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LUXEMBOURG LAW

NEWSLETTER

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ESMA report on UCITS costs and fees

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

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

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

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

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.

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.

CSSF Circular on UCI administrator

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

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

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

The following entities are eligible to act as UCI administrator:

- Luxembourg investment fund managers ("**IFMs**"), such as UCITS ManCos and AIFMs;
- Foreign IFMs pursuing the activity of UCI administrator for Luxembourg UCIs;

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

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

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

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

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

Outsourcing arrangements

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

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

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

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

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

More recently, on 1 July 2022, the CSSF also published a notification template to be used as of that date by in-scope entities (see below) when outsourcing a critical or important business process (Business Process

Outsourcing or BPO) in accordance with points 59 and 60 of the OS Circular (see CSSF Communiqué **here**).

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

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

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

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

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

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

Marketing communications

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

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

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

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

UCITS:

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

AIFs:

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

EuVECA/EuSEF:

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

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

Circular 22/810 applies as from 12 May 2022. However, the precise list of digitalised (pre)-marketing notification/de-notification procedures will progressively be made available on the homepage of the eDesk Portal and the CSSF will inform the entities concerned in due course by separate *communiqués*. A user guide providing additional information and instructions for the online submission via the eDesk Portal will also be made available.

MMF – ESMA Guidelines on stress test scenarios

On 19 July 2019, ESMA published its final report relating to the 2019 update of the **Guidelines on stress tests scenarios** ("**Stress Tests Guidelines**") under the Money Market Fund Regulation ("**MMF Regulation**"). These Guidelines are in the process of being translated into the official EU languages.

In particular, Section 4.8 of the Stress Tests Guidelines was updated. This section provides the obligation for managers of money market funds ("**MMFs**") to conduct additional common reference stress test scenarios and to report the results of these tests to their competent authorities.

The additional common reference stress test scenarios that managers of MMFs should conduct relate to the level of changes of liquidity, credit risk, interest rates and exchange rates, level of widening or narrowing spreads among indices to which interest rates of portfolio securities are tied, levels of redemption, and macro-economic shocks affecting the economy as a whole.

The results of these tests must be reported in accordance with Article 37 of the MMF Regulation. In this context, on 19 July 2019, ESMA also published a final report on the **Guidelines on the reporting to competent authorities under Article 37 of the MMF Regulation** ("**Reporting Guidelines**").

The amendments introduced by the Stress Tests Guidelines and the new Reporting Guidelines will become applicable two months after the date of publication of these Guidelines on ESMA's websites in all EU official languages, which may take some time. However, ESMA also confirms that MMFs and managers of MMFs are expected to send their reports on the common reference stress test scenarios to their national

competent authorities ("**NCAs**") in Q1 2020.

ESMA recommends MMFs and managers of MMFs to start measuring the impact of the common reference stress test scenarios specified in the Stress Tests Guidelines.

On the basis of these measurements, they will have to fill in the reporting template referred to in Article 37 of the MMF Regulation and in the Commission Implementing Regulation (EU) 2018/7082 and send the results to their NCAs with their first quarterly reports required by Article 37, scheduled in Q1 2020.

PRIIPs update

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

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

Ukraine crisis

1. ESMA Statement

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

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

2. CSSF actions and publications

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

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

- the publications of the CSSF in that respect.

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

Administrative law

Waste management

In order to ensure the protection and preservation of the environment and the improvement of its quality, Luxembourg has recently adopted five laws making up the so-called "Circular Economy Package".

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

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

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

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

The newly implemented means are:

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

- obligation for all waste holders to ensure that their waste is able to be reused, recycled or other recovered, in particular through separate collection.

Commercial

Reform of the right of establishment

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

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

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

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

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

Employment and pensions law

Next wage indexation postponed to 1 April 2023

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

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

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

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

Corporate, banking and finance

CSSF Circular on outsourcing arrangements

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

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

1. Scope

- The OS Circular applies notably to credit institutions, investment firms, payment institutions, electronic money institutions and professionals of the financial sector and their branches and partially to investment fund managers ("**IFM**"), their branches and UCITS.
- All requirements detailed in the OS Circular relating to ICT outsourcing define the new ICT outsourcing framework for IFMs and their branches and therefore the OS Circular overrides to some extent section 5.1.2 "Clarifications on technical infrastructure, IT and business continuity" of CSSF Circular 18/698.
- The FAQ specifies that part of the OS Circular applies only to IFMs in relation to one or several specific ICT outsourcing and where the requirement is relevant for IFMs. Therefore for example, section 4.1.3 "Outsourcing arrangements relating to internal control" and section 4.1.4 "Outsourcing arrangements relating to the financial and accounting function" of the OS Circular do not apply to IFMs since those sections are not related to ICT.

2. Main practical impacts

- Outsourcing of "Critical or important" functions

In-scope entities shall assess whether the functions they are outsourcing are "critical or important" pursuant to criteria developed in the OS Circular.

- Outsourcing policy

In-scope entities shall establish an outsourcing policy covering the points developed in section 4.2.3 of the OS Circular. This was already required but in-scope entities shall review it to ensure the exhaustiveness of this policy and compliance with the new rules.

- Outsourcing register

In-scope entities shall maintain a register of information of all outsourcing arrangements which must distinguish between the outsourcing of critical or important functions and other outsourcing arrangements. The register will need to refer to a certain number of points as required by section 4.2.7 of OS Circular (additional information will be required for outsourcing of critical or important functions). The outsourcing register can be requested at any time by the CSSF.

- Required provisions for outsourcing arrangements

Section 4.3.2 of OS Circular requires a certain number of provisions to be included in outsourcing arrangements. The OS Circular goes beyond the EBA Guidelines on outsourcing arrangements (EBA/GL/2019/02) and requires all outsourcing arrangements to include these provisions and not only the critical and outsourcing ones.

- Notifications

One positive change: in-scope entities intending to outsource a critical or important function shall notify (rather than authorisation process) their plans to the CSSF at least three months before the planned

outsourcing becomes effective (this delay is reduced to one month in case of outsourcing to a Luxembourg regulated support professional of the financial sector). No specific formalities are applicable to outsourcing of non-critical or non-important functions.

- Replacement of CSSF Circular 17/654 on cloud computing, as amended and simplification of cloud rules

Chapter 2 of Part II of the OS Circular replaces CSSF Circular 17/654 on cloud computing, as amended, which is repealed. The major principles, however, remain the same (e.g. requirement to identify a resource operator, appointment of a cloud officer…).

3. Timeline

- The OS Circular is applicable from 30 June 2022 to all outsourcing arrangements entered into, reviewed or amended on or after 30 June 2022.
- In-scope entities shall complete the documentation of all existing outsourcing arrangements in line with the OS Circular following the first renewal date of each existing arrangement, and by no later than 31 December 2022.
- In-scope entities which have not managed to review by 31 December 2022 outsourcing arrangements of critical or important functions existing prior to 30 June 2022 shall inform the CSSF.

WHAT TO DO NEXT?

- Implement an outsourcing register and review the outsourcing policy/procedure to ensure it complies with the OS Circular
- Set-up a plan to review and update existing outsourcing arrangements
- Make sure that all new outsourcing arrangements comply with the requirements of the OS Circular

We remain at your disposal for assistance to implement and/or enhance your outsourcing framework.

Updated governance rules for banks

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

- Scope of application and timeline

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

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

- Main changes brought by Circular CSSF 22/807

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

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

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

- reinforcement of the responsibilities of the supervisory body (which must (i) take into account ESG risks in the institution's risk monitoring and management, (ii) improve gender equality and representation of the under-represented gender among the members of the management body, and (iii) hold the majority of its meetings in Luxembourg);
- reinforcement of the requirements applicable to the authorised management regarding the obligation to implement gender-neutral policies ensuring fair treatment and equal opportunities for all staff;
- reinforcement of the conflicts of interest rules;
- reinforcement of the AML/CFT requirements in the internal governance arrangements;
- update of the internal alert arrangements' requirement to be implemented by the In-Scope Entities in light of the **EU Whistleblowing Directive** requirements; and
- repeal of Chapter 7's outsourcing requirements. In-Scope Entities must now comply with the requirements of the newly issued **Circular CSSF 22/806 on outsourcing arrangements**

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

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

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

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

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

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

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

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

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

Sustainability preferences in MiFID suitability test applicable soon

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

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

More practical details on how to integrate clients' sustainability preferences in the assessment of the suitability of investment advice and discretionary portfolio management decisions are expected through the revision by ESMA of its Guidelines on certain aspects of the MiFID II suitability requirements. Although the public consultation on the proposed text (see link **here**) closed on 27 April 2022, the final text of the guidelines is not yet available, making compliance with the new framework as of the implementation date particularly challenging for the entities concerned.

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

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

Modernisation of the Law of 22 March 2004 on securitisation

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

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

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

EU pilot regime for market infrastructures based on DLT

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

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

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

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

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

Specific permission granted to an operator of DLT market infrastructure will broadly follow the same procedures as those for authorisation under Regulation (EU) No 909/2014 (CSDR) or Directive 2014/65/EU

(MiFID II). However, when applying for specific permission under the Pilot Regime, the applicant needs to indicate the exemptions it is requesting.

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

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

CSSF Telework Circular applies since 1 July 2022

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

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

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

EU law, competition and antitrust

EU sanctions in response to Russia's invasion of Ukraine

Since February 2022, the EU has adopted six packages of sanctions in response to Russia's invasion of Ukraine. The EU has also adopted sanctions against Belarus in response to its involvement. These sanctions

are in addition to those already applying to Russia since 2014 and to Belarus since 2006.

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

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

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

- Impact on the Luxembourg financial sector

From the perspective of their impact on the activities of the Luxembourg financial sector, the main sanctions to bear in mind are the restricted access to EU primary and secondary capital markets for certain Russian banks and companies, the prohibition on transactions with Russia's government and Central Bank, the SWIFT ban for certain Russian banks, the prohibition to accept Russian deposits exceeding certain thresholds, the prohibition on the provision of euro-denominated banknotes to Russia, the prohibition for EU central securities depositories to provide services to Russian natural or legal persons, the prohibition on public financing or financial assistance for trade with or investment in Russia, the prohibition on investment in and contribution to projects co-financed by the Russian Direct Investment Fund, and the prohibition on providing high-value crypto, business & trust, as well as tax and accounting services.

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

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

- Enforcement and regulatory guidance

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

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

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

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

Revised EU competition rules for distribution agreements entering into force

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

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

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

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

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

- the VBER safe harbour is narrowed as regards (i) dual distribution, i.e. where a supplier sells its goods or services through independent distributors but also directly to end customers, and (ii) parity obligations, i.e. obligations which require a seller to offer the same as or better conditions to its counterparty than those offered on third-party sales channels, such as other platforms, and/or on the seller's direct sales channels, like its website. Such agreements or obligations may no longer be exempted and require individual assessment;
- the VBER safe harbour is enlarged as regards: (i) certain restrictions of a buyer's ability to actively approach individual customers through so-called "active" sales, and (ii) certain restrictions relating to online sales, namely the ability to charge the same distributor different wholesale prices for products to be sold online and offline and the ability to impose different criteria for online and offline sales in selective distribution systems. Such restrictions are now exempted, provided all other VBER exemption conditions are met.

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

and exclusive distribution and agency agreements.

CJEU clarifies "non bis in idem" in competition law

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

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

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

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

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

Significant EU case law on abuse of dominance

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

- In a judgment of 12 May 2022 in preliminary ruling case **Servizio Elettrico Nazionale and Others** (C-

377/20), the CJEU was asked to apply Article 102 TFEU in the context of the progressive liberalisation of the electricity market in Italy. ENEL, the pre-liberalisation monopolist in electricity distribution, was fined by the national competition authority for having used its dominant position to discriminate against competitors of its subsidiaries active on separate market segments. The Italian appeals court referred several questions to the CJEU.

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

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

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

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

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