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LUXEMBOURG LEGAL UPDATE
JULY 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 Financial Toolkit to keep you up to date with the most recent developments relating to the Finance industry.

Our dedicated FinTech guide to keep you up to date with the most recent developments relating to the Fintech trends.

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CONTENT

- CJEU case-law: C-210/16, Unabhängiges Landeszentrum für Datenschutz c (ULD) v Wirtschaftsakademie Schleswig-Holstein GmbH (WA)
- CEDH case-law: Benedik v. Slovenia (app. no. 62357/14)

Employment Law

27

- Clarification regarding the continuation of remuneration for employees on sick leave
- Increase in the number of hours students can work under fixed-term contracts
- Annual paid leave
- Resignation of an employee for serious misconduct of the employer
- Reimbursement of unemployment allowances

Data Protection

30

- Article 29 Working Party: final versions of the guidelines on consent and transparency
- EDPB: replacement of the Article 29 Working Party, guidelines certification and identifying certification criteria, guidelines on international transfers, statement on the revision of the ePrivacy Regulation
- CNPD: form "declaration of the data protection officer", statement in relation to business-customer communication in post GDPR time, public consultation on "GDPR Certified Assurance Report based Processing Activities (GDPR-CARPA)
- Bill of law 7184: amendments proposed by the government to amend article L.261-1 of the Labour Code which provides for specific provisions in relation to the monitoring of the employees at their workplace

BANKING, FINANCE & 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°2018/634 of 24 April 2018 amending Implementing Regulation (EU) 2016/1799 as regards the mapping tables specifying the correspondence between the credit risk assessments of external credit assessment institutions and the credit quality steps set out in CRR
- N°2018/728 of 24 January 2018 supplementing CRR with regard to RTS for procedures for excluding transactions with non-financial counterparties established in a third country from the own funds requirement for credit valuation adjustment risk
- N°2018/688 of 23 March 2018 amending Implementing Regulation (EU) 2016/2070 as regards benchmarking portfolios, reporting templates and reporting instructions
- N°2018/815 of 1 June 2018 on the extension of the transitional periods related to own funds requirements for exposures to central counterparties (CCPs) set out in CRR and EMIR
- N°2018/959 of 14 March 2018 supplementing CRR with regard to RTS of the specification of the assessment methodology under which competent authorities permit institutions to use Advanced Measurement Approaches for operational risk
- EBA Final Report of 1 June 2018 on Draft implementing technical standards amending Commission Implementing Regulation (EU) No 650/2014 on the format, structure, contents list and annual publication date of the supervisory information to be disclosed by competent authorities in accordance with Article 143(3) of CRD IV (EBA/ITS/2018/03)
- ECB Report of July 2018 on Recovery Plans
- BCBS publication of July 2018 for the revised assessment methodology and the higher loss absorbency requirement for global systemically important banks (G-SIBs)

MiFID2/MiFIR:

- ESMA Product Intervention Decisions in relation to contracts for differences and binary options (ESMA35-43-1135) of 1 June 2018

Solvency II:

- N°2018/633 of 24 April 2018 amending Implementing Regulation (EU) 2016/1800 laying down ITS with regard to the allocation of credit assessments of external credit assessment institutions to an objective scale of credit quality steps in accordance with Solvency II
- N°2018/730 of 4 May 2018 laying down technical information for the calculation of technical provisions and basic own funds for reporting with reference dates from 31 March 2018 until 29 June 2018 in accordance with Solvency II

IDD:

- N°2018/541 of 20 December 2017 amending Delegated Regulation (EU) 2017/2358 and Delegated Regulation (EU) 2017/2359 as regards their dates of application

SRB:

- N°2017/2361 of 14 September 2017 on the final system of contributions to the administrative expenditures of the SRB
- SRB policy of 4 June 2018 on Critical Functions: SRB Approach in 2017 and Next Steps
- Revised Memorandum of Understanding between the SRB and the ECB in respect of cooperation and information exchange of 30 May 2018

STS Regulation:

- Commission Delegated Regulation of 1 June 2018 amending Delegated Regulation (EU) 2015/35 as regards the calculation of regulatory capital requirements for securitisations and simple, transparent and standardised securitisations held by insurance and reinsurance undertakings

Blocking Regulation:

- Draft Regulation of 6 June 2018 amending the Annex to Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom

AML/CTF: Publication of the Fifth Anti-Money Laundering Directive

Directive (EU) 2018/843 of 30 May 2018 amending AMLD 4

The AMLD 5 was published on 19 June 2018 in the Official Journal of the EU. AMLD 5 amends AMLD 4 and forms part of the EU Commission's action plan on strengthening the fight against terrorist financing.

The main changes to AMLD 4 involve:

- broadening access to information on beneficial ownership, improving transparency in the ownership of companies and trusts;
- addressing risks linked to prepaid cards and virtual currencies;
- cooperation between financial intelligence units; and
- improved checks on transactions involving high-risk third countries.

AMLD 5 will enter into force twenty days after the publication in the Official Journal of the EU.

LEGISLATION

MiFID2/MiFIR: Publication of Luxembourg Law and Grand-Ducal Regulation implementing MiFID2/MiFIR

Law and Grand-Ducal Regulation of 30 May 2018
A new law of 30 May 2018 on markets in financial instruments implementing MiFID 2, MiFIR and Article 6 of Commission Delegated Directive (EU) 2017/593 (the DD) was published in the Luxembourg official journal (*Mémorial A)* on 31 May 2018 (the Law). The Law modifies, *inter alia*, the Financial Sector, Law and repeals the markets in financial instruments law of 13 July 2007 (with the exception of its Article 37).

The Law is supplemented by a Grand-Ducal Regulation of 30 May 2018 on the protection of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits (GDR). The GDR transposes the other provisions of the DD, repeals Grand-Ducal Regulation of 13 July 2007 relating to organisational requirements and rules of conduct in the financial sector and modifies Grand-Ducal Regulation of 13 July 2007 relating to maintaining the official listing for financial instruments.

The Law and the GDR aim to close the regulatory gaps revealed by the financial crisis of 2008, adapt the legislation to financial and technological changes in financial markets that occurred since the introduction of MiFID I and make financial markets more resilient and transparent, while strengthening investor protection and providing authorities with more effective supervisory powers. The stricter organisational requirements relate, *inter alia*, to product governance and set more extensive requirements for members of the management bodies of investment firms, credit institutions and market operators in an effort to strengthen investor protection.

In this context, the CSSF announced in its May 2018 Newsletter that it will update the sections of its website dedicated to MiFID 2/MiFIR and transaction reporting. The CSSF points out that CSSF Circulars 07/302, 07/306 and 08/365, providing specifications and technical arrangements in relation to transaction reporting pursuant to Article 28 of the former law of 13 July on markets in financial instruments, have become obsolete under the new regulatory framework.

The Law and the GDR entered into force on 4 June 2018.

New Grand-Ducal Regulation on the fees to be levied by the CSSF

Grand-Ducal Regulation of 2 July 2018
A new Grand-Ducal Regulation of 2 July 2018 modifying the Grand-Ducal Regulation of 21 December 2017 on the fees to be levied by the CSSF has been published in the Luxembourg official journal (Mémorial A).

The regulation introduces provisions on the fees to be levied in relation to: administrators of indices used as benchmarks in financial instruments and financial contracts; organised trading facilities (OTF) and their operators; data communication service providers (*Prestataires de services de communication de données*).

The new regulation entered into force on 8 July 2018.

BRRD/Creditors Hierarchy Directive: Publication of Implementing Bill

Bill N°7306
A new bill N°7306 implementing the Creditors Hierarchy Directive by amending the Bank Resolution Law and various

provisions of the Financial Sector Law, was lodged with the Luxembourg parliament on 14 May 2018.

The objective of the bill and the underlying directive is to provide clarity on, and establish, the eligibility criteria for subordinated liabilities which may notably be used to comply with MREL and TLAC requirements. Accordingly, the bill sets out provisions on the ranking of unsecured debt instruments in insolvency for the purpose of the recovery and resolution framework and aims to improve the efficiency of the bail-in tool.

The bill also amends the Financial Sector Law. The proposed amendments, amongst others, reflect the changes brought by the Corrigendum of 25 January 2017 to the CRD IV.

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

CRR: Implementation of Certain CRR Discretions and ECB Guideline (EU) 2017/697 on National Options and Discretions

CSSF Regulation N°18-03
The CSSF issued on 5 June 2018 a new regulation N°18-03. The regulation implements certain discretions of the CRR and Guideline (EU) N°2017/697 of the ECB on the exercise of options and discretions available in European Union law by NCAs in relation to less significant institutions (LSI) (ECB/2017/9).

One part of the regulation (Part II) applies to all CRR institutions as well as to Luxembourg branches of credit institutions or CRR investment firms incorporated in a third country and pertains to the exercise of certain NCAs and requirements related to (i) the recognition of Additional Tier 1 and of Tier 2 instruments, (ii) large exposure exemptions and (iii) accounting standards.

The other part of the regulation (Part III) applies to CRR institutions that are LSI and CRR investment firms. It also applies to Luxembourg branches of credit institutions and of CRR investment firms incorporated in a third country. This part pertains to the exercise of certain NCAs in relation to own funds and liquidity requirements.

The regulation repeals CSSF Regulation N°14-01 and entered into force with immediate effect. A correlation table between CSSF Regulation N°14-01 and the new regulation as well as an explanatory memorandum with article-by-article comments is also annexed to the new regulation.

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

CSSF Regulation N° 18-04
The CSSF issued on 14 June 2018 a new regulation 18-04 on the setting of the countercyclical buffer rate for the third quarter of 2018.

The regulation follows the Luxembourg Systemic Risk Committee's recommendation of 14 June 2018 (CRS/2018/003) and maintains a 0% countercyclical buffer rate for relevant exposures located in Luxembourg for the third quarter of 2018.

The Regulation entered into force on 1 July 2018.

PAD: Publication of Grand-Ducal Regulation Establishing a List of the Most Representative Services Linked to a Payment Account

Grand-Ducal Regulation of 6 June 2018
A new Grand-Ducal Regulation of 6 June 2018 establishing a list of the most representative services linked to a payment account under the Law of 13 June 2017 on payment accounts has been published in the Luxembourg official journal (*Mémorial A*).

The regulation specifies ten of the most representative services linked to a payment account and contains terms and definitions for each of the services identified, as required under article 5 of the Law (based on Article 3 of PAD).

The regulation entered into force on 15 June 2018.

Benchmark Regulation: Publication of the Law Implementing the Benchmark Regulation

Law of 17 April 2018
A new law of 17 April 2018 implementing the Benchmark Regulation and modifying, *inter alia*, the Luxembourg Consumer Code has been published in the Luxembourg official journal (*Mémorial A)* on 19 April 2018.

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

PRIIPS KID Regulation: Publication of the Law Implementing PRIIPS KID Regulation

Law of 17 April 2018
The law of 17 April 2018 implementing the PRIIPs KID Regulation and amending the Luxembourg law of 17 December 2010 relating to undertakings for collective

investment, was published in the Luxembourg official journal (*Mémorial A*) on 19 April 2018.

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

CSDR: Publication of Luxembourg Law Implementing CSDR

Law of 6 June 2018
The law of 6 June 2018 on central securities depositories implementing the CSDR, was published in the Luxembourg official journal (*Mémorial A*) on 8 June 2018.

The law aims at rendering the CSDR operational in Luxembourg by appointing the CSSF as the competent authority to ensure compliance in Luxembourg with the CSDR. Furthermore, the law confers control and investigation powers to the CSSF that are necessary for the exercise of its competences within the framework of the CSDR.

The law also specifies a set of sanctions and penalties that may be imposed by the CSSF for certain breaches of the CSDR, including the withdrawal of the licence pursuant to Article 16 or 54 of the CSDR, temporary or permanent bans to perform regulated functions, pecuniary fines on both natural (of up to EUR 700,000) and legal persons (of up to EUR 20,000,000, or 10% of annual turnover), and the publication of imposed sanctions.

Finally, the new law foresees whistle-blowing notification procedures for (suspected) violations of the CSDR, both within centralised securities depositories and appointed credit institutions, as well as for notifications to the CSSF.

The law entered into force on 12 June 2018.

SFTR: Publication of Luxembourg Law Implementing SFTR

Law of 6 June 2018
The law of 6 June 2018 on transparency of securities financing transactions (Law) implementing the SFTR, was published in the Luxembourg official journal (*Mémorial A*) on 8 June 2018.
Please refer to the Investment Funds section of this Luxembourg Legal Update for further details on this law.

The law entered into force on 22 May 2018.

Covered Bonds: Publication of Luxembourg Law Introducing Renewable Energy Covered Bonds

Law of 22 June 2018
The law of 22 June 2018 amending the provisions of the Financial Sector Law to introduce renewable energy covered bonds was published in the Luxembourg official journal (*Mémorial A*) on 26 June 2018.

The law introduces renewable energy covered bonds as a new Luxembourg statutory covered bond class. It also strengthens covered bondholder protection generally by implementing certain of the recommendations on the harmonization of the covered bond frameworks in the EU published on 20 December 2016 by the EBA. These include the introduction of a mandatory liquidity buffer, the regulation of the use of derivatives, the expansion of the admission of substitute collateral to public entity commitments and greater transparency requirements for covered bond banks.

The law is a further step for reaching sustainable development objectives and aims at reinforcing the position of Luxembourg as a centre of excellence in green or sustainable finance.

The law entered into force on 30 June 2018.

New Prospectus Regulation: Publication of Implementing Bill

Bill N°7328
A new bill N°7328 on securities prospectuses implementing the New Prospectus Regulation and repealing the law on securities prospectuses of 10 July 2015 (as amended) (2005 Law), was lodged with the Luxembourg parliament on 29 June 2018.

The bill is divided into five parts which correspond to those of the 2005 Law. In particular:

- Part I of the bill contains general provisions relating to its object, the definitions and the regime applicable to issuances denominated in a currency other than the Euro.

- Part II of the bill appoints the CSSF as the competent authority in Luxembourg for the purposes of the New Prospectus Regulation and confers upon it the necessary supervisory and investigative powers to exercise its mission. Part II also lays down an administrative sanctions and prospectus liability regime in accordance with the New Prospectus Regulation. In addition, the bill makes use of the option provided in article 3(2) of the Regulation by exempting offers of securities to the public from the obligation to publish a prospectus where the total amount of such offer is less than EUR 8,000,000 (article 4 of the bill). An information notice will, however, need to be made available to the public for

offers with a total amount equal or superior to EUR 5,000,000.

- Part III of the bill includes the provisions relating to the drawing up, approval and distribution of the prospectus to be published where securities offered to the public or admitted to trading on a regulated market in Luxembourg are not covered by the New Prospectus Regulation. In the interest of simplification, legal certainty and investor protection and taking into account the requirements, specifications and modifications introduced by the New Prospectus Regulation, the scope of application of Part III has been reduced and new provisions to ensure easy access to prospectuses and to complete the regime on prospectus supplements are introduced compared with Part III of the 2005 Law.

- Part IV of the bill sets out the regulatory framework applicable to prospectuses for securities admitted to trading on a market located or operating in Luxembourg not being included in the list of regulated markets published by ESMA.

- Part V of the bill contains the final and transitory provisions. The 2005 Law will be abrogated with effect on 21 July 2019 (with the exception of articles 4(2)(h), 5(2)(e) and 6(2)(a) and (g) which will cease to apply as of the day of publication of the bill in the Luxembourg official journal).

The bill foresees its entry into force of law as of 21 July 2019 with the exception of its article 4; that is foreseen to become applicable as of the day of publication of the Bill in the Luxembourg official journal.

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

AML/CTF: Publication of the Bill Organising the Financial Intelligence Unit

Bill N°7287
A new bill n°7287 organising the financial intelligence unit (*Cellule de renseignement financier*) and amending: (1) the Code of criminal procedure; (2) the amended law of 7 March 1980 on the judiciary organisation; (3) the AML Law, was lodged with the Luxembourg parliament on 23 April 2018.

The bill restructures the functioning of the Financial Intelligence Unit (FIU), the *Cellule de renseignement financier,* in order to adapt it to the evolving environment and needs. The bill, in particular, provides that the FIU shall be integrated in the General Prosecutor's (*Parquet general*) office (instead of the District Prosecutor). It also reinforces the FIU's independence and operational autonomy and increases the FIU's human resources. Furthermore, the bill takes into account the development of international requirements resulting from FATF standards (notably FATF Recommendations 20, 29, and 40) and AMLD 4, with regard to suspicious transaction reporting, FIUs and international cooperation.

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

European Small Claims Procedure and European Order for Payment Procedure: Publication of Luxembourg Law

Law of 15 May 2018
The law of 15 May 2018 implementing Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure, and amending the New Code of Civil Procedure, was published in the Luxembourg official journal (*Mémorial A*) on 18 May 2018.

While implementing Regulation (EU) 2015/2421, the Law introduces the possibility to opt for the European order for payment procedure (under Regulation (EU) 861/2007) in the event that the defendant has lodged a statement of opposition against the European order for payment (in the context of the European Small Claims Procedure).

Audit: Adoption of Audit Standards in the Field of Statutory Audit, and on Professional Ethics and Internal Quality Control

CSSF Regulation 18-02
The CSSF, issued a new regulation 18-02 relating to: (1) the adoption of audit standards in the field of statutory audit under the Law of 23 July 2016 concerning the audit profession; (2) the adoption of standards on professional ethics and internal quality control under the Law of 23 July 2016 concerning the audit profession.

The Regulation implements audit standards in the field of statutory audit, and of ethics and internal quality control as established by the International Auditing and Assurance Standards Board (IAASB) and published in the "Handbook of International Quality, Control, Auditing, Review, Other Assurance, and Related Services Pronouncements – 2016-2017 Edition" of the International Federation of Accountants (IFAC). In addition, the CSSF regulation adopts Luxembourg-specific supplements to these standards.

The new audit standards and the Luxembourg-specific supplements are enclosed in two schedules to the regulation.

The regulation was published in the Official Gazette (*Mémorial A*) on 23 April 2018 and entered into force on 27 April 2018.

REGULATORY DEVELOPMENTS

Deposit Guarantee Scheme: Survey on Amount of Covered Deposits Held as of 31 March 2018

CSSF-CPDI Circular 18/11
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 18/11 dated 16 April 2018 regarding a survey on the amount of covered deposits held as of 31 March 2017.

Single Resolution Board: Raising of the 2018 *ex-ante* Contributions to the Single Resolution Fund

CSSF-CODERES Circular 18/06
The CSSF and the Luxembourg Resolution Board (*Conseil de Résolution, CODERES*) have issued circular 18/06 dated 26 April 2018 informing on the raising of the 2018 *ex ante* contributions to the SRF.

The circular is addressed to all credit institutions established in Luxembourg and subject to SRMR, with the exception of Luxembourg branches of credit institutions established outside the EU. Luxembourg branches of credit institutions which have their head office in another Member State of the EU are covered by their head office.

The circular informs that the 2018 *ex ante* contributions to the SRF are due by 7 June 2018.

The circular provides technical details on the computation of the contribution amount and informs relevant credit institutions of a substantial increase in most cases of the contribution compared to the 2017 *ex ante* contribution.

The circular further sets forth that the conditions concerning irrevocable payment commitments (IPCs) remain the same as for the 2017 contribution cycle. Credit institutions willing to apply for IPCs in 2018 had to send the completed application form by 23 May 2018 to the CSSF and the Single Resolution Board.

Retail Banking: Product Oversight and Governance Arrangements

CSSF Circular 18/692
The CSSF issued on 11 June 2018 a new circular 18/692 providing clarifications on the EBA Guidelines on product oversight and governance arrangements for retail banking products (EBA/GL/2015/18).

The circular provides clarifications on the EBA Guidelines that entered into force on 3 January 2017 and that the CSSF declares to comply with. The Circular further provides an overview of the governance and product oversights duty specifications contained in the EBA Guidelines.

The circular is addressed to all entities supervised by the CSSF as retail banking manufacturers or distributors, and in particular Luxembourg incorporated or established credit institutions, CRR investment firms, payment institutions and electronic money institutions, as well as Luxembourg law lenders and Luxembourg law intermediaries issuing credits for consumers relating to residential immovable property.

The circular specifies that the manufactures shall comply with the EBA guidelines and ensure that their distributors comply therewith in relation to all retail banking products that are commercialised or, if already on the market, are significantly modified after the date of entry into force of the guidelines.

The CSSF emphasises that the Circular has to be read in conjunction with CSSF circular 12/552 and CSSF circular 17/651, each if and to the extent applicable to the concerned entity.

The Circular became applicable with immediate effect.

MiFID2/MiFIR: ESMA Guidelines on the Management Body of Data Reporting Services Providers

CSSF Circular 18/690
The CSSF issued on 13 April 2018 circular 18/690 on the ESMA guidelines on the management body of data reporting services providers (DRSPs) and market operators to implement the guidelines into Luxembourg regulation.

The aim of the guidelines is to develop common standards to be taken into consideration by market operators and DRSPs when appointing new, and assessing current, members of the management body and to provide guidance on how information should be recorded by market operators and DRSPs in order to make it available to the competent authorities for the exercise of their supervisory tasks.

The CSSF notes that market operators and DRSPs authorised in Luxembourg are obliged to inform the CSSF of the identity of the members of their management body and of any change in the composition of the management body. The management bodies also have to notify (by post) the CSSF of any important conflicts of interest as well as of the mitigating measures which they adopt in order to address such conflicts.

The circular is addressed to all market operators and DRSPs and entered into force on 4 June 2018.

MiFID2/MiFIR: ESMA Guidelines on Calibration of Circuit Breakers and Publication of Trading Halts under MiFID 2 and Details on Reporting of Circuit Breakers' Parameters

CSSF Circular 18/691
The CSSF issued on 19 April 2018 a new circular 18/691 amending Circular CSSF 17/668 concerning the ESMA Guidelines on the calibration of circuit breakers and publication of trading halts under MiFID 2, and details on reporting of circuit breakers' parameters (ESMA70-156-181).

The new circular takes into account the publication by ESMA of the revised procedure on reporting of circuit breakers' parameters by NCAs to ESMA (ESMA70-156-181) published on 19 December 2017 and the revised form which is attached as an annex to the circular.

MiFID2/MiFIR: CSSF Updates Q&A Paper on MiFID2/MiFIR

CSSF Q&A Paper
The CSSF has updated its Q&A paper on MiFID2/MiFIR (version of 15 May 2018). The Q&A paper update introduces a new section 4 relating to post-trade transparency and in particular whether the CSSF authorises the deferred publication of the details of transactions in non-equity instruments under MiFIR by (i) trading venues and (ii) investment firms performing transactions outside trading venues.

The new Q&A paper specifies, *inter alia*, the types of deferrals authorised by the CSSF and the process to be followed in order to obtain prior CSSF approval for making use of the deferred publication regime, depending on whether such requests are made by market operators or investment firms operating a trading venue, or by investment firms that perform transactions outside trading venues.

The CSSF will evaluate the application of post-trade transparency deferrals under MiFIR in light of the market developments on a yearly basis, and reserves the right to reassess its position regarding deferrals.

CSDR: Calculation of Indicators to Determine the Most Relevant Currencies in which Settlement Takes Place

CSSF Circular 18/688
The CSSF issued on 5 April 2018 a new circular 18/688 on the ESMA's guidelines on the process for the calculation of the indicators to determine the most relevant currencies in which settlement takes place (ESMA70-708036281-66). The circular is addressed to central securities depositories (CSD).

The guidelines are intended to ensure common, uniform and consistent application of the provisions of Article 12(1)(b) of the CSDR. The guidelines seek to ensure that CSDs apply common, clear and efficient rules for data collection. In particular, the guidelines specify the scope of the data to be provided by CSDs and the general data collection processes as well as the calculation of indicators to define the most relevant currencies in which settlement occurs.

By means of this circular the CSSF has adopted the guidelines, which have applied since 5 April 2018.

CSDR: Process for Calculation of Indicators to Determine Substantial Importance of a CSD for a Host Member State

CSSF Circular 18/689
The CSSF issued on 5 April 2018 a new circular 18/689 on the ESMA guidelines on the process for the calculation of the indicators to determine the substantial importance of a CSD for a host Member State (ESMA70-708036281-67). The circular is addressed to CSD.

The guidelines are intended to ensure common, uniform and consistent application of the provisions of Article 24(4) of the CSDR. In particular, they provide guidance on the process for the collection, processing and aggregation of the data and information necessary for the calculation of the indicators to determine the substantial importance of a CSD for the functioning of the securities markets and the protection of investors in a host Member State.

By means of this circular the CSSF has adopted the guidelines, which have applied since 5 April 2018.

AML/CTF: Survey Related to the Fight Against Money Laundering and Terrorist Financing

CSSF Press Release 18/15
The CSSF issued on 20 April 2018 a press release informing of its intention to conduct an annual online survey collecting standardised key information concerning money laundering and terrorist financing risks ("ML/TF risk") to which the professionals under its supervision are exposed as well as the implementation of related risk mitigation and targeted financial sanctions measures.

The CSSF notes that this survey forms part of the AML/CTF risk-based supervision approach put in place by the CSSF over the course of recent year following initiatives both at an EU and international level (AMLD 4, further specified by joint guidelines issued by the European Supervisory Authorities and the FATF recommendations adopted in February 2012 respectively).

In this context, the CSSF has elaborated new sector-specific questionnaires (hereinafter "AML/CTF Questionnaires") supporting the identification of ML/TF risk factors (principally related to clients, countries and geographical areas, delivery or distribution channels, products and services of supervised entities) and the measures put in place to mitigate these risks.

Prior Notification Procedure applicable to Insurance Firms Planning to Operate in New Caledonia

CAA Circular 18/6
The CAA issued on 8 May 2018 circular 18/6, laying down the *ex-ante* notification procedure to be followed by insurance undertakings planning to operate in New Caledonia under the freedom to provide services regime.

The CAA highlights the obligation of Luxembourg insurance firms, under article 139 of the law of 7 December 2015 on the insurance sector (as amended), to notify the CAA of their intention to pursue business for the first time in a third country under the freedom to provide services, indicating the nature of the risks and the commitments they intend to cover.

The CAA informs that it has signed a cooperation agreement with the government of New Caledonia setting out the procedure and the required exchange of information between the CAA and the competent authority in New Caledonia "*direction des Affaires économiques, bureau du contrôle des assurances" (NCA).* The circular specifies that in addition to the CAA's prior authorisation, an insurance undertaking also has to apply for and obtain authorisation from the NCA prior to commencing its operations in New Caledonia. Application for authorisation with the NCA can be made once the insurance undertaking has been notified of the CAA's authorisation.

For further information about the procedure's formalities in New Caledonia, the circular refers to the website of the NCA (https://dae.gouv.nc/pole-actions-economiques-professions-reglementees-assurance/les-entreprises-dassurance) which may also be contacted via email (dae.sae@gouv.nc).

FINTECH

INTERNATIONAL AND EU DEVELOPMENTS

New International and EU Texts

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

- Loan Syndications and Trading Organisation, White Paper on the Application of Blockchain Technology to the Loan Market of 2 April 2018
- EC Declaration on European Partnership on Blockchain of 10 April 2018
- EBA Opinion of 13 June 2018 on the implementation of the RTS on strong customer authentication and common and secure communication (EBA-Op-2018-04)
- BIS Annual Economic Report 2018, Part V: Cryptocurrencies: Looking beyond the hype of 17 June 2018
- EBA Report of 3 July 2018 on the Impact of Fintech on Incumbent Credit Institutions' Business Models
- EBA Report of 3 July 2018 on the Prudential Risks and Opportunities Arising for Institutions from Fintech

LUXEMBOURG DEVELOPMENTS

NIS Directive: Publication of Implementing Bill

Bill N°7199
A new bill n°7199 transposing the NIS Directive was lodged with the Luxembourg parliament on 6 June 2018. The bill aims to render the NIS Directive operational in Luxembourg by introducing into the Luxembourg legal framework provisions which, amongst others:

- set minimum requirements for the security of networks and information systems which have to be respected by operators of essential services (i.e. companies, active in various sectors, that provide an important service to society and the economy) (OES) and digital service providers (e.g. online marketplaces, online search engines and cloud computing services) (DSP). In-scope OES and DSP will have to ensure an adequate level of security in relation to their networks and information systems and to notify the competent authority in Luxembourg of incidents which have a significant impact on the continuity of such essential services
- designate the CSSF and the Luxembourg institute of regulation, Institut luxembourgeois de régulation (ILR) as the national competent authorities (NCA) responsible for fulfilling the tasks linked to the security of the network and information systems of OES and DSP. CSSF will be responsible for the banking and financial market infrastructure sectors whereas ILR will be the NCA for all other sectors
- designate ILR as the national single point of contact responsible for coordinating issues related to the security of network and information systems and cross-border cooperation at UE level, as required by the NIS Directive
- charge the Haut-Commissariat à la Protection Nationale (HCPN) with the task of elaborating a national strategy in the area of network and information system security
- with regard to the institutional framework for cybersecurity, transfer to the national information technology centre Centre des technologies de l'information de l'Etat (CTIE) the mission of being the cryptographic authorisation authority (a mission previously entrusted with the national authority for the security of information systems Agence Nationale de la Sécurité des Systèmes d'Information (ANSSI)).

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

Over the past few months, further Luxembourg texts have been published on FinTech. These include the following:

- Institut Luxembourgeois de la Normalisation, de l'Accréditation, de la Sécurité et Qualité des Produits et Services, White Paper on Blockchain and Distributed Ledgers: Technology, Economic Impact and Technical Standardisation, June 2018.

INVESTMENT FUNDS

EU DEVELOPMENTS

UCITS & AIFMD

EU Commission draft delegated regulation on UCITS and AIFMD depositary safekeeping rules

On 29 May 2018, the EU Commission published two draft delegated regulations, the aim of which is to amend the current UCITS Delegated Regulation 2016/438 and AIFMD Delegated Regulation 231/2013 in respect of the rules relating to the safekeeping of UCITS' and AIFs' assets by depositaries and sub-custodians.

The new draft delegated regulations follows ESMA's opinion on asset segregation under the UCITS Directive and the AIFMD dated July 2017, and proposes to introduce the following changes to the existing UCITS and AIFMD Delegated Regulations:

- *Reconciliation* – It is proposed to amend Article 3(1)(c) of the UCITS Delegated Regulation and Article 89(1)(c) of the AIFMD Delegated Regulation to provide the factors determining the frequency of the reconciliation between the depositary's internal accounts and records and those of the third parties to whom safekeeping functions are delegated. According to the draft delegated regulations, such reconciliation should be conducted as often as necessary depending not only on the trading frequency of the relevant UCITS or AIF, but also on any trade which would occur outside normal trading activity and on the trades carried out by other clients whose assets are kept by the third party in the same omnibus account.
- *Record-keeping* – The draft delegated regulations propose to amend Article 13(2) of the UCITS Delegated Regulation and Article 89(2) of the AIFMD Delegated Regulation to clarify that when safekeeping functions are delegated, the depositary will remain subject to the requirement to maintain a segregated account in the name of the UCITS/AIF or of the UCITS management company/AIFM acting on behalf of the UCITS/AIF, where the financial assets are recorded.
- *Contract between the depositary and the third-party to whom safekeeping functions are delegated* – A new "paragraph 2a" is proposed to be introduced in Article 15 of the UCITS Delegated Regulation and Article 98 of the AIFMD Delegated Regulation, which will set out the minimum provisions to be included in the contract between the depositary and the third party to whom the safekeeping functions over the assets of the AIF/UCITS are delegated. In particular, the contract should at least contain a guarantee of the depositary's right to sufficient information, inspection, access to the records and financial instrument accounts of the third party held in custody, so as to enable the depositary to identify all the entities in the custody chain and verify that the quantity of the financial instruments recorded at the third party match the quantity recorded in its own books for the relevant UCITS/AIF or the relevant UCITS management company/AIFM acting on behalf of the UCITS/AIF. Should the third party need to sub-delegate the safekeeping functions, the proposed paragraph 2a requires the delegating third party to contractually secure and detail equivalent rights and obligations from that sub-delegate, identical to the ones it granted to the depositary itself.
- *Asset segregation at the level of the third-party to whom safekeeping functions are delegated* – The draft delegated regulations propose to amend Article 16 of the UCITS Delegated Regulation and Article 99 of the AIFMD Delegated Regulation to set minimal segregation requirements at the level of the third-parties to whom safekeeping functions are delegated. In brief, a third party is allowed to hold the assets of UCITS clients, AIF clients and other clients of one depositary all together in one omnibus account as long as these assets are separated from the third party's own assets, from the depositary's own assets and from the assets belonging to the other clients of the third party. Moreover, in order to ensure increased asset protection and facilitate the depositary's oversight function, the third party must provide the depositary with a statement, on a regular basis and when a change occurs, detailing the assets of the depositary's UCITS/AIF clients.
- *AIF's assets held in third countries* – It is proposed to amend Article 99 of the AIFMD Delegated Regulation to align it with the UCITS Directive's existing rules applicable to depositaries appointing third parties located outside of the EU, including the obligation for the depositary to obtain legal advice from independent parties confirming that the segregation of assets is recognised by the applicable insolvency laws of the third country. The depositary should also ensure that the third party complies with the segregation requirements to which it is subject and that the third party informs the depositary of any change to the

insolvency laws to which it is subject and in its effective application.

In terms of timing, the draft regulations still have to be negotiated. If the Parliament and Council have no objections, they will be adopted by the EU Commission and will enter into force on the twentieth day following their publication in the official Journal of the EU. According to the draft texts, the draft regulations will be applicable directly in all Member States, but this application will be deferred until six months after publication to allow depositaries to adapt to the new requirements.

ESMA updated Q&As on UCITS Directive
On 25 May 2018, ESMA published an updated version of its Q&As on the UCITS Directive[1], which includes one new question and answer on the application of disclosure requirements on remuneration to delegates.

In particular, ESMA clarifies that the remuneration-related disclosure requirements to be included in UCITS annual reports under Article 69(3)(a) of the UCITS Directive (i.e. including the total amount of remuneration for the financial year split into fixed and variable remuneration, the number of beneficiaries and, where relevant, the amount paid directly by the UCITS itself including any performance fee) also apply to the staff of the delegate of a UCITS management company/self-managed investment company to whom investment management functions (including risk management) have been delegated.

According to ESMA, such disclosure should be undertaker on a prorated basis for that part of the UCITS' assets which are managed by the identified staff within the delegate in one of the following two ways in accordance with paragraph 17 of ESMA guidelines on remuneration policies under the UCITS Directive:

- Where the delegate is subject to regulatory requirements on remuneration disclosure for its staff to whom investment management (including risk management) activities have been delegated that are equally as effective as those provided for under Article 69(3)(a) of the UCITS Directive, the management company/self-managed investment company should use the information disclosed by the delegate for the purposes of fulfilling its obligations under Article 69(3)(a) of the UCITS Directive.
- In other cases, appropriate contractual arrangements should be put in place with the delegate allowing the management company/self-managed investment company to receive (and disclose in the annual report for the relevant UCITS) at least information on the total amount of remuneration for the financial year, split into fixed and variable remuneration, paid by the management company/self-managed investment company to the identified staff of the delegate – as well as the number of beneficiaries, and, where relevant, the amount of the performance fee – which is linked to the delegated portfolio.

ESMA further indicates that in both situations set out above, the disclosure may be provided on an aggregate basis i.e. by means of a total amount for all the delegates of the management company/self-managed investment company in relation to the relevant UCITS.

Benchmark Regulation

ESMA updated Q&As on Benchmark Regulation
On 24 May 2018, ESMA published an updated version of its Q&As regarding the implementation of the Benchmark Regulation[2], which includes one new answer clarifying how prospectuses drawn up under the UCITS Directive and that Prospectus Directive should include a reference to ESMA's register of administrators and benchmarks (ESMA Register).

As regards UCITS' prospectuses, ESMA indicates that:

- *UCITS' prospectuses approved on or after 1 January 2018*: These prospectuses should include a reference to the fact that the administrator is listed in the ESMA Register if such register already includes the relevant administrator by the time the prospectus is published. In case the ESMA Register does not include the relevant administrator by the time the prospectus is published, such prospectus should include a statement to that effect and be updated at the first occasion once the relevant administrator is included in ESMA Register.
- *UCITS' prospectuses approved prior to 1 January 2018:* These prospectuses should be updated at the first occasion or at the latest by 1 January 2019. In

[1] ESMA 34-43-392

[2] ESMA 70-145-11

case the relevant administrator is not included in the ESMA Register by 1 January 2019, ESMA requires that these prospectuses should be updated to include a statement to that effect.

The above clarifications provided by ESMA are in line with the position applied by the CSSF in relation to the ESMA Register and benchmark administrator-related disclosure requirements to be included in UCITS' prospectuses as per the Benchmark regulation.

Money Market Funds

Technical standards on reporting to NCAs published
The EU Commission implementing regulation (EU) 2018/708 of 17 April 2018 laying down implementing technical standards (ITS) with regard to the template to be used by managers of money market funds when reporting to competent authorities (NCAs) as stipulated by Article 37 of Regulation (EU) 2017/1131 on money market funds (MMF Regulation) was published in the Official Journal on 15 May 2018.

The new implementing regulation will apply from 21 July 2018 on, which is also the date by which most of the provisions of the MMF Regulation will apply (subject for the time being to transitional provisions for existing MMFs).

For further information about the MMF Regulation, please refer to the July 2017 edition of our Legal Update.

EMIR

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

MiFID2/MiFIR

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

AMLD

Please refer to the Banking, Finance and Capital Markets section of this Luxembourg Legal Update for further details on AMLD, including more specifically the entry into force of the fifth anti-money laundering directive on 9 July 2018 MiFID2 and MiFIR.

Other Topics

ESMA one-stop information portal for MiFID, UCITS and AIFMD entities
On 7 May 2018, ESMA launched a new portal on companies, which is intended to provide investors with a one-stop shop register including the following information in relation to MiFID, UCITS and AIFMD entities:

- whether the relevant MiFID, UCITS and AIFMD entities (including more specifically MiFID investment firms, MiFID trading venues, MiFID data reporting service providers, UCITS management companies and AIFMs) are authorised by NCAs in the EU and are thus acting with the correct permissions
- the sanctions applied by NCAs in relation to the above MiFID, UCITS and AIFMD entities on the basis of the notifications made to ESMA by the relevant EU NCAs.

ESMA's one-stop information portal for MiFID, UCITS and AIFMD entities is accessible on ESMA's website.

LUXEMBOURG LEGAL AND REGULATORY DEVELOPMENTS

Law of 17 April 2018
Implementation of PRIIPs KID Regulation
The law of 17 April 2018 implementing the PRIIPs Regulation and amending the Luxembourg UCI Law was published in the Luxembourg official journal (*Mémorial A*) on 19 April 2018 and entered into force on 23 April 2018.

As a reminder, the PRIIPs Regulation entered into force on 29 December 2014 and has been applicable as from 1 January 2018. As regards Luxembourg, the main purpose of the implementing law of 17 April 2018 is to:

- Make the PRIIPs Regulation operational in Luxembourg by introducing into the Luxembourg legal framework new provisions in relation to:

  - the appointment of (i) the CSSF (for CSSF-supervised entities and other persons or entities other than entities supervised by the Luxembourg Insurance Sector Regulator, the *Commissariat aux Assurances* or CAA), and (ii) the CAA (for CAA-upervised entities only) as competent authorities to ensure compliance with the PRIIPs Regulation in Luxembourg; and

- the control and investigation powers of the CSSF and the CAA that are necessary for the exercise of their respective competences within the framework of the PRIIPs Regulation.

- Specify a set of sanctions and penalties that may be applied by the CSSF and the CAA for certain breaches of the PRIIPs Regulation, including pecuniary fines for both natural and legal persons (e.g. up to EUR 700,000 or equivalent or up to twice the amount of the profit gained or losses avoided if they can be determined for natural persons, and for legal persons up to EUR 5,000,000 or 3% of turnover or twice the amount of the profit gained or losses avoided if they can be determined).

In addition to the above, the law of 17 April 2018 also implements the national discretion option under Article 32(2) of the PRIIPs Regulation, allowing SICARs and UCIs other than UCITS to use a UCITS KIID (Key Investor Information Document) rather than a PRIIPs KID (Key Information Document) until 31 December 2019, provided that such UCITS KIID expressly mentions that the relevant SICAR/UCI does not qualify as a UCITS. Consequently, the final paragraph Article 161(1) of the UCI Law is deleted.

Please refer to the relevant section of the November 2017 edition of our Legal Update for further details about the scope of the PRIIPs Regulation and its impact on Luxembourg investment funds. Please also see our PRIIPs Topic Guide.

Law of 17 April 2018
Implementation of Benchmark Regulation
The law of 17 April 2018 implementing the Benchmark Regulation in the Luxembourg legal framework, was published in the *Mémorial A* on 19 April 2018.

As a reminder, the Benchmark Regulation entered into force on 30 June 2016, and most of its provisions became applicable as from 1 January 2018, subject to transitional provisions. The new Luxembourg implementing law provides, amongst other things, that:

- The CSSF will act as the competent authority in Luxembourg
  - for the supervision of compliance with the Benchmark Regulation by benchmark administrators, or entities listed in Article 3(1), points 17 (a) to (l) of the Benchmark Regulation
  - where Luxembourg is the reference Member State for third-country administrators
  - where an administrator as a supervised entity established in Luxembourg applies for approval of a benchmark or benchmark class provided in a third country.
- The CAA is, however, the competent authority in Luxembourg to supervise compliance with the Benchmark Regulation by insurance sector entities listed in Article 3(1), points 17 (a) to (l) of the Benchmark Regulation which are supervised by it.

For the purposes of applying the Benchmark Regulation and the new law, the law of 17 April 2018:

- confers upon the CSSF and the CAA the necessary supervisory and investigative powers for the exercise of their respective tasks within the limits defined by the Benchmark Regulation
- lays down the procedure that has to be followed by the CSSF and the CAA to carry out on-site inspections or investigations with entities that are not subject to their supervision
- defines the framework under which the CSSF and the CAA have the power to impose administrative sanctions and other administrative measures in relation to specific infringements
- establishes the procedure that the CSSF and the CAA need to follow when they publish decisions imposing an administrative sanction or other administrative measure in accordance with Article 45 of the Benchmark Regulation.

The law of 17 April 2018 entered into force on 23 April 2018, with the exception of the changes to the provisions in the Consumer Code on mortgage credit using benchmarks which entered into force on 1 July 2018.

Please refer to the relevant section of the November 2017 edition of our Legal Update for further details on the scope of the Benchmark Regulation and its impact on Luxembourg investment funds. Please also see our Benchmark Reform and Regulation Topic Guide.

Law of 6 June 2018
Implementation of SFTR
The law of 6 June 2018, which ensures the implementation of the SFTR in the Luxembourg legal framework and which also modifies the UCI Law, the AIFM Law and the

Luxembourg law of 7 December 2015 on the insurance sector, was published in the *Mémorial* A on 8 June 2018.

In particular, the law of 6 June 2018 provides for the power of (i) the CSSF for financial counterparties subject to its supervision and non-financial counterparties (in particular Luxembourg UCITS and regulated AIFs and their Luxembourg management companies and AIFMs), and (ii) the CAA for financial counterparties subject to its supervision (in particular insurance and reinsurance undertakings) to impose adequate administrative sanctions and other administrative measures, which have to be efficient, proportionate and dissuasive in case of infringement to the trade depository reporting and to the reuse of collateral requirements under Articles 4 and 15 of the SFTR.

Examples of administrative sanctions that may be applied by the CSSF/CAA on both a firm and individual basis (i.e. against the members of the management body of the relevant legal entity) include warnings, withdrawal or suspension of authorisation, limitation on responsible persons from exercising management or other functions, pecuniary fines on both natural and legal persons (of up to EUR 5,000,000 or equivalent for natural persons and, in certain cases, of up to 10% of turnover for legal persons), as well as publication of decisions in relation thereto on the CSSF and CAA websites.

The law of 6 June 2018 further amends the UCI Law and AIFM Law to include non-compliance with Articles 13 and 14 of the SFTR, which relate to the transparency requirements to be included in the prospectus and periodic reports of UCITS/AIFs, in the list of cases giving rise to the CSSF administrative sanctions against, amongst others, UCITS management companies/self-managed investment companies and AIFMs.

The law of 6 June 2018 entered into force on 12 June 2018.

For more information on the SFTR, please see our client briefing titled "The SFTR – new EU rules for securities financing transactions and collateral" and the section related to EU key developments and next steps of our Alternative Financing Topic Guide.

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

CSSF eDesk
Online issuance of residence certificates and UCITS/AIFMD attestations
On 15 May 2018, the CSSF launched "eDesk", a new online tool allowing the fund industry to submit via a dedicated internet portal requests for:

- certificates of residence for Luxembourg UCITS, Part II UCIs, SIFs, SICARs, ManCo, AIFMs and supervised securitisation vehicles
- UCITS/ESMA and AIFMD/ESMA attestations for non-EU countries only (it being understood that for EU countries, UCITS/ESMA and AIFMD/ESMA attestations will continue to be processed through the current secured channels (e-file or SOFiE)).

The new CSSF eDesk tool is available in French, English and German on the CSSF website (https://edesk.apps.cssf.lu/edesk/attestations), and its functionalities are further explained in a separate user guide.

ALFI GDPR Q&A
On 27 April 2018, ALFI published a Q&A document on the General Data Protection Regulation (GDPR), which has been applicable since 25 May 2018. This Q&A document contains the ALFI GDPR Working Group's answers to questions about EU data protection, which are written from a perspective of investment funds. It is available on ALFI's website to the members of ALFI.

ALFI/ABBL revised guidelines for depositaries of investment funds
On 17 May 2018, ALFI and ABBL issued a revised version of their guidelines and recommendations for depositaries of Luxembourg investment funds.

The aim of such update is to cover UCITS depositaries in addition to AIFs depositaries, and to improve certain sections of the initial guidelines published in July 2013 in relation to the oversight and cash monitoring duties of depositaries of Luxembourg investment funds. The revised ALFI and ABBL guidelines and recommendations for depositaries of investment funds are available on ALFI's website to members of ALFI.

TAX

INTERNATIONAL LEGISLATION

OECD adopts mandatory tax disclosure rules for advisers

OECD Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures, 9 March 2018
Following a G7 request, the OECD issued on 9 March 2018 a set of rules that require lawyers, financial advisers, accountants, banks and other service providers to inform the local tax authorities of schemes they advise under which clients avoid the obligations under the Common Reporting Standards (the "CRS") or preventing the identification of the beneficial owners of entities or trusts.

The model mandatory disclosure rules are part of a wider approach populated by the OECD. It is expected that the rules will be implemented within a short timeframe. The EU is in advanced discussions to implement the rules as part of a wider directive.

Multilateral Instrument entered into force on 1 July 2018

OECD announcement 22 March 2018
The OECD has announced that the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the "MLI") entered into force on 1 July 2018.

Following the signature ceremony of the MLI by 68 jurisdictions on 7 June 2017, the first five participating jurisdictions (i.e. Slovenia on 22 March 2018, Poland on 21 January 2018, Jersey on 15 December 2017, Isle of Man on 19 October 2017 and Austria on 22 September 2017) have provided their instrument for ratification to the OECD.

Concerning Luxembourg, the entry into force of the MLI for the covered tax agreements above will be on the first day of the month following three months after ratification by Luxembourg. In other words, if Luxembourg ratifies the MLI in September, the MLI enters into force for the treaty between Luxembourg and the above jurisdictions by 1 January 2019.

The entry into effect of the relevant provision depends on the nature of the tax. For withholding taxes, the entry into effect of the MLI will be on or after the first day of the next calendar year that begins on or after the entry into force. For all other taxes, the provisions apply to taxable periods starting on or after the expiration of six months from the date of entry into force (i.e. if the Luxembourg MLI enters into force on 1 January 2019, the provisions will be applicable as of 1 July 2019).

Mandatory Disclosure Requirements for Intermediaries and Taxpayers entered into force on 25 June 2018

Council of the European Union publishes amended DAC
On 5 June 2018, the amended directive on administrative cooperation in the filed of taxation ("DAC6") was published. DAC6 entered into force on 25 June 2018 and introduced new mandatory disclosure rules affecting taxpayers and intermediaries.

The Members States must comply with DAC6 and are required to adopt the respective provisions by 31 December 2019. The new provisions will then apply as of 1 July 2020. It will be crucial for the Member States to ensure disclosure of the relevant information on cross-border arrangements set up between the date of (a) entry into force (i.e. 25 June 2018) and (b) of application (i.e. 1 July 2020). Information on transactions in this timeframe must be reported by 31 August 2020, which requires the parties to begin the collection process as early as possible.

NATIONAL LEGISLATION

New Luxembourg IP regime becomes effective

Bill of Law N° 7163 dated 4 August 2017
The Luxembourg government voted on 22 March 2018 the new intellectual property regime ("IP regime") under Article 50ter of the Luxembourg Income Tax Law ("LITL") following the bill of law N°7163, published in August 2017.

The new IP regime has been effective as of 1 January 2018 and addresses Luxembourg resident companies, Luxembourg permanent establishments of foreign companies and individuals. Luxembourg aligns its legislation with the OECD recommendations, including the measures set out in the OECD/G20 BEPS Action 5 of

2015. As foreseen in the draft law, the new IP regime will adopt the so-called nexus approach.

The nexus approach foresees that eligible net income from IP assets can benefit from an 80% exemption from income taxes. Compared with the previous regime, the new law provides for a rather restrictive scope and concentrates on a direct connection between the eligible IP asset (e.g. patents and software), expenditures and the income that can benefit from the exemption. Such approach will likely result in a more burdensome documentation and identification process in regard to each asset.

Existing IP assets qualifying under the previous Article 50bis LITL can benefit from a transition period until 30 June 2021. For such assets, the new regime provides the taxpayer with a right to elect whether the traditional regime should remain applicable during the transition period, or whether an option for the new regime is exercised.

New Luxembourg VAT group regime

Bill of Law N°7278 dated 13 April 2018
Following several decisions of the European Court of Justice ("ECJ"), Luxembourg has abolished its current system of Independent Groups of Persons ("IGP") which until recently has been considered as a sufficient system for the insurance and financial service sector. To remain competitive, Luxembourg has introduced the a VAT Group regime to come into force on 31 July 2018. The draft law contains the following key provisions:

- Link between group members: the draft wording foresees a link between all the members of a VAT group provided that three cumulative conditions are met, i.e. the persons are (i) directly or indirectly bound by a financial link (e.g. depending on the participation, general control over group members), (ii) economically linked (e.g. depending on the activities performed) and (iii) organisationally linked. Where all of these conditions are met, transactions between the group members will be disregarded for VAT purposes. The VAT group itself will be considered as a new taxable person.
- Consultation of the VAT Committee: Members aiming at forming a VAT group must consult the VAT Committee in advance. Such requirement results from the implementation of Article 11 Directive 2006/112/EC (the "VAT Directive"). The bill of law foresees a new section (section 9, Chapter VIII) modifying the current domestic VAT law.

Draft Bill of Law to implement ATAD

Draft Bill of Law N°7318 dated 19 June 2018
The Luxembourg government issued a draft bill of law transposing the Anti-Tax Avoidance Directive EU 2016/1164 of 12 July 2016 into domestic law.

The directive targets multinational enterprises and groups engaged in cross-border transactions. In addition to the implementation of certain measures stemming from the OECDs Base Erosion and Profit Shifting ("BEPS") Action Plan, the draft bill proposes to clarify two legislative provisions: (i) the definition of a Permanent Establishment ("PE") and (ii) the concept of a tax neutral share exchange as foresee by Article 22bis Luxembourg Income Tax Law ("LITL").

The draft Bill of Law contains five major action points, namely (i) Limitation on interest deductibility, (ii) Exit Taxation, (iii) General Anti-Abuse provisions, (iv) CFC rules and (v) provisions on the prevention of hybrid mismatch arrangements.

- Interest limitation rule: as of 1 January 2019, exceeding borrowing costs will be deductible only up to the higher of 30% of the EBITDA or EUR 3,000,000. Excessive borrowing costs not deductible in a tax period can be carried forward indefinitely, whereas interest capability which cannot be used in a tax period can be carried forward for a maximum of five years. The draft bill excludes certain undertakings from the scope of the interest limitation rules, namely financial undertakings regulated by EU directives, financial institutions, insurance and reinsurance, UCITS, AIFs and securitisation entities in the sense of EU Directive 2017/2402. The definition of interest income corresponds to the directive and includes interest revenues and other economically equivalent taxable revenues.
- General Anti-Avoidance Rule ("GAAR"): the provision aims at addressing non-genuine arrangements or series of arrangements put in place for the main purpose or one of the main purposes of obtaining tax advantages, i.e. defending the object of the purpose of the applicable law. As of 1 January 2019, the abuse of law concept as foreseen in §6 of the Steueranpassungsgesetz ("StAnpG") will be replaced by the new GAAR. The new provision addresses a

broader scope of taxpayers and, since the rules will be part of the general tax law provisions, will be applicable to any type of Luxembourg taxes (except for registration duties).

- Exit taxation: The current rules will be amended, and changes will mainly concern the payment of the exit tax. The tax will be calculated as an amount equal to the fair market value of the assets subject to the transfer at the time of the exit, less the asset value for tax purposes. This should apply to the case of a transfer of:
  - assets from the head office to a PE in another Member State/third country;
  - assets from the PE to the head office or another PE in another Member State/third country;
  - tax residency to another Member State/third country;
  - a business to another Member State/third country.

  As opposed to the current provisions, the new rules impose an immediate payment of the exit tax. Based on this, Luxembourg taxation on gains arising upon the transfer of assets outside of Luxembourg – but intra EU/EEA and where Luxembourg has an agreement of tax recovery in place with the other state – may benefit from payment in instalments over a five-year period (no guarantee will be required or interest charged in case the taxpayer opts for such deferral).
- CFC rules: The draft bill opts for the *non-genuine arrangement CFC rules*. As of 1 January 2019, Luxembourg will tax not-distributed income of an entity or PE falling within the scope of Controlled Foreign Entities ("CFC") and where the non-distributed income arises from non-genuine arrangements. The Luxembourg taxpayer must hold a direct/indirect participation of more than 50% in the controlled entity and the actual tax paid by the controlled entity must be lower than the difference between the corporate tax that would have been due in Luxembourg and the actual corporate tax paid.
- Hybrid mismatch arrangements: applicable as of 1 January 2019, the new provisions address cross-border hybrid mismatches at EU level (which will be replaced by ATAD 2 as of 2020). Where a cross-border structure results in a double deduction, the deduction should be limited to the source State. Where a structure results in the deduction without inclusion, the deduction should be denied in the jurisdiction where the payer is resident (e.g. where Luxembourg is the payer residency and the distribution is not taxed in the recipient state, the deduction will be denied in Luxembourg).

The Bill of Law must undergo the legislative parliamentary process. Given the complexity of the new provisions, it is likely that certain nuances will be clarified in practice by the Luxembourg tax authorities, once the new rules are in force.

Draft Grand Ducal Regulation amending list of CRS reporting jurisdictions

Draft Grand-Ducal Regulation dated 15 June 2018
The Luxembourg tax authorities announced that there will be a new circular issued extending the list of reportable jurisdictions for purposes of reporting under the Common Reporting Standard ("CRS"). The list will include Hong Kong and Macau and remove the Bahamas. In addition, an extension of the reporting deadline until 31 August 2018 will be granted for reporting in respect of Hong Kong and Macau.

Furthermore, the list of Excluded Accounts will be repealed. This will lead to an increased burden for current Excluded Accounts since the latter will become Reportable Accounts that will have to be included in the reporting due by the Financial Institution. For the time being, the timing for the implementation is unclear and further evolution shall be monitored.

Double Taxation Treaties

Luxembourg has a total of 81 Double Taxation 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.

New Double Taxation Treaty between Luxembourg and France signed
On 20 March 2018, Luxembourg and France signed a new DTT, replacing the current treaty of 1958. The new treaty is in line with current international standards and based on the latest OECD model tax convention taking into consideration the OECD BEPS measures in regards of treaty abuse. Amongst others, the new text provides for the following amendments:

- Dividends: A full exemption from withholding tax on dividends is foreseen in the case where the recipient is a company holding a minimum of 5% interest in the capital of the distributing company for a period of 365 days. A significant amendment has been introduced for holdings in French OPCIs or SIICs. The DTT allows now a 15% maximum withholding tax rate (opposed to 5% in the previous treaty) in cases where the beneficial owner of the dividends holds directly or indirectly less than 10% in the distributing company. Where the holding exceeds the 10% participation, dividends should be subject to a full taxation (e.g. at a 30% rate in France).
- Commuter workers: The new text addresses the taxation of salaried income and pensions in regards of cross-border commuters. The text foresees that Luxembourg retains its full taxation right on salaried income paid by a Luxembourg employer to a French-resident employee where the latter exercises his or her function in a state other than Luxembourg for a period not exceeding 29 days during the complete year. Furthermore, the treaty text clarifies that the source state of statutory pensions retains the taxing right.
- UCIs: The new wording foresees a limited access to the benefit of the treaty in regards of cross-border interest and dividends. The entitlement can be claimed to the extent the income flow corresponds to the rights owned in the UCI by a resident of either Luxembourg or France.
- Principal Purpose Test: Following the signature of the Multilateral Instrument on 7 June 2017, the new treaty contains the Principle Purpose Test corresponding to the OECD Model in regards of the entitlement to treaty benefits.

Luxembourg/Jordan – Double Taxation Treaty negotiations
At meeting held in the Dead Sea region in early May 2018, officials of Luxembourg and Jordan entered into negotiations regarding the possibility of establishing a double taxation treaty between the two states.

Double Taxation Treaty between Luxembourg and Cyprus enters into force
On 21 May 2018, the Cyprus - Luxembourg Income and Capital Tax Treaty (2017) entered into force and will apply from 1 January 2019.

Luxembourg/ Vietnam double tax treaty – protocol update
On 15 June 2018, officials of Luxembourg and Vietnam have agreed to continue the work on the amending protocol updating the Luxembourg/Vietnam double tax treaty of 1996.

Double Tax Treaty between Luxembourg and Senegal enters into force
On 22 June 2018, the convention between Luxembourg and the Republic of Senegal for the avoidance of double taxation and the prevention of tax evasion with respect to taxes on income and capital, signed in Luxembourg on 10 February 2016, entered into force. The convention will be applicable as of 1 January 2019.

CIRCULARS/REGULATORY DEVELOPMENTS

New Grand-Ducal Decree amending the Luxembourg CRS Law

Luxembourg Grand-Ducal Decree N°155
Further to the Grand-Ducal regulation of 15 March 2016, which implemented article 2 §4 of the law of 18 December 2015 (the "Luxembourg CRS Law"), a new Grand-Ducal Decree has been published by the Luxembourg tax authorities. The regulation discloses the list of reportable jurisdictions for the purposes of the Common Reporting Standard reporting for the tax year 2017.

The following countries have been added to the list of Reportable Jurisdictions with which Luxembourg intends to exchange information as of 2018:

Andorra, Antigua, Aruba, Australia, Azerbaijan, Bahamas, Belize, Brazil, Brunei, Canada, Chile, China, Costa Rica, Cook Islands, Dominica, Ghana, Grenada, Indonesia, Israel, Japan, Lebanon, Malaysia, Mauritius, Monaco, New Zealand, Pakistan, Panama, Russian Federation, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Samoa, Singapore, Sint Maarten, Switzerland, Trinidad and Tobago, Turkey, Uruguay and Vanuatu.

New circular announcing measures against EU-blacklisted jurisdictions

Circular Letter L.G. – A n° 64
On 7 May 2018, the Luxembourg tax authorities issued a new circular letter providing details on defensive measures applying in relation to countries included on the EU-blacklist of non-cooperative jurisdictions.

The current EU-blacklist refers to the following jurisdictions: American Samoa, the Bahamas, Guam, Namibia, Palau, Saint Kitts and Nevis, Samoa, Trinidad and Tobago, and the US Virgin Islands.

Structure arrangements involving any of those countries will be subject to a higher audit risk and will face increased reporting and documentation obligations (e.g. preparation of income, expense, receivable and liability statements). In addition, it is likely that companies involved in such transactions will be subject to greater scrutiny.

Circular on digital currency VAT exemption released

Circular Letter N°787 dated 11 June 2018
The Luxembourg Land Registration and Estate Administration (*Direction de L'Enregistrement et des Domaines*) published a new circular on the treatment of digital currency.

The circular results from the decision of the European Court of Justice in the Hedgvist Case C-264/14 where the court decided that the exchange of traditional currency for units of the bitcoin virtual currency and vice versa, in return for payment of a sum equal to the difference between, on the one hand the price paid by the operator to purchase the currency and, on the other hand, the price at which he sells that currency to his or her clients, constitutes a supply of services for consideration and is exempt of VAT.

Based on the circular, the only purpose of digital currencies (e.g. bitcoin) is to be used as a payment method. Concurrently, virtual currency must be treated as currency which means the application of the VAT exemption for currency transactions as foreseen by the EU VAT Directive 2006/112.

EU Commission issues proposal for new single VAT system

Press release EU Commission
The EU Commission proposed clear amendments to the current Value Added Tax ("VAT") provisions aiming at creating a future fraud-proof EU VAT system and reducing administrative burden. According to the press release, the proposal will significantly impact the current VAT Directive by amending most of the provisions contained therein. The main building blocks of the proposed changes can be summarised as follows:

- One-Stop Shop for traders: For business-to-business traders, an online portal or One-Stop Shop solution is envisaged. This system should also be available for non-EU resident traders, which in principle would be required to register for VAT purposes within the EU and enable them to appoint a EU intermediary to take care of VAT on their behalf.
- Simplification of taxation: The current VAT system distinguishes between two transactions: (1) a VAT-exempt sale in the EU Member State of origin and (2) a taxed acquisition in the EU Member State of destination. The new proposal simplifies the definition of the cross-border transaction of goods as a single taxable supply. In other words, goods will be taxed in the EU Member State where the transport of the goods ends.
- Less red tape: The proposal supports the self-policing character of VAT, and will eliminate reporting obligations linked to the transitional VAT regime. In fact, invoicing shall be governed by the EU Member State of the seller.
- VAT collection by seller: In addition, the seller should be in charge of levying the VAT due on the sale of goods to a customer in another EU Member State, except for the case where the customer is a Certified Taxable Person (e.g. recognised and reliable-tax payer).

Peru participates in the Treaty on Mutual Administrative Assistance in Tax Matters

Peru deposited its instrument of accession to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. The convention will enter into force for Peru on 1 September 2018. The convention is key to implementing the Standard for Automatic Exchange of Financial Account Information in Tax Matters.

CASE LAW

Withholding Tax: EU Advocate General issues opinion on Danish withholding tax on dividends and interest

European Union Advocate General – Opinion 01 March 2018 Case C-115/16
On 1 March 2018, the European Advocate General (the "Advocate General") issued an Opinion in regards to a pending case that deals with private equity funds that have granted loans to Danish companies through intermediary Luxembourg companies.

It is concluded that a company resident in another Member State which owns the interest-bearing claim is to be regarded as the beneficial owner within the meaning of Article 1(1) of Directive 2003/49 (the " Directive"), unless it is not acting in its own name and on its own account, pursuant to a trust relationship. The Opinion states that a refinancing agreement would not *per se* be sufficient to assume the existence of such relationship.

The Advocate General states that the OECD Model Commentaries should not have a direct effect on the interpretation of the beneficial ownership notion in the sense of the Directive. In addition, the referring courts should assess the existence of abuse under EU law.

In respect of the question of whether the double taxation treaties or the domestic provisions qualify as anti-abuse provisions in light of Article 5 of the Directive, the Opinion concludes that a member state can only rely on the Directive if it has transposed the latter. However, the general principles of national law, the purpose of which is to enable actions against artificial arrangements or abuse, should be interpreted in conformity with EU law.

EU Commission closes infringement procedure against Luxembourg regarding VAT exemption for independent group of persons

Announcement EU Commission

The EU Commission announced on 17 May 2018 that the infringement procedure against Luxembourg concerning the VAT exemption of an independent group persons has been closed.

In this respect, the ECJ issued a decision in the case of Commission v. Luxembourg C-274/14 and ruled that the VAT exemption for independent group of persons as foreseen by Article 132(1)(f) of the EU VAT Directive 2006/112 is not applicable to services from an independent group of persons to its members in cases where such services are directly relevant to a member's VATable activities. Based on this development, Luxembourg has submitted a bill of law N°7278 of 13 April 2018 to the parliament for a new VAT group regime (see related comment above).

EU Commission considers that Luxembourg provided state aid

Press release EU Commission
In a press release of 20 June 2018, the EU Commission considered that Luxembourg gave state aid to Engie. The final decision in the state aid investigation in respect of tax rulings on financing transactions, granted by the Luxembourg tax authorities to Engie (former GDF Suez), states that undue advantages have been provided amounting to EUR 120,000,000.

In the light of ATAD and other anti-tax avoidance developments, the decision can be seen as indicative, since the main focus has been drawn to the arrangement subject to the investigation. The Commission found that the arrangement gave rise to the deduction of expenses in the absence of corresponding income inclusion.

The final text of the decision is awaited. It is likely that the decision will be appealed by Luxembourg to the General Court of the EU.

EMPLOYMENT LAW

The law of 8 April 2018 (the "**New Law**"), which came into force on 15 April 2018, brought substantial changes to several provisions of the Luxembourg Labour Code (the "**Labour Code**").

Clarification regarding the continuation of remuneration for employees on sick leave

In order to end a legal uncertainty that had given rise to many individual claims before the Labour Courts, the New Law sets forth the rules for calculating the allowance to be paid by the employer to an employee on sick leave.

Article L. 121-6 (3) of the Labour Code, as amended by the New Law, distinguishes between:

- employees whose work schedule up to at least the end of the month covering the sick leave is available at the time the sickness occurs ("**Category 1**");
- employees whose work schedule up to at least the end of the month covering the sick leave is not available at the time the sickness occurs ("**Category 2**"); and
- employees whose salary depends on performance (*rendement*), who are paid per assignment or whose salary is fixed as a percentage of the financial results, or subject to significant variations ("**Category 3**").

For each category, the New Law has introduced a precise definition of what "full continuation of remuneration" (*maintien intégral du salaire et des autres avantages résultant du contrat de travail*) means and specifies which remuneration elements shall be taken into account for the calculation of the allowance owed to the employee.

Category 1 employees on sick leave are to be paid as if they had worked according to their pre-established work schedule during the sick leave: they are entitled to their basic salary of the relevant month, plus all regular bonuses and supplements, as well as any increases to their basic salary to which they would have been entitled if they had worked in accordance with their pre-established work schedule.

Category 2 employees on sick leave are entitled to a daily allowance corresponding to the average daily salary of the six months preceding their sick leave. The average daily salary is calculated by multiplying the gross hourly salary (*i.e.* the gross monthly salary divided by 173 hours or divided by the regular number of hours worked each month according to the employment contract or a collective labour agreement) by the number of hours worked daily.

For Category 3 employees on sick leave, their average salary of the 12 months preceding their sick leave serves as the basis for calculating their daily allowance during the sick leave.

For Category 2 and Category 3 employees with a length of service of less than six and, respectively 12 months, the reference period taken into consideration for establishing the average daily salary is reduced to the actual period of employment.

Any definitive increase in salary resulting from the law, from a collective labour agreement or from the individual employment contract, and which occurs during the reference period or during the sick leave, must, monthly, be taken into consideration when establishing the allowance due to the employee.

For the calculation of the sickness allowance, non-periodic benefits, gratuities and performance bonuses, ancillary work-related expenses and overtime pay are, however, not taken into consideration.

Increase in the number of hours students can work under fixed-term contracts

Prior to the entry into effect of the New Law, students pursuing an academic degree listed under article L. 122-1 (3), §3 of the Labour Code were allowed to enter into fixed-term employment contracts with an employer for a maximum duration of five years, any renewal included (article L. 122-5 (3) §3 of the Labor Code), provided that the weekly average working time did not exceed 10 hours over a one-month or four-week period.

The New Law has increased the permissible weekly working time from 10 hours to 15 hours (article L. 122-1 (3), §5 of the Labor Code).

Annual paid leave

The employee is, as a matter of principle, entitled to take his or her annual paid leave altogether, meaning in one

continuous period. The annual paid leave may, however, be split, for continuity-of-service reasons or upon the employee's legitimate request.

Pursuant to the New Law, in cases where annual paid leave is split, one split fraction of the leave must correspond to at least two calendar weeks, as opposed to 12 continuous days formerly (article L. 233-8 of the Labour Code).

Resignation of the employee for serious misconduct of the employer

- The employee is entitled to compensation *in lieu* of notice and to severance pay

Pursuant to the New Law, employees who resign with immediate effect for serious misconduct of the employer and whose resignation is considered justified by the Labour Courts, are entitled to the same indemnities as employees who have been unfairly dismissed with immediate effect, namely:

- compensation *in lieu* of notice (*indemnité compensatoire de préavis*) amounting to the salary corresponding to the applicable notice period (article L. 124-6, §2 of the Labour Code);
- statutory severance pay (*indemnité de depart légale*), if the employee's length of service exceeds five years (article L. 124-7 (1) of the Labour Code).

This amendment ensues from two rulings of the Luxembourg Constitutional Court, which held that the former version of article L. 124-6 of the Labour Code was contrary to the constitutional principle of equal treatment, because employees resigning justifiably with immediate effect for serious misconduct of the employer were treated differently from employees unfairly dismissed with immediate effect.

Under the former statutory provision, the resigning employee was not entitled to compensation *in lieu* of notice or to statutory severance pay.

- The employee may apply for provisional unemployment allowances

Going forward, employees who resign with immediate effect for serious misconduct of the employer are also allowed to request the authorisation of the judge presiding at the competent Labour Court to provisionally benefit from unemployment pay, until a court decision on the merits of their resignation has been rendered (article L. 521-4 (2) 1 of the Labour Code).

Prior to the New Law, this only existed for employees who had been unfairly dismissed.

Reimbursement of unemployment allowances

- Reimbursement by the employer

Prior to the New Law, despite lack of precision in the text, case law considered that the obligation of the employer to reimburse to the Luxembourg employment fund (*Fonds pour l'emploi*) the unemployment allowances paid for those periods covered by the salaries or indemnities to be paid by the employer following the court order, was applicable to both dismissal with immediate effect and dismissal with notice.

The New Law has now introduced an article in the Labour Code addressing the situation of unfair dismissal with notice of an employee (article L. 521-4 (8) of the Labour Code), in order to implement this jurisprudential approach.

- Reimbursement by the employee

If the employee brings a legal action against his or her employer – on the grounds of dismissal with immediate effect, for gross misconduct; of a resignation, with immediate effect, justified by an act of sexual harassment; or of a resignation, with immediate effect, justified by serious reasons resulting from facts or faults of the employer – and discontinues the action through a withdrawal before the judgment is rendered, the employee must reimburse the unemployment allowances which he or she has received on a provisional basis to the *Fonds pour l'emploi* (article L. 521-4*bis* §1 of the Labor Code). This provision acknowledges the position taken by the labour courts over recent years.

- Reimbursement by the employer and the employee

If the employee brings legal action against his or her employer – on the grounds of a dismissal with immediate effect for gross misconduct; of a resignation with immediate effect justified by an act of sexual harassment; or of a resignation with immediate effect justified by serious reasons resulting from facts or faults of the employer – and if both parties discontinue the court action by entering into a settlement agreement, following the New

Law, half of the unemployment allowances received by the employee on a provisional basis must be reimbursed by the employee and the other half must be reimbursed by the employer (article L. 521-4*bis* §2 of the Labour Code). This new provision differs from the position taken by the courts, which ruled in the past that, in such a case, the employer may be condemned to the reimbursement of the unemployment allowances.

- Employees residing abroad

In cases of unfair dismissal of the employee and in cases of justified resignation by the employee, the employer will not only have to reimburse the unemployment allowances which have been awarded by the Luxembourg employment fund (*Fonds pour l'emploi*) to the employee (for resident workers), for that period covered by the salaries or indemnities to be paid by the employer following the court order, but will also have to reimburse the unemployment allowances which have been paid by the Luxembourg employment fund (*Fonds pour l'emploi*) to the relevant foreign employment services (which payment is currently limited to three months) (for commuters) (article L. 521-4 (5) of the Labour Code).

DATA PROTECTION

Guidelines of the Article 29 Working Party

The Article 29 Working Party adopted the final version of its guidelines on the topics of consent and transparency under 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**").

*On 10 April 2018, the Article 29 Working Party issued revised guidelines on consent under the GDPR.

In its guidelines, the Article 29 Working Party takes into consideration the draft of the ePrivacy Regulation, and invites companies using, *inter alia,* online marketing messages or online tracking methods (e.g. via cookies, apps or other software) to obtain the "valid" consent (as defined further in the GDPR) of their customers.

*On 11 April 2018, the Article 29 Working Party issued revised guidelines on transparency under the GDPR.

These guidelines clarify that where processing is already under way prior to 25 May 2018, a data controller should ensure transparency by revisiting all information provided to data subjects on processing of their personal data (e.g. in privacy statements/ notices etc.). Where changes or additions are made to such information, data controllers should make it clear to data subjects that these changes have been made in order to comply with the GDPR.

Guidelines of the new EDPB

With the GDPR entering into force as of 25 May 2018, the Article 29 Working Party has ceased to exist and has been replaced by the European Data Protection Board ("**EDPB**").

*After its first plenary meeting held on 25 May 2018, the EDPB issued guidelines on certification and identifying certification criteria in accordance with Articles 42 and 43 of the GDPR.

These guidelines were open for public consultation until 12 July 2018 and aim at setting clear rules in relation to certification mechanisms (i.e. it explains the scope of what can be certified, and the key concepts of the certification provisions contained in Articles 42 and 43 of the GDPR). It is further explained that these certification mechanisms may be used by companies as an "accountability tool".

*At the same time, the EDPB adopted guidelines on derogations applicable to international transfers (Art. 49 GDPR).

In these guidelines, the EDPB provides guidance for companies who export (or who have a service provider which exports) data outside the European Economic Area. The EDPB reiterates that personal data may only be transferred to third countries if the European Commission has made an "adequacy decision" or if appropriate safeguards are in place (such as EU model contracts, binding corporate rules, approved code of conduct, approved certification mechanisms). In limited circumstances, such international transfers may take place *inter alia* if the consent of data subjects has been obtained or if it is necessary for the performance of a contract or if it is necessary for the exercise or defence of legal claims.

*Moreover, also on 25 May 2018, the EDPB issued a statement on the revision of the ePrivacy Regulation and its impact on the protection of individuals with regard to the privacy and confidentiality of their communications.

The EDPB recalls that the confidentiality of all types of electronic communications must be protected. Therefore, the consent of users must be obtained systematically before processing electronic communication data.

CNPD

*On 22 May 2018, the *Commission nationale pour la protection des données* ("**CNPD**"), the national supervisory authority in Luxembourg, made available on its website a form allowing data controllers and data processors to communicate the contact details of their designated Data Protection Officer ("**DPO**") to the CNPD.

As from 25 May 2018, data controllers and data processors which have appointed a DPO (be it voluntarily or because they had to appoint one as per the GDPR) shall provide the contact details of their DPO to the CNPD. In this respect, the CNPD has answered frequently asked questions ("FAQs"), in particular "when the appointment of a DPO is obligatory" or "what are the tasks of a DPO".

The form as well as the FAQs are, so far, only available in French and German.

* On 25 May 2018, the CNPD published a statement in relation to the business-customer communications.

The aim of this statement was to remind that the Luxembourg law of 30 May 2005, laying down specific provisions for the protection of persons with regard to the processing of personal data in the electronic communications sector, as amended, continues to apply to electronic communications.

Companies are authorised, in the case of an existing relationship with their customers, to continue to use their email addresses for advertising purposes without having to request their prior consent. However, customers must have at any time the right to request to stop receiving electronic communication for marketing purposes. They must be informed of this right when the data are collected and in each advertising message. Where there is no existing relationship between a company and a customer, prior consent must be requested before sending any marketing email.

* On 29 May 2018, the CNPD launched a public consultation on its "GDPR Certified Assurance Report based Processing Activities (GDPR-CARPA)".

Under the GDPR, companies have the possibility to use "certification mechanisms" to facilitate the process of becoming compliant with the GDPR and to enable them to demonstrate to supervisory authorities and data subjects that they are compliant with the GDPR.

In Luxembourg, the CNPD has drawn up, in collaboration with representatives from the audit profession, a certification mechanism called “GDPR-CARPA”. The document stated in previous paragraph explains the general procedure of the “GDPR-CARPA” certification mechanism as well as the criteria for the certification and for the accreditation of the certification bodies in Luxembourg.

National law

As indicated in our last newsletters, a draft bill n°7184 (the "**Bill**") aimed at complementing the GDPR was issued in September 2017 by the Luxembourg government and is still pending before the Luxembourg parliament.

In March 2018, the Luxembourg government proposed amendments to the Bill, amongst which figures a proposal to amend article L.261-1 of the Luxembourg Labour Code ("**LC**") which provides for specific provisions in relation to the monitoring of employees at their work place. It should be noted that until the entry into application of the GDPR, the Luxembourg law of 2 August 2002 on data protection with regard to processing of personal data, as amended (which will be repealed once the Bill is adopted but which has already been superseded by the GDPR) (the "**Law of 2002**"), read together with Article L. 261-1 LC did, foresee a rather strict framework for the monitoring of employees at the workplace, where only five specific grounds can legitimize such processing, and which was conditional on the authorisation of the CNPD.

In May 2018, the Government proposed new amendments to the Bill in relation to article L.261-1 LC. In short, prior to any processing for monitoring purposes, employers must now inform (including a description of the purpose of the intended processing, as well as the implementation methods of the monitoring system and, where appropriate, the period or the criteria used to determine that period for which the data will be stored, as well as a formal commitment of the employer not to use the data collected for a purpose other than that explicitly foreseen in the prior information), *inter alia,* the employees concerned, as well as the Joint works council ("*comité mixte d'entreprise*") or failing that the staff delegation ("*délégation du personnel*"), or failing that again, the Labour Inspectorate (“*Inspection du Travail et des Mines*”).

It is also explicitly foreseen in the Bill that the consent of the employees will not automatically legitimize the processing for monitoring purposes, (to be noted that under the current regime, consent cannot legitimize such a processing), meaning that if consent is used as the legal basis for this processing, it must fulfil the requirements of the GDPR, i.e. be freely given, specific, informed, and distinguishable from the other matters. In addition, when the processing for monitoring purposes is carried out: (i) for the safety and health of the employees; or (ii) to control, on a temporary basis, the productivity or performance of an employee, if such processing is the only mean of determining the exact salary of the employee; or (iii) if it is carried out in the context of a flexible working hours organisation in accordance with the law, employers will need to comply, unless the processing is legally required, with the provisions of the LC concerning the compulsory implication of the staff representatives on

certain decisions taken by the employers (with a power of co-decision).

The Bill further foresees that in all cases of monitoring, the staff delegation or, failing it the employees, may request an advisory opinion of the CNPD in relation to the compliance of the envisaged monitoring within 15 days after the prior information. The CNPD will need to render its opinion within one month of the request. Such request has a suspensive effect (to be noted that there is currently a push-back on this suspensive effect where the implementation of the processing is legally required).

Finally, the employees concerned have the right to lodge a complaint with the CNPD. Such a complaint is neither a serious reason nor a legitimate ground for dismissal. This new version of article L.261-1 LC will be applicable only to the processing of personal data for the purpose of monitoring employees taking place after the adoption of the Bill and will not prejudice the processing already in place, since the suspensive effect linked to the CNPD's request for a prior opinion could seriously disrupt the functioning of the mechanisms currently in place and create significant legal uncertainty. As for the processing already in place, that should nevertheless be in compliance with the GDPR.

CJEU case-law

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

On 5 June 2018, the CJEU rendered a judgment in Case C-210/16, "Unabhängiges Landeszentrum für Datenschutz ('ULD') v Wirtschaftsakademie Schleswig-Holstein GmbH ('WA')" clarifying the data protection responsibility of an administrator of a Facebook fan page.

WA offered educational services by means of a fan page hosted on Facebook. In general, administrators of fan pages can obtain anonymous statistical information (collected by cookies) on visitors to the fan pages via a function called 'Facebook Insights'. The German regional data protection authority of the Land Schleswig-Holstein, the ULD, ordered WA to deactivate the fan page claiming that neither WA nor Facebook informed the visitors to the page that their personal data were collected by means of cookies.

WA brought an action against that decision, arguing that it was not responsible under applicable data protection law for the processing of the data by Facebook. The Administrative Court annulled the contested decision and the Higher Administrative Court dismissed the ULD's appeal against that judgment for being unfounded. It stated that WA cannot itself be regarded as responsible for the data processing within the meaning of Article 2(d) of Directive 95/46, which defines the term "controller" as a natural or legal person determining the purposes and means of the processing of personal data alone or jointly with others.

The ULD appealed to the Federal Administrative Court of Germany, which decided to request a ruling from the CJEU on whether, *inter alia,* Article 2(d) of Directive 95/46 must be interpreted as allowing an entity to be held liable in its function as administrator of a fan page on a social network because it has chosen to make use of that network to distribute the information it offers.

In its decision, the CJEU held that as Article 2(d) of Directive 95/46 defines the concept of "controller" broadly, it does not necessarily refer to a single entity and may concern several actors taking part in a processing. Although the mere use of a Facebook fan page may not generally imply being a controller or a processor, in this case WA and Facebook were seen as joint controllers, because by creating such a page WA gave Facebook the opportunity to place cookies on the devices of any person visiting its page. Additionally, by choosing different Facebook filters it defined the targeted audience. The CJEU underlined that even though the audience statistics were transmitted to WA only in anonymised form, it is not necessary, where several operators are jointly responsible for the same processing, that each of them has access to the personal data concerned.

As this understanding will give rise to severe practical concerns of future responsibilities of users creating advertisement platforms on social networks, the CJEU clarified that the existence of joint responsibility does not necessarily imply equal responsibility: as processing operators may be involved at different stages and to different degrees, the level of responsibility of each of them must be assessed with regard to all the relevant circumstances of the particular case.

Consequently, in the future, users of Facebook fan pages will have certain duties, such as to inform the data subject of any collection methods. However, they might not be overburdened with responsibilities such as managing the right of access or of deletion as long as they only obtain anonymous statistical information, and thus Facebook still has to fulfil its specific degree of responsibility.

ECHR case-law

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

On 24 April 2018, the ECHR rendered its judgment in *Benedik v. Slovenia* (app. no. 62357/14) in which it concluded that Slovenia had violated article 8 of the European Convention on Human Rights (the "**Convention**").

The Slovenian police was informed by the authorities in Switzerland that the dynamic IP address of the applicant was used in a peer-to-peer file-sharing network, which included child pornography pictures and videos. The Slovenian police asked a local Internet service provider for information about the user who had been assigned that IP address, which the service provider handed over. The Slovenian police had based its request on a national provision which allowed them to request information from an electronic communication provider about the user of a certain means of electronic communication. The police did not obtain a prior court order.

The ECHR first held that the applicant's interest in having his identity with respect to his online activity protected falls within the scope of the notion of "private life" protected under article 8 of the Convention.

The ECHR examined the legal basis on which the police based their request: a national provision which requires the operators of electronic communication networks to disclose to the police, upon request, any information on the owners or users of certain means of electronic communication. The ECHR first questioned whether said provision offered sufficient guarantees against abuse, in particular since the conditions for obtaining a court order were not specified in the national provision. The Slovenian Constitutional Court contested the need a court order claiming that the applicant had waived his privacy rights by revealing his IP address and the contents of his network communication.

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

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

AMLD 5: Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC

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

BCBS: Basel Committee on Banking Supervision

BCL: Banque Centrale du Luxembourg

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

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

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

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

CCCTB: Common Consolidated Corporate Tax Base

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

CGFS: Committee on the Global Financial System

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

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

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

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

CRA: Credit Rating Agencies

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

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

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

CRR/CRD IV Package: Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC and Regulation (EU) 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

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

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

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

NCAs: National Competent Authorities

- New Prospectus Regulation: Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/ECText with EEA relevance
- NIS Directive: Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union

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

PRIIPs KID Regulation: Regulation (EU) 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

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 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 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

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

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

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

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

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

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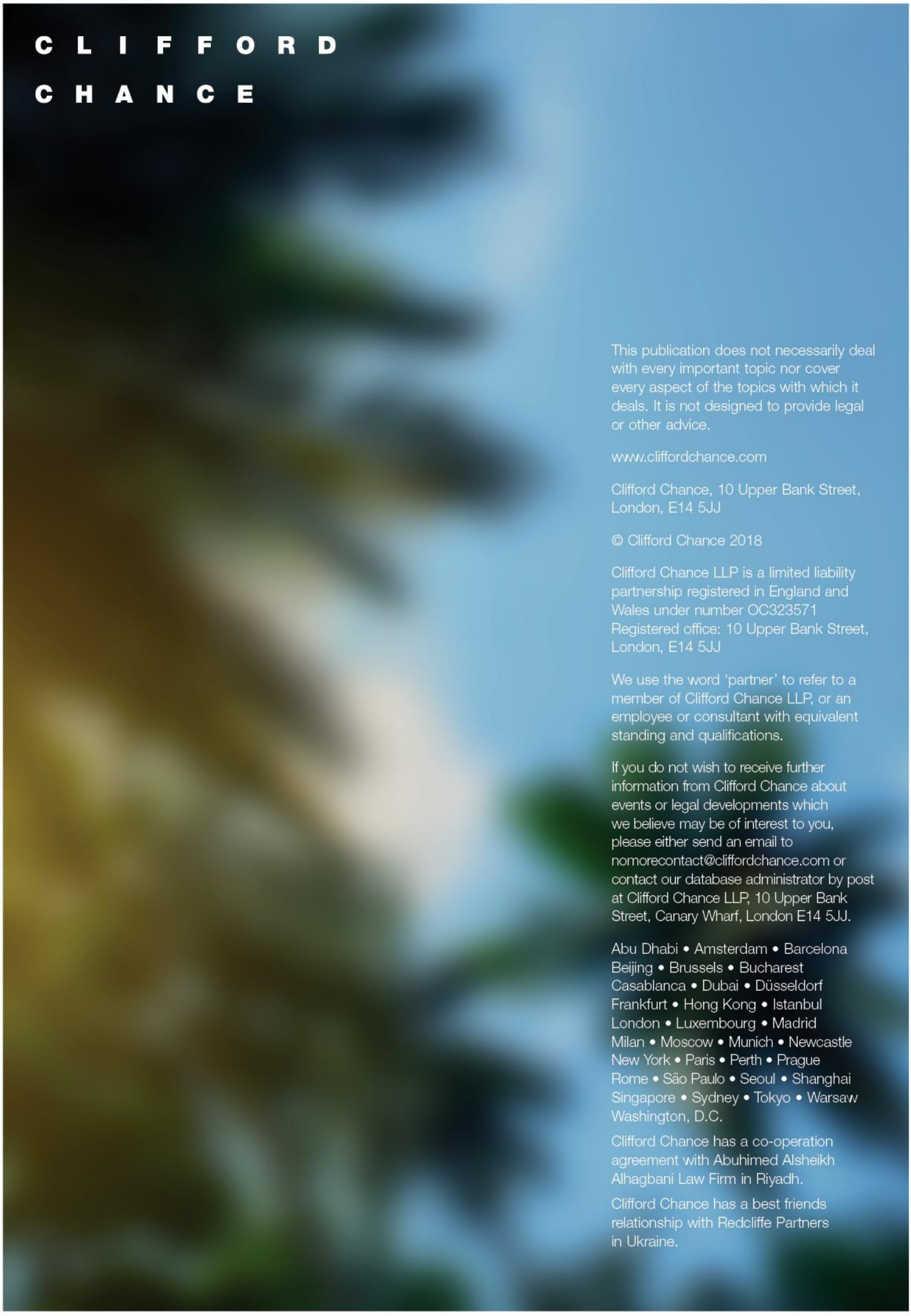

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