BSP Newsletter

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BSP

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SUMMARY

ESMA UPDATED ITS Q&AS FOR THE PROSPECTUS REGULATION

On 28 January 2021, ESMA updated its Questions and Answers (Q&As) relating to Regulation (EU) 2017/1129 of the European Parliament and of the Council 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 (“**Prospectus Regulation**”) and to Commission Delegated Regulation (EU) 2019/980 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (“**Commission Delegated Regulation 2019/980**”). Those are collectively referred to as the “**Prospectus Q&As**”.

The updated version of the Prospectus Q&As includes six (6) new Q&As covering the areas of financial information, updating of the prospectus, disclosure requirements for statements prepared by experts, order of information appearing in a prospectus, applicability of disclosure annexes and the exceptions in Article 1(5) of the Prospectus Regulation. We summarise in this article the key clarifications/ confirmations provided by ESMA.

FINANCIAL INFORMATION

ESMA clarified what is meant by “*or such shorter period as the issuer has been in operation*” in item 18.1.1 of Annex 1 of the Commission Delegated Regulation 2019/980 which relates to the requirement to provide audited historical financial information. ESMA gives guidance on the interpretation of this requirement, using a number of practical examples. For instance, insofar as issuers operating for less than one financial year are under the obligation to prepare audited historical financial information in their prospectus for the time period commencing on the company’s incorporation or entry into operation (if different), ESMA clarified that those issuers can decide whether the short-period audited historical financial information will cover the time period until the end of that first financial year, or the most feasible date before the publication of the prospectus.

UPDATING OF THE PROSPECTUS

ESMA confirmed that a new prospectus cannot be used to make several offers if that prospectus does not contain information on all such offers (although information from a previous prospectus can be incorporated by reference into a subsequent prospectus for a new offer).

DISCLOSURE REQUIREMENTS FOR STATEMENTS PREPARED BY EXPERTS

ESMA clarified the requirement to include a statement in the registration document outlining that it is possible to inspect "all reports, letters, and other documents, valuations and statements prepared by any expert at the issuer’s request, any part of which is included or referred to in the registration document". ESMA confirmed that the reference to “prepared by an expert” applies only to 'valuations and statements'. On the other hand, all reports, letters and other documents referred to in the registration document are expected to be put on display electronically regardless of whether or not they are prepared by an expert/at the issuer’s request.

ORDER OF INFORMATION IN THE PROSPECTUS

ESMA confirmed that the order of information prescribed by Articles 24 and 25 of Commission Delegated Regulation 2019/980 is mandatory and therefore issuers cannot deviate from it. This does not prevent issuers from including a brief cover note with other information about the issuer and the securities before the mandatory information.

APPLICABILITY OF DISCLOSURE ANNEXES

To determine which annexes of Commission Delegated Regulation 2019/980 are applicable when preparing a prospectus, ESMA has drawn up a table available at the following link.

STATUS OF EXEMPTIONS IN ARTICLE 1(5) OF THE PROSPECTUS REGULATION

ESMA confirmed that the exemptions provided in Article 1(5) of the Prospectus Regulation are independent of each other, meaning that if one of the exemptions applies the issuer is no longer required to publish a prospectus.

MODERNISATION OF THE LICENSING PROCESS IN THE FINANCIAL AND INSURANCE SECTORS

BACKGROUND

In a move aimed at simplifying the administrative burden in the financial and insurance sectors, the Luxembourg Minister of Finance filed draft law No. 7761 (the "**Draft Law**") with the Luxembourg Parliament (*Chambre des Députés*) on 2 February 2021. The Draft Law, if adopted, will represent a major modernisation in the procedure for the granting and revoking of licenses to companies operating within the above-mentioned sectors.

Currently, a number of sectoral laws empower the Minister of Finance to grant or withdraw a licence to a regulated entity. The main purpose of the Draft Law is to transfer that power to the CSSF or to the *Commissariat aux Assurances* as applicable, and to do so by amending the various sectoral laws.

WHY IS THIS CHANGE IMPORTANT?

The Draft Law, if adopted, shall harmonise the approach regarding the granting of licenses; pursuant to the current legislation, the CSSF is already empowered to grant and withdraw licenses to investment funds and their managers as well as to statutory auditors/audit firms. Therefore, it is only logical that this more streamlined procedure be rolled out to other market players such as payment service providers, electronic money institutions and securitisation companies, to name a few.

This Draft Law does not come as a surprise. Indeed, this is consistent with the general trend in European Union law, to delegate licensing powers to the national competent authorities in charge of prudential supervision. This is undoubtedly the right step for Luxembourg, a leading financial centre, to remain at the forefront of legal and regulatory developments.

CSSF'S NEW DIGITAL PORTAL FOR PROSPECTUS APPROVAL

On 1 March 2021, the CSSF launched its new digital portal for the submission of prospectuses and related supplements and notification requests - the "**e-Prospectus**".

BACKGROUND

The CSSF, as the national competent authority for the examination of approval and notification requests within the framework 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 of the Law of 16 July 2019 on prospectuses for securities (the "**Prospectus Law**"), had previously put in place a mechanism for the submission of prospectuses and relating documents, as well as notification requests, via email, using specific forms available on the CSSF website.

KEY CHANGES

The e-Prospectus replaces the pre-existing procedure of submission via email by an interactive digital portal. This is another step forward for the CSSF in its journey towards digitalisation. In preparation for the launch of the e-Prospectus, the CSSF issued Circular 21/766 (currently only available in French), which updates Circular CSSF 19/724 on technical specifications regarding the submission to the CSSF of documents within the framework of the Prospectus Regulation and the Prospectus Law) (the "**Prospectus Circular**"), by explaining the new process.

Going forward, applications for approval of prospectuses pursuant to the Prospectus Regulation and Prospectus Law must be made via the e-Prospectus. This also applies to supplements to those prospectuses and notification requests (for passporting to other EU jurisdictions). On the other hand, the process for filing final terms under a base prospectus has not changed. Final terms shall continue to be filed by email using the form available here.

ACCESS TO THE "E-PROSPECTUS"

In order to access and use the e-Prospectus, users must first create an e-Prospectus account. To create an e-Prospectus account, users will need a LuxTrust authentication certificate issued by the Luxembourg certification authority, LuxTrust. A LuxTrust certificate guarantees via different products (such as a token or mobile app) the identity and authentication of the user. Each certificate will be linked to a specific e-Prospectus account and will be valid for three years. Most Luxembourg residents are already in possession of a LuxTrust certificate as one is generally required in order to access the online banking portals of Luxembourg banks as well as for other online administrative matters (e.g. filing of tax returns). Non-residents can also obtain a LuxTrust certificate and further information is available here.

WHO IS CONCERNED

Anyone intending to submit applications for prospectus approval, to add documentation connected with such applicable, to see the CSSF feedback and to follow the progress of their file, will need an e-Prospectus account and therefore a LuxTrust certificate.

It follows that the new regime is most relevant for depositors/filing agents who will need to take immediate action to set up their e-Prospectus account. Issuers whose applications are filed via a law firm or a third-party depositor may also wish to create an e-Prospectus account so that they can access the application which has been filed on their request.

Importantly, each individual person needs to have his/her own e-Prospectus account and therefore, his/her own LuxTrust certificate. However, to facilitate working with other team members on a file, it is feasible to enter the email addresses of others in the contact data list; in doing so, team members have access to the file (using their own e-Prospectus account) and receive CSSF emails relating to the file.

Further guidance from the CSSF on the practical aspects of the e-Prospectus is available here.

LUXEMBOURG GREEN EXCHANGE | NEW CLIMATE-ALIGNED ISSUERS SECTION

On 25 February 2021, the Luxembourg Stock Exchange (the "**LuxSE**") announced the launch of a brand-new section to the Luxembourg Green Exchange platform, exclusively dedicated to so-called Climate-Aligned Issuers ("**CAIs**" and the section dedicated to CAIs, the "**CAIs Section**"). For this project, the Luxembourg Green Exchange (the "**LGX**") teamed up with the Climate Bonds Initiative, an international not-for-profit organisation working to mobilise the USD 100 trillion bond market for climate actions with the aim of developing a large and liquid climate bonds market.

WHICH ISSUERS' BONDS ARE ELIGIBLE TO BE DISPLAYED ON THE NEW SECTION OF LGX?

Issuers wishing to be displayed on the new CAIs section must first list their debt securities on one of the Luxembourg Stock Exchange's listing venues: the EU-regulated Bourse de Luxembourg (BdL) market, the exchange-regulated Euro MTF or the Securities Official List (SOL). In addition, issuers wishing to join LGX must either: (i) declare the sustainable nature of the instrument (green, social, sustainable, or sustainability-linked) as well as the relevant standards or principles they are aligned with or (ii) be recognised as "Climate-Aligned Issuers" whose securities, while unlabelled, finance climate change solutions. However, no additional fee or specific form is required, as the LGX will evaluate the bond's eligibility based on the documents already provided during the listing process.

CAIs are identified based on the "Climate-Aligned Data Set", a methodology developed by the Climate Bonds Initiative over time, consisting of two steps: i) the issuer-screening phase and ii) the identification of climate-aligned bonds.

In the first phase, issuers are divided in two categories based on the percentage of their revenue derived from climate-aligned activities: Issuers that derive **at least 75% or at least 95%** of their revenues from low-carbon activities qualify as **strongly or fully aligned issuers**, respectively. Issuers in both categories are classified as *climate-aligned issuers*. Only companies (or their subsidiaries and/or financing arms) with outstanding debt are eligible for inclusion, whether public or private.

During the second step, it is assessed whether debt instruments issued by CAIs shall be defined as **climate-aligned bonds**, which are bonds that finance and/ or refinance operating activities that have been identified as climate-aligned. Currently, the Climate Bonds Initiative defines eight areas of climate-aligned activities: renewable energy, low-carbon transport, smart buildings, water, waste, sustainable land use & agriculture, climate adaptation and Information and Communication Technology (ICT).

The issuer's level of alignment with climate activities is applied to its outstanding debt in the following way:

- For fully aligned issuers: 100% of their outstanding debt is considered climate-aligned.
- For strongly aligned issuers: a proxy is used to determine the percentage of climate aligned bonds; this is based on a pro-rata amount, which reflects a company's climate alignment. For example, if 80% of a company's revenue is climate-aligned, then 80% of its outstanding bonds are considered climate-aligned. The remaining 20% of the company's outstanding debt is not considered as climate-aligned.
- Only bonds issued on or after 1 January 2005 (date of entry into force of the Kyoto Protocol) are included.

NEW ENVIRONMENTALLY FRIENDLY INVEST-MENT OPPORTUNITIES

The Climate Bonds-LGX Climate-Aligned Issuers platform offers investors an additional range in the climate-aligned investment universe by connecting investors and capital with companies operating low carbon business models. Bonds issued by CAIs are not necessarily labelled as green, social or sustainability bonds, but they are nevertheless considered sustainable, climate-aligned investment opportunities through their positive environmental impact, as they finance climate-aligned activities. In that way, they constitute a necessary supplement to the labelled green, social or sustainability bonds already displayed in LGX, with a view to cater for investors' demands and achieve global climate goals as set out in the Paris Agreement and the United Nations Sustainable Development Goals.

Currently, the Climate Bonds-LGX Climate-Aligned Issuers section already includes more than 20 issuers, the full list of which is available here.

ESMA'S PROPOSED CHANGES TO THE TRANSPARENCY DIRECTIVE IN LIGHT OF WIRECARD CASE

On 3 March 2021, ESMA issued a letter addressed to the European Commission proposing modifications to Directive 2004/109/EC of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (the "**Transparency Directive**") in light of the Wirecard case.

BACKGROUND

Following the collapse of Wirecard, the German Fintech giant formerly included in the DAX 30 index, ESMA was invited by the European Commission to carry out an analysis of the events and of the supervisory response of the German authorities. The insights gained through such analysis are reflected in the suggestions to the European Commission on improvements to the Transparency Directive relating to enforcement of financial information published by issuers in accordance with that directive. In ESMA's view, the Wirecard case displayed the importance of timely and effective enforcement of financial information with a view to ensure investor protection and confidence in capital markets.

PROPOSED CHANGES

ESMA recommends modifications to the Transparency Directive to meet four aims:

- **Enhance cooperation between national competent authorities and other authorities** by eliminating confidentiality impediments that prevent an effective and efficient exchange of information and by developing Regulatory Technical Standards on cooperation and exchange of information.
- **Enhance coordination of enforcement of financial information at national level** by requiring that national transposition measures clarify responsibilities, reporting obligations and roles when implementing delegation or designation models concerning enforcement of financial information. In addition, by including regular review clauses to ensure that such delegation and designation models are fit for purpose.
- **Strengthen independence of the national competent authorities in charge of enforcement of financial information** by not permitting the outsourcing of regular examinations of financial information to audit firms and by ensuring independence of competent authorities and/or delegated entities and their staff from market participants and Governments.
- **Strengthen harmonised supervision of information across the EU** by *inter alia* (i) ensuring that all accounting enforcers, including the delegated entities and designated authorities, have the binding powers to request information and to require corrective information; (ii) supplementing the powers of national competent authorities to (amongst others) require an independent second audit or forensic examination and carry out joint on-site inspections or investigations; (iii) reinforcing ESMA's role in financial reporting; and (iv) strengthening consistent application and enforcement of disclosures related to Alternative Performance Measures.

Furthermore, ESMA highlights the importance of enhancing coordination, cooperation and communication between audit committees and financial reporting enforcers and applauds the European Commission's initiatives to enhance EU requirements in the areas of corporate governance and audit, focusing on strengthening and clarifying the role of audit committees and their supervision and on enhancing the assurance on, and disclosure requirements regarding, effectiveness of issuers' internal controls. Finally, ESMA underlines the need for sufficient and professionally skilled personnel to carry out the task of supervision of information published by issuers in accordance with the Transparency Directive.

EU CROWDFUNDING REGULATION: LATEST DEVELOPMENTS

BACKGROUND

Regulation (EU) 2020/1503 of 7 October 2020 on the European crowdfunding service providers for business (the "**Crowdfunding Regulation**"), shall apply from 10 November 2021. The Crowdfunding Regulation aims to establish a brand new and safe legal framework for the crowdfunding activity across the European Union by, *inter alia*;

- establishing the need of an authorisation for crowdfunding services providers;
- establishing the possibility for crowdfunding service providers to offer crowdfunding services under the European passport mechanism; and
- introducing investor protection measures.

The Crowdfunding Regulation will apply to lending-based crowdfunding (the so-called peer-to-peer lending) and investment-based crowdfunding (where individuals invest in unlisted shares (or debt securities) issued by businesses).

ESMA'S Q&A ON THE CROWDFUNDING REGULATION

On 25 February 2021, ESMA published Questions and Answers ("**Q&A**") on the Crowdfunding Regulation. So far these Q&A only focus on the use of a special purpose vehicle for the provision of crowdfunding services where an "**SPV**" is defined in the regulation as *an entity created solely for, or which solely serves the purpose of, a securitisation within the meaning of point (2) of Article 1 of Regulation (EU) 1075/2013 of the European Central Bank*.

Noting that the purpose of the Crowdfunding Regulation is to facilitate direct investment and to avoid creating regulatory arbitrage opportunities for financial intermediaries, the use of legal structures, including any SPV, that interpose between the crowdfunding project and investors should therefore be strictly regulated. According to the Crowdfunding Regulation, the use of an SPV should be permitted only where it is strictly necessary in order to enable investors to acquire an interest in, e.g., an illiquid or indivisible asset through issuance of transferable securities by the relevant SPV.

The Q&A provides clarity on the following topics regarding the use of SPVs:

- the circumstances and conditions in which an SPV can be created for the provision of crowdfunding services;
- the types of instruments that can be offered to investors via an SPV;
- whether an SPV can give exposure to more than one underlying asset;
- the type of underlying asset an SPV can give exposure to; and
- when an asset should be deemed to be illiquid or indivisible within the meaning of the Crowdfunding Regulation.

ESMA'S CONSULTATION ON THE CROWDFUNDING REGULATION

This Q&A is only one part of ESMA's role in progressing the legal and regulatory framework for crowdfunding. On 26 February 2021, ESMA launched a consultation on the draft technical standards under the Crowdfunding Regulation, which seeks input on the following issues:-

- Complaint handling;
- Conflicts of interest;
- Business continuity plan;
- Application for *authorisation*;
- Information to client on default rate of projects;
- Entry knowledge test and simulation of the ability to bear loss;
- Key investment information sheet;
- Reporting by crowdfunding service providers to national competent authorities ("**NCAs**") (and NCAs to ESMA); and

Publication of national provisions concerning marketing requirements.

As the Crowdfunding Regulation will only be applicable from 10 November 2021 onwards, it is fair to expect that, by then, market participants in the EU will be able to benefit from a robust regulatory framework for crowdfunding.

AMENDMENT TO THE LUXEMBOURG COMPANY LAW TO CLARIFY FINANCIAL ASSISTANCE RULES

PURPOSE OF THE AMENDMENT

The draft law 7791, submitted to the Luxembourg Parliament (*Chambre des Députés*) on 16 March 2021 (“**Draft Law**”) aims to clarify whether the rules regarding financial assistance contained in the Luxembourg law of 10 August 1915 relating to commercial companies, as amended (“**LSC**”) shall apply to private limited liability companies (“**SARL**”).

CURRENT SITUATIONS

Article 430-19 of the LSC currently includes a prohibition for a company to “*directly or indirectly, advance funds or make loans, or provide security with a view to the acquisition of its shares by a third party*” except under certain restrictive conditions.

This article applies to public limited liability companies (“**SA**”) and corporate partnerships limited by shares (“**SCA**”) whereas no similar provisions have been provided in the LSC regarding the SARL. However, Article 1500-7 (2) of the LSC providing for criminal sanctions in case of violation of the provisions regarding financial assistance refers not only to the company’s shares (*actions*) of an SA but also to the corporate units (*parts sociales*) of an SARL.

PRACTICAL IMPLICATIONS

Such reference to corporate units (*parts sociales*) in Article 1500-7 of the LSC has given rise to confusion and created legal uncertainty as to the possible applicability or not of the financial assistance rules to the SARL. Indeed, some practitioners have argued that such rules were not applicable to SARL in the absence of any specific provisions in the LSC and bearing in mind that criminal sanctions must always be interpreted restrictively, while others favoured a more conservative approach arguing that the financial assistance was prohibited for the SARL on the basis of criminal provisions of Article 1500-7 (2) of the LSC.

The question is not neutral in terms of practical implications. If financial assistance rules are indeed applicable to the SARL, this would mean that no SARL could grant loans or secure the acquisition of its shares by a third party without complying with the strict conditions laid down in article 430-19 of the LSC. Otherwise, the management of such SARL may be criminally liable for non-compliance with these rules.

CLARIFICATION PROVIDED IN THE DRAFT LAW

The Draft Law aims to put an end to the on-going legal debate triggering uncertainty on the applicability of the financial rules to the SARL.

In the explanatory statement and commentary to the Draft Law, it is mentioned that the reference in Article 1500-7 (2) of the LSC to corporate units (*parts sociales)* is a mere error, which shall be rectified. In fact, during the reform of the LSC in 2016 it was initially proposed to extend the financial assistance rules to SARL, which is why the reference to corporate units (*parts sociales*) was included in the text of Article 1500-7 (2).

Finally, although such proposal of extension to SARL of financial assistance rules has been rejected, the authors of the law omitted to delete the corresponding reference in Article 1500-7 (2) of the LSC. Therefore, it is proposed to amend Article 1500-7 of the LSC and delete any reference to corporate units (*parts sociales*).

NEXT STEPS

If adopted by the Luxembourg Parliament (*Chambre des Députés*), the proposed amendment will finally provide the much needed answer to the question of applicability of financial assistance rules to the SARL. In the meantime, legal practitioners will likely already rely on the Draft Law as sufficient grounds for concluding that financial assistance provisions are not applicable to the SARL.

COVID-19 | EXTENSION OF EXCEPTIONAL MEASURES FOR HOLDING MEETINGS

CONTEXT

Measures relating to holding of meetings and other legal persons, in the context of the pandemic of the Covid-19, have been initially introduced by the Grand-Ducal Regulation of 20 March 2020. These measures were extended several times; by the law of 20 June 2020, the law of 23 September 2020 and most recently by the law of 25 November 2020 (the "**Corporate COVID Laws**").

As it stands, these legal measures shall apply until 30 June 2021.

LEGISLATIVE FRAMEWORK

The holding of general meetings of shareholders and of meetings of the other governing organs of Luxembourg companies are predominantly governed by the law of 10 August 1915 concerning commercial companies, as amended (the "**Luxembourg Company Law**").

While the Luxembourg Company Law and the articles of many Luxembourg companies allowed some degree of remote participation in meetings, it was *de rigueur* before the current health crisis, whether to ensure the proper functioning of companies (i.e. to comply with the applicable legal requirements) or merely in the interests of good corporate governance, that general meetings and meetings of other governing bodies were generally held in a physical manner.

The COVID-19 pandemic environment required however that exceptional measures be formally enacted in legislation regarding the holding of meetings without physical presence. Indeed, a company that would hold a general meeting by videoconference or alternative means, or even written resolutions, when its articles of association did not provide for such possibilities, would potentially expose its directors or officers to liability. The legislative intervention through the Corporate COVID Laws was essential to ensure legal certainty.

THE LAW OF 25 NOVEMBER 2020 AND GENERAL MEETINGS

With the adoption of the law of 25 November 2020, the possibility for companies to hold a general meeting in a non-physical manner, even in the absence of such provisions in the articles of association, is extended until 30 June 2021. In that regard, companies may require their shareholders, members or any other persons participating in the meeting to attend the meeting and exercise their rights; (1) by remote voting (in writing or in electronic form) provided that the full text of the resolutions/decisions to be taken has been duly transmitted to them; (2) by videoconference or by any other means of telecommunication which allows their identification; or (3) through a proxyholder nominated by the Company. It is important to note that, if a shareholder/member appoints a proxyholder which is different from the one nominated by the Company, such proxyholder may only participate in the general meeting through one of the means described under points (1) to (3) above.

Given the usual legal provisions governing general meetings, it was of paramount importance to maintain the legal fiction by virtue of which each shareholder participating in the general meeting as described above shall be deemed to be present for the purpose of calculating the quorum and the majority at that meeting.

The above described legal measures also apply to general meetings of bondholders.

THE LAW OF 25 NOVEMBER 2020 AND MANAGEMENT BODIES

Following the same logic, and without prejudice to the fact that the articles of association are not required to expressly provide for the possibility, boards of directors and other corporate governance bodies may also duly hold meetings without any physical presence, in a similar manner as provided for general meetings.

Pursuant to the law of 25 November 2020, members of such corporate organs who participate in meetings through the above-mentioned exceptional means shall be deemed present for calculating the quorum and the majority.

Developments in the on-going pandemic environment will dictate whether the exceptional legal measures for non-physical meetings will have to be extended even further, after 30 June 2021.

BREXIT | DEADLINE ON MARKETING OF UK UCITS IN LUXEMBOURG

END OF TRANSITIONAL PERIOD FOR THE MARKETING OF UK UCITS PUSHED BACK TO 31JULY 2021

On 9 February 2021, the Luxembourg Parliament (*Chambre des Deputés*) adopted the draft law No. 7736 (the "**Draft Law**"). The Draft Law amends, *inter alia*, the law of 17 December 2010 relating to undertakings for collective investment (the "**UCI Law**") by pushing the deadline of the transitional arrangements between Luxembourg and the UK for marketing UK UCITS to retail investors in Luxembourg to 31 July 2021.

UK MANCO VS NON UK MANCO

This marketing extension only applies to UK UCITS managed by a UK authorized management company, which were already marketed in Luxembourg as of 31 January 2021 on the basis of Article 100, paragraph 1 of the UCI Law.

UK UCITS managed by non-UK management companies do not qualify for this extension unless the management company is an Alternative Investment Fund Manager (AIFM) pursuant to Directive 2011/61/EU. If such is the case, those UCIs can be marketed based on Article 46 of the Law of 12 July 2013 on AIFM.

Please see our previous article on the Draft Law for further information.

CSSF CIRCULAR 02/77 | AMENDMENTS TO NOTIFICATION FORM

BACKGROUND

On 3 January 2017, the CSSF introduced by means of Press Release 17/01 a notification form to be used for the transmission of NAV calculation errors or non-compliance with investment rules in accordance with Circular CSSF 02/77 on the protection of investors in case of NAV calculation error and correction of the consequences resulting from non-compliance with the investment rules applicable to undertakings for collective investment ("**CSSF Circular 02/77**").

The purpose of the Excel-based notification form was to collect all the information necessary for the CSSF in the context of its supervisory work concerning NAV calculation errors or non-compliance with investment rules.

INTRODUCTION OF A REVISED VERSION OF THE NOTIFICATION FORM

On 18 February 2021, the CSSF introduced a revised form of the notification with the aim of facilitating the filling of the form and to further streamline its content.

The changes brought to the form concern notably the introduction of additional drop-down menus (*e.g.* categorization of investment breaches), the removal of some data fields (*e.g.* share class specific information) or the addition of some data fields (notably on corrective measures implemented at the level of the fund for avoiding the re-occurrence of similar incidents in the future).

These changes will also allow the CSSF to improve the operational processing of the information contained in the notification form.

NOTIFICATION TIMEFRAME

CSSF Circular 02/77 specifies that the CSSF should immediately be advised of the occurrence of a NAV calculation error or non-compliance with investment rules and that it should also be informed in that context about the related remedial action plan.

As a consequence, the CSSF expects that the organization of a UCI provides for a timely submission of the completed notification (*i.e.* in principle within 4 to 8 weeks following the detection of an incident with time-consuming calculations and within 4 to 6 weeks following the detection of an incident with less-time consuming calculations).

COMPLETENESS OF THE NOTIFICATION FORM AND PRE-NOTIFICATION

The CSSF expects notifying entities to fill in all the requested information as foreseen by the applicable data fields (including the information on the payment date of compensation) with the exception of the pre-notification forms.

Pre-notifications forms will only be accepted on an exceptional basis, in cases where it is justified that the calculations and compensation processes necessary to remediate and correct NAV calculation errors or non-compliances of investment rules are particularly complex and time-consuming. In such exceptional circumstances where the above timeline cannot be met, the CSSF accepts that the notifying entity will first submit (within 4 to 8 weeks) a pre-notification containing all information available at that time, before submitting, in a next and final step, the complete notification form with all required information.

CONCISE INFORMATION

While the CSSF insisted on the fact that notification forms shall provide concise information and that notification forms that have been modified by adding, deleting or changing the content of the template will not be accepted, the CSSF allows entities (given the limitations in terms of maximum number of characters of the Excel file), to provide further explanations/ clarifications by means of a separate document. This document should be duly attached to the email used for the submission of the notification form and shall be named in a clear and precise way and must be attached to the notification form in all cases.

The revised notification form should be used with immediate effect and be sent electronically to opc.prud.sp@cssf.lu.

All explanations on the notification form can be found here.

CSSF DIGITALISES AML/CFT MARKET ENTRY FORM

SUBMISSION OF AML/CFT MARKET ENTRY FORM VIA EDESK PORTAL AS FROM 15 FEBRUARY 2021

On 8 February 2021, the CSSF issued a communication on the digitalisation of the AML/CFT Market Entry Form (the "**Form**"), which was previously to be submitted pursuant to a dedicated Excel form.

As from 15 February 2021, the Form for investment funds (regulated or authorised) and investment fund managers must be filled out and submitted through the CSSF's eDesk Portal:

- for an investment fund, upon authorisation and adding sub-funds;
- for an investment fund manager, upon authorisation or registration, license extension and modification of qualified shareholding.

WHO SHALL SUBMIT THE FORM?

The AML/CFT Market Entry Form must in principle be initiated and submitted by:

- the compliance officer in charge of the control of compliance with the professional obligations ("*responsable du contrôle du respect des obligations professionnelles*" ("**RC**")) of the investment fund or respectively the investment fund manager; or
- the person responsible for compliance with the professional obligations ("*responsable du respect des obligations professionnelles*" ("**RR**")) of the investment fund or respectively the investment fund manager.

While the RC or RR remains responsible for the adequate completion of the form, the completion of the form can also be assigned within eDesk Portal to another employee of the entity or third party.

All information related to the creation of user account(s) is detailed in the eDesk Portal homepage.

COMMON SUPERVISORY ACTION ON UCITS FEES AND COSTS

LAUNCH OF A COMMON SUPERVISORY ACTION ON UCITS COST PROVISION AND PERFORMANCE

On 6 January 2021, ESMA launched a Common Supervisory Action (CSA) with the National Competent authorities on the supervision of costs and fees of UCITS in the European Union (EU) taking into account the ESMA supervisory briefing on the supervision of costs published in June 2020.

The CSA will assess supervised entities' compliance with the cost related provisions in the UCITS framework and the obligation of not charging investors with undue costs. These obligations are part of the Union Strategic Supervisory Priorities for NCA's by ESMA.

Furthermore, the CSA will cover entities employing Efficient Portfolio Management techniques on their adherence to ESMA Guidelines on ETFs and other UCITS issues.

The joint effort will be carried out throughout 2021 to gather and share knowledge and experience, thus ensuring greater supervisory convergence across the EU. The NCAs are required to provide their report to ESMA by 31 December 2021.

For this purpose, the CSSF, has prepared a questionnaire for UCITS management companies ("**ManCos**").The questionnaire will be sent to a sample of relevant ManCos directly by email and should be completed in respect of all managed UCITS funds and sub-funds.

As from the date of availability, the qualifying entities will have one month to respond to the questions. The deadline for ManCos applying Efficient Portfolio Management Techniques will be six weeks.

SIMPLIFICATION OF PROCESS FOR APPROVAL OF A NEW SUB-FUND

In its press release 21/05 on 23 February 2021, the CSSF communicated the new procedure for approval of a new sub-fund under existing fund structures. The process introduces the use of a single standardised questionnaire including information related to the Benchmark Regulation (“**BMR**”), the European Market Infrastructure Regulation (“**EMIR**”) and the Sustainable Finance Disclosure Regulation (“**SFDR**”). This new procedure replaces the previous one requiring the use of four questionnaires.

As from 13 March 2021, the request for approval can exclusively be transmitted via the new single standardised questionnaire as the former procedure ceases to apply.

The process is applicable to Undertakings Collective Investments (“**UCIs**”), Specialised Investment Funds (“**SIFs**”) and *Sociétés d’Investissement en Capital à Risque* (“**SICARs**”).

SUSTAINABILITY UPDATE

SFDR FINAL REPORT ON DRAFT RTS

On 4 February 2021, the European Supervisory Authorities (ESAs) published their long awaited final report on draft regulatory technical standards (hereinafter, the "**Draft RTS**") with regard to the content, methodologies and presentation of sustainability-related disclosures under Regulation (EU) 2019/2088 (hereinafter Sustainable Finance Disclosure Regulation "**SFDR**").

Such Draft RTS aim to strengthen protection for end-investors by improving disclosures to end-investors on the principal adverse impacts of investment decisions and on the sustainability features of a wide range of financial products. This will guide financial market participants and financial advisers in responding to the increasing investor demand for sustainable products and to reduce the risk of greenwashing. For more details on the SFDR final report, please refer to BSP Sustainable Finance Newsflash Series number 10

JOINT ESA SUPERVISORY STATEMENT ON THE APPLICATION OF THE SFDR

On 25 February 2021, the three European Supervisory Authorities (EBA, EIOPA and ESMA – the "ESAs") have published a joint supervisory statement on the effective and consistent application and national supervision of Regulation 2019/2088 on sustainability-related disclosures in the financial services sector (SFDR).

The overall objective of this statement is to achieve an effective and consistent application and national supervision of the SFDR, promoting a level playing field and the protection of investors. For more details on ESA supervisory statement on the application of the SFDR please refer to BSP Sustainable Finance Newsflash Series number 11.

ESMA PROPOSES RULES FOR TAXONOMY-ALIGNMENT OF NON-FINANCIAL UNDERTAKINGS AND ASSET MANAGERS

On 1 March 2021, ESMA published its final report on advice under article 8 of the taxonomy regulation (please refer to BSP Sustainable Newsflash Series number 7), which covers the information to be provided by non-financial undertakings and asset managers to comply with their disclosure obligations under the Non-Financial Reporting Directive (NFRD).

ESMA's advice sets out in concrete terms how to comply with the disclosure obligations under the taxonomy framework, balancing investors' demand for high quality information and avoiding undue burdens on market participants. For more details on ESMA's proposed rules for taxonomy-alignment of non-financial undertakings and asset managers please refer to BSP Sustainable Finance Newsflash Series number 12.

DRAFT LAW TO IMPLEMENT SFDR AND PEPP REGULATIONS

Draft Law 7774 amends the law of 16 July 2019 implementing the EuVECA, EuSEF, MMF, ELTIF and STS securitization regulations in Luxembourg law (the "**2016 Law")** in order to implement, on the one hand Regulation (EU) 2019/1238 on a pan-European Personal Pension Product ("**PEPP**") (hereinafter, "**Regulation (EU) 2019/1238**"), and on the other hand Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector (hereinafter, "**Regulation (EU) 2019/2088**") and Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (hereinafter, "**Regulation (EU) 2020/852**").

Regulation (EU) 2019/1238 aims to establish a more harmonized European market for individual retirement savings products through a new European retirement savings product called "PEPP". The PEPP is a regulated non-compulsory individual supplementary pension product that is characterized by high portability within the European Union.

Regulation (EU) 2019/2088 establishes harmonized rules for financial market participants and financial advisors on transparency with respect to the integration of sustainability risks and the consideration of negative sustainability impacts in their processes, and provides rules on the provision of sustainability information with respect to financial products.

Regulation (EU) 2020/852 sets out criteria for determining whether an economic activity is environmentally sustainable, for the purpose of establishing the environmental sustainability of an investment.

New chapters have been inserted into the 2016 Law in order to set out the attribution of powers between the CSSF and the CAA (*Commissariat aux Assurances*) and to set out the administrative sanctions for each of the above mentioned regulations.

ELTIF | ESMA PROPOSES IMPROVEMENTS

On 3 February 2021, ESMA sent a letter to the European Commission concerning "*Review of the Regulation (EU) 2015/760 on European long term investment funds*" (the "**ELTIFs**" and the "**ELTIF Regulation**" or the "**Regulation**").

The letter fits into the context of the impending review of the ELTIF Regulation; it responds to the Commission's letter to ESMA dated 27 October 2020 on the functioning of the ELTIF framework and aims at meeting the requests for input from ESMA as per Article 37 of the Regulation itself.

After consulting ESMA and stakeholders, the Commission will submit to the European Parliament and Council a report assessing the functioning of ELTIFs in the context of the Capital Market Union and proposing a review of the ELTIF Regulation.

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The letter contains two Annexes. Annex I provides a quick overview on the ELTIF market, based on ESMA data.

This overview shows a low number of ELTIFs domiciled in Europe (25 - of which 8 not yet marketed - as of the date the survey was conducted) but an increase in the trend of the authorisation requests.

Annex II focuses on some areas that could be appropriate to improve in order to better address market and industry expectations. In ESMA's view the update of the Regulation should take into account:

- the main focus of ELTIFs legal framework, that was to boost European long-term investments in the real economy, such as transport infrastructure, sustainable energy generation or distribution, social infrastructure (housing or hospitals), the roll-out of new technologies and systems that reduce use of resources and energy, or the further growth of SMEs;
- the need to achieve the right balance between both professional and retail investors, by making the investments more flexible on the one hand and ensuring adequate standards of protection for retail investors on the other;
- the role that ELTIFs could play post pandemic, as vehicles to accelerate recovery by investing in the real economy.

The areas ESMA identifies to be improved are as follows:

1. The authorisation process; in particular ESMA suggests removing the obligation for AIFMs to receive a specific approval to manage an ELTIF;
2. Eligible assets and portfolio composition; ESMA makes a variety of proposals, in general aimed at broadening the investment universe of the ELTIFs, including allowing an ELTIF invest in other funds that are not ELTIFs, changing the risk diversification requirements and allowing Investment in non-majority owned investments;
3. Functioning of the ELTIFs - redemption rights and disposal of the assets; in particular, ESMA highlights that there might be merit in fostering mechanisms to allow the investors to exit before the end of the life cycle of the fund;
4. Disclosure to investors - prospectus and cost disclosures; ESMA is of the view there might be merit in reducing the mandatory information to be included in the prospectus. Moreover ESMA proposes rewording options so as to avoid potential uncertainties on the cost disclosures between the ELTIF Regulation and PRIIPS Delegated Act;
5. Local physical presence; ESMA proposes to remove the requirement to put in place facilities, in each Member State where the ELTIF intends to market its units/shares to retail investors;
6. Other areas highlighted for possible change by ESMA included: considering the merit of creating ELTIFs specifically dedicated to professional investors, the creation of a favourable tax treatment across the EU and the standardisation of the eligibility criteria for investors in order to be consistent with the EUVECA and EUSEF Regulations.

CROSS-BORDER FUNDS DISTRIBUTION | ESMA FINAL REPORT AND DRAFT ITS

On 1 February 2021, ESMA published its final report ("**Report**") and draft of the implementing technical standards ("**ITS**") under Regulation EU/2019/1156 on the facilitation of cross-border distribution of collective investment undertakings. The Report follows a consultation paper that ESMA published in March 2020 on the proposed draft ITS relating to the publications to be made by national competent authorities ("**NCAs**") on their websites.

The draft ITS specify standard forms, templates and procedures for the publication of information by NCAs and for NCAs to notify ESMA regarding national marketing requirements, regulatory fees and charges, and funds distributed on a cross-border basis:

PUBLICATION OF MARKETING REQUIREMENTS ON NCAS' WEBSITES

From 2 August 2021, NCAs will be required to publish and maintain, on their websites, up-to-date and complete information on the applicable national laws, regulations, and administrative provisions governing the marketing requirements for AIFs and UCITS, and summaries thereof.

This information shall be published and kept up-to-date and complete on a single dedicated webpage of the NCA's website or on separate webpages relating to UCITS and AIFs as indicated in Annex I (*Template for the publication of national provisions governing marketing requirements for AIFs and UCITS*) and Annex II (*Template for the publication of the summaries of national provisions governing marketing requirements for AIFs and UCITS*) of the Report.

PUBLICATION OF REGULATORY FEES AND CHARGES ON NCAS' WEBSITES

NCAs are required to publish and maintain an up-to-date list, on their website, of the fees and charges they levy for carrying out their duties regarding the cross-border activities of AIFMs and UCITS management companies or, if applicable, the calculation methodologies for such fees or charges. The publication of regulatory fees will need to follow a specific template as indicated in Annex III of the Report.

ESMA DATABASE LISTING FUNDS MARKETED ON A CROSS-BORDER BASIS

By February 2022, ESMA will be required to publish a central database on the cross-border marketing of AIFs and UCITS on its website, listing all AIFs and UCITS that are marketed in a host Member State, their management company, and the Member States in which they are marketed.

NCAs will have to report specific information to ESMA (as indicated in Annex VI of the Report) on a quarterly basis and will have to comply with this requirement as from 2 February 2022.

ESMA has submitted the draft ITS to the European Commission. From the date of submission, the European Commission will have three months to decide whether to adopt the ITS, or to extend such assessment period for another month.

CLARIFICATION OF THE VAT TREATMENT ON CARS LEASED TO NON-RESIDENT EMPLOYEES

THE ECJ DECISION (C-288/19) ON THE PROVISION OF VEHICLES BY EMPLOYERS TO EMPLOYEES RESIDING ABROAD

On 20 January 2021, the European Court of Justice ("**ECJ**") ruled on the place of taxation of the provision of company vehicles to employees residing in a Member State other than that of their employer.

BACKGROUND

In the case at hand, a Luxembourg fund management company (the "**Company**") made company vehicles available to two German resident employees.

These vehicles were used both for **professional and private** purposes. The cars were made available under different situations: (i) one vehicle was made available **free of charge**, while (ii) the other was made available in consideration for an **annual contribution** by the employee deducted from the employee's remuneration.

The Company was registered for VAT in Luxembourg, **but did not benefit from any right of deduction** (in application of the VAT simplified regime). In November 2014, the Company also applied to be registered for VAT in Germany, and subsequently filed German VAT returns. These statements were accepted by the authorities, but the Company filed a claim against the tax assessments. Following the rejection of this claim by the administration, the Company filed an appeal with the Land Finance Court of Sarre, which **submitted to the ECJ** the question of whether the VAT Directive's concept of "hiring of a means of transport to a non-taxable person" should also cover the provision of a company car that forms part of a taxable person's business assets to their staff. The outcome of this dispute hangs on the interpretation of **Article 56 (2) of the VAT Directive** (i.e., Article 17.2.7°. b) of the Luxembourg VAT law).

ECJ DECISION

The ECJ distinguished both situations and took a different approach depending on whether the employee was in one or the other situation:

I. Vehicle made available free of charge

The provision of a vehicle to an employee **free of charge** is **not subject to VAT** when the employer did not deduct the input VAT it had paid on the vehicle. On the contrary, if input VAT has been deducted on the vehicle, then the employer must recognize and apply VAT on the private use of the vehicle on basis of Article 26 of the VAT Directive. In such a case, VAT is **applicable in the country of residence of the employer**.

II. Vehicle made available in consideration of a contribution

Further, the ECJ considered in particular that **when the employee pays a consideration** for the use of a company vehicle, the transaction is to be considered **as a normal supply of services, taking the form of a hiring of means of transport.** Therefore, the provision of a company vehicle might be taxable for VAT at the **place of residence of the employee** (in this case in Germany), under the following conditions:

- the provision of the vehicle must constitute a provision of services for **consideration within the meaning of the VAT Directive**, which is the case in particular **when the employee devotes part of his remuneration to it in return**;
- the employee **must always have the right** to use the company vehicle for private purposes and with the prerogative to **exclude other people** from it;
- the company vehicle must be made available to the employee for a period **exceeding 30 days**.

The Court also clarified that the fact that the Luxembourg company does not own the vehicle, but that it was able to hire it out because it had it under a leasing contract, **does not preclude** the application of Article 56 of the Directive.

THE LUXEMBOURG ANGLE - CIRCULAR 807 OF THE LUXEMBOURG VAT AUTHORITIES

In reaction to the ECJ's decision, the Luxembourg VAT authorities issued Circular 807 ("**the Circular**"), which **merely summarises the content** of the ECJ's decision but does not provide additional guidance. It informs Luxembourg employers that they may have

VAT obligations in countries where their employees reside that could lead to paying VAT abroad. The potential impact, if any, to cars provided to **Luxembourg residents** is not treated either.

CONCLUSION

It is to be expected that **neighbouring countries** will be relying on the ECJ's decision to review in detail the situation of Luxembourg companies employing non-resident employees, with a view to ascertaining whether reporting and VAT collection obligations could arise.

At this stage it is still difficult to quantify the impact of this decision, as on the one hand, additional VAT compliance obligations and costs could arise for the employers, while on the other hand new VAT deduction possibilities could arise, so that a case-by-case analysis of the taxpayers position should take place. It might also be worthwhile to review existing working contracts and car leasing agreements.

THE VALUE OF THE PRINCIPLE OF RETROACTIVITY ACCORDING TO THE CONSTITUTIONAL COURT

In its judgment of 22 January 2021, the Luxembourg Constitutional Court had the opportunity to rule on the value of the principles of legal certainty, protection of legitimate expectations and non-retroactivity of laws when assessing the conformity of the law of 23 July 2016 amending, *inter alia*, the law of 23 December 2005 (the so-called RELIBI Law).

The facts leading to this decision concerned a Luxembourg resident individual who held Swiss bonds and regularly received interest from a paying agent established in Switzerland. Under the law of 23 December 2005, the taxpayer concerned had the possibility to opt for a final 20% tax levy on the interest paid by a paying agent established in Switzerland. The law of 23 July 2016, amending the law of 23 December 2005, no longer provides for this option if the paying agent is established in Switzerland so that the interest received is subject to the application of the normal progressive income tax scale. The law of 23 July 2016 is, according to its article 4, retroactively applicable as from 1 January 2016. As a result, the tax authorities denied the benefit of the final tax levy on interest payments received in 2016.

In its judgment, the Constitutional Court recalls its judgment of 28 May 2019 in which it held that the rule of law is inherent to the Luxembourg Constitution. The Constitutional Court then refers (i) to the case law of the European Court of Justice and the European Court of Human Rights, according to which the principle of legal certainty is part of the principle of the rule of law, and (ii) to the importance that the Council of State gives to the principle of legal certainty in the context of its *ex ante* control of the conformity of laws. Finally, the Constitutional Court concludes that the principle of legal certainty, and its expressions, such as the principles of legitimate expectations and non-retroactivity of laws, are part of the fundamental principle of the rule of law, which may be contravened only if justified by reasons of general/public interest.

As for the law of 23 July 2016, the Constitutional Court found that it retroactively withdrew the benefit of the final 20% tax levy from the taxpayer concerned, in such a way as to adversely affect his legitimate expectations regarding the tax regime applicable to interest payments. As the legislator has not put forward any justification of general interest for this retroactive application of the law, the Constitutional Court concludes that the retroactive application of this law is contrary to the Luxembourg Constitution

EXTENSION OF DEADLINE TO SUBMIT 2019 TAX RETURNS

On 25 February 2021, the Luxembourg Parliament (*Chambre des Députés*) voted the law amending the law of 12 May 2020, adapting certain deadlines in fiscal, financial and budgetary matters in the context of the state of emergency (hereinafter the "**Law**").

The Law follows a statement by the Ministry of Finance dated 21 December 2020, in which the Minister indicated that he deemed appropriate to extend the filing deadlines granted to taxpayers.

The Law thus provides mainly for the following three extensions:

1. The deadline to file personal income tax and personal municipal business tax returns for the fiscal year 2019 can be extended until 31 March 2021.

2. The deadline to file personal income tax, corporate income tax and municipal business tax returns for the fiscal year 2020 is set at 30 June 2021:

3. The deadline to file personal income tax and personal municipal business tax returns for the fiscal year 2020 can be extended until 31 December 2021.

Although the Law does not extend the deadline for the filing of the corporate income tax and municipal business tax returns for the fiscal year 2019, the above -mentioned statement from the Minister mentioned that the Luxembourg tax authorities will show leniency and that the tax offices will not impose late filing fines with respect to these returns, if filed before 31 March 2021.

In addition to the above, the Law provides for an extension until 30 June 2021 of the deadline for spouses to choose between collective, individual or individual with reallocation taxation for the tax year 2020.

Finally, the deadline for exercising the option for the withholding tax provided for by the law of 23 December 2005 introducing a final 20% withholding tax on certain interest income from transferable securities paid to Luxembourg resident individuals (commonly known as the RELIBI law) is set at 30 June 2021.

COVID 19 | EXTENSION OF TELEWORKING FOR CROSS-BORDER WORKERS

As previously detailed in our Newsflash dated 19 March 2020 (as updated), the Luxembourg Government has once again agreed on an "exceptional measure" with the Belgian, French and German Governments regarding the taxation of Belgian, French and German cross-border commuters normally working in Luxembourg and now teleworking from their homes.

As a result, since 14 March 2020, any days of presence of a cross-border worker at his home, in particular to carry out teleworking, are not to be taken into account for the calculation of the 24-day (Belgium) or 29-day (France) period. The measures applying to French and Belgian cross-border workers were applicable until 31 August 2020. Since then, three renewals of agreements have been signed with France and Belgium. The last ones, signed respectively on 9 and 12 March 2021, provide for an extension of this exceptional measures until 30 June 2021.

The measure applying to German cross-border workers is applicable as of 11 March 2020 and lasted until 30 April 2020, at which point an automatic monthly renewal took place, which will continue unless Germany or Luxembourg terminates the agreement.

As a reminder, the agreements signed with Belgium, France and Germany to maintain the exceptional arrangement not to take into account teleworking days linked to the COVID-19 pandemic for the determination of the social security legislation applicable to cross-border workers remain applicable until 31 June 2021 (please refer to our publication dated 15 January 2021).

EXCHANGE OF INFORMATION | CONDITIONAL UPON EXHAUSTING DOMESTIC SOURCES OF INFORMATION

In a judgment dated 25 February 2021, the Higher Administrative Court (*Cour administrative*) confirmed a judgment of the Lower Administrative Court (*Tribunal administratif*) concerning the lawfulness of injunction decisions issued to a Luxembourg company following a request for information from the Belgian tax authorities.

The claimant company argued that the lawfulness of the injunction is conditional upon the equesting authority exhausting all its domestic means of obtaining the information sought by the exchange of information. In this case, the claimant company considered that the information requested could have been obtained from a Belgian company, a company that was part of the same group as the claimant and the subject of the Belgian authorities' investigation.

When analysing the legality of the injunction, the Court firstly considered that both the Convention for the elimination of double taxation signed between Luxembourg and Belgium on 17 September 1970, as modified (the "**Convention**") and Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation (the "**Directive**") may apply in parallel. Where the Convention does not provide for a broader scope of the exchange of information than the Directive, then the Court may limit its analysis to the Directive. Secondly, the Court confirmed that a request for information issued by the Belgian tax authorities did not seem to be manifestly lacking in foreseeable relevance and adequately identified the taxpayer, the object and purpose of said request for information. Finally, the Court took the view that following a combined reading of the European Court of Justice judgment in *Berlioz* (C-682/15) and the wording of Article 18(2) of the Law of 29 March 2013 transposing the Directive, the exhaustion of domestic sources to obtain the information is a condition of the legality of the exchange of information request, and therefore of the injunction enforcing such a request.

In the case at hand, the Court ruled that the Belgian authority had exhausted the sources of information available to it in Belgium. **The Court noted that a request could not be found unlawful on the sole ground that the Belgian authorities failed to request a particular document such as a transfer pricing report from the Belgian company in light of the fact that the Belgian authorities were contesting the group's transfer pricing policy**. As such, the Belgian authority was entitled to request information beyond that report. **The Court added that the Belgian authority is, in the context of its tax investigation, sovereign in determining the evidence, which, under its domestic law, it considers relevant for the tax audit of the Belgian company.**

VAT REIMBURSEMENT | ECJ RULES ON LIMITATION PERIOD IN THE EVENT OF IRRECOVERABLE DEBT

In an order dated 3 march 2021, **the European Court of Justice ("ECJ") considered the lawfulness of a limitation period on the right to seek a reduction in the taxable amount in the case of cancellation, refusal or total or partial non-payment after the supply takes place.**

In the case at hand, the taxpayer had issued a number of invoices including Value Added Tax ("**VAT**") to a partner company. The taxpayer had remitted the VAT to the Hungarian tax authorities. However, the invoices were never settled and the partner company was eventually put into liquidation. Finally, the liquidator declared that the debt related to the unpaid invoices had become irrecoverable. The taxpayer applied for the recovery of VAT remitted in respect of those invoices.

This request was denied on the ground that the five-year limitation period to request a reimbursement had expired. In fact, under Hungarian law transposing the EU VAT Directive, the limitation period began to run from the date on which the payment obligation was to be performed (i.e the date mentioned in the invoices) rather than from the date on which the debt became irrecoverable.

Drawing on previous cases, the ECJ reiterated a number of principles. First of all, that the principle of fiscal neutrality means that the formalities to be complied with by taxable persons in order to obtain a reduction of the taxable amount must be limited to those which make it possible to prove that the consideration will definitely not be received after the transaction has been concluded. Secondly, the ECJ found that the possibility of applying for the refund of VAT without any temporal limit would be contrary to the principle of legal certainty. Finally, the ECJ recalled the *Volkswagen* (C-533/16) case where it had already held that Union law precludes legislation of a Member State under which the benefit of the right to reimbursement of VAT to a taxable person is refused on the ground that the limitation period provided for in that legislation for the exercise of that right began to run from the date of supply of the goods and expired before the application for reimbursement was submitted.

In conclusion, the ECJ held that where a Member State provides for a limitation period after which a taxable person, holding a claim that has become definitely irrecoverable can no longer assert his right to obtain a reduction in the taxable amount, **that limitation period must begin to run not from the date of performance of the payment obligation initially provided for, but from the date on which the debt has become definitively irrecoverable.**

TAX TREATMENT APPLICABLE TO THE PARTIAL TRANSFER OF A BUSINESS UNDERTAKING | COURT DECISION

CONTEXT

The Luxembourg Higher Administrative Court (*Cour administrative*), in a judgment rendered on 14 January 2021 (No. 44763C), confirms that the **partial disposal of a business undertaking by an individual** to third-parties should qualify as **a transfer for consideration of part of a business undertaking** and as a result be considered as **an extraordinary income benefiting from a preferential tax rate** rather than as ordinary income. This judgement thus solves the long standing uncertainty as to whether the partial disposal of a business undertaking by an individual should benefit from the same preferential tax regime as the complete disposal of a business undertaking.

FACTS

In the matter at hand, the Luxembourg direct tax authorities challenged the tax return filed by two married physiotherapists in respect of **a partial transfer of their practice**. The disposal consisted in selling a portion of the business (*fonds de commerce*) to two different third-parties. The sale agreement covering the transfer of the business provided that the disposal price was determined in accordance with the value of the patient group and the practice's equipment.

Upon filing of their tax returns, the married couple reported **the sale price of the transaction** as a disposal gain (***bénéfice de cession***) in order to **benefit from the preferential tax rate** that applies in case of the realization of extraordinary income. When assessing the tax returns, the Luxembourg direct tax authorities refused the qualification of the sale proceeds as *bénéfice de cession* on the ground that **the transaction does not constitute a sale of part of a business' units** and **the couple still carries out their physiotherapist activity** in said practice. Consequently, the application of the preferential tax regime (the "half-rate rule") was denied and the proceeds were taxed **in the same manner as ordinary income in the taxpayers' hands**. Upon receipt of the disputed tax assessment, the married couple filed a claim before the competent tax office. In the absence of an answer from the Director of the Luxembourg direct tax authorities, an appeal was lodged by the taxpayers before the Lower Administrative Court (*Tribunal administratif*). Not succeeding in their argument in the first-instance judgement, the **Luxembourg direct tax authorities appealed the adverse decision before the Higher Administrative Court**.

ANALYSIS PERFORMED BY THE LUXEMBOURG HIGHER ADMINISTRATIVE COURT

In its judgment dated 14 January 2021, the Luxembourg Higher Administrative Court first assessed whether **the qualification of the partial disposal of a physiotherapy practice** should fall within one of the business transfer scenarios foreseen under Article 15 of the Luxembourg Income Tax Law ("**LITL**"). To that end, the Luxembourg Higher Administrative Court specified that *"a fonds de commerce should be* ***defined as a range of elements contributing to the constitution of an economic unit whose purpose has a commercial nature being composed of tangible and intangible assets"***. In this regard, the Luxembourg Higher Administrative Court noted that the transfer was not limited to the patient group as stated by the Luxembourg direct tax authorities but on an identified portion of the whole practice. Additionally, the Luxembourg Higher Administrative Court highlighted that the sale agreement contractually foresaw that the married couple would pursue their activities within the practice and the two purchasing third-parties would become shareholders of the practice upon the partial transfer.

Considering all the above, the Luxembourg Higher Administrative Court **confirmed the position taken by the judges in the first instance**: the disputed transfer must be analysed **as a transfer for consideration of part of a business undertaking** within the meaning of Article 15 al. 1 - n°3 LITL.

Furthermore, the Higher Administrative Court confirmed the approach taken by the Lower Administrative Court with regards to the determination of the tax rate applicable to the income arising from the transfer for consideration of part of a business undertaking. As the sale proceeds fall within the scope of *bénéfice de cession*, said ***bénéfice de cession*** **should be treated as taxable extraordinary income**. As a result, the preferential tax rate which corresponds **to half of the overall marginal tax rate of the taxpayer applies to the adjusted taxable income**.

LUXEMBOURG TAX AUTHORITIES ISSUE CIRCULAR ON THE PRIME PARTICIPATIVE REGIME

CONTEXT

The Luxembourg tax authorities have issued guidance regarding the new profit-sharing bonus model (i.e., the so-called "***prime participative***") in its Circular L.I.R. N°115/12 dated 11 February 2021 (the "**Circular**"). The *prime participative* had been introduced under the Luxembourg 2021 budget law of 19 December 2020 (the "**2021 Budget Law**"). The 2021 Budget Law entered into force **on 1 January 2021** and the ***prime participative*** applies as from that date.

The introduction of the *prime participative* under **Article 115** of the Luxembourg Income Tax Law of 4 December 1967 as amended (the "**LITL**") follows **the abolition of the stock option regime** and represents a paradigm shift in the remuneration model for employees in Luxembourg.

NEW PROVISIONS

The *prime participative* allows **employees to participate in corporate profits of their employers under certain conditions**, treating the *prime participative* respectively as (i) an **employment income** in the hands of the employees and (ii) a corporate tax deductible **operating expense** from the employer's perspective. In a nutshell, upon receipt of the *prime participative* from their employer, **employees should be entitled to a 50% individual income tax exemption** on their discretionary bonus, subject to the below requirements.

CONDITIONS

The conditions for the application of the *prime participative* regime are as follows:

At the level of the employer:

- The employer must realize a profit in the relevant tax year of the bonus granting;
- The latter's accounting must fulfil the formal and substantial requirements set out in the Luxembourg tax laws during the tax year in which the bonus is being granted but also during the previous tax year; and
- The overall amount of bonus that may be granted **cannot exceed 5% of the employer's profits** (i.e., results for the financial year) for the fiscal year immediately preceding the fiscal year in which the bonus is being granted.

At the level of the employee:

- The bonus **cannot exceed 25% of the employee's gross ordinary annual remuneration** (i.e., excluding any cash, and/or in-kind benefits, bonuses, premiums, etc.) in the given tax year; and
- The employee must be affiliated either with the Luxembourg social security system or a foreign social security scheme covered by a bilateral/ multilateral social security agreement.

CLARIFICATIONS BROUGHT UNDER THE CIRCULAR

Reporting obligations: the Circular introduces reporting obligations for the employer, which consist in the need to submit via email a **detailed report** as prescribed by the Luxembourg tax authorities, in the form of an Excel file available in French only, to the appropriate tax office (i.e., the relevant RTS office) in charge of assessing payroll tax on the employee's remuneration. **Late filing or omission of filing of the form** will result in the retroactive cancellation of the 50% individual income tax exemption. It also will result in **necessary adjustments**, pursuant to the procedure applicable for withholding tax adjustments on salaries and pensions. More specifically, the **personal liability of an employer to withhold tax will be engaged**.

Precisions vis-à-vis the 25% limit: **the 25% limit is calculated based on the annual gross remuneration that the employee has already received** and/or will receive during the fiscal year when the bonus will be paid. In the case where an employee leaves the employer during the year due to retirement, change of employer or end of activity, the employer should recompute the wage tax withholding, if necessary, taking into account the annual salary finally paid and taken into account for the 25% limit.

exempted salary income, such as the *prime participative*, **are not deductible for wage withholding tax computations purposes**. More particularly, the Circular outlines through illustrative examples how to calculate the non-deductible social contributions.

<u>Executive directors/Managers and shareholders</u>: Lastly, the Circular provides further guidance in respect to allocations of the *prime participative* to executive directors/managers and shareholders of limited liability companies who also derive employment income from the company. In this particular instance, **the profit-sharing bonus received by an executive director/manager and shareholder, who may also be the sole beneficiary of the bonus is to be considered income derived from employment income**, which is subject to both the employer-level and employee-level conditions outlined as above.

ADDITIONAL SUPPORTING INFORMATION PROVIDED BY WAY OF A Q&A

In addition to the publication of the Circular n°115/12, the **Luxembourg tax authorities have created a Q&A section** (available in French only) for further in formation in respect of (i) definitions used in the legal provision introducing the *prime participative* as well as in the Circular, notably on what "**positive profits**" of the employer means, (ii) how the **operating profit year to be taken into account** for the determination of the employer's profits should be assessed and (iii) how the 25% limit should apply on an **employee's annual salary, type and number of eligible employees,** etc.

CONTRIBUTORS

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