NEWSLETTER

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COVID-19

PLEASE REFER ALSO TO OUR BSP COVID-19 DEDICATED NEWSLETTER FOR MORE INFO ON LATEST LUXEMBOURG DEVELOPMENTS WITHIN THE COVID-19 EMERGENCY.

ESMA PUBLIC STATEMENT ON IMPLICATIONS OF THE COVID-19 OUTBREAK ON HALF-YEAR FINANCIAL REPORTS

On 20 May 2020, ESMA issued a public statement to address the implications of the COVID-19 outbreak on the half-year financial reports, which must be prepared and published by issuers (the "**Statement**").

In the Statement, ESMA highlights the importance of issuers including in their reports up-to-date information that adequately reflects the current and expected impact of the COVID-19 situation on their financial position, performance and cash-flows and calls on the management, administrative and supervisory bodies of issuers (including the audit committee), as well as auditors, to take due consideration of the guidance included in the Statement.

On timing, ESMA acknowledges that issuers may consider delaying the publication of their half-year reports within the applicable time limits (subject to compliance with market abuse legislation) but reminds issuers that publication should not be unduly delayed to the detriment of providing timely, reliable and relevant information to the market.

The Statement first focuses on the application of IAS 23; ESMA expects there to be extensive information included in reports on new activities, events and circumstances that have not been captured in the most recent annual financial statements, given the COVID-19 related events which have transpired in the first half of 2020. ESMA also flags that for many issuers, COVID-19 is a **significant event** and as such, additional disclosures will likely be required. ESMA highlights that some of the disclosures that are normally required by IFRS for a complete set of (annual) financial statements may be used to provide relevant information on the consequences arising from the COVID-19 outbreak in the condensed financial statements for the half-year.

The Statement elaborates on the necessary disclosures regarding significant uncertainties, going concern and risks linked to COVID-19, noting that for many issuers, there is doubt as to their ability to continue as a going concern. If this is the case, the relevant entities must disclose those uncertainties.

ESMA calls on issuers to carefully consider and disclose the impairment of non-financial assets as a consequence of the COVID-19 outbreak. As to presentation of COVID-19 related items in the profit and loss statements, ESMA appeals for caution. In particular, ESMA points out that separate presentation of the impacts may be misleading. Issuers are asked to provide information, on a quantitative basis, on the impacts of the COVID-19 outbreak as part of the explanations/notes to the accounts.

In a more general manner, ESMA calls on issuers to consider whether there are any other IFRS requirements that might be relevant in the context of the half-year financial reporting.

ESMA also gives some specific recommendations to issuers on the content of their interim management reports in light of the COVID-19 outbreak.

Finally, issuers are reminded of the new Q&A on the ESMA Guidelines on Alternative Performance Measures in the context of COVID-19.

COVID-19 | CSSF COMMUNICATION ON MEASURES FOR RETURN TO ON-SITE WORK

Further to the recommendations of 14 May 2020 for supervised entities on telework and a possible return to the office (for details please see BSP Newsflash), the CSSF published on 19 June 2020 a communication on measures to be taken in light of the return to working on-site (the "**Communication**").

AIM OF THE COMMUNICATION

The Communication is the response to the measures taken by the Luxembourg government aiming to ease various lockdown restrictions related to the COVID-19 pandemic. In the Communication, the CSSF pointed out that despite the restrictions being gradually lifted, the virus is still present in Luxembourg and certain safety and precautionary measures must be upheld.

SCOPE

In order to avoid a second wave of infections, when returning to work on-site, entities supervised by the CSSF should put in place and continue to apply the following measures:

1. Identify the vulnerable staff or staff members who are part of a household with vulnerable person(s), and define protection measures for these employees;
2. Define organisational rules with respect to internal and external meetings as well as the reception of visitors;
3. Implement rules regarding dining and meeting areas;
4. Implement procedures preventing the return to the office of employees infected by or suspected of being infected by COVID-19;
5. Ensure specific cleaning or disinfection of office areas and equipment;
6. Ensure display of barrier gestures, such as those published by the Luxembourg government on 12 May 2020.

EXTENSION OF IMMIGRATION DEADLINES AND IMPOSITION OF TEMPORARY TRAVEL RESTRICTIONS

The law of 20 June 2020 introducing certain temporary measures relating to the application of the amended law of 29 August 2008 on the free movement of people and immigration was published on 25 June 2020 and entered into force on the same day (hereinafter referred to as the "**Law**").

The purpose of the Law is to extend specific deadlines provided for by the amended law of 29 August 2008 on the free movement of people and immigration (the "**Immigration Law**"), so as to not penalise third-country nationals who would not have been able to take the necessary steps with the Ministry of Foreign and European Affairs during the state of crisis as a result of the COVID-19 pandemic.

The Law also incorporates temporary travel restrictions imposed on third-country nationals during the state of crisis.

FORMER PROVISIONS ESTABLISHED DURING THE STATE OF CRISIS

During the state of crisis, declared by a grand-ducal regulation dated 18 March 2020 and further extended for a maximum duration of three months by a grand-ducal regulation dated 24 March 2020, certain temporary measures concerning the validity period of travel documents and the free movement of third-country nationals in the EU had already been taken.

The Grand-Ducal Regulation of 18 March 2020, which has been repealed at the end of the state of crisis (i.e. on 25 June 2020) provided, in particular, that the validity periods for visas, temporary residence permits, residence cards and residence permits, which expired after 1 March 2020, were extended for the duration of the state of crisis. The regulation also provided that the stay of third-country nationals not subject to

the visa requirement and whose stay exceeded 90 days was regular for the duration of the state of crisis.

In addition, this regulation implemented temporary travel restrictions for non-essential travel of third-country nationals, in line with the recommendations of the European Commission (please read our Newsflash for further information on this topic).

All of these temporary measures have been repealed at the end of the state of crisis, i.e. on 25 June 2020. Most of these measures have nonetheless been incorporated into the Law and extended beyond the state of crisis.

EXTENSION OF IMMIGRATION DEADLINES

To date, the Immigration Law provides that a third-country national shall apply for a residence permit before the expiry of a period of three months following its declaration of arrival. In order not to penalise third-country nationals who have made their declaration of arrival **between 1 January and 31 July 2020**, the period within which they must apply for a residence permit is extended by the Law **from three months to six months**.

The Law also provides that the period of validity of residence permits expiring after 1 March 2020 is extended until **31 August 2020**.

Finally, the Law provides that the stay of third-country nationals holding a short-stay visa and those not subject to the visa requirement whose stay has just exceeded 90 days after 1 March 2020 is regular until **31 July 2020**.

TEMPORARY TRAVEL RESTRICTIONS ON THIRD-COUNTRY NATIONALS

In addition to the measures related to the extension of certain deadlines, the Law provides that, by way of derogation from Article 34 of the Immigration Law, **third-country nationals may no longer enter the territory of the Grand Duchy of Luxembourg.** The Law refers to a grand-ducal regulation as to the duration of the restriction and the categories of persons concerned.

A Grand-Ducal Regulation dated 20 June 2020 published on 25 June 2020 (the "**Grand-Ducal Regulation**") details that third-country nationals may no longer enter the territory of the Grand Duchy of Luxembourg **until 15 September 2020 inclusive**.

The Grand-Ducal Regulation then lists third-countries whose non-European residents may enter Luxembourg territory as from 1 July 2020 as an exemption to the temporary travel restrictions and in line with the recommendations of the European institutions, according to which Member States should agree on a common list, to be reviewed every two weeks, of non-EU countries for which travel restrictions can be lifted as of 1 July. The list currently includes the following countries:

- Algeria;
- Australia;
- Canada;
- China (subject to reciprocity at EU level);
- Georgia;
- Japan;
- Montenegro;
- Morocco;
- New Zealand;
- Rwanda;
- Serbia;
- South Korea;
- Thailand;
- Tunisia;
- Uruguay.

In addition, pursuant to the Grand-Ducal Regulation, travel restrictions do not apply in the following cases:

- third-country nationals who have long-term resident status, as well as any other person with a right of residence in accordance with European Directives and the national law of a Member State of the EU and the Schengen associated countries, or who hold a national long-term visa of one of the above-mentioned States;
- third-country nationals travelling for study purposes;
- highly qualified third-country workers if their employment is necessary from an

economic point of view and their work cannot be postponed or carried out from abroad;

- cross-border workers;
- seasonal workers in the agriculture sector;
- transit passengers;
- passengers travelling for urgent and duly justified family reasons;
- persons wishing to seek international protection in the Grand Duchy of Luxembourg or for other humanitarian reasons;
- health professionals, health researchers and care professionals for elderly people;
- researchers and experts providing advice in the context of the COVID-19 pandemic;
- persons employed in the transport sector;
- members of the diplomatic corps, staff of international organisations and persons invited by these international organisations whose physical presence is required for the proper functioning of these organisations, military personnel, personnel in the field of development cooperation and humanitarian aid, in the exercise of their respective functions.

Citizens of San Marino, Andorra, Monaco and the Vatican City/Holy See and their family members are also exempt from these temporary travel restrictions.

The Law finally provides that the restrictions on travel of third-country nationals **shall cease to have effect on 31 December 2020**. Such provision implies that temporary travel restrictions imposed on third-country nationals until 15 September 2020 by the Grand-Ducal Regulation could subsequently be extended beyond the latter date, possibly until 31 December 2020.

Such a decision to extend the restrictions on third-country nationals entering Luxembourg territory beyond 15 September 2020 will depend on the development of the health situation worldwide and on further recommendations to be possibly issued at EU level.

NEW ARRANGEMENTS FOR SHORT-TIME WORKING BEYOND THE STATE OF CRISIS

As the state of crisis came to an end on 25 June 2020, the Government announced that the mechanism of short-time working due to *force majeure*/COVID-19 in force since the month of March will expire at the end of June. However, considering that a large number of companies will continue to suffer from the negative effects of the health crisis beyond the end of the crisis period, it has been decided to continue to support them through the instrument of short-time working.

SHORT-TIME WORKING DUE TO STRUCTURAL OR CYCLICAL FACTORS

From July and until the end of the current year, four possible ways of qualifying for short-time working allowances will be available to companies. These four possibilities of access to short-time working will either be based on the scheme for short-time working due to **structural reasons**, or on the scheme for short-time working due to **cyclical factors**.

As a reminder, short-time working due to **structural reasons** is designed to support businesses experiencing structural difficulties, i.e. difficulties connected to the company's legal, social, tax or commercial organisation. As a principle, companies that have recourse to this scheme must draw up a recovery plan, and can lay off workers, where required, during the structural short-time working period, provided that the redundancies form part of the recovery plan.

Short-time working due to **cyclical factors** is designed to support businesses that are part of a crisis-struck sector or an economic branch and encountering economic difficulties. It is up to the government to decide to make a branch of the economy eligible for the scheme. In practice, at the time of the first application, the situations of the sector and the company concerned are analysed. The Government then declares the economic sector to be in crisis and at the same time admits the firm

concerned to cyclical short-time work. Companies that use this scheme undertake not to make employees redundant for economic reasons.

FOUR POSSIBLE WAYS TO APPLY FOR SHORT-TIME WORKING FROM JULY TO DECEMBER 2020

In the context of the health crisis, the government will thus put in place as from July four new possible ways to access short-time working, inspired by the two mechanisms described above, the scheme to be chosen depending on the sector of activity carried out:

1) Companies in the "HORECA" (hotels, restaurants, cafés), tourism and events sectors, which are considered as **vulnerable sectors**, will be able to benefit from a short-time working scheme due to structural economic difficulties through an accelerated procedure (i.e. without the need to draw up a recovery plan), and with no limitation on the number of employees entitled to it. Where there is a proven need, these companies **will be able to carry out economic redundancies up to a maximum limit of 25% of their employees until 31 December 2020**.

The provisions provided for by the Labour Code concerning in particular collective redundancies (i.e. obligation to enter into negotiations with employee representatives with a view to reaching an agreement on the establishment of a social plan) will remain fully applicable. In addition, in the event of recovery, companies that would have carried out redundancies will, in the event of subsequent recruitment of staff, have to rehire as a matter of priority their former employees who were made redundant.

2) Other commercial companies affected by the health crisis, other than industrial businesses and those in vulnerable sectors, will also be able to have recourse to short-time working due to structural economic difficulties through the accelerated procedure, **provided they do not carry out redundancies**.

In this case, however, the number of employees covered by the scheme may not exceed 25% of the workforce for the months of July and August, 20% for the months of September and October and 15% for the months of November and December.

3) By way of exceptions to points 1) and 2) above, applications from businesses in vulnerable sectors making more than 25% of their workforce redundant, as well as those from all other businesses contemplating carrying out redundancies, will be required to submit a so-called **"traditional" short-time working application** for structural economic difficulties. Admission to the short-time working scheme will therefore be granted only if the companies draw up restructuring plans (including precise commitments that the business intends to undertake according to an agreed timetable).

These plans will be drawn up in the form of a recovery plan in the case of small firms with fewer than 15 employees, or in the form of a job maintenance plan for firms with more than 15 employees (the Government's stated objective in the latter case being to negotiate, as far as possible, sectoral job maintenance plans in order to be able to have recourse to temporary loan of workforce).

4) Finally, industrial companies will continue to benefit from the **cyclical short-time working scheme** provided for by the Labour Code in order to be able to respond to disruptions in international markets. Please note that companies that use this scheme **undertake not to make employees redundant for economic reasons**.

In any case, companies eligible to one of the four schemes detailed above should be reimbursed the compensatory allowance paid to each eligible employee (i.e. 80% of the gross salary) by the State, up to 250% of the social minimum wage (i.e. EUR 5,354.98), on the basis of a monthly statement sent by the employer.

DEADLINES TO APPLY FOR SHORT-TIME WORKING

Applications for short-time working for the month of July had to be submitted at the latest on 26 June inclusive.

From August until the end of the year 2020, applications for short-time working must be sent at the latest on the 12th day of the month preceding the requested period of short-time working (e.g. before 12 September for an application for short-time working relating to the month of October).

Before submitting an application, companies will be required to confirm, by means of a specific declaration, that the employees, respectively, the staff delegation and, where applicable, the trade union organisations have been informed of the application for short-time working.

BSP

AML

ESTABLISHMENT OF A REGISTER OF FIDUCIARY ARRANGEMENTS AND TRUSTS IN LUXEMBOURG

The draft Luxembourg law 7216B, already referred to in our February 2018 newsletter, was voted by a first parliamentary vote on 1 July 2020 and finally adopted by dispensation from the second constitutional vote granted by the Council of State on 10 July 2020 (the "**Fiduciary Arrangement Law**").

The purpose of the Fiduciary Arrangement Law is to transpose the remaining provisions of Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purpose of money laundering ("**AML**") or terrorist financing (the "**4th AML Directive**"), as amended by Directive (EU) 2018/843 of 30 May 2018 (the so-called "**5th AML Directive**").

Article 31 of the 4th AML Directive has already been partially transposed by the law of 10 August 2018 on information to be obtained and kept by fiduciary agents (the "**2018 Law**"), which will be repealed by this law.

The Fiduciary Arrangement Law also takes into account Recommendation 25 of the Financial Action Task Force on transparency and beneficial owners of legal arrangements.

For the purposes of the Fiduciary Arrangement Law, qualifying fiduciary arrangements and trusts are defined by law and shall also include legal arrangements that have a structure or functions similar to that of fiduciary arrangements and trusts defined by law.

OBLIGATION FOR FIDUCIARY AGENTS AND TRUSTEES TO KEEP AN INTERNAL FILE

Taking over certain provisions of the 2018 Law, the Fiduciary Arrangement Law first provides for the obligations of trustees and fiduciary agents to obtain and retain, at the place of administration of the fiduciary arrangement or express trust, data relating to beneficial owners and to certain other persons specified in the Fiduciary Arrangement Law providing services to or entering into a business relationship with a fiduciary arrangement or an express trust. These obligations arise if the express trust is administered from the Grand Duchy of Luxembourg or in respect of qualifying fiduciary arrangements for which the trustees or fiduciary agents act in such capacities (i.e. even if the latter are not established or resident in the Grand Duchy of Luxembourg). This may include foreign fiduciary arrangements or trusts.

The information shall include the identity of:

(i) the settlor(s);
(ii) the fiduciary agents or trustees;
(iii) the protector(s), if any;
(iv) the beneficiaries or categories of beneficiaries;
(v) any other natural person exercising ultimate control over the fiduciary arrangement or trust,

as well as basic information on foreign professionals and other foreign law entities that provide certain services to the fiduciary arrangement or trust.

This data will have to be kept for a period of five years by the fiduciary agents and trustees following the termination of their involvement in the relevant fiduciary arrangement or trust.

On request, the fiduciary agents and trustees must supply the above mentioned information, as well as the registration number in the Luxembourg or foreign register of fiduciary arrangements of the relevant fiduciary or trust scheme, to certain named national authorities (e.g. prosecution service, police, supervisory authorities, tax authorities, etc.) and to self-regulating bodies (e.g. bar association, auditors' association, etc.). Certain professionals of the financial sector (e.g. credit institutions, insurance companies, fund entities, auditors, lawyers, etc.) may also request the above mentioned information

(except the information on service providers) if they become a fiduciary agent or trustee or execute a transaction with such entities. Additionally, such professionals may ask for information regarding the assets held by the fiduciary arrangements or trusts in the context of their AML obligations.

REGISTER OF FIDUCIARY ARRANGEMENTS AND TRUSTS

In addition, the Fiduciary Arrangement Law seeks to establish a register of fiduciary arrangements and trusts (the "**Register**") maintained by the *Administration de l'Enregistrement, des Domaines et de la TVA* ("**AED**") in which trustees and fiduciary agents will be required to enter certain data that they are obliged to collect under the legislation.

The registration of the relevant information in the Register is required for:

(i) any fiduciary arrangement or express trust of which a fiduciary agent or trustee is established or resident in the Grand Duchy of Luxembourg; and

(ii) any fiduciary arrangement or express trust of which the fiduciary agent or the trustee is not established in the Grand Duchy of Luxembourg or in another Member State, where the fiduciary agent or trustee, on behalf of the fiduciary arrangement or trust, enters into a business relationship in the Grand Duchy of Luxembourg with a professional or acquires real estate located in the Grand Duchy of Luxembourg.

The fiduciary agents or trustees established or resident in different Member States will be deemed to have satisfied their registration obligation when they submit to the AED proof of their registration in an equivalent register for any fiduciary arrangements or express trusts qualifying under the Fiduciary Arrangement Law.

The information to be registered with the Register includes information on the fiduciary arrangements and trusts (including name, denomination), controlling interests held by the fiduciary arrangements and trusts as well as information on the beneficial owners of the fiduciary or trust scheme.

ACCESS TO THE REGISTER

The Register may be accessed by national authorities and self-regulating bodies as well as professionals in the context of the application of customer due diligence measures.

Access to certain more restricted information in the Register may be granted on a case by case basis to any natural or legal person who demonstrates a legitimate interest in the context of AML measures.

SANCTIONS

The Fiduciary Arrangement Law provides that failure to comply with the new requirements could lead to, *inter alia*, administrative fines of up to twice the amount of the benefit derived from the infringement, where such amount can be determined, or of up to a maximum of EUR 1,250,000.00.

ENTRY INTO EFFECT

The Fiduciary Arrangement Law was published in the *Mémorial A* on 13 July 2020 and will enter into effect on 17 July 2020.

BANKING & FINANCE

SECURITISATION REGULATION | UPDATE ON TRANSPARENCY REQUIREMENTS

In our January 2020 newsletter, we stated that the following technical standards referred to under Article 7(3) and (4) 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, as amended ("the **Securitisation Regulation**") would likely enter into force by February this year:

- regulatory technical standards ("**RTS**") – specifying the information and details of a securitisation to be made available by the originator, sponsor and securitisation special purpose entity, and
- implementing technical standards ("**ITS**") – specifying the format and providing standardised templates for making available the information and details of a securitisation to be made available by the originator, sponsor and securitisation special purpose entity.

Annexes to the RTS can be found here and the annexes to the ITS can be found here.

However, while the non-objection period for the European Parliament in respect of the RTS has now lapsed, we still await final European Council approval and publication of the RTS in the Official Journal. The ITS will enter into force at the same time as the RTS.

In the meantime, concerned persons may refer to the updated Q&A of ESMA which was updated most recently on 28 May this year to provide clarification on different aspects of the templates contained in the draft ITS and RTS with detailed explanation on how specific fields in the templates should be completed.

ESMA will continue to update this Q&A as and when necessary in the coming months.

NEW LUXEMBOURG LAW ON PROFESSIONAL PAYMENT GUARANTEES

BACKGROUND

Adding to the undoubted success of the Luxembourg law of 5 August 2005 on financial collateral arrangements (the **"Financial Collateral Law"**), Luxembourg's appeal as an international hub for cross-border financing transactions is about to get a boost with the introduction of a new legislative tool: the professional payment guarantee (the **"PPG"**).

Given the vital role that legal security and contractual freedom play in enhancing a jurisdiction's competitiveness in the financial world, the Luxembourg law of 10 July 2020 on professional payment guarantees (the **"PPG Law"**) shall be warmly welcomed. While until now, parties to cross-border financings could avail of a Luxembourg law accessory guarantee/suretyship (*cautionnement*) or a Luxembourg autonomous guarantee (*garantie autonome*), the PPG now provides an alternative guarantee which is more in line with the expectations of financial players.

WHAT IS A PPG?

The PPG is "an undertaking by which a person, the guarantor, undertakes towards a beneficiary to pay, at the request of the beneficiary or an agreed third party, a sum determined in accordance with the agreed terms, in relation to a claim or claims or the risks associated with them".

IMPORTANT CONSIDERATION

In order to benefit from the PPG regime, the parties must explicitly refer to the PPG Law in the guarantee agreement. So long as the PPG is governed by the PPG Law, there is no risk of re-characterisation as a suretyship (*cautionnement*).

KEY CHARACTERISTICS OF THE PPG

The key characteristics of the PPG regime are:

- Freedom of contract: The parties are free to set the purpose and terms of the PPG;

unlike the autonomous guarantee, the PPG agreement can expressly make reference to the guaranteed claims in order to determine the terms of the PPG (e.g. regarding the amount and duration);

- Enforcement flexibility: A PPG can be enforced in any circumstances which are contractually agreed, even if there is no default in the enforcement of the guaranteed claims;
- Third-party beneficiaries: A PPG can be granted in favour of a person acting on behalf of beneficiaries, a trustee or a fiduciary, to guarantee the claims of present or future third party beneficiaries, provided that such third party beneficiaries are determined or determinable;
- Unless otherwise agreed,
    - the guarantor cannot raise any defences relating to the guaranteed claims or risks;
    - after payment pursuant to the guarantee, the guarantor shall have a personal claim against the principal debtor and shall be subrogated in the rights of the beneficiary up to the amount paid out under the PPG;
    - the guarantor remains liable to the beneficiary for the PPG obligations, even if the original debtor of the guaranteed claims is subject to insolvency or other measures affecting the rights of creditors generally.

WHAT'S NEXT?

The PPG Law will enter into force as from 17 July 2020. In due course, we can expect to see the PPG as a common feature of Luxembourg law governed security packages, in particular where guarantors are located in Luxembourg. Indeed, we may even see, in the context of some refinancings, the amendment of existing guarantee agreements to make express reference to the PPG Law, thereby attaining the legal certainty afforded by that law.

CAPITAL MARKETS

UPDATE OF THE CSSF TRANSPARENCY FAQ

On 29 April 2020, the CSSF published an updated version of its FAQ (the "**Updated FAQ**") on the Luxembourg law and Grand-Ducal Regulation of 11 January 2008 on transparency requirements for issuers, as amended (the "**Transparency Law**" and the "**Grand-Ducal Transparency Regulation**", respectively).

With this update, the CSSF now addresses the question whether issuers benefiting from the exemption under Article 7 of the Transparency Law have to publish their annual financial reports in the "European Single Electronic Format" ("**ESEF**").

Commission Delegated Regulation (EU) 2019/815 of 17 December 2018 supplementing Directive 2004/109/EC with regard to regulatory technical standards on the specification of a single electronic reporting format (the "**ESEF Delegated Regulation**") imposes on all issuers who are subject to the obligations of Article 3 of the Transparency Law the requirement to prepare their annual financial reports in XHTML (Extensible Hypertext Markup Language), which is human readable and can be opened with any standard web browser. This requirement applies from 1 January 2020.

Pursuant to Article 7 of the Transparency Law, the following issuers are exempted from the obligation under Article 3 of the same law to publish their annual financial report:

- States, regional or local authorities of a State, public international bodies of which at least one Member State of the European Union is a member, the European Central Bank, the European Financial Stability Facility, certain other stability mechanisms and Member States' national central banks; and
- issuers exclusively of debt securities admitted to trading on a regulated market, the denomination per unit of which is at least EUR 100,000,
  (the "**Exempted Issuers**").

With respect to Exempted Issuers who anyway publish their annual financial reports (voluntarily or in order to comply with another legal or regulatory requirement), the CSSF has confirmed that such annual financial reports do not need to comply with the ESEF Delegated Regulation.

CSSF REGULATION NO. 20-02 AND CIRCULAR 20/743 REGARDING THE PROVISION OF INVESTMENT SERVICES OR PERFORMANCE OF INVESTMENT ACTIVITIES AND ANCILLARY SERVICES

On 1 July 2020, the CSSF published (i) CSSF Regulation No. 20-02 of 29 June 2020 on the equivalence of certain third countries with respect to supervision and authorisation rules for the purpose of providing investment services or performing investment activities and ancillary services by third-country undertakings ("**CSSF Regulation**") and (ii) CSSF Circular 20/743 (amending CSSF Circular 19/716 regarding the provision in Luxembourg of investment services or performance of investment activities and ancillary services in accordance with Article 32-1 of the Law of 5 April 1993 on the financial sector, as amended) ("**CSSF Circular**").

CSSF REGULATION

According to Article 32-1 of the Law of 5 April 1993 on the financial sector, as amended ("**1993 Law**"), third country firms ("**TCFs**") wishing to (i) serve retail clients or professional clients on request are required to establish a branch in Luxembourg and (ii) serve *per se* professional clients or eligible counterparties must opt in for either the national regime or the European regime. We refer you to our BSP Newsflash which

provides an overview of CSSF Circular 19/716 on TCFs providing investment services or performing investment activities in Luxembourg.

In the absence of an equivalence decision for any country in the context of Directive 2014/65/EU of 15 May 2014 on markets in financial instruments ("**MiFID II**") (necessary to activate the European regime), TCFs can benefit from the national regime as long as the CSSF is satisfied, subsequent to a duly submitted application by the interested TCF to the CSSF, that (i) the TCF is subject to supervision and authorisation rules in its country of origin considered as equivalent to those of the national law ("**Equivalence Decision**") (ii) a Memorandum of understanding is in place between the CSSF and the respective TCF's supervisory authority and (iii) the TCF is authorised in its country of origin to provide the investment services it wishes to provide in Luxembourg.

The CSSF has published through the CSSF Regulation its first ever Equivalence Decision with respect to the following countries: **Canada, Switzerland, USA, Japan, Hong Kong Special Administrative Region of the People's Republic of China and Singapore**.

CSSF CIRCULAR

The CSSF Circular amends the existing CSSF Circular 19/716 and particularly clarifies the criteria under which the provision of investment services by TCFs is considered to be provided in Luxembourg under Article 32-1 of the 1993 Law:

- the third-country firm is established in Luxembourg; or
- the third-country firm provides an investment service to a retail client established or located in Luxembourg; or
- the place for the provision of the characteristic performance (*prestation caractéristique*) of the service is Luxembourg.

The CSSF further clarifies that a TCF may fall outside the scope of application of Article 32-1 where, even though services are provided to a client established or located in Luxembourg (other than retail clients), the service may be considered as not being provided in Luxembourg.

MIFID II AND MIFIR | ESMA Q&A

Since our last newsletter, ESMA has 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 Investor Protection and intermediaries (the "**Investor Protection Q&A**")
- Q&A on MiFID II and MiFIR Transparency and market structure topics
- Q&A on MiFIR Data Reporting
- Q&A on MiFID II and MiFIR Transparency

In this article, we will only focus on the Investor Protection Q&A which includes one new Q&A relating to inducements. In particular, ESMA provides us with clarification on the application of the definition of "acceptable minor non-monetary benefits" which is given in paragraph 3 Article 12 of Commission Delegated Directive (EU) 2017/593 of 7 April 2016 supplementing MiFID II (the "**MiFID II Delegated Directive**").

Article 12, paragraph 3 of the MiFID II Delegated Directive defines "acceptable minor non-monetary benefits" as benefits that are "*reasonable and proportionate and of such a scale that they are unlikely to influence the investment firm's behaviour in any way that is detrimental to the interests of the relevant client*" and also lists various examples of what qualifies as "acceptable minor non-monetary benefits". This definition is given in the context of inducements in respect of investment advice on an independent basis or portfolio management services.

ESMA has now clarified with this new Q&A that "acceptable minor non-monetary benefits" should be construed within the meaning as set out in Article 12, paragraph 3 of the MiFID II

Delegated Directive irrespective of the investment service or ancillary service provided.

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INVESTMENT MANAGEMENT

EMIR | UPDATED ESMA Q&A

On 28 May 2020, ESMA published an updated version of the Questions & Answers (hereinafter the "**Q&A**") on the implementation of Regulation (EU) 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (hereinafter referred to as "**EMIR**").

The updated Q&A added the ***new Q&A 54*** which provides clarifications on the reporting of over-the-counter ("**OTC**") derivative contracts by a financial counterparty ("**FC**") on behalf of a non-financial counterparty which has not exceeded the clearing thresholds ("**NFC-**") pursuant to Article 9(1a) of EMIR as amended by the Regulation (EU) 2019/834 (EMIR Refit).

FCs include, *inter alia*, (i) investment firms authorised in accordance with Directive 2014/65/EU on markets in financial instruments, as amended, (ii) a UCITS and, where relevant, its management company, authorized in accordance with Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to UCITS, as amended, and (iii) an alternative investment fund managed by AIFMs authorised or registered in accordance with Directive 2011/61/EU on alternative investment fund managers. A non-financial counterparty ("**NFC**") is an undertaking established in the European Union other than an FC or a central counterparty/CCP (meaning a legal person that interposes itself between the counterparties to the contracts traded on one or more financial markets, becoming the buyer to every seller and the seller to every buyer).

NFC+/NFC- DIFFERENTIATION

As elaborated in ESMA's "EMIR Review Report no. 1 - Review on the use of OTC derivatives by non-financial counterparties (2015/1251)", EMIR establishes a two-step mechanism for NFCs to determine whether they are considered as NFCs which have crossed the clearing thresholds and, in consequence, are subject to the EMIR clearing obligations and margin requirements ("**NFC+**"):

1. Counterparties need to assess, on a trade by trade basis, whether their transactions are concluded for hedging purposes; and
2. Counterparties need to sum the gross notional amounts of their outstanding OTC derivative contracts not concluded for hedging purposes, across all the NFCs of their group.

This aggregation should be done per asset-class and the resulting figures should be compared to the clearing thresholds defined in Article 11 of the Commission Delegated Regulation (EU) No 149/2013: EUR 1 billion for the credit and equity asset classes, EUR 3 billion for the commodity, interest rate and foreign exchange asset classes.

NEW Q&A 54

TR Q&A 54 clarifies:

1. **WHAT ARE THE REPORTABLE DETAILS THAT THE NFC- SHOULD PROVIDE TO THE FC?**

   NFC- should provide to the FC the following details: (i) Reporting counterparty ID, (ii) Corporate sector of the counterparty, (iii) Nature of the counterparty, (iv) Broker ID (if unknown by FC), (v) Clearing Member (if unknown by FC), (vi) Type of ID of the beneficiary (if beneficiary is different from the NFC-), (vii) Beneficiary ID (if beneficiary is different from the NFC-), (viii) Trading capacity, (ix) Directly linked to commercial activity or treasury financing, and (x) Clearing threshold.

   The reportable details in points (i) - (iii) and (x) are static information not related to a specific derivative, meaning that they can be provided by the NFC- on a one-off basis and updated immediately each time any of such details changes. Other reportable details specified in the points

(iv) - (ix) should be provided for each OTC derivative concluded between the FC and the NFC-.
If the NFC- has not provided to the FC the reportable details specified above, the FC should submit the missing reports without undue delay as soon as it receives all the relevant details.

2. HOW SHOULD THE FC PROCEED IF THE NFC- DOES NOT RENEW ITS LEGAL ENTITY IDENTIFIER (LEI)?

The FC should timely liaise with the NFC- so that the latter renews its LEI. As the Reporting counterparty ID is one of the details that NFC- should provide to the FC as stated above, the NFC- should ensure that its LEI is correct so that FC can perform the reporting of OTC derivatives on its behalf. If the NFC- has not timely renewed its LEI and therefore FC was not able to successfully report on behalf of NFC-, the FC should submit the missing reports without undue delay as soon as the LEI of the NFC- is renewed.

3. HOW SHOULD THE FC PROCEED IF AN NFC THAT HAS BEEN CLASSIFIED AS AN NFC+ CHANGES ITS STATUS TO NFC- AND FAILS TO TIMELY INFORM THE FC OF THIS FACT?

The clearing threshold is one of the details that NFC- should provide to the FC as stated above. To the extent possible, the NFC- should inform the FC of an anticipated change in its status ahead of the date of calculation of its positions to avoid any disruption in the continuity of reporting.

When FC becomes aware of such change after the calculation date, it should submit the missing reports pertaining to the OTC derivatives that were concluded, modified or terminated after that date without undue delay. Such submissions should be done, upon having received from the NFC all relevant details (as per question (1) above) pertaining to these derivatives.

4. HOW SHOULD THE FC AND NFC- PROCEED IF THEY REPORT TO TWO DIFFERENT TRADE REPOSITORIES (TRS)?

For any outstanding OTC derivatives where an FC and an NFC- report to two different TRs, and the NFC- decides not to report itself, the outstanding OTC derivatives of the NFC- should be transferred to the TR of the FC as of **18/06/2020**, unless the FC decides to become a client of the TR of the NFC- and report the OTC derivatives concluded with the NFC- to that TR.
Each time an NFC changes its status from NFC+ to NFC- and decides not to report itself its OTC derivatives, it should transfer its outstanding OTC derivatives concluded with the FC to the TR of that FC as of the date of its changed status unless the FC decides to become a client of the TR of the NFC- and report the OTC derivatives concluded with the NFC- to that TR.

Similarly, each time an NFC changes its status from NFC- to NFC+, the outstanding OTC derivatives concluded with the FC should be transferred back to the TR of the NFC, unless the NFC decides to become a client of the TR of the FC and report the OTC derivatives concluded with the FC to that TR. Any such transfer of OTC derivatives between the TRs of any pair of FC-NFC should be performed following the principles of the Guidelines on transfer of data between Trade Repositories.

WHISTLEBLOWING | CSSF PUBLISHES REPORTING OF BREACHES OF FINANCIAL SECTOR REGULATIONS

BACKGROUND

In connection with Directive 2019/1937 of 23 October 2019 on the protection of persons who report breaches of Union law, the CSSF published on 5 May 2020 its first whistleblowing reporting of breaches of

financial sector regulations to the CSSF (the "**Report**").

The Report gives practical guidance as to how the whistleblowing procedure has to be followed by the whistleblower and how it has to be implemented by the CSSF.

SUBSTANCE OF THE REPORT

Any person, and in particular employees or former employees of entities of the financial sector in Luxembourg, may in good faith submit a whistleblowing report directly to the CSSF in a confidential and secure manner subject to that person having good grounds for believing that there have been breaches of applicable regulation. Excluded from the whistleblowing procedure are breaches that are of a criminal nature which fall within the scope of activities of the State Prosecutor.

Under certain circumstances, the CSSF also estimates that the whistleblowing procedure can be used by customers of financial service providers.

HOW TO BLOW THE WHISTLE AND WHAT KIND OF INFORMATION HAS TO BE GIVEN TO THE AUTHORITY?

In a first step and before contacting the CSSF, employees of entities of the financial sector are requested to use the whistleblowing procedures in their workplace, if any. Even though the CSSF will still consider whistleblowing reports from those that have not followed their workplaces' internal whistleblowing procedures, the CSSF strongly encourages employees to firstly blow the whistle internally.

Whistleblowing shall in principle be made via a written statement of information transmitted to the CSSF by email to the following address: whistleblowing@cssf.lu.

In case the report received by the CSSF concerns a significant supervised entity within the meaning of the single supervisory mechanism, whistleblowers are requested to use the whistleblowing procedure at the European Central Bank (the "**ECB**") by using this link.

Where such a report has not been made to the ECB but only to the CSSF, the CSSF ensures to forward the report to the ECB and informs the whistleblower accordingly.

As regards the information to be provided to the CSSF, the whistleblower must at least (if the report does not contain hard evidence) have reasonable grounds to believe that the information and any allegations the report contains are substantially true.

WHAT KIND OF PROTECTION IS GRANTED BY THE CSSF TO THE WHISTLEBLOWER?

The CSSF Report states that the CSSF commits to protect the whistleblower's identity within the limits of the applicable legislation: neither the identity of the employee having blown the whistle, nor the identity of third parties which may be involved, will be disclosed to the entity concerned. The identity of the whistleblower or of third parties will only be disclosed in circumstances in which the disclosure becomes unavoidable in law (for example, in case the act is of a criminal nature and the CSSF has the duty to inform the State Prosecutor).

Despite all the precautions that the CSSF will take to not disclose the identity of the whistleblower, it cannot, however, guarantee that the employer may not discover the whistleblower's identity by cross-checking information.

NO LEGAL ADVICE AND NO INFORMATION ON THE ACTION TAKEN GIVEN BY THE CSSF TO THE WHISTLEBOWER

The Report furthermore states that the CSSF will not give any legal advice to a whistleblower as regards the information reported to the CSSF. Due to the legal duty on professional secrecy, the CSSF will also not inform the whistleblower on the actions taken on the whistleblowing report.

ASSESSMENT OF THE AIFM DIRECTIVE BY THE EUROPEAN COMMISSION

On 10 June 2020, the European Commission published its report assessing the application and the scope of Directive 2011/61/EU of the European Parliament and of the Council on alternative investment fund managers (the "**AIFMD**"). The European Commission assessed whether the specific rules of the AIFMD are effective, efficient, coherent and relevant, and if they supported EU measures to achieve the general, specific and operational objectives of the AIFMD. The report highlights both the benefits and deficiencies of the AIFMD's central measures with regard to selected areas and may be summarised as follows:

IMPACT ON ALTERNATIVE INVESTMENT FUNDS ("AIFS") AND ALTERNATIVE INVESTMENT FUND MANAGERS ("AIFMS")

- **TOP**: access to national markets had increased due to the AIFMD.
- **FLOP**: the efficacy of the EU AIFM passport is impaired by national gold-plating, divergences in the national marketing rules, varying interpretations of the AIFMD by national supervisors, its limited scope (limited to professional investors) and the non-activation of certain measures such as the AIFMD third-country passport.

IMPACT ON INVESTORS

- **TOP**: (i) an increase of the sales of AIFs with greater participation of retail investors because of the introduction of a dedicated regime regulating functions and liability of depositaries, (ii) a general improvement of the AIFs asset valuation process and (iii) an improvement of the communication of information, especially concerning the transparency regarding the offered products and services.
- **FLOP**: (i) a lack of clarity regarding AIFMs using tri-party collateral management or central securities depositories acting as custodians and (ii) a lack of a depositary passport.

IMPACT ON MONITORING AND ASSESSMENT OF SYSTEMIC RISK

- **TOP**: generally, the tool-kit for financial stability purposes available to national competent authorities under the AIFMD was considered to be useful and to have had positive effects;
- **FLOP**: nevertheless, these measures could be improved and require a certain degree of harmonisation in order to be in line with similar regimes in force.

IMPACT OF RULES ON INVESTMENT IN PRIVATE COMPANIES AND IN OR FOR THE BENEFIT OF DEVELOPING COUNTRIES

- **TOP**: The AIFMD could be amended to better accommodate the private equity sector by removing unnecessary charges and looking for more effective ways to protect non-listed companies or issuers.
- **FLOP**: There is insufficient evidence to determine the impact of the AIFMD on investing in or for the benefit of developing countries. However, the AIFMD does not appear to impose regulatory restrictions that would hinder such investments.

LIQUIDITY RISKS IN INVESTMENT FUNDS | ESRB RECOMMENDATIONS AND CSSF RESPONSE

On 14 May 2020, ESMA published a statement (the "**Statement**") supporting the recommendations of the European Systemic Risk Board (the "**ESRB**") on liquidity risk in investment funds (the "**ESRB Recommendations**"). The aim of the recommendations is to address the COVID-19 pandemic from a macroprudential perspective and to assess the readiness of the investment fund sector to deal with further liquidity stress episodes.

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1. SUPERVISION OF INVESTMENT FUNDS WITH EXPOSURE TO ILLIQUID ASSETS

ESMA welcomed the ESRB Recommendation for the relevant National Competent Authorities (the "**NCAs**") across Europe, coordinated by ESMA, to undertake focused supervisory engagement with investment funds that have significant exposures to corporate debt and real estate, being two areas pinpointed as being high priority for enhanced scrutiny from a financial stability perspective.

2. EFFECTIVE USE OF LIQUIDITY MANAGEMENT

ESMA further supported the ESRB in highlighting the importance of the timely and effective use of liquidity management tools by investment funds with exposures to illiquid assets.

In response to the COVID-19 pandemic, ESMA has intensified the exchange of information among the NCAs on the use of liquidity management tools by UCITS and AIFs domiciled in the European Economic Area. On 30 January 2020, ESMA had already launched a Common Supervisory Action on UCITS liquidity risk management. As a result, the NCAs agreed to assess simultaneously how market participants in their jurisdictions adhere to the UCITS liquidity rules in their day-to-day business. The assessment was to be performed on the basis of a common methodology and shared with ESMA on an ongoing basis in order to ensure the supervisory convergence of UCITS liquidity risk management. As a result the CSSF directly contacted and requested a large sample of Luxembourg-based UCITS managers to complete a dedicated questionnaire for all Luxembourg and non-Luxembourg domiciled UCITS managers.

3. DOWNGRADES OF CORPORATE BONDS AND ENTITIES ACROSS THE FINANCIAL SYSTEM

ESMA also shared the view expressed in the ESRB Recommendations regarding the potential impact of procyclical downgrades of corporate bonds and entities across the financial system. While the impact of the COVID-19 pandemic on issuers is still to be assessed, deterioration in a credit quality needs to be carefully reflected in the ratings on the basis of high quality data. The proposed top-down analysis coordinated by the ESRB with the European Supervisory Agencies and the European Central Bank will help assessing the impact of large-scale downgrades across all parts of the financial sector.

CSSF RESPONSE

In response to the ESRB Recommendations and the Statement, the CSSF and the Banque Centrale du Luxembourg published on 5 June 2020 a joint communication informing the industry participants of those policy actions and pointing out their importance and impact on investment funds and their activities. On 10 July 2020, the CSSF published a communication informing the industry that it had asked a larger sample of UCITS and AIFs to complete by 31 July 2020 a questionnaire based on the data collection questionnaire prepared by ESMA. All concerned investment fund managers have been contacted directly by the CSSF in that context.

The response questionnaire for corporate debt funds will have to be submitted by the investment fund managers through CSSF's eDesk portal. A dedicated section to complete this questionnaire will be accessible in the eDesk portal on 20 July 2020.

The CSSF will inform the industry once this section, together with related guidance, will be available for use.

CSSF CIRCULAR 20/744 ON INDICATORS OF TAX OFFENCES IN THE COLLECTIVE INVESTMENT SECTOR

On 3 July 2020, the CSSF published Circular 20/744 ("**Circular 20/744**") complementing Circular 17/650 on application of the Law of 12 November 2004 on the fight against money laundering and terrorist financing and Grand-ducal Regulation of 1 February 2010 providing details on certain provisions of the AML/CFT Law to predicate tax offences ("**Circular 17/650**"). Circular 20/744 supplements Annex 1 of Circular 17/650 and adds to the list of indicators concerning the professional obligation to report suspicions regarding the predicate offence of laundering of an aggravated tax fraud or tax evasion specific to collective investment activities.

AMENDMENT

Following the amendment, Annex 1 of Circular 17/650 shall be supplemented with a list of nine (9) indicators specific to the collective investment activities and to professionals providing services in that sector (List II of Annex 1):

1. COMPLEX INVESTMENT STRUCTURING

A collective investment fund ("**UCI**") has recourse to a complex investment structure, involving one or more legal entities or one or more legal investment structures interposed between the UCI and the ultimate target investment, located in different jurisdictions with some of them not complying with international transparency standards.

2. TAX BASE EROSION

The business model of an investment fund manager ("**IFM**") results in a significant decrease of taxable earnings using cross-border transfers, triggering questions regarding compliance with transfer pricing rules or more generally Luxembourg laws implementing directly or indirectly the Base Erosion and Profit Shifting actions developed in the context of the OECD/G20 BEPS Project aimed at addressing tax avoidance.

3. INVESTMENT TRANSACTIONS

- The UCI performs investment transactions on unregulated markets where the economic beneficiaries of the parties to the transaction or their intermediaries are located in a jurisdiction not subject to AEOI, CRS or FATCA reporting.
- The UCI transactions do not have an apparent economic rationale in a specific context.
- Frequent transactions result in losses for which the professional or the counterparty appears to have no concern.

4. EFFICIENT PORTFOLIO MANAGEMENT TECHNIQUES

The UCI uses efficient portfolio management techniques such as securities lending transactions which may create tax arbitrage or tax refunds that have been or could be considered as aggravated tax fraud/tax evasion.

5. INVESTMENT COMPANIES IN RISK CAPITAL ("SICAR")

A SICAR does not meet the requirement to invest in securities representing risk capital in accordance with the concept of the risk capital provided in CSSF Circular 06/241 leading to unauthorised use of SICAR status and potential tax implications.

6. SUBSCRIPTION TAX

The UCI or the IFM does not have adequate information on the quality and status of the investors allowing it to make the subscription tax declarations to *Administration des Enregistrements et Domaines*. It will not qualify as an indicator provided that the UCI or the IFM can justify that: (i) legal or tax statuses of the investors comply with the legal requirements governing the subscription

tax, (ii) the investors' status comply with the legal provisions of the country of residence of these investors.

7. **INVESTOR TAX REPORTING**

The UCI or the IFM distributes units in a country which has in place a set of obligations for investor tax reporting based on various requirements such as the registration with the tax authorities or the tax reporting of tax data and such requirements are used for investor's tax returns or by the paying agents to deduct or levy withholding taxes that may be considered equivalent to tax advances to their personal or corporate tax return. It shall not qualify as an indicator provided that the UCI or the IFM can prove that it has taken the necessary steps to: (i) ensure that actions undertaken by the parties involved comply with the rules and principles of the local tax laws, and (ii) provide information to investors or foreign tax or regulatory authorities in a timely manner as required by the local laws of the country of distribution.

APPLICATION

In case an indicator or combination of indicators included in Annex 1 raise doubts, the professional has to examine the business relationship transaction in order to verify if those doubts are justified given the context of the transactions and the knowledge of the customer's situation. Where, regardless of the examination, doubts remain, the suspicion should be reported to the Luxembourg Financial Intelligence Unit.

HM TREASURY CONSULTATION ON POST-BREXIT OVERSEAS FUND REGIME

BACKGROUND

On 11 March 2020, HM Treasury (the "**HMT**"), the office responsible for financial services legislation in the UK, published a consultation paper on a new Overseas Funds Regime (the "**OFR**"). The consultation ended on 11 May 2020.

While the UK is part of the EU, retail investors in the UK can access other EU Undertakings for Collective Investments in Transferable Securities ("**UCITS**") funds via a passport regime.

In the context of Brexit, the UK government created a temporary marketing permissions regime ("**TMPR**") to allow EU UCITS to market in the UK until the end of the transition period, which is expected to expire on 31 December 2020.

HM TREASURY PROPOSITIONS

The UK already has a regime pursuant to section 272 of the Financial Services and Markets Act ("**FSMA**") which allows individual examination of non-UK funds to decide whether they can be marketed to retail investors in the UK. Since this regime would be rather cumbersome to apply for the thousands of EU funds that are expected to be marketed in the UK post Brexit, HMT, has proposed in the consultation two different regimes, based on the principle of equivalence:

a) an equivalence regime for overseas retail funds to be able to market to UK retail investors;
b) a separate regime for money market funds ("**MMFs**") of which there are very few domiciled in the UK.

It is not proposed to repeal section 272. HMT proposes to amend section 272 to make it more efficient for the funds that are not eligible for the OFR.

The OFR will establish processes by which the UK government will be able to make an equivalence determination in respect of another country's regime for retail funds or MMFs, respectively.

Once equivalence is granted to a particular country, funds wishing to market in the UK will need to register with or notify the UK's Financial Conduct Authority (the "**FCA**") for a formal 'recognition'. Retail funds will need to

be registered with the FCA to gain recognition. The process for MMFs gaining recognition will depend on whether they are being marketed to retail or professional clients. Those marketing to professional investors only will be required to submit a notification under the national private placement regime.

Although the recognized funds will not be under FCA's supervision, they will have to pay fees and answer any queries raised by the FCA. If necessary, the FCA can suspend or revoke the recognition of a fund.

ESMA BRIEFING ON THE SUPERVISION BY NCAS OF COSTS APPLICABLE TO UCITS AND AIFS

BACKGROUND

On 4 June 2020, ESMA issued a supervisory briefing (the "**Briefing**") on the supervision by National Competent Authorities ("**NCAs**") of costs applicable to Undertakings for the Collective Investment in Transferable Securities ("**UCITS**") and Alternative Investment Funds ("**AIFs**").

The Briefing aims to promote convergence on the supervision of costs in UCITS and AIFs across the EU. In this regard, ESMA developed criteria to support NCAs in (i) assessing the notion of "undue costs" and (ii) supervising the obligation to prevent undue costs being charged to investors.

SUPERVISING OF THE PRICING PROCESS

In order to allow NCAs to appropriately supervise that investors are not charged with undue costs, ESMA advises NCAs to require that management companies develop and periodically review a structured pricing process addressing the following elements:

a) Whether the costs are linked to a service provided in the investor's best interest;
b) Whether the costs are proportionate compared to market standards and to the type of service provided, particularly in the context of potential conflicts of interest relating to payments to third parties, intragroup delegation or depositary functions;
c) Whether the fee structure is consistent with the characteristics of the fund;
d) Whether the costs borne by the fund, including those paid to third parties, are sustainable taking also into account the expected net return of the fund;
e) Whether the costs ensure investors' equal treatment and are not of material prejudice to the interests of any class of share/unitholders or potential share/unitholders except for AIFs not distributed to retail investors disclosing a preferential treatment in their rules or instruments of incorporation where such a preferential treatment is allowed under the applicable legislation;
f) Whether there is no duplication of costs and costs are properly separated and accounted for. A clear distinction between the costs charged to the fund and those paid directly to the management company and/or the depositary and/or any other third party should be made;
g) Whether a cap on fees (e.g. subscription/redemption fees), if any, is applied and clearly disclosed to investors (e.g. expressed as a percentage of the NAV);
h) In case of UCITS and relevant AIFs, if the fund charges performance fees, whether the performance fee model and its disclosure is compliant with the ESMA Guidelines on performance fees;
i) Whether all costs are clearly disclosed to investors in line with applicable EU rules (AIFMD, PRIIPs and UCITS) as well as any additional rules applied at national level; and
j) Whether the pricing process and all charged costs are based on reliable and documented data, in order to ensure the ability of the NCA to reproduce ex post the calculations made by the management company on a single portfolio level.

SUPERVISION OBLIGATIONS

NCAs are expected to review management companies' pricing processes as part of their supervisory activity to ensure that undue costs

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are not charged to investors. The review of the processes should be carried out in one or more of the following stages:

a) Fund's authorisation stage;
b) Off-site supervision;
c) On-site inspections;
d) Approval of material changes to the fund (which would require the NCA's approval and prior information to investors, as well as the possibility for the investors to redeem at no additional charges);
e) Thematic reviews; and/or
f) Assessment of investors' complaints.

Also, the NCAs are expected to cover the following aspects:

a) Cost disclosure and transparency: (i) the existence, nature and amount of the costs/fees are clearly disclosed to investors in a manner that is comprehensive, accurate and understandable; and (ii) the charged costs are consistent with funds' rules and documentation;
b) Business conduct, strategic risk and reputational risk.

NCAs should supervise that the payment of any fee or commission is aimed at remunerating a service provided to the fund and does not impair compliance with the management company's duty to act in the best interest of the unitholders. By doing so, the management company must develop a pricing process that:

a) clearly sets out responsibilities among the management bodies of the firm in determining and reviewing the costs charge to investors;
b) in case of the existence of conflicts of interest, ensure that the risk of damage to investors' interest will be prevented;
c) is clearly documented and periodically reviewed.

When supervising the pricing process, elements referred to under the section "Supervision of the pricing process" point c) i.e whether the fee structure is consistent with the characteristics of the fund should be addressed.

Finally, in situations where undue costs are charged to investors, ESMA expects that the outcome of the supervisory action should include an assessment of the possibility to request the following actions:

a) Investor compensation, where allowed under the national provisions;
b) Reduction of fees;
c) Review of disclosure documents; and/or
d) Communication of good and poor practices by NCAs to market/stakeholders/press, which should assist in acting as a deterrent against managers charging undue costs to investors.

SUSTAINABLE FINANCE UPDATE

Sustainable finance being an evolving subject and in order to continue the European Commission's action plan on financing sustainable growth (adopted in March 2018), the European Commission published on 8 June 2020 three different proposals in this domain.

The first was draft Commission Delegated Regulation (EU) amending Delegated Regulation (EU) No. 231/2013 as regards sustainable risks and sustainability factors to be taken into account by alternative investment fund managers ("**AIFMs**"). The draft amendment proposes changes to introduce sustainability factors, *inter alia*, to risk management and conflict of interest policies as well as due diligence procedures of AIFMs.

The second was a draft Commission Delegated Directive to amend Directive 2010/43/EU as regards the sustainability risks and sustainability factors to be taken into account for undertakings for collective investment in transferable securities ("**UCITS**"). The draft amendment aims to integrate sustainability risks and clarifies the implications of Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector. The obligation of undertakings for collective investment in transferable securities to integrate sustainability risks is particularly important

where management companies of undertakings for collective investment in transferable securities disclose information with regard to the consideration of adverse sustainability impacts.

Lastly, the European Commission published a set of draft delegated acts concerning the integration of sustainability factors under Directive 2014/65/EU on markets in financial instruments (“**MiFID**”).

This draft seeks to ensure that end investors have clear information on the social and environmental risks and opportunities pertaining to their investments and to clarify the duties of investment firms while providing their clients with advice on the social and environmental risks and opportunities with respect to their selected investments.

For further information please refer to our previously published Sustainable Finance Insight Series 4, 5 and 6.

LABOUR LAW

NEW INTERNSHIP ARRANGEMENTS FOR PUPILS AND STUDENTS

The Law of 4 June 2020 amending the Labour Code and introducing a regime of internships for school pupils and students was published on 5 June 2020 and entered into force on 9 June 2020 (hereinafter the "**Law**"). **The Law applies to all internship agreements concluded from 9 June 2020.**

CATEGORIES OF INTERNSHIP

The Law regulates the terms and conditions of two types of internship agreements:

i. Compulsory internships performed during school/university courses in a Luxembourg or foreign educational establishment. In such case, the internship agreement is entered into between the intern, the professional acting as the trainee's supervisor and the educational establishment.

ii. Practical internships aimed at acquiring some professional experience. The internship agreement is entered into between the professional acting as the trainee's supervisor and the intern. Interns are defined as pupils or students who (a) are enrolled in a Luxembourg or foreign educational establishment and regularly follow a course of study or (b) have successfully completed a first cycle of higher or university education (bachelor). In other words, **a student in his/her final year of university education will no longer be able to do a practical internship as he/she is no longer considered as pupil or student under the Law.**

The Law does not apply to compulsory internships during professional training, internships with the aim of academic or professional orientation and internships provided for in mandatory training courses with a view to having access to certain professions governed by legal or regulatory provisions.

DURATION OF THE INTERNSHIP

The maximum duration for a practical internship within the same company is limited to six months over a reference period of 24 months. In addition, the entire duration of the practical internship must occur within 12 months after the end of the last school registration which led to the award of one of the diplomas referred to in point ii) above.

These rules do not apply to compulsory internships performed during a school or university curriculum.

INTERNSHIP COMPENSATION

	Compulsory internship (Company+ Intern+ Educational establishment)	Practical internship (Company + Intern)	
		Intern without a bachelor's degree	Intern with a bachelor's degree
Internship less than four weeks	*optional*	*optional*	EUR 2,570.39 /month (gross) At least the social minimum salary for qualified workers
Internship from four to 12 weeks	EUR 642.60 /month (gross)* At least 30% of the social minimum salary for unqualified workers	EUR 856.80 /month (gross) At least 40% of the social minimum salary for unqualified workers	
Internship from more than 12 weeks to 26 weeks	EUR 642.60 /month (gross)* At least 30% of the social minimum salary for unqualified workers	EUR 1,606.49 /month (gross) At least 75% of the social minimum salary for unqualified workers	

*A derogation to the mandatory compensation exists when the educational establishment explicitly prohibits compensation in the internship agreement.

INTERNSHIP AGREEMENT

An internship agreement must be entered into in writing, whether it is a compulsory internship or a practical internship. The agreement must contain several compulsory particulars:

- the activities assigned to the intern;

- the start and end dates of the internship, its duration and the maximum weekly hours of presence;
- the terms and conditions for authorising absence, in particular to attend a job interview with a potential employer;
- the compensation, if any;
- the appointment of a tutor;
- the potential benefits that the intern may benefit from;
- the social security scheme applying to the intern, including professional hazards insurance; and
- the conditions applying to a unilateral termination or termination by common consent of the internship agreement before the end of the internship.

APPOINTMENT OF A TUTOR

A tutor must be assigned to each intern. The tutor is charged with integrating the intern into the company, ensuring a regular follow-up and providing advice and guidance to the intern. For internships of at least 4 weeks, the tutor must issue, at the end of the course, a critical and detailed assessment.

LIMITATIONS

The number of practical internships should be limited to 10 % of the company's total workforce. In companies with fewer than 10 employees, the maximum is set at one internship. These limitations do not apply during the period from 1 July to 30 September inclusive.

APPLICATION OF THE LABOUR CODE

The Law specifies that the legal provisions relating to working time, weekly rest, statutory holidays, annual leave and health & safety in the workplace stipulated by the Labour Code shall apply to interns.

BSP

TAX

CONSTITUTIONAL COURT DECLARES PARTNERS NON-COMPARABLE TO MARRIED COUPLES

On 12th June 2020, the Luxembourg Constitutional Court handed down an anticipated decision regarding the regime on collective taxation of married couples and its alleged discrimination of persons registered as partners under the regime of the law of 9 July 2004. Indeed, article 3 (d) of the Luxembourg income tax law (“**LITL**”) provides for the possibility for spouses, one of whom is a resident and the other a non-resident, to apply for collective taxation by joint application under the conditions provided for therein. However, this possibility does not extend to persons registered as partners under the regime of the law of 9 July 2004.

The question arose whether this dissimilar treatment of married couples and partners by Article 3 (d) of the LITL amounted to discrimination contrary to Article 10bis (1) of the Luxembourg Constitution, which holds that ‘Luxembourgers are equal before the law’. Discrimination under this rule arises when the categories of persons between whom discrimination is alleged are in a comparable situation. The Luxembourg Constitutional Court was thus asked to establish whether married couples and partners were in a comparable situation for the purpose of Article 3 (d) of the LITL.

In this respect, the Constitutional Court held that the law of 9 July 2004 introducing the partnership regime intentionally created a difference in treatment between spouses and partners, given that the legislator's purpose in 2004 was not to assimilate the partnership regime to marriage. On that basis alone, the Court held that the situation of spouses, bound by marriage, and that of partners within the meaning of the law of 9 July 2004 are not comparable. The Court thus concluded that Article 3 (d) of the LITL is not contrary to Article 10bis (1) of the Luxembourg Constitution.

UPDATE ON DOUBLE TAX TREATIES

MLI

The Luxembourg tax authorities recently confirmed, in a newsletter issued on 8 June 2020, their intention to publish coordinated versions of the currently enforceable double tax treaties, depicting the changes due to the Multilateral Instrument (hereafter “**MLI**”) and the options exercised by each jurisdiction thereunder.

The coordinated versions will soon be released by the Luxembourg tax authorities and available for consultation on their website. The aim is to enable taxpayers to understand the impacts and consequences resulting from the application of the MLI to a specific double tax treaty.

DOUBLE TAX TREATY WITH THE RUSSIAN FEDERATION

Recently, the Russian Finance Ministry announced that it has proposed changes to the withholding tax rates currently provided in the double tax treaty entered into with Luxembourg (as well as Malta and Cyprus).

Under the current double tax treaty between Luxembourg and the Russian Federation, withholding tax on dividends is limited to 5% if certain conditions are met and no withholding tax applies on interest payments. The Russian Federation now intends to apply a 15% withholding tax on dividend and interest payments. Those amendments are the direct consequence of the speech delivered by the President of the Russian Federation on 25 March 2020, in which he ordered the increase in tax rate on income in the form of dividends and interest, which are transferred to foreign accounts.

The Russian Federation expects the changes to enter into force on 1 January 2021 and in case the partner jurisdiction refuses to amend the existing double tax treaty before the end of the year, the Russian Federation would unilaterally withdraw from the relevant double tax treaty.

As a result, dividend and interest payments made by Russian companies to Luxembourg residents could suffer a higher withholding tax charge, for which Luxembourg would have to grant a tax credit. In this context, the Russian Finance Ministry also confirmed that the proposed changes should not affect interest income paid on Eurobonds, bond issues of Russian companies and loans provided by foreign banks, which should be governed by Russian tax law.

LUXEMBOURG PARLIAMENT MODIFIES FATCA AND CRS LAWS

On 18 June 2020, the Luxembourg Parliament ratified the Draft Law No.7527 (without substantial changes from the draft law), thereby modifying the law of 24 July 2015 on the Foreign Account Tax Compliance Act ("**FATCA Law**") and the law of 18 December 2015 on the Common Reporting Standard ("**CRS Law**"). FATCA and CRS constitute the two main frameworks for the automatic exchange of information in Luxembourg.

The modified FATCA Law and CRS Law impose additional obligations on Luxembourg reporting financial institutions, introduce the possibility of lump sum penalties in case of non-compliance and extend as well as clarify the Luxembourg tax authorities' investigative powers (for more information, please refer to our April Newsletter).

EUROPEAN COMMISSION REQUESTS LUXEMBOURG TO AMEND ITS TAX LEGISLATION ON CERTAIN SECURITISATION ENTITIES

On 14 May 2020, the European Commission decided to send two letters of formal notice to Luxembourg. The first one relates to the incorrect transposition of the interest limitation rule of the Anti-Tax Avoidance Council Directive (EU) 2016/1164 ("**ATAD**"). The second letter addresses discriminatory tax rules towards foreign securitisation enterprises.

With regard to the ATAD legislation, the question revolves around the entities to be included in the "financial undertaking" definition, which are excluded from the interest limitation rules under ATAD. According to the European Commission, the domestic implementation by Luxembourg goes beyond the allowed exemptions as it provides unlimited deductibility of interest payments for corporate income tax purposes to EU regulated securitisation entities governed by EU Regulation 2017/2402. In the Commission's view, those EU regulated securitisation entities do not qualify as "financial undertakings" under ATAD.

On the second aspect, the Commission considers that Luxembourg is taxing securitisation enterprises with taxable operations in Luxembourg, but whose statutory seat is in another Member State of the EU or European Economic Area ("**EEA**") more heavily than domestic ones, which could constitute a violation of the freedom of establishment under EU law. Unfortunately, no additional details are provided at this stage.

The letter of formal notice is the first step of the EU infringement procedure to challenge Member States that do not comply with EU law. If Luxembourg does not act within four months, the Commission may send a reasoned opinion to the Luxembourg authorities detailing the arguments as to why

the Luxembourg tax rules would not be in compliance with EU law.

DRAFT LAW ON VAT INTRA-EU DISTANCE SALES REGIME

On 8 June 2020, the Luxembourg government introduced a draft law on the value-added tax ("**VAT**") regime for distance sales between businesses and consumers ("**B2C**") within the EU primarily implementing the EU VAT Directive on distance sales (Directive EU/2017/2455, the "**Directive**") into the Luxembourg VAT Law (*Loi modifiée du 12 février 1979 concernant la taxe sur la valeur ajoutée*).

This draft law is part of the implementation process of the European Commission's VAT Action Plan aimed at tackling VAT fraud within the EU and to re-establish fair competition among the EU Member States. It also aims at better enshrining the newly introduced '*destination principle'* providing that the delivery of goods and provision of services should be taxable in the Member State where the goods or services are received, conceding the old general principle of taxation at the place of departure.

The main changes include the introduction of a uniform annual turnover threshold for the B2C distance sales regime and its extension to third states as well as the introduction of the import scheme for third states and territories.

MODIFICATION OF EU DISTANCE SALES REGIME (B2C)

The Directive introduces an EU-wide uniform annual turnover threshold of EUR 10,000 for the purpose of applying the cross-border distance sales regime. Under the regime currently in place, Member States apply different turnover thresholds ranging between EUR 35,000 and EUR 100,000 in order to fall within the regime.

In order to re-establish fair competition with the new regime, any enterprise whose annual turnover threshold for the supply of goods to consumers in any Member State of the EU exceeds EUR 10,000 will be subject to the VAT rate in the state of destination of the final consumer. For the purpose of the law, consumer includes any non-taxable VAT person.

Furthermore, the new EU distance sales regime has been extended to imported goods from third States and territories and is no longer limited to the trade solely within the EU.

NEW IMPORT SCHEME FOR DISTANCE SALES FROM THIRD STATES

A new import scheme is introduced, allowing for a VAT exemption for distance sales of goods imported from third States or third territories to customers in the EU and limited to a value of EUR 150.

According to this regime, the seller will charge and collect that VAT at the point of sale to EU customers and declare and pay the VAT globally to the Member State of identification in the One-Stop-Shop system; the platform that allows enterprises to declare and pay VAT on distance sales in only one Member State. These declared goods will then benefit from a VAT exemption upon importation.

The introduction of this new import scheme is in line with the abolition of the current VAT exemption for goods in small consignments of a value of up to EUR 22.

The new VAT draft law, which still has to go through the legislative procedure and could thus be subject to amendments, is intended to become effective as from 1 January 2021.

DAC 2, DAC 6, CRS AND FATCA DEADLINES EXTENDED

On 8 May 2020, the European Commission published a proposal to amend Directive 2011/16 of 15 February 2011 on administrative cooperation in the field of taxation in order to defer certain time limits for the filing and exchange of information in the field of taxation due to the COVID-19 pandemic.

On 3 June 2020, the Member States came to a political agreement to extend these deadlines.

The extension concerns two deadlines in particular. First, **the obligation for Member States to exchange information on reportable financial accounts under Directive (EU) 2014/107 ("DAC2") has been deferred for 3 months** (i.e. until 31 December 2020). As a reminder, under **DAC 2**, Member States must automatically exchange information regarding financial accounts including information on interest, dividends or other income generated by financial accounts, gross proceeds from sales and account balances. Second, the Member States decided to **extend reporting obligations under Directive (EU) 2018/822 ("DAC6") by 6 months.** In practice:

- reportable cross-border arrangements which were implemented between 25 June 2018 and 30 June 2020 must now be reported under DAC 6 by 28 February 2021 (instead of 31 August 2020);
- the date for the beginning of the period of 30 days for reporting cross-border arrangements which are included in Hallmarks listed in Annex IV of the DAC 6 and which were implemented between 1 July 2020 and 31 December 2020 is now 1 January 2021.

In a press release, the **Luxembourg Finance Ministry confirmed this approach and announced it would also be introducing laws in order to extend reporting deadlines under Common Reporting Standard ("CRS") and Foreign Account Tax Compliance Act ("FATCA").**

Under CRS, financial institutions must annually transmit to the Luxembourg tax authority information concerning the identity, account, account balance and related financial income of each person who is a tax resident in another participating jurisdiction. **The deadline for financial institutions to communicate this information is delayed by 3 months (i.e. until 30 September 2020 for the previous year).**

Under FATCA, financial institutions and certain other non-financial foreign entities must annually report information concerning U.S. account holders, including foreign assets held by U.S. account holders to the Luxembourg tax authority which shares this information with the U.S. tax authority**. The deadline to provide this information has been deferred for 3 months until 1 October 2020 (for the previous fiscal year).**

Finally, the Luxembourg Finance Ministry announced that pending the adoption of these laws, **the penalties for late transmission of the information required under DAC 2, DAC 6, CRS and FATCA would not be applied.**

LUXEMBOURG FISCAL UNITY REGIME HELD CONTRARY TO EU LAW

In its judgment dated 14 May 2020, the European Court of Justice (hereinafter "**ECJ**") found the **Luxembourg fiscal unity regime to be contrary to the freedom of establishment and the freedom to provide services.** The Higher Administrative Court (*Cour administrative*) initially submitted three preliminary questions to the ECJ, each regarding a different aspect of the regime (see our newsletter of December 2018 for more details).

THE PROHIBITION OF HORIZONTAL FISCAL UNITIES IS CONTRARY TO EU LAW

First of all, at the time of the preliminary reference, Luxembourg law only permitted the formation of a fiscal unity between a resident parent company (or permanent establishment of a non-resident parent) and its resident subsidiaries (so-called "**vertical fiscal unity**"). Luxembourg law did not permit the formation of a horizontal fiscal unity regime between resident subsidiaries having a common non-resident parent. The ECJ held that **this difference in treatment between resident parent companies and non-resident parent companies constituted an unjustified**

restriction of the freedom of establishment and the freedom to provide services.

As of 2015 and following the ECJ's judgment in *SCA Group Holding BV and Others* (C-39/13), the **Luxembourg fiscal unity regime was amended to allow the formation of horizontal fiscal unities** for resident subsidiaries of a same non-resident parent company.

THE OBLIGATION TO DISSOLVE AN EXISTING VERTICAL FISCAL UNITY IN ORDER TO ENTER INTO A HORIZONTAL ONE IS CONTRARY TO EU LAW

Also at issue in the case was that the current Luxembourg law provides that the transformation of a vertical fiscal unity into a horizontal fiscal unity (i.e. the addition of resident subsidiaries with a common non-resident parent) results in the dissolution of the vertical unity. If this occurs prior to the 5 year minimum period prescribed by the law, this will result in the retrospective taxation on an individual basis of the companies participating in the dissolved fiscal unity.

The ECJ held that this mechanism was contrary to EU law since a resident parent company may add a subsidiary to an existing fiscal unity regime without dissolving the existing fiscal unity whereas a non-resident parent company may only create a horizontal fiscal unity between its subsidiary companies by first dissolving an existing vertical fiscal unity which may trigger retrospective taxation for the participating subsidiaries.

To sum up, Luxembourg law may not require the dissolution of an existing vertical fiscal unity in order to enter into a horizontal fiscal unity.

NO RETROSPECTIVE APPLICATION OF THE HORIZONTAL FISCAL UNITY REGIME

Finally, the ECJ confirmed the validity of the Luxembourg law which required a request for a fiscal unity to be filed before the end of fiscal year concerned. Such a limit did not, according to the ECJ, amount to a restriction that is contrary to EU law. In other words, **taxpayers may not request the retrospective application of the horizontal fiscal unity regime.**

OPINION OF THE ADVOCATE GENERAL OF THE ECJ ON THE RIGHT TO DEDUCT VAT FOR HOLDING COMPANIES

The opinion of the Advocate General ("**AG**") of the European Court of Justice ("**ECJ**"), Juliane Kokott, published on 14 May 2020 in case C-42/19, concerns a Portuguese holding company called Sonaecom, which invests in companies active in the telecommunications market and also provides services subject to VAT to those subsidiaries.

In 2005, Sonaecom ordered a market study for the acquisition of shares in a company called Cabovisao. In addition, Sonaecom hired a bank to assist it in issuing bonds to raise the necessary capital for the acquisition of Cabovisao. As Sonaecom's intention was to provide services to Cabovisao, Sonaecom deducted input VAT paid on the aforementioned services. In spite of this, the acquisition failed so that no services were eventually provided by Sonaecom to Cabovisao. The unused funds from the bond issuance were made available to Sonaecom's parent company in the form of a loan. The Portuguese authorities considered that Sonaecom was not entitled to deduct the VAT and requested a reimbursement.

In her opinion, AG Kokott firstly recalls that a holding company which supplies services subject to VAT to its subsidiaries is considered a taxable person with a right to deduct input tax in relation with these services. This right of deduction extends to VAT paid in preparation for the provision of services and remains acquired even if the envisaged provision of service will not take place.

With respect to the market study, AG Kokott considered it to be an expense directly related to the acquisition of Cabovisao and the subsequent envisaged provision of services.

She considered that even though a disproportion between the scope of the deduction and the tax liability might exist, no limitation on the right of deduction is necessary. In her view, VAT paid on expenditure for the acquisition of a shareholding should be fully deductible because of the link with the services envisaged and not because it is considered as general overhead which was recognised by traditional case-law. She also seems to be in favour of an approach which considers that a dominant holding company could be seen as indirectly exercising the economic activity of its subsidiary so as to give rise directly to a right of deduction at the level of the holding company even in the absence of provision of services to the subsidiary.

With respect to VAT paid for the bond issuance, the AG considers that it will be necessary to look at the actual use of the funds, which prevails over a divergent initial intention. As the funds, which were originally intended to be used for an activity that gives a right to deduct, are ultimately used for an activity that does not give such right, a deduction should be denied.

Given the significance of VAT deductions for holding companies, it will be interesting to see to what extent the ECJ will follow the AG's opinion.

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