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NEWSLETTER

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Publication of ESMA's final report on ELTIF RTS

On 19 December 2023, ESMA published its final report (**ESMA34-1300023242-159**) setting out the draft regulatory technical standards ("**RTS**") under the revised ELTIF Regulation ("**ELTIF II**" – **Regulation (EU) 2023/606**).

The main aspects covered by the draft RTS are considerations on the life of a European long-term investment fund ("**ELTIF**") and its compatibility with the life-cycles of each of the individual assets but also important features of the redemption policy of the ELTIF and the costs disclosures.

Other aspects covered by the draft RTS are:

- criteria for establishing the circumstances in which the use of financial derivative instruments solely serves hedging purpose;
- circumstances for the use of the matching mechanism; and
- criteria to be used for certain elements of the itemised schedule for the orderly disposal of the ELTIF assets.

In its report, ESMA suggests the specific rules to be applied, providing a detailed framework for aspects such as the following:

1) Minimum holding period: The ELTIF manager is allowed to select the minimum holding period that is best adjusted to an individual ELTIF, based on criteria set in the RTS, and upon justifications to the competent authority.

2) Maximum redemption frequency: Proposal to include a maximum quarterly redemption frequency, while allowing the ELTIF manager to deviate from it, upon justifications to the competent authority which seems positive (subject to the content of item 4) below).

3) Choice of liquidity management tools: ESMA suggests the mandatory implementation of at least one anti-dilution mechanism (in addition to a notice period) and redemption gates, while allowing the ELTIF manager to deviate from it, in specific circumstances, and upon justifications to the competent authority.

4) Prior Notice period for redemption requests, minimum percentages of liquid assets to be held and maximum percentage of liquid assets that can be redeemed: In addition to imposing predetermined minimum percentages of liquid assets to be held where the prior notice period for redemptions is of less than 12 months (usually 1 to 3 months for quarterly redemptions in retail alternative funds), the draft RTS limit the percentages which can be redeemed on the liquid assets. These rules are not as flexible as expected by the industry and do not take into account other parameters that would be fundamental in determining the liquidity profile of ELTIFs, such as its underlying strategy, the expected cash flow or the actual percentage available for redemptions.

Next steps

ESMA submitted the draft RTS to the European Commission for endorsement and final approval. The Commission has three months (with a possible one month extension) to decide whether or not do adopt the

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draft RTS. More information on ELTIF II is available on our **website**.

AIFMD II: final agreement published

Further to the political agreement on a final text for AIFMD II in July 2023 and additional discussions between the EU Commission, the Parliament and the Council until the end of October, the political agreement was published by the Council on 6 November 2023 (see the **Council website**).

Although the new directive ("**AIFMD II**") focuses on AIFMD, it also modifies UCITS by aligning certain requirements and making the regulatory approach more consistent between the two regimes.

More information on the main topics covered by AIFMD II and the next steps (including links to consolidated versions of both the AIFM Directive and the UCITS Directive identifying the changes introduced by AIFMD II) is available in our **newsflash** published on our website.

Sustainable finance developments

During the second half of 2023, 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 ESAs' final report on amendments to the SFDR RTS;
- the ESMA public statement on the postponement of the ESG fund names guidelines;
- the CSSF SFDR data collection exercise applicable to IFMs and IORPs;
- the ESMA explanatory notes on key topics of the sustainable finance framework;
- the EU Commission's public and targeted consultations on the implementation of SFDR;
- the CSSF thematic review on the implementation of the sustainability-related provisions;
- the CSSF action further to ESMA CSA on sustainability-related disclosures and integration of sustainability risks; and
- the MiFID II product governance rules on integration of sustainability factors.

Each of these documents are detailed in the article "**Sustainable finance developments**" published on our website.

UCIs/IFMs: self-assessment questionnaire, separate report and AML/CFT external report for 2023

On **22 December 2021**, the CSSF published Circulars 21/788, 21/789 and 21/790 which introduced new reports to be filed on an annual basis by IFMs and UCIs for prudential and AML/CFT purposes.

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On 15 November 2023, the CSSF published a new **Communication** to inform IFMs and UCIs that (i) as from 15 November 2023, the new reports for IFMs and UCIs with a financial year-end 31 December 2023 and 31 January 2024, are available in the CSSF CISERO module and (ii) the reports for the financial years ending after 31 January 2024 will be made available three months before the respective year-end.

The CSSF highlights the following elements concerning the new versions of the reports:

- Only **limited updates** have been carried out. The main aim of these updates is to clarify certain questions and to complement, in view of the applicable regulatory requirements, certain topics of the reports.
- A **short AML/CFT section** has been added in the **Separate Report** for **UCIs** that fall under the scope of CSSF Circular 21/790 and which have designated an **IFM outside of Luxembourg**.

Upgrade of Luxembourg Investment Fund Toolbox

On 24 July 2023, the **Law of 21 July 2023** improving and modernising the Luxembourg toolbox relating to investment funds was published in the *Mémorial* A and entered into force on 28 July 2023 ("**Law**"). The Law amends the following Luxembourg laws, up-to-date bilingual versions (FR/EN) of which are available on our **website**:

- Law of 15 June 2004 on the investment company in risk capital ("**SICAR Law**"),
- Law of 13 February 2007 on specialised investment funds ("**SIF Law**"),
- Law of 17 December 2010 on undertakings for collective investment ("**UCI Law**"),
- Law of 12 July 2013 on alternative investment fund managers ("**AIFM Law**"), and
- Law of 23 July 2016 on reserved alternative investment funds ("**RAIF Law**").

For details on the changes introduced by the Law, please refer to the **newsflash** published on our website following the deposit of the corresponding bill.

In addition, **LBR Circular 16/02** of the Luxembourg Business Registers ("**LBR**") was also updated on 23 August 2023 to take into account the amendments to Article 34 of the RAIF Law and particularly the introduction of the obligation to notify the LBR within twenty business days after implementing a change in any of the information communicated for the inscription on the RAIF list.

Update of ESA Q&As on the PRIIPs KID

On 5 December 2023, the European Supervisory Authorities ("**ESAs**") jointly published an updated version of their consolidated Q&A on the PRIIPs Key Information Document (KID) ("**Consolidated Q&A**") which now features seven additional questions/answers.

In particular, the ESAs confirmed that, in a fund context, the PRIIP manufacturer shall typically be the IFM (i.e. the UCITS management company or the AIFM, as the case may be) or the fund itself only in case of self-managed UCITS or internally managed AIF. Former interpretations, based on the definition of the

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PRIIPs manufacturer in the PRIIPs Regulation, leading to the qualification of the board of the fund or the portfolio manager (which may have initiated and designed the PRIIPs and/or may change their costs structure) are no longer acceptable according to the ESAs.

This clarification seems to mirror the responsibility and duties primarily allocated to the management company under the UCITS Directive implementing measures in the context of the UCITS KIID.

The Consolidated Q&A also provides further guidance on the following topics:

- representation in two separate KIDs of a product linked to one single ISIN code which is allowing both single and regular premium payments, under section "I. General Topics";
- product categorisation of products with recurring premiums, under section "III-A. Market Risk assessment – Product categories";
- consideration in the minimum scenario of the sum of rents paid up to the period in a context of life annuities, under section "IV. Performance Scenarios";
- the data to be used for calculating the performance scenarios in case the net asset value is calculated more than once per month, under section "IV. Performance Scenarios";
- clarification of an apparent contradiction in Annex IV, Case 3 of the PRIIPs Delegated Regulation 2017/653 regarding the performance scenarios and SRI calculation, under section "IV. Performance Scenarios"; and
- the information to be included in the KID of multi-option products, under section "X. Multi-option products (MOPs)".

Marketing update

On 23 August, the CSSF published its findings and observations from the thematic review it launched in 2022-2023 in respect of the content and use of marketing communications ("**MC**") by UCITS ManCos and AIFMs under the CBDF Regulation (**CSSF MC Findings and Observations**).

The main findings and expectations of the CSSF deal with the following points and are further described on our **website**:

- identification as such of marketing communication;
- consistency with fund's documents;
- suitability of the marketing communication for the target investors or potential investors;
- mandatory references to the availability of fund documents;
- information on risks and rewards;
- information on costs;
- information on performance and benchmark;
- information on sustainability-related aspects; and
- short MC (e.g. messages on social media).

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In addition, the CSSF published on 15 November 2023 a **Communication** on UCITS marketing notifications informing Luxembourg UCITS wishing to notify or de-notify arrangements for marketing of shares in another Member State in accordance with Article 6 of the amended Luxembourg Law of 17 December 2010 on undertakings for collective investment, that they must comply with the marketing notification and de-notification procedures, which will be available via the eDesk Portal as of 2 January 2024.

More details are provided in the new version of the "**User guide – eDesk – ePassporting module**".

CSSF feedback report on ESMA CSA on valuation

Further to the publication by **ESMA of its report** on the Common Supervisory Action ("CSA") on valuation in May 2023 ("CSA on Valuation"), the CSSF published its **own feedback report** on 18 July 2023 based on the analysis of the Luxembourg-domiciled investment fund managers ("IFMs") managing undertakings for collective investment in transferable securities ("UCITS")/open-ended alternative investment funds ("Report").

ESMA highlighted that the national competent authorities considered that there is an overall satisfactory level of compliance of the investment fund managers with the applicable regulatory requirements in the sample but also noted some shortcomings and vulnerabilities.

In this Report, the CSSF highlights the key areas where shortcoming/vulnerabilities have been observed and provides recommendations to all IFMs managing UCITS and/or alternative investment funds ("AIFs"). Therefore, the CSSF has broadened the scope for its recommendation to the closed-ended funds as well.

In particular, the CSSF requires all IFMs managing UCITS and/or AIFs (i) to conduct a comprehensive assessment of their valuation framework in relation to the observations made by ESMA as well as in its Report and (ii) to take the necessary corrective measures by 31 December 2023.

In a nutshell, IFMs must review and update their valuation policies and procedures, notably in order to enhance governance around (i) the valuation framework and changes to it under stressed market conditions, (ii) the valuation methodology/model's independent review and validation, and (iii) use of external service providers avoiding overreliance.

However, other areas are also affected by those recommendations, such as the conflicts of interest policy/register, the communication between valuation function and risk management function, the remuneration policy or the involvement of the depositaries.

Further information on the points to be covered by the review/update is provided in the article "**CSSF feedback report on ESMA CSA on valuation**" published on our website.

CSSF position on holding of ancillary liquid assets by feeder UCITS

On 30 November 2023, the CSSF updated its **FAQ concerning the UCI Law** by adding questions 1.14 and 1.15 on the holding of ancillary liquid assets by feeder UCITS clarifying that the strict interpretation adopted in the FAQ concerning the holding of ancillary liquid assets by UCITS (which is limited to bank deposits at sight) does not apply to feeder UCITS.

For feeder UCITS, the concept of ancillary liquid assets that may be held by feeder UCITS (alongside

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investments in the master) is to be interpreted more broadly and may also include, highly liquid assets such as deposits with a credit institution, money market instruments and money market funds.

As a feeder UCITS must invest at least 85% of its net assets in the master UCITS, the limit on ancillary liquid assets held by a feeder UCITS is 15% of its net assets, in accordance with Article 77(2) of the UCI Law (and not 20% as for non-feeder UCITS).

Update of CSSF FAQ on CSSF Circular 22/811 on UCI Administrators

On 29 November 2023, the CSSF published an update to the **FAQ** concerning CSSF Circular 22/811 on UCI Administrators ("**UCIA Circular**") by adding questions 3.3, 4 and 5.

As regards administration functions, the CSSF clarifies that when the UCIA is responsible for the net asset value ("**NAV**") calculation and accounting function, the sole compilation/input of accounting information is not sufficient to comply with the UCIA duties, in accordance with the UCIA Circular. As an example, a UCIA should be in a position to challenge the NAV calculation and/or accounting related information provided by a delegate. In this respect, the CSSF further clarifies that non-substantial UCIA (i.e., letter-box entity) must be considered as contravening the conditions which the UCIA is required to meet in order to obtain and maintain its authorisation. In this context, delegation models leading to a UCIA solely compiling accounting information received from third parties or delegates are not compliant with the requirements of the UCIA Circular.

Another question regarding which sub-delegation models are compliant with the UCIA Circular is raised. The CSSF confirms that the UCIA may delegate UCI administration tasks to one or more entities (which may or may not be part of the group to which the UCIA belongs) under the requirements set out in the UCIA Circular and further advises the UCIA to ensure that its entire delegation model, including any potential sub-delegations, is/are based on objective reasons and does not generate additional or increased risks for the underlying UCIs.

The CSSF finally indicates, that a UCIA must file its first annual reporting containing information regarding its business activities and resources (as detailed in Annex B of the UCIA Circular) at the latest five (5) months after its financial year-end, starting from 30 June 2023.

CSSF Circular 23/846 on ESMA Guidelines on EMIR reporting

On 1 December 2023, the CSSF published **Circular 23/846** on the application of the ESMA Guidelines for reporting under EMIR published on 23 October 2023 (ESMA74-362-2281 – "**Guidelines**") confirming that the CSSF has integrated the Guidelines into its administrative practice and regulatory approach with a view to promoting supervisory convergence in this field at European level.

The Guidelines apply as from 29 April 2024 in the context of the entry into force of the EMIR Refit Reporting Technical Standards[1] and fulfil several purposes with regard to the harmonisation and standardisation of reporting under EMIR.

> **1** Commission Delegated Regulation (EU) No 2022/1855 of 10 June 2022.
> Commission Implementing Regulation (EU) No 2022/1860 of 10 June 2022.
> Commission Delegated Regulation (EU) No 2022/1858 of 10 June 2022.
> Commission Delegated Regulation (EU) No 151/2013 of 19 December 2012 as amended by Commission Delegated

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> Regulation (EU) 2022/1856.

CSSF Circular 23/841 on ESMA Guidelines on MiFID II remuneration requirements

On 13 October 2023, the CSSF published **Circular 23/841** on the application of the ESMA Guidelines on certain aspects of the MiFID II remuneration requirements (ESMA35-43-3565 – "**Guidelines**"). The Circular confirms that the CSSF has integrated the Guidelines into its administrative practice and regulatory approach with a view to promoting supervisory convergence in this field at European level.

The Circular applies to the following entities: investment firms and credit institutions and also to UCITS management companies and alternative investment fund managers ("**IFMs**") when providing services under their MiFID top-up licence.

There are ongoing discussions with the CSSF with respect to the practical application of the Guidelines to IFMs having a MiFID top-up licence. However, considering that the Guidelines mainly aim at avoiding conflicts of interest in the area of remuneration and ensuring compliance with conduct of business requirements, no fundamental impact on current remuneration practice is expected.

CSSF annual survey on financial crime

In a **Communication** dated 22 November 2023, the CSSF announced that the annual online survey on financial crime would begin on 19 February 2024.

As a reminder, the objective of this survey is to collect standardised key information concerning money laundering and terrorism financing ("**ML/TF**") risks to which professionals under CSSF supervision (i.e. notably AIFMs, including registered AIFMs, and UCITS ManCos) are exposed and the implementation of measures to mitigate these risks.

The 2023 survey remains mostly unchanged compared to the previous year. However, some questions have been removed, added, or amended. The new and amended questions have been highlighted in the survey (e.g. the country list has been modified with the addition of Palestine).

The deadline for the final submission of answers to the survey questions is **1 April 2024**.

For this survey, the CSSF will make available a new Application Programming Interface (API)solution allowing to pre-complete the survey in order to ease the process and a dedicated user guide will soon be made available.

The survey must be completed within the CSSF eDesk Portal either by:

- the compliance officer in charge of the control of compliance with the professional obligations("*responsable du contrôle du respect des obligations professionnelles*" ("**RC**")), or
- the person responsible for compliance with the professional obligations ("*responsable du respect des obligations professionnelles*" ("**RR**")).

From a practical point of view, the completion of the survey may be assigned within the CSSF eDesk Portal

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to another employee of the entity or third party, however, the ultimate responsibility for the adequate completion of the survey shall remain with the RC or the RR.

Corporate, banking and finance

AML/CFT update

1. FATF Mutual Evaluation Report – AML/CFT measures in Luxembourg

On 27 September 2023, the Financial Action Task Force ("**FATF**") released its Mutual Evaluation Report on Luxembourg ("**Report**"), following its AML/CFT on-site visit in Luxembourg from 2 to 18 November 2022.

The Report gives Luxembourg a good overall result regarding its AML/CFT framework, placing it among the best-rated FATF member countries.

The Report identified some areas for improvement, in particular with regard to the awareness of terrorist and proliferation financing in non-financial businesses and professions. Nevertheless, according to the Report, Luxembourg has developed consistent efforts to improve its AML/CFT regime following the previous FATF report. In this respect, the Report concedes that some improvements to the Luxembourg AML/CFT legal framework have been initiated only recently (three to five years before the 2023 on-site visit), which explains why they are not yet fully effective.

2. EBA Opinion on ML/TF risks affecting the EU financial sector

On 13 July 2023, the European Banking Authority ("**EBA**") released its fourth opinion on ML/TF risks ("**Opinion**"), the last one having been published in 2021.

In this Opinion, the EBA takes stock of the exposure of the financial sector as a whole to AML/FT risks and makes proposals to European legislators and competent authorities to address the risks identified and strengthen the resilience of the financial sector in this respect.

The EBA notes that, while EU restrictive measures are "unprecedented" within the context of Russia's invasion of Ukraine in February 2022, national approaches for the enforcement of those measures are not harmonised and new risks are emerging, such as the laundering of proceeds from environmental crimes and cybercrimes.

It concludes that AML/CFT systems and controls in the Member States are not always effective, notably with regard to transaction monitoring and reporting of suspicious transactions to competent authorities.

The proposals presented by the EBA to tackle these issues include:

(I) calls on the competent authorities to improve their understanding of certain risks, including those associated with human trafficking, environmental crime and large-scale cross-border cash transfers; and

(ii) calls on the competent authorities to assess the effectiveness and adequacy of AML/CFT systems and controls of entities from the financial sector (e.g. credit institutions, payment institutions, investment firms, IFMs, UCIs, etc.).

3. Circulars CSSF 23/842 and 23/843 of 16 October 2023

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On 16 October 2023, the CSSF issued Circulars CSSF **23/842** and **23/843**, respectively endorsing the following EBA guidelines:

(i) EBA Guidelines of 31 March 2023 (**EBA/GL/2023/03**) amending the EBA ML/TF Risk Factors Guidelines (**EBA/GL/2021/02**), through the addition of a dedicated Annex setting out specific risk-sensitive measures and risk factors that should be considered when entering into a business relationship with customers that are not-for-profit organizations, notably in terms of governance and control, reputation, funding methods and jurisdictions of operation; and

(ii) EBA Guidelines of 31 March 2023 (**EBA/GL/2023/04**) on policies and controls for the effective management of ML/TF risks when providing access to financial services. These EBA Guidelines supplement the EBA ML/TF Risk Factors Guidelines with a view to reduce the practice of de-risking, notably encouraging more tailored and incremental approach before refusing to enter into, or terminating relationships with a customer, or a population of customers identified as presenting higher ML/TF risk.

Each of the aforementioned EBA Guidelines have been applicable since 3 November 2023 to all credit and financial institutions within the meaning of the Law of 12 November 2004 on the fight against money laundering and terrorist financing, as amended (thus including, without limitation, banks, PFS, investment fund managers and investment funds).

Forthcoming new rules on information accompanying transfers of crypto-assets

On 31 May 2023, ***Regulation (EU) 2023/1113*** *on information accompanying transfers of funds and certain crypto-assets ("****Regulation (EU) 2023/1113****") was adopted. It recasts* ***Regulation (EU) 2015/847*** *on information accompanying transfers of funds ("****Regulation (EU) 2015/847****") to include in its scope crypto-assets as defined in* ***Regulation (EU) 2023/1114*** *on markets in crypto-assets ("****MiCAR****"). In addition, a few adjustments are brought about to the AML framework.*

Regulation (EU) 2015/847 imposes certain rules in the context of transfers of funds, in any currency, where at least one of the payment service providers ("**PSPs**") involved in such transfers is established in the EU. According to these rules, the PSP of the payer has to ensure that transfers of funds are accompanied by specific information on the payer and the payee, the accuracy of which has to be backed up by supporting documentation. As for the PSP of the payee, it has to have effective procedures in place to identify any missing or incomplete information in that respect. Intermediary PSPs are also subject to targeted obligations.

However, Regulation (EU) 2015/847 only applies to transfers of funds, i.e. banknotes, coins, scriptural money, and electronic money, whereas Regulation (EU) 2023/1113 will cover also transfers of crypto-assets.

In a nutshell, crypto-asset service providers ("**CASPs**") will now be subject to the same obligations as PSPs with regard to the information on originators and beneficiaries accompanying transfers of crypto-assets where at least one of the CASPs involved in these transfers will be established in the EU.

Regulation (EU) 2023/1113 also sets out additional requirements in terms of policies, procedures and controls that PSPs and CASPs alike will have to comply with, aiming at ensuring an efficient implementation of EU and national restrictive measures. The European Banking Authority has been mandated to issue guidelines on this topic by 30 December 2024.

Lastly, Regulation (EU) 2023/1113 provides for certain amendments to **Directive (EU) 2015/849** on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing ("**AMLD**"). In particular, all categories of CASPs as defined in MiCAR will now be included within the category

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of "financial institutions" and will therefore be subject to the AMLD just like credit institutions and investment firms. Furthermore, the AMLD registration requirements for certain CASPs will be removed in light of the single licencing regime for CASPs under MiCAR.

Regulation (EU) 2023/1113 will apply as from 30 December 2024, when Regulation (EU) 2015/847 is repealed.

Updated ESMA guidelines on MiFID II product governance requirements

On 3 August 2023, ESMA issued updated ***Guidelines on MiFID II product governance requirements*** *("****Guidelines****"), enhancing the MiFID II investor protection framework. On 14 September 2023, the CSSF published* ***Circular CSSF 23/840****, thereby formally informing the in-scope entities under its supervision that it would apply the Guidelines as from their date of application, namely 3 October 2023.*

The Guidelines recast and replace the previous ESMA Guidelines on this topic.

The main objective of the Guidelines is to further emphasise the importance of understanding the needs and characteristics of the target market and of ensuring that products are designed and distributed accordingly.

The main changes brought about by the Guidelines relate to recent regulatory and supervisory developments and are the following:

- updated definitions of "manufacturer", "distributor" and "products";
- integration of sustainability-related objectives within the broad category of clients' objectives and needs;
- introduction of the possibility to resort to a "clustering approach" for the definition of a target market per cluster of products with comparable homogeneous characteristics instead of an individual approach;
- further detailed rules on the compatibility of the distribution strategy in the context of non-advised sales of more complex products; and
- refined rules regarding the periodicity of the product review, applying the principle of proportionality.

It is expected that the Guidelines will be complemented by questions and answers from ESMA.

Furthermore, it is worth mentioning that on 3 October 2023, ESMA **announced** that it will launch a Common Supervisory Action (CSA) with national competent authorities (NCAs) on the integration of sustainability in credit institutions' and investment firms' MiFID II suitability assessment and product governance processes and procedures in 2024.

Luxembourg FDI screening regime entered into force

Since 1 September 2023, the Luxembourg Law establishing a mechanism for the national screening of foreign direct investments likely to undermine security or public order ("**Law**" – for a link to the text as currently available (in French) see **here**) is fully applicable. The Law implements **Regulation (EU) 2019/452**

establishing a framework for the screening of foreign direct investments into the Union, which contains essential elements of the framework for the screening of such investments by Member States and introduces co-operation at EU level in the field.

The Law has a significant impact on the timing and proceedings of in-scope M&A transactions.

Main features

The screening mechanism applies to foreign direct investments ("**FDI**"), excluding portfolio investments (i.e., acquisitions of securities with the intention of making a financial investment and not allowing for the exercise of control), which could undermine security or public order, in a Luxembourg entity carrying out in Luxembourg "critical activities" as defined by the Law (Article 2 of the Law).

An FDI is defined as an investment of any kind by a foreign investor, i.e., a natural person or an undertaking of a country outside the EEA, aiming to establish or maintain lasting and direct links with a Luxembourg entity, thus allowing the foreign investor to participate, acting alone, in concert or through an intermediary, in the control of this entity, with a view to exercising a critical activity in Luxembourg.

If a Luxembourg FDI notification is required, the foreign investor must submit such a notification to the Minister of the Economy before the FDI is made *("avant la realisation"), i.e.,* before completion, or within 15 calendar days in the event that the threshold of 25% voting rights in the Luxembourg target entity is exceeded as a result of events modifying the distribution of the capital (Article 3 of the Law).

The Minister decides whether the FDI must be subject to the screening procedure within 2 months of receipt of the notification. The Law defines certain criteria to assess whether the FDI may pose a threat to security or public order in Luxembourg. The duration of the screening procedure (phase II) cannot exceed 60 calendar days after it is triggered. The review period may be suspended in case of an incomplete notification or supplementary information requests by the Ministry. The FDI cannot be completed before the authorisation decision is adopted.

Regulatory guidance

The Ministry of the Economy has issued a Q&A addressing some substantive and procedural questions about the regime (see link **here** – in French).

For more details on the scope and procedures of the new regime, please read **here**.

New EU package on payment services and financial data access

In 2022, the European Commission evaluated the application and impact of the **second payment services directive** ("**PSD II**"), the conclusions of which resulted in the publication on 28 June 2023 of a new legislative package, including proposals for a new **directive** on payment services and electronic money services in the internal market ("**PSD III**"), a **regulation** on payment services in the internal market ("**PSR**"), and a **regulation** on a framework for financial data access ("**FiDA**").

For an analysis of the proposed legislation, please read **here**.

European Green Bonds Regulation adopted

*The long-awaited Regulation (EU) 2023/2632 on European Green Bonds ("**Regulation**") was adopted on 22*

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November 2023. It sets out the requirements that bond issuers must meet if they want to label their environmentally sustainable bonds as "European Green Bonds" or "EuGBs". Through promoting consistency and comparability in the green bond market, the Regulation benefits both issuers and investors in green bonds. It shall apply from 21 December 2024.

Use of proceeds

To qualify as a EuGB, the proceeds of the bond must be used to finance economic activities having a lasting positive impact on the environment in accordance with the **Taxonomy Regulation**.

Two approaches are possible. The gradual approach implies that issuers must ensure that 85% of the net proceeds (i.e. after deduction of issuance costs) of the bond are allocated to taxonomy-aligned activities before bond maturity. In essence, the proceeds of the EuGB can be allocated to fixed assets, capital and operation expenditures or financial assets that relate to economic activities that meet taxonomy requirements or to assets and expenditures of households. Under the portfolio approach, issuers can also allocate EuGB proceeds to a portfolio of fixed assets or financial assets in accordance with taxonomy requirements.

Procedural requirements and transparency

Issuers will need to issue a prospectus compliant with the **EU Prospectus Regulation** or be exempt EU sovereign issuers. The prospectus has to be approved by a national competent authority ("**NCA**" - the CSSF in Luxembourg) before issuance, state that the bond is a EuGB and clarify how proceeds are used.

In addition, issuers are subject to specific disclosure requirements, notably via their websites, based on templates annexed to the Regulation (European Green Bond Factsheet, Annual Allocation Report, Impact Report) with a view to ensuring full transparency on the allocation of proceeds and the environmental impact of the EuGB for potential investors. A pre-issuance review of the factsheet and of the allocation report by an external reviewer is required.

External reviewers of EuGBs

The Regulation establishes a registration system and supervisory framework for external reviewers of EuGBs. They have to comply with specific good repute, organisational and governance requirements and register with ESMA. A specific regime applies to third-country external reviewers.

NCA and ESMA's supervisory and sanction powers

NCAs will be responsible for supervising the compliance with the EuGB standard, notably by ensuring that issuers make correct disclosures and obtain external review. They are empowered to conduct on-site inspections in this respect. In case of non-compliance, NCAs may suspend approval of the prospectus, withdraw the EuGB designation, prohibit an issuer from issuing EuGBs for up to a year, and/or impose fines.

ESMA is granted extensive supervisory and sanction powers with respect to external reviewers.

Enhanced consumer protection in loans and distance financial services contracts

*Strengthening consumer protection in financial services remains a key topic on the EU legislative agenda. Through Directive (EU) 2023/2225 of 18 October 2023 on credit agreements for consumers ("**New Consumer Credit Directive**", also known as CCD II), the EU legislator aims at creating a safer and more transparent environment for consumer credit, in particular in view of the digitalisation of consumer credit services. In addition, the rights of consumers who enter into financial services contracts at a distance are*

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enhanced through ***Directive (EU) 2023/2673*** *("****Amending Directive****"), adopted on 22 November 2023, which modifies the existing legal framework for consumer rights.*

New Consumer Credit Directive

This new text replaces the existing credit consumer directive (Directive 2008/48/EC, also known as CCD) and will modernise the applicable legal framework to take account of the digitalisation of consumer credit services, new consumer habits and new market players and products. The scope of protection is extended to credit agreements up to EUR 100,000 and includes credit agreements below EUR 200 – previously excluded – as well as certain new forms of credit (e.g. "buy now pay later" schemes). Stricter advertising rules will apply, including in particular an obligation to include a prominent warning that borrowing money generates costs, and pre-contractual information obligations are enhanced. The framework was also completed with a withdrawal right, an obligatory assessment of the creditworthiness of the consumer, the prohibition of certain practices (e.g. tying), and caps on charges.

The current directive will continue to apply to credit agreements existing on 20 November 2026 until their termination. The New Consumer Credit Directive must be transposed by 20 November 2025 and shall apply from 20 November 2026.

Amended Consumer Rights Directive

The Amending Directive repeals Directive 2002/65/EC on distance marketing of consumer financial services and extends the scope of **Directive 2011/83/EU** on consumer rights ("**Consumer Rights Directive**") to include contracts concluded at a distance with consumers of financial services. Thus, the general provisions of the Consumer Rights Directive will apply to these contracts, in particular the provisions on forced sales and additional payments.

On the one hand, the core provisions of the repealed directive – information obligations of professionals and consumers' right of withdrawal under distance financial services contracts – are transferred to a new dedicated chapter of the Consumer Rights Directive. On the other hand, new provisions specific to these distance contracts have been added, including the right for consumers of financial services to request human intervention on websites offering only automated online tools, and enhance consumer protection against misleading online interfaces (e.g. curbing of abusive pop-up practices). These (new) provisions will apply to a significant extent "by default", in the absence of similar provisions in sectoral EU (and related national transposition) acts, such as MiFID II or IDD.

The Amending Directive must be transposed by 19 December 2025 and will apply as from 19 June 2026.

EU law, competition and antitrust

Foreign Subsidies Regulation fully applicable

The notification and pre-approval requirements for M&A transactions and public tenders subject to the EU Foreign Subsidies Regulation ("**FSR**"), which empowers the European Commission to review and address distortions caused by foreign subsidies in the internal market, became fully applicable on 12 October 2023. This means that companies engaging in large M&A deals and EU public tenders now need to submit a mandatory *ex ante* filing to the Commission if the thresholds with respect to foreign subsidies are met.

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Implementing **Regulation (EU) 2023/1441** lays down the procedures and content of notifications of in-scope concentrations and public procurement bids, rules for calculating time limits, as well as procedural rules on preliminary reviews and in-depth investigations in cases of suspected distortive foreign subsidies.

More details on the notification thresholds and the Commission's powers are set out in the article under this **link**.

Luxembourg competition law update

Over the second semester of 2023, the Competition Authority ("**CA**") fined the supplier of a vertical price-fixing cartel in the coffee distribution sector, published the results of a sector enquiry in the residential property sector, consulted on commitments proposed by the *Ordre des Architectes et des Ingénieurs-Conseils* (OAI) to address competition law concerns regarding tariffs in public sector contracts, established its secure whistleblower platform, and joined a request for referral to the European Commission of Qualcomm's proposed acquisition of Autotalks.

For further details, please read **here**.

Luxembourg's new bill on merger control

Luxembourg is the last EU Member State without a legal framework on merger control. At present, the Competition Authority ("**Authority**") can only intervene *ex post* by sanctioning a merger to the extent it amounts to an abuse of dominant position. Mergers threatening competition in Luxembourg could be reviewed by the European Commission upon request by the Authority under certain conditions and according to a specific procedure defined in EU merger control law.

Merger control protects consumers by assessing whether a proposed transaction could adversely affect competition and therefore result in a reduction in choice, quality, innovation and an increase in prices of the products and services concerned.

Bill 8296 submitted to Parliament on 23 August 2023 (see link **here** – only in French) introduces an *ex ante* merger control in Luxembourg by the Authority based on a mandatory notification requirement defined by turnover thresholds and a standstill obligation. The two-phase review procedure and substantive test of the likelihood of significantly harm to competition, in particular by creating or strengthening a dominant position, mirror features of the EU and/or other EU Member States' merger control regime.

Some specific features proposed in the Bill such as the possibility for the Authority to call in transactions below the thresholds, a governmental evocation power for reasons of general interest as well as an exemption for certain transactions in the banking and insurance sector in specific circumstances of urgency are noteworthy.

The timetable for adoption of the Bill cannot be estimated at this stage, given that a new government took office in mid-November. The coalition agreement states that the Bill will be "re-evaluated".

For more information on the scope of application of the proposed regime, procedurals aspects, and possible sanctions, please read our article **here**.

New rules for de minimis state aid

*On 13 December 2023, the European Commission adopted two regulations amending the rules on de minimis state aid ("**Regulations**"), i.e. state aid that does not have to be notified to the Commission since it is deemed to have no impact on competition and trade in the Single Market.*

The ***de minimis* Regulation** raises the ceiling for *de minimis* aid granted by a Member State to a single undertaking from EUR 200.000 to EUR 300.000 over a period of three years.

The **SGEI *de minimis* Regulation** raises the ceiling for *de minimis* aid granted by a Member State to an undertaking providing services of general economic interest (SGEI) from EUR 500.000 to EUR 750.000 over a period of three years.

The revised thresholds will enter into force on 1 January 2024 and will apply until 31 December 2030.

In addition, the Regulations require Member States to provide information on such aid measures in a publicly accessible register at national or EU level from 1 January 2026 at the latest, thereby reducing the reporting obligations on companies.

Environmental law

The Forest Law of 23 August 2023

The Forest Law of 23 August 2023 ("**Forest Law**") entered into force on 1 October 2023. The Forest Law was introduced with the aim to creating a robust and coherent general legal framework for Luxembourg forests, bringing together the main previously existing texts in a single, structured piece of legislation.

The objectives of the Forest Law are multiple: ensuring the sustainable management of forests so that they can fulfil their ecological, economic and social functions in a balanced way; protecting them, as a natural and landscape environment; conserving and enhancing biological diversity in forest ecosystems; maintaining the national extent of forests and their distribution between ecological regions; maintaining the health and vitality of forests so that they can contribute to the carbon cycle and the protection of water and soil, and maintaining and promoting forestry and the forestry economy.

As to its scope, the Forest Law applies to all forests in Luxembourg, i.e. both public (communal, state-owned, belonging to public establishments) and private.

The following features of the Forest law are particularly noteworthy:

- Citizens are given more rights, but also more responsibilities. They now have the explicit right to walk on all forest roads and paths, a right that did not exist until now. In return, citizens are obliged not to damage these.
- The protection of nature and the development of forests are a key focus of the law :
    - better protection and management of forests and biodiversity;

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- timber harvesting and forest regeneration are regulated, with more ambitious rules for public forests;
- monitoring and incentive measures are introduced to promote good forest management, including a national forest inventory and subsidies.

A High Forestry Council is set up to make proposals to the Minister concerning forests, to give its opinion on any problems or proposals submitted, and above all to organise and manage a platform for discussion and participative exchange between all forestry stakeholders.

ICT, IP, media and data protection

Digital Services Act now applying to very large online platforms and search engines

Very Large Online Platforms ("**VLOP**") and Very Large Online Search Engines ("**VLOSE**") now have to comply with stricter obligations to prevent the dissemination of illegal content online.

Indeed, 25 August 2023 marks the date from which the anticipated application of the Digital Services Act[1] to VLOP and VLOSE starts. VLOP and VLOSE refer to online platforms and online search engines which have a number of average monthly active users in the European Union equal to or higher than 45 million, and which are designated by the European Commission. The first list, available **here**, was established by the Commission on 25 April 2023[2] .

With the purpose of ensuring a safe, predictable and trustworthy online environment, the Digital Services Act provides for a set of layered obligations on providers of digital services (online intermediaries and platforms). Illegal content is defined broadly and encompasses illegal products, services and activities. Hate speech, unlawful discriminatory content, sale of counterfeit products or non-authorised use of copyright protected material are some of the online behaviours against which the Digital Services Act intends to fight.

VLOP and VLOSE will for example be subject to audit inspections at least annually and have to carry out systemic risks assessments in relation to their services. They also have to publish regular reports on the content moderation performed and establish a compliance function.

The smaller providers of online intermediary services and online platforms also targeted by the Digital Services Act will have to comply with the provisions of this new EU Regulation from 17 February 2024.

1 Regulation (EU) 2022/2065 of the European Parliament and of The Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (the "Digital Services Act").
2 The platforms had to publish their user data by 17 February 2023.

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Key Takeaways of ALIA's White Paper on the regulation of tomorrow's media

What happened?

Electronic media in Luxembourg are currently regulated by the Law of 27 July 1991 on electronic media ("**Electronic Media Law**"). This law adopts a channel-specific regulatory approach encompassing radio broadcasting, satellite broadcasting, cable broadcasting and television but also on-demand media services and video-sharing platforms (on certain items concerning the last two media).

So far, the Electronic Media Law has been amended thirteen times, primarily to incorporate EU directives and without undertaking a global reassessment of the law. Today, the discrepancy between the practices of the public and the new forms of electronic media on the one hand, and the content of the law and the powers of the Luxembourg Independent Broadcasting Authority (*Autorité Luxembourgeoise indépendante de l'audiovisuel,* "**ALIA**") on the other, is striking. ALIA in particular calls for a thorough overhaul of the Electronic Media Law.

In that respect, ALIA organised a colloquium entitled "*Face aux défis de la digitalisation, quelle réforme de la loi sur les médias électroniques ?*" in April 2023 and released a white paper on 2 October 2023 ("**White Paper**") for the attention of Luxembourg's political forces, which underscores and summarises the observations made during the event.

Key Takeaways of ALIA's White Paper :

In its White Paper, ALIA presented eight key points for an in-depth update of the Electronic Media Law:

- defining the values governing programme content;
- introducing the principle of technological neutrality;
- expanding ALIA's surveillance mission to the Internet;
- elevating Media Education;
- combatting Harmful Content;
- providing a legal Framework for Gaming;
- revisiting Political Information Oversight;
- reforming ALIA's Structure.

What is next?

The Coalition Agreement, signed on 16 November 2023, mentions that the Government will reform the regulations applicable to the electronic media and ALIA's powers.

It should be noted, however, that the draft Bill 8309 dated 14 September 2023 aiming at implementing certain aspects of the Digital Services Act (Regulation (EU) 2022/2065) designates the Luxembourg Competition Authority (*Autorité de la Concurrence*) as the Digital Services Coordinator, which will be responsible for all matters relating to the supervision and enforcement of the Digital Services Act in Luxembourg. The future will tell what role ALIA will play in relation to the distribution of illegal content on the Internet. As for the White Paper, it underlines that ALIA intends to play an advisory role on any provisions of the Digital Services Act that fall within its area of expertise.

If you would like to read more on the eight key points listed in the White Paper, please read our full article

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here.

EU Regulation on artificial intelligence is coming

After two years of negotiation and a final session of trilogue that lasted hours, on 9 December 2023 the European Parliament and the Council of the EU finally reached a political agreement on the coming regulation on artificial intelligence ("**AI Act**"). Ursula von der Leyen, President of the European Commission, welcomed this political agreement, pointing out that the AI Act "*is the first-ever comprehensive legal framework on Artificial Intelligence worldwide*".

The final text, however, is not yet available since work must continue at technical level, and the drafting of the AI Act - based on the compromise reached - has yet to be finalised. The European Parliament and the Council of the EU will in principle formally adopt the AI Act in the next weeks.

The AI Act concerns AI systems that will be placed on the EU market and used in the EU. The AI Act aims at striking a balance between the protection of fundamental rights and EU values, and the stimulation of innovation and investment in the field of artificial intelligence.

During the trilogue sessions, points of disagreement arose between Member States, in particular with respect to the inclusion of foundation models within the scope of the regulation and the use of real-time remote biometric identification for law enforcement purposes. Foundation models are also called "general purpose AI models" and are systems capable of performing a wide range of tasks (such as the generative AI model, GPT 4).

The AI Act adopts a risk-based approach, classifying AI systems from minimal or no-risk, to unacceptable risk. Minimal-risk AI systems will be subject to light transparency obligations, high-risk systems to stricter requirements and AI systems posing an unacceptable risk simply prohibited.

Designed on the same pattern as the GDPR, the AI Act should provide national surveillance authorities with the power to supervise the implementation of the AI Act at national level, while a European body would ensure coordination at European level. In the case of any infringement of the AI Act, the fines will be set as a percentage of the offending company's global annual turnover in the previous financial year or a predetermined amount, whichever is higher. Reduced caps should apply to SMEs and start-ups.

All the obligations of the AI Act will apply 24 months after its entry into force, with some exceptions. For example, prohibitions are supposed to apply 6 months after the entry into force of the AI Act.

Tax

Luxembourg Corner

1. Legislation

New government's programme approved by the parliament

On 23 November 2023, the new government has been granted the parliament's confidence following the

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presentation of the coalition programme.

Please check out our **newsflash** for more information in this respect.

Law adjusting the personal income tax scale voted

On 20 December 2023, the Luxembourg Parliament adopted Bill 8343, which adjusts the personal income tax brackets by an equivalent of 4 index tranches starting from 1 January 2024 ("**Law**").

The Law implements one of the measures announced in the new government's coalition agreement that aim at supporting households.

In a nutshell, according to the Law, the lowest rate of 8% will apply to the income bracket between EUR 12,438 and EUR 14,508 (the current bracket being between EUR 11,266 and EUR 13,173). The next bracket taxed at 9% will therefore start at EUR 14,508 (up to EUR 16,578) instead of EUR 13,173 today and so on. The maximum tax rate of 42% will apply to income of EUR 220,788 (and above) instead of EUR 200,005 as at present.

In a press release of 30 November 2023, Finance Minister provided a series of examples to show what this adjustment will mean in practice:

- For a taxpayer in tax class 1 with an annual gross salary of EUR 75,000, it will result in an annual net gain of EUR 1,095 in 2024.
- For a couple with a total gross annual income of EUR 125,000 (where the first person's salary represents 2/3 and that of the second 1/3), the gain will amount to EUR 2,189 by applying the new brackets. Their tax burden will therefore decrease by 10.9%.
- For a taxpayer in tax class 1a with an annual gross salary of EUR 50,000, it will result in an annual net gain of EUR 1,160. This corresponds to a reduction in the tax burden of 19.8%.

The Pillar 2 law voted!

On 20 December 2023, Bill of Law 8292, which transposes the so-called Pillar 2 Directive into Luxembourg national law, was voted by the Luxembourg Parliament.

The Law largely reproduces the content of the Pillar 2 Directive[1], which itself largely mirrors the OECD's Pillar Two Model Rules (also referred to as the "Global Anti-Base Erosion" or "GloBE" Rules).

As a reminder, the Pillar 2 rules aim at ensuring a global minimum level of taxation of 15% for multinational enterprise (MNE) groups and large-scale domestic groups in the EU. In particular, the Law targets constituent entities located in Luxembourg that are part of a group – a multinational enterprise (MNE) group or a large-scale domestic group – with an annual revenue of EUR 750 million or more (including the revenue of the excluded entities) based on consolidated financial statements of its ultimate parent entity ("**UPE**") in at least two of the four previous consecutive fiscal years.

Not all group entities are subject to the rules. Excluded entities are not subject to the IIR, UTPR or QDMTT (see below) but are however taken into account for purposes of determining the 750 million threshold. The Law took over the exclusions provided under the Pillar 2 Directive which includes *inter alia* investment funds, pension funds and real estate investment funds (under conditions) as well as entities that are owned directly or indirectly at least 95% by excluded entities (under conditions).

In a nutshell, the Law is structured around three rules, namely the Qualified Domestic Minimum Top-up Tax ("**QDMTT**"), the Income Inclusion Rule ("**IIR**") and the Undertaxed Payments Rule ("**UTPR**"). These rules apply where the Effective Tax Rate ("**ETR**") in a jurisdiction in which the group operates falls below the minimum

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tax rate of 15%. In such a case, the group has to pay a top-up tax to make the ETR up to the minimum rate of 15%.

The Parliament requested the exemption from the second vote to the State Council which we expect should be granted so that the Law will be applicable to fiscal years beginning on or after 31 December

2023 for the IIR and the QDMTT and generally to fiscal years beginning on or after 31 December 2024 with respect to the UTPR.

More information on this topic will follow.

The CESOP law

On 2 August 2023, the Law of 26 July 2023 implementing the Council Directive (EU) 2020/284 amending the VAT Directive ("**CESOP Law**") was published in the Official Journal of the Grand Duchy of Luxembourg.

The CESOP Law introduces new obligations for payment service providers to keep records of the "cross-border" payments they process and their beneficiaries, and to report the collected data to the Luxembourg tax authorities. The data collected will then be stored and processed before being centralised in a European database called Central Electronic System Of Payment Information ("**CESOP**") and made available to the Member States' anti-VAT fraud agents.

For more information on this topic, please refer to our previous **newsletter**.

2. Luxembourg Courts

Unconstitutionality of the minimum net wealth tax provision

On 10 November 2023, the Constitutional Court of Luxembourg held that the legal provision in the net wealth tax law which provides for a different treatment in minimum net wealth tax (i.e. a flat rate or a progressive rate) depending on the company's balance sheet composition is unconstitutional as it gives rise to a discriminatory treatment of persons being in a comparable situation.

Therefore, pending a legislative amendment to the minimum net wealth tax article, the progressive rate must be applied to the taxpayer (instead of the flat rate) whenever this one is more favourable.

For more information on this topic, please refer to our **newsflash**.

> 1 Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union.

EU Corner

1. Legislation

Transfer Pricing Directive proposal: a potential EU harmonised framework for transfer pricing?

On 12 September 2023, the European Commission introduced the **Transfer Pricing Directive proposal** ("**TP Proposal**"). It aims at creating within the European Union a harmonised legal framework for transfer pricing

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("**TP**") and ensuring a consistent application of the arm's length principle among the Member States.

The TP Proposal essentially seeks to integrate the arm's length principle and, more generally, the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ("**OECD Guidelines**") into the legislation of all Member States. As such, the latest version of the OECD Guidelines would be binding for all Member States, regardless of the TP rules that may be already implemented in the local law prior to the TP Proposal.

The TP Proposal not only resumes the OECD Guidelines but it also intends to incorporate complementary aspects for a common approach when applying TP. To list a few, it establishes a specific arm's length range and the concept of "associated enterprises" is defined more precisely.

The TP Proposal requires unanimous approval from 27 Member States. If adopted, it should be transposed into their domestic legislation by 31 December 2025 and applicable from 1 January 2026.

Absence of an EU legal basis for TP matters left room for a discretionary application by Member States of the application and/or interpretation of the OECD Guidelines. This situation has been a source of increasing challenges around the TP arrangements, as testified by recent State aid cases concerning the interpretation of the arm's length principle.

In any case, interested stakeholders should closely monitor developments regarding the TP Proposal in order to ensure compliance on time.

BEFIT Proposal

On 12 September 2023, the European Commission proposed the **Business in Europe: Framework for Taxation directive**, which lays down a new, single set of rules to determine the tax base of groups of companies in the EU ("**BEFIT**").

BEFIT builds on the OECD/G20 international tax agreement on a global minimum level of taxation, and the Pillar 2 directive[1] adopted at the end of 2022. It replaces the Commission's CCTB (common corporate tax base) and CCCTB (common consolidated corporate tax base) proposals, which have been withdrawn.

The BEFIT initiative is meant to reduce compliance costs for large businesses who operate in more than one Member State and make it easier for national tax authorities to determine which taxes are rightly due by introducing a new, single set of rules to determine the tax base of groups of companies.

For more information on this topic, please refer to our **article**.

Proposal for the Directive "HOT"

On 12 September 2023, the European Commission published a **proposal for a new directive "Head Offices Tax System"** ("**HOT Proposal**") aiming at creating a simplified tax system for small to medium-sized enterprises ("**SMEs**") based in a EU Member State and carrying out their activity through one or several permanent establishment(s) ("**PE**") established in other EU Member States.

For more information on this topic, please refer to our **article**.

"FASTER" Directive Proposal

The proposal for a Council Directive published on 19 June 2023 on Faster and Safer Relief of Excess Withholding Taxes ("**FASTER Proposal**") seeks to make withholding tax ("**WHT**") procedures in the EU more efficient and secure for investors, financial intermediaries (such as banks) and Member States' tax administrations while simultaneously fighting against tax fraud. In this respect, the requirement to issue a digital certificate of tax residence (eTRC) within one day is obviously a relevant solution to achieve this. However, in order to mitigate potential abuses, the Faster Proposal also includes extensive standardised

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reporting and due diligence obligations for the Certified Financial Intermediary ("**CFI**"). In attempting to create a solution to WHT refund in the line of TRACE[2] , the Faster Proposal could lead to its downfall in view of the contemplated burden on CFIs and liability associated therewith, and ultimately its actual real benefit would be the eTRC.

For more information on this topic, please refer to our **article**.

2. CJEU decisions

CJEU ruled: The end of Luxembourg VAT on director's fees

Elvinger Hoss Prussen won a landmark preliminary ruling on 21 December 2023 in which the Court of Justice of the European Union (CJEU) decided in **Case C-288/22** that remuneration received by a director for his activity as a member of the board of directors of a Luxembourg limited company is not subject to VAT.

Indeed, the CJUE ruled, following the opinion of the Advocate General on these points, that the activity of a member of a board of directors of a limited company under Luxembourg law is not exercised independently for VAT purposes since the board member does not act on his own behalf or under his own liability and does not bear the economic risk linked to this activity. According to the CJUE, this holds true despite the fact that this member freely organizes the modalities of execution of his work, acts in his own name and is not subject to a subordination relationship.

For more information on the context and impact of this decision, please refer to our previous **article**.

It is important to note that this ruling reverses a Luxembourg administrative practice that has been applied since 2016 (and enshrined in Circular No 781) on the principle that independent directors are taxable persons for VAT purposes and that directors' fees are subject to VAT.

CJEU ruled: no illegal State aid in the European Commission's Engie and Amazon cases

In December 2023, the Court of Justice of the European Union annulled two decisions of the European Commission that had decided that Luxembourg had granted the Engie and Amazon groups unlawful State aids.

Please refer to our previous **newsflash** and **article** for more information in this regard.

Advocate General's opinion on Apple State aid case

As a reminder, on 30 August 2016, by its 2016 decision (SA.38373), the European Commission considered that tax rulings granted by the Irish tax authorities in favour of two Apple companies constituted illegal State aid under EU State aid rules, and ordered Apple to pay back EUR 13 billion to Ireland (plus interest), representing the undue tax advantage.

On 15 July 2020, the General Court of the European Union ("**Court**") annulled the Commission's decision considering that the Commission failed in demonstrating that the Irish tax authorities had granted Apple a selective advantage that could constitute illegal State aid.

By an application lodged on 25 September 2020, the Commission sought to have the judgment of the Court set aside.

According to Advocate General Pitruzzella's **opinion** released on 9 November 2023, the CJEU should indeed set aside the judgment of the Court "*in the light of the errors of law committed by the General Court*" and refer the case back to the Court.

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Read our previous **article** for more background on this topic.

> **1** Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union.
> **2** TRACE refers to the OECD Treaty Relief and Compliance Enhancement initiative which aim is to provide a framework for a standardised system allowing the reclaiming of withholding tax relief at source on portfolio investments, helping minimising administrative costs and ensuring proper compliance with tax obligations.

DTT Corner

New UK-Luxembourg treaty

The new double tax treaty between Luxembourg and the United Kingdom ("**Treaty**") was approved by the **Law of 18 September 2023** so that the first provisions will enter into force on 1 January 2024.

As a reminder, the Treaty that was signed by both countries on 7 June 2022 is a general modernisation of the treaty signed in 1967, taking into account Brexit and changes to international tax standards as a result of the OECD's work on base erosion and profit shifting.

For more information, please visit our **article** on the subject.

Amendment to the Romania-Luxembourg treaty

The second amendment to the Luxembourg and Romania double tax treaty signed on 14 December 1993 was approved by **the Law of 5 September 2023**. The provisions are expected to come into force on 1 January 2024. The purpose of this amendment is to introduce a new Article 25 allowing Romania to apply the credit method to eliminate the double taxation on Luxembourg-sourced income.

Amendment to the Germany-Luxembourg treaty

On 20 September 2023, Bill **8311** aiming to approve the amendment to the double tax treaty between Luxembourg and Germany was presented to the Luxembourg Parliament ("**Bill**").

As a reminder, on 6 July 2023, Luxembourg and Germany signed an amendment to the double tax treaty signed on 23 April 2012 and related protocols ("**Amended DTT**"). The purpose of the amendment is mainly to take account of changes to international tax standards as a result of the OECD's work on base erosion and profit shifting ("**BEPS**").

In that regard, Article 1 of the Amended DTT now explicitly denies treaty access to tax transparent entities.

Article 10 of the Amended DTT has been extensively modified to now subject dividends paid by German real estate investment trusts ("**REITs**") or Luxembourg equivalent entities as well as undertakings for collective investments ("**UCIs**") to a 15% withholding tax. The protocol to the Amended DTT indicates that Luxembourg UCIs shall mean investment funds subject to:

(i) the Law of 17 December 2010 relating to undertakings for collective investments;

(ii) the Law of 13 February 2007 relating to specialized investment funds; and

(iii) the Law of 23 July 2016 relating to reserved alternative investment funds

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but only to the extent those UCIs are not established as partnerships.

The Amended DTT also aims at permanently increasing from 19 to 34 the total number of days of teleworking allowed to German cross-border workers without being subject to their resident country's.

VAT Corner

On 4 September 2023, the Belgian VAT authorities issued Circular 2023/C/72 providing some useful guidance on Belgian VAT treatment of company cars provided by Luxembourg employers to employees residing in Belgium.

For more information on this topic, please refer to our **article**.

For any further information please contact us or visit our website at **www.elvingerhoss.lu**.

The information contained herein is not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific legal advice concerning particular situations.

We undertake no responsibility to notify any change in law or practice after the date of this newsletter.

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