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LUXEMBOURG LEGAL UPDATE
APRIL 2018

Dear Reader,

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

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

You can also refer to some **Topics Guides** on our website:

Our dedicated General Data Protection Regulation guide to keep up to date with the most recent developments relating to the outcome of the 25 May 2018 law in the EU.

Our dedicated FinTech guide to keep up to date with the most recent developments relating to the outcome of the 25 May 2018 law in the EU.

ONLINE RESOURCES

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

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CONTENT

BANKING, FINANCE AND CAPITAL MARKETS

INTERNATIONAL AND EU DEVELOPMENTS

New Delegated, Implementing and other EU Regulations and EU and International Texts

Over the past few months, a number of new Commission Delegated, Commission Implementing and other EU Regulations as well as EU and international texts have been published. These include, amongst others, the following:

CRD IV/CRR:

- N°2017/2241 of 6 December 2017 on the extension of the transitional periods related to own funds requirements for exposures to central counterparties set out in CRR and EMIR
- N°2017/2295 of 4 September 2017 supplementing CRR with regard to regulatory technical standards for disclosure of encumbered and unencumbered assets
- N°2018/171 of 19 October 2017 supplementing CRR with regard to regulatory technical standards for the materiality threshold for credit obligations past due

PSD 2:

- EBA Guidelines of 12 December 2017 on the security measures for operational and security risks of payment services under PSD 2 (EBA/GL/2017/17)
- EBA Opinion of 19 December 2017 on the transition from PSD 1 to PSD 2 (EBA/Op/2017/16)

MiFID 2/MiFIR:

- N°2017/2154 of 22 September 2017 supplementing MiFIR with regard to regulatory technical standards on indirect clearing arrangements
- N°2017/2155 of 22 September 2017 amending Delegated Regulation (EU) No 149/2013 with regard to regulatory technical standards on indirect clearing arrangements
- N°2017/2194 of 14 August 2017 supplementing MiFIR with regard to package orders
- European Commission Equivalence Decision
  - on the equivalence of the legal and supervisory framework in Australia applicable to financial markets in accordance with MiFID 2
  - on the equivalence of the legal and supervisory framework applicable to recognised exchange companies in the Hong Kong Special Administrative Region in accordance with MiFID 2
  - on the equivalence of the legal and supervisory framework of the United States of America for national securities exchanges and alternative trading systems in accordance with MiFID 2
  - on the equivalence of the legal and supervisory framework applicable to stock exchanges in Switzerland in accordance with MiFID 2
- N°2017/2294 of 28 August 2017 amending Delegated Regulation (EU) 2017/565 with regard to the specification of the definition of systematic internalisers for the purposes of MiFID 2
- N°2017/2382 of 14 December 2017 laying down implementing technical standards with regard to standard forms, templates and procedures for the transmission of information in accordance with MiFID 2
- ESMA statement of 20 December 2017 to support the smooth introduction of the LEI requirements (ESMA70-145-401)
- N°2017/2382 of 14 December 2017 laying down implementing technical standards with regard to standard forms, templates and procedures for the transmission of information in accordance with MiFID 2
- N°2018/63 of 26 September 2017 amends Delegated Regulation (EU) 2017/571 supplementing MiFID 2 with regard to regulatory technical standards on the authorisation, organisational requirements and publication of transactions for data reporting services providers
- ESMA opinion of 21 March 2018 on treatment of packages under trading obligation for derivatives (ESMA70-156-322)

BRRD:

- N°2017/2399 of 12 December 2017 amending BRRD with regard to the ranking of unsecured debt instruments in insolvency hierarchy

- N°2018/308 of 1 March 2018 laying down implementing technical standards for MiFID 2 with regard to formats, templates and definitions for the identification and transmission of information by resolution authorities for the purposes of informing the EBA of the minimum requirement for own funds and eligible liabilities
- N°2018/345 of 14 November 2017 supplementing BRRD with regard to regulatory technical standards specifying the criteria relating to the methodology for assessing the value of assets and liabilities of institutions or entities
- N°2018/344 of 14 November 2017 supplementing BRRD with regard to regulatory technical standards specifying the criteria relating to the methodologies for valuation of difference in treatment in resolution

Solvency II:

- N°2017/2189 of 24 November 2017 amending and correcting Implementing Regulation (EU) 2015/2450 laying down implementing technical standards with regard to the templates for the submission of information to the supervisory authorities according to Solvency II
- N°2017/2190 of 24 November 2017 amending and correcting Implementing Regulation (EU) 2015/2452 laying down implementing technical standards with regard to the procedures, formats and templates of the solvency and financial condition report according to Solvency II
- N°2018/165 of 31 January 2018 laying down technical information for the calculation of technical provisions and basic own funds for reporting with reference dates from 31 December 2017 until 30 March 2018 in accordance with Solvency II

IDD:

- EIOPA Q&A of 19 December 2017 on the comprehension alert in the Key Information Document for Insurance-Based Investment Products (EIOPA-BoS-17/375)
- N°2017/2358 of 21 September 2017 supplementing IDD with regard to product oversight and governance requirements for insurance undertakings and insurance distributors
- N°2017/2359 of 21 September 2017 supplementing IDD with regard to information requirements and conduct of business rules applicable to the distribution of insurance-based investment products
- N°2018/411 of 14 March 2018 amending IDD with regard to the date of application of Member States' transposition measures

Benchmark Regulation:

- N°2018/64 of 29 September 2017 supplementing the Benchmark Regulation with regard to specifying how the criteria of Article 20(1)(c)(iii) are to be applied for assessing whether certain events would result in significant and adverse impacts on market integrity, financial stability, consumers, the real economy or the financing of households and businesses in one or more Member States
- N°2018/65 of 29 September 2017 supplementing the Benchmark Regulation specifying technical elements of the definitions laid down in paragraph 1 of Article 3 of the Benchmark Regulation
- N°2018/66 of 29 September 2017 supplementing the Benchmark Regulation specifying how the nominal amount of financial instruments, other than derivatives, the notional amount of derivatives and the net asset value of investment funds are to be assessed
- N°2018/67 of 3 October 2017 supplementing the Benchmark Regulation with regard to the establishment of the conditions to assess the impact resulting from the cessation of, or change to existing benchmarks
- N°2017/2446 of 19 December 2017 amending Implementing Regulation (EU) 2016/1368 establishing a list of critical benchmarks used in financial markets pursuant to the Benchmark Regulation

MAR:

- N°2018/292 of 26 February 2018 laying down implementing technical standards with regard to procedures and forms for exchange of information and assistance between competent authorities according to MAR

MIF REGULATION:

- N°2018/72 of 4 October 2017 supplementing the MIF Regulation with regard to regulatory technical standards establishing the requirements to be complied with by payment card schemes and processing entities to ensure the application of independence requirements in terms of accounting, organisation and decision-making process

SSM/EBA:

- N°2017/2094 of 3 November 2017 amending Regulation (EU) N°795/2014 on oversight requirements for systemically important payment systems (ECB/2017/32)
- N°2017/2095 of 3 November 2017 amending Regulation (EC) N°2157/1999 on the powers of the ECB to impose sanctions (ECB/2017/34)
- N°2017/2098 of 3 November 2017 on procedural aspects concerning the imposition of corrective measures for non-compliance with Regulation (EU) N°795/2014 (ECB/2017/33)
- N°2017/2097 of 3 November 2017 on the methodology for calculating sanctions for infringements of the oversight requirements for systemically important payment systems (ECB/2017/35)
- ECB-SSM Supervisory Manual-European banking supervision: functioning of the SSM and supervisory approach (March 2018)
- ECB Annual Report on supervisory activities 2017 (March 2018)

SRB:

- N°2017/2361 of 14 September 2017 on the final system of contributions to the administrative expenditures of the SRB

Payment Accounts Directive:

- N°2018/32 of 28 September 2017 supplementing PAD with regard to regulatory technical standards for the Union standardised terminology for most representative services linked to a payment account
- N°2018/33 of 28 September 2017 laying down implementing technical standards with regard to the standardised presentation format of the statement of fees and its common symbol according to PAD
- N°2018/34 of 28 September 2017 laying down implementing technical standards with regard to the standardised presentation format of the fee information document and its common symbol according to PAD

Brexit:

- ECB Newsletter of 15 November 2017-Brexit: an ECB supervision perspective
- EIOPA Opinion of 21 December 2017 on service continuity in insurance in light of the withdrawal of the United Kingdom from the European Union (EIOPA-BoS-17/389)

Capital Markets Union:

- European Commission Proposal of 12 March 2018 for a Directive on the issue of covered bonds and covered bond public supervision and amending the UCITS Directive and BRRD (COM(2017) 94/3)
- European Commission Proposal of 12 March 2018 for a Regulation on amending CRR with regard to exposures in the form of covered bonds (COM(2018) 93/4)
- European Commission Proposal of 12 March 2018 for a Regulation on the law applicable to the third-party effects of assignments of claims (COM(2018) 96 final)
- European Commission Proposal of 12 March 2018 for a Directive amending the UCITS Directive and the AIFMD with regard to cross-border distribution of collective investment funds (COM(2018) 92 final)
- European Commission Proposal of 12 March 2018 for a Regulation on facilitating cross-border distribution of collective investment funds and amending Regulations (EU) N°345/2013 and (EU) N°346/2013 (COM(2018) 110 final)

Other:

- ECB Recommendation for a Decision of the European Parliament and of the Council amending Article 22 of the Statute of the European System of Central Banks and of the ECB (ECB/2017/18)
- EU Interinstitutional register of delegated acts
- Quantitative Update of the EBA MREL Report of 20 December 2017 (December 2016 Data)
- EBA Ad Hoc Cumulative Impact Assessment of the Basel Reform Package of 20 December 2017
- FSB Global Shadow Banking Monitoring Report 2017 of 5 March 2018
- FSB Reporting Guidelines of 5 March 2018 on Securities Financing Transactions
- ECB Collective Agreement on TARGET 2 between Central Banks and CSDs

NATIONAL LEGISLATION

European Account Preservation Order Regulation: Publication of Implementing Bill

Bill n°7203

A new bill n°7203 implementing Regulation (EU) N°655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters was lodged on 6 November 2017 with the Luxembourg Parliament.

The bill modifies the Luxembourg New Code of Civil Procedure in order to introduce a new Article 791-1 setting out the European Account Preservation Order procedure which aims to facilitate cross-border debt recovery in civil and commercial matters.

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

AML/CTF: Publication of Bill Implementing Directive 2016/2258

Bill N°7208

A new bill n°7208 implementing Council Directive (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU with regard to access to anti-money-laundering information by tax authorities was lodged on 8 November 2017 with the Luxembourg Parliament.

The bill proposes to implement the requirements set out in Directive (EU) 2016/2258 as well as the relevant international standards (including the Common Reporting Standard and FATCA) by allowing competent authorities the necessary access to the AML/CTF information when performing controls in the context of European and international cooperation in tax matters. The access to such information is notably ensured by referring to the relevant provisions of the AML Law.

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

AML/CTF: Implementation of AMLD 4

Law of 13 February 2018

The law of 13 February 2018 implementing AMLD 4 and FATF 2, has been published in the Luxembourg Official Journal (*Mémorial A*).

Please refer to the **Investment Funds** section of this Luxembourg Legal Update for further details on the new law.

Bill n°7216

The Luxembourg government deposited a new bill N°7216 implementing Article 31 of AMLD 4 with the Luxembourg Parliament on 6 December 2017.

The bill proposes, amongst other things, to introduce due diligence and record keeping obligations in relation to beneficial owners of fiduciary structures (*fiducies*) incumbent upon the fiduciary (*fiduciaire*) as well as a register in which information on Luxembourg fiduciary structures will be available to obliged persons and entities as well as competent national authorities.

Finally, the bill proposes to grant AML/CTF competent authorities further supervision, investigation and sanction powers necessary for the proper exercise of their supervisory functions. Fiduciaries will have six months following the entry into force of the law of the bill to comply with it.

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

Please refer to the **Investment Funds** section of this Luxembourg Legal Update for further details on this bill.

Bill n°7217

The Luxembourg government deposited a new bill n°7217 for a law on the creation of a beneficial owner register, implementing Article 30 of AMLD 4 with the Luxembourg Parliament on 6 December 2017.

The bill, together with bill n°7216, aims to adapt the Luxembourg legal framework to the international and European (stemming from AMLD 4) transparency requirements with regard to legal entities.

The bill proposes, amongst other things, to (i) introduce a beneficial owners register, the purpose of which is to maintain and make available to competent national authorities, autoregulation bodies, obliged persons and entities under the AML Law, as well as, on request and showing a legitimate interest resident persons and organisations, information in relation to beneficial owners of legal entities registered in Luxembourg (except those admitted to trading on a regulated market), and (ii) set out certain information obligations incumbent upon such legal entities. Legal entities will have six months following the entry into force of law of the bill to comply with such requirements. It further contains criminal law provisions which are part of the mechanisms aiming to ensure the effectiveness of these new requirements.

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

Please refer to the **Investment Funds** section of this Luxembourg Legal Update for further details on this bill.

Macroprudential Measures: Publication of Bill

Bill n°7218

A new bill n°7218 on macroprudential measures concerning residential mortgages amending in particular the Financial Sector Law was deposited with the Luxembourg Parliament on 11 December 2017.

The main purpose of the bill is to enhance the macroprudential toolkit of Luxembourg authorities in order to better address threats to national financial stability emanating specifically from the real estate sector in Luxembourg.

The newly introduced measures relate to the conditions for granting residential loans in Luxembourg. In particular, it should be noted that the Central Bank of Luxembourg will enjoy an enhanced right of access to information available to public institutions and state administration.

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

MIF Regulation: Luxembourg Law supporting MIF Regulation

Law of 27 February 2018

The law of 27 February 2018 supporting MIF regulation and modifying various laws on financial services has been published in the Luxembourg Official Journal (*Mémorial A*).

The law appoints the CSSF as competent authority for the purposes of application of MIF Regulation and confers on the CSSF investigation and sanctioning powers in this area. The law further caps the interchange fee announced for debit card based national payment transactions at 0.12% of the transaction value.

The law also introduces a number of adjustments and clarifications in financial sector legislation. In particular, the law modifies the Luxembourg statutory professional confidentiality obligation applying to banks and other professionals in the financial and insurance sector in order to support the outsourcing of functions by such professionals.

The law entered into force on 3 March 2018, except the 0.12% cap which will enter into force on 1 May 2018.

Please refer to the **Investment Funds** section of this Luxembourg Legal Update for further details on the above.

IDD: Publication of Implementing Bill

Bill n°7215

A new bill n°7215 implementing IDD was lodged with the Luxembourg Parliament on 6 December 2017. IDD repeals and replaces completely the provisions of Directive 2002/92/EC of 9 December 2002 on insurance mediation.

IDD aims to strengthen the protection afforded to insurance consumers irrespective of the channel through which insurance products are distributed and introduces a standardised information document for non-life insurance products, a policy to minimise conflicts of interests relevant to insurance distributors and protection rules for whistle-blowers.

The bill, exploiting the minimum harmonization nature of IDD, maintains certain rules whose positive impact has been proved in the past. Hence, under the bill insurance intermediaries are still obliged to apply for a ministerial authorisation and continue to be subject to the existing requirements of professional standing and independence. With regard to the protection afforded to insured persons, policy-holders and beneficiaries in the event of the winding up of the insurance company, the Luxembourg government has decided to combine the existence of a common lien for all insurance creditors on all assets representing the technical provisions with the introduction for each major type of debt of a senior ranking lien on a separate pool of assets.

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

Contributions to the Staff and Operating Costs of the CAA

Grand-Ducal Regulation of 21 December 2017

A new Grand-Ducal Regulation dated 21 December 2017 amending the Grand Ducal Regulation dated 28 April 2014 on contributions to the staff and operating costs of the CAA has been published in the Official Journal on 22 December 2017 and entered into force on 1 January 2018.

The regulation sets out the new contributions the CAA is authorised to collect from undertakings and persons subject to its supervision, such contributions being designed to contribute to the staff and operating costs of the CAA.

Please refer to the **Investment Funds** section of this Luxembourg Legal Update for further details on the regulation.

Fees Charged by the CSSF

Grand-Ducal Regulation of 22 December 2017

A new Grand-Ducal Regulation on fees charged by the CSSF dated 22 December 2017 has been published in the Official Journal on 22 December 2017 and entered into force on 1 January 2018. It repeals and replaces the Grand-Ducal Regulation of 28 October 2013 on fees charged by the CSSF.

One of the main changes is the revision of the fees charged to Luxembourg and foreign law undertakings for collective investment.

The regulation further introduces resolution fees for Luxembourg law credit institutions and Luxembourg branches of third country credit institutions and sets out the fees to be charged to new types of professionals, such as mortgage credit intermediaries.

CRR: Systemically Important Institutions Authorised in Luxembourg

CSSF Regulation n° 17-04

The CSSF published on 9 October 2017 regulation n° 17-04 concerning the systemically important institutions authorised in Luxembourg.

The CSSF sets out in the regulation that none of the CRR institutions authorised in Luxembourg is identified as a "global systemically important institution" (G-SII), within the meaning of the Financial Sector Law. The regulation further identifies eight CRR institutions authorised in Luxembourg as "other systemically important institutions" (O-SIIs), as well as the applicable capital buffer rates, phased in gradually by 2019. The regulation entered into force on 1 January 2018.

CRD IV/CRR: Setting of the Countercyclical Buffer Rate for the First Quarter of 2018

CSSF Regulation n° 17-05

The CSSF issued on 28 December 2017 regulation n° 17-05 on the setting of the countercyclical buffer rate for the first quarter of 2018.

The regulation follows the Luxembourg Systemic Risk Committee's recommendation of 30 November 2017 (CRS/2017/006) and maintains a 0% countercyclical buffer rate for relevant exposures located in Luxembourg for the first quarter of 2018.

The regulation entered into force on 1 January 2018.

CRD IV/CRR: Setting of the Countercyclical Buffer Rate for the Second Quarter of 2018

CSSF Regulation n° 18-01

The CSSF issued on 27 March 2018 regulation n° 18-01 on the setting of the countercyclical buffer rate for the second quarter of 2018.

The regulation follows the Luxembourg Systemic Risk Committee's recommendation of 26 February 2018 (CRS/2018/001) and maintains a 0% countercyclical buffer rate for relevant exposures located in Luxembourg for the second quarter of 2018.

The regulation will enter into force on 1 April 2018.

LUXEMBOURG REGULATORY DEVELOPMENTS

Authorisation Procedure of PSF

CSSF Document on PSF Authorisation Procedure

The CSSF issued on 27 March 2018 a new document with explanations on the PSF authorisation procedure. The document summarises the legal requirements applicable to PSF and the PSF authorisation procedure. The new document is as its predecessor available in English and French and is available on the CSSF website.

CRR: EBA Guidelines on Disclosure Requirements under Part Eight of CRR

CSSF Circular n° 17/673

The CSSF issued on 15 November 2017 a new circular 17/673 implementing the EBA Guidelines on disclosure requirements under Part Eight of CRR (EBA/GL/2016/11) into the Luxembourg regulatory framework.

The Guidelines aim to facilitate the compliance of relevant institutions with the BCBS' Revised Pillar 3 Disclosure Requirements (RPF) and the regulatory disclosure requirements defined in Part Eight of CRR. In particular, the Guidelines specify the information relevant institutions need to disclose and introduce for that purpose tables, presentation templates and corresponding explanatory notes.

The CSSF does not exercise the national discretion provided for in the Guidelines to extend, in whole or in part, their scope of application to certain institutions other than other significant institutions and globally significant institutions that are under its direct supervision.

The circular applies to all Luxembourg law credit institutions, Luxembourg law CRR investment firms and Luxembourg branches of third country credit institutions and CRR investment firms, and entered into force on 31 December 2017.

CRD IV/CRR: EBA Guidelines on Credit Institutions' Credit Risk Management Practices and Accounting for Expected Credit Losses

Circular n°17/675

The CSSF issued on 20 December 2017 a new circular 17/675 on EBA Guidelines on credit institution credit risk management practices and accounting for expected credit losses (EBA/GL/2017/06).

The circular is addressed to all Luxembourg credit institutions including their foreign branches and Luxembourg branches of credit institutions having a head office outside the European Economic Area, and requires such credit institutions to comply with the Guidelines on an individual, sub-consolidated and consolidated basis.

The circular further clarifies that significant institutions directly supervised by the European Central Bank (ECB) should apply the relevant ECB's rules in this field.

The Guidelines build on the BCBS supervisory guidance on credit risk and accounting for expected credit losses issued in December 2015, which sets out supervisory expectations for credit institutions related to sound credit risk practices associated with implementing and applying an expected credit loss (ECL) accounting model. In addition, it contains an Annex specific to jurisdictions applying IFRS. The CSSF reminds that the adoption of IFRS 9 as at 1 January 2018 introduces important changes in terms of measurement of impairment loss allowances as the latter must now be based on an ECL accounting model rather than on an incurred loss accounting model.

Finally, the CSSF specifies that the circular should be read together with notably circular CSSF 14/593 on supervisory reporting requirements and circular CSSF 12/552 on central administration, internal governance and risk management, and in particular its chapter 3 on credit risk.

The circular applies as at 1 January 2018.

CRR: EBA Guidelines on Uniform Disclosures with regard to the Transitional Period for Mitigating the Impact of the Introduction of IFRS 9 on Own Funds

CSSF Circular n° 18/687

The CSSF issued on 27 March 2018 circular 18/687 on the adoption of the EBA Guidelines on uniform disclosures under Article 473a of the CRR (EBA/GL/2018/01). The circular applies from its publication and is addressed to all Luxembourg credit institutions and CRR investment firms as well as to Luxembourg branches of third country credit institutions and investment firms.

The provisions on transitional arrangements aim to mitigate the impact of the impairment requirements resulting from IFRS 9 on own fund ratios, equity and leverage. In this context, the Guidelines aim to improve coherence and comparability of the disclosure requirements applicable to the concerned institutions and to allow the implementation of the new Basel Committee on Banking Supervision (BCBS) Pillar III requirements on the impact of the transitional arrangements for the implementation of expected credit loss accounting on banks' regulatory capital and leverage ratios.

The Guidelines apply to institutions that are subject to all or part of the disclosure requirements specified in Part Eight of the CRR in accordance with Articles 6, 10 and 13 of the CRR and which fulfil at least one of the criteria stipulated in Article 473a(1) of the CRR. The CSSF clarifies that the Guidelines refer in particular to EU parent institutions, institutions which do not draw up consolidated financial statements, O-SIIs (*Other Systemically Important Institutions*), G-SIIs (*Global Systemically Important Institutions*) and subsidiaries which are of material significance for their local market.

The Guidelines complement the disclosure requirements of Part Eight of the CRR, specifying the information that institutions must add for the IFRS 9 transitional provisions.

Institutions that choose to apply the IFRS 9 transitional provisions should complete the quantitative template contained in Annex I of the Guidelines. Institutions not applying the transitional provisions should disclose a narrative commentary in a free format.

The Guidelines apply from 20 March 2018 to 31 December 2022.

CRR: LCR Disclosure

CSSF Circular n° 18/676

The CSSF issued on 18 January 2018 circular n° 18/676 on the adoption of the EBA Guidelines on LCR disclosure to complement the disclosure of liquidity risk management under Article 435 of CRR (EBA/GL/2017/01). The CSSF confirmed its intention to comply with the Guidelines in its capacity as national competent authority. The circular is addressed to Luxembourg law credit institutions as well as to Luxembourg branches of third country credit institutions. The Guidelines provide a harmonised structure for the disclosure of information required under Article 435(1) of the CRR and are addressed to credit institutions which are subject to the disclosure requirements of Part Eight of the CRR in accordance with articles 6, 10 and 13 of the CRR and fall under the scope of the Commission Delegated Regulation (EU) 2015/61.

The information specified in Annexes I and II of the Guidelines needs to be disclosed by all credit institutions identified as O-SIIs or G-SIIs. Addressees not identified as O-SIIs or G-SIIs must disclose Annex I information and a simplified version of Annex II information.

The CSSF has decided not to make use of the option granted to competent authorities and will not extend the disclosure requirements of Part Eight of the CRR to institutions under its direct supervision, other than the ones that have been identified as O-SIIs or G-SIIs.

The CSSF further notes that the circular shall apply with immediate effect. The first application of the Guidelines on the disclosure of the information required under Part Eight of the CRR shall be carried out with respect to the credit institutions' situation as at 31 December 2017.

SSM/CRR: OND Guide

CSSF Circular n° 18/682

The CSSF issued on 5 February 2018 circular 18/682 on the adoption of the ECB Guideline (EU) 2017/697 on the exercise of options and discretions available in Union law by national competent authorities in relation to less significant institutions (ECB/2017/9)(Guideline) and of the ECB Recommendation on common specifications for the exercise of some of these options and discretions available in Union law by national competent authorities in

relation to less significant institutions (ECB/2017/10) (Recommendation). The Circular applied with immediate effect and is addressed to less significant institutions within the meaning of the SSM Regulation.

The CSSF confirms in the circular its compliance with the Guideline and the Recommendation as at 1 January 2018, except for Article 7 of the Guideline which applies from 1 January 2019.

The CSSF further notes that the provisions of CSSF Regulation N°14-01 on the implementation of certain discretions of CRR remain unaffected. Hence, with respect to the exemption from the large exposure limitation, the CSSF will continue to make use of:

- the national discretion of Article 493(3)(c) of CRR which is made use of in Article 56-1 of the Financial Sector Law regarding group exemption relating to large exposures
- the other national discretions of Article 493(3) of the CRR which are made use of in Article 19 of CSSF Regulation 14-01.

CRD IV/CRR: Supervisory Reporting Requirements Applicable to Credit Institutions

CSSF Circular n° 18/678

The CSSF issued on 22 January 2018 circular 18/678 updating CSSF circular 14/593, as amended, in order to incorporate the last developments pertaining to the supervisory reporting requirements. The circular is addressed to all Luxembourg credit institutions and CRR investment firms as well as to Luxembourg branches of third country credit institutions and investment firms.

The circular modifies the full, simplified extended and over-simplified versions of the *FINREP* framework following the entry into force of the *IFRS 9* accounting standard as of 1 January 2018.

Circular n° 18/685 and Circular n° 18/686

The CSSF issued on 20 March 2018 a new circular 18/685 updating the circular 14/593 (as amended) on supervisory reporting requirements applicable to credit institutions by incorporating the latest developments regarding reporting and in particular IFRS 9 rules.

The CSSF also issued on 20 March 2018 a new circular 18/686 updating the CSSF reporting table B. 2.4 "*Information on holdings and subordinated loans*" following the entry into force of IFRS 9 as of 1 January 2018.

Deposit Guarantee Scheme: Survey on Amount of Covered Deposits Held as at 31 December 2017

CSSF-CPDI Circular n° 17/10

The CSSF, acting in its function as Depositor and Investor Protection Council (*Conseil de Protection des Déposants et des Investisseurs - CPDI*), issued the circular CSSF-CPDI 17/10 dated 13 December 2017 regarding a survey on the amount of covered deposits held as of 31 December 2017.

The circular is addressed to all members of the Luxembourg deposit protection scheme, the *Fonds de garantie des dépôts Luxembourg* (FGDL) (in particular to all credit institutions incorporated under Luxembourg law, to the *POST Luxembourg,* and to Luxembourg branches of non-EU/EEA credit institutions), and reminds them that the CPDI collects the amount of covered deposits on a quarterly basis in order to identify the trends and changes in the relevant indicators of deposit guarantee throughout the year.

FGDL members were requested to provide the data at the level of their legal entity, comprising branches located within other Member States, by **19 January 2018** at the latest. In order to transmit these data, institutions were kindly requested to complete the table attached to the circular, being also available on the CSSF website. The file containing the data had to be duly completed in all cases, respect the special surveys naming convention, as defined by CSSF circular 08/344, and be submitted over secured channels (E-File/SOFiE). A member of the authorised management, i.e. the member in charge of the FGDL membership, had to review and approve the file prior to its transmission to the CSSF.

MiFID 2/MiFIR: ESMA Guidelines on Transaction Reporting and Order Record Keeping pursuant to MiFIR and Clock Synchronisation pursuant to MiFID 2

and Details on Transaction Reporting on Financial Instruments under MiFIR

CSSF Circular n° 17/674

The CSSF issued on 20 November 2017 a new circular 17/674 on the ESMA Guidelines on transaction reporting and order record keeping pursuant to MiFIR and clock synchronisation pursuant to MiFID 2 and details on transaction reporting on financial instruments under MiFIR (ESMA/2016/1452).

The purpose of the circular is to (i) implement the guidelines into the Luxembourg regulatory framework, and (ii) provide details on the obligation to report transactions pursuant to Article 26 of MiFIR with regard to the reporting of transactions involving branches and the modalities to be observed for the transmission of transaction reports to the CSSF.

The CSSF points out that the Guidelines should be read in conjunction with their core article in MiFID 2 or MiFIR as well as the three delegated regulations (2017/590, 2017/580 and 2017/574).

With regard to in particular the requirement to report transactions in financial instruments, credit institutions and investment firms incorporated under Luxembourg law shall report to the CSSF all the transactions executed wholly or partly through their branches established in other Member States. The CSSF will transmit such transaction reports to the competent authorities of the Member States where the branches involved are established. Inversely, the CSSF will receive transaction reports from relevant Member States competent authorities in relation to transactions executed wholly or partly through Luxembourg branches for credit institutions and investment firms incorporated in such Member States.

Luxembourg branches of third country firms must in principle submit their transaction reports to the CSSF. However, where the third country firm has set up branches in more than one Member State within the European Union, the branch authorised in Luxembourg shall inform the CSSF of the competent authority chosen by the branches for sending the transaction reports to.

Prior to sending the first MiFID 2/MiFIR transaction report file to the CSSF, Luxembourg credit institutions and investment firms as well as branches of third country firms authorised in Luxembourg, had to inform the CSSF whether they submit their transactions directly to the CSSF or through an approved reporting mechanism or the trading venue through whose systems the transaction was completed, by sending the duly completed *Transaction Reporting Form* to the e-mail address transactionreporting@cssf.lu by 11 December 2017 at the latest. Any change to such information has to be immediately notified to the CSSF.

Finally, relevant firms are required to confirm each year, by 31 January at the latest that the information provided in their last notification remains relevant. CSSF supervised trading venue operators should follow the same procedure when they have to report to the CSSF transactions relating to financial instruments traded on their venue which are executed through their systems by firms which are not subject to MiFIR.

MiFID 2/MiFIR: Application of MiFID 2/MiFIR as at 3 January 2018

CSSF Press Release n° 17/47

The CSSF issued on 29 December 2017 press release 17/47 on the application of MiFID II/MiFIR as at 3 January 2018.

The press release clarifies certain points concerning the application of MiFID II and MiFIR in Luxembourg as at 3 January 2018, in the context that the bill n°7157 transposing MiFID II into Luxembourg law has not yet been adopted.

The press release reminds that the provisions of MiFIR become directly applicable as of 3 January 2018 (except the provisions of Article 37 of MiFIR which will apply as of 3 January 2020) thereby replacing the corresponding provisions of the so far existing Luxembourg law ("**MiFID 1 Law**"). The same principles apply to secondary EU legislation in the area of MiFIR and MiFID 2.

The CSSF further highlights that, in accordance with the fundamental principles of EU law, the provisions of MiFID II that confer new rights or which are more favourable than the applicable national rules (e.g., those enhancing investor protection) apply from 3 January 2018 and the existing provisions of the Financial Sector Law and the MiFID1 Law are to be interpreted accordingly. The CSSF

also reminds that without prejudice to applicable Luxembourg legislation, the use of an approved reporting mechanism as foreseen by Article 26(7) of MIFIR is authorised as from 3 January 2018.

The CSSF kindly reminds the concerned parties of ESMA FAQs as well as of ESMA FAQs on MiFID II and MiFIR as well as ESMA Guidance on the continuity of cross-border provision of investment services in the transition between MiFID 1 and MiFID 2 (including in the event of late transposition of the Directive by the Member States) as well as circulars and/or FAQs issued or to be issued by the CSSF on the application of the new market in financial instruments framework in Luxembourg.

MiFID 2/MiFIR: ESMA's Updated Statement on its Work in Relation to the Provision of Contracts for Differences (CfDs), Binary Options and Other Speculative Products to Retail Investors

CSSF Press Release n° 17/45

The CSSF, issued on 21 December 2017 press release 17/45 on the issuing by ESMA of an updated statement on its work in relation to the sale of contracts for differences (CfDs), binary options and other speculative products to retail investors.

AML/CTF: Publication of the Annual Report 2016 of the Financial Intelligence Unit

Annual Report 2016

The Financial Intelligence Unit (*Cellule de Renseignement Financier*, FIU) of the State Prosecutor's office to the Luxembourg District Court published in October 2017 its annual report for 2016.

The report sets out statistics on the FIU's activity during 2016 and main trends and phenomena in the area of money laundering. The report emphasises an increase in the number of files opened by CRF as compared to 2015, the implementation of new software, goAML, operational since 1 January 2017, as well as the impact of the 2017 tax reform.

The 2016 report finally highlights its active participation, in the international cooperation framework, of the development of FIU.Net, an IT tool, which aims to allow and facilitate the cross-border exchange of information with regard to declarations made in Luxembourg in the context of the freedom to provide services.

AML/CTF Qualitative Survey in the Insurance Sector

CAA Circular Letter n° 17/10

The CAA issued on 28 November 2017 a new circular letter 17/10 specifying the modalities of introducing a new AML/CTF qualitative questionnaire following up on and amending the previous questionnaire introduced by circular letter 11/2.

The CAA points out that the changes were made in order to facilitate the collection of systematic, standardised and up-to-date information allowing the CAA to assess the conformity and effectiveness of the AML/CTF framework of the different insurance sector actors.

At this stage, the circular letter applies to life insurance undertakings only, but its scope of application will be extended to cover non-life insurance undertakings and reinsurance undertakings (when carrying out credit/guarantee operations) as well as brokers and brokerage companies.

The qualitative questionnaire, appended to the circular letter, comprises of two separate parts – the actual survey, and a narrative report, and had to be filled in and submitted to the CAA by 31 January 2018 (covering the situation on 1 January 2018) at the latest.

AML/CTF: Risk Factors Guidelines under AMLD 4

CAA Circular Letter n° 18/4

The CAA issued on 4 April 2018 a new circular letter 18/4 on the Joint ESA Guidelines on simplified and enhanced customer due diligence and the factors credit and financial institutions should consider when assessing the money laundering and terrorist financing (ML/TF) risk associated with individual business relationships and occasional transactions under Articles 17 and 18(4) of AMLD 4 (JC 2017 37). This circular is addressed to all professionals supervised by the CAA and which are required to comply with the AML/CTF rules.

The Guidelines set out factors firms have to consider when assessing the ML/TF risk associated with a business

relationship or occasional transaction. They also set out how firms may or have to adjust the extent of their customer due diligence measures in a way that is commensurate to the ML/TF risk they have identified. The CAA clarifies that the Guidelines do not contain an exhaustive list of ML/TF risk factors.

By this circular, the CAA informs of its compliance with the Guidelines which the CAA has notified to ESMA. The Guidelines apply as of 26 June 2018.

AML/CTF: Implementation of AMLD 4

CSSF Circular n° 18/684

The CSSF issued on 13 March 2018 circular 18/684 on the entry into force of the law of 13 February 2018 (Law) modifying, in particular, the AML Law and implementing AMLD 4.

The circular draws the attention of the professionals of the Luxembourg financial sector (Professionals) to the major changes introduced by the Law pertaining to the Luxembourg AML/CTF framework. The Law amends, amongst others, the definitions of "beneficial owner" and "politically exposed persons" (PEP), introduces measures on the way Professionals need to carry out customer due diligence and modifies the provisions on when simplified and enhanced due diligence measures may or must be applied. New provisions are also introduced on the identification of beneficiaries of various legal arrangements such as trusts or insurance policies. The Law also introduces changes in relation to the internal policies, controls and procedures that need to be in place both at a group and subsidiary level and to document retention rules.

The CSSF notes that competent authorities and self-regulatory bodies, in performing their monitoring and supervisory functions, should adopt a risk-based approach. Concurrently, the Law enhances the supervisory powers of such authorities and their ability to cooperate with each other at a European level and allowing them to impose sanctions and administrative measures that could reach up to € 5,000,000 for a credit or financial institution (and/or 10% of the total annual turnover).

The CSSF further reminds that the Law implements certain provisions of AMLD 4 and that various legal texts and recommendations have already been adopted in this area and refers in this respect to CSSF/CRF Circular 17/650 of 17 February 2017, CSSF Circular 15/609 of 27 March 2015 and CSSF Circular 17/661 of 24 July 2017 and that the Luxembourg AML/CTF framework on anti-money laundering and fight against terrorism financing will be further complemented by other legal texts transposing aspects of AMLD 4 (notably Articles 30 and 31 thereof).

Solvency II: Setting the Applicable Maximum Technical Interest Rates

CAA Circular n° 18/02

The CAA issued on 9 March 2018 circular 18/02 (as already amended in a CAA information notice dated 23 November 2017) modifying and supplementing the amended circular letter 98/1 on technical interest rates by redefining the most common maximum technical interest rates being used for calculating the technical provisions for new life insurance contracts applicable as at 1 April 2018. The last general determination of the technical interest rates had been made by CAA circular 16/12 dated 25 November 2016. The redefinition of such rates in relation to certain currencies has to be seen against the background of a continuous decrease of interest rates since then for the euro and the Norwegian krone and of a rise for the pound sterling and the Swedish krona.

Solvency II: 2017 Statistical Report of Luxembourg Branches of Foreign Entities

CAA Information Notice

The CAA issued on 20 February 2018 an information notice on the transmission by the CAA to the concerned entities of the program and fact sheets relating to the 2017 statistical report of Luxembourg branches of foreign companies.

The CAA notes that the reporting statements remain the same as last year and need to be filled in electronically encrypted form and via a paper version signed by the general representative to the CAA encrypted and by 20 April 2018 at the latest.

Solvency II: 2017 Annual Reporting of Direct Insurance Undertakings Authorised in Luxembourg

CAA Information Notice

CAA issued on 20 February 2018 an information notice on the 2017 annual reporting of direct insurance undertakings authorised in Luxembourg.

The CAA notes that the reporting statements remain the same as last year and need to be transmitted to the CAA using the secured transmission channels. Undertakings whose financial year ends on 31 December 2017 have to ensure that all files and documents (with the exception of the separate report ("*rapport distinct*") are submitted to the CAA by 20 April 2018. The two parts of the separate report must be submitted to the CAA no later than one week after the aforementioned date.

The CAA invites the concerned entities to inform their auditors accordingly, providing them with the necessary documentation on time.

Solvency II: Regular Supervisory Report

CAA Circular Letter n° 17/11

The CAA issued on 18 December 2017 a new circular letter 17/11 specifying the modalities for submission of the regular supervisory report (RSR) required pursuant to Article 304 of the Commission Delegated Regulation (EU) 2015/35.

The CAA sets out guidance with respect to the periodicity of the RSR submission, in particular confirming that the RSR needs to be submitted to the CAA every three years, unless the respective (re-)insurance undertaking falls into one of the scenarios specifically defined by the CAA, i.e. if one of the predefined events occurs or, exceptionally, following a CAA request therefor.

Finally, the CAA further discusses the cases of undertakings which have recently obtained, but subsequently given up, their (re-)insurance licence.

Non-Financial Reporting: Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups

CSSF Press Release n° 18/04

The CSSF, issued on 29 January 2018 press release 18/04 on the mandatory disclosure of specific non-financial and diversity information drawing attention to the publication by the European Commission of non-binding guidelines on environmental and social disclosures (Guidelines).

The Guidelines, taking into account current best practices and the latest international developments, lay out a methodology for reporting non-financial information, including non-financial key performance indicators, general and sectoral, with a view to facilitating relevant, useful and comparable disclosure of non-financial information by the companies in scope.

The CSSF further reminds that the Luxembourg law of 23 July 2016, transposing Directive 2014/95/EU which amends Directive 2013/34/EU with regard to disclosure of non-financial and diversity information by certain large undertakings and groups, mandates, as of the financial year 2017, the disclosure of specific non-financial and diversity information by large public interest entities (credit institutions, insurance companies and listed entities on a regulated market in the EU) exceeding 500 employees, total assets of EUR 20 million and/or a net turnover of EUR 40 million.

Transparency Law: Enforcement of the 2017 Financial Information Published by Issuers

CSSF Press Release n° 17/43

The CSSF issued on 15 December 2017 press release 17/43 on the enforcement of the 2017 financial information published by issuers subject to the Transparency Law. In accordance with the Transparency Law, the CSSF is monitoring that financial information published by issuers (e.g., consolidated and non-consolidated financial statements) is drawn up in compliance with the applicable accounting standards. The CSSF therefore draws the attention of issuers and auditors to identified financial reporting topics they should consider when preparing and

auditing the IFRS financial statements for the year ending 31 December 2017.

The CSSF, taking into account the common enforcement priorities for the 2017 financial statements identified at EU level, highlights specific items of interest that will bear considerable weight in its enforcement campaign. In particular, the CSSF's enforcement priorities are:

- disclosure of the expected impact of implementation of major new IFRS standards in the period of their initial application; this will be most relevant for IFRS 9 Financial Instruments, IFRS 15 Revenue from Contracts with Customers, both applicable as of 1 January 2018, and IFRS16 Leases, applicable as of 1 January 2019
- specific measurement and disclosure issues stemming from IFRS 3 Business Combinations
- specific issues of IAS 7 Statement of Cash Flows
- fair value measurement and disclosure requirements provided for by IFRS 13. The CSSF will monitor, in particular, the progress on certain areas where ESMA had previously identified breaches and omissions
- actions from the post-implementation of IFRS 8 Operating Segments. The CSSF will focus on this area as it has noted a divergence between operating segments identified by issuers in the same industry or sector
- disclosure of non-financial and diversity information in the management report as required by the recently introduced legislation.

More information on inspections and findings by the CSSF in this context may be found on the CSSF website and in its annual report.

Transparency Law: Update of CSSF Circular on Transparency Requirements for Issuers.

CSSF Circular n° 18/679

The CSSF issued on 23 January 2018 a new circular 18/679 updating the CSSF circular 08/337 on the law of 11 January 2008 and the Grand Ducal regulation of 11 January 2008 on transparency requirements for issuers (both as amended) by taking into account the amendments introduced by the Market Abuse Regulation and making some technical adjustments to that circular.

The track changes version of the updated CSSF Circular 08/337 is enclosed as annex 1 and the clean consolidated version thereof is enclosed as annex 2 of the CSSF Circular 18/679.

PSD 2: EBA Guidelines on the Information to be provided for the Authorisation of Payment Institutions and E-Money Institutions and for the Registration of Account Information Service Providers

CSSF Circular n° 18/677

The CSSF issued on 12 January 2018 a new circular 18/677 on EBA Guidelines on the information to be provided for the authorisation of payment institutions and e-money institutions and for the registration of account information service providers under Article 5(5) of PSD 2 (EBA/GL/2017/09).

PSD 2: EBA Guidelines on the Criteria on how to Stipulate the Minimum Monetary Amount of the Professional Indemnity Insurance or Other Comparable Guarantee under Article 5(4) of PSD 2

CSSF Circular n° 18/681

The CSSF issued on 24 January 2018 a new circular 18/681 on EBA Guidelines on the criteria on how to stipulate the minimum monetary amount of the professional indemnity insurance (PII) or other comparable guarantee under Article 5(4) of PSD 2 (EBA/GL/2017/08).

Please refer to the **FinTech section** of this Luxembourg Legal Update for further details on these new circulars.

FINTECH

INTERNATIONAL AND EU DEVELOPMENTS

New International and EU Texts

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

- ECB's Guide to assessments of FinTech credit institution licence applications (March 2018)
- BCBS's Report on sound practices on the implications on FinTech developments for banks and bank supervisors (February 2018)
- EBA's Recommendations on the use of cloud service providers by financial institutions of 20 December 2017 (EBA/REC/2017/03)
- IOSCO Board Communication issued on concerns relating to initial coin offering of 18 January 2018 (IOSCO/MR/01/2018)
- European Commission Proposal for a Regulation of the European Parliament and of the Council on European Crowdfunding Service Providers (ECSP) for Business of 8 March 2018 (COM(2018) 113 final)
- European Commission Proposal for a Directive of the European Parliament and of the Council amending MiFID 2 of 8 March 2018 (COM(2018) 99 final)
- BIS and the Committee on Payments and Market Infrastructures (CPMI) issued on 12 March 2018 a joint report on central bank digital currencies
- EBA's Fintech Roadmap: Conclusions from the consultation on the EBA's approach to financial technology (15 March 2018)
- European Commission Fintech Action Plan: For a more competitive and innovative European Financial Sector of 8 March 2018 (COM(2018) 109/2)

LUXEMBOURG REGULATORY DEVELOPMENTS

Initial Coin Offerings: CSSF Warning on Initial Coin Offerings and Tokens

CSSF Warning

The CSSF issued on 14 March 2018 a warning on the risks related to Initial Coin Offerings (ICOs) and digital tokens.

The CSSF defines ICOs as a form of fundraising from the public used to finance virtual currencies or any other kind of new projects. In return for their participation in an ICO, investors receive digital tokens issued by the initiator and which may, as the case may be, confer certain rights on them. These rights are freely defined and can take different forms (right to services provision, participative rights in a company in the process of being set up, right to receive a manufactured product, right to benefits, etc.). The value of the token for a participant therefore depends mainly on these rights, which may be very diverse, and the capacity of the counterparty to know these rights. The CSSF provides further information on the technology used for and the process of an ICO.

The CSSF underlines that ICOs constitute a not specifically regulated and highly speculative activity which can result in the total loss of investment. The CSSF notes that investors participating in ICOs are exposed to various risks, such as:

- absence of investor protection foreseen by specific laws or regulations
- uncertainty about the success of the financed project
- risk of partial or total loss of the invested capital
- fast growth in value in the past cannot be guaranteed for the future
- risk of theft of tokens
- liquidity risk
- volatility risk
- Risk of fraud and money laundering
- operational risk
- misleading information related to the investment, lack of transparency and risk of price manipulation
- Investment which is often not suitable to all investors or investment objectives

The CSSF recommends investors to be extremely cautious when investing in ICOs and conduct a thorough research on the initiator of such offerings and ensure that they have entirely understood the risks involved in the project and the investment return before proceeding with the investment.

Notwithstanding the multiple risks posed by ICOs, the CSSF notes that blockchain, underlying technology of ICOs, could be used in different innovative projects and be advantageous for the financial sector. This warning on ICOs therefore does not call into question the underlying blockchain technology of ICOs.

The CSSF reminds the entities subject to its supervision that investments in tokens through ICOs are not suitable for all types of investors and investment objectives. Accordingly, it should be permitted for UCITS, for UCI offered to non-professional clients and for pension funds to invest, directly or indirectly, in ICOs. In addition, the CSSF notes that, despite the absence of rules specifically applicable to ICOs, the activities linked to or implied in ICOs by creating tokens and fund collection or raising may be subject to certain legal provisions and hence supervisory requirements.

Finally, the CSSF will not hesitate to examine such fund raisings by extending the examination to the objectives pursued by the relevant ICOs and assess if their use aims to circumvent the applicable regulatory framework, notably prospectus requirements or Financial Sector Law rules. The CSSF takes the view that in all cases of fundraising, the initiators of such ICOs have to set up procedures to prevent operations of money laundering or terrorism financing.

Virtual Currencies: CSSF Warning on Virtual Currencies

CSSF Warning

The CSSF issued on 14 March 2018 a warning on the risks related to virtual currencies (VCs). The CSSF highlights the fact that VCs are not currencies, nor

regulated or supported by any central bank. In addition, they do not benefit from any deposit guarantee scheme.

The CSSF warns that investments in VCs can be extremely risky and are highly speculative. The CSSF notes that investors in VCs or linked financial products are exposed to various risks, such as:

- volatility and price bubble risks
- absence of protection and risk of theft
- liquidity risk
- fast growth in value in the past cannot be guaranteed for the future
- operational risk
- misleading information related to the investment
- lack of transparency on the price formation process and risk of price manipulation
- investment which is often not suitable to all investors or investment objectives
- risk of fraud and money laundering

The CSSF recognising the difficulties investors may have in evaluating such risks, advises them to be aware of and ensure that they understand the functioning of VCs, analyse the related risks (including consequences in case of a total loss) and be informed about the means that are necessary to preserve their VCs. Furthermore, investors are advised to ensure that their electronic devices are protected against unauthorised access and to verify the authorisation that has been granted to the provider of VC exchange services.

Notwithstanding the multiple risks posed by VCs, the CSSF notes that blockchain, the underlying technology of VCs, could be used in different innovative projects and be advantageous for the financial sector. This warning on VCs therefore does not call into question the underlying blockchain technology of VCs.

The CSSF reminds the entities subject to its supervision that investments in tokens through VCs are not suitable for all types of investors and investment objectives.

The CSSF reminds further that, despite the lack of a regulatory framework specific to VCs, any provision of financial services in Luxembourg requires prior authorisation granted by the Minister of Finance, taking into account also the importance of AML/CTF aspects requiring reliable procedures.

Considering the complex legal qualification of VCs and the services related thereto, the CSSF encourages persons willing to engage in an activity pertaining to VCs (e.g. issuance of means of payment, provision of payment services, exchange of fiat currencies to VCs) to submit their projects in advance to the CSSF so that the latter can determine whether such activities are regulated by the CSSF or not.

Given the cross-border nature of VC transactions, the CSSF is in favour of an approach at European or international level, notably with regard to the legal qualification of VCs, the analysis of potential impacts on financial stability issues, non-professional investor protection and prevention of the use of cryptocurrencies, the use of VCs for money laundering and terrorism financing purposes.

PSD 2: EBA Guidelines on the Information to be provided for the Authorisation of Payment Institutions and E-Money Institutions and for the Registration of Account Information Service Providers

CSSF Circular n° 18/677

The CSSF issued on 12 January 2018 a new circular 18/677 on EBA Guidelines on the information to be provided for the authorisation of payment institutions and e-money institutions and for the registration of account information service providers (EBA/GL/2017/09).

The circular is addressed to all persons who intend to apply for an authorisation as a payment institution, for an authorisation as an electronic money institution or for the registration as an account information service provider.

The circular sets out the information to be provided for the authorisation of such institutions under PSD 2.

The CSSF requires applicants to refer to the Guidelines for the information to be provided to the CSSF as part of their application for authorisation and registration.

By this circular, the CSSF adopts the Guidelines that apply as at 13 January 2018, except section 4.4 of the Guidelines on the assessment of completeness of the

application that will apply as from the date of entry into force of the Luxembourg law transposing PSD 2.

The bill n°7195 transposing PSD 2 into Luxembourg was lodged with the Luxembourg Parliament on 10 October 2017. For further information on this bill, we kindly refer to the November 2017 edition of the Clifford Chance Luxembourg Legal Update. The bill is still pending with the Luxembourg Parliament.

PSD 2: EBA Guidelines on the Criteria on how to Stipulate the Minimum Monetary Amount of the Professional Indemnity Insurance or Other Comparable Guarantee under Article 5(4) of Directive (EU) 2015/2366

CSSF Circular n° 18/681

The CSSF issued on 24 January 2018 a new circular 18/681 on EBA Guidelines on the criteria on how to stipulate the minimum monetary amount of the professional indemnity insurance (PII) or other comparable guarantee under Article 5(4) of Directive (EU) 2015/2366 (EBA/GL/2017/08).

The Guidelines set out the criteria and a formula for calculating the minimum monetary amount of the PII or other comparable guarantee required by undertakings that intend to apply for an authorisation to provide payment initiation services, a registration to provide account information services or an authorisation to provide payment initiation services as well as account information services.

By this circular, the CSSF adopts the Guidelines that apply as at 13 January 2018.

DATA PROTECTION

GUIDELINES OF THE ARTICLE 29 WORKING PARTY

The Article 29 Working Party published new Guidelines on certain key topics of the Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data ("**GDPR**") and of the Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data ("*Law enforcement Directive").*

*On 3 October 2017, the Article 29 Working Party adopted draft Guidelines on issuing administrative fines.

The GDPR provides for the maximum fines which may be imposed by data protection authorities against data controllers and data processors, depending on the nature of the breach. There are two levels of fines:

- administrative fines of level 1: up to € 10,000,000, or in the case of an undertaking, up to 2% of the total worldwide annual turnover of the preceding financial year, whichever is higher
- administrative fines of level 2: up to € 20,000,000, or in the case of an undertaking, up to 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher. Level 2 fines are applicable to what is considered to be major infringements of the GDPR.

The GDPR allows fines to be imposed based on the "worldwide annual turnover of an undertaking". There has been some speculation as to what an 'undertaking' will mean in this context. On this question, the Article 29 Working Party takes a broad approach and refers to CJEU case law which interprets an undertaking as an economic unit, regardless of the legal persons involved. It also emphasises that, in the case of a group, this would mean the parent company and all involved subsidiaries.

*On 29 November 2017, the Article 29 Working Party issued an opinion on some key issues of the Law enforcement Directive (2016/680).

In Luxembourg, a draft bill n°7168 is currently pending before the Luxembourg Parliament.

In this opinion, the Article 29 Working Party focuses on some key issues aiming at implementing the Law enforcement Directive and provides guidance by recommendations and remarks on various topics, such as time limits for storage and periodic review of data, processing of special categories of personal data, automated individual decision-making and profiling, the rights of the data subject, logging, and the powers of data protection authorities.

*On 12 December 2017, the Article 29 Working Party issued draft Guidelines on transparency and on consent under the GDPR. These guidelines were open for public consultation until 23 January 2018.

The transparency guidelines aim to provide practical guidance and clarification on the transparency obligations introduced by the GDPR, by giving details on the information that data controllers must provide to data subjects, specifically in relation to Articles 13 and 14 of the GDPR.

These guidelines are designed to help companies to structure and draft their privacy notices. To that end, as required by the GDPR, information must always be concise, easily understandable for an average person, easily accessible and provided free of charge.

The consent guidelines provide further details on what is necessary to ensure that consent satisfies the requirements of the GDPR, i.e. consent must be freely given, specific, informed, and must be an unambiguous indication of wishes. They also specify the requirements for obtaining and demonstrating consent under the GDPR.

*On 6 February 2018, the Article 29 Working Party finalized two guidelines: the first on data breach notification and another on automated individual decision-making and profiling.

The same day, the Article 29 Working Party released two new set of guidelines open for comments until the end of March 2018: one on article 49 of the GDPR (which covers the "*Derogations for specific situations*" for the transfer or

a set of transfers of personal data to a third country in the absence of an adequacy decision or of appropriate safeguards); and one on the accreditation of certification bodies (mostly aimed at Member States, supervisory authorities and national accreditation bodies).

CNPD

The CNPD has developed a data breach notification form, which is available in French and in English on the CNPD's website.

As from 25 May 2018, data controllers must indeed notify personal data breaches to the CNPD within 72 hours of becoming aware of them if the breach in question is likely to create a risk to the rights and freedoms of the data subjects.

In order to facilitate the process, the CNPD has answered frequently asked questions on a dedicated page, which can be found on its webpage.

On 1 December 2017, the CNPD has also launched a newsletter. It is possible to subscribe to the CNPD's newsletter on its webpage.

CJEU case-law

New judgment of the Court of Justice of the European Union ("**CJEU**")

On 20 December 2017, the CJEU rendered a judgment in Case C-434/16, Peter Nowak v Data Protection Commissioner, in relation to the concept of "personal data".

Mr Peter Nowak passed different examinations set by the Institute of Chartered Accountants of Ireland (the CAI), but failed one of them. Following that failure, he submitted a request for access to all the personal data relating to him held by the CAI. However, the CAI refused to send to him his examination script on the ground that it did not contain personal data. Mr Nowak challenged the decision before the Supreme Court of Ireland. The Court requested a ruling from the CJEU on whether the written answers provided by a candidate at a professional examination, and any examiners comments with respect to those answers, constitute personal data.

In its decision, the CJEU held that written answers provided by a candidate constitute information relating to that candidate, and are therefore "personal data" since it reflects the extent of the candidate's knowledge and competencies in a given field as well as the candidate's intellect, thought processes and judgement. With regard to the comments of an examiner with respect to the candidate's answers, the Court finds that they also constitute information relating to that candidate, the content of those comments reflecting the opinion or the assessment of the examiner on the individual performance of the candidate in the examination, particularly on his or her knowledge and competencies in the field concerned.

The CJEU further finds that an examination candidate has a legitimate interest in being able to object to the processing of these data outside the examination procedure and, in particular, to its data being sent to third parties, or published, without its permission.

CEDH case-law

New judgments of the European Court of Human Rights ("**ECHR**")

*On 9 January 2018, the ECHR rendered a judgment in *López Ribalda and others vs. Spain* (app. 1874/13 and 8567/13) in which it concluded that Spain had violated article 8 of the European Convention on Human Rights.

The applicants, five Spanish nationals, were working as cashiers for a Spanish supermarket chain. After noticing some irregularities, the employer installed both visible and hidden cameras. If the purpose of the visible cameras was to record possible customer thefts, the purpose of the hidden cameras was to record and control possible employee thefts. The company gave its workers prior notice of the installation of the visible cameras; however, it did not for the hidden cameras. Later on, the workers suspected of theft were dismissed.

The applicants argued that the hidden video surveillance ordered by their employer without previously informing them had violated their right to privacy protected by article 8 of the Convention.

The Court first reiterates that the term "private life" may include activities of a professional or business nature and may also be concerned in measures effected outside a

person's home or private premises. More precisely, in the context of the monitoring of the actions of an individual, the Court found that private-life considerations may arise concerning the recording of the data and the systematic or permanent nature of the recording.

Since the employees were only aware of the visible cameras zoomed in on the supermarket exits and of the installation of video surveillance covering the cash desks, the Court observed that the hidden video surveillance of an employee at his or her workplace must be considered, as such, as a considerable intrusion into his or her private life.

The Court considered that such intrusion could not be justified since the domestic courts did not strike a fair balance between the applicants' right to respect for their private life and their employers' interest in the protection of its property rights, notably due to the absence of information of the applicants of the installation of a hidden system of video surveillance.

*On 8 February 2018, the ECHR rendered a judgment in *Ben Faiza vs. France* (app. 31446/12) in which it concluded that France had violated article 8 of the European Convention on Human Rights in relation to real-time geolocation measures.

In this case, the Court concluded that the GPS real-time geolocation of the applicant's vehicle, suspected of drug trafficking, had infringed his right to private life. In this regard, the Court found that the measure constituted an intrusion into the individual's private life and that it was not justified since French law, at that time, did not indicate with sufficient clarity the extent to which and manner in which, the authorities' powers of discretion were exercised. France has since then adopted a new legislative act framing the use of geolocation in real time.

With regard to the judicial requisition made to a telephone operator allowing a geolocation *a posteriori*, the Court decided that there had been no violation of the Convention. Indeed, the Court considered that the measure constituted an intrusion into the individual's private life which was justified since it was provided by law, and pursued the following legitimate purposes: the prevention of disorder or crime, the protection of public health, and that it was necessary to dismantle drug trafficking.

*On 22 February 2018, the ECHR rendered a judgment in *Libert vs. France* (app. 588/13).

Eric Libert, a railway company official, brought a complaint against France after being suspended after his employer found pornography and forged certificates on his work computer.

If the consultation by the employer of files identified as "private" on a work computer can be considered as an intrusion into the employee's private life, the Court noted that the consultation of the files by the employer had pursued a legitimate aim of protecting the rights of employers, who might legitimately wish to ensure that their employees were using the computer facilities which they had placed at their disposal in line with their contractual obligations and the applicable regulations.

The Court further explained that if, under French law, employers are allowed to open professional files, they cannot furtively open files identified as being personal, unless if they are in the employee's presence.

However, in that particular case, the domestic courts found that the employer was not prevented from opening the files at issue since the files had not been duly identified as being private. The Court thus concluded that there was no violation of article 8 of the European Convention on Human Rights.

Hearing at the ECHR

The ECHR held a hearing on 7 November 2017 in relation to the following cases: Big Brother Watch and Others v. the United Kingdom (no. 58170/13), Bureau of Investigative Journalism and Alice Ross v. the United Kingdom (no. 62322/14), and 10 Human Rights Organisations and Others v. the United Kingdom (no. 24960/15) concerning the bulk interception of external communications by the United Kingdom intelligence services, and the sharing of intelligence between the United Kingdom and the United States of America.

The complaints in these three cases have been triggered by the leak of information by Edward Snowden about the electronic surveillance programmes used by the United States of America and the United Kingdom to intercept communications in bulk, and the sharing of intercepted communications and communications data between the two States. The applicants believe that these surveillance programmes were a significant interference with UK citizens' right to privacy under article 8 of the European Convention on Human Rights.

After this hearing, the Court began its deliberations, which are held in private. We are still awaiting its ruling.

INVESTMENT FUNDS

EU DEVELOPMENTS

UCITS/AIFMD

EU Commission proposals to facilitate Cross-Border Distribution of Investment Funds

On 12 March 2018, the EU Commission published two legislative proposals, which consist of a draft regulation and a draft directive, designed to improve and facilitate cross-border distribution of UCITS and AIFs in the EU by reducing existing regulatory barriers, including, in particular, Member States' national marketing requirements, regulatory fees, administrative requirements and notification requirements.

These proposals form part of the EU Capital Markets Union (CMU) action plan, which was launched in 2015 and is being implemented through different proposals designed to stimulate capital markets activity in the EU, namely by addressing the fragmentation in the capital markets, removing the regulatory barriers to the financing of the economy and increasing the supply of capital to all businesses in the EU.

More concretely:

- The draft directive (Draft Directive) envisages to amend certain provisions of the UCITS Directive and AIFMD in order to remove perceived regulatory barriers to the cross-border distribution of UCITS and AIFs within the EU, and also proposes to introduce a harmonised definition of "pre-marketing" in the AIFMD and to set out the conditions under which an EU AIFM can engage in pre-marketing activities.
- The draft regulation (Draft Regulation) envisages to improve transparency by harmonising and standardising certain aspects of the cross-border distribution of UCITS and AIFs within the EU, including the transparency of regulatory fees and charges levied by national competent authorities (NCAs), and also proposes to introduce a "pre-marketing" definition and conditions for pre-marketing activities in Regulations (EU) N°345/2013 and N°346/2013 on European venture capital funds (EuVECAs) and European social entrepreneurship funds (EuSEFs). Another important point of the Draft Regulation concerns the envisaged enhancement of knowledge of ESMA in relation to the cross-border distribution of UCITS and AIFs within the EU, namely by enlarging ESMA's currently existing databases and imposing additional transmission of notifications and others notices to ESMA by NCAs.

For the avoidance of doubt, it has to be noted that these proposals focus on the cross-border distribution of UCITS and AIFs within the EU only, with the view to harmonise and facilitate the use of the cross-border UCITS and AIFMD marketing passports. Consequently, for the time being, the question of cross-border marketing of non-EU funds (i.e. non-EU AIFs) and/or by non-EU fund managers (i.e. non-EU AIFMs), namely under the national private placement regimes, has not been addressed by the Draft Directive and the Draft Regulation.

In terms of timing, the Draft Directive and the Draft Regulation still have to be negotiated with and approved by the EU Parliament and the Council, and they will enter into force on the twentieth day following their publication in the Official Journal of the EU. According to the draft texts, Member States will then have two years from the date of entry into force of the Draft Directive to transpose its provisions into national law, whilst the Draft Regulation will apply directly in all Member States from the date of entry into force (except for certain provisions which will apply two years after the date of entry into force, such as those concerning marketing communications and the publication by NACs of national provisions concerning marketing requirements).

Benchmark Regulation

EU Commission Implementing Regulation adding LIBOR to the List of Critical Benchmarks

EU Commission implementing regulation (EU) 2017/2446 of 19 December 2017, which amends EU Commission implementing regulation (EU) 2016/1368 on the list of critical benchmarks used in financial markets pursuant to the Benchmark Regulation, was published in the Official Journal on 28 December 2017.

The new implementing regulation includes LIBOR as a new critical benchmark with effect from 29 December 2017 in the list of critical benchmarks in addition to EURIBOR and EONIA.

As a reminder, under the Benchmark Regulation, a benchmark is considered to be a critical benchmark where it is used, directly or indirectly, within a combination of benchmarks as a reference for financial instruments or financial contracts or for measuring the performance of investment funds, having a total value of at least EUR 500 billion on the basis of all the ranges of maturities or tenors of the benchmark, where applicable. As regards LIBOR, the FCA has identified approximately $ 156,8 trillion in OTC derivatives that made a reference to LIBOR in October 2016, and has further pointed out that there is significant reference to LIBOR in exchange traded derivatives, bond and corporate debt markets and that these exposures are relevant with regard to systemic risk and the real economy. The list of critical benchmarks has therefore been amended by adding LIBOR.

Four New EU Commission Delegated Regulations published in Official Journal

Four delegated regulations, which were adopted by the EU Commission respectively on 29 September and 3 October 2017 in order to supplement the Benchmark Regulation, were published in the Official Journal on 17 January 2018.

These delegated regulations enter into force on 6 February 2018 and specify among other things:

- how the criteria of Article 20(1)(c)(iii) of the Benchmark Regulation are to be applied for assessing whether certain events would result in significant and adverse impacts on market integrity, financial stability, consumers, the real economy or the financing of households and businesses in one or more Member States (Delegated Regulation (EU) 2018/64)
- the technical elements of the definitions laid down in Article 3(1) of the Benchmark Regulation, in particular regarding the circumstances in which a figure shall be considered to be made available to the public and what constitutes administering the arrangements for the determination of a benchmark (Delegated Regulation (EU) 2018/65)
- how the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds are to be assessed (Delegated Regulation (EU) 2018/66)
- what are the conditions to assess the impact resulting from the cessation of or change to existing benchmarks (Delegated Regulation (EU) 2018/67).

ESMA Updaated Q&A on Benchmark Regulation

ESMA published updated versions of its Q&A on the implementation of the Benchmark Regulation[1] on 14 December 2017, 5 February and 22 March 2018, which include clarifications on (i) the date of application of the conditions applicable to benchmark administrators, (ii) the written contingency plans to be produced by supervised entities other than administrators, (iii) the calculation of the threshold for the exemption for commodity benchmarks under Article 2(2)(g), (iv) the scope of the definition of "use of a benchmark" as it applies in relation to investment funds, including, more specifically, actively managed funds that simply reference a benchmark for the purposes of comparison, and (v) requirements applicable to supervised contributors during the transitional period.

In particular, ESMA indicates in its revised Q&A that:

- Administrators of benchmarks (and index providers) are required to comply with the conditions and requirements imposed on them by the Benchmark Regulation only at the time they are authorised or registered as administrators, but not before that date.
- Supervised entities other than administrators, which include UCITS management companies/self-managed investment companies and AIFMs, are also required to produce and maintain, as of 1 January 2018, robust written contingency plans setting out the actions that they would take in the event that a benchmark they are using materially changes or ceases to be provided. According to ESMA, these supervised entities, other than administrators, are required to reflect such plans in the contractual relationship with clients in contracts entered into after 1 January 2018. In relation to contracts entered into prior to 1 January 2018 and still existing at that date, ESMA expects supervised entities, other than administrators, to amend them where practicable and on a best-effort basis.
- The methodology to be used for calculating the total value of financial instruments referencing a commodity benchmark under Article 2(2)(g)(ii) of the Benchmark Regulation should follow the specifications included in Commission Delegated Regulation (EU) 2018/66 specifying how the nominal amount of financial

1 ESMA70-145-11

instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds are to be assessed even if this Delegated Regulation does not directly apply to commodity benchmarks.

As regards the scope of the definition of "use of a benchmark" as it applies in relation to investment funds[2], ESMA clarifies that:

- Investment funds using indices to measure their performance with the purpose of tracking the return of such indices include: (i) investment funds the strategy of which is to replicate or track the performances of an index or indices, e.g. through synthetic or physical replication, and (ii) structured investment funds that provide investors with algorithm-based payoffs that are linked to the performance, or to the realisation of price changes or other conditions, of indices.
- Investment funds are considered using an index for the purpose of defining the asset allocation of a portfolio when their documentation, and in particular the investment policy or investment strategy, defines constraints on the asset allocation of the portfolio in relation to an index. For example, the investment policy or strategy may require the investment fund to invest a percentage or the whole portfolio in securities that are constituents of an index. Investment funds using indices to measure their performance with the purpose of defining the asset allocation thus may include investment funds that are actively managed (where the manager has discretion over the composition of its portfolio subject to the investment objectives and strategies as opposed to a fund that tracks the return of the index).
- Investment fund should not be included in the scope of the definition of "use of a benchmark" when indices are solely referenced in their documentation to compare the performance of the investment fund and thus where no investment constraint on the asset allocation of the portfolio is established in relation to the index. This is however, without prejudice to other European or national rules governing the mentioning of indices in fund documentation.

EMIR

ESAs' Final Draft Regulation amending Margin Requirements for FX Forwards

On 18 December 2017, the ESAs published a final draft report amending the EMIR requirements for risk-mitigation techniques for OTC derivatives not cleared by a central counterparty (CCP) with regard to physically settled foreign exchange (FX) forwards.

As a reminder, the requirement for counterparties to exchange variation margin for physically settled FX forwards under the scope of EMIR has entered into force on 3 January 2018. In this respect, the ESAs' final draft report suggests to align the treatment of variation margin for FX forwards with the supervisory guidance applicable in other key jurisdictions by limiting this EMIR requirement exclusively to transactions concluded between "institutions" as defined in CRD IV Regulation, i.e. credit institutions and investment firms. Consequently, for this specific product, investment funds would in principle, be excluded from margin requirements for physically settled FX forwards.

The EU Commission has now three months to decide to endorse or to amend the ESAs' final draft report before it is adopted as a delegated regulation by the EU Parliament and Council. Until then, as the EMIR requirement to exchange variation margin for FX forwards has already entered into force on 3 January 2018, the ESAs expect the national competent authorities (NCAs) to apply the EU framework in a risk-based and proportionate manner until the limitation of EMIR requirement as described above enters into force.

Pease note that, in Luxembourg, the CSSF has indicated that it will not insist on UCITS and AIFs posting or collecting variation margin for their FX forwards.

[2] For ease of reference, the definition is provided here: Article 1(7): "*use of a benchmark means: (…) (e) measuring the performance of an investment fund through an index or a combination of indices for the purpose of tracking the return of such index or combination of indices, of defining the asset allocation of a portfolio, or of computing the performance fees.*"

MiFID2/MiFIR

ESMA Updated Q&A on Investor Protection and Intermediaries under MiFID2/MiFIR

On 18 December 2017 and 23 March 2018, ESMA issued a revised version of its Q&A document on the implementation of investor protection and intermediaries topics under MiFID2 and MiFIR[3], including new questions and answers on inducements, suitability, and provision of investment services and activities by third country firms.

As regards inducements, ESMA analyses the status of MiFID investment firms to which the functions of investment management, investment advice, administration and/or marketing of one or more UCITS and AIFs have been delegated, and the question as to whether the MiFID2 inducements rules apply to a MiFID investment firm in relation to the performance of these investment management, investment advice, administration and/or marketing functions on behalf of the relevant UCITS management company/self-managed investment company or AIFM/internally managed AIF when the relevant MiFID investment firm also provides investment services to its other clients that relate to those same investment funds.

According to ESMA, the answer to this question depends on whether the payments received by the MiFID investment firm for the provision of these investment management, investment advice, administration and/or marketing functions in relation to UCITS/AIFs can also be said to be paid in relation to, or in connection with, the provision of investment services to the other clients of the MiFID investment firm, as summarised below.

In respect of the payments received by the MiFID investment firm as a remuneration for the provision of investment/portfolio management, investment advice and/or administration services in relation to UCITS or AIFs on behalf of a UCITS management company/self-managed investment company or AIFM/internally managed AIF, ESMA considers that:

- In principle, the investment/portfolio management, investment advice and/or administration functions in relation to UCITS or AIFs that are performed by a MiFID investment firm on behalf of a UCITS management company/self-managed investment company or AIFM/internally managed AIF should not be regarded as an activity that is carried on in relation to, or in connection with, investment services provided by that MiFID investment firm to its other clients. Therefore, the payments received by the MiFID investment firm as a remuneration for the provision of a legitimate genuine service of investment/portfolio management, investment advice and/or administration on behalf of a UCITS management company/self-managed investment company or AIFM/internally managed AIF are, in principle, deemed to remain outside the scope of the MiFID2 inducement requirements.

However, a different conclusion will apply if:

- The payments received by the MiFID investment firm for the provision of the investment/portfolio management, investment advice and/or administration functions on behalf of the fund(s) can also be said to be paid in relation to, or in connection with, the provision of investment services to the MiFID investment firm's other clients. For example, if the MiFID investment firm receiving payments for the management, advisory and/or administration services to a UCITS/AIF on behalf of a UCITS management company/AIFM also recommends its own clients to buy such UCITS/AIF, or where the investment firm also provides portfolio management to its own clients and invests on their behalf in the same UCITS/AIF.
- These delegation arrangements for the provision of the investment/portfolio management function in relation to UCITS/AIFs were designed to circumvent, or resulted in the circumvention of, MiFID2 inducement requirements. This scenario might arise, for example, where there is no specific expertise within the investment firm regarding the function of investment/portfolio management and/or where it can be shown that there are no, or insufficient, operational measures adopted by the investment firm to fulfil the function of investment/portfolio management. The structure of fee arrangements will also be an element to be taken into account, in particular the level and method or manner of calculation or composition of payments received for the provision of the function of investment/portfolio management should be for a genuine service, in proportion to the nature of the service provided and comparable to the level of fees

3 ESMA35-43-49

usually paid for the provision of that or equivalent functions.

- Further, ESMA also underlines that where such delegation arrangements exist for the provision by a MiFID investment firm of the investment/portfolio management function in relation to UCITS/AIFs, even though the MiFID2 inducement requirements may not apply in relation to the payments received by the MiFID investment firm as a remuneration for the provision of a genuine service of investment/portfolio management on behalf of a UCITS management company/self-managed investment company or AIFM/internally managed AIF, MiFID investment firms must nevertheless comply with all other relevant applicable MiFID2 requirements, paying attention to the MiFID2 conflicts of interest requirements in order to avoid otherwise acting in a manner that would be contrary to the best interest of their clients.

In respect of the payments received by the MiFID investment firm as a remuneration for the provision of marketing services in relation to UCITS or AIFs on behalf of a UCITS management company/self-managed investment company or AIFM/internally managed AIF, ESMA considers that such marketing functions of UCITS/AIFs are closely related with the provision of investment services with regard to the same UCITS/AIFs by an investment firm to its own clients. In such a situation, therefore, the payments received for the provision of the function of marketing would be considered as falling under the MiFID2 inducement requirements and MiFID2 investment firms providing investment services to their clients should comply with the relevant MiFID2 inducement requirements (for example, when providing the service of reception and transmission of orders in relation to these UCITS they should, *inter alia*, comply with the quality enhancement requirement and the other requirements in accordance with Article 24(9) of MiFID2).

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

ELTIF Regulation

RTS on Financial Derivative Instruments published in Official Journal

Commission Delegated Regulation (EU) 2018/480 of 4 December 2017 supplementing so-called ELTIF Regulation (i.e. Regulation (EU) 2015/760) with regard to regulatory technical standards (RTS) on financial derivative instruments solely serving hedging purposes, sufficient length for the life of the European long-term investment funds (ELTIFs), assessment criteria for the market for potential buyers and valuation of the assets to be divested, and the types and characteristics of the facilities available to retail investors has been published in the Official Journal on 23 March 2018.

The RTS will enter into force on 12 April 2018.

LUXEMBOURG LEGAL AND REGULATORY DEVELOPMENTS

Luxembourg Law of 13 February 2018 Implementation of AMLD 4 and FATF 2 Regulation

The Luxembourg law of 13 February 2018 implementing most, but not all, of the provisions of the fourth Anti-Money Laundering Directive (AMLD4 – Directive (EU) 2015/849) and the second Regulation on information accompanying transfers of funds (FATF2 Regulation – Regulation (EU) 2015/847) was published in the Mémorial A on 14 February 2018 and entered into force on 18 February 2018 without any transitional period.

As a reminder, the AMLD4 aims to align the EU regulatory framework to the modifications brought about by the recommendations of the Financial Action Task Force (FATF) in 2012. In Luxembourg, the legislative package implementing the AMLD4 is composed of the different pieces of legislation, including more particularly:

Please refer to the related section of the July 2017 edition of our Legal Update for further details on the implementation of AMLD 4 and FATF 2 Regulation in Luxembourg.

- the Luxembourg law of 23 December 2016 on the Luxembourg fiscal reform 2017, which introduced, as at 1 January 2017, serious tax offence (*fraude fiscale aggravée*) and tax fraud (*escroquerie fiscale*) as primary tax offences to money laundering pursuant to Article 506-1 of the Luxembourg Criminal Code
- the Luxembourg law of 13 February 2018, which introduces most of the changes foreseen by the AMLD4 and the FATF2 by modifying a number of laws, including, amongst others, the amended Luxembourg law of 12 November 2004 on AML/CTF (AML Law)
- the Luxembourg bill of law n° 7208, as deposited before the Luxembourg Parliament on 8 November 2017 and which implements Directive 2016/2258 pursuant to which national tax authorities shall be granted access to the mechanisms, procedures, documents and information referred to in articles 13 and 40 of the AMLD4
- the Luxembourg bills of law n° 7216 and 7217, as deposited before the Luxembourg Parliament on 6 December 2017 and which implement the AMLD4 requirements relating to the creation of a central register of fiduciary arrangements and of a central register of beneficial owners of corporate and other legal entities (please see below for further information).

As regards more specifically the new law of 13 February 2018, the key amendments it introduces in the AML Law include, among others, new definitions (and more particularly an updated definition of the beneficial owner concept), a greater emphasis on the risk-based approach according to which the professionals subject to the AML Law may, when applying their customer due diligence measures, adjust their scope on a risk-sensitive basis depending on the type of client, business relationship, product or transaction, an extension of the scope of the obligations of the professionals subject to the AML Law, new transparency requirements and higher sanctions for professionals breaching the AML Law. However, with regard to investment funds, it is worth mentioning that some of these requirements were already imposed by CSSF Regulation 12-02 of 14 December 2012 on the fight against money laundering and terrorist financing and by CSSF Circular 11/529 concerning the risk analysis regarding the fight against money laundering and terrorist financing.

Bills of Law n°7216 and n°7217 AMLD 4 Central Registers of Beneficial Owners

On 6 December 2017, the Luxembourg government deposited two bills of law N°7216 and N°7217 (Bill 7216 and Bill 7217) with the Luxembourg Parliament, which provide for the creation of two distinct registers of ultimate beneficial owners in accordance with the AMLD 4 transparency requirements, i.e. a central register of fiduciary arrangements (registre des fiducies) respectively a central register of beneficial owners (registre des bénéficiaires effectifs, and in abbreviated form referred to as REBECO).

Please refer to the **Corporate** section of this Luxembourg Legal Update for further details on this bill of law.

Luxembourg Law of 27 February 2017 Part II UCIs Depositary Regime

The Luxembourg law of 27 February 2018 (2018 Law), which implements certain provisions of Regulation (EU) 2015/751 of 29 April 2015 on interchange fees for card-based payment transactions and modifies certain Luxembourg laws on financial services, also amends the UCI Law and AIFM Law in order to clarify the depositary regime of Part II UCIs.

According to the revised provisions of the UCI Law, the depositary regime of Part II UCIs will be as follows:

- Part II UCIs marketed to retail investors in Luxembourg are subject to the UCITS V Directive depositary regime
- Part II UCIs marketed to professional investors only are subject to the AIFMD or to the SIF Law depositary regime, depending on the status of the AIFM of these Part II UCIs, i.e. a fully authorised and licensed AIFM, a registered sub-threshold AIFM or a non-EU AIFM.

The 2018 Law was published in the Mémorial A on 1 March 2018 and entered into force on 5 March 2018.

Clifford Chance has prepared a briefing paper discussing the depositary regime of Part II UCIs.

Bill of Law n° 7194 Implementation of SFTR

Bill of law n°7194 (Bill 7194) implementing the SFTR in the Luxembourg legal framework, as deposited with the Luxembourg Parliament on 10 October 2017, has not been formally adopted.

Please refer to the related section of the November 2017 edition of our Legal Update for further details on Bill 7194.

Bill of Law n° 7164 Implementation of Benchmark Regulation

On 22 March 2018, the Luxembourg Parliament voted the adoption of bill of law n°7164 (Bill 7164) implementing the Benchmark Regulation in the Luxembourg legal framework.

An exemption to the second vote has been requested by the Luxembourg Parliament, and should, in principle, be granted by the *Conseil d'Etat* by the end of March, so that Bill 7164 can be definitively adopted and passed into law.

Bill of Law n°7199 Implementation of PRIIPs KID Regulation

On 22 March 2018, the Luxembourg Parliament voted the adoption of bill of law n°7199 (Bill 7199) implementing the PRIIPs KID Regulation in the Luxembourg legal framework.

An exemption to the second vote has also been requested by the Luxembourg Parliament, and should, in principle, be granted by the *Conseil d'Etat* by the end of March, so that Bill 7199 can be definitively adopted and passed into law.

Grand-Ducal Regulation of 21 December 2017 CSSF Fees

The Grand-Ducal Regulation of 21 December 2017relating to the fees (*taxes*) to be levied by the CSSF as of 1 January 2018 has been published in the *Mémorial A* on 22 December 2017 and repeals the Grand-Ducal Decree of 28 October 2013.

In brief, most of the existing (fixed and annual) fees levied by the CSSF in relation to the instruction and maintenance of the files of UCITS, Part II UCIs, SIFs, SICARs and their management companies or AIFMs have been increased. By contrast, as regards foreign UCIs, the fixed fees for their marketing in Luxembourg and the annual fees for files maintenance have not been amended.

The tables below provide an overview of the CSSF's fees applicable as of 1 January 2018 in relation to:

- the instruction of authorisation requests and annual maintenance of the files for Luxembourg UCITS, Part II UCIs, SIFs, SICARs, management companies and AIFMs
- the marketing of foreign UCIs (including UCITS and AIFs) in Luxembourg.

LUXEMBOURG REGULATED FUNDS[4]	FIXED FEES FOR AUTHORISATION REQUEST		ANNUAL FEES FOR FILES MAINTENANCE	
	Stand-alone fund	**Umbrella fund**	**Stand-alone fund**	**Umbrella fund**
SIF (SIF Law)	**€4,000** But **€15,000** for SICAV/SICAF qualifying as internally managed AIF	**€8,000** But **€15,000** for SICAV/SICAF qualifying as internally managed AIF	**€4,000**	**€8,000** (1 to 5 SF) **€15,000** (6 to 20 SF) **€24,000** (21 to 50 SF) **€35,000** (≥ 51 SF)
SICAR (SICAR Law)	**€4,000** But **€15,000** for SICAR qualifying as internally managed AIF	**€8,000** But **€15,000** for SICAR qualifying as internally managed AIF	**€4,000**	€8,000
UCITS & Part II UCI (UCI Law)	**€4,000** But **€15,000** for UCITS-SIAG and Part II SICAV/SICAF qualifying as internally managed AIF	**€8,000** But **€15,000** for UCITS-SIAG and Part II SICAV/SICAF qualifying as internally managed AIF	**€4,000**	**€8,000** (1 to 5 SF) **€15,000** (6 to 20 SF) **€24,000** (21 to 50 SF) **€35,000** (≥ 51 SF)
LUX MANCO	**FIXED FEES FOR AUTHORISATION REQUEST**		**ANNUAL FEES FOR FILES MAINTENANCE**	
Chap. 15 ManCo (art. 101 of UCI Law)	**€15,000**		**€35,000** Additional **€15,000** for every branch established abroad by such ManCo	
Chap. 15 ManCo & AIFM (art. 101-1 of UCI Law)	**€15,000**		**€35,000**	
Chap. 16 ManCo (art. 125-1 of UCI Law)	**€8,000**		**€15,000**	
Chap. 16 ManCo & AIFM (art. 125-2 of UCI Law)	**€15,000**		**€35,000** Additional **€15,000** for every branch established abroad by such ManCo	
Chap. 17 ManCo (art. 127 of UCI Law)	**€8,000**		€35,000	

4 For the avoidance of doubt, any transformation of the legal status or legal form of a UCITS/Part II UCI/SIF/SICAR is considered as a new instruction for authorisation subject to the fixed instruction fees set out in this table, except for the transformation of a stand-alone UCITS/Part II UCI/SIF/SICAR into an umbrella UCITS/Part II UCI/SIF/SICAR, which is subject to a fixed transformation fee of €4,000.

LUX AIFM	FIXED FEES FOR AUTHORISATION REQUEST	ANNUAL FEES FOR FILES MAINTENANCE
Any Lux AIFM other than a ManCo	**€15,000** But **€6,000** for the registration of AIFMs managing exclusively AIFs which are not subject to approval and prudential supervision in Luxembourg	**€35,000** Additional **€15,000** for every branch established abroad by such AIFM

FOREIGN UCIs	FIXED FEES FOR MARKETING IN LUXEMBOURG		ANNUAL FEES FOR FILES MAINTENANCE	
	Stand-alone fund	Umbrella fund	Stand-alone fund	Umbrella fund
EU UCITS marketed in Luxembourg with UCITS passport	**€2,650**	**€5,000**	**€2,650**	**€5,000**
FOREIGN OPEN-ENDED UCIs marketed to retail investors in Luxembourg (art. 100(1) of UCI Law)	**€2,650** covering also the instruction for CSSF authorisation of the relevant foreign UCI (art. 100(1) and 129)	**€5,000** covering also the instruction for CSSF authorisation of the relevant foreign UCI (art. 100(1) and 129)	**€3,950**	**€5,000**
FOREIGN AIFs marketed to professional investors in Luxembourg with/without AIFMD passport (art. 100(2) of UCI Law)	**€2,650**	**€5,000**	**€2,650**	**€5,000**
FOREIGN CLOSED-ENDED UCIs for which Luxembourg is the home Member State (Prospectus Directive)	See the fees due pursuant to Section M of Grand-Ducal Regulation of 21 December 2017 for the examination of each authorisation and approval request of their prospectus			

Grand-Ducal Regulation of 5 December 2017 Renumbering of Company Law

Grand-Ducal Regulation of 5 December 2017 coordinating the Company Law was published in the Mémorial A on 15 December 2017 and is applicable from 19 December 2017.

For the avoidance of doubt, this new regulation does not amend the Company Law, but it reorganises and renumbers its articles and sections with effect from 19 December 2017. A conversion table listing each article with its new number in the Company Law and its corresponding old number is available at the end of the regulation.

Circular CSSF n° 18/679 Update of Circular n° 08/337 on Obligations of Issuers of Listed Securities under the Transparency Law

On 23 January 2018, the CSSF issued Circular 18/979, which updates Circular 08/337 concerning the obligations of issuers of listed securities under the law of 11 January 2008 as amended on transparency requirements for issuers of listed securities (Transparency Law), in particular to take into account the modifications introduced by the so-called Market Abuse Regulation (i.e. Regulation (EU) N°596/2014).

As a reminder, Circular 08/337 is primarily relevant for the issuers of listed securities for which Luxembourg is the home Member State in accordance with the Transparency Law, which may include some categories of investment funds. Indeed, Article 2(2) of the Transparency Law specifies that the law does not apply to units issued by UCIs other than the closed-end type nor to units acquired or disposed of in such UCIs. Consequently, closed-ended UCIs issuing listed securities for which Luxembourg is the home Member State fall under the scope of application of the Transparency Law, regardless of whether these UCIs qualify as AIFs or not.

However, it is also worth mentioning that the Transparency Law and Circular 08/337 do not only impact the issuers of listed securities, but certain of their provisions are also relevant for their direct and indirect shareholders, which shareholders can also be investment funds. In particular, major holding notification obligations and appropriate filing with the CSSF are imposed by the Transparency Law, and clarified by Circular 08/337, on any legal or natural person who acquires or disposes of shares, including depositary receipts representing shares, of an issuer whose shares, including depositary receipts representing shares, are admitted to trading on a regulated market and for which Luxembourg is the home Member State and to which voting rights are attached, as well as to any legal or natural person who holds, directly or indirectly, financial instruments that give the holder the right to acquire shares of such issuers.

Please refer to the **Banking, Finance and Capital Markets** section of this Luxembourg Legal Update for further details on the above.

CSSF Circular 18/684 AMLD 4

On 13 March 2018, the CSSF issued Circular 18/684 concerning the entry into force of the law of 13 February 2018 amending*, inter alia*, the AML Law.

The purpose of CSSF Circular 18/864 is to draw to the attention of all professionals subject to CSSF supervision and who fall under the scope of the AML Law (thus including also Luxembourg investment funds and their Luxembourg management companies/AIFMs) the main changes introduced in the AML Law by the law of 13 February 2018 (see the sub-section titled "*Luxembourg Law of 13 February 2018-Implementation of AMLD 4 and FATF 2 Regulation*" above).

Please refer to the **Banking, Finance and Capital Markets** section of this Luxembourg Legal Update for further details on the above.

CSSF Press Release 18/02 Change of Regulatory Practice for Investment by UCITS in Other Open-Ended UCIs

On 5 January 2018, the CSSF issued Press Release 18/02 in relation to permitted investments by Luxembourg UCITS in so-called "other UCIs" under Article 41(1)(e) of

UCI Law, i.e. UCIs other than UCITS that are open-ended and the sole object of which is the collective investment in transferable securities and/or in other liquid financial assets of capital raised from the public and which operates in accordance with the principle of risk-spreading.

In its press release, the CSSF recalls that Luxembourg UCITS may invest in other UCIs in accordance with Article 41(1)(e) of the UCI Law, which implements Article 50(1)(e) of the UCITS Directive. However, the CSSF also draws particular attention to the fact that such other UCIs, in order to be considered as eligible investments for Luxembourg UCITS, must comply with all the eligibility requirements of Article 41(1)(e) of the UCI Law, including, in particular, the following:

- these other UCIs are prohibited from investing in illiquid assets (such as commodities and real estate) in accordance with Article 1(2)(a) of the UCITS Directive (that provides that these other UCIs may only invest in transferable securities and other liquid financial assets referred to in Article 50(1) of the UCITS Directive)
- these other UCIs must be bound by rules on asset segregation, borrowing, lending, and uncovered sales of transferable securities and money market instruments which are equivalent to the requirements of the UCITS Directive in accordance with Article 50(1)(e)(ii) of the UCITS Directive, and mere compliance in practice by a relevant other UCI with these rules shall not be considered sufficient by the CSSF
- the fund rules or instrument of incorporation of these other UCIs must include a restriction according to which no more than 10% of their assets can be invested in aggregate in units of other UCITS or other UCIs in accordance with Article 50(1)(e)(iv) of the UCITS Directive, and mere compliance in practice by a relevant other UCI with this requirement shall not be considered sufficient by the CSSF.

According to the CSSF, the above eligibility requirements also apply to non-UCITS ETFs of the open-ended type which qualify as other UCIs within the meaning of Article 41(1)(e) of the UCI Law. This means that, contrary to the previous regulatory practice of the CSSF in relation to the assessment of the eligibility of non-UCITS ETFs as investments by Luxembourg UCITS (as disclosed in section 1.4 of its FAQ document on the UCI Law dated 6 July 2017 as well as in Chapter VII, Section 4.7 of the CSSF annual report for 2013, both documents being available on the CSSF website), non-UCITS ETFs of the open-ended type must also comply with all the criteria listed in Article 41(1)(e) of the UCI Law to qualify as UCITS eligible assets, and the mere compliance in practice with these requirements by the relevant non-UCITS ETFs (for example, via a system of compliance control or a written confirmation of the non-UCITS ETF or its manager) will no longer be considered sufficient by the CSSF. In other words, the CSSF will no longer accept non-UCITS open-ended ETFs as eligible investments for Luxembourg UCITS under Article 41(1)(e) of the UCI Law in the case where, for instance, their prospectus provides for more flexibility and/or facilities, which are not equivalent to the above UCITS Directive and UCI Law requirements and which do not support the conclusion that these non-UCITS ETFs comply with Articles 2(2) and 41(1)(e) of the UCI Law (and this even if the relevant non-UCITS ETFs or their managers confirm that they actually comply in practice with these requirements and that continuous compliance monitoring is ensured).

In light of the above, the CSSF further indicates in its press release that:

- Luxembourg UCITS subject to the UCI Law and which have invested in any other UCIs under Article 41(1)(e) of the UCI Law (including, for the avoidance of doubt, but not limited to, non-UCITS ETFs) on the basis of the "mere compliance in practice"/"written confirmation" policy as previously accepted by the CSSF have now to disinvest from these other UCIs which do not strictly comply with all the criteria of Article 41(1)(e) of the UCI Law, and such divestment will take place as soon as possible by taking into account the best interests of the investors. In this respect, the CSSF has indicated that it will contact those UCITS managers until 31 March 2018 to check that their investments in any other UCIs comply with Article 41(1)(e) of the UCI Law and with the new CSSF policy as described in its Press Release 18/02.
- New investments by Luxembourg UCITS in other UCIs (including, but not limited to, non-UCITS ETFs) on the basis of the "mere compliance in practice"/"written confirmation" policy are no longer allowed by the CSSF.
- Section 1.4 of the CSSF FAQ document on the UCI Law describing the previous regulatory practice of the

CSSF in relation to investment by Luxembourg UCITS in non-UCITS ETFs has been deleted.

For the avoidance of doubt, the above change of CSSF regulatory practice does not apply to closed-ended UCIs, which are subject to other eligibility conditions as summarised in Section 1.3 of the CSSF FAQ document on the UCI Law.

ALFI Q&A on MiFID2 Impact on Investment Funds

On 20 December 2017, ALFI published a Q&A document on the impact of MiFID2 on investment funds, which contains answers to questions on the following four main aspects: product governance, inducements and investment advice, costs and charges, suitability and appropriateness.

ALFI Q&A on the impact of MiFID2 on investment funds is available on the ALFI website for its members. For your ease, please find below a PDF version of this Q&A.

ALFI Updated Guidance on AIFMD Reporting to Investors and Annual Reports

On 8 December 2017, ALFI published an updated version of its guidance document on reporting to investors and annual reports under the AIFMD.

As a reminder, the purpose of this document is to provide guidance to Luxembourg AIFMs in relation to the preparation of the annual reports (pursuant to Article 20 of the AIFM Law) and the periodic disclosure to investors (pursuant to Article 21 (4) and (5) of the AIFM Law) of Luxembourg regulated AIFs (mainly Part II UCI and SIFs).

The main changes introduced in the ALFI guidance document relate to the requirement to disclose remuneration of delegates in the annual reports of AIFs in one of the ways as clarified by ESMA in its Q&A on the AIFMD of 5 October 2017. In this respect, please refer to the related section of the November 2017 edition of our Legal Update, which includes a summary of ESMA's updated Q&A on the AIFMD as at 5 October 2017.

ALFI and ILA Guidelines in relation to ALFI Code of Conduct for Luxembourg Investment Funds

In October 2017, ALFI and the Luxembourg Institute of Administrators (ILA) published further guidelines for the attention of board members of Luxembourg investment funds, and, where appropriate, management companies and AIFMs, the aim of which is to clarify some of the principles and recommendations as set out in the ALFI code of conduct for Luxembourg investment funds (ALFI Code).

As a reminder, the purpose of the ALFI Code, which was introduced in 2009 and revised in 2013, is to provide boards members with a framework of 10 high-levels principles and best practice recommendations for the governance of all Luxembourg investment funds, whether UCITS or non-UCITS and whether listed or unlisted, and of Luxembourg management companies, where appropriate. This Code is however "principles" rather than "rules" based, relying thus on good judgement rather than prescription. Consequently, it does not establish any binding rules and is not designed to supersede applicable laws and regulations. As such, the Code recognises that the "right approach" for many issues will depend on the circumstances.

The new guidelines published by ALFI and ILA in October 2017 include more specifically:

- **Guidance on director independence**, which aims at clarifying ALFI Code principle and recommendation II.2, according to which consideration should be given to the inclusion of one or more independent members in the board of directors of Luxembourg investment funds and management companies. For the avoidance of doubt, this guidance is without prejudice to any legal and regulatory provisions that may apply to particular types of Luxembourg investment funds and/or management companies, including more particularly the specific independence requirements imposed on UCITS management companies/self-managed investment companies and depositaries by the UCITS V Directive, as further clarified by the CSSF in its FAQ document on the UCI Law. In this respect, please refer to the related section of the July 2017 edition of our Legal Update, which includes a summary of the CSSF position in relation to UCITS V independence requirements.

- **Guidance on board self-evaluations**, which aims at clarifying ALFI Code principle and recommendation II.7, according to which the board of directors of Luxembourg investment funds and management companies should conduct a periodic review of its performance and activities to ensure that its members are collectively competent to fulfil the board's responsibilities. In this respect, ALFI and ILA provide a checklist with a limited sample of the types of questions and considerations which might be covered in a board self-evaluation.
- **Guidance on director time capacity**, which aims at clarifying ALFI Code principle and recommendation II.6, according to which the members of the board of directors of Luxembourg investment funds and management companies are expected to understand the activities of the fund and devote sufficient time to their role. This guidance also provides for examples of issues to be at least considered by the directors to evaluate whether they allocate sufficient time to the performance of their duties.
- **Guidance on board member letters of appointment**, which includes an example of director engagement letter which may be useful to clarify items related to directors' remuneration, time commitments, etc.
- **Guidance on conflicts of Interests**, which aims at clarifying ALFI Code principle and recommendation VIII. 1-4, according to which the board of directors of Luxembourg investment funds and management companies should identify and manage fairly and effectively, to the best of its ability, any actual, potential or apparent conflicts of interest and ensure appropriate disclosure.
- **Guidance on board's reports**, which aims at clarifying ALFI Code principle VI., according to which the board of directors of Luxembourg investment funds and management companies should ensure that investors are properly informed, are fairly and equitably treated, and receive the benefits and services to which they are entitled. This guidance only applies to those funds and management companies that adhere to the ALFI Code, and provides a non-exhaustive list of examples of items that the boards of directors may consider to include in their annual reports.

Tax Administration Circular L.G. – No. 61 of 12 February 2015
Tax Residence Certificates for UCIs, SIFs and RAIFs

On 8 December 2017, the Luxembourg Tax Authorities issued Circular L.G.–A N°61 on certificates of residence for undertakings for collective investments.

Please refer to the **Tax** section of this Luxembourg Legal Update for further details on the above.

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CORPORATE

NATIONAL LEGISLATION

The expiration of the transitory period foreseen by the law and modernising the law concerning commercial companies

Law of 10 August 1915 and modifying the Civil Code

The transitory period for adapting the articles of association of Luxembourg companies in light of the changes introduced by the law of 10 August 2016 modernising the law concerning commercial companies of 10 August 1915 and modifying the Civil Code (the "**New Law**") will expire in August 2018.

As a result, the mandatory provisions introduced by the New Law will become directly applicable and any contrary provisions contained in the articles of association will be overruled by virtue of law.

Clifford Chance Luxembourg can assist with reviewing relevant legal documentation (e.g. articles of association, shareholders' agreements and joint venture agreements) in relation thereto and ensuring that it complies with the new requirements.

Coordination of the Companies Law

A Grand-Ducal Regulation of 5 December 2017 coordinating the Companies law (cf. Luxembourg Legal Update of November 2017) was published on 15 December 2017 and entered into force on 19 December 2017.

Prevention of the use of the financial system for the purposes of money laundering or terrorist financing

The law of 13 February 2018, implementing a substantial part of the Directive (EU) 2015/849 of the European Parliament and of the Council and amending, among others, the law of 12 November 2004 on the fight against money laundering and terrorist financing (AML Law), entered into force on 18 February 2018.

The purpose is to align Luxembourg law with the European Directive standards on the fight against money laundering (ML) and terrorist financing (TF) and to address new forms of ML and TF practices.

The main features of this new piece of legislation consist of:

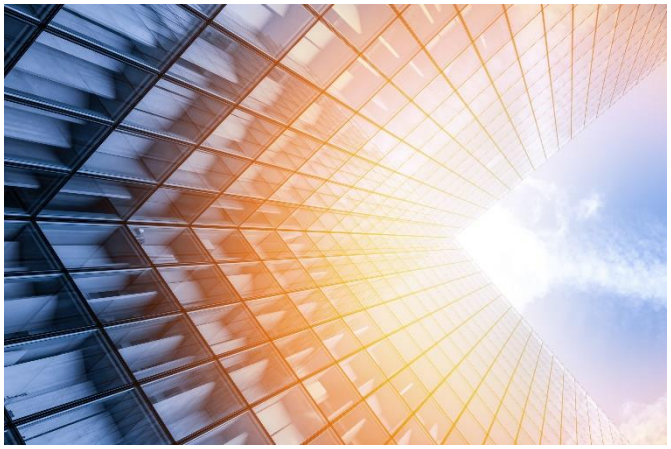
- Updating definitions in the AML Law:
  - The beneficial owners' definition has been completed, with rules allowing the identification of beneficial owners in companies, foundations, trusts (*fiducie et trust)* or similar structures in last resort
  - The politically exposed persons' definition (PEP) was extended and now includes siblings.
- Updating the list of professionals who are subject to professional obligations in relation to the fight against ML and TF. In addition to professions already listed under article 2 of the AML Law (e.g. credit institutions, professionals of the financial sector, insurance companies, notaries, etc.), persons carrying out Family Office activities and bailiffs (*huissiers de justice*) have been added.
- Setting out of new thresholds triggering the performance of the customer due diligence (*mesures de vigilance*) (CDD), such as an additional threshold of EUR 1,000 for transactions constituting a transfer of funds in accordance with article 3, point 9 of the Regulation (EU) 2015/847 of the European Parliament and the Council of 20 May 2015.
- Refining CDD and risk assessment: each professional will determine the scope of the CDD depending on its own risk assessment and in order to do so the relevant professional will consider, at a minimum, variables set out in Annex II; the AML Law also sets out criteria to be taken into account for the assessment of ML and TF risks (e.g. countries, PEP, product or client specificities, etc.), which are defined under Annexes III and IV, in a non-exhaustive list, for simplified and enhanced CDD, respectively.
- Reinforcing supervising and sanctions power available to the competent authorities, which may, amongst other things:
  - instruct Professionals to keep any data in certain specific matters for an additional period of five years

- use a wide range of sanctions to enforce the law and put an end to unlawful practices.

The amount of fines, as part of legal sanctions, might now vary from EUR 12,500 to 5,000,000.

The supervisory authorities (*autorités de contrôle*) that are now specifically referred to in the AML Law are the CSSF, the Commissariat aux assurances and *Administration de l'enregistrement et des domaines* (AED).

Last but not least, the law introduces a new framework for cooperation between supervisory authorities and the financial intelligence unit, as well as with European supervisory authorities.



LUXEMBOURG LEGAL AND REGULATORY DEVELOPMENTS

Central registers of beneficial owners and fiduciary arrangements

Bills of Law n°7216 and n°7217
AMLD4 Central Registers of Beneficial Owner

Please refer to the **Investment Funds** section of this Luxembourg Legal Update for further details on the above.

The Government filed Bill N°7216 creating a central register of fiduciary arrangements (*Registre des fiducies*) and Bill N°7217 creating a central register of beneficial owners (*Registre des bénéficiaires effectifs*) with the Parliament on 6 December 2017.

The objective of these Bills is to implement certain transparency measures introduced by AMLD 4. As a result, although the legislative process is still ongoing and the opinion of the State Council remains outstanding, no material amendments regarding the main characteristics of the respective central registers are expected.

Please find below an overview of the main features to be introduced.

- Register of beneficial owners (REBECO)

  Bill N°7217 intends to introduce a central register of beneficial owners for Luxembourg entities, in abbreviated form referred to as REBECO. The REBECO will be managed by the same operator as the RCS (being the Luxembourg Business Registers (LBR)) and will be placed under the authority of the Minister of Justice.

  Definition of beneficial owner:

  A beneficial owner is defined with reference to the AML Law.

  Please refer to the previous section of this Luxembourg Legal Update for further details on the new definition of beneficial owners introduced in the AML Law by the law of 13 February 2018.

  – Entities in scope

    The following entities fall within the scope of Bill N°7217:

    – all commercial companies, including the société anonyme (SA), the société en commandite par actions (SCA), the société par actions simplifiée (SAS), the société à responsabilité limitée (SARL), the société en commandite simple (SCS), the société en commandite spéciale (SCSp), the société en nom collectif (SNC), the société à responsabilité limitée simplifiée (SARL-S), the société coopérative and the société européenne (SE)

    – all civil companies

    – the groupement d'intérêt économique (GIE), and the groupement européen d'intérêt économique (GEIE)

    – the association sans but lucratif (ASBL) and fondation

    – the association d'épargne pension (ASSEP), association agricole, établissement public de l'Etat et des communes, association d'assurance mutuelle, and all other legal persons and entities for which registration with the RCS is required.

    Exemptions apply for:

    – Luxembourg branches of foreign commercial or civil companies, groupements d'intérêt économique (GIE) and groupements européens d'intérêt économique (GEIE)

    – fonds communs de placement

    – listed companies.

- Information to be filed with the REBECO

  The register will include personal information on the beneficial owner (such as the name, the date and place of birth, the nationality and the country of residence of the owner) as well as on the nature and extent of the beneficial interest held by it.

Bill N°7217 requires all Luxembourg entities within scope to obtain and hold up-to-date information on their beneficial owner(s). In addition to being kept at the registered office of the entity, such information must also be filed by the entity with the REBECO through a dedicated web portal.

The filing modalities are to be specified through a Grand-Ducal Regulation (which has not yet been published).

Entities in scope will have up to six months from the entry into force of the law to comply with the new requirements.

The REBECO will be available for consultation once the six-month time limit has expired.

In the case of change of any information relating to the beneficial owner(s), a request of modification must be made within one month. In this context, the REBECO administrator may refuse all non-compliant or incomplete requests. In the case of refusal, corrected information must be provided within 15 days following the request to conform.

All information filed with the REBECO will be held for a period of five years following the dissolution of the relevant entity.

- Access to the REBECO

  Full access to the REBECO will only be granted to specified Luxembourg judicial administrative, regulatory and tax authorities. These include, among others, the AML Authority, the CSSF, the Commassu, the direct tax authority (Administration des contributions directes) and the Luxembourg registry (Administration de l'Enregistrement et des Domaines).

  Limited access to the information contained in the REBECO will be available to certain self-regulatory bodies (including the Luxembourg bar council, the chamber of notaries, the institute of auditors, the association of chartered accountants and chamber of bailiffs) for the purposes of exercising their surveillance duties under the anti-money laundering and anti-terrorist financing legislation.

  Professionals which are subject to anti-money laundering and anti-terrorist financing requirements (including, notably banks, insurance undertakings, professionals of the financial sector and management companies) may, upon application, receive limited access to the information contained in the REBECO for the purposes of customer due diligence.

  Luxembourg resident individuals and organisations that demonstrate a legitimate interest may apply for access to information in relation to a particular entity on a case-by-case basis. In case such access is granted, the relevant entity is notified thereof.

  Entities registered with the REBECO can apply that access to information relating to them is generally restricted to the Luxembourg authorities set forth in paragraph 1 above in case access to such information could lead to fraud, kidnapping, blackmail or intimidation of the beneficial owner.

  Finally, any person or entity encountering an error or inaccuracy in the REBECO must notify the administration thereof.

- Sanctions

  Criminal sanctions consisting of a fine ranging from 1,250 euros to 1,250,000 euros may be imposed to the relevant entity or its proxyholder(s) in the following situations:

  - late filing
  - providing incorrect or false information
  - refusal to comply with a request to conform
  - not obtaining and keeping up-to-date information on the beneficial owner(s) at the registered office of the entity.

  The same fines also apply to professionals and self-regulatory bodies requesting access to the REBECO outside the cases provided for by the Bill.

- New RCS filing requirements

  In addition to the introduction of the REBECO, Bill n°7217 also provides for new RCS filing requirements with the aim of allowing the RCS to clearly identify all physical persons registered with it.

  In this respect, it is notably foreseen that the Luxembourg national identification number (also known as matricule) of all physical persons registered with the

RCS (e.g. merchants, managers, directors or shareholders) has to be filed.

Non-Luxembourg residents who do not yet have a Luxembourg national identification number will be automatically allocated with such number upon the relevant filing with the RCS.

Such identification number will, however, not be publicly disclosed.

- Register of fiduciary arrangements

  Bill N°7216 proposes to introduce a central register of fiduciary arrangements (Registre des fiducies) to be set up with the Administration de l'Enregistrement et des Domaines.

  While the proposed legal regime for such register is largely analogous to the one foreseen in relation to the REBECO, there are certain particularities worth highlighting.

- Entities in scope

  All Luxembourg entities acting as trustee (fiduciaries) in accordance with the Law of 27 July 2003 on trusts and fiduciary contracts (entities eligible to act as trustee under such law include banks, investment firms, SICAVs and SICAFs, securitisation companies, pension funds, insurance and re-insurance companies) fall within the scope of Bill N°7216.

- Filing of information

  The trustees will be required to obtain, keep at their registered office and file with the central register the relevant information on the beneficial owner(s), settler(s), protector(s), trustee(s) and any other person(s) exercising effective control over the trust, of all trusts for which they are acting as trustees.

- Access to the register of fiduciary arrangements

  As for the REBECO, Luxembourg judicial, administrative, regulatory and tax authorities will have full access to the filed information with the central register of fiduciary arrangements.

  No other access to the register will be granted.

- Surveillance of trustees

  The respective surveillance authorities (the CSSF, the Commassu and the Luxembourg registry) are responsible for supervising compliance by the trustees with the requirements set out by the legal framework and are entitled to conduct investigations.

  In this context, the surveillance authorities are granted extensive powers, including access to all relevant documents kept by the trustees, capacity to form information requests, proceed with on-site inspections as well as the power to impose injunctions and corresponding penalties in case of violation.

- Sanctions

  In case of non-compliance, administrative sanctions of up to two times the amount of the gain resulting from the violation or up to 1,250,000 euros may be imposed to the trustees by their respective surveillance authorities.

  Furthermore, the CSSF and the Commassu may issue temporary bans to exercise a professional activity in the financial sector for up to five years.

TAX

INTERNATIONAL LEGISLATION

Brexit: European Commission publishes notices to stakeholders

European Commission – Notice to stakeholders, 30 January 2018 and 8 February 2018

On 30 January 2018, the European Commission (the "**Commission**") published a Notice to stakeholders on the withdrawal of the United Kingdom ("**UK**") and European ("**EU**") rules in the field of customs and indirect taxation.

On this basis, it is proposed that goods entering the EU VAT territory from the UK, and goods dispatched or transported from the EU VAT territory to the UK, would be treated as importation (i.e. subject to VAT) and exportation of goods (i.e. VAT exempt), respectively.

In addition, taxable persons established in the UK carrying out taxable transactions in a Member State of the EU may be required to register for VAT in that Member State, or designate a tax representative as the person liable for payment of VAT.

The Commission also published on 8 February 2018 a series of notices addressed to stakeholders on the legal and practical implications of the UK's withdrawal from the EU with regard to financial services (e.g. asset management, banking and payment services, etc.)

NATIONAL LEGISLATION

New tax measures applicable as of 1 January 2018

Luxembourg 2018 Budget Law n° 7200

Further to the approval and publication of the 2018 budget law by the Luxembourg Parliament, several tax measures have entered into force as at 1 January 2018:

- Reduced corporate income tax rate of 18% (i.e. the combined corporate income tax rate for 2018 being 26.01% for companies incorporated in Luxembourg City).
- New tax credits for investment in (i) purchased software (8% for the portion of the investment not exceeding €150,000 and 2% for the portion exceeding €150,000 capped at 10% of the income tax due for the tax year of acquisition) and (ii) zero-emission cars (13% up to an acquisition price of €50,000).
- Extension of the list of funds eligible for the VAT exemption concerning management services of investment funds to the collective internal insurance funds, provided that the subscribers bear the financial risk and that the fund is subject to the supervision of the Luxembourg Insurance Commission (the exemption shall apply under the same conditions to services rendered to collective internal insurance funds established in another EU member state).
- Deadline extended for married resident taxpayers to opt for joint or individual taxation (i.e. 31 March of the year following the tax year concerned).
- Simplification of the conditions for married non-resident taxpayers to be treated as resident taxpayers and benefit from joint taxation in Luxembourg (i.e. "*tax class 2*"). Please see below for additional information in this respect.
- Extension of the inheritance tax exemption to couples without common descendants, provided that they are married or in a registered partnership for at least three years.

On a side note, the proposed amendment to the law on exchange of information upon request has been removed from the 2018 budget law and will be treated in a separate draft law.

Finally, the new intellectual property regime (draft law published on 7 August 2017) was not covered in the 2018 budget law. An amendment was introduced to the draft legislation on 15 December 2017 with respect to research and development expenses incurred by a foreign permanent establishment, and the draft law is expected to be voted shortly.

Simplification of the conditions for non-resident married taxpayers to benefit from joint taxation in Luxembourg

Luxembourg 2018 Budget Law n° 7200

Further to the adoption of the 2018 budget law, non-resident married taxpayers can be assimilated to resident married taxpayers in order to benefit from the Luxembourg "*tax class 2*" joint taxation under the following simplified conditions:

- at least 90% of the worldwide income of one of the non-resident spouses is taxable in Luxembourg or;
- one of the non-resident spouses' annual taxable income not subject to Luxembourg taxation is less than €13,000.

In addition, the income corresponding to the first 50 days worked outside Luxembourg should be regarded as taxable in Luxembourg for the purpose of the above 90% threshold.

It should be noted that, based on the double tax treaty concluded between Belgium and Luxembourg, these rules are not applicable to Belgian residents that may benefit from the Luxembourg "*tax class 2*" provided that at least 50% of their household's professional income is taxable in Luxembourg.

"*Ultimate beneficial owners*" proposal

Bills n° 7216 and n° 7217

On 6 December 2017, the Luxembourg Parliament published two draft laws that aim to implement two distinct registers for the beneficial owners ("**BOs**") of (i) Luxembourg legal entities, and (ii) trusts and fiduciaries.

Please refer to the **Corporate** section of this Luxembourg Legal Update for further details.

Double Tax Treaties

Luxembourg has a total of 81 Double Tax Treaties (DTT) currently in force, most of them being in line with the OECD exchange of information standards. In addition, negotiations with other states are ongoing to either amend existing DTTs or to adopt new DTTs.

Double Tax Treaty between Luxembourg and Kosovo signed and ratified by Kosovo

On 8 December 2017, Luxembourg and Kosovo signed a DTT. On 16 January 2018, Kosovo approved a law ratifying the DTT by way of decree that was published on 18 January 2018.

Double Tax Treaty between Luxembourg and Senegal approved by Council of Ministers of Senegal

On 17 January 2018, the Council of Ministers of Senegal approved the DTT between Luxembourg and Senegal that was signed on 10 February 2016 and ratified on 23 December 2016.

Double Tax Treaty between Luxembourg and Cyprus approved by Luxembourg Government

On 20 December 2017, the Luxembourg Government approved the DTT between Luxembourg and Cyprus that was signed on 8 May 2017. A Bill implementing the new DTT was introduced in the Luxembourg Parliament on 20 December 2017.

Double Tax Treaty between Luxembourg and Peru – negotiations

Luxembourg and Peru expressed their intention to negotiate and sign a DTT following a meeting held in Lima on 12 December 2017 between officials of both countries.

Double Tax Treaty between Luxembourg and Pakistan – negotiations

Luxembourg announced on 29 January 2018 that negotiations for a DTT with Pakistan are currently ongoing.

Double Tax Treaty between Luxembourg and Syria – negotiations

Luxembourg announced on 29 January 2018 that negotiations for a DTT with Syria are currently ongoing.

Double Tax Treaty between Luxembourg and the United Kingdom – negotiations

Luxembourg announced on 29 January 2018 that negotiations are currently ongoing for a new DTT with the UK, that would replace the existing DTT dated 24 May 1967, as amended by the 1978, 1983 and 2009 protocols.

CIRCULARS/REGULATORY DEVELOPMENTS

New administrative Circular released on the tax regime of stock options plans

Circular Letter L.I.R. n° 104/2

On 29 November 2017, the Luxembourg Tax Administration issued a new Circular amending the tax regime of stock options in Luxembourg and its related reporting obligations, and replacing Circulars 104/2 and 104/2bis.

Pursuant to this new Circular, as of 1 January 2018, the assessment of the taxable benefit of freely transferable options/warrants (that are not listed or valued according to a recognised financial method) has been increased from 17.5% to 30% of the value of the underlying unit of an option/warrant on the granting date, multiplied by the number of options/warrants granted.

In addition, the "reasonable conditions" for the application of the lump-sum valuation method for calculating the taxable basis of warrants (i.e. options not linked to the shares of the company) have been clarified. These conditions were initially outlined in an internal note to the Luxembourg Tax Administration but are now part of the new Circular.

Finally, the new Circular provides further clarifications regarding reporting obligations depending on the date of implementation of a particular plan (i.e. deadline notification for the 2016 and 2017 plans, information to be provided as from 1 January 2018, etc.).

New administrative Circular released on the issuance of residency certificates for Luxembourg collective investment funds

Circular L.G.-A. n° 61

On 8 December 2017, the Luxembourg Tax Administration issued a new Circular providing guidance on the issuance of residency certificates to collective investment funds, amending the existing Circular dated 12 February 2015.

This new Circular gives details on the issuance of residency certificates to Undertakings for Collective Investments and Specialised Investment Funds but the main change is the introduction of provisions on the Reserved Alternative Investment Funds set up in accordance with the law of 23 July 2016.

However, it should be noted that the Circular does not apply to the Reserved Alternative Investment Funds that qualify as investment companies in risk capital (i.e. RAIF-SICARs governed by Article 48 of the law dated 23 July 2016).

The list of DTTs accessible to Luxembourg collective investment funds has also been updated. The following jurisdictions have been added to the list of countries granting double tax treaties access to Corporate Investment Funds: Andorra, Brunei, Croatia, Estonia, Serbia and Uruguay.

Since the access to DTTs is limited, a case-by-case analysis should however be performed.

Such residency certificates can be obtained by simple request to the Luxembourg tax administration (Bureau VI) – information to be provided depends on the legal form of the collective investment fund.

CASE LAW

Clarification on the redemption of shares not followed by an immediate cancellation of such shares

Administrative Court of Luxembourg, 23 November 2017, Case n° 39193C

On 23 November 2017, the Administrative Court of Luxembourg (the "**Court**") ruled on the redemption of its own shares by a Luxembourg company not followed by an immediate reduction of its share capital and cancellation of such shares.

In the context of the exit of a shareholder, the company redeemed its own shares but reduced proportionally its share capital and cancelled such shares only a few years later, based on the nominal value of the shares at the time the redemption took place.

In the first instance, the Administrative Tribunal of Luxembourg ruled in favour of the Luxembourg tax authorities (Case N° 37032) and qualified this transaction as hidden dividend distribution subject to 15% withholding tax, based on the fact that the share capital of the company had not been reduced immediately after the redemption of the shares.

The Court ruled against this judgment by considering that the net proceeds received by the shareholder upon redemption of its shares by the company without an immediate reduction of its share capital and cancellation of the redeemed shares should not be considered as income from capital in the sense of article 97 (1) of the Luxembourg income tax law ("**LITL**"), but as an income from the realisation of a participation that could be subject to capital gain tax in the hands of the shareholder based on articles 99bis and 100 LITL.

Further to the non-application of article 97 (1) LITL, the Court concluded that the transaction at hand should not be subject to Luxembourg withholding tax.

Principle of prohibition of abusive practices within the context of VAT directly applicable into EU domestic legislation

European Court of Justice – 22 November 2017, Case n° C-251/16

On 22 November 2017, the European Court of Justice ("**ECJ**") ruled on the direct effect of the prohibition of abusive practices' to individuals within the framework of the VAT Directive.

The case at hand concerned individuals that leased back several newly built holiday homes in Ireland in order to artificially avoid any VAT burden on subsequent sale of the properties, based on the decision of the Irish tax authorities. The appellants argued that the principle of prohibition of abusive practices was not applicable against them since this rule was not transposed into Irish domestic law.

The ECJ ruled in favour of the Irish tax authorities and held that the principle of abuse of law is based on previous ECJ case law (i.e. not established by an EU directive) and does not need to be transposed into domestic law, or does not have to be sufficiently precise or unconditional, in order to produce direct effects towards EU individuals.

Danish withholding tax on dividends paid to foreign investment fund

European Court of Justice – Advocate General's Opinion, Case n° C-480/16

Pursuant to the Danish domestic law, dividends distributed by a resident company to Danish undertakings for collective investment in transferable securities ("**UCITS**") are exempt from withholding tax. However, dividends distributed to foreign UCITS – two Luxembourg and UK investment funds in the case at hand – are subject to withholding tax. This difference of treatment was challenged based on the free movement of capital.

On 20 December 2017, the opinion of Advocate General Mengozzi was delivered. He concluded that the difference of treatment resulting from the Danish tax legislation constituted a restriction to the free movement of capital, which may be justified but was not proportionate in the case at hand.

Interestingly enough, the Advocate General added that non-resident UCITS might benefit from the withholding tax exemption at source, provided that they satisfy the distribution conditions in their own resident state, i.e. that they pay a tax equivalent to the tax which Danish UCITS are required to retain. Ultimately, if this opinion is followed by the Court, non-residents could only claim for a withholding tax refund if they satisfy the distribution conditions in their own resident state.

Recent developments from the European Commission in terms of State aid

European Commission-Press release, 4 October 2017

On 4 October 2017, the Commission concluded that the tax treatment applied by the Luxembourg tax authorities to Amazon constituted an unlawful State aid. This decision is in line with the will from the Commission to tackle artificial tax arrangements, notably in relation to transfer pricing considerations.

The Commission challenged, in this case, the transfer pricing methodology applied to the computation of the royalties paid by Amazon EU to Amazon Europe Holding Technologies with respect to intellectual property rights owned by the latter. The Commission considered that such royalties were too high (i.e. not at arm's length), resulting in a decrease of the taxable basis of Amazon EU that was not reflecting the economic reality.

It is likely that this decision will be appealed, however, considering that an appeal does not automatically suspend the recovery procedure, Luxembourg will have to recover from Amazon the EUR 250 million identified by the Commission as an illegal tax advantage granted by Luxembourg.

In parallel, the Commission also announced that Ireland did not fulfil its obligations to recover the EUR 13 billion that resulted from the decision taken in the Apple Case on 30 August 2016 (despite the fact that the decision was appealed on 19 December 2016). Ireland could potentially face penalties in this respect.

LITIGATION

Property right and accession: non-mandatory principles

Court of Appeal, 13 April 2016, n°42265.

In the context of an action in liquidation and sharing of a joint possession (action en liquidation et partage d'un indivision) of a building, a claimant argued before the Court of Appeal that the building, built on land which belonged (in half) to the claimant, necessarily belonged to the claimant (in half) as well. His argument was based on article 552 of the Luxembourg Civil Code, which provides that "ownership of the ground entails ownership of what is above and below it". That legal provision aims at ensuring that the right to build on land is confined to its owner.

The Court of Appeal rejected his claim, ruling that Article 552 of the Luxembourg Civil Code was not mandatory (impératif). In other words, the Court of Appeal tends to consider that (i) despite Article 552 of the Luxembourg Civil Code, the owner of the ground/land may be a different person than the owner of the constructions erected on this ground/land, and that (ii) as a result, the ownership right may be multiplied and divided in space (division dans l'espace) between several owners.

This Court decision seems to pave the way to new possibilities of arrangements of property in complex real estate assets in Luxembourg. In France, for instance, the division by volume of a property is an already well-established legal technique and practice, allowing for the organisation of complex real estate assets, especially when involving assets of different characteristics, nature and purpose (for instance, public and private domains).

In France, case law suggests that each owner of a volume is granted an exclusive right of ownership on such volume. Such principle in France has however, not yet been officially and legally recognized, and is still controversial in the legal literature. In Luxembourg, the question of attribution of a real right of ownership also remains, and it is, for today, uncertain whether the "owner" is granted a full ownership right, or only a surface right (droit de superficie) which is legally limited in time (99 years at maximum).

Reform of the Commercial Lease Legal Regime

Law of 3 February 2018 on the commercial lease and modifying some provisions of the Civil Code

After many years of discussion, the Luxembourg Parliament finally passed the law on the commercial lease and modifying some provisions of the Civil Code. The purpose of the law is to recast and modernise the Luxembourg legal regime of commercial leases which was until then limited to the general provisions of the Civil Code on leases and to only six specific provisions on the matter introduced in the Civil Code in 1936. As a matter of fact, this previous legislation was indeed too narrow and too outdated to respond to the current and emerging issues of the sector. Besides, the purpose of this reform is also to put an end to many abusive practices that had developed in the sector as a result of the lack of regulation, such as the system of "key money" (*pas-de-porte*) – a significant amount of money to pay by the potential tenant in order to obtain the lease – excessive security deposit amounts and speculative sub-letting. Alongside the modernisation, one of the main objectives of the reform is therefore to rebalance the relations between landlords and tenants and to ensure an effective protection of retail tenants.

The law amends the specific section on commercial leases of the Luxembourg Civil Code. In particular:

- The law introduces a legal definition of the commercial lease as any lease for a building designed for the exercise of a commercial, industrial or artisanal activity. This definition excludes other business-related leases not related to a retail activity per se, such as leases of licensed professionals (lawyers, physicians, etc.) or office leases.
- If a term is not specified in the agreement, the lease is deemed to be concluded for an indefinite period. The law does not impose a minimum duration. However, the regime does not apply to lease agreements of one year or less in order to not discourage the establishment of new forms of retail stores, such as so-called "pop-up stores".
- The tenant has a preferential renewal right of the lease which is now also conferred to the sub-tenant. This right must be exercised at least six months before the term of the lease.

With regard to the termination of the lease agreement, the tenant is free to terminate the lease with six months' notice

before the term in case of a fixed-term lease or with six months' notice at any time in case of an indefinite-term lease, whereas with respect to the owner:

First, the law reminds the owner's possibility to request the judge to terminate the lease directly in case of a breach by the tenant of its obligation.

Then, during the first nine years of occupancy, the owner can terminate the lease or refuse its renewal in particular cases provided for in the law with six months' notice (either at any time in case of an indefinite-term lease or before the term in case of a fixed-term lease). Such particular cases cover notably the landlord's will to occupy the leased premises himself or the discontinuance of the leasing of the premises for the use for which they are currently leased as well as the landlord's will to rebuilt or renovate the premises.

After nine years, and in addition to the above-mentioned possibility, the owner can terminate the lease or refuse its renewal with the payment of an eviction indemnity and without having to give reasons.

In the event that neither party terminates the lease agreement at the end of its term, the lease is deemed to be renewed for an indefinite period.

Lastly, if at the end of the lease, in the event that the owner obtains an eviction order, the law provides the possibility for the tenant to seek a nine-month suspension of the order.

In addition, the reform introduces three remedies to abusive practices:

- any key money or any other kind of fees charged to the tenant in order for him to obtain the lease are forbidden;
- the security deposit that may be requested from the tenant is limited to an amount equivalent to six months of rent
- in order to prevent the practice of speculative subleasing, the sub-lease rent cannot be higher than the main rent except in the case of specific investments in the building made by the main tenant in favour of the sub-tenant

Finally, in terms of scope, it is important to note that the law specifies that it applies also to lease agreements already in effect at the date of its entry into force with an exception for the ban of key money (which does not apply to leases already in effect) and for the provisions on subleasing (which only apply 12 months after the entry into force of the law so as to have a transitional period during which the lease agreements already in effect can be brought into line with the new legal regime).

EMPLOYMENT LAW

The law of 15 December 2017 on special leave

The law of 15 December 2017 came into force on 1 January 2018.

It has introduced significant changes to the field of special leave, aiming at reducing and increasing certain holidays and removing others.

Paternity leave (upon birth or adoption of a child aged under 16 years old) has been extended from 2 days to 10 days. In order to benefit from paternity leave, the employee must inform his employer within a 2-months' notice period of the foreseeable date on which he intends to take the leave, by means of a written request, to be accompanied by a copy of the medical certificate indicating the expected date of birth or by a certificate specifying the visiting dates for the child being adopted. If the employee fails to fulfil these conditions, the employer may reduce the leave to 2 days. Paternity leave must be taken within 2 months of the birth or adoption and can be split if the employer agrees. Costs are reimbursed from the third day on, provided that a request is duly submitted by the employer, with supporting documents, to the Ministry of Labour within 5 months.

Postnatal leave (maternity leave) has been extended from 8 weeks to 12 weeks, independently of any question relating to breastfeeding, event of multiple birth or premature birth.

Settling-in leave (i.e. leave in case of adoption of a child aged under 12 years old) has been extended from 8 weeks to 12 weeks.

Family reasons leave (granted to parents for a child's illness) was, originally, for a period of 2 days for a child aged between 0 and 15 years old and has been extended to 12 days for a child aged under 4 years old, to 18 days for a child aged between 4 and 13 years old and to 5 days for a hospitalised child aged between 13 and 18 years old. For children with one or more medical conditions leading to their physical or mental capacity being reduced by 50% or more, the number of leave days for each age bracket is doubled, with no upper age limit in the final age bracket. Each parent is individually entitled to this leave, but it cannot be taken by both parents at the same time. The leave can also be split.

Moving-in leave remains for a period of 2 days, but over a reference period of 3 years with the same employer.

Civil wedding leave has been reduced from 6 days to 3 days.

Civil partnership leave has been reduced from 6 days to 1 day.

Leave for parents for a civil wedding of a child has been reduced from 2 days to 1 day.

Leave for parents for civil partnership of a child has been abolished (originally 2 days).

Leave for enrolment in military service has been abolished (originally 1 day).

GLOSSARY

ABBL: Luxembourg Banks and Bankers' Association

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

AIFM: Alternative Investment Fund Managers

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

AIF: Alternative Investment Fund

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

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

AIFs: Alternative Investment Funds

ALFI: Association of the Luxembourg Fund Industry

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

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

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

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

BCBS: Basel Committee on Banking Supervision

BCL: Banque Centrale du Luxembourg

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

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

CCCTB: Common Consolidated Corporate Tax Base

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

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

CGFS: Committee on the Global Financial System

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

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

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

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

CRA: Credit Rating Agencies

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

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

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

CSDR: Regulation (EU) N°909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012

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

Data Protection Law: Luxembourg law of 2 August 2002 (as amended) on the protection of persons with respect to the processing of personal data

DGSD 2: Directive 2014/49 of 16 April 2014 on

deposit guarantee schemes

EBA: European Banking Authority

ECB: European Central Bank

ECJ: European Court of Justice

EIOPA: the European Insurance and Occupational Pensions Authority

ESAs: EBA, EIOPA and ESMA

ESMA: European Securities and Markets Authority

ESRB: European Systemic Risk Board

ETDs: Exchange Traded Derivatives

ETFs: Exchange Traded Funds

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

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

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

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

FCP: Fonds Commun de Placement or mutual fund

FGDL: Fonds de garantie des dépôts Luxembourg

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

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

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

FSB: Financial Stability Board

GDPR: Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data

ICMA: International Capital Market Association

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

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

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

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

IRE: Institut des Réviseurs d'Entreprises

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

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

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

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

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

the European Parliament and of the Council, and repealing Council Directive 93/22/EEC

MiFID 2: Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments

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

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

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

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

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

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

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

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

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

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

Public Interest Entities:

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

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

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

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

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

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

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

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

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

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

SRB: the Single Resolution Board

SRF: the Single Resolution Fund

SRM: the Single Resolution Mechanism

SSM: the Single Supervisory Mechanism

SSM Regulation: Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions

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

Statutory Audit Regulation: Regulation (EU) No 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities

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

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

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

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

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

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