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LUXEMBOURG LAW

NEWSLETTER

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Performance fees: ESMA clarifications and mandatory CSSF declaration for UCITS and regulated AIFs

1. ESMA clarifications

On 28 May 2021 and 16 July 2021, new questions on performance fees were added to the ESMA Q&As on **UCITS** and on **AIFMs** , to complete the **Guidelines on performance fees in UCITS and certain types of AIFs** ("Guidelines") which ESMA had published on 5 December 2020 and in respect of which the CSSF confirmed, by way of its **Circular 20/764** , the integration of those Guidelines into its administrative and regulatory practices.

The clarifications provided by ESMA through its Q&A in May and July 2021 notably concern:

- the set-up of the reference period for performance fee models based on a benchmark index;
- the set-up of the reference period in case of a merger where the receiving UCITS/AIF is a newly established fund with no performance history and is in effect a continuation of the merging UCITS/AIF;
- the application of the Guidelines in the case of delegation of the portfolio management function to different delegated portfolio managers within the same sub-fund of a UCITS; and
- the crystallisation of performance fees in case of creation of a new sub-fund/share class in an existing umbrella UCITS or AIF in the course of its financial year or in case of creation of a new UCITS/AIF.

2. Mandatory CSSF declaration for UCITS and regulated AIFs

By means of a **press release** dated 22 September 2021, the CSSF announces a new requirement for a performance fee declaration to be made as from 30 September 2021 on eDesk by IFMs for the Luxembourg regulated UCITS and AIFs they manage.

The declaration is to be made by Investment Fund Managers ("IFM") with respect to UCITS and AIFs, including their sub-funds ("Funds") by means of completing a predefined form on eDesk. For the avoidance of any doubt, the form also needs to be completed for AIFs which are out of scope of the ESMA Guidelines on performance fees applicable to UCITS and certain types of AIFs in order to declare that they are out of scope.

The form will be available as from 30 September 2021 for all Funds whose financial year is ending between July 2021 and December 2021. As from January 2022, the form will be requested for Funds whose financial year is ending between January 2022 and June 2022. The deadline for submission of the initial declaration will be at the latest before the corresponding closing date of each fund as further specified in the IFM's performance fee eDesk dashboard.

The form must also be completed in respect of Funds and sub-funds that are not subject to a performance fee. Funds that have not yet been launched since having been approved by the CSSF, or that became inactive following the full redemption of their shares or units (and then await reactivation) shall also make the declaration.

After the initial declaration and in case of changes (such as for example introduction of a performance fee for the first time after that date or changes in performance fee models), the IFM will also be responsible to ensure that performance fee declarations shall be kept up to date. According to the press release, a specific update function will be made available under the new eDesk module to send electronically any such changes in parallel to the transmission of the modified prospectus.

The Performance Fee declaration as well as subsequent updates must be completed and submitted by an eDesk user linked to the IFM. Delegations will in principle be possible.

UCITS: liquidity risk management

In a **Press Release dated 22 June 2021**, the CSSF asks all UCITS Management Companies to conduct, by the end of 2021, a comprehensive assessment with regard to the compliance of their liquidity risk management set-ups in relation to the observations made by (i) ESMA in the **Public Statement** dated 24 March 2021 and (ii) the CSSF in the **Feedback Report** dated 22 June 2021 and to take, if applicable, the necessary corrective measures.

UCITS and AIFs: compliance by Luxembourg IFMs with Benchmark Regulation

On 29 July 2021, the CSSF published the results of its review of the Benchmark Regulation (BMR") compliance by Luxembourg IFMs (as benchmark users) (**CSSF Press Release**). The thematic review took place from July to November 2020 and included six authorised Luxembourg IFMs.

In its publication the CSSF reminds that (i) IFMs must implement controls to ensure that benchmarks used are included in the ESMA Register, (ii) they must have in place robust contingency plans to set out the actions that they would take in the event that a benchmark materially changes or ceases to be provided, including defining alternative benchmarks when the original benchmark is no longer available, and if the latter is not the case, an appropriate decision and justification by the management body/governing body of the IFM and (iii) the UCITS Prospectus must disclose (a) whether the benchmark is provided by an administrator included in the ESMA Register and (b) the benchmark contingency plans or indicate how investors can access them.

FAQ regarding the AML/CFT market entry form for investment funds and IFMs

On 21 June 2021, the CSSF published the **FAQ Market Entry Form** ("FAQ") regarding the completion of the AML/CFT market entry form ("MEF") via eDesk for UCIs and IFMs. The CSSF clarifies the events that shall trigger the submission of a MEF as well as the type of MEF which shall be submitted.

For the sake of clarity, the MEF is submitted at the umbrella level including up-to-date information on all sub-funds (and not one MEF per sub-fund).

Only the person responsible for the respect of compliance (RR") and the person responsible for compliance of the UCI ("RC") have the rights to initiate and submit the MEF. Others (delegates) may contribute to the completion of the MEF before its final submission to the CSSF via eDesk by the RR or the RC.

The FAQ also clarifies that certain documents normally attached to the MEF do not need to be re-included if they have been filed previously and they have not changed.

UCITS: treatment of breaches of UCITS global exposure limit

On 17 August 2021, the CSSF updated its **FAQ on the UCI Law** in order to add four new questions in a new Section 11 entitled "Treatment of breaches of the UCITS global exposure limit".

The new questions bring about certain clarifications in relation to passive and active breaches of VaR limits, notably:

- in what circumstances a breach can be considered as passive, the actions which the CSSF expects managers to take in case of passive breaches and confirmation that passive breaches do not need to be reported to the CSSF;
- the information that UCITS must communicate to the CSSF upon occurrence of an active breach of VaR limits.

UCITS and AIFs: Swing Pricing

On 17 August 2021, the CSSF has updated questions 6, 7 and 8 of their **FAQ concerning the swing pricing mechanism**.

The update clarifies the circumstances in which UCIs may increase the applied swing factor beyond the maximum swing factor disclosed in the prospectus.

Non-judicial liquidation of UCITS, UCIs, SIFs and SICARs

On 31 August 2021, the CSSF issued a **press release** providing that the liquidation period extension requests for UCIs, UCITS, SIFs and SICARs (not individual sub-funds thereof, see below) in non-judicial liquidation will no longer be required with effect from the date of such press release.

The CSSF will monitor the status of the liquidation via the semi-annual reports on the progress of the liquidation submitted by the liquidator who will be using a **form available on the CSSF website**.

The CSSF has however stated that the liquidation period extension requests for sub-funds of umbrella investment funds are still required after a nine-month deadline.

Cross-border distribution update

Regulation (EU) 2019/1156 ("CB Regulation") and Directive (UE) 2019/1160 ("CB Directive") on cross-border

Regulation (EU) 2019/1156 ("CB Regulation") and Directive (UE) 2019/1160 ("CB Directive") on cross-border distribution became applicable on 2 August 2021. On the same date, ESMA published the **Guidelines on marketing communications under the CB Regulation** ("Marketing Communications Guidelines"). The CB Directive was implemented in Luxembourg by means of the **Law of 21 July 2021**.

The CB Directive notably includes:

- a pre-marketing definition for AIFMs.
- a de-notification process for marketing of units/shares of UCITS and AIFs. In this context the CSSF has published a Circular on the process of de-notification of Luxembourg-based UCITS (**Circular CSSF 21/778**) which updates **Circular CSSF 11/509** on the notification procedures to be followed by a UCITS;
- new facilities to be made available to UCITS/AIF retail investors;
- new requirements in case of changes to information contained in the marketing notification of UCITS. In this context, the CSSF has published on 10 August 2021 a **FAQ on the cross-border distribution of funds notifications procedures**.

The CB Regulation notably provides that all UCITS/AIFs marketing communications addressed to investors must:

- be identifiable as such;
- describe the risks and rewards of purchasing units or shares of an AIF or units of a UCITS in an equally prominent manner;
- include fair, clear and not misleading information.

The Marketing Communication Guidelines determine the detailed format and content of all marketing communications addressed to investors for UCITS and AIFs, including when they are set up as EuVECAs, EuSEFs, ELTIFs and MMFs.

They will become applicable from 2 February 2022 and notably include:

- a list of documents that may be considered as marketing communications and a list of documents that should not be considered as marketing communications;
- guidelines on the identification as such of marketing communications;
- guidelines on the description of risks and rewards in an equally prominent manner;
- guidelines on the fair, clear and not misleading character of marketing communications, with clarification on the information to be provided on costs, past performance and expected future performance, and on sustainability-related aspects.

SFDR/Sustainable Finance update

1. Postponement of Level 2 SFDR/Taxonomy related RTS

In a **letter dated 8 July 2021**, the EU Commission indicated that it will defer the application date of the SFDR level 2 Regulatory Technical Standards (“**RTS**”) by six months from 1 January 2022 to 1 July 2022.

One of the reasons of the delay is the fact that the current draft SFDR level 2 RTS needs to be amended in order to include additional requirements in relation to activities that contribute to/promote climate change mitigation and/or climate change adaptation as defined in the Taxonomy Regulation.

The EU Commission plans to bundle all SFDR/Taxonomy related level 2 RTS into one single delegated act that it will submit to the EU Parliament and the Council for approval in the coming weeks.

2. Publication of Taxonomy related delegated acts

Also in relation to the Taxonomy Regulation:

- The delegated act which specifies the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to (i) climate change mitigation or (ii) climate change adaptation and for determining whether that economic activity causes no significant harm to any of the other environmental objectives, was adopted on 4 June 2021 (**Climate Delegated Act** and its **Annex 1** and **Annex 2**).
- Article 8(1) Taxonomy Regulation provides that certain large undertakings that are required to publish non-financial information under the the Non-Financial Reporting Directive (“**NFRD**”) should disclose information to the public on how and to what extent their activities are associated with environmentally sustainable economic activities, as defined under the EU Taxonomy legislation. On 6 July 2021, the **delegated act** on the information to be disclosed was adopted.

3. EU Commission FAQ on the application of SFDR

At the end July 2021, the EU Commission published an **FAQ on the application on SFDR** which includes some answers to the priority questions raised by the ESAs in January 2021. The answers provide clarification on:

- the application of SFDR to registered AIFMs and to non-EU AIFMs;
- the meaning of "promotion" in the context of financial products promoting environmental or social characteristics (Article 8 of SFDR);
- clarifications as regards financial products with a sustainable investment objective (Article 9 SFDR);
- the application of SFDR product rules to portfolios managed on a discretionary basis and dedicated funds.

4. Amendment of UCITS, AIFM and MiFID level 2 measures to integrate sustainability risks

On 2 August 2021, the **delegated acts amending UCITS, AIFM and MiFID level 2 measures** to integrate sustainability risks, factors and preferences were published in the OJEU.

The objective is to ensure that financial firms, e.g. advisers, asset managers (MiFID firms / AIFMs / UCITS management companies) include sustainability risks and factors in their procedures. The existing MiFID II suitability assessment is also completed with questions on clients’ sustainability preferences.

The amendments to UCITS, AIFMs and MiFID II sustainability preferences will become applicable in August

2022 and the amendments to MiFID II product governance rules start to apply in November 2022.

5. A new phase in the EU's sustainable finance strategy

On 6 July 2021, the Commission published its new **Strategy for Financing the Transition to a Sustainable Economy** ("New Strategy") , which seeks to further implement its 2018 action plan for sustainable finance (as part of the European Green Deal).

The New Strategy includes six specific action plans within the four main policy areas of which the following two may be of particular interest for the asset management industry:

- Proposal for minimum sustainability criteria, or a combination of criteria, for financial products in scope of Article 8 SFDR in order to guarantee minimum sustainability performance of such products. It should be noted that the Commission does not provide any further details on what these minimum sustainability criteria would consist of nor by when it would seek to implement this.
- Consideration of the merits of further changes to enable financial markets participants and financial advisers to systematically consider the positive and negative sustainability impacts of their investment decisions and advices. This would concern both AIFMs and UCITS management companies and would in essence impose the double materiality requirement on them which is not currently foreseen by SFDR.

The Commission also announced its proposal for a **Regulation on European green bond standards**.

PRIIPS: postponement of the UCITS exemption

In accordance with Article 32 (1) of the **PRIIPS Regulation**, IFMs and persons advising on, or selling, units of UCITS and non-UCITS which issue a UCITS KIID currently benefit from a transitional arrangement exempting them from complying with the PRIIPS Regulation ("UCITS Exemption") until 31 December 2021. On 15 July 2021, the EU Commission published **a Proposal for a Regulation amending the PRIIPs Regulation**, which aims to postpone the end of the UCITS Exemption to 30 June 2022. It is expected that the Regulation will become effective before year end.

CSSF implementation of ESMA guidelines on cloud outsourcing

On 12 July 2021, the Luxembourg regulator of the financial sector, the CSSF, published its **Circular 21/777** implementing the **ESMA' guidelines on outsourcing to cloud service providers** (ESMA50-164-4285, "ESMA Guidelines").

The CSSF considers that CSSF Circular 17/654 on cloud outsourcing, as amended (the "Cloud Circular") (applicable inter alia to credit institutions, investment firms, professionals of the financial sector and investment fund managers) and its current regulatory practice are already in line with the substance requirements of the ESMA Guidelines.

The CSSF, however, extends the scope of the Cloud Circular to align it with the ESMA Guidelines by including the following financial market professionals in the scope of the Cloud Circular as of 31 July 2021 ("New Entities"):

- depositaries of AIFs (under Article 21, paragraph 3 of the AIFMD)
- UCITS, depositaries of UCITS (under Article 2, paragraph 1, a) of the UCITS Directive) and investment companies that have not designated a management company authorised pursuant to the UCITS Directive
- as well as other professionals such as central counterparties, data reporting services providers, market operators of trading venues, central securities depositories, administrators of critical benchmarks.

For new cloud outsourcing arrangements (entered into, renewed or amended on or after 31 July 2021), the New Entities will have to comply with the provisions of the Cloud Circular. The New Entities will have until 31 December 2022 to revisit their existing cloud outsourcing arrangements for compliance with the Cloud Circular.

CSSF Circular 21/777 does not require entities already in scope of the Cloud Circular to take specific action with regards the ESMA Guidelines.

The CSSF does not take the opportunity to comment on points such as the definition of cloud computing and critical or important functions, the initial due diligence and sub-outsourcing requirements etc. on which the Cloud Circular seems to diverge from the ESMA Guidelines.

Updated CSSF FAQ on AIFMs: use of US GAAP

On 30 June 2021, the CSSF updated its FAQ on the Luxembourg law of 12 July 2013 on alternative investment fund managers ("**AIFM Law**") to state that Section 14, L2 of the FAQ with regard to the accounting standards which are accepted under Article 20(3) of the AIFM Law for preparing the accounting information in the annual report of an AIF managed by an authorised AIFM established in Luxembourg, is no longer applicable. Further to an update of 17 January 2021, this Section had provided that Lux. GAAP and IFRS were the sole accounting standards accepted under Article 20(3) of the AIFM Law.

The CSSF took into consideration inter alia the Luxembourg Bill 7737 (now the law of 21 July 2021), which now explicitly permits AIFs under the form of special limited partnership (SCSp) to use Lux. GAAP, IFRS and other accounting standards from certain third countries (such as U.S. GAAP) to draw up the accounting information contained in their annual report.

We consider that this clarification will provide added regulatory certainty to a number of AIFMs whilst confirming the practice of a number of industry players over the last years.

Administrative law

Right of access to documents on the exercise of an administrative activity

The Law of 14 September 2018 on a transparent and open administration ("**Law**"), gives any person the right to obtain access to a document held by the administration provided that the requested document relates to the exercise of an administrative activity. However, the Law does not define the notion of "administrative activity".

The dispute between the State, the municipality of Bissen and Google on the one hand, and the Ecological Movement on the other hand, allowed the Administrative Court to clarify this notion and the scope of application of the Law.

In this case, the State, the municipality of Bissen and Google had concluded a memorandum of understanding relating to the establishment of a data centre in Bissen. The Ecological Movement had requested the communication of the memorandum from the State and the municipality, then before the Commission on Access to Documents.

This communication having been refused, the Ecological Movement challenged this refusal before the administrative tribunal.

By a judgment of 9 November 2020, the administrative tribunal rejected the request of the Ecological Movement, which appealed this judgment.

By a decision of 6 April 2021, the Administrative Court held that:

"The administrative activity does not have an end in itself but is called to serve the general interest. (...)

In this respect, it is a public service provided, not, in principle, by private actors, but by public entities.

This gives rise to the notion of public service, which underlies the administrative activity, which can therefore be validly circumscribed by the term public service mission. It follows that the notion of "documents relating to the exercise of an administrative activity" can be circumscribed by all the documents for which there is a sufficient link with the public service mission of the entity referred to in the Law that produces or receives them. "

The Court concludes that the State and the municipality did not act in the context of the memorandum as public bodies carrying out an administrative activity relating to a public service, and consequently, that the Ecological Movement does not have a right of access to this memorandum.

Corporate, banking and finance

New prudential regime for investment firms

Investment firms offer a variety of services and vary by their size, business model, risk profile and complexity. Considering that their activities and risk profiles were not always properly captured by the prudential framework resulting from the CRR/CRD IV regime, applicable to both credit institutions and investment firms, a new prudential regime comprising the Investment Firms Directive 2019/2034 ("**IFD**") and the Investment Firms Regulation 2019/2033 ("**IFR**") was developed at EU level. The new EU regime became effective on 26 June 2021.

What's new? The Luxembourg Law of 21 July 2021 transposes IFD and implements certain operational aspects of IFR ("**Law**" – available in French). It brings significant amendments to the Law of 5 April 1993 on the financial sector, as amended ("**LFS**").

Why is it important? A number of changes brought to the LFS merit discussion.

The most important change introduced is a **new classification of investments firms**, generally referred to by way of the following 4 classes:

- **Class 1** are investment firms considered as credit institutions in their own right and will continue to be subject to the CRR/CRD IV regime;

- **Class 1b** are investment firms which, considering their size and importance or their membership of a group, will remain subject to several CRR/CRD IV obligations.

Credit institutions and class 1 and class 1b investment firms are henceforth categorised as "CRR institutions".

- **Class 2** represents the traditional investment firms subject to the IFR and the IFD;

- **Class 3** concerns small and non-interconnected investment firms, which benefit from certain exemptions from the IFR/IFD framework in view of the proportionality principle.

Class 2 and class 3 investment firms will be referred to as "IFR investment firms". The new categorisation notably affects their capital requirements (application of new risk parameters defined by IFR, the so-called "K factors"), prudential supervision, governance and remuneration policies.

In addition, the Law brings about **a modernisation of the status of certain professionals of the financial sector** ("**PFS**"), including investment firms.

Henceforth, for investment firms, the existing Luxembourgish designations and provisions are abandoned. Investment activities and services carried out must be those listed in Section A of Annex 1 of Directive 2014/64/EU ("**MiFID II**"). Access to these activities and services is reserved to legal persons only. Existing authorisations to exercise investment services or activities remain valid but entities concerned have to regularise their situation in accordance with the provisions of the Law.

Furthermore, the Law introduces additional changes for PFS. The category "*persons carrying out cash exchange operations*" is abolished. Henceforth, only credit institutions will be allowed to carry out foreign currency cash purchase and sale operations. In addition, the categories of primary IT systems operators and secondary IT systems and communications networks operators of the financial sector are merged. A new category of operators of IT systems and communication networks of the financial sector is introduced.

Finally, the Law also **transposes requirements of Directive (EU) 2021/338**, which notably brought about certain changes to the MiFID II regime to facilitate the recovery from the pandemic, including the requirement that all MiFID client communications must be provided in electronic form although retail clients can still request the communication to be provided on paper. More details on this Directive can be found in the article on our website under this link.

What does it mean? Investment firms need to assess the impact of the IFR/IFD regime and determine in which class of investment firm they will be categorised, which will determine the changes they need to implement. A new authorisation comparable to that of a credit institution will be required for the largest CRR investment firms. Further guidance of the CSSF is available under this **link**. The CSSF specifies notably that investment firms must file with the Trade and Companies Register (RCS) an updated version of their articles of incorporation, reflecting their amended corporate object in line with the new provisions of the LFS. A coordinated version of the LFS is available on the CSSF's website under this **link**.

New approval regime for Luxembourg financial holding companies

What's new? The Law of 20 May 2021 ("**Law**" – available in French) transposes the requirement introduced by Directive (EU) 2019/878 ("**CRD5**") that financial holding companies and mixed financial holding companies (together "**(M)FHCs**") must be approved by their consolidating supervisor.

Parent (M)FHCs in a Member State, EU parent (M)FHCs and other certain parent (M)FHCs established in Member States participating in the Single Supervisory Mechanism and which are part of a significant or less significant supervised group are subject to approval (or exemption) by the European Central Bank ("**ECB**") or the national competent authority, whichever is the consolidating supervisor.

In Luxembourg, the competent authority is the *Commission de Surveillance du Secteur Financier* (**CSSF**). The Law adds a new Chapter to the Law of 5 April 1993 on the Financial Sector ("**LFS**"), specifying in which cases and under which conditions approval must be sought as well as in which cases approval is not required.

Why is it important? When (M)FHCs are parent undertakings of a supervised group, prudential requirements must be applied throughout the supervised group based on the consolidated situation of these holding companies. Since the (credit) institution controlled by these holding companies cannot always ensure compliance with prudential requirements on a consolidated basis throughout the supervised group, the specific approval procedure and direct supervisory powers over (M)FHCs is introduced. Hence, (M)FHCs can be held directly responsible for ensuring compliance with consolidated prudential requirements without being subject to additional prudential requirements on an individual basis.

What does it mean? If the CSSF or the ECB considers that an entity qualifies as a financial holding company or mixed financial holding company, such entity must formally apply for either approval or exemption. Transitional arrangements require (M)FHCs in existence on 27 June 2019 to apply for approval by 28 June 2021.

Seeking approval requires the submission to the CSSF or the ECB of a set of information regarding the structural and internal organisation, the management and compliance with criteria set out in the LFS. In addition, (M)FHCs have to comply with various conditions mainly related to the internal arrangement and distribution of tasks within the group and the structural organisation of the group.

In exceptional circumstances, approval may not be required depending on the activity of (M)FHCs and their role within the group. An exemption must then be requested.

If the CSSF or the ECB considers that the conditions required to benefit from an exemption are not met, the (M)FHCs has to seek approval. Failure to apply for approval or exemption may result in the imposition of monitoring and administrative sanctions or other administrative measures.

Amended rules for the authorisation of qualifying holdings

The Law of 1 June 2021 which entered into force on the same date introduced a new subparagraph to

The Law of 1 June 2021, which entered into force on the same date, introduced a new subparagraph to Article 57 of the Law of 5 April 1993 on the financial sector.

Article 57 provides for an obligation for credit institutions and professionals of the financial sector to obtain the authorisation from the *Commission de Surveillance du Secteur Financier* (CSSF) before acquiring a qualifying holding in another company (i.e. holding of more than 10% of the capital/voting rights).

The new subparagraph introduces an exemption to such authorisation requirement if the qualifying holding does not exceed EUR 40 million and 5 per cent of a CRR institution's own funds. These conditions are cumulative.

With a view to stimulating the stabilisation and recovery of the economy, the amendment thus facilitates capital injections in companies by credit institutions and CRR investment firms.

Sustainable finance update

EU institutions continue to shape the EU regulatory environment in the ESG field. Through the so-called "**April Package**" published on 21 April 2021, significant progress was made on standard-setting and reporting on sustainability related disclosures through the adoption of a number of draft legal instruments, some of which have been finally adopted since, affecting EU corporates and financial sector players.

Read more **here** on the EU Taxonomy Climate Delegated Act, the proposed Corporate Sustainability Reporting Directive, and the amending delegated acts on sustainability preferences, fiduciary duties, and product governance.

Recent news on the postponed applicability of the SFDR RTS, the Commission's FAQ on the applicability of SFDR, and its New Sustainable Finance Strategy can be found in the SFDR/Sustainable Finance update of the Asset Management and investment funds section of this Newsletter.

No financial assistance criminal offence for S.à r.ls

The Law of 6 August 2021 (**Law**"), which entered into force on 16 August 2021, removes uncertainty as to the non-application of a specific criminal law provision of the Luxembourg law of 10 August 1915 on commercial companies to financial assistance for S.à r.ls on the grounds that for this type of company, where shares (*parts sociales*) are not freely transferable, a more flexible regime should apply.

For more information on the rationale and impact of the change, please read **here**.

Modernisation of the Law of 22 March 2004 on securitisation

A draft Bill of law 7825 ("**Bill**") amending the Law of 22 March 2004 on securitisation ("**Securitisation Law**") and certain other laws was submitted to the Luxembourg Parliament on 21 May 2021 by the Luxembourg Minister of Finance. The Bill provides for general modernisation of the Securitisation Law, and aims to strengthen the position of the Luxembourg market as a leading European securitisation place.

Overview of the key changes:

Additional corporate forms

Special limited partnerships (*sociétés en commandite spéciale*), simple limited partnerships (*sociétés en commandite simple*), general corporate partnerships (*sociétés en nom collectif*) and simplified joint stock company (*sociétés par actions simplifiée*) are now available as corporate forms for securitisation companies.

New financing methods

The current Securitisation Law requires securitisation vehicles to finance their acquisition of risks by the issuance of securities. The Bill extends the instruments that can be issued to include financial instruments other than securities (such as warrants, futures, options etc.) and it now allows securitisation vehicles to be fully financed by credit facilities that no longer need to be either ancillary to the issuance of securities, for warehousing purposes or for short-term liquidity purposes.

Active management

The Bill allows securitisation vehicles to actively manage a portfolio of assets consisting of debt securities or loans, to the extent that they do not issue financial instruments or receive financing from the public (please see below for the definition of "public").

Restrictions on security interests and guarantees are lifted

The Bill provides the possibility for securitisation vehicles to grant security interests in broader fashion by requiring only that such security be granted in the context of a securitisation transaction.

Legal subordination

The Bill provides for a comprehensive set of rules defining subordination of the financial instruments issued by securitisation vehicles.

Better investor protection

The Bill grants better investor protection on a compartment-by-compartment basis by allowing the constitutive documents of securitisation undertakings to organise (i) shareholder votes on the approval of annual accounts, (ii) distributions of profits and reserves and (ii) allocations to the legal reserve per compartment, rather than at the level of the whole securitisation undertaking (aggregating all compartments). These provisions clarify uncertainties previously existing on these topics.

Registration of Securitisation funds

Securitisation funds are now required to be registered with the *Registre de Commerce et des Sociétés* ("**RCS**"), and, as a result, will have an RCS registration number.

Regulated securitisation undertakings

The Bill incorporates the guidance provided by the CSSF on the definitions of issuance of securities "to the public" and "on a continuous basis" to the Securitisation Law. As a result, and in line with the FAQs of the CSSF on securitisation, issuance of securities are on a continuous basis if more than three issuances of securities are carried out by a securitisation undertaking (taking into account all its compartments, not at compartment level) in the same financial period. An issuance is to the public if it is not targeted at professional clients, if the securities are in denominations below EUR 100,000 and the issuance is not done under a private placement.

EU law, competition and antitrust

The European Climate Law and the "Fit for 55" Package

Regulation (EU) 2021/1119 or the "European Climate Law", a landmark text writing into law the EU's commitment to reaching climate neutrality by 2050, entered into force on 29 July 2021.

In addition to the 2050 climate neutrality objective, the European Climate Law contains a commitment to negative emissions after 2050 and sets a binding EU climate target of a reduction of net greenhouse gas emissions (emissions after deduction of removals) of at least 55% by 2030 compared to 1990 levels. It also provides for the establishment of the European Scientific Advisory Board on Climate Change, which will provide independent scientific advice.

Furthermore, in July 2021, the European Commission launched the first tranche of its "Fit for 55%" package that will support the EU's climate policy framework and put it on track for a 55% reduction in carbon emissions by 2030, and net-zero emissions by 2050 in line with the European Climate Law. The interconnected proposals, including revisions to existing laws and new proposals, cover areas of climate, land use, energy, transport and taxation. An overview of the different proposals can be found in the Commission's press release of 14 July 2021 under this **link**.

Confirmation of rejection of interim measures against Amazon

In a **judgment** of 24 Mars 2021, the Luxembourg Administrative Tribunal confirmed the **decision** of the President of the Competition Council rejecting a request for interim measures against Amazon Services Europe S.à r.l. ("**Amazon**") for an alleged abuse of its dominant position.

The applicant, a seller of digital photography devices, accused Amazon of committing several unfair practices in the market for online platform services. In particular, the applicant claimed that Amazon had unilaterally closed his seller account and, consequently, had deprived him of any possibility of distributing his products. The request for interim measures accompanying the complaint was aimed notably at restoring this seller account.

The Tribunal held that the applicant had not sufficiently proven a serious and irreparable damage caused to him by the alleged unfair practices. In particular, the applicant did not demonstrate how the abrupt termination of a commercial relationship by Amazon had affected his turnover and how it had deprived him of the possibility of distributing his products on other online platforms or in physical stores.

The judgment is without prejudice to the final judgment on the substance of the application.

Fighting bid rigging in public procurement

The Competition Council ("**Council**") has launched an awareness campaign to encourage contracting authorities, companies and individuals to report bid rigging in public procurement processes. To this extent, it has published several guides (in French) on its **website**, highlighting different competition law issues that might be identified in this context:

- The guide "*The prohibition of bid rigging in public procurement*" describes different forms of bid rigging, such as:

    - bid rotation: occurring when bidding companies take turns at being the winning bidder;
    - bid suppression: occurring when a bidder stays out of a public procurement process so that another party is guaranteed to win the process; and
    - complementary or cover bidding: when bidding companies intentionally submit uncompetitive bids as a way of guaranteeing that their bid will not be selected, thereby ensuring that another, preselected bidder, will be chosen.

- The guide "*Joint tenders in the context of calls for tenders*" presents several criteria for compliance of joint tenders with competition law. In particular, joint tenders may be authorised if they benefit consumers and do not lead to the elimination of competition.

If the Council finds anticompetitive practices, the public procurement process may be annulled. Moreover, the companies involved may be ordered to pay a fine or compensation for the damages; they may also be excluded from public procurement procedures for a certain period. Finally, according to the Council, criminal sanctions apply to violations by violence or threat to the liberty of tenders.

The Council also underlines that companies have the possibility of benefiting from the leniency programme by reporting anti-competitive behaviour in exchange for full or partial immunity from fines.

Closure of investigation of alleged anti-competitive practices by Volkswagen

By a **decision** of 8 June 2021, the Competition Council ("**Council**") closed its investigation conducted since 2016 against certain companies belonging to the Volkswagen Group. There will be no further legal proceedings in the matter.

The investigation resulted from several complaints addressed to the Council by Luxembourg residents about their difficulties in purchasing cars distributed by the Volkswagen Group in Germany, via online trading platforms.

Following its investigation, the Council did not find any evidence to qualify the Volkswagen Group's practices as anticompetitive. In particular, the Council affirmed that the selective distribution system established by the Volkswagen Group is compatible with competition law. Moreover, according to the Council, the rules established within the group regarding bonuses to distributors did not have the object or effect of limiting the sales of cars to buyers residing in countries other than Germany.

Employment and pensions law

CSSF Teleworking Circular 21/769

On 9 April 2021 the CSSF published a new Circular 21/769 on "Governance and security requirements for supervised entities to perform tasks or activities through Telework" ("**Telework Circular**").

The Telework Circular does not apply under pandemic situations (such as Covid-19 pandemic) or in case of other exceptional circumstances having a comparable impact on the general working conditions.

Under the Telework Circular, all entities supervised by the CSSF and the branches of the Luxembourg regulated entities located abroad ("**Supervised Entity**") will be required to have sufficient staff members at the premises to comply with central administration requirements. Notably, the amount of normal working time that individual staff members are allowed to telework, shall be limited. At least one authorised manager/conducting officer shall be on-site at the head office at all times and key functions shall be sufficiently represented every day at the premises.

CSSF approval will not be required for teleworking: it will be the responsibility of the Supervised Entities to assess whether its internal rules comply with the requirements of the Telework Circular (taking into account its size and organisation and the nature, scale and complexity of its activities).

The Supervised Entities shall identify all risks resulting from telework, as well as monitor and mitigate them. The internal controls functions (i.e. compliance and internal audit) shall also consider the telework situation in their missions.

The Supervised Entities will be required to establish a telework policy and to review and update existing policies and procedures to take into account telework. The practical implementation of the telework policy shall also be monitored and documented notably with a record disclosing the identity and function of staff allowed to telework. Staff of the Regulated Entities shall be trained with respect to teleworking. Furthermore, specific IT requirements mentioned in the Telework Circular must also be complied with by Supervised Entities in the context of telework (e.g. encryption).

Finally, additional requirements also apply from a labour law perspective notably further to the new agreement on telework signed on 20 October 2020 between the social partners LCGB, OGB-L and UEL, which was declared a general obligation by Grand Ducal Regulation of 22 January 2021 and which is now binding for all companies in Luxembourg.

The Telework Circular was due to apply from 30 September 2021, however, given that the coronavirus is still active, the CSSF has indicated that it will only apply as from the end of the pandemic, in accordance with Article 66 of the Telework Circular.

Stand-by period: qualification as working or rest time?

By two decisions in cases (i) C-344/19 D.J. v Radiotelevizija Slovenija and (ii) C-580/19 RJ v Stadt Offenbach am Main of 9 March 2021, the Court of Justice of the European Union ("**CJEU**") ruled that on-call time may only qualify as 'working time' if there are significant constraints on how the workers can use their free time during these stand-by periods.

- The first case concerned a technician who was responsible for ensuring, for several consecutive days, the operation of television transmission centres situated in a hardly accessible place in the mountains of Slovenia. During this stand-by period, the worker was not obliged to remain in the centre, but he had to be contactable by telephone and able to return to the centre within one hour, if necessary. However, given the location of the centre the worker was, in fact, obliged to remain at the place of work, without any possible leisure.
- The second case concerned a firefighter who had to execute periods of stand-by time according to a stand-by system. During those periods, he was not required to be present at a place determined by his employer but in the event of an alert, the worker had to be contactable and able to reach the city

boundaries within 20 minutes with his uniform and the service vehicle made available to him.

Both claimants considered that, due to the restrictions involved, their periods of stand-by time had to be recognised as 'working time' and remunerated accordingly, irrespective of whether or not they had carried out any specific work during these periods.

As a preliminary matter, the CJUE recalled that stand-by time qualifies as either working or rest time within the meaning of Directive 2003/88 as those concepts are exclusive to each other.

The CJEU further clarified the determining criteria for a period of stand-by time or on-call time to qualify as 'working time'. This is the case when it results from an overall assessment of all the circumstances of the case that the constraints imposed on workers objectively and significantly affect their ability to manage their free time during the stand-by period. The CJEU underlined that national courts shall carry out an overall assessment of the reasonableness of the time limit within which the worker is required to resume his or her professional activities during his on-call duties.

In these two decisions, the CJEU also recalled that the classification of 'working time' or 'rest period' has no effect on the system of remuneration set up by the employer, subject to national legislation. The rules on workers' health and safety also remain unaffected. The employer may not therefore introduce periods of stand-by time which may breach the health and safety safeguards of workers on the grounds that these periods are classified as 'rest periods'.

New collective bargaining agreements 2021/2023 for the Banking and Insurance sector

After six months of negotiations, the trade unions along with the Luxembourg Bankers Association (ABBL) and Luxembourg's Insurance Companies Association (ACA) have reached two collective agreements applicable to the banking and the insurance sectors from 1 January 2021 until 31 December 2023.

These agreements will govern the employment of some 50,000 employees in the banking and insurance sector in Luxembourg.

Among the highlights of the new collective agreements: the right to disconnect, the integration of the new collective agreement on teleworking and the right to social leave of at least 5 days per year.

Concerning the banking sector, the agreement provides for the payment of linear salary increases of a total envelope of 1% in 2022 and in 2023, the implementation of a re-evaluation of at least EUR 15 (index 100) in case of a change of group, and the payment of a monthly minimum of EUR 3 (index 100) for employees working from home.

Concerning, the insurance sector, employees will benefit from an increase of basic salary based on a guarantee of advancement over a period of 3 years, the continuation of a June bonus and an exceptional "Covid" bonus of EUR 500 gross payable in September 2021.

Right for employees to disconnect in Luxembourg

The increasing digitization of the modern era and the fast-pacing rhythms of companies are forcing employees to be more and more connected to their professional phones or computers outside their working hours. This constant rising demand, however, blurs the border between private and professional life by making employees reachable by phone, e-mail or instant messages at all times. This phenomenon raises the question as to whether a right to disconnect and cut the continuous link to work should be recognised for employees. A certain number of countries have chosen to clarify this right to disconnect through legislative initiatives.

In Luxembourg, the Labour Code does not expressly provide a right to disconnect for an employee. However, many provisions of the Labour Code have already set up safeguards, including in particular the rules applicable to working time and to health and safety at work.

In its decision dated 2 May 2019, the Luxembourg Court of Appeal formally recognised for the first time the employee's right to disconnect during paid leave. In that case, the Court of Appeal declared the termination of the employment contract with immediate effect for gross misconduct by the employee as being abusive. It has been considered that the employee's aggressive attitude refusing to assist the employer upon an urgent request while on paid leave could not justify such termination with immediate effect, the employee being entitled to a right to disconnect.

Alongside the above, a number of collective bargaining agreements ("**CBA**") have already adopted the principle of a right to disconnect, such as the CBA for employees of the University of Luxembourg concluded in September 2018, or more recently, the CBA for Luxembourg Post employees signed in December 2020, the CBA for employees of aid and care and the social sector signed in February 2021, as well as both CBAs for the bank and the insurance sectors agreed in June 2021.

In addition, the new collective agreement on telework, which was signed on 20 October 2020 between the social partners and was declared a general obligation by Grand Ducal Regulation as of 22 January 2021, provides that teleworking employees benefit from the same disconnection provisions as those applicable to the other employees.

Finally, on 30 April 2021 the Luxembourg Economic and Social Council (*Conseil économique et social*, "**CES**") issued an opinion on the right to disconnect. In this opinion, the CES suggests supplementing the legal provisions on occupational safety and health with a new Section 8 "Respect for the right to disconnect" and a new Article L. 312-9 of the Labour Code providing that, when employees use digital devices for their work, a dedicated scheme should be set up at company or sector level, ensuring that the right to disconnect outside of working hours is respected. This scheme should be adapted to the specific situation of the company or sector and should in particular set out practical arrangements and technical measures for disconnecting from digital devices, as well as specific compensation in the event of exceptions from the right to disconnect, and implementation of awareness and training measures regarding the new scheme.

Prior information and consultation of the staff delegation will be requested to implement such a scheme. Co-decision is also being considered in companies with at least 150 employees.

Finally, the proposed article introduces sanctions in the event of any breach of the obligations to implement a right for the employees to disconnect and in particular an administrative fine of between EUR 251 and 25,000 imposed by the Inspectorate of Mines and Labour ("**ITM**").

Further actions are expected by the Government in the coming months in its fight for the implementation of a legislative framework on the right for the employees to disconnect.

GDPR - Adequacy decisions for the UK

On 28 June 2021, the European Commission adopted two adequacy decisions for the United Kingdom ("**Adequacy Decisions**"); the first one concerning the continued free flow of personal data from the European Union ("**EU**") to the United Kingdom ("**UK**") under the General Data Protection Regulation 2016/679 ("**GDPR**") and the other one under the Law Enforcement Directive.

The Adequacy Decisions come just in time to continue the bridging mechanism applicable under the Trade and Cooperation Agreement between the EU and the UK, allowing transfers of personal data from the EU to the UK for a temporary period ending on 30 June 2021.

With the adequacy decision adopted under the GDPR, the Commission confirms that the UK offers an adequate level of protection for personal data. As a consequence, the continued free flow of personal data between the EU and UK is guaranteed at least until 27 June 2025, unless extended. This adequacy decision is the first of its kind having a sunset clause.

For more information, please read our previous **article** on the topic Draft adequacy decisions for the free flow of personal data from the EU to the UK.

GDPR compliance - New standard contractual clauses

On 4 June 2021, the European Commission adopted the following two sets of new standard contractual clauses in the context of the General Data Protection Regulation (Regulation 2016/679, "**GDPR**"):

- standard contractual clauses replacing the old standard contractual clauses providing appropriate safeguards within the meaning of Article 46(1) and (2)(c) of the GDPR for the transfer of personal data by a controller or processor (data exporter) to a controller or (sub-)processor whose processing is not subject to the GDPR (data importer);[1] and
- standard contractual clauses that can be used in contracts between controllers and processors who process personal data on behalf of the controller(s) for compliance with the requirements of Article 28(3) and (4) of the GDPR, regardless of whether there is a transfer or not;[2]

The main innovation in the standard contractual clauses for transfers of personal data to third countries reside in its modular structure giving the flexibility to cover various transfer scenarios within one single document, i.e. transfers from controller to controller, from controller to processor; from processor to processor and from processor to controller. The same set of standard contractual clauses equally covers the rights and obligations of controllers and processors with respect to the requirements in Article 28(3) and (4) of the GDPR.

These standard contractual clauses for transfers notably reflect some requirements deriving from the GDPR as interpreted in the light of the relatively recent developments on international transfers of personal data further to the outcome of the “Schrems II” case. Nevertheless, they do not remove the consequences of the

CJEU ruling and the need to assess the necessity to adopt supplemental measures as recommended by the European Data Protection Board (in a version adopted for public consultations). On the foregoing and the consequences of Schrems II in particular, please see our **article**.

The decisions adopting the standard contractual clauses entered into force on 27 June 2021.

Former standard contractual clauses will be repealed on 27 September 2021. Contracts concluded before that day that rely on former standard contractual clauses will remain valid for a period of 15 months ending on 27 December 2022, provided the processing operations that are the subject matter of the contract remain unchanged and that reliance on those clauses ensures that the transfer of personal data is subject to appropriate safeguards within the meaning of Article 46(1) of the GDPR.

> 1 See **Commission Implementing Decision 2021/915 of 4 June 2021 on standard contractual clauses between controllers and processors under Article 28(7) of Regulation 2016/679 and Article 29(7) of Regulation 2018/1725**.
> 2 See **Commission Implementing Decision 2021/914 of 4 June 2021 on standard contractual clauses for the transfer of personal data to third countries pursuant to Regulation 2016/679**.

First administrative fines imposed by the Luxembourg data protection supervisory authority

On 7 June 2021, the Luxembourg National Data Protection Commission (*Commission Nationale pour la Protection des Données* – "**CNPD**") published 18 decisions:

- in nine decisions, the CNPD found that controllers (Luxembourg-based companies) did not breach any of the provisions of the (EU) General Data Protection Regulation 2016/679 ("**GDPR**") and decided therefore to close the ongoing investigation;
- in six decisions, the CNPD issued a formal warning *(rappel à l'ordre)* or an injunction to comply *(injonction de se mettre en conformité)* to companies due to breaches of the GDPR (sometimes associated with a fine);
- finally, in six cases, the CNPD decided to impose administrative fines on the entities concerned due to more significant violations of the GDPR.

This is the very first set of administrative fines the CNPD has issued since the entry into force of the GDPR. These 18 decisions are the result of enquiries and audits led by the CNPD towards several companies that were selected according to various criteria such as:

- the size of the organisations,
- the sensitivity of the data processed and the associated risk for the data subject, and
- the sector of activity (e.g. the insurance sector)[1].

The CNPD noted that the entities subject to administrative fines either failed to comply with key principles of the GDPR, such as the principle of data minimisation, the principle of transparency or did not adequately put in place appropriate security measures or did not appoint a Data Protection Officer ("**DPO**") as is required by the GDPR under certain criteria. As a consequence of these breaches, the CNPD imposed administrative fines ranging from EUR 1,000 to EUR 18,000.

In one of the decisions, the CNPD reminded the importance of the DPO's involvement at the earliest possible stage in all data protection issues and the need to have necessary resources and time to carry out his/her data protection duties.

A decision rendered by the CNPD may be appealed before the administrative court within three months following its notification to the entity concerned.

All the decisions published by the CNPD can be consulted **here**. Please note that these decisions are anonymised.

> **1** National Data Protection Commission (*Commission Nationale pour la Protection des Données)* – Annual report p. 43.

Bill of Law 7847 transposing New Copyright Directive

On 24 June 2021, the Luxembourg Government, acting through the Ministry of the Economy, introduced a Bill of law 7847 aiming at transposing into Luxembourg law the Directive on copyright and related rights in the Digital Single Market[1] ("**New Copyright Directive**") adopted on 17 April 2019.

This bill of law follows a public consultation launched in February 2021 by the Luxembourg Government relying on a proposed draft legislative text and, in that respect, we note that the proposed text of the bill does not drastically deviate from the initial draft text of that public consultation.

As expected, the proposed bill contemplates modifying the Luxembourg Law of 18 April 2001 (as amended) on authors' rights in particular by adding:

- a new Article 56bis dealing with the protection of press publications concerning online uses, and,
- a new Article 70bis relating to the use of protected content by online content-sharing service providers.

The deadline set out in the New Copyright Directive for implementation into national laws being 7 June 2021, we would expect a certain swiftness in such a late legislative process.

For more information, please read our previous **article** on the topic related to the public consultation, as mentioned above, and our **article** dedicated to the adoption of the New Copyright Directive.

> **1** Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

CJEU ruling on the competence of a non-lead supervisory authority to bring legal proceedings

In a **judgment** dated 15 June 2021 further to a request for preliminary ruling, the Court of Justice of the European Union ("**CJEU**") confirmed that a national supervisory authority concerned ("**SAC**")[1] , which is not the lead supervisory authority ("**LSA**")[2] , may exercise its power to initiate or engage in legal proceedings in relation to an instance of cross-border data processing[3] that would violate the GDPR. That statement applies notwithstanding whether or not the controller has an establishment on the territory of the SAC and whether the SAC acts against the main establishment of the controller on its territory or against another establishment.

However, any such power of the SAC may only be exercised in compliance with the procedure of the so-called "one-stop-shop" mechanism, under which the competence of the LSA is the rule and the competence of the SAC is the exception.

The "one-stop-shop" mechanism was set to ensure a consistent and homogeneous application of the GDPR through the European Union and avoid the risk that various supervisory authorities take different approaches with regard to cross-border processing. In the event of a cross-border processing, the LSA and the SAC must cooperate, including sharing information and providing mutual assistance in order to reach a consensus and issue a single decision in relation to that cross-border processing.

In this context, the LSA cannot ignore the views of the other supervisory authorities: any relevant and reasoned objection, if not followed by the LSA, has the effect of blocking the adoption of the draft decision, which must be submitted to the European Data Protection Board ("**EDPB**") to obtain a binding decision.

A first exception to the competence of the LSA to bring legal proceedings is under Article 56(2) of the GDPR providing that an SAC is competent where the subject matter relates only to an establishment in its Member State or substantially affects data subjects only in its Member State. However, the SAC will be competent only where the LSA decides not to handle the case (Article 56(3) of the GDPR).

A second exception is the urgent need to act: the SAC may adopt provisional measures on its territory for a maximum period of three months. Final measures may be adopted by requesting an urgent opinion or binding decision from the EDPB. In addition, if the LSA does not provide the information requested by the SAC in the context of the mutual assistance procedure, the SAC may adopt provisional measures for which the urgent need to act is presumed and for which a binding decision from the EDPB is required.

As a third exception, in the case at hand, the CJEU restated that the "one-stop shop" mechanism and the competence of the LSA as a rule does not apply where the GDPR itself does not apply. In particular, the CJEU notes that following **Opinion 5/2019** of the EDPB, storing and obtaining access to personal data by means of cookies fall within the scope of Directive 2002/58/EC[4] and does not result in the application of the "one-stop shop" mechanism. "On the other hand, the court says, all earlier processing operations, and all subsequent processing activities, with respect to that personal data, by means of other technologies, do fall within the scope of Regulation 2016/679, and consequently within the scope of the 'one-stop shop' mechanism."

1 i.e. a supervisory authority which (i) has received a complaint or which is established in a Member State where (ii) the controller or processor is also established, or (iii) the data subjects are substantially affected or likely to be substantially affected by the processing.
2 i.e. the supervisory authority of the main establishment or of the single establishment of the controller or processor.
3 i.e. any processing taking place in the context of the activities of establishments in more than one Member State of a controller or processor or in the context of the activities of its single establishment in the Union, but which substantially affects or is likely to substantially affect data subjects in more than one Member State.
4 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) as amended by Directive 2006/24/EC and Directive 2009/136/EC.

Tax

Parent-subsidiary exemption: account 115 challenged

In a judgement dated 11 May 2021 (No. **42417**), the Luxembourg Lower Administrative Court (*Tribunal Administratif*) challenges the qualification of contribution in account 115 for the purposes of the application of the Luxembourg parent-subsidiary regime.

Background

In the matter at hand, in 2014 the taxpayer, a Luxembourg resident company ("**LuxCo**") acquired a shareholding in another Luxembourg resident company ("**Subsidiary**"). The same day, further to the acquisition, LuxCo made a so-called "account 115 contribution" to its Subsidiary.

An equity contribution by means of an "account 115 contribution" involves a contribution of value in the special equity reserve account of the company as reflected in the Luxembourg standard chart of accounts ("**LSCA**") under sub-account 115 named "capital contribution without issue of shares". The absence of share issuance removes the requirement that otherwise applies to making such transactions by way of notarial deed.

Subsequently, LuxCo received a dividend distribution from its Subsidiary for which it paid withholding tax of15%. LuxCo then claimed a refund of the withholding tax based on Article 147 of the Luxembourg income tax law ("**LITL**") considering that all the conditions required to benefit from the parent-subsidiary regime were met.

In this respect, it is recalled that the minimum shareholding that qualifies for the dividend withholding tax exemption under the Luxembourg parent-subsidiary regime is either a 10% participation or, alternatively, an acquisition price of a minimum of €1,200,000. In the case at hand, although LuxCo only held a shareholding of 4,5% in the Subsidiary, it claimed that the said shareholding had been acquired for more than €1,200,000. In order to determine the acquisition price, LuxCo took into account the purchase price but also the amount contributed in account 115.

The Luxembourg tax authorities did not grant the request on the grounds that the account 115 contribution cannot be assimilated to an equity participation, running contrary to the LSCA classification following which the account 115 is a sub-account of the 111 account named "share premium and similar premium". They pointed out, based on the Luxembourg commercial company law that, unlike a share premium, the account 115 contribution is an informal contribution that does not involve an issuance of shares.

According to Luxco, however, neither contributions were remunerated by new shares, but both do increase the value of the existing shares. Furthermore, LuxCo also pointed out that:

- it is necessary to distinguish between the two alternative conditions that must be met in order to benefit from the Luxembourg parent-subsidiary regime: the minimum 10% shareholding condition is to be analysed from the capital of the subsidiary while the minimum acquisition value of the participation is to be analysed having regard to the accounts of the parent company;
- hidden capital contributions have always been treated as equity for tax purposes by the Luxembourg courts based on an economic analysis of the case so that a capital contribution which is not even hidden but only informal should consistently follow the same treatment;
- in order to determine the minimum acquisition value of the participation for the purposes of Article 147 LITL, reference should be made to the "effective acquisition price" of the participation within the meaning of Article 25 of the LITL, which would be obtained by adding the incidental costs to the purchase price. In the case at hand, the acquisition price of the shareholding in the Subsidiary should be made up of the purchase price as well as the amount contributed to account 115 (even more so as both the sale and the contribution took place on the same day).

Decision of the lower Court

The Luxembourg Lower Administrative Court upheld the position of the Luxembourg tax authorities that rejected the claim for a refund of withholding tax because it does not result from the facts of the case that the account 115 contribution was a component of the purchase price. The fact that the sale and the 115 account contribution occurred the same day is not sufficient to show the connection between them. On the contrary, the legal documentation (and especially the share purchase agreement) rather shows the opposite by stating that: " *T*he Company hereby accepts such Contribution without any obligation to pay a consideration or to issue any shares in its capital in return".

LuxCo has lodged an appeal against this judgement before the Luxembourg Higher Administrative Court (*Cour Administrative*).

While the position of the Luxembourg Lower Administrative Court is questionable, pending the decision of the Higher Administrative Court, qualifying companies would be advised not to rely on the amounts (to be) contributed to account 115 to meet the minimum acquisition price requirement for the purposes of the parent-subsidiary exemption, save in specific circumstances where the link between this contribution and the share acquisition price is demonstrated.

International Tax Watch: business Tax for the coming years

- EU Commission's Anti-Tax Avoidance Agenda

On 18 May 2021, the European Commission ("**Commission**") of the European Union ("**EU**") published a communication on "**Business Taxation for the 21st century**". The Commission sets out both a long-term vision to provide an EU tax system that will be more globalised and more digital to fit the new economic environment, and a tax agenda for the next two years, with targeted measures that promote productive investment and entrepreneurship and ensure effective taxation.

1. For the long-term agenda: the BEFIT

The flagship initiative of the Commission is the "Business in Europe: Framework for Income Taxation" ("**BEFIT**") which will replace the Commission's 2011 proposal for a Common Consolidated Corporate Tax Base (CCCTB). The BEFIT will provide a single corporate tax rulebook for the EU, based on a formulary apportionment, which would build on the reallocation of profits under OECD's Pillar 1 and a common tax base determined following OECD's Pillar 2 rules. Details on the BEFIT will only come in 2023.

2. Agenda for the next two years

This agenda builds on the July 2020 EU Tax Action Plan and includes:

- A legislative proposal by the end of the year amending ATAD to address shell companies in the EU ("**ATAD3**") which would encompass actions such as requiring companies to report to the tax administration the necessary information to assess whether they have substantial presence and real economic activity. If not, tax administrations would deny tax benefits linked to the existence or the use of abusive shell companies. In relation thereto, on 20 May 2021, the Commission already adopted an **inception impact assessment roadmap** that aims to provide an EU legislative measure which defines substance requirements for tax purposes to be met by entities within the EU. This roadmap was opened for feedback until 17 June 2021. The results of the impact assessment will help inform the Commission's decision. Also, a public consultation was launched in June and has been closed on 27 August 2021. The adoption of the legislative proposal is planned for Q1 2022.
- A legislative proposal by 2022, requiring certain large companies operating in the EU to publish their effective tax rates based on the methodology under discussion in the OECD's Pillar 2.
- A legislative proposal to address the debt-equity bias in corporate taxation, via an allowance system for equity (the Debt Equity Bias Reduction Allowance - "DEBRA") by Q1 2022 which would tackle excessive accumulation of debts preventing the EU as a whole from possible negative spill-over effects should some countries face high waves of insolvency. As for the proposed measures for shell companies, the Commission adopted an **inception impact assessment roadmap** which is open for feedback until 12 July 2021 and a public consultation will also be launched soon.

Furthermore, in order to better support businesses during the Covid 19 pandemic recovery, the Commission has also adopted a non-binding Recommendation on the domestic treatment of losses that prompts Member States to allow up to €3m of loss carry-back for businesses to at least the previous fiscal year.

Finally, in addition to the above corporate tax reforms, the Commission will swiftly propose measures to implement OECD's Pillar 1 (partial re-allocation of taxing rights) and Pillar 2 (minimum effective taxation of multinationals' profits) once a consensus-based global agreement will be reached internationally.

- G7 tax reform

Finance Ministers of the 7 richest nations (i.e. the US, the UK, France, Germany, Canada, Italy and Japan) so called "**G7**", reached a **landmark global tax agreement** on 5 June 2021 to tackle tax challenges that arise from the global digital economy and multinationals leading to:

- the creation of a new taxing right where the largest and most profitable multinationals will pay their fair share of tax in the countries in which they operate, using a formulaic approach; and

- A global minimum rate that ensures that large multinational businesses pay an effective tax rate of at least 15% in each country they operate.

Key details of the agreement, such as in-scope companies and how the tax revenue would be distributed, are yet to be thrashed out in the larger G20 during their 10-11 July 2021 meeting.

Updated circular on share exchange transactions

On 27 July 2021, the tax authorities published updated guidelines on Article 22bis of the Luxembourg income tax law which sets out share exchange scenarios that may benefit from a tax deferral at the level of the Luxembourg shareholder. This circular replaces the previous version issued on 22 November 2002 and mainly takes into account amendments introduced by the Law of 21 December 2018 (through the abolishment of the tax neutral conversion of loans into shares).

Tax administrative guidelines on the equity escape clause

The Luxembourg Tax Authorities updated twice the circular of 8 January 2021 dealing with certain aspects of the interest deduction limitation rule ("**IDLR**") laid down in Article 168bis of the Luxembourg tax law ("**LITL**"). To gain insight into this circular, please refer to our **previous newsletter**.

With a first update made on 2 June 2021, the Luxembourg tax authorities provided additional guidance on the IDLR with respect to the so-called "equity escape clause" (Article 168bis (6) LITL). The equity escape clause foresees the possibility for a member of a consolidated group for accounting purposes to deduct its entire exceeding borrowing costs if the taxpayer can demonstrate that the ratio between its equity to its total assets is equal to or higher than the same ratio of the consolidated group. On 28 July 2021, the Luxembourg tax authorities completed their guidance a second time in order to address the application of the equity escape clause in the context of a fiscal consolidation. The ultimate fiscal consolidated entity or a member of fiscal consolidated group could, indeed, deduct the entire exceeding borrowing costs of the fiscal consolidated group if the ratio between the equity to the total assets of the fiscal consolidated group is equal to or higher than the same ratio of the consolidated group to which all the members of the fiscal consolidated group must belong.

In light of the Luxembourg tax authorities' guidance, the conditions to be met in order to benefit from the equity escape clause can be summarised as follows:

- The taxpayer must be fully consolidated (i.e. full line-by-line integration) and proportional consolidation or equity method are excluded.
- The consolidation for financial accounting purposes could be either undertaken based on a legal requirement or on a voluntary basis.
- The consolidated financial statements must be drawn up in accordance with eligible accounting

standards, i.e. International Financial Reporting Standards (IFRS) or with the national financial reporting framework of a Member State (which includes the accounting standards applicable in each Member State and those whose conformity or equivalence is officially recognised or demonstrated by official accounting procedures).

- The accounting standards to be used is determined based on the legal consolidation requirements applicable to the ultimate consolidating entity. In the case of voluntary consolidation, the accounting standards to be used is determined based on the legislation that would be applicable in the jurisdiction of the ultimate consolidating entity, if the latter was legally required to prepare consolidated financial statements. However, IFRS is always accepted even if such legislation does not provide with such a possibility.
- The consolidated financial statements must be audited by an expert officially authorised to carry out audits of consolidated financial accounts under the national law of the ultimate consolidating entity.
- The application of the equity escape clause is subject to a request to be made for each financial year for which the taxpayer wishes to apply the equity escape clause.

Taxpayers need to carefully review their position for the application of the equity escape clausein light of the numerous conditions set forth by the Luxembourg tax authorities.

Circular on administrative fines and penalties

Nearly 5 years after the 2017 tax reform amending provisions of the General Tax Law of 22 May 1931 (*Abgabenordnung*, "**AO**") with a view to reinforcing the coercive power of the tax authorities, an administrative circular LG - A n ° 67 was released on 28 July 2021 ("**Circular**") providing guidance to the tax offices on the application of these provisions.

Breaches subject to administrative fines

The following breaches are subject to administrative fines:

- Intentional defaults or inaccuracies committed by the taxpayer in its tax return or wilful failure to file the tax return are subject to a fine ranged from 5% to 25% of the evaded taxes (§166 (3) AO).
- Simple tax fraud (an undue tax advantage fraudulently obtained for the taxpayer or someone else's benefit or intentional reduction of tax revenues) is subject to a fine ranged from 10% to 50% of the evaded taxes or undue reimbursement (§396 (1) AO).
- Involuntary tax fraud (undue tax advantage or reduction of tax revenues obtained negligently) is subject to a fine ranged from 5% to 25% of the evaded taxes or non-due reimbursement (§402 (1) AO). The fine can be imposed on the taxpayer itself but also on tax advisers which act as intermediaries between the taxpayer and the tax authorities ("TA").

In order to ensure uniform application of these fines, the Circular provides the following guidance:

- Although the application of these fines and the determination of their amount is at the discretion of the TA, the latter must, however, for that purpose, consider all circumstances of the case so that the fine must be proportionate to the breach caused and the taxpayer's ability to pay.
- The date when the decision to impose a fine based on art. 166 (3) AO, art. 396 (1) AO and art. 402 (1)

AO is notified is relevant for: (i) the deadline to pay the fine (one month); and (ii) the deadline to file an appeal (*réclamation*). As fines are notified by registered letter, notification takes place on the third day (not the third working day) after the date of posting.

Criminal frauds subject to penalties

Luxembourg law provides for two types of criminal tax fraud:

- Aggravated tax fraud (when the amount of tax evaded or non-duly refunded is higher than (i) 25% of the tax due but not less than EUR 10,000 or (ii) EUR 200,000) is punished by 1 month to 3 years of imprisonment and penalties ranging from EUR 25,000 to up to 6 times the amount of evaded taxes or undue refund (§396 (5) AO).
- Tax fraud (when a fraud involves (i) a significant amount of tax evaded - either in absolute terms or having regard to the annual taxes due and (ii) the systematic use of fraudulent actions to conceal information from the TA or to mislead the TA) is punished by 1 month to 5 years of imprisonment and ranging from EUR 25,000 to up to 10 times the amount of taxes evaded or unduly refunded (§396 (6) AO).

If the criteria of the criminal frauds mentioned above are met, the competent tax officer shall bring the case to the Public Prosecutor who will initiate prosecution. The Circular recalls that Article 16 of the Law of 19 December 2008 allows the tax authorities to disclose information to the judicial authorities by exception to the general tax secrecy set forth in §22 AO. In this respect, the Circular provides guidelines on cases where the cooperation between the competent tax offices and the judicial authorities should take place (e.g. when the competent tax office must comply with requests from judicial authorities or report crimes and offences to the Public Prosecutor or report suspicious transactions in accordance with the Anti-Money Laundering and Anti-Terrorist Financing Law, etc.).