Newsletter

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Brexit update

1. Extension of the withdrawal period

On 10 April 2019, further to multiple rejections by the UK Parliament of the withdrawal agreement endorsed by the European Council on 25 November 2018, the European Council agreed to extend the withdrawal period for the UK to leave the EU.

More information on this point can be found in the EU law, competition and antitrust section of this Newsletter.

2. New Luxembourg laws (in case of a no-deal Brexit)

On 8 April 2019, two new laws in relation to the Luxembourg financial sector were adopted, in the event that the UK leaves the EU without a withdrawal agreement ("**a no-deal Brexit**").

- The first law aims at amending various Luxembourg laws, including the Law of 17 December 2010 on undertakings for collective investment, as amended ("**UCI Law**") and the Law of 12 July 2013 on Alternative Investment Fund Managers, as amended ("**AIFM Law**")

  A dedicated article on the Bill of Law which preceded the new law was included in our previous Newsletter February 2019.

  As a result of the amendments brought to the UCI Law and to the AIFM Law by this new law, a grandfathering regime of contractual arrangements existing at the date of a no-deal Brexit is provided for a period of 21 months from that date.

  During that grandfathering period, management companies ("**UK ManCo(s)**") and AIFMs ("**UK AIFM(s)**") duly authorised by the UK financial supervisory authority and appointed respectively as management company of Luxembourg UCITS or as AIFM of Luxembourg alternative investment funds, may continue to provide their services in Luxembourg.

- The second law relates to the treatment of breaches of investment policies/rules resulting from Brexit and to the marketing of UK UCITS in Luxembourg.

  This law treats breaches of investment policies, rules or investment restrictions, as set out in the prospectus, the constitutional documents or the law, and that result from the UK no longer being a Member State of the EU, or otherwise from Brexit (irrespective of a "hard" or "soft" Brexit), as "passive" breaches that need to be remedied within a period not exceeding 12 months. The law provides that the remedial action must be taken as soon as possible (within the 12-month deadline) taking into account the stability of the financial markets and the interests of the shareholders. The 12-month period for taking remedial action is only accorded in relation to breaches resulting from positions held prior to the UK leaving the EU. The law provides for a similar regime for Specialised Investment Funds.

  The same law provides that UK UCITS managed by a UK ManCo, that are currently authorised for marketing to retail investors in Luxembourg, may continue marketing to retail investors in Luxembourg for a period of 12 months from the date the UK leaves the EU. Where a UK UCITS is managed by a UCITS ManCo established in another EU Member State (i.e. not the UK), marketing to retail investors in Luxembourg remains possible only if the UCITS ManCo is also authorised as an AIFM.

Cloud computing infrastructure

On 27 March 2019, the CSSF issued Circular 19/714 ("**Circular**") which amends CSSF Circular 17/654 on IT outsourcing relying on a cloud computing infrastructure (CSSF Circular 17/654 as amended by the Circular is referred to as the "**Cloud Computing Circular**"). The key changes introduced by the Circular are as follows:

- it is no longer obligatory to notify the CSSF in case of outsourcing to a cloud computing infrastructure of non-material activities and there is a possibility to rely on the proportionality principle in order to disapply some requirements provided by the Circular (these are exhaustively enumerated in the Circular). The proportionality principle does not, however, include the possibility for the related entity to waive requirement to appoint a cloud officer within the resource operator even in case of outsourcing of non-material activities;
- investment fund managers subject to CSSF Circular 18/698 (" **IFMs**") which have

outsourced IT relying on a cloud computing infrastructure before the publication of the Circular do not need to file an authorisation request or to notify such cloud infrastructure to the CSSF. Any new outsourcing relying on a cloud computing infrastructure must however comply with the Cloud Computing Circular;

- introduction of a register of cloud computing infrastructure outsourcing (a specific form is available on the CSSF website). The register must be established and completed (i) within 6 months from the publication of the Circular for credit institutions, professionals of the financial sector, payment institutions and electronic money institutions and (ii) within one year for IFMs; and
- publication by the CSSF of new forms, which simplify the authorisation process. Those forms must be completed and filed with the CSSF inter alia in case of (i) prior notification of outsourcing to a cloud computing infrastructure supporting a material activity and use of a Luxembourg-based support PFS [1] (which is the only remaining case where a notification to the CSSF is required) and (ii) authorisation request to host material activity on a cloud computing not provided by a support PFS.

In addition, and in order to help the industry to better understand the requirements provided by the Circular, two FAQs were published by the CSSF's concomitantly with the Circular: the first is on the concept of materiality and the second is more general and includes questions on the requirements provided by the Cloud Computing Circular.

> **1** "**PFS**" means Professional of the Financial Sector.

Shareholders Rights Directive: 10 June 2019

On 10 June 2019, the amendments introduced by Directive (EU) 2017/828 ("**Shareholders Rights Directive**") to Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies will become applicable.

The proposed changes will affect various market players [1] including UCITS management companies and alternative investment fund managers ("**AIFMs**") managing, respectively, UCITS and AIFs which invest in shares of companies which have their registered office in a Member State and whose shares are admitted to trading on a regulated market situated or operating within a Member State ("**EU Listed Companies**"). Those UCITS management companies and AIFMs will be required, in particular, to develop an engagement policy and they will be subject to additional transparency requirements.

1 For example, institutional investors (mainly life-assurance/reinsurance companies and pension institutions), asset managers (UCITS management companies, AIFMs, self-managed UCITS, and investment firms which provide portfolio management services to investors), directors of EU Listed Companies, intermediaries, proxy advisors.

PRIIPS: Extension of UCITS exemption

In the course of the discussions which took place in the EU Parliament and Council, a proposal to amend the PRIIPs Regulation (EU) 2014/1286 ("**PRIIPs Regulation**") was added to the Cross-Border Distribution Proposal for a Regulation.

The amendment to the PRIIPs Regulation aimed to push back (i) the UCITS exemption to 31 December 2021 (based on the current provisions of the PRIIPs Regulation, this exemption will be valid until 31 December 2019) and (ii) the European Commission's review of the PRIIPs key information document ("**KID**") to 31 December 2019.

In February 2019, an agreement on a final text for this proposal was reached between the EU authorities and on 16 April 2019, just before the EU Parliament's election break, the EU Parliament formally adopted it.

Once the Council has also approved it, the Cross-border Distribution Regulation with the above mentioned amendments to the PRIIPs Regulation will be published in the OJEU.

In Luxembourg, the CSSF has recently published an updated version of its FAQ on UCITS as well as its FAQ on the application of the Law of 12 July 2013 on Alternative Investment Fund Managers, as amended ("**AIFM Law**"), in order to anticipate the extension of the exemption to produce a PRIIPs KID (i) for UCITS and (ii) for AIFs which produce a UCITS-like KIID (Key Investor Information Document).

In addition, in the FAQ on the application of the AIFM Law to which the FAQ on UCITS cross-refers, the CSSF has clarified its position as regards the notification of the final form of a PRIIPs KID of a Luxembourg AIF the units of which are advised on, offered or sold to retail investors. The CSSF confirms that the notification is not mandatory, however, the CSSF reserves the right to request it on a case-by-case basis. The CSSF also confirms that Luxembourg AIFs that have issued a UCITS-like KIID do not need to file a final version of such document with the CSSF but it may also request it on a case-by-case basis.

UCITS: Update of ESMA Q&A - KIID requirements

On 29 March 2019, ESMA updated its Q&A on the application of the UCITS Directive ("**Q&A**") in order to provide further guidance on the past performance and UCITS benchmark disclosure obligations as provided for in Regulation (EU) 583/2010 on UCITS KIID (mainly Articles 7) 1) d) and 18) 1)) relating to the content of the UCITS KIIDs).

This update may have an impact on the content of the KIIDs, i.e. (i) the investment objective and policy section of UCITS KIIDs, and (ii) the past performance section. It is also likely to impact other fund documentation (including the prospectus and marketing materials).

For more details regarding this subject, see the article " UCITS: Update of ESMA Q&A - KIID requirements" published on our website.

AIFM: Update of ESMA Q&A

On 29 March 2019, two new Q&As were added to the ESMA Q&A on the application of the AIFMD in Section VII: Calculation of leverage.

One relates to the frequency of the calculation of the leverage by an AIFM. According to ESMA, an AIFM should calculate the leverage of each AIF that it manages as often as necessary to ensure that the AIF is capable of remaining in compliance with leverage limits at all times. Consequently, leverage should be calculated at least as often as the NAV is calculated, or more frequently if required.

ESMA also gives a few examples of circumstances which may lead to increased frequency of leverage calculation, i.e. material market movements, changes to portfolio composition and any other factors the AIFM believes require calculation of leverage more frequently than NAV calculation in order for the AIF to remain in compliance with leverage limits at all times.

The other question relates to the need to adjust the calculation of leverage exposure of an

AIF resulting from a short-term interest rate future. In its answer, ESMA states that the calculation of leverage exposure of an AIF resulting from a short-term interest rate future should not be adjusted for the duration of the future.

Market Abuse Regulation: Update of ESMA Q&A

On 29 March 2019, ESMA updated its Q&A on the Market Abuse Regulation (EU) 596/2014 ("**MAR**") to include clarifications on Article 17 of MAR and more particularly to clarify that the obligation of an issuer, which has requested or approved admission of its financial instruments to trading on a regulated market, an MTF [1] or an OTF [2] in an EU Member State, to inform the public as soon as possible of inside information which directly concerns that issuer, applies to Undertakings for Collective Investment ("**UCIs**") without legal personality (including Luxembourg *fonds commun de placement* ("**FCPs**") whilst underlining the fact that the obligations of article 17 of MAR apply to all issuers. As a consequence, it is now clear that MAR applies to all types of UCIs (set up as corporate or non-corporate entities).

The Q&A also sheds some light on the circumstances in which cases of inside information may arise in the context of UCIs.

- According to the Q&A, a UCI without legal personality meets the issuer definition regardless of the fact that the effective issue/redemption of units and any obligations arising from MAR (or any other piece of legislation) are discharged by the relevant asset manager and that in this context the asset manager could be held responsible for a potential infringement of the UCI's obligation to disclose inside information. In a Luxembourg context, the references to "asset manager" are likely to mean the FCP's management company.

  ESMA helpfully clarifies that the obligation to publish inside information under article 17(1) of MAR only covers issuers that have requested or approved admission of their financial instruments to trading on a regulated market, an MTF or an OTF in an EU Member State which therefore seems to exclude circumstances in which the UCI (or its management company) was not aware that its shares or units have been listed on a stock exchange by a third party. This is corroborated by the wording used in the title of the section itself "Disclosure of inside information by collective investment undertakings without legal personality voluntarily admitted to trading or traded on a trading venue".

ESMA also recalls that the obligation to publicly disclose inside information under article 17 of MAR is different from other disclosure requirements under the UCITS directive or the AIFM Directive as it strictly refers to cases involving inside information as defined in article 7 of MAR.

- The Q&A gives (in Q5.7 and A5.7) a non-exhaustive list of examples of cases where inside information may arise in respect to UCIs (including ETFs [3] admitted to trading or traded on a trading venue under article 17 of MAR whilst making it clear that ultimately a final assessment has to be made on a case-by-case basis, and, that the below examples may not constitute inside information in all cases.

  The examples include: any situation with significant impact (appreciation or depreciation) on the valuation of the UCI assets and, as a result, on the value of the UCI's units, cases where the UCI has been affected by fraud, theft or an adverse tax ruling, unexpected circumstances in the creation/redemption of units of a UCI (including any situation under which the UCI cannot issue/redeem its units), events that will directly affect the liquidity of the market in units of an ETF arising from events impacting the entities acting as counterparties in the secondary market, issues related to the total or partial liquidation of the UCI's assets (such as imminent insolvency or termination of the UCI, or a sub-fund where the UCI is an umbrella fund, partial liquidation of the UCI's units; modalities and payment terms preceding the liquidation or delisting of the UCI).

  ESMA highlights that for real estate UCIs admitted to trading/traded on a trading venue, inside information may also arise in the context of significant events related to the acquisition, sale or management of its real estate assets, including rent renegotiation or possible relevant losses derived from legal disputes.

  While the title of this section of the MAR Q&A expressly refers to UCIs without legal personality, there is no reason why the above examples of inside information would not apply to UCIs with legal personality.

1 "**MTF**" means Multilateral Trading Facility.

2 "**OTF**" means Organised Trading Facility.

3 "**ETF**" means Exchange-Traded Fund.

New CSSF fees

On 9 March 2019, a series of modifications regarding the CSSF fees applicable to entities under its supervision became applicable. These amendments are provided by the Grand Ducal Regulation of 1 March 2019 which amends the Grand Ducal Regulation of 21 December 2017 relating to the fees to be levied by the CSSF (" **Regulation**").

Amongst the new fees introduced by the Regulation, we have noted the following:

- on-site inspections: a lump sum of EUR 10,000 will have to be paid by undertakings for collective investments, pension funds, and authorised securitisation undertakings for each on-site inspection conducted on a specific topic (that lump sum was already provided for investment fund managers and for professionals of the financial sector);
- SICAR and SICAR alternative investment funds ("**AIF**") with multiple compartments become subject to the payment of an annual lump sum based on the number of compartments ranging from EUR 8,000 to EUR 35,000 (instead of a fixed annual lump sum of EUR 8,000);
- EuVECA manager and EuSEF manager: a single lump sum of EUR 4,000 for each registration request by (i) the manager of a qualifying venture capital fund ("**EuVECA**") in accordance with Regulation (EU) 345/2013 on EuVECA and (ii) the manager of a qualifying social entrepreneurship fund ("**EuSEF**") in accordance with Regulation (EU) 346/2013 on EuSEF;
- manager of a foreign AIF subject to Chapter II of the AIFM Directive 2011/61/EU with a branch in Luxembourg: the introduction of an annual lump sum of EUR 5,000.

RBO regulations: New publication

An enhanced version of the regulations governing the Register of Beneficial Owner ("**RBO**") is now available on our website. It comprises the original French version of the Luxembourg Law of 13 January 2019 creating an RBO and the Grand-Ducal Regulation of 15 February 2019 on the arrangements regarding registration and payment of administrative costs as well as the access to the information registered in the RBO, together with an English translation.

For ease of reference, some relevant sections of the Luxembourg Law of 12 November

2004 on the fight against money laundering and terrorist financing, and of the Law of 19 December 2002 on *inter alia* the register of commerce have been inserted in both language versions, i.e. English and French.

Banking and financial services

Adoption of Brexit law

On 8 April 2019, the Luxembourg Parliament adopted a law providing for protective measures for the financial sector in the event of the UK leaving the EU without a withdrawal agreement ("**no-deal Brexit**").

In essence, the Law provides for a grandfathering period of 21 months for existing contractual arrangements in the banking, investment services, payment services and insurance sector, on the one hand, and the investment funds and asset management sector, on the other hand, in the case of a no-deal Brexit.

For more details, please see the article dedicated to the relevant Bill of Law in our February 2019 Newsletter.

For information on further recent measures at EU and national level relating to Brexit, please see the EU law, competition and antitrust and the Asset management and investment funds section**s** of this Newsletter.

CSSF Circular on provision of investment services by third-country firms

On 10 April 2019, the CSSF issued Circular 19/716 ("**Circular**") laying out the regimes applying to third-country firms wishing to provide investment services in Luxembourg or perform investment activities and ancillary services in accordance with Article 32-1 of the Law of 5 April 1993 on the financial sector ("**Law**"), which was introduced further to the implementation of MiFID II [1] and MiFIR [2].

At the outset, it is important to note that the Circular confirms that the analysis set out in the CSSF's Circular 11/515, which indicates the conditions under which financial services provided by a third-country firm can be considered not to be performed on the Luxembourg territory, no longer applies to the provision of investment services. Article 32-1 of the Law thus provides for an exhaustive regime regarding the provision of investment services by third-country firms in Luxembourg.

The Circular distinguishes between the situation of investment services provided to retail clients or to professional clients on request, on the one hand, and investment services provided to *per se* professional clients and eligible counterparties, on the other hand.

As far as investment services to retail clients or to professional clients on request are concerned, the CSSF merely recalls that the Law imposes the establishment of a branch in Luxembourg.

Regarding investment services provided to *per se* professional clients and eligible counterparties, they can be provided through a branch in Luxembourg or on a cross-border basis. The Circular clarifies the procedure with which third-country firms must comply in order to benefit from the regime in Article 32-1(1), second subparagraph of the Law allowing for the provision of investment services to *per se* professional clients or to eligible counterparties in Luxembourg on a cross-border basis without establishing a branch. They can do so on the grounds of either (i) an equivalence decision of the European Commission and registration with the European Securities and Markets Authority ("**European regime**") [3] , or (ii) a decision by the CSSF ("**national regime**") [4] in the event the Commission has not yet taken a decision or the third-country firm chooses to benefit from the three-year transitional period provided by Article 54(1) of MiFIR.

To benefit from the national regime, a formal CSSF authorisation will have to be obtained on a case-by-case basis. The CSSF will verify that (i) the firm is subject, in the third country, to supervision and authorisation rules deemed equivalent to those of the Law in terms of provision of investment services [5] , (ii) cooperation between the CSSF and the supervisory authority(ies) of the third country is ensured (generally, through the signature of a new MoU or an addendum to an existing MoU), and (iii) the third-country firm is authorised in the third country to provide the investment services it wishes to provide in Luxembourg. Written applications to benefit from the national regime (which shall include the form in Annex II of the Circular) must be submitted to the CSSF.

The Circular also draws attention to the fact that third-country firms authorised under the national regime or the European regime are required to disclose to their clients (i) that they are only allowed to provide services to eligible counterparties and *per se* professional clients, (ii) that they are not subject to supervision in the EU, and (iii) the name and

address of their supervisory authority in the third country in writing and in a prominent way.

Finally, the Circular recalls that third-country firms providing investment services at the client's own exclusive initiative (reverse solicitation) do not have to apply for authorisation in Luxembourg or to establish a branch regardless of the client's category (retail, professional client on request, *per se* professional client or eligible counterparty). Such situations must be assessed on a case-by-case and continuous basis.

1 Directive 2014/65/EU of 15 May 2014 on markets in financial instruments.

2 Regulation (EU) 600/2014 of 15 May 2014 on markets in financial instruments.

3 which gives access to the whole EU market in the same way as a European passport.

4 providing access to the Luxembourg market only.

5 The CSSF will publish and update a list of countries considered as equivalent based on the requests submitted by third-country firms.

PSD 2 Guidelines and implementing texts

On 14 March 2019, the CSSF issued two circulars relating to aspects of PSD2 [1] addressed in two sets of guidelines of the European Banking Authority ("**EBA**"), with which the CSSF commits to comply and which are annexed to these circulars:

- Circular 19/712 relates to guidelines EBA/GL/2018/05, which provide details on statistical data on fraud related to different means of payment that payment service providers have to report to their competent authorities as well as on the aggregated data that competent authorities have to share with the EBA and the European Central Bank as provided by Article 105-2 (3) of the Law of 10 November 2009 on payment services, as amended ("**Law**"). It will be applicable as of 1 January 2020.
- Circular 19/713 encompasses EBA guidelines EBA/GL/2017/17 on the security measures for operational and security risks of payment services as set out in Article 105-1 (2) of the Law. It became applicable with immediate effect. These guidelines provide details with regard to (i) the annual auditing requirements as regards the security measures taken, and (ii) the annual reporting requirements regarding the assessment of major operational and security risks.

In addition, on 15 March 2019, two regulations of the European Commission were

published relating to the practical implementation of the PSD2 requirement imposing on EBA to develop, operate and maintain an electronic central register containing information on payment service providers in the EU Member States:

- Commission Implementing Regulation (EU) 2019/410 lays down implementing technical standards with regard to the details and structure of the information to be notified by competent authorities to EBA; and
- Commission Delegated Regulation (EU) 2019/411 sets out technical requirements on the development, operation and maintenance of the electronic central register and on access to the information contained therein.

These regulations entered into force on 4 April 2019.

> **1** Directive (EU) 2015/2366 of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC.

Forged transfer orders: Typologies

On 24 April 2019, the Financial Intelligence Unit ("**FIU**") of the Luxembourg Prosecutor's office published a note on forged transfer orders which particularly addresses their typologies and indicators. The note also advises on what steps should be taken when a forged transfer order has been executed or is about to be.

The typologies described in the note are:

- the CEO fraud;
- the falsified invoices;
- the "man in the middle attack"; and
- the use of hacked emails.

These should however be seen as examples as, in practice, we have seen cases in which other typologies or variations of the typologies described by the FIU were applied.

As regards the indicators that may enable the detection of a fraud, the FIU refers to the list drafted by the Egmont Group [1] , while at the same time warning that these indicators should not be analysed separately. The most common indicators of a fraud relate to the

account, the victim or the fraudster. For example, fraudsters often use money mules i.e. individuals who allow their bank account(s) to be used for the transfer or withdrawal of the diverted funds. The inflow of large sums of money with the communication “payment of invoice n°xxx” into an account held by an individual who has a modest salary could be an indication that the accountholder is a money mule.

Other indicators include sudden changes to an account (for example, informing the addressee of the invoice that the invoice must be paid into a new account held with a bank located in a jurisdiction in which the beneficiary of the payment does not operate) and unusual or incoherent information given by the alleged client on the process of the payment, transaction or the activity.

Once the fraud has been identified it is essential to act quickly. The FIU considers that the first 24 hours are crucial for recovering the transferred funds. However, even an intervention within 72 hours may sometimes lead to a partial recovery. The persons that the victim should contact immediately are the bank of the beneficiary, the FIU and the Public prosecutor.

In addition, recovery and conservatory measures should be taken in the jurisdiction where the diverted funds were transferred to. Luxembourg banks or professionals of the financial sector drawn into a fraud should also inform the CSSF.

> **1** The Egmont Group is a united body of 158 FIUs, which provides a platform for the secure exchange of expertise and financial intelligence to combat money laundering and terrorist financing (ML/TF).

RBO regulations: New publication

An enhanced version of the regulations governing the Register of Beneficial Owner ("**RBO**") is now available on our website. It comprises the original French version of the Luxembourg Law of 13 January 2019 creating an RBO and the Grand-Ducal Regulation of 15 February 2019 on the arrangements regarding registration and payment of administrative costs as well as the access to the information registered in the RBO, together with an English translation.

For ease of reference, some relevant sections of the Luxembourg Law of 12 November 2004 on the fight against money laundering and terrorist financing, and of the Law of 19 December 2002 on *inter alia* the register of commerce have been inserted in both

language versions, i.e. English and French.

Employment and pensions law

Time savings account in the private sector

On 28 April 2019, the law introducing a legal framework for the possibility of a time savings account for employees in the private sector came into force.

Companies having introduced a time savings account in execution of an existing collective bargaining agreement may continue to apply the rules set out therein until the expiry of such collective bargaining agreement.

A time savings account may only be agreed in the context of a collective bargaining agreement or of an interprofessional agreement.

Employees who have more than two (2) years' seniority within the company have the possibility to collect rights to paid leave of up to 1800 hours on a special account. The employee shall be entitled to use such hours at a later stage to carry out personal plans, such as a sabbatical leave or child-rearing without having recourse to unpaid leave.

The time savings account which is held in hours can be supplied by additional paid leave days, overtime hours or compensatory rest. The account can be used by means of leave paid at the hourly rate applicable to fulltime work or halftime work with a minimum of ten (10) hours per week.

Such leave is considered effective working time for the determination of the annual leave of the employee and for other rights and obligations such as seniority or complementary pension schemes. As long as the employee is on leave, the employer is obliged to maintain the same or at least a similar employment and salary. Furthermore, the employer must foresee the financial counterpart of such a time savings account increased by the employer contributions and adapted, if applicable, to the costs of living, such financial counterpart having hence to be re-evaluated on a yearly basis.

In the event of a settlement of the time savings account, the employer pays to the employee a compensatory indemnity corresponding to the monetary conversion of all acquired rights multiplied by the hourly rate applicable on the day of payment. In the

event of bankruptcy of the employer, the Employment Fund (*Fonds pour l'emploi*) guarantees the claims arising from a settlement of the time savings account up to twice the minimum social wage.

EU law, competition and antitrust

Brexit update

On 10 April 2019, the European Council, in agreement with the United Kingdom (" **UK**"), took a decision to grant a further extension to the period under Article 50(3) of the Treaty on the European Union for the UK to leave the European Union ("**EU**") ("**Extension Decision**").

The Extension Decision allows the UK more time to ratify the withdrawal agreement endorsed by the European Council on 25 November 2018 ("**Withdrawal Agreement**", see the Brexit Update in our December 2018 Newsletter). The extension will last until such UK ratification, but it will not continue past 31 October 2019. If the UK ratifies the Withdrawal Agreement before such date, it will leave the EU on the first day of the month following the completion of the ratification procedures. In any event, the withdrawal must happen no later than 1 November 2019.

The Extension Decision contains the following principles:

- the UK will remain an EU Member State until the new withdrawal date with all the associated rights and obligations;
- the UK must organise elections for the European Parliament in the absence of ratification of the Withdrawal Agreement by 22 May 2019. Failure to do so will imply the end of the extension on 31 May 2019 and a no-deal Brexit will ensue;
- during this extension period, the UK will refrain from any measure which could jeopardise the attainment of the EU's objectives, and it will not undermine the letter or spirit of the Withdrawal Agreement or hamper its implementation through any unilateral commitment, statement or other act;
- during this extension period, the Withdrawal Agreement will not be open to renegotiation.

The European Council will review the progress of this extension in June 2019.

At national level, the Luxembourg Parliament has adopted a law to protect the rights of UK residents living and working in Luxembourg in the event that the UK leaves the EU without a Withdrawal Agreement (see our Newsflash "Rights of residence safeguarded for UK citizens residing in Luxembourg" on our website). In addition, as discussed in the Banking and financial services and in the Asset management and investment funds sections of this Newsletter, two new laws in relation to the Luxembourg financial sector were adopted providing for protective measures for the banking, investment services, payment services and insurance sector, on the one hand, and the investment funds and asset management sector, on the other hand, in such a scenario.

In parallel, at EU level, the European Parliament has also adopted legislative safeguard measures to limit the negative impact of a no-deal Brexit on citizens.

Further, the European Securities and Markets Authority (" **ESMA**") has released several public statements relating to Brexit. Statement 70-155-7253 covers the impact of a no-deal Brexit on MiFID II/MiFIR and Benchmark Regulation provisions. Statement 65-8-6254 covers the impact on ESMA's databases and IT systems in the event of a no-deal Brexit scenario. Finally, Statement 70-155-7329 discusses the trading obligation for shares under Article 23 of MiFIR in the absence of an equivalence decision in respect of the UK by the European Commission.

Acquisition of shares: No abuse of dominance

By Decision 2019-R-01 of 15 March 2019, the Competition Council (" **Council**") dismissed the complaint filed against Encevo S.A. ("**Encevo**"), Enovos Luxembourg S.A. (" **Enovos**"), the number one energy suppliers in Luxembourg, and Paul Wagner & fils S.A. ("**Paul Wagner**"), active in the technical equipment installation sector in Luxembourg.

In its complaint of November 2018, the *Fédération des Artisans*, the representative organisation of craftsmen and self-employed persons in Luxembourg, alleged that the acquisition, in July 2018, by Encevo, the mother company of Enovos, of all the shares of Paul Wagner amounted to an abuse of a dominant position in violation of the Law of 3 October 2011 on Competition, as amended, and Article 102 of the Treaty on the Functioning of the European Union.

According to the *Fédération des Artisans*, the acquisition presented serious risks of these companies adopting abusive conduct in the future and foreclosing competitors of Paul Wagner in various ways (e.g. through joint offers, creating entry barriers, or in a public procurement context). The Council dismissed these claims arguing that the alleged abuse of a dominant position was merely potential and that the risk of abusive conduct in the future, however significant, did not justify for an investigation to be launched.

The *Fédération des Artisans* further alleged that the acquisition of the shares itself constituted an abuse of a dominant position as it increased the size and economic power of the Encevo group, leading to competition being seriously disturbed within the meaning of the "Continental Can" case law of the Court of Justice of the European Union (judgment of 21 February 1973, Case 6-72).

Referring to "Continental Can" and its own case law (Decision 2016-FO-04 - Utopia), the Council reiterated that the fact that an undertaking holds a dominant position does not imply that there is an abuse of a dominant position. Since no abusive conduct had been established, the question of whether Encevo held a dominant position was irrelevant. In addition, Encevo and Paul Wagner were not active in the same business sector and were therefore not competitors prior to the acquisition. The Council saw no possibility to intervene, but did not exclude a possible future investigation if new elements arose.

Online platforms investigation

On 1 April 2019, the Competition Council (" **Council**") confirmed that it has launched an investigation into the provision of online platform services in Luxembourg.

This investigation was opened following several complaints relating to an international company with European headquarters in Luxembourg that provides access to its websites and various platform services to third-party merchants. The aim of the Council's enquiry is to collect testimonies from Luxembourg merchants active in online retail sales who have met problems in the course of their activities.

Prior to this investigation, the Council dismissed, by Decision 2017-C-02 (see our July 2017 Newsletter), a complaint filed against Amazon Services Europe S.à.r.l., active in this field, arguing that no abuse of a dominant position was established.

Interaction e-Privacy principles / GDPR

On 10 January 2017, the EU Commission issued a proposal for a Regulation on the respect for private life and the protection of personal data in electronic communications ("**e-Privacy Regulation**") which aims to replace the current legal framework established under Directive 2002/58/EC ("**e-Privacy Directive**").

The e-Privacy Directive, as implemented into the national legislations of the EU Member States, provides special privacy rules for electronic communications services and therefore regulates activities such as the use of cookies and unsolicited electronic communications.

The proposal for the e-Privacy Regulation intends to further harmonize the rules on electronic communications across all Member States by defining better and clearer rules on tracking technologies, in particular by taking into account the principles and requirements deriving from the General Data Protection Regulation 2016/679 ("**GDPR**").

In terms of timing, the EU institutions were initially aiming to adopt the e-Privacy Regulation by 25 May 2018, i.e. the date of entry into application of the GDPR. This was then post-poned until the end of 2018. This timing would have established a comprehensive framework on the matter at hand. However, the adoption of the e-Privacy Regulations has taken longer than expected due to the huge economic and financial stakes at hand. Indeed, discussions are still ongoing within the Council and the proposal has not made it yet to the first reading at the Parliament.

Meanwhile, following a request from the Belgian data protection authority, the European Data Protection Board ("**EDPB**") adopted on 12 March 2019 Opinion 5/2019 on the interplay between the e-Privacy Directive and the GDPR, in particular regarding the competence, tasks and powers of data protection authorities ("**Opinion**").

The Opinion recalls that certain processing activities may fall within the material scope of application of both the e-Privacy Directive and the GDPR. The EDPB nevertheless emphasises that, in accordance with the adage *lex specialis derogat legi generali*, the general rules set out in the GDPR shall apply in the absence of specific provisions governing a particular processing operation or set of operations, in particular in relation to

the rights granted to data subjects.

Furthermore, the Opinion recalls that the GDPR itself recognizes the complementary role of the e-Privacy Directive in its Article 95 which states that the GDPR should not impose additional obligations on electronic communications service providers which are subject to specific obligations with the same objective set out in e-Privacy Directive. A concrete example of such potentially duplicated obligations would be in case of personal data breach notification obligations as prescribed under both legal instruments. The result of applying Article 95 of the GDPR is that once a breach notification is made under the e-Privacy Directive (as implemented into national law), there is no need for a separate data breach notification under the GDPR.

The EDPB finally states that where a subset of a processing falls within the scope of the e-Privacy Directive, this does not necessary limit the competence of data protection authorities as set out under the GDPR.

This may also interest you :

- **CJEU limits the de-referencing right to the EU territory**
- **Consent requirements regarding cookies (Planet49 case) (CJEU)**

Consent requirements regarding cookies (Planet49 case) (Advocate General)

On 21 March 2019, Advocate General Szpunar (" **AG**") issued some clarifications about consent requirements with regard to cookies in the Planet49 case pending before the Court of Justice of the European Union (Case C-673/17, Planet49 GmbH v. Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V.).

The facts: before hitting the participation button of a promotional online lottery organised by Planet49, the user had to enter his name and address and, beneath these fields, there were two sets of checkboxes accompanied by explanatory texts. One required the user to consent to cookies being installed on their computer (by unticking the box) while the other required the user to agree to being contacted by a certain number of firms for promotional offers (by ticking the box).

Consent is defined in Article 4(11) of the General Data Protection Regulation 2016/679 ("**GDPR**"), as "any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her". The AG, while applying Directive 2002/58/EC as amended ("**e-Privacy Directive**") either in conjunction with Directive 95/46/EC or with the GDPR (respectively for situations before and after the 25 May 2018), has advised regarding 'cookies checkbox', that there is no valid consent in a situation such as the case at hand "where the storage of information, or access to information already stored in the user's terminal equipment, is permitted by way of a pre-ticked checkbox which the user must deselect to refuse his consent and where consent is given not separately but at the same time as confirmation in the participation in an online lottery". Indeed, according to the AG, pre-ticked boxes do not provide a guarantee that users have read the information and have therefore given their consent freely. Moreover, there is no separate consent since decisions to participate in the lottery and consent to the installation of cookies were made simultaneously. Additionally, the user was not fully informed that participation in the lottery was not conditional upon giving consent to such installation and gaining access to cookies.

According to the AG, this interpretation is also valid whether or not the information stored or accessed constitutes personal data.

The AG, while applying transparency requirements and informed consent concept considered that since the average internet user would not be expected to have a high level of knowledge on how cookies work, the clear and comprehensive information that a service provider has to give to a user "implies that a user is in a position to be able to easily determine the consequences of any consent he might give". This means that the information must be clear, comprehensible and unambiguous for such an average internet user. To this end, the AG is of the opinion that when access to the cookies is granted to third parties, the clear and comprehensive information that a service provider must give to a user must include the information on that access as well as the duration of the operation of these cookies.

The Court will deliberate and make a judgement at a later date. Even though the judges are not bound by the AG's observations, the legal solution he suggests, offers them a certain direction to take into consideration.

This may also interest you :

- **Consent requirements regarding cookies (Planet49 case) (CJEU)**

Approval of the 2019 Budget Law

On 25 April 2019, the *Chambre des Députés* approved the Bill of Law 7450 as part of the draft Luxembourg budget for the 2019 financial year which will now become law ("**Budget Law**").

The Budget Law contains two main measures with respect to corporate tax.

First, the Budget Law provides for a reduced corporate income tax (" **CIT**") rate which shifts from 18% to 17% resulting in an overall income tax rate of 24.94% for companies established in Luxembourg-city (this figure includes the municipal business tax and the solidarity surcharge).

Also the Budget Law extends the reduced 15% CIT rate to taxable income not exceeding EUR 175,000 (this reduced rate was formerly applicable to taxable income not exceeding EUR 25,000).

In addition, taxable income ranging between EUR 175,000 and EUR 200,001 will be taxed at a rate corresponding to EUR 26,250 plus 31% of the taxable income exceeding EUR 175,000.

Another salient measure introduced by the Budget Law is the amendment of Article 164 *bis* of the Luxembourg income tax law ("**LITL**") to transpose the option offered by the anti-tax avoidance directive (ATAD) to apply the new interest limitation rule (laid down in Article 168*bis* LITL) at the level of the tax unity.

For more information regarding this topic, please refer to our article " Luxembourg Tax Unity Regime" available on our website.

The CIT rate reductions will be applicable for the 2019 tax year and the amendment of article 164*bis* LITL will be applicable to accounting years starting as of 1 January 2019.

MLI: Ratification and deposit with OECD

By the Law of 7 March 2019 ("**Law**"), Luxembourg ratified the Multilateral Instrument ("**MLI**").

According to the Law, the MLI enters into force on the first day of the month following the expiration of a period of three calendar months beginning on the date of the deposit by Luxembourg of its instrument of ratification.

Accordingly, Luxembourg has deposited the ratification instrument with the Organisation for Economic Co-operation and Development ("**OECD**") on 9 April 2019.

The MLI will then enter into force on 1 August 2019. However, the provisions will become effective for each covered tax agreement ("**CTA**") if:

- the other party to the CTA has also chosen the treaty with Luxembourg as a CTA;
- the other party to the CTA has ratified the MLI; and
- both parties to the CTA have chosen to adopt the same provisions (with some exceptions allowed).

For more information regarding the date of entry into effect for each type of taxes and the list of reservations and notifications made by Luxembourg, please refer to our Tax Treaty News dated 14 September 2018 and 25 February 2019 as well as our Newsletter of July 2018.

State aid: Huhtamäki group

On 7 March 2019, the European Commission ("**EC**") announced the opening of an in-depth State aid investigation concerning three tax rulings issued by the Luxembourg tax authorities to the benefit of a Luxembourg company of the Huhtamäki group.

According to the EC's press release, the Luxembourg company, which carried out intra-group financing activities, has been granted interest-free loans from an Irish group company and used the funds to grant in turn interest bearing loans to other group companies. The rulings confirmed that the Luxembourg company can deduct from its taxable base an amount of deemed interest on the interest-free loans corresponding to

interest payments that an independent third party would have required for such loans. As a result, the Luxembourg company is taxed on a substantially smaller profit.

The EC will investigate into whether Luxembourg has granted the Luxembourg company a selective advantage by accepting this unilateral downward adjustment of its taxable base.

In a press release dated 7 March 2019, the Luxembourg government stated that, in its view, it did not grant Huhtamäki companies a state aid incompatible with the internal market within the meaning of Article 107 (1) of the Treaty on the Functioning of the EU. Nevertheless, the Luxembourg government recalled that it shares the Commission's objective of combating tax evasion and that it is willing to cooperate fully with the Commission during its investigation.

Amending law on exchange of information

Further to the decision of the Court of Justice of the European Union of 16 May 2017 (Berlioz case, C-682/15), the Luxembourg law of 25 November 2014 on the procedure applicable to the exchange of information in tax matters ("**EOIP Law**") has been amended by the Law of 1 March 2019 ("**Amending Law**").

The Amending Law obliges the Luxembourg tax authorities to carry out a high level review on the foreseeable relevance of the incoming request for information before sending an order to the information holder. In case of disagreement, the information holder can seek an annulment of the Luxembourg tax authorities' order before the Luxembourg Courts. In this respect, the Amending Law restores the information holder´s right for a judicial review of the legality of the request which was denied in the former version of the EOIP Law.

Regarding the procedure, the claim (which has a suspensive effect), must be filed with the Administrative Tribunal (*Tribunal administratif*) within one month of the notification of the information order and the judgement of the Administrative Tribunal can be appealed before the Administrative Court (*Cour administrative*) within 15 days following the Tribunal's judgement.

For more details regarding the Berlioz case, please refer to our article " ECJ challenges the Luxembourg law on exchange of information" dated 12 July 2017 on our website.

Tax Dispute Resolution Mechanism: New Bill of Law

The Bill of Law 7431 ("**Bill**") introduced by the Luxembourg government on 11 April 2019 implements the European Union ("**EU**") Directive 2017/1852 dated 17 October 2017 on tax dispute resolution mechanisms in the EU ("**Directive**"). The Bill integrates the content of the Directive to a greater extent.

The Directive meets the BEPS Action Plan 14 minimum standards and is a subsidiary to the mandatory binding arbitration clause of the Multilateral Instrument (if applicable). The objective of the Directive is to provide an efficient resolution mechanism for disputes arising between EU Member States regarding the interpretation and application of agreements and conventions that provide for the elimination of double taxation of income and, where applicable, capital ("**Resolution Mechanism**"). Depending on the case, disputes may be settled on a unilateral basis or a mutual agreement of the Member States involved.

The effectiveness of the Resolution Mechanism relies on strict deadline periods in each procedural phase and on an obligation for the Members States to reach a solution.

For more information regarding this topic, please refer to our article " Tax dispute resolution mechanism" available on our website.

Tax treaty news

Argentina

On 13 April 2019, Luxembourg signed a new tax treaty with Argentina which aims to eliminate double taxation with respect to taxes on income and wealth and prevent tax evasion and fiscal fraud ("**DTT**"). The DTT contains the minimum standards provided for in the BEPS Action Plan and a provision for the exchange of information.

Through this agreement, Luxembourg continues to update its network of double taxation treaties in line with the anti-BEPS rules developed at OECD level.

Ghana

Luxembourg and Ghana have initiated a tax treaty on 10 April 2019 which aims to eliminate double taxation with respect to taxes on income and wealth and prevent tax evasion and fiscal fraud.