



C L I F F O R D  
C H A N C E

**LUXEMBOURG LEGAL UPDATE**  
**JULY 2023**

# C L I F F O R D C H A N C E

Dear Reader,

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

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

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

[ESG and sustainability: funds and investment management](#)

[Financial Toolkit](#)

[Fintech guide](#)

[Green and Sustainable Finance Topic Guide](#)

## ONLINE RESOURCES

To view the "**client briefings**" mentioned in this publication, please visit: [www.cliffordchance.com](http://www.cliffordchance.com)

To view all "**editions**" of our "**Luxembourg Legal Update**", please visit: [www.cliffordchance.com/luxembourglegalupdate](http://www.cliffordchance.com/luxembourglegalupdate)



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## FINANCIAL INSTITUTIONS

### CSSF CIRCULAR LETTER ON THE PILLAR 3 DISCLOSURE FRAMEWORK

16 March 2023<sup>1</sup>

On 16 March 2023, the CSSF issued Circular letter 23/830 on the public disclosure framework applicable to credit institutions and CRR investment firms (Pillar 3).

The Commission Implementing Regulation (EU) 2021/637 lays down implementing technical standards ("ITS") on Pillar 3 disclosures by institutions of the information referred to Titles II and III of Part Eight of CRR.

The application of this disclosure framework triggered some overlap with existing requirements contained in EBA guidelines. For this reason, the EBA decided to repeal several EBA guidelines. Consequently, the Circular repeals the previous CSSF Circular letters 15/605, 17/673 and 18/676 adopting these Guidelines.

Furthermore, the ITS specify Pillar 3 disclosure requirements on nonperforming and forborne exposures that are applicable only to large and other listed institutions, in line with the CRR. However, the EBA pointed out that, in a post COVID-19 environment and considering the current geopolitical developments, external stakeholders' access to relevant information on non-performing and forborne exposures of all types of institutions, except for small and non-complex institutions that are non-listed, should be maintained.

Therefore, the amending Guidelines (EBA/GL/2022/13) adjust the scope of application of the Guidelines (EBA/GL/2018/10) to clarify that:

- (1) the Guidelines will not apply to large and other listed institutions that are covered by the disclosure requirements under the ITS on Pillar 3 disclosures, but
- (2) the Guidelines will continue to apply only to listed small and non-complex institutions and to other institutions that are non-listed, subject to certain

exceptions. Also, small and non-complex institutions that are not listed are not subject to any disclosure requirements for non-performing and forborne exposures.

In this context, the scope of application of Circular CSSF 20/751 adopting, amongst others, these EBA Guidelines, is modified accordingly by the Circular. The details of the amendments can be consulted in Annex 1 containing a coordinated version of the amended Circular CSSF 20/751 with tracked changes.

The Circular applied with immediate effect.

<sup>1</sup> Circular: [https://www.cssf.lu/wp-content/uploads/cssf23\\_830eng.pdf](https://www.cssf.lu/wp-content/uploads/cssf23_830eng.pdf)

## LUXEMBOURG BILL ON THE IMPLEMENTATION OF THE NPL DIRECTIVE

24 March 2023<sup>2</sup>

A bill implementing Directive (EU) 2021/2167 of 24 November 2021 on credit servicers and credit purchasers and amending Directives 2008/48/EC and 2014/17/EU ("**NPL Directive**") (bill N° 8185) was lodged with the Luxembourg Parliament on 24 March 2023.

The Bill has a double objective:

- *first*, it aims to transpose the NPL Directive, establishing a European framework for the transfer or assignment of non-performing loans, thus enabling credit institutions to be able to sell on the secondary markets, these non-performing loans to other operators with the necessary risk appetite and expertise to manage them;
- *secondly*, it aims to operationalise Article 2(1) and (3) of Regulation (EU) 2022/2036, relating to certain amendments of the Bank Recovery and Resolution Directive 2014/59/EU as regards the determination of the minimum requirement for own funds and eligible liabilities for resolution entities of global systemically important institution (G-SII) entities.

The Bill transposes the provisions relating to the transfer or assignment of non-performing loans initially granted by a credit institution, the obligations incumbent on credit purchasers, and the provisions applicable to supervision and sanctions, among others. The Bill also introduces, in the law of 5 April 1993 on the financial sector (as amended), credit servicers in Luxembourg law as a new type of professional of the financial sector subject to authorisation and supervision by the CSSF.

Targeted amendments are also made to the Consumer Code, to the law of 23 December 1998 establishing a financial sector supervisory commission (as amended), to the law of 22 March 2004 on securitisation (as amended), the law of 18 December 2015 on the failure of credit

institutions and certain investment firms (as amended) as well as certain other laws.

The lodging of the Bill with the Luxembourg Parliament constitutes the start of the legislative procedure.

<sup>2</sup> Bill 8185: <https://www.chd.lu/fr/techdossier/4773> (only in French)

## CSSF COMMUNIQUÉ ON THE QUALITY CONTROL OF TRANSACTION REPORTS RECEIVED UNDER ARTICLE 26 OF MIFIR

30 March 2023<sup>3</sup>

On 30 March 2023, the CSSF issued a press release to inform on the obligation for credit institutions and investment firms to report transactions in financial instruments as set out in Article 26 of MiFIR.

The obligation to report transactions in financial instruments to the CSSF applies to credit institutions and investment firms incorporated under Luxembourg law as well as to branches of third country firms authorised in Luxembourg (together hereafter "**obliged institutions**").

The CSSF points out that ESMA has chosen to maintain market data quality as one of the two Union Strategic Supervisory Priorities for 2023 and that it fully supports this objective.

In 2022, the CSSF carried out the standardised quality tests developed together with the other competent authorities and ESMA. In addition to these tests, the CSSF introduced the Quarterly Analytical Summary which largely builds on the scripts developed for the individual quality tests conducted between 2018 and 2021 and aims to provide obliged institutions with a quarterly overview of transaction reporting data quality.

Obliged institutions are expected to thoroughly analyse the data provided to identify and fix potential flaws within their reporting tools and to correct erroneous and incomplete transaction reporting. If a systematic error is identified, a dedicated issue notification shall be sent without delay to the following email address: [transactionreporting@cssf.lu](mailto:transactionreporting@cssf.lu). Subsequently, obliged institutions are requested to send an updated version of their initial error notification as soon as new information in relation to the notified issue becomes available.

The CSSF will more closely follow up on automatic error messages generated by its reporting system upon the processing of the received transaction reports and which

are subsequently sent to the submitting entities. A prompt follow-up by the obliged institution of the received error messages is required in order to comply with the obligation to report complete and accurate details of transactions.

A sample of obliged institutions will be asked to provide the CSSF with a detailed description of their respective procedure established for reconciling the front-office trading records with the appropriate transaction report data, in accordance with Article 15(3) of RTS 22. The CSSF is also considering reconciling transaction reports received from different reporting entities pertaining to the same transaction, to identify transaction reports which mention an obliged institution as buyer or seller but for which no corresponding mirror report can be found.

Obliged institutions are expected to be fully compliant with their obligations under Article 26 MiFIR by now.

Therefore, the CSSF will adopt a more rigorous approach to enforcement of violations. In 2022, the CSSF imposed for the first time an administrative sanction on an obliged institution for non-compliance with its transaction reporting obligations and intends to make increased use of its sanctioning powers for non-compliance with Article 26 MiFIR going forward. The CSSF stresses that a proactive approach by obliged institutions, including notably the timely submission of error notification forms to the CSSF and the swift implementation of remedial actions, will in any case be taken into account by the CSSF when deciding on the nature and severeness of potential enforcement measures to be pronounced in case of non-compliance with the transaction reporting obligations.

<sup>3</sup> Communiqué: <https://www.cssf.lu/fr/2023/03/controle-de-la-qualite-des-declarations-de-transactions-recues-en-vertu-de-larticle-26-de-mifir-3/>

## CSSF COMMUNIQUÉ ON ITS SUPERVISORY PRIORITIES IN THE FIELD OF SUSTAINABLE FINANCE

6 April 2023<sup>4</sup>

On 6 April 2023, the CSSF issued a press release to give a general overview of the CSSF's supervisory priorities in the area of sustainable finance (the "**Overview**").

The Overview is not to be construed as an exhaustive or definitive list. It rather aims at drawing the attention of the financial sector to a number of prominent matters to be addressed in this area. If deemed necessary, supervision priorities may be adjusted, and the CSSF's duties of ongoing prudential supervision may also warrant other ESG-related aspects to come under scrutiny.

Supervisory priorities for credit institutions:

- Transparency and disclosures obligations for credit institutions which fall in the scope of SFDR through the revised long form report;
- Off-site reviews of the SFDR website disclosures at entity and products level will be performed on a sample basis;
- Transversal reviews of Pillar 3 disclosures on ESG risks with possible subsequent follow up with the institutions concerned;
- Climate-related and environmental risks integration and mitigation through a self-assessment exercise on climate related and environmental risks with a new sample, onsite inspections and a sample-based review of the remunerations policies and practices;
- Understanding where the industry stands in the practical implementation of the MiFID rules related to sustainability, including through onsite inspections and other actions.

Supervisory priorities for investment fund managers ("**IFM**") continued verification of:

- SFDR requirements regarding the integration of sustainability risks in the activities of IFMs, including

their organisational and governance arrangements and related website disclosures;

- compliance with SFDR, SFDR RTS and Taxonomy Regulation regarding the provision of sustainability-related information in pre-contractual and periodic documentation of financial products;
- the consistency of sustainability-related disclosures in fund documentation and marketing material;
- the compliance by IFM product related website disclosure;
- portfolio holdings so that they reflect the name, the investment objective, the strategy, and the characteristics displayed in the documentation to investors.

The CSSF announces that will further continue to provide clarifications through Q&As or similar guidance to the investment fund industry.

Supervisory priorities for investment firms:

- Establishing of a self-assessment questionnaire to be addressed to all investment firms, as part of the contemplated reform of the long-form report, including in particular to assess compliance with SFDR disclosure obligations for investment firms providing investment advice and portfolio management;
- Implementation of a gradual approach to the supervision of ESG risks for investment firms, prioritising the recognition of ESG risks in investment firms' strategies and governance arrangements. The CSSF announces a related update of Circular CSSF 20/758 in due course;
- As regards MiFID rules related to sustainability, same as for credit institutions.

Supervisory priorities for issuers:

- The review procedures will address both the aspects covered by European common enforcement priority ("**ECEP**") for the 2022 annual reports and the follow-up of the observations made during its 2022 campaign thereon by the CSSF. The information required under Article 8 of the Taxonomy Regulation (disclosures of alignment of economic activities with climate change

<sup>4</sup> Communiqué: [https://www.cssf.lu/fr/2023/04/priorites-de-supervision-de-la-cssf-en-matiere-de-finance-durable/?utm\\_campaign=email-230406-014fa](https://www.cssf.lu/fr/2023/04/priorites-de-supervision-de-la-cssf-en-matiere-de-finance-durable/?utm_campaign=email-230406-014fa)

mitigation and adaptation objectives) for relevant issuers is also one of the ECEPs for the upcoming campaign.

- The CSSF further informs about its involvement in cooperation activities at international level and provides a simplified overview of supervision exercises in the area of sustainable finance, as planned by the ESAs and based on available information to date.



## **CSSF COMMUNIQUÉ ON NEW Q&A RELATED TO REVISED EXTERNAL AUDITOR LONG-FORM REPORT AND NEW SELF-ASSESSMENT QUESTIONNAIRE FOR BANKS**

**18 April 2023<sup>5</sup>**

On 18 April 2023, the CSSF issued a press release (communiqué) on a new Q&A paper, aiming to clarify certain elements of the self-assessment questionnaire ("SAQ") and other aspects related to the introduction of the new long-form report following the entry into force of CSSF circulars 22/821 and 22/827 ("Q&A").

Since the publication of CSSF circulars 22/821 and 22/827, the CSSF has received questions from credit institutions and branches of credit institutions to whom the new external auditor's long-form report and SAQ framework applies. As some of the questions could be relevant for other entities as well, the CSSF has decided to publish these questions and answers.

The Q&A relating to the SAQ sections concern topics like bank governance, ICT risk management and control, PSD2, MiFID, credit risk, large exposures, related parties and consolidation as well as languages to be used for filling in the self-assessment questionnaire. The Q&A on the long-form report itself concern topics including its scope of application, the mission of the external auditor, submission procedures as well as the continued existence of the management letter.

The Q&A will be updated on a regular basis as necessary.

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<sup>5</sup> Q&A: <https://www.cssf.lu/fr/Document/questions-reponses-relatives-au-nouveau-compte-rendu-analytique-tel-quintroduit-par-les-circulaires-cssf-22-821-et-22-827>

## CSSF COMMUNIQUÉ ON PUBLICATIONS RELATED TO THE SFDR AND THE TAXONOMY REGULATION

20 April 2023<sup>6</sup>

On 6 April 2023, the CSSF issued a press release to draw attention to recent publications made by the ESAs in respect of SFDR, of Commission Delegated Regulation (EU) 2022/1288 (the "**SFDR RTS**"), and of the Taxonomy Regulation (the "**Overview**").

In particular, the Overview highlights that a third set of Q&As on the interpretation of SFDR has recently been adopted by the European Commission and published by the ESAs on 14 April 2023. Concomitantly to the publication of the third set of Q&As, amendments to the first and second Q&As on the interpretation of SFDR were adopted by the European Commission and published by the ESAs.

The Overview also draws attention to the Delegated Acts relating to the EU Taxonomy Regulation, dating from 5 April 2023. The first draft delegated act notably provides a new set of technical screening criteria for the four environmental objectives pursuant to Article 9 (c) to (f) of the EU Taxonomy Regulation:

- the sustainable use and protection of water and marine resources;
- the transition to a circular economy;
- pollution prevention and control; and
- the protection and restoration of biodiversity and ecosystems.

It also provides amendments to Delegated Regulation (EU) 2021/2178 (the "**Taxonomy Disclosures Delegated Act**").

The second draft delegated act amends Delegated Regulation (EU) 2021/2139 (the "**Climate Delegated Act**") to add or complement the technical screening criteria for

climate change mitigation for certain economic activities in the transport and manufacturing sectors.

On 12 April 2023, the ESAs further published a joint consultation paper on a proposed review of the SFDR RTS regarding PAI and financial product disclosures. Comments were to be provided until 4 July 2023.



<sup>6</sup> Communiqué: <https://www.cssf.lu/en/2023/04/publications-related-to-regulation-eu-2019-2088-sfdr-and-regulation-eu-2020-852-the-eu-taxonomy-regulation-2/>

## CSSF MODIFIES THE METHOD FOR CALCULATING EX-ANTE CONTRIBUTIONS TO THE LUXEMBOURG DEPOSIT PROTECTION SCHEME

28 April 2023<sup>7</sup>

On 28 April 2023, the CSSF, acting in its function as Depositor and Investor Protection Council (*Conseil de Protection des Déposants et des Investisseurs*) (the "CPDI"), published CSSF-CPDI circular 23/34 modifying Circular CSSF-CPDI 20/21 on the annual contributions to be paid by all members of the Luxembourg deposit protection scheme, the *Fonds de garantie des dépôts Luxembourg* (the "FGDL").

The Circular is addressed to all credit institutions incorporated under Luxembourg law, to the *POST Luxembourg*, and to Luxembourg branches of non-EU/EEA credit institutions.

In its prior version, Circular CSSF-CPDI 20/21 provides that FGDL member institutions pay annual contributions which depend among other things on the annual growth of their covered deposits. No allowance is foreseen in case the deposit growth results from mergers between member institutions or from transfers of liabilities or similar operations between member institutions, whereas contributions have been paid in the past of the protection of such transferred deposits.

The Circular aims to adjust the contributions to be paid in the above cases. The adjustment consists in calculating the contribution of the member institution whose deposits have been transferred to another member institution, without applying a floor at zero. This amount, which is generally negative due to the decline in the volume of covered deposits, is used to reduce the contributions of the absorbing member institution(s).

To ensure coherence of the calculation, the Circular adjusts the definition of certain sums in Circular CSSF-CPDI 20/21 such that the formulas to be used in the future take into consideration institutions which no longer participate in the FGDL on 1 January of the year during

which the contributions are levied. A version of Circular CSSF-CPDI 20/21 tracking the changes is attached to the Circular.

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<sup>7</sup> Circular: [https://www.cssf.lu/wp-content/uploads/CSSF\\_CPDI\\_2334eng.pdf](https://www.cssf.lu/wp-content/uploads/CSSF_CPDI_2334eng.pdf)

## **CSSF COMMUNIQUÉ ON A JOINT THEMATIC REPORT WITH THE BCL ON ARTIFICIAL INTELLIGENCE IN THE LUXEMBOURG FINANCIAL SECTOR**

**3 May 2023<sup>8</sup>**

On 3 May 2023, the BCL and the CSSF issued a press release to announce the publication of a joint Thematic Report on Artificial Intelligence ("AI") in the Luxembourg financial sector.

AI is an innovative technology that can positively affect the financial sector by enabling, for example, improved processes, enhancing fraud detection mechanisms, new customer insights, fostering inclusion, etc. Nevertheless, AI also brings new challenges and risks to be considered both by the regulator and the entities using this technology.

In order to gather information about the usage of AI (and machine learning in particular) in the Luxembourg financial sector and the particular use cases being implemented by credit institutions, payment institutions and e-money institutions supervised by the CSSF, the BCL and the CSSF launched a joint survey in October 2021. The aim of this joint initiative was primarily to assess the level of adoption of these technologies by supervised institutions and to analyse the implementation of AI ("use cases") with their related challenges, including AI trustworthiness aspects (e.g., explainability, ethics, bias and fairness, auditability, etc.).

The Thematic Report sets out a summary of the main findings from the survey.

A link to the Thematic Report can be found on the relevant CSSF website page.

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<sup>8</sup> Communiqué: <https://www.cssf.lu/en/2023/05/thematic-review-on-the-use-of-artificial-intelligence-in-the-luxembourg-financial-sector/>

## LUXEMBOURG BILL ON THE TRANSPPOSITION OF CERTAIN PROVISIONS OF AMLD 5

15 May 2023<sup>9</sup>

A bill amending the law of 7 March 1980 on the organization of the judiciary ("**1980 Law**") to ensure the transposition of certain provisions of AMLD 5 (bill N° 8215) was lodged with the Luxembourg Parliament on 15 May 2023.

The Bill introduces two new paragraphs in Article 74-5 of the 1980 Law:

- A new paragraph 7 aims to specify the terms of mutual assistance and of the exchange, dissemination and use of information between the FIU of the EU, in case the definition of "associated predicate offence" differs between national laws;
- A new paragraph 9 aims to specify the conditions for refusing to disseminate information and documents to a FIU of an EU Member State. This proposed addition is intended to meet the requirements of Article 55(2) AMLD 4, as replaced by Article 1(35) AMLD 5.

The lodging of the Bill with the Luxembourg Parliament constitutes the start of the legislative procedure.

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<sup>9</sup> Bill 8215: <https://www.chd.lu/fr/techdossier/4812> (only in French)

## CSSF CIRCULAR LETTER ON RAISING 2023 EX-ANTE SINGLE RESOLUTION FUND CONTRIBUTIONS

15 May 2023<sup>10</sup>

On 15 May 2023, the CSSF issued Circular letter CODERES 23/16 on raising 2023 ex-ante contributions according to Articles 69 and 70 of SRMR for the Single Resolution Fund ("**SRF**").

Pursuant to Article 2 of the law of 18 December 2015 implementing the agreement on the transfer and mutualisation of contributions to the SRF, all credit institutions subject to the SRMR ("**concerned banks**") have to transfer upon instruction given by the CSSF, the requested amounts to an account of the *Fonds de résolution Luxembourg*, which in return will transfer the collected amounts to the SRF. The amounts for the 2023 contributions were due by 15 June 2023.

Details of the calculation of the amount to be paid are described in the Circular's Annex 1, which can be found on the relevant CSSF website page referred to in the Circular. The CSSF distributes the individual invoices to institutions in the coming days after issuance of the Circular.

The conditions concerning irrevocable payment commitments ("**IPC**") compared to the 2022 contribution cycle remain similar: Article 8(3) of the Council Implementing Regulation (EU) 2015/81 of 19 December 2014 ("**CR**") provides that during the initial period, under normal circumstances, the Single Resolution Board ("**SRB**") shall allow the use of IPC upon request from a concerned bank. For the 2023 contribution period, the SRB has decided that concerned banks are allowed to provide IPC equal to an amount of 22.5% of the amount to be paid (2022: 15.0%). The SRB has, furthermore, decided that these IPC must be fully backed by collateral exclusively in the form of cash collateral in euro. Even if the concerned bank has already applied in previous years to use IPC, this application has to be renewed for 2023.

Only a fully completed and duly signed application package consisting of an application form and an IPC

agreement can be considered as a valid request. An Excel copy of the completed application form labelled "[CSSF No. (NOSIG)]2023\_Application Form" had to be sent by COB on 9 June 2023 at the latest via email to the CSSF at [res@cssf.lu](mailto:res@cssf.lu). In addition, the application form and signed IPC agreement have to be sent either to the physical address of the SRB or by e-mail to [SRB-IPC@srb.europa.eu](mailto:SRB-IPC@srb.europa.eu).

Failure to comply with the requirements as set out above will preclude the concerned bank to use IPC for the 2023 contribution period. By 31 July 2023 at the latest, the SRB will return the countersigned IPC agreement to the concerned bank at the address provided in the application form. The process above applies only for this year.

<sup>10</sup> Circular: [https://www.cssf.lu/wp-content/uploads/CSSF-CODERES\\_23\\_16.pdf](https://www.cssf.lu/wp-content/uploads/CSSF-CODERES_23_16.pdf)

## **CSSF CIRCULAR LETTER ON COMMUNICATION MEANS FOR REQUESTS AND REPORTING TO THE CSSF**

**16 May 2023<sup>11</sup>**

On 16 May 2023, the CSSF issued Circular letter 23/833 on communication means for requests and reporting to the CSSF.

The Circular is addressed to all professionals subject to CSSF supervision and applies with immediate effect.

The Circular repeals CSSF circular letters 08/334 on encryption specifications for reporting firms and 08/344 on provisions relating to the transmission of reporting files to the CSSF.

The CSSF informs that as of now, depending on the proceeding or reporting concerned, professionals may use the following communication means:

- eDesk;
- API interface provided by the CSSF;
- MFT;
- External transmission channels (currently eFile & Sofie).

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<sup>11</sup> Circular: [https://www.cssf.lu/wp-content/uploads/cssf23\\_833.pdf](https://www.cssf.lu/wp-content/uploads/cssf23_833.pdf)  
(only in French)

## **CSSF CIRCULAR LETTER ON THE MANDATORY USE OF THE IMAS PORTAL FOR CERTAIN SUPERVISORY PROCESSES**

**16 May 2023<sup>12</sup>**

On 16 May 2023, the CSSF issued Circular letter 23/834 on the mandatory use of the IMAS Portal for certain supervisory processes.

The use of the IMAS Portal allows a more efficient processing of files at the SSM level and increases the transparency of the different processes and related communications. In this context, the CSSF has, upon recommendation of the ECB and like other national competent authorities within the SSM, decided to make the use of the IMAS Portal mandatory for supervisory processes within the scope of this Circular.

The Circular applies to all credit institutions incorporated under Luxembourg law for the following supervisory processes:

- For significant and less significant institutions
  - Acquisition of qualifying holdings;
  - Passporting notifications (initial and subsequent changes);
  - Licensing procedures;
  - Voluntary withdrawals of licensing authorisations.
- For significant institutions only
  - Appointments of the members of the management body, in their executive and supervisory (non-executive) functions;
  - Authorisation procedures for (mixed) financial holding companies;
  - Credit quality on-site inspections;

- Internal models (non-material model changes and extensions);
- Notification of outsourcing arrangements

Please note that the IMAS Portal should not be used in the following supervisory processes:

- Applications for third-country branches;
- Licence lapsing notifications;
- Fit and proper assessments in the following cases:
  - Notification of key function holders (who are not expected to also become members of the management body);
  - Notification of renewals (without any change in the executive or nonexecutive nature of the mandate);
  - Communication of new material facts regarding appointees previously assessed and approved.

Following the introduction of the IMAS Portal, the submission of original documents is no longer required for supervisory processes within the scope of this Circular. However, the relevant parties must ensure that the documents sent electronically constitute a true copy of the original and that the original documents are available upon the CSSF's request.

The CSSF underlines that the relevant parties must use the IMAS Portal not only for the submission of their initial applications but also for any subsequent exchange of information. E-mails outside the IMAS Portal may be necessary; however, the communication required to complete the documentation and advance the process must be done within the IMAS Portal.

The registration and use of the IMAS Portal are free. A link to the IMAS Portal and details for registration and account activation can be found in the Circular.

The Circular repeals and replaces Circular CSSF 20/763 and Circular CSSF 21/781 on the same topic.

<sup>12</sup> Circular: [https://www.cssf.lu/wp-content/uploads/cssf23\\_834eng.pdf](https://www.cssf.lu/wp-content/uploads/cssf23_834eng.pdf)



## CSSF CIRCULAR REGARDING SINGLE CUSTOMER VIEW FILE FOR DEPOSIT PROTECTION SCHEME

23 May 2023<sup>13</sup>

On 23 May 2023, the CSSF, acting in its function as Depositor and Investor Protection Council (*Conseil de Protection des Déposants et des Investisseurs*) (the "CPDI"), published CSSF-CPDI circular 23/36 amending Circular CSSF 13/555 on the *Fonds de garantie des dépôts Luxembourg* (the "FGDL").

The Circular is addressed to all members of the FGDL (Luxembourg banks, Luxembourg branches of banks having their registered office in a third country and POST Luxembourg).

Circular CSSF 13/555 was issued in 2013 to implement the decision made by the Board of Directors of the *Association pour la Garantie des Dépôts, Luxembourg* (the "AGDL") to introduce a "Single Customer View" ("SCV") file within the deposit guarantee framework. The Circular now adds a new field to the SCV file in which the depositors' national identification number has to be recorded. The Circular also introduces clarifications that concern the need to identify the beneficiaries of omnibus accounts and the requirement that the SCV procedures be in scope of the internal audit function.

Finally, the introduction of the Law of 18 December 2015 on the failure of credit institutions and certain investment firms requires updating the use of obsolete terms such as AGDL by referring to either the FGDL or the CPDI in the Circular CSSF 13/555. The Circular carries out these updates, while maintaining the principles and practices of Circular CSSF 13/555 as far as possible.

A version of Circular CSSF 13/555 tracking the changes is annexed to the Circular.

The addition of the new field to the SCV file will enter into force on 1 September 2023. All other amendments entered into force on 23 May 2023.

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<sup>13</sup> Circular: [https://www.cssf.lu/wp-content/uploads/CSSF\\_CPDI\\_2336eng.pdf](https://www.cssf.lu/wp-content/uploads/CSSF_CPDI_2336eng.pdf)

## **CSSF CIRCULAR ON THE SCOPE OF THE LUXEMBOURG DEPOSIT GUARANTEE AND INVESTOR COMPENSATION SCHEME**

**23 May 2023<sup>14</sup>**

On 23 May 2023, the CSSF, acting in its function as Depositor and Investor Protection Council (*Conseil de Protection des Déposants et des Investisseurs*) (the "CPDI"), published CSSF-CPDI circular 23/35 modifying Circular CSSF-CPDI 16/02 on the scope of the deposit guarantee and the investor compensation.

The Circular is addressed to all credit institutions and investment firms incorporated under Luxembourg law, to the *POST Luxembourg*, and to Luxembourg branches of non-EU/EEA credit institutions and investment firms, as well as to UCITS management companies and to alternative investment fund managers whose authorisation includes the management of portfolios on a discretionary, client-by-client basis.

The Circular incorporates the provisions of Article 62 of IFR which affect the definition of financial institutions, in Circular CSSF-CPDI 16/02. As a reminder, financial institutions are excluded from the scope of deposit guarantee and investor compensation in Luxembourg.

Furthermore, in the context of the application of Articles 174 and 196(5) of the Law of 18 December 2015 on the failure of credit institutions and certain investment firms, certain terms relating to the identification and indemnification of accounts where the holder is different from the person absolutely entitled are clarified.

A version of Circular CSSF-CPDI 16/02 tracking the changes is annexed to the Circular.

The Circular entered into force with immediate effect.

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<sup>14</sup> Circular: [https://www.cssf.lu/wp-content/uploads/CSSF\\_CPDI\\_2335eng.pdf](https://www.cssf.lu/wp-content/uploads/CSSF_CPDI_2335eng.pdf)

## **CSSF CIRCULAR ON APPLICATION OF ESMA GUIDELINES ON CERTAIN ASPECTS OF THE MIFID II SUITABILITY REQUIREMENTS**

**24 May 2023<sup>15</sup>**

On 24 May 2023, the CSSF, issued Circular letter 23/835 on the application of the Guidelines of the ESMA on certain aspects of the MiFID II suitability requirements (ESMA35-43-3172).

The Circular is addressed to all investment firms, credit institutions, UCITS management companies and external alternative investment fund managers authorised to provide the services of investment advice or portfolio management. The CSSF informs them by way of the Circular of the application of the Guidelines and their integration into the CSSF's administrative practice and regulatory approach.

A link to the Guidelines available on ESMA's website can be found in the Circular.

The Guidelines and the Circular shall apply from 3 October 2023 onwards. The previous ESMA guidelines on this topic will cease to apply on the same date.

<sup>15</sup> Circular: [https://www.cssf.lu/wp-content/uploads/cssf23\\_835eng.pdf](https://www.cssf.lu/wp-content/uploads/cssf23_835eng.pdf)

Guidelines: [https://www.esma.europa.eu/sites/default/files/library/esma35-43-3172\\_final\\_report\\_on\\_mifid\\_ii\\_guidelines\\_on\\_suitability.pdf](https://www.esma.europa.eu/sites/default/files/library/esma35-43-3172_final_report_on_mifid_ii_guidelines_on_suitability.pdf)

## CSSF CIRCULAR ON THE EBA GUIDELINES ON BENCHMARKING DATA UNDER CRD IV

24 May 2023<sup>16</sup>

On 24 May 2023, the CSSF issued Circular letter 23/836 on the integration of the EBA Guidelines on the benchmarking exercises on remuneration practices, the gender pay gap and approved higher ratios under CRD IV (EBA/GL/2022/06) (the "**Guidelines**") into its administrative practice and regulatory approach.

The Circular is addressed to all credit institutions, as defined in Article 1(12) of the Financial Sector Law, and all CRR investment firms, as defined in Article 1(9a) of the Financial Sector Law (collectively referred to as the "**relevant institutions**").

These Guidelines specify, for the purposes of the oversight of remuneration policies, the information to be provided by the selected institutions to the CSSF, namely:

- data for benchmarking remuneration trends and practices, including information disclosed in accordance with the criteria for disclosure established in points (g), (h), (i) and (k) of Article 450(1) CRR ("**remuneration data**"), to be provided annually;
- data for benchmarking the gender pay gap ("**gender pay gap data**"), to be provided every three years (starting from 2024 for the financial year 2023);
- in accordance with Article 94(1)(g)(ii), sixth indent CRD IV, the common reporting format to be used for the purposes of the benchmarking of approved higher ratios between the fixed and variable components of remuneration ("**higher ratios data**") to be submitted every two years (starting from 2023 for the financial year 2022) by the relevant institutions, in accordance with paragraph 19 of the Guidelines.

The Guidelines specify how the CSSF will collect the higher ratios data, the remuneration data and the gender pay gap data (collectively referred to as "**benchmarking data**") from institutions, and how the CSSF will submit the benchmarking data to the EBA.

Furthermore, the Guidelines repeal the EBA Guidelines on the remuneration benchmarking exercise (EBA/GL/2014/08).

The Guidelines are attached to the Circular and are also available on EBA's website, to which a link can be found in the Circular.

This Circular applied with immediate effect.



<sup>16</sup> Circular: [https://www.cssf.lu/wp-content/uploads/cssf23\\_836eng.pdf](https://www.cssf.lu/wp-content/uploads/cssf23_836eng.pdf)

Guidelines: <https://www.eba.europa.eu/regulation-and-policy/remuneration/guidelines-remuneration-gender-pay-gap-and-approved-higher-ratio-benchmarking-exercises-under-crd>

## CSSF CIRCULAR ON THE EBA GUIDELINES ON THE HIGH EARNERS DATA COLLECTIONS UNDER CRD IV AND IFD

26 May 2023<sup>17</sup>

On 26 May 2023, the CSSF, issued Circular letter 23/837 on the integration of the EBA Guidelines on the data collection exercises regarding high earners under CRD IV and IFD (EBA/GL/2022/08) (the "**Guidelines**") into its administrative practice and regulatory approach.

The Circular is addressed to all credit institutions, as defined in Article 1(12) of the Financial Sector Law), and all CRR investment firms, as defined in Article 1(9a) Financial Sector Law and all non-small and non-interconnected investment firms (the "**non-SNI IF**"), as defined in Article 1(9a-2) of the Financial Sector Law.

The Guidelines specify the information to be provided annually by relevant institutions on individuals remunerated EUR 1 million or more per financial year (the "**high earners**"). The Guidelines also specify how the CSSF will collect the high earners data from relevant institutions, and how the CSSF will submit the high earners data to the EBA.

When Article 13 CRR, or Article 7 of IFR apply, the Guidelines are applicable in accordance with paragraphs 12 and 15 of the Guidelines at the consolidated level. When Article 13 CRR and Article 7 IFR do not apply, the Guidelines are applicable on an individual basis as set out in Articles 6 to 10 CRR and in Articles 5 and 6 IFR.

Furthermore, the Guidelines repeal the EBA Guidelines on the data collection exercise regarding high earners (EBA/GL/2014/07).

The Guidelines are attached to the Circular and are also available on EBA's website, to which a link can be found in the Circular.

<sup>17</sup> Circular: [https://www.cssf.lu/wp-content/uploads/cssf23\\_837eng.pdf](https://www.cssf.lu/wp-content/uploads/cssf23_837eng.pdf)

Guidelines: <https://www.eba.europa.eu/regulation-and-policy/remuneration/guidelines-high-earner-data-collection-exercises-under-crd-and-ifd-updated>

## CSSF COMMUNIQUÉ ON THE ADOPTION OF THE EBA GUIDELINES ON REMUNERATION DATA COLLECTION EXERCISES AND RELATED CSSF CIRCULARS

26 May 2023<sup>18</sup>

On 26 May 2023, the CSSF issued a press release on the publication of the following three Circulars, adopting the EBA Guidelines on remuneration data collection exercises:

- CSSF Circular 23/836 on the EBA Guidelines on benchmarking data under CRD IV ("**Circular CSSF 23/836**");
- CSSF Circular 23/837 on the EBA Guidelines on the high earners data collections under CRD IV and IFD ("**Circular CSSF 23/837**"); and
- CSSF Circular 23/838 on the EBA Guidelines on benchmarking data under IFD ("**Circular CSSF 23/838**").

These Guidelines organise the remuneration data collection exercises, as mandated by requirements in the CRD and IFD frameworks.

Entities that are in scope of the EBA exercises will be informed by letter in due course.

According to the CSSF, the data collection format will be XBRL rather than Excel, starting from the data collection exercises in 2023 for financial year 2022.

The EBA data collection exercises, frequencies and data collection start dates of these exercises are listed in the Communiqué.

The CSSF will also continue to conduct national data collection exercises including a wider scope of entities, in line with its supervisory role.

The Communiqué provides an email address in case of questions by concerned entities.

<sup>18</sup> Communiqué: <https://www.cssf.lu/en/2023/05/publication-of-circulars-cssf-23-836-cssf-23-837-and-cssf-23-838-adopting-the-guidelines-on-the-european-banking-authoritys-remuneration-data-collection-exercises-for-banks-and-investment-fi/>

Circulars: [https://www.cssf.lu/wp-content/uploads/cssf23\\_836eng.pdf](https://www.cssf.lu/wp-content/uploads/cssf23_836eng.pdf)  
[https://www.cssf.lu/wp-content/uploads/cssf23\\_837eng.pdf](https://www.cssf.lu/wp-content/uploads/cssf23_837eng.pdf)

[https://www.cssf.lu/wp-content/uploads/cssf23\\_838eng.pdf](https://www.cssf.lu/wp-content/uploads/cssf23_838eng.pdf)

EBA Guidelines: <https://www.eba.europa.eu/regulation-and-policy/remuneration/guidelines-remuneration-gender-pay-gap-and-approved-higher-ratio-benchmarking-exercises-under-crd>

## CSSF CIRCULAR ON THE EBA GUIDELINES ON BENCHMARKING DATA UNDER IFD

26 May 2023<sup>19</sup>

On 26 May 2023, the CSSF issued Circular letter 23/838 on the integration of the EBA Guidelines on the benchmarking exercises on remuneration practices and the gender pay gap under CRD IV (EBA/GL/2022/07) (the "**Guidelines**") into its administrative practice and regulatory approach.

The Circular is addressed to all non-small and non-interconnected investment firms ("**non-SNI IF**"), as defined in Article 1(9a-2) of the Financial Sector Law.

These Guidelines specify, for the purposes of the oversight of remuneration policies, the information to be provided by selected non-SNI IF to the CSSF, namely:

- data for benchmarking remuneration trends and practices, including information disclosed in accordance with Article 51(1)(c) and (d) of IFR ("**remuneration data**"), to be provided annually;
- data for benchmarking the gender pay gap ("**gender pay gap data**"), to be provided every three years (starting from 2024 for the financial year 2023).

The Guidelines specify how the CSSF will collect the remuneration data and the gender pay gap data (collectively referred to as "**benchmarking data**") from non-SNI IF, and how the CSSF will submit the benchmarking data to the EBA.

Gender pay gap data will be collected at the individual level. Remuneration data will be collected at the individual level if Article 7 of IFR does not apply. Where Article 7 of IFR does apply, remuneration data will be collected at the level of consolidation set out in the article.

The Guidelines are attached to the Circular and are also available on EBA's website, to which a link can be found in the Circular.

This Circular applied with immediate effect.

<sup>19</sup> Circular: [https://www.cssf.lu/wp-content/uploads/cssf23\\_838eng.pdf](https://www.cssf.lu/wp-content/uploads/cssf23_838eng.pdf)

Guidelines: <https://www.eba.europa.eu/regulation-and-policy/remuneration/guidelines-remuneration-and-gender-pay-gap-benchmarking-exercises-under-ifd>

## **CSSF COMMUNIQUÉ ON THE LAUNCH OF THE ESMA CSA ON THE APPLICATION OF MIFID II RULES ON DISCLOSURE IN MARKETING COMMUNICATIONS AND ADVERTISEMENTS**

**31 May 2023<sup>20</sup>**

On 31 May 2023, the CSSF issued a press release on the launch by ESMA of a Common Supervisory Action (the "CSA") with national competent authorities (the "NCAs") on the application of MiFID II disclosure rules with regard to marketing communications and advertisements of financial products.

The methodology of this CSA was developed by ESMA and aims to ensure a common supervisory approach among NCAs in this area.

The aim of the CSA is to understand and assess how investment firms as well as credit institutions have implemented the requirements of the MiFID II Directive and of the MiFID II Delegated Regulation in the field of marketing communications and advertisements. This CSA is also seen by regulators as an opportunity to collect information about possible 'greenwashing practices' observed in marketing communications and advertisements.

In this context, the CSSF will contact a sample of supervised entities and ask them to complete a dedicated questionnaire. All concerned entities have been or will shortly be contacted by the CSSF.

A link to the ESMA CSA launch can be found on the relevant CSSF website page referred to in the Communiqué.

<sup>20</sup> Communiqué: [https://www.cssf.lu/en/2023/05/launch-of-the-esma-common-supervisory-action-on-the-application-of-mifid-ii-](https://www.cssf.lu/en/2023/05/launch-of-the-esma-common-supervisory-action-on-the-application-of-mifid-ii-disclosure-rules-with-regard-to-marketing-communications-and-advertisements-of-financial-products/)

[disclosure-rules-with-regard-to-marketing-communications-and-advertisements-of-financial-products/](https://www.cssf.lu/en/2023/05/launch-of-the-esma-common-supervisory-action-on-the-application-of-mifid-ii-disclosure-rules-with-regard-to-marketing-communications-and-advertisements-of-financial-products/)



## **CSSF COMMUNIQUÉ ON CSSF/CAA JOINT CONFERENCE ON EMIR REPORTING**

**12 June 2023<sup>21</sup>**

On 12 June 2023, the CSSF and the CAA issued a press release on the joint CSSF-CAA conference on EMIR Reporting held on 5, 6 and 7 June.

The Conference covered three topics:

- Derivative market in Luxembourg
- What is next? EMIR Refit
- What is coming? New Data Quality supervision

On EMIR Refit Reporting, the key messages delivered were:

- Ensure continuity across 29 April 2024
- Start preparing for these changes as soon as possible
- Any failure to report accurately as from 29 April 2024 will be considered as a non-compliance with Article 9 of EMIR

On EMIR Data Quality, the key messages delivered were:

- EMIR data quality is a key priority for ESMA for the CSSF as well as for the CAA
- Leverage on existing EMIR obligations to reduce the compliance effort for data quality:
  - use or upgrade confirmation process
  - use or improve reconciliation process
- Both counterparties shall agree on details to be reported, involving all stakeholders in the reporting value chain
- Bad data quality is a signal of other issues within the organisation
- Outsourcing EMIR reporting does not relieve an entity from its duties. The entity must have access to its data and understand it

- The CAA asks its entities to make sure that their TR reporting is consistent with its Solvency 2 reporting and the rapport distinct of its auditors

The CSSF asks its entities to make sure that their TR reporting is consistent with the information shared in other regulatory reporting

<sup>21</sup> Communiqué: <https://www.cssf.lu/en/2023/06/cssf-caa-joint-conference-on-emir-reporting/>

EMIR Reporting slides: <https://www.cssf.lu/wp-content/uploads/EMIR-by-CSSF-CAA.pdf>

## CSSF COMMUNIQUÉ ON ESMA'S STATEMENT TO HIGHLIGHT THE RISKS ARISING FROM THE PROVISION OF UNREGULATED PRODUCTS AND/OR SERVICES BY INVESTMENT FIRMS

12 June 2023<sup>22</sup>

On 12 June 2023, the CSSF issued a press release to draw attention to the statement of the ESMA highlighting the risks arising from the provision of unregulated products and/or services by investment firms (the "**Statement**") published on 25 May 2023.

The CSSF expects investment firms as well as credit institutions providing investment services and activities to take into consideration the impact that potential unregulated activities may have on their business activity as a whole when it comes to risk management systems and policies.

A link to the ESMA Statement can be found on the relevant CSSF website page referred to in the Communiqué.



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<sup>22</sup> <https://www.cssf.lu/en/2023/06/esma-issues-a-statement-to-highlight-the-risks-arising-from-the-provision-of-unregulated-products-and-or-services-by-investment-firms/>

## INSURANCE

### CAA INFORMATION NOTE ON THE RESULTS OF A QUALITATIVE QUESTIONNAIRE ON THE COMPLIANCE WITH CONDUCT OF BUSINESS RULES

21 March 2023<sup>23</sup>

On 21 March 2023, the CAA issued its Information Note 23/5 on the results of the qualitative questionnaire on the compliance with conduct of business rules by life insurance undertakings.

With regards to the product approval process for newly created insurance products and significant adaptations of existing products ("**POG policy**"), the CAA notes that most life insurance undertakings confirm that they have a policy or group policy on this matter, but sometimes the content of these policies isn't adequate.

The CAA recalls that target market (TM) criteria used aren't always sufficiently granular, considering the characteristics, risk profile, complexity and nature of the product. Criteria such as the customer's loss-bearing capacity, employment status or income and a negative tm should be considered as well. As for the negative TM, the determination thereof is recommended to avoid the product being marketed to an unsuitable market segment.

Regarding product testing before its introduction to the market or significant adaption or where the TM has changed significantly, the results show there's often little or no product testing by life insurance undertakings or if there is it does not focus enough on the policyholder interests.

Regarding the product approval processes, the CAA calls for a strengthened testing process by considering the concept of "value for money".

The CAA has noted that many undertakings barely or don't consider off-target sales or the profitability of the product for the policyholder as an indicator for monitoring products.

The CAA notes certain good practices as regards specific indicators of monitoring or review of products.

Regarding the distributing strategy, the CAA recalls the manufacturer's obligation of information and periodically checks that products are being distributed by distributors to the defined TM.

For life insurance undertakings that distribute IBIPs, the CAA notes that some operators should further adapt the group conflict of interest policy used to the local situation, develop appropriate conflict of interest procedures more adapted to the specific IBIPs and record potential and/or actual conflict of interests. The CAA also draws attention to good practices of Col analysis.

Regarding remuneration, the CAA notes possible risks in the employee or distributor remuneration systems, business provider remuneration and retrocession schemes in light of the obligation to always act in the best interest of the customer.

The CAA notes that the questionnaire served, amongst others, to prepare life insurance undertakings for future CAA onsite visit campaigns in the area of conduct of business rules compliance.

<sup>23</sup> CAA Information Note 23/4:  
[https://www.caa.lu/uploads/documents/files/Note\\_info\\_23\\_5\\_quest\\_quali\\_VIE.pdf](https://www.caa.lu/uploads/documents/files/Note_info_23_5_quest_quali_VIE.pdf) (only in French)

## **LUXEMBOURG BILL ON THE IMPLEMENTATION OF THE MOTOR VEHICLES CIVIL LIABILITY INSURANCE DIRECTIVE AND CERTAIN TARGETED CHANGES TO INSURANCE LAWS**

**Bill of 24 March 2023<sup>24</sup>**

A bill implementing Directive (EU) 2021/2118 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (bill N° 8184) was lodged with the Luxembourg Parliament on 24 March 2023.

The bill proposes to amend several laws relating to the insurance sector, including:

- the law of 16 April 2003 on the on the mandatory insurance against civil liability in respect of the use of motor vehicles, as amended;
- the law of 7 December 2015 on the insurance sector, as amended; and
- the law of 15 March 2016 on OTC derivatives, central counterparties and trade repositories and amending different laws relating to financial services, as amended.

The bill proposes a series of changes. With respect to the insurance against civil liability in respect of the use of motor vehicles, the bill notably proposes (i) to amend and clarify the definition of a motor vehicle, (ii) to introduce a new public institution, the *Fonds d'Insolvabilité en Assurance Automobile (FIAA)* which will be in charge of compensating parties injured in a motor accident in case of an insurer's insolvency and (iii) to clarify the use of certificates of claims (*attestation de sinistres*) in a cross-border context.

In addition to this, the bill proposes other targeted changes to insurance laws and that are not related to the implementation of Directive (EU) 2021/2118. In this context, the bill notably proposes to (i) amend the amounts that were provided for under Solvency II to take into account inflation, (ii) adapt the governing structure of the CAA to reflect the expansion of the insurance activity in

Luxembourg, (iii) amend the rules related to the digital preservation of documents and processing with certain third-party service providers in order to take into account the development of new technologies or (iv) submit the insurance holding companies falling under the control of the CAA to the same obligation to have their accounts audited by an approved auditor as (re)insurance companies and pension funds.

In this context, the Bill also foresees a new legal exemption to the Luxembourg insurance professional confidentiality ('secrecy') regime in respect of the digital storage and processing of confidential information and documents by critical ICT third-party service providers (such as cloud services providers) subject to oversight by a European Supervisory Authority (ESA) in accordance with Article 31 of the Financial Sector Digital Operational Resilience Regulation (EU) 2022/2554 (DORA) as well as a statutory mechanism of deemed policyholder consent where a policyholder of policies concluded before May 2023 in certain life insurance classes has been approached by the insurance undertaking to obtain the policyholders acceptance to disclosure of confidential information to outsourcing service providers and does not react following sending of two registered letters and lapsing of certain timelines after each sending.

The lodging of the Bill with the Luxembourg Parliament constitutes the start of the legislative procedure.

<sup>24</sup> <https://www.chd.lu/fr/dossier/8184> (only in French)

## **CAA CIRCULAR LETTER ON ANNUAL REPORTING OF (RE-)INSURANCE BROKERAGE FIRMS**

**19 April 2023<sup>25</sup>**

On 14 March 2023, the CAA issued Circular letter 23/7, modifying Circular Letter 23/5 on annual reporting of insurance or reinsurance brokerage firms and brokers who are natural persons.

To avoid a misunderstanding between the gross premiums negotiated by the broker during the reference year and the outstanding relating to life insurance policies taken from other intermediaries during the reference year, the Circular Letter 23/5 on the annual reporting of brokerage firms and insurance or reinsurance brokers who are natural persons, has been slightly adjusted as set out in the new Circular.

The new annual reporting under Circular Letter 23/5 applies first for the reference year 2022 and the Circular entered into force on 19 April 2023 with immediate effect.

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<sup>25</sup> CAA Information Note 23/7:  
[https://www.caa.lu/uploads/documents/files/LC23-7\\_modifiant\\_LC23-5.pdf](https://www.caa.lu/uploads/documents/files/LC23-7_modifiant_LC23-5.pdf) (only in French)

## **CAA CIRCULAR LETTER ON THE MODALITIES OF INTRODUCTION AND CONTENT OF A CHANGE TO THE SCHEME OF OPERATIONS FILE FOR REINSURANCE UNDERTAKINGS**

**19 April 2023<sup>26</sup>**

On 19 April 2023, the CAA issued circular letter 23/8, on the modalities of introduction and content of a change to the scheme of operations file for reinsurance undertakings.

Luxembourg insurance and reinsurance undertakings are subject to Article 49(2) of the Insurance Sector Law, requiring them to notify the CAA of any extension of the operations or major amendment to the scheme of operations.

For captive reinsurance undertakings, the acceptance of a new reinsurance treaty can quickly lead to a material increase in liabilities or premiums collected. Strict criteria cannot easily be defined to determine what will be considered a major amendment given the different risk typologies, the variety in the different types of captive reinsurance undertakings, etc. Therefore, the objective of the Circular is to facilitate the exchanges between the reinsurance undertakings and the CAA by structuring and streamlining the process of modifying the scheme of operations in one of the following cases:

- (1) Submission of a request for a multiple (used for the calculation of the claims fluctuation provision (*provision pour fluctuation de sinistralité*)) relating to a new risk;
- (2) Submission of a request for a multiple relating to an existing modified risk (excluding run-off).

The notification process to be applied and the expected content of the amendment file consists of two successive phases:

- (a) **Phase 1: Submission of preliminary information**  
  
Where reinsurance undertakings fall into either category (1) or (2) above, they must submit to the CAA, without delay, the information requested in an excel sheet annex to the Circular. The Circular provides further details in this respect.  
  
These pieces of information will enable the CAA to determine whether there is a need to provide a complete operations scheme amendment file. The CAA will inform the reinsurance undertaking of any further modalities to be pursued. Where relevant, the CAA will ask undertakings to provide information requested in Phase 2. If not, the CAA will directly analyse the request(s) for multiples and clarify that a Phase 2 application of the file is not necessary.
- (b) **Phase 2: Submission of the complete application file for the amendment of the operations scheme**  
  
In case the CAA requests to provide a complete application file for the amendment of the scheme of operations, the reinsurance undertaking must provide the information listed in a dedicate excel sheet annex to the Circular.

If the CAA considers that a file is incomplete, unclear or has the slightest objection following receipt of the quantitative and qualitative information mentioned above, it reserves the right to request additional information necessary for the proper processing of the application for a change of the operations scheme.

The Circular applied with immediate effect as of 19 April 2023.

<sup>26</sup> CAA Circular letter 23/8:  
[https://www.caa.lu/uploads/documents/files/LC23-8\\_chgmt\\_BP\\_CAA.pdf](https://www.caa.lu/uploads/documents/files/LC23-8_chgmt_BP_CAA.pdf) (only in French)

## **CAA INFORMATION NOTE ON A NEW TOOL TO ASSIST IN THE COLLECTION OF QUANTITATIVE DATA FOR THE QUANTITATIVE RISK ASSESSMENT QUESTIONNAIRE**

**27 April 2023<sup>27</sup>**

On 27 April 2023, the CAA issued information note 23/7 on a new tool to assist in the collection of quantitative data resulting from the quantitative risk assessment questionnaire, introduced by Circular Letter 23/3.

The quantitative questionnaire aims to carry out a harmonised assessment of the exposure to money laundering and terrorist financing of certain categories of intermediaries who have distributed or are distributing certain types of life insurance contracts. In accordance with point 3 of the circular, the CAA requests the relevant intermediaries to provide on an annual basis:

- data relating to the business relationships that led to the conclusion of these contracts, and
- data relating to the stock of these contracts which, since 1 July 2023, have been subject to one (or more) quantitative questionnaire assessment(s).

The first collection of data is expected by 31 January 2024.

In this respect, the CAA has developed a tool to facilitate the application of the quantitative questionnaire and the related reporting.

The use of this tool is optional. It is up to each intermediary concerned to decide whether or not to use this tool, and if so, to adapt it to the size and nature of its business.

The proposed tool does not constitute a reporting file that has to be sent to the CAA. The CAA will send a personalised EXCEL file to each intermediary concerned before the end of 2023, following the example of the EXCEL file sent as part of the annual reporting of insurance or reinsurance brokerage firms and brokers who

are natural persons. The CAA will provide further technical details on the modalities of transmission of the reporting file later on by another information note.

A link to the new tool can be found on the relevant CAA website page referred to in the Information Note.

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<sup>27</sup> CAA Information Note 23/7:  
[https://www.caa.lu/uploads/documents/files/Note\\_info\\_23-7.pdf](https://www.caa.lu/uploads/documents/files/Note_info_23-7.pdf)  
(only in French)

## CAA CIRCULAR 23/9 ON THE INFORMATION SHEET OF THE INSURANCE AGENCIES' ANNUAL REPORTING

13 June 2023<sup>28</sup>

On 13 June 2023, the CAA issued its Circular Letter 23/9 on the information sheet of the insurance agencies' annual reporting.

The purpose of this Circular is the introduction of annual reporting for insurance agencies, designed to make their supervision more effective.

The agencies' annual reporting file will be divided into two parts:

- A. the "report" section that concerns the figures for the insurance agency's distribution business for the reference year;
- B. the "information sheet" section that concerns general information about the insurance agency.

To allow insurance agencies to familiarise themselves with the annual reporting process, only part (B) will initially be sent to insurance agencies, which must return it to the CAA, duly completed and accompanied by the documents listed in the Circular, by 31 July 2023 at the latest. The Circular provides clarifications on how to complete part (B) (e.g., as regards the modules on Approved agents linked to the insurance agency, distribution points in Luxembourg, the composition of the statutory body, key function holders, shareholders, shareholding structure and shareholdings).

From 2024 onwards, insurance agencies will have to complete the full annual reporting file each year, i.e., including the first part (A) and the second part (B). A Circular containing details on how to complete part (A) will be published in due course so that insurance agencies can familiarise themselves with it before having to fill in details of their insurance business during the 2023 reference year for the first time in 2024.

The insurance agent(s) responsible for the daily management of the agency in terms of insurance distribution is/are responsible for the quality and accuracy of the information provided and the documents supplied as part of the annual reporting.

The agencies' annual reporting file should only be sent electronically to the email address [reporting\\_agences@caa.lu](mailto:reporting_agences@caa.lu). Agencies are asked to refrain from providing the annual reporting file in paper form, unless expressly requested to do so by the CAA.

A list of documents and information that must be sent by email to the CAA officer in charge of annual reporting in addition to the part (B) information sheet is further included in the Circular, requiring submission of certain corporate documents, a report of the statutory auditor or the *réviseur d'entreprises (agréé)*, a detailed group structure chart, declarations of honour for daily managers.

<sup>28</sup> CAA Circular 23/9:  
<https://www.caa.lu/uploads/documents/files/LC23-9.pdf> (only in French)

CAA Circular 23/9 (inauthentic English translation)  
[https://www.caa.lu/uploads/documents/files/LC23-9\\_EN.pdf](https://www.caa.lu/uploads/documents/files/LC23-9_EN.pdf)



## **FINTECH**

### **LUXEMBOURG LAW IMPLEMENTING EU PILOT REGIME**

**Law of 15 March 2023<sup>29</sup>**

The Luxembourg law of 15 March 2023 implementing Regulation (EU) 2022/858 of 30 May 2022 on a pilot scheme for market infrastructures based on distributed ledger technology (*DLT*) was published in the Luxembourg official journal (*Mémorial A*) on 17 March 2023.

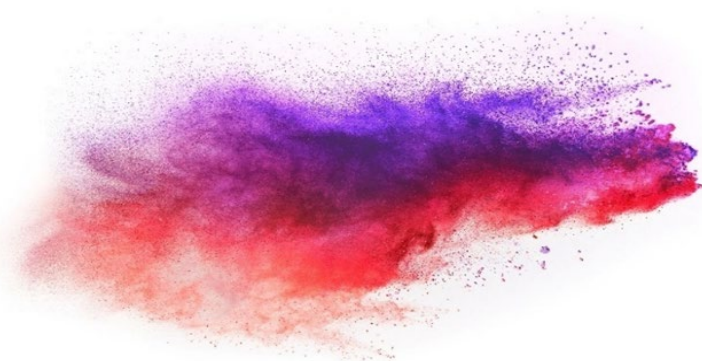
The purpose of the Law is to expressly recognise DLT technology in the financial sector and to enable financial market participants to take full advantage of the opportunities offered by this new technology, with full legal certainty.

The Law amends several laws relating to the financial sector, including:

- the Financial Sector Law, which notably clarifies that the definition "financial instrument" also includes financial instruments issued by means of DLT as defined in article 2(1) of Regulation (EU) 2022/858;
- the law of 5 August 2005 on financial collateral arrangements (as amended), which now incorporates a technology neutral approach as already provided for in article 18*bis*(2) of the law of 1 August 2001 on the circulation of securities, as amended, by clarifying that "book-entry financial instruments" also include securities registered or existing in securities accounts maintained in or through secure electronic recording devices, including distributed electronic registers or databases; and
- the law of 30 May 2018 on markets in financial instruments (as amended), which reflects the abovementioned amendment of the Financial Sector Law.

This Law follows up on two laws already in force since some time dealing with DLT in the Luxembourg legal framework and is therefore also called sometimes 'Blockchain III Law'. The two laws mentioned are namely a law of 1 March 2019 recognising expressly the use of electronic recording devices such as DLT for the custody of book-entry financial instruments and a law of 22 January 2021 concerning the issuance of dematerialised securities with issuance accounts using such devices, including DLT, for registering a dematerialised securities issuance.

This Law entered into force on 23 March 2023.



<sup>29</sup> <https://legilux.public.lu/eli/etat/leg/loi/2023/03/15/a147/jo> (only in French)

## ESG

### CSSF UPDATES CSSF FAQ ON SFDR

13 March 2023<sup>30</sup>

On 13 March 2023, the CSSF updated its Frequently Asked Questions (FAQs) on the Sustainable Finance Disclosure Regulation (SFDR) aim to provide further clarity on aspects of Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial sector.

This update covers the addition of three new questions and answers covering

- (1) the use of ESG and/or sustainability related terminology in fund names,
- (2) the methodology used to define sustainable investments and whether such methodology should be made available to investors, and
- (3) the efficient portfolio management techniques and whether such techniques fall within the "remaining portion" of the investment portfolio of funds disclosing under Article 9 SFDR.

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<sup>30</sup> <https://www.cssf.lu/en/Document/cssf-faq-sustainable-finance-disclosure-regulation-sfdr/>

## **CSSF PUBLISHES SECOND COMMUNIQUÉ ON SFDR DATA COLLECTION EXERCISE**

24 March 2023<sup>31</sup>

On 24 March 2023, the CSSF published a second communication on its sustainability-related disclosures in the financial services sector (SFDR) data collection exercise now asking for SFDR data to be provided by investment fund managers (IFMs) in respect of the SFDR pre-contractual product disclosures.

The reporting is mandatory for, among others,

- UCITS management companies, based in Luxembourg or in another Member State of the European Union, in relation to all Luxembourg-domiciled UCITS they manage;
- authorised AIFMs, based in Luxembourg, in relation to all Luxembourg-domiciled regulated and unregulated AIFs (including ELTIFs) they manage;
- authorised AIFMs, based in another Member State of the European Union, in relation to all Luxembourg-domiciled regulated AIFs, as well as Luxembourg-domiciled unregulated AIFs (only when they qualify as ELTIFs) they manage;
- registered AIFMs, subject to Article 3(3) of the Law of 12 July 2013, based in Luxembourg or in another Member State of the European Union, in relation to all Luxembourg-domiciled regulated AIFs they manage;

(all together, IFMs).

The data should be provided for any of the above-mentioned funds, regardless of their qualification under SFDR (i.e. Article 6, 8 or 9). IFMs remain responsible to ensure that the information provided is being kept up-to-date.

The submission deadline was initially 15 June 2023, but was thereafter, complemented through a follow-up communiqué dated 4 May 2023, providing that the relevant

information should be provided on a best effort basis by 15 June 2023 and in any event by 31 October 2023 at the latest.

<sup>31</sup> <https://www.cssf.lu/en/2023/03/sfdr-data-collection-exercise-applicable-to-investment-fund-managers-ifms-and-institutions-for-occupational-retirement-provision-ioprs-on-precontractual-disclosures-in-relation-to-regulation-eu/> and

<https://www.cssf.lu/en/2023/05/extension-of-the-initial-submission-deadline-for-the-sfdr-data-collection-exercise-on-precontractual-disclosures/>

## **CSSF COMMUNIQUÉ ON ITS SUPERVISORY PRIORITIES IN THE FIELD OF SUSTAINABLE FINANCE**

6 April 2023<sup>32</sup>

On 6 April 2023, the CSSF issued a press release to give a general overview of the CSSF's supervisory priorities in the area of sustainable finance (the "**Overview**").

The Overview is not to be construed as an exhaustive or definitive list. It rather aims at drawing the attention of the financial sector to a number of prominent matters to be addressed in this area. If deemed necessary, supervision priorities may be adjusted, and the CSSF's duties of ongoing prudential supervision may also warrant other ESG-related aspects to come under scrutiny.

Supervisory priorities for credit institutions:

- Transparency and disclosures obligations for credit institutions which fall in the scope of SFDR through the revised long form report;
- Off-site reviews of the SFDR website disclosures at entity and products level will be performed on a sample basis;
- Transversal reviews of Pillar 3 disclosures on ESG risks with possible subsequent follow up with the institutions concerned;
- Climate-related and environmental risks integration and mitigation through a self-assessment exercise on climate related and environmental risks with a new sample, onsite inspections and a sample-based review of the remunerations policies and practices;
- Understanding where the industry stands in the practical implementation of the MiFID rules related to sustainability, including through onsite inspections and other actions.

Supervisory priorities for investment fund managers ("IFM") continued verification of:

- SFDR requirements regarding the integration of sustainability risks in the activities of IFMs, including their organisational and governance arrangements and related website disclosures;
- compliance with SFDR, SFDR RTS and Taxonomy Regulation regarding the provision of sustainability-related information in pre-contractual and periodic documentation of financial products;
- the consistency of sustainability-related disclosures in fund documentation and marketing material;
- the compliance by IFM product related website disclosure;
- portfolio holdings so that they reflect the name, the investment objective, the strategy, and the characteristics displayed in the documentation to investors.

The CSSF announces that will further continue to provide clarifications through Q&As or similar guidance to the investment fund industry.

Supervisory priorities for investment firms:

- Establishing of a self-assessment questionnaire to be addressed to all investment firms, as part of the contemplated reform of the long-form report, including in particular to assess compliance with SFDR disclosure obligations for investment firms providing investment advice and portfolio management;
- Implementation of a gradual approach to the supervision of ESG risks for investment firms, prioritising the recognition of ESG risks in investment firms' strategies and governance arrangements. The CSSF announces a related update of Circular CSSF 20/758 in due course;

<sup>32</sup> Communiqué: [https://www.cssf.lu/fr/2023/04/priorites-de-supervision-de-la-cssf-en-matiere-de-finance-durable/?utm\\_campaign=email-230406-014fa](https://www.cssf.lu/fr/2023/04/priorites-de-supervision-de-la-cssf-en-matiere-de-finance-durable/?utm_campaign=email-230406-014fa)

- As regards MiFID rules related to sustainability, same as for credit institutions.

Supervisory priorities for issuers:

- The review procedures will address both the aspects covered by European common enforcement priority ("**ECEP**") for the 2022 annual reports and the follow-up of the observations made during its 2022 campaign thereon by the CSSF. The information required under Article 8 of the Taxonomy Regulation (disclosures of alignment of economic activities with climate change mitigation and adaptation objectives) for relevant issuers is also one of the ECEPs for the upcoming campaign.

The CSSF further informs about its involvement in cooperation activities at international level and provides a simplified overview of supervision exercises in the area of sustainable finance, as planned by the ESAs and based on available information to date.

## **CSSF COMMUNIQUÉ ON PUBLICATIONS RELATED TO THE SFDR AND THE TAXONOMY REGULATION**

20 April 2023<sup>33</sup>

On 6 April 2023, the CSSF issued a press release to draw attention to recent publications made by the ESAs in respect of SFDR, of Commission Delegated Regulation (EU) 2022/1288 (the "**SFDR RTS**"), and of the Taxonomy Regulation (the "**Overview**").

In particular, the Overview highlights that a third set of Q&As on the interpretation of SFDR has recently been adopted by the European Commission and published by the ESAs on 14 April 2023. Concomitantly to the publication of the third set of Q&As, amendments to the first and second Q&As on the interpretation of SFDR were adopted by the European Commission and published by the ESAs.

The Overview also draws attention to the Delegated Acts relating to the EU Taxonomy Regulation, dating from 5 April 2023. The first draft delegated act notably provides a new set of technical screening criteria for the four environmental objectives pursuant to Article 9 (c) to (f) of the EU Taxonomy Regulation:

- the sustainable use and protection of water and marine resources;
- the transition to a circular economy;
- pollution prevention and control; and
- the protection and restoration of biodiversity and ecosystems.

It also provides amendments to Delegated Regulation (EU) 2021/2178 (the "**Taxonomy Disclosures Delegated Act**").

The second draft delegated act amends Delegated Regulation (EU) 2021/2139 (the "**Climate Delegated Act**") to add or complement the technical screening criteria for

climate change mitigation for certain economic activities in the transport and manufacturing sectors.

On 12 April 2023, the ESAs further published a joint consultation paper on a proposed review of the SFDR RTS regarding PAI and financial product disclosures. Comments were to be provided until 4 July 2023.

<sup>33</sup> Communiqué: <https://www.cssf.lu/en/2023/04/publications-related-to-regulation-eu-2019-2088-sfdr-and-regulation-eu-2020-852-the-eu-taxonomy-regulation-2/>

## ASSET MANAGEMENT

### CSSF UPDATES CSSF FAQ ON SFDR

13 March 2023<sup>34</sup>

On 13 March 2023, the CSSF updated its Frequently Asked Questions (FAQs) on the Sustainable Finance Disclosure Regulation (SFDR) aimed to provide further clarity on aspects of Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial sector.

This update covers the addition of three new questions and answers covering

- (1) the use of ESG and/or sustainability related terminology in fund names,
- (2) the methodology used to define sustainable investments and whether such methodology should be made available to investors, and
- (3) the efficient portfolio management techniques and whether such techniques fall within the "remaining portion" of the investment portfolio of funds disclosing under Article 9 SFDR.

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<sup>34</sup> <https://www.cssf.lu/en/Document/cssf-faq-sustainable-finance-disclosure-regulation-sfdr/>

## **CSSF UPDATES CSSF FAQ ON CBDF NOTIFICATION PROCEDURES**

16 March 2023<sup>35</sup>

On 16 March 2023, the CSSF updated its Frequently Asked Questions (FAQs) on the rules regarding cross-border distribution of collective investment undertakings as introduced into the Luxembourg Laws of 17 December 2010 and of 12 July 2013 following Directive (EU) 2019/1160 (CBDF) and which aim at highlighting the changes for notifications to the CSSF as from 2 August 2021.

The updates cover clarifications on (1) the main changes for UCITS notifications introduced by the CBDF rules, (2) the rules around de-notification for Luxembourg UCITS that are marketed in another EU Member State, (3) the procedure to notify the CSSF for pre-marketing, (4) how to de-notify AIFs and (5) in which cases de-notification letters need to be submitted for AIFs.

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<sup>35</sup> <https://www.cssf.lu/wp-content/uploads/FAQ-CBDF.pdf>



## **CSSF PUBLISHES CIRCULAR CSSF 23/831 INTEGRATING ESMA GUIDELINES ON STRESS TEST SCENARIOS UNDER ARTICLE 28 OF THE MONEY MARKET FUND REGULATION**

**23 March 2023<sup>36</sup>**

On 23 March 2023, the CSSF published a Circular CSSF 23/831 to inform all money market funds under the supervision of the CSSF and Luxembourg managers of money market funds, as well as those that take part in the functioning and control of these undertakings, that the CSSF, as competent authority, integrates the latest version of the ESMA Guidelines on stress test scenarios under the Money Market Fund Regulation (Ref. ESMA/34-49-495), as published on 27 January 2023 (the 2022 Guidelines), in its administrative practices. All money market funds (MMFs) under the supervision of the CSSF and Luxembourg managers of MMFs shall duly comply with the 2022 Guidelines.

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<sup>36</sup> <https://www.cssf.lu/en/Document/circular-cssf-23-831/>

## **CSSF PUBLISHES SECOND COMMUNIQUÉ ON SFDR DATA COLLECTION EXERCISE**

24 March 2023<sup>37</sup>

On 24 March 2023, the CSSF published a second communiqué on its sustainability-related disclosures in the financial services sector (SFDR) data collection exercise now asking for SFDR data to be provided by investment fund managers (IFMs) in respect of the SFDR pre-contractual product disclosures.

The reporting is mandatory for, among others,

- UCITS management companies, based in Luxembourg or in another Member State of the European Union, in relation to all Luxembourg-domiciled UCITS they manage;
- authorised AIFMs, based in Luxembourg, in relation to all Luxembourg-domiciled regulated and unregulated AIFs (including ELTIFs) they manage;
- authorised AIFMs, based in another Member State of the European Union, in relation to all Luxembourg-domiciled regulated AIFs, as well as Luxembourg-domiciled unregulated AIFs (only when they qualify as ELTIFs) they manage;
- registered AIFMs, subject to Article 3(3) of the Law of 12 July 2013, based in Luxembourg or in another Member State of the European Union, in relation to all Luxembourg-domiciled regulated AIFs they manage;

(all together, IFMs).

The data should be provided for any of the above-mentioned funds, regardless of their qualification under SFDR (i.e. Article 6, 8 or 9). IFMs remain responsible to ensure that the information provided is being kept up-to-date.

The submission deadline was initially on 15 June 2023, but was thereafter, complemented through a follow-up communiqué dated on 4 May 2023, providing that the

relevant information should be provided on a best effort basis by 15 June 2023 and in any event by 31 October 2023 at the latest.

<sup>37</sup> <https://www.cssf.lu/en/2023/03/sfdr-data-collection-exercise-applicable-to-investment-fund-managers-ifms-and-institutions-for-occupational-retirement-provision-iorps-on-precontractual-disclosures-in-relation-to-regulation-eu/> and

<https://www.cssf.lu/en/2023/05/extension-of-the-initial-submission-deadline-for-the-sfdr-data-collection-exercise-on-precontractual-disclosures/>

## **LUXEMBOURG CHAMBER OF DEPUTIES PUBLISHES DRAFT LAW 8183 RELATING TO THE LUXEMBOURG INVESTMENT FUNDS TOOLBOX**

24 March 2023<sup>38</sup>

On 24 March 2023, the Luxembourg Chamber of Deputies published a draft law 8183 to improve and modernise the existing Luxembourg investment funds toolbox and, accordingly, increase attractiveness and competitiveness of the Luxembourg financial market.

The draft law amends the following existing specific fund vehicles laws:

- the Luxembourg law of 15 June 2004 on the investment company in risk capital, as amended (SICAR Law);
  - the Luxembourg law of 13 February 2007 on specialised investment funds, as amended (SIF Law);
  - the Luxembourg law of 17 December 2010 concerning undertakings for collective investment, as amended (UCI Law);
  - the Luxembourg law of 12 July 2013 on alternative investment fund managers, as amended (AIFM Law);
  - the Luxembourg law of 23 July 2016 on reserved alternative investment funds, as amended (RAIF Law).
- furthermore, the draft law enables AIFMs to directly appoint tied agents for distribution purposes;
  - the draft law includes the possibility for an UCI Part II fund - SICAV to adopt any corporate legal form (currently being restricted to the corporate legal form of a public limited liability company (*société anonyme*) only);
  - the draft law intends to provide for the non-judicial liquidation regime (applicable as per the UCI Law) to also apply to management companies and fund managers.
  - finally, the draft law provides for an exemption of the subscription tax for ELTIFs adopting the form of a Part II UCI, SIF or RAIF.

In terms of latest developments, the *Conseil d'Etat* issued a broadly aligned opinion on 20 June 2023. The Finance and Budget Committee issued an equally aligned report on 30 June 2023. The bill of law has now been added to the agenda for the Chamber of Deputies public session n°62 to be held on 11 July 2023.

Among others,

- the draft law modifies the definition of "well-informed investor", included in the SICAR Law, the SIF Law and the RAIF Law, by lowering the minimum investment threshold from EUR 125,000 to EUR 100,000 and thereby aligning to the European standard;
- the draft law also extends the duration within which Part II UCIs, RAIFs, SICARs and SIFs should meet their minimum capital requirement threshold;

<sup>38</sup> <https://www.chd.lu/fr/dossier/8183>

## **CSSF PUBLISHES COMMUNIQUÉ ON LIABILITY DRIVEN INVESTMENT FUNDS**

**3 April 2023<sup>39</sup>**

On 3 April 2023, the CSSF published a communiqué on liability driven investment funds (LDI Funds) in light of the volatility in yields associated with UK Gilts back in September 2022 and its associated impact on LDI Funds. The CSSF informed the market of its ongoing work on improving the resilience of LDI Funds denominated in GBP, including in close cooperation with other relevant UK and EU authorities. The CSSF asked investment fund managers managing LDI Funds denominated in GBP to maintain the Yield Buffer in the region of 300-400 basis points as build up following the September 2022 episode. The CSSF also expects from alternative investment fund managers of LDI Funds denominated in other currencies to maintain a sufficient level of resilience enabling them to absorb severe but plausible market shocks.

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<sup>39</sup> <https://www.cssf.lu/en/2023/04/cssf-communication-on-liability-driven-investment-funds/>

## **CSSF UPDATES ITS FAQ ON VIRTUAL ASSETS**

**6 April 2023<sup>40</sup>**

On 6 April 2023, the CSSF has published an update of its FAQ on virtual assets for collective investment's undertakings. The 6 April 2023 update to the FAQs clarifies, among others, that:

- An AIF may invest in virtual assets as defined by the AML/CTF law provided that such AIF is restricted to professional investors and under the condition that such investment does not prevent the AIF of compliance with existing regulatory requirements. The Luxembourg-authorized AIFM managing such AIF must obtain an authorization extension from the CSSF for this new investment strategy. The CSSF also draws attention to the integration phase of virtual assets in the investment policy and reiterates the importance of having adequate internal control functions with their key role in the approval of new products/investment strategies.
- A Luxembourg-based AIFM does not need to request the "Other-Other Fund-Virtual assets" license when managing an AIF investing in virtual assets through one or several target funds. When the AIF invests more than 20% of its NAV in one or several target funds, such AIFM's authorization shall cover the "Fund of Funds" strategy.

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<sup>40</sup> <https://www.cssf.lu/en/Document/faq-virtual-assets-ucis/>

## **SUSTAINABLE FINANCE: CSSF SETS OUT SUPERVISORY PRIORITIES**

6 April 2023<sup>41</sup>

The CSSF published its supervisory priorities for sustainable finance.

Supervisory priorities for investment fund managers (IFMs) include the continued verification of:

- compliance with SFDR requirements regarding the integration of sustainability risks in the activities of IFMs, including their organisational and governance arrangements and related website disclosures;
- compliance with SFDR, SFDR RTS and the Taxonomy Regulation regarding the provision of sustainability-related information in pre-contractual and periodic documentation of financial products;
- the consistency of sustainability-related disclosures in fund documentation and marketing material;
- the compliance by IFMs with product related website disclosure; and portfolio holdings, so that they reflect the name, the investment objective, the strategy, and the characteristics displayed in the documentation to investors.

The CSSF has indicated that it will continue to provide clarifications to the investment fund industry through Q&As or similar guidance.

The CSSF's supervisory priorities for investment firms include:

- establishing a self-assessment questionnaire to be addressed to all investment firms, as part of the contemplated reform of the long-form report, including in particular, to assess compliance with SFDR disclosure obligations for investment firms providing investment advice and portfolio management;
- the implementation of a gradual approach to the supervision of ESG risks for investment firms, prioritising the recognition of ESG risks in

investment firms' strategies and governance arrangements. The CSSF has also announced a related update of Circular CSSF 20/758 in due course; and

- understanding where the industry stands in the practical implementation of the MiFID rules related to sustainability, including through on-site inspections and other actions.

<sup>41</sup> <https://www.cssf.lu/fr/2023/04/priorites-de-supervision-de-la-cssf-en-matiere-de-finance-durable/>

## **CSSF ISSUES COMMUNIQUÉ ON PUBLICATIONS RELATED TO THE SFDR AND THE TAXONOMY REGULATION**

20 April 2023<sup>42</sup>

On 20 April 2023, the CSSF published a dedicated communiqué specifically flagging the following publications made by the European Supervisory Authorities (ESAs) in relation to Regulation (EU) 2019/2088 (SFDR), Commission Delegated Regulation (EU) 2022/1288 (SFDR RTS) and Regulation (EU) 2020/852 (EU Taxonomy Regulation).

1. The third set of Q&As of the European Commission on the interpretation of SFDR dated on 14 April 2023 and corresponding amendments to the first and second set of Q&As of the European Commission dated on, respectively, July 2021 and May 2022.
2. The Delegated Acts relating to the EU Taxonomy Regulation dated on 5 April 2023.
3. The consultation paper on a proposed review of the SFDR RTS relating principal adverse impacts (PAI) and financial product disclosures dated on 12 April 2023 and for which comments can be submitted until 4 July 2023.

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<sup>42</sup> <https://www.cssf.lu/en/2023/04/publications-related-to-regulation-eu-2019-2088-sfdr-and-regulation-eu-2020-852-the-eu-taxonomy-regulation-2/>

## **CSSF ISSUES COMMUNIQUÉ ON LAUNCH OF ESMA COMMON SUPERVISORY ACTION ON APPLICATION OF MIFID2 RULES ON DISCLOSURE IN MARKETING COMMUNICATIONS AND ADVERTISEMENTS**

31 May 2023<sup>43</sup>

The aim of the common supervisory action (CSA) is to understand and assess how investment firms as well as credit institutions have implemented the requirements of MiFID2 and of the MiFID2 Delegated Regulation in the field of marketing communications and advertisements. The CSA is also seen by regulators as an opportunity to collect information about possible 'greenwashing practices' observed in marketing communications and advertisements. In this context, the communiqué notes that the CSSF will contact a sample of supervised entities and ask them to complete a dedicated questionnaire. All concerned entities have been or will shortly be contacted by the CSSF.

<sup>43</sup> <https://www.cssf.lu/en/2023/05/launch-of-the-esma-common-supervisory-action-on-the-application-of-mifid-ii-disclosure-rules->

[with-regard-to-marketing-communications-and-advertisements-of-financial-products/](https://www.cssf.lu/en/2023/05/launch-of-the-esma-common-supervisory-action-on-the-application-of-mifid-ii-disclosure-rules-with-regard-to-marketing-communications-and-advertisements-of-financial-products/)



## LUXEMBOURG IMPLEMENTS NATIONAL SCREENING MECHANISM FOR FOREIGN DIRECT INVESTMENTS

13 June 2023<sup>44</sup>

On 13 June 2023, the Luxembourg Parliament adopted bill number 7885 establishing a national screening mechanism for foreign direct investments in order to protect national security and public order. The bill implements Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019, establishing a framework for the screening of foreign direct investments into the Union (the "**Bill**").

The purpose of the Bill is to implement a national screening mechanism for foreign direct investments ("**FDIs**").

In a nutshell, a FDI falls under the scope of the filtering mechanism when a foreign investor (i.e., any individual or legal entity residing in a non-European Economic Area member state) gains control over a Luxembourg legal entity through an investment in one of the listed critical activities enumerated in the Bill (including certain activities in the infrastructure, defence, transportation, aerospace, healthcare and communication sectors), noting that the Bill provides for an exclusion of portfolio investments from its scope.

If a FDI is made in a covered activity, the foreign investor may pursuant to the Bill, become subject to notification requirements and screening procedures.

Non-compliance with the notification requirement and/or screening procedure may result in administrative measures and penalties.

It is expected that the Bill will enter into force on 1 August 2023.

<sup>44</sup> <https://www.chd.lu/en/dossier/7885>

<https://www.cliffordchance.com/briefings/2023/06/luxembourg-implements-national-screening-mechanism-for-foreign-d.html>

## **EMPLOYMENT**

### **NEW LEGAL FRAMEWORK FOR MORAL HARASSMENT AT WORK**

**Law of 29 March 2023 amending the Labour Code to insert a provision on protection against moral harassment in employment relationships<sup>45</sup>**

A new law on moral harassment in employment relationships entered into force on 9 April 2023 (the "**Moral Harassment Law**").

The key elements of the Moral Harassment Law to be noted are the following ones:

- it prohibits any acts of moral harassment, defined as *"any conduct which, by its repetition or systematic nature, undermines the dignity or psychological or physical integrity of a person"*, in the framework of employment relationships (including business travel, training and work-related communications by any means), within and outside normal working hours;
- this prohibition expressly applies to employers, employees (including, as specified by the Moral Harassment Law, pupils and students employed during school holiday), clients and suppliers.

In addition, the Moral Harassment Law imposes specific obligations on employers, including the following ones:

- ensuring that any moral harassment of which they are aware ceases immediately;
- putting in place measures to protect employees from moral harassment, after information and consultation of the staff delegation (or all employees where there is no staff delegation). These measures must be adapted to the activities and size of the company and must at least cover the following:
  - the definition of the means available to victims of moral harassment (assistance and support, return to work, etc.) as well as

information on how to contact the staff delegation,

- the rapid and impartial investigation of acts of moral harassment in the workplace,
- making employees and managers aware of the definition of moral harassment, the ways in which it can be managed within the company and the sanctions against the perpetrators,
- informing the staff delegation or all staff (where there is no delegation) of the employer's obligations to prevent acts of moral harassment in the workplace,
- informing and training employees;
- in the event of moral harassment, carrying out an internal assessment of the effectiveness of the preventive measures and the possible implementation of new preventive measures;
- refraining from any reprisals against an employee who has protested, refused, denounced or testified to acts of moral harassment.

The Moral Harassment Law provides that if the employer fails to end moral harassment, the employee concerned may file a complaint directly with the Labour Inspectorate, which will investigate and may order the employer to take appropriate actions.

Employers are recommended to implement or review their harassment policy, as well as to adapt their actions against moral harassment, to comply with the new statutory provisions.

<sup>45</sup> <https://legilux.public.lu/eli/etat/leg/loi/2023/03/29/a187/jo>

<https://www.cliffordchance.com/briefings/2023/03/new-law-on-moral-harassment-at-work.html>

## WAGE INDEXATION

### 1 April 2023<sup>46</sup>

The consumer index price - on which wages are indexed - increased on 1 April 2023 from 898.93 to 921.40 points, resulting in a mandatory increase in wages of 2.5% with effect as from 1 April 2023.

This increase in wage indexation was to have been triggered in June 2022, but was postponed until April 2023 by an agreement of the Government, the UEL, and the LCGB and CGFP, which was transposed into a law of 29 June 2022.

Depending on the evolution of the national economic situation, one or more further increases in the consumer index price (and hence in wages) could occur in 2023.

<sup>46</sup>

<https://mss.gouvernement.lu/fr/actualites.gouvernement%2Bfr%2B03-mars%2B29-parametres-sociaux.html>

[Bactualites%2Btoutes actualites%2Bcommuniques%2B2023%2B03-mars%2B29-parametres-sociaux.html](https://mss.gouvernement.lu/fr/actualites.gouvernement%2Bfr%2B03-mars%2B29-parametres-sociaux.html)

## NEW LAW ON THE PROTECTION OF WHISTLEBLOWERS

**Law of 16 May 2023 transposing the Directive (EU) 2019/1937 of 23 October 2019 on the protection of persons who report breaches of Union law.<sup>47</sup>**

A new law entered into force on 21 May 2023, transposing the Directive (EU) 2019/1937 of 23 October 2019 on the protection of persons who report breaches of Union law (the "**Whistleblowing Law**").

The Whistleblowing Law enables workers (e.g., employees, former employees, applicants, interns, directors, etc.) to report "breaches" under specific forms, procedures and conditions, without fear of retaliation.

The "breaches" are defined by the Whistleblowing Law as "*acts or omissions that are:*

- (a) *unlawful or*
- (b) *contrary to the object or purpose of directly applicable provisions of national or European law."*

The reported information may relate to actual or potential breaches (including reasonable suspicions) but must have been obtained in a professional context.

To enable the report of breaches, entities employing at least 50 workers (during 12 consecutive months), must establish internal reporting channels and procedures (companies with a lesser number of workers may be required to implement reporting channels and procedures in accordance with other laws, e.g. sectorial legislation, which continue to apply).

These internal reporting and follow-up procedures are subject to specific form and content conditions, as provided for by the Whistleblowing Law, which extends the time limit for entities employing between 50 and 249 workers to implement these procedures until 17 December 2023.

Reports can also be made directly to certain competent authorities, including the Labour Inspectorate and the CSSF (prior internal reporting is encourage not

mandatory), or by public disclosure (but specific conditions must be complied with to trigger the protection).

Any form of retaliation against persons having reported breaches in accordance with the Law is void.

<sup>47</sup> <https://legilux.public.lu/eli/etat/leg/loi/2023/05/16/a232/jo>

## NEW OBLIGATIONS TO ENSURE THE EMPLOYEES' RIGHT TO DISCONNECT

**Law of 28 June 2023 amending the Labour Code to introduce a provision relating to employees' right to disconnect** <sup>48</sup>

The law amending the Labour Code to introduce a provision relating to employees' right to disconnect (the **"Disconnection Law"**) entered into force on 4 July 2023.

The Disconnection Law aims at improving employees' work life balance by enshrining in the Labour Code the protection of their right to disconnect outside their normal working time from digital devices used for work (smartphones, laptop, etc).

Although the existing statutory provisions already regulate and limit the performance of work outside normal working hours, the Disconnection Law intends to ensure that employees' right to disconnect is respected by imposing specific obligations on employers.

More specifically, the Disconnection Law provides that all companies whose employees use digital devices for work are required to implement specific arrangements, adapted to the specific situation of the company or of the sector, to respect the right of employees to disconnect outside working hours.

These arrangements must ensure that the statutory and contractual rules on working hours are complied with, and cover, where appropriate: the practical and technical measures for disconnection from digital devices, the raising of the employees' awareness and training measures, and the terms for compensation in case of exceptional derogation to the right to disconnect.

The concrete measures to be implemented must be defined in the applicable collective agreement, if any, or at the company's level (with the involvement of the staff delegation, if any). In practice, examples of arrangements to ensure the employees' right to disconnect could include, if adapted to the company: the implementation of policies regulating the use of digital devices for work outside working hours, the organisation of training sessions, the

use of technology to restrict the access to the IT system outside working hours, etc.

For more details check out our client briefing [here](#).

<sup>48</sup> <https://legilux.public.lu/eli/etat/leg/loi/2023/06/28/a344/jo>

## UPDATES ON TELEWORK: INCREASE IN THE SOCIAL SECURITY THRESHOLD AND GERMAN TAX THRESHOLD

**Effective on 1 July 2023<sup>49</sup> (social security) and in 2024 (German tax threshold)<sup>50</sup>**

The EU member states have drawn up a new social security framework agreement according to which an employee who carries out cross-border telework from their EU country of residence may remain subject to the social security legislation and affiliation of the EU country in which the employer has its statutory seat, provided that this cross-border telework represents less than 50 % of the employee's total working time.

This framework agreement enables hence employees to telework beyond the threshold which is provided for by the EU social security regulations of 25% of their total working time spent, or remuneration earned, in their country of residence without impact on their affiliation.

However, the two following conditions must be met to benefit from the framework agreement:

- The countries of residence of the employee and the country where the employer has its statutory seat must have signed the framework agreement. Luxembourg, Belgium, Germany and France have signed it.
- A request to benefit from the framework agreement must be filed with the social security administration of the country where the employer has its statutory seat. In principle, requests must be made for the future but certain exceptions are provided for by the framework agreement.

The framework agreement will apply from 1 July 2023 in the countries which will have signed it.

Employers wishing to benefit from this increase of the social security threshold should check if their telework arrangements are adapted (e.g. that they do not limit telework to the 25% threshold).

Also, the practice of telework or its increase may have legal and tax impacts on the company and/or the employees concerned, which need to be assessed.

In addition, on 6 July 2023, the Luxembourg and German authorities concluded a tax agreement which notably provides for the increase of the tax tolerance threshold applicable on the number of days a German resident can work in Germany without impact on the competent country of taxation. This threshold will increase in 2024 from 19 days to 34 days.

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[https://mss.gouvernement.lu/fr/actualites.gouvernement%2Bfr%2Bactualites%2Btoutes\\_actualites%2Bcommuniqu%C3%A9s%2B2023%2B06-juin%2B06-haagen-accord-teletravail-frontaliers.html](https://mss.gouvernement.lu/fr/actualites.gouvernement%2Bfr%2Bactualites%2Btoutes_actualites%2Bcommuniqu%C3%A9s%2B2023%2B06-juin%2B06-haagen-accord-teletravail-frontaliers.html)

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[https://mfin.gouvernement.lu/fr/actualites.gouvernement%2Bde%2Bactualites%2Btoutes\\_actualites%2Bcommuniqu%C3%A9s%2B2023%2B07-juillet%2B06-steuerliche-vereinfachungen-deutschland-luxemburg.html](https://mfin.gouvernement.lu/fr/actualites.gouvernement%2Bde%2Bactualites%2Btoutes_actualites%2Bcommuniqu%C3%A9s%2B2023%2B07-juillet%2B06-steuerliche-vereinfachungen-deutschland-luxemburg.html)

## CORPORATE

### LUXEMBOURG TRANSPOSES THE DIGITALISATION DIRECTIVE

15 June 2023

On 15 June 2023, the Luxembourg Parliament adopted the bill n°7968 aiming to transpose the Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 (the "**Directive**") amending Directive (EU) 2017/1132 on the use of digital tools and processes in company law and to implement the digitalisation of the notarial profession (the "**Bill**").

The Bill creates a legal basis for authentic instruments to be drawn up in electronic format.

It establishes the electronic notarial exchange platform, enabling notaries to draw up authentic instruments in electronic format, collect electronic signatures, obtain data from the parties and transmit data to public bodies and authorities.

The Bill also introduces the possibility to incorporate SA, SCA, SARL and to establish branches online without any physical presence. The online incorporation of companies will also be possible using standard articles of association made available free of charge by the Chamber of Notaries.

It is foreseen that the law implementing the Bill will come into force on the first day of the month following the publication of the law, except for the rules on the RCS filing and signature, which should be effective as of 1 August 2023.

For more details check out our client briefing [here](#).

## LITIGATION

### LIMITATION PERIOD FOR THE ACTION IN WARRANTY FILED BY THE PRIME CONTRACTOR IN CASE OF SUB-CONTRACTING

25 May 2023<sup>51</sup>

Called upon to rule in the context of a dispute on a defect affecting different rooms of a flat acquired by a couple via a sale before completion, the court of appeal issued an interesting judgment from a procedural point of view.

*Firstly*, the court of appeal ruled that the first instance judges rightly decided that if the limitation period of ordinary law for action in commercial matters, which is of ten years pursuant to article 189 of the Luxembourg Commercial Code, starts running as a general rule from the date of appearance of the default, the same limitation period for the action in warranty in case of sub-contracting only starts running as from the date on which the prime contractor was summoned to appear before court.

This is justified - on the basis of a French Court of Cassation's judgment - by the fact that the prime contractor is prevented from being able to file an action in warranty against its sub-contractors as long as the prime contractor is not itself summoned to appear before court for the purpose of payment or performance in kind (French Court of Cassation, Third Chamber, 14 December 2022, nr. 21-21-305).

*Secondly*, the court of appeal ruled that a decision of justice based solely on a judicial expertise ordered in a proceedings to which the unsuccessful party was not a party and who disputes the enforceability of the expertise, infringes the principle of contradiction set under article 65 of the New Code of civil procedure (Court of Cassation, 8 December 2005, n°63/05, nr. 2226 of the docket, Pas.33, p. 143).

The court of appeal recalled that a non-adversarial expert report can serve as evidence under article 64 of the New Code of civil procedure. As long as a non-adversarial

expert report is duly produced in the proceedings and subject to the discussion of the parties, it has to be taken into account as evidence and cannot be set aside on the grounds of its unilateral character.

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[https://anon.public.lu/D%C3%A9cisions%20anonymis%C3](https://anon.public.lu/D%C3%A9cisions%20anonymis%C3%A9es/CSJ/03_Chambre/2023/20230525_CA3_CAL-2022-00295_pseudonymis%C3%A9-accessible.pdf)

[%A9es/CSJ/03\\_Chambre/2023/20230525\\_CA3\\_CAL-2022-00295\\_pseudonymis%C3%A9-accessible.pdf](https://anon.public.lu/D%C3%A9cisions%20anonymis%C3%A9es/CSJ/03_Chambre/2023/20230525_CA3_CAL-2022-00295_pseudonymis%C3%A9-accessible.pdf)



## DATA PROTECTION

### DATA PROTECTION AUTHORITY PUBLISHES DECISIONS FOLLOWING INVESTIGATIONS ON THE THEME OF TRANSPARENCY

13 December 2022<sup>52</sup>

The CNPD recently published 6 decisions dated 13 December 2022 (No 19 to 24) which follows on from the thematic investigation on the GDPR principle of transparency (already announced in the CNPD's annual report of 2020 and 2021) and concern 6 companies managing websites, web portals and/or smartphone apps. Strict interpretation is made of the A29WP/EDPB's guidelines on transparency (WP260 rev.01) and notable highlights in relation to the drafting of privacy notices are that: (1) summaries of privacy notices (and updates thereof) must be made available if the reading time exceeds 5 minutes; (2) privacy notices need be translated in all the languages in which a website/service is made available to users; and (3) no reference should be made to inexistant or outdated processing activities. The decisions resulted in low fines - ranging from EUR 700 to 3,000 - plus corrective measures.

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<sup>52</sup> <https://cnpd.public.lu/fr/decisions-sanctions.html>

## **ADMINISTRATIVE TRIBUNAL VOIDS REFUSAL OF THE STATE TO PROVIDE PERSONAL DATA IN PROCEEDINGS ON GDPR GROUNDS**

**18 April 2023<sup>53</sup>**

On 18 April 2023, the Administrative Tribunal annulled a decision of the Luxembourg State refusing to disclose personal data about passengers to an Irish airline. The airline was ordered by the State to compensate consumers in relation to delayed or cancelled flights on the basis of European regulation 261/2004. In view of opposing such order, the airline has requested the State the contact details of the relevant consumers in order to bring consumers in proceedings against the State. The Minister in charge for the protection of consumers refused to disclose the information requested by the airline, citing that consumers' consent would be required pursuant to the GDPR. The Administrative Tribunal found such explanation insufficient and criticized the State's passive attitude in not providing further explanations as to the requirement for consent, the reasons why such consent was not collected, etc.

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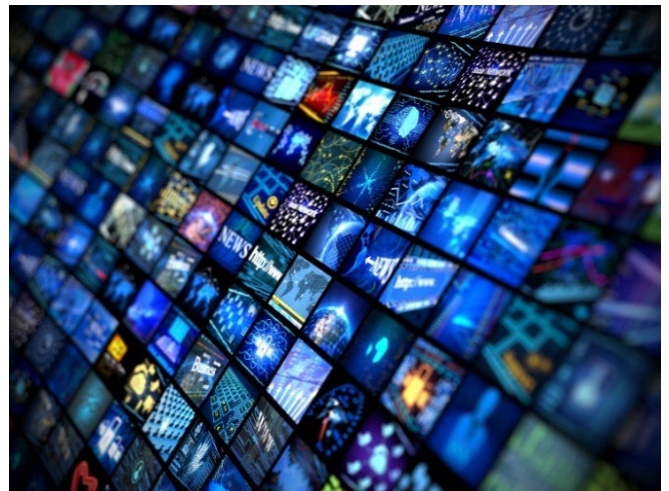
<sup>53</sup> <https://ja.public.lu/45001-50000/46014.pdf>

## **ADMINISTRATIVE TRIBUNAL REJECTS TWICE NGO'S REQUEST FOR THE CNPD TO INVESTIGATE US-BASED CONTROLLERS**

21 April 2023<sup>54</sup>

On 21 April 2023, the Administrative Tribunal rejected the request in reformation of the decision of the CNPD not to investigate a complaint brought by an Austrian non-profit association. The data subject has had multiple exchanges with the CNPD alleging that a US-based controller with no representative in the EU processed personal data in breach of the GDPR. The CNPD refused to further investigate the matter on the grounds that (i) the controller is based in the US with no representative in the EU, (ii) the CNPD has full discretion in deciding whether to investigate, and (iii) that the personal data of the data subject had been deleted by the controller. The Administrative Tribunal upheld the CNPD's decision, finding that while a data subject may claim damages for the harm they suffered, they are not entitled (lack of legal standing) to request that a controller be sanctioned by the regulator.

On the same day, the Administrative Tribunal rendered another similar decision originating from a complaint from a data subject to the CNPD concerning a US-based controller with no EU representative that did not answer their requests for additional information and access to their personal data. The CNPD responded that, besides reaching out to the US-based controller and hoping for their cooperation, it has no means to further investigate the matter. The Administrative Tribunal here found the request inadmissible based on the lack of an interest by the data subject to see a controller sanctioned for not having designated a representative in the EU (art. 27 GDPR).



<sup>54</sup> <https://ja.public.lu/45001-50000/45716.pdf>;  
<https://ja.public.lu/45001-50000/45716.pdf>

## IP/IT

### SUPREME COURT REITERATES IMPORTANCE OF EVIDENCE IN COPYRIGHT MATTERS

12 January 2023<sup>55</sup>

By judgement dated 12 January 2023, the Luxembourg Supreme Court annulled a decision of the Luxembourg Court of Appeal which failed to apply the burden of proof of the defendant. The case features two alleged assignments of the same piece of software: on one hand a Luxembourg labour union claimed assignment of the software from a now liquidated software development company in the framework of a bespoke software development agreement, and on the other hand, a third party company also claimed assignment of the software from the same software development company. The third party company has initiated proceedings in view of obtaining alleged unpaid royalties from the labour union.

In the first instance and on appeal, the claims of the third party company were held as unfounded based on the failure of the third party company to evidence its assignment of the software, including in light of the labour union's assignment, even if the underlying assignment agreement of the labour union was not submitted as evidence.

In addition to the default rule that a party making an allegation has the burden of proof thereof, the Luxembourg law of 18 April 2011 on copyright provides that the scope of an assignment or transfer of copyright is interpreted in favour of the author (or original rightsholder).

The Luxembourg Supreme Court upheld the criticism of the third party company that the court of appeal should have the underlying assignment agreement as evidence of the labour union's assignment of the software. The mere fact that a copy of the software is installed in the labour union's IT systems was not considered as sufficient in this regard.

By reference to the copyright judgement presented in the [March 2023 Legal Update](#), special attention should be brought to the preparation and safeguarding of evidence regarding the ownership and assignments of copyright and other intellectual property rights.

<sup>55</sup>

[https://anon.public.lu/D%C3%A9cisions%20anonymis%C3%A9es/Cour%20de%20Cassation/Cour%20de%20Cassation/2023/20230112\\_CAS-2022-00031\\_2\\_pseudonymis%C3%A9-accessible.pdf](https://anon.public.lu/D%C3%A9cisions%20anonymis%C3%A9es/Cour%20de%20Cassation/Cour%20de%20Cassation/2023/20230112_CAS-2022-00031_2_pseudonymis%C3%A9-accessible.pdf)

[230112\\_CAS-2022-00031\\_2\\_pseudonymis%C3%A9-accessible.pdf](https://anon.public.lu/D%C3%A9cisions%20anonymis%C3%A9es/Cour%20de%20Cassation/Cour%20de%20Cassation/2023/20230112_CAS-2022-00031_2_pseudonymis%C3%A9-accessible.pdf)

## REAL ESTATE

### **RULING N°47204C RENDERED ON 26 JANUARY 2023 BY THE ADMINISTRATIVE COURT ON THE OPERATING PERMITS (THE SO-CALLED "COMMODO-IN COMMODO" PERMITS)**

26 January 2023<sup>56</sup>

The Administrative Court of Luxembourg recently handed down an important decision concerning the operating permits on classified establishments, clarifying their actual nature and the strict conditions that must be met.

In this case, the operating permit at stake was issued to an entity in the process of formation seeking to establish its business on a site belonging owned by a third party.

The Administrative Tribunal confirmed an existing case law pursuant to which the operating permits issued under the law of 10 June 1999 have a right *in rem* character, insofar as they are attached to the property to which they relate and not to the person to whom they are granted.

The Administrative Court confirmed in appeal the judgement rendered by the Administrative Tribunal and ruled that operating permits do not depend on the specific characteristics of an operator but take account of the development and operating conditions imposed on the operator and his successors.

The Administrative Court also clarified the following elements:

- Operating permits are linked to the land on which the establishment is built. Thus, the applicant must demonstrate at least the potential to hold a right *in rem* over this land, thus ensuring the viability of the intended project.
- The authorisation granted is considered abstract, theoretical, and unrealistic if it ignores major obstacles, such as the categorical refusal of the landowner.
- Consequently, it is the responsibility of the administration and ministerial departments to ensure, when the application is submitted and throughout the examination of the application, that right *in rem* condition is met to allow the project to be carried out on the specified land. The competent minister must also verify this essential condition before granting the operating permit. If the Minister fails to do so, he commits a factual error that nullifies the authorisation from the outset.
- In addition, the ruling highlights that a new application for authorisation is only required if substantial changes are made to the establishment that could have significant negative consequences. The court considers that the change of operator does not directly affect by itself the establishment and therefore does not require a new application for authorisation.

<sup>56</sup> <https://ja.public.lu/45001-50000/47204C.pdf>

## **TAX**

### **LUXEMBOURG BILL ON SIMPLIFICATION AND MODERNIZATION OF CERTAIN TAX MATTERS**

28 March 2023<sup>57</sup>

On 28 March 2023, the Luxembourg Government presented the bill n°8186 related to the simplification and modernization of certain tax matters, which contains a set of amendments to the General Tax Law of 22 May 1931 as amended (*Abgabenordnung*) and new procedural aspects applicable to taxpayers.

The main changes are related among others to:

- the introduction of a new procedure for bilateral and multilateral advance pricing agreements;
- the transfer pricing documentation to be provided, upon request, to the Luxembourg tax administration;
- the mutual agreement procedure regarding tax assessments;
- the alignment of the procedure to claim before the Director of the Luxembourg tax administration (e.g., to challenge a tax assessment) with the one before the Administrative Tribunal;
- the set-up of a 12-month deadline to claim before the Administrative Tribunal after the implicit negative answer of the Director of the Luxembourg tax administration (i.e., 6 months silence of the Director after the filing of the claim);
- the bookkeeping obligations;
- the possibility to pay the tax debt in several instalments, under certain conditions.

Further details notably with respect to the new procedure for bilateral and multilateral advance pricing agreements and transfer pricing documentation will be provided through a Grand Ducal decree.

The bill still needs to go through the legislative process and the changes will be applicable once the law is published in the Memorial (*Journal Officiel*).

<sup>57</sup> <https://www.chd.lu/fr/dossier/8186>

## **ECJ DECIDES ON WHETHER EXEMPTION OF DOMESTIC SPECIALIZED PROPERTY FUNDS WITH FOREIGN INVESTORS IS COMPATIBLE WITH EU LAW**

27 April 2023<sup>58</sup>

On 27 April 2023, the Court of Justice of the European Union ("ECJ") gave its decision in *L Fund v. Finanzamt D* (Case C-537/20) regarding the compatibility of German tax law with the EU law about the taxation of specialized property funds.

In this case, the applicant was a real estate investment fund (set up as a specialized investment fund) under Luxembourg law and was not subject to corporate income tax in Luxembourg. However, it received income from rental and sale of real estate in Germany.

The German tax authorities issued tax notices for this income in accordance with German tax law, as the applicant was a foreign fund and therefore subject to partial taxation in Germany. This would not have been the case if the fund had been German (as German resident specialized property funds are exempt from that tax).

Ultimately, the *Bundesfinanzhof* referred a question to the ECJ for a preliminary ruling, opposing German legislation (and the difference in taxation depending whether the fund is a foreign or a national fund) with article 63 of the Treaty on the Functioning of the EU ("TFEU"), which protects the free movement of capital across the EU Member States.

To this question, the CJEU replied that article 63 TFEU precludes a Member State from making non-resident specialized real estate investment funds partially liable to corporation tax on the real estate income they receive in that territory, while resident specialized real estate investment funds are exempt from that tax.

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<https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-537/20>

## **THE ADMINISTRATIVE TRIBUNAL OF LUXEMBOURG RECOGNISES AN ABUSE OF RIGHT IN CASE OF SALE OF SHARES AFTER REPAYMENT OF AN EQUITY LOAN**

15 May 2023<sup>59</sup>

On 15 May 2023, the Administrative Tribunal of Luxembourg ruled on a case concerning the repayment of an equity loan through the sale of shares by a subsidiary to its parent company, followed by the same sale by the parent company to a third company (case no 46042).

In this respect, the Administrative Tribunal first recalled that equity loans are hybrid instruments when the subsidiary is located outside Luxembourg. Indeed, the payments made under the loan are tax deductible in the subsidiary's jurisdiction (i.e., Belgium), whereas they are considered as distributions of profits in Luxembourg. Therefore, by application of article 166 (2bis) of the Luxembourg income tax law ("**LITL**"), income from equity loan cannot be exempted.

In the present case, an equity loan had been set up between a parent company and its subsidiary. The subsidiary also held claims against another company. In order to repay the loan, the subsidiary transferred these receivables to its parent company. On the same day, the parent company sold these receivables to a third company.

The tax authorities qualified the difference between the nominal value and the market value of the receivables as a capital gain realised by the parent company and argued that an abuse of right had been committed.

However, the parent company argued that this was not a capital gain but a hidden distribution of profits benefiting from the exemption provided for in article 166 LITL.

The Administrative Tribunal ruled in favour of the tax authorities, confirming the classification of the income as capital gain and, therefore, the existence of an abuse of right.

<sup>59</sup> <https://ja.public.lu/45001-50000/46042.pdf>



## NEW OBLIGATIONS FOR REPORTING FINANCIAL INSTITUTIONS

16 May 2023<sup>60</sup>

On 16 May 2023, the Council Directive (EU) 2021/514 of 22 May 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation ("**DAC 7**") was implemented in Luxembourg through the Luxembourg law on the automatic and mandatory exchange of information ("**DAC 7 Law**").

DAC 7 Law introduces diverse obligations for platform operators – i.e., an entity that contracts with sellers to make available all or part of a platform to such sellers – which must carry out specific due diligence procedures and report some information to tax authorities.

DAC 7 Law also impacts the entities qualifying as reporting financial institutions ("**RFIs**") under the common reporting standard ("**CRS**"). Effective as from June 1, 2023, Luxembourg-based RFIs have the obligation to inform individuals that their information will be collected and transferred in accordance with DAC 7 Law. They must also provide all the relevant information they shall receive to individuals, allowing them to exercise their data protection rights.

Although DAC 7 Law provides for administrative fines for failure to comply with some provisions of the law, it does not explicitly address the consequences of non-compliance with the provision of information to individuals under the CRS. Clarification would be welcome as to whether the right to review the information beforehand is to be considered as part of the right to inform under the General Data Protection Regulation (EU) 2016/679 ("**GDPR**") and, as such, whether failure to comply herewith would trigger the sanction regime under the GDPR (and possibly the two fines up to EUR 20 million or 4% of the organisation's total worldwide annual turnover).

Eventually, DAC 7 Law extends the mandatory exchange of information on Luxembourg real estate owned by

individuals or entities that are resident in another EU Member State.

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[https://www.stradalex.lu/fr/slu\\_src\\_publ\\_leg\\_mema/toc/leg\\_lu\\_m\\_ema\\_202305\\_237/doc/mema\\_etat-leg-loi-2023-05-16-a237-jo](https://www.stradalex.lu/fr/slu_src_publ_leg_mema/toc/leg_lu_m_ema_202305_237/doc/mema_etat-leg-loi-2023-05-16-a237-jo)

## REVERSE HYBRID RULE: GUIDANCE ISSUED BY THE LUXEMBOURG TAX ADMINISTRATION

9 June 2023<sup>61</sup>

On 9 June 2023, the Luxembourg tax administration issued a circular L.I.R n° 168 quater/1 (the "**Circular**") providing some guidance on the application of the reverse hybrid rule, in particular on the computation of the taxable result of a reverse hybrid entity and the tax due by such taxpayer.

The reverse hybrid rule was introduced by the law of 19 December 2019 transposing the Council Directive (EU) 2017/952 of 29 May 2017 amending Directive EU72016/1164 ("**ATAD 2**") into Luxembourg law and resulting in the insertion of an article 168 quater in the Luxembourg income tax law ("**LITL**"). The reverse hybrid rule applies from the 2022 tax year (i.e., to tax years closing in 2022).

The rule sets out the conditions under which an entity is treated as transparent for tax purposes under Luxembourg tax law (e.g., *société en commandite simple* (SCS), *société en commandite spéciale* (SCSp)), but not by the country where its investor(s) is(are) resident. Such an

entity will thus be considered as a resident taxpayer and will become liable to Luxembourg corporate income tax on (a portion) of its net income (if such income is not taxed otherwise under Luxembourg domestic or any foreign tax laws).

The Circular provides some guidance with respect to (i) the tax status of a reverse hybrid entity, (ii) the method of computation of the net taxable result and the tax due, and (iii) the tax compliance obligations.

Before that, a specific form (i.e., form 205) had been established for reverse hybrid entities and now the Circular is accompanied by a FAQ on the filing of such form.

The first part of the form is related to the total net income of the entity which is subject to tax in Luxembourg. The second part of the form is related to the net income falling within the scope of article 168 quater, even if they are not subject to tax in Luxembourg by application for example of a double tax treaty.

Although these clarifications in the interpretation and application of the law are welcome, there are still grey areas that have not been addressed by the Luxembourg tax administration, notably with respect to the filing of form 205.

<sup>61</sup> <https://impotsdirects.public.lu/dam-assets/fr/legislation/legi23/lir-168quater-1-du-09062023.pdf>

## **GLOSSARY**

**"AML/CTF Law"**: Luxembourg law of 12 November 2004 on the fight against money laundering and terrorist financing, as amended

**"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 AMLD4 and amending Directives 2009/138/EC and 2013/36/EU

**"BCL"**: Banque centrale du Luxembourg, the central bank of Luxembourg"

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

**"CRD IV"**: 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 and repealing Directives 2006/48/EC and 2006/49/EC, as amended

**"CRR"**: Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, as amended

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

**"DLT"**: Distributed Ledger Technology

**"EBA"**: European Banking Authority

**"EBA"**: European Banking Authority

**"ECB"**: European Central Bank

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

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

**"ESAs"**: European Supervisory Authorities (EBA, ESMA and EIOPA)

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

**"FATF"**: Financial Action Task Force

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

**"FIU"**: Cellule de renseignement financier, the Luxembourg Financial Intelligence Unit

**"IBIPs"**: insurance-based investment products

**"IFD"**: Directive (EU) 2019/2034 of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU, as amended

**"IFR"**: Regulation (EU) 2019/2033 of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014, as amended

**"Insurance Sector Law":** Luxembourg Law of 7 December 2015 on the insurance sector, as amended

**"MiFIR":** Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, as amended

**"ML/TF":** Money Laundering and Terrorism Financing

**"PSD2":** Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, as amended

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

**"Solvency 2 Directive":** 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, as amended.

**"SRB":** Single Resolution Board

**"SRF":** Single Resolution Fund

**"SRMR":** Regulation (EU) No 806/2014 of the European Parliament and of the Council 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 a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, as amended

**"SSM":** Single Supervisory Mechanism

**"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

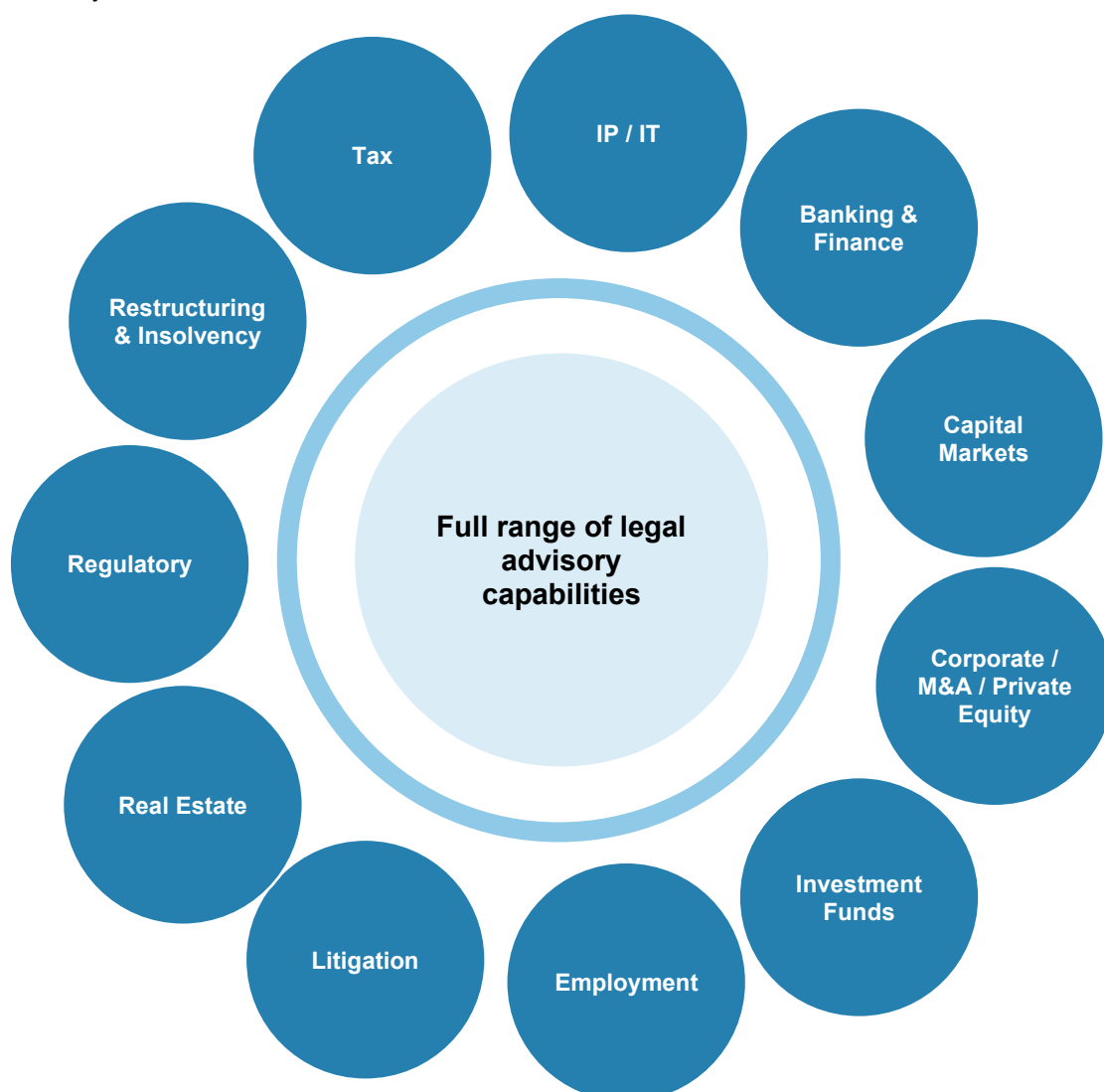
## CLIFFORD CHANCE IN LUXEMBOURG

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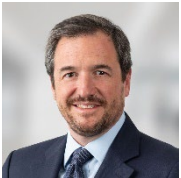
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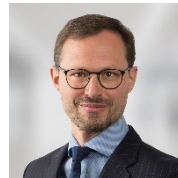
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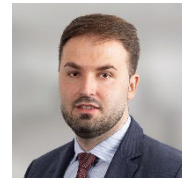
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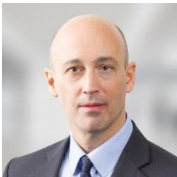


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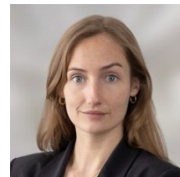
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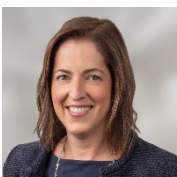
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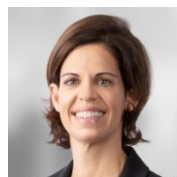
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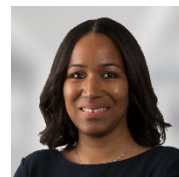
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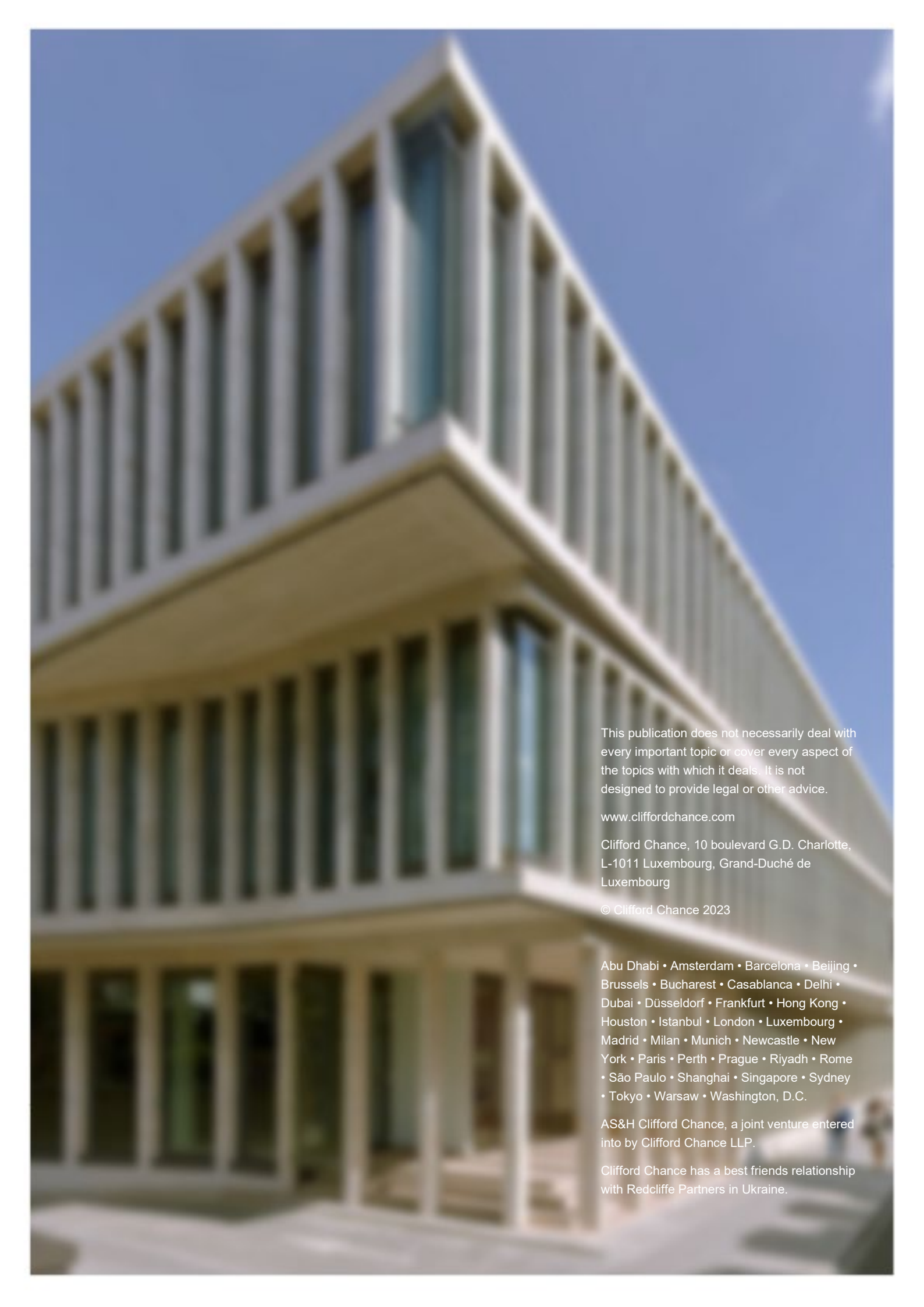


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