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LUXEMBOURG LAW

NEWSLETTER

JULY 2023

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Sustainable finance developments

During the first semester 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 EU Commission's June 2023 sustainable finance package;
- the EU Commission FAQ on the interpretation and implementation of **Taxonomy Regulation** and **SFDR**;
- the European Supervisory Authorities ("**ESAs**")' consolidated Q&A on the SFDR and the **SFDR RTS**;
- the ESAs' consultation on the review of the SFDR RTS;
- the RTS on nuclear energy and fossil gas investment disclosures under SFDR;
- the CSSF update of its FAQ on SFDR;
- the CSSF SFDR data collection exercises;
- the CSSF's supervisory priorities in the area of sustainable finance;
- the new ESMA Guidelines on MiFID II suitability requirements; and
- the ESMA's final report on the new MiFID II Guidelines on product governance rule.

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

ESMA Q&As on UCITS and AIFM Directives: update

ESMA has recently updated its Q&As on the application of (i) the UCITS Directive (**ESMA34-43-392**) and (ii) the AIFMD (**ESMA34-32-352**).

1. The **Q&A on the application of the UCITS Directive** was updated to deal with the following topics:

- permitted activities of UCITS management companies; and
- de-notification requirements if there are no investors in a host Member State.

2. The **Q&A on the application of the AIFMD** was updated to deal with the following topics:

- notion of "substantive direct or indirect holding" in the context of sub-threshold/registered AIFMs;
- pre-marketing activities by non-EU AIFMs;
- pre-marketing conducted by an EU AIFM or by a third party on behalf of an authorised EU AIFM;
- pre-marketing by registered AIFMs not qualifying as EuSEF managers or EuVECA managers;
- de-notification requirements if there are no investors in a host Member State;
- permitted activities of AIFMs; and
- calculation of leverage of AIFs acquiring real estate assets indirectly through non-listed companies.

ESMA report on valuation of UCITS and open-ended AIFs

On 24 May 2023, ESMA published its final report on the 2022 **Common Supervisory Action ("CSA") on valuation** of UCITS and open-ended AIFs ("**ESMA Final Report**").

As a reminder, the aim of the CSA launched in 2022 was to assess compliance of supervised entities with the relevant valuation-related provisions in the UCITS and AIFMD frameworks, in particular the valuation of less liquid assets (e.g. unlisted equities, unrated bonds, corporate debt, real estate, high yield bonds, emerging markets, listed equities that are not actively traded, bank loans).

The various actions and assessments carried out in the framework of the CSA on valuation were intended to lead to greater convergence in the approach of National Competent Authorities ("**NCAs**") to the supervision of valuation-related issues.

The ESMA Final Report finds room for improvement in the following areas:

- appropriateness of valuation policies and procedures;
- valuation under stressed market conditions;
- independence of the valuation function and use of third-party valuers;
- early detection mechanisms for valuation errors and compensation to investors.

The ESMA Final Report includes a section focusing on private equity and real estate potential valuation issues.

Following the publication of this report, the CSSF is likely to publish its own feedback report on the CSA on valuation and to specify the supervisory actions it intends to initiate based on ESMA's conclusions. However, in the meantime, UCITS management companies and alternative investment fund managers ("**AIFMs**") could already start looking at their own valuation policies and procedures in light of ESMA's key findings and identify any action which may need to be taken in order to align them with ESMA's expectations.

ELTIF II

On 20 March 2023, **Regulation (EU) 2023/606** ("**ELTIF II**") amending the initial ELTIF Regulation (EU)

2015/760 ("**ELTIF I**) was published in the OJEU.

ELTIF II removes the barriers to the success of European long-term investment funds (**ELTIFs**") under ELTIF I. In particular, ELTIF II introduces the following amendments:

- broader scope of eligible assets with the inclusion, for instance, of listed companies with a market capitalization of up to EUR 1.5 billion, FinTech companies, simple, transparent and standardised securitisations ("**STS**") and green bonds;
- broader definition of what constitutes a "real asset", which is now simply "an asset that has an intrinsic value due to its substance and properties", thus increasing significantly the type of real assets in which an ELTIF can invest;
- possibility to adopt a fund-of-fund strategy or to set up a master-feeder structure;
- more flexible portfolio composition with a larger portion of liquid assets and less strict diversification rules;
- exemption of the diversification and concentration rule requirements for ELTIFs marketed to professional investors only;
- clarification that ELTIFs can invest the majority of their assets in investments located in third countries;
- possibility to conduct minority co-investments through intermediary entities, including special purpose vehicles, securitisation or aggregator vehicles, and holding companies;
- removal for retail investors of both the minimum investment amount of EUR 10,000 and the limit of investments in ELTIFs to 10% of their portfolio;
- while the suitability test for retail investors is still required, there is no longer an obligation to provide investment advice, and with the possibility for a retail investor to bypass a negative conclusion to that test by giving express consent to proceed with the transaction; and
- a MIFID II license is no longer required for Alternative Investment Fund Managers ("**AIFMs**") that market themselves the ELTIFs which they manage to retail investors (without investment advice).

ELTIF II will become applicable on 10 January 2024. Specific provisions are provided for ELTIFs authorised before 10 January 2024 ("**Existing ELTIFs**"), in particular:

- Existing ELTIFs benefit from a grandfathering period and have until 11 January 2029 to comply with ELTIF II, unless they do not raise additional capital, in which case they shall be deemed to comply with the revised regulation.
- Existing ELTIFs may also choose to become subject to ELTIF II after 10 January 2024 (opt-in), in which case they must notify their national competent authority. Although there is no official CSSF position yet, ELTIFs newly authorised prior to 10 January 2024 should already disclose their intention to opt-in after 10 January 2024 and hence the rules that will apply after such date, in order to protect the interests of investors and for the sake of transparency.

ESMA published draft regulatory technical standards (RTS) for consultation on 23 May 2023. These RTS bring further guidance on the provisions relating to the redemption of units or shares of ELTIFs. The consultation is open until 24 August 2023 (**ESMA34-1300023242-124**).

Cross-border distribution: CSSF FAQ on CBDF notification procedures

On 16 March 2023, the CSSF updated its **FAQ on CBDF notification procedures**.

In this update, the CSSF clarifies the following points:

- distinction between voluntary and non-voluntary cross-border marketing de-notifications for undertakings for collective investment in transferable securities ("**UCITS**") and alternative investment funds ("**AIFs**") and conditions to be complied with in both cases;
- (pre-)marketing notification and de-notification procedures by Luxembourg alternative investment fund managers ("**AIFMs**"), which are exclusively available through the eDesk Portal.

Bill upgrading the Luxembourg investment fund toolbox

A new Bill **8183** was deposited at the end of March 2023 with the Luxembourg Parliament with the aim to improve and modernise the Luxembourg toolbox relating to investment funds by proposing certain targeted amendments to the following Luxembourg laws:

- Law of 15 June 2004 on the investment company in risk capital (**SICAR Law**"),
- Law of 13 July 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**").

More information on this bill is available in our **Newsflash** published on this topic on our website.

AML/CFT update

1. CSSF: AML/CFT External Report – Reminder on submission deadline

CSSF Circular 21/788 of 17 December 2021 introduced the obligation for In-scope Entities to prepare, together with their approved statutory auditor acting as external AML/CFT expert, and submit, on a yearly basis, the so-called "CSSF AML/CFT External Report" ("**Report**"). "**In-scope Entities**" are (i) all Luxembourg investment fund managers (including registered AIFMs) and (ii) Luxembourg investment funds supervised by the CSSF for AML/CFT purposes (excluding Luxembourg investment funds having appointed an investment fund manager, established in Luxembourg or abroad).

In this context, the In-scope Entities are reminded that the extended deadline to submit the Report within nine months after the financial year-end (31 December) is no longer applicable. As a result, the Report for In-scope Entities having their financial year ending on 31 December 2022 had to be submitted to the CSSF by 30 June 2023.

2. AED: Updated guide for AML/CFT obligations for RAIF and other guidance for non-regulated funds

In March 2023, the *Administration de l'enregistrement, des domaines et de la TVA* ("**AED**") has released on its website an updated version of its **Guide on the Professional Obligations with regard to the fight against money laundering and terrorist financing for the product reserved alternatives investment fund ("RAIF")**.

Compared to the previous version published in January 2023, the updated guide includes limited modifications regarding, in particular, the AML/CFT due diligence information and documentation that must be gathered in respect of the investors/beneficial owners, as follows:

- the certified social security card has been removed from the list of documents provided in case of non-face-to-face business relationship (Part 1, Section 1.1.);
- the list of information/documentation to be gathered to identify any type of investor and beneficial owner has been amended as follows (Part 1, Section 1.5.):
    - the extract from the Register of beneficial owners or, as applicable, the Register of *Fiducies* and Trusts has been added to the list of supporting documents; whilst
    - the registration number has been removed as supporting information.

On a related note, for the unregulated investment funds subject to the AML/CFT supervision of the AED, practical guidance may be found on the **AED's website** regarding the implementation of their AML/CFT obligations, including in particular:

Technical sheet relating to the implementation of the AML/CFT risk assessment (only in French)

As requested by Article 2-2 of the Law 12 November 2004 on the fight against money laundering and terrorist financing, as amended ("**AML/CFT Law**"), professionals (including non-regulated investment funds) shall take appropriate steps to identify, assess and understand the risks of money laundering and terrorist financing that they face. In this context, this document provides guidance as to the methodology to develop and implement an AML/CFT risk assessment.

Technical sheet relating to the implementation of the internal AML/CFT procedure (only in French)

Pursuant to Article 4 of the AML/CFT Law, the professionals are required to implement an internal AML/CFT policy/procedure. This document details the main AML/CFT professional obligations to be reflected in the AML/CFT procedure (e.g., AML/CFT due diligence obligations, record keeping, suspicious activity/transaction reporting). For further guidance regarding the reporting of suspicious operations, please refer to the related guideline from the Financial Intelligence Unit (**version 2.1 of 1 April 2021**). The AED also published a **guide** on this topic (only in French).

Technical sheet relating to the AML/CFT risk factors to be identified within the risk assessment (only in French)

This document provides guidance as to (i) the main risk factors which should be considered in the framework of the AML/CFT risk assessment (Please refer also to the first technical sheet referred to above.), and (ii) for the situations triggering the application of enhanced due diligence.

Technical sheets relating to the **alternative investment funds** ("AIFs") (only in French) and the **RAIFs**

The documents provide details on the three pillars underpinning the AML/CFT professional obligations for non-regulated AIFs and RAIFs, namely (i) customer/investor due diligence, (ii) adequate internal management requirements (including details on the appointment of the RR/RC) and business-wide risk assessment, and (iii) requirements in terms of cooperation with the AML/CFT competent authorities.

For the avoidance of doubt, this guidance only applies to AIFs which are not otherwise subject to CSSF supervision.

Recognition of UK benchmark administrators in the EU

On 25 January 2023, ESMA and the UK Financial Conduct Authority ("**FCA**") agreed on a **Memorandum of Understanding ("MoU") concerning the recognition of UK benchmark administrators in the EU**, establishing a cooperation arrangement under Article 32 (5) of **Regulation (EU) 2016/1011** of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds ("**Benchmark Regulation**") with respect to benchmark administrators based in the UK and recognised in the EU or seeking recognition.

The MoU enables ESMA to start recognising benchmark administrators from the UK.

Dispute resolution

Amended Constitution entered into force on 1 July 2023

The new Constitution of Luxembourg entered into force on 1 July 2023.

The complete text (in French) is available **here**. For more information on this subject, please read **here**.

New law on arbitration

The new law on arbitration ("**Arbitration Law**") published on 21 April 202 aims to modernise the current arbitration legislation deemed to be "outdated".

Why is it important?

The Arbitration Law redefines the legal basis for arbitration with a view to accommodating the business needs of today's market players when it comes to dispute resolution. By offering practice-oriented rules setting up a complete framework for the various stages of the arbitral proceedings, the Arbitration Law intends to promote Luxembourg's attractiveness as an arbitration centre, highlighting its advantages of flexibility, rapidity and confidentiality while at the same time providing appropriate guarantees, particularly with regard to compliance with public order and preservation of the rights of the parties and those of third parties.

In this respect, the Arbitration Law is inspired by the French rules on international arbitration as well as the

United Nations Commission on International Trade Law ("**UNCITRAL**") Arbitration Rules, which have been transposed in over 100 countries and have proved their effectiveness in other successful international arbitration centres.

What does it mean?

These are the key points of the reform:

- **Adjusting the scope of application of arbitration**

  The Arbitration Law does not change the principle that all persons can compromise on the rights of which they have free disposal. However, it clarifies which rights fall outside of this general scope, by expressly excluding from arbitration the disputes between professionals and consumers, between employers and employees as well as disputes relating to residential leases.

- **Improving the conduct of the proceedings**

  The Arbitration Law introduces the principle of confidentiality of the arbitral proceedings (subject to contrary statutory requirement) which is essential when it comes to disputes involving business secrets or financial and banking transactions.

  The Arbitration Law further sets a time limit for the duration of the arbitral proceedings which may not exceed 6 months from the moment the arbitral tribunal is formed, except where the parties have decided otherwise or an extension of the time limit is decided.

  Furthermore, the Arbitration Law introduces the supporting judge whose role is to resolve blockages and difficulties during the arbitral proceedings. The supporting judge is a Luxembourg judge when, amongst other things, the seat of arbitration is located in the Grand-Duchy of Luxembourg or the parties have chosen the Luxembourg procedural rules for their arbitration.

  If the parties have decided otherwise, the arbitral tribunal may order provisional or conservatory measures, except for attachments which may only be ordered by judicial courts.

- **Remedies and enforcement of arbitration awards**

  As soon as it is rendered, the arbitral award has the authority of *res judicata*.

  The Arbitration Law provides, however, for two possible remedies against an arbitral award.

  First, according to the Arbitration Law, a party can file an application for review aiming at the re-examination in fact and in law and the subsequent withdrawal of the award. Nevertheless, this remedy is only possible in four cases relating to serious fraud committed during the arbitral proceedings.

  Second, and more importantly, the award is not subject to opposition, appeal or cassation before a state court but a party may file an application for annulment with the Court of Appeal in a limited number of serious circumstances. This remedy, however, only applies to awards rendered in Luxembourg and awards rendered abroad cannot be set aside by the Luxembourg courts; only the courts of the State in whose territory the award was rendered have jurisdiction to do so.

  As regards the enforcement of the arbitral award, the Arbitration Law does not innovate and still provides that an arbitral award may still only be enforced in the territory of the Grand Duchy of Luxembourg by virtue of an exequatur order issued by the president of the competent district court.

What's next?

The Law is welcomed by national arbitration specialists and practitioners such as the Think Tank for Arbitration and the Luxembourg Arbitration Association ("**LAA**"). It is an additional but essential piece contributing to the construction of Luxembourg as an arbitration centre. Previous steps had already laid out the foundations of this construction: the renewal of the rules of arbitration by the Luxembourg Chamber of Commerce, the organisation of the Luxembourg Arbitration Day by the LAA and the recent signature of a cooperation agreement between the main arbitration centres and arbitration associations in the Benelux area (namely CEPANI, NAI, DAA, LAA and the Luxembourg Chamber of Commerce) for the creation of the Benelux Arbitration and Alternative Dispute Resolution ("**ADR**") Group to join forces for the strengthening and the promotion of arbitration in the Benelux area.

Our firm is represented in the Think Tank for Arbitration, on whose work the Arbitration Law is based, and in the board of the LAA.

Corporate, banking and finance

Sustainable finance update

An extensive overview of regulatory developments in the first half of 2023 in the field of sustainable finance also relevant for credit institutions and MiFID firms is provided in the Asset management and investment funds section of this newsletter under this **link**.

The relevant instruments discussed include the EU Commission's Sustainable Finance Package published in June 2023, new regulatory guidance regarding the application of the Taxonomy Regulation and SFDR, and ESMA updates regarding MiFID suitability requirements and product governance rules.

In addition, the following developments are specifically worth mentioning:

- Publication of the CSSF's supervisory priorities in the area of sustainable finance in a **Communiqué** of 6 April 2023

As far as **credit institutions** are concerned, the CSSF indicates that its actions will focus on the supervision of relevant disclosures, the integration and mitigation of climate-related and environmental risks (see also the self-assessment exercise discussed below), and an understanding of where the industry stands as to the practical implementation of the MiFID rules relating to sustainability.

With respect to **MiFID firms**, priorities are similar: assessment of SFDR disclosures, supervision of ESG risks with a priority focus on their recognition in strategies and governance arrangements as well as implementation of MIFID ESG requirements.

Finally, for **issuers**, the CSSF refers to the European common enforcement priorities ("**ECEPs**") identified at EU level and, in particular, the fact that climate-related matters are a priority for both IFRS and non-IFRS reporting.

- CSSF self-assessment exercise 2022 related to Circular CSSF 21/773 on climate-related and environmental risks for Luxembourg credit institutions and third-country branches

In June 2023, the CSSF presented the outcome of the self-assessment exercise 2022 with respect to the application of **Circular CSSF 21/773** on climate-related and environmental risks (see link to overview slides **here**). The CSSF notes, in particular, that although all banks have started to adapt their practices, demonstrating a widespread awareness of climate-related and environmental ("**CR&E**") risk drivers, significant progress is still necessary to comply with CSSF expectations. An overview is given of identified best practices. A new self-assessment questionnaire was sent to 14 banks for completion by 30 September 2023.

- First draft of CSRD reporting standards published

On 5 January 2023, the Corporate Sustainability Reporting Directive ("**CSRD**") entered into force (read more **here** on the adoption of CSRD, its requirements and impact timeline). In-scope companies will have to report ESG data in accordance with European Sustainability Reporting Standards ("**ESRS**") to be adopted by the EU Commission by means of a delegated act. On 9 June 2023, the **draft delegated regulation** containing these ESRS was published. It is currently subject to public consultation.

EU regulates markets in crypto assets (MiCA)

*Regulation (EU) 2023/1114 of 31 May 2023 on markets in crypto-assets ("**MiCA**") was published on 9 June 2023 and will apply as from 30 December 2024. The main objective of MiCA is to provide legal certainty for crypto-assets not covered by existing European financial services legislation and introduce uniform rules for service providers and issuers of crypto-assets at the EU level. MiCA also aims at supporting innovation, introducing consumer and investor protection and market integrity, as well as ensuring financial stability.*

MiCA creates a regulatory framework for three main types of tokens: utility tokens, asset-referenced tokens ("**ART**") and e-money tokens ("**EMT**"). It also brings about major changes regarding trading platforms and other financial services.

MiCA defines utility tokens as a "*type of crypto-asset that is only intended to provide access to a good or a service supplied by its issuer*". The legal entity issuing utility tokens will have to prepare a white paper containing information about, *inter alia*, the issuer, the crypto-asset and the risks involved. However, contrary to ARTs and EMTs, utility tokens may be issued and traded on crypto-assets trading platforms without the prior approval of the relevant Member State's national authority.

ARTs, also known as stable coins, purport to maintain a stable value by referencing another value or right, or a combination thereof, including one or more official currencies. The issuance of ARTs is restricted to legal entities established in the EU and must be authorised beforehand by the competent authority except in specific cases. As part of the approval process, a legal opinion is required in order to confirm that the ARTs do not qualify as financial instruments, electronic money, deposits or structured deposits.

The third type of crypto-asset regulated by MiCA, namely EMTs, is "*a type of crypto-asset that purports to maintain a stable value by referencing the value of one official currency*". Contrary to ARTs, they should only be used as a medium of exchange and cannot be treated as a deposit. Only credit institutions authorised under Directive 2013/36 /EU or electronic money institutions authorised under Directive 2009/110/EC may issue EMTs. A white paper must be published beforehand.

To enhance security, MiCA also regulates crypto-asset service providers providing custody and administration of crypto-assets on behalf of clients. Such providers will have to conclude an agreement with their clients, keep a register of positions and establish a custody policy.

Finally, MiCA sets out rules for crypto-asset trading platforms. Crypto-asset service providers operating a trading platform for crypto-assets will notably have to determine (i) the policies, procedures and the level of fees, if any, for the admission to trading, (ii) non-discretionary rules and procedures to ensure fair and orderly trading, (iii) conditions for crypto-assets to remain accessible for trading, and (iv) conditions under which trading of crypto-assets can be suspended.

Entry into force of DLT Pilot Regime

*Regulation (EU) 2022/858 of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology ("**Regulation**") introduced a sandbox regime for market infrastructures based on distributed ledger technology ("**DLT**") allowing for a testing environment in a flexible regulatory framework. The Regulation entered into force on 23 March 2023. It was implemented in Luxembourg by the Law of 15 March 2023 ("**Law**"), which also introduced certain amendments to existing legislation, namely (i) the Law of 5 April 1993 on the financial sector, as amended, (ii) the Law of 5 August 2005 on financial collateral arrangements, as amended, and (iii) the Law of 30 May 2018 on markets in financial instruments.*

DLT is a technology allowing a network of independent and often geographically dispersed computers to update, share and keep a definitive record of data (e.g. information, transactions) in a common decentralised database in a peer-to-peer way, without a supervising central authority. Its potential has been emphasised since 2008, with the development of the blockchain (which is a particular type of DLT).

The Regulation aims at creating a uniform and attractive legal framework for security token activities, which consists in converting the rights attached to an asset into a digital token (security tokens) through the DLT. The Regulation also intends to integrate DLT into existing European financial services legislation, while maintaining financial stability, investor protection and transparency. Thus, DLT multilateral trading facilities ("**DLT MTF**"), DLT settlement systems ("**DLT SS**") and DLT trading and settlement systems ("**DLT TSS**") are governed by the Regulation.

Only some financial instruments within the meaning of MiFID II respecting certain thresholds may be traded on DLT trading platforms. There are also several thresholds that must not be exceeded in terms of the aggregate market value of all financial instruments admitted to trading or registered on a DLT infrastructure: 6 billion euros at the time of admission or registration of a new instrument and above 9 billion euros, the operator must activate an exit transition strategy.

In order to operate a DLT MTF, DLT SS or DLT TSS, the authorisation request to be submitted to a Member State's competent authority must include, *inter alia*, the following information: (i) the types of envisaged business and the organisational structure, (ii) a description of the distributed registry technology used, (iii) proof that the applicant has put in place sufficient guarantees to honour its commitments and indemnify its customers and (iv) its transition strategy. Authorisation is temporary: it can be granted for a period of up to six years and will only be valid during the pilot regime period. The Regulation provides for certain exemptions from the requirements laid down in the MiFID II/MiFIR and CSDR framework, which are deemed too restrictive to enable authorised financial market infrastructures (or those in the process of being authorised) using DLT to provide trading or securities settlement services, or a combination of these services, for financial instruments.

To allow for a smooth implementation of the Regulation, ESMA published on 30 May 2022 a **Q&A with reference ESMA70-460-189**. The CSSF, in its capacity as competent authority, issued on 5 April 2023

Circular 23/832, confirming its application of **ESMA's guidelines** on standard forms, formats and templates to apply for permission to operate a DLT Market Infrastructure (Ref. ESMA70-460-213), published on 8 March 2023.

Finally, in March 2026, ESMA will issue a report on the results of the pilot regime to the EU Commission. Following this report, the regime could potentially be made permanent or extended to other financial instruments not covered by the Regulation.

EU transfer of funds rules amended for cryptos

*Regulation (EU) **2015/847** on information accompanying transfers of funds ensures traceability of fund transfers, in particular with a view to prevent, detect and investigate money laundering and terrorist financing, but it only applies to transfers defined as banknotes and coins, scriptural money and electronic money. Regulation (EU) 2023/1113 of 31 May 2023 on information accompanying transfers of funds and certain crypto-assets ("**Regulation**") now extends the scope of the EU legal framework to transfers of virtual funds*

The new rules shall apply to all transfers of funds sent or received by an (intermediary) payment service provider ("**PsP**") established in the EU, including transfers of crypto-assets if the crypto-asset service provider ("**CSP**") of either the originator or the beneficiary is registered within the EU. Nevertheless, the Regulation provides for numerous exclusions from its scope.

As is already the case under the existing regime, the payer's PsP has to communicate the payer's name, account number, address, official personal document number and customer identification number or place and date of birth. Communication of the legal entity identifier ("**LEI**") or equivalent official identifier in certain circumstances is new. Furthermore, the payer's PsP will have to communicate the payee's name, payment account number as well as the LEI or equivalent official identifier where applicable. Other requirements of the existing regime are maintained: the payer's PsP must verify the information unless the identity of the payer has been verified according to the customer due diligence rules of Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, as amended ("**AMLD 4**"), and the Regulation provides for fewer requirements if the transfer is within the EU or in the form of a batch file transfer.

Requirements regarding transfers involving crypto-assets are new. For such transfers, the originator's CSP must make sure that the operation is accompanied, in addition to the personal information required for fund transfers, by the originator's distributed ledger address if the transfer is registered on a network using distributed ledger technology ("**DLT**") or similar technology, and the crypto-asset account number where it exists or where the transfer is not registered on a network using DLT. The originator's CSP must also ensure the transfer of similar information about the beneficiary (except for specific personal data).

The payee's PsP or the beneficiary's CSP will have to implement effective procedures to verify if the transfer of information has been done in compliance with the Regulation. Missing or incomplete information shall be a factor in the assessment of suspicion of a transfer and may lead up to the rejection of it. Similar obligations shall apply to intermediary PsPs or CSPs. The same verification standards apply to both types of transfers. PsPs and CSPs must adopt the necessary internal policies, procedures and controls as specified by guidelines to be issued by the European Banking Authority. If necessary, PsPs and CSPs will be obliged to provide without delay all the information required by the authorities responsible for combatting money laundering and terrorism financing, for which the Regulation provides for extensive cooperation mechanisms.

Failure to comply with the Regulation is punishable by administrative sanctions and effective mechanisms to

report breaches shall be established.

The Regulation will enter into force on 30 December 2024 and Regulation 2015/847 has been repealed with effect from that date.

Law on filtering mechanism for foreign direct investments

On 13 June 2023, the Luxembourg Parliament voted the law establishing a mechanism for the national screening of foreign direct investments likely to undermine security or public order ("**Law**"). 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 will have 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 réalisation*"), 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 (phase I). 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.

What's next?

The law has been published on 18 July 2023. The new regime will enter into force on 1 September.

Considering certain areas of uncertainty in the Law, e.g., as to its potentially wide scope, it is expected that the Ministry of the Economy will provide guidance to assist relevant entities in complying with the new framework.

For further details on the new regime, please read **here**.

Bill transposing EU Directive on non-performing loans

On 24 March 2023, a bill aiming, inter alia, at transposing Directive (EU) 2021/2167 on credit servicers and credit purchasers ("**NPL Directive**") into Luxembourg law ("**Bill**") was submitted to the Luxembourg Parliament. The Bill purports to create a legal framework for the transfer of non-performing loan agreements ("**NPL**") and a new category of professionals of the financial sector ("**PFS**"), the credit servicers.

For more information, please read **here**.

New law on non-profit organisations and foundations

On 28 June 2023, the Luxembourg Parliament adopted the Law on non-profit organisations and foundations ("**Law**") aimed to simplify and modernise the existing legal framework from 1928 on non-profit organisations and foundations. While providing for enhanced flexibility and some innovative mechanisms, the Law also covers important updates from the Financial Action Task Force ("**FATF**") Recommendations, particularly Special Recommendation VIII concerning non-profit organisations, establishing a new international standard in the field.

Key provisions

In substance, the Law proposes the following key changes:

- **Simplified administrative procedures and more flexibility**: administrative procedures related to the establishment and management of non-profit organisations are streamlined. Notably, the yearly obligation to submit a member list to the Trade and Companies Register (*Registre de Commerce et des Sociétés*, "**RCS**") has been abolished. Instead, non-profit organisations are now required to maintain an updated member list at their registered office. The Law also brings greater flexibility to governance rules by allowing board meetings and general meetings to be held remotely.
- **Enhanced transparency and customized accounting system**: a new, size-specific accounting system for non-profit organisations has been introduced. Non-profit organisations are categorised based on their size in terms of personnel, revenues, and assets, providing a more flexible and proportionate approach to accounting obligations.
- **Adjustment of a foundation's initial endowment**: initial funding requirements for foundations have been aligned with current economic conditions. The initial endowment has been lowered from EUR 250.000 to EUR 100.000, allowing foundations to use their assets as long as their net worth does not drop below EUR 50.000.
- **New restructuring mechanisms**: non-profit organisations and foundations can now make use of new conversion mechanisms or proceed with a merger while retaining their legal personality and by transferring their assets and liabilities to a new or absorbing entity.
- **Real estate ownership**: non-profit organisations and foundations are now allowed to own real estate that is not directly necessary for achieving their purpose.
- **Administrative dissolution without liquidation**: the importance of maintaining updated and accurate data for non-profit organisations and foundations registered with the RCS has been emphasized. New

provisions allow the RCS to initiate a data update procedure if an entity fails to update its data within six months or has not made any filing with the RCS for at least five years, aiming to enhance accountability and transparency among non-profit organisations and foundations. Failure to reply within this time limit may result in the administrative dissolution of the organisation or foundation without the opening of a judicial liquidation.

Repealing and transitory measures

The Law of 21 April 1928 has been repealed. Within 24 months from the entry into force of the Law, the statutes of non-profit organisations and foundations must be aligned with the new law. Meanwhile, such non-profit organisations and foundations remain subject to the previous law.

EU law, competition and antitrust

Extension of EU sanctions regarding Ukraine crisis

In the first half of 2023, two additional packages of sanctions were adopted by the EU in the context of the Ukrainian crisis.

10th package of sanctions

On 25 February 2023, the EU adopted a **tenth package** of restrictive measures against Russia through a set of regulations amending or implementing existing regulations and completing sanctions already adopted between February and July 2022 (please read **here**) and in December 2022 (please read **here**).

It added not only individuals and entities to the list of designated persons, but also measures against individuals in Iran supporting Russia by elaborating certain equipment for Russia's military. In addition, new export and import bans and restrictions were introduced. In addition, three additional Russian banks were designated and two media outlets were added to the media ban. Other measures involved a ban on Russian nationals from serving on governing bodies of Member States' critical infrastructure companies, a prohibition for Russian nationals or entities to book gas (other than LNG) storage capacity in the Union as well as certain measures to facilitate divestments from Russia. In the field of enforcement and anti-circumvention measures, new reporting obligations were imposed on Russian Central Bank Assets.

11th package of sanctions

On 23 June 2023, an **11th package** of restrictive measures was published, which entered into force on 24 June 2023. The measures have added individuals and entities to the list of persons subject to asset freezes and have expanded the list of goods and technology subject to specific restrictions. They now also include bans on vessels suspected or found in breach of EU sanctions from accessing EU ports and locks.

Additional anti-circumvention measures include, in particular, the possibility to restrict the sale, supply, transfer or export of certain goods and technology to certain third countries. They also provide for the possibility to prohibit the provision of technical assistance, brokering services or other services as well as of financing or financial assistance for such goods to persons in these countries or for use in these countries. The prohibition on the sale, license or transfer of intellectual property rights or trade secrets also applies to these countries and goods. At present, however, the EU has identified neither goods or technology subject

to these restrictions, nor targeted specific third countries. It is expected that these tools will only be used as a last resort if cooperation or other measures fail to prevent circumvention.

There are also new reporting obligations: EU economic operators have to supply immediately any information which would facilitate the implementation of EU sanctions to the competent authority of their Member State within two weeks of acquiring this information – an obligation which previously only existed for asset freeze measures.

Further guidance

For further information on international and EU sanctions, including a list of 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 **EU Commission**. The latter includes a **consolidated FAQ**, last updated on 30 June 2023, and the useful **EU sanctions map**.

Commission adopts revised Horizontal Block Exemption Regulations

On 1 June 2023, the EU Commission adopted revised Horizontal Block Exemption Regulations ("**HBERs**") applicable to **R&D agreements** (cooperation in research and development of new products and technologies) and **specialisation agreements** (agreements between two parties which are active on the same product market by virtue of which one party decides to cease production of certain products and instead purchase same from the other party).

The HBERs serve as an exception to the general prohibition outlined in Article 101(1) TFEU, granting protection for qualifying R&D and specialisation agreements. They entered into force on 1 July 2023.

The revised **Horizontal Guidelines** complement these regulations. They provide valuable insights on how the HBERs should be applied, how to assess R&D and specialisation agreements that fall outside the safe harbour, and various other common types of cooperation agreements between competing companies such as, among others, joint purchasing agreements, information sharing, or sustainability agreements.

Extension of applicability of the Motor Vehicle Block Exemption

On 17 April 2023, the Commission extended the applicability of Regulation (EU) 461/2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices in the motor vehicle sector ("**Block Exemption Regulation**") for another five years, i.e. until 31 May 2028, following positive feedback from stakeholders and few substantial changes in the market conditions.

The Block Exemption Regulation, with its **updated guidelines**, creates a *"safe harbour"* for vertical agreements for the purchase, sale or resale of new motor vehicles, vertical agreements for the purchase, sale or resale of spare parts for motor vehicles and vertical agreements for the provision of repair and maintenance services for such vehicles. These agreements must meet the exemption conditions of Regulation (EU) 2022/720 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices, and must not contain any of the restrictions listed in Article 5 of the Block Exemption Regulation.

Among other things, the updated guidelines identify as a potential abuse of a dominant position the refusal by a motor vehicle manufacturer to provide independent operators with vehicle-generated data.

Merger control update

*At EU level, the EU Commission has published rules and guidance to further reduce the administrative burden for parties with respect to the merger control process. An interesting judgment by the Court of Justice of the European Union ("**CJEU**") confirmed Member States' powers to address concentrations a posteriori under the rules on abuse of dominance, whether or not a national merger control regime exists. At Luxembourg level, the Competition Authority recently communicated about its decision to join a request for referral of a merger below the EU and national merger control thresholds to the Commission for review. Finally, the submission to Parliament of a bill introducing a merger control regime in Luxembourg is expected this July.*

Simplification of EU merger control procedure

To reduce the administrative burden for merging parties, the EU Commission adopted on 5 May 2023 a package of texts to further simplify procedures for reviewing concentrations under the EU Merger Regulation. As a result, the scope of the simplified procedure for the review of mergers that are unproblematic from a competition point of view, the so-called simplified cases, is widened and the notification process is made easier for both simplified and non-simplified cases. The package includes: (i) a revised Merger Implementing **Regulation**, entering into force on 1 September 2023, (ii) a **Notice** on Simplified Procedure, and (iii) a **Communication on the transmission of documents**. For the Luxembourg Competition Authority's communication on the matter, please read **here**.

CJEU Judgment in Case C-449/21, Towercast

In a judgment of 16 March 2023 in Case **C-449/21**, Towercast, the CJEU ruled that a national competition authority may review ex post, under Article 102 TFEU prohibiting the abuse of a dominant position, a merger carried out by an undertaking in a dominant position where that merger is below the turnover thresholds required for the application of the prior merger control arrangements provided for in EU and national merger law. Although rendered in the context of a French merger case below the thresholds of French merger control rules, the judgment confirms the decision practice by the Luxembourg Competition Authority as to its competence to review a merger *ex post* on the basis of the abuse of dominance rules in the absence of a national merger control system. For the authoritys' analysis on the importance of the judgment, please read **here**.

Luxembourg Competition Authority joins merger referral request

On 30 January 2023, the Competition Authority joined for the first time a referral request by other 15 Member State competition authorities in accordance with Article 22 of the EU Merger Regulation ("**EUMR**") for the Commission to review the proposed acquisition by Adobe of Figma, a merger which falls below EU and Member State notification thresholds. The joint referral request is inspired by the concern that the acquisition of Figma by Adobe could lead to a reduction of competition in certain niche technology markets. See the authority's communication **here**.

Introduction of a merger control regime in Luxembourg

At a conference organised jointly by the Luxembourg Chamber of Commerce and the Association luxembourgeoise pour l'étude du droit de la concurrence ("**ALEDC**") on 14 June 2023, a representative of the Luxembourg Ministry of the Economy confirmed that the submission to Parliament of a bill purporting to introduce a merger control regime in Luxembourg is scheduled for July 2023. A mandatory notification regime would be proposed.

Luxembourg vertical price-fixing decision overturned on appeal

Elvinger Hoss Prussen assisted a large Luxembourgish supermarket group in obtaining the annulment of a decision by the Luxembourg Competition Authority imposing a fine for an alleged vertical price-fixing agreement. Two related decisions were partially overturned.

What is the context?

In 2015, the *Conseil de la concurrence* of Luxembourg (since renamed *Autorité de la concurrence,* "**Authority**") opened an investigation into the distribution of sweet and salted snacks, for which it suspected that several retail distributors had aligned resale prices. In 2020, the Authority issued three **decisions** sanctioning the supplier and three retail distributors for alleged vertical agreements on consumer prices. Judicial actions were introduced against all three decisions. On 14 December 2022, the Administrative Tribunal annulled one of the decisions, referring the case back to the Authority (Case **N° 45635 + 45685**, "**Judgment**"). The other two decisions were partially altered. The Authority did not appeal the judgments, which are final.

Why is it important?

In the Judgment, the Administrative Court clarifies central elements regarding procedural rights of a company under investigation, in particular, the rights of the defence, as well as the methodology to be followed by the Authority and the standard of proof for establishing the existence of a vertical agreement infringing competition law. Two related judgments rendered on the same day provide guidance on the leniency procedure, referring in particular to the principle of legitimate expectations (*principe de confiance légitime*) (see cases **N° 45684** and **N° 45683**).

Key findings?

Some of the key findings are laid out below.

- Rights of the defence in competition proceedings

In decision **F-2020-FO-04** at issue in the Judgment, the Authority allegedly had based the finding of an infringement on a new form of evidence (direct evidence), certain documents which had not been relied upon in the statement of objections, a modified product sample and a new methodology of price comparison. In the Judgment, the Administrative Tribunal found that the use of a modified product sample and a new price comparison methodology violated the parties' rights of the defence since the decision was partly based on them without a possibility for the parties to comment on them.

- Authority's dismissal of the parties' evidence deemed unjustified

The Authority refused to take into account certain pricing analyses submitted by the companies under investigation arguing that, as they were produced as part of their defence, they were unreliable. In the Judgment, on the merits, after dismissing the allegation of sufficient direct evidence to establish an illicit agreement, the Administrative Tribunal held that the mere fact that evidence was produced as part of the defence was not sufficient to cast doubt on its reliability. The analyses produced by the companies were reliable and contradicted the Authority's findings regarding the body of evidence allegedly establishing an infringement. Hence, the Authority should have included them in its analysis instead of dismissing them.

- Denial of leniency altered

In the course of the investigation, the Authority had indicated that the supplier would be granted leniency in a leniency notice. However, in the decisions, the supplier was denied leniency. The Authority justified the leniency refusal, firstly, by the fact that the supplier allegedly forced other companies to participate in the cartel. In cases N° 45684 and N° 45683, the Administrative Court considered that no new facts had come to the Authority's knowledge in this respect following the leniency notice. Hence, the change in position infringed the principle of legitimate expectations (*principe de confiance légitime*). The Authority's second argument for refusing leniency, the alleged non-satisfactory cooperation of the supplier during the investigation, was also rejected. The Administrative Tribunal found that the obligation to cooperate did not prevent the leniency applicant from providing explanations on documents which it considered misinterpreted in the statement of objections or to point out reasonings in relation to the facts which it found erroneous.

Employment and pensions law

Luxembourg implements the Directive on whistleblowers

Background

On 17 May 2023, the law transposing the Directive (EU) 2019/1937 on the protection of persons who report violations of Union law was published in the *Mémorial A* ("**Whistleblower Law**").

Protection granted to whistleblowers through dedicated reporting channels

- The purpose of the Whistleblower Law is to establish a comprehensive legal framework offering protection to persons who report or disclose illicit acts or omissions contravening Luxembourg or EU law ("**Reporting Persons**").
- Reporting Persons are effectively protected against any form of retaliation by their employer and are provided with effective legal remedies.
- Reporting Persons will not incur any liability for obtaining or accessing information that is reported or publicly disclosed.
- Protection is granted to Reporting Persons in both private and public sectors, including independent contractors, shareholders, executives, volunteers, interns, contractors, and suppliers. The protection also extends to facilitators and third parties linked to Reporting Persons and legal entities affiliated with Reporting Persons.

The obligation to implement dedicated reporting channels and procedures

- Private and public entities with 50 employees or more must establish dedicated written and oral reporting channels and procedures. These channels must ensure the confidentiality of the Reporting Persons and any mentioned third parties.
- Said entities must appoint an impartial person responsible for the diligent follow-up of the report.
- Failing to implement said procedures, or failing to meet diligent follow-up requirements, may enable

Reporting Persons to proceed with an external report or even to publicly disclose said illicit acts or omissions to the public.

Criminal sanctions and penalties

- Entities which fail to implement said reporting channels and procedures could face fines ranging from 1,500 to 250,000 euros, with penalties potentially reaching up to 500,000 euros for repeat offences.

Transitory measures

- The Whistleblower Law entered into force on 21 May 2023.
- For entities employing between 50 and 249 employees, the obligation to implement these procedures is deferred until 17 December 2023. Such entities may "share resources" by organising a joint service, for example, within a group of companies.

New law on protection against moral harassment

Luxembourg Parliament voted on 9 March 2023 a new **law** which entered into force on 9 April 2023 ("**Law**") and amends the legal framework in the context of moral harassment. While an agreement on harassment and violence in the workplace negotiated between social partners entered into force in 2009 and was declared of general interest, such existing rules have never been introduced into the Luxembourg Employment Code.

What is changing?

The Law inserts a new chapter in the Employment Code, which provides essentially for the following changes:

Increase of the competence of the staff delegation:

- The staff delegation is assigned the prerogative to assist and advise the employee victim of moral harassment.
- The staff delegation is to be implicated in establishing and re-evaluating the internal policies regarding prevention and management of moral harassment.

Introduction of a procedure involving the Labour and Mines Inspectorate (**ITM**"):

- The Law provides for the possibility for the employee victim of moral harassment or the staff delegation to refer the case to the ITM.
- On any such referral, the ITM is obliged to carry out an investigation and draw up a report containing recommendations.
- The employer has the obligation to take appropriate measures to put an end to acts of moral harassment and prevent occurrence of any further such acts. Non-compliance can result in administrative fines.

Increased protection of the employee:

- The employee has the possibility to terminate their employment contract without notice and to claim damages from the employer.
- The employee victim of moral harassment cannot suffer any retaliation or termination because of their complaint against moral harassment. A termination issued in violation of this protection can be declared null and void, resulting in the reintegration of the employee.
- However, the burden of proof remains on the employee who claims to have been a victim of moral harassment.

Criminal sanctions:

- Fine ranging from EUR 251 to EUR 2,500 euros (doubled for undertakings).
- Doubled in case of recidivism in under two years.

Law on right to disconnect

On 13 June 2023, the Luxembourg Parliament voted a new law that was published on 30 June 2023 and entered into force on 4 July 2023 ("**Law**").

The Law introduces into the Luxembourg Labour Code a section on the employee's right to "disconnect" outside working hours, thus codifying into law a right previously referred to by a ruling of the Luxembourg Court of Appeal (Court of Appeal, 3rd Chamber, docket 45230).

What is changing?

The Law inserts a new section into the Labour Code, which will apply to employees using digital tools for professional purposes and essentially provides for the following changes:

- The employer must implement a system ensuring the application of practical measures allowing employees to disconnect from digital tools outside of working hours.
  Said system must be adapted to the specific situation of the company or business sector.
- The applicable system must be defined by the collective bargaining agreement related to the different sectors.
  In the absence of a collective bargaining agreement, the specific system is to be defined by the company after informing and consulting the staff delegation.
  If the company has at least 150 employees, the system has to be negotiated and defined by mutual agreement with the staff delegation in accordance with Article L.414-9 of the Labour Code.
- The Law further introduces an administrative fine ranging from EUR 251 to EUR 25,000 imposed by the Inspectorate of Labour and Mines (*Inspection du travail et des mines*, "**ITM**"), should a company not comply with the Law.

While the Law entered into force on 4 July 2023, it should be noted that the provision relating to the

abovementioned fine will only become effective in three years from now, i.e. on 30 June 2026, in order to enable employers to comply with the Law.

ICT, IP, media and data protection

Some useful clarifications on right of access under GDPR

The year 2023 has seen a number of clarifications with respect to the right of access under the GDPR:

- Clarification by the Court of Justice of the European Union ("CJEU") of the notion of "copy" to be provided to the data subject

How far to go in responding to an access request? This is a recurring question in practice when controllers prepare their answer to an access request made under Article 15 of the GDPR.

On 4 May 2023, the CJEU in its judgement in **Case C-487/21** confirmed that the underlying document containing the concerned data does not necessarily have to be provided and if the decision is made to produce the entire document, it may be necessary to anonymise the parts involving third parties.

- EDPB's final version of Guidelines 01/2022 on data subject rights - Right of access

The European Data Protection Board ("**EDPB**") adopted on 28 March 2023 the final version of its Guidelines 01/2022 regarding the right of access ("**Guidelines**"). These Guidelines are an essential tool for controllers and data subjects to better understand the aim and the scope of the right of access, the methods of reply and the existing limits of a right that is more and more used by data subjects. Further to the public consultation, the Guidelines were updated to clarify several aspects, among which are:

- personal data processed by the processor: the EDPB clarifies that in the event the data controller uses a processor for its data processing activities, the reply must also include personal data processed by the processor.
- information with respect to recipients or categories of recipients: the EDPB recalls that on 12 January 2023, the CJEU in its judgement in **Case C-154/21** indicated that, in the absence of choice of the data subject, a controller must "*provide the data subject with the actual identity of those recipients, unless it is impossible to identify those recipients or the controller demonstrates that the data subject's requests for access are manifestly unfounded or excessive (…), in which cases the controller may indicate to the data subject only the categories of recipient in question*."

Finally, an important clarification is expected from the CJEU in the coming months since the German Federal Court of Justice decided to refer the following question to the CJEU for a preliminary ruling: *can data subjects request access to their personal data on the basis of the GDPR for purposes other than those relating to data protection*? (Case C-307/22)

Transfers to the USA raise highest GDPR fine to date

*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!***

What happened?

On 12 May 2023, the Irish Data Protection Commission ("**Irish DPC**") imposed a EUR 1.2 billion record fine on Meta Platforms Ireland ("**Meta IE**") and ordered compliance measures to be taken by the latter as a result of infringements of the General Data Protection Regulation ("**GDPR**"). Based on the EDPB's binding dispute resolution **decision 1/2023** of 13 April 2023, the Irish DPC imposed sanctions on Meta IE because of the massive transfers of personal data from the EEA to the United States related to the management of its Facebook platform, such transfers being considered as infringing the GDPR.

Beyond the record fine (highest fine to date under the GDPR), this decision has brought the issue of data transfers from the EEA to the USA back into the spotlight.

What are the key takeaways?

Meta IE was arguing that the transfers of the Facebook EU users' personal data to servers located in the USA relied upon (i) the EU Standard Contractual Clauses ("**SCCs**") adopted by the EU Commission and (ii) supplementary measures.

Since the **Schrems II ruling** of the Court of Justice of the European Union ("**CJEU**") and the invalidation of the EU-US Privacy Shield Framework, the transfer of personal data from the EEA to the USA has become a sensitive issue. Even if the CJEU reaffirmed the validity of the SCCs, data exporters are, however, responsible for assessing whether the legal standards in the country of the data importer allow for a level of data protection equivalent to that existing in the EU.

Where those standards are not met, data exporters must either provide additional safeguards ensuring that data subjects receive essentially equivalent protection to EU law or suspend the transfer of personal data.

The Irish DPC first found that US law does not provide an essentially equivalent level of protection to that provided in the EU, and that the SCCs relied upon by Meta IE cannot compensate for the inadequate protection.

The Irish DPC then decided that Meta IE failed to implement supplementary measures compensating for the inadequate protection provided by US law (the supplementary measures must not merely "mitigate" the deficiencies in US law). In particular, the Irish DPC criticises Meta IE for failing in its duty of care and for acting at least with the highest degree of negligence.

The fine was accompanied by an order requiring Meta IE to suspend any future data transfers to the USA within five months from the date of notification of the Irish DPC's decision (i.e. until October 2023) and cease, within six months of such date of notification (i.e. until November 2023), the unlawful processing, including storage in the USA of personal data of EEA users transferred in violation of the GDPR.

What's next?

On 22 May 2023, Meta IE already stated on Facebook that it would appeal the decision and underlined that the decision from the Irish DPC "*sets a dangerous precedent for the countless other companies transferring data between the EU and USA.*"

It is true that for the purpose of legal certainty, it is now crucial that transfers of personal data from EEA to the USA rely on a stable transfer mechanism.

As indicated in a **previous publication**, on 13 December 2022, the EU Commission issued a first draft adequacy decision on a potential upcoming EU-US Data Privacy Framework.

On 28 February 2023, the EDPB rendered a mixed opinion (**Opinion 5/2023**) on this draft adequacy decision. The EDPB noted the substantial improvements that the new EU-US Data Privacy Framework offers compared to the previous legal framework, in particular with respect to the introduction of the principles of necessity and proportionality, and the individual redress mechanism for EU data subjects. However, the EDPB considers that certain topics such as the "temporary bulk data collection" require further clarification, and invites the EU Commission to amend the draft adequacy decision based on its Opinion.

The coming months may bring the adoption of an amended, solid and durable adequacy decision with respect to the EU-US Data Privacy Framework so that transfers of personal data from the EEA to the USA are no longer synonymous with risks for data controllers and data subjects.

Indeed legal certainty in transfers of personal data presupposes that neither the EU-US Data Privacy Framework nor the adequacy decision mentioned above would be challenged.

Real estate

Subletting and the fight against speculation

In a **judgment** (*in French only*) of 23 December 2022, the Constitutional Court declared that "*Article 1762-6, paragraph 4, of the Civil Code, as introduced by the Law of 3 February 2018 on commercial leases (...) in that it does not allow an economic operator who has taken a lease of commercial premises to sublet it at a price that allows him to cover his operational expenses relating to the subletting and to obtain a reasonable profit from the subletting , is contrary to Article 11, paragraph 6, subparagraph 1, of the Constitution*."

The Court stated that, while the fight against speculation pursues an aim of general interest which justifies the intervention of the legislator, the ceiling on the price of the sublease imposed by Article 1762-6(4) of the Civil Code constitutes a disproportionate restriction.

Pending remedial action by the legislature, the balance between the legitimate aim pursued by the legal provision under review and the freedom of trade and industry is achieved if the sublease rent does not exceed the rent paid by the lessee to the principal lessor, plus his operating expenses relating to the sublease and a reasonable profit.

Tax

New law on administrative cooperation in the field of taxation

The **Law of 16 May 2023** ("**Law**") has strengthened the administrative cooperation in the field of taxation (i) introducing new reporting obligations on digital platform operators, (ii) clarifying and improving existing rules.

Check out our **article** for more details on this topic.

Bill introducing new reporting obligations for PSPs

On 5 May 2023, the government submitted to the Luxembourg Parliament Bill **8207** to implement Council Directive (EU) 2020/284 amending the **VAT Directive** ("**Bill**").

The Bill 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.

The payment service providers include payment institutions, credit institutions, electronic money institutions and post office giro institutions that are established in Luxembourg ("**PSP**").

A payment (i.e. classic payment transactions and money remittances) is cross-border when it is made by a payer located in an EU Member State to a beneficiary located in another country (be it a Member State or a third country).

Data to be submitted by the PSP includes *inter alia*, the BIC, or any other unique identifier of the PSP transmitting the data, name and address of the payee, VAT number or national tax number of the payee, if available IBAN, or any other identifier of the payee, BIC, or any other business identifier for PSP, individual payment transaction details, payment refunds.

The PSP will be required to transmit this data on a quarterly basis to the Luxembourg tax authorities and to keep record of the reporting data electronically for three years (from the end of the calendar year in which the respective payment was made).

The record keeping and reporting obligation only applies where, during a calendar quarter, a payment service provider executes more than 25 cross-border payments per quarter intended for the same beneficiary.

The law should enter into force on 1 January 2024.

Bill implementing the EU public CbC reporting

Bill **8158** transposing EU Directive 2021/2101 amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches ("EU public country-by-country ("**CbC**") reporting directive") imposes on certain entities a yearly mandatory disclosure of certain income tax information. The disclosure obligation would be required for financial years starting on or after 22 June 2024.

Targeted entities include *inter alia* Luxembourg limited liability companies and transparent entities where all shareholders have limited liability, whether they are members of a consolidated group or not, exceeding a

750,000,000 EUR turnover threshold for two consecutive financial years. Luxembourg branches of entities established outside the EU will also be subject to the yearly disclosure obligation when exceeding an 8,800,000 EUR turnover threshold for two consecutive financial years. The disclosure obligation will not apply to Luxembourg entities and branches where the controlling entity has already made the required information public.

The disclosure relates to information concerning, among others, the ultimate parent entity, a list of every subsidiaries included in the ultimate parent entity's consolidated financial statements, a brief description of the activities carried out by the ultimate parent entity and the Luxembourg entity, the taxable profit or loss, the current tax expense recognised on taxable profits or losses of the financial year, the amount of income tax paid on a cash basis and non-distributed income at the end of the relevant financial year.

The information will be published on the Luxembourg company register's website ("**RCS**") or on the website of the Luxembourg entity or branch (if any). The publication will occur no later than 12 months after the end of the relevant financial year.

Sanctions in case of failure to disclose mandatory information include criminal fines against the management body of the ultimate parent entity (and/or of the Luxembourg entity and the subsidiaries) or, in the case of a Luxembourg branch, its permanent representative in Luxembourg.

Circular on reverse hybrid rule

On 9 June 2023, the Luxembourg tax authorities ("**LTA**") issued the administrative **circular LIR 168*quater*/1** ("**Circular**") providing some guidance on the determination of the total net income and tax due by the reverse hybrid entity ("**RHE**") under Article 168*quater* of the Luxembourg Income Tax Lax ("**LITL**")

The key takeaways of the Circular can be summarised as follows:

- According to the Circular, a RHE is not a resident collective undertaking (*organismes à caractère collectif*) within the meaning of Article 159 LITL. Accordingly, the following tax provisions are (*inter alia*) not applicable to it:
    - Article 164*ter* LITL: Controlled Foreign Companies ("**CFC**") provisions;
    - Article 166 LITL: participation exemption on dividends received;
    - Article 168*bis* LITL: Interest Limitation Rules;
    - Article 168*ter* LITL : Anti-hybrid rules.
- At the level of the RHE, the income that would be subject to tax is limited to net income from investment within the meaning of Article 97 LITL, net rental income within the meaning of Article 98 LITL, and other net income listed in Article 99 LITL. Accordingly, their determination is to be made in accordance with Article 103 LITL, i.e. the revenue within the meaning of Article 104 LITL will be decreased by the costs incurred to earn income defined in Article 105 LITL.
- The total net income to be taken into consideration corresponds to the total net income realized during the calendar year, regardless of the RHE's accounting year. Thus, for RHE having an accounting year diverging from the calendar year, the relevant income and charges related to the period from 1 January to 31 December will need to be identified.

- When income and charges are denominated in a foreign currency, the conversion into euros should be made at the exchange rate of the day the income and charges are accounted. However, for the sake of simplification, the conversion of said amounts may be done either at the year-end exchange rate or at the average exchange rate of the tax year.
- No step-up in value must be made when an entity becomes a RHE. Conversely, no tax consequences will arise when the entity ceases to be a RHE,
- Distributions made by the RHE are not subject to withholding tax.

The above clarifications by the LTA are welcomed especially for purposes of filing the new form 205 recently issued by the Luxembourg tax authorities.

Measures on telework for cross-border workers

Taxation

As part of an agreement concluded with France on 1 October 2022 to permanently increase to 34 the total number of days of teleworking allowed to French frontier workers without being subject to French income tax, the Luxembourg Parliament has unanimously ratified the signature of the amendment to the Luxembourg-France double tax treaty, which will include the provisions of this agreement into the treaty. The amendment to the Luxembourg-France double tax treaty will become retroactively effective as of 1 January 2023.

A similar agreement was concluded with Belgium on 20 October 2022, which will also be part of the Luxembourg-Belgium double tax treaty but with retroactive effect from 1 January 2022.

On 6 July 2023, Luxembourg and Germany entered into a similar agreement increasing the maximum number of teleworking days from currently 19 days to 34 days per year as from 2024.

Social security

In principle, an employee resident of a Member State working for an employer established in another Member State and who performs more than 25% of his working time/pay in his country of residence, is subject to the social security system of his country of residence.

On 5 June 2023, Luxembourg's Minister for Social Security, Claude Haagen, signed a new agreement, which raises the 25% limit to 50% per year. However, this agreement only applies if the governments of both countries have signed it. So far, Germany and Belgium have already signed it. However France, has "not yet taken a decision", according to the Minister. The agreement entered into force on 1 July 2023 for an initial period of five years.

On 20 June 2023, the Luxembourg government published on its website a "**declaration of cross-border telework from 1 July 2023**" providing some details regarding the conditions to be met and the formalities to be fulfilled in order to benefit from the application of the agreement.

Luxembourg VAT authorities issue new circular on company cars

The new administrative **circular 807*bis* dated 28 April 2023** ("Circular 807*bis*") complements and clarifies the

administrative circular 807 dated 11 February 2021 on company cars ("**Circular 807**").

For more information on the Circular 807 and its application please read our previous **article** dated 23 March 2021.

The Circular 807*bis* recalls the three situations where the provisions of a company car is to be considered against consideration for VAT purposes:

- where the employee makes a payment to the employer;
- where the employer retains a part of the employee's remuneration; or
- where the provision of the company car is conditional on the employee foregoing other benefits.

In any case, the employee could use the company car for private purposes and for a period of more than 30 days.

According to the Circular 807*bis*, the taxable basis subject to VAT should be the "normal value" of the service, i.e. the price that would have been paid between unrelated parties under normal market conditions, it being understood that:

- in case of leasing, the normal value cannot be less than the lease payments made by the employer;
- if the company car was purchased by the employer, the normal value should not be less than the depreciation value of the car over a five-year period including any costs incurred by the employer with respect to the car;
- in cases where the car is partly used for business purposes, the normal value should be reduced accordingly.

The Circular 807*bis* only applies to situations where the employee is resident in Luxembourg. Where the employee is resident in another EU Member State, only the Circular 807 should apply and the employer must consider VAT payments in the employee's country of residence.

Guidance on the prime participative regime for companies forming a fiscal unity

The profit sharing bonus ("*prime participative*") has been introduced by the Luxembourg 2021 Budget Law of 19 December 2020 in order to keep Luxembourg attractive for talents. In this respect, Luxembourg companies can provide a *prime participative* to their employees, 50% of which is exempt from tax, as long as the *prime participative* does not exceed 5% of the positive result of the employer in the relevant year.

For more insight on this topic, please refer to our previous **Newsletter**.

On 23 December 2022, the 2023 Budget Law introduced to possibility for Luxembourg companies in a fiscal unity within the meaning of Article 164ter of the Luxembourg income tax law to opt for calculating the 5% limit based on the positive algebraic result of all companies forming part of such a fiscal unity.

In this respect, the Luxembourg tax authorities have issued a new **Circular L.I.R. n°115/12** dated 27 February 2023 which replaces the former circular dated 8 March 2021 in order to provide further guidance related to this option ("**Circular**").

In particular, the Circular clarifies that the employer must file a specific form which includes *inter alia* the

names of the employees of each company that forms the integrated group benefiting from the *prime participative* during the tax year. Such a form must be accompanied by a joint request from all members of the integrated group. The form and the joint request must be sent to the competent tax office by the integrating parent company or by the integrated subsidiary company, at the time the *prime participative* is made available.

New Relibi Circular

On 22 February 2023, the *Administration des Contributions Directes* published a **circular** concerning the so-called "Relibi Law" ("**Circular**"). As a reminder, the Relibi Law of 23 December 2005 as amended, provides for a 20% withholding tax on interest payments made to or for the benefit of a Luxembourg resident individual who is the beneficial owner of the payment. The withholding tax is paid by the paying agent. The Circular has clarified a number of points:

- the object of the law (Art. 1 of the Relibi Law);
- the beneficial owner (Art. 2 of the Relibi Law);
- the definition of the paying agent (Art. 3 of the Relibi Law);
- the scope of the withholding tax (Art. 4 of the Relibi Law);
- exemption (Art. 5 of the Relibi Law);
- the terms and conditions for deducting the withholding tax operated by the paying agent established in Luxembourg (Art. 6 of the Relibi Law);
- establishment and recovery of the withholding (art. 7 of the Relibi Law); and
- other withholding taxes (Art. 8 of the Relibi Law).

The Circular replaces the previous Relibi Circular No. 1 dated 27 February 2017.

Lawyer's professional secrecy and exchange of information on request

On 4 May 2023, the Administrative Court of Luxembourg ("**Court**") had to rule on the application of professional secrecy of lawyers to requests for exchange of information (cf. see cases with docket numbers: **48677C and 48684C** and **48678C and 48685C**).

Background

Following a request for exchange of information from the Spanish tax authorities (based on the DTT Luxembourg-Spain and **Directive 2011/16/EU** ("**DAC**")), the Luxembourg tax authorities ("**LTA**") subsequently issued an injunction against a Luxembourg law firm to communicate information about one of its clients (i.e. a Spanish resident company).

The Luxembourg law firm refused to provide this information in light of:

- §177, paragraph (1), AO (*Abgabenordnung* dated 22 May 1931), which establishes in its paragraph (i) the principle of enforceability of professional secrecy of lawyers against the LTA. There is one

exception to this principle in its paragraph (2) for facts that have been revealed to a lawyer by his/her client in connection with an advisory or representation activity in tax matters. On this point, the Luxembourg law firm clarified that its legal mandate was exclusively of a non-tax nature and concerned only company law. The possibility of applying this provision of domestic law would be possible on the basis of Article 27, paragraph (3), of the DTT Luxembourg-Spain and Article 17 (4) of DAC, which recognises the right to refuse a request for an exchange of information that is covered by professional secrecy; and

- Article 7 of the Charter of Fundamental Rights of the EU ("**Charter**") insofar as this would constitute an unjustified interference with the right to respect for communications between lawyers and their clients.

Questions for a preliminary ruling

The Court, noted on the one hand that Article 17 (4) of Directive 2011/16 does not further define the professional secrecy that would justify that the competent authority of the requested Member State refuses to exchange the information and on the other hand, that the CJEU has not yet had the opportunity to determine the scope of Article 7 of the Charter in relation to the professional secrecy of lawyers with regard to the exchange of information on request. Therefore, the Court has decided to refer to the European Court of Justice ("**CJEU**") one of the following questions for a preliminary ruling:

- Does a legal consultation with a lawyer in the field of company law – in this case with a view to setting up a corporate investment structure – fall within the scope of the enhanced protection of exchanges between a lawyer and his/her client guaranteed by Article 7 of the Charter?
- If the first question is answered in the affirmative, does the competent authority of a requested Member State ordering a lawyer to provide it roughly with all the available documentation relating to his/her relationship with his/her client, a detailed description of the transactions in the scope of his/her advice, an explanation of his/her involvement and the identification of his/her interlocutors, entail an interference with the right to respect for communications between lawyers and their clients, guaranteed in Article 7 of the Charter?

Interestingly, the CJEU already ruled last year on a similar issue with respect to mandatory automatic exchanges of information in the field of taxation in relation to reportable cross-border arrangements ("**DAC6**"). According to the CJEU, 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. See our **Newsflash** dated 20 December 2022 for more details on this case.

Advocate General calls on CJEU to annul Engie and Amazon state aid decisions

Amazon case

On 4 October 2017, the EU Commission ("**Commission**") decided that Luxembourg had granted Amazon unauthorised State aid of about EUR 250 million through a tax ruling which was confirming the arm's length nature of the deductible royalty payments by a Luxembourg operating company to a tax transparent Luxembourg partnership.

On 12 May 2021, this decision was annulled by the General Court considering that the Commission relied on an incorrect analysis (mainly erroneous functional analysis and selection of tested party) and was not able to

sufficiently demonstrate the existence of a selective advantage.

An appeal was lodged by the Commission against the judgment of the General Court before the European Court of Justice ("**CJEU**").

In an **opinion** of Advocate General ("**AG**") Kokott delivered on 8 June 2023 (Case C-457/21 P), it is reminded that in assessing the existence of a selective advantage, the identification of the reference system is key and in this specific case, the Commission relied exclusively on the guidelines provided by the OECD, whereas Luxembourg law did not refer to these guidelines at the date of the tax ruling. As such, the AG Kokott was of the view that the Commission erred in deciding that Luxembourg had granted unauthorised State aid to Amazon in the form of tax advantages because "*the reference system (the OECD Transfer Pricing Guidelines instead of Luxembourg law) relied on by the Commission was incorrect*".

Engie Case

On 20 June 2018, the Commission found that Luxembourg had granted the Engie group unlawful State aid in connection with restructuring operations in Luxembourg by means of various tax rulings issued by the Luxembourg tax authorities confirming the tax treatment of convertible zero-interest coupon issued by two Luxembourg group subsidiaries ("**Subsidiaries**") to two other Luxembourg companies of the group's ("**Holdings**"). On the one hand, the borrowers took deductions from their profits equal to the accretions on the zero interest loan (i.e. variable component, equivalent to the profits made by the Subsidiaries) but on the other hand, no equivalent interest income inclusions were made at the level of the Holdings. The loan and accretions were later converted into equity and paid to the Holdings with the gains exempted under the participation exemption regime. According to the Commission, (i) the rulings endorsed an inconsistent treatment of the same amounts, both as debt and equity and (ii) a selective advantage was conferred as a result of the non-application of national provisions relating to abuse of law.

On 12 May 2021, the General Court fully endorsed the Commission's view and dismissed the actions brought by Engie and Luxembourg, who subsequently lodged an appeal before the CJEU.

In an **opinion** delivered on 4 May 2023 (Case C-454/21 P), AG Kokott suggests that the CJEU uphold the appeals and annul the Commission decision.

In her view, the Commission and the General Court proceeded on the basis of an incorrect reference framework. They erred in law in assuming a principle of correspondence, according to which a tax exemption for participation income at the level of the Holdings is contingent on taxation of the underlying profits at the level of the Subsidiaries. "*The EU institutions cannot use State aid law to shape some ideal tax law*".

Furthermore, AG Kokott pushes for a restricted standard of review in respect of tax law decisions taken by the tax authorities that is limited to a plausibility check: "*That will mean that not every error in the application of national tax law is evidence of a selective advantage. Thus, only the manifest derogation in favour of the taxpayer of a tax ruling (or tax assessment) from the reference framework encompassing the national tax law can constitute a selective advantage. In the absence of such a manifest derogation, the tax assessment may be unlawful, but a possible derogation from the reference framework does not by itself mean that it constitutes State aid within the meaning of Article 107 TFEU*". The same reasoning applies to the question of abuse of law, which according to AG Kokott, almost always presents difficulties of interpretation. Therefore, "*the standard of review for assessing the application of [abuse of law] rules for compliance with State aid law must certainly be reduced to a pure plausibility check*".

Finally, it is worth noting that AG Kokott recalled that tax rulings do not, per se, constitute illegal State aids: "*they are an important instrument for creating legal certainty [...]. Tax rulings are therefore unproblematic in terms of State aid law as long as they are open to all taxpayers (usually upon request) and – like any other tax assessment – are in line with the relevant tax law*".

The CJEU should rule in the coming months in both cases.

New double tax treaty concluded between Luxembourg and the United Kingdom

On 7 June 2022, Luxembourg and the United Kingdom signed a new double tax treaty (**Treaty**"). The treaty is a general modernisation of the treaty signed in 1967, to take account of Brexit and changes to international tax standards as a result of the OECD's work on base erosion and profit shifting ("**BEPS**").

A bill to approve the Treaty was tabled on 24 February 2023 with the first provisions of the Treaty coming into force on 1 January 2024.

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

Bill amending certain tax related procedural aspects

On 28 March 2023, the Luxembourg government submitted Bill **8186** proposing certain amendments to the General Tax Law (*Abgabenordnung* dated 22 May 1931) and introducing new procedural aspects applicable to taxpayers. The transfer pricing documentation requirements and procedure for requesting a bilateral or multilateral advance pricing agreement are also part of the proposed measures.