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LUXEMBOURG LAW

NEWSLETTER

FEBRUARY 2022

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CSSF reform of the long form report

With a view to improving its risk-based supervision, the CSSF published three Circulars for prudential and AML/CFT purposes at the end of December 2021. These circulars modify (and replace) the requirements set forth in the updated CSSF Circular 02/81 of 6 December 2002 on the Guidelines concerning the task of auditors of UCITS and Part II UCIs[1] (requiring the preparation of the so-called "Long Form Report") and extend the revised requirements to other regulated entities (SIFs, SICARs and investment fund managers ("**IFMs**")).

The three new CSSF Circulars are listed below:

- **Circular CSSF 21/788** introduces a new AML/CFT external report to be prepared by the approved statutory auditor (*réviseur d'entreprises agréé*), as referred to in Article 49 of the CSSF Regulation 12-02 on the fight against money laundering and terrorist financing, as amended.

  Circular 21/788 applies to all Luxembourg IFMs as defined in CSSF Circular 18/698, including registered AIFMs, and all Luxembourg investment funds supervised by the CSSF for AML/CFT purposes, except funds which have appointed an IFM (established in Luxembourg or abroad). Thus, UCITS that have appointed a management company and AIFs that have appointed an AIFM will not be subject to the requirements of this Circular.
- **Circular CSSF 21/789** introduces a new self-assessment questionnaire ("**SAQ**") for all authorised IFMs, self-managed SICAV and self-managed AIFs. The approved statutory auditor (*réviseur d'entreprises agréé*) of the authorised IFM or Self-Managed UCI is required to review on an annual basis certain questions of the SAQ and to complete on that basis a separate report. The Circular also defines a specific regulatory framework applicable to the management letter to be issued by the approved statutory auditor.
- **Circular CSSF 21/790** introduces a new SAQ for all UCITS, Part II UCIs, SIFs and SICARs. The approved statutory auditor of such regulated UCIs is required to review on an annual basis certain questions of the SAQ and to complete on that basis a separate report. The Circular also defines a specific regulatory framework applicable to the management letter to be issued by the approved statutory auditor.

The completion and filing of the reports mentioned above (SAQs, separate reports and management letters) is to be performed using the CSSF eDesk platform.

A new module "**Collective Investment Sector Reporting Tool**" for preparing and filing with the CSSF the reports foreseen in Circulars CSSF 21/789 and 21/788 is already available on the CSSF **eDesk** platform.

The reports and the type of information to be communicated to the CSSF in case the approved statutory auditor issues a modified audit opinion for a regulated UCI, as foreseen in Circular CSSF 21/790 which will become applicable as of the financial years ending 30 June 2022, are expected to be available respectively, on the CSSF **eDesk** platform and the CSSF website, by 31 March 2022 at the latest.

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1 "**Part II UCIs**" refers to undertakings for collective investment subject to Part II of the Luxembourg Law of 17 December 2010 relating to undertakings for collective investment, as amended.

ESG - Sustainable finance update

1. SFDR/Taxonomy RTS: Postponement

In its **letter of 25 November 2021**, the EU Commission informed the EU Parliament and the Council that it would not be able to adopt the SFDR/Taxonomy level 2 Regulatory Technical Standards ("**SFDR/Taxonomy RTS**") in December 2021 and that it would therefore postpone their application to January 2023 to give the industry sufficient time to prepare for compliance with the SFDR/Taxonomy RTS.

The EU Commission also confirmed in this letter that it would bundle the SFDR level 2 RTS (**dated 15 February 2021**) and the Taxonomy-related RTS (**dated October 2021**) into one single delegated act.

2. Publication of Taxonomy delegated acts

In relation to the Taxonomy Regulation:

- the delegated act which specifies the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to (i) climate change mitigation or (ii) climate change adaptation and for determining whether that economic activity causes no significant harm to any of the other environmental objectives, was published in the Official Journal of the EU on 9 December 2021 (**Climate Delegated Act)**;
- article 8(1) Taxonomy Regulation provides that certain large undertakings that are required to publish non-financial information under the Non-Financial Reporting Directive Directive 2013/34/EU ("**NFRD**") should disclose information to the public on how and to what extent their activities are associated with environmentally sustainable economic activities, as defined under the Taxonomy Regulation.

  The delegated act supplementing the Taxonomy Regulation by specifying the content and presentation of non-financial information to be disclosed by undertakings subject to Articles 19a or 29a of NFRD concerning environmentally sustainable economic activities, and specifying the methodology to comply with that disclosure obligation, was published in the Official Journal of the EU on 10 December 2021 (**Commission Delegated Regulation (EU) 2021/2178**).

3. Taxonomy complementary delegated act on gas and nuclear activities

On 2 February 2022, the EU Commission published a 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**").

According to the EU Commission's proposal, natural gas and nuclear can be seen as a means to facilitate the transition towards a predominantly renewable-based future.

As a reminder, in early January 2022, the EU Commission submitted the proposal to the Member States Expert Group on Sustainable Finance and to the Platform on Sustainable Finance.

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In the **Response to the Complementary Delegated Act** published on 24 January 2022, the experts of the Platform on Sustainable Finance rejected the EU Commission's proposal to include gas and nuclear activities in the taxonomy, concluding that these "activities are not in line with the Taxonomy Regulation and most members see a serious risk of undermining the sustainable Taxonomy framework. Further, Platform members have doubts about how the draft criteria would work in practice and many are deeply concerned about the environmental impacts that may result". The EU Commission's plans to include gas and nuclear in the taxonomy has also met with considerable opposition from a number of EU member states, notably Luxembourg, Germany and Austria.

As regards the next steps, once translated into all official EU languages, the Taxonomy Complementary Climate Delegated Act will be formally transmitted to the European co-legislators for scrutiny. Once the scrutiny period (four months, with a possible extension of 2 months) is over and if neither of the co-legislators objects, the Taxonomy Complementary Climate Delegated Act will enter into force and apply as of 1 January 2023.

Marketing communications

CSSF applies and integrates ESMA guidelines on marketing communications for UCITS and AIFs in its administrative and regulatory practices

On 30 January 2022, the CSSF published **Circular 22/795** concerning the application of **ESMA guidelines on marketing communications** ("ESMA Guidelines") under Regulation (EU) 2019/1156 on the cross-border distribution of funds ("CBDF Regulation"), which were published on 2 August 2021.

CSSF Circular 22/795 applies as from 2 February 2022, which is also the date of application of ESMA Guidelines, whilst the marketing communication requirements set out in the CBDF Regulation have been applicable since 2 August 2021.

For an overview of the key points of CSSF Circular 22/795, please read **here**.

UCITS cross-border notification requirement: new share class

In the last update of its **FAQ on UCITS**, ESMA added a question on notification requirements for a new share class of of a UCITS already notified for cross-border marketing.

In its answer, ESMA states that in this case, the UCITS should give written notice to the national competent authority ("NCA") of both the UCITS home and host Member State, at least one month before the marketing of the new share class starts.

Further to this clarification, the **CSSF FAQ on the CBDF Notifications procedures** ("CSSF FAQ on CBDF") will probably be updated in order to reflect this requirement. Indeed, in August 2021, the CSSF only required a prior notification to the NCA of the UCITS host Member State (i.e. Question 11 of the CSSF FAQ on Cross-Border Distribution of Funds (CBDF) Regulation).

Virtual assets: CSSF and ESMA positions

1. ESMA FAQ on AIFMD: investment in crypto-assets

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1. ESMA FAQ on AIFMD: investment in crypto-assets

In the November 2021 update of its **FAQ on AIFMD**, ESMA answered the question of whether the managers of undertakings investing in crypto-assets are subject to AIMFD.

In its analysis, ESMA recalls the importance (i) of assessing on a case-by-case basis the conditions to be fulfilled in order to qualify as an 'AIF' and (ii) of considering the guidance provided by ESMA in the Guidelines on key concepts of the AIFMD (**ESMA/2013/611**).

On that basis, ESMA states that (i) collective investment undertakings which (ii) raise capital (iii) from a number of investors to invest in crypto-assets (iv) in accordance with a defined investment policy for the benefit of those investors, will qualify as 'AIF' and as the AIFMD does not provide for a list of eligible or non-eligible assets, AIFs may in principle invest in any traditional or alternative assets (i.e. including in crypto-assets).

ESMA, however, also insists on the specific investment and risk diversification requirements and the limitations regarding the target investors that may exist at national level for AIFs investing in crypto-assets. A joint ESMA, EBA and EIOPA warning statement on the high risks involved in investments in crypto-assets was also published in February 2018 (**ESMA50-164-1284**).

According to ESMA, market participants and investors should be alert to the high risks of buying and/or holding these assets, including the possibility of losing their investment entirely.

2. CSSF FAQ on virtual assets

In November 2021, the CSSF addressed the possibility for UCIs to invest in virtual assets and published an **FAQ** on virtual assets providing guidance in relation thereto.

In this FAQ, which was updated in January 2022, the CSSF notably states that:

- UCITS are not allowed to invest directly or indirectly in virtual assets as defined in Article 1 (20b) of the AML Law[1] (which does not cover virtual assets fulfilling the conditions of financial instruments within the meaning of MiFID[2]) (as per the previous CSSF position). Any assets qualifying as financial instruments under MiFID may therefore potentially be eligible for UCITS, such as shares of companies active in the virtual asset ecosystem; and
- AIFs are authorised to invest in virtual assets under certain circumstances.

For more details on the CSSF's position on this topic, please read **here**.

> 1 **AML Law** refers to the **Law of 12 November 2004** on the fight against money laundering and terrorist financing, as amended.
> 2 **MiFID** refers to **Directive 2014/65/EU of 15 May 2014** on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

UCITS: impact of the covered bonds reform

As part of the implementation of **Directive (EU) 2019/2162** on the issue of covered bonds and covered bonds public supervision ("**Covered Bonds Directive**"), the **Law of 8 December 2021** (Loi du 8 décembre

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2021 relative à l'émission de lettres de gage) ("**Law**") amends, amongst other things, the provision of the UCI Law on the single issuer limit which applies to UCITS.

Article 43 of the UCI Law currently allows Luxembourg UCITS to raise the general 10% single issuer limit up to 25% when they invest their assets in certain covered bonds issued by the same issuer.

According to the Law, the benefit of the 25% single issuer limit will be limited in the future to UCITS investing in the following covered bonds:

- Bonds that fall under the definition of covered bonds provided for by the Covered Bonds Directive; and
- On a transitional basis, certain bonds (including mortgage bonds) that have been issued before 8 July 2022 and meet the previous requirements set out in Article 43(4) of the UCI Law on the date of their issue, i.e. bonds that have been issued by a credit institution which has its registered office in a Member State and is subject by law, to special public supervision designed to protect bondholders.

  In this case, these bonds may continue to be referred to as covered bonds in accordance with the Covered Bond Directive and to remain invested by Luxembourg UCITS under the benefit of the 25% single issuer limit until their maturity.

The changes detailed above will start to apply on 8 July 2022.

CSSF FAQ on UCIs: investment in SPACs

On 17 December 2021, the CSSF updated its **FAQ on the UCI Law** (question 18) with information on the possibility for UCITS to invest in SPACs.

The CSSF position on the conditions under which SPACs may be eligible investments for UCITS may be summarized as follows:

- the SPACs must qualify, at any point of their life cycle, as transferable securities[1] ;
- due to the different kind of risks that SPACs may carry, their potentially complex structure and the fact that their characteristics may vary largely from one SPAC to another, the structure of each SPAC needs to be carefully analysed;
- a detailed pre-trade risk assessment covering all material risks to which the UCITS will be exposed to as a result of the investment in SPACs must be performed. Such pre-trade risk assessment shall:
  - comply with the provisions of article 26 (4) of the **CSSF Regulation 10-4** requiring management companies to formulate forecasts and perform analysis concerning the SPAC's contribution to the UCITS' portfolio composition, liquidity and risk and reward profile;
  - ensure that, at all times, the liquidity of the SPAC investments does not compromise the ability of the UCITS to repurchase its shares/units at the request of shareholder/unitholders.
- investments in SPACs should in principle be limited to a maximum of 10% of a UCITS' NAV;
- investments in SPACs should be appropriately disclosed in UCITS prospectuses.

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UCITS management companies should ensure that if the UCITS they manage invest or intend to invest in SPACs, the above conditions are or will be complied with.

> 1 In accordance with UCITS rules within the meaning of Article 1 (34) and Article 41 of the UCI Law and Article 2 of the Grand Ducal Regulation of 8 February 2008, further clarified by the CESR Guidelines concerning eligible assets for investment by UCITS.

UCITS: ESMA/EU Commission position on fee rebates

In November 2021, a question on fee rebate arrangements was added in the ESMA FAQ on UCITS.

In fact, ESMA did not answer itself but forwarded the question to the EU Commission (as allowed by Article 16b (5) of the **ESMA Regulation**).

The question relates to the applicability of the UCITS inducement rules (i.e. Article 29 of the **UCITS Level 2 Directive**):

- to rebate arrangements where UCITS management companies ("**UCITS Mancos**") pay these rebates from their own resources (payment vis-à-vis an individual investor);
- the payment of fees by UCITS Mancos from their own resources to separate investors (e.g. by concluding side letters with institutional investors, subscribing investment fund units on behalf of their clients).

The EU Commission in the first part of its reply verifies the application of the UCITS inducement rules in this case. According to the EU Commission, as management fee discount arrangements entail payments to certain investors based on the fees charged by the UCITS Mancos to remunerate investment management and/or administration activities, they should be analysed as payments for the activity of the investment management and administration of the UCITS and therefore as falling within the scope of the UCITS inducement rules. The EU Commission states that UCITS Mancos must be able to provide accurate and documented justifications upon national competent authorities' request.

The analysis made by the EU Commission in its reply is surprising in view of the texts in question. To date, to our knowledge, the CSSF has not officially commented on this position.

PRIIPs : end of UCITS exemption on 31 December 2022

1. Postponement of the end of the UCITS exemption

Until 31 December 2021, investment fund managers and persons advising on, or selling, units of UCITS and non-UCITS which issue a UCITS KIID had a temporary exemption from the requirement to produce a PRIIPs KID ("**UCITS Exemption**").

On 20 December 2021, in view of the end of the UCITS Exemption, two new legislation ("**UCITS/PRIIPs Quick Fixes**") were published in the Official Journal of the EU:

- a Regulation amending the PRIIPs Regulation in order to postpone the end of the UCITS Exemption to 31 December 2022 (**Regulation (EU) 2021/2259**); and
- a Directive amending the UCITS Directive in order to prevent retail investors from receiving two different pre-contractual documents, i.e. the PRIIPs KIDs and the UCITS KIIDs (**Directive (EU) 2021/2261**).

According to the provisions of the UCITS/PRIIPs Quick Fixes:

- investment funds sold to or acquired by retail investors, that currently produce a UCITS KIID have until 31 December 2022 to produce a PRIIPs KID;
- UCITS exclusively distributed to professional investors will have the choice to issue either a UCITS KIID or a PRIIPs KID.

2. Amendments to the PRIIPs Level 2 RTS

Also in relation to the end of the UCITS Exemption, new PRIIPs regulatory technical standards ("RTS") were published in the Official Journal of the EU on 20 December 2021 (**Commission Delegated Regulation (EU) 2021/2268**). The new PRIIPs RTS introduces changes to the existing KID PRIIPs in order to adapt it to UCITS.

The new PRIIPs RTS provide for a greater use of historical data and changes to the presentation and content of the KID, including methodologies for the calculation and presentation of risks, rewards and costs.

As regards past performance information in particular, the new RTS require certain types of investment funds and insurance-based investment products to publish information on the past performance of the product, in a standardised and comparable format, and to disclose, in the KID, where the information is available.

As regards the timing, unfortunately the application date of the new PRIIPs RTS (i.e. 1 July 2022) is not aligned with the UCITS/PRIIPs Quick Fixes package. In order to solve this issue, the EU Commission is expected to publish a new regulation in the first quarter of 2022 to change the application date of the new PRIIPs RTS.

UCITS and AIFs: CSA on valuation

On 20 January 2022, ESMA launched a Common Supervisory Action ("CSA") with national competent authorities ("NCAs") on valuation of UCITS and open-ended AIFs ("**CSA on valuation**") across the EU.

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

The various actions and assessments carried out in the framework of the CSA on valuation are intended to lead to greater convergence in the approach of NCAs to the supervision of valuation-related issues.

In this context, in a **Communiqué dated 24 January 2022**, the CSSF indicated that at the beginning of March 2022 it will launch the first phase of the CSA by asking a representative selection of Luxembourg-

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based authorised investment fund managers ("**IFMs**") of UCITS and open-ended AIFs and a limited number of EU IFMs managing Luxembourg UCITS and AIFs to complete a dedicated questionnaire for all UCITS and AIFs managed.

The response questionnaire will have to be submitted by the selected IFMs through a dedicated communication channel set up by the CSSF. The CSSF will inform the industry once this communication channel, together with additional guidance, will be available for use.

New CSSF fees

The **Grand-Ducal Regulation of 17 December 2021** relating to the fees to be levied by the CSSF ("**Regulation**"), which repeals the Grand-Ducal Regulation of 21 December 2017, entered into force on 1 January 2022.

The Regulation increases the existing fees, and introduces new fees, payable by legal entities and natural persons subject to the CSSF's supervision, which include, amongst others, Luxembourg regulated investment funds (i.e. UCITS, Part II UCIs, SIFs and SICARs) and their management companies or alternative investment fund managers, as well as credit institutions and other professionals of the financial sector.

The main changes for the investment fund sector are summarised in the **article** published on our website.

More specifically, as regards fees and charges levied by the CSSF in relation to the cross-border activities of Luxembourg investment fund managers referred to in the Cross-Border Distribution Regulation (EU) 2019/1156 ("**CBDF**"), a dedicated webpage listing these fees and charges in accordance with the template provided for in the CBDF implementing Regulation (EU) 2021/955, is accessible on the **CSSF website**.

End of EONIA and LIBOR

In a **Press Release dated 19 November 2021**, the CSSF reminded UCIs and investment fund managers ("**IFMs**") of the cessation of the benchmarks EONIA and LIBOR and insisted on the need for them:

- to ensure that they have taken all necessary actions to enable a smooth transition to alternative rates; and
- to have in place robust fall-back provisions covering a possible cessation of any other benchmarks used by them (if any), in accordance with Article 28(2) of the Benchmark Regulation ("**BMR**").

The CSSF also reminded UCIs and IFMs of the end of EONIA from 3 January 2022 and gave information on the designated replacement rate for EONIA and recommended alternative rates for LIBOR rates.

Administrative law

Right of pre-emption: important case law

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The following recent developments are worth noting:

- Judgment of 21 October 2021 (no. 45871C):

The pre-empting authority must comply with the provisions of Article 9 of the Grand Ducal Regulation of 8 June 1979 on the procedure to be followed by the administrations of the State and the municipalities:

- inform the parties concerned of its intention to exercise its right of pre-emption;

- grant them a period of 8 days to present their observations;

- and/or organise a meeting.

Failing this, the decision to exercise the right of pre-emption is subject to annulment.

The Court underlines the role played by notaries who must ensure that the provisions of Article 9 are applied.

- Circulars to municipal administrations of 21 December 2021 from the Minister of the Interior (no. 4076).

Municipalities must comply with the provisions of the Administrative Court's decision of 21 October 2021.

Failure to comply with the provisions of the above-mentioned Article 9 may result in the refusal of approval by the Minister of the Interior in the context of approval supervision.

New developments in public procurement and concessions

I. Public Procurement and Concessions: new European thresholds applicable from 1 January 2022 for the years 2022 and 2023

As of 1 January 2022, following the delegated regulations (EU) 2021/1951, (EU) 2021/1952 and (EU) 2021/1953 of 10 November 2021, the European thresholds are increased from:

- €139,000 excl. taxes to €140,000 excl. taxes for supply and service contracts of central public authorities and for competitions organised by them;
- €214,000 excl. taxes to €215,000 excl. taxes for supply and service contracts of sub-central contracting authorities and for competitions organised by them;
- €428,000 excl. taxes to €431,000 excl. taxes for supply and service contracts of contracting entities and for competitions organised by them;
- €5,350,000 excl. taxes to €5,382,000 excl. taxes for works contracts and for concession contracts.

These thresholds will apply for the years 2022 and 2023.

II. Public contracts and concessions: reinforcement of the obligations of companies with regard to electronic

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invoicing

The Law of 13 December 2021 amending the Law of 16 May 2019 on electronic invoicing in the context of public procurement and concession contracts came into force on 18 December 2021.

The purpose of this text is to implement stronger and more binding measures on electronic invoicing.

The main measures are:

- Obligation for companies holding public procurement contracts and concessions to issue and transmit electronic invoices for the payment of their services. However, this obligation will only come into force according to a differentiated timetable:
    - 18 October 2022 for companies that meet two of the following three criteria according to the 2019 balance sheet: the balance sheet total is €20m, the net turnover is €40m, and that employ 250 people full time and on average;
    - 18 March 2023 for companies that meet two of the following three criteria according to the 2019 balance sheet: balance sheet total is €4.4m, net turnover is €8.8m, and that employ an average of 50 full-time staff;
    - 18 March 2023 for companies that are materially unable to provide for 2019 the numerical limits of at least one of the above three criteria (e.g. because they are materially unable to have a balance sheet for 2019).
- Establishment of a system for issuing, transmitting and receiving electronic invoices, which is madatory for contracting authorities and entities.

Accessibility for everyone to places open to the public

The Law of 7 January 2022 on accessibility to all places open to the public, public roads and collective housing buildings ("**Law**") aims to ensure that everyone can exercise and fully enjoy their rights and freedoms in terms of accessibility, this through the implementation of specific measures and in particular by making places open to the public, public roads and collective housing buildings accessible to all.

This includes, amongst other things, the premises of liberal professions, hotels and accommodation structures, roads used by pedestrians and commercial facilities.

The specific accessibility requirements differ depending on whether the locations and spaces involved are existing or new constructions.

Exceptions may be granted, however, in certain situations for reasons of technical impossibility, disproportionate burden or preservation of cultural and historical heritage. In these specific cases, solutions of equivalent effect can be implemented.

Development works can be subsidised (application to be submitted before 1 July 2028).

Penalties are provided for by the Law in case of non-compliance with its provisions.

The Law shall apply as of 1 July 2023, except that the provisions of section 3, subsection 1, relating to

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existing places open to the public shall apply as of 1 January 2032.

Any application for a building permit for new constructions submitted after 1 July 2023 shall take into account the accessibility requirements of sections 2, 4 and 5 of the Law.

Corporate, banking and finance

CSSF adopts EBA Guidelines on sound remuneration

Through Circular 22/797 of 31 January 2022, the CSSF indicates applying the Guidelines of the European Banking Authority ("EBA") on sound remuneration policies under Directive 2013/36/EU (EBA/GL/2021/04) ("**Guidelines**"), published on 2 July 2021. All credit institutions and all CRR investment firms must comply with them. Circulars 17/658 and 11/505 relating to the same topic are repealed. In essence, the Guidelines cover both remuneration policies for all staff as part of institutions' internal governance arrangements and remuneration policies for identified staff, i.e. staff whose professional activities have a material impact on the institutions' risk profile. Remuneration policies must notably be gender neutral and respect the principle of equal pay for male and female workers for equal work or work of equal value.

New law on the issue of covered bonds

What's new? Access to the activity of covered bond issuance is now open to any Luxembourg credit institution, within a strict framework set out in the Luxembourg Law of 8 December 2021 ("**Law**" – available in French), which transposes Directive (EU) 2019/2162 of 27 November 2019 on the issue of covered bonds and covered bond public supervision ("**Directive**").

The Law amends the Law of 5 April 1993 on the Financial Sector, as amended ("LFS") and certain other relevant financial sector laws.

The current regime for specialised credit institutions issuing covered bonds will continue in parallel with the new regime set up by the Law. The Directive does not exclude the maintenance of the specific national regimes already put in place.

Why is it important? The Law allows any Luxembourg credit institution ("*banque universelle*") to exercise the activity of issuing covered bonds, without requiring the establishment of a specialised credit institution whose main purpose is the issuance of covered bonds ("*banque d'émission de lettres de gage*"), as is the case under the former legislation.

What does it mean? The Law provides that a bank may carry out the activity of issuing covered bonds (i) if it issues covered bonds within the meaning of Art. 1, point 2*ter*-1 of the LFS or (ii) if it is a bank governed by Luxembourg law, other than a bank issuing covered bonds, which has put in place the necessary measures to ensure that the total of the covered funds linked to the letters of pledge issued does not exceed, at any time, 20 per cent of its total liabilities, including own funds, after deduction of eligible deposits.

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Opening up the business of issuing covered bonds to so-called "universal" credit institutions will provide the latter with additional possibilities to cover their financing needs by giving them access to a wider range of refinancing instruments. In particular, covered bonds are considered to be stable sources of refinancing, because they are secured by claims on underlying assets. Access to this activity will thus allow credit institutions issuing such debt securities to diversify their sources of financing, thereby strengthening the stability and soundness of the credit institutions in question.

CSSF guidance on virtual assets (credit institutions)

Following the publication of an FAQ Virtual Assets - Undertakings for collective investment, discussed in the Asset management and investment funds section of this Newsletter, the CSSF sets out equivalent guidance in a specific FAQ Virtual Assets – Credit institutions ("**FAQ")**.

The FAQ contains seven questions covering various regulatory and organisational aspects regarding banks wanting to provide virtual asset services. A summary overview of the FAQ can be found **here**.

Sustainable finance: Taxonomy update

On 1 January 2022, certain obligations resulting from the EU **Taxonomy Regulation** became applicable, affecting various players in the financial sector and beyond. Two delegated acts further defining its implementation were published early December and became applicable as of 1 January 2022.

The Taxonomy Regulation has established a classification system enabling the categorisation of economic activities that play key roles in contributing to at least one of six defined environmental objectives, and no significant harm done to the other objectives. The six objectives include climate change mitigation, climate change adaptation, sustainable use and protection of water and marine resources, transition to a circular economy, pollution prevention and control, and protection and restoration of biodiversity and ecosystems. It has also introduced additional disclosure obligations for financial products within the meaning of the Sustainable Finance Disclosure Regulation ("**SFDR**"). In addition, it has reinforced disclosure requirements resulting from the Non-Financial Reporting Directive ("**NFRD**").

You can read about the latest developments around the EU Taxonomy Regulation's delegated acts as well as an update on the timing of the adoption of the SFDR/Taxonomy level 2 Regulatory Technical Standards in the Asset management and investment funds section of this Newsletter under this **link**.

New regulatory framework for Crowdfunding Service Providers

The EU Regulation on Crowdfunding Service Providers regulating their functioning and activities entered into force on 10 November 2021 and implies specific licensing requirements at Luxembourg level.

Crowdfunding is a form of financing increasingly used by start-ups and small and medium-sized enterprises, typically relying on small investments. Over the past few years, several crowdfunding models have emerged

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within the European Union. Only some forms are currently covered by financial sector regulation.

Regulation (EU) 2020/1503 of 7 October 2020 on European Crowdfunding Service Providers for business ("**Regulation**") is directly applicable in all Member States since 10 November 2021. It promotes and regulates the use of financial intermediation where a crowdfunding service provider, without taking on own risk, operates a digital platform open to the public in order to match or facilitate the matching of prospective investors or lenders with businesses that seek funding, the type of crowdfunding that the EU wants to foster.

The new legal status of European Crowdfunding Service Providers ("ECSP") allows relevant players to benefit from an EU passport, based on a single set of rules. Since 10 November 2021, the provision of crowdfunding services in the EU has been subject to a licence from and supervision by a Member State competent authority. For the provision of crowdfunding services from Luxembourg, a licence needs to be obtained from the CSSF.

As the CSSF further sets out on its **webpage** dedicated to crowdfunding, the Regulation only applies to crowdfunding services provided to non-consumer project owners relating to offers for an amount of up to EUR 5,000,000 calculated over a period of 12 months per project owner.

Investors on crowdfunding platforms will benefit from a strengthened protection regime based on clear rules on information disclosures for project owners and crowdfunding platforms, in the form of a "key investment information sheet", marketing communication, governance and risk management and harmonised supervision.

The CSSF underlines that ECSPs intending to provide payment services in addition to crowdfunding services, may need to obtain a separate licence under the amended Law of 10 November 2009 on payment services.

Finally, Bill of Law 7825 (see link **here** – available in French only) implementing the Regulation and detailing the CSSF's powers with respect to ECSPs is finalised and should be submitted to a vote in Parliament soon.

Clarifications on TCSP's registration requirements under the AML Law

The registration requirements for trust and company service providers ("TCSPs") resulting from the Law of 12 November 2004 on the fight against money laundering and terrorism financing, as amended ("AML Law"), have given rise to much uncertainty. The National Prevention Committee seeks to bring clarity through the **TCSP Guidelines** published in October 2021.

Under Article 1(8) of the AML Law, a TCSP is defined as "any natural or legal person which by way of business provides any of the following services to third parties:

(a) forming companies or other legal persons;

(b) acting as or arranging for another person to act as a director or secretary of a company, a partner of a partnership, or a similar position in relation to other types of legal persons;

(c) providing a registered office, business address, correspondence or administrative address or business premises and other related services for a company, a partnership or any other legal person or arrangement;

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(d) acting as, or arranging for another person to act as a "fiduciaire" in a "fiducie", a trustee of an express trust or an equivalent function in a similar legal arrangement;

(e) acting as, or arranging for another person to act as, a nominee shareholder for another person".

According to Article 7-2(1) of the AML Law, TCSPs shall register with the supervisory authority or self-regulatory body that is competent for each one of them.

The TCSP Guidelines apply to non-financial sector TCSPs since, in accordance with Article 7-2(2) of the AML Law, financial sector TCSPs, already authorised and supervised by the CSSF or the CAA to perform the activity of TCSP, are exempted from the Article 7-2(1) registration requirement.

Non-financial sector TCSPs include the professionals under the AML/CFT supervision of the *Administration de l'enregistrement, des domaines et de la TVA* (Registration Duties, Estates and VAT Authority), the *Institut des réviseurs d'entreprises* (Institute of Statutory Auditors), the *Ordre des experts-comptables* (Order of Professional Chartered Accountants), the *Ordre des avocats de Luxembourg* (Luxembourg Bar Association) and *the Ordre des avocats de Diekirch* (Diekirch Bar Association).

According to the TCSP Guidelines, a natural or legal person must register as a TCSP when it (i) provides one or more services listed in letters a) to e) of Article 1(8) of the AML Law, (ii) for another natural person, legal person or legal arrangement, (iii) in the course of a business relationship, by written or oral agreement.

Inspired by FATF's publications, the TCSP Guidelines also provide relevant explanations on the concepts used in Article 1(8) of the AML Law and practical examples to illustrate the scope of entities subject to AML Law's registration requirements. For instance, natural persons sitting on the board of a company in their own name and on their own behalf are not TCSPs.

Domiciliation activity for business centres or co-working spaces

Given the significant development of domiciliation activities and the growing interest for business centres and co-working spaces in Luxembourg, the CSSF has recently clarified its view on domiciliation activities with respect to entities offering such services (see **CSSF Press Release** of 23 November 2021, updated on 17 December 2021).

The CSSF recalls that the offering of a head office or a commercial or professional address to a company when the latter carries out its activities within the framework of its corporate purpose and the provision of any service related to these activities (e.g. mail management, incoming calls handling or welcoming visitors) is considered as a company domiciliation activity within the meaning of Article 1 of the Law of 31 May 1999 governing the domiciliation of companies ("**1999 Law**").

The CSSF restates that members of the regulated professions referred to in Article 1 of the 1999 Law, other than specialised PFS authorised as corporate domiciliation agents in accordance with Article 28-9 of the amended Law of 5 April 1993 on the financial sector, are exclusively entitled to domicile companies for which they provide professional services.

However, and in accordance with the administrative practice of the CSSF, the renting of a closed and private office to a company where it establishes its head office is, in principle, not to be considered as a

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domiciliation activity, provided that it is a genuine rental, and if no other services are provided to that company.

Moreover, the CSSF considers that incubators providing services as part of the support to start-ups which are in the development phase of an innovative activity are not carrying out a domiciliation activity within the meaning of the 1999 Law.

New case law on minority shareholder action

Who may initiate legal proceedings for management fault against directors of an SA?

Before the 2016 reform of the Luxembourg company law, only the shareholders' meeting deciding by a simple majority (or possibly the board itself) had the authority to decide on actions against a director of a public limited liability company (*société anonyme* or SA) for management faults.

The 2016 reform extended the possibility to initiate legal proceedings against directors on behalf of the SA to minority shareholders. Article 444-2 of the Luxembourg company law provides that "an action may be brought against the directors or the members of the management board or the supervisory board, as the case may be, on behalf of the company by minority shareholders or holders of profit units. This minority action may be brought by one or more shareholders or holders of profit units who, at the general meeting which decided upon discharge of such directors or members, owned securities with the right to vote at such meeting representing at least 10 per cent of the votes attaching to all such securities."

Is an equal shareholder a minority shareholder?

If the law fixes a minimum shareholding (10%), it does not indicate if an equal shareholder (holding exactly 50% in the share capital) shall be treated as a minority shareholder for the purpose of Article 444-2.

In a judgment dated 13 June 2019, the District Court of Luxembourg decided that the provisions of Article 444-2 were clear in that they reserved the minority action only to minority shareholders holding less than 50% of the voting rights.

In a judgment dated 27 October 2021, the Seventh Chamber of the Luxembourg Court of Appeal overruled the above judicial decision and declared that minority shareholder should not be understood as designating the one which has fewer voting rights than the "majority", but should be considered more broadly in the context of the law which led to the introduction of Article 444-2. In view of the purpose of the law introducing the minority shareholder, the action of Article 444-2 of this law goes beyond the sole minority shareholder taken in the literal sense and benefits the equal shareholder.

Is the vote by the shareholders' meeting on the discharge a preliminary condition to the minority action?

Article 444-2 reserves the minority action to minority shareholder which holds at least 10% "at the general meeting which decided upon discharge of such directors or members". Does it mean that the shareholders' meeting shall have approved the discharge before the minority shareholder can initiate the proceedings?

In the same judgment, the Court of Appeal says no to this question. Article 444-2 does not expressly state that the discharge had to be voted for the minority action to be initiated. The use of the verb "to decide" means that it is sufficient that a vote has taken place and that this has not resulted in either a discharge or a refusal of discharge.

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What about an Sarl?

A minority shareholder holding at least 10% is entitled to initiate proceedings against a director for management fault only for a public limited liability company (*société anonyme* or SA), a corporate partnership limited by shares (*société en commandite par actions* or SCA) and as simplified joint stock companies (*société par actions simplifiée* or SAS) but not for a private limited liability company (*société à responsabilité limitée* or Sàrl).

Does it mean that an equal shareholder will always be considered as a minority shareholder for the purpose of the Luxembourg company law?

Not necessarily: the Court of Appeal concluded that an equal shareholder is a minority shareholder taking into account the aim pursued by the law which established the minority action. Depending on the context, a different conclusion might be reached for other provisions of the Luxembourg company law.

New RCS filling formalities

On 1 October 2021, the Luxembourg Business Register ("**LBR**") issued a **public notice** detailing a new set of rules regarding the filing process with the Luxembourg Trade and Companies Register ("**RCS**").

In line with the LBR's objectives to enhance digitalisation as well as facilitating the document filing process with the RCS, these new rules strengthen the requirements for the identification of natural persons and introduce a new technical process in its forms.

What is new? The most significant change made to the existing filing process is that any individual registered with the RCS in any capacity whatsoever will have to be identified by a Luxembourg national identification number ("**LNIDN**") upon filing.

Furthermore, as a new technological process will apply, whereby the traditional PDF format will be replaced by HTML forms, a check on the consistency of the Luxembourg addresses referenced in the RCS filing application will be performed against the information in the National Register of Localities and Streets.

What does it mean?

- Scenario 1: Individuals already registered with the RCS.

The LNIDN of all individuals (shareholders, directors/managers, supervisory auditors etc.) already registered with the RCS will have to be communicated to the RCS (initially on a voluntary basis or on the occasion of a new registration of an individual in the RCS file) and registered through the new HTML format, failing which any new filing for the entity will not be accepted (after the expiry of the initial phase).

For those individuals who have not yet obtained an LNIDN, a specific procedure will be put in place to request the creation of the LNIDN on the RCS portal, for which fees will apply in certain circumstances (after the expiry of the initial phase).

- Scenario 2: Individuals who do not have an LNIDN and are not yet registered with the RCS

Individuals without an LNIDN will be required to go through a dedicated process in which the filing applicant will have to provide a copy of his/her passport or ID card and specific information such as on the gender,

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private address and the nationality (additional information such as evidence of private domicile address may be requested during the process). A third-party representative will be able to introduce the request.

When does it apply? These new RCS filing formalities will apply from 31 March 2022 (initial phase). The LBR also specifies that the expiry date of the initial phase will be communicated to the public in due course.

Employment and pensions law

Covid-19: measures on telework for cross-border workers

Telework continues to be an effective tool in mitigating the spread of the Covid-19 virus. Luxembourg and its neighbouring countries have agreed to extend bilateral special agreements concerning telework of cross-border worker in order to avoid any implications on the applicable tax and social security regime.

Special tax arrangements are extended until 31 March 2022 as follows:

1. Luxembourg and Germany have decided that the amicable agreement governing the tax implications of telework, currently applicable until 31 December 2021, will be extended until 31 March 2022. Consequently, until that date, the days spent working remotely in accordance with the agreement will continue not to be taken into account when calculating the tolerance threshold of 19 days applicable to taxation.

2. Luxembourg and Belgium have decided that the amicable agreement governing the tax implications of telework currently applicable until 31 December 2021, will be extended until 31 March 2022. The application of the agreement will then be extended automatically until 30 June 2022, unless terminated by written notification by either Luxembourg or Belgium at least 2 weeks before March 31, 2022. Consequently, until that date, the days spent working remotely in accordance with the agreement will continue not to be taken into account when calculating the new tolerance threshold of 34 days applicable to taxation.

3. Luxembourg and France have decided that the amicable agreement governing the tax implications of telework currently applicable until 31 December 2021, will be extended until 31 March 2022. The application of the agreement will then be extended automatically until 30 June 2022, unless terminated by written notification by either Luxembourg or France at least 1 week before March 31, 2022. Consequently, until that date, the days spent working remotely in accordance with the agreement will continue not to be taken into account when calculating the new tolerance threshold of 34 days applicable to taxation.

Special social security arrangements are extended until 30 June 2022 as follows:

Luxembourg has agreed with Germany, Belgium and France to extend the exceptional provision of not taking into account teleworking days related to the COVID-19 crisis for the determination of the social security legislation applicable to cross-border workers until 30 June 2022.

As a result, all cross-border workers who telework from their country of residence will thus continue to be affiliated with the Luxembourg social security system regardless of whether the 25% threshold of activity in their country of residence has been reached.

Mandatory Covid-Check at the workspace

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Following up on recent government announcements, the Bill of law 7924 was voted on 16 December 2021, amending the Law of 17 July 2020 on measures to combat Covid-19 ("**Law**") and came into force from Friday 17 December 2021.
One of the main changes for employers relates to the implementation of a compulsory Covid-Check regime at the workplace, applicable between 15 January 2022 and 28 February 2022, including the following measures:

1. In order to access the workplace, all employees must be able to present a Covid-Check certificate, i.e. either:

- a vaccination certificate with a QR code; or
- a certificate of recovery with a QR code; or
- a Covid-19 test certificate with a QR code (the validity of which is reduced to 48 hours for a PCR test and 24 hours for an antigen test); or
- a negative result of a self-diagnostic test carried out onsite for employees with a certificate contraindicating vaccination against Covid-19.

2. Employers must control the employee's Covid-Check certificates, or delegate such controls internally to one or several employees or to an external third party. The controller shall also verify the identity of the holders of the certificates by requesting a proof of identity.

3. To facilitate controls, employers are authorised to set up a list of vaccinated or recovered employees who voluntarily agree to be referred thereto. This list may only refer to the name of the employees and the length of validity of their Covid-Check certificate. Access to the content of the list must be limited to the employer and the controller. This list must be deleted after 28 February 2022.

4. Access to the employer's premises will have to be denied to any employee who does not or cannot present a valid Covid-Check certificate.

In such a scenario, and subject to the employer's agreement, the employee may take legal or conventional paid leave. Failing this, the employee will automatically lose his/her entitlements to remuneration proportionally to the hours not worked. The employee may not benefit from short-time work.

The employee concerned will maintain the social security affiliation during the unpaid period which will nevertheless be considered for employee's seniority and entitlements to annual leave. A specific calculation is foreseen for the split of the social security contributions.

5. The employee's refusal or failure to present a valid Covid-Check certificate and his/her consequent absence from work does not constitute a valid reason for dismissal or a disciplinary sanction. Any such dismissal is null and void.

6. Employers may decide to limit access to the premises by applying similar Covid-Check controls to external persons. Access to the public service and the continuity of the public service should remain guaranteed.

7. The Labour and Mines Inspectorate ("ITM") is competent to monitor the compliance of employees and employers with the new obligations set forth by the Law. Notably:

- any access to the workplace in violation of the obligation to present a valid Covid-Check certificate would be sanctioned with a fine of 500 to 1,000 euros to be paid by the employee;
- any failure of the employer to monitor this obligation would be sanctioned with a fine of 4,000 euros

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to be paid by the employer.

Please note that there is currently a bill of law n°7964 which intends to lighten these measures, even before 28 February 2022.

EU law, competition and antitrust

Merger control in Luxembourg – Launch of a public consultation

On 20 January 2022, the Ministry of Economy launched a public consultation on the possible implementation of a merger control regime in Luxembourg.

The purpose of such a regime would be to give the Competition Council the power and the tools to carry out an *ex ante* control of certain mergers and acquisitions or other alignments between undertakings which may have a restrictive effect on competition in Luxembourg. Such a regime would allow for early detection of such threats to competition, potentially limiting damage to consumers and undertakings alike.

While this would be a novelty in Luxembourg law, such regimes already exist at the level of the European Union as well as in the other Member States of the European Union.

The Ministry of Economy has stated that it is working in close collaboration with the Competition Council and all affected ministerial departments on this subject. The Ministry's objective is to steer preparatory works scheduled for 2022 with a view to introducing a bill of law later on.

The public's opinion is sought in order to assess whether such a regime is necessary and, if so, how it should be implemented. All interested parties may participate before 31 March 2022. A link to the public consultation (in French) can be found **here**.

Recent activity of the Competition Council

- Two dismissal decisions adopted by the Competition Council

In **Decision n°2021-C-03** of 16 December 2021, the Council analysed whether the acquisition of a minority shareholding in the capital of a competitor constitutes a violation of competition rules. The Council found that, in the case at hand, the minority shareholder had neither a blocking minority nor access to information likely to influence its own competitive behaviour. Based on these elements, the Council ruled out the existence of an infringement of competition law.

In **Decision n°2021-C-04** of 22 December 2021, the Council assessed the award of a public contract by the municipality of Hesperange to Publi-Lux, a publishing company. A complainant alleged a violation of competition law by both Publi-Lux and the municipality of Hesperange due to the alleged dominant position held by Publi-Lux. The Council found, first, that it has no jurisdiction to rule on a violation of competition by the State or an emanation of the State such as a municipality. Second, it found that Publi-Lux is not in a dominant position, hence it cannot be accused of any abuse of a dominant position. Here also, the case was

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therefore closed.

- Investigation on competition in public procurement procedures

In October 2021, the Council published the first part of its conclusions on competition in public procurement procedures in the context of its ongoing Sector inquiry in the construction and public procurement sector (see link **here**).

The objective of the Council's investigation is, on the one hand, to examine whether, upstream, public tenders organised in Luxembourg allow effective and non-discriminatory competition, and, on the other hand, whether, downstream, the construction sector operates in a competitive manner.

According to the Council, although overall, public procurement, which has a considerable weight in the national economy, ensures a satisfactory level of competition, access to public tenders by SMEs is rendered difficult by the complexity of the applicable legal framework and tenders largely continue to be awarded solely on the basis of price considerations.

The Council makes various recommendations to the legislator and the sector.

Finally, the Council indicates that the second part of its conclusions is forthcoming and will examine the behaviour of companies when responding to calls for public tenders.

Foreign sanctions: CJEU interprets EU Blocking Statute

In a Grand Chamber judgment of 21 December 2021 in preliminary ruling case Bank Melli Iran v Telekom Deutschland GmbH (C-124/20), the Court of Justice of the European Union ("CJEU") was asked to interpret for the first time Regulation 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom ("**EU Blocking Statute**").

The EU Blocking Statute aims to protect EU natural and legal persons against the effects of the extra-territorial application of certain foreign laws specified in its annex. Its Article 5 prohibits such persons from complying with any requirement or prohibition imposed by such foreign laws unless authorisation to be exempt from this prohibition is granted by the European Commission. One of the laws listed is the US Iran Freedom and Counter-Proliferation Act of 2012, which prohibits any person to trade, outside the US territory, with any person or entity included in the Specially Designated Nationals and Blocked Persons List of the United States Office of Foreign Assets Control (OFAC) ("SDN List").

In the case at hand, Telekom Deutschland GmbH terminated, prior to their expiry, all contracts it had concluded with Bank Melli Iran ("BMI") after BMI was added back to the SDN List in 2018, without providing reasons for termination and without obtaining Commission authorisation. BMI challenged this termination in the German court on the grounds that it infringed Article 5 of the EU Blocking Statute.

In the judgment, the CJEU first clarifies the scope of the EU Blocking Statute, indicating that the prohibition set out in its Article 5 is broadly drafted and applies even in the absence of a foreign administrative or judicial order directing compliance. In addition, after confirming that Article 5 may be directly relied upon by EU natural and legal persons in civil proceedings, the CJEU indicates that such persons can terminate contracts concluded with sanctioned entities despite having no authorisation from the Commission and without giving reasons for that termination. However, where all the evidence seems to indicate that the termination was motivated by compliance with third countries' prohibition laws, the terminating party must prove that its decision was motivated by other reasons.

As to sanctions in the event of a breach of the Blocking Statute (Article 9), the CJEU had to consider whether, in view of the freedom to conduct a business guaranteed by the Charter of fundamental rights of the European Union, the annulment of a termination should be precluded where the terminated party risks suffering substantial economic loss as a result. The CJEU holds that any such annulment must not have disproportionate effects. It is up to the national judge to weigh in the balance the pursuit of the EU objectives served by the annulment of the termination of a contract in breach of the EU Blocking Statute and the probability that the person concerned may be exposed to economic loss, as well as the extent of that loss, if he or she cannot terminate his or her commercial relationship with a person on the SDN List.

Foreign Direct Investment (FDI) update

The EU Foreign Direct Investment ("**FDI**") Screening Regulation ("**FDI Screening Regulation**") has installed EU-wide formalised cooperation between Member States and the European Commission on the screening of FDI into the EU. Luxembourg draft legislation establishing an FDI screening mechanism is currently going through the legislative process.

The FDI Screening Regulation, applicable since 11 October 2020, and individual Member State screening legislations, aim to protect security or public order considering the critical nature of certain investment targets in the EU Member States and the risks that investments by certain investments may pose on e.g. critical infrastructure or technologies or sectors such as the health sector. The decision on which investments to screen, approve, condition or block lies with the Member States under their respective rules.

In Luxembourg, Bill of Law 7885 (**Bill**" - available in French) establishing an FDI screening mechanism was submitted to Parliament on 15 September 2021. In-scope are FDIs allowing investors from outside the European Economic Area (EEA) to gain effective control of a Luxembourg-based entity carrying out critical activities in Luxembourg. Such FDI will have to go through a mandatory notification and pre-approval procedure.

The scope of the Bill is wide considering the broad definition of a "critical" activity. These include, in particular, certain activities in the energy, transport and water sector, the health sector (e.g. biotech), the communications sector (including the satellite sector), the aerospace sector (e.g. the exploitation of space resources), the data processing or storage sector, central bank activity and infrastructures and systems relating to the exchange, payment and settlement of securities, and the media sector (notably publishing, audiovisual and broadcasting activities). Also included are research and production activities directly related to these activities, activities likely to allow access to them, or related activities likely to allow access to the premises in which they are exercised. However, simple portfolio investments are explicitly excluded from the FDI Regulation and from the Bill.

The Bill is currently going through the ordinary legislative process and may be amended. Formal adoption can be expected in the course of 2022.

On 23 November 2021, the Commission published its first **Annual Report** on the application of the FDI Screening Regulation in EU Member States. It follows from the report that, during the reporting period, 24 out of 27 EU Member States either adopted a new national FDI screening mechanism, amended an existing mechanism, or initiated a consultative or legislative process for the adoption of a new mechanism or amendments to an existing one.

For 2020, Member States have reviewed 1,793 investment files upon request for approval relating to FDI into seven reporting Member States, A very high share of files were speedily approved (80%) whereas of the remaining 20% of cases, which were formally screened, again a very high share were approved without conditions (79%) and a small share (12%) were approved with conditions. Only 2% of all formally screened

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files received a prohibition decision. A list of Member States' screening mechanisms is available on the Commission's website under this **link**.

ICT, IP, media and data protection

CSSF White Paper on DLT and blockchain

On 21 January 2022, the CSSF provided guidance with regard to the use of the DLT in the financial sector by publishing a *Communiqué* together with a **press release** and a **white paper** ("White Paper").

Context of publication of the White Paper

In the presence of constantly evolving technologies, it is important to recall that the Law of 1 March 2019[1] and the Law of 22 January 2021[2] respectively enable the maintenance and circulation of securities by way of inscription in a distributed ledger and the issuance of such dematerialised securities through secured electronic registration mechanisms such as the DLT.

From an AML/CTF[3] standpoint, the Law of 12 November 2004 on the fight against money laundering and terrorist financing was amended by a law dated 25 March 2020 introducing a new status of "virtual asset service providers" which must be registered with the CSSF for such AML/CTF purposes.[4]

In this context of appetite for decentralisation and dematerialisation, the White Paper follows two FAQs (one related to **UCIs** and another one for **credit institutions**) published in November and December 2021 by the CSSF in relation to virtual assets. These FAQs emphasise the need for professionals to carry out a case-by-case assessment of the specific risks related to investments in, and services provided in relation to, such types of assets.

Please see elsewhere in this Newsletter about the FAQs concerning **UCIs** and **credit institutions**.

Content of the White Paper

First of all, the White Paper, which is a non-binding document, agrees on the following definition for the DLT:

"DLT is a technology allowing a network of independent and often geographically dispersed computers to update, share and keep a definitive record of data (e.g. information, transactions) in a common decentralised database in a peer-to-peer way, without the need for a central authority."

Then, the White Paper focuses on three main aspects:

- explanatory developments related to the identification of the main components of a DLT and the different types of DLT;
- indication of the roles and responsibilities of the different players in the use of the DLT such as the DLT developers or the infrastructures service providers;
- emphasis on the fact that entities should weigh up the risks that involve the use of a DLT against the benefits.

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From a practical standpoint, the White Paper ends with an appendix summarising all DLT-specific key questions and considerations, some of which have legal or contractual implications.[5]

1 Amending the Law of 1 August 2001 on the circulation of securities.
2 Amending the Law of 5 April 1993 on the financial sector and the Law of 6 April 2013 on dematerialised securities.
3 Anti-Money Laundering and Counter Terrorist Financing.
4 See: **https://www.cssf.lu/en/registration-vasp/**.
5 Noting in particular that performance of certain services may trigger the need to obtain additional or different licences.

A refresh of certain trademark rules thanks to AC Milan

What happened?

In February 2017, the well-known football club Associazione Calcio Milan SpA ("**AC Milan**") filed an application to register its emblem as an international trademark designating the EU for many goods including goods in Class 16 (paper, cardboard, stationery items, writing materials, etc.).

Defending its German word trademark "Milan" registered in 1988 for goods such as "paper", "cardboards", "stationery" in Class 16, the German office supply store InterES[1] introduced an opposition before the European Union Intellectual Property Office ("**EUIPO**") to prevent the registration of AC Milan's trademark application with respect to the goods mentioned above. InterES was claiming the existence of a risk of confusion between its prior trademark and AC Milan's trademark application for these goods.

The signs at issue were the following:

Both the EUIPO's Opposition Division and the Board of Appeal upheld the opposition, which led AC Milan to request the annulment of the Board of Appeal's decision before the General Court of the European Union ("**General Court**"). On 10 November 2021, the General Court dismissed AC Milan's action in its entirety[2] .

What is the key takeaway?

Quite classical, this judgment is an opportunity to refresh key rules of trademark law regarding :

- the assessment of the genuine use of the earlier trademark; and

- the importance of the principle of interdependence in the assessment of the risk of confusion.

Further points of attention: the role of the respective reputation of the conflicting signs when assessing the risk of confusion

The Milanese football club was arguing that the Board of Appeal should have taken into account, in the context of the assessment of the risk of confusion, the high reputation of the sign applied for and of the club AC Milan.

The General Court dismissed the argument in a terse way and reaffirmed that only the reputation of the earlier trademark shall be taken into account in order to assess whether the similarity of the goods designated by the conflicting signs is sufficient to lead to a risk of confusion. This rule tends to protect the owners of existing trademarks against subsequent trademark applications for signs already known to the general public.

In the past, however, the position of the Court of Justice of the European Union ("**Court**") has not always been as clear-cut.

In a recent decision of 17 September 2020 concerning opposition proceedings involving another player in the world of football, the Argentine footballer Lionel Messi who, in 2011, had filed the trademark application

(in particular for clothing and sporting goods), the Court did take into account the reputation of the person requesting one's name to be registered as a trademark, since this reputation may have an influence on the perception of the trademark by the relevant public.

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

> 1 The full company name is InterES Handels- und Dienstleistungs Gesellschaft mbH & Co. KG.
>
> 2 **Judgment of the General Court (Sixth Chamber) of 10 November 2021, Associazione Calcio Milan SpA (AC Milan) v European Union Intellectual Property Office, T-353/20.**

Updated CNPD's FAQ on CovidCheck controls

Following the legislative developments in Luxembourg based on the adoption of the Law dated 16 December 2021, amending the Law of 17 July 2020 on measures to combat Covid-19 ("**Covid Law**"), on 12 January 2022 the national data protection supervisory authority ("**CNPD**") updated its FAQ on data protection and CovidCheck.

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The updated **FAQ** (only available in French for the moment) notably details the strict conditions under which employers are authorised to set up a list of vaccinated or recovered employees to facilitate checks on the validity of their certificates. In particular, registration on a list must be voluntary meaning that employees must give their explicit consent (also meaning that they can request deletion from the list at any time without justification), the list can only contain limited information aimed at verifying the controls pertaining to the CovidCheck and is limited in time.

Please see our other **publication** for more information about the mandatory CovidCheck controls in the workspace based on the Covid Law.

Consumer Code modernised to cover digital goods and services

What happened?

The new Law of 8 December 2021 transposes and integrates into the Luxembourg Consumer Code the requirements set out under the Directive (EU) 2019/770 dedicated to the supply of digital content and services ("**DCD**") and the Directive (EU) 2019/771 governing the sale of goods ("**SGD**").

What's the main takeaway?

This new legal framework modernises the legal guarantee of conformity for the sale of goods and introduces a new regime in terms of the legal guarantee of conformity for digital content and services. Indeed, in the case of goods comprising digital elements, when the contract provides for the continuous supply of the digital content or digital service for a certain period, the seller is now liable for any lack of conformity of the digital content or service that occurs or appears within two years from the time where the said goods with the digital elements have been delivered.

For more information about the DCD and the SGD, please read **here**.

What's next?

The Luxembourg Consumer Code should soon be modified again, subject to the adoption of Bill of law 7904 currently being debated in the Parliament. That Bill of law aims at transposing the "Omnibus" Directive (UE) 2019/2161, mostly dealing with consumer law in relation to price indication and sanctions.

European Electronic Communication Code adopted

What happened?

The **Law of 17 December 2021 on electronic communications networks and services** ("**Law**") was published on 22 December 2021 and came into force on 26 December 2021. It repeals the former regime set out by the Law of 27 February 2011 on electronic communications networks and services.

What is the main takeaway?

The new legislative regime transposes into Luxembourg law the **European Electronic Communications Code** ("**EECC**") established by Directive (EU) 2018/1972.

The EECC forms part of a package of telecom laws and aims at updating the rules governing the telecoms sector. It regulates electronic communications networks and services with new or revised rules and sets out

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tasks for national regulatory authorities, in Luxembourg the *Institut Luxembourgeois de Regulation* ("**ILR**"). The ILR is a member of the Body of European Regulators for Electronic Communications ("**BEREC**") set up by one of the laws of the EU telecom package. The Law also integrates certain national provisions not originating from the EECC but from the Law of 21 March 1997 on telecommunications (pushed since then into the Law of 30 May 2005 on electronic communication networks and services).

What are the main changes?

The general objectives of the EECC are to promote connectivity through and access to high capacity networks (such as 5G networks), effective competition, the security of networks and services and addresses the needs of certain social groups, in particular people with disabilities. The EECC aims at taking into account today's reality of the provision of digital services: the convergence of telecommunications, media and information technology.

In order to follow these general political objectives, the EECC notably requires that local regulation and regulators (i) provide operators with predictable regulation, (ii) ensure there is no discrimination between network and service providers operating under similar circumstances, and (iii) apply the regulation in a technology neutral fashion whenever possible and relevant.

Consequently, the scope of the Law, regulating the electronic communications, now also extends to many over-the-top players ("**OTT**"), i.e. personal communication services not subject to numbering resources such as messaging apps (including instant messaging, electronic mail and video conferencing), streaming services and connected devices. Both types of services are now subject to *ex ante* supervision. Security requirements for OTT services should, however, be adapted as they are considered in general as presenting lower risks than traditional electronic communication services as they do not control the effective convey signals over networks (with some exceptions).

Consumer protection is reinforced (information to be provided prior to the conclusion of a contract for communication services, possibility to compare offers, tariffs and quality of services, possibility to monitor the level of consumption of services included in a subscription) and the universal service now incorporates adequate and affordable access to broadband Internet.

In terms of security, the Law provides for the possibility of taking certain measures (including prohibition) for the use in public networks of equipment or software which are the source of a serious threat to the security of networks and services and having an impact on national security. This aims in particular at remedying threats related to the intrusion or interference from private or public third-party players on electronic communications networks and services, an outside control over them, or even espionage situations. This task is entrusted to the Government Council on proposal from the relevant ministry, with the assistance as appropriate of the National Committee of Communications. Nevertheless, it remains the operators' own responsibility to ensure the security of their networks.

Content is not regulated under the EECC, which focuses on electronic communications networks and services.

What's next?

Operators of telecommunication networks and related services are generally already well informed of the applicable regime. OTT service providers, however, are not necessarily familiar with electronic communication services regulation and need to understand how their own services may be affected and how to comply with the regulatory changes.

EU adequacy decision for South Korea

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On 17 December 2021, the European Commission ("**Commission**") adopted an adequacy decision for the Republic of Korea.[1] This adequacy decision allows the free flow of personal data from the EU to Korea, without any further need for additional safeguards.[2]

The Commission will conduct a first review of the decision after three years to evaluate the functioning of this framework. After this initial review, periodic reviews of this framework will take place at least every four years.

For more information on the adequacy decision, please consult its related **FAQ**.

A fully updated list of the countries benefiting from an adequate level of data protection can be consulted on the Commission's dedicated **webpage**.

> **1** Commission implementing decision of 17.12.2021 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by the Republic of Korea under the Personal Information Protection Act.
> **2** Such as standard contractual clauses.

Tax

Exchange of information request to a group of persons not individually identified

In its judgment of 25 November 2021 in case C-437/19, the European Court of Justice of European Union ("**CJEU**") responded to questions posed by the Luxembourg Administrative Court regarding the foreseeable relevance of a request from the French tax authorities for information on a group of persons that were not identified individually and by name.

That group of persons was suspected to be the beneficial owners of two real estate properties located in France and owned through a Luxembourg company. The French tax authorities referred to these persons as a group of persons who are designated as a whole on the basis of common criteria.

The CJEU ruled that a request for information is not manifestly devoid of any foreseeable relevance, where the persons under investigation are not identified individually and by name as long as the requesting authority:

(i) provides as full and precise a description as possible of the group of taxpayers under examination or investigation, specifying the common set of distinctive qualities or characteristics of the persons who are part of it, in such a way as to enable the requested authority to identify those persons; and

(ii) explains the specific tax obligations of those persons; and

(iii) states the reasons why those persons are suspected of having committed the infringements

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or omissions under examination or investigation.

The CJEU highlighted that this interpretation is in line with Article 26 of the OECD Model Convention which was updated in 2012 with a new commentary on that article so as to precisely allow group requests.

ATAD 3

On 22 December 2021, the European Commission published a proposal for a Directive setting out rules aimed at tackling the abusive use of so-called "shell" companies.

For more information on this topic, please read **here**.

EU Directive Proposal on Pillar II

On 22 December 2021, the European Commission released a proposal for a Directive on the implementation of a minimum level of effective corporate taxation ensuring that large multinational groups and large-scale purely domestic groups operating in the Single Market pay an effective tax rate of at least 15% in each jurisdiction where they operate.

More information on this topic will be posted on our website very soon.

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

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

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