NEWSLETTER

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BANKING & FINANCE

SECURITISATION REGULATION | FINALISATION OF THE DISCLOSURE TECHNICAL STANDARDS

BACKGROUND

Article 7 of Regulation (EU) 2017/2402 of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation (the "**Securitisation Regulation**") imposes strict disclosure requirements on originators, sponsors and securitisation special purpose entities ("**SSPEs**") of securitisations.

Pursuant to Article 7(3) and (4) of the Securitisation Regulation the European Securities and Markets Authority ("**ESMA**") was mandated to produce draft regulatory technical standards ("**RTS**") and implementing technical standards ("**ITS**") in relation to the transparency requirements specifying what information must be disclosed and standardised templates for submitting that information.

PUBLICATION OF RTS AND ITS BY EUROPEAN COMMISSION

On 16 October 2019, the European Commission published on its website Commission delegated regulation with associated Annexes (based on drafts submitted by ESMA); and the Commission implementing regulation with associated Annexes (based on drafts submitted by ESMA).

The RTS specify the information to be made available for all securitisations namely underlying exposures in the securitisation (Article 2), investor reports (Article 3), inside information (Article 6), and significant events that affect the transaction (Article 7) and describe the granularity of the information to be disclosed. The document applies to both public and private securitisations, with the RTS drawing a distinction between what is required to be disclosed in each case.

The ITS clarify the format and lay down standardised templates for disclosing the information as required by the RTS. As an interim measure prior to the ITS becoming effective, issuers, originators and sponsors were allowed to refer to the draft disclosure templates from Regulation (EC) No. 1060/2009 of 16 September 2009 on credit rating agencies. This will no longer be possible once the ITS enter into force.

NEXT STEPS

The next stage in the process is a three-month extendable review period during which the European Parliament and the Council of the European Union may object and veto the RTS. The ITS *per se* are not subject to a no-objection condition, but given their pure technical nature, they enter into force together with the RTS. Therefore, assuming there is no objection to the RTS in their current form, they, together with the ITS, will be published in the Official Journal and come into force 20 days after the date of such publication. It is anticipated that both the RTS and ITS will enter into force in February 2020.

No transitional period is expected to apply and therefore market participants are encouraged to prepare themselves so they are ready to comply with the new reporting requirements once the RTS and ITS become effective. The RTS will apply to all EU securitisation transactions that have closed since 1 January 2019 (when the Securitisation Regulation came into force).

PSD 2 | EBA OPINION ON THE DEADLINE OF THE SCA

On 16 October 2019, the European Banking Authority (the "**EBA**") published an opinion on the deadline for the migration to strong customer authentication (the "**SCA**")

under the Directive (EU) 2015/2366 of 25 November 2015 on payment services in the internal market (the "**PSD 2**") for e-commerce card-based payment transactions (the "**Opinion**").

Although the Opinion was addressed to the national competent authorities (the "**NCAs**"), it is also useful for payment service providers (the "**PSPs**"), card schemes as well as payment service users, including merchants.

The Opinion follows the earlier EBA opinion published on 21 June 2019 which acknowledged that NCAs may provide limited additional time for e-commerce card-based payment transactions to allow card-issuing PSPs to migrate to authentication approaches that are compliant with the SCA and acquiring PSPs to migrate their merchants to solutions that support the SCA.

Furthermore, following the realisation by the EBAs and the NCAs that many market participants were not ready for transition and implementation of the SCA, the Opinion now sets the deadline for the SCA to 31 December 2020 (instead of 14 September 2019) and prescribes the expected actions to be taken by an NCA during the migration period.

The Opinion additionally recommends NCAs to take a consistent approach toward the SCA migration period across the EU and to require their respective PSPs to carry out the actions set out in the Opinion.

Finally, the EBA recommends that, where required, NCAs shall communicate to PSPs in their jurisdiction that the supervisory flexibility they have exercised does not represent a delay in the application date of the SCA requirements in PSD 2 and the EBA's Technical Standards. Rather, it means that NCAs will focus on monitoring migration plans instead of pursuing immediate enforcement actions against PSPs that are not compliant with the SCA requirements.

CSSF UPDATES ON IT OUTSOURCING BY SUPERVISED INSTITUTIONS

NEW AND MODIFIED CSSF TEMPLATES FOR AUTHORISATION REQUESTS AND NOTIFICATIONS

As regards IT outsourcing of material activities by credit institutions, investment firms and professionals performing lending operations under Circular CSSF 12/552 (as amended) and IT outsourcing by electronic money institutions, payment institutions and professionals of the financial sector ("**PFS**") other than investment firms, under Circular CSSF 17/656, the CSSF has published on 16 December 2019 a new form for authorisation requests.

As regards cloud computing outsourcing by support PFS, the CSSF published an update to the Form A, for the prior notification to be transmitted to the competent authority where a cloud computing infrastructure will be used for a material activity.

The CSSF announced these updates through a *communiqué* on its website.

FAQ ON THE ASSESSMENT OF IT OUTSOURCING MATERIALITY

As regards the assessment of IT outsourcing materiality by credit institutions, investment firms, professionals performing lending operations, electronic money institutions, payment institutions and PFS other than investment firms, investment fund managers and entities carrying out the activity of registrar agent, the CSSF updated the related FAQ on 4 December 2019. The updated FAQ can be found here.

Firstly, the CSSF clarified that IT outsourcing means "*An arrangement of any form between the institution and a service provider (including of the same group) by which that service provider performs an IT process, an IT service or an IT activity that would otherwise be undertaken by the institution itself.*"

Secondly, the CSSF noted that there are two different ways to assess the materiality of IT outsourcing. You can look at it from a technical point of view which states that if a deficiency in outsourced IT operational functions, activities or services may disrupt the ability of the supervised entity to operate its material activities in a controlled manner; or you can look at it from a business point of view, which suggests that if the outsourced IT operational functions, activities or services support a material activity and in case of failure, there is a major impact on the business activity.

CAPITAL MARKETS

PROSPECTUS REGULATION | ESMA UPDATES

ESMA GUIDELINES ON RISK FACTORS

Pursuant to Article 16 (4) of Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (the "**Prospectus Regulation**"), ESMA was mandated to develop guidelines to assist competent authorities in their review of the specificity and materiality of risk factors included in prospectuses and the presentation of the risk factors across categories depending on their nature.

On 1 October 2019, ESMA published the required guidelines (the "**Guidelines**").

The Guidelines provide guidance to competent authorities by recommending how they should query and/or challenge the persons responsible for drawing up the prospectus in respect of the following:

1. Specificity of the risk factor to the issuer/guarantor or securities;
2. Materiality of the risk factor;
3. Corroboration of the specificity and materiality of the risk factor with the overall picture presented in the prospectus;
4. Presentation of risk factors across categories based on their nature;
5. Conciseness of the risk factor disclosure;
6. Consistency in risk factor disclosure in the summary.

For illustrative purposes ESMA has included in Appendix I to the Guidelines some practical examples showing how the specificity of a risk factor can be demonstrated, how both the specificity and materiality of a risk factor can be demonstrated together and providing an example of mitigating language.

The Guidelines apply from 4 December 2019. The national competent authorities of Luxembourg and all other Member States of the EEA, except Hungary and Iceland, have notified ESMA that they comply with the Guidelines. Hungary and Iceland have confirmed their intention to comply.

UPDATED ESMA Q&A

Since our last newsletter, ESMA updated its Q&As relating to the Prospectus Regulation on 4 December 2019 with two new Q&As.

Firstly, with respect to Article 8(8) of the Prospectus Regulation, ESMA has confirmed that it is not permitted to include a pro-forma summary in a base prospectus unless the final terms are included in the base prospectus or supplement and the issue specific summary is annexed thereto.

Secondly, in a scenario where the securities which are being offered to the public or admitted to trading are of a type not covered by the annexes to the Prospectus Regulation and the persons responsible for drawing up the prospectus are therefore uncertain as to which annexes are most appropriate to use, ESMA urges persons to contact the relevant competent authority for confirmation.

MIFID II & MIFIR | UPDATE OF ESMA Q&A

Since our last newsletter, ESMA updated its Q&A on the Market in Financial Instruments Directive 2014/65/EU of 15 May 2014 ("**MiFID II**") and on the Markets in Financial Instruments Regulation 600/2014 of 15 May 2014 ("**MiFIR**"), on the following topics:

- Q&A on MiFID II and MiFIR investor protection and intermediaries;
- Q&A on MiFIR data reporting; and
- Q&A on MiFID II and MiFIR transparency and market structures topics.

Focussing only on the Q&A on investor protection and intermediaries topics, we note that ESMA has provided two new Q&As in respect of information on costs and charges. ESMA clarifies how the ex-post costs and charges disclosure requirements should be

applied to the service of portfolio management and how the investment firm's obligation to provide ex-post aggregated costs and charges information under Article 50 (9) of the MiFID II Delegated Regulation (EU) 2017/565 of 25 April 2016, which allows firms to provide this information together with any existing periodic reporting to clients, relates to existing reporting obligations in respect of portfolio management under Article 60 of the same Regulation.

Additionally, ESMA added one new Q&A on the subject of product intervention. ESMA explains which national product intervention measures firms should apply in case of cross-border provision of investment services.

LUXEMBOURG STOCK EXCHANGE | VARIOUS UPDATES

UPDATED APPLICATION FORM AND UNDERTAKING LETTER

Following the entry into force of Regulation (EU) 2017/1129 of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (the "**Prospectus Regulation**") and its transposing law, the Luxembourg law of 16 July 2019 on prospectuses for security (the "**Prospectus Law**"), the Luxembourg Stock Exchange (the "**LuxSE**") has published updated versions of its application forms and undertaking letters for the listing and admission of securities to trade on the LuxSE's Regulated Market and/or Euro MTF, which are available here.

The main changes in these documents just pertain to the cross-references to the updated legislation. Furthermore, in the application forms, applicants can now indicate if the securities shall be listed on the professional segment of either the Euro MTF or the Regulated Market of the LuxSE.

REGULATORY MAPPING

The LuxSE has published a helpful regulatory mapping document which is an informative document describing issuers' main disclosure obligations applicable under the main EU capital markets' legislation, covering both the Regulated Market and the Euro MTF. This document which is available here also describes the services offered by the LuxSE which can assist issuers in complying with these disclosure obligations.

PERMA LINK UPLOAD SERVICE (PLUS)

Another service offered by the LuxSE which is not referenced in the aforementioned regulatory mapping document, is the Perma Link Upload Service (PLUS).

Pursuant to the Prospectus Regulation and Prospectus Law, it is required that information incorporated by reference into prospectuses must be accessible through hyperlinks pointing to the relevant documents. These hyperlinks must be valid and accessible for a minimum period of ten years.

In order to facilitate issuers complying with this obligation, the LuxSE now offers PLUS which provides users with direct, permanent hyperlinks for a period of "ten plus one" years.

NEW BOND TRADING PLATFORM - LUXXPRIME

In September 2019, the LuxSE launched LuxXPrime, a new bond trading platform dedicated to retail-sized orders.

This platform was launched by the Luxembourg Stock Exchange (the "**LuxSE**") with EUWAX AG, a subsidiary of *Börse Stuttgart GmbH* ("**Börse Stuttgart**") as prime liquidity provider.

With LuxXPrime, the LuxSE aims to meet the needs of brokers, asset managers and investors who are looking for attractive prices for smaller-sized trades in fixed-income securities.

THE NEW LUXSE ESG REPORTING GUIDE

In October 2019, the LuxSE published the "Guide to ESG Reporting" which is a set of

comprehensive guidelines for reporting on Environmental, Social and Governance ("**ESG**") aspects (the "**Guide to ESG Reporting**"). This guide provides information to companies, issuers of debt instruments and asset managers active in sustainable and responsible investment funds on how to integrate ESG matters into their reporting. The Guide to ESG Reporting will be updated on a regular basis in line with market practice.

CSSF FEES

BACKGROUND

The Grand-Ducal Regulation of 26 October 2019 (the "**Amending Grand-Ducal Regulation**") amending the Grand-Ducal Regulation of 21 December 2017 relating to the fees to be levied by the CSSF updates the fee arrangements in order to, *inter alia*, take into consideration Regulation (EU) 2017/1129 of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (the "**Prospectus Regulation**").

AMENDMENTS

Pursuant to the Amending Grand-Ducal Regulation, the CSSF fees for:

- approval of a universal registration document shall be EUR 5,000 and
- approval of a summary pursuant to the third subparagraph of Article 26(4) of the Prospectus Regulation shall be EUR 700.

Furthermore, the CSSF has introduced a lower fee arrangement where several supplements of the same issuer or of several issuers belonging to the same group are officially filed on the same day for approval by the CSSF in accordance with the Prospectus Regulation and where these supplements are substantially identical with respect to the content and the form. A fee of only EUR 250 shall be paid for the official filing of any supplement which follows the first supplement.

The Amending Grand-Ducal Regulation entered into force on 2 November 2019.

BSP

CORPORATE

DIRECTIVE (EU) 2019/2121 ON CROSS-BORDER CONVERSIONS, MERGERS AND DEMERGERS

On 27 November 2019, the European Parliament and the Council adopted Directive (EU) 2019/2121 (the "**Directive**") which amends the provisions of Directive (EU) 2017/1132 on cross-border mergers and creates harmonised rules on cross-border conversions and demergers.

The lack of a legal framework for cross-border conversions and cross-border demergers has been considered as a cause of legal fragmentation and uncertainty, leading to barriers to the exercise of the freedom of establishment within the EU.

Therefore, the Directive provides for harmonised rules for cross-border conversions and cross-border demergers in the EU and also reinforces the protection of shareholders, employees and creditors in case of cross-border mergers.

The procedures applicable for the implementation of cross-border conversions and demergers involve almost identical steps and information requirements as is the case for cross-border mergers including, in particular: the publication of the draft terms of the operation; issuance of a report for the shareholders and employees; issuance of an independent expert report; approval by the general meeting and obtaining of a certificate from a competent authority confirming compliance with legal obligations.

In contrast to the existing rules relating to cross-border mergers, additional information will now be required in the common draft terms relating to the relevant operation and in the report of the management body of the company for its shareholders and employees relating to the impact of the relevant operation on such persons. Shareholders and employees will thus be enabled to present their observations to the general meeting which is deciding on the operation.

Shareholders must be informed of their new right to dispose of their shares for adequate cash compensation if they vote against the approval of the common draft terms of the cross-border operation as well as their right to dispute the share-exchange ratio in a court of law.

The common draft terms also need to disclose the safeguards offered by the companies to their creditors, such as guarantees or pledges. If such safeguards are deemed insufficient by the creditors, the Directive allows them to apply for more adequate safeguards before the competent administrative or judicial authority within three months of the publication of the draft terms. Member States can also demand that financial statements reflecting the current financial state of the companies be published at the same time as the draft terms of the operation.

An obligation is imposed on Member States to ensure that their respective competent authority does not issue the confirmatory certificate regarding compliance with legal obligations if it is established that the operation has been set up for abusive or fraudulent purposes in order to avoid the application of, or in order to circumvent, European or national law or for criminal purposes.

The Grand Duchy of Luxembourg and the other Member States have until 31 January 2023 to transpose the Directive into national law.

INVESTMENT MANAGEMENT

AML/CFT | CSSF FAQ ON RESPONSIBLE PERSONS FOR A LUXEMBOURG INVESTMENT FUND OR INVESTMENT FUND MANAGER

On 25 November 2019, the CSSF issued its FAQ on persons responsible for AML/CTF compliance for a Luxembourg Investment Fund or Investment Fund Manager supervised by the CSSF.

This FAQ gives the CSSF's interpretation on the application of article 4(1) of the Law of 12 November 2004 on the fight against money laundering and terrorist financing, as amended ("**AML Law**").

The CSSF recalls that every Luxembourg Investment Fund subject to AML/CFT supervision is legally required to appoint, both:

- a "*responsable du respect des obligations*" ("**RR**"); and
- a "*responsable du contrôle du respect des obligations*" ("**RC**").

The RR can be the board of directors (or other governing body) acting as a collegial body or, alternatively, the board may also appoint one of its members.

The RC shall be mandated in person by the board of directors (or other governing body) of the Fund. The RC may be a board member with appropriate experience or a third party. In case the board appoints a third party, the fund must either enter into a contractual relationship directly with the RC or with the employer of the RC. In principle the RC must be located in Luxembourg, however the CSSF clarifies that on an exceptional basis it is acceptable that the RC is located outside Luxembourg if the investment fund manager and its relevant staff member acting as RC are not domiciled in Luxembourg.

The CSSF requires that the RR and the RC:

- have sufficient AML/CFT knowledge with regard to the applicable Luxembourg legislation and regulation and can demonstrate this (e.g. trainings) upon request;
- are knowledgeable about the investments and distribution strategies of the fund/about the services offered by the investment fund manager; and
- will be available without delay upon contact by the Luxembourg AML/CFT competent authorities (if the RR is a collegial body, at least one of its members must fulfil this requirement).

In addition the RC needs to have access to all internal documents and systems necessary to perform his/her tasks.

Similar rules apply to any Luxembourg investment fund manager supervised by the CSSF:

1. The RR can be the governing body (e.g. board of directors) in its entirety or one of its members; and
2. The RC can be the compliance officer at appropriate hierarchical level in charge of AML/CFT aspects for the investment fund manager.

The CSSF clarifies that the above rules are general rules and these may need to be adapted on a case-by-case basis since they do not address all possible scenarios.

AML/CFT | CSSF GUIDANCE ON COMPLIANCE BY REGISTERED AIFMS AND 2019 ML/TF SURVEY

On 5 December 2019, the CSSF published a communication summarizing results of an AML/CFT questionnaire as well as an AML/CFT conference concerning registered

AIFMs and Self-Managed Non-AIFs which took place on 3 December 2019 (the "**Communication**"). The Communication provides seven areas which in the view of the CSSF require further guidance or could further be improved by registered AIFMs and Self-Managed Non-AIFs. Those areas are:

1. Identification of beneficial owner;
2. Development of tailor-made AML/CFT procedures;
3. Application of a risk-based approach to minimize money-laundering and terrorist financing related risks;
4. Participation in the AML/CFT training dedicated to the risks faced by the organization;
5. Improvement of the frequency of targeted financial sanctions screenings to ensure timely notification to the competent authorities;
6. Improvement of the transactions monitoring which is to be conducted on all investors, or in case of delegation of this control, oversight on the delegate;
7. Cooperation with Luxembourg Financial Intelligence Unit which must be immediately notified about any suspicion of money laundering or terrorist financing.

The CSSF reminded that in Luxembourg all suspicious transactions as of 1 November 2018 must be notified to the Luxembourg Financial Intelligence Unit through the Go AML Portal. The notification is mandatory for all entities subject to the law of 12 November 2004 on the fight against money laundering and terrorism financing, as amended, and requires prior registration on the GO AML Portal.

The Communication also referred to the CSSF's press release 19/57 dated 28 November 2019 (the "**Press Release**") which announced an annual online survey for the year 2019 collecting standardised key information concerning ML/FT risks to which the professionals under CSSF supervision are exposed (the "**Survey**"). The Survey will be launched on 3 February 2020 and will be available for completion on the eDesk portal for a period of six (6) weeks (except for the banking sector where the period is four (4) weeks). It should be completed by a member of the management body of an entity (preferably the AML/CFT Compliance Officer) or any other assigned employee of an entity. The Survey can be completed through the eDesk Portal only and therefore prior registration on the eDesk Portal is required.

AIFMD | ESMA'S UPDATED Q&A

BACKGROUND

On 4 December 2019, ESMA published updated Questions and Answers ("**Q&A**") on the application of the Alternative Investment Fund Managers Directive ("**AIFMD**"). The updated Q&A incorporate a new question and answer into Section III on reporting to national competent authorities under Articles 3, 24 and 42 of the AIFMD, clarifying how Alternative Investment Fund Managers ("**AIFM(s)**") should report the results of liquidity stress tests for closed-ended unleveraged funds that they manage.

CLARIFICATIONS ON REPORTING LIQUIDITY STRESS TESTS

The Q&A reiterate the obligation imposed on AIFMs to report results of liquidity stress tests for all the AIFs under their management as part of their reporting duties to competent authorities. Such obligation stems from Article 24(2) of the AIFMD and supplemented by Article 110(2)(f) of Regulation (EU) No 231/2013 with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision. The results of the stress tests performed by the AIFMs in accordance with the second subparagraph of Article 16(1) of the AIFMD need to be disclosed in the field 280 of the AIFMD reporting template (2013-1359_consolidated_aifmd_reporting_template)

However, Article 16(1) of the AIFMD exempts closed-ended unleveraged AIFs from implementing liquidity risk management systems and from "conducting stress tests,

under normal and exceptional liquidity conditions, which enable AIFMs to assess the liquidity risk of the AIFs and monitor the liquidity risk of the AIFs accordingly". Hence, for closed-ended unleveraged AIFs, AIFMs can indicate in the field 280 of the AIFMD reporting template that the question is "Not Applicable" and report in this field the fact that the relevant fund is a closed-ended unleveraged AIF.

Should an AIFM decide to conduct liquidity stress tests for unleveraged closed-ended AIFs despite the applicable exemption, it should report the results of the liquidity stress tests accordingly.

NEW UCI APPLICATIONS VIA EDESK | CSSF PRESS RELEASE 19/45

As and from 1 November 2019, applications for new UCI approvals (i.e. UCITS, UCI Part II, SIF and SICAR) not yet registered on the official list, will have to be submitted via the CSSF's new eDesk portal. Applications via email will no longer be accepted.

The CSSF have provided a dedicated user guide, available here, with all information related to the creation of a user account.

PRIIPS ASSESSMENT REMINDER | CSSF PRESS RELEASE 19/60

On 11 December 2019, the CSSF published press release 19/60 (the "**Press Release**") reminding that pursuant to press release 19/28 published on 1 July 2019 all SIFs, Part II UCIs and SICARs are obliged to complete an online assessment about the impact of Regulation 1286/2014 on key information documents for packaged retail and insurance-based investment products (the "**PRIIPS Assessment**"). The Press Release provides that all entities in scope which failed to complete the PRIIPs Assessment within the prescribed deadline (31 October 2019) are obliged to do so as soon as possible. This obligation includes entities created after October 2019.

Finally, the CSSF points out that all entities in scope are allowed to appoint a legal advisor or a law firm to complete the PRIIPs Assessment on their behalf. In order to do so, the CSSF needs to receive a mandate signed by the directors/managers of the entity obliged to fill in the PRIIPs Assessment. A template mandate is available for download at the eDesk portal and needs to be sent to the email address indicated in the document.

EMIR | CSSF PRESS RELEASE 19/49 ON RESULTS OF QUESTIONNAIRE

BACKGROUND

In August 2018, the CSSF addressed a European Market Infrastructure Regulation ("**EMIR**") questionnaire to investment fund managers under its supervision ("**IFMs**"). The IFMs were required to complete and return the questionnaire to the CSSF in order to assess compliance with EMIR.

The aim of the questionnaire was to collect a self-assessment from IFMs on the existence of adequate EMIR monitoring and oversight procedures to ensure that IFMs, and the funds they manage, comply with EMIR obligations.

Unfortunately, the CSSF noticed that in many cases, IFMs were not yet compliant with the monitoring and oversight duties as well as the requirements of CSSF Circular 18/698.

MAIN CONCLUSIONS DRAWN DOWN FROM THE RESPONSES TO THE QUESTIONNAIRE

The CSSF identified a lack of formalization and reminded that adequate written procedures and arrangements have to be put in place by the IFMs to comply with all EMIR obligations even when a specific obligation does not apply further to the IFMs' assessments.

Their assessments need to be documented and their monitoring and oversight procedures reviewed on a regular basis to ensure adequacy.

The CSSF mentioned that IFMs remain responsible to ensure that the funds they manage comply, even in case of delegation, with their EMIR obligations. Thus, IFMs must, in order to appropriately monitor their EMIR obligations, carry out initial and ongoing due diligence over the delegate. As a general principle of the delegation, the CSSF reminded that the arrangements concluded between the IFM and the delegate shall clearly establish the roles and responsibilities and ensure an adequate ongoing oversight by the IFM of the EMIR obligations which they have delegated.

The CSSF further reminded, as already clarified in its press release 15/36, that EMIR applies to derivative contracts concluded for investment purposes as well as for hedging purposes and noted that some IFMs erroneously considered that derivative contracts concluded for hedging purposes are not subject to EMIR obligations.

Finally, the CSSF reminded that registered AIFM are in scope of EMIR.

NEXT STEPS

The CSSF already contacted IFMs with potentially significant deficiencies to improve their EMIR monitoring and oversight procedures by the end of 2019.

In the near future, the CSSF will assess the compliance with EMIR requirements, including the procedures of IFMs which have to be amended to comply with the EMIR Refit and act to improve the data quality of trades reported to trade repositories.

LIQUIDITY RISK MANAGEMENT | CSSF CIRCULAR 19/733

On 20 December 2019, the CSSF published circular 19/733 on liquidity risk management for open-ended undertakings for collective investment (the "**Circular**"). The objective of the Circular is to implement recommendations and good practices of the International Organization of Securities Commissions ("**IOSCO**") on liquidity risk management for undertakings for collective investment (the "**IOSCO Recommendations").**

APPLICATION

The Circular applies to management companies regulated by Chapter 15 and Chapter 16 of the Law of 17 December 2010 relating to undertakings for collective investment (the "**2010 Law**"), Luxembourg branches of investment fund managers subject to Chapter 17, investment companies which did not designate a management company within the meaning of Article 27 of the 2010 Law, alternative investment fund managers authorised under Chapter 2 and internally managed alternative investment funds within the meaning of point (b) of Article 4(1) of the Law of 12 July 2013 on alternative investment fund managers (the "**2013 Law**"), that are managing open-ended undertakings for collective investment (the "**UCIs**").

The CSSF also recommends open-ended UCIs subject to Part II of the 2010 Law which are not managed by an authorized alternative investment fund manager to consider applying the provisions of the Circular.

SCOPE

The Circular, following the IOSCO Recommendations, addresses three elements of the UCIs life cycle where liquidity risk management has to be particularly present.

The UCI design process should take into account:

- the establishment of liquidity risk management effective in both normal and stressed market conditions;
- the establishment of frequency arrangements appropriate to the investment strategy and underlying assets of the UCIs;
- the manner in which the planned marketing and distribution are likely to impact the liquidity of UCIs;

- the integration of an appropriate range of additional liquidity management tools (the "**LMTs**") which could contribute to a better management of liquidity risk under exceptional market conditions;
- tools to ensure that liquidity risk of the UCIs and the liquidity risk management processes are effectively disclosed to investors and prospective investors.

The day-to-day liquidity management should include:

- regular checks of the UCIs' liquidity;
- due consideration and integration of liquidity management into investment decisions. Transactions should be conducted only if the investments or techniques/strategies employed do not compromise the ability of the UCI to comply with the redemption obligations or other liabilities;
- a process to facilitate the identification of emerging liquidity pressures/shortages before they occur and should integrate relevant data and factors in order to have a holistic view of the possible risks;
- ongoing liquidity assessments and stress testing in different market conditions.

Contingency planning:

- contingency plans should be implemented and periodically tested to ensure that any applicable LMTs can be used where necessary;
- the CSSF reminded that the IOSCO Recommendations indicate a list of the LMTs which are available to Luxembourg domiciled UCIs.

ENTRY INTO FORCE

The Circular entered into force with immediate effect.

CROWDFUNDING | EU RULES AGREED

BACKGROUND

On 27 March 2019, the European Parliament adopted a legislative resolution on the proposal for a regulation on European Crowdfunding Service Providers (“**ECSP**”). Until now, the European Parliament negotiating team and the Council still had some points of discussion. An agreement has finally been found.

CAP

Whereas the Economic and Monetary Affairs Committee wanted to expand the scope of the ECSP by increasing the maximum threshold for each crowdfunding offer to EUR 8,000,000 (an eightfold increase from the level of EUR 1,000,000 proposed by the European Commission), to be calculated over a period of 12 months, it has been agreed that the single set of rules stated in the proposed ECSP regulation will apply to all ECSP up to offers of EUR 5,000,000, calculated over a period of 12 months per project owner.

EXTENDED SCOPE OF APPLICATION TO SMALL COMPANIES AND START-UPS

It has been decided to enable small companies or start-ups to use the crowdfunding option. Therefore, the shares of certain private limited liability companies, which are freely transferable on the capital markets, have been included in the scope of the proposed regulation.

INVESTOR PROTECTION

In addition to the key investment information sheet (“**KIIS**”) to be provided to investors for each crowdfunding offer and containing, *inter alia*, information about the financial risks and charges related to their investment, investors identified as non-sophisticated would be offered more in-depth advice and guidance, including on their ability to bear losses and a warning in case their investment exceeds either EUR 1,000 or five per cent of their net worth, followed by a reflection period of four calendar days.

AUTHORISATION AND SUPERVISION

Prospective ECSP would need to request authorisation from the national competent authority of the Member State in which they are established and will also be able, through a notification procedure in the host Member State, to provide their services on a cross-border basis. The national competent authority and ESMA will ensure cooperation between Member States.

The text will now have to be approved by the Economic Affairs Committee and the Parliament as a whole.

ESMA's press release is available here.

SUSTAINABLE FINANCE | RECENT DEVELOPMENTS

On 9 December 2019, the European Parliament and the Council adopted two new regulations relating to sustainable finance in the context of the European Union's aim to strengthen the response to climate change.

Regulation (UE) 2019/2088 on sustainability-related disclosures in the financial services sector aims at establishing harmonised rules on transparency to be applied by financial market participants. In this respect they must systematically consider and integrate sustainability risks and performance into investment decision-making or advisory processes and provide investors with sustainability related information on the financial products they offer or advise on.

Regulation (UE) 2019/2089 amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks was also adopted.

For further information please refer to our previously published newsflashes on both regulations (Sustainable Finance Insights Series – 1 and Sustainable Finance Insights Series - 2).

BENCHMARK REGULATION | CSSF COMMUNICATION

On 24 December 2019, the CSSF published a communiqué (the "**Communication**") regarding Regulation (EU) 2016/1011 on indices used as benchmarks (the "**Benchmark Regulation**") addressed to all entities which are subject to the CSSF's supervision and which are using benchmarks (the "**Concerned Entities**").

EXTENSION OF TRANSITIONAL PROVISIONS

The CSSF draws attention to the fact that the transitional provisions provided for in article 51 of the Benchmark Regulation concerning the use of benchmarks provided by third country administrators and benchmarks declared as critical by the European Commission have been extended until 31 December 2021.

FALL-BACK PROVISIONS

The CSSF reminds that the Concerned Entities are expected to set up fall-back provisions in the event a benchmark materially changes or ceases to be provided pursuant to article 28(2) of the Benchmark Regulation. In that respect, the Concerned Entities are expected to be prepared for the EONIA and the LIBOR rates to cease to operate around the turn of 2021 and 2022. To stay up to date, the Concerned Entities should regularly monitor developments and actions of the European working groups established in this respect and consider their recommendations on an ongoing basis. The most recent information can be found on the website of the European Central Bank or the Bank of England.

DISCLOSURES IN PROSPECTUSES OF TRANSFERABLE SECURITIES PRODUCTS

According to article 29(2) of the Benchmark Regulation in case the object of a prospectus to be published under the Prospectus Directive ((EU) 2017/1129) or the UCITS Directive (2009/65/EC) is transferable securities or other investment products that reference a benchmark, the prospectus must include

information on whether the benchmark is provided by an administrator included in the ESMA register of benchmark administrators and third country benchmarks (the "**ESMA Register**").

LIST OF PERMITTED BENCHMARKS

The Communication also provides a detailed list of benchmarks which the Concerned Entities may use as of 1 January 2020:

- an index exempted from the scope of application of the Benchmark Regulation (art. 2(2) of the Benchmark Regulation);
- a benchmark included in the ESMA Register;
- a benchmark that is provided by an administrator located in a third country (which can be used until 31 December 2021 without listing in the ESMA Register);
- a benchmark provided by an administrator located in third country, where the benchmark was used in the European Union on or before 31 December 2021 as a reference for financial instruments, financial contracts, or for measuring the performance of an investment fund but only for such financial instruments, financial contracts and measurements of the performance of an investment fund that already reference the benchmark in the European Union or which add reference to such benchmark prior to 31 December 2021;
- a benchmark declared to be critical by the European Commission;
- a benchmark that is provided by an index provider who has applied for the authorisation or registration by 1 January 2020;
- a benchmark that is not compliant with the Benchmark Regulation, where its use is permitted by a national competent authority of a Member State of the European Union and provided that the requirements of article 51(4) of the Benchmark Regulation are met.

TAX

TAX TREATIES UPDATE

As of 1 January 2020, Luxembourg's already comprehensive double tax treaty network has been expanded by the entry into force of a new double tax treaty with Kosovo.

The double tax treaty between Kosovo and Luxembourg foresees a nil withholding tax rate on dividends on qualifying shareholdings held by corporations, a 5% withholding tax on interest, with the possibility of a nil withholding tax for interest payments made under loans granted by banks and a nil withholding tax on royalties. This double tax treaty does not contain a "real-estate rich clause".

Other changes to the tax treaty network, which took place recently are most notably, the amendment to the double tax treaty entered into between France and Luxembourg, the main impacts of which we described in our previous newsletter, the new protocol concerning information exchange between Luxembourg and the United States of America, as covered in our previous newsletter and the amendment of the double tax treaty entered into with Uzbekistan to include customary exchange of information and mutual assistance provisions as well as a specific provision for the assistance for tax collection and a limitation of benefits clause.

Finally, please note that as covered previously and in addition to the changes listed above, several of the existing double tax treaties will be affected by the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("**MLI**"). In order to see how the MLI could affect the various tax treaties, which will mostly depend on the ratification by the other countries as well as the options notified by both jurisdictions, the OECD prepared a helpful tool that can be found on their website.

PARENT-SUBSIDIARY DIRECTIVE AND GIBRALTAR COMPANIES

On 24 October 2019, Advocate General ("**AG**") Hogan published his opinion in the case "*GVC Services (Bulgaria)" EOOD v Direktor na Direktsia Obzhalvane i danachno-osiguritelna praktika – Sofia"* (Case C-458/18) pending in front of the European Court of Justice ("**ECJ**") and addressing the entitlement of Gibraltar companies to benefit from the provisions of Article 2 of the EU Parent-Subsidiary Directive (EU) (2011/96) as further amended ("**PSD**"), together with its Annex I. The request for a preliminary ruling more specifically relates to the withholding tax exemption on dividend distributions made by a limited liability company (*GVC Services EOOD*) governed by Bulgarian law to its parent company (PBG Limited – Gibraltar), a company established in Gibraltar ("**GibCo**"). The distributing company applied for the withholding tax exemption by arguing that the GibCo should be considered as a foreign legal person resident for tax purposes in a Member State of the EU and thus benefit from the PSD as implemented into Bulgarian tax legislation. Such interpretation has been rejected by the Bulgarian tax authorities and subsequently challenged before the Sofia Administrative Court, Bulgaria, which decided to refer the question to the ECJ for a preliminary ruling.

As a reminder, Gibraltar is a European territory, the external relations of which are under the responsibility of the United Kingdom. As such, Gibraltar is entitled to the benefit of any EU acts with certain exceptions. For the purpose of the PSD, which provides for a withholding tax exemption on dividends derived by an EU Member State company in respect of its shareholding in a company of another Member State, the parent company must take one of the company forms listed in Annex I, Part A of the PSD and be subject to one of the taxes listed in Annex I, Part B of the PSD. Since Gibraltar companies and taxes applied by Gibraltar are not listed in the

Annex I of the PSD, the question is whether it might fall under the provisions of Annex I related to the United Kingdom. Indeed, as far as the United Kingdom is concerned, Annex I lists (i) "companies incorporated under the law of the United Kingdom" and (ii) "corporation tax in the United Kingdom".

In the opinion of AG Hogan, Annex I is exhaustive and cannot be extended to include Gibraltar companies and Gibraltar taxes, even if they were comparable to UK companies and taxes. Gibraltar companies should thus be considered as falling outside the scope of the PSD. However, AG Hogan also analyses whether the refusal would be compatible with the freedom of establishment. In this regard, he takes the view that a more general analysis of the Bulgarian law should be performed in light of the EU freedom of establishment principle and that national laws like the Bulgarian national law cannot refuse to exempt dividends paid by a subsidiary located in an EU Member State to its parent company solely on the ground that such company is incorporated in Gibraltar. A refusal can only be admitted, if it results from the application of anti-avoidance measures that should be assessed on a case by case basis.

The judgment by the ECJ on the case is still pending. In the event that the ECJ would follow AG Hogan's opinion, the Luxembourg participation exemption regime implementing the PSD would have to be interpreted accordingly.

OECD RELEASES ITS "UNIFIED APPROACH" PROPOSAL (PILLAR I)

In October 2019, the Organisation of Economic Cooperation and Development ("**OECD**") published a public consultation document on the so-called "Unified Approach" under Pillar I.

Pillar I is concerned with the allocation of taxing rights between countries and seeks to undertake a review of the profit allocation rules as provided under current principles of international taxation. The Unified Approach aims to cover highly digital models but also consumer-facing businesses more broadly, defined as "businesses that generate revenue from supplying consumer products or providing digital services that have a consumer-facing element".

The Unified Approach puts forward a new nexus rule which would be applicable in all cases where a business has a sustained and significant involvement in the economy of a market jurisdiction and irrespective of the level of physical presence in that jurisdiction. Once this new nexus is met, the OECD Secretariat suggests introducing new profit allocation rules which go beyond the arm's length principle. These rules consist of a three-tier profit allocation mechanism, as follows:

(i) the residual profit of the Multinational Enterprise ("**MNE**") would be reallocated to market jurisdictions according to the new nexus test; (Amount A)

(ii) marketing and distribution activities taking place in market jurisdiction would be allocated a fixed return; (Amount B) and

(iii) any disputes arising about amount (ii) would be submitted to a binding and effective dispute resolution system (Amount C).

The proposal asked for comments on a number of points including how to differentiate between different business models, the elimination of double taxation and administration or compliance issues. Stakeholders were invited to submit comments on this point and a public consultation took place on 21 and 22 November 2019 in Paris. It is worth keeping in mind that the Unified Approach is a Secretariat proposal which means that it has not been endorsed by the members of the OECD or of the Inclusive Framework. In this respect, the US Treasury Secretary already expressed concerns regarding "potential mandatory departures from arm's-length transfer pricing and taxable nexus standards". Further details are expected to be published in the coming months.

OECD RELEASES ITS "GLOBAL ANTI-BASE EROSION" PROPOSAL (PILLAR II)

On 8 November 2019, the Organisation of Economic Cooperation and Development ("**OECD**") published a public consultation document asking for comments on its Global Anti-Base Erosion ("**GloBE**") Pillar II proposal. This follows the publication of the OECD Secretariat's "Unified Approach" under Pillar I.

According to the OECD, the objective of GloBE Pillar II is to address ongoing risks from structures that allow Multinational Enterprises ("**MNEs**") to shift profit to jurisdictions where they are subject to no or very low taxation. To do so, the proposal presents a significant departure from the traditional principles of international taxation.

In terms of substantive scope, the proposal is aimed at MNEs but is not limited to any particular sector (such as the digital economy) and does not, for now, include any turnover thresholds. Its impact therefore, if implemented, could be far-reaching for taxpayers operating in multiple jurisdictions.

In essence, GloBE is intended to operate as a top-up to an agreed minimum rate of tax. In this sense, it may draw comparisons with the US GILTI regime. GloBE consists of four components:

a. An income inclusion rule that would tax the income of a foreign branch or controlled entity if that income was subject to tax at an effective rate that is below a minimum rate (akin to CFC-rules);
b. An undertaxed payments rule that would operate by way of a denial of a deduction or imposition of sourced-based taxation (including withholding tax) for a payment to a related party if that payment was not subject to tax at or above a minimum rate;
c. A switch over rule to be introduced into tax treaties that would permit the residency jurisdiction to switch from an exemption to a credit method where the profits attributable to a permanent establishment or derived from immovable property (taxable in the source jurisdiction) are subject to an effective rate below the minimum rate; and
d. A subject to tax rule, that would complement the undertaxed payment rule by subjecting a payment to withholding or other taxes at source and adjusting eligibility for treaty benefits on certain items of income where the payment is not subject to tax at a minimum rate.

At this stage, the public consultation seeks to take the work forward on technical aspects necessary to agree on this minimum rate of tax: (i) how to determine the tax base and in particular the feasibility of using financial accounts as a starting point, (ii) the blending of low and high-tax income to determine the effective tax rate ("**ERT**") the MNE is subject to, and (iii) carve-outs as well as thresholds. The proposal remains silent on what would be the agreed minimum rate.

The OECD wishes to develop a solution for its final report which will be submitted to the G20 in 2020. While the proposal remains a secretariat proposal at this stage, it is worth noting that the US Treasury Secretary expressed full support for a GILTI like Pillar II solution in a letter dated 3 December 2019.

LUXEMBOURG PARLIAMENT ADOPTS BUDGET LAW 2020 AND ATAD 2

BUDGET LAW 2020

On 19 December 2019, the Luxembourg Parliament voted to approve the 2020 Budget Law (the "**Budget Law**"), which introduces several tax related measures, namely:

i. Limitation on validity of pre-2015 Advance Tax Agreements

The most important measure introduced by the Budget Law is the new provision according to which Advance Tax Agreements ("**ATAs**") issued before 1 January 2015 became

inapplicable by law at the end of the tax year 2019. The measure was introduced by inserting a new paragraph 29b to the General Tax Law. While pre-2015 ATAs did not always contain a fixed validity period (thus potentially binding the Luxembourg tax authorities for an unlimited period), ATAs issued since the tax year 2015 are only valid for a maximum of five years (as provided for under the ATA procedure included in the General Tax Law effective as of 2015). The aim of the Budget Law was to eliminate the current inconsistency with regard to the period of validity between the ATAs granted pre-2015 and those granted thereafter under the ATA procedure.

While the amendment introduced by the Budget Law provides the possibility for taxpayers to file a new ATA request in order to renew their expired ATA, one needs to consider that a prerequisite for filing an ATA is that the tax situation to be covered by said ATA should not have yet fully developed the tax effects that one wishes to receive confirmation for. As a result, it will in most cases not be possible to request a new ATA covering the same situation as the one covered by the previous ATA. As a reminder, any ATA request is subject to mandatory and automatic exchange of information and to a fee ranging between EUR 3,000 and EUR 10,000, depending on the complexity of the request.

ii. Services provided by writers, composers and performers now subject to the Super-Reduced VAT rate of 3%

Annex B of the Luxembourg VAT law, which covers the goods and services which are subject to the super-reduced VAT rate of 3%, has been amended in order to not only cover copyrights of writers, composers and performers, but also all services provided by them within the framework of their activity.

iii. Increase of excise duty

According to a communication from the Ministry of Finance, the excise duties on road fuels will increase in 2020 and will lead to an increase in prices, ranging between 1 and 3 cent per litre of petrol and between 3 and 5 cent per litre of diesel, which will be implemented between February and April 2020.

ATAD 2

The draft law implementing the Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries (hereafter the "**ATAD 2 Directive**") was passed on 19 December 2019 by the Luxembourg parliament. As a result, it applies since 1 January 2020 as expected (save for the reverse hybrid provisions which will only enter into effect starting 2022). Despite several comments having been made by the Council of State, the final law contains no material changes from the initial draft law, save for a clarification included in the reverse hybrid provisions.

As a result, the Luxembourg specific 10% *de minimis* rule included in the related parties definition and which represents an exception to the "acting together" concept, which was not included in the ATAD 2 Directive, has been maintained and provides a welcome safe harbour provision for widely held investment funds.

PRELIMINARY QUESTION TO CONSTITUTIONAL COURT ON RETROACTIVITY OF TAX LAWS

On 26 November 2019, the Luxembourg Higher Administrative Court (*Cour administrative*) referred a preliminary question to the Constitutional Court (*Cour constitutionnelle*) concerning the compatibility with the Constitution, and more specifically with the principle of the rule of law, of the change of a provision of the Luxembourg tax law which had a retroactive effect.

In the matter at hand, a Luxembourg resident taxpayer had received interest income from Belgium and Switzerland during the fiscal year 2016. Under the tax provision known as the "RELIBI" law, Luxembourg resident individuals

that are the beneficial owners of interest payments derived from savings and paid by certain foreign paying agents have the possibility to opt for a final tax, which is currently set at a rate of 20% (but was 10% in 2016), *in lieu* of a taxation at the progressive tax rate.

On 23 July 2016, a law amended the “RELIBI” law by narrowing the list of countries which fall within its scope. Pursuant to this amendment, which was retro-actively applicable as of 1 January 2016, interest payments paid by paying agents located in Switzerland were excluded from the benefit of the “RELIBI” law. As the taxpayer had received interest payments from Switzerland in the course of the year 2016 and the amendment of the “RELIBI” law only occurred in the course of the year, he nonetheless requested to benefit from the final tax on said interest income. The tax authorities denied the application of the “RELIBI” law, which led to an unsuccessful complaint before the Director of the Luxembourg tax authorities as well as to an unsuccessful petition in first instance before the Lower Administrative Court (*Tribunal administratif*). The question brought before the Higher Administrative Court was thus whether a law having an economical retroactive effect could be enforceable on the taxpayer.

As a reminder, retroactivity, in the context of tax matters, can be split between two different sub-categories, the first one being the legal retroactivity and the second one being the economic retroactivity. Legal retroactivity occurs when laws are given a retroactive application date, which results in said laws covering situations which took place at a time where the parties involved could not know the application thereof. Economic retroactivity is deemed to occur when laws only start to apply from their publication date, but nonetheless cover situations that already occurred, because the point in time that is relevant for the tax treatment has not yet occurred (e.g. for periodic taxes such as income taxes, the date of 31 December of each year). As a result, since certain elements of the transaction, which are irreversible, predate the entry into force of the law, but the law nevertheless applies at the time at which the tax charge is determined, the taxpayer suffers from an increased tax charge due to the retroactive application of the law. The question of the compatibility of economic retroactivity of a law with the principles of legality (*principe de légalité*) and legal certainty (*sécurité juridique*), both sub-principles of the fundamental constitutional principle of the rule of law (*état de droit,* itself a principle which was only recently recognised by the Constitutional Court), has not yet been answered by the Constitutional Court. Therefore, the Higher Administrative Court referred a preliminary question to the Constitutional Court and decided to stay proceedings pending the response of the Constitutional Court.

ABUSE OF LAW IN RELATION WITH USE OF SPFS

In a judgment handed down on 12 November 2019, the Luxembourg Lower Administrative Court (*Tribunal administratif*) ruled in favour of the disallowance of interest expenses paid under bonds held by a family wealth management company, a *société de gestion de patrimoine familial* (“**SPF**”), on the grounds of abuse of law. In the case at hand, a tax transparent entity, a *société civile immobilière* (“**SCI**”), whose purpose was the acquisition and renovation of real estate located in Luxembourg, was financed by bonds held by a related SPF. Both, the SCI and the SPF were held by the same Luxembourg resident individuals. As a result of said structure, the SCI was treating the interest payments made to the SPF as tax deductible while the corresponding income was not subject to direct taxes in the hands of the SPF. Due to this outcome, the Luxembourg tax authorities refused the deductibility of interest paid under the bonds, primarily on the basis that an SPF is prohibited from granting interest-bearing loans. In the course of litigation, the government’s representative claimed the existence of an abuse of law, as

defined under §6 of the Luxembourg *Steueranpassungsgesetz*. In their decision, the judges assessed exclusively the existence of an abuse of law to deny the deductibility of the interest payments.

As a reminder, the existence of an abuse of law requires the fulfilment of the following conditions: (i) the use of private law forms or institutions; (ii) a tax saving resulting from the bypassing or reduction of the tax burden; (iii) the use of inappropriate means; and (iv) the absence of any non-tax related reasons that might justify the means chosen.

In the case at hand, the Lower Administrative Court considered that all those conditions were fulfilled and that the tax authorities were therefore entitled to refuse the deductibility of the interest paid under the bonds. One point to reflect on however, is whether the "tax saving" criteria was effectively met in the present case. Indeed, when comparing the structure put in place with the one that the judges deemed appropriate (i.e. where the taxpayer would have directly lent the funds to the SCI and which would not have been tax deductible due to the tax transparency of the SCI), one can wonder whether this comparison should not be pursued until the end, where one would have to take into account the taxation of the distributions that would need to be made by the SPF to the taxpayer in order to arrive to the same economic result than in case of a direct loan by the individual. In this scenario, interest income would in the end also be fully taxable in the hands of the Luxembourg resident partners of the SCI, thus significantly weakening the tax savings aspect. The judges simply deemed the taxation of future distributions by the SPF to be irrelevant.

Given the particular fact pattern of the present case as well as the possibility to appeal the judgment in front of the Higher Administrative Court (*Cour administrative*), no broader reaching conclusion should be drawn at this stage. However, this should serve as an important reminder to taxpayers generally that the existence of non-tax related reasons to structure an investment in a certain way (and the supporting documentation) should not be an afterthought, but rather the initial jumping-off point for any investment structure.

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