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Covid-19: Flexibility regarding reporting for banks and financial service providers

In its **Communiqué of 23 March 2020** on the subject of regulatory reporting in the context of the COVID-19 crisis the CSSF asks supervised entities to perform their regulatory reporting when it is due but also offers some leniency.

- In general

The CSSF indicates that if for operational reasons supervised entities experience difficulties in preparing or validating their CSSF reporting due to staff not being available, for example because they work remotely without having full access to all systems, they should contact it through their usual channels as soon as possible and ahead of reporting deadlines. The CSSF also says that during the COVID-19 crisis it will not apply a strict enforcement policy with regard to reporting if delays are duly justified. It also specifies that the leeway it applies will be closely coordinated with national authorities, the ESAs as well as the European Central Bank.

The CSSF's **FAQ** provides guidance on reporting flexibility granted to banks and other financial service providers. In principle, submission on time of regulatory reports is encouraged but upon reasoned request, the CSSF can grant exceptions to filing deadlines. The FAQ should be referred to for details on which reporting obligations are affected for various players, including banks, payment institutions/electronic money institutions, investments firms, support Persons of the Financial Sector ("**PFS**"), and specialised PFS.

- Transparency

In a **Communiqué of 27 March 2020**, the CSSF describes a temporary measure providing flexibility applying to certain reporting deadlines in the Law of 11 January 2008 on transparency requirements for issuers (the "**Transparency Law**"), by granting issuers an extra two months to make the necessary publications of periodic information. The temporary measure applies to issuers for which Luxembourg is the home Member State pursuant to the Transparency Law for reporting periods ending on 31 December 2019 or after that date but before 1 April 2020. However, the CSSF expects issuers to take all necessary and reasonable measures in order to publish periodic information within, or as near as possible to, the deadlines set by the Transparency Law and that they inform markets and the CSSF of anticipated reporting delays. The CSSF also reminds issuers and holders of securities to comply with ongoing disclosure requirements in the Transparency Law (such as regarding major holdings or managers' transactions) and in Regulation (EU) No 596/2014 on market abuse ("**MAR**"), notably regarding inside information. Finally, the CSSF also asks issuers to refer to the European Securities and Markets Authority (ESMA)'s **Statement of 27 March 2020** on actions to mitigate the impact of COVID-19 on the EU financial markets regarding publication deadlines in the context of the Transparency Directive.

- SFTR

In a **Communiqué of 9 April 2020**, the CSSF draws attention to the European Securities and Markets Authority (ESMA)'s **Statement of 26 March 2020**, aimed particularly at credit institutions, regarding the postponement of the reporting obligations related to securities financing transactions under Regulation (EU) 2015/23651 (SFTR) and under Regulation (EU) No 600/2014 (MIFIR). The CSSF indicates that it will not prioritise its supervisory actions towards counterparties, entities responsible for reporting and investment firms in respect of their reporting obligations pursuant to SFTR or MiFIR, regarding (i) SFTs concluded between 13 April 2020 and 13 July 2020, and (ii) SFTs subject to backloading under SFTR. However, it expects relevant entities to be sufficiently prepared ahead of the next phase of the reporting regime, i.e. 13 July 2020, in order to start reporting as of this date.

- Extension of deadlines for disclosing financial statements and other reporting in the financial sector

On 7 May 2020, the Luxembourg Parliament adopted a law extending the deadlines for publishing annual accounts and related reports mentioned in certain specific laws of the financial sector during the state of emergency declared in the context of the COVID-19 crisis, as discussed in our **Newsflash on this topic**.

This law has to be read in conjunction with the Law of 22 May 2020, which is of a general nature and concerns deadlines for convening annual general meetings and for filing and publishing annual accounts, consolidated accounts as well as related reports for all Luxembourg companies. You can read more on this general law and the interaction between the two laws **here**.

Is COVID-19 a case of force majeure?

The immediate answer to this question is yes, COVID-19 could be a case of *force majeure* provided, however, that it can be qualified as an event meeting the following criteria: irresistibility, unpredictability and externality.

In Luxembourg and abroad, officials have declared COVID-19 as a case of *force majeure*. The position of legal writers, however, is less clear, given the severity of past French case law in the qualification of previous epidemics. The severity is understandable, given the legal consequences of such qualification.

Indeed, the consequences of such a qualification on a given contract would, on the one hand, be the relief of the debtor from his obligations and on the other hand, the deprivation of the creditor from obtaining damages from his debtor.

However, limits to a full discharge of the debtor exist, depending on the circumstances, namely:

- partial impediment where there is only partial impossibility of the contractual performance;
- temporary impediment where the contractual performance is temporarily suspended and
- the termination of the contract for contracts with immediate performance.

The divisible nature of the respective services is of crucial importance in the determination of the consequences of the cancellation of the contract or of the possibility (or impossibility) to terminate the contract during the performance.

In the past, French courts have been confronted with several cases where epidemics have been invoked as cases of *force majeure*, but to date, none of those analysed by the courts have met the cumulative criteria in order to be qualified as such.

This case law might, however, change with the pandemic of COVID-19 since a number of arguments may help plead in favour of a qualification as *force majeure*:

- it is an **irresistible event** because up to this date, there is no effective treatment;
- it is an **unpredictable event** because such an epidemic is hardly foreseeable (this criterion must though be put into perspective where multiple dates must be considered);
- finally, it is an **external event** because it is generally occurring outside of the sphere of which the debtor shall be accountable.

The qualification of COVID-19 as a *force majeure* event, however, is to be appreciated on a case-by-case basis.

Asset management and investment funds

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Brexit

Data Protection - Consequences of a no-deal Brexit on personal data transfers to the UK

Several administrations released information on the consequences of a no-deal Brexit. So did the National Data Protection Commission in Luxembourg (CNPD) in a “Brexit” report published on their website. EU businesses subject to the GDPR should review their personal data flows and, if appropriate, review their situation to ensure that personal data transferred to the UK will still be made in compliance with EU legislation in the event of a no-deal Brexit. In most cases, the soundest alternative would generally be for EU-based data exporters to enter into Standard Data Protection Clauses (also known as EU Model Clauses) with the relevant UK data importers. Please **read our analysis here**.

This may also interest you :

- **Schrems II case: EU to U.S. transfers of personal data challenged**
- **EU Entities can continue to transfer personal data within the Privacy Shield framework**

Tax

The draft Budget Law for the year 2021 is released!

On 14 October 2020, Luxembourg's Minister of Finance, Pierre Gramegna, tabled before the Parliament the draft budget law for the year 2021 (the “**Draft Budget Law**”).

The Draft Budget Law proposes amendments which, according to the Government, aim at restoring tax justice at the level of Luxembourg tax residents. In this context, it is noteworthy that some of the most salient tax measures included therein would affect certain Luxembourg investment funds holding real estates in Luxembourg and the current stock-option regime.

Please find below the key suggested tax measures:

- **Introduction of a 20% withholding tax on income derived by Luxembourg investment funds from real estate located in Luxembourg**

The Draft Budget Law proposes to introduce a 20% withholding tax levied on income (e.g. rental income, capital gains) deriving from real estate located in Luxembourg (“**Luxembourg Real Estate**”) held by Luxembourg Investment Funds directly or through transparent entities or common funds (*fonds commun de placement*).

“Luxembourg Investment Funds” include entities with a legal personality (but excluding the limited partnership - *société en commandite simple*) subject to:

- the Law of 17 December 2010 relating to undertakings for collective investments (the so-called "Part II Funds");
- the Law of 13 February 2007 relating to specialised investment funds (SIFs); and
- the Law of 23 July 2016 relating to reserved alternative investment funds (RAIFs).

Where the Luxembourg Investment Fund derives income from the Luxembourg Real Estate held through one or more transparent entities or common funds, the 20% withholding tax would be levied on the portion of the income pro rata to the Luxembourg Investment Fund's interest/units in the tax transparent entities or common funds.

The Luxembourg Investment Fund must file a return with the Luxembourg tax authorities ("**LTA**") regarding the 20% withholding tax before 31 May of the year following the year in which the real estate income is received or realized and the relevant tax amount must be paid by 10 June.

All Luxembourg Investment Funds (regardless of whether they derive real estate income during the calendar years 2020 and 2021) must inform the LTA before 31 May 2022 if they hold or do not hold Luxembourg Real Estate during the calendar years 2020 and 2021.

Finally, Luxembourg Investment Funds changing their legal form in the course of 2020 or 2021 to become a transparent entity or a common fund and holding directly or indirectly at the time of the change Luxembourg Real Estate, must also inform the LTA.

- **Explicit prohibition, as of 1 January 2021, for private wealth management companies (*société de gestion de patrimoine familial*, "SPFs") to hold real estate through tax transparent companies.**

The Law of 11 May 2007 on SPFs would be amended so as to clearly state therein that SPFs are prohibited from holding real estates through:

- one or more, Luxembourg or non-Luxembourg, tax transparent companies, such as non-commercial real estate companies *(sociétés civiles immobilières)*. The Law of 11 May 2007 on SPFs remains however unchanged, however, on the possibility for a SPF to hold real estate through tax opaque companies; or
- one or more common funds *(fonds communs de placement)* and other foreign entities subject to a comparable legal and tax regime.

- Increased of the registration duties due upon a contribution of a real estate in exchange for shares

One of the main differences between asset deals compared to share deals is the relatively high Luxembourg registration duty applicable on the transfer of a Luxembourg Real Estate.

Indeed, transfer of Luxembourg Real estates against cash are subject to a proportional registration duty of 7% (including 5 % registration fees increased by 2/10^{ths} plus 1% transcription tax). By contrast, contributions of a Luxembourg real Estate to a company upon incorporation (or at a later stage by capital increase) remunerated by shares are subject to a proportional registration duty of 1,1% (including 0,5 % registration fees increased by 2/10^{ths} plus a 0.5% transcription tax). In case of a later sale of shares of a fully taxable company no further registration tax will apply.

The Draft Budget Law now proposes that the contribution of a Luxembourg Real Estate to a corporate entity remunerated by shares will be subject to a proportional registration duty of 3.4% (including 2 % registration fees, increased by 2/10^{ths} plus a 1% transcription tax).[1] The aim is to achieve a more coherent taxation of share deals versus asset deals.

- Abolition of the current stock option regime

According to the Budget Law, the current tax regime of stock options plans governed by circular letter L.I.R. 104/2 issued by the LTA on 29 November 2017 would be abolished on 1 January 2021.

However, in order to keep Luxembourg attractive for talents, a new participative premium regime (*prime participative*) would be introduced and the current inpatriate regime would be amended.

- Introduction of a new participative premium regime

In parallel to the abolition of the Stock Options Circular, new measures would be introduced allowing employees to participate in the profits of their company in a tax-attractive manner, i.e. so-called participative premium regime.

Article 95 of the Luxembourg income tax law (the "LITL") would be modified to ensure that the participative premium will qualify as a salaried income for the employee for Luxembourg tax purposes. If the conditions set out below are met, the participative premium will benefit from a 50% tax exemption at the level of the employee. Concurrently, this participative premium will be tax deductible at the level of the employer as operating expenses (as provided under the proposed amendment of Article 46 of the LITL).

The conditions under which the participative premium may be granted would be laid down in a new paragraph 13a to be inserted in Article 115 of the LITL and contain conditions to be fulfilled by both the employer and the employee:

a) Conditions to be fulfilled by the employer:

(i) the employer must realise income that qualifies either as commercial profit, agricultural profit or profit deriving from an independent activity;

(ii) the employer must hold [regular accounts] (*comptabilité régulière*) during the fiscal year in which the participative premium is granted as well as during the previous fiscal year;

(iii) the amount of the participative premium allocated to the employees is limited to 5% of the profit of the financial year immediately preceding the year in which the premium is granted; and

(IV) the employer shall provide the competent withholding tax office (*bureau d'imposition RTS*), with a nominative list of all employees benefiting from the participative premium during the fiscal year. This communication is to be made in the form prescribed by the withholding tax office and at the time the participative premium is settled (*au moment de la mise à disposition*). In addition, it shall include all elements necessary in order to assess that the conditions relating to the exemption are met.

b) Conditions to be fulfilled by the employee:

(i) the beneficiary of the participative premium must be an employee (i.e. he/she must receive an income deriving from a contract of employment);

(ii) the participative premium may not exceed 25% of the employee's ordinary annual remuneration of the fiscal year during which the participative premium is allocated. For the determination of this 25% threshold, the employer must take into consideration the deemed gross annual salary (*salaire brut annuel présumé*) to be received by the employee during that year. Advantages in kind and other gratifications, however, will not be taken into account. The 25% threshold is to be calculated exclusive of the participative premium; and

(iii) the employee must be personally affiliated to the Luxembourg social security system or to a foreign social security system covered by a bilateral or multilateral instrument.

- Regime for inpatriates

The regime currently applicable for foreign workers in Luxembourg ("inpatriates") is regulated through an administrative circular, *Circulaire du directeur des contributions* L.I.R. – n° 95/2 dated 27 January 2014 ("Circular n° 95/2"). The Draft Budget Law foresees a legal basis for this regime by supplementing Article 115 of the LITL.

The Draft Budget Law introduces an inpatriation allowance, for an amount not exceeding 30% of the annual remuneration of the inpatriate that would be exempt from taxation. This inpatriation allowance corresponds to an additional flat-rate premium paid by the employer to the inpatriate to compensate for the differential in the cost of living. In addition, expenses and costs related to hiring inpatriates incurred by the employer would also tax be exempt. Further details on those expenses may be provided in a Grand-Ducal Regulation.

While the majority of the conditions required for the application of such a fiscal regime for inpatriate remains unchanged in the Draft Budget Law, some features of the Circular No. 95/2 would be adjusted, such as the annual remuneration of the inpatriate which would be increased from EUR 50,000 to EUR 100,000. Furthermore, the inpatriate would benefit from the amended tax regime for up to 8 years instead of the 5 years provided in the Circular No 95/2.

- Amendments to the Luxembourg Fiscal unity regime prior to 2015

On 14 May 2020 (C-749/18), the European Court of Justice ruled that Luxembourg's former tax unity regime was contrary to EU freedom of establishment.

The Draft Budget Law intends to implement, for fiscal years 2020, 2021 and 2022, the possibility to dissolve an existing Luxembourg fiscal unity composed of a Luxembourg resident integrating parent company holding one or more Luxembourg resident integrated subsidiaries and to create a new fiscal unity that incudes, in addition, Luxembourg resident sister companies of the Luxembourg resident integrating parent company, without any negative retroactive taxation for the existing members that would otherwise result from the dissolution of the fiscal unity.

The change of fiscal unity is subject to the following cumulative conditions:

  - the integrating parent company of the dissolved fiscal unity becomes the integrating subsidiary of the new fiscal unity;
  - the change of unity for 2020, 2021 or 2022 must be jointly requested by all the concerned companies on 31 December of the relevant fiscal year, at latest;
  - the amount of entities part of the new fiscal unity must be effectively larger compared to the dissolved fiscal unity;

- the new members must remain in the fiscal unity for a period of at least 5 years, whereas the computation of the 5-year period at the level of the former members remains unchanged.

The change of fiscal unity will not have an impact on:

- the choice made, if at all, to apply the interest limitation rule at the level of the fiscal unity rather than individually to each member of the fiscal unity; and

- tax losses incurred prior to or during the dissolved fiscal unity, which will continue to be carried forward insofar as they would have been carried forward at the level of the relevant member had the change of fiscal unity not been made.

The existing Luxembourg tax unity regime had already been amended in 2015 to implement the horizontal tax unity following a prior ruling of the ECJ. Please refer to our previous **newsflash** for more information.

- **Modification of the Law of 17 December 2010 relating to undertakings for collective investments (the "UCI Law") in order to encourage investment in sustainable economic activities**

The European Commission has adopted various measures in the field of sustainable finance aiming at taking due account of environmental, social and governance (ESG) considerations. Luxembourg is willing to maintain and reinforce its position as pioneer in this sector.

Against this background, a new paragraph 3 would be inserted in Article 174 of UCI Law in order to encourage Luxembourg undertakings for collective investments ("**UCIs**") to invest in sustainable economic activities.

According to this new paragraph 3, UCIs, or individual compartments thereof, may benefit from reduced subscription tax rates depending on the value of their net assets invested in economic activities that qualify as environmentally sustainable within the meaning of Article 3 of EU Regulation 2020/852 of 18 June 2020 (the "**Qualifying Activities**").

The reduced subscription tax rates would be of:

- 0.04% if at least 5% of the total net assets of the UCI, or of the individual compartment, are invested in Qualifying Activities;

- 0.03% if at least 20% of the total net assets of the UCI, or of the individual compartment, are invested in Qualifying Activities;
- 0.02% if at least 35% of the total net assets of the UCI, or of individual compartment, are invested in Qualifying Activities; and
- 0.01% if at least 50% of the total net assets of the UCI, or of individual compartment, are invested in Qualifying Activities.

The subscription tax rates mentioned above would only apply to the net assets invested in Qualifying Activities.

For UCIs, or compartments thereof, willing to benefit from such reduced rates, the part of net assets invested in Qualifying Activities on the last day of the UCI's financial year shall be controlled by an approved statutory auditor (*révsieur d'entreprises agréé*) or, as the case may be, certified by the auditor in the framework of a reasonable assurance audit (*mission d'asssurance raisonnable*). This part and the percentage corresponding to net assets invested in Qualifying Activities against the total net assets of the UCI, or its individual compartment, must be included in the annual report or in an assurance report.

A statement certified by the approved statutory auditor (*attestation certifiée*), containing the percentage of the net assets invested in Qualifying Activities as determined in the annual report or the assurance report, must be filed with the Luxembourg indirect tax authorities ("**LITA**") with the first subscription tax return following the annual report or the assurance report. This percentage will be used as a basis to determine the tax rate to the part of the net assets invested in Qualifying Activities for the 4 quarters following the filing of the statement.

During a transition period ending on 1 January 2022, entities willing to benefit from the reduced subscription tax rates must electronically file their quarterly return at the rate of 0.05% together with a corrective statement (*déclaration rectificative*) based on a form made available by the LITA.

- **Increase of the small businesses' VAT threshold**

In order to allow a greater number of taxable persons to benefit from administrative simplification represented by the VAT exemption regime referred to in Article 57 of the amended Law of 12 February 1979 concerning value added tax ("VAT Law"), it is proposed to raise the threshold of EUR 30,000 currently provided for in the said article to EUR 35,000.

It must be noted that taxable persons whose annual turnover is EUR 35,000 or less were already exempt from VAT as of 1 January 2020 based on an authorisation granted to Luxembourg by the Council of the European Union via Decision No 2019/2210. The EU Council's decision was directly applicable but not yet enshrined in the VAT Law.

> 1 a city surtax of 50% of the registration fees must be added if the building is located in Luxembourg City.

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.