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LUXEMBOURG LAW

NEWSLETTER

DECEMBER 2022

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Asset management and investment funds

ESG – Sustainable finance update

During the last quarter of 2022, several pieces of legislation and other guidance documents related to sustainable finance in the asset management industry have been published by national and European authorities.

Amongst these are:

- the **CSSF FAQ on Regulation (EU) 2019/2088** on sustainability-related disclosures in the financial sector ("SFDR");
- the **ESAs' Q&A on the SFDR RTS**;
- the new **RTS on nuclear energy and fossil gas** investment disclosures under SFDR adopted by the European Commission;
- the **EU Commission FAQ on certain provisions of Disclosure Delegated Act** under Article 8 of the Taxonomy Regulation;
- the MiFID II product governance rules: **Integration of sustainability factors**;
- the ESMA **Guidelines on MiFID II suitability requirements** (final report);
- the ESMA **Consultation on guidelines on funds' names using ESG or sustainability-related terms**.

Each of these documents are detailed in the article "**ESG – Sustainable Finance Update**" published on our website.

In addition, an **article** on the new Corporate Sustainability Reporting Directive, which will notably extend the scope of application of the non-financial information reporting obligation, is available in the Corporate, Finance and Banking section of this Newsletter.

PRIIPs KID: update

1. Update of CSSF FAQs with respect to the PRIIPs KID

On 16 December 2022, the CSSF updated the following FAQs with respect to the PRIIPs KID in light of the UCITS exemption that will expire on 31 December 2022:

- the **FAQ concerning the Luxembourg Law of 17 December 2010 relating to undertakings for collective investment;**
- the **FAQ on the KIID**;
- the **FAQ concerning the Luxembourg Law of 12 July 2013 on alternative investment fund managers**, and

- the **FAQ concerning SIFs and SICARs that do not qualify as AIFs**.

Each of these documents are detailed in the **article** published on our website.

2. Update of ESA Q&As on the PRIIPs KID

On 14 November 2022 and 21 December 2022, the European Supervisory Authorities ("ESAs") published an updated version of their **Q&A on the on the PRIIPs Key Information Document (KID)**. The document now includes both Q&As relating to:

- the rules originally included in **Commission Delegated Regulation (EU) 2017/653** ("Regulation 2017/653") supplementing the **PRIIPs Regulation**; and
- the amendments introduced in **Commission Delegated Regulation (EU) 2021/2268** ("Regulation 2021/2268") that are only applicable as from 1 January 2023.

The key changes are addressed in the aforementioned **article** available on our website.

CSSF guidance on marketing communications

On 12 October 2022, the CSSF updated its **FAQ on CBDF Marketing Communications** ("CSSF FAQ"). The objective of this FAQ is to provide additional guidance to Luxembourg IFMs on certain key aspects of the marketing communication ("MC") requirements under Article 4 of the **CBDF Regulation** and ESMA Guidelines on marketing communications ("**ESMA Guidelines**"), which were implemented by the CSSF in its **Circular 22/795**.

The only change to the initial version of the FAQ in October is a change in the date from which IFMs must link marketing communications information to funds/sub-funds and identify ESG information (in the context of the application of Article 13 of SFDR and of the ESMA Supervisory briefing on Sustainability risks and disclosures in the area of investment management (**ESMA34-45-1427**)). This date has been changed from 1 April 2023 to 1 January 2023.

The key points of the CSSF FAQ, as amended in October 2022, are addressed in the dedicated **article** on our website.

CSSF report on costs and fees of UCITS and AIFs

On 20 October 2022, the CSSF published its **CSSF Feedback Report** ("2022 Feedback Report") in which it presents its main observations and recommendations for improvements to the Luxembourg fund industry in the context of **the ESMA Report on its Common Supervisory Action ("CSA") on costs and fees** of UCITS and AIFs ("CSA Report").

In the **CSA Report**, ESMA stresses e.g. the importance of the investment fund managers' ("IFMs") pricing process to be structured and formalised in line with the characteristics of the funds managed and ESMA supervisory briefing on the supervision of costs in UCITS and AIFs.

In particular, ESMA stated that national competent authorities ("**NCAs**") should:

- require that IFMs develop and periodically review a structured pricing process addressing the specific aspects/elements listed in point 19 of the **ESMA Supervisory Briefing** on costs and fees (which sets out the principles of the notion of undue costs and the characteristics of a structured pricing process);
- incorporate the review of the IFMs' pricing processes in their activity at different stages and in the event of materialisation of undue costs charged to investors, NCAs should assess the possibility to request different actions including (but not limited to) investor compensation (where allowed under national provisions) or reduction of fees.

In its 2022 Feedback Report, among the recommendations addressed by the CSSF to IFMs is the requirement, by the end of the first quarter 2023, to conduct:

- a comprehensive assessment with regard to the compliance of their pricing process for both their UCITS and AIFs under management in relation to the observations and recommendations contained in the ESMA CSA Report, the CSSF 2022 Feedback Report and the ESMA Supervisory Briefing, and if applicable, to take the necessary corrective measures;
- a comprehensive assessment with regard to the compliance of the set-up of their efficient portfolio management (EPM) activities in relation to the observations made by ESMA and the CSSF, and if applicable, to take the necessary corrective measures.

ESMA Q&As on UCITS and AIFM: update

1. Depositaries and Delegation under UCITS and AIFMD

On 20 July 2022, ESMA published an updated version of its **Q&A** on the application of the UCITS Directive and its **Q&A** on the application of the AIFMD including two new questions on depositaries and one new question on delegation. The issues (and responses) dealt with are identical in respect of both the AIFMD and UCITS.

- Depositaries

In the two questions on the depositaries, the ESMA gives further clarifications regarding (i) the reconciliation frequency of the depositary's accounts and records and those of its delegates and (ii) the reconciliation frequency and process requirements where the safekeeping of the assets has been delegated to a tri-party collateral manager.

- Delegation

This question seeks to clarify whether the AIFM/UCITS management company ("**UCITS ManCo**") is still responsible for ensuring compliance with Article 4 (1) of the **CB Regulation** (regarding the identification of marketing materials, description of risks and rewards of the investments and disclosure of fair, clear and not misleading information) where marketing is performed by a third party distributor (i) under a contractual relationship, or (ii) in the absence of a contractual relationship, with the AIFM or UCITS ManCo.

ESMA confirms the responsibility of the AIFM/UCITS ManCo in that respect on the basis that:

- marketing is to be considered as one of the functions included in the management of funds, and therefore subject to UCITS Directive (Article 13) and AIFMD (Article 20); and
- UCITS ManCos and AIFMs are responsible for compliance with CB Regulation (Article 4), irrespective of who is the actual entity marketing the fund, and of the relationship it has with the third-party distributor (whether it is contractual or not).

2. Managers of SPACs under AIFMD

On 16 December 2022, ESMA further updated its **Q&A** on the application of the AIFMD to include a new question dealing with the qualification managers of special purpose acquisition companies ("**SPACs**") under the AIFMD.

In this respect, EMSA clarifies that, due to the complex structure of SPAC transactions and the significant variations, it needs to be assessed on a case-by-case basis:

- whether SPACs meet the definition of an "AIF" as legally defined in Article 4 (1) (a) of the AIFMD, and
- whether SPACs qualify as a "holding company" in accordance with Article 4(1) (o) of the AIFMD.

ESMA notes that, during the life-cycle of a SPAC, there might be circumstances which may indicate that a SPAC is not an AIF as it might not meet all the elements described in the ESMA Guidelines on key concepts of the AIFMD (**ESMA/2013/611**).

In this context, please also refer to our **Article** published in December 2021 on the update of the CSSF **FAQ on the UCI Law** with respect to the possibility for UCITS to invest in SPACs for which it is relevant whether securities issued by SPACs qualify as transferable securities or as units of investment funds.

AED: AML/CFT supervision of non-regulated AIFs

The *Administration de l'enregistrement, des domaines et de la TVA* ("**AED**") has recently published on its website a **new section** dedicated to AML/CFT supervision of non-regulated Alternative Investment Funds ("**AIFs**"), excluding Reserved Alternative Investment Funds ("**RAIFs**")[1]. In this context, the AED has notably published the following:

- an FAQ regarding the RR and the RC

This FAQ is similar to the one previously published by the AED for RAIFs and imposes the appointment of both an RR[2] and an RC[3] for all AIFs.

- a RR/RC identification form

This form is similar to the RR/RC identification form previously issued by the AED for RAIFs.

This implies that the AIFs shall have appointed their RC and RR through a decision made at the level of its managerial body (board of the GP, board of managers, board of directors) and defined an AML/KYC framework in accordance with the Law of 12 November 2004 on the fight against money laundering and terrorist financing, as amended, the Grand Ducal Regulation of 1 February 2010 providing details on certain provisions of the said Law of 12 November 2004, as amended, and the AED guidelines.

All AIFs must file this identification form. More generally, this form will have to be transmitted without delay upon initial appointment of the RR/RC, and in the event of any change in the RR/RC functions, together with the signed legal documentation[4] related to the appointment of the RR/RC.

- an AML/CFT questionnaire

This questionnaire is similar to the AML/CFT questionnaire previously issued by the AED for RAIFs. The questionnaire must be transmitted by the RR or, based on a mandate from the RR, by the RC. **Dedicated guidelines** for completion are available on the AED's website.

The AED addressed a communication to certain AIFs on 12 October 2022, urging them to fill in and submit to the AED (i) the said RR/RC identification form, and (ii) by close of business on 12 November 2022 at the latest, the AML/CFT questionnaire covering the financial year ended in 2021.

The AED verbally confirmed that other AIFs will receive similar communications in due course, but, in the meantime, they are not expected to file these documents. However, the other AIFs should anticipate the AED's formal request: they should start gathering relevant data to be in a position to complete the RR/RC identification form and the AML/CFT questionnaire when requested. These AIFs may also decide to complete and proactively submit these documents in advance to the AED, in order to anticipate and manage forthcoming deadlines. The AED's website further details the practicalities for these filings, which shall be done through email to **AED.finvehicles@en.etat.lu**.

> **1** For RAIFs, a **dedicated section** was already in place on the AED's website. References to "AIFs" in this Newsflash shall be construed as a reference to AIFs non-supervised by the CSSF, excluding RAIFs.
> **2** i.e. the person responsible for compliance with the AML/CFT professional obligations (in French, the " *responsable du respect des obligations*", commonly referred to as the "RR").
> **3** i.e. the person responsible for control of compliance with the AML/CFT professional obligations (in French, the "*responsable du contrôle du respect des obligations* ", commonly referred to as the "RC").
> **4** The AED's website refers to the " *minutes of board meeting or circular resolutions of the governing body of the AIF acting for and on behalf of the AIF*".

Administrative law

Regime for existing buildings in green zones: changes to come

As successive laws on the protection of nature and natural resources have been passed and amended, the regime for existing buildings in green zones has become increasingly stringent.

Indeed, it was impossible to carry out most of the work on a building located in a green zone.

Over the past few months, the administrative courts have made considerable changes to this situation.

Based on the fundamental principle of human dignity, two judgments of the Administrative Court of Appeal dated 9 January (No. 43470C) and 26 March 2020 (No. 43708C) allowed a former operator to remain in his dwelling and to remodel it by extending it, if necessary, in order to adapt it to a disability or to old age.

This first step forward was supplemented by the decision of the Administrative Court of 10 January 2022 (No. 44875), and by the judgment of the Administrative Court of Appeal of 20 July 2022 (No. 47027C).

The decision of the Minister for Environment, Climate and Sustainable Development which refused to authorise roof raising works to ensure better energy performance has been annulled.

The Court confirmed this annulment by relying on the provisions of Articles 11*bis* and 16 of the Constitution, on the general principles of the rule of law, effective remedy, proportionality, legitimate expectations and legal certainty (see judgment of 23 December 2021, No. 46070C, and judgment of 10 March 2022, No. 46378C). The case was referred to the Minister, who will have to take a new decision in compliance with these principles.

It appears from these decisions and judgments that the regime for construction work in green zones should be made more flexible.

Following this judgment, the Ministry of the Environment, Climate and Sustainable Development issued a press release on 20 September 2022, inviting owners of legally existing dwellings in green zones affected by applications for permission to either apply to the same administrative authority to reconsider its decision if the refusal decision is less than three months old, or submit a new application for permission regardless of a refusal decision and the date of such a decision.

Real estate

Private nuisance related to construction work under long-term leases

On 8 July 2022, the District court of Luxembourg-City clarified the scope of Article 544 of the Civil Code in the event of an emphyteusis.[1]

A neighbour complained about the nuisance caused by the construction of a large building complex nearby and sued the administration of the City of Luxembourg, who owned the land, as well as the companies involved in the redevelopment project having emphyteutic rights in rem on the respective plots of land.

Based on Article 544 of the Civil Code, the court recalled that this legal provision can be invoked not only against the owner but also against any person who, by reason of a right in rem or a personal right, has one of the attributes of the right of ownership over the property. The court noted that the companies each had such attributes on their respective lots. The judges concluded that it was "the emphyteutic lessee and not the owner of the land (...) who is liable under Article 544 of the Civil Code."

Furthermore, the court pointed out that in matters of private nuisance, the damage suffered by the neighbour must not only be causally related to the new construction directly, but must also be serious and exceed the standard of usual damages caused by construction work carried out nearby. In this case, the court found that, in view of the information submitted, the plaintiff could not have been unaware of the existence, nature and scope of the planned works at the time he moved in next door, so that the inconveniences resulting from the construction works were foreseeable. The court therefore dismissed all of the plaintiff's claims.

> 1 District Court of Luxembourg-City 8 juillet 2022, civil judgment n°2022TALCH10/00145, role number n°TAL-2019-06288 et TAL-2020-00603.

Clarification on rental damages

In a commercial judgment of 13 July 2022, the District Court of Luxembourg-City had the opportunity to rule on the causal link between rental damages and the failure to comply with the completion deadline for a flat acquired for rental purposes.[1]

In this case, the flat acquired by a couple for rental purposes was delivered late due to non-compliance in the bathroom floor. Having considered that the company responsible for these works had failed in its performance obligation to carry out the work within the contractual timeframe, which would have caused them rental damage, the owners of the flat brought an action before the court.

The court clarified that the nature of the damage suffered as a result of the delay in the delivery of the flat to be constructed differs according to the purchaser's intentions. Thus, if the purpose is to rent, the purchaser "thereby makes an investment for rental purposes" and "the damage is calculated in relation to the loss of rent suffered as a result of the delay in its delivery". However, if the acquisition is made for housing purposes, the damage is not the same as a loss of rent and is calculated according to the living situation during the period of delay and the means used to finance the acquisition.

Based on this reasoning, the court dismissed the plaintiffs' claim because of absence of any advertisement that would prove that the flat had been put on the rental market, a signed lease contract or any other evidence that the rental was impossible due to the non-completion of the flat.

> 1 District Court of Luxembourg-City 13 juillet 2022, commercial judgment n°2022TALCH15/01037, role number n°TAL-2020-09627.

Condominiums: introduction of a works fund

The Law of 30 June 2022 amending the amended Law of 16 May 1975 on the status of condominiums for the purpose of introducing a works fund ("**Law**"), which entered into force on 1 October 2022, has introduced a mandatory works fund for condominiums for the purpose of promoting the renovation, and in particular the energy renovation, of these buildings.

Co-owners are required to build up financial reserves to anticipate the costs of renovation works. In practical terms, these reserves are made up of a mandatory annual contribution, the amount of which is decided by a simple majority vote at the general meeting. A minimum amount is set per square metre of energy reference area, based on the energy quality of the relevant building.

The works in question are the following:

- maintenance, repair, improvement, remodelling, renovation of buildings (heating, ventilation, walls, windows, roofing, ...),
- building of infrastructures in preparation for the fitting of technical ducts in the common areas of the building, in particular for the installation of charging stations for electric vehicles,
- installation of energy production and storage facilities using renewable energy sources (solar, wind and geothermal energy).

The works, as such, are decided by a majority vote of all co-owners at the general meeting.

The contributions paid are attached to the units and are definitively acquired by the co-owners' association. They may not be reimbursed if the unit is sold.

Any potential buyer needs to be able to know the amount of contributions acquired for the unit in which he or she is interested.

The advantages of setting up such a fund are the spreading of expenses over time and the availability of funds, which makes it easier for co-owners to decide whether or not to carry out work.

Corporate, banking and finance

MiFID ESG requirements specified

The MiFID legal framework is evolving in light of sustainability related requirements with respect to the definition of clients' sustainability preferences, on the one hand, and requirements relating to product governance, on the other hand.

The Grand-ducal Regulation of 30 May 2018 on, inter alia, product governance obligations, for MiFID firms was amended to transpose changes on this point introduced in **MiFID II Delegated Directive (EU) 2017/593** (see the consolidated version of the Grand-ducal Regulation as modified on 27 July 2022 **here**).

As the CSSF underlines in a **Communiqué** of 24 November 2022, the amended rules regarding product governance apply from 22 November 2022 onwards so entities are now required to take into account sustainability factors when specifying the target markets for the financial instruments and structured deposits they manufacture and/or distribute. ESMA is currently revising its guidelines on the topic.

In addition, as the CSSF recalls in that same Communiqué, since 2 August 2022 providers of investment advisory and discretionary portfolio management services are required to obtain specific information on their clients' preferences regarding sustainability and meet such preferences, while also meeting their other investment objectives and taking into account their financial situation and knowledge and experience. These requirements stem from the amended **MiFID II Delegated Regulation 2017/565** on organisational requirements for investment firms. Covered entities must gather information from customers about their preferences and their level of knowledge about sustainable investments. This concerns new clients as well as existing clients, at the next update of their profile.

ESMA's final report on the revised Guidelines on certain aspects of the MIFID II suitability requirements ("**Guidelines**") were published on 23 September 2022. On the context of and specifications set out in the Guidelines, you can read more **here**.

Corporate Sustainability Reporting Directive adopted

*In the context of the EU's transition to a sustainable economy, the Council of the European Union approved on 28 November 2022 the text of the Corporate Sustainability Reporting Directive ("**CSRD**") which, following on from the Non-Financial Reporting Directive ("**NFRD**"), amends **Directive 2013/34/EU** on financial statements and related reports and broadens the reporting rules on environmental, social affairs and governance (ESG) matters and their scope. The NFRD established good grounds for the sustainability information disclosure but showed its limits fast. The implementation of the CSRD will now constrain concerned companies to more detailed non-financial reporting and extend the number of companies targeted by such reporting rules.*

Scope and timing of application Member States need to transpose the CSRD by no later than mid-2024 but the timing of application is deferred according to the size of the companies concerned. Hence, it shall apply to:

- large public-interest undertakings, or large groups on a consolidated basis, with over 500 employees, already subject to the NFRD: from 1 January 2024, with reports due in 2025;
- large European undertakings, or large groups on a consolidated basis, listed on a regulated market or not, which on their balance sheet dates exceed at least two of three criteria: a balance sheet total of EUR 20 000 000, a net turnover of EUR 40 000 000 and an average number of employees during the financial year of 250: from 1 January 2025, with reports due in 2026;
- small and non-complex credit institutions and captive insurance undertakings: from 1 January 2026, with reports due in 2027;
- listed small and medium undertakings: from 1 January 2026, with reports due in 2027, but with a possible opt-out until 2028, except for micro undertakings which are out of scope;
- non-European undertakings with substantial activity in Europe, a turnover over 150 million in Europe, and at least one subsidiary or branch in the EU exceeding certain thresholds: from 1 January 2028, with reports due in 2029.

A group exemption is available, however, allowing a subsidiary undertaking to be exempt if any such undertaking and its subsidiaries are included in the consolidated management report of a parent company.

Content of reporting and impact Concerned companies will be subject to standardised electronic non-financial reporting, aligned with their financial reporting. Sustainability information disclosure will need to be more detailed than under NFRD, and to comply with European Sustainability Reporting Standards (ESRS), a first draft of which is expected to be prepared by the European Financial Reporting Advisory Group (EFRAG) by June 2023. These standards are to be adopted by the European Commission in the form of a delegated act no later than 1 October 2028. Reports will need to be audited and certified by an independent assurance services provider and will have to be shown in an identifiable dedicated section of the management reports.

In essence, each company's report will show a risk exposure analysis, describe how its business model affects its sustainability and how external sustainability factors affect its business. It will also detail the measures implemented to improve the company's approach towards these factors.

The non-financial reporting obligations imply internal continued monitoring of environmental, social, and governance impacts and risks, and a high level of transparency on those matters.

The CSRD is intended to make an extended number of concerned companies publicly accountable, but also to ease the access to sustainability information for investors with a view to encouraging responsible investments.

Strengthening of international sanctions enforcement in Luxembourg

The implementation of EU restrictive measures in financial matters ("**sanctions**") requires mechanisms that bring together the competent national authorities to ensure their rigorous and consistent application. These mechanisms are contained in the Law of 19 December 2020 on the implementation of restrictive measures in financial matters ("**Sanctions Law**"), which was amended by a **law of 20 July 2022** setting up a monitoring committee for restrictive measures in financial matters and amending Article 506-1, first indent, of the Criminal Code. This law entered into force on 24 July 2022.

National monitoring committee for sanctions This newly created committee is responsible for monitoring the implementation of sanctions and contributing to the development of the related national policies. It is composed of a representative of the Ministry of Finance, the Ministry of Foreign and European Affairs, the Ministry of Justice, the CSSF, the *Commissariat aux assurances* (CAA), the *Administration de l'enregistrement, des domaines et de la TVA* (AED) and the Financial Intelligence Unit ("**FIU**"). The committee meets as often as its tasks require and at least twice a year.

New associated predicate offence to money laundering Article 506-1, first indent, of the Criminal Code relating to the offence of money laundering was amended. The infringement of Article 10 of the Sanctions Law and the enforcement measures and decisions referred to therein has been added to the list of associated predicate offences to money laundering. It is the legislator's intent that the breach of any international, European or national sanctions applicable in Luxembourg may from now on constitute an associated predicate offence to money laundering. As a reminder, the offence of money laundering is punishable by imprisonment for a term of one to five years and a fine of between EUR 1,250 and EUR 1,250,000, or by one of these penalties only.

As a result, the FIU is now competent to receive suspicious transaction and activity reports of suspected violations of the Sanctions Law. This enlarges its powers and aims to strengthen the legislative and regulatory framework for the implementation of sanctions, including the freezing of assets. Entities are therefore required immediately to inform the FIU, on their own initiative, when they know, suspect or have reasonable grounds to suspect that a breach of sanctions and related enforcement measures and decisions is ongoing, has occurred or has been attempted.

Regulatory specifications regarding sanctions enforcement The **Grand-ducal Regulation of 14 November 2022** clarifying the Sanctions Law makes clear that both the enforcement of sanctions and informing the Ministry of Finance thereof must be done without delay. It also clarifies that the enforcement of sanctions does not require any prior notification.

For more information regarding the Sanctions Law, please read **here**. For further information and guidance on international and EU sanctions, including a list of all applicable EU regulations and affiliated texts and their interpretation, reference can be made to the dedicated webpages of the **Luxembourg Ministry of Finance** (which includes useful best practice guides and forms), the **CSSF** and the **European Commission** (which includes a comprehensive Q&A).

For an insight on the latest sanctions developments at EU level, please read **here**.

Public access to RBO invalidated by CJEU

*Elvinger Hoss Prussen triggered a landmark preliminary ruling on 22 November 2022, in which the Court of Justice of the European Union ("**CJEU**") has declared the 5th AML Directive ("**5AMLD**") invalid insofar as it imposes a public access regime for national UBO registers.*

What is the context and our involvement? In accordance with 5AMLD, the Law of 13 January 2019 establishing the Register of Beneficial Owners, as amended ("**RBO Law**") foresees unlimited public access of certain personal data of beneficial owners ("**BOs**") registered with the Register of Beneficial Owners ("**RBO**"). It also provides for the possibility to obtain an exemption from that public access under very strict conditions, proving, in essence, the existence of a disproportionate risk for the BO's personal situation.

Certain Luxembourg companies or their BOs which had unsuccessfully requested the application of the exemption, have launched an appeal before the Luxembourg District Court. In such proceedings, we have asked the District Court to refer to the Court of Justice of the European Union ("**CJEU**") several preliminary questions concerning, in essence, the validity of the public access regime in light of the Charter of Fundamental Rights of the European Union ("**Charter**") as well as the interpretation of specific provisions of 5AMLD. The District Court has acceded to such request in one of our cases and stayed the others, pending the outcome of the CJEU proceedings.

Key CJEU findings? In its **judgment** of 22 November in Joined Cases C-37/20 and C-601/20, the Grand Chamber of the CJEU concludes that the provision of 5AMLD, which requires Member States to ensure that the information on the beneficial ownership of corporate and other legal entities incorporated within their territory is accessible in all cases to any member of the general public, is invalid.

According to the CJEU, the general public's access constitutes a serious interference with the fundamental rights to respect for private life and to the protection of personal data enshrined in Articles 7 and 8 of the Charter, respectively, without the interference being limited to what is strictly necessary or proportionate to the objective pursued by 5AMLD. That interference is held to be considerably more serious than the regime under the 4th AML Directive, which provided for access on demonstration of a legitimate interest, without the increased interference being capable of being offset by any additional benefits.

Furthermore, the optional provisions allowing Member States to make information on beneficial ownership available on condition of online registration and to provide, in exceptional circumstances, for an exemption from access, cannot demonstrate a proper balance between the objective of general interest pursued by 5AMLD and the fundamental rights at issue or the existence of sufficient safeguards enabling data subjects to protect their personal data effectively against the risks of abuse.

What does this mean? The general public's access to the RBO without limitation constitutes a unjustified interference with certain fundamental rights, as protected notably by the Charter, and can therefore no longer apply.

The right of access to UBO registers of public authorities and AML professionals is not affected since it is enshrined in other provisions of the AML Directives whose validity is not at issue.

The CJEU leaves open the possibility to define further which persons or entities can demonstrate a legitimate interest to access BO data. It seems reasonable to expect legislative developments in that area.

In practice, access by AML professionals to the RBO has been blocked following the judgment since it was based on the online public access available to the public at large, which is invalid. As indicated in the **press release** of the Ministry of Justice of 6 December 2022, in line with the judgment, the RBO will be open to representatives of the press who have a legitimate interest in consulting the RBO in the context of their research. Access for national journalists will be managed by the Luxembourg Press Council under an agreement with the Luxembourg Business Registers.

In the meantime, access has been restored for professionals as defined in the Law of 12 November 2004 on the fight against money laundering and terrorist financing, as amended, on the basis of a new procedure set out on the **website** of the RBO. Access will be restored at a later stage for other persons with a legitimate interest and a link to the fight against money laundering and terrorist financing. In parallel, discussions are held at European level to bring the text of the proposed 6th AML directive into line with the judgment.

Finally, national judges must draw all necessary conclusions from the judgment but it does not give them guidance how to do so with respect to pending appeals regarding exemption requests.

New law on administrative dissolution of companies without liquidation

*The Law of 28 October 2022 creating the procedure for administrative dissolution without liquidation ("**Law**") allows for a simplified dissolution of "empty" commercial companies at the request of the Public Prosecutor (Procureur d'État) in collaboration with the managing entity of the Luxembourg Register of Commerce and Companies ("**RCS**"), the Luxembourg Business Registers ("**LBR**"). The Law will become effective on 1 February 2023.*

Scope Three cumulative conditions must be met for the administrative dissolution procedure to be initiated against commercial companies: an infringement of criminal law or a material breach of commercial law, as per Article 1200-1 of Law of 10 August 1915 on commercial companies, as amended, committed by the relevant company (1), the absence of employees (2) and the absence of assets (3).

Certain entities subject to prudential supervision, such as insurance and reinsurance companies, credit institutions, law firms, etc., are excluded from the scope of the Law.

Procedure The sequencing of the administrative dissolution requires a continuous exchange of information:

- the LBR carries out initial specific checks with respect to the three conditions mentioned above and gathers financial, administrative and tax information from governmental or public bodies or authorities in Luxembourg. The findings are provided to the Public Prosecutor;
- the Public Prosecutor, at his entire and sole discretion, requests the LBR to open the dissolution procedure;
- the LBR opens the procedure, a decision which is notified to the company and published in the *Recueil électronique des sociétés et associations* ("**RESA**") ("**Opening Decision**"). As from the date of publication of the Opening Decision, the company is prevented from administering its assets as if it were declared bankrupt by a commercial court. Article 444 of the Luxembourg Commercial Code applies and any payment made by the company or to the company and any operation or action made by it are void;
- the LBR only then requests banks, Luxembourg insurance companies and other public authorities to provide evidence of any potential employee or assets of the company;
- the results of the administrative investigation are presented to the Public Prosecutor, who shall request the LBR to either continue or stop the procedure:

- should one of the conditions not be fulfilled, the procedure ends and a concurring decision is published at the RESA; and
- should the cumulative conditions be met, the administration dissolution procedure is closed at the latest within 6 months following the Opening Decision, the dissolution decision published on the RESA, the company dissolved and struck off the RCS.

Recourse The administrative dissolution was thought to avoid court-ordered liquidation, but the procedure remains driven by the Public Prosecutor under the control of the District Court (*Tribunal d'arrondissement*) dealing with commercial matters.

Any recourse from the company or any third party shall be addressed to the President of the District Court dealing with commercial matters within 1 month following the date of publication of the Opening Decision. No reference is made to the filing of claims held against the company.

Liquidation Should any asset be evidenced after the closing of the dissolution, the District Court may revoke the decision to close the administrative dissolution and order the liquidation of the company. The company is deemed to exist (again) for the purpose of the liquidation and a relatively standard court-ordered liquidation is then conducted.

Insolvency The Law further provides that a judgment, rendered after 1 February 2023, and deciding to close the insolvency proceedings of a company, automatically entails the dissolution of the company and the immediate closing of its liquidation. Consequently, the company will immediately cease to exist, which is not the case under the current legislation.

The Law finally provides that any company whose insolvency proceedings were closed prior to 1 February 2023 and whose RCS file was not updated in compliance with their filing obligations is automatically dissolved and struck off the RCS on 1 February 2025.

Asset Management As regards investment fund structures, the Law expressly excludes regulated UCIs (i.e., UCITS, Parts II Funds, SIFs, SICARs) as well as RAIFs, while UCITS management companies and authorised AIFMs are expected to fall outside the scope (as a result of the substance requirements and the supervision they are subject to). However, non-supervised investment funds (other than RAIFs) and their managers might fall under the administrative dissolution procedure without liquidation, to the extent they qualify as empty shell.

CAA specifies outsourcing requirements for the insurance sector

In **CAA Circular letter 22/16 on the outsourcing of critical or important operational functions and activities** ("**Circular**"), the *Commissariat aux Assurances* ("**CAA**"), the supervisor of the Luxembourg insurance sector, clarifies the requirements regarding the outsourcing of critical or important operational functions and activities in the insurance sector.

The Circular also includes requirements applicable to any outsourcing, other than IT outsourcing based on a cloud computing infrastructure, the latter being expressly excluded from the scope of the Circular (see also Article 81 Law of 7 December 2015 on the Insurance Sector, as amended ("**LSA**").

Content and structure The CAA sets out multiple requirements regarding outsourcing and offers guidance. It enumerates the elements of the required pre-outsourcing analysis, offers guidance on how to assess whether and to what extent the outsourcing agreement relates to a critical or important operational function or activity, indicates the steps to take to ensure compliance with the insurance secrecy rules of Article 300 of the LSA, and defines the documentation that should be kept by the insurance or reinsurance undertaking.

In addition, the Circular includes guidance on the required notification to the CAA with regard to the outsourcing of critical or important operational functions and activities: the CAA clarifies those cases where notification is required, particularly with regard to the timeframe and the manner of such notification.

Main practical impacts A form available on the CAA website should be used for the notifications. The CAA provided guidance on how to use this form in the Circular. This notification must be submitted at least one month before the intended outsourcing takes effect. Also, for each notified outsourcing of a critical or important activity or function, the compliance key function holder must assess and confirm in writing to the CAA, within two months of the signing of the outsourcing agreement, that the outsourcing complies with the applicable regulatory framework on multiple points.

The undertaking must keep a record of its outsourcing agreements.

On certain points, the CAA requires an analysis or evaluation to be documented, such as with respect to the evaluation of the critical or important character of an outsourcing and the analysis of the necessity to obtain prior approval of the policyholder pursuant to Article 300 of the LSA.

The undertaking should carry out a self-assessment, including a correlation table, on the compliance of the outsourcing agreement with the Circular, Article 274 of Delegated Regulation (EU) 2015/35, as amended and the EIOPA guidelines on system of governance.

Timeline and what to do next? The Circular applies as from 1 November 2022 to all outsourcing agreements concluded or amended from that date. In particular, covered entities must implement an outsourcing register, review existing outsourcing policies in view of the Circular, and make sure that all new or newly amended outsourcing arrangements comply with it.

AED AML guidance for covered professionals

In October 2022, the *Administration des Enregistrements et des Domaines* ("AED"), the supervisory authority in the AML/CFT field for a number of professionals subject to the Law of 12 November 2004 on the fight against money laundering and terrorist financing, as amended, published a series of updated guides to assist those professionals under its supervision in their AML/CFT compliance effort. The 2022 guides were published for

- Trust and Company Service Providers,
- Dealers in Goods,
- the Real Estate Sector,
- Accountants and Tax Advisers Artwork Traders.

A new guide was published for RAIF.

As the AED points out, the guides are of an indicative nature, describing the minimum requirements to be complied with by accounting professionals and tax advisers.

The guides contain, *inter alia*, a minimum checklist regarding customer identification and the entering into a business relationship as well as examples of forms that can support the KYC exercise.

Through the guides, the AED wishes to strengthen its approach in prevention and awareness-raising about AML/CFT compliance.

The AED underlines that professionals, while drawing inspiration from this practical guidance, still have to adapt their internal AML/CFT procedures according to the size, the activity of the company and the nature of their customers.

Amendments to the Law of 5 August 2005 on financial collateral arrangements

On 24 July 2002, the Law of 20 July 2022 (published in *Mémorial* A 371, with corrigendum published in *Mémorial* A 402) entered into force.

In particular, the Law of 20 July 2022 has amended a number of provisions of the **Law of 5 August 2005 on financial collateral arrangements**, as amended from time to time, which implemented Directive 2002/47/EC on financial collateral arrangements, as amended.

In most cases, the amendments introduced by the Law of 20 July 2022 clarify or consolidate practices developed by practitioners in relation to security interests governed by the Law of 5 August 2005.

For more information on the changes made to the Law of 5 August 2005, please read **here**.

Adoption of the Women on Boards Directive

*Following an initial proposal on gender balance on company boards submitted by the European Commission ten years ago and numerous positions by EU institutions setting gender equality as a priority within the Union expressed since then, Directive 2022/2381 on improving the gender balance among directors of listed companies and related measures was adopted on 23 November 2022 ("**Directive**").*

Scope & objective The Directive will not apply to micro, small and medium-sized enterprises (SMEs) but only to listed companies considering their particular economic importance, visibility and impact on the market. Through the increased representation of women among the directors of listed companies, the Directive aims to improve gender balance in their decision-making process while allowing listed companies sufficient time to make the necessary arrangements. It also lays down minimum procedural requirements regarding the selection of candidates for appointment or election to director positions.

Key provisions Member States will have to ensure that listed companies are subject to either of the following objectives, to be reached by 30 June 2026: individuals of the underrepresented sex holding either (a) 40% of non-executive director positions, or (b) 33% of all director positions, including both executive and non-executive directors. When listed companies are only subject to the first requirement, they will have to set objectives to improve the gender balance among executive directors as well by 30 June 2026.

Listed companies failing to meet these requirements will have to adjust their selection process when appointing or electing a director. The selection will have to be based on clear, neutral and unambiguous criteria applied in a non-discriminatory manner throughout the entire process and candidates will have to be selected on the basis of a comparative assessment of their qualifications. When two candidates are equally qualified in terms of suitability, competence and performance, preference should be given to the candidate of the underrepresented sex unless, for greater legal reasons, the other candidate is preferred. In this regard, the Directive contains an exception clause: such obligations can be suspended by the Member State if, by 27 December 2022, all its listed companies have nearly achieved the quotas and if its laws already contain equally effective provisions.

Listed companies will be subject to yearly reporting obligations regarding the representation of their boards and Member States will have to publish a list of the listed companies which have achieved the gender balance requirement on their board. Effective, proportional and dissuasive penalties will have to be applied to listed companies breaching the obligations deriving from the Directive.

Transposition and entry into force The Directive will enter into force on 27 December 2022 and expire on 31 December 2038, a date before which the Commission will have to assess whether there is a need to extend its duration. Member States will have to adopt the necessary laws and regulations to comply with the Directive by 28 December 2024.

EU law, competition and antitrust

New competition law adopted

On 24 November 2022, Luxembourg enacted a new law on competition ("**Law**"), aiming to overhaul the current competition legislation and transpose into Luxembourg law Directive (EU) 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market ("Directive"). The Law repeals and replaces the law on competition of 23 October 2011.

Why is it important? The Law transforms both the internal organisation and the statute of the Competition Council (*Conseil de la concurrence*). It becomes an "*établissement public*"and will be renamed "National Competition Authority" (*Autorité de concurrence du Grand-Duché de Luxembourg)* ("Authority"). In addition, the Law modifies the powers of the Authority during the investigation phase as well as certain other elements of procedure, such as those concerning the content and handling of complaints, the Authority's duty to state reasons and the availability of appeals to different types of decisions. It also provides for the possibility of a settlement in competition proceedings and specifies the conditions for leniency. Certain elements of procedure applied in practice are now formalised in the Law.

Impact? The Law is due to enter into force on 1 January 2023. It is organisational and procedural in scope. Hence, the definition and appreciation of competition law infringements (in essence, agreements or concerted practices restricting competition or abuses of dominant positions) remain unchanged.

Moreover, it is important to note that the Law does not introduce a national merger control regime. On this topic, a draft bill has been announced for Spring 2023 but this timetable may seem unlikely in view of the Parliamentary elections scheduled to take place on 8 October 2023.

As the Law is expected to strengthen the Authority, an important effort of recruitment is envisaged. Useful procedural clarifications and additions, such as regarding complaint handling or the conditions for settlement and leniency increase legal certainty and are to be welcomed.

It is hoped that the Law will further increase the effectiveness of the application of competition law in Luxembourg. For a more detailed overview of the changes envisaged by the Law, please read **here**.

Is merger control in Luxembourg forthcoming?

Currently, Luxembourg is the only EU Member State without a national merger control regime.

In essence, merger control rules aim to review *ex ante* the impact of projected business combinations on the competitive structure of a given market with a view to intervening preventively with respect to transactions which would likely reduce competition among rival firms and/or foreclose competitors.

On 13 July 2022, the Ministry of Economy published an interim report on the preparatory work on the introduction of such a regime to which economic players and public authorities have participated (see link **here**). This document summarises the input of the participants, in particular the outcome of a public consultation launched earlier this year (read more **here**).

The Ministry notes that a majority of the responses to the public consultation call for the introduction of a national merger control regime.

As the Ministry points out, the crucial question regarding the future implementation of such a tool in Luxembourg will be the choice of the notification system, mandatory, voluntary or hybrid, these different models each presenting advantages and drawbacks. In addition, the thresholds triggering the jurisdiction of the competition authority will also have to be determined.

Other themes related to the specificities of Luxembourg and addressed by the report include the often cross-border activity of Luxembourg companies and the crucial role of the definition of the relevant market in the analysis made by the competition authority, the importance of the financial sector in Luxembourg, or the need to provide the authority with adequate resources and powers.

On the basis of the interim report, the Luxembourg government will prepare a bill of law which is expected to be filed with Parliament in the Spring of 2023.

EU competition regulatory update

Over the third and fourth quarter of 2022, several interesting regulatory developments are worth noting in the field of EU competition law. The European Commission issued a notice on the possibility of requesting informal guidance on Article 101 and Article 102 TFEU questions in individual cases, the Digital Markets Act entered into force and the Commission is holding a public consultation on the review of the Market Definition Notice. With reference to merger control, the prohibition by the Commission of Illumina's acquisition of Grail and the opening of a second-phase investigation regarding Microsoft's proposed acquisition of Activision are of particular interest.

For more information on this topic, please read **here**.

EU sanctions in response to Russia's invasion of Ukraine (update)

*To complement the package of sanctions against Russia which were adopted between February and July 2022 (please read **here**), on 21 July 2022, 6 October and 16 December 2022 respectively the EU adopted a seventh, eighth and ninth package of restrictive measures in financial matters ("sanctions") through a set of regulations amending **Regulation (EU) 269/2014** and **Regulation (EU) 833/2014**.*

Content of the new sanctions packages The **seventh package** subjects further individuals and entities to asset freezes. It also clarifies a number of provisions to enhance legal certainty for operators and enforcement by Member States, and further aligns EU sanctions with those of all G7 members. Importantly, the package reiterates the Commission's stance to protect food security around the globe, including by not targeting trade in agricultural products between third countries and Russia. In addition, the package introduces a new import ban on Russian gold, while strengthening export controls on advanced and dual-use technologies. It also strengthens reporting requirements to reinforce EU asset freezes and clarifies the exact scope of certain financial and economic sanctions.

Furthermore, in addition to a few ad hoc listings, the **eighth package** introduces new EU import bans worth €7 billion to reduce Russia's revenues, as well as export restrictions, which aim at depriving the Russian military and industry of key components (e.g. technologies) and the Russian economy of European services and expertise. The sanctions also aim to deprive the Russian army and its suppliers of other specific goods and equipment needed for the war. It also lays the groundwork for the legal framework necessary to implement the G7's proposed oil price cap.

It also introduces a new listing criterion, allowing the sanctioning of persons who facilitate the circumvention of sanctions. In addition, it extends the scope of business-relevant services that can no longer be provided to the Russian government or to legal persons established in Russia. Those services now include consultancy, legal advisory, engineering and architecture services. The provision of some of these services may fall outside the scope of the prohibition in certain specific circumstances, such as the exercise of the right of defence in judicial proceedings. Finally, certain limited exceptions are added, such as for allowing the termination of contracts or operations involving the sanctioned Russian central securities depositary (NSD) under certain conditions.

The ninth package of sanctions provides for additional listings and export bans as well as bans on transactions with certain banks, bans on additional Russian media outlets, cutting Russia's access to drones as well as for additional economic measures against the Russian energy and mining sectors.

Extension of duration of EU sanctions On 14 September 2022, the Council decided to extend the duration of the sanctions against listed individuals and entities under Regulation (EU) 269/2014 for a further period of six months, **until 15 March 2023**. This covers travel restrictions for natural persons, freezing of assets, and a prohibition on making funds or other economic resources available to listed individuals and entities. The economic sanctions against Russia under Regulation (EU) 833/2014 are applicable **until 31 January 2023**.

Breaches of sanctions to become EU crimes Due to a lack of harmonisation among EU Member States of what constitutes a breach of sanctions and applicable penalties, on 28 November 2022 the Council of the European Union decided that the breach of EU sanctions will be on the list of EU crimes as set out in Article 83(1) of the Treaty on the Functioning of the European Union (please read **here**). On this basis, the European Commission has **communicated** about a proposed directive setting out minimum rules on the definition of, and penalties applicable to, the crime of breaching EU sanctions.

Guidance For further information on international and EU sanctions, including a list of all applicable EU regulations and affiliated texts and their interpretation, reference can be made to the dedicated webpages of the **Luxembourg Ministry of Finance** (which includes useful best practice guides and forms), the **CSSF** and the **European Commission** (which includes a comprehensive Q&A).

For an insight on the evolution of the international sanctions enforcement framework at national level, please read our **article** on this topic.

EU General Court confirms certain sanctions in the context of Ukrainian crisis

In the context of EU restrictive measures adopted following the military operations launched by Russia in Ukraine on 24 February 2022, the Council of the European Union temporarily prohibited (i.e., until 31 July 2022 but extended since) media outlets under the direct or indirect control of the Russian State, including Russia Today France ("**RT France**"), from broadcasting any form of content within the EU. In a judgment dated 27 July 2022 (**Case-T-125/22**), the General Court of the European Union, seating in an exceptional Grand Chamber composition, rejected RT France's application for annulment of this decision.

Firstly, the General Court confirmed the competence of the Council to adopt the contested decision on the basis of Article 29 of the Treaty of the European Union regarding the common foreign and security policy ("**CFPS**"). Considering the broad scope of the goals and purposes of the CFPS, the General Court recalls that the Council benefits from a great deal of latitude in defining the objective of the restrictive measures adopted by the EU in this area. Consequently, the Council rightfully exercised its competence by temporarily prohibiting RT France from broadcasting any form of content, in order to prevent serious threats to peace at Europe's border and the violation of international law.

Secondly, the General Court had to decide whether there was an infringement of the rights of defence, especially the right to be heard, as the applicant was unable to present its observations and arguments before the decision was enforced. The General Court held that the extreme urgency and exceptional character of the context required the Council to answer immediately to the violation of international law. As the circumstances would have prevented the Council from giving RT France time to submit its observations without compromising the effectiveness of such measures, there was no infringement of the rights of defence.

Thirdly, the applicant claimed that the decision of the Council breached the freedom of expression and information. Considering that audiovisual media outlets could have a significant influence on the Union's public opinion in a modern society, the General Court stated that large-scale media support for Russia's aggression towards Ukraine could be subject to restrictive measures insofar as they met the objective of general interest and respected the principle of proportionality. The restriction was temporary and reversible, thus compliant with the freedom of expression.

Lastly, RT France alleged an infringement on the right to conduct a business and the principle of non-discrimination on grounds of nationality, without success.

The decision is, however, subject to appeal before the Court of Justice of the European Union (Case C-620/22 P).

Foreign Subsidies Regulation adopted

The Regulation on foreign subsidies distorting the internal market ("**FSR**"), a new EU tool aimed at preventing foreign subsidies from distorting competition in the internal market, was adopted on 28 November 2022.

What is it about? At present, subsidies granted by Member States must comply with stringent EU state aid rules, but there is no EU instrument to control similar subsidies granted by non-EU countries. The FSR aims to address distortions created by financial contributions that are granted by non-EU countries to companies active in the EU single market. It lays down the procedural rules for the European Commission to investigate such contributions in the context of large concentrations and bids in large public procurement procedures. The Commission is also granted powers to redress these distortions.

Under the FSR, the Commission will have different tools at its disposal to investigate a financial contribution by a public authority in a non-EU country.

A prior authorisation mechanism based on a notification must ensure a level playing field for the largest mergers and bids in large-scale public procurement procedures involving players benefiting from foreign subsidies.

Under that mechanism, companies will have to notify the Commission of, and suspend, mergers and acquisitions if one of the parties involved has an EU turnover of at least EUR 500 million and a foreign financial contribution of at least EUR 50 million is involved. For public procurement procedures, the notification threshold is a value of the procurement of least EUR 250 million and an aggregate foreign financial contribution to an operator involved in the tender of at least EUR 4 million. If an undertaking fails to comply with the notification requirement, the Commission will be able to impose fines and examine the foreign financial contribution as if it had been notified.

Generally, the Commission will be empowered to investigate foreign subsidies granted up to five years prior to the entry into force of the FSR where such subsidies distort the internal market after this entry into force. If it finds that a foreign subsidy exists and that it distorts competition, it will perform a balancing test to assess its positive and negative effects. If the negative effects outweigh the positive effects, the Commission can impose redress measures, including structural and non-structural remedies and the repayment of the foreign subsidy or to accept commitments from the undertakings concerned in order to remedy the distortion caused by the foreign subsidy.

In addition, a market investigation tool will allow the Commission to investigate other market situations, such as mergers below the threshold. Also, the FSR empowers it to conduct *ex officio* reviews on the basis of information from any source regarding concluded transactions and tenders, but such reviews cannot lead to cancellations of award decisions or the termination of contracts.

Finally, the FSR grants the Commission far-reaching investigation and sanction powers.

What's next? The FSR is expected to be published in the Official Journal shortly and will enter into force 20 days thereafter. It will be applicable six months after its entry into force. The notification obligation for M&A deals and public tenders will apply nine months after its entry into force.

ICT, IP, media and data protection

EU unveils proposal and recommendation for an EU Media Freedom Act

On 16 September 2022, the European Commission published its Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market ("**EU Media Freedom Act**") and amending Directive 2010/13/EU (the revised Audiovisual Media Services Directive), and the Commission's non-binding recommendation on internal safeguards for editorial independence and ownership transparency in the media sector ("**Recommendation**").

The EU Media Freedom Act sets new rules to protect the media pluralism and media independence in the European information space through EU-wide minimum standards including, non-exhaustively, rights for both recipients of media services and media providers, and duties of media service providers, protection of editorial independence transparent state advertising, protection of media content online, and the framework for regulatory cooperation and enforcement in the media internal market. From the ashes of the European Regulators Group for Audiovisual Media (ERGA), the Proposal sets up a new independent European Board for Media Services comprising national media authorities, giving this Board new administrative and regulatory tasks and powers affecting the internal media market.

The proposal is accompanied by a non-binding Recommendation for the media companies, a toolbox of voluntary measures to promote editorial independence and greater ownership transparency.

Building up on the revised Audiovisual Media Services Directive of 2010, the proposal is consistent and complements the Digital Single Act and the Digital Market Act, such as EU competition rules too. EU competition law does not directly address the impacts that market concentrations could have on media pluralism or independence.

The next steps

The Proposal and Recommendation are currently being discussed jointly by the Council of the European Union and the European Parliament in a first reading under the ordinary legislative procedure. Once adopted, the EU Media Freedom Act will be directly applicable across the European Union. The Recommendation will remain applicable on a voluntary basis.

For more information on this proposal, please read **here**.

Data Transfers: US Executive Order and EU Commission draft adequacy decision

For an outlook of the latest development as at July 2023 in relation to transfers to the US, please read our article about the ***New EU adequacy decision allowing personal data transfers to US self-certified entities!***

Introduction

Since **the invalidation of the EU-US Privacy Shield by the Court of Justice of the European Union** ("CJEU"), the long-term lawfulness of cross-border transfers of personal data from the European Union to the United States remain uncertain. Private and public players must therefore rely on alternative tools provided by Chapter V of Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data ("GDPR"). Recently, the President of the United States has signed an **Executive Order on Enhancing Safeguards for United States Signals Intelligence Activities** ("Executive Order") which will provide enhanced protection for the free flow of personal data between the European Union and the United States for a "durable and reliable legal basis for transatlantic data flows".[1]

Enhanced protection provided by the Executive Order

The Executive Order builds upon the preliminary agreement in principle[2] which the European Commission and the United States have reached on a new EU-U.S. Data Privacy Framework. Essentially, the Executive Order addresses the concerns raised by the CJEU when invalidating the EU-U.S Privacy Shield in 2020. More precisely, it (i) establishes binding enhanced protections for European data subjects and (ii) reinforces their safeguards when personal data is collected through the activities of the members of the Intelligence Community.[3] These enhanced protections imply:

- that personal data collected through said activities may only be collected for a defined national security objective and only when necessary to advance a validated and proportionate priority
- the establishment of an independent and impartial two-step redress mechanism which includes a Civil Liberties Protection Officer as well as a Data Protection Review Court to investigate and to resolve complaints and access requests by European data subjects.

What are the next steps?

On 13 December 2022, in light of the Executive Order, the Commission issued a first draft adequacy decision (available **here**) on this potential upcoming EU-US Data Privacy Framework. This is a new step forward in the European Union and United States efforts to address the concerns raised by the CJEU in the aforementioned **Schrems II decision issued July 2020**. In a nutshell, the draft adequacy decision provides that the EU-US Data Privacy Framework based on the abovementioned Executive Order ensures a comparable level of safeguards for data subjects and their personal data than that in the EU.

The draft adequacy decision has now been transmitted to the European Data Protection Board who will perform its own assessment and publish its opinion. Members States will also be involved in the review process.

What should companies (and other data exporters) do in the meantime?

Until a final adequacy decision is adopted, all transfers of personal data to the United States must be performed via the alternative tools provided by Chapter V of the GDPR. Currently, standard contractual clauses ("**SCCs**") remain the most common used transfer. In June 2021, the Commission adopted its most recent SCCs which will provide more flexibility and which should cover various transfer scenarios in one single document. The deadline to transition existing data transfer arrangements based on the "old" SCCs to the 2021 SCCs is set for 27 December 2022. Companies and other players must therefore replace existing data transfer agreements with the most recent SCCs before the end of this year.

Towards Schrems III?

Once adopted, a final adequacy decision can, however, still be challenged before the CJUE. Several privacy rights agencies have already expressed their scepticism as to whether the Executive Order will be sufficiently protective or address in a satisfactory manner the concerns raised by the CJUE in their Schrems II ruling. It remains uncertain therefore whether the Executive Order is setting the basis for a durable framework for international data transfers.

> 1 **Press Release: Questions & Answers: EU-U.S. Data Privacy Framework 7 October 2022** .
> 2 **European Commission and United States Joint Statement on Trans-Atlantic Data Privacy Framework** .
> 3 **The U.S. Intelligence Community is composed of the following 18 organizations** .

Deadline to adopt the new EU Standard Contractual Clauses for transfers

Controllers and processors wishing to rely or continue to rely on the European Commission's standard contractual clauses ("**SCCs**") mechanism for transfers of personal data outside the European Union must adopt or, where applicable, replace existing clauses with the new SCCs before 27 December 2027.

The new modular SCCs for transfers were adopted on 4 June 2021 as more specifically detailed in our previous article **GDPR compliance - New standard contractual clauses** .

They provide the flexibility to cover various transfer scenarios within one single document, i.e. transfers from controller to controller, from controller to processor; from processor to processor and from processor to controller. Elvinger Hoss Prussen uses a specific tool to prepare efficiently any module or any combination of modules of standard contractual clauses.

Although the new SCCs reflect some requirements deriving from the GDPR as interpreted in the light of the famous "Schrems II" Case, they do not remove the consequences of the CJEU ruling and the need to assess the necessity to adopt supplemental measures as recommended by the European Data Protection Board.

EU legal framework for crypto-assets and financial sector resilience: update

The EU is working on setting out the legal framework for Fintech. On a separate but connected note, the EU legislator also addresses risks carried by technological evolutions. This paper focuses on three pieces of legislation and legislation in preparation for shaping the future of financial markets.

The Pilot Regime for market infrastructure based on distributed Ledger Technology Regulation ("EU DLT Pilot Regime")

- The EU DLT Pilot Regime provides for a temporary testing environment offering derogations from existing rules, which provides a legal framework for the trading and settlement of transactions in crypto-assets that qualify as financial instruments within the meaning of MiFID II (true digital securities or security tokens).
- Through their relevant national authorities, authorised investment firms and market operators may apply to trading on a DLT Multilateral trading facility. Authorised Central securities depositary ("**CSD**") can apply for specific permission to operate a DLT settlement system. These two groups may apply for the operation of a combined DLT trading and settlement system, whereas new entrants will have the option to apply for temporary authorisations as investment firms, market operators or CSD to apply for the pilot regime.
- Adopted in May 2022, the EU DLT Pilot Regime will enter into force on 23 March 2023.
- On 27 September 2022, a bill of law was filed aiming at implementing the EU DLT Pilot Regime in Luxembourg by amending the Law of 5 April 1993 on the financial sector, the Law of 5 August 2005 on financial collateral arrangements and the Law of 30 May 2018 on markets in financial instruments. The bill of law is currently receiving the opinions of professional chambers and will thereafter be discussed in Parliament.

The Market in Crypto-Assets Regulation proposal ("MiCA")

- MiCA is set to regulate the market of crypto-assets and set up obligations of registrations, authorisations, publication to the competent authorities, governance and compliance for the issuers of crypto-assets.
- Once adopted, MiCA will apply to all natural and legal persons and other undertakings that are engaged in the issuance, offer to the public and admission to trading of crypto-assets or that provide services related to crypto-assets in the Union. However, MiCA will not apply to crypto-assets qualifying as financial instruments under MiFID II (which include shares/units in collective investment

undertakings).

- On 30 June 2022, an agreement was reached between the EU Parliament, the Council and the Commission (*trilogues*) and the final text must now be formally approved by the EU Parliament in plenary meeting. The vote is expected to take place in February 2023. MiCA will apply 12 to 18 months after the final text is published in the Official Journal.

The Digital Operational Resilience for the financial sector Regulation proposal ("DORA")

- DORA sets out rules for financial entities, including full responsibility of the management body in ICT risks, the requirement to set up, maintain and test resilient ICT systems and tools, and the requirement to report to the competent authorities only deemed major ICT-related incidents.
- All investment firms, managers of alternative investment funds, management companies and multiple other financial entities regulated at EU level will fall under DORA's scope of application.
- On 10 May 2022, an agreement was reached between the EU Parliament, the Council and the Commission (*trilogues*) and on 10 November 2022, the final text was formally approved by the plenary meeting of the EU Parliament. The adoption process is now completed and the final version of DORA will be published in the Official Journal in the coming weeks. Dora will apply 24 months after its entry into force.

Unified Patent Court: final stretch!

What happened?

On 6 October 2022, the Administrative Committee of the Unified Patent Court ("**UPC**") announced via the publishing of an implementation roadmap that the entry into force of the UPC Agreement was expected for 1 April 2023. On 5 December 2022, this timetable was adjusted and the entry into force of the UPC is now announced for 1 June 2023.

Indeed, Germany has finally[1] scheduled the ratification of the UPC Agreement for the week of 19 December 2022. The UPC Agreement, which is already ratified by 16 Member States among which are Luxembourg, Belgium, the Netherlands and France, provides that it will enter into force only after its ratification by Germany.

This announcement by the UPC Administrative Committee followed another milestone which occurred on 1 September 2022 with the entry into force of the UPC's Rules of Procedure.

More than ten years after 24 Member States signed the UPC Agreement on 19 February 2013[2] , the patent law landscape is about to evolve significantly with the implementation of the European patents having a unitary effect (the "Unitary Patents")[3] and a cross-border patent court, the Unified Patent Court, the Court of Appeal of which will be located in Luxembourg.

It is worth remembering that once a European patent is granted by the European Patent Office, the owner of that European patent must request the application of the unitary effect. Then the European patent will turn into a Unitary Patent, which will provide uniform protection and have equal effects in all the Member States which participate in the Unitary Patent system and which have ratified the UPC Agreement. There will be no need for a separate national validation and a single annual tax will be payable after the grant of the Unitary Patent.

By contrast, when a classical European patent is granted, it has, in each of the contracting States for which it is granted, the effect of and is subject to the same conditions as a national patent granted by that State, unless otherwise provided in the European Patent Convention. A European patent still needs to receive a national validation in every country where patent protection is sought, and national taxes shall be paid annually in each country chosen to maintain the national title.

What's new?

Considering the scope of the UPC jurisdiction, the UPC is expected to rapidly become a leading patent court at EU level even if all EU Member States do not participate in this new judicial system (such as Spain, Croatia and Poland).

- Unitary Patents will of course fall under the exclusive jurisdiction of the UPC.
- The UPC also has jurisdiction for the classic European patents (or the European patent applications) ("**European Patents**") which do not have a unitary effect and for which the owners have not requested an opt-out from the UPC judicial system.

Indeed, for a certain period, the jurisdiction of the UPC over the classic European Patents will not be mandatory; the owners of classic European Patents will have the possibility to escape the jurisdiction of the UPC if they deem that their interests may be put at risk before the UPC. During a transitional period of seven years[4] after the date of entry into force of the UPC Agreement, infringement or revocation actions with respect to European Patents may still be brought before national courts or other competent national authorities.

This is an important topic because the decisions of the UPC with respect to European Patents will cover the territory of all the Member States that are party to the UPC Agreement for which the European Patent has effect (while decisions of national courts with respect to European Patents only cover the territory of the concerned Member State).

To complicate matters, during the transitional period mentioned above, the owners of European Patents may opt out from the exclusive jurisdiction of the UPC only if no action involving their European Patents has already been brought before the UPC. Opt-outs can be withdrawn at any moment as long as no action has been brought before a national court.

Opting out from the UPC judicial system will be possible from the beginning of the so-called "sunrise period" which was supposed to start on 1 January 2023 according to the implementation roadmap. On 5 December 2022, the Unified Patent Court announced the postponement of the Sunrise Period to 1 March 2023. It should be noted that all the co-owners of the European Patent need to agree on and ask for the opt-out. On the contrary, licensees do not have the possibility to choose to opt out from the UPC judicial system. However, the owners of European patents must be careful not to fall "unintentionally" under the jurisdiction of the UPC because of an action initiated by an exclusive licensee as provided for under Article 47.2 of the UPC Agreement.

Further point of attention

It is interesting to observe that after any future enlargement of the European Union any EU trademark and EU registered Community[5] design registered or applied for before the accession of new countries will automatically extend to the new Member State(s) without any formalities or fees. This will not be the case for the Unitary Patent. A Unitary Patent shall take effect only in the participating Member States at the time of the grant of the Unitary Patent[6].

Conclusion

It is really time now for the owners of classic European Patents to think about their litigation strategy and make choices regarding the type of court that will be competent in the event legal disputes arise with respect to their European Patents. They must also review and amend their licensing agreements to ensure that the question of the Unitary Patents and the competent court is dealt with and that the patent protection strategy is not indirectly put at risk by the potential actions of exclusive licensees.

For more information, please read **here** an article on the Unified Patent Court system and the Unitary Patent published when Luxembourg adopted the law approving the UPC Agreement (12 April 2015). Please note, however, that some information has since changed. Due to Brexit, a section of the central division will not be located in London. The new location has not yet been decided and a decision will most probably be made at the highest political level. Also, Italy is now part of the enhanced cooperation since it ratified the UPC Agreement in February 2017.

1 The ratification process in Germany was significantly delayed by two judicial proceedings before the German Constitutional Court.
2 While 24 Member States signed the UPC Agreement, only 17 of them have ratified the UPC Agreement and will participate for the moment.
3 As provided for in Regulation (EU) 1257/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, the rules governing the new unitary patent title shall only apply from the date of entry into force of the UPC Agreement.
4 The UPC Agreements provides that the 7-year transitional period may be renewed for a period up to 7 years under certain circumstances.
5 Both EU trademarks and EU registered Community have a unitary effect.
6 Article 4 of the Regulation (EU) No 1257/2012.

Tax

The Property Tax Reform Bill

To clamp down on speculation and the growth of property prices, Bill No. 8082 (**Property Bill**") was filed with the Luxembourg Parliament on 10 October 2022 reforming the land tax (*impôt foncier* - "**New IFON**") and introducing two new national taxes: a land mobilisation tax (*impôt à la mobilisation de terrains* -"**IMOB**") and a tax on the non-occupation of housing (*impôt sur la non-occupation de logements* - "**INOL**").

The New IFON

The New IFON will continue to apply to all owners of land in Luxembourg (with a lump sum tax deduction of EUR 2,000 for the primary residence - subject to conditions).

The main point of the reform is the update of the land values which have not changed since 1941. The revised new values of land is largely conditioned by the building potential according to the classification in the General Development Plans (PAG).

For the rest, the calculation method remains unchanged, i.e. the (revised) base value will be multiplied by a municipal tax rate set by each municipalities (within a range of 9% to 11%).

The New IFON is levied yearly by municipalities and is tax deductible for individual and corporate income tax purposes.

An estimation can be made on a dedicated **website**.

The IMOB

The IMOB aims to create an incentive for the actual construction of buildings on land earmarked for urbanisation. It will require the establishment of a national register of undeveloped land.

The IMOB will be calculated on the same basis as the New IFON but will be multiplied by a progressive tax rate increasing with the number of years the land remains undeveloped. A lump sum deduction from the basic value is foreseen for taxpayers younger than 25 or having children under 25.

The IMOB is not tax deductible.

The INOL

The INOL aims to tax a building constructed for residential purposes that remains unoccupied (i.e. when no natural person is registered in it for a period of six months). To establish that a dwelling is not occupied, a national register of buildings and dwellings will be created.

The INOL will amount to EUR 3,000 per dwelling for the first year. The tax will increase by EUR 900 per year up to a maximum of EUR 7,500. If the property remains unoccupied, this amount will be due annually.

The INOL is not tax deductible.

Budget Law for the year 2023 is voted!

On 15 December 2022, the Luxembourg Parliament passed the budget law for the year 2023 (**Budget Law**"). A request to dispense with the second vote has been filed with the State Council.

Among the measures foreseen in the Budget Law, it is worth noting the following key takeaways:

- **clarification of the reverse hybrid entity rule ("RHER")** : Article 168*quater* of the Luxembourg income tax law ("**LITL**") sets out the conditions of the RHER. Amongst those conditions, the foreign jurisdiction must treat the Luxembourg transparent entity as tax opaque resulting in the net income attributed to the relevant foreign partner not being taxed either in Luxembourg or abroad. The Budget Law amends Article 168*quater* LITL so as to clarify that the absence of taxation of the net income must result from the divergent tax qualification of the Luxembourg transparent entity and not, e.g., from the subjective tax exemption of the said partner. This amendment must be read as an additional condition for triggering the application of Article 168*quater* LITL. The revised rule will apply as from 1 January 2022;
- **extension of the deadline for filing the individual income tax return as well as corporate income tax returns** : considering that the original deadline of 31 March of each year was difficult to meet in practice, the Budget Law extends this deadline to 31 December of each year. This measure will apply for the first time to 2022 tax returns;

- **application of the 4% accelerated tax depreciation regime**: the Budget Law limits the benefit of this regime to only two buildings per taxpayer or part thereof dedicated to rental housing acquired or constructed after 31 December 2022;
- **revision of the inpatriate regime**: the Budget Law extends the application of this regime to inpatriates earning an annual gross salary of at least EUR 75,000 (instead of EUR 100,000 under the current rules);
- **amendment of the "prime participative" regime**: under the current regime, Luxembourg companies can provide a premium to employees, 50% of which is exempt from tax, as long as the premium does not exceed 5% of the positive result of the employer in the relevant year. Under the Budget Law, Luxembourg companies in a fiscal unity within the meaning of Article 164*ter* LITL can opt for calculating the 5% limit based on the positive algebraic result of all companies forming part of such a fiscal unity.

VAT corner

Temporary reduction of VAT rates

As part of the measures to combat inflation, the Law of 26 October 2022 provides for a temporary reduction in Luxembourg VAT rates that will be effective from 1 January 2023 to 31 December 2023.

Accordingly, the standard, intermediate and reduced rates will decrease by 1% to reach 16%, 13% and 7% respectively. The super reduced rate of 3% will remain unchanged.

The VAT authorities (*Administration de l'Enregistrement et des Domaines*) published a **circular** on 7 December 2022 providing guidelines on the application of these temporary VAT rates.

VAT on directors' fees : a turning point?

On 26 April 2022, the lower administrative court of Luxembourg (T*ribunal administratif*) has requested a preliminary ruling from the Court of Justice of the European Union ("**CJEU**") on the VAT treatment applicable to the director's fees (*tantièmes*) received by a (natural person) member of the board of directors of a Luxembourg public limited company (see **Case C-288/22**).

In particular, the CJEU is asked to answer the following two questions:

> (i) does a natural person who is a member of the board of directors of a Luxembourg public limited company carry out an "economic" activity within the meaning of Articles 9 and 10 of the VAT Directive and more specifically, are director's fees received by that person to be regarded as remuneration paid in return for services provided to that company?
>
> (ii) does a natural person who is a member of the board of directors of a Luxembourg public limited company carry out his or her activity "independently", within the meaning of Articles 9 and 10 VAT Directive?

It must be noted that following Circular No. 781 of 30 September 2016, the Luxembourg VAT authorities were of the view that the director's fees received by directors must be regarded as remuneration paid in consideration for a service. As such, directors are considered as carrying out an economic activity that falls within the scope of VAT. In fact, the CJEU ruling is highly expected as it could reverse the current Luxembourg VAT practice.

CJEU Case C-250/21: sub-participation agreements are VAT-exempt credit transactions.

Case C-250/21 deals with a sub-participation agreement pursuant to which a sub-participant must pay an original creditor an upfront amount in return for the latter (which still holds a debt against the principal debtor) to pay to the sub-participant all the proceeds received from the principal debtor. Accordingly, the sub-participation agreement (i) provides liquidity to the original creditor and (ii) shifts the credit risk to the sub-participant for which the sub-participant has no recourse if the principal debtor defaults (either against the principal debtor or the original creditor).

According to the CJEU, any such operation is qualified as a "granting of credits", exempt from VAT under Article 135(1)(b) of the VAT Directive[1] , since it consists essentially in the provision of capital in return for remuneration. The fact that the sub-participant is exposed to potential losses and thus bears the credit risk is inherent in any grant of credit, regardless of whether that risk stems from non-payment by the principal debtor or the original creditor.

It should be noted that the CJEU's ruling departed from the opinion of the General Advocate who considered that the sub-participation service is made of two indivisible elements of similar importance, i.e. the granting of credit and the risk management. As such, the General Advocate concluded that the operation in its entirety could not benefit from the VAT exemption for the "granting of credit".

> **1** Council Directive 2006/112/CE of 28 November 2006 on the common system of value added tax.

DAC6 corner

CJEU ruling of 8 December 2022: the obligation of lawyers to notify other intermediaries pursuant to DAC6 rules infringes EU Primary Law

In a judgment dated 8 December 2022 (**Case C-694/20**), the Grand Chamber of the Court of Justice of the European Union ("**CJEU**") ruled that the obligation imposed on lawyers under DAC6 to notify intermediaries other than their own clients, infringes the right to respect for communications between lawyers and their clients guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union ("**Charter**").

As a reminder, DAC6 provides that all intermediaries (including lawyers) involved in potentially tax aggressive cross-border arrangements are required to report such arrangements to the competent tax authorities. Under DAC6, each Member State may grant a waiver from that reporting obligation to intermediaries that are subject to legal professional secrecy obligations protected under their national law. In such circumstances, intermediaries are, however, required to notify other intermediaries involved in the same reportable arrangement or relevant taxpayers (if no other intermediaries having a reporting obligation are involved) of their reporting obligations.

According to the CJEU, the obligation imposed on a lawyer acting as an intermediary to notify another intermediary who/which is not his client is an infringement of Article 7 of the Charter as it is not strictly necessary to meet the objectives of DAC6, i.e. the fight against aggressive tax planning and the prevention of the risk of tax avoidance and evasion.

In this respect, the CJEU recalls that Article 7 of the Charter protects the confidentiality of all correspondence between individuals and affords strengthened protection to exchanges between lawyers and their clients in view of the lawyer's fundamental role in a democratic society of defending litigants, a task which encompasses the giving of independent legal advice and the correlative duty of the lawyer to act in good faith towards his or her client. The CJEU underlines that the information obtained by a lawyer in providing legal advice, both with regard to its content and to its existence, even outside any litigation, remains covered by professional secrecy. As pointed out by the CJEU, "individuals who consult a lawyer can reasonably expect that their communication is private and confidential. Therefore, other than in exceptional situations, those persons must have a legitimate expectation that their lawyer will not disclose to anyone, without their consent, that they are consulting him or her".

Under the Luxembourg DAC6 law currently in effect, lawyers benefit from a waiver of their reporting obligations due to their professional secrecy but still have an obligation to notify other intermediaries of their reporting obligation under DAC6. As a consequence of the judgment of the CJEU, Luxembourg lawyers no longer have an obligation to notify other intermediaries who are not their clients.

New requests on DAC6 for CJEU's preliminary ruling

On 15 September 2022, the Belgian Constitutional Court again requested a preliminary ruling from the CJEU on new issues related to DAC6 rules.

In particular, the CJEU is requested to rule if DAC6 infringes the EU primary law in that (*inter alia*):

- certain concepts used to determine the scope of DAC6 obligations would not be sufficiently clear and precise (e.g. "arrangement", "intermediary", "participant", "associated enterprise", the qualifier "cross-border", "hallmarks", and the "main benefit criterion");
- the starting point of the 30-day reporting deadline is not set out in a sufficiently clear and precise manner;
- the disclosure obligation would lead to interference with the right to respect the private life of the intermediaries and taxpayers concerned which would not be reasonably justified and proportionate with regard to the objectives pursued by DAC6 and which would not be relevant with regard to the objective of ensuring the proper functioning of the internal market.

Interestingly, the CJEU was also requested to rule on the compatibility of the lawyers' obligation to notify other intermediaries when legal professional privilege is invoked with EU primary law (which protects the secret of communications between lawyers and their clients). This issue has been recently addressed by the CJEU in the judgment of 18 December 2022 discussed above.

Fiat: Luxembourg did not grant illegal State aid

In October 2015, the European Commission found that a tax ruling granted by Luxembourg to Fiat Chrysler Finance Europe ("**FFT**") in 2012 ("**Ruling**"), validating certain transfer pricing methodologies to assess the annual taxable profit of FFT, constituted State aid and ordered Luxembourg to recover from FFT the unlawful and incompatible aid. In 2019, the General Court of the European Union ("**General Court**") dismissed the actions brought by FFT and the Grand Duchy of Luxembourg and confirmed the validity of the Commission's decision.

On 8 November 2022, the Court of Justice of the EU ("**CJEU**") set aside the judgment of the General Court and annulled the Commission's decision in the Fiat Case (Joined Cases C-885/19 P and C-898/19 P, available **here**).

The CJEU recalled that taxation is a prerogative of Member States in the absence of EU harmonisation. The specific detailed rules for the application of the arm's length principle that are defined by national law must therefore be taken into account in order to identify the reference framework for the purposes of determining the existence of a selective advantage.

The CJEU concluded that the Commission committed an error of law in the application of Article 107(1) of the Treaty on the Functioning of the European Union by failing to take account of the specific transfer pricing rules provided for by Luxembourg law for the purposes of determining whether the Ruling has conferred a selective advantage on its beneficiary.

This decision of the CJEU was long-awaited and the outcome is key for Luxembourg taxpayers and transfer pricing experts. The Fiat Case may weaken the position of the Commission in other similar transfer pricing cases, in particular cases pending before the EU Courts concerning Amazon and Apple.

Covid-19: measures on telework for cross-border workers

Luxembourg entered into an agreement with France and Belgium, on 1 and 20 October 2022, respectively, to permanently increase to 34 the total number of days of teleworking allowed to Belgian and French cross-border workers without being subject to their resident country's income tax. Those agreements will each be part of amendments to the Luxembourg-Belgium and Luxembourg-France double tax treaties and will replace amicable agreements concluded before.

The Luxembourg-Belgium amendment will have retroactive effect from 1 January 2022 whereas the amendment to the Luxembourg-France double tax treaty will only become effective as of 1 January 2023.

Luxembourg and Germany have not yet entered into a similar agreement; the maximum number of teleworking days therefore remains at 19 days per year.