

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

LUXEMBOURG LEGAL UPDATE
NOVEMBER 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

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CONTENTS

Financial Institutions	4
Insurance	29
Fintech	38
ESG	45
Asset Management	54
Employment	75
Corporate	80
Litigation	84
IP/IT	88
Real Estate	93
Tax	99
Glossary	106
Clifford Chance in Luxembourg	110
Your Contacts	111



FINANCIAL INSTITUTIONS



FINANCIAL INSTITUTIONS

CSSF PRESENTATION ON THE OUTCOMES OF THE CIRCULAR 21/773 SELF-ASSESSMENT EXERCISE 2022 ON CLIMATE-RELATED AND ENVIRONMENTAL RISKS

27 June 2023¹²

On 27 June 2023, the CSSF published the slides of a presentation given by the CSSF on the outcomes of the CSSF self-assessment exercise 2022, related to Circular CSSF 21/773 on climate-related and environmental risks. The CSSF further published a video on a joint webinar organised with the ABBL on the same topic, leading through these slides.

The self-assessment exercise was based on a selected sample of 12 less significant institutions and three branches of non-EU credit institutions, representing different business models in Luxembourg, based on the principles to target the most important less significant institutions (in terms of size) and to cover all relevant business models in Luxembourg.

The purpose of the self-assessment exercise was to assess banks' compliance with the provisions of the Circular, to improve banks' and supervisors' knowledge of climate-related and environmental risks and assessment, as well as to be prepared for the introduction of climate-related and environmental risk assessment in the SREP.

The CSSF in particular highlights good practices detected in the self-assessment, and provides an overview of the forthcoming 2023-2024 self-assessment exercise and the CSSF's supervisory approach, expectations towards banks in this respect and next steps.

¹ Presentation on CSSF Circular 21/773: https://www.cssf.lu/wp-content/uploads/Closing-webinar_Circ21773_SA_200623.pdf

² Webinar: <https://www.cssf.lu/en/Document/webinar-on-the-outcomes-of-the-cssf-self-assessment-exercise-2022-related-to-circular-cssf-21-773-on-climate-related-and-environmental-risks/>

THE CSSF AND THE LUXEMBOURG FIU SIGN AN AML/CTF PUBLIC-PRIVATE PARTNERSHIP FOR SPECIALISED PFS WITH SEVERAL INDUSTRY ORGANISATIONS

29 June 2023³

On 29 June 2023, the CSSF published a press release on the signing by the CSSF, the FIU, the Association of Luxembourg Compliance Officers (ALCO), the Luxembourg Alternative Administrators Association (L3A), the Luxembourg Association of Family Offices (LAFO) and the Luxembourg Private Equity Association (LPEA) of a public-private partnership on 22 May 2023.

The goal of the partnership is to have an integrated approach in which public authorities and the representatives of specialised PFS that have signed up to the partnership pool their knowledge and skills to detect, prevent and combat money laundering and terrorist financing together. Such a public-private dialogue helps providing clarity on risks related to specialised PFS activities and defining regulatory explanations, and aims at identifying specific areas or issues where more regulatory guidance is needed.

³ Communiqué: <https://www.cssf.lu/en/2023/06/the-cssf-crf-alco-the-l3a-lafo-and-lpea-sign-an-aml-cft-public-private-partnership-for-specialised-pfs/>

CSSF COMMUNIQUÉ ON MICAR AND RECAST TRANSFER OF FUNDS REGULATION

6 July 2023⁴⁵⁶

On 6 July 2023, the CSSF published a communiqué on the publication of both the MiCAR and the recast Regulation (EU) 2023/1113 on information accompanying transfers of funds and certain crypto-assets (TFR) in the Official Journal of the European Union on 9 June 2023.

The CSSF points out that with MiCAR, the EU is adopting for the first time a harmonised regulatory framework for the crypto-asset market which applies to both traditional institutions of the financial sector and new players emerging in the crypto ecosystem that are engaged in the issuance, offer to the public and admission to trading of crypto-assets or that provide services related to crypto-assets in the EU. These institutions must meet a set of specific requirements to benefit from a regulated status recognised at the EU level, thereby permitting the passporting of these services across the EU market.

MiCAR will come into full application from 30 December 2024, except for Titles III and IV (the framework for asset-referenced tokens (ART) and e-money tokens (EMT) issuers) which will apply from 30 June 2024.

The CSSF further emphasise that with the recast TFR, the EU complements the implementation of recommendation R.15 from the FATF with regard to ML/TF risks linked to virtual assets, by extending the existing rules on information accompanying the transfers of funds to transfers of crypto-assets (the so-called "travel rule") within the entire EU. The definition of "crypto-asset" in the TFR is aligned with MiCAR and covers the same categories of crypto-assets in scope of MiCAR.

The TFR requires crypto-asset transfers carried out with the involvement of a crypto-asset service provider (CASP) having its registered office in the EU to be accompanied with information on the originators and beneficiaries of

those transfers, with the purpose of facilitating the traceability of transfers of crypto-assets and therefore the prevention, detection and investigation of ML/TF. CASPs will be required to obtain, hold and share, in a secure manner, that information with their counterpart on the other end of the crypto-asset transfer, and this in advance of, or simultaneously or concurrently with, the transfer, and make it available on request to competent authorities.

The TFR will apply from 30 December 2024.

The CSSF refers for further information on these topics to dedicated pages on the CSSF website, including with a contact email address for MiCA/MiCAR-related matters.

⁴ Communiqué: <https://www.cssf.lu/en/2023/07/regulation-on-markets-in-crypto-assets-mica-and-regulation-on-information-accompanying-transfers-of-fund-and-certain-crypto-assets/>

⁵ More information on MiCA: <https://www.cssf.lu/en/markets-in-crypto-assets-mica-micar>

⁶ More information on AML/CTF: <https://www.cssf.lu/en/anti-money-laundering-and-countering-the-financing-of-terrorism/>

CSSF REGULATION TRANSPOSING ECB GUIDELINE ON THE EXERCISE OF OPTIONS AND DISCRETIONS FOR LESS SIGNIFICANT INSTITUTIONS

12 July 2023⁷

On 12 July 2023, the CSSF issued Regulation No. 23-03, amending Regulation CSSF No. 18-03.

The Regulation transposes Guideline (EU) 2022/508 of the ECB on the exercise of options and discretions available in Union law by NCAs in relation to less significant institutions. The Regulation modifies the existing rules in Regulation CSSF No. 18-03 on full large exposure exemptions and introduces new provisions on liquidity buffers and the net stable funding ratio. Certain other provisions are abrogated. These relate to IAS 19, hedging sets, grandfathering rules on certain own funds items as well as the option referred to in Article 471 CRR relating to the deduction of certain equity holdings.

The Regulation entered into force on publication on 12 July 2023.

⁷ Regulation: https://www.cssf.lu/wp-content/uploads/RCSSF23_03eng.pdf

CSSF DOCUMENT ON THE REPORTING REQUIREMENTS FOR CREDIT INSTITUTIONS

21 July 2023⁸

On 21 July 2023, the CSSF published a document on the reporting requirements for credit institutions.

This document follows the publication at the European level of the Commission Implementing Regulation No. 680/2014 (as amended), which aimed at harmonising the content and format of data to be reported by European banks to their supervisors in order to comply with CRD IV and CRR. The Commission Implementing Regulation No. 680/2014 is part of the Single Rulebook and is directly applicable in the member states of the EU, without legal transposition at the national level. With this document, the CSSF aims at providing some further guidance on the technical specifications of the reporting requirements for credit institutions as applicable under the CRD IV/CRR framework.

The CSSF reminds that as from January 2014, the reporting requirements applicable to credit institutions are laid down:

- in European regulations (e.g. CRR, Commission Implementing Regulation (EU) No. 680/2014) for some reporting areas, while
- national provisions (CSSF Circulars) continue to apply for other reporting areas (template layouts, reporting instructions, validation rules, technical specifications...).

In addition to the reporting requirements mentioned above, other regular reporting may be required by the European institutions (e.g. guidelines).

The purpose of the present document is thus to provide an overview of the periodical reporting requirements and other regular reporting applicable to credit institutions in Luxembourg (including specific requirements applicable to branches) from January 2014 (chapters 1-4) as well as the reporting formats and technical specifications (chapter 5).

⁸ CSSF Document: https://www.cssf.lu/wp-content/uploads/Reporting_requirements_final.pdf

2021 AND 2022 ANNUAL REPORT BY LUXEMBOURG FIU PUBLISHED

27 July 2023⁹

On 27 July 2023, the FIU published its Annual Report for 2021 and 2022. The report covers the activity of the FIU over the course of the years 2021 and 2022. Main activity points reported on include the following:

- To carry out its operational and strategic analysis tasks, the FIU has recruited analysts specialised in the areas of greatest risk identified by the National Risk Assessment (NRA). These include specialists in new technologies to target online fraud and misuse of virtual assets, corruption and misappropriation of public assets, criminal tax offences and complex corporate and legal structures.
- At the operational level, cooperation with the competent police and judicial authorities was formalised in cooperation agreements with the national public prosecutors' offices, the European Public Prosecutor's Office (EPPO) and the criminal investigation police department. The continuous improvement of available IT tools and the expertise of FIU specialists in data analysis have further contributed to improved quality at the operational level.
- Following the adoption of the goAML IT tool in 2017, the FIU receives and analyses all suspicious transaction reports in a digital environment. The FIU has been closely monitoring developments on the ongoing digital transformation at the FATF level. The FIU has also modernised the online registration form and moved to version 5 of goAML, and intends to continue its digital transformation over the coming years by adopting new technologies.
- At a strategic level, the FIU contributed to various AML/CTF projects initiated and coordinated by the Committee for the Prevention of Money Laundering and Terrorist Financing, including vertical risk

assessments of legal entities, legal constructions and terrorist financing. It also took part in the AML/CTF colleges organised by the CSSF and the CAA respectively, and in the public-private partnerships (PPP) on banks, investment funds and specialised PFSs.

In general, the FIU has intensified its cooperation with supervisory authorities, self-regulatory bodies and the professionals filing the reports to continue to improve the quality and relevance of the received suspicious transactions reports.

⁹ 2021 and 2022 Annual Report: <https://justice.public.lu/dam-assets/fr/publications/rapport-activites-crf/rapport-crf-2021-2022.pdf> (only in French)

CSSF COMMUNIQUÉ ON CNMV PRODUCT INTERVENTION MEASURES RELATING TO CFDs AND OTHER LEVERAGED PRODUCTS

31 July 2023¹⁰

On 31 July 2023, the CSSF published a communiqué to announce the publication by Spain's national securities market commission, *Comisión Nacional del Mercado de Valores* (the "**CNMV**") of MiFIR (Art. 42) product intervention measures regarding CFDs and other leveraged products.

These measures have the effect that when entities who are supervised by the CSSF market, distribute or sell CFDs to retail investors in Spain, these entities are prohibited from using advertisements, sponsoring events or organisations, engaging in brand advertising and using certain marketing practices. And when they market, distribute or sell other leveraged instruments (such as futures and options) to retail investors in Spain, whose maximum risk is not known upon subscription or whose risk of loss is greater than the amount of the initial financial contribution, specific investor protection requirements apply.

These measures are effective from 3 August 2023.

These new measures from the CNMV should be read in conjunction with the existing measures for binary options and financial CFDs already applicable in Spain.

The CSSF further reminds supervised entities of the measures restricting the marketing, distribution or sale of CFDs and binary options currently applicable in Luxembourg under CSSF Regulations 19-05 and 19-06.

¹⁰ Communiqué: <https://www.cssf.lu/en/2023/07/cnmv-product-intervention-measures-relating-to-financial-contracts-for-differences-cfds-and-other-leveraged-products/>

CSSF COMMUNIQUÉ ON NEW CMVM REQUIREMENTS FOR FINANCIAL INTERMEDIARIES ON ADVERTISING

1 August 2023¹¹

On 1 August 2023, the CSSF published a communiqué to draw the attention of supervised entities under its supervision, which are carrying out financial intermediation activities in Portugal under the freedom to provide services, to Circular Note No. 010/2023 (Financial Intermediaries on Advertising) published by the Portuguese Securities Market Commission *Comissão do Mercado de Valores Mobiliários* (the "**CMVM**") when advertising on financial intermediation activities and/or financial instruments in Portugal. The communiqué contains a web link to such Circular Note for further details on the new CMVM requirements.

¹¹ Communiqué: <https://www.cssf.lu/en/2023/08/requirements-of-the-portuguese-securities-and-exchange-commission-the-cvm->

[regarding-advertising-on-financial-intermediation-activities-and-or-financial-instruments/](https://www.cssf.lu/en/2023/08/requirements-of-the-portuguese-securities-and-exchange-commission-the-cvm-regarding-advertising-on-financial-intermediation-activities-and-or-financial-instruments/)

LUXEMBOURG BILL IMPLEMENTING DORA

4 August 2023¹²

A bill implementing DORA and transposing into Luxembourg law Directive 2022/2556 (bill No. 8291) was lodged with the Luxembourg Parliament on 4 August 2023.

The objective of DORA and Directive 2022/2556 is to harmonise and strengthen ICT security requirements in order to achieve a high level of digital operational resilience for the entire financial sector. DORA consolidates the different rules dealing with ICT risk in the financial sector and brings them together in a single legislative act to fill gaps and inconsistencies. The consolidation and further harmonisation of key digital operational resilience requirements are part of the objective to foster innovation and the adoption of new technologies in the financial sector, while ensuring financial stability and the protection of investors and consumers.

As the provisions of DORA are directly applicable in the EU, the main purpose of the bill is to provide the national competent authorities with the supervisory and investigative powers necessary for the performance of their duties, within the limits defined by DORA, and to lay down a system of penalties.

These unified rules aim to ensure that financial entities (understood as those falling within the scope of Article 2(1) of DORA, i.e., credit institutions, investment firms, crypto-asset service providers, managers of alternative investment funds (with the exception of those falling within the scope of Article 3(2) Directive 2011/61/EU, as per Article 2(3)(a) of DORA) and management companies, among others) can withstand, respond to and recover from any serious ICT-related operational disruption.

Directive 2022/2256 accompanies and complements DORA by providing for a series of targeted amendments to existing European directives in the financial sector. Such amendments are necessary to ensure sectoral consistency with DORA as regards the application of digital operational

resilience requirements that are currently scattered across the various existing sectoral laws.

Targeted amendments are therefore made to a series of Luxembourg laws relating to the financial sector, such as the Financial Sector Law, the Payment Services Law, the UCI Law, the AIFM Law and Insurance Sector Law.

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

¹² Bill No. 8291: <https://www.chd.lu/fr/dossier/8291> (only in French)

CSSF COMMUNIQUÉ ON THE DISCONTINUATION OF FAX SERVICES

4 August 2023¹³

On 4 August 2023, the CSSF published a communiqué to announce the discontinuation of its fax services as a means of communication to send and receive documents.

The CSSF informs entities that its other contact details remain unchanged. In particular, the CSSF reminds that its email address is direction@cssf.lu, while customer complaints should be addressed to reclamation@cssf.lu. Regarding email addresses for specific requests, the CSSF further refers to its directory.

Specific channels to be used by entities in the context of the CSSF's missions, such as Managed File Transfer (MFT) and the eDesk Portal, remain unchanged as well.

¹³ Communiqué: <https://www.cssf.lu/en/2023/08/discontinuation-of-fax-services/>

CSSF FAQ ON VIRTUAL ASSET SERVICE PROVIDERS

17 August 2023¹⁴

On 17 August 2023, the CSSF published a document on FAQ regarding VASP.

The FAQ is of interest for persons and entities being already registered in the CSSF register as a VASP, as defined in Article 1 (20c) of the AML/CTF Law, or willing either to be established or to offer virtual asset services in Luxembourg.

The CSSF FAQ has been established based on the current AML/CTF legal framework applicable to VASPs, and does not take into account the evolution of the framework related to virtual assets at the European level (i.e., MiCAR).

The FAQ clarifies, among others, the concept of virtual assets, as well as the persons and entities who are required to register with the CSSF as a VASP, including registration requirements applicable to non-Luxembourg entities which provide virtual asset services in Luxembourg. Some practicalities with regards to the registration as a VASP are also addressed, such as the timing for registration, passporting and fees levied by the CSSF. Certain questions covered by the FAQ are specific to certain types of persons and entities, such as credit institutions, undertakings for collective investment or providers which solely offer the technology to support virtual asset services, while other questions provide more general guidance on the application of AML/CTF requirements by VASPs.

¹⁴ **FAQ:** https://www.cssf.lu/wp-content/uploads/QR_VASP.pdf

CSSF COMMUNIQUÉ ON THE OECD REPORT ON FINANCIAL CONSUMERS AND SUSTAINABLE FINANCE

18 August 2023¹⁵¹⁶

On 18 August 2023, the CSSF published a communiqué to announce the publication of the OECD report on financial consumers and sustainable finance – policy implications and approaches.

The CSSF states that the report represents an important contribution to the international policy context on sustainable finance relating specifically to the issues, risks and opportunities for financial consumers.

The report represents a first piece of work by the OECD Task Force on Financial Consumer Protection on this topic. It explores issues, opportunities and challenges for financial consumers in relation to sustainable finance. The report examines current trends in terms of consumer demand for, and experience with, sustainable finance products, as well as new risks to consumers posed by sustainable finance products. The report also explores financial consumer protection tools and responses available to policymakers and oversight authorities.

The CSSF, as a national competent authority, participated in the preparation as well as in the drafting of the report.

¹⁵ Communiqué: <https://www.cssf.lu/en/2023/08/oecd-financial-consumers-and-sustainable-finance-policy-implications-and-approaches/>

¹⁶ Report: <https://www.oecd-ilibrary.org/finance-and-investment/financial-consumers-and-sustainable->

[finance_318d0494-en;jsessionid=dAMXr158ljWDpBW0Zelcfa0YP3matWljl_-5N1YS.ip-10-240-5-61](https://www.oecd-ilibrary.org/finance-and-investment/financial-consumers-and-sustainable-finance_318d0494-en;jsessionid=dAMXr158ljWDpBW0Zelcfa0YP3matWljl_-5N1YS.ip-10-240-5-61)

LUXEMBOURG BILL INTRODUCING A MERGER CONTROL REGIME IN LUXEMBOURG

23 August 2023¹⁷

A bill No. 8296 introducing a national regime on the control of concentrations between undertakings in Luxembourg was lodged with the Luxembourg Parliament on 23 August 2023. The bill provides for a set of rules (notification process and procedural rules as well as concentration analysis rules) which are largely inspired by the EU merger control regime and the ones of other European countries such as France or Belgium.

As a general rule, pursuant to the bill, a concentration, which does not fall under the EU merger control regime provided for under EU Regulation 139/2004, must be notified to the Luxembourg *Autorité de la concurrence*, and the parties are subject to a stand-still obligation if the following thresholds are met:

- the combined turnover of the undertakings or group of physical or legal persons concerned in Luxembourg exceeds EUR 60 million (excl. taxes); and
- at least two of the undertakings or group of physical or legal persons concerned each generate a turnover in Luxembourg of at least EUR 15 million (excl. taxes).

Alternatively, the *Autorité de la concurrence* may also refer cases to itself.

The bill in particular takes into consideration the significant cross-border nature of the Luxembourg activity and the importance of its financial sector. In relation to this later point, the following aspects are of particular interest:

- With respect to the abovementioned thresholds, the bill provides specific guidance as to how these thresholds should be calculated in the context of undertakings from the insurance and financial sectors (Article 1) and excludes from the scope of the notification obligation certain entities, in particular when they trade or own on a temporary

basis interest under strict conditions governing the exercise of voting rights (Article 2).

- The bill provides for specific rules in case of a merger with entities in the financial or insurance sectors that are subject to early intervention, recovery or resolution measures (Articles 47 and 48).
- Coordination rules between the *Autorité de la concurrence* and the Luxembourg financial sector supervisory authorities, i.e., respectively the CSSF (financial sector other than insurance) and the CAA (insurance sector) are provided (Article 12).

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

¹⁷ Bill No. 8296: <https://www.chd.lu/fr/dossier/8296> (only in French)

CSSF ANNUAL REPORT 2022

25 August 2023¹⁸

The CSSF has published its annual report for 2022.

The report contains, among other things, an overview of the CSSF's organisation and priority action areas, including the CSSF's concern to adapt to a complex, changing environment without compromising its core mission, consumer and investor protection and contribution to financial stability. In that sense, the CSSF highlights that the training of its agents and the upgrading of its IT infrastructure are key issues.

Furthermore, the report provides insight into the CSSF's work and activities in relation to the main legal and regulatory developments of 2022 and the CSSF's activities at the national and international level, as well as an analysis of the evolution of the different sectors that are under the supervision of the CSSF.

Attention is drawn to the current main challenges faced by supervised entities and the CSSF. These include challenges in the areas of:

- economy. In order to reduce inflation, the ECB progressively raised interest rates, and, after 10 years of zero and negative rates, they moved into positive territory as from July 2022;
- Luxembourg financial system. The Luxembourg financial system remained resilient, and despite a higher cost of borrowing, non-performing loans remained at a low level until year end and into 2023. Both the CSSF and the Luxembourg Systemic Risk Committee of which it is a member have closely followed the impact of the energy crisis and rising interest rates on the banking and investment fund sectors, including residential real estate, corporates and household indebtedness. This enhanced monitoring will continue in 2023;
- climate change. Sustainability must be a core value of the Luxembourg financial centre, and the CSSF is using all means to ensure that the entities under its supervision implement in a timely way the EU regulatory framework. The CSSF carefully considers the inclusion, in its risk-based approach supervision, of risks arising from sustainability considerations for the financial sector, and is providing guidance on this topic. The implementation of EU rules and guidance by the CSSF in 2021-22 will be supplemented by supervisory action starting in 2023;
- digitalisation of finance. The CSSF plans to actively contribute to and support the European framework, including a proposed regulation on AI, the Data Act, the European Data Governance Act and the Digital Services Act package. Its Information Technology Supervisory Team and Innovation Hub are following and accompanying startups and supervised entities in the digital transition and issuing guidance. The CSSF also recognises the need to regulate the activity of crypto-exchanges in a comprehensive and global manner. It states that the principle of *'same services/activities, same risks, same rules and same supervision'* should always be applied so as to safeguard market integrity and protect investors;
- financial education. The financial education of children and adults is more than ever needed, with regard to the necessary shift to green finance, as well as the dangers related to some crypto markets;
- operational resilience. The CSSF is a permanent member of the European Supervisory Authorities' Sub-Committee on Digital Operational Resilience. It is also following the implementation of NIS2 and the eIDAS Regulation, and has started to oversee the first tests under the so-called TIBER framework.

¹⁸ Annual Report 2022: https://www.cssf.lu/wp-content/uploads/CSSF_RA_2022_EN.pdf

CSSF CIRCULAR ON MIFID II PRODUCT GOVERNANCE REQUIREMENTS

15 September 2023^{19,20}

On 15 September 2023, the CSSF issued Circular 23/840 on the application of the ESMA guidelines on the MiFID II product governance requirements.

The Circular is addressed to all investment firms and credit institutions providing investment services or performing investment activities; investment firms and credit institutions selling or advising clients in relation to structured deposits; UCITS management companies providing the investment services of portfolio management (in accordance with mandates given by investors on a discretionary, client-by-client basis) or investment advice; and external alternative investment fund managers providing the investment services of portfolio management (in accordance with mandates given by investors on a discretionary, client-by-client basis), investment advice or reception and transmission of orders.

The Circular does not apply in cases where financial instruments are marketed or distributed exclusively to eligible counterparties as per Article 16a of MiFID II.

The CSSF applies the guidelines to the aforementioned addressees since 3 October 2023 and integrates the guidelines into its administrative practice and regulatory approach.

Further details on the application of the guidelines are provided for in the Circular.

¹⁹ CSSF Circular 23/840: https://www.cssf.lu/wp-content/uploads/cssf23_840eng.pdf

²⁰ ESMA Guidelines: https://www.esma.europa.eu/sites/default/files/2023-08/ESMA35-43-3448_Guidelines_on_product_governance.pdf

CSSF-CPDI CIRCULAR ON A SURVEY ON THE AMOUNT OF COVERED DEPOSITS HELD ON 30 SEPTEMBER 2023

3 October 2023²¹

On 3 October 2023, the CSSF, acting in its function as CPDI, published CSSF-CPDI Circular 23/38 to carry out a regular survey on the amount of covered deposits held on 30 September 2023.

The Circular is addressed to all members of the FGDL, in particular, credit institutions incorporated under Luxembourg law, Luxembourg branches of non-EU/EEA credit institutions and POST Luxembourg, the latter in respect of its postal financial services.

The Circular draws member's attention to the definitions of "covered deposits" and "eligible deposits", in particular with regard to the exclusions of structures assimilated to financial institutions as well as the treatment of accounts whose holder is not absolutely entitled to the sums on the account (e.g., omnibus or fiduciary/trust accounts, third-party accounts, etc.).

FGDL members are requested to provide the data at the level of their legal entity, comprising data from branches located within other Member States, by **15 November 2023**.

Additionally, FGDL members are reminded that neither accounts denominated in units of precious metals nor accounts denominated in virtual currencies constitute eligible deposits for the purpose of the FGDL guarantee, and shall hence not be reported under this data collection.

Institutions are also informed that the reporting of this survey via E-File or SOFiE has been deactivated. Starting from 9 October 2023, institutions are required to submit the reporting through one of the following means of communication:

- via the CSSF eDesk platform, which is accessible through the CSSF website; or

- via the submission of a structured file through the S3 ("simple storage service") protocol

A user guide is available on eDesk, explaining the technical procedures for completing, validating and submitting the DCOR Quarterly Reporting.

A member of the authorised management, in this case the member in charge of the membership of the FGDL in accordance with section C of CSSF Circular 13/555, as amended, must review and approve the document prior to its transmission to the CSSF.

²¹ CSSF-CPDI Circular 23/38: https://www.cssf.lu/wp-content/uploads/CSSF_CPDI_2338eng.pdf

CSSF REGULATION ON THE SETTING OF THE COUNTERCYCLICAL BUFFER RATE FOR THE FOURTH QUARTER OF 2023

9 October 2023²²

On 30 September 2023, the CSSF issued Regulation No. 23-04 on the setting of the countercyclical buffer rate for the fourth quarter of 2023.

The Regulation provides that the countercyclical buffer rate applicable to the relevant exposures located in Luxembourg remains set at 0.50% for the fourth quarter of the year 2023.

The Regulation entered into force on publication in the Luxembourg official journal on 6 October 2023.

²² Regulation: <https://www.cssf.lu/en/Document/cssf-regulation-no-23-04-of-30-september-2023/>

CSSF COMMUNIQUÉ ON THE EVALUATION OF DIVERSITY POLICIES THROUGH A DATA COLLECTION ANALYSIS

10 October 2023²³

On 10 October 2023, the CSSF published a communiqué on the evaluation of the diversity policy through a data collection analysis.

Following a survey launched in April 2023 on the subject of diversity within the management bodies of less significant credit institutions, the CSSF has noted certain weaknesses in their diversity practices.

The CSSF considers that the financial place must accelerate its transition towards diversity in compliance with the regulations currently in force. The CSSF is the competent authority responsible for verifying compliance with these requirements.

The CSSF wishes to inform the financial place that, from now on, it will monitor progress in the implementation of diversity with particular attention through regular investigations and controls. If, following the injunctions sent to the less significant credit institutions concerned, the CSSF identifies a breach of the legal and regulatory provisions on diversity policy, it will take strict measures, including administrative sanctions.

In accordance with article 38-2(8) of the Financial Sector Law, credit institutions must call on a wide range of qualities and skills when recruiting members of the management body, and are required to put in place a policy to promote diversity within the management body. These provisions aim to ensure that decisions taken by the management body of a credit institution can benefit from "*a variety of views and experiences and to facilitate independent opinions*", in accordance with paragraph 102 of the joint ESMA and EBA guidelines on the assessment of the suitability of members of the management body and key function holders (EBA/GL/2021/06).

The effective implementation of diversity policies should result in a significant improvement in the diversity of less significant credit institutions' management bodies, both in terms of gender and other diversity criteria, but also in the implementation of measures enshrining equal opportunities and treatment and career planning elements. The aim of these measures is to create a pool of diversified profiles for the succession of members in management bodies.

²³ Communiqué: https://www.cssf.lu/wp-content/uploads/La-diversite-%E2%80%93-Un-etat-des-lieux-etabli-par-la-CSSF-a-travers-un-exercice-de-collecte-de-donnees_101023.pdf

CSSF-CODERES CIRCULAR LETTER ON THE INFORMATION REQUEST BY THE SRB TO COLLECT DATA FOR THE CALCULATION OF THE 2024 EX-ANTE CONTRIBUTION TO THE SRF

12 October 2023²⁴

On 12 October 2023, the CSSF issued Circular CODERES 23/17 on SRF – Information request by the SRB for the calculation of the 2024 ex-ante contribution, according to Articles 4 and 14 of Commission Delegated Regulation (EU) 2015/63.

The Circular is addressed to all credit institutions established in Luxembourg and subject to the SRMR, except for Luxembourg branches of credit institutions which have their head office outside of the EU as they will be covered by the Luxembourg Resolution Fund. Branches established in Luxembourg by a credit institution having its head office in another Member State, participating in the Banking Union (BU) or not participating, are covered by their head office.

The purpose of this Circular is to collect data for the calculation of the 2024 ex-ante contribution to the SRF. The initial period for the constitution of the SRF is expected to end on 31 December 2023. The SRMR requires the raising of contributions to the SRF after the end of the Initial Period, where the amount of available financial means in the SRF diminishes below 1% of the amount of covered deposits of all credit institutions authorised in all Member States participating in the BU. The SRB will verify in early 2024 whether the available financial means in the SRF are equal to at least 1% of covered deposits held in the BU. Based on the outcome of that verification exercise, the SRB will decide whether ex-ante contributions to the SRF will be calculated and collected in the 2024 contribution period. The SRB needs, therefore, a certain amount of information.

The Circular therefore launches in Luxembourg this data collection exercise which is done as in the previous year in XBRL format. In order to properly complete the required

XBRL file, the SRB has provided the data reporting form along with guidance, which can be found in an annex to the Circular. The duly completed XBRL file must be sent by the credit institutions concerned to the CSSF at the latest by 12 January 2024 at 24:00 CET.

In case not all required information is transmitted correctly by that date, the SRB shall use estimates or its own assumptions for the calculation of the 2024 contribution of the concerned credit institution to the SRF. In specific cases, the SRB may assign the credit institutions concerned to the highest risk adjusting multiplier for the calculation of the institution's contribution to the SRF.

In addition, each credit institution that directly or as part of a group falls under direct ECB supervision, unless it is subject to the lump-sum payment, must make available to the resolution department of the CSSF additional assurance documents (AA) by mailing a signed hard copy at the latest by 23 February 2024.

In case restatements for the previous years must be taken into account, credit institutions concerned shall proactively inform the CSSF of their intention to send these files and of the collection years concerned by 30 November 2023.

²⁴ Circular: https://www.cssf.lu/wp-content/uploads/CSSF-CODERES_23_17.pdf

CSSF CIRCULAR LETTER ON THE APPLICATION OF THE ESMA GUIDELINES ON CERTAIN ASPECTS OF THE MIFID II REMUNERATION REQUIREMENTS

13 October 2023²⁵²⁶

On 13 October 2023, the CSSF issued Circular 23/841 on the application of ESMA guidelines on certain aspects of the MiFID II remuneration requirements, published on 3 April 2023 (ESMA35-43-3565).

This Circular applies to:

- investment firms, as defined in Article 1(9) of the Financial Sector Law;
- credit institutions, as defined in Article 1(12) of the Financial Sector Law, where they provide investment services and activities within the meaning of Article 1(30) of the Financial Sector Law;
- investment firms and credit institutions, where they sell to or advise clients in relation to structured deposits within the meaning of Article 1(7c) of the Financial Sector Law;
- UCITS management companies, as defined in Article 1(31) of the Financial Sector Law, where they provide investment or ancillary services as listed in Article 101(3) of the UCI Law; and
- AIFMs as defined in Article 1(46) of the AIFM Law, where they provide portfolio management or ancillary services as listed in Article 5(4) of the AIFM Law.

The aim of this Circular is to notify to the addressees that the CSSF has incorporated these ESMA guidelines into its administrative practice and regulatory approach with a view to promoting supervisory convergence in this area at the European level.

The guidelines aim to ensure the uniform application of certain remuneration, conflict of interest and conduct of

business rules and requirements under MiFID II (notably under its Articles 16(3), 23, 24(1) and (10) and 27, as well as Article 34 of the MiFID II Delegated Regulation) and to clarify governance requirements concerning remuneration based on Article 9(3) of MiFID II across the European Union.

The guidelines are annexed to the Circular.

The Circular replaces and repeals Circular CSSF 14/585 on the transposition of the ESMA guidelines on remuneration policies and practices (MiFID) and also deletes Annex V (containing the same ESMA guidelines) to Circular CSSF 07/307 (as amended).

The Circular applies since 13 October 2023.

²⁵ Circular: https://www.cssf.lu/wp-content/uploads/cssf23_841.pdf

²⁶ ESMA Guidelines: <https://www.esma.europa.eu/document/guidelines-certain-aspects-mifid-ii-remuneration-requirements>

CSSF CIRCULAR ON THE EBA GUIDELINES ON MONEY LAUNDERING AND TERRORIST FINANCING RISK FACTORS WHEN PROVIDING ACCESS TO FINANCIAL SERVICES

16 October 2023^{27 28}

On 16 October 2023, the CSSF issued Circular 23/843 on the adoption of the revised EBA guidelines on policies and controls for the effective management of ML/TF risks when providing access to financial services into its administrative practice and regulatory approach.

The Circular is addressed to all credit and financial institutions, as defined in Article 1(3) and (3a) of the AML/CTF Law.

The purpose of the Circular is to inform its addressees that the CSSF, in its capacity as competent authority, applies the guidelines and has integrated them into its administrative practice and regulatory approach with a view to promoting supervisory convergence in this field at the European level.

The guidelines have been issued by the EBA following its assessment of the main drivers of de-risking and the negative impact unwarranted de-risking can have on customers and access to financial services and the fight against financial crime.

The objective of the guidelines is to set out the steps credit and financial institutions should take to facilitate access to financial services by those categories of customers that the EBA's analysis had highlighted as particularly vulnerable to unwarranted de-risking.

Therefore, the guidelines clarify the interaction between the provision of access to financial services and the credit or financial institution's AML/CTF obligations. They set out, *inter alia*, the steps the professionals should take when considering whether to refuse or terminate a business relationship with a customer based on ML/TF risk

or AML/CFT compliance grounds. For example, the guidelines specify that the professionals should document any decision to refuse or terminate a business relationship. Finally, the guidelines also address aspects relating to the complaint mechanism that the professionals should have put in place to ensure that customers can complain if they feel they have been treated unfairly.

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

The Circular applies since 3 November 2023.

²⁷ Circular: https://www.cssf.lu/wp-content/uploads/cssf23_843eng.pdf

²⁸ EBA Guidelines: https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Guidelines/2023/1054144/Guidelines%20on%20MLTF%20risk%20management%20and%20access%20to%20financial%20services.pdf

CSSF CIRCULAR ON THE REVISED EBA GUIDELINES ON MONEY LAUNDERING AND TERRORIST FINANCING RISK FACTORS

16 October 2023^{29 30 31}

On 16 October 2023, the CSSF issued Circular 23/842 on the adoption of the revised EBA guidelines on customer due diligence and the factors credit and financial institutions should consider when assessing the ML/TF risk associated with individual business relationships and occasional transactions under Articles 17 and 18(4) of Directive (EU) 2015/849 into its administrative practice and regulatory approach.

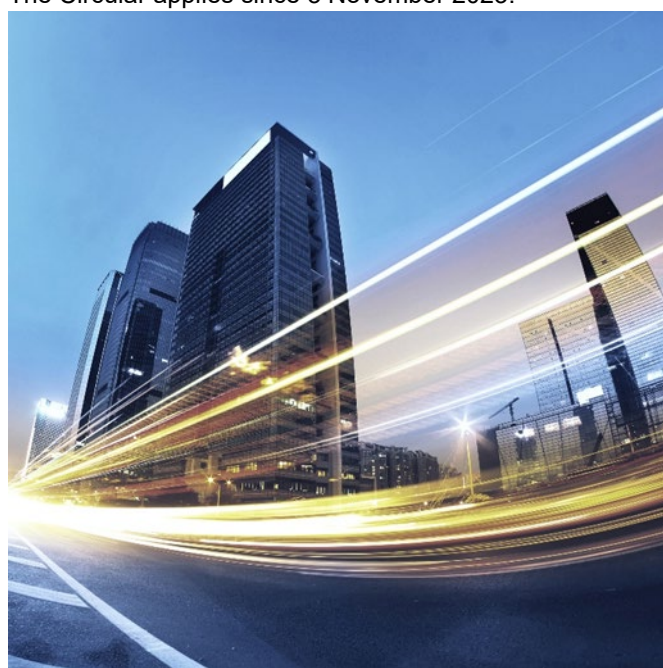
The Circular is addressed to all credit and financial institutions, as defined in Article 1(3) and (3a) of the AML/CTF Law.

The purpose of the Circular is to inform its addressees that the CSSF, in its capacity as competent authority, applies the revised EBA guidelines and has integrated them into its administrative practice and regulatory approach with a view to promoting supervisory convergence in this field at the European level.

The revised guidelines have been issued by the EBA following its assessment of the scale of de-risking in the EU and in order for credit and financial institutions to take steps to facilitate access to financial services by NPOs. The objective of the revised EBA guidelines is to support credit and financial institutions in their understanding of the specificities of existing and prospective customers which are NPOs with regards to understanding NPOs' set up, operations and ML/TF risk factors.

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

The Circular applies since 3 November 2023.



²⁹ Circular: https://www.cssf.lu/wp-content/uploads/cssf23_842eng.pdf

³⁰ EBA Guidelines: https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Guidelines/2023/1054143/Amending%20GLs%20to%20the%20RFGs%20in%20relation%20to%20NPOs.pdf

³¹ Consolidated EBA Guidelines on ML/TF risk factors (EBA/GL/2021/02): https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Guidelines/2023/EBA-GL-2023-03/1061654/Guidelines%20ML%20TF%20Risk%20Factors_consolidated.pdf.pdf?retry=1

CSSF COMMUNIQUÉ RELAYING A MESSAGE FROM THE ISRAELI MINISTRY OF JUSTICE ON AML/CTF

25 October 2023³²

On 25 October 2023, the CSSF issued a press release relaying a message from the Israeli Ministry of Justice and the Israel Money Laundering and Terror Financing Prohibition Authority (IMPA) which calls on the financial sector and the public to increase their vigilance towards terrorist financing attempts in light of the ongoing war and state of emergency in Israel.

The CSSF asks supervised entities to exercise particular vigilance in relation to the transfers referred to in the message, i.e., financial activity whose purpose is to finance and support terrorist activity and to assist terrorist organisations, particularly Hamas and Palestinian Islamic Jihad.

The message states that based on IMPA's experience, terrorist financing activities often appear under the guise of fundraising campaigns for humanitarian aid and are led by various associations and charities or private initiatives. Such campaigns are published in various media, using a variety of channels and avenues for transferring money, including bank and electronic transfers, credit cards, advanced payment methods, gift cards and cryptocurrency. Said publications are mostly made in Arabic and English, and may refer to the Gaza Strip, to the fighting in Gaza, and sometimes include the involvement of declared parties or feature symbols of Hamas or Palestinian Islamic Jihad.

IMPA works jointly with its partners in the law enforcement and security agencies to freeze and/or block accounts and other financial activities for which there is an indication that they are being used to raise funds for terrorist organisations.

The communiqué contains a link to the message.

³² Communiqué: <https://www.cssf.lu/en/2023/10/communiqué-aml-ctf/>

CSSF COMMUNIQUÉ ON THE LAUNCH OF THE ESMA COMMON SUPERVISORY ACTION ON MIFID II SUSTAINABILITY REQUIREMENTS

25 October 2023³³

On 25 October 2023, the CSSF issued a communiqué on the launch by ESMA of a Common Supervisory Action with NCAs on the integration of sustainability in credit institutions' as well as investment firms' MiFID II suitability assessment and product governance processes and procedures in 2024.

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

The Common Supervisory Action will cover the following aspects:

- How firms collect information on their clients' "sustainability preferences";
- Which arrangements have been put in place by firms to understand and correctly categorise investment products with sustainability factors for the purpose of the suitability assessment;
- How firms ensure the suitability of an investment with respect to sustainability (including the use of a "portfolio approach"); and
- How firms specify any sustainability-related objectives a product is compatible with as part of the target market assessment of the investment product.

The Common Supervisory Action follows ESMA's recent update of two sets of guidelines on suitability and product governance, both of which entered into application on 3 October 2023.

In this context, the CSSF will contact a sample of supervised entities.

A link to the relevant pages on the ESMA website on the ESMA Common Supervisory Action launch, as well as to ESMA's abovementioned guidelines on suitability and product governance, can be found in the Communiqué.



³³ Communiqué: <https://www.cssf.lu/en/2023/10/launch-of-the-esma-common-supervisory-action-on-mifid-ii-sustainability-requirements/>



INSURANCE



INSURANCE

This Circular Letter entered into force on 1 September 2023.

CAA CIRCULAR LETTER 23/10 ON THE TELEWORKING OF MANAGERS, KEY FUNCTION HOLDERS AND OTHER CONTROL FUNCTIONS AND THE USE OF ELECTRONIC SIGNATURES

13 June 2023³⁴

On 13 June 2023, the CAA issued its Circular Letter 23/10 on the teleworking of managers, key function holders and other control functions and the use of electronic signatures.

The CAA first clarifies its expectations on teleworking of managers, key function holders and other control functions. In this respect, it reminds that Luxembourg insurance and reinsurance companies are required to have their central administration (i.e., decision-making and administrative centre) in Luxembourg and should be able to justify compliance with this legal requirement at any time. In this context, the entities should also ensure compliance with Luxembourg labour law and professional secrecy and data protection rules when organising teleworking. The CAA may verify compliance with these rules during on- and off-site inspections.

In addition to this, the CAA clarifies its expectations on the use of electronic signatures and, in particular, indicates that (re)insurance companies must use "qualified electronic signatures" for official documents signed by managers and sent to the CAA if they do not use wet-ink signatures. Besides, a (re)insurance company must, when using electronic signatures in its communication with the CAA, make a declaration to the CAA (using the standard questionnaire attached to the Circular Letter) concerning its internal organisation on the use of electronic signatures and its technical features. This questionnaire must be filled in and sent to the CAA within 30 days after the Circular Letter comes into force if the company already uses electronic signatures or 30 days before starting using them.

³⁴ CAA Circular Letter 23/10:
<https://www.caa.lu/uploads/documents/files/LC23-10.pdf>

CAA COMMUNIQUÉ ON THE PUBLICATION OF THE 2022/2023 ANNUAL REPORT AND THE 2022 KEY FIGURES

17 July 2023³⁵

On 17 July 2023, the CAA issued a press release on the publication of the 2022/2023 annual report and the 2022 key figures.

In its communiqué, the CAA provides an overview of the main findings for the period 2022-2023, noting in particular the impact of the geopolitical uncertainties, increase in energy prices, inflation and the sudden rise in interest rates on the insurance sector. Among these impacts, the CAA notably notes that in non-life insurance, the inflation rise has led not only to an increase in operation costs, but also has a negative impact on the cost of claims, particularly in motor and home insurance. Besides, inflationary pressures have led (re)insurance undertakings to review their prices, either through automatic indexation mechanisms and/or by renegotiating contractual terms and conditions during the renewal period. In this context, the CAA reminds the insurance undertakings and intermediaries of their transparency obligations towards consumers. Another important aspect highlighted by the CAA is the impact of natural disasters (incl. floods) on the general coverage terms (deductibles/limits) and pricing conditions.

In addition to this, the Communiqué provides an overview of the main legislative and regulatory updates that occurred during the period 2022-2023. This includes, among others:

- the transposition of Directive 2021/2118 relating to insurance against civil liability in respect of the use of motor vehicles, resulting in the creation of a Motor Insurance Insolvency Fund (*Fonds*

d'Insolvabilité en Assurance Automobile), which will be managed administratively by the CAA;

- in life insurance, the CAA continued its targeted supervision of the governance of insurance-based investment products (IBIPs). As a result of a survey and market analysis, the CAA has asked life insurance undertakings to review their key information documents to ensure that they are consistent with the binding contractual documents;
- the development with regard to distribution of a new reporting system for insurance agencies, which is scheduled to go live in 2024 in order to collect data relating to the 2023 financial year. The annual reporting for brokerage firms has also been amended, in particular, to collect data on life insurance policies acquired through intermediation; and
- the introduction of a circular letter and a harmonised quantitative AML/CTF risk assessment questionnaire targeting intermediaries.

Finally, the communiqué sets out the CAA's main priorities for the coming months, which will be implemented at the level of the undertakings' head offices and branches. These priorities are, in addition to the monitoring of the macro-economic and financial impact of the Ukraine war, rises in interest rates and inflation rises:

- Monitoring the level of implicit and explicit prudence in technical reserves as a result of inflation, which increases the cost of claims for past and future claims when the insurance undertaking has not been able to pass on the inflation impact on its tariffs;
- Monitoring the AML/CTF measures put in place by life insurance undertakings and intermediaries in respect of primary tax offences and compliance with

³⁵ Communiqué:
https://www.caa.lu/uploads/documents/files/Communique_20230718.pdf (only in French)

2022/2023 annual report:
https://www.caa.lu/uploads/documents/files/rapport_annuel_2022.pdf (only in French)

2022 key figures:
https://www.caa.lu/uploads/documents/files/rapport_annuel_2022-chiffres_cles.pdf (only in French)

international financial sanctions and restrictions following Russia's invasion of Ukraine;

- Supervision of insurance undertakings and insurance distributors to verify compliance with regulatory obligations in the areas of product governance and the management of conflicts of interest; and
- Control of the systems put in place by (re)insurance undertakings and intermediaries to meet regulatory requirements relating to sustainable finance.

2021 AND 2022 ANNUAL REPORT BY LUXEMBOURG FIU PUBLISHED

27 July 2023³⁶

On 27 July 2023, the FIU published its Annual Report for 2021 and 2022. The report covers the activity of the FIU over the course of the years 2021 and 2022. Main activity points reported on include the following:

- To carry out its operational and strategic analysis tasks, the FIU has recruited analysts specialised in the areas of greatest risk identified by the National Risk Assessment (NRA). These include specialists in new technologies to target online fraud and misuse of virtual assets, corruption and misappropriation of public assets, criminal tax offences and complex corporate and legal structures.
- At the operational level, cooperation with the competent police and judicial authorities was formalised in cooperation agreements with the national public prosecutors' offices, the European Public Prosecutor's Office (EPPO) and the criminal investigation police department. The continuous improvement of available IT tools and the expertise of FIU specialists in data analysis have further contributed to improved quality at the operational level.
- Following the adoption of the goAML IT tool in 2017, the FIU receives and analyses all suspicious transaction reports in a digital environment. The FIU has been closely monitoring developments on the ongoing digital transformation at the FATF level. The FIU has also modernised the online registration form and moved to version 5 of goAML, and intends to continue its digital transformation over the coming years by adopting new technologies.
- At a strategic level, the FIU contributed to various AML/CTF projects initiated and coordinated by the Committee for the Prevention of Money Laundering and Terrorist Financing, including vertical risk assessments of legal entities, legal constructions and

terrorist financing. It also took part in the AML/CTF colleges organised by the CSSF and the CAA respectively, and in the public-private partnerships (PPP) on banks, investment funds and specialised PFSs.

In general, the FIU has intensified its cooperation with supervisory authorities, self-regulatory bodies and the professionals filing the reports to continue to improve the quality and relevance of the received suspicious transactions reports.

³⁶ 2021 and 2022 Annual Report: <https://justice.public.lu/dam-assets/fr/publications/rapport-activites-crf/rapport-crf-2021-2022.pdf> (only in French)

LUXEMBOURG BILL IMPLEMENTING DORA

4 August 2023³⁷

A bill implementing DORA and transposing into Luxembourg law Directive 2022/2556 (bill No. 8291) was lodged with the Luxembourg Parliament on 4 August 2023.

The objective of DORA and Directive 2022/2556 is to harmonise and strengthen ICT security requirements in order to achieve a high level of digital operational resilience for the entire financial sector. DORA consolidates the different rules dealing with ICT risk in the financial sector and brings them together in a single legislative act to fill gaps and inconsistencies. The consolidation and further harmonisation of key digital operational resilience requirements are part of the objective to foster innovation and the adoption of new technologies in the financial sector, while ensuring financial stability and the protection of investors and consumers.

As the provisions of DORA are directly applicable in the EU, the main purpose of the bill is to provide the national competent authorities with the supervisory and investigative powers necessary for the performance of their duties, within the limits defined by DORA, and to lay down a system of penalties.

These unified rules aim to ensure that financial entities (understood as those falling within the scope of Article 2(1) of DORA, i.e., credit institutions, investment firms, crypto-asset service providers, managers of alternative investment funds (with the exception of those falling within the scope of Article 3(2) Directive 2011/61/EU, as per Article 2(3)(a) of DORA) and management companies, among others) can withstand, respond to and recover from any serious ICT-related operational disruption.

Directive 2022/2256 accompanies and complements DORA by providing for a series of targeted amendments to existing European directives in the financial sector. Such amendments are necessary to ensure sectoral consistency with DORA as regards the application of digital operational

resilience requirements that are currently scattered across the various existing sectoral laws.

Targeted amendments are therefore made to a series of Luxembourg laws relating to the financial sector, such as the Financial Sector Law, the Payment Services Law, the UCI Law, the AIFM Law and Insurance Sector Law.

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

³⁷ Bill No. 8291: <https://www.chd.lu/fr/dossier/8291> (only in French)

LUXEMBOURG BILL INTRODUCING A MERGER CONTROL REGIME IN LUXEMBOURG

23 August 2023³⁸

A bill No. 8296 introducing a national regime on the control of concentrations between undertakings in Luxembourg was lodged with the Luxembourg Parliament on 23 August 2023. The bill provides for a set of rules (notification process and procedural rules as well as concentration analysis rules) which are largely inspired by the EU merger control regime and the ones of other European countries such as France or Belgium.

As a general rule, pursuant to the bill, a concentration, which does not fall under the EU merger control regime provided for under EU Regulation 139/2004, must be notified to the Luxembourg *Autorité de la concurrence*, and the parties are subject to a stand-still obligation if the following thresholds are met:

- the combined turnover of the undertakings or group of physical or legal persons concerned in Luxembourg exceeds EUR 60 million (excl. taxes); and
- at least two of the undertakings or group of physical or legal persons concerned each generate a turnover in Luxembourg of at least EUR 15 million (excl. taxes).

Alternatively, the *Autorité de la concurrence* may also refer cases to itself.

The bill in particular takes into consideration the significant cross-border nature of the Luxembourg activity and the importance of its financial sector. In relation to this later point, the following aspects are of particular interest:

- With respect to the abovementioned thresholds, the bill provides specific guidance as to how these thresholds should be calculated in the context of undertakings from the insurance and financial sectors (Article 1) and excludes from the scope of the notification obligation certain entities, in particular when they trade or own on a temporary

basis interest under strict conditions governing the exercise of voting rights (Article 2).

- The bill provides for specific rules in case of a merger with entities in the financial or insurance sectors that are subject to early intervention, recovery or resolution measures (Articles 47 and 48).
- Coordination rules between the *Autorité de la concurrence* and the Luxembourg financial sector supervisory authorities, i.e., respectively the CSSF (financial sector other than insurance) and the CAA (insurance sector) are provided (Article 12).

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

³⁸ Bill No. 8296: <https://www.chd.lu/fr/dossier/8296> (only in French)

CAA INFORMATION NOTE 23/8 ON THE CAPITAL REQUIREMENT ESTIMATION FOR THE PREMIUM AND RESERVE RISK FOR NON-LIFE AND HEALTH SIMILAR TO NON-LIFE INSURANCE

10 October 2023³⁹

On 10 October 2023, the CAA issued information note 23/8 on the results of the questionnaire on the capital requirement estimation for the premium and reserve risk for non-life and health similar to non-life insurance, which the CAA sent to non-life insurance and reinsurance undertakings in mid-July 2022.

The purpose of this questionnaire was twofold:

- to verify, on the basis of information from the survey, that the solvency capital requirement (SCR) of premiums and reserves recalculated by the CAA is equal to that communicated in the Solvency II annual report (QRT YE 2021); and
- to have a critical view of the various premium volumes indicated in the survey and defined in Articles 116 and 147 of Delegated Regulation (EU) 2015/35, as amended.

The analysis of the results came from both the questionnaire and the Solvency II annual reports.

Based on the information provided, the CAA concludes that the majority of non-life insurance and reinsurance undertakings estimate premium and reserve risks correctly.

However, a comparison of the questionnaire and the Solvency II annual reports revealed the presence of errors or inconsistencies in the estimation of premium and reserve risks, mainly:

- failure to update the formula/parameters (see Delegated Regulation (EU) 2019/981);
- the absence of future premium volumes on future contracts and/or on existing contracts (in

contradiction with the undertakings' documented accepted practices, for example, in the ORSA), mainly for direct insurance undertakings; and

- the estimate of the geographical diversification coefficient.

The CAA will check in with the undertakings and professionals of the insurance sector concerned to ensure that the identified corrective measures are put in place. It also encourages the entire market to keep a close eye on regulatory developments.

Lastly, the CAA draws attention to the fact that the other risk modules (catastrophe risk, counterparty default risk and market risk) have also been impacted by the latest regulatory changes (see Delegated Regulation (EU) 2015/35, as amended, currently the last consolidated text dated 02/08/2022).

³⁹ Information note:
https://www.caa.lu/uploads/documents/files/Note_info_23-8.pdf
(only in French)

CAA INFORMATION NOTE 23/9 ON THE MONITORING OF THE IMPLEMENTATION OF SCENARIOS LINKED TO THE RISKS OF CLIMATE CHANGE IN THE ORSA

10 October 2023⁴⁰

On 10 October 2023, the CAA issued its Information Note 23/9 on the monitoring of the implementation of scenarios linked to the risks of climate change in the ORSA.

In its information note, the CAA follows up on the publication of its previous Information Note 23/2 on the implementation of scenarios relating to the risks of climate change in the ORSA and provides an overview of the current situation and highlights the efforts that still need to be made to comply with applicable regulation (cf. publications of EIOPA: EIOPA-BoS-19/241 and EIOPA-BoS-22/329).

The information note further presents the monitoring carried out during the first half of 2023 and the first control actions currently being deployed.

The CAA study includes the ORSA reports for 2019 to 2021 (published before August 2022 and analysed in Information Note 23/2), as well as the 2021 and 2022 ORSA reports published from that date until 27 August 2023.

The CAA notes that there is an improvement in the way climate change risks are taken into account and managed, compared with previous analyses. The majority of direct insurance companies, groups and reinsurance companies subject to the quarterly quantitative reporting templates (QRT) now take climate change risks and sustainable finance regulations into account (between 70% and 83%, depending on the sector). Many of them consider these risks to be material.

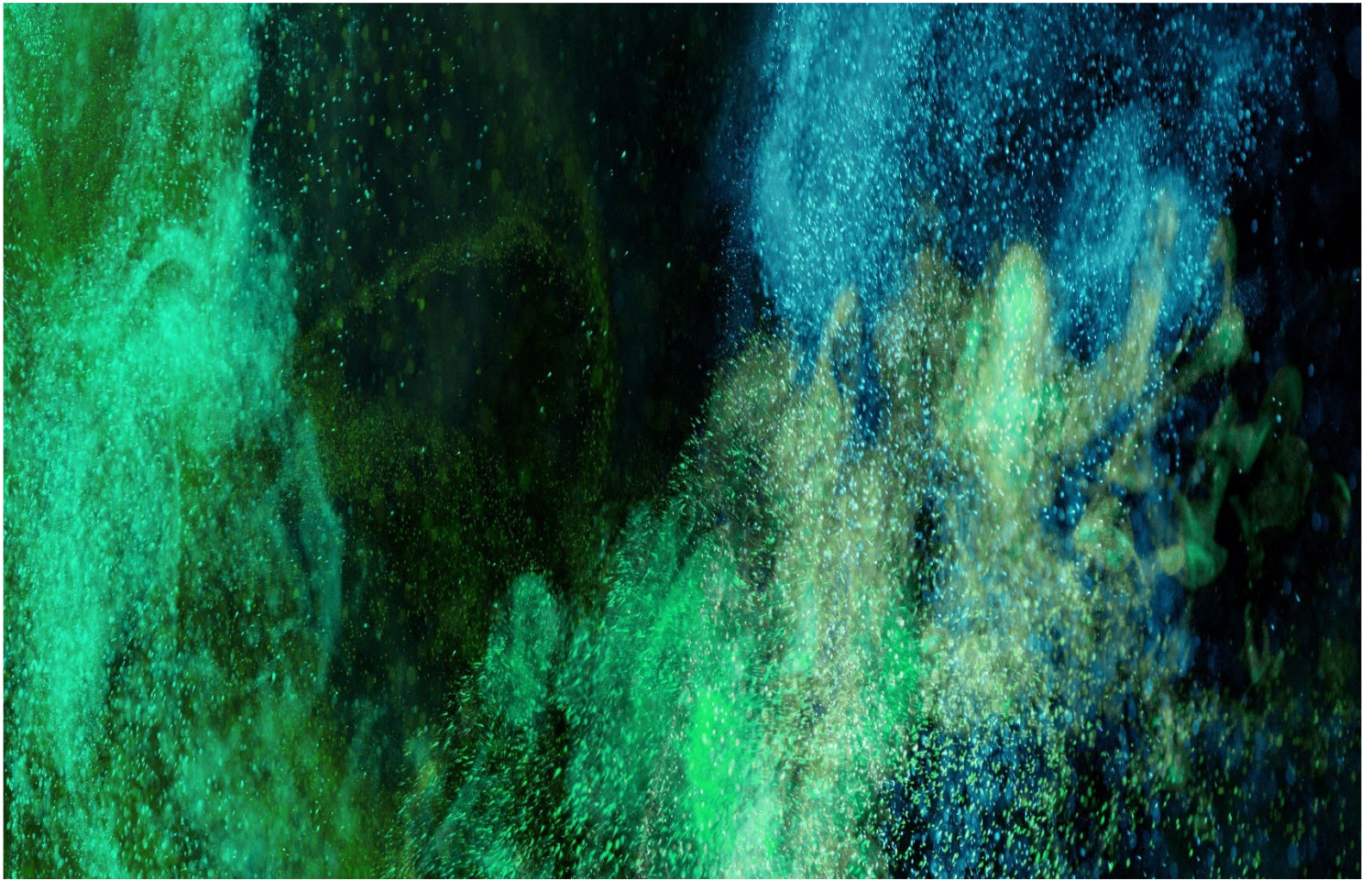
However, the CAA emphasises that a minority of direct insurance companies (or groups) and the majority of captive reinsurance companies have made little or no reference to the risks of climate change in their ORSAs.

The CAA reminds that the applicable regulations (Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 (as amended) and guidelines EIOPA-BoS21/127 and EIOPA-BoS-22/329) require these climate change and environmental, social and governance risks to be taken into account, even in cases where the risk is considered insignificant. In the latter case, an explanation should be provided as to why this is the case.

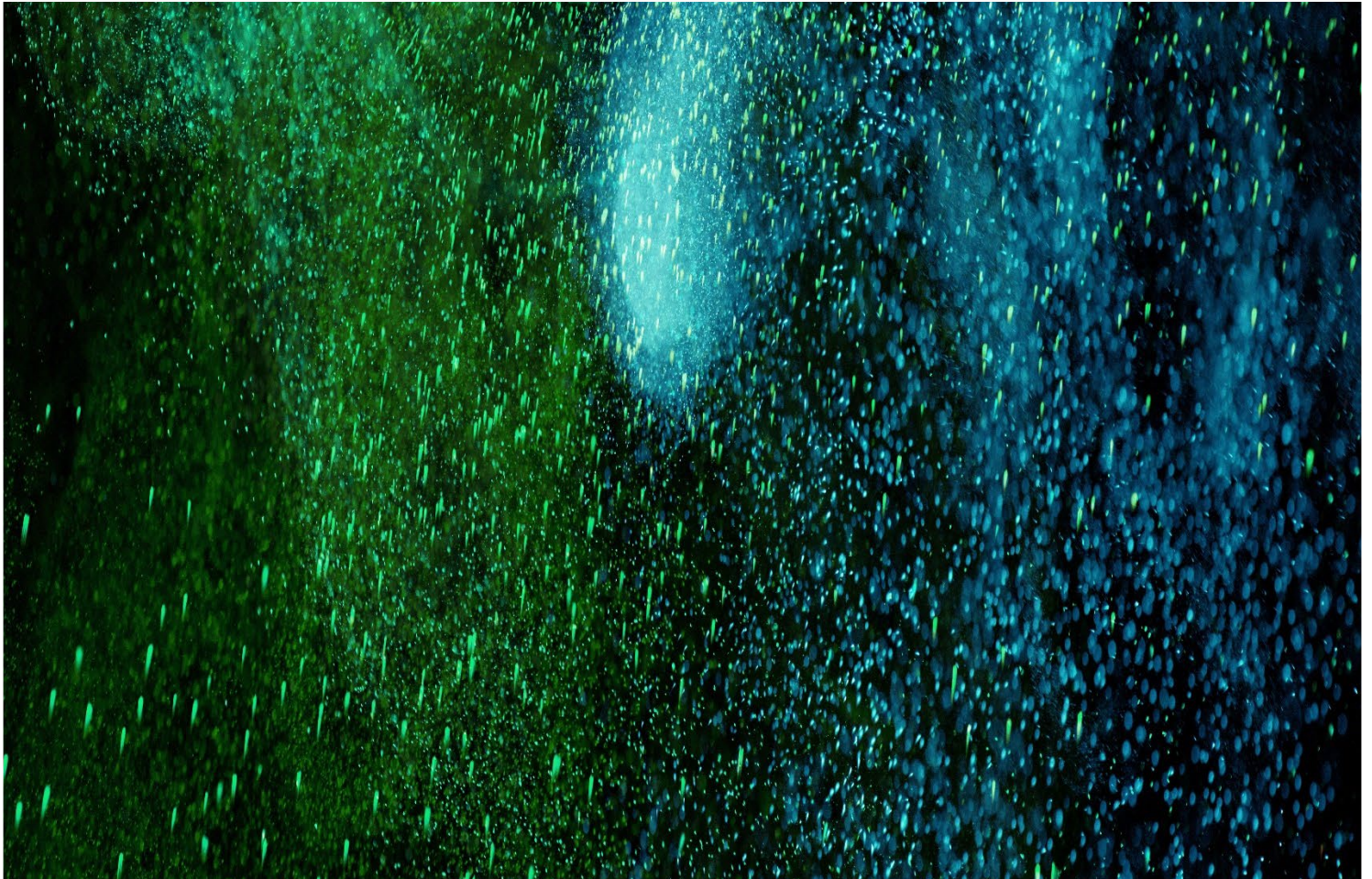
In view of the weaknesses or shortcomings identified during the analysis of the ORSA reports, certain companies will be contacted individually by the CAA.

In addition, given the materiality of climate change risks, the CAA plans to continue its supervisory action to ensure that relevant regulations are applied. Such controls will focus on both governance and quantitative aspects (on the medium- to long-term impact on underwriting results and on companies' solvency ratios).

⁴⁰ Information note:
https://www.caa.lu/uploads/documents/files/Note_info_23-9.pdf
(only in French)



FINTECH



FINTECH

CSSF FAQ ON VIRTUAL ASSET SERVICE PROVIDERS

17 August 2023⁴¹

On 17 August 2023, the CSSF published a document on FAQ regarding VASP.

The FAQ is of interest for persons and entities being already registered in the CSSF register as a VASP, as defined in Article 1 (20c) of the AML/CTF Law, or willing either to be established or to offer virtual asset services in Luxembourg.

The CSSF FAQ has been established based on the current AML/CTF legal framework applicable to VASPs, and does not take into account the evolution of the framework related to virtual assets at the European level (i.e., MiCAR).

The FAQ clarifies, among others, the concept of virtual assets, as well as the persons and entities who are required to register with the CSSF as a VASP, including registration requirements applicable to non-Luxembourg entities which provide virtual asset services in Luxembourg. Some practicalities with regards to the registration as a VASP are also addressed, such as the timing for registration, passporting and fees levied by the CSSF. Certain questions covered by the FAQ are specific to certain types of persons and entities, such as credit institutions, undertakings for collective investment or providers which solely offer the technology to support virtual asset services, while other questions provide more general guidance on the application of AML/CTF requirements by VASPs.

⁴¹ FAQ: https://www.cssf.lu/wp-content/uploads/QR_VASP.pdf

DORA – ESAS REPORT ON LANDSCAPE OF ICT THIRD PARTY PROVIDERS IN THE EU

19 September 2023⁴²

On 19 September 2023, the ESAs published an indicative overview of information and communication technology (ICT) third-party providers (TPPs) as part of their preparations for the Digital Operational Resilience Act (DORA). The analysis is intended to map the provision of ICT services by TPPs to financial entities in the EU and to support the ESAs' policy-making process in light of the EU Commission's call for advice to further specify the criteria for critical ICT TPPs and to determine oversight fees.

The analysis revealed that approximately 15,000 ICT TPPs directly served financial entities in the EU. These TPPs played significant roles, supporting critical or important functions and offering a wide array of services. For functions crucial to financial entities or services with high impact, most were non-substitutable, indicating their essential nature.

⁴² Overview: https://www.esma.europa.eu/sites/default/files/2023-09/ESA_2023_22_-_ESAs_report_on_the_landscape_of_ICT_TPPs.pdf

EUROPEAN PARLIAMENT BRIEFING ON NON-EU COUNTRIES' REGULATION ON CRYPTO-ASSETS

21 September 2023⁴³

On 21 September 2023, the European Parliament published a briefing summarising the current status of relevant legislation in the UK and U.S., and providing a brief overview of the global regulatory landscape.

It highlights several potential issues, including that:

- the UK framework appears to be taking an increasingly common law, principles-based approach to financial regulation, including in the crypto-asset space, which may result in regulatory divergence; and
- the U.S. framework has wide variation at the state level and a lack of clarity around what products within the crypto-asset space are under the jurisdiction of the financial markets supervisor.

The briefing concludes that the relatively strict regulatory framework within the EU should have limited but positive effects on global crypto-asset markets, but that further action from third countries is required to help strengthen financial stability and decrease the potentially negative impact of crypto-assets and stablecoins.

⁴³ Briefing:
[https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/753930/EPRS_BRI\(2023\)753930_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/753930/EPRS_BRI(2023)753930_EN.pdf)

ESAS 2023 JOINT REPORT ON THE EXTENT OF VOLUNTARY DISCLOSURES UNDER SFDR

28 September 2023⁴⁴

On 28 September 2023, the European Supervisory Authorities (ESAs) published their second annual report on the extent of voluntary disclosure of principal adverse impacts (PAI) under Article 18 of the Sustainable Finance Disclosure Regulation (SFDR). Highlights of the report include that:

- there was an overall improvement compared to the previous year, although the ESAs note that there is still significant variation in the extent of compliance with the requirements and in the quality of disclosures across both financial market participants and jurisdictions;
- disclosures appear easier to find on websites compared to the previous year;
- financial market participants are generally not disclosing the extent to which their investments align with the Paris Agreement, despite being encouraged to do so; and
- voluntary disclosures of PAI consideration by financial products will be further analysed in future reports.

The 2023 report also includes a set of recommendations for the European Commission to consider ahead of the next comprehensive assessment of the SFDR.

⁴⁴ Report: https://www.eiopa.europa.eu/system/files/2023-09/Joint%20ESAs%202023%20annual%20report_Article%2018%20SFDR.pdf

EBA TECHNICAL ADVICE ON MICAR DELEGATED ACTS

29 September 2023⁴⁵

On 29 September 2023, the EBA issued its Technical Advice in response to the European Commission's Call for Advice (CfA) of December 2022 to the EBA on matters related to two delegated acts under Regulation (EU) 2023/1114 (the Markets in Cryptoassets Regulation, MiCAR). The report outlines the EBA's advice in response to the CfA.

MiCAR allows the Commission to create delegated acts concerning the key indicators used to assess whether asset-referenced tokens (ARTs) and electronic money tokens (EMTs) should be deemed 'significant.'

The indicators revolve around factors such as the issuer's international activities outside the EU and the interconnectedness of ARTs/EMTs with the financial system.

MiCAR also authorises the Commission to establish delegated acts specifying certain aspects of supervisory fees charged by the EBA to issuers of significant ARTs (sARTs) and significant EMTs (sEMTs).

Regarding the criteria for classifying ARTs and EMTs as significant, the EBA recommends a set of core and ancillary indicators for each criterion. The EBA proposes that the determination of significance should consider both types of indicators collectively.

The second part of the report offers the EBA's advice regarding supervisory fees, specifying the type of fees, the subjects for which fees are applicable, the fee amounts, payment methods and the calculation of the maximum amount per entity that the EBA can charge. The EBA highlights the need for flexibility in estimating fee amounts from year to year due to the rapidly evolving crypto-assets market, as the number of tokens under direct supervision and supervisory priorities may significantly change over time.

⁴⁵ Technical Advice:
https://www.eba.europa.eu/sites/default/documents/files/docuement_library/Publications/Other%20publications/2023/1062227/EBA

https://www.eba.europa.eu/sites/default/documents/files/docuement_library/Publications/Other%20publications/2023/1062227/EBA%20advice%20on%20MiCAR%20CfA%20on%20significance%20criteria%20and%20supervisory%20fees.pdf

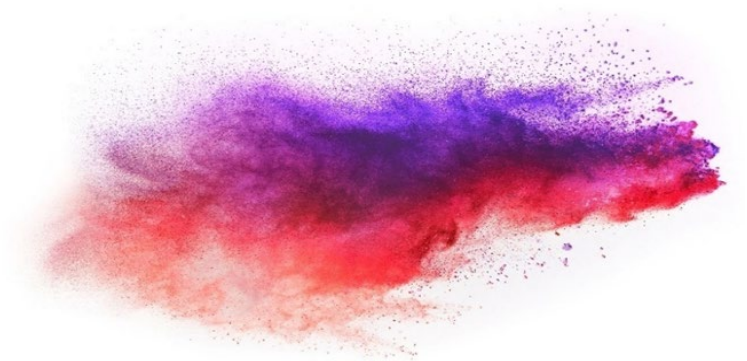
ESAS TECHNICAL ADVICE ON CRITERIA AND OVERSIGHT FEES FOR CRITICAL ICT THIRD-PARTY PROVIDERS

29 September 2023⁴⁶

On 29 September 2023, the ESAs published the Joint European Supervisory Authorities' Technical Advice in response to the European Commission's call for advice on two delegated acts under the Digital Operational Resilience Act (DORA), in which they set out further criteria for identifying critical ICT third-party service providers (CTPPs) and determine the oversight fees they must pay.

The report proposes both quantitative and qualitative indicators for criticality criteria, along with minimum relevance thresholds as a basis for assessing criticality.

The report further outlines types of expenditure covered by oversight fees, methods for determining applicable turnover (for fee calculation), fee calculation methodology and payment-related practicalities. A financial contribution for voluntary opt-in requests is suggested.



⁴⁶ Technical Advice:
<https://www.eiopa.europa.eu/system/files/2023-09/Joint%20ESAs%20response%20to%20the%20Call%20for%20advice%20on%20the%20designation%20criteria%20and%20fees%20for%20the%20DORA%20oversight%20framework.pdf>

[0advice%20on%20the%20designation%20criteria%20and%20fees%20for%20the%20DORA%20oversight%20framework.pdf](https://www.eiopa.europa.eu/system/files/2023-09/Joint%20ESAs%20response%20to%20the%20Call%20for%20advice%20on%20the%20designation%20criteria%20and%20fees%20for%20the%20DORA%20oversight%20framework.pdf)



ESG



ESG

CSSF PRESENTATION ON THE OUTCOMES OF THE CIRCULAR 21/773 SELF-ASSESSMENT EXERCISE 2022 ON CLIMATE-RELATED AND ENVIRONMENTAL RISKS

27 June 2023⁴⁷

On 27 June 2023, the CSSF published the slides of a presentation given by the CSSF on the outcomes of the CSSF self-assessment exercise 2022, related to Circular CSSF 21/773 on climate-related and environmental risks. The CSSF further published a video on a joint webinar organised with the ABL on the same topic, leading through these slides.

The self-assessment exercise was based on a selected sample of 12 less significant institutions and three branches of non-EU credit institutions, representing different business models in Luxembourg, based on the principles to target the most important less significant institutions (in terms of size) and to cover all relevant business models in Luxembourg.

The purpose of the self-assessment exercise was to assess banks' compliance with the provisions of the Circular, to improve banks' and supervisors' knowledge of climate-related and environmental risks and assessment, as well as to be prepared for the introduction of climate-related and environmental risk assessment in the SREP.

The CSSF in particular highlights good practices detected in the self-assessment, and provides an overview of the forthcoming 2023-2024 self-assessment exercise and the CSSF's supervisory approach, expectations towards banks in this respect and next steps.

⁴⁷ Presentation on CSSF Circular 21/773: https://www.cssf.lu/wp-content/uploads/Closing-webinar_Circ21773_SA_200623.pdf

Webinar: <https://www.cssf.lu/en/Document/webinar-on-the-outcomes-of-the-cssf-self-assessment-exercise-2022-related-to-circular-cssf-21-773-on-climate-related-and-environmental-risks/>

CSSF THEMATIC REVIEW ON THE IMPLEMENTATION OF SUSTAINABILITY-RELATED PROVISIONS IN THE INVESTMENT FUND INDUSTRY

3 August 2023⁴⁸

On 3 August 2023, the CSSF published a thematic review on the implementation of Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector (SFDR) and Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment (Taxonomy Regulation) in the investment funds industry.

The EU sustainable finance legislative framework is in progress, with key regulations already in effect. The SFDR, applicable since March 2021, imposes sustainability disclosure obligations on financial market participants, including investment funds managers (IFMs), with regards to managed or advised financial products like UCITS or AIFs. The Taxonomy Regulation introduced additional disclosure requirements for IFMs specifically relating to environmental considerations. Both of these have been supplemented by the Commission Delegated Regulation (EU) of 2022/1288 (SFDR RTS), detailing transparency requirements. The UCITS Directive and AIFMD frameworks were in the meantime amended to integrate considerations around sustainability risks.

Against the above background, the CSSF initiated supervisory actions, including on-site inspections and off-site thematic reviews, to ensure compliance by Luxembourg IFMs with the above requirements.

The report aims to inform the industry about observations and recommendations for improvement based on the CSSF's review, which among others, cover the sustainability-related organisation arrangements to be implemented by IFMs, but also the integration of sustainability considerations in marketing communications.

IFMs are expected to implement corrective measures in response to the CSSF's findings, aligning with ongoing sustainability-related requirements assessment.

These requirements may include:

- Organisational arrangements, such as ensuring disclosure requirements under the SFDR are met; obtaining full documentation explaining how portfolio managers embed sustainability-related provisions in investment decisions;
- Risk management requirements, such as establishing, implementing and maintaining effective risk management policies covering sustainability risks; integrating sustainability risks into the fund's risk profile, limitation system and reporting mechanisms; and conducting stress tests and scenario analyses focused on relevant sustainability risks;
- Disclosure obligations on the integration of sustainability risks; and
- Pre-contractual and product website disclosures, such as providing clear, specific and detailed information about environmental/social characteristics or sustainable objectives pursued by funds; fund names accurately reflecting their sustainability characteristics and alignment with investment objectives; and asset allocation alignment with objectives and adhering to specific proportions.

⁴⁸ Thematic Review: <https://www.cssf.lu/wp-content/uploads/The-implementation-of-sustainability-related-provisions-in-the-investment-fund-industry.pdf>

CSSF COMMUNIQUÉ ON THE OECD REPORT ON FINANCIAL CONSUMERS AND SUSTAINABLE FINANCE

18 August 2023⁴⁹

On 18 August 2023, the CSSF published a communiqué to announce the publication of the OECD report on financial consumers and sustainable finance – policy implications and approaches.

The CSSF states that the report represents an important contribution to the international policy context on sustainable finance relating specifically to the issues, risks and opportunities for financial consumers.

The report represents a first piece of work by the OECD Task Force on Financial Consumer Protection on this topic. It explores issues, opportunities and challenges for financial consumers in relation to sustainable finance. The report examines current trends in terms of consumer demand for, and experience with, sustainable finance products, as well as new risks to consumers posed by sustainable finance products. The report also explores financial consumer protection tools and responses available to policymakers and oversight authorities.

The CSSF, as a national competent authority, participated in the preparation as well as in the drafting of the report.

⁴⁹ Communiqué: <https://www.cssf.lu/en/2023/08/oecd-financial-consumers-and-sustainable-finance-policy-implications-and-approaches/>

Report: <https://www.oecd-ilibrary.org/finance-and-investment/financial-consumers-and-sustainable-finance>

[finance_318d0494-en;jsessionid=dAMXr158ljWDpBW0Zelcfa0YP3matWijl_-5N1YS.ip-10-240-5-61](https://www.oecd-ilibrary.org/finance-and-investment/financial-consumers-and-sustainable-finance)

EUROPEAN COMMISSION LAUNCHES CONSULTATIONS ON SFDR

14 September 2023⁵⁰⁵¹

On 14 September 2023, the European Commission launched a targeted consultation⁵² and a public consultation⁵³ to seek feedback on the Sustainable Finance Disclosure Regulation (SFDR).

The Commission is interested in understanding how the SFDR has been implemented and any potential shortcomings, including in its interaction with the other parts of the European framework for sustainable finance, and in exploring possible options to improve the framework.

The consultations are accompanied by a series of workshops, beginning on 10 October 2023. Comments on both consultations are due by 15 December 2023.

⁵⁰ Targeted Consultation: https://finance.ec.europa.eu/regulation-and-supervision/consultations/finance-2023-sfdr-implementation_en

⁵¹ Public Consultation: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13961-Report-on-the-Sustainable-Finance-Disclosure-Regulation/public-consultation_en

⁵² Targeted Consultation: https://finance.ec.europa.eu/regulation-and-supervision/consultations/finance-2023-sfdr-implementation_en

⁵³ Public Consultation: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13961-Report-on-the-Sustainable-Finance-Disclosure-Regulation/public-consultation_en

ESMA ARTICLE ON ESG NAMES AND CLAIMS IN THE EU FUND INDUSTRY

2 October 2023⁵⁴

On 2 October 2023, ESMA published an article exploring the use of language relating to ESG factors in EU investment fund names and documentation.

In the context of sustainable economy, trust in the accuracy of Environmental, Social, and Governance (ESG) disclosures is crucial. Accordingly, the increasing threat of greenwashing has become a significant concern for policymakers worldwide. Focusing specifically on EU investment funds, the ESMA study delved into these concerns by analysing various datasets.

The researchers examined a dataset containing historical information on 36,000 funds managing assets worth EUR 16 trillion. Their analysis revealed a rising trend in funds incorporating ESG-related language in their names with investors consistently preferring funds with ESG-related terms in their names. The study also explored the extent of ESG language across funds' regulatory documents and marketing materials.

More specifically, the study shows fund managers tend to use generic language such as 'ESG' or 'Sustainable' in investment funds' names rather than more specific terms. This practice can complicate investors' efforts to verify if a fund's portfolio aligns with its name.

Interestingly, the article relates back to the ESMA Consultation Paper on guidelines on funds' names using ESG or sustainability-related terms of 18 November 2022,⁵⁵ for which final feedback is still expected (ESMA considered comments until 20 February 2023). Importantly, these guidelines contain specific thresholds for funds to comply with should they wish to use sustainability-related words in their funds' names.

⁵⁴ [ESMA Article: https://www.esma.europa.eu/press-news/esma-news/esma-finds-increase-use-esg-related-language-eu-fund-industry](https://www.esma.europa.eu/press-news/esma-news/esma-finds-increase-use-esg-related-language-eu-fund-industry)

⁵⁵ [ESMA Consultation Paper: https://www.esma.europa.eu/sites/default/files/library/esma34-472-373_guidelines_on_funds_names.pdf](https://www.esma.europa.eu/sites/default/files/library/esma34-472-373_guidelines_on_funds_names.pdf)

ESMA ANNOUNCES COMMON SUPERVISORY ACTION ON MIFID2 SUSTAINABILITY REQUIREMENTS

3 October 2023⁵⁶

On 3 October 2023, ESMA announced that it intends to launch a common supervisory action (CSA) with national competent authorities (NCAs) on the integration of sustainability in firm's suitability assessment and product governance processes and procedures.

The CSA will cover:

- how firms collect information on clients' sustainability preferences;
- for the purpose of the suitability assessment, the arrangements firms have put in place to understand and correctly categorise investment products with sustainability factors;
- how firms ensure the suitability of an investment with respect to sustainability, including the use of a portfolio approach; and
- as part of the target market assessment of the investment product, how firms specify any sustainability-related objectives a product is compatible with.

The CSA will be conducted over the course of 2024.

⁵⁶ ESMA Announcement: <https://www.esma.europa.eu/press-news/esma-news/esma-launch-common-supervisory-action-mifid-ii-sustainability-requirements>

CAA INFORMATION NOTE 23/9 ON THE MONITORING OF THE IMPLEMENTATION OF SCENARIOS LINKED TO THE RISKS OF CLIMATE CHANGE IN THE ORSA

10 October 2023⁵⁷

On 10 October 2023, the CAA issued its Information Note 23/9 on the monitoring of the implementation of scenarios linked to the risks of climate change in the ORSA.

In its information note, the CAA follows up on the publication of its previous Information Note 23/2 on the implementation of scenarios relating to the risks of climate change in the ORSA, and provides an overview of the current situation and highlights the efforts that still need to be made to comply with applicable regulation (cf. publications of EIOPA: EIOPA-BoS-19/241 and EIOPA-BoS-22/329).

The information note further presents the monitoring carried out during the first half of 2023 and the first control actions currently being deployed.

The CAA study includes the ORSA reports for 2019 to 2021 (published before August 2022 and analysed in Information Note 23/2), as well as the 2021 and 2022 ORSA reports published from that date until 27 August 2023.

The CAA notes that there is an improvement in the way climate change risks are taken into account and managed, compared with previous analyses. The majority of direct insurance companies, groups and reinsurance companies subject to the quarterly quantitative reporting templates (QRT) now take climate change risks and sustainable finance regulations into account (between 70% and 83%, depending on the sector). Many of them consider these risks to be material.

However, the CAA emphasises that a minority of direct insurance companies (or groups) and the majority of captive reinsurance companies have made little or no reference to the risks of climate change in their ORSAs.

The CAA reminds that the applicable regulations (Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 (as amended) and guidelines EIOPA-BoS21/127 and EIOPA-BoS-22/329) require these climate change and environmental, social and governance risks to be taken into account, even in cases where the risk is considered insignificant. In the latter case, an explanation should be provided as to why this is the case.

In view of the weaknesses or shortcomings identified during the analysis of the ORSA reports, certain companies will be contacted individually by the CAA.

In addition, given the materiality of climate change risks, the CAA plans to continue its supervisory action to ensure that relevant regulations are applied. Such controls will focus on both governance and quantitative aspects (on the medium- to long-term impact on underwriting results and on companies' solvency ratios).

⁵⁷ Information note:
https://www.caa.lu/uploads/documents/files/Note_info_23-9.pdf
(only in French)

CSSF COMMUNIQUÉ ON THE LAUNCH OF THE ESMA COMMON SUPERVISORY ACTION ON MIFID II SUSTAINABILITY REQUIREMENTS

25 October 2023⁵⁸

On 25 October 2023, the CSSF issued a communiqué on the launch by ESMA of a Common Supervisory Action with NCAs on the integration of sustainability in credit institutions' as well as investment firms' MiFID II suitability assessment and product governance processes and procedures in 2024.

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

The Common Supervisory Action will cover the following aspects:

- How firms collect information on their clients' "sustainability preferences";
- Which arrangements have been put in place by firms to understand and correctly categorise investment products with sustainability factors for the purpose of the suitability assessment;
- How firms ensure the suitability of an investment with respect to sustainability (including the use of a "portfolio approach"); and
- How firms specify any sustainability-related objectives a product is compatible with as part of the target market assessment of the investment product.

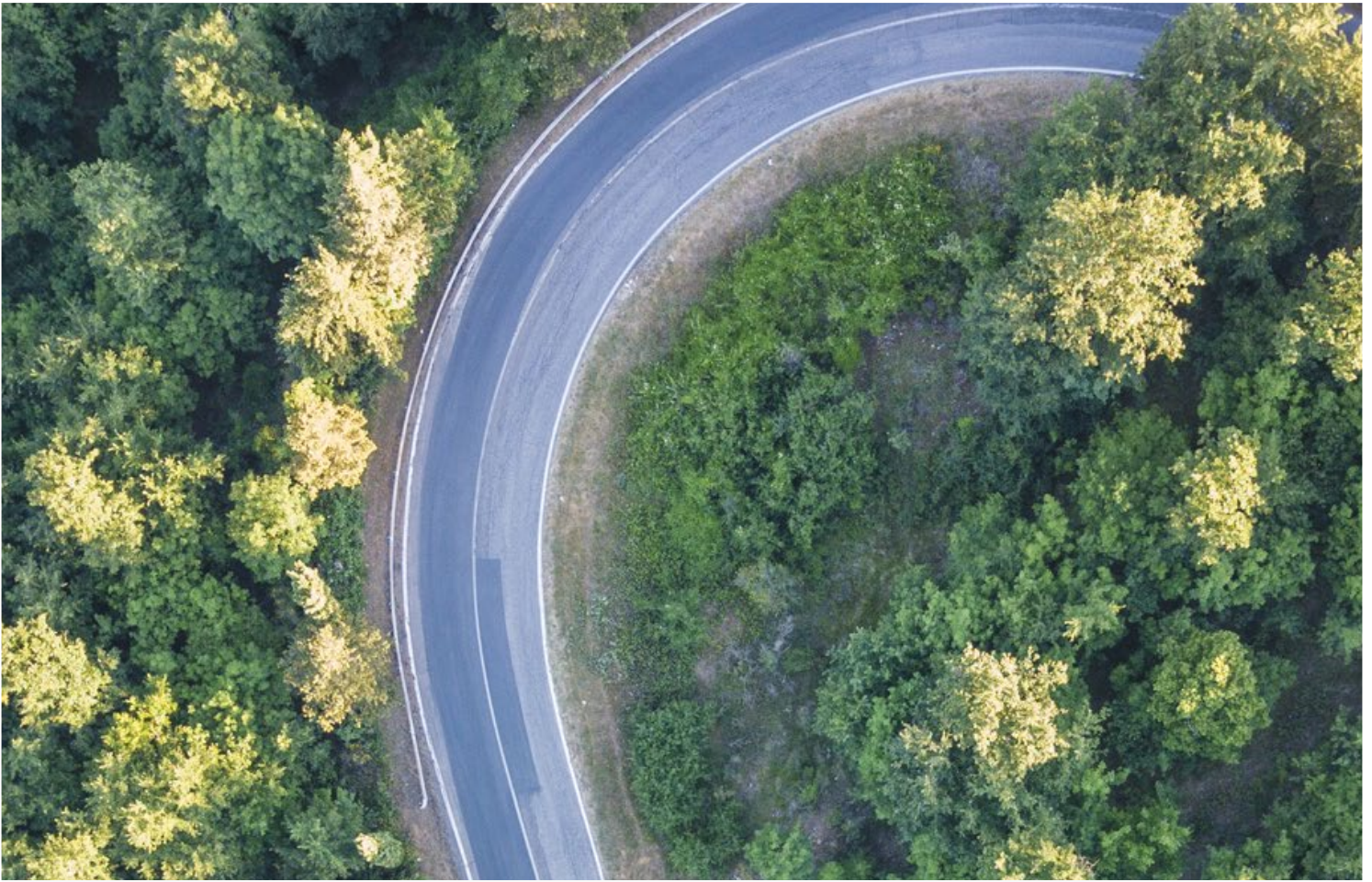
The Common Supervisory Action follows ESMA's recent update of two sets of guidelines on suitability and product governance, both of which entered into application on 3 October 2023.

In this context, the CSSF will contact a sample of supervised entities.

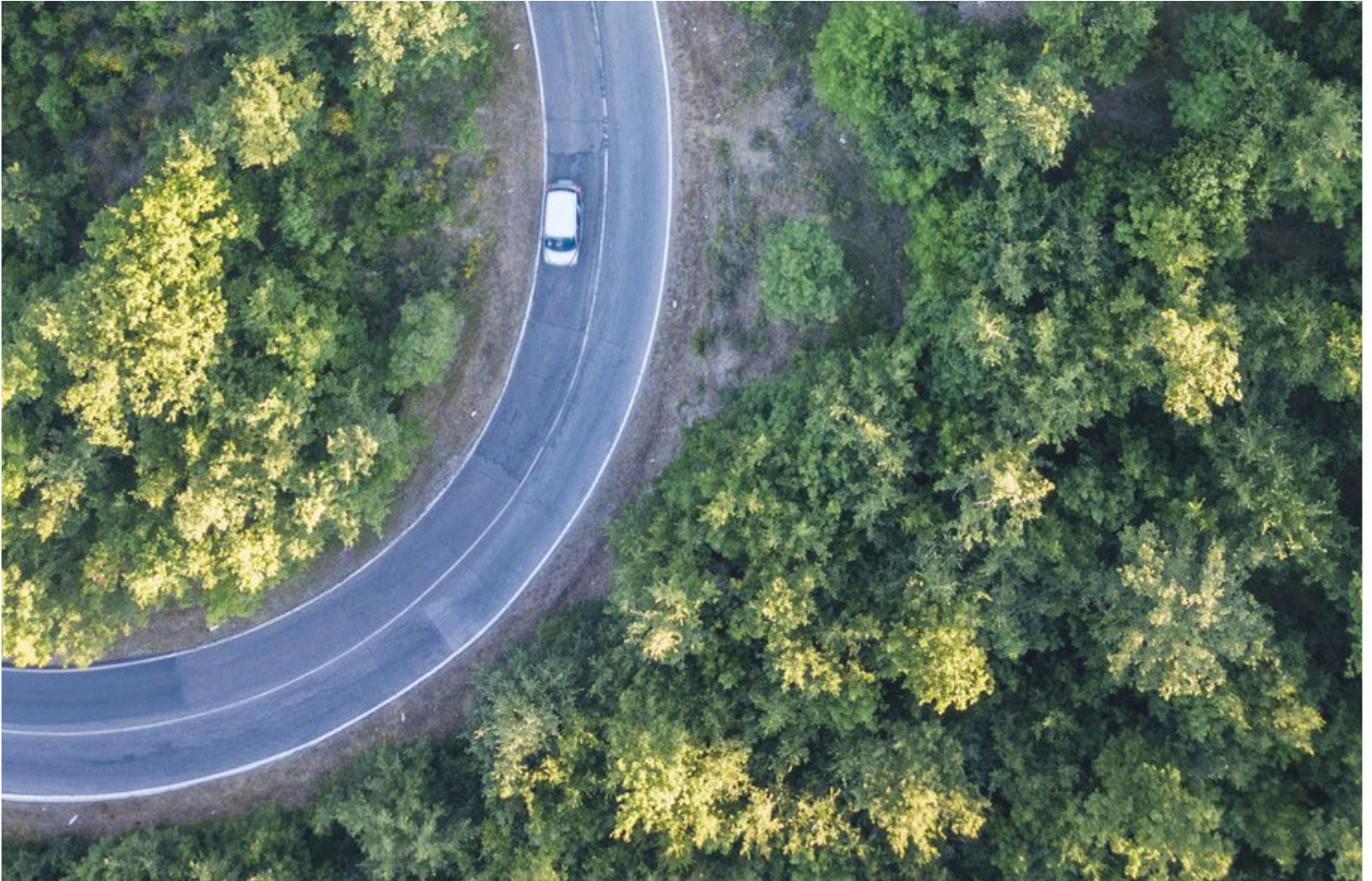
A link to the relevant pages on the ESMA website on the ESMA Common Supervisory Action launch, as well as to ESMA's abovementioned guidelines on suitability and product governance, can be found in the Communiqué.



⁵⁸ Communiqué: <https://www.cssf.lu/en/2023/10/launch-of-the-esma-common-supervisory-action-on-mifid-ii-sustainability-requirements/>



ASSET MANAGEMENT



ASSET MANAGEMENT

ESMA REPORT MARKETING REQUIREMENTS AND COMMUNICATIONS ON CROSS-BORDER DISTRIBUTION OF FUNDS

3 July 2023⁵⁹

On 3 July 2023, ESMA published its second report on national rules governing the marketing of investment funds under Regulation (EU) 2019/1156 on facilitating cross-border distribution of collective investment undertakings (Regulation on Cross-Border Distribution of Funds, CBDF). ESMA's key findings are that:

- the transposition of Directive (EU) 2019/1160 (the CBDF Directive) and entry into force of ESMA's guidelines on funds' marketing communications helped to achieve a greater level of harmonisation in areas where national divergences existed (as identified in ESMA's first report, submitted in 2021); and
- despite the powers national competent authorities (NCAs) have under the Regulation, only a limited number of NCAs carried out any ex-ante verifications of marketing communications, while an increasing number of NCAs reported carrying out ex-post verifications.

ESMA is due to submit its next report to the EU Parliament, Council and Commission in two years.

⁵⁹ ESMA Report: <https://www.esma.europa.eu/press-news/esma-news/esma-publishes-second-overview-national-rules-governing-fund-marketing>

PUBLICATION OF THE LAW OF 21 JULY 2023 AMENDING THE LUXEMBOURG FUND LAWS

24 July 2023⁶⁰

On 24 July 2023, the new Luxembourg law of 21 July 2023 amending the Luxembourg sectoral fund laws was published in the Official Journal of Luxembourg.

This law will entered into force on 28 July 2023.

The new law modernises the Luxembourg funds toolbox by, among others:

- Lowering the minimum investment threshold for "well-informed" investors from EUR 125,000 to EUR 100,000;
- Extending the period within which the minimum capital requirements of a "SIF", "UCI Part II" or "RAIF" should be reached;
- Extending the possible corporate forms a "UCI Part II" may take (currently limited to public limited liability companies only (*société anonyme*)); and
- Introducing an exemption from the subscription tax for a SIF, UCI Part II fund or RAIF authorised as a European Long Term Investment Fund (ELTIF).

Amended and coordinated versions of the relevant sectoral fund laws, accompanied by an English translation, have in the meantime been published on the CSSF website.

⁶⁰ Law of 21 July 2023:
https://www.stradalex.lu/fr/slu_src_publ_leg_mema/toc/leg_lu_mema_202307_442/doc/mema_etat-leg-loi-2023-07-21-a442-jo

CSSF THEMATIC REVIEW ON THE IMPLEMENTATION OF SUSTAINABILITY-RELATED PROVISIONS IN THE INVESTMENT FUND INDUSTRY

3 August 2023⁶¹

On 3 August 2023, the CSSF published a thematic review on the implementation of Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector (SFDR) and Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment (Taxonomy Regulation) in the investment funds industry.

The EU sustainable finance legislative framework is in progress, with key regulations already in effect. The SFDR, applicable since March 2021, imposes sustainability disclosure obligations on financial market participants, including investment funds managers (IFMs), with regards to managed or advised financial products like UCITS or AIFs. The Taxonomy Regulation introduced additional disclosure requirements for IFMs specifically relating to environmental considerations. Both of these have been supplemented by the Commission Delegated Regulation (EU) of 2022/1288 (SFDR RTS), detailing transparency requirements. The UCITS Directive and AIFMD frameworks were in the meantime amended to integrate considerations around sustainability risks.

Against the above background, the CSSF initiated supervisory actions, including on-site inspections and off-site thematic reviews, to ensure compliance by Luxembourg IFMs with the above requirements.

The report aims to inform the industry about observations and recommendations for improvement based on the CSSF's review, which among others, cover the sustainability-related organisation arrangements to be implemented by IFMs, but also the integration of sustainability considerations in marketing communications.

IFMs are expected to implement corrective measures in response to the CSSF's findings, aligning with ongoing sustainability-related requirements assessment.

These requirements may include:

- Organisational arrangements, such as ensuring disclosure requirements under the SFDR are met; obtaining full documentation explaining how portfolio managers embed sustainability-related provisions in investment decisions;
- Risk management requirements, such as establishing, implementing and maintaining effective risk management policies covering sustainability risks; integrating sustainability risks into the fund's risk profile, limitation system and reporting mechanisms; and conducting stress tests and scenario analyses focused on relevant sustainability risks;
- Disclosure obligations on the integration of sustainability risks; and
- Pre-contractual and product website disclosures, such as providing clear, specific and detailed information about environmental/social characteristics or sustainable objectives pursued by funds; fund names accurately reflecting their sustainability characteristics and alignment with investment objectives; asset allocation alignment with objectives and adhering to specific proportions.

⁶¹ Thematic Review: <https://www.cssf.lu/wp-content/uploads/The-implementation-of-sustainability-related-provisions-in-the-investment-fund-industry.pdf>

LUXEMBOURG BILL NO. 8291 IMPLEMENTING DORA

4 August 2023⁶²

On 4 August 2023, bill No. 8291 was lodged with the Luxembourg Parliament.

The purpose of the bill is twofold. Firstly, it aims to transcribe Regulation (EU) 2022/2554 on digital operational resilience of the financial sector (Digital Operational Resilience Act, DORA). Secondly, it transposes into Luxembourg law Directive (EU) 2022/2556 amending various EU directives concerning the digital operational resilience of the financial sector (DORA Amending Directive).

The main objective of the Regulation and of the Directive is to harmonise and strengthen information and communication technology (ICT) security standards in the financial sector, thereby ensuring a high level of digital operational resilience.

As the provisions of DORA are directly applicable in the EU, the main purpose of the bill is to provide the national competent authorities with the supervisory and investigative powers necessary for the performance of their duties, within the limits defined by DORA, and to lay down a system of penalties.

These unified rules aim to ensure that financial entities (understood as those falling within the scope of Article 2(1) Regulation (EU) 2022/2554, i.e., credit institutions, investment firms, crypto-asset service providers, managers of alternative investment funds (with the exception of those falling within the scope of Article 3(2) Directive 2011/61/EU, as per Article 2(3)(a) Regulation (EU) 2022/2554) and management companies, among others) can withstand, respond to and recover from any serious ICT-related operational disruption. The bill aims to give the competent national authorities the supervisory and investigative powers they need to enforce these regulations.

It also makes targeted changes to the existing EU financial directives to ensure their consistency with the new digital operational resilience requirements; including the law of 5 April 1993 on the financial sector (as amended), the law of

17 December 2010 on undertakings for collective investment (as amended) and the law of 12 July 2013 on alternative investment fund managers (as amended).

The CSSF has urged on an informal basis, during a recent webinar on the topic, all financial entities in scope to already start performing a gap analysis against these new requirements, regardless of the fact that the date of entry into force of the law is 17 January 2025.

⁶² Bill No. 8291: <https://www.chd.lu/fr/dossier/8291>

CSSF FAQs – VIRTUAL ASSET SERVICE PROVIDERS

17 August 2023⁶³

On 17 August 2023, the CSSF published its Frequently Asked Questions (FAQs) on virtual asset service providers (VASPs) which clarified, among other things, the concept of virtual assets (VA), as well as the persons and entities who are required to register with the CSSF as VASPs, including registration requirements applicable to non-Luxembourg entities which provide VA services in Luxembourg.

The FAQ is relevant for entities already registered VASPs according to the Law of 12 November 2004 on money laundering and terrorist financing or those intending to establish or offer virtual asset services in Luxembourg. It is created based on the existing legal framework for VASPs, and does not consider potential changes related to virtual assets at the European level, such as MICAR.

Some practicalities with regard to the registration as a VASP are also addressed, such as the timing for registration, passporting and fees levied by the CSSF.

Some questions covered by the FAQs are specific to certain types of persons and entities, such as credit institutions, undertakings for collective investment or providers which solely offer the technology to support VA services, while other questions provide more general guidance on the application of AML/CTF requirements by VASPs.

⁶³ FAQs: https://www.cssf.lu/wp-content/uploads/QR_VASP.pdf

CSSF PRESS RELEASE 23/15 ON THE OECD REPORT ON FINANCIAL CONSUMERS AND SUSTAINABLE FINANCE

18 August 2023⁶⁴

On 18 August 2023, the CSSF published a press release welcoming the publication of the Organisation for Economic Cooperation and Development (OECD)'s July 2023 report on financial consumers and sustainable finance – policy implications and approaches.

The report examines current trends in terms of consumer demand for, and experience with, sustainable finance products, driven by awareness of finance's role in mitigating climate change and a desire for better financial returns while avoiding environmental risks. However, it also highlights risks like "greenwashing", whereby products are deceptively presented as environmentally friendly, leading the report to explore financial consumer protection tools and responses available to policymakers and oversight authorities, and, more specifically, how principles of financial consumer protection (FCP) can apply to sustainable finance. These principles include promoting financial literacy, ensuring equitable treatment, disclosure transparency, quality products and efficient complaint handling.

The report further suggests adopting a coordinated approach, defining sustainable finance consistently, collecting data, promoting financial education, considering vulnerable consumers, monitoring disclosures, addressing misleading advertisements, enhancing training for financial providers and fostering international collaboration.

The aim is to guide policymakers and oversight bodies in effectively safeguarding consumers amidst the evolving landscape of sustainable finance.

⁶⁴ CSSF Press Release: <https://www.cssf.lu/en/2023/08/oecd-financial-consumers-and-sustainable-finance-policy-implications-and-approaches/>

ECB PUBLIC CONSULTATION ON THE DRAFT GUIDE ON REPORTING OF RISK CONCENTRATIONS AND INTRAGROUP TRANSACTIONS

21 August 2023⁶⁵

On 21 August 2023, the European Central Bank (ECB) launched its public consultation on the draft guide on financial conglomerate reporting of significant risk concentrations and intragroup transactions.

After the implementation of Commission Implementing Regulation (EU) 2022/2454, which entered into force on 8 January 2023 and will apply from 31 December 2023, technical standards for supervisory reporting of risk concentrations and intra-group transactions (RC-IGT reporting ITS) were established, thus, the ECB decided to issue general policy guidance.

The guidance outlines what individual financial conglomerates must report based on these standards and the Financial Conglomerates Directive. The purpose of this guide is to ensure consistency, coherence, effectiveness and transparency in the ECB's approach as a coordinator for financial conglomerates. It provides assistance to these conglomerates in establishing internal processes for reporting significant risk concentrations and intra-group transactions using the templates from the RC-IGT reporting ITS.

Comments are due by 6 October 2023.

⁶⁵ ECB Public Consultation:
https://www.bankingsupervision.europa.eu/legalframework/public_cons/html/OnD_financial_conglomerates.en.html

CSSF GENERAL FINDINGS AND OBSERVATIONS FOR THE 2021-2023 MARKETING COMMUNICATIONS UNDER THE REGULATION ON CROSS-BORDER DISTRIBUTION OF FUNDS

23 August 2023⁶⁶

On 23 August 2023, the CSSF published its general findings and observations on the use of marketing communications by Luxembourg investment funds managers and their compliance with Regulation (EU) 2019/1156 facilitating cross-border distribution of collective investment undertakings (CBDF Regulation) as well as with the European Securities and Markets Authority (ESMA) Guidelines on marketing communications (ESMA34-45-1272) for the period 2021-2023.

The CSSF conducted a thematic review on marketing communications (MCs) used by Luxembourg investment fund managers (IFMs) in accordance with the CBDF Regulation and ESMA Guidelines. The review, conducted between April 2021 and March 2023, aimed to ensure compliance with cross-border distribution regulations.

The CSSF emphasised that fund managers are responsible for complying with the regulations, regardless of the entity marketing the fund. The report did not provide a specific definition of MCs but outlined examples, stating that corporate communications not referring to specific funds need not to be considered as MCs.

The CSSF urged IFMs to consider these findings when reviewing their procedures and communications, advising corrective actions if necessary.

The publication serves as guidance and examples of best practice so as to increase awareness and transparency, ensuring better investor protection.

⁶⁶ CSSF General Findings: <https://www.cssf.lu/wp-content/uploads/Guidance-and-best-practices-CBDF.pdf>

CSSF ANNUAL REPORT 2022

25 August 2023⁶⁷

On 25 August 2023, the CSSF published its Annual Report for 2022.

The report provides an overview of the CSSF's organisation and priority action areas, as well as its work and activities in relation to the main legal and regulatory developments of 2022.

The report also provides an analysis of the evolution of different sectors subject to its supervision, and highlights current challenges faced by supervised entities and the CSSF.

To illustrate, the report highlighted the urgency to address climate change, biodiversity loss and pollution, emphasising the need for sustainable finance.

The CSSF stressed the importance of incorporating Environmental, Social and Governance (ESG) factors into financial strategies and risk management.

The CSSF also focused on advancing digitalisation in finance, supporting initiatives related to AI and monitoring crypto exchanges. Financial education became a priority, especially regarding green finance and the risks associated with crypto markets.

Additionally, cybersecurity and operational resilience were key areas of focus, with the CSSF actively participating in regulatory developments in these domains. CSSF agents underwent extensive training, ensuring their readiness to adapt to the evolving financial landscape and fulfil their mission of consumer and investor protection.

⁶⁷ CSSF Annual Report: https://www.cssf.lu/wp-content/uploads/CSSF_RA_2022_EN.pdf

ESRB ISSUES NOTE ON POLICY OPTIONS TO ADDRESS RISKS IN CORPORATE DEBT AND REAL ESTATE INVESTMENT FUNDS FROM A FINANCIAL STABILITY PERSPECTIVE

4 September 2023⁶⁸

On 4 September 2023, the European Systemic Risk Board (ESRB) published a note describing how the resilience of investment funds with large exposures to corporate debt and real estate could be further improved by adapting some of the policy tools already present in the regulatory framework for investment funds, including:

- closer alignment between fund redemption terms and investment strategy;
- the use of anti-dilution liquidity management tools (LMTs); and
- better preparedness for cash needs stemming from margin and/or collateral calls in derivative and repo transactions.

In addition to adapting existing policy tools, the ESRB suggests that the development of new policy tools might be useful in increasing investment fund resilience, thereby benefiting the stability of the wider financial system.

These new tools could include a liquidity bucketing approach and the development of an ex-ante policy instrument aimed at mitigating the build-up of liquidity risk.

The ESRB supports recent agreements to enhance regulatory frameworks for investment funds, including the use of liquidity management tools.

⁶⁸ ESRB Note:
<https://www.esrb.europa.eu/pub/pdf/reports/esrb.issuesnotepolicyoptionsrisksinvestmentfunds202309~cf3985b4e2.en.pdf>

EUROPEAN COMMISSION LAUNCHES CONSULTATIONS ON SFDR

14 September 2023⁶⁹⁷⁰

On 14 September 2023, the European Commission launched a targeted consultation⁷¹ and a public consultation⁷² to seek feedback on the Sustainable Finance Disclosure Regulation (SFDR).

The Commission is interested in understanding how the SFDR has been implemented and any potential shortcomings, including in its interaction with the other parts of the European framework for sustainable finance, and in exploring possible options to improve the framework.

The consultations are accompanied by a series of workshops, beginning on 10 October 2023. Comments on both consultations are due by 15 December 2023.

⁶⁹ Targeted Consultation: https://finance.ec.europa.eu/regulation-and-supervision/consultations/finance-2023-sfdr-implementation_en

⁷⁰ Public Consultation: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13961-Report-on-the-Sustainable-Finance-Disclosure-Regulation/public-consultation_en

⁷¹ Targeted Consultation: https://finance.ec.europa.eu/regulation-and-supervision/consultations/finance-2023-sfdr-implementation_en

⁷² Public Consultation: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13961-Report-on-the-Sustainable-Finance-Disclosure-Regulation/public-consultation_en

ESAs' JOINT COMMITTEE REPORT ON RISKS AND VULNERABILITIES IN THE EU FINANCIAL SYSTEM

18 September 2023⁷³

On 18 September 2023, the ESAs published their Autumn 2023 Joint Committee Report on risks and vulnerabilities in the EU financial system.

In the report, the ESAs advise national competent authorities, financial institutions and market participants to take the following policy actions:

- Monitor impact of rising rates: closely examine the broader impact of policy interest rate hikes and sudden increases in risk premia. Rising rates affect all sectors, impacting the value of fixed income assets and insurers' profitability. While higher rates currently benefit banks, there might be adverse implications in the medium term, affecting funding costs and liquidity risks;
- Prepare for asset quality deterioration: remain prepared for a deterioration in asset quality in the financial sector. High uncertainty, risk of recession, persistent inflation, volatile energy and commodity prices and potential interest rate hikes pose challenges. Monitoring asset quality, loan loss provisioning and assessing the ability of borrowers to service debt are crucial;
- Monitor inflation impact: be aware of and closely monitor the impact of inflation risk, potentially affecting asset quality, valuation and funding costs; and
- Enhance risk management and governance: place high importance on effective risk management and governance arrangements, in particular in relation to liquidity risk and interest rate risk, and remain resilient to the impact of future substantial interest rate changes.

⁷³ ESAs' Joint Committee Report: <https://www.eiopa.europa.eu/system/files/2023-09/Joint%20Committee%20Report%20on%20risks%20and%20vulnerabilities%20in%20the%20EU%20financial%20system%20-%20Autumn%202023.pdf>

[vulnerabilities%20in%20the%20EU%20financial%20system%20-%20Autumn%202023.pdf](https://www.eiopa.europa.eu/system/files/2023-09/Joint%20Committee%20Report%20on%20risks%20and%20vulnerabilities%20in%20the%20EU%20financial%20system%20-%20Autumn%202023.pdf)

NIS2 DIRECTIVE – EUROPEAN COMMISSION GUIDELINES ON EQUIVALENCE OF CYBERSECURITY REQUIREMENTS

18 September 2023⁷⁴

On 18 September 2023, the European Commission published its guidelines on the equivalence of cybersecurity requirements in the Official Journal.

The guidelines seek to clarify the application of Article 4(1) and (2) of Directive (EU) 2022/2555 on measures for a high common level of cybersecurity across the EU (Cybersecurity Directive, NIS2), which disapply relevant provisions of NIS2 to essential or important entities subject to equivalent requirements under sector-specific EU legal acts, and cover:

- assessing the equivalence of obligations to adopt cybersecurity risk-management measures and to notify significant incidents; and
- the consequences of equivalence, such as in relation to supervision and enforcement, and national cybersecurity strategies.

An appendix to the guidelines sets out a non-exhaustive list of EU legal acts that the Commission considers fall within the scope of Article 4, which at present only lists the Digital Operational Resilience Act (DORA).

⁷⁴ European Commission Guidelines: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023XC0918\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023XC0918(01))

ESMA 2024 WORK PROGRAMME

28 September 2023⁷⁵

On 28 September 2023, ESMA published its 2024 annual work programme.

ESMA's plan for 2024 is geared towards addressing the challenges confronting the European Union (EU), its citizens, and capital markets amidst a complex economic backdrop characterised by high inflation, intensified geopolitical tensions and rapid technological advancements.

ESMA intends to focus on legislative files relating to digital change and the green transition, including undertaking several tasks mandated under the recently concluded reviews of the Alternative Investment Fund Managers (AIFMD) and Undertakings for Collective Investment in Transferable Securities (UCITS) Directives, the Central Securities Depositories Regulation (CSDR) and under the new Retail Investment Strategy.

ESMA also intends to:

- develop rules for sustainable finance as part of the new European Green Bond Regulation;
- deliver its final report on greenwashing, proposing actions to combat this practice;
- finalise technical standards for the European Single Access Point (ESAP) and continue preparatory work on the necessary IT infrastructure that will support it;
- conclude the work on technical standards and guidelines in relation to the Markets in Cryptoassets Regulation (MiCAR) and the Digital Operational Resilience Act (DORA);
- begin the process of selecting and authorising Consolidated Tape Providers (CTPs) in the EU, in addition to developing technical standards and guidelines; and

- continue the ongoing reviews of the European Market Infrastructure Regulation (EMIR) as well as the new Listing Act, which may also lead to new mandates for ESMA in 2024.

⁷⁵ ESMA 2024 Work Programme:
https://www.esma.europa.eu/sites/default/files/2023-09/ESMA22-50751485-1368_-_2024_Annual_Work_Programme.pdf

ESMA ARTICLE ON ESG NAMES AND CLAIMS IN THE EU FUND INDUSTRY

2 October 2023⁷⁶

On 2 October 2023, ESMA published an article exploring the use of language relating to ESG factors in EU investment fund names and documentation.

In the context of sustainable economy, trust in the accuracy of Environmental, Social, and Governance (ESG) disclosures is crucial. Accordingly, the increasing threat of greenwashing has become a significant concern for policymakers worldwide. Focusing specifically on EU investment funds, the ESMA study delved into these concerns by analysing various datasets.

The researchers examined a dataset containing historical information on 36,000 funds managing assets worth EUR 16 trillion. Their analysis revealed a rising trend in funds incorporating ESG-related language in their names with investors consistently preferring funds with ESG-related terms in their names. The study also explored the extent of ESG language across funds' regulatory documents and marketing materials.

More specifically, the study shows fund managers tend to use generic language such as 'ESG' or 'Sustainable' in investment funds' names rather than more specific terms. This practice can complicate investors' efforts to verify if a fund's portfolio aligns with its name.

Interestingly, the article relates back to the ESMA Consultation Paper on guidelines on funds' names using ESG or sustainability-related terms of 18 November 2022,⁷⁷ for which final feedback is still expected (ESMA considered comments until 20 February 2023). Importantly, these guidelines contain specific thresholds for funds to comply with should they wish to use sustainability-related words in their funds' names.

⁷⁶ ESMA Article: <https://www.esma.europa.eu/press-news/esma-news/esma-finds-increase-use-esg-related-language-eu-fund-industry>

⁷⁷ ESMA Consultation Paper: https://www.esma.europa.eu/sites/default/files/library/esma34-472-373_guidelines_on_funds_names.pdf

ESMA MICA CONSULTATION TIMETABLE

5 October 2023⁷⁸

Regulation (EU) 2023/1114 on markets in crypto-assets (MiCA) has been in force since June 2023.

ESMA therefore had the intention to consult on implementing measures under MiCA in sequenced packages, starting with the Level 2 and Level 3 measures with the shortest deadlines. These include those related to authorisation, governance, conflicts of interest and complaint-handling procedures.

The first package⁷⁹ was launched 12 July 2023 and ESMA considered comments until 20 September 2023. The second package⁸⁰ was launched on 5 October 2023, and ESMA will consider comments by 14 December 2023.

The third and final consultation package, which includes the MiCA mandates with an 18-month deadline, will be published (tentatively) in Q1 2024.

⁷⁸ ESMA Article: <https://www.esma.europa.eu/esmas-activities/digital-finance-and-innovation/markets-crypto-assets-regulation-mica>

⁷⁹ ESMA Consultation Paper: https://www.esma.europa.eu/sites/default/files/2023-07/ESMA74-449133380-425_MiCA_Consultation_Paper_1st_package.pdf

[07/ESMA74-449133380-425 MiCA Consultation Paper 1st package.pdf](https://www.esma.europa.eu/sites/default/files/2023-07/ESMA74-449133380-425_MiCA_Consultation_Paper_1st_package.pdf)

⁸⁰ ESMA Consultation Paper: https://www.esma.europa.eu/sites/default/files/2023-07/ESMA74-449133380-425_MiCA_Consultation_Paper_1st_package.pdf

ECON COMMITTEE DRAFT REPORTS ON RETAIL INVESTMENT PACKAGE

9 October 2023⁸¹⁸²

On the 2 and 9 October 2023, the European Parliament's Committee on Economic and Monetary Affairs (ECON Committee) published two draft reports on each of the legislative proposals adopted by the EU Commission as part of its retail investment strategy, namely a proposed Regulation amending the PRIIPs Regulation, and a proposed Omnibus Directive amending MiFID2, IDD, Solvency II, the UCITS Directive and AIFMD, respectively.

Both draft reports (on the Omnibus Directive and on the amending Regulation) set out the Committee's proposed amendments to the Commission's texts, and contain the same explanatory statement noting, among other things:

- concerns about the introduction of a partial ban on inducements;
 - proposals to further clarify and strengthen the Commission's proposed new test for applying the principle of acting in the best interest of the client under MiFID2 and IDD;
 - that the Commission's proposed value for money benchmarks could be disruptive on the market and that further discussions are needed to find a balanced approach;
 - the introduction of a new obligation for companies to register in the same Member State where their head office is located, in order to avoid forum-shopping and boost the Commission's proposal on cross-border supervision;
 - proposals to further strengthen the Commission's proposals relating to financial influencers (finfluencers);
 - proposals intended to implement horizontal and holistic EU regulation for both financial and non-financial data providers and their activities, including increased supervision of all data providers; and
- in relation to the Commission's proposals on PRIIPs, the need to introduce further adjustments to market practices and certain adaptations to the insurance sector, and to further assess the alignment of the new sustainability section with the relevant existing legislation.

⁸¹ Amending Regulation:
https://www.europarl.europa.eu/doceo/document/ECON-PR-753665_EN.pdf

⁸² Omnibus Directive:
https://www.europarl.europa.eu/doceo/document/ECON-PR-753711_EN.pdf

**CIRCULAR CSSF 23/843 ON THE
ADOPTION OF THE GUIDELINES, BY THE
EBA, ON MONEY LAUNDERING AND
TERRORIST FINANCING RISK FACTORS
WHEN PROVIDING ACCESS TO
FINANCIAL SERVICES**

16 October 2023⁸³

On 16 October 2023, the CSSF published Circular 23/843 on the European Banking Authority (EBA)'s guidelines on money laundering and terrorist financing risk factors when providing access to financial services.

Such guidelines are now integrated into CSSF administrative practice and its regulatory approach.

The guidelines intend providing a harmonised understanding of what constitutes effective money laundering and terrorist financing (ML/TF) risk management practices for institutions and AML/CFT supervisors of effective ML/TF risk management practices in situations where access by customers to financial products and services should be ensured.

The EBA seeks to clarify the interplay between accessing financial services and AML/CFT obligations of credit or financial institutions.

The Circular will apply as from 3 November 2023.

⁸³ Circular 23/843: <https://www.cssf.lu/en/Document/circular-cssf-23-843/>

CIRCULAR CSSF 23/842 ON THE ADOPTION OF THE REVISED GUIDELINES, BY THE EBA, ON MONEY LAUNDERING AND TERRORIST FINANCING RISK FACTORS

16 October 2023⁸⁴

On 16 October 2023, the *Commission de Surveillance du Secteur Financier* (CSSF) published Circular 23/842 adopting the European Banking Authority (EBA) revised guidelines on money laundering and terrorist financing risk factors.

The EBA seeks to provide guidance to credit and financial institutions when refusing to enter or terminate a business relationship with individuals or categories of customers that are identified with a higher money laundering and terrorist financing (ML/FT) risk. These customers, which include not-for-profit organisations (NPOs), can be negatively affected by these unwarranted de-risking measures taken by credit and financial institutions.

Thus, the EBA, in order to facilitate access to financial services to these customers, which include more vulnerable ones such as NPOs, provides for specific steps (provided for in an annex) credit and financial institutions (which includes undertakings for collective investment) may take to identify factors to consider when analysing whether or not to conduct business with NPO customers based on their ML/FT risks.

These guidelines will, according to the EBA, provide for a common and harmonised understanding for institutions and AML/CFT supervisors of what constitutes effective ML/FT risks management practices, thereby mitigating adverse consequences of de-risking on human relief efforts.

The CSSF Circular will apply as from 3 November 2023.

⁸⁴ CSSF Circular: <https://www.cssf.lu/en/Document/circular-cssf-23-842/>

EBA AND ESMA CONSULT ON TWO SETS OF JOINT GUIDELINES UNDER MICA

20 October 2023⁸⁵

On 20 October 2023, the European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA) published a Consultation Paper on two Joint Guidelines covering suitability assessment of members of the management body, and suitability of shareholders and members with qualifying holdings of issuers of asset referenced tokens (ARTs) and of crypto-asset service providers (CASPs).

The consultation paper aims to present common criteria to assess the extent to which ARTs and CASPs have the necessary knowledge, skills and experience, as well as honesty and integrity, when performing their services.

The common harmonised criteria will provide competent authorities with a methodology to determine the suitability of the shareholders as well as members with (in)direct qualifying holdings for purposes of granting authorisation as issuers of ARTs or as CASPs.

The consultation will end on 22 January 2024.

⁸⁵ Joint Guidelines: <https://www.esma.europa.eu/press-news/esma-news/eba-and-esma-consult-two-sets-joint-guidelines-under-mica>



EMPLOYMENT



EMPLOYMENT

PATERNITY AND ADOPTION LEAVE

Law of 29 July 2023 amending article L.233-16 of the Labour Code ⁸⁶

The provisions of article L.233-16 of the Labour Code on paternity leave and on the ten days' adoption leave (the "**short adoption leave**") have been amended with the entry into force, on 22 August 2023, of a law of 29 July 2023. Important changes include the following:

- Extension of the right to paternity leave. This leave is now available to "the person recognised as an equivalent second parent", where the applicable legislation authorises this person to establish the filiation without adoption of the child. The right to paternity leave is also extended to independent workers.
- Clarification regarding the prorating of the right to paternity and adoption leaves for part-time employees. It is now clearly specified in the Labour Code that these leaves correspond to 80 hours for a full-time employee, which are prorated for part-time employees.
- Modification of the consequences if employees do not notify their employer of the dates of their paternity leave within the statutory two-months' notice period. In this case, the employee will only have the possibility to take their leave in one go and immediately after the birth of the child, unless otherwise agreed between the parties (the leave is no longer reduced to two days as was previously the case).
- Modifications and details regarding the financial participation of the state in the salary costs of employees in paternity or adoption leave (amount of the participation, date to apply, form, etc.).

⁸⁶ Law of 29 July 2023:
<https://legilux.public.lu/eli/etat/leg/loi/2023/07/29/a524/jo>

EMPLOYMENT OF THIRD COUNTRY NATIONALS

Law of 7 August 2023 amending the Labour Code, the amended Law of 29 August 2008 on the free movement of people and immigration and the amended Law of 18 December 2015 on international protection and temporary protection⁸⁷

The Law of 7 August 2023 amending notably the Labour Code and the Law of 29 August 2008 on the free movement of people and immigration entered into force on 1 September 2023. It provides for several modifications regarding the employment of non-EU nationals, the most important of which are as follows:

- Modifications in the "test of the employment market" and the delivery by the Luxembourg employment administration (*Agence pour le Développement de l'Emploi - ADEM*) of the certificate of vacant position required in the framework of applications for work permits for employees.

More specifically, employers can now request this certificate directly when declaring the vacant position or subsequently (during the validity period of the job advert).

If the vacancy is considered as being in serious shortage (based on a list of the ADEM), the certificate of vacant position is issued quickly (within five working days after the ADEM acknowledged receipt of the certificate request). If not, the ADEM has seven days from this acknowledgement of receipt to search for a candidate among the registered jobseekers:

- if no adequate candidate is found, the certificate is issued within five additional working days; and
- if adequate candidates can be proposed to fill the vacancy, the ADEM has 15 working days to propose candidates to the employer. In case of rejection, the employer must, within one month after the proposal, justify with precision its decision to the ADEM. The

latter may either accept this rejection and issue the vacancy certificate (within ten working days) or find the rejection unjustified and refuse the issuance of the certificate.

- Increased penalties in case of employment of illegal third-country nationals.
- Access to the labour market for family members of third-country nationals who hold a Luxembourg residence permit for family reunification purposes (a work permit is no longer required).

⁸⁷ Law of 7 August 2023:
<https://legilux.public.lu/eli/etat/leg/loi/2023/08/07/a556/jo>

NEW LEGAL PROVISIONS TO IMPROVE WORK-LIFE BALANCE FOR PARENTS AND CARERS

Law of 15 August 2023 transposing EU directive 2019/1158 of 20 June 2019 on work-life balance for parents and carers⁸⁸

The Law of 15 August 2023 amending the Labour Code to transpose the EU directive 2019/1158 entered into force on 21 August 2023. It has provided additional rights for employees and obligations for employers to improve work-life balance for parents and carers. The key measures of this new law are the following ones:

New family-related leaves

The two new following extraordinary leaves are now available for employees:

- Leave for urgent family reasons: employees are entitled to a leave of one day, over a 12-month employment period, for reasons of force majeure linked to urgent family reasons in the event of illness or accident where the employee's immediate presence is indispensable.
- Leave to take care of a family member (or other person living in the same household) requiring considerable care for serious medical reasons: employees are also entitled to five days' leave, over a 12-month employment period, to provide personal care or assistance to a family member (son, daughter, mother, father, spouse or partner) or to a person living in the same household as the employee and who requires considerable care or assistance for serious medical reasons which reduce their capacity and autonomy, rendering thus person incapable of compensating for or coping independently with physical, cognitive or psychological impairments or health-related constraints or demands, and which is certified by a doctor.

These leaves are prorated for part-time employees and their benefit is subject to compliance by the employees with specific information obligations to the employer.

A financial participation of the state is available (conditions apply).

Additional obligations related to parental leave

In case an employer needs to refuse a request for a split parental leave or to postpone the second parental leave of an employee, it must now justify these decisions in writing. In addition, before postponing the second parental leave, the employer must propose to the employee, to the extent possible, an alternative form of parental leave (split or part-time).

Flexible working arrangements

Employees who wish to benefit from flexible working arrangements (e.g., remote working, flexible working hours or reduced working hours) are now statutorily entitled to a meeting with their employer to make this request, provided that:

- they have at least six months' length of service with the employer; and
- they are the parent of a child under the age of nine or provide personal care or assistance to a family member (son, daughter, father, mother, spouse or partner) or to a person living in the same household who requires considerable care or assistance for serious medical reasons.

These flexible working arrangements are for a fixed term which may not exceed one year.

Employers must respond to requests for flexible working arrangements within one month. In the event of refusal or postponement, employers must justify their decision by registered letter with acknowledgement of receipt.

⁸⁸ Law of 15 August 2023:
<https://legilux.public.lu/eli/etat/leg/loi/2023/08/15/a512/jo>

WAGE INDEXATION

1 September 2023⁸⁹

The consumer index price – on which wages are indexed – increased on 1 September 2023 from 921.40 to 944.43 points, resulting in a mandatory increase in wages of 2.5% with effect as from 1 September 2023.

⁸⁹ Statistics: <https://statistiques.public.lu/fr/actualites/2023/stn39-tranche-indicair.html>



CORPORATE



CORPORATE

BILL REFORMING LUXEMBOURG ACCOUNTING LAW

28 July 2023

Bill No. 8286 concerning the accounting, annual financial statements and consolidated financial statements of companies and the reports relating thereto and abolishing the office of statutory auditor (*commissaire*) was lodged on 28 July 2023.

This bill aims to modernise the accounting legislation by consolidating all accounting obligations into a single accounting law while extending its scope to non-commercial undertakings. It introduces, among other things, filing requirements for SCSps and yearly filing requirements for companies in liquidation until the closing of the liquidation process.

Bill No. 8286 also transposes obligations provided in Directive 2013/34/EU on annual financial statements, consolidated financial statements and related reports, including additional requirements for large holding companies and implementing some non-financial reporting on sustainability for specific undertakings.

Parliamentary works on this bill are at a very early stage and further amendments are hence expected⁹⁰.

⁹⁰ Bill No. 8286: <https://www.chd.lu/fr/dossier/8286>

LUXEMBOURG LAW REFORMING THE NON-PROFIT ASSOCIATIONS AND FOUNDATIONS IN LUXEMBOURG

7 August 2023

The new law of 7 August 2023 on non-profit associations ("ASBLs") and foundations came into force on 23 September 2023 and apply to newly incorporated ASBLs and foundations as from that date. This law supersedes and replaces the amended law of 21 April 1928 formerly governing non-profit associations and foundations.

This new law aims to simplify and modernise the legal framework for ASBLs and foundations and to create a greater accounting transparency to ensure better control of these entities. Generally, the new regime of ASBLs and foundations is closer to the regime governing commercial companies.

The main changes introduced by this new law are the following:

- Removal of the prohibition for ASBLs to own real estate property other than that necessary to fulfil the corporate object or objects for which it was formed. Ownership of real estate that is not necessary to achieve the objects of the ASBLs is now permitted.
- Modernisation and introduction of flexibility regarding the governance of ASBLs (e.g., the possibility to convene directors and members electronically, to hold board meetings and members meetings by video conference or other means enabling their identification and to adopt circular resolutions).
- Introduction of three different accounting regimes depending on the size of the ASBLs (small, medium and large ASBLs). Each year, no later than six months after the end of the financial year, the board of directors of the ASBLs shall submit to the general meeting of members, for approval, the accounting documents relating to the past financial year and the draft budget for the following financial year.
- Introduction of several restructuring regimes for ASBLs, i.e., the possibility for an ASBL to convert into a foundation or a *société d'impact sociétale* and the possibility for ASBLs to proceed to mergers

either by absorption or the incorporation of a new ASBL.

Existing ASBLs and foundations have a transitional period of 24 months as from 23 September 2023 to adapt their articles of association to the provisions of the new law. In the meantime, they remain subject to the provisions of the amended law of 21 April 1928.

BILL NO. 8296 INTRODUCING A NATIONAL MERGER CONTROL REGIME IN LUXEMBOURG

23 August 2023

Bill No. 8296 aiming to establish a national regime on the control of concentrations between undertakings in Luxembourg was lodged with the Luxembourg Parliament on 23 August 2023.

Under the proposed regime, a concentration, which does not fall under the EU merger control regime provided for under EU Regulation 139/2004, must be notified to the Luxembourg Competition Authority (*l'Autorité de la concurrence*) which may also refer cases to itself (*autosaisine*), and the parties are subject to a stand-still obligation, if the following thresholds are met:

- the aggregate turnover of the undertakings or group of physical or legal persons concerned realised in Luxembourg exceeds EUR 60 million (excl. taxes); and
- at least two of the undertakings or group of physical or legal persons concerned each generate a turnover in Luxembourg of at least EUR 15 million (excl. taxes).

In addition, the Luxembourg government will have the power to intervene on public interest grounds in an operation that has been cleared by the Luxembourg Competition Authority. The relevant grounds are industrial, economic or financial development, the international competitiveness of the companies in question or the creation or maintenance of employment.

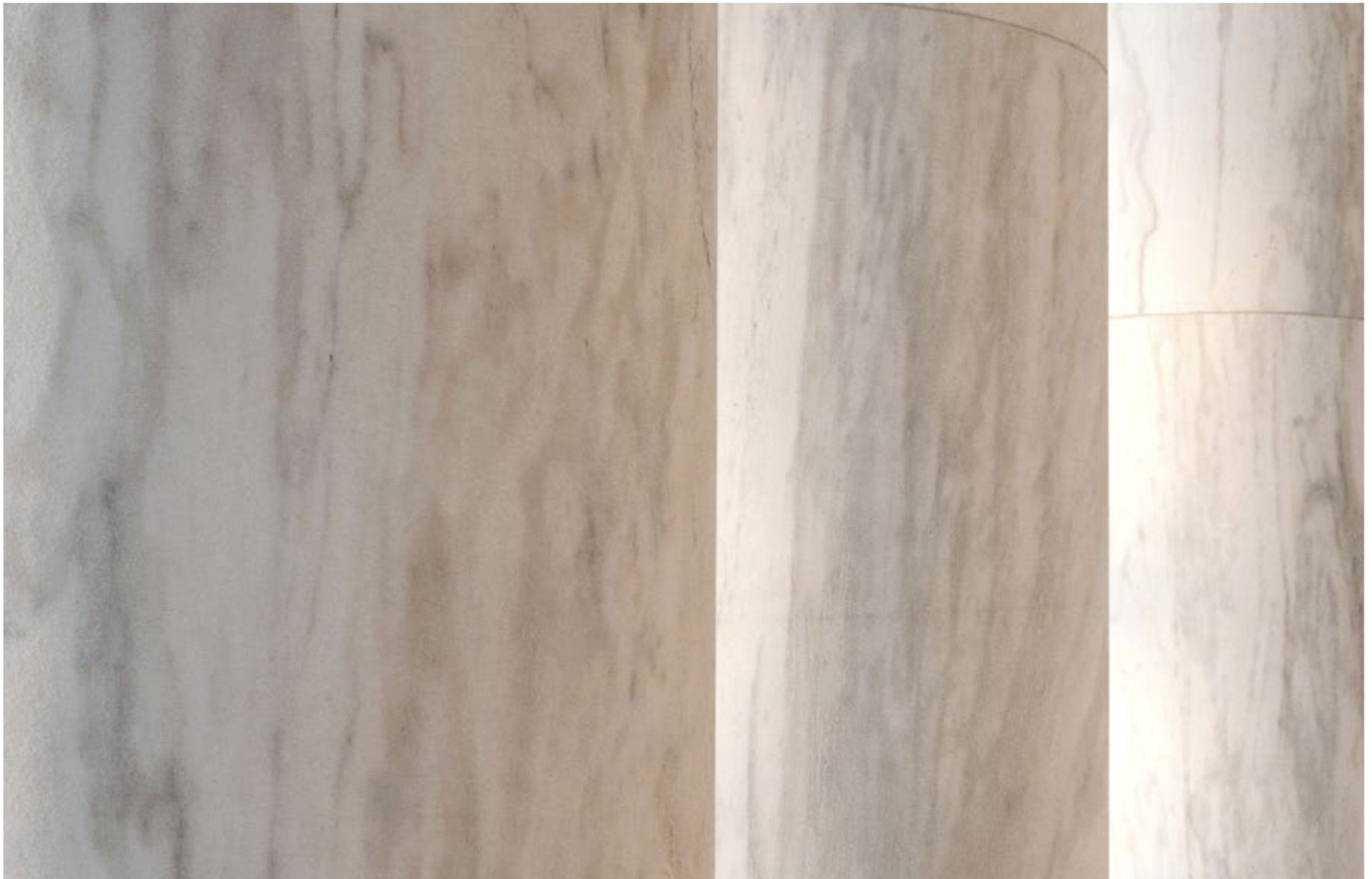
The proposed regime comprises two phases: Phase I consists in the assessment of the competition risks of the contemplated transactions. Phase II will be only applicable to operations presenting significant risks in terms of competition.

Under the current version of the bill, the law would enter into force four months after its publication in the *Mémorial*. The merger control regime would not apply to operations

that have already been approved/published or carried out before the entry into force of the law.

Parliamentary works regarding this bill are at a very early stage and further amendments are hence expected⁹¹.

⁹¹ Bill No. 8296: <https://www.chd.lu/fr/dossier/8296>



LITIGATION



LITIGATION

CLAUSE REDUCING THE PRESCRIPTION PERIOD IS VALID AND QUALIFIES AS CLAUSE LIMITING THE OBLIGATION.

20 June 2023

Luxembourg District Court, 20 June 2023, judgment nr. 2023TALCH01/00163, nr. TAL-2020-05742 of the docket ⁹²

Called upon to rule in the context of a liability claim brought by two spouses against a bank in voluntary liquidation, based on the alleged mismanagement of a joint account, the Luxembourg District Court (the "**Court**") issued an interesting judgment on several counts.

The Court first recalled that the sole decisive criterion to qualify as a consumer is the purpose (private or professional) of the conclusion of the agreement with the professional, the professional occupation of the contracting party being irrelevant in this respect.

The notion of "consumer" is therefore to be interpreted restrictively by the sole reference to the objective quality of the contracting party.

The Court then specified that contractual arrangements such as clauses limiting or excluding liability on the one hand, and clauses limiting or excluding obligations on the other hand, are of different nature and have different legal regimes.

To categorise contractual arrangements modelling the extinctive prescription, and notably clauses reducing the prescription period, whose validity is accepted, the Court indicated that the purpose of said prescription shall be considered, and ruled that extinctive prescription aims at limiting the scope of the duty in time.

The Court concluded that clauses reducing the extinctive prescription period qualify as clauses limiting the obligation and not the liability and apply therefore in case of wilful

misconduct or gross negligence (unlike clauses limiting or excluding liability).

In the case at hand, the applicable general terms and conditions stipulated that legal actions must be filed within two years from the date of the bank's action or omission giving rise to the client's claim, and that any action brought after the expiry of such two years will be time barred.

The Court qualified said contractual arrangement as a clause limiting the obligation, and ruled that the two-year time limit for bringing legal action is not abusive.

⁹² Judgment: <https://anon.public.lu/D%C3%A9cisions%20anonymis%C3%A9es/Tribunal%20d%27arrondissement%20Luxembourg%20civil/01>

[Chambre/2023/20230620 TAL01 TAL-2020-05742_pseudonymis%C3%A9-accessible.pdf](#)

EX PARTE APPLICATION BASED ON ARTICLE 66 OF THE NEW CODE OF CIVIL PROCEDURE.

1 September 2023

Court of appeal, 1st September 2023, appeal judgment nr. 187/23, nr. CAL-2023-00851 of the docket⁹³

On an *ex parte* basis under article 66 of the New Code of civil procedure, an American entity holding shares in the capital of a Luxembourg limited liability company ("**Company**") requested for the appointment of an *ad hoc* agent of the Company in view of the vote of the Company at the general assembly of the Company's French subsidiary.

The request was not granted in first instance, and the Court of Appeal recalled that the concept of necessity provided under article 66 of the New Code of civil procedure is to be construed narrowly.

The Court of Appeal ruled that the first instance judge considered rightly that, under article 66 of the New Code of civil procedure, the judicial intervention shall be absolutely necessary, so that any delay would jeopardise the claimant's rights. Said necessity exists under three assumptions: (i) when it is necessary to cause surprise, (ii) in case of emergency, or (iii) when it is impossible to identify, accurately and with certainty, the persons against whom measures shall be implemented.

The Court of Appeal reiterated that the emergency required by article 66 of the New Code of civil procedure is such that the filing of the request in summary matters, even with the shortened period, is powerless, inefficient or impossible to address the situation in due time. The emergency relates to the risk of an immediate and serious harm requiring that immediate action is taken, and which should not be impacted by the delay caused by contradictory proceedings.

In the case at hand, the Court observed that the shareholders of the Company have been in dispute for several years, that the Company has had no manager for more than a year, and that an *ad hoc* agent was appointed

at the level of the Company's French subsidiary to manage provisionally said entity pending a settlement agreement to be reached between the shareholders of the Company.

Subsequently, the Court concluded that the situation of emergency arising from the convening of the general assembly of the Company's French subsidiary, upon which the claimant was relying, was created by its own act and can therefore not constitute a legitimate cause to derogate from the contradictory principle.

⁹³ Judgment: https://anon.public.lu/D%C3%A9cisions%20anonymis%C3%A9es/CSJ/Chambre%20des%20vacations/2023/20230901_CAL-2023-00851_187_Art.66_pseudonymis%C3%A9-accessible.pdf

[s/CSJ/Chambre%20des%20vacations/2023/20230901_CAL-2023-00851_187_Art.66_pseudonymis%C3%A9-accessible.pdf](https://anon.public.lu/D%C3%A9cisions%20anonymis%C3%A9es/CSJ/Chambre%20des%20vacations/2023/20230901_CAL-2023-00851_187_Art.66_pseudonymis%C3%A9-accessible.pdf)

LIABILITY ACTION AGAINST AN INSURANCE COMPANY IN JUDICIAL LIQUIDATION

19 October 2023

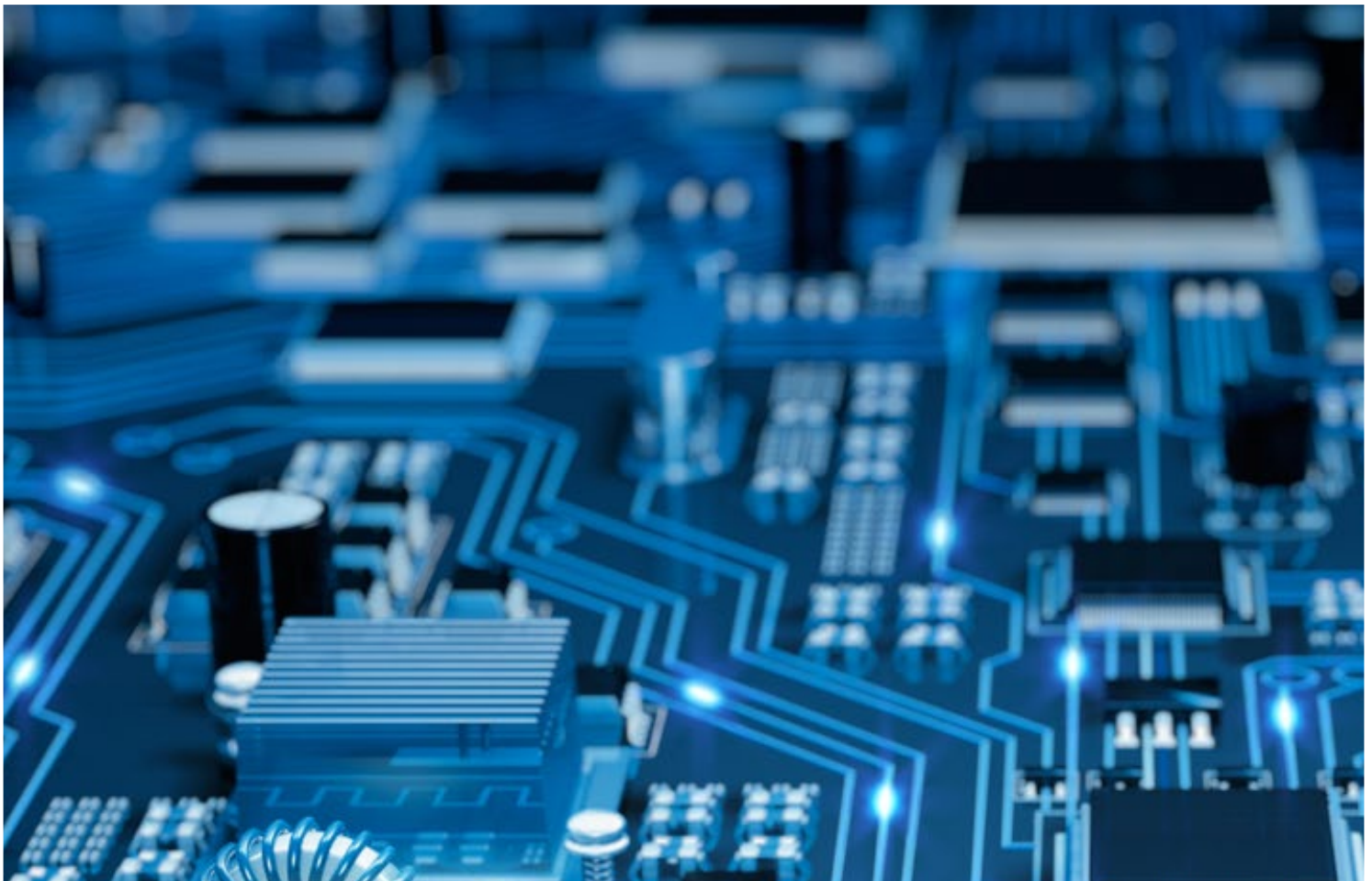
Cour de cassation, 19 October 2023, cassation
judgment nr. 106/23, nr. CAS-2022-00122 of the docket
⁹⁴

The *Cour de cassation* was called upon to rule on the pleas of law related to the liability action initially brought by the creditors of an insurance company in judicial liquidation against the *Commissariat Aux Assurances* and the Grand Duchy of Luxembourg, primarily on the basis of article 24 of the law of 6 December 1991 on the insurance sector, as amended, and subsidiarily on the basis of articles 1382 and 1383 of the Civil Code.

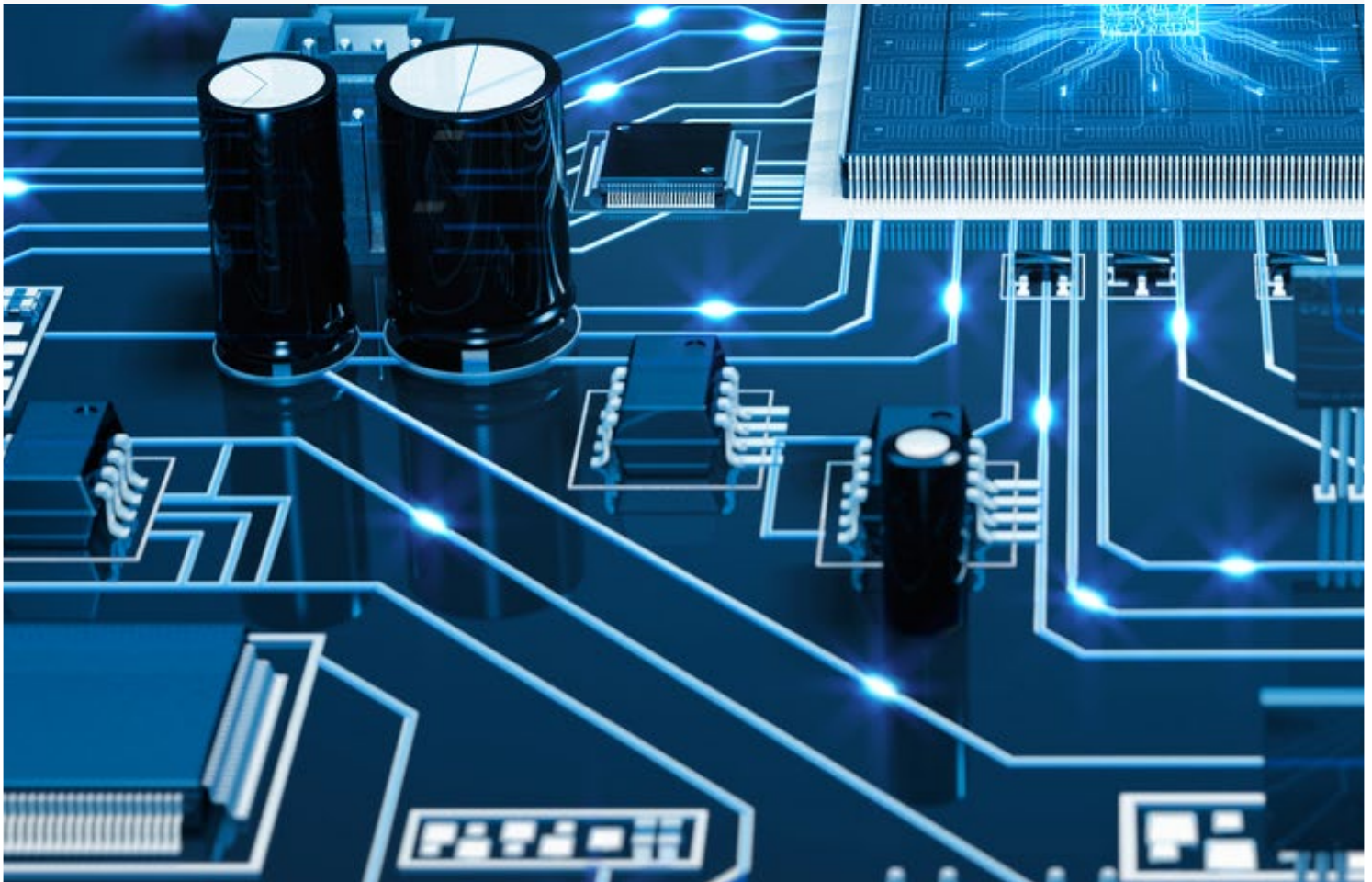
Analysing that article 444 of the Commercial Code was applicable to the liquidation at hand, the request filed by the creditors was ruled inadmissible in both first and appeal instances.

The *Court de cassation* recalled that the liability action filed against a third party whose fault decreased the assets or increased the liabilities of the company in liquidation belongs to the sole liquidator acting in the name of the mass of all the creditors, as long as such fault has resulted in a collective prejudice for the creditors and violates rights which are, by nature, collective.

⁹⁴ Judgment:
<https://justice.public.lu/content/dam/justice/fr/jurisprudence/cour-cassation/civil/2023/10/20231019-cas-2022-00122-106-p.pdf>



IP/IT



IP/IT

THE CNPD PUBLISHES A TRIO OF DECISIONS FOLLOWING THE COMPLAINT OF A DATA SUBJECT WHO FOUND HER PERSONAL DATA FREELY ACCESSIBLE ON THE INTERNET.

5 July 2023⁹⁵

The CNPD published 3 decisions dated 5 July 2023. A complaint was filed with the CNPD regarding personal contact information that continued to be published on a company's website, even after the data subject had terminated its contract with the said company.

The CNPD did not receive any response from the company in question during the handling of the complaint. Following this, an investigation was opened with multiple organisations involved in the daily operations of the company's business (namely in charge of the administrative management of subscriptions and electronic communications services).

While one investigation has been closed without further action, the two other decisions that refer to the same case imposed administrative fines, even though these are minimal (EUR 1,500 and EUR 2,500).

The CNPD found that:

- failure to ensure that the data subject's information was delisted, and the fact that this information continued to be published on the website, constituted a violation of art. 32 on both the controller's and the processor's part;
- the degree of cooperation with the CNPD was insufficient, and the oral and written responses provided during the investigation were partly inconsistent; and
- information of the data subject was inadequate (the controller was unable to evidence that its current T&Cs, and notably the data protection provisions

thereof, were made available to the data subject at the time of entering into a contractual relationship).

⁹⁵ Links to the [first](#), [second](#), and the [third](#) decision

THE ADEQUACY DECISION FOR EU-U.S. TRANSFERS HAS BEEN PUBLISHED.

10 July 2023⁹⁶

On 10 July 2023, the adequacy decision to allow personal data transfers between the EU and the U.S. (known as the Data Protection Framework, or "**DPF**") has been published. This will be giving entities looking to transfer personal data to the U.S. a new option to justify such transfers, rather than entering into standard contractual clauses, and the onus of drawing up a transfer impact assessment ("**TIA**").

The DPF is however not as wide in scope as other adequacy decisions (such as between the EU and the UK) and functions similarly to the previous instruments of the *Safe Harbour* and *Privacy Shield* frameworks: self-certifying entities in the U.S. must be part of a list drawn up by the U.S. Department of Commerce in order to be within the scope of the DPF transfers.

The new DPF aims at responding to the criticisms of the CJEU which invalidated the *Privacy Shield* decision in the *Schrems 2* case (CJEU, 16 July 2020, C-311/18) on the basis of new safeguards adopted under U.S. law to limit access by U.S. intelligence agencies to the transferred personal data from the EU and the establishment of an independent and impartial redress mechanism to handle and resolve complaints in relation thereto.

Despite such developments, Max Schrems, the privacy advocate who brought the cases leading to the invalidation of the *Safe Harbour* framework and *Privacy Shield*, has already announced that he does not accept that the DPF delivers the required essentially equivalent level of protection of personal data regulated by the GDPR, and will seek to persuade the CJEU to invalidate the adequacy decision.

In the meantime, entities transferring personal data to the U.S. shall assess the opportunity of their U.S. data importers to make use of the DPF by joining the aforementioned list, and in any case re-assess the existing TIAs to take into account the observations made by the

European Commission in the – admittedly lengthy – Whereas section of the DPF adequacy decision.

⁹⁶ CNPD Annual reports:
<https://cnpd.public.lu/en/publications/rapports.html>

THE CNPD PUBLISHES A "THEMATIC DOSSIER" ON AI

9 August 2023⁹⁷

On 4 October 2023, the CNPD published its 2022 annual report. 2022 has been a memorable year for the CNPD, marked by its 20th anniversary.

On 9 August 2023, the CNPD published a thematic on AI which provides high-level information on its impact on data protection and related legal obligations. The CNPD chose to align itself with the guidance of the CNIL on AI published in April 2022, and cites as a source for its additional recommendations the UK ICO's Guidance on AI and Data Protection published in March 2023.

⁹⁷ CNPD dossier: <https://cnpd.public.lu/fr/dossiers-thematiques/intelligence-artificielle/ia-droits-obligations.html>

THE CNPD PUBLISHED ITS 2022 ANNUAL REPORT

4 October 2023⁹⁸

On 4 October 2023, the CNPD published its 2022 annual report. 2022 has been a memorable year for the CNPD, marked by its 20th anniversary.

Key takeaways include:

- The CNPD finds that there is an increased awareness of GDPR obligations as illustrated by an increase of notified personal data breaches, but found that controllers must make efforts in relation to their transparency obligations under the GDPR.
- An increase was reported in notified personal data breaches, with the majority still reported as being caused by human error (63%). A quarter of reported breaches were caused by malicious attackers (26%).
- A total of 24 national decisions were handed down (half of which concerned video surveillance), with a total of over EUR 48,000 in administrative fines.
- The headcount of the CNPD increases to 58 employees.

⁹⁸ [CNPD Annual reports](https://cnpd.public.lu/en/publications/rapports.html)
<https://cnpd.public.lu/en/publications/rapports.html>



REAL ESTATE



REAL ESTATE

JUDGMENT NO. 00083 RENDERED ON 18 MAY 2022 BY THE DISTRICT COURT: A CITY MAY BE FOUND LIABLE ON THE GROUND OF THE LIABILITY FOR NEIGHBOURHOOD DISTURBANCES ("TROUBLES DE VOISINAGE")

18 MAY 2022 – Commented case law in the Luxembourg real estate legal journal "Revue luxembourgeoise de droit immobilier" No. 16/2023 on 28 August 2023

The District Court of Luxembourg (*Tribunal d'arrondissement*) handed down a decision concerning on liability for neighbourhood disturbances.

The case was brought as a result of damage caused to the Claimant's basement by infiltration and flooding from works carried out by the city and from the neighbour's downpipe.

The Claimant therefore summoned both parties before the District Court of Luxembourg based on the expert's report in order to obtain a joint sentence against the City and the neighbour to pay the expenses of repairing the harm as well as compensation for the prejudice incurred. She referred to article 544 of the Civil Code concerning liability for neighbourhood disturbances.

The Court considered that there was a neighbourly relationship between the parties and that the City and the neighbour should therefore be held jointly liable.

The owner may be held liable based on article 544 of the Civil Code when, even in the absence of faulty behaviour, he causes a disturbance to his neighbour that goes beyond the ordinary inconveniences of neighbourliness. It would therefore not be up to the harmed owner to prove fault as only the abnormal disturbance would have to be established.

JUDGMENT NO. 00897 RENDERED ON 30 JUNE 2022 BY THE DISTRICT COURT ON THE RECHARACTERISATION OF A SPECIFIC DEED OF SALE INTO A CONTRACT OF SALE IN THE FUTURE STATE OF COMPLETION (*VENTE EN L'ETAT FUTUR D'ACHEVEMENT*)

30 JUNE 2022⁹⁹ – Commented case law in the Luxembourg real estate legal journal "Revue luxembourgeoise de droit immobilier" No. 16/2023 on 28 August 2023

The notarised deed in dispute, entitled "deed of sale with contract for work" ("*Acte de vente avec contrat de louage ouvrage*"), was concluded between the following parties, including:

1. the two buyers ("**Buyer**");
2. the seller of the land ("**Seller**"); and
3. the seller of the structures to be built on the said land (the "**Constructor**").

The buyer issued a writ of summons against the Seller and the Constructor, seeking an order to pay the damages, as well as compensation after noticing defects in the bought property. According to him, the contract concluded between the parties should be qualified as a contract of sale in the future state of completion ("*Vente en état futur d'achèvement*" or "VEFA"), opening the system of articles 1601-1 to 1601-14 of the Civil Code applicable in this case, which is intended to be more protective of the buyer.

Under article 1601-4 of the Civil Code, a "VEFA" must meet certain criteria, one of which provides that the person who undertakes to build the property has the powers of the project owner ("*Maître d'Ouvrage*") until the property is completed.

The court ruled that the Seller acted as a project owner, given that:

- he supplied the requirement specifications (*cahier des charges*) such that the Buyer had no control over it;
- the construction works were carried out by another company with which the Buyer did not sign a contract and from which he did not receive invoices; and
- while the works were being carried out, the Seller sent letters of formal notice to various parties involved in the construction.

The judges concluded that the contract at issue was rightfully a "VEFA", and that the mandatory protection rules of the Civil Code therefore applied.

⁹⁹ Judgment: https://anon.public.lu/D%C3%A9cisions%20anonymis%C3%A9s/Tribunal%20d%27arrondissement%20Luxembourg%20comme/rce/06_Chambre/2022/20220630_TAL6_TAL-2019-05087%20+%20TAL-2019-06318%20+%20TAL-2019-08886%20+%20TAL-2019-09689%20+%20TAL-2021-08977_pseudonymis%C3%A9.pdf

[08886%20+%20TAL-2019-09689%20+%20TAL-2021-08977_pseudonymis%C3%A9.pdf](https://anon.public.lu/D%C3%A9cisions%20anonymis%C3%A9s/Tribunal%20d%27arrondissement%20Luxembourg%20comme/rce/06_Chambre/2022/20220630_TAL6_TAL-2019-05087%20+%20TAL-2019-06318%20+%20TAL-2019-08886%20+%20TAL-2019-09689%20+%20TAL-2021-08977_pseudonymis%C3%A9.pdf)

JUDGMENT NO. 00180 RENDERED ON 11 NOVEMBER 2022 BY THE DISTRICT COURT: LEGAL FORMALITIES SET OUT BY THE GRAND-DUCAL IMPLEMENTING REGULATION OF 13 JUNE 1975 ON CO-OWNERSHIP REGIME ARE MANDATORY ONLY IF THEY ENFORCE MANDATORY LEGAL PROVISIONS

11 NOVEMBER 2022 – Commented case law in the Luxembourg real estate legal journal "Revue luxembourgeoise de droit immobilier" No. 16/2023 on 28 August 2023

The District Court of Luxembourg (*Tribunal d'arrondissement*) handed down a decision concerning the annulment of resolutions passed at a co-ownership general meeting ("*Assemblée générale de copropriété*" or "AG").

In this case, the claimant is one of the co-owners seeking the annulment of the resolutions numbered 3 to 6, on the grounds that several formalities provided for by the Grand-Ducal Implementing Regulation of 13 June 1975 ("**Grand-Ducal Regulation**") had not been complied with at the co-ownership general meeting.

The Court pointed out that, within the meaning of Article 34 paragraph 2 of the Law, as well as legal doctrine, an action for nullity of a resolution passed at a General Meeting was admissible when criteria such as (for e.g.,) **failure to comply with legal formalities when convening, holding and composing meetings would have the effect of vitiating the meeting itself.**

The court outlined that only those provisions of the Grand Ducal Regulation that are intended to enforce mandatory legal provisions are themselves mandatory. In other cases, an action for nullity of the disputed resolution will only be accepted by the court if its irregularity causes the plaintiff greater harm.

Consequently, as the Grand Ducal Regulation is not a legal instrument of public order, the violation of an article of the said Regulation is not sanctioned by automatic nullity if the said article is not the execution of a mandatory legal provision.

The greater harm of the claimant was thus not recognised by the court since his presence or absence would not have changed the outcome of the final vote as there was a majority vote in favour of adopting the resolutions at issue.

REPORT ON THE SECTOR ENQUIRY INTO THE RESIDENTIAL PROPERTY SECTOR

19 JULY 2023¹⁰⁰

On 19 July 2023, the Luxembourg government published a statement concerning the recommendations of the Competition Authority ("*Autorité de la concurrence*"), which was self-appointed to carry out an investigation in 2022, with a focus on property developers. The recommendations include the following key points, in particular:

- property developers are invited to remain attentive to compliance with the competition rules applicable to cooperation;
- better supervision of the "*PAP nouveaux quartiers*" project development phase through legal deadlines and administrative simplifications would speed up the adoption of PAPs while reducing developers' stocks of land;
- with regard to invitations to tenders and auctions, the authority recommends that all stakeholders pay particular attention to the possibility of bid-rigging when selling a property;
- the banks' legal monopoly on issuing completion guarantees is interpreted as being unconstitutional, and is said to hinder the activities of insurance companies. The Authority recommends therefore that it be abolished;
- the Authority proposes to upgrade and regulate the estate agent profession, following the example of the *Chambre immobilière*, in order to curb the so-called "bidding race";
- the Authority recommends the formal repeal of the amended Grand Ducal Regulation of 20 January 1972 setting the maximum commission scale in order to clarify the current legal situation;
- the Authority encourages other methods of remunerating agency services, such as an amount

expressed in euros or an hourly rate, which would have the advantage of being more transparent and less costly.

¹⁰⁰ Report:
https://gouvernement.lu/fr/actualites/toutes_actualites/communiqués/2023/07-juillet/19-rapport-enquete-secteur-immobilier.html

THE COMPULSORY WORK FUND FOR CO-OWNERSHIPS (*FONDS DE TRAVAUX*) BECAME MANDATORY ON 1 AUGUST 2023

1 AUGUST 2023¹⁰¹

The law introduces a compulsory works fund for co-ownerships of buildings with the aim of promoting renovation in general, including energy renovation of these buildings. The works fund became compulsory on 1 August 2023.

The existence of a compulsory works fund facilitates, and even makes possible, the carrying out of maintenance, repair, improvement, conversion and renovation work on built-up properties, as well as the installation of energy production and storage facilities using renewable energy sources.

It is compulsory to set up a works fund, even for new buildings. In this way, the logic of building up savings for future works is present from the very outset.

The assets in the works fund are not part of the capital invested. Only the amounts actually invested are taken into account.

The minimum annual contribution to the works fund per square metre of energy reference area is adapted according to the thermal insulation class indicated by the building's energy performance certificate (EPC). Energy performance is a good indicator of the extent of future work required.

¹⁰¹ Law of 30 June 2022:
<https://www.legilux.public.lu/eli/etat/leg/loi/2022/06/30/a347/jo>



TAX



TAX

THE ADMINISTRATIVE TRIBUNAL OF LUXEMBOURG FURTHER CONFIRMS THE TAX TREATMENT OF THE REDEMPTION OF ALPHABET SHARES

14 June 2023¹⁰²¹⁰³

On 14 June 2023, the Administrative Tribunal of Luxembourg ruled in case No. 45759 on the tax treatment of the redemption of two shortly-before-converted classes of shares and the immediate cancellation thereof which were financed through recent dividend distributions¹⁰⁴.

In the present case, a Luxembourg resident company ("**LuxCo**") received several dividend distributions, upon which its share capital, composed entirely of ordinary shares, was wholly converted into 20 classes of shares (the so-called "**Alphabet Shares Classes**") with the same economic features. The aforementioned dividend distributions enabled LuxCo to repurchase and cancel two Alphabet Shares Classes.

LuxCo treated the redemption followed by cancellation as a partial liquidation, rather than a distribution of profits, wherefore it would not be subject to withholding tax in Luxembourg. However, the Luxembourg tax authorities considered such transaction to be an abuse of law intended to distribute profits while avoiding the 15% withholding tax.

In this respect, the Administrative Tribunal notes that the income received by the shareholders through the repurchase and disposal of the Alphabet Shares Classes is to be considered as a capital gain. However, it further states that where the purchase price paid by the company to its shareholders exceeds the real value of the participation in share capital, the income derived therefrom is to be qualified as a dividend distribution.

In light of the short intervals between the conversion of capital, the dividend distributions, the redemption and cancellation of the two Alphabet Shares Classes, as well as the unmodified economic and legal rights of the shares following conversion, the Administrative Tribunal of Luxembourg ultimately ruled in favour of the tax authorities and confirmed the whole operation to constitute an abuse of law aimed at avoiding the withholding tax on profit distributions.

This decision aligns with the [previous decision of the Administrative Tribunal on Alphabet Shares](#) No. 42432 earlier this year, according to which the redemption of a class of shares could be recharacterised as a hidden dividend distribution, subject to Luxembourg withholding tax, for the amount exceeding the fair market value of the shares redeemed if said amount lacks valid economic reasons.

¹⁰² Judgment: <https://ja.public.lu/45001-50000/45759.pdf>

¹⁰³ Client Briefing: <https://www.cliffordchance.com/briefings/2023/02/redemption-of-alphabet-classes-of-shares---guidance-on-the-lux.html>

¹⁰⁴ Tribunal Ruling: <https://ja.public.lu/45001-50000/45759.pdf>

BILL NO. 8276 ON REFORMING THE INVESTMENT TAX CREDIT SCHEME FOR RESIDENT COMPANIES TO ENDORSE GREEN AND DIGITAL CHANGE

13 July 2023¹⁰⁵

On 13 July 2023, the Luxembourg Government presented bill No. 8276 aiming to amend the Luxembourg income tax law of 4 December 1967, as amended, with respect to the modernisation of the investment tax credit scheme for companies¹⁰⁶.

Arising from the *Solidaritéitspak 2.0*, aiming to (among other things) encourage the ecological and digital transition, the purpose of the proposed tax measure is to stimulate the local economy by supporting businesses to pursue green and digital options. To this end, the reform enlarges the material scope of the tax credit to encompass investments and operating expenses of resident companies that were made in the context of digital or ecological transformation. In addition, the bill also provides for an increase in the global investment tax credit rate from 8% to 12%, as well as the removal of the EUR 150,000 investment bracket condition. Accordingly, a 12% tax credit will be granted on the acquisition price of the investments made that take the form of tangible depreciable assets (e.g., acquisition of machinery, equipment, computer or technological hardware, etc., other than buildings, livestock and mineral and fossil deposits) or operating expenses (e.g., employee training costs, diagnostic or audit costs, cloud computing, software licences, etc.) incurred as part of the digital or ecological transition during a financial year.

Another aspect of the bill is to abolish the second component of the framework, namely the tax credit for complementary investments and instead introduce the possibility for companies to benefit from an income tax credit of 18% on the aforementioned investments and operating expenses.

In order to be eligible for the proposed 18% tax credit regime, the transformation project must meet certain criteria, as set out in the bill. For instance, the digital

transformation must substantially improve productivity or bring about innovation to an extent of creating new value for the company's stakeholders; or, in the context of ecological transformation, significantly improve the energy efficiency of one of the company's production processes.

Regarding the verification procedure of eligibility, given the diversity of investments and operating expenses in relation to digital and green transformation, the bill foresees to establish a system of certification in which companies are to submit their projects to the Government who in turn will decide on the eligibility in the form of an attestation. Subsequently, during the tax declaration procedure, the companies will be required to provide a certificate issued by the Government which reflects the reality of the acquisition prices of the investments and the operating costs incurred.

The bill still needs to go through the legislative process, with the reform intended to take effect as of 2024.

¹⁰⁵ Bill No. 8276: <https://wdocs-pub.chd.lu/docs/exped/0142/176/285764.pdf>

¹⁰⁶ Bill No. 8276: <https://wdocs-pub.chd.lu/docs/exped/0142/176/285764.pdf>

LUXEMBOURG LAW AND CIRCULAR ON THE NEW SUBSCRIPTION TAX EXEMPTION REGIME

Law of 21 July 2023; Circular of 26 July 2023¹⁰⁷

On 21 July 2023, the Luxembourg Parliament adopted a law aiming to modernise Luxembourg's investment fund toolbox (the "**Law**")¹⁰⁸.

To enhance the attractiveness of the Luxembourg financial centre and uphold its prominent status in the alternative investment funds market, the Law amends the following laws that govern investment funds in Luxembourg:

- The law of 15 June 2004 relating to investment company in risk capital ("**SICAR**");
- The law of 13 February 2007 relating to specialised investment funds ("**SIF**");
- The law of 17 December 2010 relating to undertakings for collective investment ("**UCI**");
- The law of 12 July 2013 on alternative investment fund managers ("**AIFM**"); and
- The law of 23 July 2016 on reserved alternative investment funds ("**RAIF**").

Regarding taxation, the Law notably modernises the subscription tax regime to support the emergence of new European products such as European Long-Term Investment Funds according to Regulation 2015/760 ("**ELTIF**") and pan-European individual savings products in line with Regulation 2019/1238 ("**PEPP**"). Indeed, (i) Part II UCIs, SIFs and RAIFs (or compartments thereof) authorised as ELTIF, and (ii) UCITS or Part II UCIs (or compartments thereof) limited to savers participating in a PEPP are now exempt from subscription tax.

Furthermore, the Law clarifies that UCIs can benefit from the reduced subscription tax rate of 0.01% if they qualify

as money market funds under Regulation 2017/1131 ("**MMF**"). Moreover, UCIs, SIFs and RAIFs considered as short-term MMF within the Regulation 2017/1131 meaning will benefit from the subscription tax exemption.

Within this context, the Luxembourg tax administration issued a circular No. 818¹⁰⁹ (the "**Circular**") clarifying the amended subscription tax regime. In that regard, the Circular provides guidance on the scope and criteria for the application of the new subscription tax exemption and reduction regime, as well as guidance on the filing procedure.

Considering the entry into force on 29 July 2023 of the Law, the new subscription tax regime is applicable as of the third quarter of 2023.

¹⁰⁷ Circular of 26 July 2023/ Law of 21 July 2023:
<https://pfi.public.lu/content/dam/pfi/pdf/circulaires/taxe-dabonnement/circulaire-n-818-taxe-dabonnement-loi-et-rgd-du-21-juillet-2023.pdf>
<https://legilux.public.lu/eli/etat/leg/loi/2023/07/21/a442/jo>

¹⁰⁸ Law of 21 July 2023:
<https://legilux.public.lu/eli/etat/leg/loi/2023/07/21/a442/jo>.

¹⁰⁹ Circular of 26 July 2023:
<https://pfi.public.lu/content/dam/pfi/pdf/circulaires/taxe-dabonnement/circulaire-n-818-taxe-dabonnement-loi-et-rgd-du-21-juillet-2023.pdf>.

AMENDED OBLIGATIONS TO DISCLOSE INCOME TAX INFORMATION FOR CERTAIN UNDERTAKINGS IN LUXEMBOURG

15 August 2023¹¹⁰

On 15 August 2023, the Council Directive (EU) 2021/2101 of 24 November 2021, amending Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, was implemented in Luxembourg through the Luxembourg law on the disclosure of income tax information by certain undertakings and branches (the "Disclosure Law")¹¹¹.

The Disclosure Law aims to render the tax information of groups and standalone undertakings with a significant turnover of EUR 750 million established in Luxembourg (respectively having a sizeable subsidiary or branch established therein) more transparent by amending the law of 19 December 2022 on the register of commerce and companies and the accounting and annual accounts of companies.

The Disclosure Law addresses four types of undertakings, which have to publish an annual income tax information report:

- ultimate parent undertakings;
- standalone undertakings;
- medium- and large-sized subsidiaries of an ultimate parent undertaking (with said turnover) that is not governed by the law of an EU Member State. Such subsidiaries are to report on the income tax information of the ultimate parent company; and
- branches that achieve net sales in excess of EUR 8.8 million, respectively, are established by a group or standalone company that is not governed by the law of an EU Member State and achieve said turnover. Such branches are required to report on the income tax information of the group as a whole.

Ultimate parent undertakings and standalone undertakings that are established in Luxembourg only and have no business activities (including subsidiaries and branches) in other tax jurisdictions are, however, exempt from this reporting obligation.

The report on income tax information shall include:

- the name of the undertaking, the financial year concerned, the currency featured in the declaration, and, where applicable, a list of subsidiaries included in the consolidated accounts;
- a description of the nature of activities;
- the number of employees;
- the turnover from qualifying income;
- the overall gross profit or loss;
- the amount of income tax due;
- the amount of income tax paid; and
- the amount of retained earnings at the end of the year concerned.

This report must be filed and published within 12 months following the end of the financial year concerned and made freely accessible for at least five years on the company's website or in the commercial register.

The Disclosure Law was published in the Official Journal on 22 August 2023 and will apply to financial years beginning on or after 22 June 2024.

¹¹⁰ Law of 15 August 2023:
<https://legilux.public.lu/eli/etat/leg/loi/2023/08/15/a532/jo>;

¹¹¹ Law of 15 August 2023:
<https://legilux.public.lu/eli/etat/leg/loi/2023/08/15/a532/jo>

NEW EU DIRECTIVE PROPOSALS TO HARMONIZE AND SIMPLIFY CORPORATE TAX RULES ACROSS THE EU

12 September 2023¹¹²

On 12 September 2023, the European Commission adopted a series of initiatives addressed to multinational entities ("MNEs"), namely Council Directive 2023/0321 on Business in Europe: Framework for Income Taxation ("BEFIT")¹¹³; Council Directive 2023/0322 on transfer pricing ("TP")¹¹⁴; and Council Directive 2023/0320 establishing a Head Office Tax system for micro, small and medium-sized enterprises, and amending Directive 2011/16/EU ("HOT")¹¹⁵.

The BEFIT proposal was motivated by the Two-Pillar Solution of the OECD, aimed at negating the effects of profit shifting and tax avoidance. It notably replaces the Commission's Common (consolidated) Corporate Tax Base (C(C)CTB) proposals, and depicts a new take on establishing a common framework for corporate income taxation in the EU. This proposal seeks to simplify the tax compliance procedure for large-scale MNEs and to facilitate, as well as harmonise, national legislation on determining the tax base of groups.

The BEFIT rules will be mandatory for EU groups where (i) the combined turnover exceeds EUR 750 million, and (ii) the ultimate parent entity holds at least 75% of ownership rights or profit entitlement rights. Other businesses are free to opt in, under the condition that they prepare consolidated financial statements. BEFIT entails for:

- companies that are members of the same group to calculate their tax base in conformity with a common set of rules;
- the tax base of the intragroup members to be aggregated into a single tax base, enabling the set-off of cross-border losses; and
- the aggregated tax base to be reallocated to each member of the BEFIT group based on results from the previous three fiscal years, allowing for additional local tax deductions and adjustments.

As part of the BEFIT package and sharing common *ratio legis* with the BEFIT proposal, the TP proposal intends to improve tax certainty by harmonising and ensure a common application of transfer pricing rules across the EU. In this vein, it sets up common rules by turning the OECD Transfer Pricing Guidelines into a binding tool as regards interpretation and application of the arm's-length principle. Moreover, the TP proposal provides for a harmonised definition of an "associated enterprise" which denotes a person who holds significant influence over another person's management, or holds over 25% of ownership, voting rights or rights to their profits.

TP furthermore seeks to mitigate the risks of double taxation by establishing a mechanism involving the interplay between Member States. For instance, if a Member State records higher amounts of taxable profits of a company as a result of non-arm's-length-compliant transactions with another associated enterprise, a corresponding adjustment will be applied by the other associated enterprise's Member State. Therefore, the proposal would also reduce the opportunities for

¹¹² EU Council Directive proposals:
[https://www.europarl.europa.eu/RegData/docs_autres_institution/s/commission_europeenne/com/2023/0528/COM_COM\(2023\)0528_EN.pdf](https://www.europarl.europa.eu/RegData/docs_autres_institution/s/commission_europeenne/com/2023/0528/COM_COM(2023)0528_EN.pdf)
[https://www.europarl.europa.eu/RegData/docs_autres_institution/s/commission_europeenne/com/2023/0532/COM_COM\(2023\)0532_EN.pdf](https://www.europarl.europa.eu/RegData/docs_autres_institution/s/commission_europeenne/com/2023/0532/COM_COM(2023)0532_EN.pdf)
[https://www.europarl.europa.eu/RegData/docs_autres_institution/s/commission_europeenne/com/2023/0529/COM_COM\(2023\)0529_EN.pdf](https://www.europarl.europa.eu/RegData/docs_autres_institution/s/commission_europeenne/com/2023/0529/COM_COM(2023)0529_EN.pdf)

¹¹³ Council Directive 2023/0321:
[https://www.europarl.europa.eu/RegData/docs_autres_institution/s/commission_europeenne/com/2023/0528/COM_COM\(2023\)0528_EN.pdf](https://www.europarl.europa.eu/RegData/docs_autres_institution/s/commission_europeenne/com/2023/0528/COM_COM(2023)0528_EN.pdf)

[s/commission_europeenne/com/2023/0532/COM_COM\(2023\)0532_EN.pdf](https://www.europarl.europa.eu/RegData/docs_autres_institution/s/commission_europeenne/com/2023/0532/COM_COM(2023)0532_EN.pdf).

¹¹⁴ Council Directive 2023/0322:
[https://www.europarl.europa.eu/RegData/docs_autres_institution/s/commission_europeenne/com/2023/0529/COM_COM\(2023\)0529_EN.pdf](https://www.europarl.europa.eu/RegData/docs_autres_institution/s/commission_europeenne/com/2023/0529/COM_COM(2023)0529_EN.pdf).

¹¹⁵ Council Directive 2023/0320:
[https://www.europarl.europa.eu/RegData/docs_autres_institution/s/commission_europeenne/com/2023/0528/COM_COM\(2023\)0528_EN.pdf](https://www.europarl.europa.eu/RegData/docs_autres_institution/s/commission_europeenne/com/2023/0528/COM_COM(2023)0528_EN.pdf).

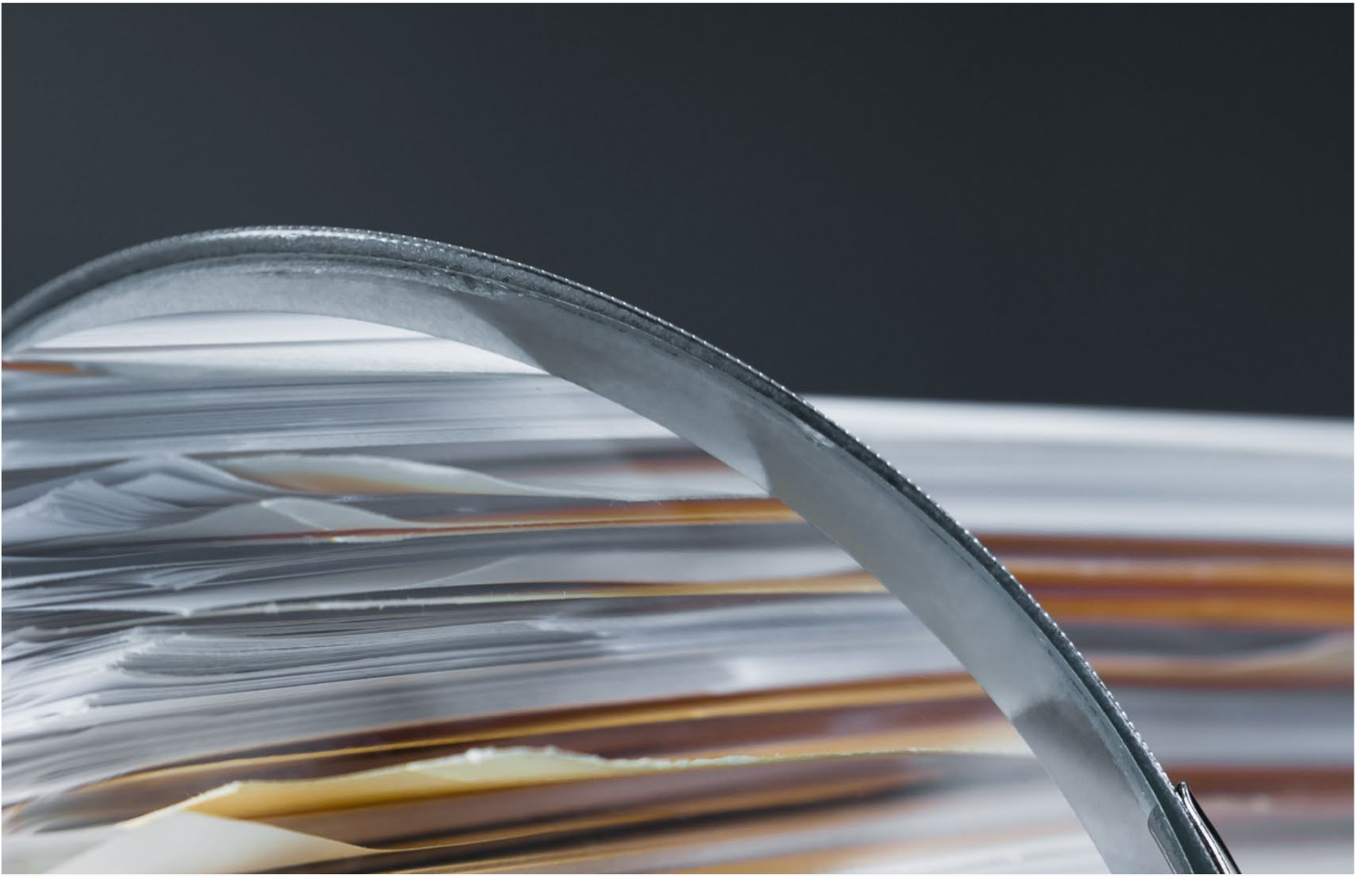
aggressive tax planning of MNEs by ensuring intra-group transactions to be carried out at market value.

Ensuing from the SME Relief Package, the HOT proposal aims to reduce tax compliance costs for micro, small and medium-sized enterprises ("**SMEs**") that operate in other Member States exclusively through permanent establishments ("**PEs**") by allowing them to opt for a simplified tax compliance procedure. Once adopted by the head office, this opt-in regime will be applicable for all the PEs and will be initially valid for five years unless specific changes in circumstances occur. Under the proposed framework, SMEs would benefit from a one-stop shop with centralised procedures, and would only be required to file a single tax declaration according to the tax rules of the Member State in which its head office is located. This Member State will subsequently share the declaration and the resulting tax revenues with the other Member States in which the SMEs' PEs are situated.

The scope of HOT is strictly limited to standalone SMEs expanding through PEs and does not apply to SMEs with subsidiaries. HOT specifies that once an SME qualifies as a group or its balance sheet exceeds certain limit, it will no longer benefit from this simplified tax declaration regime.

Noteworthy, the criteria of a "group" differ among the proposed directives, which renders the interaction of the different, yet related, rules unclear.

If the proposals are adopted in their present form, HOT and TP will be applicable as from 1 January 2026 and BEFIT will come into force on 1 July 2028.



GLOSSARY



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"**ABBL**": Luxembourg Bankers' Association

"**AI**": Artificial Intelligence

"**AIFM**": Alternative Investment Fund Manager

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

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

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

"**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

"**CASP**": Crypto-asset service provider

"**CFDs**": Contracts for differences

"**CPDI**": *Conseil de Protection des Déposants et des Investisseurs*

"**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 Directive 2002/87/EC 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, and reporting and disclosure requirements (as amended)

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

"**Directive 2022/2556**": Directive (EU) 2022/2556 of 14 December 2022 amending Directives 2009/65/EC, 2009/138/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU, 2014/65/EU, (EU) 2015/2366 and (EU) 2016/2341 as regards digital operational resilience for the financial sector

"**DLT**": Distributed Ledger Technology

"**DORA**": Regulation (EU) No. 2022/2554 of 14 December 2022 on digital operational resilience for the financial sector and amending Regulations (EC) No. 1060/2009, (EU) No. 648/2012, (EU) No. 600/2014, (EU) No. 909/2014 and (EU) No. 2016/1011

"**EBA**": European Banking Authority

"**ECB**": European Central Bank

"**EEA**": European Economic Area

- "**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
- "**EU**": European Union
- "**FAQ**": Frequently Asked Questions
- "**FATF**": Financial Action Task Force
- "**FGDL**": Luxembourg deposit protection scheme, *Fonds de garantie des dépôts Luxembourg*
- "**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
- "**ICT**": Information and Communication Technology
- "**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) No. 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)
- "**MiCAR**": Regulation (EU) 2023/1114 on markets in crypto-assets
- "**MiFID II**": Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (as amended)
- "**MiFID II Delegated Regulation**": Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (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
- "**NCA**": National Competent Authority
- "**NPO**": Not-for-profit organisation
- "**OECD**": Organisation for Economic Cooperation and Development
- "**ORSA**": Own Risk and Solvency Assessment
- "**Payment Services Law**": Luxembourg law of 10 November 2009 on payment services (as amended)
- "**PFS**": Professionals of the Financial Sector

"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

"SREP": Supervisory Review and Evaluation Process

"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

"TFR": means Regulation (EU) 2023/1113 of the European Parliament and of the Council of 31 May 2023 on information accompanying transfers of funds and certain crypto-assets

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

"UCITS": Undertakings for collective investment in transferable securities that are "harmonised" within the meaning of and governed by the UCITS Directive

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

"VASP": Virtual Asset Service Providers

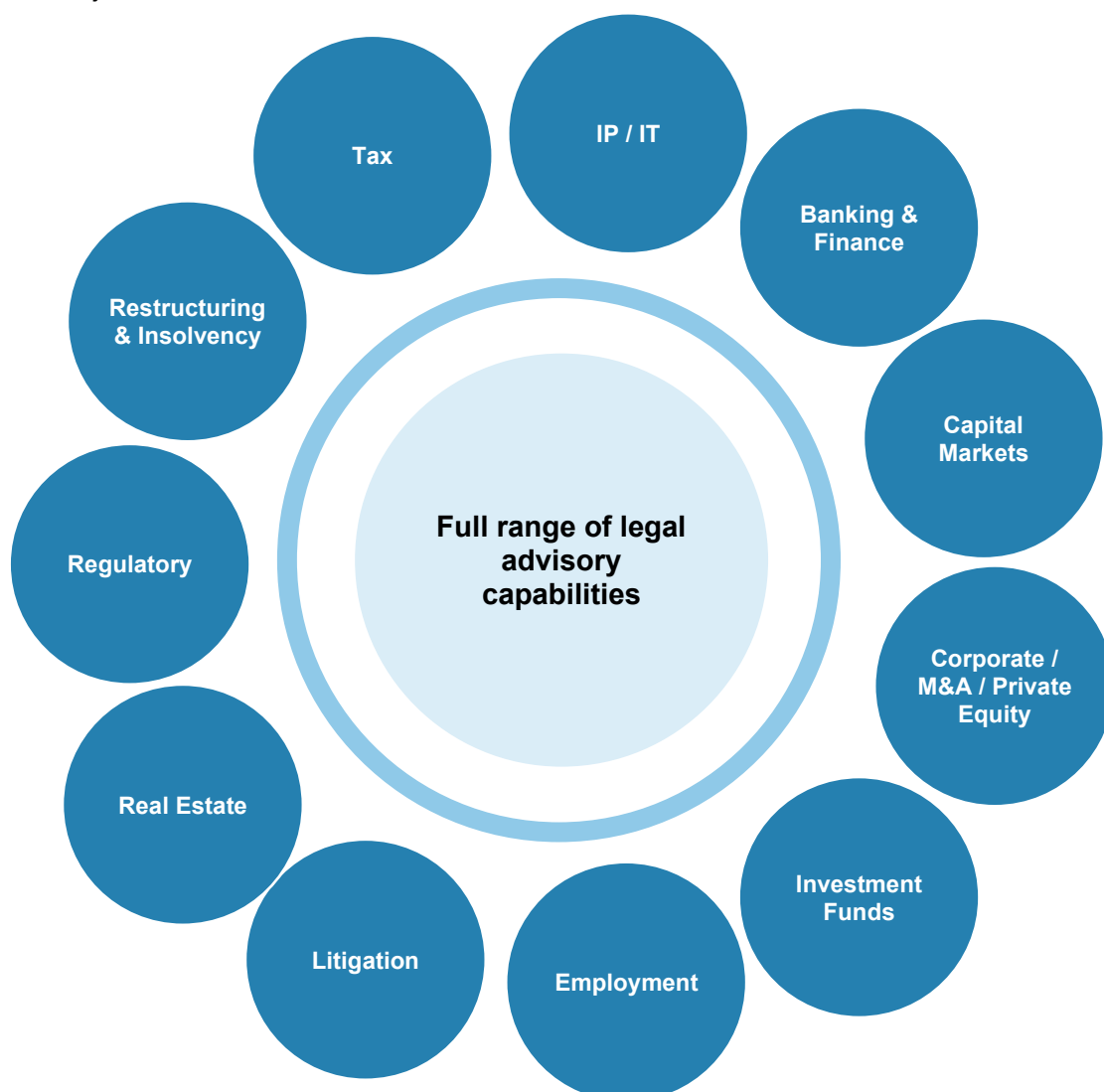
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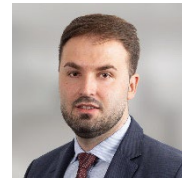
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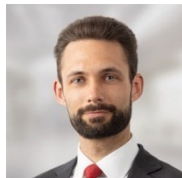
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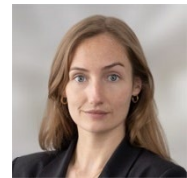
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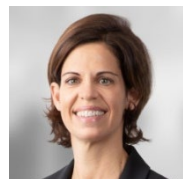
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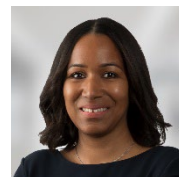
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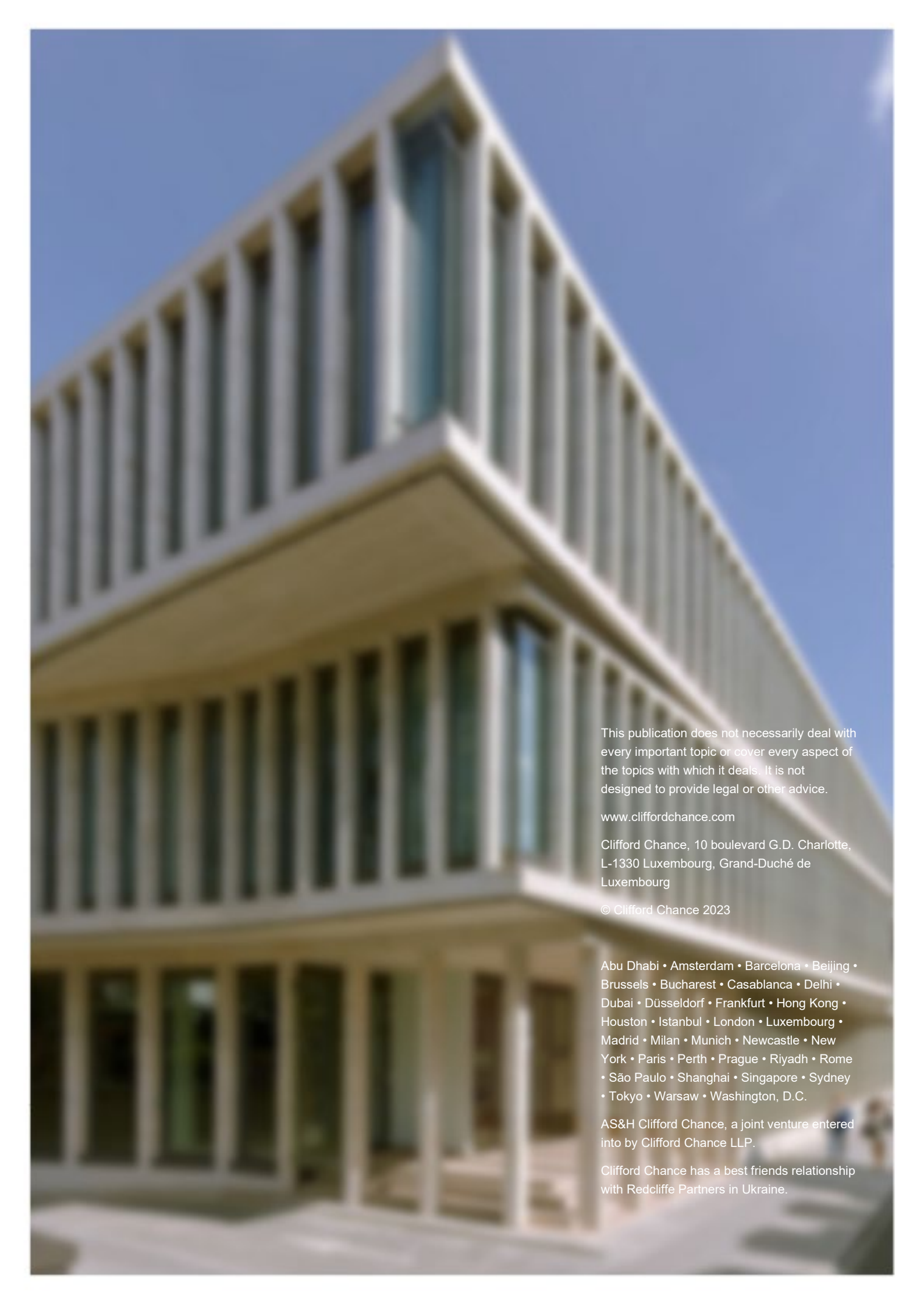
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