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LUXEMBOURG LAW

NEWSLETTER

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EMIR Refit

EMIR Refit, i.e. Regulation (EU) 2019/834 which amends EMIR Regulation **(EU) 648/2012**, became effective on 17 June 2019.

Amongst the newly introduced changes, the following affect UCITS and AIFs[1] and their managers.

1. EMIR Refit amends the definition of financial counterparty ("**FC**") with respect to AIFs. As a consequence, AIFs managed by a non-EU AIFM[2] now also qualify as FCs[3].

2. Clearing Obligation: Since 17 June 2019, "Category 3" counterparties, which include most UCITS and AIFs, became subject to the clearing obligation. EMIR Refit however, introduces a new category of "small financial counterparties" ("**Small FCs**") that are exempt from the clearing obligation when they do not exceed the following clearing thresholds ("**Clearing Thresholds**") for their transactions in OTC derivatives:

- EUR 1 billion gross notional value for OTC credit derivatives;
- EUR 1 billion gross notional value for OTC equity derivatives;
- EUR 3 billion gross notional value for OTC interest rate derivatives;
- EUR 3 billion gross notional value for OTC foreign exchange derivatives;
- EUR 3 billion gross notional value for OTC commodity derivatives and other OTC derivatives.

The calculation must be done at group level, except for UCITS and AIFs for which the positions are calculated at the level of the fund (or sub-funds)[4]. UCITS management companies which manage more than one UCITS, and AIFMs which manage more than one AIF must, however, be able to demonstrate to their respective national competent authorities that the calculation of positions at the fund level does not lead to:

- a systematic underestimation of the positions of any of the funds they manage or the positions of the manager; and
- a circumvention of the clearing obligation.

3. In order to benefit from this exemption, FCs and Small FCs must, every 12 months (starting on the day EMIR Refit entered into force, i.e. 17 June 2019), calculate their aggregate month-end average position for the previous 12 months.

If they choose not to calculate it, or if they exceed the Clearing Thresholds, they must notify it to **ESMA** and the **CSSF**, and the clearing obligation will start applying to their OTC derivative contracts (pertaining to a class of OTC derivatives which is subject to the clearing obligation) entered into or novated more than 4 months following such notification.

4. In Luxembourg, in order to facilitate the notification process, the CSSF launched on 27 June 2019 an electronic platform allowing FCs, Small FCs and non-FCs to notify that they have exceeded (or have ceased to exceed) the Clearing Thresholds or that they do not perform the calculation of

these thresholds. The platform is available on the **CSSF website**.

5. Clarification of the reporting responsibility and liability regime for AIFMs and UCITS management companies: EMIR Refit expressly provides that AIFMs and UCITS management companies are responsible and legally liable for the reporting of OTC derivatives of the UCITS and AIFs that they manage.

1. "**AIFs**" refers to Alternative Investment Funds.
2. "**AIFM**" refers to Alternative Investment Fund Manager.
3. AIFs and UCITS serving one or more employee share purchase plans and AIFs qualifying as securitisation special purpose entities (as defined in the AIFM Directive 2011/61/EU) are, however, excluded from the definition of FC.
4. It is our understanding that in the case of an umbrella fund, the calculation of the positions will have to be done at the level of the sub-funds.

New ESMA Q&A addressing AIFMD and UCITS depositary issues

On 4 June 2019, ESMA published updated questions and answers on the application of the Alternative Investment Fund Managers Directive ("**AIFMD**") and the Undertakings for the Collective Investment in Transferable Securities ("**UCITS**") Directive.

These questions and answers relate to delegation issues for depositaries (including delegation to another legal entity within the same group) and to depositary's activities conducted by branches. In this context and in essence, ESMA provides that:

- Supporting tasks linked to depositary functions may relate to cash monitoring and oversight and avoid the strict conditions imposed by the delegation regime of the AIFMD or the UCITS Directive provided that (i) these supporting tasks are standardised and pre-defined, (ii) their execution does not involve any discretionary judgement or interpretation by the third party in relation to the depositary functions, and (iii) their execution does not require specific expertise in regard to the depositary functions.
- An arrangement whereby a depositary entrusts tasks to a third party and gives this third party the ability to transfer assets belonging to a UCITS or to an AIF managed by an authorised AIFM without requiring the depositary's intervention is allowed, but is subject to the strict conditions of the delegation regime of the AIFMD or the UCITS Directive.
- A depositary which is a branch located in a Member State (i.e. that of the UCITS or the AIF managed by an authorised AIFM for which this branch is acting as depositary) other than the home Member State of its head office:

  (i) may allocate certain of its functions to its head office, but must have an operational infrastructure and an internal governance system which are adequate to carry out its depositary functions autonomously from its head office and ensure compliance with national rules implementing the AIFMD or the UCITS Directive, and

  (ii) may be subject to local supervision and authorisation for performing its depositaries activities.

- For the purposes of the delegation regime of the AIFMD or the UCITS Directive, a legal entity belonging to the same group as that of a depositary to which this depositary delegates certain of its functions should be considered by this depositary as a "third party".

Dematerialisation of requests to the CSSF

On 1 July 2019, the CSSF published **Circular 19/721** which informs supervised entities, including but not limited to UCITS, Part II UCIs[1], SIFs[2], SICARs[3], Luxembourg management companies and AIFMs, of the establishment of an electronic desk portal ("**eDesk Portal**").

This eDesk Portal will have to be used for all the requests listed and published on the homepage of the **eDesk Portal**.

As of today, only the PRIIPs[4] assessment request referred to in the Article "**New CSSF PRIIPs assessment**", is listed on the eDesk Portal.

In this respect, Circular 19/721 expressly provides that all entities must check themselves on a regular basis the homepage of the eDesk Portal in order to be informed of any update of the list of requests. In addition, all entities must ensure that all requests that are applicable to them are completed appropriately and in due time via the eDesk Portal.

> 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.
> 2. "**SIFs**" refers to Specialised Investment Funds subject to the Luxembourg Law of 13 February 2007 relating to specialised investment funds, as amended
> 3. "**SICARs**" refers to Investment Company in Risk Capital subject to the Luxembourg Law of 15 June 2004 relating to the investment company in risk capital, as amended.
> 4. "**PRIIPs**" refers to Packaged Retail and Insurance-based Investment Products within the meaning of the PRIIPs Regulation (EU) 1286/2014.

New CSSF PRIIPs assessment request

In the context of the dematerialisation of CSSF requests[1], the CSSF requires **all Luxembourg regulated investment funds**, i.e. SIFs, Part II UCIs and SICARs to complete an **online assessment** which replaces the previous self-assessment confirmation on the exclusive professional investor status under the PRIIPs Regulation.

SIFs, Part II UCIs and SICARs which have already provided the CSSF with the previous assessment are not exempt from the obligation to complete the new online assessment. The deadline is fixed on 31 October 2019. Access to the online assessment is currently restricted to central administrations, however, it will be extended to management companies at the end of July 2019 and to other entities/persons at a later stage.

> 1. See also the article "**Dematerialisation of requests to the CSSF**" in this Newsletter.

EuVECA/EuSEF Regulations: Implementing measures

Two new regulations supplementing (i) the European Venture Capital Funds Regulation 345/2013 ("**EuVECA Regulation**") and (ii) the European Social Entrepreneurship Funds Regulation 346/2013 ("**EuSEF Regulation**") were published in the Official Journal of the European Union in May 2019:

- **Regulation (EU) 2019/820** of 4 February 2019 with regard to conflicts of interest, and
- **Regulation (EU) 2019/819** of 4 February 2019 with regard to conflicts of interest, social impact measurement and information to investors.

Both regulations will become applicable on 11 December 2019.

In addition, see the Article "**Securitisation and other EU Regulations: New sanction powers**" in this Newsletter, which relates to the implementation of various regulations, including the EuVECA and EuSEF Regulations. New powers to impose administrative sanctions are notably granted to the CSSF for the performance of its mission under these two regulations. See also the Article " **Cross-border distribution: New EU regulation and directive**" in this Newsletter.

Securitisation and other EU regulations: New sanction powers

On 11 July 2019 the **Bill of Law 7349**, which implements the Securitisation Regulation[1], the EuVECA Regulation[2], the EuSEF Regulation[3], the ELTIF Regulation[4] and the Money Market Funds Regulation[5], was voted for by the Luxembourg Parliament (*Chambre des Députés*) (first constitutional vote).

The Bill of Law designates the competent authorities, i.e. the CSSF (*Commission de Surveillance du Secteur Financier*) and the CAA (*Commissariat aux Assurances*)[6], and provides for their investigative and supervisory powers as well as their powers to impose administrative sanctions for the performance of their missions under the various regulations mentioned above. It also introduces some specific amendments the RAIF Law[7] and to the amended Law of 5 April 1993 on the financial sector.

Depending on the date of its publication in the Luxembourg Official Gazette, the new law should become applicable either in the course of July, or early August 2019.

1. "**Securitisation Regulation**" refers to Regulation 2017/2402 of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation.
2. "**EuVECA Regulation**" refers to Regulation (EU) 345/2013 of 17 April 2013 on European venture capital funds.
3. "**EuSEF Regulation**" refers to Regulation (EU) 346/2013 of 17 April 2013 on European social entrepreneurship funds.
4. "**ELTIF Regulation**" refers to Regulation EU) 2015/760 of 29 April 2015 on European long-term investment funds.
5. "**Money Market Funds Regulation**" refers to Regulation (EU) 2017/1131 of 14 June 2017 on money market funds.
6. The CSSF is appointed as competent authority to ensure compliance with the EuVECA Regulation, the EuSEF Regulation, the ELTIF Regulation and the Money Market Funds Regulation. For the Securitisation Regulation,

the CSSF and the CAA are appointed as competent authorities to ensure compliance by the entities under their respective supervision with the obligations applying to them.
7. "**RAIF Law**" refers to the Law of 23 July 2016 on Reserved Alternative Investment Funds.

Shareholders Rights Directive II: Implementation

On 10 July 2019, the **Luxembourg law** implementing the Shareholders Rights Directive II (**(EU) 2017/828**) ("**SRD II**") was voted for by the Luxembourg Parliament (*Chambre des Députés*) (first constitutional vote).

Depending on certain procedural aspects of the legislative process, the new law should become applicable either in the course of July, or early August 2019.

For further information on the changes introduced by SRD II, please see the article "**Shareholders Rights Directive: 10 June 2019**" which was published in our June 2019 Newsletter.

Register of beneficial owners: Update

As set out in our recent Newsflash "**Less than three months left for RBO filing**" on our website, by the end of August 2019, all in-scope Luxembourg entities will have to be compliant with the provisions of the Luxembourg Law of 13 January 2019 creating a Register of Beneficial Owners ("**RBO Law**") and, in particular, file information on their beneficial owner(s) with the Register of Beneficial Owners ("**RBO**").

Several guidance documents have recently been made available online by the RBO:

- Two new **circulars** were published. Circular LBR 19/03 concerns the treatment of foundations and Circular LBR 19/04 covers the treatment of public undertakings and companies partially or majority owned by the State.
- The RBO also added new **user guidance**, including an explanatory guide (Declaration of beneficial owners – guide) containing, in particular, schematic representations of the analysis to be performed by obliged entities when identifying their beneficial owners, as well as a brochure relating to certain formalisms of the registration process. The RBO indicates in these documents that they do not have legal value and do not constitute legal advice.

Cross-border distribution: New EU regulation and directive

The new EU **regulation** and **directive** on cross-border distribution were published in the Official Journal of the European Union on 12 July 2019.

1. Cross-border distribution directive (EU) 2019/1160 amending the UCITS and AIFM directives

This directive notably includes:

- A pre-marketing definition for AIFMs[1]: the new directive allows AIFMs to engage in pre-marketing activities to test an investment idea or an investment strategy with EU professional investors in

order to test their interest in an AIF or a compartment which has not yet been established, or which is established, but has not yet been notified for marketing in the Member State where the potential investors are domiciled or have their registered office.

Pre-marketing in the EU is, however, not permitted where the information presented to potential professional investors:

(a) is sufficient to allow investors to commit to acquiring units or shares of a particular AIF;

(b) amounts to subscription forms or similar documents whether in a draft or a final form; or

(c) amounts to constitutional documents, a prospectus or offering documents of a not-yet-established AIF in final form.

Specific conditions apply in the case where a draft prospectus or offering documents are provided.

No pre-marketing definition has been provided in the directive for UCITS.

- A de-notification process for marketing of units/shares of UCITS and AIFs;

- New facilities to be made available to UCITS/AIF retail investors;

- New requirements in case of changes to information contained in the marketing notification of UCITS/AIFs.

The directive must be implemented into national law by 2 August 2021 at the latest and Member States must apply those new provisions from the same date, i.e. 2 August 2021.

2. Cross-border distribution regulation (EU) 2019/1156 amending EUVECA, EUSEF and PRIIPS regulations

This regulation notably includes:

- A pre-marketing definition for EuVECA/EuSEF (which is the same as the one provided for AIFMs);

- New requirements as regards the fees and charges of competent authorities;

- The implementation of a new ESMA central database on cross-border marketing of UCITS/AIFs;

- The standardisation of notifications to ESMA;

- New marketing communication requirements;

- An amendment to the PRIIPs Regulation which aims to push back (i) the UCITS exemption to produce a PRIIPs KID to 31 December 2021 and (ii) the EU Commission's review of the PRIIP Regulation to 31 December 2019.

The Regulation will become applicable on 1 August 2019, except for the new requirements for marketing communications and the amendment of the EuVECA and EuSEF Regulations which shall apply from 2 August 2021.

1. Only the AIFM Directive has been amended on that point.

CSSF Annual Report 2018

The report on the CSSF's activities and on the development of Luxembourg's financial centre in 2018 has been released and is available on the **CSSF website**. It can only be downloaded in French at this time but will soon be available in English too.

The annual report includes, in addition to statistical data, information on the CSSF's regulatory practice in all areas (including investment funds, management companies and AIFMs) where the CSSF is the competent supervisory authority.

Corporate, banking and finance

Amendment of Capital Requirement Regulation

On 7 June 2019, a new regulation amending the Capital Requirement Regulation (EU) 575/2013 ("**CRR**") was published in the Official Journal of the European Union, i.e. **Regulation (EU) 2019/876** of 20 May 2019 amending CRR and Regulation (EU) 648/2012 ("**CRR II**").

CRR II will for the most part be applicable as of 28 June 2021 and the amendments include inter alia, the introduction of a more precise definition of small and non-complex institutions, new requirements relating to leverage ratio, net stable funding ratio and own funds as well as the implementation of the total loss-absorbing capacity (TLAC) standard.

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Garnishment order against economic beneficiaries

This verdict validates a garnishment order which does not target the debtors themselves but which applies to the two companies of which the debtors are economic beneficiaries.

Deux décisions contradictoires ont été récemment rendues dans une même affaire en matière de saisie-arrêt. Si l'une d'entre elles illustre le rôle grandissant que jouent les bénéficiaires économiques dans le paysage juridique luxembourgeois, l'autre pointe également la difficulté rencontrée par les juges à admettre cette nouvelle place.

Alors que traditionnellement, les juges considéraient qu'une saisie-arrêt ne pouvait être pratiquée qu'à charge du débiteur du saisissant, et non d'un tiers, même ayant des liens économiques avec le débiteur, le tribunal d'arrondissement de Luxembourg a accepté de valider une saisie-arrêt pratiquée non à l'encontre des véritables débiteurs du créancier mais à l'encontre de deux sociétés dont ces véritables débiteurs étaient bénéficiaires économiques (jugement civil 2019TALCH01/00166 du 15 mai 2019).

La saisie pratiquée à l'encontre ces sociétés venait d'être levée par le juge des référés pour les raisons habituelles (« application du principe fondamental selon lequel les personnes morales, telles que les sociétés 1 et 2, sont dotées d'une personnalité juridique, propre et distincte de celle des actionnaires, dirigeants et bénéficiaires économiques ») lorsqu'elle a été validée par le juge du fond.

Ce dernier, dont le jugement de validation se basait sur une décision tchèque de condamnation, exequaturée au Luxembourg, très détaillée sur les liens entre les bénéficiaires économiques et les débiteurs saisis, a en effet décidé ce qui suit :

> *« La saisie ne peut, en principe, être pratiquée qu'à charge du débiteur et non d'un tiers même si celui-ci a des liens économiques avec celui-là ; la réalité juridique doit, en règle, prévaloir nonobstant une certaine identité économique entre le débiteur poursuivi et un tiers. Celui-ci ne pourrait être tenu comme débiteur qu'en cas de simulation, de confusion et généralement d'attitude fautive engageant sa responsabilité envers le poursuivant (…).*
>
> *Le tribunal constate qu'en l'espèce, la société [créancière] a expressément et nommément identifié les sociétés auxquelles elle fait référence dans l'exploit de saisie-arrêt du 13 mai 2016 dont les [débiteurs 1 et 2] seraient bénéficiaires économiques ou juridiques, à savoir les sociétés [1, 2 et 3].*
>
> *Par ailleurs, il résulte des termes du jugement rendu par le Tribunal Supérieur de Prague en date du 17 octobre 2012 que les infractions d'abus de biens sociaux et de fraudes dont [les débiteurs 1 et 2] ont été reconnus coupables par les juridictions tchèques ont été commises par l'intermédiaire des sociétés [1, 2 et 3] et notamment à l'aide des différents postes que [les débiteurs 1 et 2] occupaient au sein de ces sociétés. Ces trois sociétés sont ainsi activement intervenues dans la commission des actes frauduleux mis à charge [des débiteurs 1 et 2]. A ce titre, le voile sociétaire doit céder pour assurer le recouvrement des dettes mises à charge [des débiteurs 1 et 2] par suite d'agissements auxquels ont pris part ces sociétés.*
>
> *Au vu de l'ensemble des développements qui précèdent, la saisie-arrêt est à valider dans la mesure où des sommes, deniers, effets, titres ou valeurs que la société [tierce-saisie] détient pour le compte [des débiteurs 1 et 2], pris en leur qualité de bénéficiaires économiques des sociétés [1, 2 et 3], sont concernés. »*

Alors que la dissimulation d'un débiteur derrière une société écran lui a longtemps permis d'échapper à ses créanciers, cela risque de devenir plus difficile, du moins en matière de saisie-arrêt et à condition que le créancier soit en mesure de démontrer la participation de la société aux actes litigieux de son bénéficiaire économique.

Si cette décision de première instance est confirmée en appel, la vie deviendra peut-être un peu plus compliquée pour les débiteurs indélicats.

ICT, IP, media and data protection

Entry into force of the law on the protection of trade secrets

Since 2 July 2019, Luxembourg has had full-blown legislation on trade secrets. After a one-year delay, Luxembourg finally transposed **Directive (EU) 2016/943** of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure ("**Directive**").

The **Law of 26 June 2019** on trade secrets[1] ("**Trade Secrets Law**") literally transposes the Directive and provides a legal definition of "trade secrets", which was until now only defined by the courts. The Trade Secrets Law defines as "trade secrets" information which fulfils the three following cumulative criteria: (i) it is secret, (i.e. it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question), (ii) it has commercial value because it is secret and (iii) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret. For example, market studies, business plans, customer databases may be trade secrets.

The Trade Secrets Law fills a gap for businesses for which trade secrets have significant commercial value but do not satisfy the conditions to be protected under intellectual property law or are not registered as an industrial property title (on a voluntary basis) because of their confidential nature. From now on, the trade secret holder will have at its disposal an arsenal of measures and remedies (such as prohibitory injunctions, damages and corrective measures) that may be requested from the court against an alleged infringer in civil proceedings. These actions are time-barred after two years from the time the trade secret holder becomes aware of the unlawful acquisition, use or disclosure of the trade secret and of the infringer's identity.

Protection of trade secrets is not absolute. The Trade Secrets Law provides for a series of derogations from the application of the measures detailed in the Trade Secrets Law which aim at ensuring that the fundamental freedoms such as the right to freedom of expression and information, including respect for the freedom and pluralism of the media (and more particularly investigative journalism), and whistleblower protection are not jeopardised.

The Trade Secrets Law also provides for rules and measures aiming at ensuring the confidentiality of trade secrets during judicial proceedings relating to the latter. Such measures should encourage trade secret holders to assert their rights with respect to the unlawful use or disclosure of their trade secrets before the courts.

1. Law of 26 June 2019 on the protection of undisclosed know-how and business information (trade secrets)

against their unlawful acquisition, use and disclosure.

New law on sanctions against geo-blocking discriminations

Regulation (EU) 2018/302 on addressing unjustified geo-blocking and other forms of discrimination ("**Geo-blocking Regulation**"), applicable as from 3 December 2018, sets out rules prohibiting discrimination against consumers, and, as the case may be, undertakings, based on their nationality, place of residence or establishment when they purchase goods or services.

As a matter of general principle, the Geo-blocking Regulation prohibits any EU trader from discriminating customers from EU countries other than the one in which it is established on the basis of their nationality, place of residence or establishment. However the Geo-Blocking Regulation (i) does not prevent traders from making specific offers only to a specific territory within a Member State or other targeted offers to certain groups of customers on a non-discriminatory basis and (ii) does not order traders to deliver goods or services in other (EU) countries.

Therefore, a Luxembourg trader is, for example, allowed to restrict its deliveries of goods to Luxembourg only but cannot refuse a sale to a non-Luxembourg EU resident who organises the pick-up of the product in Luxembourg.

Furthermore, the non-discriminatory obligations to be borne by traders due to the Geo-blocking Regulation may have, under certain circumstances, tax implications, such as the relevant VAT rate to be charged. In this respect, the Geo-Blocking Regulation states that traders subject to Chapter 1 of Title XII of the VAT Directive 2006/112/EC (i.e. SMEs) are exempted from the prohibition of applying different general conditions of access for reasons related to customers' nationality, place of residence or place of establishment, when providing electronically supplied services, as such prohibition would require them to register in order to account for VAT of other Member States, which would be a disproportionate burden, considering the size and characteristics of such traders.

Audiovisual services, including services for which the main purpose is the provision of access to broadcasts of sports events and which are provided on the basis of exclusive territorial licenses, are excluded from the scope of the Geo-blocking Regulation.

In terms of infringements of the provisions set out under the Geo-blocking Regulation, it is stated that Member States shall lay down the rules for the measures applicable to such infringements.

In this respect, the Luxembourg **Law of 26 June 2019** on certain modalities of application and sanctions in relation with the Geo-blocking Regulation was published in the *Mémorial* on 28 June 2019 ("**Geo-blocking Law**").

The Geo-blocking Law states that the European Consumer Centre is the entity in charge of providing assistance to consumers in the event of a dispute with traders arising from the application of the Geo-blocking Regulation.

In terms of legal proceedings, the Geo-blocking Law establishes that the President of the *Tribunal d'arrondissement* (Commercial Chamber) may, upon request from any person, professional association, or consumer organisation, order the suspension of the acts in breach of the Geo-blocking Regulation. Appeal against such a court order can be lodged within 15 days.

The law further states that any failure to comply with a binding court order shall be punished by a fine of EUR 251 up to EUR 120,000.

As stated during the parliamentary debates leading to the adoption of the Geo-blocking Law, 68% of Luxembourg residents purchase goods and services online from traders located in other EU countries, so that they are more likely to be subject to discrimination practices.

Harmonisation of national consumer laws: New directives

On 20 May 2019, the European Union adopted two new directives on sales contracts for goods and digital content. The objective of these new directives is to further harmonise the different national consumer laws and make it easier and safer for consumers and traders to buy and sell inside the Member States' borders. In doing so, the new rules intend to reduce the costs supported by businesses stemming from the differences in consumer laws through the European Union. **Directive (EU) 2019/770** is dedicated to the supply of digital content and services (online movies, games, music, e-books, cloud storage, communication services, software, etc.), including when sold on a medium (Blurays, DVDs, etc.), whereas **Directive (EU) 2019/771** governs the sale of goods (online or in shops), including goods embedded with digital components (smart watches, smart TVs, smart fridges, etc.).

Both directives provide in particular for (i) conformity requirements (e.g. quality, interoperability, updates, accessories, fit for purposes, etc.), (ii) remedies for lack of conformity (e.g. repair, replacement, price reduction, full reimbursement etc.), (iii) a 2-year guarantee ensuring traders' liability for defects, and (iv) rules regarding the burden of proof.

Directive (EU) 2019/770 will apply to the supply of digital content and services even where the counter-performance is not money but personal data. In that respect, the scope of this directive specifies that it applies without prejudice to the requirements of the General Data Protection Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data.

Member States will have to transpose the provisions of both directives into their national laws by 1 July 2021 and effectively apply such provisions from 1 January 2022.

Adoption of new European Copyright Directive

On 17 April 2019, the Directive on copyright and related rights in the Digital Single Market[1] ("**New Copyright Directive**") was finally adopted after months of negotiation. While the European Commission describes the New Copyright Directive as the "right balance between the interests of all players – users, creators, authors, press – while putting in place proportionate obligations on online platforms"[2], some Member States – among which Luxembourg – have disapproved the proposed text of the New Copyright Directive and have considered that it is "a step back for the Digital Single Market rather than a step forward[3]". Those Member States have in particular denounced the lack of legal clarity of the New Copyright Directive.

Over the past months, the debate has focused in particular on the following provisions:

- Article 15 which deals with the protection of press publications concerning online uses: publishers of press publications are granted the rights to reproduction and making available of works to the public for a period of 2 years from 1 January of the year following the date on which that press publication is published; this right can only be invoked against information society service providers such as the news aggregator Google News;
- Article 17 which deals with the use of protected content by online content-sharing service

providers (such as YouTube): the New Copyright Directive clarifies that an online content-sharing service provider performs an act of communication to the public or an act of making available to the public, subject to the prior authorisation of the concerned right holders, when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users.

The general rules laid down by these articles are qualified by exceptions resulting from negotiations between parties with opposing interests and it is likely that further discussions will start within the Member States at the time of transposition of the New Copyright Directive.

Member States shall transpose the New Copyright Directive into their respective national legislations by 7 June 2021. Regarding the controversial Article 17, please note that the New Copyright Directive provides that the European Commission shall issue guidance on the application of this article following the organisation of stakeholder dialogues and the results thereof.

1. **Directive (EU) 2019/790** of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.
2. European Commission – Statement, 26 March 2019, **Statement 19/1839**.
3. Council of the European Union, **Joint statement by the Netherlands, Luxembourg, Poland, Italy and Finland**, 15 April 2019, 7986/19 ADD 1 REV 2 (interinstitutional File: 2016/0280(COD)).

Tax

Luxembourg and France: Entry into force of new double tax treaty

The law approving the new double tax treaty and its additional protocol ("**New DTT**") signed on 20 March 2018 by the governments of Luxembourg and France, was adopted by the Luxembourg Parliament on 2 July 2019 and published in the Luxembourg Official Gazette on 12 July 2019.

The New DTT will enter into force once Luxembourg has notified France of the end of its ratification process (which should occur soon), as Luxembourg should already have received France's notification.

Once in force, the provisions of the New DTT will be applicable to taxes for the tax year 2020 at the earliest.

For more information regarding the New DTT, see our Tax Treaty News dated **20 April 2018** and **12 December 2018,** published on our website.

New IP Circular

On 28 June 2019, the Luxembourg tax authorities issued Circular 50ter/1 ("**IP Circular**") which provides further guidelines on the application of the law dated 17 April 2018 introducing a new intellectual property ("IP") regime in Luxembourg ("**IP Law**").

As a reminder, the IP Law provides for an 80 percent exemption on income derived from the marketing of certain IP rights, as well as a full exemption from net wealth tax. Eligible assets are patents, utility models, and other IP rights that are functionally equivalent to patents as well as software protected by copyright. The new IP regime is based on the "modified nexus approach" in line with the recommendations of the BEPS final report on action 5, following which only revenues that are directly related to qualifying expenditure can benefit from the exemption.

For further insight on the key features introduced by the IP Law, please refer to our article "**New Luxembourg IP regime**" dated 20 December 2017, which is published on our website.

The IP Circular now brings further clarifications on certain concepts laid down in the IP Law (such as eligible IP assets, research and development activities, the date of constitution of the eligible asset, eligible expenditures, etc.) and provides a series of examples on the determination of the exempt amount in various situations (for instance, when the expenditure has been capitalised, after a migration to Luxembourg or in the transition period from the former IP regime to the new one).

More detailed information on the IP Circular can be found in our related article "**New IP Circular**" published on our website.