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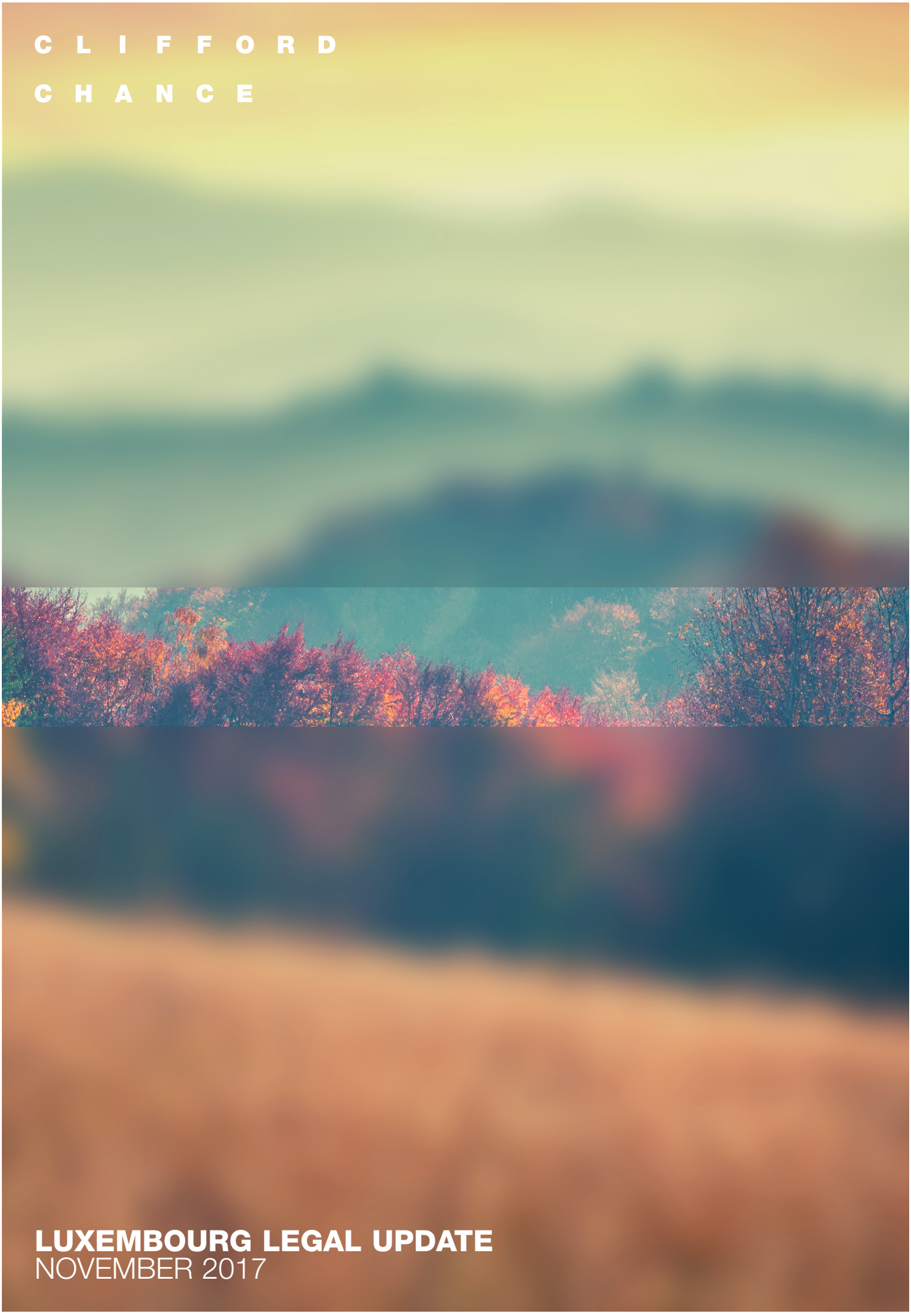

# LUXEMBOURG LEGAL UPDATE

NOVEMBER 2017

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## BREXIT topic guide

Make sure to regularly visit our dedicated Brexit topic guide to keep up to date with the most recent developments relating to the outcome of the 23 June 2016 referendum in the UK.

## Online resources

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

To view all editions of our **Luxembourg Legal Update**, please visit www.cliffordchance.com/luxembourglegalupdate

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We are pleased to provide you with the latest edition of our Luxembourg Legal Update. This newsletter provides a compact summary and guidance on the new legal issues which could affect your business, particularly in relation to banking, finance, capital markets, corporate, litigation, employment, funds, investment management and tax law.

## BANKING, FINANCE AND CAPITAL MARKETS

### International and EU Developments

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

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

**CRD IV/CRR:**

- N°2017/1230 of 31 May 2017 on preferential treatment in cross-border intragroup financial support
- N°2017/1443 of 29 June 2017 on supervisory reporting of institutions
- N°2017/1486 of 10 July 2017 on benchmarking portfolios and reporting instructions

**PSD2:**

- EBA Guidelines of 7 July 2017 on the criteria on how to stipulate the minimum monetary amount of the professional indemnity insurance or other comparable guarantee under Article 5(4) of PSD2 (EBA/GL/2017/08)

**MiFID 2/MiFIR:**

- N°2017/1799 of 12 June 2017 on exemption of certain third country central banks from transparency requirements
- N°2017/1944 of 13 June 2017 on standard forms, templates and procedures for the consultation process between relevant competent authorities in relation to the notification of a proposed acquisition of a qualifying holding in an investment firm
- N°2017/1945 of 19 June 2017 on notifications by and to applicant and authorised investment firms
- ESMA FAQs of 3 July 2017 on MiFID 2 – Interim Transparency Calculations (ESMA50-164-677)
- ESMA Opinion of 6 July 2017 on ancillary activity – market size calculation (ESMA70-156-165)
- N°2017/1946 of 11 July 2017 on an exhaustive list of information to be included by proposed acquirers in the notification of a proposed acquisition of a qualifying holding in an investment firm
- N°2017/1943 of 14 July 2016 on information and requirements for the authorisation of investment firms
- EU Commission FAQs of 26 October 2017 on the interaction with third country broker-dealers

**EMIR:**

- N°2017/1800 of 29 June 2017 on access to data and aggregation and comparison of data across trade repositories
- N°2017/1857 of 13 October 2017 on the equivalence of the legal, supervisory and enforcement arrangements of the USA for derivatives transactions supervised by the Commodities Futures Trading Commission (CFTC) to certain requirements under Article 11 of EMIR

**PRIIPs KID Regulation:**

- ESAs Q&A of 18 August 2017 on the PRIIPs KID (JC 2017 49)

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

**Solvency II:**

- N°2017/1421 of 2 August 2017 laying down technical information for the calculation of technical provisions and basic own funds for reporting with reference dates from 30 June until 29 September 2017 in accordance with Solvency II
- N°2017/1542 of 8 June 2017 amending Delegated Regulation (EU) 2015/35 concerning the calculation of regulatory capital requirements for certain categories of assets held by insurance and reinsurance undertakings (infrastructure corporates)

**IDD:**

- N°2017/1469 of 11 August 2017 laying down a standardised presentation format for the insurance product information document

**Benchmark Regulation:**

- N°2017/1147 of 28 June 2017 amending Implementing Regulation (EU) 2016/1368 establishing a list of critical

benchmarks used in financial markets pursuant to the Benchmark Regulation

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

**Brexit:**

- EBA Opinion of 12 October 2017 on issues related to the departure of the United Kingdom from the European Union (EBA/Op/2017/12)

**Other:**

- ECB Recommendation for a Decision of the European Parliament and of the Council amending Article 22 of the Statute of the European System of Central Banks and of the ECB (ECB/2017/18)
- FSB Assessment of 3 July 2017 of shadow banking activities, risks and the adequacy of post-crisis policy tools to address financial stability concerns
- ECB Regulation (EU) 2017/1538 of 25 August 2017 amending Regulation (EU) on reporting of supervisory financial information (ECB/2017/25)
- N°2017/1991 of 25 October 2017 amending Regulation (EU) N°345/2013 on European venture capital funds and Regulation (EU) No 346/2013 on European social entrepreneurship funds
- Notice concerning the provisional application of the Bilateral Agreement between the European Union and the United States of America on prudential measures regarding insurance and reinsurance of 7 November 2017

## Legislation

### Benchmark Regulation: Publication of Implementing Bill

#### Bill N°7164

A new bill N°7164 implementing the EU Benchmark Regulation has been lodged with the Luxembourg Parliament.

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

### SFTR: Publication of the Implementing Bill

#### Bill N°7194

A new bill N°7194 implementing SFTR was lodged with the Luxembourg parliament on 10 October 2017.

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

### PSD2: Publication of Implementing Bill

#### Bill N°7195

A new bill N°7195 implementing PSD 2 was lodged with the Luxembourg parliament on 10 October 2017.

The bill implements the PSD2 into the Luxembourg legal framework and, in particular, modifies the Luxembourg law of 10 November 2009 on payment services, as amended.

The bill foresees an entry into force on 18 January 2018 in line with the PSD2 implementation deadline.

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

### GPDR: Publication of Implementing Bill

#### Bill N°7184

A new bill N°7184 implementing Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (GDPR) was lodged with the Luxembourg parliament on 12 September 2017.

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

### PRIIPs KID Regulation: Publication of the Bill Implementing the PRIIPs KID Regulation

#### Bill N°7199

A new bill N°7199 implementing the PRIIPs Regulation was lodged with the Luxembourg parliament on 25 October 2017.

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

### Audit: Grand Ducal Regulation on the Audit Profession

#### Grand Ducal Regulation of 20 June 2017

Following the entry into force on 1 July 2017 of the Grand Ducal Regulation of 20 June 2017 on the audit profession, the following regulations have been updated:

- Grand Ducal Regulation of 9 July 2013 determining the requirements for the professional qualification of statutory auditors and approved statutory auditors; and
- Grand Ducal Regulation of 18 December 2009 determining the conditions for the recognition of service providers from other Member States in order to carry out any duties exclusively entrusted to statutory auditors by way of free provision of services.

Additionally, the Audit Regulation repealed the Grand Ducal Regulation of 15 February 2015 organising the continuous training of statutory auditors and approved statutory auditors with effect as of 1 August 2016.

**CRD IV/CRR: Setting of the Countercyclical Buffer Rate for the Fourth Quarter of 2017**

**CSSF Regulation 17-03**

The CSSF issued on 25 September 2017 a new regulation 17-03 (Regulation) on the setting of the countercyclical buffer rate for the fourth quarter of 2017.

The Regulation follows the Luxembourg Systemic Risk Committee's recommendation of 5 September 2017 (CRS/2017/004) and maintains a 0% countercyclical buffer rate for relevant exposures located in Luxembourg for the fourth quarter of 2017.

The Regulation entered into force on 1 October 2017.

## Regulatory Developments

**CRD IV: Fit and Proper Requirements and Key Function Holders Approval Process**

**New CSSF Form of Fit and Proper Declaration for Natural Persons**

The CSSF published on 30 June 2017 a new form of fit and proper declaration for natural persons supporting new applications submitted by significant institutions.

The new fit and proper declaration is based on, and implements, the ECB's fit and proper questionnaire document adopted by the ECB's Supervisory Board on 3 August 2016 as a model to be used by national competent authorities.

The CSSF has updated its information notice on the "Prudential approval procedure of key function holders in credit institutions and investment firms" accordingly and made further clarifying and other changes. The updated notice replaced the previous version with effect from 30 June 2017. Notification and authorisation files pending on that date have to be completed on request of the competent authority, in order to respond to the requirements of the new approval process notice version.

**EU Funds Transfer Regulation**

**CSSF Circular 17/660**

The CSSF issued on 5 July 2017 circular 17/660 on the EU Regulation on information accompanying transfers of funds and repealing Regulation (EC) N°1781/2006 (Funds Transfer Regulation).

The Funds Transfer Regulation introduces a number of new requirements and changes to some of the obligations under the current regime, i.e. the rules on information on payers and payees, accompanying transfer of funds, in any currency, for the purposes of preventing, detecting and investigating money laundering and terrorist financing, where at least one of the payment service providers involved in the transfer of funds is established in the EU.

The circular reminds all CSSF supervised persons and entities that the Funds Transfer Regulation became applicable in all Member States from 26 June 2017. The CSSF therefore asks all such entities and persons to verify and adapt (where necessary) their internal processes and procedures, in particular those in relation to anti-money laundering and counter terrorist financing, in order to comply with the new requirements.

**Deposit Guarantee Scheme: Survey on Amount of Covered Deposits Held as of 30 June 2017**

**CSSF-CPDI Circular 17/08**

The CSSF, acting in its function as Depositor and Investor Protection Council (*Conseil de Protection des Déposants et des Investisseurs*) (CPDI), issued the circular CSSF-CPDI 17/08 dated 6 July 2017 regarding a survey on the amount of covered deposits held as of 30 June 2017.

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

in the relevant indicators of deposit guarantee throughout the year. The circular further draws members' attention to the provisions of the CSSF-CPDI Circular 16/02, notably as regards the exclusion of structures assimilated to financial institutions and the treatment of omnibus and fiduciary accounts. The volume of eligible and covered deposits in omnibus and fiduciary accounts and the number of beneficiaries (*ayants droit*) are to be reported where credit institutions wish to ensure deposit protection for relevant beneficiaries and in order to allow the CPDI to prepare the FGDL for the reimbursement of such deposits.

In addition, FGDL members were requested to provide the data at the level of their legal entity, comprising branches located within other Member States, by 31 July 2017 at the latest. In order to transmit these data, institutions were kindly requested to complete the table attached to the circular, being also available on the CSSF website. The file containing the data had to be duly completed in all cases, respect the special surveys naming convention, as defined by the CSSF Circular 08/344, and be submitted over secured channels (E-File/SOFiE). Furthermore, a member of the authorised management, i.e. the member in charge of the FGDL membership, had to review and approve the file prior to its transmission to the CSSF.

**Deposit Guarantee Scheme: Survey on Amount of Covered Deposits Held as of 30 September 2017**

**CSSF Circular 17/679**

The CSSF, acting in its function as Depositor and Investor Protection Council (*Conseil de Protection des Déposants et des Investisseurs*) (CPDI), issued the circular CSSF-CPDI 17/09 dated 9 October 2017 regarding a survey on the amount of covered deposits held as of 30 September 2017.

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

The circular further draws members' attention to the provisions of the CSSF-CPDI Circular 16/02, notably as regards the exclusion of structures assimilated to financial institutions and the treatment of omnibus and fiduciary accounts. The volume of eligible and covered deposits in omnibus and fiduciary accounts and the number of beneficiaries are to be reported where credit institutions wish to ensure deposit protection for relevant beneficiaries and in order to allow the CPDI to prepare the FGDL for the reimbursement of such deposits.

In addition, FGDL members were requested to provide the data at the level of their legal entity, comprising branches located within other Member States, by 27 October 2017 at the latest. In order to transmit these data, institutions were kindly requested to complete the table attached to the circular, being also available on the CSSF website. The file containing the data had to be duly completed in all cases, respect the special surveys naming convention, as defined by CSSF Circular 08/344, and be submitted over secured channels (E-File/SOFiE).

A member of the authorised management, i.e. the member in charge of the FGDL membership, had to review and approve the file prior to its transmission to the CSSF. Finally, members were reminded to communicate to the CPDI the name, email address and phone number of the member of authorised management responsible for reporting to the FGDL by way of email to the address cpdi@cssf.lu by 23 October 2017 at the latest.

**Single Resolution Board: Information Gathering for 2018 *Ex-Ante* Single Resolution Fund Contribution Calculation**

**CSSF-CODERES Circular 17/05**

The CSSF, acting for the Luxembourg Resolution Board (*Conseil de Résolution*), issued circular 17/05 dated 24 October 2017 informing on the data collection for the 2018 *ex-ante* contributions to the Single Resolution Fund (SRF).

The circular is addressed to all credit institutions incorporated in Luxembourg and subject to Regulation (EU) 806/2014. Luxembourg branches of credit institutions established outside the EU are not covered by the circular, as they will be covered by the Luxembourg Resolution Fund (rather than by the SRF). Luxembourg branches of credit institutions which have their head office in another Member State of the EU are covered by their head office.

In order to determine the annual contribution to be paid by each credit institution in 2018, the Single Resolution Board (SRB) requests to obtain a certain amount of information via a template attached to the circular (together with the relevant instructions on how it has to be filled in).

The circular informs that the requested data collection for the 2018 *ex-ante* contributions to the SRF has to be sent to the CSSF by 15 January 2018 at 24:00 at the latest.

In cases where all required information is not transmitted correctly within the indicated deadline, the SRB may use estimates or its own assumptions for the calculation of the 2018 contribution of the concerned credit institution and, in specific cases, it may assign the credit institution to the highest risk adjusting multiplier for the calculation.

The circular brings changes compared to the data collection for 2017 *ex-ante* contributions. The main changes include the following:

- Field 1A8 (national identifier code for the institution) is now mandatory.
- The Liquidity Coverage Ratio (field 4B1-4B6) has been added as an additional risk indicator.
- Additional validation rules have been added (see worksheet "6. Validation rules").
- Credit institutions which fulfil the condition of "small institutions" are not allowed to opt for the simplified lump-sum approach in case they fulfil the triggers for the use of early intervention measures as defined in EBA Guideline EBA/GL/2015/03. Such institutions will be contacted separately.

Finally, each credit institution that directly or as part of a group falls under direct ECB supervision, unless it is subject to the above-mentioned lump-sum payment, must make available certain additional assurance documents, which have to be sent to the CSSF by 15 February 2018 at the latest.

**Reporting: Supervisory Reporting Requirements Applicable to Credit Institutions**

**CSSF Circular 17/663**

The CSSF issued on 31 July 2017 circular 17/663 amending CSSF Circular 14/593 on supervisory reporting requirements applicable to credit institutions.

The circular is addressed to all credit institutions and amends CSSF Circular 14/593 in order to introduce the latest developments in terms of reporting requirements.

The CSSF has, following a request to cover statistical data at national level, reintroduced several additional reporting requirements, in particular:

- L and S versions of the FINREP/ITS reporting for Luxembourg credit institutions with foreign branches, which are to be established in three different versions as of 31 December 2017; and
- tables B 2.5 B (Staff expenses) and B 2.5 E (Details on taxes), which are to be established on an annual basis as of 31 December 2017.

Additional details on the tables on staff expenses and details on taxes may be found in CSSF Circular 17/664.

**Reporting: Survey on Staff Expenses and Taxes**

**CSSF Circular 17/664**

The CSSF issued on 31 July 2017 circular 17/664 concerning a survey on staff expenses and taxes.

The circular is addressed to all credit institutions and issued further to CSSF Circular 17/663 updating the reporting requirements for credit institutions. It sets out information on the annual survey on staff expenses and tax income and expenses. The circular provides that the data are collected for statistical purposes and need to be established in the IFRS accounting standards. The data are to be provided via the reporting tables B 2.5 B (Staff expenses) and B 2.5 E (Details on taxes). The circular contains detailed explanations on the applicable reporting period, reporting deadlines, scope and different reporting items in the reporting tables.

Technical instructions on the transmission of the reporting are set out in the paper 'Reporting requirements for credit institutions' published on the CSSF's website.

**MiFID 2/MiFIR: ESMA Guidelines on Assessment of Knowledge and Competence**

**CSSF Circular 17/665**

The CSSF issued on 31 July 2017 circular 17/665 on ESMA's guidelines on the assessment of knowledge and competence.

The aim of the circular is to implement the guidelines and to comply with paragraphs 21 and 22 of the guidelines requiring national competent authorities to publish certain information on their websites. In this context the CSSF has specified, among other things, the following:

- the maximum period during which a staff member/employee without the required qualifications or experience is authorised to work under supervision is fixed at four years;
- the period required for gaining appropriate experience is fixed at a minimum of one year full-time job experience; and
- the verification of knowledge and minimum competence can be done through either:
  - an internal evaluation, through all means at the professional's disposal, in line with a formal procedure which the CSSF can verify a posteriori, or
  - external professional training certified by the CSSF.

Any person/entity wishing to offer external professional training will need to apply for certification from the CSSF on the basis of an application demonstrating the adequacy of the means and expertise required for the purposes of the assessment. The minimum criteria to be included in the external training will be fixed at a later stage by way of CSSF circular. The list of entities that have obtained a certification from the CSSF will be published on the CSSF's website.

The circular applies to all professionals subject to prudential supervision by the CSSF who provide investment services and activities listed in Annex II, Section A of the law of 5 April 1993 on the financial sector (FSL), or who market or advise clients in relation to structured deposits or who provide ancillary services listed in Annex II, Section C of the FSL.

The circular entered into force on the date of its publication on the CSSF's website (i.e. 3 August 2017) and professionals are required to comply with the provisions thereof as of 3 January 2018.

**MiFID 2/MiFIR: ESMA Guidelines on the Calibration of Circuit Breakers and Publication of Trading Halts under MiFID 2**

**CSSF Circular 17/668**

The CSSF issued on 22 August 2017 a new circular 17/668 on the ESMA Guidelines on the calibration of circuit breakers and publication of trading halts MiFID 2 (Guidelines) to implement the Guidelines into Luxembourg regulation.

The aim of the Guidelines is to develop common standards to be taken into consideration by trading venues for the calibration of their circuit breakers and, more generally, to ensure consistent application of the provisions in Article 48(5) of MiFID 2. They set forth a non-exhaustive list of elements to be taken into account by trading venues when performing calibration of volatility parameters necessary for the implementation of circuit breakers and provide guidance on the publication by trading venues in case of trading halts under Article 48(5) of MiFID 2.

The CSSF draws the attention of trading venues subject to its supervision that:

- they need to notify to the CSSF the circuit breakers parameters used on the first trading day of the current year at the latest on 15 January of each year, and
- any future substantial change to these parameters needs to be notified to the CSSF in a timely manner.

The circular further provides additional guidance as to the forms to be used for such reporting.

The circular applies to all regulated markets, market operators, credit institutions, investment firms and operators of MTF or OTF markets, and entered into force on 22 August 2017. Trading venues have to apply the provisions of the circular as from 3 January 2018.

**MiFID 2/MiFIR: Criteria for External Professional Training Relating to Knowledge and Competence**

**CSSF Circular 17/670**

The CSSF issued on 13 October 2017 a new circular 17/670 on the criteria for external professional training for the purpose of CSSF Circular 17/665 implementing the ESMA MiFID 2 Guidelines for the assessment of knowledge and competence.

The circular aims to provide:

- the minimum criteria to be included in external training, and
- specifications regarding the file for requesting the inscription on the list of entities recognised by the CSSF for the provision of external training published on the CSSF's website.

The circular further reminds that, in order to satisfy the requirements to verify the minimum knowledge and competences, relevant professionals can either proceed with the required verification internally, following a formal procedure subject to an *ex post* CSSF control, or ensure

that their employees have attended professional training delivered by one of the entities listed on the CSSF's website.

The circular applies to all professionals subject to prudential supervision by the CSSF who provide MiFID 2 investment services and activities listed in the Financial Sector Law, or who market or advise clients on structured deposits or who provide MiFID 2 ancillary services.

The circular entered into force on publication by the CSSF on its website.

**Prospectus Regulation: Publication of a New Prospectus Regulation**

**CSSF Press Release 17/26**

The CSSF issued on 13 July 2017 a press release on the publication of the new Prospectus Regulation.

The CSSF draws the attention of issuers to the fact that the Prospectus Regulation applies as of 21 July 2019, with the exception of certain provisions on the obligation to publish a prospectus as provided for in Article 49 of the Prospectus Regulation, among others, provisions on prospectus publication obligation exemptions, which apply as of 20 July 2017, respectively as of 21 July 2018. The CSSF reminds that the Prospectus Regulation is mandatory in all respects and directly applicable in all Member States.

In this context, the CSSF draws the attention to the three consultation documents published by ESMA regarding draft technical advice:

- on format and content of the prospectus
- on scrutiny and approval of the prospectus
- on content and format of the EU Growth prospectus.

Comments and remarks may be directly transmitted in the consultation process to ESMA until 28 September 2017.

Any potential questions concerning the application of the Prospectus Regulation may be addressed via email prospectus.help@cssf.lu to the CSSF.

**Benchmark Regulation: Entry into Force of the Benchmark Regulation**

**CSSF Press Release 17/36**

The CSSF issued on 30 October 2017 press release 17/36 on the Benchmark Regulation.

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

**Transparency Law: CSSF Sets Out Findings Related to ESMA Guidelines on Alternative Performance Measures**

**CSSF Press Release 17/28**

The CSSF issued on 3 August 2017 a press release on its findings related to the ESMA's guidelines on alternative performance measures (ESMA/2015/1415), following an examination of the compliance of issuers subject to the law of 11 January 2008 on transparency requirements for issuers with the guidelines, in particular in relation to financial communications published for 2016.

The CSSF identified a series of misstatements and omissions, the most significant being issues related to press releases, identification of alternative performance measures (APMs), and recurring breaches regarding the definition of APMs used and reconciliations of APMs to the most directly reconcilable line item, subtotal or total presented in the financial statements, and explanations on the use of APMs.

Accordingly, the press release draws issuers' attention to the fact that the CSSF will continue closely to monitor how issuers comply with the guidelines in their future financial communications, in particular the 2017 half-yearly financial report and press release.

**Deposit Guarantee Scheme: Update of the FGDL Website**

**CSSF Press Release**

The CSSF issued on 28 August 2017 a press release highlighting the update of the website of the FGDL.

The updated website has a 'Depositor's corner' section which provides the customers of banks and certain investment firms with information on, in particular, the amount of their deposits that is protected in case of failure of a bank and the compensation process within the limits foreseen by the law of 18 December 2015 on the failure of credit institutions and certain investment undertakings, as amended.

The "Bank"s corner' section provides information for banks, members of the FGDL (i.e. links to the relevant CSSF-CPDI circulars and stress tests information).

Moreover, a glossary of the terminology sets out definitions of certain technical terms used on the website.

**Out-of-Court Complaint Resolution**

**CSSF Circular 17/671**

The CSSF issued on 13 October 2017 a new circular 17/671 on CSSF Regulation 16-07 on out-of-court complaint resolution.

The circular is addressed to all professionals subject to CSSF prudential supervision and to all entities subject to the public supervision of the audit profession carried out by the CSSF, and aims to provide clarifications regarding the implementation of the regulation.

In accordance with the regulation, the CSSF acts as the entity competent for out-of-court complaint resolution within the meaning of Directive 2013/11/EU, and as such, is inscribed on the respective lists drawn up by the Luxembourg Minister of Economy and the European Commission. Additionally, the CSSF acts as out-of-court complaint resolution authority for disputes on matters other than consumer matters (i.e. in particular disputes between commercial companies).

In that respect, the circular provides guidance on:

- the complaints processing procedure, by clarifying the complaints recording modalities and the complaint treatment to be carried out by the relevant professional (e.g. setting up of a dedicated hotline or call centre where this may be necessary in relation to the number and complexity of the complaints)
- Article 15 of the regulation, by providing details on the responsibilities and tasks of the person responsible at management level of the respective professional for complaints resolution and the relevant information obligations vis-à-vis each complainant
- the communication of information to the CSSF, in particular, by establishing a template table providing details on the number of registered complaints and which respective professionals need to submit to the CSSF on an annual basis.
- The circular finally abolished CSSF circular 14/589 and entered into force on the day of its publication on the CSSF website.

**MiFID 2/MiFIR/EMIR: Mandatory Use of Legal Entity Identifier**

**CSSF Press Release**

The CSSF issued on 12 October 2017 a press release on the mandatory use of a legal entity identifier (LEI) under MiFID 2/MiFIR and EMIR. The CSSF draws attention, with reference to the upcoming entry into force of MiFID 2 and MiFIR, to the ESMA statement released on 9 October 2017 on LEI.

The CSSF further reminds that under the new EMIR reporting requirements, the LEI is mandatory as of 1 November 2017 to identify the counterparty in a derivative transaction (i.e. reporting counterparty ID) and that, in order to accept the EMIR reports, trade repositories will check the LEI of the reporting counterparty with the Global LEI Foundation (GLEIF) database.

**ESA Joint Guidelines on the Prudential Assessment of Acquisitions and Increases of Qualifying Holdings in the Financial Sector**

**CSSF Press Release and CAA Information Note**

The CSSF issued on 28 September 2017 a new circular 17/669 implementing the ESA joint guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector (JC/GL/2016/01 of 20 December 2016) (Guidelines) and repealing of the circular CSSF 09/392.

The main objective of the Guidelines is to provide the necessary legal certainty, clarity and predictability with regard to the assessment process contemplated in the sectoral directives and regulations. In particular, the Guidelines, compared to the former 2008 joint guidelines of CEBS, CESR and CEIOPS (2008 Guidelines) in more detail:

- specify certain general concepts, such as those of "parties acting in concert", "indirect acquisitions of qualifying holdings", "significant influence", "decision to acquire" and "proportionality principle"
- determine the assessment period and information to be provided to the target supervisor
- clarify that where the notification is incomplete, the acknowledgment of receipt does not start the assessment period where the target supervisor either specifies the missing information in the acknowledgment of receipt, or refers therein to a

separate letter to be sent in a reasonable timeframe thereafter
- clarify the assessment criteria for a proposed acquisition.

Furthermore, the Guidelines provide:

- a recommended list of information to be required by the competent authorities for the assessment of an acquisition of a qualifying holding (which is an extended and modified list compared to the one annexed to the 2008 Guidelines)
- practical examples of the determination of acquisitions of indirect holdings.

The CSSF applied the Guidelines in respect of an assessment of qualifying holdings in credit institutions, investments firms and central counterparties, irrespective of the acquirer as from their entry into force on 1 October 2017.

The CAA issued on 27 September 2017 an information note on changes in the shareholding structure of insurance and reinsurance undertakings (Information Note). In the Information Note, the CAA indicates that it applies the new Guidelines in respect of an assessment of qualifying holdings in insurance and reinsurance undertakings, in replacement of the former 2008 Guidelines, as of 1 October 2017.

**Payment Accounts Directive: Right of Access to Banking Services**

**CSSF Press Release**

The CSSF issued on 29 September 2017 a press release on the right of access to banking services.

The press release, in particular, sets out the list of five institutions that have to provide consumers with basic payment accounts in Luxembourg pursuant to Article 23(1) of the Law of 13 June 2017 on payment accounts implementing the Payment Accounts Directive and amending the Luxembourg law of 15 December 2000 on postal financial services, as amended.

**CSDR: ESMA Guidelines on access by a CSD to the transaction feeds of CCPs and trading venues**

**CSSF Circular 17/666**

The CSSF issued on 18 August 2017 a new circular 17/666 on the ESMA guidelines on access by a central securities depository (CSD) to the transaction feeds of central counterparties (CCPs) and trading venues (Guidelines) to implement the Guidelines into Luxembourg regulation.

The aim of the Guidelines is to specify the legal, financial and operational risks to be taken into account by a CCP or a trading venue when carrying out a comprehensive risk assessment following a CSD's request for access to the transaction feed of the CCP or trading venue. These risks are also taken into account by the competent authority of the CCP or trading venue, when assessing the grounds for refusal to provide services to a CSD.

The circular applies to all CCPs and trading venues, and entered into force on 18 August 2017.

**CSDR: ESMA Guidelines on CSD participants default rules and procedures**

**CSSF Circular 17/667**

The CSSF issued on 18 August 2017 a new circular 17/667 on the ESMA guidelines on central securities depositories (CSDs) participants default rules and procedures (Guidelines) to implement the Guidelines into Luxembourg regulation.

The aim of the Guidelines is to ensure common, uniform and consistent application of the provisions in Article 41 of the CSDR. In particular, they aim to ensure that CSDs define and apply clear and effective rules and procedures to manage the default of any of their participants.

The Guidelines explain:

- how a CSD should define its default rules and procedures and acknowledge a participant's default;
- which type of actions a CSD may take in case of default, as well as how the CSD should implement them;
- how the CSD should communicate about the implementation of such rules and procedures; and
- how a CSD should test and periodically review its default rules and procedures.

The circular applies to all CSDs and entered into force on 18 August 2017.

### Case Law

**Financial Collateral Arrangements – Pledge – Enforcement**

**District Court (summary proceedings), 12 July 2017, N°170744**

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

## CORPORATE

### International and EU Developments

**Directive (EU) 2017/1132**

The directive (EU) 2017/1132 of 14 June 2017 relating to certain aspects of company law codified six previous European directives in order to coordinate the European company law regarding the incorporation, operating, publicity, cross-border mergers and divisions of public limited liability companies.

The purpose of the directive is to cover a wide range of corporate aspects and to provide precise regulations in order to coordinate member states' laws.

The directive counts 168 articles and 4 appendixes. The six European directives that are subject to this coordination are the following: directive 82/891/CEE on the division of public limited liability companies, directive 89/666/CEE on the publicity of branches, directive 2005/56/CE on cross border mergers of limited liability companies, directives 2009/101/CE and 2012/30/UE on coordination of safeguards for the protection of shareholders and third parties, and directive 2011/35/UE concerning mergers of public limited liability companies.

### Luxembourg law

**Proposed coordination of the Companies Law**

The purpose of the proposed regulation, which was presented to the Council of State by the Minister of Justice on 15 May 2017, is to provide a whole new numbering of the law in order to make it more accessible, to remove some title references and to correct grammatical errors. This choice of a new numbering has been made due to the scattered legal provisions that were added progressively since the creation of the law. The proposed regulation has for purpose to reorganise the Companies Law in order to gather similar topics together, which were until now mixed with other non-related topics.

Finally, this opportunity will also be used in order to remove and replace the current references to six European directives (namely 82/891/CEE, 89/666/CEE, 2005/56/CE, 2009/101/CE, 2011/35/UE and 2012/30/UE) by the directive (EU) 2017/1132.

## DATA PROTECTION

**Guidelines of the Article 29 Working Party**

The Article 29 Working Party published new Guidelines on certain key topics of the Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data ("GDPR").

On 8 June 2017, the Article 29 Working Party adopted Opinion 2/2017 on data processing at work, which includes important considerations for employers when processing data.

The opinion is a complement to previous Article 29 Working Party publication (Opinion 8/2001 on the processing of personal data in the employment context (WP48) and the 2002 Working Document on the surveillance of electronic communications at the workplace (WP55)) and was written with the view to help controllers comply with the additional obligations placed on employers by the upcoming GDPR.

More precisely, it makes a new assessment, in view of new technologies, of the balance between legitimate interests of employers, on the one hand, and the reasonable privacy expectations of employees, on the other. To do so, it identifies nine different data processing methods at work, scenarios where new technologies have, or may have, the potential to result in high risks to employees' privacy.

It concludes by giving recommendations which touch upon fundamental rights, consent and legitimate interest, transparency, proportionality and data minimisation, as well as cloud services, online apps and international transfers.

On 3 October 2017, the Article 29 Working Party adopted two new guidelines: the first one on data breach notification and another on automated individual decision-making and profiling.

The guidelines on data breach notification are a consequence of the requirement imposed by the GDPR to notify to the competent national supervisory authority (the CNPD in Luxembourg) any breach which is likely to result in a risk to the rights and freedoms of individuals and, in certain cases, to notify also the individuals whose personal data have been affected by the breach.

Such notification will be mandatory for controllers, but also for processors who will have to inform their controllers if there is a breach. Therefore, controllers and processors are encouraged in these guidelines to plan in advance and put in place processes to be able to detect and promptly contain a breach. Thus, these guidelines explain the steps controllers and processors can take to meet these new obligations.

Such a failure to report a breach should be taken seriously since it may lead to a sanction, including an administrative fine, the value of which can be up to EUR 10 million or up to 2% of the worldwide annual turnover of the controlling entity.

As a consequence of advances in new technologies and the widespread availability of personal data on the internet, the Article 29 Working Party also decided to adopt guidelines on automated individual decision-making and profiling.

Automated individual decision-making and profiling are used in a large number of sectors, including in banking and finance, health, taxation, insurance, marketing and advertising.

The Article 29 Working Party recognises that there are two general benefits of these technologies: increased efficiencies and resource savings.

However, automated individual decision-making and profiling may also pose significant risks for individuals, which is the reason why the GDPR introduces new provisions to address these risks.

These guidelines clarify these new provisions and give good practice recommendations to the actors involved.

**Bills of Law – the "Data Protection Package"**

**The First Bill**

On 1 August 2017, WAS lodged with the Luxembourg parliament the draft bill N°7168 regarding data processing in criminal matters and matters of national security which implements Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties,

and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

This bill is mostly an adaptation of the GDPR for data processing in criminal matters but it also contains a significant change with the Luxembourg law of 2 August 2002 on data protection with regard to the processing of personal data, under which individuals have only an "indirect" access to their data held by a competent authority. This will no longer be the case, since the bill provides that the data subjects can directly contact the data controller to access their data.

Another innovation is the creation of a supervisory authority for the protection of judicial data.

### The Second Bill

On 12 September 2017, another bill (N°7184) implementing and complementing the GDPR and repealing the law dated 2 August 2002 on data protection with regard to the processing of personal data was lodged with the Luxembourg parliament. This bill ensures the implementation of the GDPR in the Luxembourg legal framework, and is limited to completing the EU framework through national provisions in relation to:

- the Luxembourg data protection authority, the Commission Nationale de la Protection des Données ("CNPD"). The bill regulates the structure, functioning and powers of the CNPD, powers which are necessary for the exercise of its missions under the GDPR, and confirms its independence as regulator and expands its sanction powers; and
- specific provisions in areas where the GDPR allows for local regulations, including in particular provisions on the conciliation of personal data protection rules and the freedom of expression and information, the safeguards and derogations relating to processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes and processing of special categories of personal data by the health or social care systems and services.

### The Third Bill

The third bill of the data protection package (N°7151/00) should be lodged with the Luxembourg parliament very soon. This bill will implement Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.

The purpose of this bill is thus to guarantee the protection of PNR data and to implement the specific data protection requirements laid down in the aforementioned Directive.

**Compliance Support Tool launched by the CNPD**

The CNPD and the Luxembourg Institute of Science and Technology (LIST), with the support of Digital Lëtzebuerg, created a “compliance support tool” for the general rules on data protection.

The aim of the compliance support tool is to draw up an innovative, intuitive solution enabling users to check the level of maturity of their organisations. The tool will allow users not only to manage a processing register, together with all the other documents necessary for demonstrating their responsibility, but also to monitor the evolution of the level of maturity of their organisations. The tool will soon be available on the CNPD's website.

## Case Law

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

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

# FINTECH

## International and EU Developments

### New International and EU Texts

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

- EBA Discussion Paper of 4 August 2017 on the EBA's approach to financial technology (FinTech) (EBA/DP/2017/02)
- BCBS Consultative Paper of 31 August 2017 on implications of FinTech for banks and supervisors
- European Commission feedback statement summarising responses to its consultation 'Public Consultation on FinTech: a more competitive and innovative European financial sector'
- ECB Consultation on guides concerning the assessment of licence applications and fintech credit institution licence applications

### ICOs: ESMA Statements on ICOs

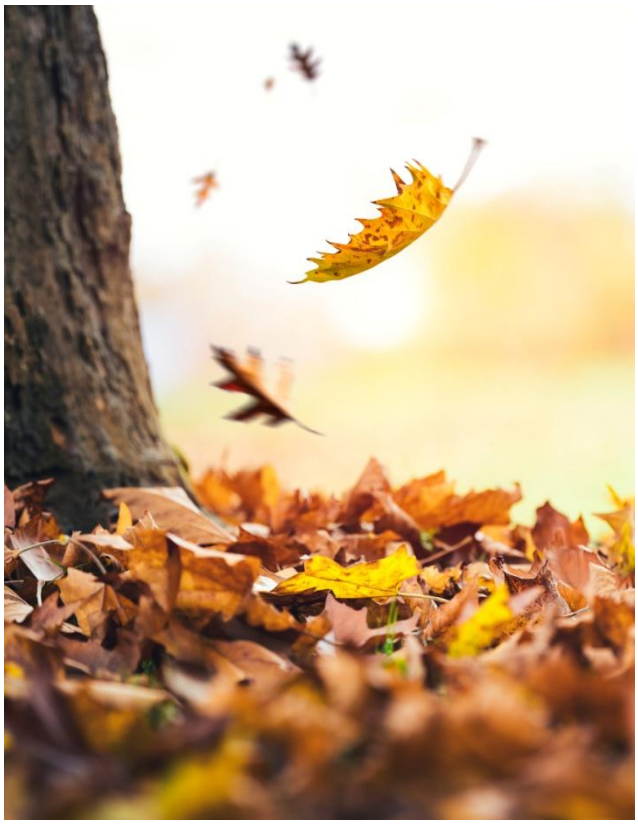
#### ESMA Statements on Risks of ICOs and Rules Applicable to Firms involved in ICOs (ESMA50-157-829, ESMA50-157-828)

ESMA published on 13 November 2017 two statements on initial coin offerings (ICOs); one on risks of ICOs for investors and one on the rules applicable to firms involved in ICOs.

ESMA's first statement warns investors that ICOs are risky and highly speculative investments because the price of the coin or token is typically extremely volatile, and ICOs are also vulnerable to the risk of fraud or money laundering. Additionally, the statement notes that ICOs may fall outside of the scope of EU laws and regulations depending on how they are structured, so investors may not be able to benefit from the protection that these laws and regulations provide.

ESMA's second statement alerts firms involved in ICOs to the need to meet relevant regulatory requirements. The statement notes that where ICOs qualify as financial instruments, it is likely that firms involved in ICOs conduct regulated investment activities, in which case they need to comply with the relevant legislation, including: the Prospectus Directive, MiFID, AIFM Directive and AMLD 4.

ESMA stresses that firms involved in ICOs should give careful consideration as to whether their activities constitute regulated activities.



# INVESTMENT FUNDS

## EU Developments

### UCITS/AIFMD

#### ESMA Updated Q&A on UCITS Directive SFTR's Impact on UCITS Directive

On 5 October 2017, ESMA issued an updated version of its Q&A document on the application of the UCITS Directive[1], which includes new questions and answers on the impact of the SFTR for UCITS and their management companies.

In particular, ESMA reminds that, according to Article 13 of SFTR, UCITS management companies and self-managed investment companies must inform investors on the use they make of SFTs and total return swaps in the UCITS' annual and semi-annual reports, and that the information on SFTs and total return swaps must include the data provided for in Section A of the Annex to the SFTR.

In this respect, the revised Q&A contains a table explaining how each data item in Section A of the Annex to the SFTR should be reported. In particular, this table indicates that all data items should be reported as a snapshot (taken at the end of the reporting period), with the exception of cash collateral reinvestment returns to the collective investment undertaking and data on return and cost for each type of SFT and total return swaps for which additional explanations are provided by ESMA. ESMA further outlines that the guidance provided by its Q&A is without prejudice to further work that may be carried out in relation to the disclosure obligations for UCITS under SFTR.

As a reminder, a previous version of ESMA's Q&A on the UCITS Directive (issued in October 2016) had clarified that the relevant information on the use of SFTs and total return swaps by UCITS must be included in the **UCITS' next annual report and semi-annual report to be published after 13 January 2017**, which reports may relate to a reporting period beginning before that date. For the avoidance of doubt, the above periodic report transparency requirements under SFTR are without prejudice to pre-contractual transparency requirements to be complied with by UCITS and their management companies under the SFTR.

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

#### ESMA Updated Q&A on AIFMD SFTR's Impact on AIFMD and Remuneration Disclosures

On 5 October 2017, ESMA issued an updated version of its Q&A document on the application of the AIFMD[2], which includes the following new questions and answers:

- As regards the SFTR's impact, ESMA reminds that, to the same extent as UCITS management companies and self-managed investment companies:
  - AIFMs must inform investors on the use they make of SFTs and total return swaps in the AIFs' annual reports, and that the information to be provided in this respect must include the data provided for in Section A of the Annex to the SFTR.
  - All data items under Section A of the Annex to the SFTR should be reported as a snapshot (taken at the end of the reporting period), with the exception of cash collateral reinvestment returns to the collective investment undertaking and data on return and cost for each type of SFT and total return swaps (as illustrated the table included in ESMA's Q&A).
  - The guidance provided in ESMA's Q&A is without prejudice to further work that may be carried out in relation to the disclosure obligations for AIFs under SFTR.

  As a reminder, a previous version of ESMA's Q&A on the AIFMD (issued in October 2016) had clarified that the relevant information on the use of SFTs and total return swaps by AIFMs must be included in **the AIF's next annual report to be published after 13 January 2017**, which report may relate to a reporting period beginning before that date. For the avoidance of doubt, the above periodic report transparency requirements under the SFTR are without prejudice to pre-

[1] ESMA34-43-392

[2] ESMA34-32-352

contractual transparency requirements to be complied with by AIFMs/AIFs under the SFTR.

- As regards remuneration disclosures, ESMA clarifies that the remuneration-related disclosure requirements under Article 22(2)(e) of the AIFMD (which imposes an obligation to disclose in the relevant AIF's annual report the total amount of remuneration for the financial year, split into fixed and variable remuneration, paid by the AIFM to its staff, and number of beneficiaries, and, where relevant, the carried interest paid by the AIF) also apply to the staff of the delegate of an AIFM to whom portfolio management or risk management activities have been delegated.

  In this respect, ESMA indicates that, in line with its AIFMD remuneration guidelines[3], an AIFM can ensure compliance with the above remuneration disclosure requirements in one of the following two ways:

  - where the delegate is subject to regulatory requirements on remuneration disclosure for its staff to whom portfolio management or risk management activities have been delegated that are equally as effective as those under Article 22(2)(e) of the AIFMD, the AIFM should use the information disclosed by the delegate for the purposes of fulfilling its obligations under Article 22(e) of the AIFMD and Article 107 of the AIFMD Level 2 Regulation; or
  - in other cases, appropriate contractual arrangements should be put in place with the delegate allowing the AIFM to receive (and disclose in the annual report for the relevant AIF(s) that it manages) at least information on the total amount of remuneration for the financial year, split into fixed and variable remuneration, paid by the AIF and/or the AIFM to the identified staff of the delegate – and number of beneficiaries, and, where relevant, carried interest – which is linked to the delegated portfolio. This means that the disclosure should be done on a prorated basis for the part of the AIF's assets which are managed by the identified staff within the delegate.

  For both situations set out above, ESMA specifies that the disclosure may be provided on an aggregate basis, i.e. by means of a total amount for all the delegates of the AIFM in relation to the relevant AIF.

  ESMA also indicates that the information as prescribed by Article 22(2)(e) and Article 22(2)(f) (i.e. the aggregate amount of remuneration broken down by senior management and members of staff of the AIFM whose actions have a material impact on the risk profile of the AIF) must be included in the annual report of the relevant AIF and cannot only be disclosed by way of a link to a document where such information would be available. This is, however, without prejudice to references in the annual report to other documents where additional information may be found.

[3] ESMA/2013/232 as amended by ESMA/2016/579

**PRIIPs**

**Reminder of PRIIPs KID Regulation Deadline 1 January 2018**

The PRIIPs KID Regulation, which entered into force on 29 December 2014, will apply as from **1 January 2018**.

Accordingly, **manufacturers and distributors/advisers of AIFs and other non-UCITS funds** (whether closed- or open-ended) need to comply with the PRIIPs KID Regulation, namely by having in place a **PRIIPs KID as from 1 January 2018**, when these AIFs and other non-UCITS funds are advised on, offered or sold in the EU to retail investors within the meaning of MiFID 2 (i.e. every investor not qualifying as a professional investor or not having opted to be treated as a professional investor). They can, however, be exempted from the obligations of the PRIIPs KID Regulation until 31 December 2019 if the relevant retail AIF/non-UCITS fund benefits from the exemption provided for by Article 32(2) of the PRIIPs KID Regulation, i.e. when a UCITS KIID is issued for these funds.

UCITS are grandfathered **until 31 December 2019**, which means that **manufacturers and distributors/advisers of UCITS may continue to produce, respectively to deliver, a UCITS KIID** for the time being, and will, in principle, only need to have in place a PRIIPs KID as of 1 January 2020, unless such deadline is postponed by the EU Commission on the basis of the review of the transitional arrangements of the PRIIPs KID Regulation. For the avoidance of doubt, even if UCITS will be exempt from the obligations of the PRIIPs KID Regulation until 31 December 2019, they may nevertheless be indirectly impacted by the PRIIPs KID Regulation, namely in the case where a PRIIP (such as a life insurance product) has one or several UCITS as underlying investment. In such

case, the PRIIP manufacturer, which is, in particular, obliged to disclose all costs incurred under the PRIIPs Regulation in relation to the life insurance product it offers, will have to liaise with the underlying UCITS manager to obtain information on, among other things, the transaction costs incurred by the UCITS and that are not disclosed in the UCITS KIID. These costs would, in principle, be expected to be calculated by using the methodology provided for in the EU Commission Delegated Regulation (EU) 2017/653 of 8 March 2017 laying down RTS with regard to the presentation, content, review and revision of the PRIIPs KID.

For more information on the PRIIPs KID Regulation, please refer to the related section of the July 2017 edition of our Luxembourg Legal Update, which includes a summary of CSSF's and ALFI's guidance on the impact and applicable timescale of the PRIIPs KID Regulation for Luxembourg regulated investment funds and their managers.

### ESAs Q&A on PRIIPs KIDs

On 18 August and 20 November 2017, the Joint Committee of ESAs (comprising EBA, ESMA and EIOPA) published updated versions of its questions and answers document in relation to the PRIIPs Delegated Regulation, which includes new questions and answers on market risk assessment (Annex II, Part 1), methodology for assessing credit risk (Annex II, Part 2), summary risk indicator (SRI) (Annex III), performance scenarios (Annex IV), derivatives, multi-option products (MOPs) and presentation of costs (Annex VII).

### EFAMA and Insurance Europe updated versions of EPT and CEPT

In October 2017, EFAMA and Insurance Europe endorsed new versions of the EU PRIIPs Template (EPT) and Comfort EU PRIIPs Template (CEPT), which are both immediately applicable and replace the previously available version 1.0 approved in July 2017.

As a reminder, these templates are meant to provide a functional description of the set of data to be exchanged from asset managers and banks to insurers to help them fulfil their PRIIPs regulatory obligations. In particular, the EPT includes the minimum data necessary that asset managers will deliver free of charge to insurers for them to produce a KID according to the provisions of the PRIIPs KID Regulation, and the CEPT includes more optional data, so its delivery is subject to bilateral agreements between insurers and asset managers. The use of these templates is not compulsory, but EFAMA strongly encourages stakeholders to use the most recent versions of the templates to ensure data operability among all users.

## Benchmark Regulation

### Reminder of Benchmark Regulation Deadline 1 January 2018

The Benchmark Regulation entered into force on 30 June 2016, and most of its provisions will apply from **1 January 2018**, subject to transitional provisions.

**UCITS management companies/self-managed investment companies and AIFMs** are captured by the Benchmark Regulation **as "supervised entities"** when they use benchmarks[4], namely to measure the performance of an investment fund through an index or a combination of indices for the purpose of tracking the return of such an index or combination of indices, to define the asset allocation of a portfolio, or to calculate performance fees.

According to the Benchmark Regulation, **supervised entities** are subject to the following requirements:

- As regards the **use of benchmarks**:
  - As from **1 January 2018**, supervised entities may only use benchmarks that are provided by (i) an EU benchmark administrator authorised or registered under the Benchmark Regulation and included in the ad hoc register to be kept by ESMA, or (ii) a non-EU provider that has been qualified under the Benchmark Regulation's third country regime. However, **transitional provisions** allow supervised entities to continue

[4] According to the Benchmark Regulation, a "benchmark" means any index by reference to which the amount payable under a financial instrument or a financial contract, or the value of a financial instrument, is determined, or an index that is used to measure the performance of an investment fund with the purpose of tracking the return of such an index or of defining the asset allocation of a portfolio or of computing the performance fees. The Benchmark Regulation also defines an "index" as any figure that is published or made available to the public, and regularly determined, entirely or partially by the application of a formula or any other method or calculation, or by an assessment, on the basis of the value of one or more underlying assets or prices, including estimated prices, actual or estimated interest rates, quotes and committed quotes, or other values or surveys.

to use **existing EU benchmarks** provided by a non-authorised or non-registered EU benchmark administrator until **1 January 2020** or, if such administrator applies for authorisation or registration before that date, **until their application is refused**. As regards **existing non-EU benchmarks** that have not yet been qualified for use in the EU under the Benchmark Regulation's third country regime, their use in the EU will only be permitted in a financial instrument or financial contract, or for measuring the performance of an investment fund, that already references the non-EU benchmark or adds a reference to the non-EU benchmark **before 1 January 2020**.

- As from **1 January 2018**, supervised entities must produce and keep up-to-date **robust written contingency plans** outlining the steps to be taken in the event that a benchmark used by them is materially changed or ceases to be produced. These plans and any updates must be provided to NCAs upon request, and supervised entities are also obliged to reflect these contingency plans in their contractual relationship with their clients.

- As regards transparency requirements towards investors, the Benchmark Regulation requires that **prospectuses to be published under the Prospectus Directive or UCITS Directive** include **clear and prominent information** as from **1 January 2018** stating whether the benchmark is provided by an administrator included in the register held by ESMA when the object of these prospectuses is transferable securities or other investment products that reference a benchmark. However, for **UCITS prospectuses approved prior to 1 January 2018**, the transitional provisions of the Benchmark Regulation provide that the underlying documents shall be updated **on the first occasion** or, at the latest, by **1 January 2019**.

For more information and resources on the Benchmark Regulation, please see our client briefing The new EU benchmarks regulation: what you need to know and our Benchmark Topic Guide on the Clifford Chance Financial Markets Toolkit, and more particularly the Benchmark Regulation Compliance Tool section of this Topic Guide which is designed to assist firms with their implementation projects under the Benchmark Regulation. See also the related section of the July 2017 edition of our Luxembourg Legal Update and sub-section "ESMA Updated Q&A on Benchmark Regulation" of this Legal update summarising ESMA's guidance on the Benchmark Regulation's transitional provisions applicable to existing EU and non-EU benchmarks.

### EU Commission Delegated Regulation on Conditions to Assess Impact resulting from Cessation of or Change to Existing Benchmarks

On 3 October 2017, the EU Commission adopted a delegated regulation (Delegated Regulation) supplementing the Benchmark Regulation with regard to the establishment of the conditions to assess the impact resulting from the cessation of or change to existing benchmarks.

The purpose of this Delegated Regulation is to provide a non-exhaustive list of the conditions to be taken into account by national competent authorities (NCAs) when considering the permission to continue to use, on the basis of Article 51(4) of the Benchmark Regulation, an existing benchmark which does not meet the requirements of the Benchmark Regulation in the EU, namely because the cessation or modification of such existing benchmark, to make it compliant with the Benchmark Regulation requirements, could result in a *force majeure* event, or could frustrate or otherwise breach the terms of a financial contract or financial instrument, or the rules of an investment fund, referencing such existing benchmark.

Examples of conditions to be considered and applied on a case-by-case basis by NCAs include the changes to the type of input data used or the change to the methodology to determine those data as well as the absence of a substitute benchmark.

The Delegated Regulation will enter into force 20 days following its publication in the Official Journal and will be binding and directly applicable in all member states.

### EU Commission Delegated Regulations supplementing Benchmark Regulation

Further to the consultation it organised from 22 June to 20 July 2017, the EU Commission adopted on 29 September 2017 three delegated regulations supplementing the Benchmark Regulation by specifying:

- how the criteria of Article 20(1)(c)(iii) are to be applied for assessing whether certain events would result in significant and adverse impacts on market integrity, financial stability, consumers, the real economy or the

financing of households and businesses in one or more member states
- how the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds are to be assessed
- the technical elements of the definitions laid down in paragraph 1 of Article 3 of the Benchmark Regulation.

The above delegated regulations will enter into force on the twentieth day following that of their publication in the Official Journal of the EU and be directly applicable in all member states.

### ESMA Updated Q&A on Benchmark Regulation

On 29 September and 8 November 2017, ESMA published updated versions of its Q&A on the implementation of the Benchmark Regulation[5], which include new questions and answers regarding:

- the scope of application of the Benchmark Regulation to EU and third country central banks
- the exemption on single reference price
- the definition of "family of benchmarks"
- the definition of "use of a benchmark"
- the application of the Benchmark Regulation outside of the EU
- the transitional provisions applicable to third country benchmarks.

As regards the application of the Benchmark Regulation outside the EU, ESMA reminds that the Benchmark Regulation's objective is to ensure the proper functioning of the EU market and a high degree of consumer and investor protection vis-à-vis benchmarks at EU level, and that it is not the ambition of the Benchmark Regulation to protect users of benchmarks worldwide, possibly conflicting with any applicable third country regimes. Accordingly, ESMA considers that the Benchmark Regulation does not apply to the provision of benchmarks that are exclusively used outside the EU and that an administrator providing a benchmark exclusively to users outside the EU would have to comply with any applicable third country regimes with respect to benchmarks.

As regards the transitional provisions applicable to third country benchmarks, ESMA clarifies that the meaning of the term “where the benchmark is already used in the Union” in Article 51(5) of the Benchmark Regulation is "where the benchmark is already used in the Union on or before 1 January 2020".

As a reminder, a previous version of ESMA Q&A on the Benchmark Regulation (published in July 2017) has clarified the transitional provisions applicable to EU benchmarks. In this respect, please refer to the related section of the July 2017 edition of our Luxembourg Legal Update.

### ESMA Draft Guidelines for Non-Significant Benchmarks

On 29 September 2017, ESMA launched a consultation on draft guidelines detailing the obligations which apply to non-significant benchmarks (i.e. benchmarks which are not critical or significant benchmarks) under the Benchmark Regulation.

The consultation proposes lighter requirements for non-significant benchmarks, their administrators and their supervised contributors in relation to the following four areas:

- procedures, characteristics and positioning of oversight function
- appropriateness and verifiability of input data
- transparency of methodology
- governance and control requirements for supervised contributors.

The first three areas are applicable to administrators of non-significant benchmarks, while the fourth one is directly applicable to supervised contributors to non-significant benchmarks. Comments to the consultation are due by 30 November 2017 and ESMA expects to publish a final report based on the feedback received after the publication by the EU Commission of the delegated regulations that relate to the same topics.

[5] ESMA70-145-11

**EMIR**

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

**MiFID 2/MiFIR**

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

**EuVECA and EuSEF**

**Approval of Amending Regulation by EU Parliament**

Regulation (EU) 2017/1991 amending Regulation 345/2013 on EU venture capital funds (EuVECA) and Regulation 346/2013 on EU social entrepreneurship funds (EuSEF) has been published in the Official Journal on 10 November 2017.

As a reminder, the initial EuSEF and EuVECA Regulations were adopted in 2013 to diversify fund-raising and investment opportunities for innovative small and medium-sized enterprises (SME) and social undertakings across the EU. To that end, EuVECA and EuSEF labels have been introduced together with a new EU passport to allow EuVECA/EuSEF managers to market their funds across the EU and grow while using a single set of rules, provided that they comply with certain qualifying requirements. The most important condition is that the EuVECA/EuSEF must primarily invest – at least 70% of its assets under management – in venture capital companies or social entrepreneurship companies, respectively. In addition, the EuVECA/EuSEF manager must be established in an EU member state and comply with a number of other requirements, including the condition to have total assets under management below the EUR 500 million threshold laid down in the AIFM Directive, and to comply with certain other conditions in respect of, *inter alia*, skill, care and diligence, prevention of conflict of interests, portfolio management, sufficient available own funds and human resources, delegation rules, information disclosure and reporting.

The proposed amendment to the EuVECA and EuSEF Regulations forms part of the Capital Markets Union Action (CMU) plan, the aim of which is to increase the supply of capital to businesses. To facilitate and increase investments by EuVECA and EuSEF funds as much as possible, the following main changes have been introduced in comparison with the initial EuVECA and EuSEF rules adopted in 2013:

- The scope of the EuVECA and EuSEF Regulations is extended to allow fully authorised and licensed AIFMs with assets under management of more than EUR 500 million to set up, manage and market EuVECA and EuSEF funds.
- The minimum capital necessary to become manager of EuSEFs and EuVECAs is set at EUR 50,000 for both internally managed vehicles and external managers, and the minimum of own funds of an EuVECA/EuSEF manager has to amount at all times to at least one eighth of the fixed overheads of the manager and, if the assets under management exceed EUR 250 million, additional own funds of 0.02% of the amount exceeding EUR 250 million shall be provided. In this respect, the NCAs of the home member state may authorise the EuVECAs/EuSEFs manager not to provide up to 50% of the additional amount of own funds if that manager benefits from a guarantee for the same amount given by a credit institution or an insurance undertaking which has its registered office in a member state, or in a third country where it is subject to prudential rules which the NCAs of the home member state consider to be equivalent to those laid down in EU law.
- The range of eligible "qualifying portfolio undertakings" in which EuVECAs can invest is expanded to include unlisted companies with up to 499 employees (small mid-caps) and SMEs listed on SME growth markets.
- The definition of "qualifying portfolio undertakings" in which EuSEFs can invest in is enlarged to include "services and goods generating social return".
- The registration process for application of the EuVECA or EuSEF label is simplified. In particular, the new rules provide that the NCAs of the home member state of the manager must, in principle, decide on an application for registration as EuVECA/EuSEF manager within two months after the manager has provided all the information required. Moreover, the fees and other charges imposed by the host member state NCAs on EuVECA and EuSEF managers for the marketing of such funds are explicitly prohibited where no supervisory activity is performed by the relevant NCAs.
- ESMA is vested with an oversight role to ensure that EuVECAs and EuSEFs are consistently registered and supervised.

The above changes will enter into force on 30 November 2017 and will apply from 1 March 2018, with the exception of the new minimum capital, own fund and technical and human resources requirements that will not apply to existing managers of existing EuVECAs and EuSEFs existing as at 1 March 2018 during the terms of those funds. Those managers shall nevertheless ensure that they are able to justify at all times the sufficiency of their own funds to maintain operational continuity.

Please refer to the June 2013 edition of our Luxembourg Legal Update for further information on the initial EuVECA and EuSEF Regulations.

**Capital Market Union**

**EU Commission Legislative Proposals Strengthening Financial Supervision**

On 20 September 2017, the EU Commission adopted a package of legislative proposals that aim to adjust and upgrade the framework of the ESAs – comprising EBA, EIOPA and ESMA – through new powers, governance and funding in order to support their enhanced responsibility for financial market supervision.

The EU Commission has reconsidered the scope of the ESAs' mandate in light of the policy objectives of the Capital Markets Union (CMU) project and the UK's decision to leave the EU.

Key features of the proposed changes include:

- Extending ESMA's direct supervisory powers in a number of sectors which are highly integrated, have important cross-border activities and which are, in most cases, regulated by directly applicable EU law. These new proposed powers include ESMA's responsibility for:
  - authorising and supervising the EU's critical benchmarks and endorsing non-EU benchmarks for use in the EU
  - approving certain EU prospectuses and all non-EU prospectuses drawn up under EU rules
  - authorising and supervising EuVECAs, EuSEFs and long-term investment funds (ELTIFs)
  - coordinating market abuse investigations
  - **restricting or prohibiting in certain exceptional and well-defined cases the marketing, sale or distribution of units or shares in UCITS and AIFs** (the proposal extending here ESMA's supervisory powers under Articles 40 and 42 MiFIR to cover also fund managers in addition to MiFID firms and credit institutions).
- Giving the ESAs responsibility for reviewing the consistency of the work programmes of NCAs and **coordinating and monitoring NCAs' practices in allowing** banks, **fund managers**, insurance companies, investment firms and other market players to **delegate and outsource a material part of their activities or any of their key business functions to non-EU countries**. This means that NCAs will have to notify to the relevant ESA of each authorisation request they receive from firms that envisage delegating and outsourcing a material part of their activities or any of their key business functions outside the EU.
- Giving EIOPA a greater role in coordinating the authorisation of insurance and reinsurance companies' internal risk measurement models to avoid the risk of divergent supervisory standards and outcomes.
- Creating executive boards that will allow the ESAs to take decisions independently from national interests.
- Providing for the ESA's budget to be funded partly by contributions from the financial sector, making them independent from NCAs.
- Prioritising FinTech and coordinating national initiatives to promote innovation and strengthen cyber security.

The legislative proposals are only in the early stages and will have to be reviewed and considered further by the EU Parliament and Council before adoption.

## Luxembourg Legal and Regulatory Developments

**Bill of Law N°7184**
**Implementation of GDPR**

A new bill of law N°7184 (Bill 7184) implementing Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (GDPR) was lodged with the Luxembourg Parliament on 12 September 2017.

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

**Bill of Law N°7164**
**Implementation of Benchmark Regulation**

A new bill of law N°7164 (Bill 7164) implementing the Benchmark Regulation was lodged with the Luxembourg Parliament on 4 August 2017.

Bill 7164 appoints the CSSF as competent authority for benchmark administrators and supervised entities pursuant to the Benchmark Regulation (which supervised entities include, among others, UCITS management companies/self-managed investment companies and AIFMs), with the exception, however, of insurance sector entities, for which the CAA will be the competent authority.

Bill 7164 further provides for the necessary supervision and investigation powers for the CSSF and the CAA for the purpose of the Benchmark Regulation, and it also transposes the Benchmark Regulation's administrative sanction regime in the Luxembourg legal framework. Accordingly, the CSSF and the CAA will be vested with the power to impose, within the limits of their respective competences, different administrative sanctions against (i) benchmark administrators and supervised entities that do not comply with certain applicable provisions of the Benchmark Regulation, and (ii) any person who, among other things, prevents the CSSF from exercising its powers of supervision, inspection and investigation under the Benchmark Regulation, or who fails to act in response to the injunctions of the CSSF/CAA to cease a particular illicit conduct and to desist from a repetition of that conduct, or who provides documents or other information to the CSSF/CAA which prove to be incomplete, incorrect or false.

The administrative sanctions that may be applied by the CSSF/CAA include cease and desist orders, warnings, profit disgorgement, withdrawal or suspension of authorisation/registration of a benchmark administrator, ban against responsible persons from exercising management or other functions, pecuniary fines on both natural and legal persons (of up to EUR 500,000 or equivalent for natural persons and, in certain cases, of up to 10% of turnover for legal persons), as well as publication of decisions in relation thereto on the CSSF's and the CAA's websites.

Finally, Bill 7164 modifies the Luxembourg Consumer Code in order to implement the changes made by the Benchmark Regulation to Directives 2008/48/EC (Consumer Credit Directive) and Directive 2014/17/EU (Mortgage Credit Directive).

**Bill of Law N°7194**
**Implementation of SFTR**

A new bill of law N°7194 (Bill 7194) was lodged with the Luxembourg Parliament on 10 October 2017, which ensures the implementation of the SFTR in the Luxembourg legal framework and which also modifies the UCI Law, the AIFM Law and the Luxembourg law of 7 December 2015 on the insurance sector.

In particular, Bill 7194 provides for the power of the Luxembourg financial sector supervisory authorities – i.e. (i) the CSSF for financial counterparties subject to its supervision and non-financial counterparties (in particular Luxembourg UCITS and regulated AIFs and their Luxembourg management companies and AIFMs), and (ii) the CAA for financial counterparties subject to its supervision (in particular insurance and reinsurance undertakings) – to impose adequate administrative sanctions and other administrative measures, which have to be efficient, proportionate and dissuasive in case of infringement to the trade repository reporting and to the reuse of collateral requirements under Articles 4 and 15 of the SFTR.

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

Bill 7194 further amends the UCI Law and AIFM Law to include non-compliance with Articles 13 and 14 of the SFTR, which relate to the transparency requirements to be included in the prospectus and periodic reports of UCITS/AIFs, in the list of cases giving rise to the CSSF administrative sanctions against, among others, UCITS management companies/self-managed investment companies and AIFMs.

**Bill of Law N°7199**
**Implementation of PRIIPs KID Regulation**

A new bill of law N°7199 (Bill 7199) implementing the PRIIPs KID Regulation, and also amending the UCI Law and the Luxembourg law of 7 December 2015 on the insurance sector, was lodged with the Luxembourg Parliament on 25 October 2017.

Bill 7199 aims at rendering the PRIIPs KID Regulation operational in Luxembourg by introducing into the Luxembourg legal framework new provisions in relation to (i) the appointment of the CSSF (for CSSF supervised entities and other persons or entities (other than the CAA supervised entities)) and CAA (for CAA supervised entities only), as competent authorities to ensure compliance in Luxembourg with the PRIIPs KID Regulation, and (ii) the control and investigation powers of the CSSF/CAA that are necessary for the exercise of their respective competences within the framework of the PRIIPs KID Regulation.

Bill 7199 also specifies a minimum set of sanctions and penalties that may be applied by the CSSF/CAA for certain breaches of the PRIIPs KID Regulation, including pecuniary fines on both natural and legal persons (of up to EUR 700,000 or equivalent or up to twice the amount of the profit gained or losses avoided if they can be determined for natural persons, and for legal persons up to EUR 5,000,000 or 3% of turnover or twice the amount of the profit gained or losses avoided if they can be determined). Other sanctions include the possibility for the CSSF/CAA to order the prohibition to market a PRIIP or to suspend the marketing of a PRIIP, to prohibit the provision of a non-compliant PRIIPs KID and impose the publication of a new compliant document, as well as the publication of any administrative sanctions and other measures that are adopted by the CSSF/CAA in case of breach of the PRIIPs KID Regulation. In addition, Bill 7199 also provides that the CSSF/CAA may issue, or require the PRIIP's manufacture or distributor/adviser to issue, a direct communication to the retail investors concerned giving them information about the administrative sanctions and other measures applied and informing them of where to lodge complaints or submit claims for redress.

Finally, Bill 7199 implements the national discretion option under Article 32(2) of the PRIIPs KID Regulation, allowing SICARs and UCIs other than UCITS to establish a UCITS KIID rather than a PRIIPs KID until 31 December 2019, provided that such UCITS KIID expressly mentions that the relevant SICAR/UCI does not qualify as a UCITS.

For more information on the PRIIPs KID Regulation, please refer to the related section of the July 2017 edition of our Luxembourg Legal Update, which includes a summary of CSSF's and ALFI's guidance on the impact and applicable timescale of the PRIIPs KID Regulation for Luxembourg regulated investment funds and their managers.

**CSSF Circular 17/669**
**ESA's Joint Guidelines on the Prudential Assessment of Acquisitions and Increases of Qualifying Holdings in the Financial Sector**

On 28 September 2017, the CSSF issued Circular 17/669 implementing ESA's joint guidelines of 20 December 2016 on the prudential assessment of acquisitions and increases of qualifying holdings in credit institutions within the meaning of CRR, investment firms within the meaning of MiFID, insurance undertakings within the meaning of Solvency 2, reinsurance undertakings within the meaning of Solvency 2 and central counterparties within the meaning of EMIR[6].

Circular 17/669 indicates that the CSSF will apply ESA's guidelines in respect of an assessment of qualifying holdings in credit institutions, investments firms and central counterparties, irrespective of the acquirer. Therefore the provisions of CSSF Circular 17/669 are also relevant for investment funds acquiring or increasing qualifying holdings in such institutions.

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

**CSSF Circular 17/671**
**Out-of-Court Complaint Resolution**

On 13 October 2017, the CSSF issued Circular 17/671 concerning CSSF Regulation 16-07 relating to out-of-court complaint resolution (Regulation), which is addressed to all professionals subject to CSSF prudential supervision and to all entities subject to the public supervision of the audit profession carried out by the CSSF, and aims to provide

[6] JC/GL/2016/01

clarification regarding the implementation of the Regulation.

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

**CSSF Press Release 17/36**
**Benchmark Regulation**

On 30 October 2017, the CSSF issued press release 17/36 on the Benchmark Regulation, in which the CSSF reminds benchmark administrators, input data contributors and supervised entities using benchmarks in financial instruments, in financial contracts or to measure the performance of investment funds, that most of the provisions of the Benchmark Regulation will become applicable as from 1 January 2018, subject to certain transitional provisions.

In particular, the CSSF draws attention to certain restrictions that will apply to the use of EU and non-EU benchmarks by supervised entities (including UCITS management companies/self-managed investment companies and AIFMs) as from 1 January 2018, subject, however, to a two-year transitional period applicable under certain conditions to existing benchmarks.

The CSSF also reminds of other Benchmark Regulation requirements to be complied with by supervised entities, including (i) the obligation to establish and keep up-to-date contingency plans describing the measures they take where the benchmark is substantially modified or ceases to be provided, and (ii) the obligation for concerned supervised entities to update, as appropriate, the prospectuses to be published in accordance with the Prospectus Directive or the UCITS Directive when these prospectuses relate to transferable securities or other investment products based on benchmarks (it being understood that for UCITS prospectuses approved before 1 January 2018 and using a benchmark, the underlying documents have to be updated as soon as possible and at the latest by 1 January 2019).

For further information on the above Benchmark Regulation deadline and transitional regime, please refer to the sub-section titled "Benchmark Regulation" of the Investment Fund section of this Luxembourg Legal Update as well as to the related section of the July 2017 edition of our Luxembourg Legal Update.

**CSSF's Conclusions on Closet Index Tracking Work**

On 28 July 2017, the CSSF published a press release in relation to ESMA's public statement of 2 February 2016[7], which provided details on ESMA's work concerning UCITS qualifying as closet index trackers, i.e. those funds the managers of which are claiming in their investor information documentation to manage their funds in an active manner while the funds are in fact (i) staying very close to a benchmark and therefore implementing an investment strategy which requires less input from the investment manager, and (ii) charging management fees in line with those charged by actively managed funds.

In its statement, ESMA has required a more detailed follow-up by NCAs. On this basis, the CSSF has carried out its own investigations by considering, in addition to the quantitative measures used by ESMA, such as Active Share, Tracking Error and R2, qualitative criteria including the actual management style and the disclosure to investors. In this context, except in one isolated case for which the analyses have not yet been completed, the CSSF indicated that it could not identify any UCITS qualifying as a closet index tracker. It could, however, be observed that investor disclosure in relation to the use of a benchmark can be improved for some of the funds under review. As a result, the CSSF asked the management companies concerned to increase the level of information disclosed in the KIID and the sales prospectus.

In its press release of 28 July 2017, the CSSF also takes the opportunity to remind that the "Objectives and Investment Policy" section of the UCITS KIID shall, in accordance with the regulations in force, indicate any benchmark used explicitly or implicitly by the UCITS in its investment approach, along with the degree of freedom in relation to this benchmark. The description of the degree of freedom shall, in particular, enable an investor to understand to what extent the investments of a UCITS are close to its benchmark. Finally, the CSSF is of the view that the above-mentioned provisions apply in the same way to the disclosure in the sales prospectus.

**ALFI Q&A on PRIIPs**

On 13 October 2017, ALFI published the third issue of its Q&A document on PRIIPs, which contains ALFI's answers

[7] ESMA/2016/165

to questions covering many aspects of the PRIIPs KID Regulation and the PRIIPs Delegated Regulation written from the perspective of investment funds (including UCITS and AIFs as PRIIPs, or where these funds form part of multi-option PRIIPs).

For the avoidance of doubt, ALFI's Q&A has not been validated by any regulator and only represents ALFI's view at the time of publication, it being understood that ALFI reserves the right to certain questions to incorporate new material, and/or to amend previously published answers, where appropriate.

## LITIGATION

### Banking, Finance and Capital Markets

**Financial Collateral Arrangements – Pledge – Enforcement**

**District Court (summary proceedings), 12 July 2017, N°170744**

Following summary proceedings in July 2015 (please see the November 2015 edition of our Luxembourg Legal Update), the District Court has issued a judgment on the substance of the matter in circumstances where, following the occurrence of an event of default under a facilities agreement, a pledge over shares had been enforced. The borrower tries to obtain the cancellation of the enforcement.

According to the Court, it appears from preparatory works to the Financial Collateral Law that the enforcement of financial collateral arrangements was supposed to be protected by the law and that the only means left to the parties was to act for damages after enforcement unless enforcement has taken place in a fraudulent manner.

Additionally, the borrower argues that, at the time of the enforcement, there was no case for enforcement of the pledge. According to the court, under the Law on Financial Collateral Arrangements, the pledgee may not only enforce the pledge in the event of the debtor's failure to pay at maturity but also in different circumstances determined by contract. When checking the agreement, the court notes that it provides for enforcement in case of failure to pay at maturity and in certain other circumstances.

The court also notes that enforcement as well as the valuation of the pledged assets has not been abusive, and that, even if this had been the case this would not affect the validity of the enforcement and could only give rise to the payment of damaged to the injured party.

Finally, according to the court, if the enforcement had been fraudulent, it would be null and void.

## Data protection

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

On 5 September 2017, the Grand Chamber of the ECHR rendered a judgment in *Barbulescu vs. Romania* (app. 61496/08) in which it concluded that the Romanian state had violated Article 8 of the European Convention on Human Rights.

Mr. Barbulescu was dismissed by his employer for having used his professional email account for personal purposes during working hours even though the private use of IT tool was prohibited by his company's rules.

Mr. Barbulescu first denied having used his email account for personal purposes. The company then proceeded to publish a transcript of messages he had exchanged with his brother and fiancée in relation to his personal life.

The ECHR decided that monitoring messages sent by an employee using company equipment and accessing the content of these messages constituted a violation of the right to privacy and the confidentiality of communications if the employee had not first been informed of this possibility, even if the company had rules in place banning the use of company equipment for personal purposes.

## Real Estate

### Building Permit – Scope of the Acquired Right of the Authorisation Holder

**Administrative Court, 25 April 2017, N°37557**

The case at hand recalls an already well-established case-law concerning the scope of the acquired right belonging to the holder of a building permit in the context of an amendment of the urban planning regulation after the permit is granted.

In line with this case-law, the present decision reaffirms the general principle whereby, in the event of an amendment of the urban planning regulation, the owner of a building is able to invoke an acquired right resulting from a building permit which was delivered under the previous regulation, which means that an amendment of such regulation cannot call into question the sustainability of his building. In the same way, however, the decision also confirms the well-established restriction according to which the holder of a building permit cannot invoke this acquired right in order to justify new constructions or to justify the demolition and reconstruction in the same form of all or part of his building in accordance with the previous urban planning regulation and in breach of the latest regulation.

## Tax

### Tax Qualification of Profit Participating Loans as Hidden Capital Contributions

**Administrative Court of Luxembourg, 26 July 2017, Case N°35925**

On 26 July 2017, the Administrative Court of Luxembourg had to rule on whether the profit participating loans granted by a Luxembourg company to its foreign subsidiaries should be regarded as debt instruments or as equity contributions for Luxembourg net wealth purposes. If the loans were considered as equity instruments, they would benefit from the Luxembourg participation exemption regime (§60 BewG) and would not be included in the taxable wealth of the company.

In the case at hand, the Luxembourg company granted two profit participating loans to its Dominican subsidiaries whose sole assets were hotel properties located in the Dominican Republic. The Luxembourg tax authorities refused to treat the two loans as additional equity contributions (*suppléments d'apport*) into the subsidiaries and to exempt them from Luxembourg net wealth tax (by virtue of §60 BewG) for the fiscal years 2009 and 2010.

The Administrative Court of Luxembourg ruled in favour of the taxpayer by considering that the two profit participating loans were to be re-qualified as hidden capital contributions (*apports déguisés de capital*), given their legal features, and should have been exempt from Luxembourg net wealth tax.

In reaching this conclusion, the Luxembourg Court conducted a detailed legal analysis of the loan agreements and noted that these instruments had specific equity features (i.e. no fixed interest to be paid under these loans but only a variable interest corresponding to 75% of the capital gains realised upon the sale of the properties held by the subsidiaries, a creditor's right of consent before any sale of the properties, the subordinated nature of the loans and no redemption date).

**Independent Group of Persons: the Luxembourg VAT Cost Sharing Exemption not applicable to Financial Services**

**European Court of Justice, 21 September 2017, three cases (*Aviva*, C-605/15, *DNB BANKA*, C-326/15, *Commission v Germany*, C-616/15)**

The European Court of Justice rendered three decisions on 21 September 2017 pertaining to independent groups of persons (IGPs) (also referred to as the cost-sharing VAT exemption).

In these three cases, the Court had to define the scope of application of the VAT exemption provided for by Article 132 (1) f) of the EU VAT Directive (Article 44 a. y) of the Luxembourg VAT law) regarding services supplied by IGPs to their members.

The Court held that the VAT cost-sharing exemption only applies to services supplied by IGPs whose members carry on an activity in the public interest. According to the Court, the term "public interest" includes, *inter alia*, welfare, social security, education, sport and culture activities and is not restricted to the health sector (in the *Commission v Germany* case, the Court considered the German legislation, which only exempts from VAT services provided by IGPs to members operating in the medical industry, was too restrictive).

In addition, in the *Aviva* and *DNB BANKA* cases, the Court decided that the services supplied by IGPs to members operating in the financial and in the insurance sectors should not benefit from the VAT exemption. Such services should be subject to VAT.

Finally, in view of the principles of non-retroactivity and legal certainty, the Court ruled that these decisions should not have a retrospective application (this concerns the national courts which may have given a broader interpretation to the cost-sharing exemption).

As a reminder, on 4 May 2017, the European Court of Justice (Case C-274/15) held that the Luxembourg VAT rules applicable to independent groups of persons (IGPs) were contrary to the EU VAT Directive and had to be amended so as to be in line with the EU VAT Directive. For further information, please see the July 2017 edition of our Luxembourg Legal Update.

**Interpretation of the Concept of "Debt-Claims with Participation in Profits" within the Meaning of the Double Tax Treaty Germany-Austria**

**European Court of Justice, 12 September 2017, Case C-648/15**

On 12 September 2017, the European Court of Justice (Grand Chamber) had to rule on the dispute which arose between Germany and Austria regarding the interpretation of Article 11(2) within the meaning of the double tax treaty between Germany and Austria.

In the case at hand, an Austrian company acquired certain certificates issued by a German company. Under these certificates, the German company paid interest to the Austrian company. The divergent views of both countries as to the legal characterisation of these debt instruments within the meaning of the double tax treaty between Germany and Austria led to double taxation of the interest income.

Austria claimed that Article 11(1) of the treaty should apply in this case, as the certificates should not be regarded as debt-claims with participation in profits within the meaning of Article 11(2) of the treaty (including the participation of a silent partner, profit-participating loans and profit-sharing bonds according to this provision). Hence, according to Austria, the exclusive right to tax the interest payments should be given to the resident state of the beneficiary, i.e. Austria. Germany took the opposite view and applied Article 11(2) of the treaty, which grants a right to tax to the source state, i.e. Germany.

The European Court of Justice held that the concept of "debt-claims with participation in profits" should be given a strict interpretation to the extent that Article 11(2) of the tax treaty constitutes a derogation from the principle expressed in Article 11(1) of the convention, of allocating the right to tax to the State where the beneficiary of the interest is resident. In adopting a broad interpretation, this would limit the scope of Article 11(1) of the tax treaty and give rise to a risk of double taxation.

The Court noted that the certificates issued by the Austrian company only conferred entitlement to an annual payment at a fixed percentage of their nominal value. Although these financial instruments had the particularity to suspend the interest payments in case the company would have ended up with a loss because of such payments (with an

adjustment being made subsequently in the following beneficial financial years), this would not imply that these certificates confer entitlement to a share in the issuer's profits.

In light of the foregoing, the European Court of Justice ruled that such certificates should not be qualified as "debt-claims with participation in profits" within the meaning of Article 11(2) of the double tax treaty Germany-Austria. Accordingly, Article 11(1) of the tax treaty should apply and interest paid by the German company to the Austrian company should exclusively be taxed in the resident state, i.e. Austria.

# TAX

## National Legislation

### The New Luxembourg IP Tax Regime

#### Bill of Law N°7163

On 4 August 2016, the Luxembourg Minister of Finance released the bill of law N°7163 introducing a new Luxembourg IP tax regime (under Article 50ter of the Luxembourg Income Tax Law ("LITL")).

The new IP regime proposed by the draft law is in line with the Final Report on BEPS Action 5 and the so-called "modified nexus approach". According to the nexus approach, taxpayers can only benefit from the IP regime to the extent that they establish a direct nexus between the qualifying income, assets and R&D expenditures.

This new IP regime would apply to Luxembourg companies and individuals. Under certain conditions, this regime provides for an 80% exemption (for corporate income and municipal business tax purposes) in relation to income related to patents and copyrighted software (provided they are not marketing-related IP assets and created, developed or enhanced after 31 December 2007). A net wealth tax exemption would also apply to such IP assets. Trademarks and domain names are expressly excluded from the scope of the regime.

In order to compute the amount of income benefiting from the 80% exemption, the Luxembourg taxpayer has to determine:

- which expenditures are qualifying expenditures incurred to develop IP assets
- which ones are overall expenditures to develop IP assets and
- the adjusted net qualifying income from IP assets.

These concepts are defined within the draft law.

The IP will have to be developed in Luxembourg or the EU/EEA in order to benefit from the Luxembourg exemption.

If this draft law were enacted by the Parliament, it would enter into force as from 1 January 2018. In case of interaction with the former IP regime (as the latter has a grandfathering period until 30 January 2021), the taxpayer which can benefit from both regimes has to opt for one of them (such option is irrevocable).

## New Tax Provisions for 2018

### Budget Bill of Law N°7200

The Budget bill for 2018 N°7200 was submitted to the Luxembourg Parliament on 11 October 2017. This draft bill introduces new tax measures relating to the taxation of married taxpayers and non-resident taxpayers and extends the investment tax credit to the acquisition of software.

The draft law also extends the VAT exemption for investment funds to collective internal funds held by a life-insurance undertaking. The management of these funds should benefit from the VAT exemption under Article 44 1 d) i), provided that:

- the unit holders of the funds bear the financial risk
- the fund is subject to the supervision of the "Commissariat aux assurances".

Finally, in order to comply with the decision taken by the ECJ in the *Berlioz* case (C-682/1) (for further information please refer to the July 2017 edition of our Luxembourg Legal Update), the draft law reinstalls the possibility for the taxpayer to file a claim against an injunction/exchange of information request addressed by the Luxembourg tax authorities. Such claim would have a suspensive effect.

## Double Tax Treaties

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

### Protocol to Double Tax Treaty between Luxembourg and Uzbekistan – signed

On 18 September 2017, Luxembourg and Uzbekistan signed a protocol amending the existing DTT. The protocol provides for an online exchange of information process taking into account the OECD standards. The protocol also implements some of the BEPS rules developed by the OECD and introduces a provision on mutual assistance for the recovery of tax claims.

### Double Tax Treaty between Luxembourg and Sri Lanka – negotiations

Luxembourg and Sri Lanka expressed their intention to revise the existing DTT further to a meeting held in Luxembourg between officials of both countries on 27 September 2017.

### Double Tax Treaty between Luxembourg and Colombia – negotiations

Luxembourg and Colombia expressed their intention to negotiate and sign a DTT further to a meeting held in New York on 22 September 2017 between officials of both countries.

### Double Tax Treaty between Luxembourg and Albania – negotiations

Luxembourg and Albania expressed their intention to negotiate and amend the not yet in force DTT further to a meeting held in Tirana between officials from both countries.

## Circulars/Regulatory Developments

## Procedure for the Implementation of the Mutual Agreement Procedure (MAP)

### Circular L.G. – Conv. D.I. N°60 of 28 August 2017

On 28 August 2017, the Luxembourg tax authorities issued Circular L.G. – Conv. D.I. N°60 setting forth the procedures for the implementation of the mutual agreement procedure (MAP) laid down in double tax treaties concluded by Luxembourg (in identical/comparable terms to those used by Article 25 of the OECD MC).

The access to the MAP is given where an anti-abuse provision provided for by an applicable double tax treaty or domestic rules is applied. The MAP addresses the transfer pricing issues as well as the issues of taxation not in accordance with a given double tax treaty.

The specific information/documents that need to be provided and filed by the taxpayer requesting the MAP are listed in the Circular. In principle, the request has to be filed with the competent tax authorities of the taxpayer's country of residence.

**Four New Tax Circulars clarifying some Personal Income Tax Provisions**

**Circular N°122/1 of 7 August 2017;**

**Circular N°123/1 of 7 August 2017;**

**Circular N°127bis/2 of 7 August 2017;**

**Circular N°154ter1 of 7 August 2017**

On 7 August 2017, the Luxembourg tax authorities issued four circulars aiming to clarify the personal tax provisions that have been introduced by the law of 23 July 2016 regarding family allowances, tax moderations for children in the household, education allowances (for children not sharing the same household as the taxpayer) and tax credits for single parents.

## Case Law

**Tax Qualification of Profit Participating Loans as Hidden Capital Contributions**

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**European Court of Justice, 12 September 2017, Case C-648/15**

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

## GLOSSARY

**ABBL**: Luxembourg Banks and Bankers' Association

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

**AIFM**: Alternative Investment Fund Managers

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

**AIF**: Alternative Investment Fund

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

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

**AIFs**: Alternative Investment Funds

**ALFI**: Association of the Luxembourg Fund Industry

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

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

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

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

**BCBS**: Basel Committee on Banking Supervision

**BCL**: *Banque Centrale du Luxembourg*

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

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

**CCCTB**: Common Consolidated Corporate Tax Base

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

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

**CGFS**: Committee on the Global Financial System

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

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

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

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

**CRA**: Credit Rating Agencies

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

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

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

**CSDR**: Regulation (EU) N°909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives

98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012

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

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

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

deposit guarantee schemes

**EBA**: European Banking Authority

**ECB**: European Central Bank

**ECJ**: European Court of Justice

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

**ESAs**: EBA, EIOPA and ESMA

**ESMA**: European Securities and Markets Authority

**ESRB**: European Systemic Risk Board

**ETDs**: Exchange Traded Derivatives

**ETFs**: Exchange Traded Funds

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

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

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

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

**FCP**: *Fonds Commun de Placement* or mutual fund

**FGDL**: **Fonds de garantie des dépôts Luxembourg**

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

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

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

**FSB**: Financial Stability Board

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

**ICMA**: International Capital Market Association

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

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

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

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

**IRE**: *Institut des Réviseurs d'Entreprises*

**KIID**: Key Investor Information Document (within the meaning of the UCITS Directive) that aims to help the investors to 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 and the accounting

**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*)

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

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

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

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

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

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

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

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

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

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

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

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

**Public Interest Entities**:

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

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

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

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

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

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

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

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

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

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

**SRB**: the Single Resolution Board

**SRF**: the Single Resolution Fund

**SRM**: the Single Resolution Mechanism

**SSM**: the Single Supervisory Mechanism

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

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

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

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

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

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

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

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