CLIFFORD CHANCE

MARCH 2020

LUXEMBOURG LEGAL UPDATE

Dear Reader,

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

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

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

Coronavirus: What are the legal implications?

Financial Toolkit

Fintech guide

Brexit Hub

ONLINE RESOURCES

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CORONAVIRUS: ELECTRONIC SIGNATURES: WHEN CAN THESE BE USED?

Clifford Chance client briefing[1], 19 March 2020

The precautions being put in place globally to address the spread of Coronavirus (COVID 19) include recommending or requiring many people to work from home.
This has raised the question of how to execute documents in these circumstances and whether it is possible to legally execute documents by electronic signature. The appropriate method of execution will depend on the applicable fact pattern. Relevant factors include the governing law of the document, the type of document that is to be signed, the form of electronic signature used and any cross-border implications to be considered.

The below table provides a summary of how the Luxembourg jurisdiction views three different types of execution - email execution, jpeg signatures and e-signature platforms.

Jurisdiction	Email execution	Jpeg signatures	E-signing platforms
Luxembourg	Yes	Yes	Yes
	Examples of exceptions: if a wet ink signed document is required, for example, for contracts that create or transfer rights in real estate and contracts that require by law the involvement of courts, public authorities or professions exercising public authority	Examples of exceptions • same as email execution	Examples of exceptions: - same as email execution unless the platform complies with the eIDAS QES requirements and generates a QES signature
	Additional conditions or considerations: - the parties must validly consent to this method of execution and agree to exchange the executed documents in this manner - there are no concerns regarding the evidential value as the signatories signed by hand - the documents exchanged by email are copies only and not originals. However, the hard copy documents signed by the parties are originals and could be produced if required	Additional conditions or considerations: the Civil Code requires an electronic signature to: - identify the author of the act; - demonstrate the author's adherence to the contents of the act; and - guarantee the integrity of the act It is unlikely that a jpeg signature will fulfil these conditions so it may not be recognised as a valid electronic signature for evidential purposes however, a jpeg signature will still be admissible in court	Additional conditions or considerations: - same as jpeg signatures unless the signature is a QES in which case the applicable eIDAS QES requirements must be complied with. In such case the Civil Code requirements will be satisfied and the signature will have the presumption of authenticity

[1] https://www.cliffordchance.com/briefings/2020/03/coronavirus--electronic-signatures--when-can-these-be-used--a-gl.html

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COVID-19

LUXEMBOURG INTRODUCES EXTRAORDINARY LEAVE FOR FAMILY REASONS IN RESPONSE TO CORONAVIRUS

Luxembourg has introduced several measures to deal with the outbreak of Coronavirus (Covid-19).

Clifford Chance client briefing[2], 19 March 2020

Luxembourg has introduced several measures to deal with the outbreak of Covid-19, including a new extraordinary leave for family reasons.

Originally, the Grand Ducal Regulation of 10 May 1999 ("GDR of 10 May 1999") granted in its Article 1 a standard leave for family reasons (*congé pour raisons familiales*) for children suffering from a disease or deficiency of exceptional gravity, defined as progressive cancer diseases and other pathologies resulting in acute hospitalization for a period exceeding two consecutive weeks.

Since the epidemic, two Grand Ducal Regulations were adopted to amend that GDR.

Article 1 was firstly supplemented on 13 March 20203 by a leave available in situations in which a parent can no longer go to work because he/she has to keep his/her children under 13 years of age quarantined upon the order of the competent authorities.

Another GDR of 18 March 20204, with effect as of 14 March 2020, once again supplemented the aforementioned article by a leave available in situations where a parent can no longer go to work due to an isolation, eviction or 'stay-home' measure decided against children, based on imperious public health reasons, by the competent authorities when faced with the propagation of an epidemic.

Only one parent, affiliated to the Luxembourg social security system, can take this leave when no option is available to care for his/her children.

The request has to be submitted via a specific form5 mentioning only the names and national identification numbers of the parent and his/her children. The leave can be extended if need be.

Regarding the procedure, after having informed his/her employer on his/her first day of absence, the parent must complete and forward the form to his/her employer and to the National Health Fund6. Once these conditions are met, the employer cannot refuse the requested leave. The employee is entitled to the same remuneration than the one he/she is entitled to on sickness leave, and he/she cannot be dismissed or invited to a preliminary meeting during that leave.

This leave will be available for as long as schools and day-care establishments are closed, without diminishing the available quantum of 'regular' leave for family reasons counted separately.

[2] https://www.cliffordchance.com/briefings/2020/03/luxembourg-introduces-extraordinary-leave-for-family-reasons-in-.html

[3] http://www.legilux.lu/eli/etat/leg/rgd/2020/03/12/a146/jo

[4] http://www.legilux.lu/eli/etat/leg/rgd/2020/03/18/a163/jo

[5] https://gouvernement.lu/dam-assets/documents/actualites/2020/03-mars/Certificat-de-demande-pour-CRF.pdf and https://gouvernement.lu/fr/actualites/toutes_actualites/communiques/2020/03-mars/13-formulaire-certificat-covid19.html

[6] Caisse Nationale de Santé or "CNS"

GRAND DUCAL REGULATION OF 20 MARCH 2020 INTRODUCING MEASURES REGARDING HOLDING OF MEETINGS IN COMPANIES AND OTHER LEGAL ENTITIES

Grand ducal regulation of 20 March 2020[7]

The Coronavirus (Covid-19) pandemic and the exceptional emergency safety measures render meetings in person almost impossible.

In order to ensure business continuity, the Luxembourg government has adopted on 20 March 2020 a regulation introducing temporary measures regarding the adoption of corporate approvals for Luxembourg entities8 (the "Regulation").

Under current legislation, alternatives to the holding of physical meetings exist, but are often either applicable only to certain entities or permitted only where the constitutional documents foresee these.

The Regulation validates the use of these means to take decisions remotely and extend it to all companies (including the listed entities), notwithstanding any provisions to the contrary in their articles of association. In addition, the Regulation provides for an extension of the time period to convene annual general meetings, irrespective of any contrary provisions in articles of association.

For shareholders' meetings, shareholders may, at the request of the company, participate in shareholder meetings:

- by voting at distance, in writing or in electronic format; or
- by appointing a special attorney designated by the company; or
- by video conference or any other means of telecommunication allowing the identification of participants.

Meetings of management bodies may be held by video conference or any other means of telecommunications allowing the identification of board members. Alternatively, circular resolutions may be adopted.

Shareholders or board members participating through such means will be considered present for the purposes of determining the quorum and majorities.

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

[8] Including non-profit associations and public institution (*établissement publics*)

COVID-19

COVID-19: A *FORCE MAJEURE* EVENT?

Following the outbreak of the novel coronavirus and the consequential surveillance and controls introduced by a number of governments including the Luxembourg government, it may become essential to determine whether these events may be considered as force majeure events under Luxembourg law.

Following the outbreak of the novel coronavirus, one question arising with regard to contracts is whether this outbreak and its consequences, especially also taking into account the measures taken by different governments, including amongst others confinement measures, closure of the borders, possible closure of companies, etc. - may be considered as a force majeure event. This may be envisaged from two perspectives.

Firstly, there may be a force majeure clause in a given agreement. Such a clause is normally used to describe a contractual term by which one or both of the parties is entitled to suspend performance of its affected obligations or to claim an extension of time for performance, following a specified event or events beyond its control. It may also entitle termination of the contract, usually if it exceeds a specified duration. Whether or not the outbreak of the novel coronavirus will constitute force majeure in a contract is very much a case of interpretation of the relevant wording in the contract, and such clauses would need to be analysed in detail.

Secondly, according to general Luxembourg civil law principles, a force majeure event may be raised by a party responsible of having breached its contractual obligations in order to be discharged from its liability.
According to Luxembourg case law, a force majeure event has to be (i) external to the liable party, (ii) unpredictable and (iii) irresistible.

(i) With regard to the external nature, it has been held that the origin of the force majeure event must be external to the responsible party's sphere of influence. This may be the case for the outbreak of the novel coronavirus and its consequences on the economic situation in general due to the public health situation as well as governments measures. It is however not completely clear whether events affecting the parties' health are considered as external to the parties or not. It is however possible for the parties to provide in their agreement that future health problems would be considered as force majeure events.

(ii) With regard to the unpredictable nature, Luxembourg case law has held that the force majeure event had to be unpredictable on the date on which the contract was definitely formed. For example, according to legal writing, if an illness exists on such date, it may be impossible to predict its future evolution. However, this also means that the debtor has to make sure that he avoids any predictable consequences. In a sense, this type of reasoning could be transposed to the wider consequences of the outbreak of the novel coronavirus and the date of conclusion of the contract may become important in order to evaluate whether the outbreak and/or its consequences were foreseeable at such date.

(iii) With regard to the irresistible nature of the force majeure event, Luxembourg case law is particularly demanding. The District Court has held in 2011 that, in contractual matters, the irresistible nature of the event causing force majeure consists of an impossibility of performance, which must be distinguished from a simple difficulty of performance or even from performance becoming more expensive than expected. Additionally such impossibility must be complete and permanent and not only temporary or partial (please see our Luxembourg Legal Update September 2011, p. 17).

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COVID-19

COVID-19: LUXEMBOURG TAX IMPLICATIONS FOR COMPANIES AND INDIVIDUALS

The Luxembourg tax authorities announced on 17 March 2020 specific tax measures[9] in the context of the Covid-19 crisis for both legal entities (companies and self-employed individuals) and individual taxpayers.

Measures regarding direct taxes

Luxembourg companies and self-employed individuals realizing income from either commercial, agricultural, forestry of a liberal profession and experiencing liquidity issues due the Covid-19 pandemic, can apply for:

- A waiver of the quarterly tax advances of corporate income tax (*impôt sur le revenu des collectivités*) and municipal business tax (*impôt commercial communal*). Taxpayers should file a dedicated form which is available online (*annulation avances*)[10].
- A 4-month deferral for the payment of corporate income tax (*impôt commercial communal*), municipal business tax (*impôt commercial communal*) and net worth tax (*impôt sur la fortune*) due after 29 February 2020, without interest or penalties for late payment. Taxpayers should file a dedicated form which is available online (*délai de paiement*)[11].

All eligible waiver and deferral requests will automatically be accepted upon receipt by the tax authorities for all eligible taxpayers that have advances to pay, respectively where advances are due to be paid.

Furthermore, the deadline to file the 2019 tax returns for both legal and natural persons has been extended to 30 June 2020 (including taxpayers that wish to amend the selection of their individual tax scheme).

Measures regarding VAT

The Luxembourg VAT authorities may[12] extend the deadline for submission of VAT returns and grant payment extensions. This tolerance shall apply until otherwise indicated by the VAT authorities.

Furthermore, VAT credits below EUR 10,000 shall be reimbursed as from 16 March 2020. This measure aims at supporting the liquidity needs of around 20,000 companies based in the Grand Duchy.

Luxembourg VAT authorities also asked companies to communicate with them electronically, in so far as possible.

Cross-border workers – Teleworking

On 16 March 2020, exceptional measures have been agreed between the Luxembourg, French and Belgian governments concerning teleworking and cross-border workers.

This decision will allow cross-border workers to work from their home in France or Belgium until further notice, without risking to become tax resident in these countries.

Normally, the double tax treaties of France and Belgium provide for a tolerance rule allowing French/Belgian cross-border workers to exercise their activity no more than 29 (France)/ 24 (Belgium) days outside of Luxembourg while remaining tax resident in Luxembourg. Applying the temporary measurers, this cap is lifted until further notice. The government remains in discussions with Germany to reach a similar agreement.

[9] https://impotsdirects.public.lu/fr/archive/newsletter/2020/nl17032020.html

[10] https://impotsdirects.public.lu/dam-assets/fr/formulaires/covid/annulationavances.pdf

[11] https://impotsdirects.public.lu/dam-assets/fr/formulaires/covid/delaipaiement.pdf

[12] http://www.aed.public.lu/actualites/2020/03/Covid19Toladmin/index.html

COVID-19

UPDATE OF CSSF FAQS ON SWING PRICING MECHANISM USED BY LUXEMBOURG REGULATED FUNDS IN THE CONTEXT OF COVID-19

On 20 March 2020, the Luxembourg financial sector supervisory authority ("**CSSF**") published a communication[13] and an update of its FAQs on the swing pricing mechanism[14] (as initially published in July 2019) in relation to the application and use of the swing pricing and dilution levy mechanisms by Luxembourg regulated UCITS, Part II UCIs and SIFs (together "**UCIs**") further to the questions received from industry participants in the context of the financial market developments around COVID-19.

Increase of swing factor/dilution levy by UCIs up to the maximum level laid down in the prospectus

The CSSF confirms that UCIs can increase the swing pricing factor/dilution levy up to the maximum level laid down in the relevant UCI's prospectus without prior notification to the CSSF.

Increase of swing factor/dilution levy beyond the maximum level laid down in the prospectus

The CSSF clarifies that, when the prospectus formally provides for such possibility, the management body of UCIs, or their management company (as applicable), may increase the applied swing pricing factor/dilution levy beyond the maximum percentage laid down in the relevant UCI's prospectus on a temporary basis and in accordance with the provisions of the prospectus, provided that such a decision:

(i) is duly justified;

(ii) is the result of a robust internal governance process and is based on a robust methodology (including market/transaction data based analysis) that provides for an accurate NAV which is representative of prevailing market conditions;

(iii) takes into account the best interest of the investors; and

(iv) is communicated to the relevant UCI' s current and new investors through the usual communication channels as laid down in its prospectus (such as the ordinary notice to investors, through the UCI's internet website or other ways as disclosed in the prospectus).

The CSSF further clarifies that, given the current exceptional market circumstances involved by the COVID-19, the above position is also applicable, on a temporary basis, in the case where the prospectus does not formally provide for such possibility to apply the swing pricing factor/dilution levy beyond the maximum level laid down in the prospectus. In this case, in addition to the conditions mentioned under points (i) to (iv) above, the UCI's prospectus will have to be updated at the earliest convenience in order to formally provide for such a possibility to go beyond the maximum level under certain predefined conditions.

In case of application of a higher percentage swing pricing factor/dilution levy than the one provided for in the UCIs prospectus, the CSSF has also to be provided with a detailed notification of the relevant UCI's decision to increase the applied swing factor/dilution levy beyond the maximum percentage laid down in its prospectus, including a specific explanation on the reasons for such a decision. Moreover, for a swing factor adjustment going beyond the maximum swing factor laid down in the UCI's prospectus in force, the CSSF may also ask the UCI to justify, on an ex-post basis, the level of the swing factor applied and to provide documentary evidence that such factor was at any time representative of the prevailing market conditions.

[13] http://www.cssf.lu/fileadmin/files/Publications/Communiques/Communiques_2020/C_update_FAQ_swing_price_mechanism_200320.pdf

[14] http://www.cssf.lu/fileadmin/files/Metier_OPC/FAQ/FAQ_Swing_Pricing_Mechanism_200320.pdf

Consolidated version of CSSF FAQs on swing pricing mechanism

The above clarifications by the CSSF have been consolidated in the existing CSSF FAQ[15] on swing pricing mechanism. Please also refer to the relevant section of the October 2019 issue of our Legal Update[16] for further information on the concept of swing pricing and on the conditions to be complied with by UCIs to use swing pricing according to the CSSF regulatory practice.

ALFI Covid-19 Information Board

ALFI has set-up an email address (covid-19@alfi.lu) to gather questions for authorities regarding the Covid-19 crisis and has also created a dedicated Covid-19 Information Board to the ALFI members section (read-only access for members), whereby ALFI will compile related information of relevance in an investment fund context, including a documents library and links to useful websites.

[15] http://www.cssf.lu/fileadmin/files/Metier_OPC/FAQ/FAQ_Swing_Pricing_Mechanism_230320.pdf

[16] https://www.cliffordchance.com/content/dam/cliffordchance/PDFDocuments/October%202019%20-%20Legal%20Update.pdf

FINANCIAL INSTITUTIONS

CASE LAW: ABSENCE OF BUSINESS LICENCE AND VALIDITY OF CONTRACTS

Court of Appeal, 12 June 2019

According to the law of 2 September 2011 regulating access to the professions of craftsman and merchant and industrial as well as certain liberal professions, in order to exercise such professions it is necessary to obtain a business licence (*autorisation d'établissement*).

An important question is whether contracts passed by a person exercising such a profession without having obtained a business licence are valid.

The Court of Appeal traditionally held that, even in such circumstances, the contracts entered into were neither illicit nor contrary to the Luxembourg public.[17]
The Luxembourg District Court had a stricter approach and held that the legislation regarding business licences was part of the Luxembourg economic public order, and that, for this reason, contracts entered into in violation of such legislation were void. [18]

This stricter approach has recently been confirmed by the Court of Appeal[19], which held that contracts entered into in violation of the law on business licences are contrary to the Luxembourg economic public order and therefore void.

Interestingly, in the case at hand, the person had obtained a business licence for certain of its activities, but not for all of them. The Court held that only the contracts relating to activities for which it had no licence were void.

PUBLICATION OF NEW LAW ON THE IMPLEMENTATION OF MACROPRUDENTIAL MEASURES CONCERNING RESIDENTIAL MORTGAGE CREDITS

Law of 4 December 2019[20]

A new law of 4 December 2019 amending (1) the law of 5 April 1993 on the financial sector and (2) the law of 1 April 2015 establishing a Systemic Risk Committee in order to implement macroprudential measures concerning residential mortgage credits was published in the Luxembourg official journal (*Mémorial A*) on 5 December 2019.

The new Law empowers the CSSF to take macroprudential measures concerning residential mortgage credits, in particular, by imposing certain requirements on credit institutions, insurance undertakings and professionals performing lending operations with respect to the issuance of residential mortgage credits relating to real property in Luxembourg.

Under the new law, the CSSF is entitled to use its new powers only if the evolution of the residential real estate market constitutes a risk for the stability of the national financial system. Furthermore, the CSSF may only make use of its power on the basis of a recommendation issued by the Systemic Risk Committee and after consultation with the BCL and the CAA (if the measures concern the insurance sector).

The new powers of the CSSF under the new law consist of imposing certain ratios that need to be taken into account when issuing residential mortgage credits, such as the amount of the credit in consideration of the value of the real estate object or the total disposable income of the borrower.

The law entered into force on 9 December 2019 and only applies to loans issued after its entry into force.

[17] Court of Appeal, 26 October 2006, N°29984; 4 November 2015, N°39974; 8 March 2017, N°42595; 20 December 2017, N°43426.

[18] Luxembourg District Court, 3 February 2017, N°167372.

[19] Court of Appeal, 12 June 2019, N°45067.

[20] http://data.legilux.public.lu/file/eli-etat-leg-loi-2019-12-04-a811-jo-fr-pdf.pdf

LUXEMBOURG LAW CONCERNING THE OFFICE DU DUCROIRE LUXEMBOURG (LUXEMBOURG EXPORT CREDIT AGENCY)

Law of 4 December 2019[21]

A new law of 4 December 2019 concerning the Luxembourg Export Credit Agency, Office du Ducroire Luxembourg ("ODL"), was published in the Luxembourg official journal (*Mémorial A*) on 13 December 2019.
The law abolishes and replaces the law of 24 July 1995 concerning the ODL.

The law responds to the increasing demand for new products by enlarging the scope of activities of the ODL. For instance, under the law, the ODL is able to offer specific insurance products covering risks related to export and import activities, which, in turn, facilitates access to financing for enterprises pursuing such activities. The ODL may further provide financial support to export and import enterprises or to their commercial partners. For the purposes of the above activities, the law creates dedicated funds for, among others, insurance and financial support to the export.

The law further introduces an internal governance structure with a board of directors, a management, and own staff. While the board of directors holds the main decision-making powers, the management is in charge of the day-to-day business of the ODL. The board of directors also has the power to create expert committees (e.g., credit committee, legal committee) which will advise the other bodies of the ODL on technical questions. Moreover, the law formally creates the COPEL Committee (*Comité pour la Promotion des Exportations Luxembourgeoises or Committee for the Promotion of Luxembourg Exports*) as a decision-making body.

Finally, the law further foresees a capital increase of the ODL.

The law entered into force on 1 January 2020.

AMENDMENT TO THE GRAND DUCAL REGULATION REGARDING THE FEES TO BE LEVIED BY THE CSSF

Grand Ducal Regulation of 26 October 2019[22]

A new Grand Ducal Regulation of 26 October 2019 amending the Grand Ducal Regulation of 21 December 2017 regarding the fees to be levied by the CSSF was published in the Luxembourg official journal (*Mémorial A*) on 29 October 2019.

The new regulation introduces references to the Prospectus Regulation (EU) 2017/1129 and to the Commission Delegated Regulation (EU) 2019/980 supplementing the Prospectus Regulation and amends the fees applicable to various tasks carried out by the CSSF in relation to documents to be provided by prospective issuers, such as the Universal Registration Document or the summary of the registration document.

The new regulation entered into force on 2 November 2019.

[21] http://data.legilux.public.lu/file/eli-etat-leg-loi-2019-12-04-a839-jo-fr-pdf.pdf

[22] http://legilux.public.lu/eli/etat/leg/rgd/2017/12/21/a1121/jo

Financial Institutions

CSSF PRESS RELEASE IN THE CONTEXT OF BREXIT

CSSF Press Release of 31 January 2020[23]

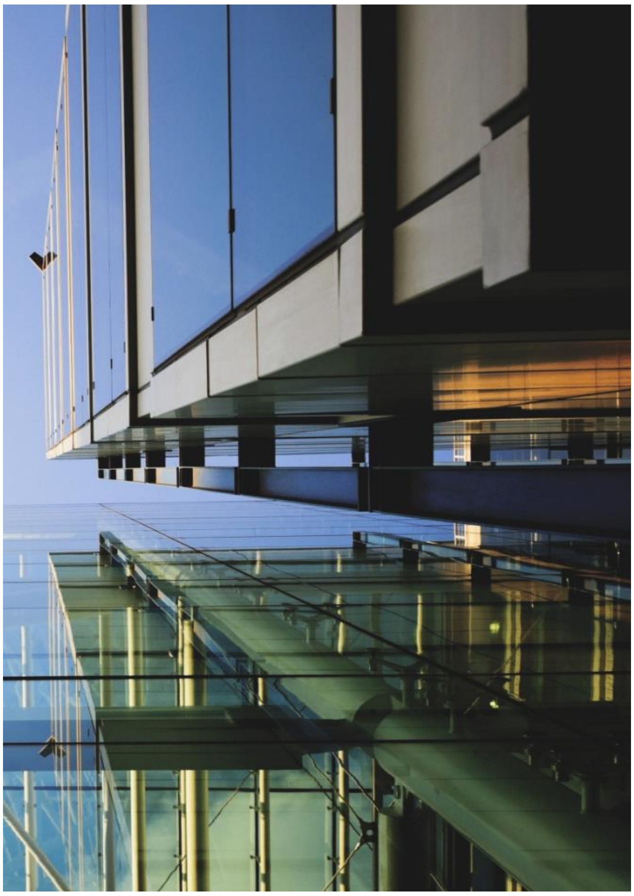
On 31 January 2020, the CSST issued a press release following up on its previous Brexit communications regarding the transitional regime under the laws of 8 April 2019 ("Brexit Laws"), as well as on the mandatory notifications through the CSSF's eDesk portals.

The press release refers to the formal adoption of the agreement on the withdrawal of the UK from the EU by the Council of the EU on 30 January 2020, which foresees a transitional period until 31 December 2020, whereby EU laws and regulations continue to apply in the UK and UK entities would be able to continue operating in Luxembourg on the basis of their passporting rights during such transitional period, following the departure of the UK from the EU on 31 January 2020 at midnight (Brussels time).

Consequently, the previous CSSF communications on the transitional regimes under the Brexit Laws, which were applicable only in the event of the UK leaving the EU without a withdrawal agreement, are no longer relevant.
In this context, the CSSF informs concerned entities that the individual decisions taken by the CSSF and granting the 12-month transitional regime under the Brexit Laws to UK entities and all notifications made through the dedicated eDesk portals are lapsing, and the e-Desk portals are closed with immediate effect.

The CSSF stresses that the impacted entities should continue taking all necessary steps to prepare and anticipate the end of the transitional period foreseen in the withdrawal agreement. Continued progress should also be made on contingency planning, notably to ensure that customers and investors are adequately informed of any steps taken in order to mitigate potential "cliff-edge" issues after the end of such transitional period.

Finally, the CSSF announces the continuation of communication on Brexit-related issues via press releases in the course of the transitional period, as necessary.



http://www.cssf.lu/fileadmin/files/Publications/Communiques/Communiques_2020/PR2003_Brexit_310120.pdf

INSURANCE

IORP2 DIRECTIVE IMPLEMENTATION PACKAGE PUBLISHED

A new law of 15 December 2019 implementing the IORP2 Directive was published in the Luxembourg official journal (*Mémorial A*) on 19 December 2019.

Law of 15 December 2019[24]

The law amends (i) the law of 13 July 2005 on institutions for occupational retirement provision in the form of pension savings companies with variable capital (SEPCAVs) and pension savings associations (ASSEPs) which are licensed and supervised by the Luxembourg financial sector supervisory authority ("**CSSF**") and (ii) the Insurance Sector Law (by, among others, introducing a new Title II bis (Pension Funds) therein) for pension funds licensed and supervised by CAA. Finally, the law also amends (iii) the law of 13 July 2005 concerning the activities and supervision of IORP in order to adapt it to the requirements under the IORP2 Directive.

The law intends to reinforce the legal framework for IORP, to foster the internal market for IORP regimes, and to encourage cross-border activities in this area. For instance, a new procedure for the cross-border transfer of pension scheme portfolios is put in place.

The law further amends the Luxembourg IORP framework by introducing additional requirements, including, among others: (i) specific internal governance obligations, such as a risk-based governance system with internal risk assessment procedures for long- and short-term risks, and other risks which could have an impact on the IORP's capacity to honour its obligations; (ii) an obligation to communicate to its affiliated members and beneficiaries clear and useful information, allowing the latter to take well-informed decisions; and (iii) detailed rules and requirements with respect to margin of solvability and outsourcing.

Finally, the law provides to the supervisors, namely the CSSF, the CAA and the General Social Security Inspection (*Inspection Générale de la Sécurité Sociale*), the necessary powers to fulfil their IORP supervisory functions in a more efficient way.

In addition to the law, a Grand Ducal Regulation of 15 December 2019 was published in the Luxembourg official journal (*Mémorial A*) on 19 December 2019. The regulation abolishes the Grand Ducal Regulation of 31 August 2000 which sets out the implementing rules and requirements in relation to pension funds supervised by the CAA.

The law and the regulation entered into force on 23 December 2019.

[24] http://data.legilux.public.lu/file/eli-etat-leg-loi-2019-12-15-a859-jo-fr-pdf.pdf

CAA CIRCULAR LETTER ON THE PUBLICATION OF THE FORM INTENDED TO PROVE PROFESSIONAL CIVIL LIABILITY COVER OF (RE)INSURANCE BROKER FIRMS AND BROKERS

CAA Circular Letter 19/17 of 22 October 2019[25]

On 22 October 2019, the CAA issued circular letter 19/17 concerning the online publication of the form intended to prove professional civil liability cover of insurance or reinsurance broker firms and brokers as from 1 January 2020.

In the context of the IDD, CAA Regulation 19/01 of 26 February 2019 introduced the obligation for insurance and reinsurance broker firms and brokers to submit to the CAA on an annual basis (before 31 January of the relevant year of cover) a duly completed declaration of professional liability insurance cover signed by the insurance undertaking granting cover.

The circular informs its addressees that the form for such declaration has been published on the CAA's website and is also attached to the circular. The new declaration form replaces the insurance certificates that previously had to be provided to the CAA.

PUBLICATION OF CAA REPORTING CALENDARS FOR 2020 AND NAMING CONVENTIONS DOCUMENT FOR CAA REPORTING

CAA Reporting Calendars for 2020

On 22 November 2019, the CAA published reporting calendars[26] for the year 2020 for (i) life and non-life insurance undertakings; (ii) reinsurance undertakings; (iii) pension funds (that are under CAA supervision); and (iv) professionals in the insurance sector.

The reporting calendars list the deadlines for submission of certain reports that apply to all entities of the relevant category.

On 22 November 2019, the CAA also published in this context a document on naming conventions for reporting to the CAA.

MAXIMUM TECHNICAL INTEREST RATES APPLICABLE TO NEW LIFE INSURANCE CONTRACTS

CAA Circular Letter 19/19 of 22 December 2019[27]

On 2 December 2019, the CAA issued circular letter 19/19 on maximum technical interest rates applicable for new life insurance contracts.

The circular redefines the most common maximum technical interest rates that may be used for calculating the technical provisions for new life insurance contracts applicable as of 1 January 2020.

[25] http://www.caa.lu/uploads/documents/files/LC_19-17_EN_.pdf

[26] http://www.caa.lu/uploads/documents/files/Calendrier_Reportings_CAA_2020_A.pdf

[27] http://www.caa.lu/uploads/documents/files/LC19-19_taux_techniques_janvier_2020.pdf

FINTECH

CSSF PRESS RELEASE ON VIRTUAL ASSETS AND VIRTUAL ASSET SERVICE PROVIDERS

CSSF Press Release of 15 January 2020[28]

On 15 January 2020, the CSSF issued a press release on virtual assets and virtual asset service providers ("VASP"). The purpose of the press release is to draw the attention of entities (including those in the financial sector) to the adoption of recent FATF documents in the area of virtual assets and VASP as well as to the Luxembourg bills of law n° 7467 and n° 7512 currently pending in the legislative procedure. Both bills aim to introduce certain amendments to the AML Law in relation to virtual assets of VASP.

In particular, bill n°7467, which will implement Directive 2018/843/EU (AMLD5) into the Luxembourg legal framework and align it with further FATF requirements, proposes, among other things, to extend the scope of the AML Law so as to include VASP. These are defined in the bill as entities conducting one or more of the following activities or operations in the name of a customer or on its own behalf:

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

Bill n° 7512 will introduce a new framework for AML/CTF supervision of VASP active in Luxembourg.

Consequently, the CSSF urges concerned entities to start preparations for compliance with the new framework as soon as possible.

[28] http://www.cssf.lu/fileadmin/files/Publications/Communiques/Communiques_2020/C_INR15_FATF_150120.pdf

SIGNATURE OF A COOPERATION AGREEMENT ON FINTECH WITH THE DUBAI INTERNATIONAL FINANCIAL CENTRE

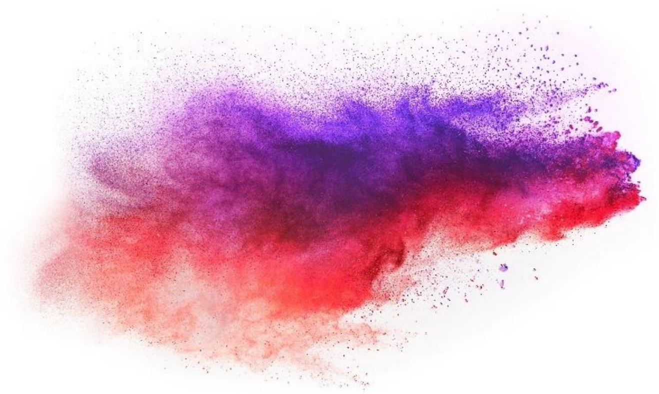
CSSF Press Release of 19 December 2019[29]

On 19 December 2019, the CSSF issued a press release regarding the signature by it of a cooperation agreement on Fintech with Dubai Financial Services Authority (DFSA) of the Dubai International Financial Centre as part of the CSSF's development of its relationships with international regulators.

The cooperation agreement provides a framework for cooperation and referrals between each authority and sets out a mechanism which will enable the authorities to refer innovative businesses between their respective innovation functions and provide them with regulatory support.

The cooperation agreement further allows both authorities to exchange information about innovations in financial services in their respective markets in order to share knowledge and experiences.

The new agreement with the DFSA follows the signature by the CSSF of memorandums of understanding on Fintech with Australian and Abu Dhabian counterparts in 2018.



[29] http://www.cssf.lu/fileadmin/files/Publications/Communiques/Communiques_2019/PR1962_Luxembourg_Dubai_Fintech_MoU_191219.pdf

NEW CSSF TEMPLATES FOR IT OUTSOURCING NOTIFICATIONS AND AUTHORISATION REQUESTS

CSSF Press Release of 16 December 2019[30]

On 16 December 2019, the CSSF issued a press release regarding new and modified templates in relation to authorisation requests and notifications for IT outsourcing.

The CSSF informs supervised institutions of the release of a new form to be used in the event of an authorisation request for IT outsourcing of "critical or important functions" (in the sense of the EBA Guidelines on outsourcing arrangements (EBA/GL/2019/02)) under circular CSSF 12/552 (for credit institutions and investment firms) or under circular CSSF 17/656 (for electronic money institutions, payment institutions and other professionals of the financial sector other than investment firms).

Furthermore, the CSSF draws the attention of the supervised institutions to the fact that "Form A"[31], to be used in the case of cloud computing outsourcing for a prior notification to be transmitted to the competent authority where a cloud computing infrastructure will be used for a material activity and provided by an institution authorised under Articles 29-3 (primary IT systems operators of the financial sector) and 29-4 (secondary IT systems and communication networks operators of the financial sector) of Financial Sector Law, has been updated.

Finally, the FAQ on the assessment of IT outsourcing materiality have been updated at the same time.

SCA REQUIREMENTS FOR E-COMMERCE CARD PAYMENT TRANSACTIONS

CSSF Press Release of 6 December 2019[32]

On 6 December 2019, the CSSF issued a press release regarding compliance with the strong customer authentication ("SCA") requirements of Commission Regulation (EU) No 2018/389 (the "Regulation") for e-commerce card payment transactions.

The press release makes reference to the CSSF press release of 30 August 2019, by which the CSSF announced that it had made use of the flexibility offered by the EBA at European Union level concerning the implementation by payment service providers ("PSPs") of the SCA beyond 14 September 2019 for e-commerce card payments transactions.

The CSSF informs these PSPs that they are expected to gradually implement the SCA requirements in order to be fully compliant with the SCA requirements for e-commerce card payments transactions under the Regulation by 31 December 2020 at the latest.

The CSSF will start the expected actions foreseen by the new timetable proposed by the EBA and it will regularly monitor the state of preparation of the Luxembourg market and the progress made to ensure that this new deadline is met.

Finally, the CSSF reminds the PSPs that the liability regime provided for in Article 74 of PSD2 applies without delay, i.e. issuing and acquiring PSPs are responsible for payment transactions and it is therefore in their own interest to migrate to solutions and approaches that comply with SCA requirements in an expedited way.

30 http://www.cssf.lu/fileadmin/files/Publications/Communiques/Communiques_2019/C_new_and_modified_templates_for_authorisation_requests_and_notifications_for_IT_outsourcing_161219.pdf

31 http://www.cssf.lu/fileadmin/files/Systemes d informations/Forms A. docx

32 http://www.cssf.lu/fileadmin/files/Publications/Communiques/Communiques_2019/C_SCA_e-commerce_061219_en.pdf

ESG FOCUS

REGULATION ON SUSTAINABILITY-RELATED DISCLOSURES IN THE FINANCIAL SECTOR

Regulation 2019/2088 of 27 November 2019

Regulation 2019/2088 on sustainability-related disclosures in the financial services sector (Disclosure Regulation) of 27 November 2019, which is part of the EU Commission's action plan adopted in March 2018 for financing sustainable growth, has been published in the Official Journal on 9 December 2019 and entered into force on 29 December 2019.

Main Objective and Scope

The main objective of the Disclosure Regulation is to address the concern that disclosures in the asset management, insurance and pension sectors can be unsystematic and fail to ensure effective comparability between different financial products in different Member States with respect to their environmental, social and governance risks and sustainable investment objectives, which make it difficult and costly for end-investors to make informed investment choices and may also create obstacles to the smooth functioning of the internal market.

Therefore, financial market participants (including, but not limited to, UCITS management companies/self-managed UCITS, AIFMs, and credit institutions/investment firms providing portfolio management services) and financial advisers (including, but not limited to, credit institutions/investment firms providing investment advisory services as well as UCITS management companies and AIFMs providing investment advisory services under the so-called 'top-up MiFID licence') are explicitly required by the Disclosure Regulation to: (i) integrate sustainability risks in their investment decision-making and/or investment advisory processes; (ii) consider the adverse sustainability impacts of their processes on sustainability factors; and (ii) insert information in their remuneration policies on how these policies are consistent with the integration of sustainability risks.

The Disclosure Regulation also increases transparency towards existing and potential end-investors of financial products offered/advised (including, but not limited to, UCITS, AIFs, PEEPs and pension products), by imposing requirements on financial market participants and financial advisers to disclose certain specific sustainability-related information, including, amongst others, the disclosure of:

- Information on the financial market participant's/financial adviser's website in relation to the integration of sustainability risks in its investment/advisory decisions and on the principal adverse impacts of such decisions on sustainability factors, which information will also comprise a statement on its due diligence policies in this respect, implying that these policies must be implemented, unless the relevant entity does not consider the adverse impacts of its investment/advisory decisions or has fewer than 500 employees (for itself or at group level), in which case it must disclose the reasons why it does not consider such adverse impacts and if and when it intends to consider them.

- Information in the precontractual documentation of the financial products offered/advised (i.e. the prospectus or provision of information document for UCITS/AIFs and other marketing materials, as the case may be) and, where applicable, in the annual/periodic reports of these financial products, regarding, as applicable, the manner in which sustainability risks are integrated into investment/advisory decisions, the results of the assessment of the likely impacts of sustainability risks on the returns of the financial products offered/advised, and how such financial products consider principal adverse impacts on sustainability factors. Again, if no sustainability risks are deemed relevant, a clear and concise explanation of the reasons therefore will also have to be included in the precontractual documentation.

- Additional sustainability-related disclosure requirements are imposed on financial market participants and financial advisers offering/advising financial products that promote environmental and/or social characteristics and/or have sustainable investments as their objective (ESG products).

Timing

The Disclosure Regulation will apply as from 10 March 2021, expect for (i) the annual/periodic report disclosure obligations in relation to ESG products (which applies as from 1 January 2022), and (ii) certain pre-contractual/periodic report disclosure obligations concerning the adverse sustainability impacts at financial product level (which applies as from 30 December 2022). For more information and resources in relation to the above, see our Clifford Chance Green and Sustainable Finance Topic Guide. Please also note that, in Luxembourg, ALFI published a guidance document in January 2020 for the attention of its members in order to clarify how the sustainability-related requirements imposed by the Disclosure Regulation may have an impact on, and have to be complied with by, asset managers of Luxembourg UCITS and AIFs.

AMENDMENTS TO BENCHMARKS REGULATION INTRODUCING LOW CARBON BENCHMARKS AND SUSTAINABILITY-RELATED DISCLOSURE AND EXTENDING TRANSITIONAL PROVISIONS FOR CRITICAL AND THIRD COUNTRY BENCHMARKS

Regulation 2019/2089[33] of 27 November 2019 and CSSF Communication of 24 December 2019[34]

Regulation 2019/2089 amending the Benchmarks Regulation with regard to EU climate transition benchmarks, EU Paris-aligned benchmarks and sustainability-related disclosures for benchmarks has been published in the Official Journal on 9 December 2019 and entered into force on 10 December 2019.

In addition to the creation of two new 'low carbon benchmarks' and sustainability-related disclosures for benchmark administrators, Regulation 2019/2089 also extends the transitional period for critical and third country benchmarks until 31 December 2021, as further explained below.

Regulation 2019/2089 establishes a new regulatory framework for low carbon benchmarks used to reference or measure the performance of investment portfolios by creating the following two new distinct low carbon labels for benchmarks:

- the EU Paris-aligned Benchmark for indices the underlying assets of which are selected, weighted or excluded in such a manner that the resulting benchmark portfolio's carbon emissions are aligned with the long-term global warming target of the Paris Climate Agreement approved by the Union on 5 October 2016
- the EU Climate Transition Benchmark for the indices the underlying assets of which are selected, weighted or excluded in such a manner that the resulting

[33] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R2089&from=EN

[34] http://www.cssf.lu/fileadmin/files/Publications/Communiques/Communiques_2019/C_regulation_EU_2016_1011_indices_used_as_benchmarks_241219.pdf

benchmark portfolio is on a decarbonisation trajectory by December 2022, but do not satisfy the higher Paris Agreement target.

These two new categories of benchmarks are voluntary labels designed to orient the choice of investors who wish to adopt a climate-conscious investment strategy.

In order to ensure that the labels "EU Climate Transition Benchmark" and "EU Paris-aligned Benchmark" are reliable and easily recognisable for investors across the EU, only benchmark administrators that comply with the requirements laid down in Regulation 2019/2089 will be eligible to use these labels when marketing those benchmarks in the EU. In this respect, Regulation 2019/2089 grants a transitional compliance period until 30 April 2020 in favour of benchmark administrators providing EU Climate Transition and EU Paris-aligned Benchmarks. It also encourages administrators located in the EU, which provide significant benchmarks determined on the basis of the value of one or more underlying assets or prices, to endeavour to market one or more EU Climate Transition benchmarks by 1 January 2022.

Regulation 2019/2089 also requires that administrators of all benchmarks or families of benchmarks (except for interest rate and currency benchmarks and subject to an opt-out for those benchmarks which are not pursuing ESG objectives) comply with certain sustainability-related disclosure requirements, including:

- ESG disclosures in relation to the benchmark methodology (which has to be used and developed by administrators under Article 13 of the Benchmarks Regulation) requiring that administrators also publish or make available, by 30 April 2020, an explanation of how the key elements of that benchmark methodology reflect ESG factors.
- ESG disclosures in the benchmark statement (which has to be published by administrators under Article 27 of the Benchmarks Regulation within two weeks of their registration in the ESMA register of administrators of benchmarks) requiring that administrators include in that benchmark statement, by 30 April 2020, an explanation of how ESG factors are reflected in each benchmark
- Paris alignment disclosures in the benchmark statement, requiring that administrators also include in that benchmark statement, by 31 December 2021, an explanation of how their methodology is aligned with the target of carbon emission reductions or the objective of the Paris Climate Agreement.

Extension of transitional period for critical and third country benchmarks:

The Benchmarks Regulation, which for most of its provisions has applied since 1 January 2018, also contained a transitional period according to which an index provider providing a benchmark on 30 June 2016 should apply for authorisation or registration by NCAs by 1 January 2020.

Regulation 2019/2089 grants an extension of this transitional period from 1 January 2020 to 31 December 2021 in favour of:

- non-compliant EU critical benchmarks (which are benchmarks designated as such by the EU Commission such as EURIBOR and LIBOR), which means that EU administrators of critical benchmarks benefit from two additional years to comply with the Benchmarks Regulation, and that EU supervised entities (which includes self-managed UCITS, UCITS management companies and AIFMs) are allowed to continue using these critical benchmarks until 31 December 2021 even where such benchmarks are not fully compliant with the Benchmarks Regulation
- non-compliant third country benchmarks, which means that non-EU administrators also benefit from two additional years to qualify the non-EU benchmark for use in the EU under the third country regime, and that EU supervised entities (which includes self-managed UCITS, UCITS management companies and AIFMs)

are also allowed to continue using these non-compliant third country benchmarks until 31 December 2021. For the sake of completeness, the use of non-compliant third country benchmarks by supervised entities after 31 December 2021 will be allowed only for such financial instruments, financial contracts and measurements of the performance of an investment fund that already references the benchmark in the EU or add reference to such benchmark prior to 31 December 2021.

Luxembourg reminder by the CSSF:

It is also worth mentioning that, in Luxembourg, the CSSF published a communication on the Benchmarks Regulation on 24 December 2019, which is addressed to entities subject to its supervision and which are using benchmarks (including self-managed UCITS, UCITS management companies and AIFMs (Concerned Entities)) in order to remind these entities:

- that the transitional provisions provided for by the Benchmarks Regulation have been extended until 31 December 2021 with respect to the use of benchmarks provided by third country administrators and benchmarks which have been declared as critical by the EU Commission

- that concerned Entities must comply, as the case may be, with the prospectus disclosure and/or written contingency plans requirements as provided for by the Benchmarks Regulation, including the necessary update of the contingency plans regarding LIBOR and EONIA that will cease to be provided as benchmarks at the end of 2021/beginning of 2022

- of the permitted uses of benchmarks (in the form of a summary bullet point list) under the Benchmarks Regulation by Concerned Entities as from 1 January 2020 and the conditions and transitional period applicable thereto.

ASSET MANAGEMENT

EU COVERED BOND REFORM AMENDING UCITS 'COMPLIANT COVERED BOND' DEFINITION

Directive 2019/2162 and Regulation 2019/2160 of 27 November 2019[35]

Directive 2019/2162 of 27 November 2019 on the issue of covered bonds and covered bond public supervision and amending the UCITS Directive and the BRRD has been published in the Official Journal on 18 December 2019. Alongside this, Regulation 2019/2160 of 27 November 2019 amending the CRR as regards exposures in the form of covered bonds has also been published in the Official Journal on the same date.

Directive 2019/2162 and Regulation 2019/2160 have both entered into force on 7 January 2020. Regulation 2019/2160 will apply as from 8 July 2022, whilst Member States have to transpose Directive 2019/2162 by 8 July 2021 and apply its provisions as from 8 July 2022 as well (subject to certain transitional provisions).

Background

Covered bonds are financial instruments that are generally issued by banks to fund the economy. They are backed by a separate pool of assets and offer a so-called "double-recourse protection" to the investors/bondholders in the case of failure or default of the issuer, consisting in a direct and preferential claim against the high-quality assets of the covered pool and an ordinary claim against the issuer's remaining assets if the assets of the covered pool fail to generate sufficient cash flows for the repayment of investors/bondholders.

Overall, the treatment of covered bonds has generally been considered to be harmonised at EU regulatory level regarding the conditions for investing in covered bonds, which conditions have been addressed, among others, as follows under the UCITS Directive, the CRR and the BRRD:

- Article 52(4) of the UCITS Directive provides for the so-called "single issuer limit" that can be raised by Member States from 5% to 25% for UCITS (and from 10% to 25% for Luxembourg UCITS under Article 43(4) of the UCI Law) investing in so-called "UCITS-compliant covered bonds" issued by a single entity.

  Article 52(4) specifies the minimum requirements for UCITS-compliant covered bonds as the basis for easing of prudential investment limits, including the obligation for these covered bonds (i) to be issued by a EU credit institution subject to a special public supervision designed to protect the bondholders, and (ii) to be governed by special legal requirements, including, in particular, the dual recourse mechanism according to which the cover asset pool must provide sufficient collateral to cover the bondholders' claims throughout the whole term of the covered bond and the priority claim of bondholders on the cover asset pool in the event of default of the issuing credit institution.

  Article 52(4) also obliges Member States to send to ESMA and the EU Commission a list of UCITS-compliant covered bonds that meet the above criteria together with the categories of issuers authorised to issue such bonds.

- Article 129 of the CRR cross-refers to the UCITS-compliant covered bond definition and also adds further conditions to those referred to in Article 52(4) of the UCITS Directive for obtaining preferential treatment as regards regulatory capital requirements of credit institutions in respect of debt securities held on their books, risk-weighted according to the type of issuer and obligation. Those credit institutions investing in covered bonds qualifying under Article 129 of CRR are allowed to hold lower levels of regulatory capital in relation to these instruments as compared to other debt.

- Article 44(2) of the BRRD exempts UCITS-compliant covered bonds from the scope of the bail-in tool, under specific conditions.

Purpose of Directive 2019/2162 and Regulation 2019/2160

Notwithstanding the above, there have been some differences between national frameworks, or the absence of such a framework, regarding the conditions for the issue of covered bonds, their structural features, their public

[35] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L2162&from=EN

supervision and the publication/labelling requirements applicable in relation thereto, which differences could, among others, create obstacles to the development of a truly integrated single market for covered bonds and also create risks to financial stability because covered bonds with different levels of investor protection can be purchased across the EU.

Therefore, Directive 2019/2162 and Regulation 2019/2160 aim to establish common definitions and standards for covered bonds in order to address the above concerns.

In particular, Directive 2019/2162 provides for:

- a common definition of covered bond, which is defined as a debt obligation that is issued by a credit institution in accordance with the provisions of national law transposing the mandatory requirements of Directive 2019/2162 and that is secured by cover assets to which covered bond investors have direct recourse as preferred creditors

- the mandatory structural features of covered bonds, such as the dual recourse, quality of the assets backing the covered bond, liquidity, segregation and transparency requirements, etc.

- the tasks and responsibilities for the public supervision of covered bonds
- the rules allowing the use of the 'European Covered Bonds' label

- the transitional measures to ensure, among others, that covered bonds issued before 8 July 2022 and that comply with the conditions of Article 52(4) of the UCITS Directive are not affected and can continue to be referred to as covered bonds without being required to comply with all the new requirements of Directive 2019/2162 until their maturity

- amendments to Article 52(4) of the UCITS Directive as a consequence of laying down a uniform framework and a common definition for covered bonds. Thus, the first paragraph of Article 52(4) of the UCITS Directive is amended to allow Member States to raise the 5% single issuer limit to a maximum of 25% where UCITS invest in bonds that are issued before 8 July 2022 and that met the requirements set out in Article 52(4) of the UCITS Directive as applicable on the date of their issue, or where UCITS invest in bonds that fall under the definition of covered bonds provided for by Directive 2019/2162. The third paragraph of Article 52(4) of the UCITS Directive regarding the communication by Member States to ESMA and the EU Commission of the list of categories of covered bonds and authorised issuers is deleted

- amendment to article 2, paragraph 1 of the BRRD so that covered bonds are defined by reference to the new common definition provided for by Directive 2019/2162 or, with regard to instruments issued before 8 July 2022, by reference to Article 52(4) of the UCITS Directive, as applicable on the date of their issue.

Alongside Directive 2019/2162, Regulation 2019/216 amends the CRR with the aim of strengthening the conditions for granting preferential capital treatment, by adding further requirements.

THE ONLINE AML/CFT CROSS-SECTOR SURVEY FOR THE YEAR 2019

CSSF Circular letters of 17 March 2020[36] 31 January 2020[37]

On 17 March 2020, the CSSF issued a circular letter noting that, as announced in its previous circular letter of 31 January 2020 and in its Press Release 19/57, the annual AML/CFT online cross-sector survey for the year 2019 (2019 Survey), which collects standardised key information concerning money laundering and terrorist financing risks to which professionals subject to CSSF supervision are exposed and the implementation of related risk mitigation and targeted financial sanctions measures, was launched on 3 February 2020 and that answers had initially to be submitted by 15 March 2020 at the latest through the CSSF eDesk portal.

The new circular letter is addressed to the board of directors and management board of the following Luxembourg-based professionals: investment firms, specialised professionals of the financial sector and investment fund managers (including also registered AIFMs and self-managed UCITS/internally managed AIFs and investment funds which have not designated an investment fund manager). It is also addressed to Luxembourg branches of the above professionals with their registered office in the EU or in a third country.

In its new circular letter of 17 March 2020, the CSSF extends the deadline for the submission of the 2019 Survey through the CSSF eDesk portal until close of business on 10 April 2020 so as to take into account potential delays that may have occurred regarding the timely submission by the concerned professionals of the 2019 Survey due to the implementation of the relevant online registration and submission processes with the CSSF eDesk portal and, on an exceptional basis, due to the COVID-19 pandemic.

However, the CSSF also draws the attention of the professionals concerned, and of their directors and employees, to their legal obligation under the AML Law to cooperate fully with the Luxembourg authorities responsible for combating money laundering and terrorist financing. In this context, the CSSF reminds them that administrative sanctions and other administrative measures may be imposed by the CSSF with respect to these professionals subject to its supervision if they do not comply with their professional obligations under the AML Law, including the above legal cooperation obligation.

According to a combined reading of Press Release 19/65, the circular letters of 31 January and 17 March 2020 and the AML/CFT questionnaire user guide available in the dedicated section of the eDesk portal (User Guide), the 2019 Survey must be initiated and submitted to the CSSF by a member of the management body or a conducting officer of the relevant professional responsible for AML/CFT, being preferably the person responsible for compliance with AML/CFT professional obligations at management level (i.e. the so-called "RR" for investment funds and investment fund managers) or the compliance officer responsible for the control of compliance with AML/CFT professional obligations at the appropriate hierarchical level (i.e. the so-called "RC" for investment funds and investment fund managers).

A mandate document also allows the relevant person responsible for AML/CFT compliance of the professional to appoint another employee of the professional or a third party (including a law firm) to complete the 2019 Survey on its behalf, in which case a specific delegation procedure must be complied with, as further explained in the User Guide. In this case, the delegated person may only fill in, edit and save the answers to the 2019 Survey, but cannot submit them to the CSSF as the ultimate responsibility for adequate completion of the 2019 Survey remains with the relevant person responsible for AML/CFT compliance of the professional.

36 http://www.cssf.lu/fileadmin/files/Lois_reglements/Circulaires/Blanchiment_terrorisme/lettre-circulaire_170320_AML-CFT.pdf

37 http://www.cssf.lu/fileadmin/files/Lois_reglements/Circulaires/Blanchiment_terrorisme/lettre-circulaire_310120_AML-CFT.pdf

PERSONS INVOLVED IN AML/CFT OF REGULATED FUNDS AND THEIR MANAGERS (RR AND RC)

CSSF FAQs[38] of 11 December 2019

On 25 November 2019, the CSSF published a FAQs[39] document regarding the persons to be involved in AML/CFT for Luxembourg regulated investment funds (i.e. so-called UCITS as well as Part II UCIs, SIFs and SICARs regardless whether they qualify as AIF or not, hereafter the "Funds") and Luxembourg investment fund managers (i.e. so-called Chapter 15 and Chapter 16 ManCos as well as AIFMs, hereafter the "IFMs"), which are supervised by the CSSF for AML/CFT purposes.

In its FAQs, the CSSF starts to remind that, according to the requirements of article 4(1) of the AML Law, all professionals subject to the AML Law (including thus also the Funds and the IFMs) must appoint the following two different persons to be involved in and in charge of AML/CFT:

- one person responsible for the "compliance" with the relevant professional's AML/CFT obligations, which will be appointed among the members of the management body of the relevant professional (such person being defined as "RR" by the CSSF) and
- where appropriate with regard to the size and nature of the activity, one person responsible for the "control" of the compliance with the relevant professional's AML/CFT obligations, which will be appointed at appropriate hierarchical level (such person being defined as "RC" by the CSSF).

However, by taking into consideration the results of the Luxembourg national risk assessment, and regarding in particular the high risk exposure of the investment fund sector in terms of AML/CFT, the CSSF indicates that Funds and IFMs must always appoint a RR and a RC and cannot invoke the proportionality principle provided for by the AML Law as regards the appointment of the RC.

CSSF clarifications for appointment of RR and RC by Funds and IFMs

As regards Funds, the CSSF FAQs clarify that:

- The RR can be the relevant Fund's management body (e.g. the board of directors, manager(s), general partner(s) or management company depending on the legal structure of the Fund) acting as a collegial body or, alternatively, one of the members of the relevant Fund's management body.
- The RC must be an individual mandated *intuitu personae* by the relevant Fund's management body, and may be one of the members of the relevant Fund's management body with appropriate experience, or a third party delegate which may, for example, be chosen among the staff of the relevant Fund's IFM (such as the RC of the IFM). In the case of a third party delegate, the CSSF further requires that (i) the Fund enters into a contractual relationship with the RC personally, or (ii) where the contract is concluded with the employer of the RC, then the contract must name the RC, any replacement of the RC must be subject to the Fund's approval and the RC must acknowledge its appointment in writing. Even if not specified by the CSSF FAQs, it is worth reminding that, in case of appointment of a third-party RC by a Fund, the drafting and entering into the relevant contract by the Fund and the RC, or its employer, will have to be done in compliance with applicable Luxembourg labour law requirements.
- As a principle, the RR and the RC must both be reachable for any contact by the Luxembourg AML/CFT competent authorities (e.g. CSSF and FIU). In addition, the RC must, in principle, be available in Luxembourg for the accomplishment of his tasks. In this respect, there is no Luxembourg residency requirement imposed on the RC, nor does the CSSF require that the RC works permanently and/or full time in Luxembourg. Thus, the CSSF may accept that the RC is located outside of Luxembourg on an exceptional basis and under certain conditions (including, in particular, in the case of cross border-management of the Fund by a foreign IFM implying that the IFM and its relevant staff member acting as RC are not domiciled in Luxembourg). In such cases, the RC must be available in Luxembourg upon request, meaning that the RC must be reachable at any

[38] http://www.cssf.lu/fileadmin/files/Metier_OPC/FAQ/FAQ_Persons_involved_in_AML_CFT_fora_Luxembourg_Investment_Fund_or_Investment_Fund_Manager_251119.pdf

[39] http://www.cssf.lu/fileadmin/files/Publications/Communiques/Communiques_2019/PR1960_PRIIPS_assessment_111219.pdf

time during normal business hours by the CSSF and is able to regularly come in Luxembourg in an appropriate timely manner if requested by the CSSF to deal with AML/CFT issues.

As regards IFMs, the CSSF FAQs clarify that:

- The RR can be the relevant IFM's management body (depending on its legal form) acting as a collegial body or, alternatively, one of its members.
- The RC must be the compliance officer at appropriate hierarchical level in charge of the AML/CFT aspects for the IFM. In practice, the RC can thus be one of the conducting officers or the compliance officer of the IFM, but could also cumulates its role as RC with several functions as a conducting officer, compliance officer, risk management officer within the IFM, subject to compliance with the incompatibilities of functions listed in CSSF Circular 18/698 and provided that the RC is able to commit sufficient time and attention to the performance of its various functions within the IFM).

CSSF clarification on the skill, duties and other conditions applicable to the RR and RC of Funds and IFMs

The CSSF FAQs provide, or allow to deduct, that:

- The RC has to be seen as the AML/CFT officer in charge of the day-to-day control of the compliance by the Fund/IFM with its AML/CFT obligations. Accordingly, the CSSF FAQs requires that the RC of the Fund/IFM has (i) AML/CFT knowledge and expertise with regard to the applicable Luxembourg legislation and regulation (and can demonstrate this through e.g. trainings and also work experience), (ii) knowledge about the investments and distribution strategies of the Fund/the services offered by the IFM, and (iii) access to all internal documents and systems required necessary for performing its tasks. Further details on the role and duties of the RC may be found, for the time being, in CSSF Regulation 12-02 and in CSSF Circular 18/698: thus, for instance, the RC will be in charge of the oversight of the AML/CFT checks performed by intermediary and delegates (e.g. transfer agent), and will also have to provide, at least once a year, a summary report on his activities and operation on AML/CFT to the Fund's/IFM's management body/RR and to the CSSF.
- The RR has to be seen as the last level of responsibility for the compliance by the Fund/IFM with its AML/CFT obligations. Accordingly, the CSSF FAQs requires that the RR has (i) AML/CFT knowledge with regard to the applicable Luxembourg legislation and regulation and can demonstrate this through e.g. trainings, but the RR does not necessarily need to have AML/CFT expertise (i.e. AML/CFT work experience is not required), and (ii) knowledge about the investments and distribution strategies of the Fund/the services offered by the IFM. In terms of duties, the RR should thus consider specific AML/CFT issues that are escalated to him by the RC, and also receive and review, in principle, AML/CFT reports from the RC, including the annual AML/CTF summary report before transmission by the RC to the CSSF.

AML/CFT MARKET ENTRY FORMS FOR FUNDS AND THEIR MANAGERS

CSSF Communication of 7 November 2019[40]

On 7 November 2019, the CSSF published a communication regarding the new AML/CFT market entry forms (available on the CSSF website) to be completed by certain Luxembourg investment funds and Luxembourg investment fund managers in order to allow the CSSF to collect standardised key information in relation to money laundering and terrorist financing risks to which these funds and managers are exposed and in relation to the measures they put in place to mitigate those risks.

According to the CSSF, the relevant market entry forms must be completed and submitted to the CSSF by:

- UCITS, Part II UCIs, SIFs, SICARs, ELFTIFs, EUVECAs, EUSEFs and money market funds within the meaning of the so-called "Money Market Fund Regulation" (the "Funds"):
  - each time an application is made for the setting-up and approval by the CSSF of a new Fund
  - each time an application is made for the setting-up and approval by the CSSF of an additional sub-fund of an existing Fund (in which case, the Fund's market entry form must be renewed with the new sub-fund related information and/or with any changes to the information previously filed with the CSSF in connection with the umbrella Fund)
- Luxembourg management companies subject to Chapter 15, 16 or 17 of the UCI Law and Luxembourg AIFMs authorised or registered with the CSSF under the AIFM Law (the "IFMs"):
  - each time an application is made for the setting-up and approval or registration (as the case may) of a new IFM by the CSSF
  - each time an application is made for approval by the CSSF of an additional licence, an extension of a licence or a change in the shareholder structure of the IFM (in which case, the IFM's market entry form must be renewed with the relevant licence or shareholder structure-related information and/or with any changes to the information previously filed with the CSSF in connection with the IFM).

In practice, the CSSF requires that the Fund's/IFM's so-called "RR" (i.e. the person responsible for "compliance" by the Fund/IFM with its relevant AML/CFT obligations) or so-called "RC" (i.e. the person responsible for "control" of the compliance by the Fund/IFM with its relevant AML/CFT obligations) fills in and submits the relevant market entry form to the CSSF together with some mandatory supporting documents, as further detailed in the relevant market entry form.

40 http://www.cssf.lu/fileadmin/files/Publications/Communiques/Communiques_2019/C_AML_CFT_questionnaire_investment_funds_071119.pdf

IDENTIFICATION AND VERIFICATION OF IDENTITY OF THE ULTIMATE BENEFICIAL OWNER OF PROFESSIONALS UNDER AML/CFT SUPERVISION OF THE CSSF

CSSF Circular 19/732 of 20 December 2019[41]

On 20 December 2019, the CSSF issued Circular 19/732 in relation to the prevention of money laundering and counter terrorist financing for the attention of all professionals subject to the AML/CTF supervision of the CSSF (Professionals), including Luxembourg regulated investment funds (i.e. so-called UCITS as well as Part II UCIs, SIFs and SICARs regardless of whether they qualify as AIFs or not, hereafter the "Funds") and Luxembourg regulated investment fund managers (i.e. so-called Chapter 15 and Chapter 16 management companies as well as AIFMs, hereafter the "IFMs").

The purpose of Circular 19/732 is to provide guidance to these Professionals on the practical implementation of the identification requirements of the ultimate beneficial owner (UBO) of their customers as well as on the reasonable measures that should be taken to verify the identity requirements, so that these Professionals are satisfied that they have fulfilled their customer due diligence obligations by knowing who the UBO is (are) in accordance with the requirements of article 3(2) of the AML/CTF Law.

In brief, Circular 19/732 is divided into three parts:

- Part I of the Circular outlines the UBO identification requirements for customers that are either natural persons, legal persons or legal arrangements. For the avoidance of doubt, the CSSF recalls as general considerations that: (i) by definition, the UBO can only be a natural person and neither another legal person nor a legal arrangement and that the UBO concept should also be conceptually distinguished from the customer (which could be a natural person, a legal person or a legal arrangement) and from the beneficiaries of the contract or the transaction; (ii) a business relationship or transaction can involve several UBOs; and (iii) where it is not possible to identify the UBO as required by laws and regulations, the transaction(s) should not be carried out (or the business relationship should not be established or should be terminated, as the case may be). The CSSF also points out that, in order to identify the UBO(s) of their customers in accordance with article 3(2) of the AML/CTF Law, Professionals can make use of, but cannot exclusively rely on, the information contained in publicly available records on UBOs (such as the Luxembourg national register on beneficial ownership, or "RBO"), and/or on information or data provided by a reliable source independent from the customer.
- Part II of the Circular describes the identity verification measures that should be taken and the documents and information that should be collected and registered/stored by Professionals, taking into account a risk-based approach, to verify the identity of the UBO(s) of their customers once the UBO(s) is/have been identified. The CSSF also recalls the need for Professionals to regularly update the beneficial ownership information, as UBO(s) can change over time.
- Part III of the Circular contains FATF indicators concerning the customer and/or the transaction (non-exhaustive and non-exclusive list) that may help Professionals detect potential concealment of beneficial ownership information.

[41] http://www.cssf.lu/fileadmin/files/Lois_reglements/Circulaires/Blanchiment_terrorisme/cssf19_732eng.pdf

ESMA Q&AS ON BENCHMARK DISCLOSURES FOR UCITS KIID

CSSF communication of 27 January 2020[42]

On 27 January 2020, the CSSF published a communication reminding Luxembourg UCITS management companies and self-managed UCITS to include, in the annual update of their KIID, the necessary disclosures on benchmark(s) and related past performance, as required by ESMA in the revised version of is Q&As on the application of the UCITS Directive as published on 29 March 2019.

In particular, the CSSF indicates that it is the responsibility of UCITS management companies and self-managed UCITS to verify and ensure that:

- UCITS KIIDs are updated by 19 February 2020, at the latest, with the required benchmark and past performance disclosures and transmitted electronically to the CSSF via the usual transmission channels. In this context, the CSSF reminds that the updated KIID should notably include the following elements as further specified in ESMA Q&As:
  - whether the UCITS is "actively" or "passively" managed
  - the indication of the benchmark index (or indices) the UCITS is tracking or is making reference to
  - the disclosure on the use of the benchmark in the management of the UCITS, the degree of freedom from the benchmark and the past performance against the benchmark when the investment approach of the UCITS includes or implies a reference to a benchmark.

UCITS prospectuses are updated and filed with the CSSF at the earlier of the next revision of the prospectus or the end of 2020, to ensure that the benchmark-related information as disclosed in the UCITS KIID and in the objectives and investment policy of the UCITS prospectus are aligned, as specified by ESMA Q&As.

AIFMS REPORTING OBLIGATIONS TO NCAs ON LIQUIDITY STRESS TEST RESULTS FOR CLOSED-ENDED UNLEVERAGED AIFs

ESMA updated Q&As on AIFMD of 4 December 2019

On 4 December 2019, ESMA published an updated version of its Q&As on the AIFMD, which includes a new question and answer on how AIFMs should report liquidity stress test results for closed-ended unleveraged AIFs that they manage, as these closed-ended unleveraged AIFs are explicitly exempted from implementing the liquidity risk management system and from conducting stress tests by Article 16(1) of AIFMD.

In its Q&As, ESMA considers that AIFMs need to report the results of the liquidity stress tests for all the AIFs they manage as part of their AIFM reporting obligations to national competent authorities (NCAs), as required by Article 24(2) of the AIFMD and further specified by Article 110(2)(f) of the AIFMD-Delegated Regulation 231/2013 and by field 280 of the AIFMD mandatory reporting template.

Consequently, due to the mandatory character of the AIFMD reporting template field, ESMA indicates that AIFMs should indicate that the relevant question of the AIFMD reporting template is 'not applicable' in that case and report at least the fact that the relevant AIF is a closed-ended unleveraged AIF. However, if an AIFM decides to conduct liquidity stress tests for closed-ended unleveraged AIFs, it should then report the results of these liquidity stress tests in the same field of the AIFMD mandatory reporting template.

[42] http://www.cssf.lu/fileadmin/files/Publications/Communiques/Communiques_2020/C_ESMA_QA_KIID_benchmark_disclosures_UCITS_270120.pdf

DEADLINE FOR COMPLIANCE BY UCITS' AND AIFS' DEPOSITARIES WITH NEW RULES ON THEIR SAFEKEEPING AND SEGREGATION OF ASSETS OBLIGATION

Commission Delegated Regulation 2018/1618[43] and Commission Delegated Regulation 2018/1619[44] of 12 July 2018

Depositaries of UCITS and AIFs have until 1 April 2020 to apply and comply with the new rules as regards their safekeeping and segregation obligations as introduced by the following delegated regulations (Delegated Regulation) adopted by the EU Commission on 12 July 2018 and published in the Official Journal on 30 October 2018.

As a reminder, the above Delegated Regulations introduce the following changes to the existing UCITS and AIFMD delegated regulations in respect of the rules relating to the safekeeping and segregation of UCITS' and AIFs' assets by depositaries and sub-custodians:

- Reconciliation – Article 13(1)(c) of the UCITS Delegated Regulation and Article 89(1)(c) of the AIFMD Delegated Regulation have been amended 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. Accordingly, such reconciliation should be conducted as often as necessary, depending not only on the normal trading activity 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 financial instrument account.

- Record-keeping – Article 13(2) of the UCITS Delegated Regulation and Article 89(2) of the AIFMD Delegated Regulation have been amended to clarify that when safekeeping functions are delegated with read to assets held in custody, 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 thirdparty to whom safekeeping functions are delegated – a new "paragraph 2a" has been introduced in Article 15 of the UCITS Delegated Regulation and Article 98 of the AIFMD Delegated Regulation, which sets 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 holding assets in custody, so as to enable, amongst others, 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 to whom safekeeping functions are delegated need to subdelegate these safekeeping functions, it is then required to contractually secure and detail equivalent rights and obligations from that sub-delegate, identical to the ones it has granted to the depositary itself.

- Asset segregation at the level of the third-party to whom safekeeping functions are delegated – Article 16 of the UCITS Delegated Regulation and Article 99 of the AIFMD Delegated Regulation – have been amended to set minimal segregation requirements at the level of the third parties to whom safekeeping functions are delegated. In particular, 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.

[43] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R1618&from=EN

[44] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R1619&from=EN

- AIF's assets held in third countries – Article 99 of the AIFMD Delegated Regulation – has been amended in order to be aligned with the UCITS Directive's existing rules applicable to depositaries appointing third parties located outside 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 shall 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 of its effective application.

PRIIPS ASSESSMENT FOR PART II UCIS, SIFS AND SICARS

CSSF Press Release 19/60 of 11 December 2019

On 11 December 2019, the CSSF published Press Release 19/60 regarding the PRIIPs assessment form that all Luxembourg SIFs, Part II UCIs and SICARs have been required to complete by 31 October 2019 via the CSSF eDesk portal.

The CSSF indicates that:

- Part II UCIs, SIFs and SICARs created after 31 October 2019 must also complete the PRIIPs assessment via the eDesk portal
- all information fields in the online PRIIPs assessment that have been completed by Part II UCIs, SIFs and SICARs before 31 October 2019 via the eDesk portal must also be kept up-to-date via that portal; and

Even if not mentioned explicitly in CSSF Press Release 19/60, all Part II UCIs, SIFs and SICARs are required to complete and submit the online PRIIPs assessment to the CSSF, regardless of whether these funds qualify as AIFs or not, and/or whether they are offered to retail or professional investors.

In practice, access to the online PRIIPs assessment form is available on the CSSF eDesk portal to all Part II UCIs, SIFs and SICARs as well as to their central administrations and management companies. A mandate document also allows Part II UCIs, SIFs and SICARs to appoint their law firms/legal advisers to complete the PRIIPs assessment on their behalf, in which case a specific delegation procedure must be complied with, as further explained in the CSSF user guide on the PRIIPs assessment.

IMPLEMENTATION OF IOSCO RECOMMENDATIONS AND GOOD PRACTICES ON LIQUIDITY RISK MANAGEMENT FOR OPEN-ENDED UCIS

CSSF Circular 19/733 of 20 December 2019[45]

On 20 December 2019, the CSSF issued Circular 19/733, the objective of which is to implement into Luxembourg regulation the IOSCO's Recommendations and Good Practices on liquidity risk management for open-ended UCIs as published on 1 February 2018.

Circular 19/733 entered into force on 20 December 2019 and the CSSF expects that all in-scope entities will implement the IOSCO Recommendations to allow the implementation of a robust and effective liquidity risk management process for each of their managed open-ended UCIs.

In-Scope Entities

Circular 19/733 applies to the following regulated investment funds and investment fund managers:

- Luxembourg UCITS management companies and self-managed UCITS
- Luxembourg authorised external AIFMs (including Chapter 16 management companies subject to article 125-2 of the UCI Law) and internally-managed AIFs
- Luxembourg branches of management companies governed by Chapter 17 of the UCI Law
- SIFs that do not qualify as AIFs but are required to implement appropriate risk management systems in accordance with article 42a of the SIF Law and CSSF Regulation N°15-07.

The CSSF also recommends open-ended Part II UCIs which are not managed by an authorised AIFM to consider applying the provisions of Circular 19/733.

In practice, investment managers to whom portfolio or risk management functions in relation to UCITS and other open-ended UCIs have been delegated by the above in-scope entities may also be indirectly impacted. Indeed, such in-scope entities may require their delegated investment managers to consider also the IOSCO Recommendations in order to enable them to comply with their own obligations as regards the implementation, for the UCITS and other open-ended UCIs that they manage, of robust and effective liquidity risk management governance frameworks meeting the elements of the IOSCO Recommendations.

Main Elements of IOSCO Recommendations

The IOSCO Recommendations point to the importance of effective liquidity risk management to safeguard the interests and protection of UCIs' investors, to maintain the orderliness and robustness of UCIs and markets, and to help reduce systemic risk, all of which support financial stability.

In particular, these recommendations address the following three elements of the UCIs' life cycle where the liquidity risk management has to be considered:

- The design process of UCIs, in respect of which Circular 19/733 reminds that it should take into account, among other things:
  - the establishment of an effective liquidity risk management process in both normal and stressed market conditions
  - the establishment of UCIs' frequency dealing arrangements appropriate to the investment strategy and underlying assets through the entire life cycle of the UCIs (i.e. UCIs' redemption obligations should be met under both normal and stressed market conditions)
  - the integration by UCIs of an appropriate range of additional liquidity management tools (LMTs) which could contribute to a better management of liquidity risk under exceptional market conditions

[45] http://www.cssf.lu/fileadmin/files/Lois_reglements/Circulaires/Hors_blanchiment_terrorisme/cssf19_733eng.pdf

- the consideration of the manner in which the planned marketing and distribution are likely to impact the liquidity of UCIs
- the effective disclosure of the liquidity risk of the UCIs and the liquidity risk management processes to investors and prospective investors.

▪ The day-to-day liquidity management of UCIs, in respect of which Circular 19/733 reminds that it should include, among other things:

  - regular review, monitoring and management of the liquidity of UCIs
  - integration of liquidity management into investment decisions so that transactions are only conducted if the investments or techniques/strategies employed do not compromise the ability of UCIs to comply with their redemption obligations or other liabilities
  - measures to facilitate the identification of emerging liquidity pressures/shortages before they occur so that prompt and appropriate remedial actions can be taken in the best interests of investors
  - integration of relevant data and factors in order to have a holistic view of the possible risks, such as potential future liabilities and redemptions
  - ongoing liquidity assessments in different market conditions, including stress testing.

▪ Circular 19/733 reminds that the contingency plans should be implemented and periodically tested to ensure that any applicable LMT can be used where necessary and, if activated, can be used in a prompt and orderly manner.

The CSSF also reminds in its Circular 19/733 that the IOSCO Good Practices on liquidity risk management for UCIs indicate a list of the LMTs which are available to Luxembourg-domiciled UCIs.

CORPORATE

ADOPTION OF EU DIRECTIVE ON CROSS-BORDER CONVERSIONS, MERGERS AND DIVISIONS

Adopted on 27 November 2019 and entry into force on 1 January 2020

Directive (EU) 2019/2121 on cross-border conversions, mergers and divisions (the "Directive") was adopted on 27 November 2019 by the European Parliament and the Council and entered into force on 1 January 2020. The Directive amends the directive 2017/1132.

The main purposes of the Directive are to (i) complete and refine the rules applicable to cross-border mergers, (ii) introduce specific legal regimes for cross-border conversions and divisions within the EU, (iii) harmonise the process of cross-border operations, offering additional protections to companies' stakeholders and (iv) implement a prevention of abuse by competent authorities.

The Directive applies to cross-border operations of limited liability companies (*sociétés de capitaux*), except the European Company (*société européenne*), which remains governed by the European regulation[46]. At this stage, the limited liability companies (i) whose object is the collective investment of capital provided by the public, (ii) which are in the course of liquidation, or (iii) which are subject to resolution instruments, powers and mechanisms provided for in Title IV of directive 2014/59 establishing a framework for the recovery and resolution of credit institutions and investment firms, are excluded from the scope of the Directive.

Cross-border operations of other forms of companies, while being out of the scope of the Directive, remain possible under the freedom of establishment enshrined in case law of the European Court of Justice.

The member states have until 31 January 2023 to implement the Directive into their national legislation.

TIMING OF ASSESSMENT OF THE DECREASE OF THE NET ASSETS

District Court, sitting in commercial matters, 11 July 2019, n°2019TALCH06/00828

A shareholder holding 50% of the shares of an SA requested its board of directors to convene a shareholders' general meeting further to the reduction of the company's net assets to an amount of less than half the corporate capital as a result of losses, based on article 480-1 of the Companies Law. The special report prepared thereafter by the board of directors indicated the reasons for such circumstances and justifying its proposals with regard to the SA's continuation or its possible dissolution. The other shareholder waived subsequently his claim against the company in order to cover the losses and be out of the scope of article 480-1. At the subsequent shareholders' extraordinary general meeting, a deadlock situation was characterised: one shareholder voted in favour of the dissolution of the company, whereas the other, having waived his claim, voted for the continuation of its activities.

The District Court, sitting in commercial matters, held that the waiver of the claim was sufficient for the purpose of compensating the losses and thus, at the time of the vote at the shareholders' general meeting, the condition set out by article 480-1 was no longer fulfilled. It further considered that the shareholders could not ignore the financial changes relating to the net assets of the company that have occurred between the date of convening notice, deliberation and possible extension of the meeting.

The District Court also reminded that, with regard to the plaintiff's alternative motion to request the enforcement of the dissolution of the SA for just cause (based on article 480-1 paragraph 3 of the Companies Law), a serious disagreement between shareholders which paralyses the operation of the SA was not characterised here as it did not jeopardise the functioning of the corporate bodies nor the existence of the SA.

[46] Regulation (EC) n°2157/2001 of 8 October 2001 on the statute of European Company.

Corporate

THRESHOLD OF THE EXERCISE OF MINORITY SHAREHOLDERS ACTION IN AN SA

District Court, sitting in commercial matters, 13 June 2019, n°2019TALCH06/00627

In this case, during the approval of the annual accounts of an SA, a shareholder, holding 50% of the issued share capital, voted against the discharge of the directors for their mandate and did not approve such annual accounts, whereas the other shareholder, holding the remaining 50% of the share capital, voted the opposite.

The shareholder who voted against, filed an action for the account of the company (i.e. *actio mandati*), for misconduct in the management of the company's affairs against the other shareholder and directors based on article 444-2 of the Companies Law, pursuant to which such action can be brought by a shareholder representing at least 10% of the votes cast at the general meeting.

The defendants asserted that such minority shareholders' legal action cannot be brought by an "egalitarian" shareholder holding 50% as such shareholding cannot be seen, per se, as "minority".

The District Court, sitting in commercial matters, rejected the reasoning of the claimant and held that article 444-2 was clear and precise and that the reasoning *a contrario*, whereby a shareholding of 50% is assimilated to a minority shareholding, would add a new case of opening of legal proceedings that was not initially provided for by the legislator.

EMPLOYMENT

A GENERAL EUROPEAN FRAMEWORK FOR THE PROTECTION OF WHISTLE-BLOWERS

Directive 2019/1937[47] of 23 October 2019 on the protection of persons who report breaches of union law

A draft bill n°7516 transposing Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC relating to the posting of workers in the framework of the provision of services ("Directive (EU) 2018/957") and amending the Luxembourg Labour Code (the "Bill") was submitted to Parliament on 23 January 2020.

In accordance with the prescriptions of Directive (EU) 2018/957, the Bill provides that employees posted away from their regular place of work and whom the employer offers to accommodate during the relevant period of time, are mandatorily accommodated in accordance with certain hygiene, sanitary, safety and habitability standards.

The Bill further provides that statutory, regulatory or conventional allowances and/or expense reimbursements are mandatory in so far as expenses incurred are due to the posting and are incurred in travels to or from the employee's regular place of work in Luxembourg, or by virtue of a temporary dispatch to a different place of work.

The provisions on social minimum wage that are considered public order, and that are hence applicable to all employees pursuing an activity on Luxembourg territory, would henceforth include, beyond the statutory minimum wage, the minimum wage provided for by any collective bargaining agreement declared of general application. These provisions would henceforth further include any elements considered as constitutive of remuneration and rendered applicable by law, regulation, administrative provisions or generally applicable collective agreements.

The Bill introduces provisions specific to the posting of interim workers and posting in the context of a temporary loan of workforce.

Where a posting exceeds 12 months and is not extended to 18 months following an application to the authorities, most of the Luxembourg employment-related laws and regulations would become applicable (except as regards the entry into and the termination of employment contracts, and/or complementary pension schemes).

In line with the scope of application of Directive (EU) 2018/957, the Bill is not intended to cover the international road transport sector.

[47] https://chd.lu/wps/portal/public/Accueil/TravailALaChambre/Recherche/RoleDesAffaires?action=doDocpaDetails&backto=/wps/portal/public/Accueil/Actualite&id=7516

DATA PROTECTION

INTRODUCTION OF A FRAMEWORK FOR THE USE OF VIDEO-SURVEILLANCE BY THE POLICE.

Bill n°7498 of 14 November 2019

The Bill aims at amending the Law of 28 July 2018 on the Grand-ducal Police to establish a framework for the use of video-surveillance by the Police.

The Bill introduces an article 43bis in the aforementioned law, allowing the Grand-ducal Police to place under surveillance public places which are either presenting risks of commissions of offences or crimes, or presenting risks to human safety or good safety.

A prior ministerial authorisation will nevertheless be required and the public will have to be informed and made aware of the video-surveillance.

The Bill also foresees that the processing of personal data in relation to the video-surveillance activities will have to be undertaken in compliance with the Luxembourg law of 1 August 2018 on the processing of personal data in criminal matters and in national security matters.

QUESTIONS AROUND THE USE OF DASHCAMS IN PUBLIC SPACES

Guidance from the CNPD

In November 2019, the CNPD published guidance on the following question: "is the use of mobile video surveillance cameras intended to film the public highway ("dashcams" type) in accordance with the GDPR?".

The CNPD found that the use of dashcams in a public space is hardly reconcilable with the GDPR, notably since it will be difficult for the users of dashcams to legitimate, based on one of the grounds listed in Article 6 of the GDPR, the processing of personal data resulting from the use of dashcams. Moreover, the CNPD cannot see how users of dashcams could be able to fulfil their obligation to inform data subjects about the processing of their personal data.

NEW PROVISION IN THE INSURANCE SECTOR TO PROCESS PERSONAL HEALTH DATA

Bill n°7511 of 23 December 2019

The Bill aims at amending the Law of 7 December 2015 on the insurance sector to remedy the lack of lawful ground to process personal health data in the context of insurance contracts.

The Bill introduces an article 181bis in the aforementioned law, stating that the processing of personal health data by insurance/reinsurance companies shall only be lawful when said processing is necessary for the performance of precontractual measures in insurance or reinsurance, or for the performance of insurance or reinsurance contracts, provided that insurance companies comply with the relevant legal provisions on professional secrecy and consider the implementation of various "appropriate measures", such as the designation of a data protection officer, the drafting of data protection impact assessments, the use of anonymisation or pseudonymisation techniques, etc. If one or more of the said appropriate measures listed in this article are not implemented, insurance/reinsurance companies will have to document and justify internally the reasons why they have not been implemented.

Data Protection

CLARIFICATIONS ON SPECIFIC GDPR ASPECTS

Guidelines of the EDPB

Between October 2019 and January 2020, the EDPB published several guidelines and opinions, and in particular:

- Guidelines 5/2019 on the criteria of the Right to be Forgotten in the search engines cases under the GDPR (open to public consultation), in relation to the processing by search engine providers and the subsequent delisting requests submitted by data subjects based on Article 17 of the GDPR;
- Guidelines 4/2019 on Article 25 Data Protection by Design and by Default (open to public consultation) provides recommendations on how data controllers, data processors and technology providers can cooperate to implement successfully data protection by design and by default;
- Guidelines 3/2018 on the territorial scope of the GDPR (version adopted after public consultation) (please refer to the January 2019 edition of our Luxembourg Legal Update).

PRE-TICKED BOXES DO NOT ALLOW TO OBTAIN "ACTIVE CONSENT"

CJEU, 1 October 2019, Case C-673/17 Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV v Planet49 GmbH

Following the opinion of Advocate General Szpunar on 21 March 2019 (please refer to the October 2019 edition of our Luxembourg Legal Update), the CJEU rendered a judgment in the case at hand.

The CJEU agreed with the Advocate General that consent (in this case in relation to cookies) cannot be validly obtained by way of a pre-ticked box, since there is no "active" consent (i.e. no affirmative act). Sadly, the CJEU did not elaborate on the requirement that consent must be "freely given" in relation to a box related to direct marketing which had to be ticked in order to benefit from the service offered by the company.

VALIDITY OF STANDARD CONTRACTUAL CLAUSES BETWEEN CONTROLLERS AND PROCESSORS?

Opinion of Advocate General Saugmandsgaard Øe, 19 December 2019, Case C-311/18 Data Protection Commissioner v Facebook Ireland Limited, Maximillian Schrems

The Advocate General has issued an opinion in relation to the validity of the European Commission Decision 2010/87/ EU dated 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries (standard contractual clauses between controllers and processors).

As a reminder, the European Commission can decide that standard contractual clauses offer sufficient safeguards to transfer personal data outside the EEA. It has so far issued two sets of standard contractual clauses for data transfers from data controllers in the EU to data controllers established outside the EEA, as well as one set of contractual clauses for data transfers from controllers in the EU to processors established outside the EEA (Decision 2010/87/ EU, challenged in this case).

The Advocate General is of the opinion that Decision 2010/87/ EU is valid in light of EU law and the Charter of Fundamental Rights of the EU.

It considers that the fact that the standard contractual clauses are not binding on the authorities of the third country does not affect their validity since Decision 2010/87/ EU already contains provisions requiring controllers to suspend data transfers if it is impossible for their processors to honour the protections provided by the standard contractual clauses due to specific local laws or practices, and enabling EU data protection supervisory authorities to suspend (temporarily or permanently) transfers to the country in question.

If this opinion were not to be followed by the CJEU, the impact would be significant since all controllers relying on standard contractual clauses with their processors located outside the EEA would have to legitimate their transfers of personal data on one of the other legitimate grounds listed in Article 44 and following the GDPR (such as binding corporate rules).

INTELLECTUAL PROPERTY

MONITORING DUTIES OF HOST PROVIDERS?

CJEU, 3 October 2019, C-18/18 Eva Glawischnig-Piesczek Facebook Ireland Ltd

The CJEU rendered a judgment[48] following a request for a preliminary ruling brought by the Oberster Gerichtshof (Supreme Court, Austria).

The CJEU, in particular, had to interpret a provision of the Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ("E-commerce Directive"), which has been transposed in article 63 of the Luxembourg law of 14 August 2000 on electronic commerce, pursuant to which host providers are prohibited from monitoring generally information which they store or from seeking actively facts or circumstances indicating illegal activity.

In its judgment, the CJEU recalled that the E-commerce Directive aims at striking a balance between the interests of the host provider (such as Facebook) and the interests of the users of the platform, and therefore that the E-commerce Directive does not preclude Member States from ordering a host provider:

- to remove information which it stores, the content of which is identical or equivalent to the content of information which has been previously found to be unlawful, or
- to block access to that information, provided that the monitoring of, and search for, the information concerned by such an injunction are limited to information conveying a message, the content of which remains essentially unchanged compared with the content which gave rise to the finding of illegality and containing the elements specified in the injunction, and provided that it does not require the host provider to carry out an independent assessment of that content.

LIABILITY OF ONLINE RETAILERS FOR TRADEMARK INFRINGEMENT

Advocate General Campos Sánchez-Bordonahas, 28 November 2019, C-567/18 Coty Germany v Amazon

The Advocate General issued an opinion on liability of online retailers for trademark infringement, following a request for a preliminary ruling by the Bundesgerichtshof (Federal Court, Germany) on whether a person who stores, on behalf of a third party (seller), goods which infringe trademark rights, is liable for trademark infringement, even if this person is not aware of such infringement.

The Advocate General found that, where the online platform has no active role in the process of distribution (i.e. it does not intend to offer or to put the goods on the market itself), and if, in addition, the online platform is not aware that there is an infringement of trademark rights, then the online platform should not be held liable for trademark infringement.

However, for the Advocate General, where the online retailer (such as Amazon) takes a more active role in the process of distribution, it is deemed to stock the goods, and therefore, the fact that it was not aware of an infringement of trademark rights is not taken into consideration. Since the online retailer stocks the goods, it should have in place the means to detect trademark infringement.

48 https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-10/cp190128en.pdf

REAL ESTATE

A BUSINESS LICENCE FOR REAL ESTATE ACTIVITIES CANNOT BE REQUIRED FROM AIRBNB

CJEU, 19 December 2019[49], C-390/18 Airbnb Ireland v. France

On 19 December 2019, the CJEU rendered a judgment following a request for a preliminary ruling brought by a French Court in criminal proceedings against AIRBNB Ireland UC ("AIRBNB").

The "Association for professional tourism and accommodation" (the "Association") had lodged a complaint, together with an application to be joined as a civil party to the proceedings, against AIRBNB for mediation and management of real property activities by a person not in possession of a professional licence.

The Association argued that the intermediation activity carried out by AIRBNB through its platform shall be construed as a real estate activity.

AIRBNB claimed that the legal provisions compelling a person to obtain a business licence were inapplicable on the ground of their incompatibility with Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (the "Directive").

The Court held that the intermediation service provided by AIRBNB shall be construed as an "information society service", so that the provisions restricting the free movement of services, such as the necessity to obtain a business licence, are not applicable to AIRBNB.

A FORMAL NOTICE TO REINSTATE THE PREMISES ISSUED BY A MAYOR IS NOT AN ADMINISTRATIVE ACT SUBJECT TO APPEAL BEFORE ADMINISTRATIVE JURISDICTIONS

Administrative Tribunal, 4 December 2019, n°41867

A mayor identified works carried out without a building permit and in violation of the general development plan ("Plan d'Aménagement Général" – "PAG") and the specific development plan ("Plan d'Aménagement Particulier" or "PAP"). He consequently ordered that the site be shut down and gave notice to the company performing the works to reinstate, within one month, the premises into their initial state (before the unauthorised works had been initiated). At the expiration of this month, the mayor reissued a letter with a last notice to reinstate the premises in their initial state.

The claimants filed an action for annulment before the Administrative Tribunal against the formal notices to reinstate the premises in their initial state.

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

A formal notice to reinstate the premises in their pristine state does not consist in an administrative act subject to appeal before administrative courts. Such a formal notice consists in a mere preliminary step to a possible introduction of a judicial action, bearing in mind that only a judicial (or penal) court may effectively order the reinstatement of the premises in their initial state, neither the mayor nor the administrative courts being entitled to render such decisions.

[49] https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-12/cp190162en.pdf

Real Estate

THE MORAL ELEMENT OF THE CRIMINAL OFFENCE PERTAINING TO THE VIOLATION OF PLANNING LAW REQUIREMENTS IS PRESUMED

Court of Cassation 19 December 2019, n°CAS-2019-00012

Article 107(1) of the amended law of 19 July 2004 on municipal land management and urban development as amended (the "Law of 2004") defines the offence pertaining to the violation of the requirements laid down in, inter alia, the general development plan ("Plan d'Aménagement Général" or "PAG"), the specific development plan ("Plan d'Aménagement Particulier" or "PAP"), the buildings regulation ("Règlement sur les bâtisses") and the building permits and provides that infringement of these requirements is subject to the following criminal penalties: imprisonment from eightdays to two months and a fine up to EUR 125,000.

The District Court of Diekirch ruled on appeal that the offence defined in the above-mentioned article 107(1) of the Law of 2004 is not a material offence, meaning that, in addition to the material element, a moral element consisting of the intent to commit the infringement has to be proven by the prosecution in order to have the criminality liability of the offender established. Consequently, the District Court acquitted the defendants on the basis that the moral element had not been proven. An appeal in cassation was introduced before the Court of Cassation by the public prosecutor.

In its decision dated 19 December 2019, the Court of Cassation confirmed that the offence provided in article 107(1) of the amended Law of 2004 is not a material offence and requires the proof of the intent to commit the infringement.

However, the Court of Cassation set aside the judgment of the District Court on the ground that the moral element of the offence consists in the material transgression of the legal provision, committed liberally and consciously, and that the perpetrator is presumed to be in breach of the law merely by virtue of the fact that the offence has been committed, unless he reverses the presumption.

CLIFFORD CHANCE

Real Estate

THE LIMITATIONS TO THE RIGHT FOR A THIRD PARTY TO OBTAIN THE COMMUNICATION OF THE PLANS ATTACHED TO A BUILDING PERMIT ON THE BASIS OF PERSONAL SAFETY AND PRIVACY

Opinion rendered on 23 December 2019 by the Commission for Access to Documents, n°R-27/2019

The law dated 14 September 2018 on transparent and open administration (the "Law") introduced into Luxembourg law the right for all natural all legal persons to obtain the communication of certain documents held by certain public entities. The Law sets forth the general principles and the limits of this right of access and establishes a commission, the Commission for Access to Documents (the "CAD"). The CAD can be referred to by any person encountering difficulties in order to obtain the communication of a document. Under the Law, there is no need to justify a personal and direct interest in order to obtain the communication of an administrative act. The opinions rendered by the CAD are not binding.

On 23 December 2019, the CAD rendered an opinion on a refusal by the City of Luxembourg to communicate the plans attached to a building permit requested by a potential purchaser of the concerned building. The City invoked arguments relating to copyright and protection of personal data to refuse the communication of the authorised plans. The CAD rejected these arguments, concluding that the authorised exterior plans of the building are communicable (measuring plans, site plans, façade plans, etc.). However, the CAD considered that the interior plans of the building could not be disclosed, on the ground of the safety of individuals and respect for privacy.

It has to be noted that the right for a third party to obtain the communication of an (administrative) document pursuant to the Law shall be distinguished from the communication of documents that a claimant obtains from the administration in relation to the administrative act which is subject to an action for annulment. Indeed, administrative authorities must communicate these documents to the Court pursuant to Article 8(5) of the Law of 21 June 1999 on the rules of procedure before the administrative courts.

TAX

LUXEMBOURG 2020 BUDGET LAW: AUTOMATIC EXPIRATION OF TAX RULINGS ISSUED BEFORE 1 JANUARY 2015

On 19 December 2019, the Luxembourg Parliament voted the budget law for the year 2020 (the "2020 Budget Law"). Pursuant to Article 5 of the 2020 Budget Law, all tax rulings issued before 1 January 2015 automatically expire by 31 December 2019.

Background

The 2020 Budget Law has introduced Article 29b in the General Tax Law, the purpose of which is to align the validity period of pre-2015 and post-2015 tax rulings.

As a reminder, the budget law for the year 2015 stated that tax rulings approved by the Luxembourg tax authorities (Commission des décisions anticipées) are valid for a period of no more than five years (to the extent that the situations and operations remain unchanged and compliant with domestic, European or international tax laws).

Key elements

Since tax rulings issued before 1 January 2015 cease to have legal effect as of 1 January 2020, taxpayers are still entitled to apply such tax rulings as part of their returns for the fiscal year 2019.

For fiscal years following 2019, taxpayers may obtain upon written request a renewal of their expired ruling, should the tax treatment set out in such ruling still be compliant with the legislation in force. In this respect, the Luxembourg tax authorities released a newsletter50 describing both the formalities and the procedural steps to follow as part of renewal requests.

Therefore, taxpayers should assess the impact of this measure and may consider filing new requests to ensure the tax treatment applicable to existing structures that are subject to a tax ruling granted before 1 January 2015.

[50] https://impotsdirects.public.lu/fr/archive/newsletter/2019/nl03122019.html

CLIFFORD CHANCE

Tax

TRANSPOSITION OF THE DIRECTIVE ON TAX DISPUTE RESOLUTION MECHANISMS IN THE EUROPEAN UNION

The Council Directive 2017/1852 of 10 October 2017 on Tax Dispute Resolution Mechanisms in the European Union ("TDRM Directive") has been transposed into domestic law by the Luxembourg law of 20 December 2019.

Background

The TDRM Directive has been adopted to tackle situations in which different Member States interpret or apply differently the provisions of bilateral tax treaties that may result in major tax obstacles for cross-border businesses.

Key elements

The rules implemented by the Luxembourg Law of 20 December 2019 aim at addressing any disputes that may arise between Luxembourg and a Member State regarding the interpretation and the application of bilateral tax treaties preventing double taxation. It applies to Luxembourg income tax, withholding tax, business tax and wealth tax due in a fiscal year from 2018 onwards.
The procedure starts with the taxpayer filing a complaint to the Luxembourg tax authorities (Administration des contributions directes) and to the competent authorities of the other concerned Member State, which is accepted or rejected within six months. In the event that the complaint is rejected, the taxpayer may be entitled to lodge an appeal to the Luxembourg Administrative Court.

Then, the competent authorities of the Member States are expected to solve the dispute within a two-year period through a mutual agreement procedure.
If the Member States fail to reach an agreement, the taxpayer may submit the case to arbitration and request the set-up of an advisory commission, whose role is to deliver its opinion on how to solve the dispute within six months. This decision may become binding, should the disagreement remain between the Member States within the following six months.

IMPLEMENTATION OF ATAD 2 ADDRESSING HYBRID MISMATCHES INTO LUXEMBOURG DOMESTIC LAW

The Council Directive 2017/952 of 29 May 2017 addressing hybrid mismatches with third countries ("ATAD 2") has been implemented into domestic law by the Luxembourg law of 20 December 2019 (the "ATAD 2 Law").

Background

ATAD 2 addresses hybrid mismatches with third countries and refers expressly to the OECD's BEPS report (Action 2 – Neutralising the Effects of Hybrid Mismatch Arrangements) as its source. Three types of hybrid mismatches are targeted by ATAD 2: hybrid mismatches resulting from payments under a financial instrument, hybrid mismatches resulting from payments to hybrid entities and hybrid mismatches resulting from reverse hybrid entities.

Key elements

The Luxembourg Parliament has voted the ATAD 2 Law further to the State Council report issued on 10 December 2019. Although some changes have been introduced to the text of the ATAD 2 Law, none have substantially modified it, so that the ATAD 2 Law has been voted largely unaltered from the bill issued in August 2019[51].

The ATAD 2 Law introduces a new Article 168quater of the Luxembourg Income Tax Law ("LITL") and adapts some related provisions of the LITL, such as the limitation on the deduction of foreign tax credits in the context of hybrid mismatches.
Most of the provisions of the ATAD 2 Law apply as from the fiscal years starting on or after 1 January 2020, except for provisions addressing reverse hybrid mismatches, which will apply as from fiscal year 2022.

Therefore, taxpayers should assess their situation considering the potential impact of the ATAD 2 Law. Taxpayers having a tax year diverging from the calendar year should pay particular attention to the potential application of reverse hybrid rules in 2021.

[51] https://www.cliffordchance.com/content/dam/cliffordchance/PDFDocuments/October%202019%20-%20Legal%20Update.pdf

CLIFFORD CHANCE

Tax

AMENDMENT AND ENTRY INTO FORCE OF THE NEW LUXEMBOURG-FRANCE DOUBLE TAX TREATY

The provisions of the new double tax treaty between Luxembourg and France (the "DTT") apply to income earned from 1 January 2020 onwards, comprising the provisions of the amendment to the DTT adopted on 10 October 2019.

Background

On 2 July 2019, the Luxembourg Parliament voted the law ratifying the DTT and accompanying protocol between Luxembourg and France, signed on 20 March 2018.

As a reminder, the DTT affects real estate investment and targets specifically Luxembourg companies holding shares in a French OPCI/SPPICAV or a French SIIC.

Key elements

On 10 October 2019, Luxembourg and France signed an amendment to Article 22 of the DTT, providing clarification about the modalities preventing double taxation for French residents working in Luxembourg.
In this respect, French resident cross-border workers have an obligation to report their salary income taxable in Luxembourg in their French income tax return. To the extent that the salary income was already subject to tax in Luxembourg, French resident cross-border workers would be granted a tax credit corresponding to the French tax calculated on the Luxembourg source income.

LUXEMBOURG STATE COUNCIL RELEASES ITS REPORT REGARDING THE IMPLEMENTATION OF DAC 6

On 14 January 2020, the Luxembourg State Council released a report regarding the implementation of the Council Directive 2018/822 of 25 May 2018 regarding mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements ("DAC 6").

Background

DAC 6 has been published by the Official Journal of the European Union on 5 June 2018 and aims at enhancing transparency among the European Union and preventing intermediaries from designing harmful tax arrangements. It provides for mandatory disclosure of certain cross-border arrangements by intermediaries or taxpayers to the tax authorities and for automatic exchange of this information among the Member States.

Key elements

On 8 August 2019, the Luxembourg Government has tabled the bill of law implementing DAC 6 (the "**Bill**").

The Bill follows closely the text of DAC 6 and provides for mandatory disclosure by intermediaries (or taxpayers, if there is no intermediary or if the latter is subject to professional secrecy) of cross-border arrangements that contain at least one of the five hallmarks listed in the Bill. Some of these hallmarks are subject to the "main benefit test", which is satisfied when the main benefit or one of the main benefits of the arrangement is to obtain a tax advantage.

Among other comments, the Luxembourg State Council report of 14 January 2020 has notably underlined the necessary exemption of intermediaries protected by legal professional privilege from the scope of the reporting obligation, such as lawyers, statutory auditors and chartered accountants (such intermediaries should, however be required to inform other intermediaries involved or the taxpayer of their reporting obligations).

GLOSSARY

ABBL: Luxembourg Banks and Bankers Association

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

AIF: Alternative Investment Fund

AIFM: Alternative Investment Fund Managers

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

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

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

ALFI: Association of the Luxembourg Fund Industry

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

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

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

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

AMLD 5: 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*, the Luxembourg Central Bank

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

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

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

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

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

CCCTB: Common Consolidated Corporate Tax Base

Glossary

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

CGFS: Committee on the Global Financial System

CJEU: the Court of Justice of the European Union

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

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

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

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

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

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

CRA: Credit Rating Agencies

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

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

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

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

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

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

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

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

EBA: European Banking Authority

ECB: European Central Bank

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

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

EEA: European Economic Area

EIOPA: European Insurance and Occupational Pensions Authority

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

Glossary

ESAs: EBA, EIOPA and ESMA

ESMA: European Securities and Markets Authority

ESRB: European Systemic Risk Board

ETDs: Exchange Traded Derivatives

ETFs: Exchange Traded Funds

EU: European Union

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

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

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

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

FCP: *Fonds Commun de Placement* or mutual fund

FGDL: *Fonds de garantie des dépôts Luxembourg*

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

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

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

FSB: Financial Stability Board

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

ICMA: International Capital Market Association

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

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

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

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

IRE: *Institut des Réviseurs d'Entreprises*

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

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

Glossary

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

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

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

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

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

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

ML/TF: Money laundering and terrorist financing

NCA: National Competent Authority

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

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

Part II UCIs: undertakings for collective investment subject to the provisions of Part II of the UCI Law

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

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

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

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

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

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

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

PSP: Payment Service Provider

Glossary

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

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

Public Interest Entities:

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

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

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

RAIF: reserved alternative investment fund

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

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

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

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

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

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

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

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

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

SRB: the Single Resolution Board

SRF: the Single Resolution Fund

SRM: the Single Resolution Mechanism

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

SSM: the Single Supervisory Mechanism

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

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

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

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

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

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

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

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

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

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

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

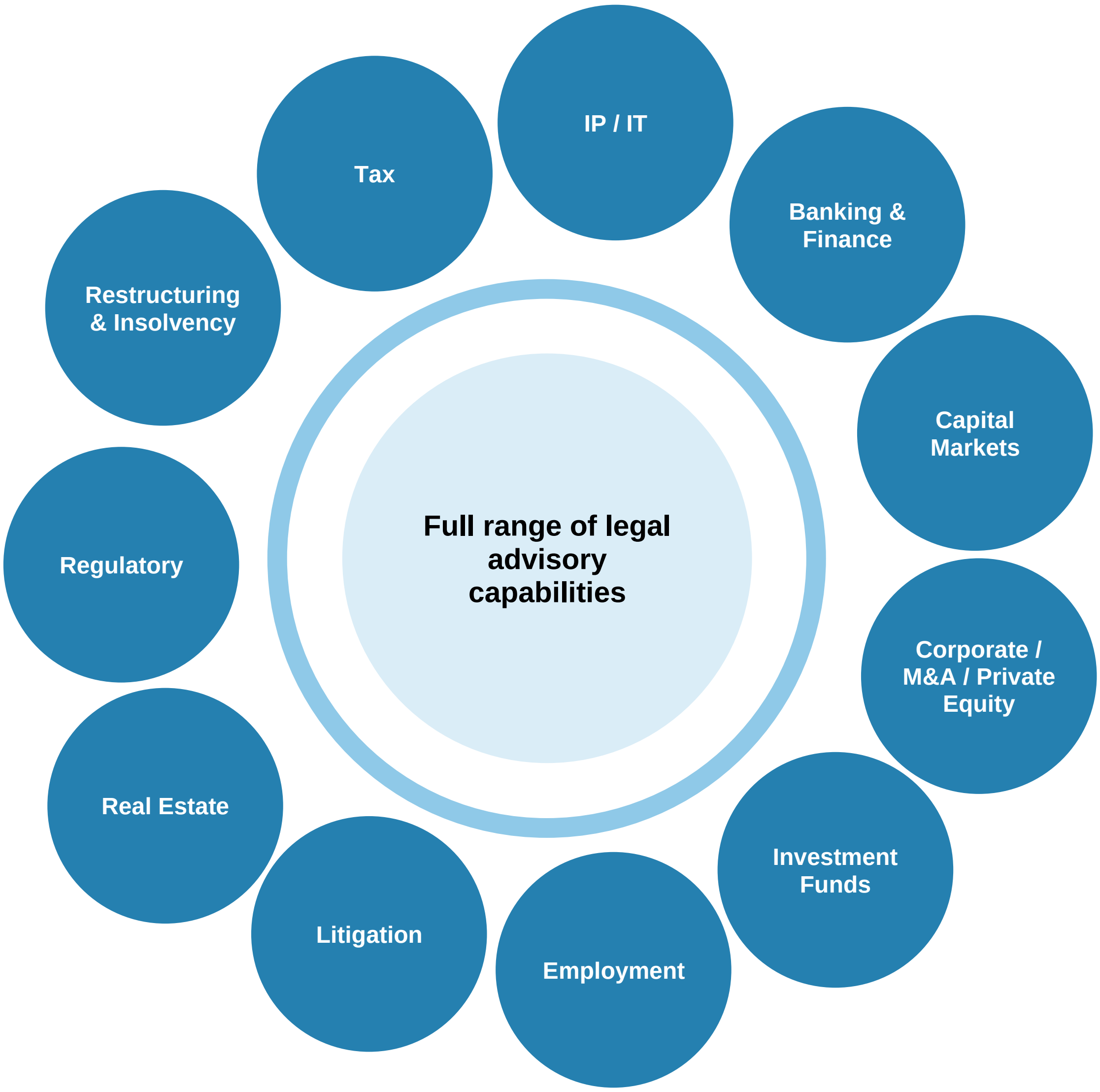
Your Contacts

CLIFFORD CHANCE IN LUXEMBOURG

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

Clifford Chance has specialist knowledge of the local and international dynamics of this unique location across all major areas of business.

- We have a strong team of more than 110 lawyers, including 10 partners
- Our lawyers have a thorough understanding of different business cultures, the ability to work in many languages and experience in multi-jurisdictional work



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