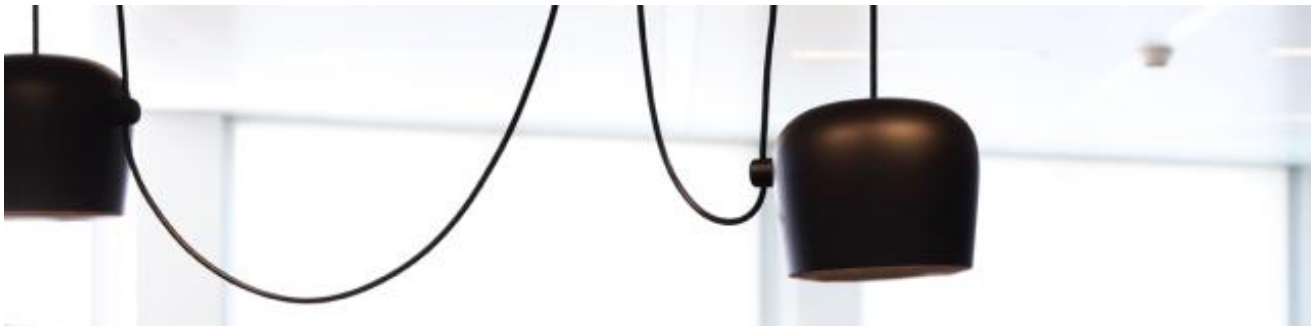
# Newsletter

Newsletter July 2022



## Asset management and investment funds



## Administrative law



## Commercial



## Corporate, banking and finance



## EU law, competition and antitrust

## Employment and pensions law



## ICT, IP, media and data protection



## Tax

## ESMA report on UCITS costs and fees

On 31 May 2022, ESMA published its report on the Common Supervisory Action (" **CSA**") on costs and fees of UCITS that was carried out with national competent authorities ("**NCAs**") (including the CSSF) in 2021.

This report sets out ESMA's analysis and conclusions on the CSA and presents ESMA's views on the various findings, including on the process of the setting and the reviewing of fees, the notion of undue costs, the issues stemming from related party transactions and EPM techniques, as well as the follow-up actions envisaged by NCAs and the main lessons learnt.

This report is therefore important not only for NCAs but also for the funds and their managers.

For more information on this topic, see the article " **ESMA report on UCITS costs and fees: Key points**" on our website.

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## ESG - sustainable finance update

In the last weeks and months, the European Commission and the European supervisory authorities have published guidance in order to clarify certain concepts concerning the application of SFDR and the Taxonomy Regulation.

These include the SFDR RTS (adopted by the European Common on 6 April 2022 but not yet published in the OJEU) which should become applicable on 1 January 2023, a Commission FAQ on SFDR (25 May 2022), a Supervisory Statement (31 May 2022) from ESMA on EU convergence in the supervision of investment funds with sustainability features and another from the ESAs (2 June 2022) with clarifications on the SFDR RTS.

In terms of next steps, as of 2 August 2022, MiFID firms that provide portfolio management services and investment advice to their clients will have to include in the suitability test

specific questions relating to the sustainable investment preferences of those clients (Delegated Regulation (EU) 2021/1253).

In addition to the sustainability preferences, the product governance rules under MiFID have been amended and will become applicable in November 2022.

Compliance with the new MiFID provisions on sustainability preferences will be particularly challenging for the asset management industry due to several elements, such as:

- The fact that the SFDR RTS will not become applicable until 1 January 2023;
- ESMA has yet to publish guidelines on the scope of these new MiFID ESG obligations.

The European investment fund industry has taken steps to anticipate as much as possible the imminent application of the new MiFID sustainability preference requirements. This is notably reflected in the publication of a European ESG Template (EET), which is a cross-sectoral template comprising the views of the banking, asset management, structured product, insurance, and pensions industries. It is designed to standardise SFDR/Taxonomy-related data exchange between these industry participants. The EET notably includes the information from the manufacturer of financial products (i.e. investment funds) that distributors and advisors need to fulfil their new MiFID obligations.

In spite of all these efforts and initiatives, the lack of ESG data in the market continues to be a major obstacle regarding the effective application of the various sustainable finance rules. Examples include:

- the information concerning environmentally sustainable economic activities to be disclosed by undertakings subject to the Non-Financial Reporting Directive (Directive 2014/95/EU) in accordance with the delegated act supplementing the Taxonomy Regulation (Commission Delegated Regulation (EU) 2021/2178) will not be fully available until 2024; and
- the proposed Corporate Sustainability Reporting Directive which will notably broaden the scope of entities subject to the Non-Financial Reporting Directive has not yet been finalised.

In parallel to the MiFID changes, Directive 2010/43/EU (UCITS level 2 - link) and Regulation 231/2013 (AIFM level 2 - link) have also been amended to reflect the new SFDR requirements. The new measures which apply to AIFMs and UCITS management companies from 1 August 2022 are briefly described below:

- Asset selection process (due diligence): sustainability risks must be taken into account.
- Human resources: necessary ESG resources and expertise are required in order to effectively integrate sustainability risks in processes and procedures as well as to ensure effective oversight.
- Conflict of interest: an assessment of any conflicts of interest that may arise as a result of the integration of sustainability risks in the processes and policies.
- Risk management: the risk management process and policy will need to be reviewed to make sure they cover sustainability risks.
- Organisational systems and controls: sustainability risks must be taken into account in the organisational procedures, control mechanisms and reporting.
- Senior management responsibilities: the senior management is responsible for the integration of sustainability risks in the following points:
    - the implementation of the investment policies;
    - overseeing the approval of the investment strategies;
    - the valuation policies and procedures;
    - the compliance function;
    - what is done to ensure and verify on a periodic basis that the investment policy, investment strategies and risk limits are properly and effectively implemented and complied with;
    - the approval and review on a periodic basis of the adequacy of the internal procedures for undertaking investment decisions, to ensure such decisions are in line with their respective investment strategies;
    - the risk management policies and procedures, including the risk limits for each of the fund that they manage; and
    - (for AIFMs) the remuneration policy.

Finally, there have also been recent developments as regards gas and nuclear activities and in particular the EU Commission proposal for a Taxonomy Complementary Climate Delegated Act which includes a list of criteria that classifies investments in nuclear or gas power generation as "sustainable" ("Taxonomy Complementary Climate Delegated Act"). The deadline to object to the Commission's proposal was 11 July 2022. On 6 July 2022, the EU Parliament rejected a motion to oppose the inclusion of nuclear and gas as

environmentally sustainable economic activities. As the scrutiny period (i.e. objection period) has now expired, the Taxonomy Complementary Climate Delegated Act will be published in the Official Journal and will apply as of 1 January 2023.

## CSSF Circular on UCI administrator

On 16 May 2022, the CSSF issued Circular 22/811 concerning the authorisation and organisation of entities acting as UCI administrators ("**Circular**").

The Circular formalises the CSSF's regulatory practice concerning the activity of UCI administration and determines the principles of sound governance and the requirements to be complied with by entities providing UCI administration services in terms of substance, internal organisation (including but not limited to delegation models) and reporting.

The UCI administration activity covers any one, or any two or all of the following three main functions, all as defined and detailed in the Circular: (i) registrar (TA) function, (ii) NAV calculation and accounting function, and (iii) client communication function.

The following entities are eligible to act as UCI administrator:

- Luxembourg investment fund managers ("**IFMs**"), such as UCITS ManCos and AIFMs;
- Foreign IFMs pursuing the activity of UCI administrator for Luxembourg UCIs;
- Luxembourg regulated UCIs (i.e. UCITS, Part II UCIs, SIFs, and SICARs), which may, however, only act as UCI administrator for themselves; and
- Luxembourg external service providers authorised under the Law of 5 April 1993 on the financial sector as amended, such as credit institutions, registrar agents, client communication agents and administrative agents.

The requirements of the Circular shall apply at the level of the UCI administrator, which means that any entity, which performs one or several of the three functions encompassed by the UCI administration activity, is subject to the provisions of the Circular as UCI administrator. In this context, an IFM that has delegated all such three functions to another entity will not be subject to the provisions of the Circular as UCI administrator, instead such delegates will be. By contrast, if an IFM retains, i.e. itself performs, any one or several of these functions, it will be subject to the Circular in respect of such function(s).

Luxembourg non-regulated UCIs (i.e. RAIFs and other non-CSSF regulated AIFs) remain, in principle, outside the scope of the Circular in the sense that they can continue to act as UCI administrator for themselves without being subject to the Circular requirements. However, they may be affected indirectly, should they use an external UCI administrator. This external UCI administrator will, in turn, be subject to the Circular.

The provision of UCI administration activity is subject to prior authorisation by the CSSF.

For an overview of the key points of the Circular and its practical impacts, see the Newsflash "CSSF Circular 22/811 on UCI Administrators" on our website.

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## Outsourcing arrangements

On 30 June 2022, Circular 22/806 on outsourcing arrangements ("**OS Circular**") became applicable to all outsourcing arrangements entered into, reviewed or amended by the in-scope entities on or after 30 June 2022.

A transition period is provided for outsourcing arrangements in force before 30 June 2022:

- in line with the OS Circular, their documentation must be completed following the first renewal date of each existing arrangement, and by no later than 31 December 2022.
- In-scope entities which have not reviewed by 31 December 2022 outsourcing arrangements of critical or important functions existing prior to 30 June 2022 must inform the CSSF.

Together with the OS Circular, the CSSF has published an FAQ and the following circulars in relation with outsourcing arrangements:

- Circular 22/805 on the revised EBA Guidelines on outsourcing arrangements (EBA/GL/2019/02) – Publication of CSSF Circular 22/806 on outsourcing arrangements –Repeal or amendments of certain CSSF circulars ("**Circular 22/805**");
- Circular 22/807 updating CSSF Circular 12/552 on central administration, internal governance and risk management, as amended.

More recently, on 1 July 2022, the CSSF also published a notification template to be used as

of that date by in-scope entities (see below) when outsourcing a critical or important business process (Business Process Outsourcing or BPO) in accordance with points 59 and 60 of the OS Circular (see CSSF Communiqué here).

The OS Circular applies notably to credit institutions, investment firms, payment institutions, electronic money institutions and professionals of the financial sector and their branches and partially to IFMs, their branches and UCITS (in the case of a UCITS, only if it has an information and communication technology ("**ICT**") outsourcing arrangement independent of that of its IFM).

All requirements detailed in the OS Circular relating to ICT outsourcing define the new ICT outsourcing framework for IFMs and their branches.

The FAQ specifies that part of the OS Circular applies to IFMs only in relation to one or several specific ICT outsourcing and where the requirement is relevant for IFMs.

The key practical impacts of the OS Circular are described in the Newsflash " CSSF Circular on outsourcing arrangements" published on our website.

Among the actions to be initiated by IFMs (and UCITS, as the case may be), there would be:

- the implementation of an outsourcing register and the review of the outsourcing policy/procedure to ensure it complies with the OS Circular with respect to ICT outsourcing;
- the setting-up of a plan to review and update existing ICT outsourcing arrangements;
- the verification of compliance of all new ICT outsourcing arrangements with the requirements of the OS Circular.

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## Marketing communications

In our February 2022 Newsletter, we informed about the publication and key points of CSSF Circular 22/795 of 30 January 2022 concerning the application of the ESMA Guidelines on marketing communications..

It is now expected that the CSSF will imminently publish an FAQ that will provide

additional guidance on marketing communications, including clarifications on (i) the scope, (ii) governance and organisational requirements that will need to be but in place by IFMs, and (iii) the information on marketing documents that IFMs will need to provide to the CSSF.

## Cross-border (pre-)marketing: CSSF digitalised process

On 12 May 2022, the CSSF issued Circular 22/810 indicating that the reception and processing by the CSSF of the following (pre)marketing notification and de-notification procedures will be progressively digitalised and will henceforth have to be carried out (exclusively) via the CSSF eDesk Portal:

**UCITS:**

- Marketing notification and de-notification procedures of Luxembourg UCITS in a Member State other than Luxembourg.

**AIFs:**

- Marketing notification and de-notification procedures of EU/Luxembourg AIFs by Luxembourg AIFMs in any Member State including Luxembourg;
- Notification of pre-marketing of EU/Luxembourg AIFs by Luxembourg AIFMs in any Member State including Luxembourg.

**EuVECA/EuSEF:**

- Marketing notification and de-notification procedures of EuVECAs/EuSEFs by Luxembourg EuVECA/EuSEF managers in any Member State including Luxembourg;
- Notification of pre-marketing of EuVECAs/EuSEFs by Luxembourg EuVECA/EuSEF managers in any Member State including Luxembourg.

The CSSF further indicates that CSSF Circular 11/509 concerning the marketing notifications procedures to be followed by UCITS will be repealed (not yet but ultimately).

Circular 22/810 applies as from 12 May 2022. However, the precise list of digitalised (pre)-marketing notification/de-notification procedures will progressively be made available on

the homepage of the eDesk Portal and the CSSF will inform the entities concerned in due course by separate *communiqués*. A user guide providing additional information and instructions for the online submission via the eDesk Portal will also be made available.

## MMF: ESMA Guidelines on stress test scenarios

On 29 June, the CSSF published Circular 22/818 on ESMA Guidelines on stress test scenarios - Update 2021 (ESMA/34-49-446).

The purpose of this Circular is to integrate the latest version of the ESMA Guidelines on stress test scenarios under the MMF Regulation, as published on 4 May 2022 ("**2021 Guidelines**").

When compared to the 2020 version, the 2021 Guidelines notably include updated common reference parameters for the common reference stress test scenarios.

CSSF Circular 22/818 includes a summarised presentation of the 2021 Guidelines (available here).

## PRIIPs update

On 24 June 2022, the EU Commission finalised the last step necessary to align the end date of the exemption for UCITS funds to produce a PRIIPs KID i.e. 31 December 2022 ("**UCITS Exemption**"). Indeed, due to several previous postponements, the date of application of the PRIIPs Level 2 measures as amended by the Regulation (EU) 2021/2268 ("**PRIIPs RTS**") was not aligned with the end of the UCITS exemption. The Delegated Regulation (EU) 2022/975 published on 24 June 2022 provides that the new RTS PRIIPs will apply on 1 January 2023.

Therefore, as of 1 January 2023, UCITS funds will have to produce a PRIIPs KID and comply with the new PRIIPs RTS.

## Ukraine crisis

**1. ESMA Statement**

On 16 May 2022, ESMA published a Public Statement to promote convergence in relation to actions taken to manage the impact of the Russian invasion of Ukraine on investment fund portfolios exposed to Russian, Belarusian and Ukrainian assets (ESMA34-45-1633).

It concerns in particular the obligations of the IFMs to manage investment funds in the best interest of investors, to have adequate liquidity management systems in place and to ensure fair valuation of assets. The statement includes appropriate actions to deal with valuation issues in case of exposures to Russian, Belarusian and Ukrainian assets, and notably provides clarifications on the use of side pockets (including for UCITS) in these exceptional circumstances.

**2. CSSF actions and publications**

In the context of the Ukrainian crisis, the CSSF has created a page dedicated to the Ukraine crisis on its website (Ukraine crisis - CSSF), with:

- the recently adopted regulations which detail the sanctions and restrictions on financial operations with regard to Russia and some of its nationals;
- the publications of the EU Commission and the EBA;
- the publications of the CSSF in that respect.

For further information on EU sanctions in response to Russia's invasion of Ukraine, please read our article in the EU Law, competition and antitrust section of this Newsletter here.

# Administrative law

## Waste management

In order to ensure the protection and preservation of the environment and the

improvement of its quality, Luxembourg has recently adopted five laws making up the so-called "Circular Economy Package".

Among these laws, two concern waste and waste packaging more generally:

- the Law of 9 June 2022 amending the amended Law of 21 March 2012 on waste,
- the Law of 9 June 2022 amending the Law of 21 March 2017 on packaging and packaging waste.

These laws implement a number of fundamental principles of the circular economy and the protection of the environment:

- prevention of waste and packaging waste,
- for essential waste and packaging waste, manufacture of the least polluting products possible,
- reuse/recycling of waste and packaging waste,
- the costs of waste management shall be borne by the original waste producer or by the next waste holder,
- extended producer responsibility,
- control of breaches and sanctions.

The newly implemented means are:

- ban on single-use plastic products from 5 January 2024. Examples: trays and other plastic food containers, cutlery, straws etc.,
- ban on the deposit of printed advertising material on vehicles, in letterboxes (unless the recipient gives his or her express consent) from 1 January 2024,
- implementation of the deposit system for bottles and containers,
- obligation for restaurants to use reusable containers and cutlery from 1 January 2023,
- food waste reduction: obligation for supermarkets to implement a food waste prevention plan, every restaurant customer has the right to have their leftover food returned to them to be taken away,
- obligation for all waste holders to ensure that their waste is able to be reused, recycled or other recovered, in particular through separate collection.

# Commercial

## Reform of the right of establishment

On 8 April 2022, Bill of Law 7989 amending the Law of 2 September 2011 regulating the access to the professions of craftsman, merchant, manufacturer and certain liberal professions, as amended, was submitted to the Chamber of Deputies.

This bill of law aims to modernise the right of establishment by making the law more comprehensible for applicants and "to stimulate entrepreneurship".

More specifically, the bill of law provides, inter alia, for the following amendments:

- the right to engage in a second undertaking after bankruptcy through the implementation of the second chance principle. This second chance is granted in the event of bankruptcy of the company due to misfortune (e.g. bad weather, fire, pandemic, etc.) or mismanagement;
- the manager (*dirigeant*) must no longer be a partner, shareholder or employee of the company;
- the number of business permits that a manager can hold at the same time for several craft companies varies depending on whether these companies are related to each other or not;
- the regulation of the short-term real estate rental business. Beyond a certain threshold of overnight stays, the aim is to bring the hygiene and safety requirements in line with those already in place in the hotel industry ;
- facilitation of administrative procedures. For example, it is no longer necessary to notify the Minister in charge of middle class directly of amendments to the information entered in the trade and company register;
- identification of certain activities, which can be subject to anti-money laundering control obligations, by creating wordings for specific business permits, such as the business permit for commercial vehicle sales activities and services; and

- consumers will in the future have real-time access to information regarding both the professional qualifications contained in the business permit of an undertaking and the validity of the permit.

Please note that this bill of law will still be subject to various opinions and may thus be amended.

# Corporate, banking and finance

## CSSF Circular on outsourcing arrangements

On 22 April 2022, the *Commission de Surveillance du Secteur Financier* ("**CSSF**") issued:

- **Circular 22/805** on the revised EBA Guidelines on outsourcing arrangements (EBA/GL/2019/02) – Publication of Circular CSSF 22/806 on outsourcing arrangements –Repeal or amendments of certain circulars CSSF ("**Circular 22/805**");
- **Circular 22/806** on outsourcing arrangements (" **OS Circular**");
- **Circular 22/807** updating CSSF Circular 12/552 on central administration, internal governance and risk management, as amended; and
- **CSSF FAQ – Circular CSSF 22/806 on outsourcing arrangements** providing guidelines on the scope and application of the OS Circular ("**FAQ**").

As set out in Circular 22/805, the CSSF has integrated the revised EBA Guidelines on outsourcing arrangements in its administrative practice and regulatory approach via the OS Circular.

The OS Circular applies notably to credit institutions, investment firms, payment institutions, electronic money institutions, other professionals of the financial sector and their branches and partially to investment fund managers, their branches, central counterparties, approved publication arrangements, market operators operating a trading venue, central securities depositories, administrators of critical benchmarks and UCITS.

The OS Circular therefore covers more entities than the revised EBA Guidelines on outsourcing arrangements (EBA/GL/2019/02), which the OS Circular implements. It represents the CSSF's integrated framework on outsourcing arrangements and introduces

a harmonised text governing outsourcing arrangements in order to promote convergence at a national level.

- Content and Structure
  The OS Circular gathers all supervisory requirements on outsourcing arrangements, including those on information and communication technology (ICT) outsourcing arrangements that were previously disseminated in individual circulars, in one single document.

  The OS circular is divided in two main parts: the first part sets out the requirements in relation to outsourcing arrangements and includes definitions, scope of application, general principles and applicable governance requirements; the second part is dedicated to specific requirements for ICT outsourcing arrangements relying or not on a cloud computing infrastructure.

- Main practical impacts, timeline and what to do next
  A critical change is the absence of the requirement to seek authorisation in the outsourcing of a critical or important function going forward. The OS Circular is applicable from 30 June 2022 to all outsourcing arrangements entered into, reviewed or amended on or after 30 June 2022. A transition period ending on 31 December 2022 applies to existing outsourcing agreements. For more details on the main practical impact, please read here.

- Amendments and repeal
  The following Circulars are amended as of 30 June 2022: CSSF Circulars 12/552, 20/758 and 04/155 as amended and IML Circulars 95/120, 96/126 and 98/143 as amended.

  The following circulars are repealed as of 30 June 2022: CSSF Circular 13/554, 15/611, 17/654, 17/656, 19/714, 17/654, 21/777, 17/654 and 21/785.

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## Updated governance rules for banks

On 22 April 2022, the CSSF issued a new  Circular CSSF 22/807 updating Circular CSSF 12/552 on central administration, internal governance and risk management, as amended

("**Circular CSSF 12/552**").

- **Scope of application and timeline**

Circular CSSF 12/552, as amended by Circular CSSF 22/807, is applicable to credit institutions, including their branches. It also applies to Luxembourg branches of third-country credit institutions, to Luxembourg branches of credit institutions established in another Member State and, in part, to professionals carrying out lending operations ("**In-Scope Entities**").

The updated Circular CSSF 12/552 has been applicable since 30 June 2022.

- **Main changes brought by Circular CSSF 22/807**

Since 30 June 2022, the CSSF applies the following guidelines:

- EBA Guidelines on internal governance (which have been integrated into the body of Circular CSSF 12/552);
- Joint ESMA and EBA Guidelines on the assessment of the suitability of members of the management body (which have not been integrated into the body of Circular CSSF 12/552 but are directly applicable to the In-Scope Entities);
- ESMA Guidelines on certain aspects of the MiFID II compliance function requirements (which have been partially integrated into the body of Circular CSSF 12/552).

In addition, the CSSF has updated some parts of Circular CSSF 12/552:

- reinforcement of the responsibilities of the supervisory body (which must (i) take into account ESG risks in the institution's risk monitoring and management, (ii) improve gender equality and representation of the under-represented gender among the members of the management body, and (iii) hold the majority of its meetings in Luxembourg);
- reinforcement of the requirements applicable to the authorised management regarding the obligation to implement gender-neutral policies ensuring fair treatment and equal opportunities for all staff;
- reinforcement of the conflicts of interest rules;
- reinforcement of the AML/CFT requirements in the internal governance arrangements;

- update of the internal alert arrangements' requirement to be implemented by the In-Scope Entities in light of the EU Whistleblowing Directive requirements; and
- repeal of Chapter 7's outsourcing requirements. In-Scope Entities must now comply with the requirements of the newly issued Circular CSSF 22/806 on outsourcing arrangements.

## New legal framework for inactive accounts, safes and unclaimed insurance contracts

Until recently, Luxembourg's financial sector had no specific legislation on dormant accounts, safes and life insurance contracts. Only regulatory guidance was available on this highly technical topic, such as through Circular CSSF 15/631 on dormant or inactive accounts. The Law of 30 March 2022 on inactive bank accounts, inactive safe-deposit boxes and unclaimed insurance contracts, ("**Law**") introduces a legal framework applicable to financial institutions and insurance undertakings authorised in Luxembourg.

The purpose of the Law is threefold: prevention of inactivity, mandatory consignment after prolonged inactivity, and simplification of the restitution of assets.

First, the Law contains various provisions aiming to prevent the proliferation of inactive accounts and safes as well as unclaimed life insurance contracts. Banks and insurance companies are required to closely monitor their client relations and uphold regular contact. They have to introduce specific internal procedures and will have to comply with strict client information obligations.

Second, in case of prolonged inactivity and unfruitful research to identify the account owner, the Law provides for a consignment obligation. To this end, banks and insurance companies must file a digital consignment request with the *Caisse de consignation* (consignment office), within a 3-month period at the expiry of a period of inactivity defined in the Law (10 years for bank accounts and safe-deposit boxes and 6 years for unclaimed insurance contracts). Successful consignment requests will put an end to the contract concluded between clients and credit institutions or insurance companies. However, the *Caisse de consignation* can refuse the consignment request, in which case the assets will remain under the custody of the relevant entities.

Third, the Law facilitates the restitution process for account holders, beneficiaries or their heirs, by introducing a centralised electronic register, held by the *Caisse de consignation*. Any person with a right to the consigned assets can consult this register.

Moreover, the Law forces banks and insurance companies to closely monitor inactive accounts, safes and insurance contracts. An annual information report will have to be transferred to the respective regulator (CSSF or CAA) as well as the tax administration.

Covered entities and their management bodies may be subject not only to administrative sanctions by the CSSF and the CAA in their supervisory roles regarding the application of the Law, but also to criminal sanctions in the event of violation of consignment obligations.

The Law entered into force on 1 June 2022 but contains numerous transitional measures for accounts, safes and life insurance contracts that were already inactive prior to that date.

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## Sustainability preferences in MiFID suitability test applicable soon

As of 2 August 2022, MiFID firms providing discretionary portfolio management services or investment advice must collect information about their clients' and potential clients' sustainability preferences as part of the suitability assessment.

In accordance with Delegated Regulation 2021/1253, which amends MiFID Delegated Regulation 2017/565 regarding organisational requirements and operating conditions for investment firms, for the provision of these services investment firms are required to obtain specific information on their clients' preferences regarding (environmentally) sustainable investments and investments which consider adverse impacts on environment and society. Hence, transactions recommended or entered into in the context of portfolio management services now also have to meet the client's sustainability preferences besides the other parameters of the suitability test, including the client's financial situation, knowledge and experience.

More practical details on how to integrate clients' sustainability preferences in the assessment of the suitability of investment advice and discretionary portfolio management decisions are expected through the revision by ESMA of its Guidelines on

certain aspects of the MiFID II suitability requirements. Although the public consultation on the proposed text (see link here) closed on 27 April 2022, the final text of the guidelines is not yet available, making compliance with the new framework as of the implementation date particularly challenging for the entities concerned.

In-scope entities will also have to take into account the ESG-related changes made to the MiFID II product governance requirements introduced by Commission Delegated Directive 2021/1269. These updated requirements will apply from 22 November 2022, once transposed into national legislation.

For further information on recent EU legal texts and guidance on sustainable finance, please read our article in the Asset Management section of this Newsletter here.

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## Modernisation of the Law of 22 March 2004 on securitisation

On 9 February the Luxembourg Parliament voted into law the Bill of law 7825 (" **Bill**") amending the Law of 22 March 2004 on securitisation ("**Securitisation Law**") and certain other laws. The Luxembourg legislator wishes to offer new opportunities for market participants to accomplish securitisation transactions within a new framework with clear conditions and combining flexibility and legal certainty.

The Bill clarifies the current legal framework and adapts it to the requirements of the securitisation market with a view to strengthening the position of the Luxembourg market as a leading European market for securitisations. It does this by clarifying and broadening the way a securitisation undertaking can obtain financing, give more flexibility to granting security interests, permit an active management of certain securitised assets, clarify existing rules (including accounting rules) as regards compartmentation and adding additional corporate forms for securitisation companies.

For a more detailed view of the amendments to the Securitisation Law, please read here.

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## EU pilot regime for market infrastructures based

# on DLT

The long-awaited EU Pilot Regime creating a provisional regulatory framework to test the use of distributed ledger technologies ("**DLT**") in market infrastructures has been adopted. Regulation (EU) 2022/858 on a pilot regime for market infrastructures based on distributed ledger technology, and amending Regulations (EU) No 600/2014 and (EU) No 909/2014 and Directive 2014/65/EU, was published on 2 June 2022 ("**Pilot Regime**").

EU financial services legislation was not designed with distributed ledger technology and crypto-assets in mind, and contains provisions that potentially preclude or limit the use of DLT in the issuance, trading and settlement of crypto-assets that qualify as financial instruments. At the same time, regulatory gaps exist due to legal, technological and operational specificities related to the use of DLT and to crypto-assets that qualify as financial instruments.

The pilot regime will allow for certain DLT market infrastructures to be temporarily exempted from some of the specific requirements of EU financial services legislation that could otherwise prevent operators from developing solutions for the trading and settlement of transactions in crypto-assets that qualify as financial instruments, without weakening any existing requirements or safeguards applied to traditional market infrastructures. For example, subject to certain conditions, an exemption from the obligation of intermediation under Directive 2014/65/EU (MiFID II) will be possible.

The pilot regime will create a new optional EU status as DLT market infrastructure. The concept of DLT market infrastructure comprises DLT multilateral trading facilities (DLT MTF), DLT settlement systems (DLT SS) and DLT trading and settlement systems (DLT TSS). DLT market infrastructures can only admit to trading or record DLT financial instruments on a distributed ledger. DLT financial instruments are crypto-assets that qualify as financial instruments and which are issued, transferred and stored on a distributed ledger.

DLT market infrastructures and their operators will be subject to additional requirements compared to traditional market infrastructures. The additional requirements are necessary to avoid risks related to the use of DLT or the way in which the DLT market infrastructure would operate.

Specific permission granted to an operator of DLT market infrastructure will broadly follow the same procedures as those for authorisation under Regulation (EU) No 909/2014 (CSDR) or Directive 2014/65/EU (MiFID II). However, when applying for specific permission under the Pilot Regime, the applicant needs to indicate the exemptions it is



 

requesting.

Specific permission granted by a competent authority to an operator of DLT market infrastructure will indicate the exemptions granted to that DLT market infrastructure. It will be valid throughout the Union. Specific permission and exemptions will be granted on a temporary basis, for a period of up to six years from the date on which the specific permission was granted, and will be valid only for the duration of the pilot regime.

For covered market infrastructures and operators, the Pilot Regime will apply from 23 March 2023.

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## CSSF Telework Circular applies since 1 July 2022

On 31 March 2022, the CSSF confirmed that Circular 21/769 on "Governance and security requirements for supervised entities to perform tasks or activities through Telework" ("**Telework Circular**") applies as from 1 July 2022 in view of the government's recent announcements removing the majority of the health restrictions adopted in the context of COVID-19. The Telework Circular was issued on 9 April 2021 with an effective date initially scheduled for 30 September 2021 but its entry into force was postponed due to the pandemic situation.

The Telework Circular sets out governance and security requirements with respect to the implementation and use by entities under the CSSF's supervision of work processes based on telework solutions. Its purpose is to promote a sound and prudent management contributing to the proper organisation of these entities and the preservation of information security by specifying the requirements they have to comply with. For more details, please refer to the article published on our website available under this link.

No CSSF approval will be required for implementing, maintaining or extending telework solutions for staff. However, covered entities having recourse to telework are obliged to have a telework policy since 1 July 2022. In addition to respecting the principles of the Telework Circular relating to financial sector regulatory requirements, this policy must comply with mandatory public provisions, in particular the Luxembourg Labour Code.

# EU sanctions in response to Russia's invasion of Ukraine

Since February 2022, the EU has adopted six packages of sanctions in response to Russia's invasion of Ukraine. The EU has also adopted sanctions against Belarus in response to its involvement. These sanctions are in addition to those already applying to Russia since 2014 and to Belarus since 2006.

Regarding Russia, the EU has imposed different types of sanctions, in essence through a set of regulations amending Regulation (EU) 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine as well as Regulation (EU) 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, which contain sanctions already in place against Russia since 2014.

The 2022 sanctions include restrictive measures against designated natural or legal persons (i.e. travel bans, asset freezes, and prohibitions to make funds or economic resources available), economic sanctions targeting specific sectors of the Russian economy (e.g. financial sector, media, luxury goods, iron and steel), and restrictions on economic relations with certain territories, including the non-government-controlled areas of Donetsk and Luhansk.

Regarding Belarus, specific EU regulations apply, which contain sanctions largely in line with the measures adopted against Russia.

- **Impact on the Luxembourg financial sector**

From the perspective of their impact on the activities of the Luxembourg financial sector, the main sanctions to bear in mind are the restricted access to EU primary and secondary capital markets for certain Russian banks and companies, the prohibition on transactions with Russia's government and Central Bank, the SWIFT ban for certain Russian banks, the prohibition to accept Russian deposits exceeding certain thresholds, the prohibition on the provision of euro-denominated banknotes to Russia, the prohibition for EU central securities depositories to provide services to Russian natural or legal persons, the prohibition on public financing or financial assistance for trade with or investment in

Russia, the prohibition on investment in and contribution to projects co-financed by the Russian Direct Investment Fund, and the prohibition on providing high-value crypto, business & trust, as well as tax and accounting services.

In addition, the obligation to freeze assets of and the prohibition to make funds or economic resources available to person listed in the annexes to the relevant regulations may affect shareholders or beneficial owners of Luxembourg entities or their counterparties and, hence, affect purported transactions.

The impact of the prohibition to circumvent sanctions set out in the EU relevant regulations also needs to be considered.

- **Enforcement and regulatory guidance**

In accordance with the Law of 19 December 2020 on the implementation of restrictive measures in financial matters, all natural and legal persons residing, established or operating in or from Luxembourg must apply the sanctions and inform the Ministry of Finance accordingly. In addition, supervisory authorities and self-regulatory bodies (e.g. CSSF, CAA, AED) shall ensure effective monitoring of the implementation of the sanctions by the persons and entities falling within their competence. Such authorities and bodies have the same powers as those conferred upon them by the AML framework.

Failure to comply with the restrictive measures is punishable by imprisonment for a term of eight days to five years and a fine of between EUR 12,500 and EUR 5,000,000 or by one of these penalties only. Where the offence has resulted in substantial financial gain, the fine may be increased to four times the amount of the offence.

For more information regarding the Law of 19 December 2020, please read here.

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

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# Revised EU competition rules for distribution agreements entering into force

**What's new?** On 1 June 2022, the new Vertical Block Exemption Regulation (" **VBER**") as well as the revised Guidelines on vertical restraints ("**Guidelines**") entered into force. They were adopted following a thorough review of the 2010 texts. The revised framework provides up-to-date rules and guidance allowing companies to self-assess the compatibility of supply and distribution agreements with EU competition rules considering an economic context reshaped by the growth of e-commerce and online sales.

A one-year transition period applies for agreements in force on 31 May 2022 satisfying the conditions for exemption under the 2010 rules, but which do not comply with the new regime.

**What is this about?** Agreements between parties at a different level of a distribution chain relating to the conditions under which they purchase, sell or resell goods or services, so-called "vertical agreements", may create efficiencies and, absent market power, have benefits for competition. Hence, various contractual arrangements which may be seen as restricting competition are accepted for vertical agreements if a number of conditions are fulfilled – in particular, a 30% market share threshold and the absence of certain hard-core restrictions, such as certain price or territorial restrictions.

Therefore, the prohibition on agreements restrictive of competition in Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) does not apply to vertical agreements that meet the exemption conditions set out in the VBER, thus creating a safe harbour. The Guidelines accompany the VBER and explain how to apply the rules, notably for vertical agreements that fall outside the safe harbour and hence require individual assessment as regards their compliance with competition law.

**What should you retain?** The European Commission explains the main changes as ensuring that the safe harbour is neither too generous nor too narrow, notably in view of new online distribution modes:

- the VBER safe harbour is narrowed as regards (i) dual distribution, i.e. where a supplier sells its goods or services through independent distributors but also directly to end customers, and (ii) parity obligations, i.e. obligations which require a seller to offer the same as or better conditions to its counterparty than those offered on third-party sales channels, such as other platforms, and/or on the seller's direct sales channels, like its website. Such agreements or obligations may no longer be exempted and require individual assessment;
- the VBER safe harbour is enlarged as regards: (i) certain restrictions of a buyer's ability to actively approach individual customers through so-called "active" sales, and

(ii) certain restrictions relating to online sales, namely the ability to charge the same distributor different wholesale prices for products to be sold online and offline and the ability to impose different criteria for online and offline sales in selective distribution systems. Such restrictions are now exempted, provided all other VBER exemption conditions are met.

The rules have also been updated regarding the assessment of online sales restrictions (the prevention of the use of the internet for resale by the buyer is blacklisted) as well as with respect to vertical agreements in the platform economy, agreements that pursue sustainability objectives, and non-compete obligations amongst others. In addition, the Guidelines provide updated detailed guidance on topics such as selective and exclusive distribution and agency agreements.

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## CJEU clarifies "non bis in idem" in competition law

The "*non bis in idem*" principle ("**Principle**"), enshrined in Article 50 of the Charter of Fundamental Rights of the European Union ("**Charter**"), prohibits duplication of proceedings and criminal penalties for the same acts and against the same person. In two Grand Chamber judgments of 22 March 2022, the CJEU ruled on the scope of protection offered by that prohibition in competition law.

Factually, in preliminary ruling case Bundeswettbewerbsbehörde v Nordzucker AG and Others (C-151/20), a telephone conversation proving anti-competitive behaviour was mentioned in a fining decision of the German competition authority first. Thereafter, the same conversation was made the object of legal proceedings by the Austrian competition authority. Both legal proceedings were conducted on the basis of Article 101 of the Treaty on the functioning of the European Union ("**TFEU**"), which prohibits cartels. In the second preliminary ruling case, Bpost SA v Autorité belge de la concurrence (C-117/20), the Belgian postal services company Bpost was sanctioned for the same facts by two Belgian authorities. It was sanctioned by the postal regulator for the infringement of sectoral rules concerning the liberalisation of the relevant market as well as by the competition authority for an abuse of dominant position as prohibited by Article 102 TFEU.

In both cases, national courts asked the CJEU to rule on the limits of the application of the Principle in competition law cases.

In the Nordzucker case, the CJEU held, in essence, that it is possible for a national authority to open proceedings against anti-competitive conduct on its territory and, where appropriate, pronounce a fine with respect to this conduct, even though that same conduct had already been referred to by a competition authority of another Member State in a final decision in respect of that undertaking for infringement of Article 101 TFEU, provided that that decision is not based on a finding of an anti-competitive object or effect in the territory of the first Member State.

In the Bpost case, the CJEU further detailed the application of the Principle in competition law by stating that the duplication of proceedings for the same conduct under different types of legislation, sectoral and antitrust, pursuing distinct legitimate objectives, is not contrary to the Charter. However, in view of the principle of proportionality implying the strict necessity of the duplication of proceedings and penalties, the CJEU clarified that there should exist clear and precise rules making it possible to predict which acts or omissions may be subject to a duplication of proceedings and penalties and that there will be coordination between the two competent authorities. In addition, the two sets of proceedings must be conducted in a sufficiently coordinated manner within a proximate timeframe and the overall penalties imposed must correspond to the seriousness of the offences committed.

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## Significant EU case law on abuse of dominance

Important recent EU case law further defined the application of the prohibition on the abuse of a dominant market position in Article 102 of the Treaty on the Functioning of the European Union ("**TFEU**") as far as exclusionary practices in liberalised markets are concerned and with regard to pricing abuses in tech markets. Important findings on due process are also to be noted.

- In a judgment of 12 May 2022 in preliminary ruling case **Servizio Elettrico Nazionale and Others** (C-377/20), the CJEU was asked to apply Article 102 TFEU in the context of the progressive liberalisation of the electricity market in Italy. ENEL, the pre-liberalisation monopolist in electricity distribution, was fined by the national competition authority for having used its dominant position to discriminate against competitors of its subsidiaries active on separate market segments. The Italian appeals court referred several questions to the CJEU.

  The CJEU recalled that the practice by a dominant undertaking affecting negatively

the effective competition structure of the market must be sanctioned but Article 102 TFEU does not apply if that undertaking can prove that the exclusionary effect resulting from the practice is outweighed by positive effects on customers. Moreover, the CJEU underlined that competition authorities are not required to demonstrate the abusive intent of the undertaking to exclude competitors by using unfair means: the existence of anti-competitive effects due to the conduct is sufficient to qualify it as abusive and exclusionary. The CJEU also distinguished between what practices can be defined as “normal” competition and which are abusive in a liberalisation context: undertakings losing their legal monopoly must refrain, during the liberalisation of the market, from using means available to them due to their former monopoly and not available to other competitors.

Finally, the CJEU also clarified that a parent company is liable for an abuse of dominant position by its subsidiary unless it proves that it did not have the power to influence the latter's conduct.

- In a judgment of 15 June 2022 in case **Qualcomm v. Commission** (T-235/18), the General Court of the EU annulled the European Commission's 2018 decision imposing a fine of EUR 997 million on Qualcomm with respect to exclusivity payments made to Apple in order to have the latter exclusively source its iPhone and iPad chipsets from Qualcomm during the 2011-2016 period.

  Regarding procedure, the General Court found that the Commission's failure to inform Qualcomm of a number of interviews it conducted with third parties and the absence of proper records of these meetings amounted to a violation of Qualcomm's rights of defence. It also held that, although the Commission could abandon charges with respect to one of the markets under investigation without hearing Qualcomm's views on that, narrowing in this way the coverage of the abusive conduct examined had affected the parameters of Qualcomm's economic analysis, thus rendering it obsolete. Failure to give Qualcomm the opportunity to update this analysis infringed its right to be heard.

  On substance, the General Court set aside the Commission's analysis of anti-competitive effects. Given that Qualcomm was the sole supplier capable of satisfying Apple's technical and scheduling chipset requirements for iPhones, the Commission had not proved that Qualcomm's conduct, i.e. exclusivity payments, had an effect on Apple's incentives to switch suppliers for all relevant products. In addition, the Commission's assessment of the actual anti-competitive effects of the payments concerned failed to take into account all the relevant evidence whether there were competing suppliers from whom Apple could have sourced.

# Employment and pensions law

## Next wage indexation postponed to 1 April 2023

On Wednesday 15 June 2022, the Bill of law 8000A, transposing certain measures provided by the tripartite agreement signed on 31 March 2022 by and between the Government and the social partners UEL, the LCGB and the CGFP, ("**Tripartite Agreement**") has been voted and should come into force soon after its publication ("**Law**").

Amongst other things, the Law provides that the first indexation on wages after 1 April 2022 will be postponed to 1 April 2023. According to Luxembourg law, when the cost of living index increases by 2.5% all wages are increased proportionally. Considering the significant recent inflation as well as the last two indexations which occurred on 1 October 2021 and 1 April 2022, it has been decided to postpone the next indexation, which was expected in mid-2022, in order to limit the excessive financial pressure on businesses in Luxembourg.

In order to compensate for the postponement of the wage indexation, the Government has opted for several compensatory measures, e.g. energy tax credit (CIE), financial aid for students, tax credit for the beneficiaries of social inclusion income (Revis) and for the recipients of the severely disabled benefit (RPGH), etc.

The Government has announced that, for any additional indexation (i.e. apart from the one already postponed to 1 April 2023) triggered until 31 December 2023, a new meeting of the Tripartite Coordination Committee would be convened in order to discuss a possible postponement of any such additional indexation and/or any other social measures.

# ICT, IP, media and data protection

# The New Copyright Directive finally transposed into Luxembourg law!

***What happened?***

On 1st April 2022, Luxembourg enacted the law [1] aiming at transposing into Luxembourg law the *Directive 2019/790 on copyright and related rights in the Digital Single Market* ("New Copyright Directive") adopted on 17 April 2019[2].

This new law modifies the three following laws:

- the Law of 18 April 2001 on authors' rights, related rights and databases, as amended,
- the Law of 3 December 2015 on certain authorised uses of orphan works, and
- the Law of 25 April 2018 on the collective management of author's rights and neighbouring rights.

***What are the key takeaways?***

The Luxembourg law faithfully transposes into Luxembourg law the New Copyright Directive, which aims at modernising the legal regime of authors' rights and neighbouring rights. The purpose of the New Copyright Directive was to take into account the major technological developments of the last twenty years and the new ways of creating, producing, distributing and exploiting works and other protected content.

The main changes to the authors' rights regime are the following:

- The creation of neighbouring rights for press publishers (the right of reproduction and the right of making press publications available to the public) in relation to the use of their content online; subject to certain limitations, this would allow press publishers to ask for remuneration when their content is reused by online platforms, news search engines and news aggregators.
- The creation of an authorisation mechanism and a new liability regime regarding specific uses of protected content by online content-sharing service providers (such as YouTube).
- the creation of new exceptions to the authors' rights to promote, in particular, text and data mining under certain conditions (which is a set of automated techniques

aiming at analysing texts and data in digital form in order to extract information) and the digital use of the works, exclusively for purposes of illustration in the context of teaching, to the extent justified by the non-commercial purpose pursued;

- the enshrinement of a principle of appropriate and proportionate remuneration for authors when they conclude licence agreements or assignment agreements about the exploitation of their work, as well as a possibility for authors to ask for an additional compensation. The parties with whom the authors have signed a licence or an assignment agreement must provide the authors, at least once a year, with information on the exploitation of their works in particular with regard to the total income generated. If the remuneration initially agreed upon proves to be unreasonably low in comparison with the total income derived from the exploitation of the works, then the authors will have the right to an appropriate and fair additional remuneration.

***Conclusion***

It remains to be seen whether the new law will entail more balanced relationships between the various players of the Luxembourg market regarding the use and exploitation of works and protected content.

The new law will come into force on 9 April 2022

For more information about the New Copyright Directive, please see our previous articles on this topic:

- Adoption of new European Copyright Directive
- Transposing New Copyright Directive - Luxembourg draft legislation
- Bill of Law 7847 transposing New Copyright Directive

1 Resulting from Bill of Law 7847.

2 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.

# Proposed EU Data Act open for feedback

On 23 February 2022, the European Commission adopted a Proposal for a Regulation on harmonised rules on fair access to and use of data ("**Data Act**"), as part of its set of measures related to the European Data Strategy.

As a key pillar of the European Data Strategy, this act aims at contributing to the creation of a cross-sectoral governance for data access. The Commission is hence willing to foster access to and use of data between various players, notably by way of protecting small and medium-sized enterprises (SMEs).

The proposed EU Data Act was open for feedback by stakeholders until 13 May 2022.

You will find our summary user guide about the Digital Market Act, Digital Services Act, Data Governance Act and Data Act here.

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## Calculation of fines under the GDPR: draft guidelines by and for the authorities

On 12 May 2022, the European Data Protection Board (the " **EDPB**") published its Guidelines 04/2022 on the calculation of administrative fines (the "**Draft Guidelines**") under Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data (the "**GDPR**"). The Draft Guidelines provide for a harmonised calculation of administrative fines under the GDPR. In general, the calculation of administrative fines is at the discretion of national data protection authorities ("**DPAs**"), which must assure that the latter remain effective, proportionate and dissuasive in each individual case. Under the Draft Guidelines, the EDPB provides for a *five-step methodology* which DPAs should apply when calculating administrative fines.

**Step 1: Determining whether there are one or multiple infringements against the GDPR**

First, DPAs should consider the conduct and the GDPR infringement of the controller or processor. Depending on the case, DPAs may identify either one or multiple sanctionable conduct according to which the scope of the administrative fine will differ:

- if there is only one sanctionable conduct, DPAs should establish whether or not the alleged conduct gives rise to one or more infringements and whether those infringements are to be considered individually or alongside each other;

- if multiple sanctionable conducts are identified (e.g. different processing operations infringing different requirements stemming from the GDPR), the undertaking can be subject to separate fines applicable for each infringement of the GDPR (in which case the maximum monetary cap for a fine in relation to the same or linked processing operations shall not apply).

As a result, in practice, the aggregate amount of fines may exceed the absolute maximum of 4% of the annual worldwide turnover of the undertaking or EUR 20,000,000, whichever is higher. Also, it is confirmed that the concept of "undertaking" includes group companies.

**Step 2: Setting out the starting amount of the fine**

To determine the adequate starting amount to consider for the further calculation of the administrative fine, the Draft Guidelines provide that DPAs shall notably assess the degree of seriousness of the infringement by giving due regard to the nature, the duration and the gravity of the infringement and finally take into account the turnover of the undertaking acting as controller or processor.

**Step 3: Evaluation of aggravating and mitigating circumstances related to past or present behaviours**

Next, DPAs shall determine whether there are any aggravating or mitigating circumstances, in the past or present, against the data controller or processor, that could justify increasing or decreasing the amount of the fine. In particular, DPAs should, in the event of an infringement, focus on the actions taken by the controller or processor to mitigate the damage suffered by the data subjects.
In this regard, it is specified that cooperation with the authorities is a general obligation under the GDPR and should not be taken into consideration for the determination of the amount of the fine, except if such cooperation results in mitigating risks for the individuals affected by the infringement at stake.

**Step 4: Identification of the relevant legal maximums for the alleged processing operation**

As a fourth step, the DPA should identify the maximal legal amount for the processing operation at stake as provided by Articles 84(4)-(6), namely either:

- a fine of maximum EUR 10,000,000 or 2% of the undertaking's annual worldwide turnover, whichever is higher or,
- a fine of maximum EUR 20,000,000 or 4% of the undertaking's annual worldwide

turnover, whichever is higher.

**Step 5: Analysis of whether the calculated fine meets the requirement of effectiveness, dissuasiveness and proportionality**

Finally, the DPA shall assess whether the final fine meets the requirements of effectiveness, dissuasiveness and proportionality as required by Article 83(1) of the GDPR.

With respect to its proposed methodology, the EDPB emphasises the fact that the calculation of an administrative fine is not a mathematical exercise, but rather a process which must take into account the specific circumstances of each case.

**What's next?**

The Draft Guidelines are subject to public consultation and open for comments. Stakeholders can submit their feedback until 27 June 2022 after which the EDPB is expected to adopt its final guidelines.

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## EU institutions reach a political agreement on the Digital Services Act

In December 2020, the European Commission published the Digital Services Act Package, which includes two significant Regulation proposals:

- proposal for a Regulation on a Single Market For Digital Services (known as the Digital Services Act, "**DSA**"), which also aim at amending Directive 2000/31/EC ( " **e-Commerce Directive**"); and
- proposal for a Regulation on contestable and fair markets in the digital sector, known as the Digital Markets Act ("**DMA**").

Together with the DMA, the DSA will set the standards for a safer and more open digital space for users and a level playing field for companies for years to come.

On 23 April 2022, the European Parliament and the Council reached a provisional political agreement on the DSA.

For more information on this package, please read here.

# GDPR: EU Commission's Q&A about the New Standard Contractual Clauses for Transfers

**What happened?**

On 25 May 2022, exactly 4 years after entry into force of the General Data Protection Regulation ("**GDPR**"), the European Commission (the "**Commission**") released new guidance on Standard Contractual Clauses (the "**SCCs**"). Earlier in 2021, the Commission adopted a new set of SCCs aiming at providing greater flexibility for cross-border data transfer of personal data from the European Economic Area to third countries not benefiting from an adequacy decision. The Commission published Questions and Answers on SCCs based on feedback received from various stakeholders and addressing 44 practical questions raised about the new modular-type SCCs (the "**Q&A**").

**What are the key takeaways?**

- The Q&A confirms that the text of the SCCs may not be altered except (1) to select modules or specific options offered in the text, (2) to complete the text where necessary (3) to fill in the Annexes or (4) to add additional safeguards. None of these actions are considered as altering the core text.
- However, the parties may supplement the SCCs with additional clauses or incorporate them into a broader commercial contract, as long as the other contractual provisions do not contradict the SCCs, either directly or indirectly, or prejudice the rights of data subjects.
- The Q&A also provides practical guidance with respect to the "docking clause" which is an optional clause allowing an additional party to join a contract. All the pre-existing parties may provide consent. The formalisation of such consent is governed by national law and not by the SCCs. In order to make the accession of the contract effective, the new party will need to complete the Annexes and sign Annex I of the SCCs. Upon accession to the SCCs the party will assume all the rights and obligations according to its role and the other parties will simultaneously have the relevant rights and obligations vis-à-vis the new party.
- SCCs can be signed electronically if the national law governing the agreement allows conventions to be signed electronically.

- The Commission also confirmed that processors are required to provide the names of their respective sub-processors. It is not sufficient for the processors to provide only the categories for the sub-processor.
- Finally, the Q&A provides important guidance on the four different modules to the SCCs, the contexts in which they are to be used as well as how the new SCCs are to be used in a post Schrems II[1] context (read more about the Schrems II case here).

**Next steps**

Transfer of personal data outside of the EEA to countries not benefiting from an adequacy decision can only be made if the data exporter –i.e. you or the (sub-)processor, as applicable– provide appropriate safeguards, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available.

SCCS may, depending on the circumstances, provide such appropriate safeguards. Hence, if you or any of your (sub-)processors processing personal data on your behalf or, in turn, on behalf of your own processors transfer or intend to transfer personal data as mentioned above, SCCs might be the right choice. SCCs might need to be supplemented by specific measures according to the situation at hand.

We can provide you with any advice in this respect. We have developed an internal tool to quickly and efficiently provide you with the SCCs modules or any of them alone that your transfers require!

1 Case C-311/18, Data Protection Commissioner v Facebook Ireland and Maximillian Schrems.

# Tax

## New tax administrative guidance on interest deduction limitation rule

On 25 March 2022, the Luxembourg Tax Authority updated for the third time the circular issued on 8 January 2021 ("**Circular**") providing additional clarification on certain aspects of the interest deduction limitation rule ("**IDLR**") laid down in Article 168bis of the

Luxembourg income tax law ("**LITL**").

To gain insight into the previous updates, please refer to our article of 14 September 2021.

**The grandfathering rule and the end of LIBOR**

According to the grandfathering rule (Article 168bis (7) of the LITL), borrowing costs related to loans concluded before 17 June 2016 are excluded from the application of the IDLR. However, borrowing costs related to subsequent modifications to such loans are not covered by the grandfathering rule. In the second update of the Circular, the Luxembourg Tax Authority already provides for examples of what would be considered as a "subsequent modification" and what would not.

With this third update, the Luxembourg Tax Authority clarifies that an amendment to the interest rate or the computation of interest return of a loan concluded before 17 June 2016 due to the phasing out of the "London Interbank Offered Rate" ("**LIBOR**") is not considered as a "subsequent modification" for the purposes of the application of the grandfathering rule, provided the following three cumulative conditions are met:

- The modification is strictly necessary to take into account the end of LIBOR or its non-representativeness;
- The modification does not alter the economic substance of the loan; and
- The modification does not include other modifications that could be qualified as "subsequent modifications" within the meaning of Article 168bis (7) of the LITL.

**Interplay between the recapture rule and the IDLR**

As a reminder, expenses incurred in relation to exempt participations (under the participation exemption regime) may be deducted to the extent that they exceed tax-exempt dividend income realised in a given tax year. However, such expenses are then subject to recapture. This means that exempt capital gain realised on the disposal of the participation will remain subject to tax up to the sum of all related expenses and write-downs that were previously deducted (during the year of disposal or in previous financial years).

In the first version of the Circular issued on January 2021, the Luxembourg Tax Authority confirmed that only the borrowing costs that remain deductible after the application of the IDLR must be accounted for the recapture rule without providing any further details.

In this third update, the Luxembourg Tax Authority brings further clarification regarding the interaction between the recapture rule and the IDLR.

In particular, the Luxembourg Tax Authority provides for an allocation method (along with an illustrative example) to determine the part of exceeding borrowing cost in relation to an exempt participation that is disallowed as a deduction under the IDLR (and correlatively, the amount of recapture).

This allocation method also has to take into account the retrospective impact of potential carry-forward of the exceeding borrowing costs (Article 168bis(4) of the LITL). Under the IDLR, the amount of exceeding borrowing cost disallowed as a deduction in the current year could be carried forward without limitation of time ("**Disallowed Interest Expense Carry-forward**"). Where in a subsequent tax year, the company decides to make use of its interest deduction capacity, the Disallowed Interest Expense Carry-forward part in relation to the exempt participation will need to be recalculated (as will be the amount of recapture).

Holding companies financing their participations with a mix of debt and equity should monitor this aspect carefully.

**Definition of tax EBITDA**

According to Article 168bis al.1 number 4 of the LITL, the tax EBITDA corresponds to the total net taxable income determined according to the LITL, increased by the amount of net borrowings costs as well as impairments, depreciation and amortisation having decreased the basis.

The Luxembourg Tax Authority specifies in this latest update that no further increase or correction is required to determine the tax EBITDA (for instance, in the case of reversal of an impairment booked in a previous year).

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## Contribution to account 115 and participation exemption

On 31 March 2022, the Higher Administrative Court ( *Cour Administrative*) confirmed the judgement of the Luxembourg Lower Administrative Court (*Tribunal Administratif*) dated 11 May 2021 and ruled that contributions to the Account 115 are not to be taken into account when determining if the EUR 1.2 million minimum acquisition price condition is met for the application of the Luxembourg participation exemption.

A detailed analysis of the ruling will be published soon.

Meanwhile, please read here for more information on the judgement.

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## Guidance on defensive tax measures against the EU list of non-cooperative jurisdictions

On 10 February 2021, Luxembourg introduced defensive measures in its tax legislation aiming at disallowing, in certain cases, the deduction of interest and royalty expenses owed to related enterprises located in jurisdictions that are included in Annex I of the European Union list of non-cooperative jurisdictions for tax purposes ("**EU List**").

On 31 May 2022, the Luxembourg tax authorities published an updated circular on the application of these measures ("**Circular**").

The deduction is denied taking into account to the following:

- The rules apply to interest or royalty owed to a collective undertaking within the meaning of Article 159 of the Luxembourg income tax law ("**LITL**"), thus excluding partnerships and physical persons. The Circular clarifies that foreign entities are classified as collective undertaking within the meaning of Article 159 LITL by comparison of their legal and statutory features with those of Luxembourg entities. In addition, such collective undertaking must be :

1. (i) an associated enterprise within the meaning of Article 56 LITL [1];
2. (ii) the beneficial owner of the interest or royalty. It was clarified in the Circular that the beneficial owner of the interest or royalty is the person to whom the income is actually attributable from an economic perspective; and
3. (iii) established in a jurisdiction or a territory that is blacklisted by Luxembourg. The Luxembourg blacklist would be determined once a year based on the latest updated version of the EU list of non-cooperative jurisdictions for tax purposes available at this time. However, the rules cease to apply as soon as the country or territory concerned is removed from the EU published blacklist. Twelve jurisdictions are currently on the EU blacklist: American Samoa, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, US Virgin Islands, Vanuatu.

- The definitions of interest and royalties are based on those provided under Article 2 of the interest and royalties Directive 2003/49 and Articles 11 and 12 of the OECD Model Tax Convention.
- The rule applies to accrued interest or royalties and not to actual payments. Therefore, those interest or royalties that have accrued before 1 March 2021 (date of entry into force of the law) remain deductible even if payment occurs after 1 March 2021.
- The deduction of interest or royalties will not be denied if the taxpayer can prove (in particular with supporting documentation) that the transaction was implemented for valid commercial reasons that reflect economic reality. The Circular recalls that it is not sufficient simply to state economic reasons, but such reasons, taking into account all relevant facts and circumstances, must be real and economically relevant enough. The Circular confirms that a ruling request can be filed to have confirmation that the commercial reasons are valid and reflect economic reality.
- It was also recalled in the Circular that where the deduction of interest is entirely denied under the defensive rules, the interest limitation rule laid down in Article 168*bis* LITL (see our previous articles on this topic, especially in this newsletter and the article dated 19 January 2021) is not applicable.

1 Under Article 56 LITL, two enterprises are deemed associated when one enterprise participates, directly or indirectly, in the management, control or share capital of the other, or if the same persons participate, directly or indirectly, in the management or share capital of both enterprises.

## DEBRA Directive

On 11 May 2022, the European Commission published the proposal for the so-called "**DEBRA**", i.e. directive on laying down rules on a debt-equity bias reduction allowance and on limiting the deductibility of interest for corporate income tax purposes (available here).

For more information, please read here.

## Tax authorities' FAQ on DAC6

On 4 May 2022, the Luxembourg tax authorities published a Frequently Asked Questions ("**FAQ**") on the mandatory disclosure rules introduced in Luxembourg law on 25 March 2020.

The FAQ includes clarifications already brought by the Luxembourg tax authorities in May 2020 but also new ones.

Amongst other things, the FAQ provides useful clarifications on:

- the impact of Brexit;
- certain hallmarks and the Main Benefits Test ("**MBT**");
- the declaration in the income tax returns;
- the declaration and notification obligations.

For more background on this topic, please check out the article dated of 23 March 2020.

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## New UK-Luxembourg treaty

On 7 June 2022, a new double tax treaty along with an additional protocol ("New DTT") were signed by the UK and Luxembourg. The entry into force is subject to completion of the ratification processes in both jurisdictions and so the New DTT is not expected to be effective before January 2023 (for some taxes though, there should even be a later start – see below for more details).

Below is a non-exhaustive summary of salient changes:

- Resident (Article 4): A Luxembourg collective investment vehicles (CIV) treated as body corporate is given access to the New DTT (as an individual who is a resident of Luxembourg) and shall be treated as the beneficial owner of the income it receives if (i) at least 75 per cent of the beneficial interests in the CIV are owned by equivalent beneficiaries, or (ii) the CIV is an undertaking for collective investment in transferable securities ("UCITS").

  The term "CIV" includes:
  - UCITS subject to Part I of the Law of 17 December 2010 and Undertakings for

Collective Investment subject to Part II of the same law;
- Specialised Investment Funds (SIF) subject to the Law of 13 February 2007; and
- Reserved Alternative Investment Funds (RAIF) subject to the Law of 23 July 2016, with the exception of reserved alternative investment funds which choose to subject themselves to the regime of Article 48 of the said law;
- any other investment fund, arrangement or entity established in Luxembourg which the competent authorities agree to regard as a CIV.

"equivalent beneficiary" means a resident of Luxembourg, and a resident of any other jurisdiction with which the UK has a treaty providing for an effective and comprehensive information exchange and which benefits from a rate of tax with respect to that item of income that is at least as low as the rate claimed under the New DTT.

- Dividends (Article 10): the New DTT generally provides a full relief from withholding tax on dividends (which is currently levied at a minimum rate of 5%). By exception, a maximum 15% withholding tax will be levied on dividends paid out of income (including gains) derived directly or indirectly from immovable property by an investment vehicle which (i) distributes most of this income annually and (ii) whose income from such immovable property is exempted from tax (e.g. UK REITs), unless the beneficial owner of the dividends is a recognised pension established in the other contracting state (in which case no withholding tax would apply).

- Interest continues to benefit from a full exemption of withholding tax. The New DTT requires however that the interest rate shall be at arm's length.

- Royalties (Article 12): the New DTT provides full relief from withholding tax on royalties (which is currently levied at a minimum rate of 5%). The New DTT requires, however, that the amount of royalties shall be at arm's length.

- Capital gains (Article 13): Under existing treaty, the UK has no taxing rights over gains from the sale of indirect investments in UK real estate. To be in line with other treaties, the New DTT now gives the UK the taxing right on the gains accruing to a resident in Luxembourg on the sale of shares or comparable interests (such as interests in a partnership or trust), deriving more than 50% of their value directly or indirectly from UK immovable property (and vice versa).

- The New DTT also introduces the concept of the principal purpose test.

- Entry into force (Article 29): the New DTT will apply as follows:

1. in the UK:

1. (i) in respect of taxes withheld at source, to income derived on or after 1 January of the next calendar year following the year in which New DTT enters into force;
2. (ii) in respect of income tax and capital gains tax, for any year of assessment beginning on or after 6 April of the calendar year following the year in which the New DTT enters into force;
3. (iii) in respect of corporation tax, for any financial year beginning on or after 1 April of the calendar year following the year in which the New DTT enters into force;

2. in Luxembourg:

1. (i) in respect of taxes withheld at source, to income derived on or after 1 January of the calendar year following the year in which the New DTT enters into force;
2. (ii) in respect of other taxes on income, and taxes on capital, to taxes chargeable for any taxable year beginning on or after 1 January of the calendar year following the year in which the New DTT enters into force.