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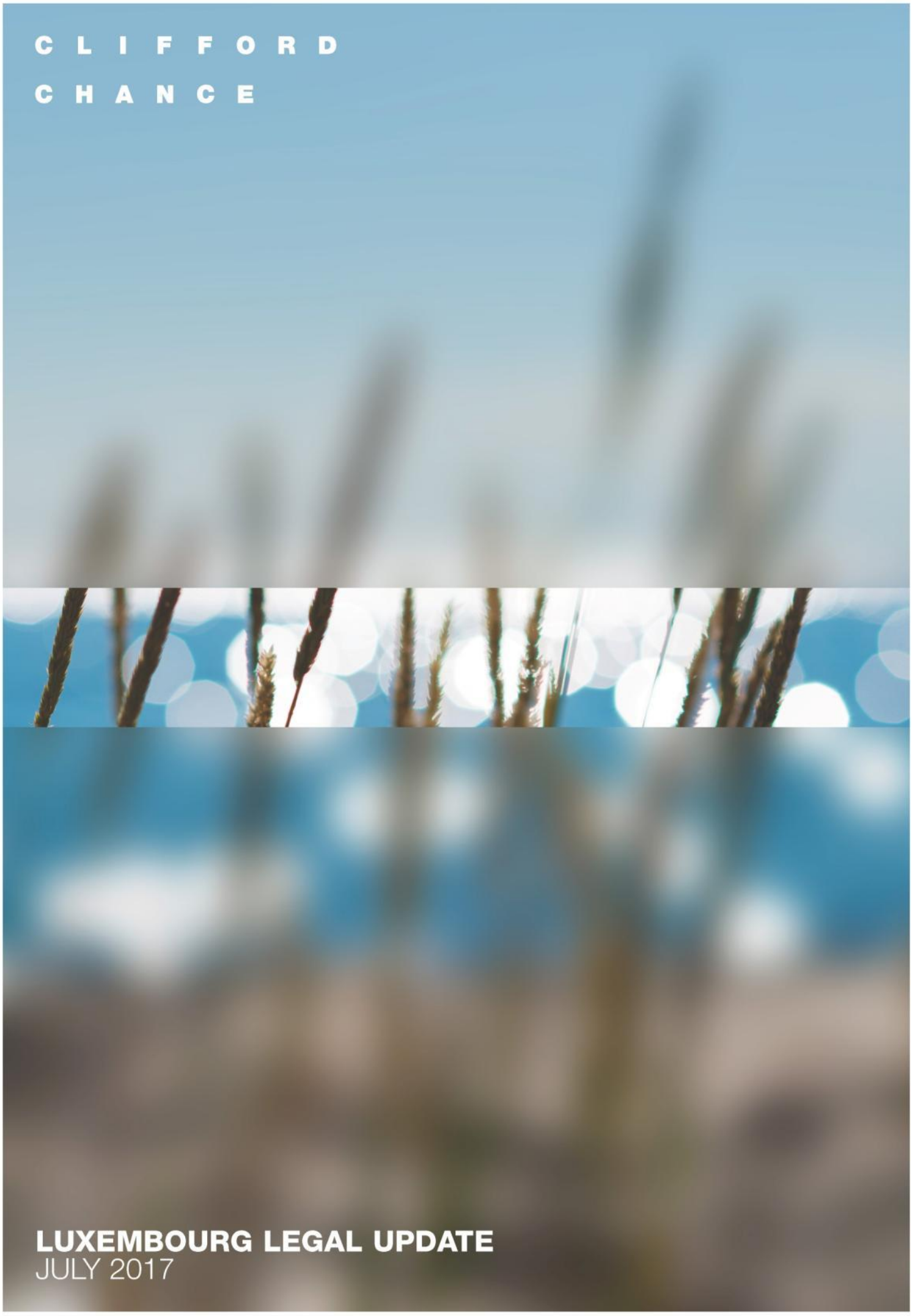

LUXEMBOURG LEGAL UPDATE

JULY 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

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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, amongst others, the following:

CRD IV/CRR:

- N°2017/954 of 6 June 2017 on the extension of the transitional periods related to own funds requirements for exposures to central counterparties set out in CRR and EMIR

SSM:

- ECB 2016 Annual Report on supervisory activities
- ECB FAQs of 12 April 2017 on ECB's role in supervising euro area banks
- ECB Guideline N°2017/697 of 4 April 2017 on the exercise of options and discretions available in Union law by national competent authorities in relation to less significant institutions
- ECB Guide of May 2017 to fit and proper assessments

MiFID2/MiFIR:

- Level 2 measures published in Official Journal:
  - N°2017/565 of 25 April 2016 supplementing MiFID2 as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of MiFID2
  - N°2017/566 of 18 May 2016 on the ratio of unexecuted orders to transactions in order to prevent disorderly trading conditions
  - N°2017/567 of 18 May 2016 supplementing MiFIR with regard to definitions, transparency, portfolio compression and supervisory measures on product intervention and positions
  - N°2017/568 of 24 May 2016 on the admission of financial instruments to trading on regulated markets
  - N°2017/569 of 24 May 2016 on the suspension and removal of financial instruments from trading
  - N°2017/570 of 26 May 2016 on the determination of a material market in terms of liquidity in relation to notifications of a temporary halt in trading
  - N°2017/571 of 2 June 2016 on the authorisation, organisational requirements and the publication of transactions for data reporting services providers
  - N°2017/572 of 2 June 2016 on the specification of the offering of pre- and post-trade data and the level of disaggregation of data
  - N°2017/573 of 6 June 2016 on requirements to ensure fair and non-discriminatory co-location services and fee structures
  - N°2017/574 of 7 June 2016 on the level of accuracy of business clocks
  - N°2017/575 of 8 June 2016 on the data to be published by execution venues on the quality of execution of transactions
  - N°2017/576 of 8 June 2016 on the annual publication by investment firms of information on the identity of execution venues and on the quality of execution
  - N°2017/577 of 13 June 2016 on the volume cap mechanism and the provision of information for the purposes of transparency and other calculations
  - N°2017/578 of 13 June 2016 on the requirements on market-making agreements and schemes
  - N°2017/579 of 13 June 2016 on the direct, substantial and foreseeable effect of derivative contracts within the Union and the prevention of the evasion of rules and obligations
  - N°2017/580 of 24 June 2016 for the maintenance of relevant data relating to orders in financial instruments

- N°2017/581 of 24 June 2016 on clearing access in respect of trading venues and central counterparties
- N°2017/582 of 29 June 2016 specifying the obligation to clear derivatives traded on regulated markets and timing of acceptance for clearing
- N°2017/583 of 14 July 2016 on transparency requirements for trading venues and investment firms in respect of bonds, structured finance products, emission allowances and derivatives
- N°2017/584 of 14 July 2016 on organisational requirements of trading venues
- N°2017/585 of 14 July 2016 on the data standards and formats for financial instrument reference data and technical measures in relation to arrangements to be made by the ESMA and competent authorities
- N°2017/586 of 14 July 2016 on exchange of information between competent authorities when cooperating in supervisory activities, on-the-spot verifications and investigations
- N°2017/587 of 14 July 2016 on transparency requirements for trading venues and investment firms in respect of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments and on transaction execution obligations in respect of certain shares on a trading venue or by a systematic internaliser
- N°2017/588 of 14 July 2016 on the tick size regime for shares, depositary receipts and exchange-traded funds
- N°2017/589 of 19 July 2016 on the organisational requirements of investment firms engaged in algorithmic trading
- N°2017/590 of 28 July 2016 on reporting of transactions to competent authorities
- N°2017/591 of 1 December 2016 on the application of position limits to commodity derivatives
- N°2017/592 of 1 December 2016 on the criteria to establish when an activity is considered to be ancillary to the main business
- N°2017/593 of 7 April 2016 supplementing MiFID2 with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits
- N°2017/980 of 7 June 2017 cooperation in supervisory activities, for on-site verifications, and investigations and exchange of information between competent authorities
- N°2017/981 of 7 June 2017 on the consultation of other competent authorities prior to granting an authorisation
- N°2017/988 of 6 June 2017 on standard forms, templates and procedures for cooperation agreements in respect of a trading venue whose the operations of which are of substantial importance in a host Member State
- N°2017/1005 of 15 June 2017 on the format and timing of the communications and the publication of the suspension and removal of financial instruments
- N°2017/1093 of 20 June 2017 laying down ITS with regard to the format of position reports by investment firms and market operators
- N°2017/1110 of 22 June 2017 laying down ITS with regard to the standard forms, templates and procedures for the authorisation of data reporting services providers and related notifications pursuant to MiFID2
- N°2017/1018 of 29 June 2016 on information to be notified by investment firms, market operators and credit institutions

- ESMA Opinion of 22 May 2017 on OTC derivatives traded on a trading venue
- ESMA Guidelines of 2 June 2017 on MiFID 2 product governance requirements

EMIR:

- N°2017/610 of 20 December 2016 as regards the extension of the transitional periods related to pension scheme arrangements
- N°2017/751 of 16 March 2017 amending Delegated Regulations (EU) 2015/2205, (EU) 2016/592 and (EU) 2016/1178 as regards the deadline for compliance with clearing obligations for certain counterparties dealing with OTC derivatives
- N°2017/954 of 6 June 2017 on the extension of the transitional periods related to own funds requirements for exposures to central counterparties set out in CRR and EMIR
- N°2017/979 of 2 March 2017 amending EMIR with regard to the list of exempted entities

CSDR:

- Level 2 measures published in Official Journal:

  - N°2017/389 of 11 November 2016 supplementing CSDR as regards the parameters for the calculation of cash penalties for settlement failures and the operations of CSDs in host Member States
  - N°2017/390 of 11 November 2016 supplementing CSDR with regard to RTS on certain prudential requirements for central securities depositories and designated credit institutions offering banking-type ancillary services
  - N°2017/391 of 11 November 2016 supplementing CSDR with regard to RTS further specifying the content of the reporting on internalised settlements
  - N°2017/392 of 11 November 2016 supplementing CSDR with regard to RTS on authorisation, supervisory and operational requirements for central securities depositories
  - N°2017/393 of 11 November 2016 laying down ITS with regard to the templates and procedures for the reporting and transmission of information on internalised settlements in accordance with CSDR
  - N°2017/394 of 11 November 2016 laying down ITS with regard to standard forms, templates and procedures for authorisation, review and evaluation of central securities depositories, for the cooperation between authorities of the home Member State and the host Member State, for the consultation of authorities involved in the authorisation to provide banking-type ancillary services, for access involving central securities depositories, and with regard to the format of the records to be maintained by central securities depositories in accordance with CSDR
- ESMA Guidelines of 1 June 2017 on the process for the calculation of the indicators to determine the substantial importance of a CSD for a host Member State
- ESMA Guidelines of 1 June 2017 on the process for the calculation of the indicators to determine the most relevant currencies in which settlement takes place

PRIIPs:

- N°2017/653 of 8 March 2017 on KIDs for PRIIPs laying down RTS with regard to the presentation, content, review and revision of KIDs and the conditions for fulfilling the requirement to provide such documents

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

Solvency II:

- N°2017/812 of 15 May 2017 laying down technical information for the calculation of technical provisions and basic own funds for reporting with reference dates from 31 March until 29 June 2017

BRRD:

- N°2017/747 of 17 December 2015 supplementing Regulation (EU) N°806/2014 with regard to the criteria relating to the calculation of *ex ante* contributions to the SRF, and on the circumstances and conditions under which the payment of extraordinary *ex post* contributions may be partially or entirely deferred
- N°2017/867 of 7 February 2017 on classes of arrangements to be protected in a partial property transfer under Article 76 of BRRD

Brexit:

- ESMA Opinion of 31 May 2017 on General principles to support supervisory convergence in the context of the United Kingdom withdrawing from the European Union
- ESMA Opinions of 13 July 2017 on specific sector principles to support convergence in the area of investment management, investment firms and secondary markets in the context of the United Kingdom withdrawing from the European Union
- Speech by Sabine Lautenschläger, Member of the Executive Board of the ECB and Vice-Chair of the Supervisory Board of the ECB, at the AFME Board Meeting in Frankfurt, 22 March 2017

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

Other:

- EC Consumer Financial Services Action Plan of 23 March 2017
- Agency for the Cooperation of Energy Regulators ("**ACER**") Guidance Note 1/2017 on the application of REMIT to wash trades

Cross-Border Insolvency Proceedings: EUIR (Recast) Begins to Apply

Regulation (EU) 2015/848

As of 26 June 2017, the EUIR (Recast), which replaces the EUIR, has begun to apply. The EUIR (Recast) is applicable to insolvency proceedings opened after 26 June 2017.

For more information and resources on the EUIR (Recast), please refer to the July 2015 edition of our Luxembourg Legal Update and to the related section in the Clifford Chance Topic Guide on the Clifford Chance Financial Markets Toolkit.

Clifford Chance has prepared a client briefing describing the main characteristics of the EUIR (Recast).

Clifford Chance has prepared a client briefing describing the changes to the cross-border insolvency proceedings.

Legislation

Debt Recovery: European Account Preservation Order Procedure

Law of 17 May 2017

The law of 17 May 2017 implementing Regulation (EU) 655/2014 of 15 May 2014, establishing a European account preservation order procedure to facilitate cross-border debt recovery in civil and commercial matters, has been published in the Luxembourg official journal (*Mémorial A*).

The law amends the Luxembourg New Code of Civil Proceedings (*Nouveau Code de Procédure Civile*) by introducing a new Article 685-5, which provides for:

- the recognition and enforcement in Luxembourg of judicial decisions in civil and commercial matters issued by EU Member State courts in accordance with the Regulation; and
- the procedure to issue, revoke and modify a European account preservation order, as well as to limit or terminate the enforcement thereof, in Luxembourg.

The law further amends the law of 23 December 1998 establishing a financial sector supervisory commission (as amended). The CSSF will be the authority competent to obtain account information, and banks established in Luxembourg will be required to disclose, upon request from the CSSF, whether the relevant debtor holds an account with them.

The law entered into force on 27 May 2017.

CRD IV/CRR: Setting of Countercyclical Buffer Rate

CSSF Regulation N°17-01

CSSF issued on 27 March 2017 regulation 17-01 on the setting of the countercyclical buffer rate for the second trimester of 2017.

The regulation follows the Luxembourg Systemic Risk Committee's recommendation of 6 March 2017 (CRS/2017/002) and maintains a 0% countercyclical buffer rate for relevant exposures located in Luxembourg for the second trimester of 2017.

The regulation entered into force on 1 April 2017.

CSSF Regulation N°17-02

CSSF issued on 26 June 2017 regulation 17-02 on the setting of the countercyclical buffer rate for the third quarter of 2017.

The regulation follows the Luxembourg Systemic Risk Committee's recommendation of 29 May 2017 (CRS/2017/003) and maintains a 0% countercyclical buffer rate for relevant exposures located in Luxembourg for the third quarter of 2017.

The Regulation came into force on 1 July 2017.

AML/CTF: Implementation of AMLD 4

Bill N°7128 of 26 April 2017

The Luxembourg government deposited a new bill implementing the fourth Anti-Money Laundering Directive (AMLD 4 – Directive (EU) 2015/849) and the second Regulation on information accompanying transfers of funds (FATF 2 Regulation – Regulation (EU) 2015/847) with the Luxembourg parliament on 26 April 2017.

The bill implements the AMLD 4 and ensures the correct implementation of the FATF 2 Regulation in the Luxembourg legal framework. The AMLD 4 aims to align the European regulatory framework to the modifications brought about by the recommendations of the FATF in 2012. The new rules, setting out a risk-based approach, provide further details on the scope of obligations required for all relevant national and international actors in order to ensure better comprehension of the risks and vulnerabilities in relation to AML/CTF.

The bill provides for an obligation to perform an in-depth risk evaluation which should allow the relevant professionals to

adapt their level of monitoring dependent on the risks identified. In order to facilitate this task, the AMLD 4 contains three annexes which list client-inherent risk variables, and risk factors indicating potential money laundering/terrorist financing risks. On this basis, professionals will be able to evaluate the adequate individual level of monitoring of their clients. The AMLD 4 contains no list of situations and transactions where professionals may systematically apply simplified monitoring and professionals are therefore required to perform a risk evaluation of the respective transactions based on the risk criteria provided for in the annexes to the AMLD 4. The AMLD 4 further provides a certain number of situations entailing higher risks, for which professionals shall implement reinforced monitoring measures. Finally, the AMLD 4 sets out detailed rules as to the supervisory mechanisms available to Member States by providing for a minimum level of sanctions which should be imposed by the competent authority in case of violation by a professional of its AML/CTF obligations. The Directive also foresees the setting-up of mechanisms for the reporting of breaches of the professional's obligations, both at the level of the professional as well as at the level of the competent authority.

The FATF 2 Regulation aims to guarantee asset traceability throughout the entire payment chain by requiring payment service providers to ensure that asset transfers, including electronic credit transfers, are accompanied by complete information on the payer and the beneficiary and, under certain conditions, requires them to verify the correctness of such information. The rules contained in the FATF 2 Regulation apply both to payment service providers and electronic money issuers.

The bill proposes to introduce the changes foreseen by the AMLD 4 and the FATF 2 by modifying a number of laws, including, amongst others, the amended law of 12 November 2004 on AML/CTF.

The publication of the bill constitutes the start of the legislative procedure.

MiFID2/MiFIR: Implementation of MiFID2 and MiFIR

Bill N°7157 of 3 July 2017

A new bill of law No° 7157 implementing MiFID2 and MiFIR has been lodged with the Luxembourg Parliament on 3 July 2017.

The bill implements MiFID2 and ensures implementation of MiFIR in the Luxembourg legal framework. The bill further implements Article 6 on inappropriate use of title transfer collateral arrangements under Commission Delegated Directive 2017/593/EU supplementing MiFID2.

Entry into force is foreseen for 3 January 2018 in line with the MiFID2/MiFIR implementation deadline.

PAD: Implementation of Payment Accounts Directive

Law of 13 June 2017

The law of 13 June 2017 implementing Directive 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features (Payment Accounts Directive) and modifying the Luxembourg law of 15 December 2000 on postal financial services (as amended) was published in the Luxembourg official journal (*Mémorial A*) on 14 June 2017.

The law establishes rules on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, in particular:

- the right for all consumers legally residing in the EU to open a payment account with a credit institution or payment service provider offering services in Luxembourg in order to perform essential operations, such as receiving their salary, pensions and allowances, or payment of utility bills, etc.
- easier comparison of fees charged for payment accounts in Luxembourg through standardised documentation and guaranteed access to fee comparison via the website of the CSSF
- a new procedure for switching payment accounts to another service provider in Luxembourg, and facilitating the process of closing a Luxembourg bank account and opening it in another Member State.

Furthermore, the CSSF has been empowered as the Luxembourg competent authority to ensure the application and enforcement of the law.

The law entered into force on 18 June 2017, subject to certain rules of transitional application.

Regulatory Developments

EMIR: Exchange of Collateral in relation to Life Insurance Contracts

CAA Circular 17/6

The CAA issued on 23 March 2017 circular 17/6 on the exchange of collateral in relation to life insurance contracts where the investment risk is borne by the policyholder.

The circular notes that the margining rules for OTC derivative contracts not cleared by a central counterparty set out in Commission Delegated Regulation (EU) N°2016/2251 supplementing EMIR apply to life insurance undertakings entering into non-centrally cleared OTC derivatives contracts as EMIR financial counterparties.

The CAA reminds life insurance undertakings that margining solutions involving the pledging of internal funds' underlying assets, or creating a sub-account within the internal funds, are not possible under the current legislative framework. The CAA therefore invites life insurance undertakings to opt for a deduction of the sums necessary to constitute the collateral from the technical provisions of the life insurance contract, a technique which shall be applied in a transparent manner and with the client's consent.

Furthermore, to the extent that until the unwinding of a position, the margin provided constitutes a surety (*sûreté*) rather than a charge, the obligation to restore the remaining amounts shall be reflected in an adequate balance sheet position and be reported in the periodical reporting made to the policyholders.

The CAA further points out that life insurance undertakings may always opt to use their own funds in case of margin calls related to such life insurance contracts, by then charging the respective capital costs to the policyholder.

The circular entered into force on 23 March 2017.

EMIR: Obligations of Non-Financial Counterparties to Derivative Contracts

CSSF Press Release

The CSSF issued on 11 May 2017 a press release on the obligations of non-financial counterparties ("**NFCs**") to derivative contracts under EMIR.

The press release draws the attention of NFCs which are prudentially supervised by the CSSF and NFCs which are not subject to supervision (for which the CSSF is also responsible for ensuring compliance with EMIR) to the fact that they need to respect the obligations introduced by EMIR as soon as they conclude derivative transactions. These obligations, modulated in different ways dependent on the nature of counterparties to a derivative contract, include a clearing obligation, an obligation to apply risk mitigation techniques, a reporting obligation and certain additional requirements for NFCs.

The press release provides guidance as to the measures to be implemented by NFCs in order to fully comply with EMIR. These measures include:

- identification of an organisational unit and/or person responsible for ensuring ongoing compliance with EMIR
- adoption of procedures formalising functional activities in compliance with the EMIR requirements applicable to the NFC
- adoption of control tools on the quality of data reported to trade repositories ("**TRs**").

The CSSF also recommends the active involvement of the administrative body in the management process (including derivatives contract risk monitoring and control), and an increased focus of the control body (where applicable) on the adequacy of the company's organisational structure to comply with EMIR rules.

The CSSF has further announced its intention to strengthen the supervision of NFCs operating in the derivatives market. In particular, for the year 2017, EMIR supervisory activities will include certain measures (including, amongst others,

verification on a sample basis) in the following three areas (in order of priority): quality of the data reported to TRs, monitoring of derivative transactions entered into for hedging purposes, and monitoring of risk mitigation techniques.

Finally, the CSSF requires all NFCs who conclude derivatives transactions to provide the CSSF, within 30 days of publication of the press release, with the name, email address and telephone number of the person responsible for the organisational unit in charge of EMIR compliance.

CRD IV/CRR: Remuneration Policies

CSSF Circular 17/658

The CSSF issued on 16 June 2017 circular 17/658 on the adoption of the EBA Guidelines on sound remuneration policies under CRD IV (EBA/GL/2015/22) and repealing Circular 10/496.

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

AML/CTF: Implementation of AMLD 4

CSSF Circular 17/661

On 24 July 2017, the CSSF issued circular 17/661 to implement the guidelines issued by the Joint Committee of ESAs under Articles 17 and 18(4) of AMLD4 on simplified and enhanced customer due diligence and the factors credit and financial institutions should consider when assessing the money laundering and terrorist financing risk associated with individual business relationships and occasional transactions (Risk Factors Guidelines – JC 2017 37) into Luxembourg regulation.

The circular, addressed to all firms and entities subject to CSSF supervision, aims to draw relevant professionals' attention to the adoption of the Risk Factors Guidelines.

The CSSF notes that the Risk Factors Guidelines' objective is to set out factors firms and entities shall take into account when assessing the risk of money laundering and terrorist financing (ML/TF). The guidelines further detail how firms can adjust their customer due diligence (CDD) measures in a way that is commensurate to the ML/TF risk associated with a business relationship or an occasional transaction.

In addition, the Risk Factors Guidelines provide general information in relation to CDD measures and sector-specific risk factors that are of particular importance in certain sectors, and provide guidance on the risk-sensitive application of CDD measures by firms and entities in those sectors (e.g. correspondent banking relationships, retail banking, wealth management, trade finance or investment fund service providers).

Finally, the CSSF highlights that neither the risk factors nor the CDD measures set out in the Risk Factors Guidelines should be considered exhaustive, and may be further updated and completed as necessary following an assessment by the ESAs.

The Risk Factors Guidelines will enter into force on 26 June 2018.

Solvency II: Separate Report

CAA Circular 17/7

The CAA issued on 6 April 2017 circular 17/7 on the separate report for the purpose of the Solvency II.

The CAA notes that, in light of the volume of work and cost considerations, it was agreed in 2016 that prudential balance sheet external certification for the purpose of Solvency II would be carried out through authorised procedures and a questionnaire prepared by the CAA. Since this questionnaire could only be discussed with the relevant professionals at the beginning of 2017, its analysis simultaneously with the analysis of Solvency II report was not going to be possible.

The CAA further notes that for the financial year 2016 it was agreed that the external auditor validation of the questionnaire would be replaced by a validation carried out by the key person responsible for the actuarial function.

Finally, the circular provides that insurance and reinsurance undertakings are required to provide via the secured channels SOFiE/E-File the completed Excel questionnaire of the 2016 reporting:

- for non-life and life insurance and reinsurance undertakings not exempted from the Solvency II quarterly reporting, as of 19 May 2017
- for non-life insurance and reinsurance undertakings exempted from the Solvency II quarterly reporting, as of 1 July 2017.

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

CSSF-CPDI 17/05

The CSSF, acting in its function as CPDI, issued on 5 April 2017 circular 17/05 to conduct a survey of the amount of covered deposits held as of 31 March 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 *POST Luxembourg*, and to Luxembourg branches of non-EU/EEA credit institutions), and informs them that, from now on, the CPDI aims to collect 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 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 omnibus and fiduciary accounts and the number of beneficiaries (*ayants droit*) will also have to be reported where credit institutions wish to ensure deposit protection for relevant beneficiaries.

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 28 April 2017 at the latest. In order to transmit this data, institutions have been asked to complete the table attached to the circular, which is also available on the CSSF website. The file containing the data had to be duly completed in all cases, had to respect the special surveys naming convention, as defined by CSSF Circular 08/344, and had to be submitted through secured channels (E-File/SOFiE).

Deposit Guarantee Scheme: Collection of 2017 *Ex Ante* Contributions to Luxembourg Deposit Guarantee Fund

CSSF-CPDI 17/06

The CSSF, acting in its function as CPDI issued on 19 April 2017 circular 17/06 on the forthcoming collection of the 2017 *ex ante* contributions to the Luxembourg Deposit Guarantee Fund, the FGDL.

The circular is addressed to all credit institutions incorporated under Luxembourg law, to Luxembourg branches of non-EU credit institutions and to *POST Luxembourg*, which are required to pay contributions into accounts of the FGDL with the Luxembourg Central Bank in order to meet the FGDL's financial resources target level.

The CSSF, following the relevant EBA Guidelines (EBA/GL/2015/10) and using the amounts of the reported covered deposits as at 31 December 2016, has set the total volume of contributions for 2017 at half of the amount of financial means that the FGDL still needs to collect in order to meet the target level of 0.8% of covered deposits, which has to be reached in 2018.

The CSSF points out that the method of calculating the 2017 contributions remains essentially the same as that defined in Annex 1 to Circular CSSF-CPDI 16/01, with the exception of a formula change and an increase to the lower bound of the sliding scale applied to the liquidity coverage ratio.

The corresponding invoices for the forthcoming 2017 contribution collection, including above changes, will be sent to the credit institutions in the coming days by the FGDL.

Deposit Guarantee Scheme: Survey on Covered Claims in Connection with Investment Business

CSSF-CPDI 17/07

The CSSF, acting in its function as CPDI, issued on 19 April 2017 circular 17/07 regarding a survey on covered claims in connection with investment business.

The circular is addressed to all credit institutions and investment firms incorporated under Luxembourg law, to the Luxembourg branches of non-EU credit institutions and investment firms, as well as to UCITS management companies and to alternative investment fund managers whose authorisation includes the management of portfolios on a discretionary basis.

The circular requests data from the members of the *Système d'indemnisation des investisseurs Luxembourg* (SIIL) regarding the volume of covered claims (instruments and money) in relation to investment business of which members are debtors. For the purpose of this survey and to the extent portfolio management on a discretionary, client-by-client basis is provided, UCITS management companies and alternative investment fund managers are assimilated to investment firms.

The circular further clarifies that paragraphs 2 to 5 of CSSF-CPDI Circular 16/03 remain applicable.

The amounts of covered claims need to be reported based on the figures as at 31 December 2016. To this end, members were requested to submit their responses by 15 May 2017.

BRRD: Collection of 2017 *Ex Ante* Contributions to the SRF

CSSF-CODERES 17/04

The CSSF and the Luxembourg Resolution Board (*Conseil de Résolution*) issued on 21 April 2017 circular 17/04 containing information on the raising of the 2017 ex ante contributions to the SRF.

The circular is addressed to all credit institutions established in Luxembourg and subject to the SRM Regulation (EU) 806/2014, with the exception of Luxembourg branches of credit institutions established outside the EU. Luxembourg branches of credit institutions which have their head office in another Member State of the EU are covered by their head office.

The circular states that the 2017 ex ante contributions to the SRF are due by 6 June 2017. The corresponding individual invoices will be distributed by the CSSF in the coming days. Affected credit institutions have to transfer the requested amounts to an account of the *Fonds de résolution Luxembourg*, which will in turn transfer the collected amounts to the SRF.

The circular provides technical details on the computation of the contribution amount and informs relevant credit institutions of a substantial increase in most cases of the contribution compared to the 2016 ex ante contribution.

The circular further points out that the conditions concerning irrevocable payment commitments ("**IPCs**") remain unchanged compared with the 2016 contribution cycle. Credit institutions wishing to apply for IPCs in 2017 needed to send by 24 May 2017 the completed application form to the CSSF and the SRB.

Case Law

Transfer of Agreement

Court of Appeal 21 December 2016, N°41762

Indemnity (*porte-fort d'exécution*)

Luxembourg District Court 13 juin 2014, N°160927

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

DATA PROTECTION

Guidelines of the Article 29 Working Party

The Article 29 Working Party published new Guidelines and announced more to come

The Article 29 Working Party, a group composed of representatives from all EU Data Protection Authorities, the EDPS and the European Commission, and set up under the Directive 95/46/EC, has since its creation provided many guidelines on data protection.

On 5 April 5 2017, the Article 29 Working Party adopted the following guidelines in order to give some criteria, methodology and recommendations on how to implement the new EU General Data Protection Regulation ("**GDPR**"):

- Guidelines on the right to "data portability", a new right under the GDPR, which should make it easier for individuals to transmit personal data between service providers.
- Guidelines on Data Protection Officers ("**DPOs**"), which explains when it is mandatory for a company to designate a DPO.
- Guidelines on the Lead Supervisory Authority, which identifies the Lead authority in the Member State where the controller or the processor has its "main" establishment, but which only concerns cross-border data processing.
- (Draft) Guidelines on Data Protection Impact Assessment ("**DPIA**"), which is a process designed to determine whether processing operations are likely to result in a high risk to the rights and freedoms of natural persons. The guideline explains when and how to use a DPIA.

It should also be noted that guidelines on consent and profiling, data protection certification schemes, administrative fines, transparency, international data transfers and breach notification are also expected very soon.

EMPLOYMENT

National Legislation

Equal Pay between Men and Women in Luxembourg – Law of 15 December 2016

On 15 December 2016, the Chamber of Deputies voted the bill of 24 November 2016 which notably amends the Labour Code.

One of the objects of this new law is to include in the Labour Code the general provisions on equal pay for men and women (Article L.225-1 et seq. Labour Code).

Pursuant to these new provisions of the Labour Code, every employer must therefore ensure, for the same work or work of equal value, equality of salary between men and women. Men and women are considered as undertaking work of an equal value when such work requires employees to have a comparable set of professional knowledge derived from a qualification, diploma or [previous] professional practice, and capacity derived from experience gained, responsibilities and [comparable] physical workload or nervous/mental strain.

It is also specified that equal treatment between men and women has to be ensured within companies, both with regard to regular wages and to benefits.

As a consequence, any provision contained in an employment contract, a collective labour agreement or a company internal regulation which stipulates that an employee or employees of either sex will have a lower wage than an employee or employees of the other sex for the same work or work of equal value, shall be considered null and void.

Failure to comply with this obligation is punishable by a fine ranging from EUR 251 to EUR 25,000.

CRD IV/CRR: Remuneration Policies

CSSF Circular 17/658

The CSSF issued on 16 June 2017 circular 17/658 on the adoption of the EBA Guidelines on sound remuneration policies under CRD IV (EBA/GL/2015/22) and repealing Circular 10/496.

The circular applies to all Luxembourg law credit institutions and CRR investment firms and Luxembourg branches of non-EU/EEA credit institutions and investment firms.

In this circular, the CSSF states that it intends to follow the EBA Guidelines with one exception: the proportionality principle (which allows a certain number of the specific remuneration requirements to be neutralised). The CSSF indicates that it does not share the EBA's interpretation of the proportionality principle and that, given the current discussions at EU level on this topic (draft CRD V), it has decided to maintain the application of CSSF Circular 11/505 (providing guidance on the CSSF expectations as regards the application of the proportionality principle by Luxembourg law credit institutions and CRR investment firms) until new European rules are applicable.

For the purpose of preparing and publishing an FAQ document in the course of 2017, the CSSF also invites all firms to address their questions on the EBA Guidelines by e-mail to remuneration@cssf.lu.

The CSSF has stated that CSSF Circulars 10/497 and 11/505 will be updated in order to take account of recent regulatory developments.

The circular became applicable as of 16 June 2017.

FINTECH

International and EU Developments

New International and EU Texts

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

- European Commission consultation on Fintech (23 March 2017 – 15 June 2017)
- European Parliament resolution of 17 May 2017 on the influence of technology on the future of the financial sector
- EBA consultation of 18 May 2017 on guidance on the use of cloud computing
- CGFS and FSB Report of 22 May 2017 on Fintech credit: Market structure, business models and financial stability implications

Clifford Chance Comment: European Fintech Regulation – An overview

The use of technology to deliver, enhance or 'disrupt' financial services is transforming the sector.

Fintech has the potential to increase efficiency and reduce costs, to improve access to, and delivery of, financial services, to enhance the customer experience and to create markets in new and innovative financial services products. It also poses risks, including money laundering, cyber security, consumer protection and data privacy. However, despite these risks, financial institutions, regulators and challenger companies believe that Fintech – and the opportunities it presents – should be embraced.

Clifford Chance has prepared a client briefing in cooperation with Kromann Reumert and Arthur Cox outlining the complex regulatory framework for Fintech products across the EU.

Luxembourg Developments

IT Outsourcing and Outsourcing to a Cloud and the Use of Cloud Computing Infrastructure

CSSF Circulars 17/654, 17/655, 17/656 and 17/657

The CSSF issued on 17 May 2017 these four circulars supplementing and amending the IT outsourcing regulatory framework and introducing a dedicated regulatory regime for IT outsourcing relying on cloud computing infrastructure. The circulars are applicable to credit institutions, investment firms

and other PFS, as well as to payment and electronic money institutions.

CSSF circular 17/654 establishes the requirements regarding a new type of IT outsourcing – that which relies on cloud computing infrastructure. In particular, the circular provides guidance on the cloud computing service by, amongst other things, defining cloud computing, setting out the essential characteristics of the activity, and clarifying the service models offered by cloud computing service providers as well as the implementation models generally used. It further sets out the requirements in relation to IT outsourcing to cloud computing infrastructure, including, but not limited to, requirements as regards operation of resources, governance, client notification and consent, CSSF notification and authorisation, risk management, business continuity, security of the systems, contractual provisions, and control of the activities, as well as audit rights.

CSSF circular 17/655 additionally updates and amends the provisions on the IT function and IT outsourcing provided for in CSSF circular 12/552 on the central administration, internal governance and risk management (as amended). In particular, it creates a new-standby process allowing the relevant entity to be informed of security failures and requiring the implementation of a management procedure for patches in relation to security failures. It further explicitly introduces need-to-know and least-privilege principles into the general outsourcing requirements foreseen in circular 12/552.

CSSF circular 17/656, repealing and replacing CSSF circular 05/178, notably its Chapter 1 on outsourcing requirements, is aligned with circular 12/552. Chapter 2 of circular 17/656 further sets out the conditions support PFS and their potential foreign branches need to respect when making use of IT outsourcing (other than IT outsourcing relying on cloud computing infrastructure).

Finally, CSSF circular 17/657 updates and amends CSSF circular 06/240 on administrative and accounting organisation, IT outsourcing and details regarding services provided under the status of support PFS (as amended), notably in relation to the entry into force of the new CSSF circular 17/654 on IT outsourcing relying on a cloud computing infrastructure.

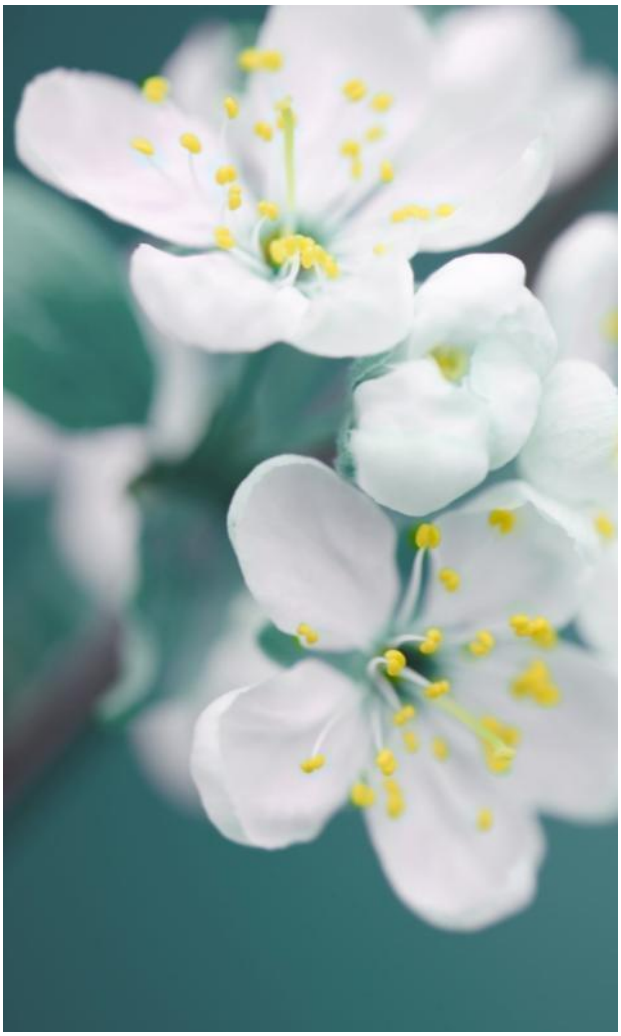
The circulars have been applicable since 17 May 2017.

E-Archiving

Grand Ducal Regulation of 22 May 2017

The Grand-Ducal Regulation dated 22 May 2017 modifying the Grand-Ducal Regulation of 25 July 2015 executing Article 4(1) of the law of 25 July 2015 on electronic archiving (E-Archiving Law) has been published in the Luxembourg official journal (*Mémorial A*). The new regulation replaces the existing technical rules for a management system and security measures for dematerialisation and storage services providers.

The new regulation entered into force on 18 June 2017.



INVESTMENT FUNDS

EU Developments

Brexit

ESMA General Cross-Sectoral Opinion Supporting Supervisory Convergence on Financial Market Participant Relocations to the EU27

On 31 May 2017, ESMA published an opinion on general principles to support supervisory convergence in the context of the UK withdrawing from the EU[1].

The ESMA opinion is addressed to national competent authorities ("**NCAs**") of the 27 member states that will remain in the EU (EU27) and is intended to address regulatory and supervisory arbitrage risks that may arise as a result of increased requests from financial market participants seeking to relocate to the EU27 in order to maintain access to EU financial markets. It assumes that the UK will become a third country after its withdrawal from the EU, without prejudice to any specific arrangements that may be reached between the UK and the EU.

In brief, the opinion is intended to foster consistency in relation to authorisation, supervision and enforcement, and sets out the need for EU27 NCAs to prepare for an increase in activities in relation to authorisation and supervision of regulated entities. It sets out nine principles based on the objectives and provisions of the legislation referred to in Articles 1(2) and (3) of Regulation (EU) N°1095/2010 of the EU Parliament and of the Council (including, among other things, the UCITS Directive, AIFMD, MiFID 1 and MiFID2), which are applied to the specific case of relocation of entities, activities and functions following the UK's withdrawal from the EU, in particular:

- no automatic recognition of existing authorisations
- authorisations granted by EU27 NCAs should be rigorous and efficient and ensure that conditions set by relevant legislation, in particular the AIFMD, UCITS Directive, MiFID1 and MiFID2, are met from day one of authorisation
- NCAs should be able to verify the objective reasons for relocation
- special attention should be granted to avoid letterbox entities in the EU27, in particular considering issues relating to the outsourcing and delegation of activities or functions
- outsourcing and delegation to third countries is only possible under strict conditions
- NCAs should ensure that substance requirements are met to ensure that any outsourcing or delegation arrangements are clearly structured and set up in a way that do not hinder NCAs efficiently and effectively supervising entities
- NCAs should ensure sound governance of EU entities, including ESMA's expectation that the key executives or senior managers of EU-authorised entities are employed in the member state of establishment and work there to a degree proportionate to their envisaged role
- NCAs must be in a position to effectively supervise and enforce EU law, ensure they have the ability to adequately handle authorisation requests, and respond to relevant market developments
- coordination to ensure effective monitoring by ESMA, including ESMA's intention to establish new practical convergence tools and establishing a new supervisory coordination network to promote consistent decisions taken by NCAs.

ESMA intends to make use of all its powers in order to support supervisory convergence activity through follow-up work, including bringing cases for reporting and discussions among NCAs to the new recently established forum – the Supervisory Coordination Network" – regarding market participants seeking to relocate entities, activities or functions to the EU27.

Clifford Chance has prepared a client briefing on ESMA's opinion setting out its supervisory approach to Brexit-related relocations from the UK.

ESMA Sector Specific Opinions Supporting Supervisory Convergence on Financial Market Participant Relocations to the EU27

On 13 July 2017, ESMA published three opinions setting out sector-specific principles in the area of investment management, investment firms and secondary markets, which are aimed at supporting supervisory convergence in the context of requests from UK financial market participants seeking to relocate to the EU27[2].

[1] ESMA42-110-433

[2] ESMA34-45-344, ESMA35-43-762 and ESMA70-154-270

The three ESMA sector specific opinions, which are built on the general cross-sectoral opinion published by ESMA on 31 May 2017, are addressed to NCAs, but are also relevant for market participants considering relocating to the EU27.

ESMA opinions are not extensive documents as such, and are directed at potential risks related to relocation of entities, activities and functions following the UK's withdrawal from the EU. In particular:

- ESMA opinion on investment management covers the UCITS and AIFMD structures, as well as asset management structures involving delegation to MiFID investment firms and addresses, in particular, regulatory and supervisory risks in relation to authorisation, governance and internal control, delegation and effective supervision of authorised UCITS management companies/self-managed investment companies and authorised AIFMs. Although it is based on the objectives and provisions of the UCITS Directive and the AIFMD, this opinion is likely to have wider implications also, as regulators will need to consider other asset management regulations, such as the EuVECA, EuSEF, ELTIF and MMF regulations.
- ESMA opinion on investment firms is based on the objectives and provisions of the MiFID framework, but should also be read, where appropriate, together with the sector-specific opinion on secondary markets. This opinion addresses regulatory and supervisory risks in the area of investment firms, in particular in relation to the authorisation, substance requirements, including governance and outsourcing, and effective supervision.
- ESMA opinion on secondary markets addresses regulatory and supervisory arbitrage risks stemming from third country trading venues relocating in the EU27 seeking to outsource activities to their jurisdiction of origin. ESMA focuses on outsourcing arrangements, due diligence, substance of outsourcing of key and important activities to third countries, performance of key and important activities in the EU27, non-EU branches and effective supervision of outsourcing arrangements with third-country service providers.

It is worth mentioning that most of the content of ESMA sector specific opinions is not surprising and describe what is already known about regulators' considerations when an asset manager is establishing in their jurisdiction, but it does indicate a change of tone from ESMA in respect of Brexit relocations, particularly in relation to substance requirements on delegation. The underlying message is that ESMA is requiring EU regulators to be tough on proposed relocations and, in particular, any proposals to delegate functions back to the UK.

Similar to the general cross-sectoral opinion published on 31 May 2017, ESMA sector specific opinions also assume that the UK will become a third country after its withdrawal from the EU and are therefore without prejudice to any specific arrangements that may be agreed between the EU27 and the UK and to any future ESMA opinions or other convergence tools.

Clifford Chance has prepared a client briefing on ESMA opinion to support supervisory convergence in the investment management sector.

UCITS /AIFMD

ESMA Updated Q&As on UCITS Directive

On 6 April,24 May and 11 July 2017, ESMA published updated versions of its Q&A on the application of the UCITS Directive[3], including the following new questions and answers:

- As regards cross-border activities by UCITS management companies, ESMA's point of view is that a UCITS management company that wishes to pursue cross-border activities, including collective portfolio management and MiFID services, by way of the UCITS management company passport (Articles 16 to 21 of the UCITS Directive) can notify its NCAs of these cross-border activities without having to identify a specific UCITS in the notification letter. However, when the UCITS management company, at a later time, has identified a UCITS that it wants to manage on a cross-border basis, it has to notify the NCAs in the home member state of the relevant UCITS in accordance with Article 20 of the UCITS Directive.
- As regards possible exemption to EMIR clearing obligations, ESMA considers that an exemption to the clearing obligation laid down in Article 4(1) of EMIR can only be granted to a UCITS on the basis of the so-called "intra group transaction" exemption (Article 4(2) of EMIR) after a thorough case-by-case assessment. This assessment shall take into account whether the UCITS has been established to form part of the same group (as defined in Article 2(16) of EMIR) as the counterparty to the OTC derivative contract, and whether such UCITS fulfils all the criteria for intra group transactions set out in Article 3(2)(a)(i)-(iv), (b), or (d) of EMIR. ESMA further specifies that, in the case of UCITS, the intra group transactions

[3] ESMA34-43-392

exemption under Article 4(2) of EMIR should be construed narrowly, and that in most cases it will not be possible for the exemption to be used.

- As regards the issuer concentration limit, ESMA clarifies that the 40% limit set out in Article 52(2) of the UCITS Directive (according to which the total value of the transferable securities and MMIs held by a UCITS in the issuing bodies in each of which it invests more than 5% of its assets must not exceed 40% of the value of its assets) does not apply to index-tracking UCITS that comply with the requirements set out in Article 53 of the UCITS Directive. These index-tracking UCITS are those the investment policies of which aim to replicate the composition of a certain stock or debt securities index, which is recognised by NCAs on the basis that the indices composition is sufficiently diversified, the indices represent an adequate benchmark for the market to which they refer and the indices are published in an appropriate manner.
- As regards UCITS V depositary independence requirements, ESMA clarifies that where a group link exists between the UCITS depositary and the UCITS management company/self-managed investment company for the purpose of Article 24 of the UCITS V Delegated Regulation (i.e. when the UCITS management company/self-managed investment company and the UCITS depositary are part of the same "group"), a person who served in the management body or supervisory body of an entity or was otherwise employed by such an entity should be deemed to fulfil the independence requirement only after an appropriate cooling-off period following the termination of his/her relationship with the relevant entity. According to ESMA, that period should start from the final payment of any outstanding remuneration due to him/her which entails a margin of discretion from the entity (e.g. in case of any portion of variable remuneration which is deferred and still subject to contraction, including through malus or clawback arrangements) and is linked to his/her previous employment or other relationship with that entity. ESMA further indicates that, without prejudice to any requirements established under the relevant national corporate governance rules or codes, the cooling-off period should be proportionate to the length of the employment or other relationship that the individual had with any of the companies within the group and to the type of functions performed within such company(ies).

ESMA Updated Q&As on AIFMD

On 6 April, 24 May and 11 July 2017, ESMA published updated versions of its Q&A on the application of the AIFMD[4], including the following new questions and answers:

- As regards the AIFMD marketing passport set forth by Article 32 of AIFMD, ESMA clarifies that this marketing passport may only be used by EU AIFMs for the cross-border marketing of EU AIFs to "professional investors" (which means investors that are considered to be professional clients or may, on request, be treated as professional clients within the meaning of Annex II of the MiFID), but cannot be extended to other categories of investors that, by their definition, share some – but not all – the element of the professional investor definition (such as, for instance, that of “qualifying investor”, “informed investor”, or “semi-professional investor” as defined in some member states). As a result, any cross-border marketing activities to such other non-professional investors have therefore to be notified and undertaken according to national legislation in the host member state of the EU AIF and cannot be carried out by way of the AIFMD marketing passport.
- As regards reporting to NCAs by AIFMs, ESMA specifies that AIFMs should report "0" in relation to the breakdown between retail and professional investors where the breakdown is not known, and use the assumption boxes for questions 119 and 120 of the reporting template for AIF-specific information to indicate that the information is not available.
- As regards the notification obligations of AIFMs, ESMA recalls that an AIFM must provide information in its programme of operation on the AIFs it intends to manage, including information on their name and national identifier (if available) and investment strategies. However, when the specific AIFs cannot be identified at the time of notification (namely, if they are domiciled in another member state), ESMA considers that the AIFs to be managed may be identified by their investment strategy. In that regard, ESMA sees merit in relying on the investment strategies contained in the reporting template for identification purposes (Annex IV of Commission Delegated Regulation (EU) N°231/2013). Where an AIFM has only been authorised to manage certain types of AIFs, it could also refer to the scope of its authorisation to identify the funds to be managed.

[4] ESMA34-32-352

- As it is the case for UCITS funds, ESMA clarifies that an AIF can make use of the exemption for intra group transactions under Article 4(2) of EMIR provided that the AIF has been established to form part of the same group (as defined in Article 2(16) of EMIR) as the counterparty to the OTC derivative contract, and that the AIF fulfils all the criteria for intra group transactions set out in Article 3(2)(a)(i)-(iv), (b), or (d) of EMIR. According to ESMA, the intra group transactions exemption under Article 4(2) of EMIR should also be construed narrowly in relation to AIFs, meaning that in most cases it will not be possible for AIFs to use such exemption.
- As regards reporting obligations to NCAs in relation to the valuation of loans purchased on the secondary market by an AIF, ESMA indicates that the AIF should report the valuation of the loan as it is reported in the calculation of its NAV. This means that the AIF should report the amount it actually spent to acquire the loan, rather than the notional value of the loan which may overestimate the risk exposure.
- As regards the currency in which an AIF's NAV should be reported to NCAs, ESMA considers that AIFMs should report such NAV in the base currency of the relevant AIF.
- As regards the rules applicable to the conversion of an AIFM's total value of assets under management into EUR, ESMA specifies that the AIFM should (i) use the rounded values of the AIFs in the base currency of the AIFs and (ii) thereafter divide the rounded values by the corresponding rate of one unit of the base currency in EUR.

EFAMA Letter regarding ESMA Q&A on AIFMD

On 11 April 2017, EFAMA sent a letter to ESMA to share the concerns of its members regarding the revised version of ESMA Q&A on the application of the AIFMD, which was published on 16 November 2016 in relation to AIFM delegation arrangements[5].

As a reminder, ESMA indicated on 16 November 2016 that when a function listed in points 1 and 2 of Annex I of the AIFMD is not performed by the AIFM itself, this function should be considered in every case as being delegated by the AIFM to the relevant third party who is performing such function. Consequently, the AIFM should not be released from, but should always remain responsible for, ensuring compliance with the delegation requirements set out in Article 20 of the AIFMD for these functions. According to ESMA, this requirement should apply to all the functions listed in points 1 and 2 of Annex I of the AIFMD, meaning that it should also apply to the administration, marketing and other services relating to the AIF's assets for which the AIFM may not have been authorised pursuant to the AIFMD, which would be the case if its licence only covers portfolio and risk management in respect of AIFs.

While EFAMA agrees that the AIFM is generally responsible for ensuring compliance with AIFMD, it outlines that the interpretation taken by ESMA on 16 November 2016 is not aligned with the approach taken within a number of EU member states. EFAMA therefore invites ESMA to undertake a further analysis of its Q&A as issued on 16 November 2016 in order to take into account the legal and regulatory, governance, operational, tax and cost impacts that it may have on the business models of existing AIFs. Pending this impact analysis, EFAMA:

- urges ESMA to not apply the approach taken in the Q&A, given the lack of any grandfathering or transitional period available to those AIFs and AIFMs whose business models will be impacted, and due to the risk of litigation at the national level
- suggests that ESMA may wish to amend its Q&A to align it with the current legislative framework, and that no stricter approach should be applied.

In its letter, EFAMA also proposes that ESMA revisits its new question 3 on the possibility for an externally managed AIF to itself perform the functions stated in Annex I of the AIFMD.

For more information on ESMA Q&A on the AIFMD dated 16 November 2016, please refer to the March 2017 edition of our Luxembourg Legal Update.

ESMA Opinion on Asset Segregation and Applying Depositary Delegation Rules to CSDs

On 20 July 2017, ESMA published an opinion to the EU Commission, Council and Parliament setting out possible clarifications of legislative provisions under the AIFMD and the UCITS Directive[6]. The suggested clarifications relate to the asset segregation requirements in case of safe-keeping duties by the appointed depositary of a UCITS or AIF and the application of depositary delegation rules to central securities depositaries (CSD).

[5] ESMA/2016/1669

[6] ESMA34-45-277

In its opinion, ESMA suggests a regime which ensures that:

- assets are clearly identifiable as belonging to the AIF/UCITS, consistent with any reuse (where permitted), and
- investors receive adequately robust protection by avoiding the ownership of the assets being called into question in case of the insolvency of any of the entities in the custody chain.

ESMA concludes that only minimum EU-wide segregation requirements should be prescribed, leaving room for stricter requirements or different account structures if national laws in specific member states make them necessary.

ESMA Reports on Notification Frameworks and Home-Host Responsibilities under UCITS Directive and AIFMD

On 7 April 2017, ESMA published a report[7] setting out the findings of a thematic study it conducted in 2016 on the operation of home and host responsibilities under the UCITS Directive and the AIFMD, with a view to promoting the smooth operation of EU passports for marketing and management, looking at the notification frameworks contained in the UCITS Directive and AIFMD.

The thematic study evaluated supervisory activity around the notification frameworks and identified a number of good supervisory practices. In the context of this work, NCAs also identified further issues around the day-to-day functioning of the passporting frameworks outside the scope of the study.

Following the study, further work will be carried out at ESMA level to identify, analyse and resolve the identified issues through one or more of the instruments at ESMA's disposal, with a view to enhancing supervisory convergence amongst NCAs by clarifying supervisory responsibilities and facilitating administrative procedures around the passporting frameworks. In this context, ESMA will also assess the possibility of contributing to the work on barriers to cross-border distribution of funds carried out by the EU Commission.

PRIIPs

Publication of PRIIPs Delegated Regulation

The 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, was published in the Official Journal on 12 April 2017 (PRIIPs Delegated Regulation).

As a reminder, in September 2016 the EU Parliament rejected the original draft RTS adopted by the EU Commission in June 2016 and returned them to the EU Commission for revision. The amendments included in the PRIIPs Delegated Regulation concern multi-option PRIIPs ("**MOPs**"), performance scenarios, comprehension alert and presentation of administrative costs in relation to biometric components of insurance-based investment products.

The PRIIPs Delegated Regulation entered into force on 2 May 2017 and will apply from 1 January 2018, which is the same date as the PRIIPs KID Regulation. For the sake of completeness, certain formulas contained in the Annexes of the PRIIPs Delegated Regulation have been amended by a corrigendum published in the Official Journal on 11 May 2017.

For more information on the PRIIPs KID Regulation and its implementing measures, please refer to the July 2016 edition of our Luxembourg Legal Update and to our client briefings Implementing PRIIPs and The PRIIPs KID Regime.

Publication of EU Commission Guidelines on PRIIPs KID Regulation

On 4 July 2017, the EU Commission adopted a communication, which includes guidelines on the application of the PRIIPs KID Regulation and which was published in the Official Journal on 7 July 2017.

The purpose of these guidelines is to clarify some of the PRIIPs KID Regulation requirements, such as the products covered by the PRIIPs KID Regulation, the products made available to retail investors against no consideration, the multi-option PRIIPs, the territorial application of the PRIIPs KID Regulation, the use of PRIIPs KID by UCITS, etc. The guidelines also specify that the distribution of a PRIIP without a PRIIPs KID is a breach of the PRIIPs KID Regulation.

[7] ESMA34-340

ESAs Q&As on PRIIPs KIDs

On 4 July, the Joint Committee of ESAs published the first set of questions and answers on the KID requirements for PRIIPs in relation to the PRIIPs Delegated Regulation.

The Q&A document includes answers on the presentation, content and review of the PRIIPs KID, including the methodologies underpinning the risk, reward and costs information.

The ESAs intend to periodically update the document with new Q&As.

Money Market Funds

Publication of MMF Regulation

Regulation (EU) 2017/1131 of the EU Parliament and of the Council of 14 June 2017 on money market funds (MMF Regulation), which lays down rules and common standards on the structure of MMFs, their credit quality and liquidity, was published in the Official Journal on 30 June 2017.

The MMF Regulation entered into force on 20 July 2017 and will apply from 21 July 2018, with the exception of Article 11(4), Article 15)7), Article 22 and Article 37(4) which will apply from 20 July 2017. However, existing MMFs will have 18 months after the entry into force of the Regulation (i.e. by 21 January 2019) to comply with the provisions of the MMF Regulation and to submit an application to their NCAs demonstrating their compliance with the MMF Regulation. No later than 2 months after receiving the complete application, the NCAs of the MMF shall assess whether the relevant MMF is compliant with the MMF Regulation and shall issue a decision and notify the MMF accordingly.

As a reminder, the aim of the MMF Regulation concerns the provision of a common framework for UCITS and AIFs qualifying as MMFs and that are established, managed or marketed in the EU in order to improve their liquidity profile and the stability of their structure and also to ensure that they invest in well-diversified assets of good credit quality.

Under the MMF Regulation, an "MMF" is a UCITS or an AIF that has, as distinct or cumulative objectives, to offer returns in line with money market rates or to preserve the value of the investment and that seek to achieve these objectives by investing in short-term assets (such as money market instruments or deposits, or entering into reverse repurchase agreements, or certain derivative contracts with the sole purpose of hedging risks inherent to other investments of the fund).

In brief, the MMF Regulation:

- Allows three different categories of MMFs, being:
  - the standard variable net asset value MMFs ("**VNAV MMF**")
  - the public debt constant net asset value MMFs ("**Public CNAV MMF**") that invests 99.55% of assets in qualifying government debt and in cash
  - the low volatility net asset value MMFs ("**LVNAV MMF**").
- Lays down common rules concerning the financial instruments eligible for investment by MMFs, the risk diversification of their portfolio, the valuation of their assets and the reporting requirements in relation to MMFs established, managed or marketed in the EU.
- Introduces common standards to increase the liquidity of MMFs to ensure that MMFs can face sudden redemption requests when market conditions are stressed.
- Provides for common rules to ensure that the fund manager has a good understanding of his/her investors, and provides investors and competent authorities with adequate and transparent information.

Following the entry into force of the MMF Regulation, any UCITS and AIF that are investing in short-term assets and the investment objective of which is to offer return in line with money market rates and/or preserve the value of their investment, will no longer be allowed to use the designation "money market fund" or "MMF" or to use a misleading or inaccurate designation which would suggest they are MMFs or have their characteristics, unless these UCITS or AIFs have been authorised in accordance with the MMF Regulation. In that respect, the MMF Regulation scope is thus larger than ESMA guidelines on money market funds (ref. CESR/10-049) which only apply to funds labelling or marketing themselves as MMFs.

For the avoidance of doubt, UCITS qualifying as MMFs will remain subject to the UCITS Directive and AIFs qualifying as MMFs will remain subject to the AIFMD. Therefore, the new product rules imposed by the MMF Regulation shall apply to these UCITS and AIFs in addition to the product rules laid down in the UCITS Directive and AIFMD, unless they are explicitly disapplied under the proposed MMF Regulation.

ESMA Consultation on Draft Technical Advice, ITS and Guidelines

On 27 May 2017, ESMA published a consultation paper containing proposals on draft technical advice, draft implementing technical standards (**ITS**) and guidelines under the MMF Regulation[8].

The key draft proposals under the different policy tools may be summarised as follows:

- The draft technical advice relates to the liquidity and credit quality requirements applicable to assets received as part of a reverse repurchase agreement. It also includes criteria for:
  - the validation of the credit quality assessment methodologies
  - the quantification of the credit risk and the relative risk of default of an issuer and of the instrument in which the MMF invests
  - the establishment of qualitative indicators on the issuer of the instrument.
- The draft ITS relate to the development of a reporting template containing all the information that managers of MMFs are required to send to the NCAs of the MMF and which must then be transmitted to ESMA, including the characteristics, portfolio indicators, assets and liabilities of the MMF.
- The guidelines are intended to set out common reference parameters of the scenarios to be included in the stress tests that managers of MMFs are required to conduct. This takes into account such factors as hypothetical changes in the level of liquidity of the assets held in the portfolio of the MMF, movements of interest rates and exchange rates, or levels of redemption.

Comments on the consultation are due by 7 August 2017, and ESMA is expected to finalise the technical advice and ITS for submission to the EU Commission, and to issue the guidelines, by the end of 2017.

Benchmark Regulation

Publication of EU Commission Implementing Regulation including EONIA as Critical Benchmark

On 28 June 2017, the EU Commission adopted Implementing Regulation (EU) 2017/1147, which amends Implementing Regulation (EU) 2016/1368 establishing a list of critical benchmarks used in financial markets pursuant to the Benchmark Regulation.

The new Implementing Regulation amends the list of critical benchmarks to include the Euro Overnight Index Average (EONIA) in the list of critical benchmarks in addition to the Euro Interbank Offered Rate (EURIBOR).

As a reminder, under the Benchmark Regulation, a benchmark is considered to be a critical benchmark where it is used directly or indirectly within a combination of benchmarks as a reference for financial instruments or financial contracts or for measuring the performance of investment funds, having a total value of at least EUR 500 billion on the basis of all the ranges of maturities or tenors of the benchmark, where applicable. Data analysis and contributions by the European Central Bank (ECB) have indicated that the value of financial instruments and financial contracts referencing EONIA in the EU exceeds the threshold of EUR 500 billion.

The new Implementing Regulation was published in the Official Journal on 29 June 2017 and entered into force on 30 June 2017.

EU Commission Draft Delegated Acts clarifying Key Terms under Benchmark Regulation

On 22 June 2017, the EU Commission published four draft texts of delegated regulations under the Benchmark Regulation specifying:

- the technical elements of the definitions laid down in paragraph 1 of Article 3 of the Benchmark Regulation
- 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 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
- the establishment of the conditions to assess the impact resulting from the cessation of or change to existing benchmarks.

[8] ESMA34-49-82

The consultation has closed on 20 July 2017, and the EU Commission will now consider the feedback received in finalising its proposals, and then submit the delegated acts to the EU Parliament and Council for scrutiny before publication in the Official Journal.

ESMA Framework for Mandatory Benchmarks Contributions and Draft RTS on Third Countries Cooperation Agreements

On 2 June 2017, ESMA published a methodological framework to promote convergence in relation to the supervision of critical benchmarks, which is designed to assist NCAs with their selection of supervised entities to be compelled to contribute input data to critical benchmarks should its representation become at risk. It applies to all Interbank Offered Rates (**IBORs**) and to the Euro OverNight Index Average (**EONIA**). The selection of the supervised entities shall be made on the basis of the size of a supervised entity's actual and potential participation in the market that the benchmark intends to measure, and the framework sets out criteria on how to measure this.

On the same date, ESMA also published the final draft RTS on the minimum contents for cooperation arrangements between ESMA and NCAs in third countries that have been designated as equivalent under the Benchmark Regulation. The final draft RTS are intended to ensure convergence on cooperation arrangements entered into by EU NCAs and third country NCAs when they supervise administrators that apply for recognition in the EU. The draft RTS also aim to enhance the negotiation of the relevant arrangements and thereby allow for the use of third country benchmarks soon after an equivalence decision has been adopted.

ESMA Q&A on Transitional Provisions under Benchmark Regulation

On 5 July 2017, ESMA published a Q&A on practical questions regarding the implementation of the Benchmark Regulation.

For the time being, the Q&A includes two answers regarding the transitional provisions applicable to EU index providers under Article 51 of the Benchmark Regulation, clarifying which benchmarks supervised entities in the EU will be allowed to use after 1 January 2018 as a result of the transitional provisions of the Benchmark Regulation.

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. This topic guide is a compliance tool developed by Clifford Chance to assist clients with their implementation projects on the Benchmark Regulation.

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.

Luxembourg Legal and Regulatory Developments

Bill 7128 implementing AMLD 4 and FATF 2 Regulation

Bill of law N°7128 implementing the fourth Anti-Money Laundering Directive (AMLD 4 – Directive (EU) 2015/849) and the second Regulation on information accompanying transfers of funds (FATF 2 Regulation – Regulation (EU) 2015/847) was deposited with the Luxembourg Parliament on 26 April 2017.

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

Bill 7157 implementing MiFID2 and MiFIR

Bill of law N° 7157, the purpose of which is to ensure implementation of MiFID2 and MiFIR in the Luxembourg legal framework, was deposited with the Luxembourg Parliament on 3 July 2017.

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

CSSF-CPDI Circular 17/07
Deposit Guarantee Scheme – Survey on Covered Claims re Investment Business

The CSSF, acting in its function as Depositor and Investor Protection Council (*Conseil de Protection des Déposants et des Investisseurs*) (**"CPDI"**), issued on 19 April 2017 circular 17/07 regarding a survey on covered claims in connection with investment business.

The circular is also addressed to UCITS management companies and to alternative investment fund managers whose authorisation includes the management of portfolios on a discretionary basis.

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

CSSF Circular 17/661
ESAs Risk factors Guidelines under AMLD 4

On 24 July 2017, the CSSF issued circular 17/661 to implement the guidelines issued by the Joint Committee of ESAs under Articles 17 and 18(4) of AMLD4 on simplified and enhanced customer due diligence and the factors credit and financial institutions should consider when assessing the money laundering and terrorist financing risk associated with individual business relationships and occasional transactions into Luxembourg regulation.

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

CSSF Updated FAQ on UCI Law

On 6 July 2017, the CSSF published an updated version of its FAQ document on the UCI Law, including new questions and answers in relation to the UCITS V independence requirements, the impact of the PRIIP KIDs Regulation on UCITS, and the application of ESMA's opinion of 30 January 2017 relating to UCITS' share classes.

UCITS V Independence Requirements

As regards the UCITS V independence requirements laid down in Chapter 4 of EU Commission Delegated Regulation (EU) 2016/438 of 17 December 2015 supplementing the UCITS Directive with regard to obligations of depositaries (UCITS V Delegated Regulation), the CSSF FAQ on the UCI Law clarifies, among other things, the following points:

- Impacted entities and bodies – The UCITS V independence requirements apply to and between UCITS depositaries and UCITS management companies/self-managed investment companies, and they impact the "management body" and the "body in charge of the supervisory function" (as such concepts are further specified in the CSSF FAQ) of UCITS depositaries and UCITS management companies/self-managed investment companies.
- Luxembourg branches of EU entities – In case of cross-border structures implying Luxembourg branches of EU management companies or depositaries, the CSSF FAQ on the UCI Law clarifies that :
  - When the UCITS depositary is established as a Luxembourg branch of an entity having its registered office in another EU member state, the UCITS V independence requirements are assessed at the level of the Luxembourg UCITS management company/self-managed investment company with regard to the management body (and, as the case may be, the supervisory board) of the head office of the depositary and the employees of the depositary (both at the level of its head office and of the Luxembourg branch).
  - When the UCITS management company is established as a Luxembourg branch of a management company having its registered office in another EU member state (and has therefore no legal personality in Luxembourg), the UCITS V independence requirements are assessed at the level of the depositary established in Luxembourg with regard to the management body (and, as the case may be, the supervisory board) of the head office of the management company and the employees of the management company (both at the level of its head office and of the Luxembourg branch).
- Group link – When there is a group link between the UCITS management company/self-managed investment company and the UCITS depositary, the provisions of Article 24 of the UCITS V Delegated Regulation apply in addition to the provisions of Article 21 of the UCITS V Delegated Regulation, and the CSSF FAQ on the UCI Law summarises the impacts of these Articles for Luxembourg UCITS management companies/self-managed investment companies and the UCITS depositaries as follows:
  - Prohibition for the employees and the members of the management body of a UCITS management company/self-managed investment company to hold a position either as an employee or as a member of the management body of the UCITS depositary
  - Prohibition for the employees and the members of the management body of a UCITS depositary to hold a position either as an employee or as a member of the management body of a UCITS management company/self-managed investment company
  - In case of two-tier board structure within a UCITS management company/self-managed investment company (i.e. including a management board and a supervisory board), prohibition to have more than one third of the members of the supervisory board of the

UCITS management company/self-managed investment company to hold a position either as a member of the management body, as a member of the supervisory board or as an employee of the UCITS depositary

- In case of two-tier board structure of a UCITS depositary, prohibition to have more than one third of the members of the supervisory board of the UCITS depositary to hold a position either as a member of the management body, as a member of the supervisory board or as an employee of the related UCITS management company/self-managed investment company
- In case of a group link between a UCITS management company/self-managed UCITS and a UCITS depositary, obligation to have a certain number of independent members in the relevant management body (or, when applicable, in the supervisory board) of the said UCITS management company/self-managed investment company and UCITS depositary, the number of which will vary depending on the total number of members within the governing relevant body. In this respect, the CSSF FAQ on the UCI Law provides that the following minimum thresholds of independent members should be complied with: (i) bodies of three members or less in total must include a minimum of one independent member, (ii) bodies of four members in total must include a minimum of one independent member, (iii) bodies of five members in total must include a minimum of two independent members, (iv) bodies of six members or more in total must include a minimum of two independent members.

- Cooling-off period – Like ESMA Q&A on the application of the UCITS Directive, the CSSF FAQ on the UCI Law also provides for a cooling-off period that should be respected by individuals previously involved with, or linked to, either the UCITS management company/self-managed investment company and the UCITS depositary (or any other undertaking within the group to which such entities belong) in order to be considered as independent member. Contrary to ESMA which does not provides for any specific period of time following the termination of the relationship with the relevant entity, the CSSF indicates that a cooling-off period of 12 months should be respected.

- CSSF Circular 12/546 – The provisions of CSSF Circular 12/546 relating to UCITS management companies/self-managed investment companies remain applicable, in particular those provisions relating to the solid governance arrangements and to the independence of UCITS management companies/self-managed investment companies and UCITS depositaries.

Impact of PRIIPs KID Regulation

As regards the PRIIPs KID Regulation, the CSSF recalls in its FAQ on the UCI Law that UCITS manufacturers are exempted from the obligation to provide a PRIIPs KID until 1 January 2020. As form such date, they will have to draw up a PRIIPs KID instead of UCITS KIIDs unless the 1 January 2020 deadline is postponed by the EU Commission on the basis of the review of the transitional arrangements under Article 33(1) paragraph 2 of the PRIIPs KID Regulation.

ESMA Opinion on UCITS' Share Classes

Further to the publication of ESMA's opinion on UCITS share classes on 30 January 2017 (ESMA Opinion)[9] and to CSSF press release 17/06 of 13 February 2017, the CSSF now clarifies the following points in its FAQ on the UCI Law :

- Impact – In case a UCITS intends to convert an existing share class, which is considered as non-eligible according to ESMA Opinion, into another eligible share class, the provisions of CSSF Circular 14/591 on the protection of investors in case of a material change to an open-ended UCI will have to be applied. This means that the minimum notification period of one month with the ability for investors to convert their holdings free of charge will have to be complied with.

- Transitional provisions – According to ESMA Opinion's transitional provisions, share classes established prior to 30 January 2017 and which do not comply with the principles contained in ESMA Opinion should be allowed to continue in order to mitigate the impact on investors. However, such share classes should be closed to subscriptions by new investors by 30 July 2017 and to additional subscriptions by existing investors by 30 July 2018. In this respect, the CSSF clarifies that investors that have subscribed for a “non-eligible share class” before the 30 July 2017 deadline will be considered as existing investors allowed to further invest in the same share-class until 30 July 2018.

- Common investment objective principle – In line with ESMA Opinion's principle according to which share classes of the same UCITS (or sub-fund) should have a common investment objective reflected by a common pool of assets, the CSSF indicates in its FAQ on the UCI Law that all “overlay share classes” that are derivatives-based,

[9] ESMA34-43-296

with the exception of derivatives-based currency risk hedging, will no longer be permitted. By contrast, currency risk hedging arrangements that systematically hedge out part or all of the foreign currency exposure in the common pool of assets into the share class currency will remain compatible with the principle of a common investment objective, provided that these arrangements comply with all the principles set forth in ESMA Opinion.

- Non-contagion principle – According to ESMA Opinion, UCITS management companies/self-managed investment companies should, at the level of the share class with a derivative overlay, ensure that (i) over-hedged positions do not exceed 105% of the net asset value of the share class and (ii) under-hedged positions do not fall short of 95% of the portion of the net asset value of the share class which is to be hedged against currency risk. In this respect, the CSSF clarifies that the provisions of CSSF Circular 02/77 (concerning the protection of investors in case of NAV calculation error and correction of the consequences resulting from non-compliance with the investment rules applicable to UCIs) will not apply in case the hedge ratios of 105% and 95% would be breached, but requires that UCITS management companies/self-managed investment companies define and implement monitoring and control processes/procedures for ensuring compliance with these hedge ratios on an ongoing basis.
- Pre-determination principle – According to this principle, ESMA Opinion considers that all the features of a share class should be pre-determined before the share class is set up and that, in share classes with hedging arrangements, this pre-determination should also apply to the currency risk, which is to be hedged out systematically. As indicated in ESMA Opinion, the CSSF recalls that, as a result of this pre-determination, there is no discretion of the UCITS management company/self-managed investment company in the currency risk hedging strategy. However, this does not limit the UCITS management company's/self-managed investment company's discretion as to the type of derivative instrument used to hedge the currency risk, nor its operational implementation.
- Transparency principle – The CSSF allows UCITS management companies/self-managed investment companies to provide the list of share classes with a contagion risk as prescribed by point 32b of ESMA Opinion on the website of the relevant UCITS management company/self-managed investment company, provided that the link to this publication is included in the UCITS' prospectus. Moreover, the CSSF clarifies that, in accordance with point 32 of ESMA Opinion, the prospectus should contain information on the types and main features of the share classes including the fee structure, dividend policy, investor type, currency or currency risk hedging. However, the CSSF does not expect an exhaustive list of share class with exhaustive details on their characteristics although additional information on share classes issued should be provided to investors on request and free of charges, or via a reference in the prospectus to a website where such information can be found. For the avoidance of doubt, investors must be notified if the UCITS prospectus is amended as a consequence of ESMA Opinion in the case where the relevant changes impact their rights and/or interests, including in case a non-eligible share class is closed for new investments by 30 July 2017 and for additional investments by 30 July 2018.

CSSF Updated FAQ on AIFM Law

On 6 July 2017, the CSSF published an updated version of its FAQ document on the AIFM Law, which includes a new section considering the impact of the PRIIPs KID Regulation on Luxembourg AIFs.

In particular, the CSSF FAQ on the AIFM Law clarifies the following aspects:

- The obligation for Luxembourg AIFs advised on, offered or sold, to retail investors to have in place a PRIIPs KID as from 1 January 2018, unless they benefit from the exemption provided for by Article 32(2) of the PRIIPs KID Regulation to have in place a PRIIPs KID until 31 December 2019.
- The possibility for Luxembourg retail AIFs to benefit from the 31 December 2019 transitional period – during which they may be exempted from the obligation to have a PRIIPs KID – applies if these AIFs already issue a UCITS KIID before 1 January 2018 and provided that the following conditions are complied with:
  - The UCITS KIID to be issued should comply with Articles 159 to 162 of the UCI Law of 2010, as well as with the provisions of Commission Regulation (EU) n°583/2010
  - The UCITS KIID should be issued for each retail share class of the sub-funds of the relevant Luxembourg AIF before 1 January 2018
  - The offering document of the Luxembourg AIF in question should be amended in order to reflect the distribution of a UCITS KIID to all retail investors contemplating an investment in the AIF, and also mention that the UCITS KIID shall be published on the

website of the registered or authorised AIFM of the Luxembourg AIF and that it shall be available, upon request, in paper form.

- The possibility for additional new sub-funds/share-classes of retail AIFs which are launched after 1 January 2018 to also benefit from the exemption to issue a PRIIPs KID as per Article 32(2) if these AIFs have already issued a UCITS KIID.
- The timescale for retail AIFs to draw up a PRIIPs KID (i.e. before 1 January 2018 or as from 1 January 2020 depending on whether they may be exempted under Article 32(2) of the PRIIPs KID Regulation), as well as the timing, medium and language to be used for providing the PRIIPs KID to retail investors.
- The exclusion from the scope of the PRIIPs KID Regulation of Luxembourg AIFs solely distributed to professional investors and the CSSF's strong recommendation to update the offering documents of these AIFs before 1 January 2018 to indicate that their units/shares are solely advised on, offered or sold, to professional investors and that, as a consequence, no PRIPPs KID will be issued, although the CSSF foresees the possibility to receive a self-assessment form on the status of these AIFs as an alternative to the amendment of their offering document.
- The absence of obligation to provide a PRIIPs KID to retail investors outside of the EU/EEA, unless required by the applicable rules of the third country in which the marketing takes place provide otherwise.
- The absence of obligation to provide a PRIIPs KID to existing retail investors of a Luxembourg retail AIF if that AIF is not advised on, offered or sold, to any new retail investors.
- The obligation to draw up a PRIIPs KID for a Luxembourg retail AIF if an existing retail investor intends to make an additional investment after 1 January 2018, except if such existing retail investor invests through a regular savings plan but provided that no changes are made to the subscription arrangements and no new subscription form is required.

In terms of CSSF's approval, the CSSF FAQ on the AIFM Law indicates that the CSSF only requires the notification of the final PRIIPs KID by the manufacturer of the Luxembourg AIF advised on, offered or sold, to retail investors, but not the notification of its draft versions. Similarly, Luxembourg AIFs that have issued a UCITS KIID before 1 January 2018 will only have to file the final version of that KIID with the CSSF.

CSSF FAQs on Non-AIFs SIF and SICARs

On 6 July 2017, the CSSF published a FAQ document concerning SIFs and SICARs that do not qualify as AIFs.

For the time being, the CSSF FAQ on non-AIFs SIF and SICARs includes one section analysing the impact of the PRIIPs KID Regulation on Luxembourg SIFs and SICARs that do not qualify as AIFs, clarifying in particular that:

- The manufacturers of such Luxembourg SIFs and SICARs advised on, offered or sold, to retail investors must draw up a PRIIPs KID as from January 2018, but may also be exempted under Article 32(2) the PRIIPs KID Regulation if they have decided to draw up a UCITS KIID before that date.
- Points 23.b) to 23.q) of the CSSF FAQ on the AIFM Law apply to these Luxembourg SIFs and SICARs.

CSSF Press Release in relation to ESMA Sector Specific Opinions Supporting Supervisory Convergence on Financial Market Participant Relocations to the EU27

On 14 July 2017, the CSSF issued a press release in which it indicates that the principles laid down in ESMA opinions dated 13 July 2017 to support supervisory convergence in the areas of investment firms, investment management and secondary markets in the context of the UK withdrawing from the EU are in line with the CSSF’s practice.

Please refer to sub-section titled "ESMA Sector Specific Supporting Supervisory Convergence on Financial Market Participant Relocations to the EU27" for further information.

ALFI Q&A on PRIIPs

On 7 April 2017, ALFI published a Q&A on PRIIPs, which was then updated on 30 May 2017, and contains ALFI's answers 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 MOPs).

As regards the scope and applicable transitional provisions of the PRIIPs KID Regulation and the PRIIPs Delegated Regulation, ALFI recalls that the benefit of the 31 December 2019 transitional period – during which the UCITS KIID can continue to be used by UCITS as per Article 32(1) PRIIPs KID Regulation – also applies in respect of non-UCITS retail funds in EU member states applying the UCITS rules on the format and content of the KIID document to such funds (Article 32(2) PRIIPs KID Regulation). Otherwise, non-UCITS retail funds must issue a KID compliant with the PRIIPs KID Regulation requirements as from 1 January 2018.

ALFI further indicates that Luxembourg Part II UCIs sold to retail investors have the option to produce a UCITS KIID-like document as per Article 161 paragraph 1 of the UCI Law in order to benefit from the exemption under Article 32(2) of the PRIIPs KID Regulation until at least 31 December 2019. However, ALFI clarified that Part II UCIs may benefit from this exemption, provided that:

- they publish a UCITS KIID-like document for each retail share class issued before 1 January 2018; and
- they modify their prospectus/issuing document before 1 January 2018 with a reference to Article 161 paragraph 1 of the UCI Law and explaining that a UCITS KIID-like document in line with the rules of the PRIIPs KID Regulation has also been produced and is published on a website and available in paper form to investors upon request.

According to ALFI, the 31 December 2019 transitional period can also be extended by analogy to Luxembourg SIFs, RAIFs and SICARs, which do not reserve their shares or units exclusively to institutional and professional investors as defined by MiFID II. The aforementioned conditions would however, also apply to these SIFs, RAIFs and SICARs.

For the avoidance of doubt, ALFI's Q&A has not been validated by any regulator and only represents the view from a group of market participants at the time of publication. It is worth noting that ALFI will review and revise the answers to certain questions to incorporate new material, and to amend previously published material, where appropriate.

ALFI Guidelines for Backtesting of Value-at-Risk Models

In March 2017, ALFI published an "ABC of Value-at-Risk (**VaR**) Model Backtesting" practionner guide, which was followed in May 2017 by the publication of a second paper titled "VaR Model Backtesting C.S.I – Practitioners' Thoughts".

The first paper "ABC of Value-at-Risk (VaR) Model Backtesting" proposes practical guidelines on how to properly perform and interpret backtesting for UCITS calculating their global risk exposures by using a VaR model, and is structured in four sections. Starting with definitions and basic distinctions, these guidelines then describe some elementary statistical backtesting techniques before proposing additional, complementary analysis tools. The concluding section points to additional considerations to improve the backtesting framework.

The second paper "VaR Model Backtesting C.S.I – Practitioners' Thoughts" examines how to respond to the apparent failure of a VaR model, and is structured in three sections. Starting with some background information about recent market turbulence and feedback from a survey and ensuing discussions within the industry, it then reviews various areas of potential analysis, such as embedded assumptions and event risks, before offering conclusions. Given this scope, the paper is intended for risk managers and persons in charge of risk management, and adopts a somewhat technical stance.

ALFI has indicated that a third and final paper will discuss how to structure governance arrangements around backtesting.

ALFI Principles for the Oversight of Financial Intermediaries in Distribution of Investment Funds

On 17 May 2017, ALFI published a set of principles for the oversight of financial intermediaries in the distribution of investment funds.

In this document, ALFI recalls that, in accordance with Luxembourg laws and regulations as well as with EU legislation, the management body, respectively the management company or AIFM of investment funds, must act with due care and diligence in the performance of its duties

and will remain and be considered ultimately responsible for the activities delegated to financial intermediaries it has appointed. Such responsible party is thus required by a number of laws, regulations and circulars to oversee the activities so delegated to these financial intermediaries as well as their performance.

In this respect, ALFI principles aim at providing those parties responsible for the oversight of financial intermediaries in the distribution chain of investment funds with a set of high-level common principles covering key areas of financial intermediaries' oversight, such as risk assessment of the distribution model, initial due diligence, ongoing due diligence/monitoring, governance of financial intermediaries and reporting. The *rationale* adopted for these principles in covering due diligence of financial intermediaries is therefore a "principles" rather than "rules"-based approach, in that it relies upon good judgement rather than prescription.

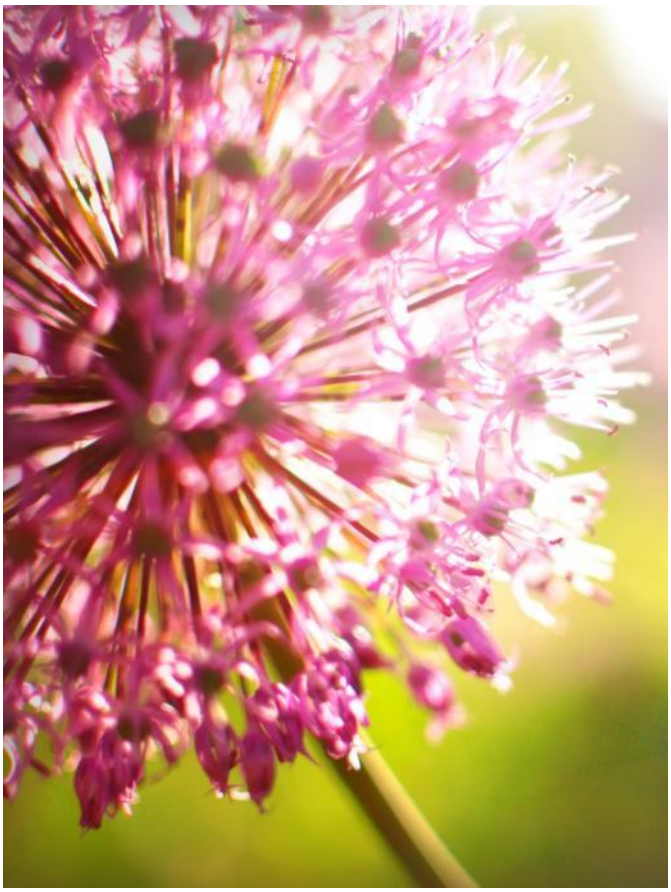
For the avoidance of doubt, ALFI stresses that its principles for the oversight of financial intermediaries in the distribution of investment funds do not in any way supersede applicable law and regulations. It further specifies that there is not one single comprehensive definition of what lawmakers (national or international) define as a "distributor" or "financial intermediary", and that the individual set-up of an investment fund will dictate to those in charge of oversight of financial intermediaries within their respective organisations what laws and regulations are applicable.

ALFI FAQs and Note on CRS Reporting for Investment Funds

On 22 May 2017, ALFI published FAQs on reporting for investment funds under CRS, which follows the publication by ALFI of its recommendations on the automatic exchange of information (CRS and DAC2) on 28 December 2015, and of the CRS self-certification form templates for individuals, entities and controlling persons, as last updated in November 2016 (all these documents being available on the ALFI website). The ALFI FAQ should also be read together with ALFI newsflash on automatic exchange of information in the field of taxation and related considerations on data protection published in June 2016 (also available on ALFI's website).

On 23 May 2017, ALFI also published a note, the purpose of which is to remind ALFI's members of the 30 June 2017 deadline that applies to reportable information under CRS for the year 2016. ALFI's note also contains certain clarifications provided by the Luxembourg tax authorities on such deadline and the use of corrective files.

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



LITIGATION

Banking, Finance and Capital Markets

Transfer of Agreement

Court of Appeal, 21 December 2016, N°41762

Transfers of agreements (*cession de contrat*) have become an independent legal institution that parties may freely use and which has full effect (see our previous Luxembourg Legal Update January 2011, p. 14). The rules regarding transfers of agreement become clearer with every new case.

The Court of Appeal states that there is a transfer of an agreement in a situation where the agreement of the parties results in:

- the replacement of a party by a third party in the contractual relation
- transferring to the third party the function of contracting party, and therefore all the rights and obligations attached to that status.

The Court has further laid out the rules regarding transfer of agreements. According to the Court, consent by the transferred party is necessary, whether the agreement has been concluded *intuitu personae* or not. Additionally, the parties are not required to fulfil the formalities of notification provided for in Article 1690 of the Civil Code regarding the assignment of receivables.

Indemnity (*porte-fort d'exécution*)

Luxembourg District Court, 13 June 2014, N°160927

Luxembourg case law recognises contracts of indemnity (*porte-fort d'exécution*), a form of personal guarantee which is different from suretyship (*cautionnement*) and autonomous guarantee (*garantie autonome*). Through such a contract, one party (A) promises to another (B) that a third party (C) will perform its obligations under an agreement between C and B. If the third party (C) does not perform its obligations under the contract, A has to repair any damage that would have come into existence due to the breach of its contractual obligations by C.

According to the Luxembourg District Court, entering into such an agreement does not imply any obligation for the parties to respect any particular formalities. It is, however, necessary that it can be clearly proven that the promisor had the intention to guarantee the performance of the third party's obligations. Finally, the Court holds that, given that the indemnity comes in addition to the principal agreement, the creditor has to be able to give evidence of the existence of the principal agreement as well as of the indemnity.

Real Estate

Building Permit – Assessment by the Mayor only on the Basis of Administrative Considerations

Administrative Court, 7 February 2017, N°37219

In the case at hand, the applicants filed a request to the Administrative Court, aiming at the cancellation of a building permit granted to the owner of the neighbouring property, pleading the violation of civil prescriptions regarding, amongst others, easements of view on their property.

The decision of the Administrative Court illustrates an already well-established case law in Luxembourg: the mayor, when granting and delivering building permits, shall only take into consideration administrative prescriptions, allowing the building permit whenever the project is possible and compliant with the urban planning instruments applicable in the municipality. The authorities may take into consideration no civil consequence. For instance, if the construction is built on the neighbouring land, or is burdened with easements, the application may still be allowed, simply because the authorities will ignore the civil law points.

In the case at hand, and as a general principle, a mayor may not, in any case, refuse to issue a building permit on the mere basis of easements of view that relate only to private interests. Even though a building permit is always delivered subject to the right of third parties, the mayor is not to take into consideration any prescription of private interest. To do so would exceed his/her power and the third parties may only raise a claim before the civil courts (assuming they have an interest in taking legal action and seeking annulment, which is the case for direct neighbours).

Tax

Absence of Tax Deductibility of a Debt Waiver

Administrative Court of Luxembourg, 7 April 2017, Case N°37275

On 7 April 2017, the Administrative Court of Luxembourg ruled on whether a debt waiver granted by a Luxembourg company to its foreign subsidiaries should be regarded as a tax deductible expense at the level of the former.

In the case at hand, a Luxembourg company granted a debt waiver to two of its foreign subsidiaries, respectively in 2011 and 2012. In 2014, the Luxembourg tax authorities issued a corporate income tax bulletin for the fiscal years 2011 and 2012 denying, notably, the tax deduction of the debt waivers granted by the Luxembourg company. Indeed, the Luxembourg tax authorities claimed that the debt waiver should be regarded as an additional contribution (*supplément d'apport*) into the subsidiaries.

The Administrative Court of Luxembourg upheld the position of the Luxembourg tax authorities and considered that the debt waivers were to be regarded as additional contributions because these debt waivers were only motivated by the relationship between these companies. Indeed, a reasonably prudent and diligent creditor would have first sought to be reimbursed before granting a debt waiver, especially in light of the financial situation of the relevant subsidiaries, which did not justify such debt waivers.

Although this decision does not preclude the tax deductibility of all intra group debt waivers, Luxembourg creditors need to be cautious and assess the financial robustness of their related debtor before granting such a debt waiver.

Independent Group of Persons: the Luxembourg VAT Cost-Sharing Exemption Incompatible with EU VAT Directive

European Court of Justice, 4 May 2017, Case C-274/15

On 4 May 2017, the European Court of Justice (Fourth Chamber) ruled in favour of the EU Commission and declared that, by laying down the VAT regime applicable to independent groups of persons ("**IEP**"), Luxembourg had failed to fulfil its obligations under the EU VAT Directive. In the case at hand, the EU Commission brought an infringement proceeding against Luxembourg and its domestic VAT rules applicable to independent group of persons (also known as the VAT cost-sharing exemption as provided by Article 132(1)(f) of the EU VAT Directive and implemented in Luxembourg VAT law under Article 44(1)(y)).

The VAT cost-sharing exemption applies when two or more persons with VAT exempt and/or non-business activities join together on a cooperative basis to form an independent group of persons (IGP). Luxembourg's VAT cost-sharing exempts from VAT the supply of services by the IGP to its members provided that the members' taxable activities do not exceed 30% (or 45% under certain conditions) of their annual turnover. However, under EU law, in order to benefit from the VAT exemption, the services provided by the IGP to its members should be "directly necessary" to the members' exempt or non-business activity only.

In its ruling, the European Court of Justice followed the Opinion rendered by the Advocate General on 6 October 2016, and held that Luxembourg VAT rules applicable to IGPs are contrary to the EU VAT directive. Consequently, while the existing Luxembourg VAT cost-sharing exemption will have to be amended so as to be in line with the EU VAT Directive, existing IGPs will have to be analysed on a case-by-case basis.

For further information, see the March 2017 edition of our Luxembourg Legal Update.

Automatic Exchange of Information – Compatibility of the Absence of Effective Remedy with the EU Charter of Fundamental Rights

European Court of Justice, 16 May 2017, Case C-682/15

On 17 December 2015, the Administrative Court of Appeal had to rule on whether the absence of an appeal procedure against a decision of the Luxembourg tax authorities ordering the taxpayer to deliver information requested pursuant to the law of 25 November 2014 (the "**Law**") is compliant with the provisions of the EU Charter of Fundamental Rights, notably its Article 47 as regards the right to an effective remedy and to a fair trial.

In the case at hand, information was requested by the Luxembourg tax authorities of a Luxembourg company under Article 2 of the Law. The company refused to provide such information on the grounds that this information would not be foreseeably relevant for the request and would constitute a mere "fishing expedition". As a result, the Luxembourg tax authorities imposed a fine of EUR 250,000, which was subsequently reduced to EUR 150,000.

Since the present exchange of information procedure was based, notably, on an EU directive (namely, EU Directive 2014/107/EU), the Court concluded that the provisions of the EU Charter of Fundamental Rights might be applicable. Due to the absence of relevant ECJ case law, the Court referred to the ECJ for a preliminary ruling as regards, particularly, the compatibility of the absence of an effective remedy pursuant to the Law in light of Article 47 of the EU Charter of Fundamental Rights.

On 16 May 2016, the European Court of Justice (Grand Chamber) notably confirmed the applicability of the EU Charter of Fundamental Rights in the present context and that the national court hearing an action against a fine imposed on a person for failure to comply with an information order must be able to review the legality of that order if it is to comply with the right to an effective judicial remedy.

The European Court of Justice further held that the review performed by the courts of one Member State is limited to verifying whether the information sought by another Member State is not, manifestly, devoid of any foreseeable relevance to the tax investigation concerned.

The European Court of Justice finally ruled that the person to whom the information order is addressed may, however, be barred from having access to the request for information because it is secret, and that that person does not therefore have a right of access to the whole of that request. Nevertheless, in order to be given a fair hearing, that person must have access to key information in the request for information (namely the identity of the taxpayer concerned and the tax purpose for which the information is sought), and the court may provide that person with certain other information if it considers that the key information is not sufficient.

For further information, see November 2015 and April 2016 editions of our Luxembourg Legal Update.

Challenge of a Ruling – Amortisation of Goodwill

Administrative Court of Luxembourg, 23 May 2017, Cases N°36505, N°36691, N°36692 and N°36693

On 23 May 2017, the Administrative Court of Luxembourg ruled on the challenge by the Luxembourg tax authorities of advance tax agreements granted in 2009, 2011, 2012 and 2013 to distinct taxpayers admitting the tax recognition/ amortisation of goodwill (the "**Agreements**").

Pursuant to the Agreements, the contributions of the know-how were individually regarded tax-wise as a hidden capital contribution valued at 80% and 95% of the business profit of the relevant company. Consequently, a concurrent portion of the dividend distributions (i.e. 80% or 95%) were to be treated as capital reimbursements, and hence exempt from withholding tax pursuant to domestic legislation.

Despite the Agreements, the Luxembourg tax authorities challenged the tax treatment applicable. According to the Luxembourg tax authorities, the valuation of the contribution would notably be constitutive of an abuse of law such that the Agreements would no longer be binding.

In cases N°36505 and N°36692, the administrative court, however, ruled that the factual backgrounds described within the request of the Agreements were sufficiently precise and comprehensive. In addition, no new elements had been revealed since the issuance of the Agreements. Therefore, the Luxembourg tax authorities were not in a position to challenge the Agreements or the valuation of the hidden capital contribution based on the abuse of law theory.

In cases N°36691 and N°36693, the administrative court further ruled that the fixed estimation (*évaluation forfaitaire*) has been clearly presented and that no particular reservation has been raised by the Luxembourg tax authorities with respect to this very estimation. As a consequence, the Luxembourg tax authorities could not claim the absence of collaboration of the taxpayer in order to challenge the validity of the Agreements.

REAL ESTATE

National Legislation

Adoption of the New General Land Use Plan (*Plan d'Aménagement Général – PAG*) of the City of Luxembourg

A general land use plan (*Plan d'Aménagement Général – **PAG***) is an important urban planning regulation that each municipality in the Grand-Duchy of Luxembourg has to adopt. It defines and establishes the rules of the urban development of a municipal territory, and consists of a series of provisions in graph and written form. It aims at assessing in particular:

- the rational use of land
- the improvement of the population's quality of life
- the harmonious development of urban and rural structures.

After several years of studies and discussion of the project, the municipal council of the City of Luxembourg adopted a new *PAG* on 28 April 2017, redefining and adapting the orientations of the City's urban planning, and intended to replace the current *PAG* dating from the 1990s.

The key broad lines focus in particular on:

- developing mobility in the city but also safeguarding green zones
- planning more socio-cultural and sports facilities
- safeguarding the architecture, historical and cultural heritage, as well as the environment
- regaining the city for housing, ensuring that housing meets the needs of the population and aids the installation of family households.

The difficulty faced by the City of Luxembourg is the complex combination of the demographic growth (population growth of 30% in 10 years) and preservation of the quality of life. The new *PAG* is therefore particularly intended to focus on the housing crisis: yet, the construction areas have not been extended, but the *PAG* will allow extending construction within the current available areas. Also, the partitioning of green areas (parks, forests or non-developable land) will remain, if not be extended.

The *PAG* is not in itself sufficient to determine the building possibilities, but is completed:

- for certain areas, by specific land use plans qualified as "*quartier existant*" (*Plan d'Aménagement Particulier "Quartier Existant" – **PAP "QE"***), that will in turn determine the construction rules for specific areas, also adopted by the municipal council; and
- for other areas, by specific land use plans qualified as "nouveau quartier" (*Plan d'Aménagement Particulier "Nouveau Quartier" – **PAP "NQ"***).

The new PAG has now to be approved by the Minister of Interior who also has to settle the claims made against the project. If approved, the new PAG should enter into force this autumn.

Case Law

Building permit – Assessment by the Mayor only on the Basis of Administrative Considerations

Administrative Court, 7 February 2017, N°37219

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

TAX

International Legislation

Multilateral Convention to implement Tax Treaty-Related Measures to prevent BEPS

Signature of the Multilateral Convention

Further to the adoption of the multilateral convention to implement tax treaty-related measures to prevent BEPS by the OECD on 24 November 2016 (the "**MLI**"), ministers and high-level officials from 68 countries and jurisdictions (including Luxembourg) have signed the MLI. Concurrently, nine countries have formally expressed their intention to sign the MLI.

The first modifications to bilateral tax treaties are expected to enter into effect in early 2018.

Please refer to the March 2017 edition of our Luxembourg Legal Update for further details on the above.

Anti-Tax Avoidance Directive as regards Hybrid Mismatches with Third Countries

Adoption of the ATAD II by the Council of the European Union

On 29 May 2017, the Council of the EU adopted, without discussion, the proposal for a Directive extending hybrid mismatch anti-avoidance provisions to third countries ("**ATAD II**"). The EU Parliament gave its opinion on 27 April 2017.

The EU Member States will need to implement the ATAD II into their domestic law for a first application as from 1 January 2020 (except for the specific reverse hybrid entity rule which will be as from 1 January 2022).

Please refer to the March 2017 edition of our Luxembourg Legal Update for further details on the above.

National Legislation

Double Tax Treaties

Luxembourg has 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.

Double Tax Treaty between Luxembourg and Norway – negotiations

On 15 May 2017, Luxembourg and Norway expressed their intention to revise their existing DTT further to a meeting held in Oslo between officials of both countries.

Double Tax Treaty between Luxembourg and Congo (Dem. Rep.) – negotiations

Luxembourg and Congo (Dem. Rep.) expressed their intention to negotiate and sign a DTT further to a meeting held in Washington on 21-22 April 2017 between officials of both countries.

Double Tax Treaty between Luxembourg and Ivory Coast – negotiations

Luxembourg and Ivory Coast expressed their intention to negotiate and sign a DTT further to a meeting held in Washington on 21-22 April 2017 between officials of both countries.

Protocol to the Double Tax Treaty between Luxembourg and Moldova – negotiations

Luxembourg and Moldova expressed their intention to negotiate and sign a protocol to the existing DTT further to a meeting held in Luxembourg between, the Prime Ministers of both countries.

Double Tax Treaty between Luxembourg and Cyprus – signed

On 8 May 2017, Luxembourg and Cyprus signed a DTT, the details of which have not been released at the moment.

Protocol to the Double Tax Treaty between Luxembourg and Belgium – signed

On 29 March 2017, Luxembourg and Belgium signed a protocol amending the existing DTT. The purpose of this protocol is to implement the mutual agreement (*accord amiable*) signed on 16 March 2015 which provides for a 24-day tolerance regarding taxation of the days physically worked outside the state of employment, effective as from 1 July 2015.

Double Tax Treaty between Luxembourg and Ukraine entered into force

On 18 April 2017, the DTT between Luxembourg and Ukraine signed on 6 September 1997, together with the amending

protocol signed on 30 September 2016, entered into force further to reciprocal implementation by both countries within their domestic laws. The DTT shall have effect on 1 January 2018.

Please refer to the March 2017 edition of our Luxembourg Legal Update for further details on the above.

Circulars/Regulatory Developments

Final Withholding Tax Regime applicable to Savings Income

Parliamentary Question N°2818 of 8 March 2017

Further to the circular dated 27 February 2017 issued by the Luxembourg tax authorities on the final withholding tax regime applicable to savings income, a Parliamentary question was addressed to the Ministry of Finance on 8 March 2017.

This question was sought to obtain clarification on the scope of the final withholding tax regime applicable to savings income where such income is paid to a structure without legal personality.

On 3 April 2017, the Ministry of Finance indicated in its response that the final withholding tax should only be levied where the interest payment has been made directly for the immediate benefit of an individual beneficial owner who is a resident of Luxembourg. Therefore, interest payment made via a structure without legal personality should *prima facie* not fall within the scope of the withholding tax.

Nonetheless, the Ministry of Finance finally pointed out that the interposition of a structure without legal personality, the sole purpose of which is to circumvent the collection of the withholding tax, could be disregarded under the applicable anti-abuse and/or anti-simulation provisions.

CRS – Luxembourg

Grand Ducal Decree of 28 March 2017 – List of the Reportable Jurisdictions under CRS

On 28 March 2017, a new Grand Ducal Decree was published listing the reportable jurisdictions (*Juridictions soumises à déclaration*) for the purpose of CRS.

This Grand Ducal Decree complements the Grand Ducal Decree dated 23 December 2016 which updated the list of participating jurisdictions (*jurisdictions partenaires*) with which Luxembourg will effectively exchange information for the purpose of CRS.

Withholding Tax Clarifications

Press release of 17 March 2017 from the Luxembourg Tax Authorities

On 17 March 2017, the Luxembourg tax authorities published a press release clarifying the withholding tax requirements on dividends, interest, royalties, remuneration for literary activities and activities of performers and athletes, as well as management fee payments, in light of usual DTT provisions.

Automatic Exchange of Information – CRS

Parliamentary Question N°2973 of 10 May 2017

A Parliamentary question was addressed to the Ministry of Finance on 10 May 2017 with respect to the automatic exchange of information requirements in Luxembourg.

More specifically, this question was sought to obtain clarification on the short time period left between the publication of the list of the reportable jurisdictions for the purpose of CRS (i.e. end of March 2017) and the legal deadline to submit the required information to the Luxembourg tax authorities (i.e. 30 June 2017). In addition, this Parliamentary question notably tried to obtain confirmation that an extension of this legal deadline could be obtained from the Luxembourg tax authorities

On 9 June 2017, the Ministry of Finance indicated in its response that notwithstanding the absence of an official list, and given the "wider approach" adopted by Luxembourg, the reportable financial institutions were in a position to identify their customers according to the due diligence procedures laid down by the Luxembourg law dated 18 December 2015 on the automatic tax-related information exchange for financial accounts (the "**CRS Law**").
On that basis, the Ministry of Finance further pointed out that a reportable financial institution would not suffer any fines as long as it properly applied the due diligence procedures foreseen by the CRS Law in assessing the tax residency of its customers.

Finally, the Ministry of Finance declined to seek any extension of the legal deadline from the Luxembourg tax authorities.

Case Law

Absence of Tax Deductibility of a Debt Waiver

Administrative Court of Luxembourg, 7 April 2017, Case N°37275

Independent Group of Persons: the Luxembourg VAT Cost-Sharing Exemption Incompatible with EU VAT Directive

European Court of Justice, 4 May 2017, Case C-274/15

Automatic Exchange of Information – Compatibility of the Absence of an Effective Remedy with the EU Charter of Fundamental Rights

European Court of Justice, 16 May 2017, Case C-682/15

Challenge of a Ruling – Amortisation of Goodwill

Administrative Court of Luxembourg, 23 May 2017, Cases N°36505, N°36691, N°36692 ad N°36693

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

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

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*)

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

ICMA: International Capital Market Association

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

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

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

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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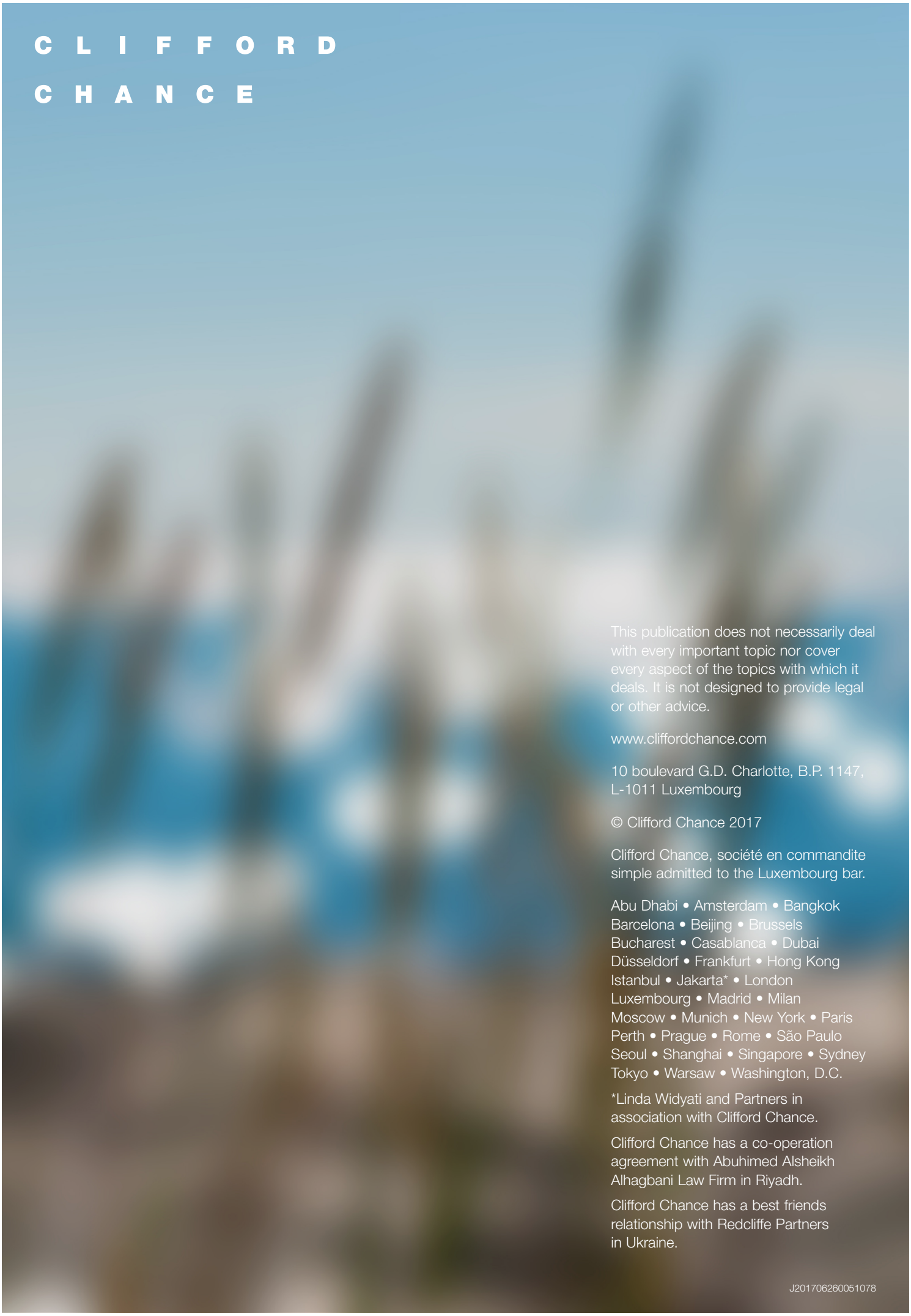

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Clifford Chance, société en commandite simple admitted to the Luxembourg bar.

J201706260051078