37]

The AML Law has been amended by a law dated 25 March 2020 implementing certain provisions of AMLD 5. Amongst the various provisions of the new law, we will focus on (i) the data protection aspect and (ii) the whistleblowing aspect.

- Data Protection

The law provides that the processing of personal data for the purposes of AML/CTF is considered as achieving an objective of public interest pursuant to the GDPR.

The law also recalls that professionals must inform their new customers of the data processing carried out on their personal data, before entering into a business relationship with them.

In limited circumstances, professionals will also be able to limit or defer the right of access of data subjects.

- Whistleblowing

The law introduces "self-regulatory bodies" as other entities of supervision and sanction for the observance of AML and KYC obligations (including the institute of auditors (*Institut des Réviseurs d'Entreprises*), the Luxembourg bar association (*Conseil de l'Ordre*), the chamber of bailiffs (*Chambre des Huissiers*), the chamber of notaries (*Chambre des Notaires*) and the order of chartered accountants (*Ordre des Experts-Comptables*)).

The law provides that the supervisory authorities and the self-regulatory bodies must put in place effective and reliable mechanisms, such as reporting channels, to encourage the reporting of potential or proven breaches of professional obligations in the fight against money laundering and the financing of terrorism by professionals.

NEW FEES FOR CONSULTATION AND APPROVAL PROCEDURES BY THE LUXEMBOURG DATA PROTECTION AUTHORITY

Regulation n°7/2020 of 3 April 2020[38]

On 15 April 2020, the CNPD published a regulation fixing the amount and terms of payment of fees in the context of its powers of authorisation and consultation, according to which it can charge fees in the following cases:

- for the accreditation of certification bodies in accordance with article 43 of the GDPR;
- for the approval of certification schemes submitted by certification bodies;
- for the authorisation of "in-house" contractual clauses to justify international transfers of personal data between a Luxembourg-based entity and an entity based outside the EEA; and
- for the approval of binding corporate rules used by multinational corporations (with an EU nexus) to legitimate the international transfer of personal data between their group entities.

[37] http://legilux.public.lu/eli/etat/leg/loi/2020/03/25/a194/jo

[38] https://cnpd.public.lu/dam-assets/fr/decisions-avis/2020/07-2020-reglement-CNPD-redevances-signe.pdf

EDPB GUIDELINES ON CONSENT

Guidelines of 4 May 2020[39]

On 4 May 2020, the EDPB published a revised version of its Guidelines on consent under the GDPR in light of the recent case-law of the CJEU.

Following the recent case law of the CJEU involving pre-ticked boxes[40], the Guidelines confirm that:

- silence or inactivity cannot be construed as consent;
- pre-ticked boxes cannot be used to collect consent; and
- consent may not be a prerequisite to have access to a service (i.e. access to a service must not be made conditional on the consent of a user to the placement of cookies in his/her terminal equipment).

39 https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_202005_consent_en.pdf

40 Please refer to the Data Protection section of the March 2020 Luxembourg Legal Update for further details on the above.

REAL ESTATE

CASE LAW : THE DECISION IN PRINCIPLE OF THE MUNICIPAL COUNCIL TO MAINTAIN AN AREA IN THE LAND USE PLAN IS NOT AN ADMINISTRATIVE ACT SUBJECT TO APPEAL BEFORE ADMINISTRATIVE JURISDICTIONS

Administrative Tribunal, 1 April 2020, n° 41723

A municipal council adopted a resolution agreeing to the principle of maintaining the current hotel area in the frame of the elaboration of the new general land use plan (*plan d'aménagement général* – PAG) to be launched shortly.

The owners of one of the hotels sent a letter to the mayor, as well as to the municipal council, asking for the reclassification of their property a mixed village or mixed urban area, since they were not able to find a transferee willing to continue the operation of the hotel.

In their answer, the mayor and the council of the mayor and alderman both recalled that the municipal council adopted this decision in principle in order to increase the attractiveness of the region.

The owners first introduced an administrative appeal and then filed an action for annulment before the Administrative Tribunal against the so-called "refusal decisions".

The Administrative Tribunal recalled that an action for annulment can only be filed against an administrative act, which implies that the issuing administrative authority had the intention to render a decision that is likely to cause grievance to a subject, i.e. to modify or affect the personal or patrimonial situation of the addressee of the decision.

The Tribunal examined if, at the time of issuance of the so-called "refusal decisions", a punctual modification of the PAG would have been possible. The Tribunal found that, based on the applicable law at that time, a modification of the PAG could have been initiated either by the municipality or in the frame of the elaboration of a specific land use plan (*plan d'aménagement particulier* – PAP).

After noting that neither the municipality nor the owners had initiated such proceedings, the Tribunal held that the above letters do not consist of administrative acts subject to appeal before administrative courts.

THE SECTOR MASTER PLANS: A NEW DELAY IN THEIR FINAL APPROVAL?

Opinions rendered by the Council of State on 12 May 2020 pertaining to the sector master plans drafts (opinions 53/500, 53/501, 53/502, 53/503)

The sector master plans (*Plans Directeurs Sectoriels* or "**PDS**") are regulations implementing the Law dated 17 April 2018 on spatial planning (the "**Law of 2018**"). The purpose of the PDS is to organise Luxembourg's territory in terms of housing, economic activities, transport and landscaping by means of graphic and written prescriptions, limiting or framing the right of ownership, respectively, having a notable impact on the general land use plan (*plan d'aménagement general* – PAG) – the specific land-use plans (*plans d'aménagement particulier* – PAP) or the building permits. Indeed, PAG, PAP and building permits shall comply with the PDS.

The PDS may, in particular:

- restrict or prohibit the land use (activities admissible in a given area); and
- burden plots with a prohibition or with restrictions as to the building rights.
- Concerning this last aspect, the Law of 2018 notably provides that, as from the date of the entry into force of the grand-ducal regulations making the PDS compulsory:
- no building permit shall be delivered if the project does not comply with the PDS; and
- the State and the municipalities are entitled to acquire the lands necessary for the realisation of the purpose of the PDS by way of expropriation.

The Law of 2018 also provides that before the grand-ducal regulations making the PDS compulsory are definitively approved, the Minister can decide on his own initiative, or on the initiative of the municipality concerned, to set restrictions as to the building rights on the plots concerned by a PDS. He can notably decide to forbid any PAP new area, any parcelling of land, any modification of the boundaries of land, as well as any works whatsoever in general (with the exception of conservation and maintenance works) that are contrary to the PDS drafts.

On 5 July 2019, the Government meeting in council approved the draft grand-ducal regulations making the PDS compulsory.

The Council of State (*Conseil d'Etat*) rendered opinions for each of the PDS drafts on 12 May 2020. The main issues raised by the Council of State concern the PDS on Transport ("**PDS Transport**").

The PDS Transport draft defines "corridors and overlapping areas" as areas designated in the graphic part of the PDS Transport where some restrictions to the building rights of the owners apply and which accommodate transport infrastructure projects.

The Government Council underlines in its opinion that the final localisation of a transport infrastructure project may differ from the indication in the graphic part of the PDS and states that the indicative value of this localisation in the PDS Transport is not clearly indicated, which does not comply with the requirement of legal certainty.

Article 5 of the PDS Transport draft provides in substance that Annex 1 to the PDS Transport lists the transport infrastructure projects that can be declared to be in the public interest within the meaning of the amended law dated 15 March 1979 on expropriation for reasons of public interest, meaning that the expropriation mechanism could be used by the authorities in order to acquire the plots necessary in order to implement these infrastructure projects.

The Council of State recalls that the matter of expropriation falls within the competence of the area reserved for the law under article 16 of the Constitution, which results in the impossibility for grand-ducal regulations to define which projects are likely to be declared in the public interest. The Council of State therefore considers that the corresponding provisions of the PDS Transport do not comply with the Constitution.

The abovementioned issues are likely to delay (again) the definitive approval of the PDS.

THE REQUIREMENT FROM THE OWNERS TO OBTAIN AN AUTHORISATION FOR CHANGE IN USE IN ORDER TO LET THEIR PROPERTY FOR SHORT STAYS VIA AIRBNB IS COMPLIANT WITH THE EUROPEAN PROVISIONS

Advocate General Michal Bobek, 2 April 2020, C-724/18 and C-727/18 Cali Appartements SCI v. Procureur général près la cour d'appel de Paris, Ville de Paris[41]

The Advocate General issued an opinion following a request for a preliminary ruling from the French Court of Cassation on whether the authorisation for a change in use is compliant with the Directive 2006/123/EC on services in the internal market (the "**Services Directive**")

On 19 December 2019, the CJEU held in an another case, also involving AIRBNB, that the intermediation service provided by AIRBNB shall be construed as an "information society service", so that the provisions restricting the free movement of services, such as the necessity to obtain a business licence, are not applicable to AIRBNB.

The Advocate General found that a national legislation that makes the letting of furnished accommodation for short stays subject to the issuance of a change in use falls within the scope of the Services Directive.

However, and contrary to the first decision rendered in relation to AIRBNB on 19 December 2019, the Advocate General considers that the legal provisions requiring owners to obtain an authorisation for the change in use is compliant with the European provisions, in spite of their restricting effect on the freedom of enterprise or the right of ownership, insofar as such a requirement is justified by reasons relating to the public interest, in particular ensuring the supply of affordable long-term housing and the protection of the urban environment.

41 http://curia.europa.eu/juris/document/document.jsf;jsessionid=D73340 48DFA42B10F9FC322CA1C0AEA4?text=&docid=224903&pageIndex=0&doclang=fr&mode=req&dir=&occ=first&part=1&cid=3193604

A MEMORANDUM OF UNDERSTANDING SIGNED BETWEEN A REAL ESTATE DEVELOPER AND PUBLIC ENTITIES COULD BE CONSTRUED AS AN ADMINISTRATIVE DOCUMENT SUBJECT TO THE OBLIGATION OF PUBLICATION AND COULD, AS SUCH, BE DISCLOSED AT THE REQUEST OF A THIRD PARTY

Opinion rendered on 4 May 2020 by the Commission for Access to Documents, n°R-3/2020

The law dated 14 September 2018 on transparent and open administration (the "**Law**") introduced into Luxembourg law the right for all natural and legal persons to disclose certain administrative documents held by certain public entities. The Law also provides the obligation for these public entities to publish the administrative documents falling in the scope of the Law and which were adopted after 1 January 2019.

On 4 May 2020, the Commission for Access to Documents (the "**CAD**") rendered an opinion on a refusal by the Ministry of Economy and the city of Bissen to provide the Memorandum of Understanding ("**MoU**") signed by Google, the city of Bissen and the State of Grand Duchy of Luxembourg pertaining to the implementation of a data centre project in Bissen, as requested by an environmental association (the "**Association**").

The CAD considered that the MoU can be construed as a document relating to the exercise of an administrative activity of the State and of the city of Bissen and falls, as such, in the scope of the Law.

The CAD rejected the arguments invoked by the city and the State pursuant to which the MoU would be excluded from the right of access on the basis of the confidential nature of commercial and industrial information contained in the MoU.

The CAD considered, however, that the part of the MoU containing personal data should not be disclosed or published.

The opinions rendered by the CAD are not binding. However, if the public entity does not provide the requested documents within one month from the receipt of the opinion of the CAD, it is deemed to have taken a refusal decision, which is subject to an appeal for reformation before the Administrative Tribunal within three months.

Some members of Parliament have asked the government to disclose the MoU and a general discussion was held before a parliamentary commission on 27 May 2020 on access to the MoU executed by the State. On 4 June 2020, the government provided a copy of the MoU in the frame of a closed session of a parliamentary commission, but still refuses to disclose the document to the public, despite the opinion rendered by the CAS. The Association indicated that it would introduce an appeal for reformation against this refusal.

TAX

EU COMMISSION FORMALLY REQUESTS LUXEMBOURG TO AMEND ITS DOMESTIC LEGISLATION TRANSPOSING THE ATAD INTEREST BARRIER RULE FOR SECURITISATION ENTITIES

EU Commission's letters of formal notice issued on 14 May 2020[42]

Background
On 14 May 2020, the EU Commission initiated an infringement proceeding under article 258 of the Treaty on the Functioning of the European Union against Luxembourg, considering the latter had breached EU law as regards the implementation of the interest barrier rule laid down in article 4 of the Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (the "**ATAD**") into Luxembourg law and the exemption of Luxembourg securitisation entities.

Key elements
Due to the importance of the financial sector, Luxembourg did make use of the possibility offered by article 4 (7) of the ATAD to exempt financial undertakings from the interest barrier rule (under which exceeding borrowing costs are tax deductible up to the higher of 30% of the taxpayer's adjusted EBITDA or EUR 3 million) when implementing the ATAD via the Luxembourg law of 21 December 2018 (the "**Luxembourg ATAD Law**").

Accordingly, financial undertakings which were listed in the ATAD, as well as securitisation entities governed by article 2 (2) of Regulation (EU) n° 2017/2402 of 12 December 2017 (the "**SSPE**"), are not subject to the interest barrier rule under the Luxembourg ATAD Law, even though SSPE were not listed in the ATAD.

In this respect, the EU Commission considers that this piece of the Luxembourg ATAD Law went beyond the exemptions allowed by the ATAD and provides, as it stands, unlimited deductibility of interest for the purpose of corporate income tax, including securitisation entities, while such entities do not qualify as "financial undertakings" under the ATAD.

Luxembourg is therefore formally requested to amend its domestic legislation in order to transpose a fully compliant version of the interest barrier rule. If Luxembourg does not act within the next four months to revisit its domestic legislation, the EU Commission will be entitled to issue a reasoned opinion to the Luxembourg authorities.

Taxpayers who are expected to rely on this specific exclusion under the Luxembourg ATAD Law for certain of their Luxembourg securitisation entities are strongly urged to reconsider their initial position (in particular, when they file their tax returns for the fiscal year 2019 – which is the first fiscal year for which the Luxembourg interest barrier rule kicks in). This would have a particular impact on SSPE deriving non-interest income which, after this change, could no longer be fully offset by interest expenses due to the interest barrier rule.

[42] https://ec.europa.eu/commission/presscorner/detail/en/inf_20_859

IMPLEMENTATION OF DAC 6 INTO DOMESTIC LAW

Luxembourg Law of 25 March 2020

Background
Council Directive (EU) 2018/822 of 25 May 2018 regarding mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements ("**DAC 6**") has been implemented into domestic law by the Luxembourg law of 25 March 2020 (the "**Law**"). The Law has adopted, to a great extent, the provisions of the Council Directive, but contains certain differences and clarifications compared to the initial bill. The amendments notably follow the proposals of the Finance and Budget Commission of the Parliament, closely linked to the opinion of the State Council[43].

Reportable arrangements
The Law provides for mandatory disclosure of certain cross-border arrangements with respect to direct taxes to the local tax authorities.

Cross-border arrangements are reportable should they contain at least one of the five hallmarks listed in the appendix attached to the Law, which describes characteristics of features of arrangements that may display an indication of a potential risk of tax avoidance. Some hallmarks are subject to the "main benefit test".

Intermediaries
The reporting obligation rests primarily with intermediaries, who are broadly defined by the Law (i.e. any person who directly designs, markets, organises or implements a cross-border arrangement, including persons who know or could reasonably be expected to know that they have undertaken to provide, directly or indirectly, aid, assistance or advice with respect to the implementation of a cross-border arrangement).

Professional secrecy and exemptions
Following the opinion of the State Council and extending the initial bill, the Law now provides that intermediaries subject to legal professional secrecy (i.e. Luxembourg lawyers, as well as statutory auditors and chartered accountants) are exempted from the reporting requirements (and are no longer required to file anonymised reporting, as foreseen by the initial bill, but remain with a notification obligation towards other intermediaries and the taxpayer concerned).

Reporting deadlines
The provisions of the Law apply as from 1 July 2020, it being stipulated that cross-border arrangements implemented between 25 June 2018 and 1 July 2020 must be reported by 31 August 2020 at the latest.

Any delayed, incomplete or false reporting may lead to penalties up to EUR 250,000, such penalties being determined on a case-by-case basis.

However, the European Commission has released, on 8 May 2020, a proposal for a Council Directive in the context of the COVID-19 outbreak. It is notably proposed to postpone the abovementioned reporting deadlines.

43
https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2020/03/dac-6-law-approved.pdf

LUXEMBOURG PUBLISHES DRAFT RULES LIMITING DEDUCTIBILITY OF PAYMENTS TO BLACKLISTED COUNTRIES

Bill n° 7547 of 30 March 2020

Background
On 30 March 2020, the Luxembourg Government submitted a bill to introduce a specific rule aimed at refusing the tax deductibility of interest and royalties paid or due to associated enterprises that are located in a country listed on the European Union blacklist (the "**Bill**")[44].

Key elements
The Bill provides that interest and royalties paid or owed would not be deductible for the paying entity, should the following conditions simultaneously meet:

- the entity to which the interest or royalties are paid or are due is established in a country or territory included on the EU blacklist (currently including the Cayman Islands, American Samoa, Fiji, Guam, Oman, Palau, Panama, Samoa, Trinidad, Tobago, the US Virgin Islands, Vanuatu and the Seychelles);
- the entity to which the interest or royalties are paid or are due is an affiliated undertaking within the meaning of Article 56 of the Luxembourg income tax law (the "**LITL**"); and
- the entity to which the interest or royalties are paid or are due is a corporation within the meaning of Article 159 LITL (i.e. partnerships are excluded from the scope).

The beneficial owner (i.e. the entity which actually benefits from the interest or the royalties) would be taken into consideration if the entity to which the interest or royalties are paid or due is not the beneficial owner.

The non-deductibility rule would not apply if the taxpayer provides evidence that the interest of royalties expenditures are linked to a transaction which reflects economic reality, being precised that mere evidence that the transaction is used for valid business motives would not be sufficient. Not only should these business motives – considering all the relevant facts and circumstances – be real, but they should also present a sufficient economic advantage beyond any tax benefit obtained through the transaction. To the extent that such evidence is provided by the taxpayer, the deduction would be allowed.

The Luxembourg Government shall add to these provisions a list (the "**Luxembourg List**"), with effect as from 1 January 2021, the content of which will be determined in accordance with the EU blacklist in its latest version.

The measure would apply to interest and royalties paid or due from 1 January 2021.

44 https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2020/04/Client%20Briefing%20-%20Bill%20payments%20to%20blacklisted%20countries.pdf

GLOSSARY

"**ABBL**": Luxembourg Banks and Bankers Association

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

"**AIF**": Alternative Investment Fund

"**AIFM**": Alternative Investment Fund Managers

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

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

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

"**ALFI**": Association of the Luxembourg Fund Industry

"**AML Authority**": *Parquet du Tribunal d'arrondissement de Luxembourg, Cellule de Renseignement Financier*, the department competent for the fight against money laundering and terrorism financing of the Luxembourg state prosecutor

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

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

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

"**AMLD 5**": 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

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

"**BCBS**": Basel Committee on Banking Supervision

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

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

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

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

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

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

"**CCCTB**": Common Consolidated Corporate Tax Base

Glossary

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

"**CGFS**": Committee on the Global Financial System

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

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

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

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

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

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

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

"**CRA**": Credit Rating Agencies

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

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

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

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

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

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

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

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

"**EBA**": European Banking Authority

"**ECB**": European Central Bank

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

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

"**EEA**": European Economic Area

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

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

Glossary

"**ESAs**": EBA, EIOPA and ESMA

"**ESMA**": European Securities and Markets Authority

"**ESRB**": European Systemic Risk Board

"**ETDs**": Exchange Traded Derivatives

"**ETFs**": Exchange Traded Funds

"**EU**": European Union

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

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

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

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

"**FCP**": *Fonds Commun de Placement* or mutual fund

"**FGDL**": *Fonds de garantie des dépôts Luxembourg*

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

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

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

"**FSB**": Financial Stability Board

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

"**ICMA**": International Capital Market Association

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

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

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

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

"**IRE**": *Institut des Réviseurs d'Entreprises*

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

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

Glossary

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

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

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

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

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

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

"**ML/TF**": Money laundering and terrorist financing

"**NCA**": National Competent Authority

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

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

"**Part II UCIs**": Undertakings for collective investment subject to the provisions of Part II of the UCI Law

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

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

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

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

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

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

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

"**PSP**": Payment Service Provider

Glossary

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

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

"**Public Interest Entities**":

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

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

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

"**RAIF**": reserved alternative investment fund

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

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

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

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

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

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

"**SHR Law**": Luxembourg law of 24 May 2011 (as amended) on the exercise of certain rights of shareholders in listed companies.

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

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

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

"**SRB**": the Single Resolution Board

"**SRF**": the Single Resolution Fund

"**SRM**": the Single Resolution Mechanism

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

Glossary

"**SSM**": the Single Supervisory Mechanism

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

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

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

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

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

"**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

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

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

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

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

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

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

"**VASP**": Virtual Asset Service Providers

Clifford Chance in Luxembourg

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Luxembourg is one of the founding members of the European Union and home to many European institutions. It is a leading investment funds and banking centre with a reputation for competence and innovation.

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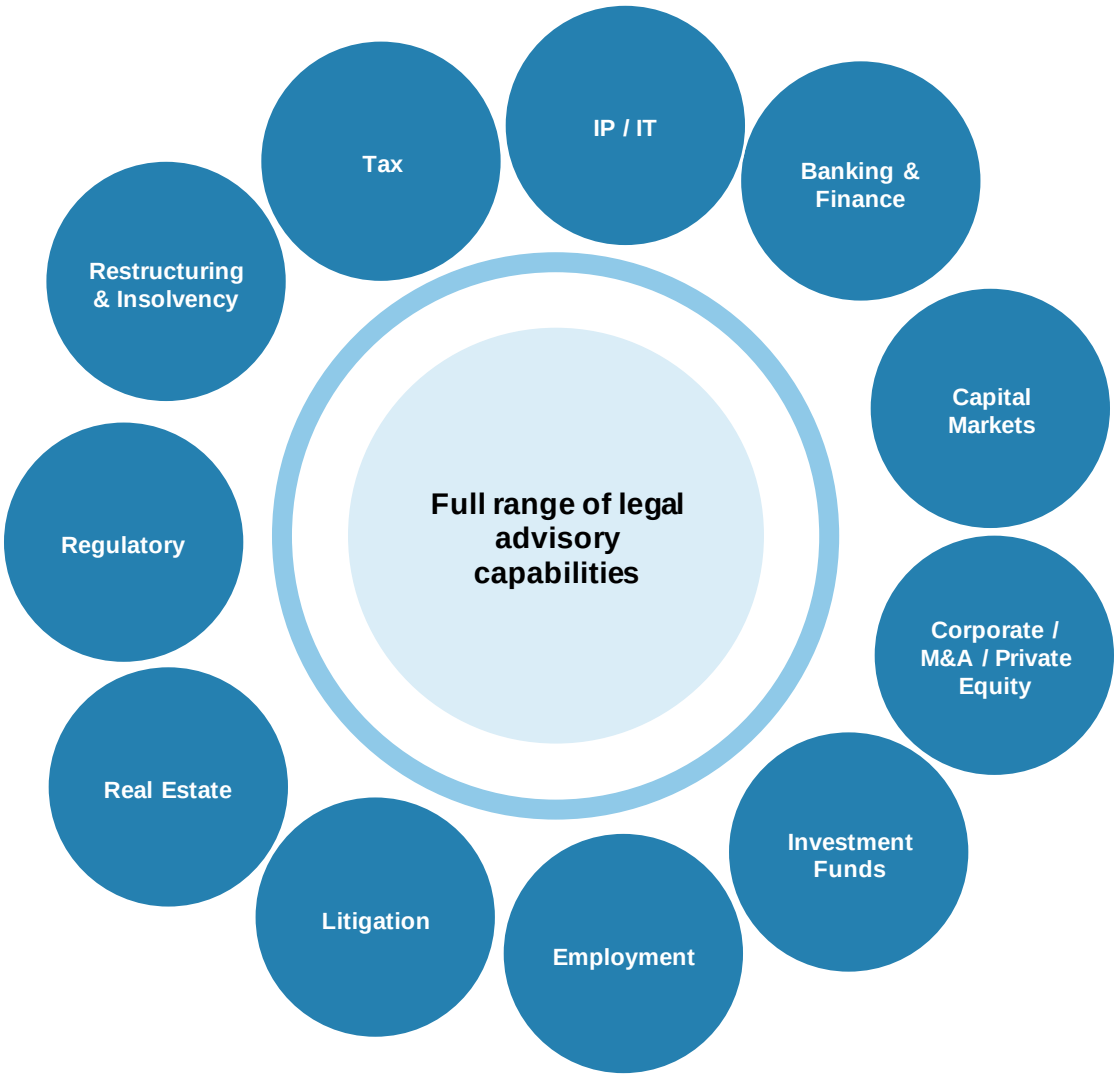
- Our lawyers have a thorough understanding of different business cultures, the ability to work in many languages and experience in multijurisdictional work



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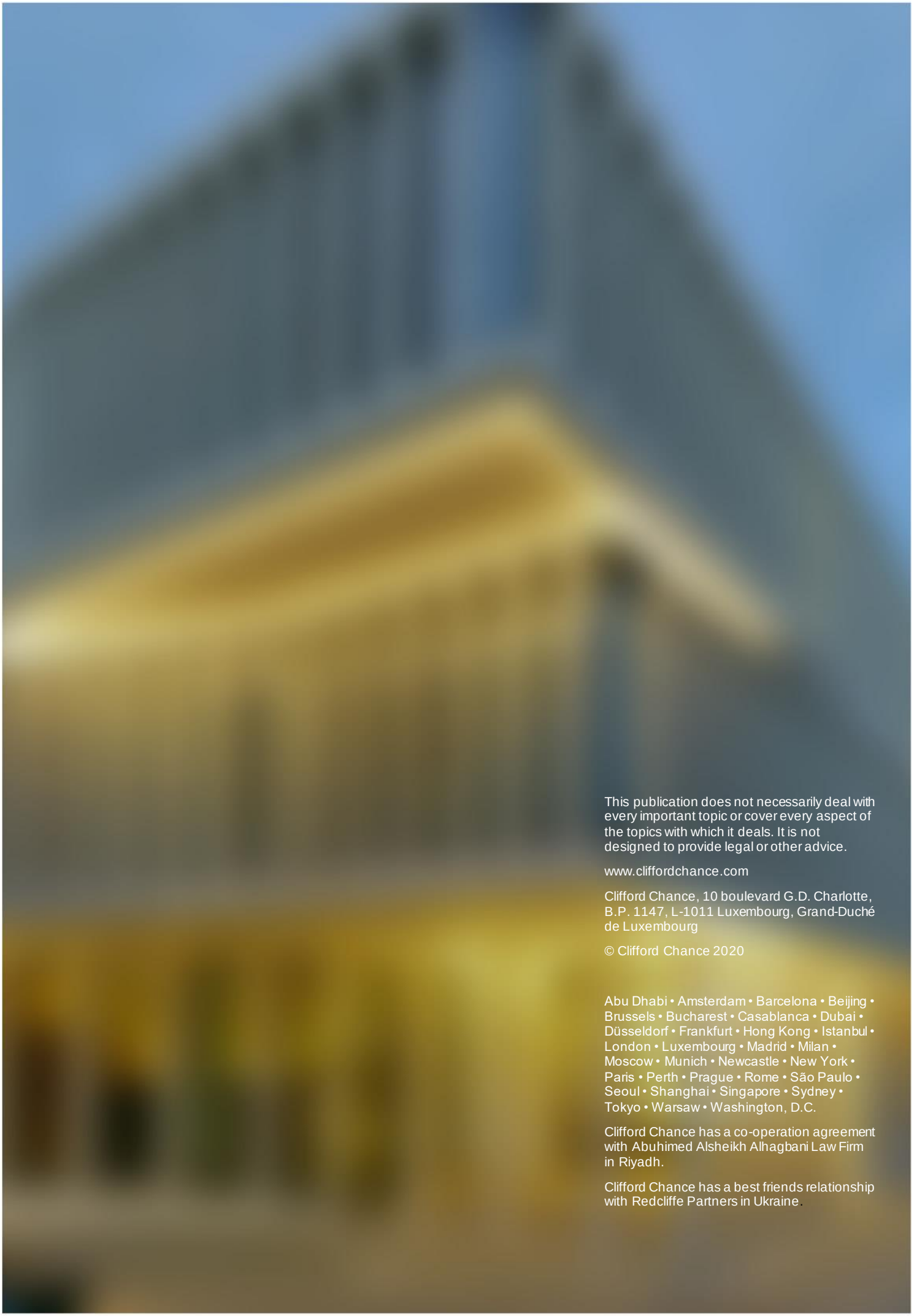

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