BSP Newsletter

2021 October edition

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LUXEMBOURG

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THIS NEWSLETTER IS INTENDED ONLY AS A GENERAL DISCUSSION OF THE TOPICS WITH WHICH IT DEALS. IT SHOULD NOT BE REGARDED AS LEGAL ADVICE. IF YOU WOULD LIKE TO KNOW MORE ABOUT THE TOPICS COVERED IN THIS NEWSLETTER OR OUR SERVICES PLEASE CONTACT US.

RECENT PUBLICATION OF LUXEMBOURG LAWS REGARDING THE FINANCIAL SECTOR

MODERNISATION OF THE LICENSING PROCESS IN THE FINANCIAL AND INSURANCE SECTORS

On 26 July 2021, the Luxembourg law of 21 July 2021 which empowers the CSSF or the *Commissariat aux Assurances*, as applicable, to grant or withdraw a licence to a regulated entity, instead of the Minister of Finance, was published in the Luxembourg official journal (*Mémorial A*).

This new law entered into force on 30 July 2021. For additional information on the new law, check out our previous newsletter on the draft law.

NEW PRUDENTIAL REGIME FOR INVESTMENT FIRMS

On 26 June 2021, Directive (EU) 2019/2034 of 27 November 2019 on the prudential supervision of investment firms (the "**IFD** ") and Regulation (EU) 2019/2033 of 27 November 2019 on the prudential requirements of investment firms (the "**IFR** ") introduced a new prudential regime for investment firms at EU level.

On 26 July 2021, another Luxembourg law of 21 July 2021 was published, which law transposed *inter alia* the IFD into Luxembourg national law and implemented some aspects of the IFR, by making significant amendments to the Luxembourg law of 5 April 1993 on the financial sector, as amended ("**LFS**").

This new law entered into force on 31 July 2021, except that:

- certain provisions changing the scope of the LFS will only apply from 1 January 2022; and
- the implementing provision regarding Regulation (EU) No. 2020/1503 on European crowdfunding service providers for business, will only enter into force on 10 November 2021.

Check out our previous newsletter article on the draft law.

PAYMENTS SERVICES AND E-MONEY | NEW DELEGATED REGULATION

On 28 September 2021, the Commission Delegated Regulation (EU) 2021/1722 of 18 June 2021 (the "**Regulation**"), supplementing Directive (EU) 2015/2366 of the European Parliament and of the Council (the "**Payment Services Directive**", "**PSD2**") with regard to regulatory technical standards specifying the framework for cooperation and the exchange of information between competent authorities of the home and the host Member States in the context of supervision of payment institutions and electronic money institutions exercising cross-border provision of payment services, has been published in the Official Journal of the European Union.

BACKGROUND

This Regulation is based on the draft regulatory technical standards (the "**RTS**") developed by the European Banking Authority (the "**EBA**"), in execution of the mandate given to it under the PSD2.

The RTS set out in the Regulation specify the framework for cooperation and for the exchange of information between the competent authorities of the home and host Member States in accordance with Title II of PSD2 and, as far as the payment service is provided under the right of establishment, for the monitoring of compliance with the provisions of national law transposing Titles III and IV of PSD2.

KEY PROVISIONS

1. All competent authorities shall designate a **single point of contact** and notify the same to the competent authorities in other Member States as well as to the EBA in order to facilitate communication with the competent authorities among Member States, specifying the language in which they can receive correspondence. The single point of contact is to be a dedicated functional mailbox.
2. **Standardised forms** should be introduced in order to facilitate communication and exchange of information. These forms should nevertheless remain flexible, allowing for the inclusion of explanations and any other information deemed to be essential by the competent authorities.
3. Where the competent authorities of a host Member State require payment institutions which have a branch or agent within their territory to submit periodical reports on their activities, they should indicate to such institutions **the language and electronic means** to submit their reports and ensure the **comparability and predictability of the data** reported to them.
4. A particular procedure should be established when the competent authority of a home Member State carries out **on-sight inspections** of branches or agents of payment institutions located in another Member State. Additionally, the competent authority of the host Member State shall be able to request the competent authority of the home Member State to conduct an on-site inspection at the head office of a payment institution situated within that home Member State.

ENTRY INTO FORCE

The Regulation enters into force, and apply, on 18 October 2021.

ESMA RELEASED DISCLOSURE AND INVESTOR PROTECTION GUIDANCE ON SPACS

On 15 July 2021, ESMA issued a public statement (the "**Statement**") providing guidance on prospectus disclosure and investor protection considerations in special purpose acquisition companies ("**SPACs**").

BACKGROUND

SPACs are shell companies with no business activity, which are created for the sole purpose of raising capital through an initial public offering ("**IPO**") with the prospect of acquiring an operating, non-listed company (the "**Target**"), resulting in the Target becoming publicly traded. Very popular for some time now in the United States, SPACs have recently gained some ground in European markets, offering an attractive alternative to the traditional IPO.

SUMMARY

ESMA considers that the complex structure of SPAC transactions, as well as the differences in company law and market practices across the EU, create an additional need for uniform disclosure of information in SPAC prospectuses.

ESMA expresses the view that SPACs, due to their inherent complexity and risks, may not be suitable for all investors and expects careful assessment of such products in order to ensure compliance with the product governance requirements stemming from Directive 2014/65/EU of 15 May 2014 on markets in financial instrument ("**MiFID II**").

While ESMA's considerations are largely based on existing disclosure requirements under Regulation (EU) 2017/1129 (the "**Prospectus Regulation**"), ESMA underlines the need for supplementary disclosure, where necessary for investor protection.

KEY PROSPECTUS CONTENT REQUIREMENTS

In the Statement, ESMA lists information that EU regulators should take into consideration when scrutinizing SPAC prospectuses. With reference to the various disclosure requirements under Commission Delegated Regulation (EU) 2019/980 of 14 March 2019 supplementing the Prospectus Regulation, ESMA encourages national competent authorities ("**NCAs**") to focus their scrutiny in particular on the following when reviewing SPAC prospectuses:

1. **RISK FACTORS** noting in particular those which are inherent to SPAC activity, SPAC's governance, decision making procedure concerning the business combination and any potential future dilution.
2. **INVESTMENT STRATEGY AND OBJECTIVES**, more specifically information on the issuer's investment policy and the criteria for the selection of the Target. Consistency with the rest of the disclosed information being key.
3. **ESCROW ACCOUNTS AND REINVESTMENT OF PROCEEDS**, this includes information on any escrow account or the re-investment of the IPO proceeds before an acquisition takes place, including any reliance on third parties and/or an investment policy.
4. **MANAGERIAL EXPERTISE AND EXPERIENCE** of the administrative, management and supervisory bodies, along with an indication of their activities accomplished outside of the SPAC.
5. **CONFLICTS OF INTEREST OF SPONSORS** who are responsible for setting up SPACs. In order to mitigate risk for investors, prospectuses must include any existing or potential conflict of interest, such as deadlines imposed to the sponsor, agreements between SPAC and sponsors, which may restrict the SPAC's disposal of SPAC securities, sponsors' rivalling activities in the relevant sectors.
6. **SHARES, WARRANTS AND SHAREHOLDERS RIGHTS**, which includes information of the share and warrant structure, including redemption rights and any rights that shareholders will need to approve concerning the acquisition of Target. SPAC prospectus should provide information on decision-making process with respect to business combination in the shareholders' meetings.
7. **MAJOR SHAREHOLDERS**, which includes information on the name, scope of interest and the different voting rights of any person other than directors or members of the supervisory bodies who has any form of interest in the SPAC's capital

ESMA RELEASED DISCLOSURE AND INVESTOR PROTECTION GUIDANCE ON SPACS

or voting rights notifiable under the SPAC's national law.

8. **RELATED PARTY TRANSACTIONS**, more specifically any information about past and present related party transactions.
9. **MATERIAL INTERESTS**, such as services provided to the SPAC by the sponsors' affiliates.
10. **INFORMATION ON THE PROCEEDS OF THE OFFER**, especially the financing of the acquisition in the event that the proceeds raised during the SPAC's IPO do not cover the entire acquisition price, the use of proceeds raised from the sponsors and the total costs up to and including the acquisition of a Target.
11. **INTENTION OF RELEVANT PERSONS TO SUBSCRIBE IN THE OFFER**, especially when major shareholders or directors intend to subscribe to the offer and/or whether any person aims to subscribe for more than 5% of the offer.
12. **INFORMATION ON THE OFFER PRICE**, revealing material disparities between the IPO price and the real cost, i.e. discounts for directors, senior managers or affiliates, but also on securities acquired by them in the last 12 months or securities which they have the right to acquire.

FURTHER MANDATORY DISCLOSURE

Notwithstanding the Prospectus Regulation, ESMA considers that additional disclosure is likely to be required to guarantee transparency and investor protection with regard to SPAC prospectuses. ESMA notes that NCAs may require the disclosure of supplementary information where necessary for investor protection. ESMA lists out some additional information points on which it considers NCAs should generally require disclosure for the purposes of investor protection.

Although addressed to EU regulators, ESMA's guidance should of course be taken into account by issuers and their advisors when preparing SPAC prospectuses.

LxSE PUBLISHES GUIDELINES FOR THE LISTING OF SPACS ON ITS MARKETS

In August 2021, the Luxembourg Stock Exchange ("**LxSE**") published guidelines for the listing of special purposes acquisition companies ("**SPACs**") on its markets, which complement the general admission rules set out in the rules and regulations of the LxSE.

The LxSE encourages sponsors and other professional intermediaries to respect the following five recommendations during the SPACs structuring process:

1. **Placing of funds in an escrow account with a regulated financial institution**
   In order to ensure the protection of investors, all capital invested will now be held in an escrow account until the acquisition is complete. Additionally, an order of priority shall be documented with regard to outgoing payments.

2. **Redemption rights of shareholders**
   All shareholders of the SPAC shall be granted redemption rights. The issuer should describe the conditions under which such rights shall be exercised.

3. **De-SPAC process**
   The business combination with the target company should be approved by the majority of shareholders. The issuer should also provide shareholders all the information required to make an informed decision on the exercise of redemption rights.

4. **Business strategy**
   The admission to trading prospectus should provide details on the business strategy, including the target industries and geographical locations of where the issuer is seeking opportunities.

5. **Timeframe**
   There should be a defined timeframe for the consummation of the business combinations.

The LxSE highlighted that the aforementioned guidelines are not exhaustive and that the LxSE reserves the right to consider any other features of the SPACs in the course of its assessment of the transaction.

LATEST UPDATES ON ESMA Q&A ON PROSPECTUS REGULATION

Since our last newsletter, ESMA has twice 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**”), on 16 July 2021 and again on 27 July 2021. In some cases, the answers to the new questions were provided by the European Commission. A few of the key points from the latest updates to the Q&As are as follows:

- It is possible to supplement the information in an expired registration document (“**RD**”) or universal registration document (“**URD**”) that is used in a valid tripartite prospectus, by supplementing the prospectus itself.
- It is not possible to replace original RD or URD with a new RD or URD, because this would result in a new tripartite prospectus, which would require approval. Rather, an issuer may incorporate by reference information from the new RD or new URD into the existing tripartite prospectus via a supplement, if that information qualifies as a significant new factor, material mistake or material inaccuracy.
- The simple indication of secondary market prices on a public domain (e.g. on the issuer’s website) is not to be regarded in itself as an offer of securities to the public unless such publication of prices is accompanied by a communication constituting an offer of securities to the public or unless there are additional circumstances which might altogether amount to an offer of securities to the public.
- In a scenario where an issuer has chosen as home Member State for the approval of its base prospectus a Member State different from where it has its registered office, there is a reasonable expectation that such issuer will make an issue under the programme which will be admitted to trading or offered to the public in the home Member State that it has chosen, and it must do so within 12 months. If it fails to do at least one offer or admission to trading in the chosen home Member State, but has done so within the same period in another Member State, the issuer will be in breach of Article 2(m)(ii) of the Prospectus Regulation and may be sanctioned accordingly.
- Reference is made to Article 1(c) of Commission Delegated Regulation (EU) 2019/980 which defines ‘profit estimate’ as *a profit forecast for a financial period which has expired and for which results have not yet been published;* it is confirmed that quarter four reports, which contain unaudited results for an annual financial period, should be considered an interim financial information and not profit estimates; as regards the term “*for which results have not been published*” in the above definition, this refers to the publication of the final figures as approved by the issuer.
- For equity or non-equity securities, information on restrictions on the transferability and for equity securities only, information on lock-up agreements, must be included in a prospectus pursuant to the Commission Delegated Regulation (EU) 2019/980 and hence, shareholders’ agreements restricting transferability of shares must be disclosed on the prospectus, so long as shares are deemed as transferable securities within the meaning of MiFID II.
- Issuers who previously traded on an alternative stock exchange market (MTF) which subsequently becomes an SME Growth market, can benefit from the simplified disclosure regime for secondary issuances as per Article 14 of the Prospectus Regulation without the need to wait for an additional 18 months.
- If a securities issuance leads to a reverse acquisition, a prospectus should be produced even when the listed issuer is an empty shell and not a business.
- It is possible to make an offer of securities to the public in more than one Member State using the exemption in Article 3(2), using the lowest threshold of the individual Member States in which the offer is made.
- For offers of warrants and other derivative securities, “total consideration” under Article 1(3) and 1(4) of the Prospectus Regulation should only be construed as referring to the total consideration of the securities offered and therefore the strike price of the underlying securities should not be taken into account.

ESMA UPDATED ITS Q&A ON THE MARKET ABUSE REGULATION

On 6 August 2021, ESMA updated its Questions and Answers (“**Q&A**”) on the Regulation (EU) No. 596/2014 (the “**Market Abuse Regulation**”) to add three new questions regarding disclosure of inside information.

With this latest update of the Q&A, ESMA provides further clarity on the implication of the presumption contained within Article 10(2a) of the Regulation No. 1060/2009 on credit rating agencies (the “**CRAR**”) that credit ratings, rating outlooks and the information relating thereto shall be deemed as inside information until the disclosure of the respective information to the public. More specifically, ESMA has confirmed that:

- with respect to credit ratings, rating outlooks and the information relating thereto, it is not required to make an additional assessment as to whether the conditions of inside information stipulated under Article 7(1)(a) of the Market Abuse Regulation are met; credit ratings, rating outlooks and the information relating thereto should always be treated as inside information;
- the language “disclosure to public” in Article 10(2a) of the CRAR shall be interpreted to cover the disclosure of credit ratings, rating outlooks and the information relating thereto (i) through the rating agency’s public website and (ii) exclusively to rating agency’s subscribers.

LUXEMBOURG BUSINESS REGISTER (LBR) | NEW RCS FILING FORMALITIES

The LBR has recently issued a public notice specifying new rules relating to the filing process of documents with the Luxembourg Trade and Companies Register (the "**RCS**"). These new rules aim to enhance digitalisation, thereby easing the document-filing process with the RCS.

The new procedure will implement a new technical process whereby HTML forms will replace the traditional PDF format, which was problematic in certain circumstances in the past.

The most important change to the filing process is that every natural person registered with the RCS in any capacity whatsoever will need to be identified by a Luxembourg national identification number (LNIDN) upon filing. The following three scenarios shall be considered in connection with this new requirement: (i) the natural person has an LNIDN and is not yet registered with the RCS; (ii) the natural person does not have an LNIDN and is not yet registered with the RCS and; (iii) the natural person is already registered with the RCS prior to the new rules coming into effect.

THE NATURAL PERSON HAS AN LNIDN AND IS NOT YET REGISTERED WITH THE RCS

The filing applicant must provide the individual LNIDN in the filing application at the time of registering the relevant natural person.

THE NATURAL PERSON DOES NOT HAVE AN LNIDN AND IS NOT YET REGISTERED WITH THE RCS

For a natural person who does not have an LNIDN, a specific process will be implemented at the time of registering such person whereby the filing applicant will need to provide specific information such as on the nationality, gender and private address of the relevant natural person. Supporting documents evidencing the accuracy of the above information (i.e. copy of the ID card, certificate of residency, etc.) must be provided. Upon receipt of the required information, the natural person will be allocated an LNIDN.

THE NATURAL PERSON IS ALREADY REGISTERED WITH THE RCS PRIOR TO THE NEW RULES COMING INTO EFFECT

For these natural persons, the LNIDN will need to be entered into the RCS. There will be a transition period during which communication of the LNIDN to the RCS will be voluntary. After that transition period, the LNIDN of any registered natural person must be entered into the RCS in order for a new filing for an entity (to which the natural person is registered in the RCS file of) to be accepted.

CONSISTENCY CHECK

The consistency of Luxembourg addresses indicated in the RCS filing application will be automatically checked against the information in the National Register of Localities and Streets (‘*registre national des localités et des rues*’).

ENTRY INTO EFFECT

These new rules will become applicable as at the end of the first quarter of 2022 (subject to the transition period described above for natural persons who are already registered with the RCS). The LBR will communicate in due course the precise date from which these changes apply.

DRAFT LAW ON MORAL HARASSMENT

On 23 July 2021, the Luxembourg Minister of Labour filed a draft law No.7864 (hereafter the "**Draft Law**") with the Luxembourg Parliament (*Chambre des Députés*) aimed at introducing into the Luxembourg Labour Code new provisions on the protection of employees against moral harassment at work.

BACKGROUND

To date, moral harassment is not specifically regulated by the Labour Code but has been recognised by the Labour Courts and by the Convention on Harassment and Violence at Work dated 25 June 2009, which was declared generally binding by a Grand Ducal Regulation dated 15 December 2009.

In this context, the Draft Law aims at introducing a definition of moral harassment into the Labour Code, and at establishing a protection of the employee against moral harassment at work, as well as preventive measures against it. The Draft Law also aims at protecting employees who would protest against or refuse to engage in harassing behaviors.

SCOPE OF APPLICATION

The following categories of persons may be considered as victims of moral harassment:

- employees;
- trainees;
- apprentices;
- students working during the holiday period.

The Draft Law also provides that the following persons must refrain from any act of moral harassment in the workplace:

- employers;
- employees;
- any client or supplier of the company.

DEFINITION OF MORAL HARASSMENT

The Draft Law provides for a broad definition of moral harassment and covers the following acts:

- any behavior or act, as well as any conduct which, by its repetition or systematization, is detrimental to the dignity or the psychological and physical integrity of a person by creating an intimidating, degrading, humiliating, hostile or offensive environment; as well as
- repeated acts which have the purpose or effect of degrading working conditions, likely to infringe the employee's rights and dignity, to alter his/her physical or mental health or to jeopardize his/her professional future.

The scope of application of the new provisions set out in the Draft Law would be even broader as this definition would cover any moral harassment that would occur:

- during working relationships; but also
- during professional trips, professional trainings and communications in connection with or caused by work, by any means and even outside normal working hours.

EMPLOYERS' OBLIGATIONS IN THE EVENT OF MORAL HARASSMENT

Pursuant to the Draft Law an employer must ensure that any act of moral harassment against his employees which he is made aware of, ceases immediately. To this end, the employer must determine, after consultation with the staff delegation, if any, or, failing this, the entire staff, the measures to be taken to protect the employees against moral harassment at the workplace.

These measures, which should be adapted to the nature of the activities and the size of the company, should cover at least:

- a description of the means available to victims of mobbing to obtain help and the way to address the staff delegation, which is competent in matters of prevention and protection against moral harassment at work;
- the prompt and impartial investigation of acts of mobbing in the workplace;
- the welcoming, assistance and support required by the victims of mobbing;
- the awareness raising of employees and managers on the definition of mobbing, its management within the company and the sanctions against its perpetrator(s);
- the measures for supporting and helping victims of mobbing to resume work;
- the employer's obligations in the prevention of mobbing at work;

DRAFT LAW ON MORAL HARASSMENT

- information and training of employees.

In the event of moral harassment of an employee, the employer should also:

- carry out internal assessment of the efficiency of the preventive measures as well as the possible implementation of new preventive measures to be taken, in particular with regard to the organization of the company, the revision of procedures applied in the event of moral harassment and the information of employees; and
- take the appropriate measures to stop immediately any moral harassment acts he has been informed of.

EMPLOYEES' RIGHTS IN THE EVENT OF MORAL HARASSMENT

The Draft Law provides that if the moral harassment continues after preventive measures have been applied or if the employer doesn't take any appropriate measures, the employee or the staff delegation (with the approval of the concerned employee) could refer the case to the Labour and Mines Inspectorate ("*Inspection du travail et des mines*" or "**ITM**").

After examination of the file and hearing of the different parties, the ITM prepares a report within 45 days from the date of the deferral. The report would contain recommendations and concrete measures to stop the moral harassment acts within a defined deadline.

In case of non-compliance, the ITM could impose administrative fines.

The employee who is subject to moral harassment has the right to refuse to resume work and terminate his/her employment contract without notice for gross misconduct of the employer. In such case, the employee could claim damages before the Labour Court.

PROTECTION AGAINST RETALIATION

According to the Draft Law, the employee victim of moral harassment or who has testified would be protected against any retaliation from the employer or any other supervisor, co-worker or external person connected with the employer. As a result, any reprisal (including dismissal) would be deemed null and void.

In case of dismissal, the employee has the following remedies:

- he/she could bring an action before the President of the Labour Court, for annulment of the dismissal, within 15 days from the notification of the termination. The President of the Labour Court could order that the employment relationship be maintained or, where applicable, the reinstatement of the employee.
- alternatively, he/she could bring an action before the Labour Court for unfair dismissal and claim compensation for damages. Such damages could be awarded to the employee not only for the damage suffered by the employee as a result of the dismissal, but also, where applicable, for the damage suffered as a result of the moral harassment of which the employee was a victim during the employment relationship. It nevertheless remains to be determined how the court will assess the amount of the damages to be awarded, where applicable, to the employee as a result of the moral harassment.

INCREASED ROLE OF THE STAFF DELEGATION

An important role in the prevention and fight against moral harassment would be played by the staff delegation, which would ensure the protection of employees against any act of moral harassment in the course of their work relationships.

In this context, the Draft Law provides that the staff delegation could:

- suggest to the employer any preventive action deemed useful and necessary;
- assist and advise the employee victim of moral harassment.

In addition, an employee victim of moral harassment could ask to be accompanied and assisted by a member of the staff delegation during the interview which would take place in the context of the investigation conducted by the ITM.

CRIMINAL PENALTY

Infringement to the legal provisions on moral harassment would be punishable by a fine of between EUR 251 to EUR 2,500. In the event of a repeat offence within two years, these amounts may be doubled.

DRAFT LAW ON THE RIGHT TO DISCONNECT

On 28 September 2021, the Luxembourg Minister of Labour filed a Draft Law No. 7890 (hereafter the "**Draft Law**") with the Luxembourg Parliament (*Chambre des Députés*) aimed at introducing into the Luxembourg Labour Code the obligation for each company to define precisely the rules governing the right to disconnect.

BACKGROUND

To date, a right to disconnect is not expressly addressed in the Luxembourg legislation, although many provisions of the Labour Code already provide safeguards (e.g. the rules protecting employees in terms of working hours, the general obligation of the employer to ensure the safety and health of all employees, etc.).

Moreover, the Court of Appeal recognised the right of an employee (in that case, a restaurant manager) to disconnect during a paid leave period in a decision dated 2 May 2019.

Finally, in a recent opinion, the Luxembourg Economic and Social Council (hereafter "**ESC**") recommended to put in place mechanisms encouraging compliance with the right to disconnect and its implementation within companies.

The Draft Law essentially incorporates into the Labour Code the provisions suggested by the ESC.

OBLIGATION TO SET UP A SCHEME ENSURING COMPLIANCE WITH THE RIGHT TO DISCONNECT OUTSIDE WORKING HOURS

The Draft Law provides for the introduction of two new Articles into the Labour Code (Articles L.312-9 and L.312-10) and addressing the right to disconnect.

More particularly, the Draft Law provides that where employees use digital tools for work purposes, a scheme ensuring compliance with the right to disconnect outside working hours must be set up (Article L.312-9).

The regime must in particular set out:

- the practical arrangements and technical measures for disconnecting from digital devices;
- awareness and training measures; and
- compensation arrangements in the event of exceptional derogations to the right to disconnect.

The scheme must be adapted to the specific situation of the company or sector, and be set up by way of a collective bargaining agreement or a subordinate agreement.

In the absence of a collective bargaining agreement or a subordinate agreement, the specific scheme is to be defined at company level, in compliance with the relevant legal requirements in terms of information and consultation of the staff delegation, if any. Thus:

- in companies with less than 150 employees, the staff delegation should be informed and consulted on the introduction or modification of a scheme ensuring respect for the right to disconnect outside working hours;
- in companies with at least 150 employees, there must be a mutual agreement between the employer and the staff delegation on the introduction or modification of said scheme.

Any breach of the obligation to implement a right to disconnect scheme would be liable to an administrative fine of between EUR 251 and EUR 25,000 imposed by the Director of the Labour and Mines Inspectorate (Article L.312-10).

ENTRY INTO FORCE

With regard to the new Article L.312-9 of the Labour Code, the Draft Law does not provide for a specific date of entry into force. In the absence of specific provisions, Article L.312-9 will come into force according to the classical rules applicable in Luxembourg, i.e. four days after the publication of the law in the Official Gazette of the Grand Duchy of Luxembourg.

However, the Draft Law provides for a delayed entry into force of Article L.312-10 regarding the sanctions applicable in the event of infringement to the obligation to implement a right to disconnect scheme.

Article L.312-10 would enter into force one year after the date of publication of the law in the Official Gazette of the Grand Duchy of Luxembourg. For companies covered by a collective bargaining agreement or a subordinate agreement, Article L.312-10 would enter

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DRAFT LAW ON THE RIGHT TO DISCONNECT

into force three years after the date of publication of the law in the Official Gazette.

CONCLUSION

The introduction of a right to disconnect will be welcome, at a time when employees' rights in terms of working hours can easily be undermined by the exponential use of telework. In any case, it is certain that this right to disconnect will have to be applied in the same way for employees teleworking as for employees working at the premises of a company. Indeed, the new telework agreement which came into force on 2 February 2021 specifies that any provision relating to the right to disconnect applicable to a “classic” worker shall also apply to a teleworker.

LAW OF 21 JULY 2021 TRANSPOSING THE CROSS-BORDER DIRECTIVE AND UPDATING CSSF PROCEDURES

On 21 July 2021, the law transposing Directive (UE) 2019/1160 with regard to cross-border distribution of collective investment undertakings (the "**CBD**") and amending:

1. the law of 17 December 2010 regarding undertakings for collective investment (the "**UCI Law**"), and
2. the law of 12 July 2013 related to alternative investment fund managers (the "**AIFM Law**") (the "**Law**"), was published in the Official Gazette.

The aim of the Law was to transpose the provisions of the CBD which had to be passed into national laws no later than 1st August 2021. As a consequence of the adoption of the Law the *Commission de Surveillance du Secteur Financier* ("**CSSF**") amended its regulatory framework in relation to marketing notifications.

THE LAW

The Law amends the UCI Law and the AIFM Law by incorporating the relevant provisions of the CBD.

The Law introduces:

- new rules governing the de-notification procedure;
- new information that must be provided in the notification letter further to the end of the obligation to appoint local agents in host Member States and the new obligation for AIFs marketed to retail investors to make arrangements in relation to subscriptions, redemptions and communication of certain information; and
- new timing for the CSSF to inform the manager, or UCITS directly in case they have not appointed a management company, that it may not proceed with the contemplated change(s) that it proposes to make to its marketing notification.

A definition of "pre-marketing" is also introduced in the AIFM Law along with the new regime governing this activity.

The Luxembourg government took the opportunity of the Law to clarify the accounting rules that AIFs structured under the form of a special limited partnership can apply. It is specifically provided that such AIFs may avail of any third country GAAP which have been deemed equivalent pursuant to Commission decision of 12 December 2008.

It is worth noting that in each law, the provisions of the CBD are incorporated by replicating them *in extenso*. The CSSF has also amended its regulatory framework regarding marketing notifications.

THE NEW CSSF REGULATORY FRAMEWORK

On 28 July 2021, the CSSF published CSSF Circular 21/778 to update of the Circular 11/509 in accordance with the Directive EU 2019/1160 (the "**Circular**"). Further details on the Circular can be found here .

The CSSF also created a new FAQ CBDF-Notification procedures (the "**FAQ**") on 30 July 2021. The FAQ, which has already been updated once, aims to highlight the main changes which have been introduced by the CBD and to provide clarifications as to the procedures to be followed in relation to marketing notifications. For UCITS it mainly summarises the content of the Circular with additional guidance. For AIFMs, the FAQ provides information in relation to the procedure to be followed to notify the CSSF of pre-marketing activities, de-notification and on the information to be included in the marketing notification for AIFs marketed to retail investors. A new template de-notification letter is also now available.

The rules regarding pre-marketing by AIFMs have been described in further details on the new CSSF web page: Pre-marketing by AIFMs. The Webpage provides information as to the procedure applicable to Luxembourg AIFMs, EU AIFMs and non-EU AIFMs, clarifying that the same procedure as the one applicable to Luxembourg AIFMs apply to them. Two different templates of pre-marketing notification letter are now available and shall be used in the context of notifying the CSSF of pre-marketing.

CIRCULAR CSSF 21/778 | UCITS MARKETING NOTIFICATIONS

On 28 July 2021, the CSSF issued Circular 21/778, regarding "*Update of the Circular CSSF 11/509 in accordance with Directive (EU) 2019/1160*" (the "**Circular**"); the Circular amends Circular CSSF 11/509 on "*Notification procedures to be followed by a UCITS governed by Luxembourg Law to market its units in another Member State of the European Union and by a UCITS of another Member State of the European Union wishing to market its units in Luxembourg*".

The Circular has been issued with the aim to align the current technical provisions governing the cross-border marketing procedure for UCITS with the provisions of Directive (EU) 2019/1160 of 20 June 2019, on cross-border distribution of collective investment undertakings (the "**Cross-Border Distribution Directive**"), as implemented in Luxembourg by the Law of 21 July 2021.

Following the Cross-Border Distribution Directive, the Circular updates some of the rules provided in Circular 11/509 for the notification procedures applicable to UCITS governed by Luxembourg law. Particularly, it adds a new kind of notification procedure, to be used in the case of discontinuation of marketing arrangements. Consequently, any UCITS governed by Luxembourg law will be subject to three different kinds of notification procedures:

1. initial notification, to be submitted by any UCITS proposing to market all or part of its units in a host Member State (in case of umbrella UCITS, the initial notification needs to be proposed for any compartment or new compartment and in case of classes of shares; it needs to be provided for each new class of shares noting that the CSSF has further clarified that this procedure is not yet available);
2. notification of amendments to the documents provided in the context of the initial notification; and
3. de-notification, for the case of discontinuation in the marketing, which has to be done on a sub-fund and/or share or unit class level. It is only required to include the de-notification letter in the package and template de-notification letters (one for compartment and one for share-class) are available.

De-notification must be submitted in the form provided in Annex VI of the Circular, also published on the CSSF website.

Documents for each notification procedure must be submitted to the CSSF electronically in accordance with CSSF Circular 19/708, regarding the electronic transmission of documents to the CSSF.

EUROPEAN COMMISSION'S RESPONSE TO QUESTIONS ON THE INTERPRETATION OF SFDR

On 14 July 2021, the European Commission ("**EC**") responded to the letter of 7 January 2021 addressed to it by the European Supervisory Authorities ("**ESAs**") in relation to the application of Regulation (EU) 2019/2088 on sustainability - related disclosures in the financial services sector ("**SFDR**"). The response took the form of a question and answer document (Q&A). The key points of this Q&A can be summarised as follows.

ON THE QUESTIONS OF APPLICABILITY

1. To the question whether the SFDR applies to registered AIFM as referred to in Article 3(2) of the alternative investment fund managers' directive ("**AIFMD**"), the EC has responded affirmatively. AIFMs as defined in Article 2(1) of the SFDR include registered AIFM. In this respect, entity and financial product related requirements of the SFDR would also apply to them. Given the fact that disclosures to investors referred to under Article 23 (1) of the AIFMD as well as the requirement for annual reports pursuant to Article 22 of AIFMD registered AIFMs should apply those provisions by analogy (such information is to be included in pre-contractual and periodic documentation made available to the end investors under national law).
2. To the question whether the SFDR applies to non-EU AIFMs when they market EU alternative investment funds on the basis of the national private placement regime, the answer is yes. Non-EU AIFMs must ensure compliance with SFDR, including the financial product related provisions (i.e. at product level).
3. To the question whether website disclosure as foreseen in Article 10 of the SFDR applies to tailored financial products given by clients of an investment firm providing investment advice on a discretionary client-by-client basis, the EC responds that the definition of financial products in Article 2(12) SFDR does not distinguish between tailored and standardised products. Therefore the disclosure obligations apply to both of these categories without distinction.

QUESTIONS ON PRINCIPAL ADVERSE IMPACTS

1. Pursuant to Article 4(1) and (2) of the SFDR financial market participants can decide whether to consider principal adverse impacts ("**PAI**") or not. However, by way of derogation and pursuant to Article 4(4), financial market participants which are parent undertakings of large groups exceeding, on a consolidated basis, an average number of 500 employees, have to take PAI into consideration.
2. The question asked is, whether the calculation of the 500-employees threshold is to be applied to both EU and non-EU entities of the group without distinction as to the place of establishment of the group and/or subsidiary, and should the due diligence statement include impacts of the parent undertaking only or must it include the impacts of the group at a consolidated level. The EC clarifies that the calculation of the headcount takes into account the number of employees of a parent undertaking and of subsidiary undertakings regardless of whether they are established inside or outside the Union.
3. As regards the due diligence policies with respect to PAI these obligations are imposed on the parent undertakings which in this capacity set the group wide policies. Therefore the parent undertaking must publish and maintain the requested information (set out under Article 4(4) of the SFDR) adapted to the specific situation of the parent undertakings and not the group as a whole.

QUESTIONS ON ARTICLE 8 OR ARTICLE 9 OF THE SFDR

1. The question raised was whether a product falling under Article 9 (1), (2) or (3) of the SFDR can only invest in sustainable investments as defined in Article 2(17) SFDR and if not, is there a minimum share of sustainable investments required. The EC responds that such products may in addition to "sustainable investments" include investments for certain specific purposes such as hedging or liquidity which, in order to fit the overall sustainable investments objective have to meet minimum environment or social safeguards.
2. The second question was whether when an EU Climate Transition Benchmark (EU CTB) or EU Paris-aligned Benchmark (EU PAB) exists, does the product have to track an EU PAB or an EU CTB

EUROPEAN COMMISSION'S RESPONSE TO QUESTIONS ON THE INTERPRETATION OF SFDR

on a passive basis to fall within the scope of 9(3) (financial product having reduction of carbon emissions as their objective)? The EC clarifies that where an EU CTB or EU PAB exists, a financial product must be tracking these. Where such a benchmark does not exist, the pre-contractual information must include a detailed explanation of how the continued effort of attaining the objective of reducing carbon emissions is ensured in view of achieving the long-term global warming objectives of the Paris Agreement.

3. Pursuant to Article 8 of the SFDR financial products have to promote environmental and social characteristics.
   The question asked is whether the inclusion of the word "**sustainability**" or "**sustainable**" or "**ESG**" would be sufficient to qualify a product to be promoting environmental or social characteristics and whether the financial product has to invest a minimum share of its investments to attain its designated environmental or social characteristics in order to be considered to be "promoting environmental or social characteristics". Is sectoral exclusion sufficient to qualify as promotion?

The EC responds that Article 8 of the SFDR remains neutral in terms of design of financial product and does not prescribe composition of investments or minimum investment threshold or eligible investment targets. These financial products, may continue to apply various market practices and tools (or a combination thereof) such as screening, exclusion strategies or best-in-class. Article 8 means that where a financial product complies with certain environmental, social or sustainability requirements, including international conventions or voluntary codes, and these characteristics are "promoted" in the investment policy of the financial product then the financial product is subject to Article 8 of the SFDR. The term "promotion" is very largely defined. The financial product must refer in the pre-contractual disclosures to those elements which relate to their environmental and/or social characteristics which are binding during the whole holding period.

AMENDMENTS TO AIFM REGULATION AND UCITS DIRECTIVE TO INTEGRATE SUSTAINABILITY CONSIDERATIONS

The proposed sustainability amendments to Directive 2010/43/EU (the "**UCITS** Directive") and to Delegated Regulation (EU) 231/2013 (the "**AIFM Regulation**") integrating sustainability considerations into the organisational, operating and risk management obligations of authorised alternative investment managers ("**AIFMs**") and UCITS management companies ("**ManCos**") have been adopted and published in the Official Journal of the European Union on 2 August 2021 (for a detailed overview of the introduced changes please see our previous articles on Amendments to the UCITS Directive 2010/43/EU and Amendments to the AIFM Regulation).

The amendments relating to sustainability will apply to all European Economic Area UCITS ManCos and AIFMs as of 1 August 2022.

CSSF CIRCULAR 21/782 | ADOPTION OF THE EBA REVISED GUIDELINES ON MONEY LAUNDERING AND TERRORIST FINANCING RISK FACTORS

BACKGROUND

On 24 September 2021, the CSSF issued a new Circular 21/782 regarding the adoption of the revised guidelines by the European Banking Authority ("**EBA**"), on money laundering and terrorist financing risk factors (the "**Circular**"). This Circular replaces CSSF Circular 17/661.

PURPOSE

The purpose of the Circular is to draw the attention to the adoption by the EBA of the revised guidelines on customer due diligence and the factors credit and financial institutions should consider when assessing the money laundering and terrorist financing ("**ML/TF**") risk associated with individual business relationships and occasional transactions under Articles 17 and 18(4) of Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (the "**Guidelines**").

Since the publication in 2017 of the original Joint Guidelines of the three European Supervisory Authorities (EBA, ESMA, EIOPA), the applicable legislative framework in the EU has changed and new ML/TF risks have emerged. The purpose of the Guidelines is to continue providing guidance on the different ML/TF factors the professionals should consider when assessing their risks.

ADDITIONAL NEW SECTORAL GUIDELINES

The structure of the Guidelines remains unchanged: the first part of the Guidelines provides information on the general application of due diligence (with more detailed information on sector-specific risk factors) and the relevant due diligence measures are set out in the second part of the Guidelines.

New sectoral guidelines have however been added covering crowdfunding platforms, providers of currency exchange services, corporate finance, payment initiation service providers, account information service providers.

NEW EMERGING RISKS

The Guidelines specify how professionals can adjust anti-money laundering and counter-terrorist financing ("**AML/CTF**") customer due diligence measures commensurate with the level of risk associated with a business relationship or occasional transaction. Thus, they set out examples of due diligence measures, either simplified for lower risk or enhanced in order to mitigate higher identified risks.

The Guidelines stress out new and emerging risks such as the use of RegTech solutions for customer due diligence purposes and contain more guidance on the identification of beneficial owners and enhanced customer due diligence related to high-risk third countries.

Furthermore, the Guidelines stress that professionals enhance their understanding of risks related to tax crimes as there are substantial similarities between the techniques used to launder the proceeds of crimes and to commit tax crimes.

The Guidelines finally specify that an effective risk-based approach should not result in systematically exiting or discontinuing to offer services to certain categories of customers associated with higher ML/TF risk ("de-risking" approach) and that professionals should also carefully balance the need for financial inclusion with the need to mitigate ML/TF risk.

APPLICABILITY OF GUIDELINES

Even though the Guidelines are applicable as of 26 October 2021, the Circular reminds that professionals need to apply the changes to future business relationships and also to existing customers at appropriate times as risk assessment and mitigation is an ongoing process. Any new control made by professionals should thus apply to both categories of customers (new and existing).

BENCHMARK REGULATION | DRAFT LAW

Last July Draft Law No. 7861 (the "**Draft Law**") was published containing proposed amendments to the Law 17 April 2018 (the "**Benchmark Law**") that had implemented Regulation (EU) 2016/1011 of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds amending Directives 2008/48/EU and 2014/17/EU and Regulation (EU) 596/2014 (the "**Benchmark Regulation**").

The Draft Law is aimed at aligning the Luxembourg legislative framework with the amendments introduced to the Benchmark Regulation by the following Regulations:

1. Regulation 2021/168 that introduced, among others and in the context of the cessation of LIBOR, provisions for the orderly termination of a benchmark; in order to reduce the legal uncertainty and the connected potential impacts on market integrity and financial stability, this Regulation provides for a replacement of certain benchmarks (mainly the critical benchmarks and the significant benchmarks) by EU or national law;
2. Regulation 2019/2175 that provides for ESMA to be, as of January 2022, the supervisory authority for the critical benchmarks and for the authorisation of benchmark administrators located in third countries;
3. Regulation 2019/2089 that introduced provisions with regard to the EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks.

The amendments concern, mainly:

- the designation of ESMA (instead of the CSSF) as the competent authority for the supervision of critical benchmark and for the authorisation of the benchmark administrators located in third countries;
- the designation of the CSSF as the competent authority for the replacement of a benchmark under Artticle 23 quater of the amended Benchmark Regulation;
- the designation of the CSSF as the competent authority for the assessments and the declarations under Articles 23 ter, par. 7 and 5a (assessment for establishing if a benchmark agreed as a contractual fall-back rate no longer reflects or significantly diverges from the underlying market), 23 ter, par. 2a and c (declarations announcing that the benchmark no longer reflects the underlying market or that the relevant administrator is commencing a wind-down procedure, to be acquired from the competent authority in the context of the designation by the European Commission of one or more replacements) and Article 23 quater, par. 1 a and c of the same Regulation (declarations announcing that the benchmark no longer reflects the underlying market or that the relevant administrator is commencing a wind-down procedure, in the context of the designation by the National Authority of one or more replacements);
- the alignment of Article 4 of the Benchmark Law, regarding the case in which the CSSF may dispose administrative sanctions, by referring to the provisions concerning the EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks.

CSSF Q&A ON UCITS | TREATMENT OF BREACHES OF UCITS GLOBAL EXPOSURE LIMIT

On 17 August 2021, the *Commission de Surveillance du Secteur Financier* (the "**CSSF**") published an updated version of its Frequently Asked Questions concerning the Luxembourg Law of 17 December 2010 relating to undertakings for collective investment schemes (the "**UCITS FAQ**") in order to add a new Section 11 which comprises four new questions in relation to the treatment of breaches of the UCITS global exposure limit.

The new section clarifies in which circumstances a breach can be considered as passive (eg: as the result of the increase of volatility in financial markets even in the absence of any new positions increasing the risk of the portfolio) and the actions the CSSF expects the funds' managers to take in case of passive breaches. The updated UCITS FAQ also confirms that passive breaches do not need to be reported to the CSSF.

It also provides the list of information that UCITS must communicate to the CSSF in case of occurrence of an active breach of the VaR limits.

CSSF | CHANGES IN AUTHORISATION PROCESSES OF NEW REGULATED FUNDS AND SUB-FUNDS

CHANGE OF AUTHORISATION PROCESS FOR NEW UCI AND /OR NEW SUB-FUNDS

In a communiqué of 30 July 2021, the CSSF announced the introduction of a new questionnaire named "Fund Pre-Inception Readiness Review" to be completed together with the application file relating to the authorisation process of new regulated funds and/or sub-funds to be added to existing regulated fund structures. The document is to be filled out in respect of UCITS, Part II Funds, SIFs and SICARs, by the investment fund manager contemplating the management of such new fund or an additional sub-fund in an existing structure. The questionnaire will streamline the authorisation process by replacing the series of confirmations regarding the preparatory work and assessments that are currently requested separately.

SIMPLIFICATION OF ASSESSMENT OF CONTRACTS WITH SERVICE PROVIDERS

The CSSF also issued guidance on good practice in drafting contracts with service providers, which do not need to be assessed by the CSSF anymore. Only the final signed agreements need to be submitted along with a standardised letter. This letter, confirming that the agreements are in compliance with legal and regulatory requirements, has to be signed by the person entrusted with the verification of the entity's documentation.

The Fund Pre-Inception Readiness Review and the standardised letter will have to be submitted in PDF format for funds applications falling within the scope of eDesk via the relevant path in eDesk. For applications falling outside of eDesk, these will have to be submitted via email to the respective generic email address.

GUIDANCE ON DOCUMENTS SUPPORTING APPLICATIONS

To clarify what is expected in terms of documents required to support applications, the CSSF further issued guidelines to be followed when submitting documents and an overview table containing lists of the required documents to be submitted in the context of an application for approval of a new regulated fund or sub-fund thereof.

These changes are applicable as of 16 August 2021.

END OF SUBMISSION OF EXTENSION REQUEST FOR FUNDS IN NON-JUDICIAL LIQUIDATION

On 31 August 2021, the *Commission de Surveillance du Secteur Financier* (the "**CSSF**") published a communication update in relation to the requirement to submit liquidation extension request for funds in non-judicial liquidation (the "Communication"), whereby it informs the market that, effective immediately, liquidators will no longer be required to request an extension of the liquidation period when the initial timing for the closing of the liquidation is no longer expected to be reached. The CSSF usually expects that the liquidation of a fund be finalized within one year as of the date of its opening. Until the date of the Communication liquidators had to receive CSSF's approval on the extension of the liquidation period and on its timing.

LIQUIDATIONS COVERED BY THE END OF THE EXTENSION REQUEST

As per the Communication, the end of the extension request applies "to non-judicial liquidation of funds". As a reminder, the CSSF is the competent authority to supervise the liquidation of funds that are ordinarily under its supervision, that is to say UCITS, Part II funds, SIF and SICAR ("**Regulated Funds**"). As the CSSF does not directly supervise RAIFs or other unregulated structures qualifying as investment funds, the Communication is irrelevant for these funds.

The CSSF is competent when the liquidation is non-judicial, which is the case when the liquidation was not ordered by a court. The non-judicial liquidation of a legal structure is generally decided by the general meeting of the shareholders (the manager in case of mutual funds). Non-judicial liquidations represent the vast majority of fund liquidations in Luxembourg.

The end of the extension request is only applicable in case the entire fund legal structure is terminated with the liquidation. In fact, the Communication expressly mentions that sub-funds of funds that are still on the official list and consequently not in non-judicial liquidation are still required to file an extension request when a period of 9 months has expired.

ONGOING SUPERVISION OF THE LIQUIDATIONS

The CSSF will carry on supervising and monitoring the progress of the liquidation of Regulated Funds through the different reports that liquidators are required to send it from time to time. In particular, the CSSF has updated the form "Periodical report from the liquidator on the progress of the liquidation" which needs to be filed with the CSSF twice a year, in electronic form according to the following deadlines:

- For reports covering the period from 1 January to 30 June: the report must be submitted no later than 30 September of the same calendar year; and
- For reports covering the period from 1 July to 31 December: the report must be submitted no later than 31 March of the following year.

Outside of these regular reports, the Communication also reminds liquidators that the CSSF shall be informed, without delay, of any significant issue that they might be facing in the context of the liquidation.

The CSSF shall also carry on receiving financial information about the funds. The financial information to be provided to the CSSF includes the liquidator's reports for each accounting period during the liquidation.

Upon closing of the liquidation, liquidators will remain responsible to ensure that the liquidation closing statement, their report on the liquidation and the auditor report be filed with the CSSF.

Liquidators shall also ensure that non-financial information, such as information on deposits in escrow at the *Caisse de Consignation*, monitoring of residual cash, or confirmations on closure of bank accounts are provided to the CSSF after the closing of the liquidation.

PERFORMANCE FEES DECLARATION

On 22 September 2021, the *Commission de Surveillance du Secteur Financier* ("**CSSF**") published a communication (the "**Communication**") on its website inviting investment fund managers ("**IFMs**") to proceed with a declaration regarding performance fees (the "**Declaration**"). The Communication has been issued in the context of CSSF Circular 20/764 (the "**Circular**") which integrated into the CSSF administrative practices and regulatory approach the content of the ESMA Guidelines on Performance Fees in UCITS and certain type of AIFs (the "**Guidelines**"), which apply since 6 January 2021. More information about the ESMA Guidelines can be found on our previous Newsletter.

THE PURPOSE OF THE DECLARATION

As per the Communication, the aim of the Declaration is to enable the CSSF to ensure that proper disclosures are made in compliance with the Guidelines. Under the Guidelines and the Circular, IFMs must ensure that adequate information about the existence of a performance fee and its potential impact on investment returns are provided to investors. They shall also clearly set out in the prospectus/ issuing document ("**prospectus**") of the fund they manage all information necessary to enable investors to understand properly the performance fee model and the computation methodology. In this context the prospectus shall include:

- The description of the performance fee calculation;
- Concrete examples of how the performance fee is calculated; and
- The main elements, as listed in Guideline 1 of the Guidelines, of the performance fee.

The Declaration also aims to enable the CSSF to collect standardised key information in relation to performance fees.

IFMS AND FUNDS COVERED BY THE DECLARATION

The Communication clarifies that IFMs managing Luxembourg based UCITS or AIFs are requested to proceed with the Declaration, even if the fund that is managed does not apply a performance fee. According to the Guidelines, the Circular and further clarifications provided by ESMA in its Questions and Answers on the Application of the AIFM Directive, the Guidelines apply to (i) all UCITS managers (ii) the UCITS directly in case it has not appointed a management company and (iii) AIFMs managing AIFs marketed to retails investors. Registered AIFMs and AIFMs managing the following types of AIFs are however out of the scope of the Guidelines, and therefore should not be caught by the obligation to proceed with the Declaration:

- Closed-ended AIFs;
- Open-ended AIFs that are EUVECA (or other type of venture capital AIFs), EuSEF, private equity AIFs and real estate AIFs; and
- ELTIFs provided that they are not marketed to retail investors, have a closed-ended structure and are venture/private equity capital or real-estate AIF.

Funds and/or sub-funds that do not apply a performance fee will have to be declared as such. Funds or sub-funds that have not yet launched since their approval or became inactive following full redemptions of their shares and then await for re-activation are also covered by the Declaration and shall thus be declared.

FORM AND TIMING OF THE DECLARATION

The Declaration will take the form of a questionnaire to be filled out by IFMs via a new eDesk module on Performance Fees (the "**Module**") that will be launched as from 30 September 2021. The list of funds and sub-funds concerned by the Declaration and the data collection will be available on the Module. As part of the Declaration, IFMs will also have to provide a declaration of compliance with the Guidelines.

The Module will be accessible according to the following timing:

- For funds which financial year ends between July 2021 and December 2021: as from 30 September 2021; and
- For funds which financial year ends between September 2022 and June 2022: as from January 2022.

PERFORMANCE FEES DECLARATION

The Declaration shall be completed, at the latest, on the corresponding closing date of each fund as this will be specified in the IFM corresponding performance fee eDesk dashboard, except for funds which financial year ends between July 2021 and September 2021 to which the Guidelines already apply, which will have to proceed with the Declaration by 30 November 2021.

The Communication also indicates that a dedicated eDesk user guide will be available in eDesk to provide assistance to complete the questionnaire.

UPDATE OF THE DECLARATION

The Declaration shall be kept up to date and IFMs are responsible to ensure compliance with this obligation.

The Declaration will have to be updated in cases of changes impacting the performance fee after the initial Declaration. Examples of types of changes requiring an update of the Declaration have been provided in the Communication, and will include:

- The introduction of the performance fee model for the first time; or
- Changes in the performance fee model.

The updated Declaration will have to be sent electronically to the CSSF via an “update” function on the Module that is to be created shortly, in parallel of the transmission of the revised prospectus reflecting those changes.

CASE C-931/19 TITANIUM | ECJ RULES NO FIXED ESTABLISHMENT FOR VAT PURPOSES WITHOUT OWN STAFF

In a judgment dated 3 June 2021, the European Court of Justice (“**ECJ**”) ruled that own staff is required for a finding of “fixed establishment” within the meaning of Directive 2006/112/EC as amended (the “**VAT Directive**”).

FACTS OF THE CASE

In the case at hand, a Company with registered office and management located in Jersey let, subject to tax, a property which it owned in Vienna (Austria) to two Austrian traders. This was the Company’s sole activity in Austria and the Company appointed an Austrian real estate management company to act as an intermediary in the day-to-day management of the property. The Company did not engage any staff in Austria and retained decision-making powers in relation to the management of the leases.

The Austrian tax authority took the view that a property owned by Titanium constituted a fixed establishment and, therefore, determined an amount of VAT chargeable to that Company (as opposed to VAT being payable by the tenant under the Austrian domestic reverse charge mechanism). The Company brought an action before the Federal Finance Court against the tax authority’s decision and the matter was referred to the ECJ.

FINDING OF THE COURT

The ECJ found that a property which is let in a Member State in the circumstance where the owner of that property does not have his or her own staff to perform service relating to the letting does not constitute a fixed establishment within the meaning of the VAT Directive. In particular, the ECJ noted that a “fixed establishment” implies a minimum degree of stability derived from the permanent presence of both the human and technical resources necessary for the provision of a given services.

However, the ECJ seemed to place particular emphasis on the fact that the persons responsible for management tasks were contractually appointed while the Company reserved for itself all important decisions concerning the letting of the property in question. It therefore remains open whether the ECJ would have reached a different conclusion if the Company had also contractually delegated key decisions regarding the letting of the property to the intermediary located in Austria.

DRAFT LAW 7872 AMENDING THE INTER-ADMINISTRATIVE AND JUDICIAL COOPERATION LAW

On 17 August 2021, the Luxembourg government introduced a draft law amending among others the amended law of 19 December 2008 on inter-administrative and judicial cooperation and the reinforcement of the means of the direct tax authorities (*Administration des contributions directes*) (the "**ACD**"), the indirect tax authorities (*Administration de l'enregistrement, des domaines et de la TVA*) (the "**AEDT**"), and the customs and excise authorities (*Administration des douanes et accises*) (the "**Draft Law**").

Although the Draft Law contains a new set of information (please see below a summary) that shall be exchanged between administrations, the information are mostly to be communicated to the AEDT. In the explanatory note attached to the Draft Law, the government justifies the new measures by the need for the AEDT to control VAT and the subscription tax collection. Indeed, for efficient management, and taking into account the growing number of VAT taxpayers, the controls of VAT returns are progressively carried out in a targeted and computerised manner. Thus, the effectiveness of the controls relies largely on the quality of the data analysed.

The main measures of the Draft Law can be summarised as follows:

- The joint social security center (*Centre commun de la sécurité sociale)* (the "**CCSS**") will have to communicate to the AEDT and to the ACD the list of affiliated self-employed workers. In addition, the CCSS will be required to annually provide the AEDT with the number of employees and the total payroll of each enterprise;
- AEDT will also be entitled to receive from the Ministry of Transport certain data relating to vehicles subject to registration (including the holder of the registration certificate) and held by VAT taxpayers;
- Finally, upon request, the AEDT shall obtain from the financial sector regulator (*Commission de Surveillance du Secteur Financier*) all information, deeds and documents in its possession regarding the entities subject to its supervision, insofar as they are necessary for the verification of the correct collection of the VAT and the subscription tax.

EXTENSION OF TELEWORKING FOR BELGIAN, FRENCH AND GERMAN CROSS-BORDER WORKERS IN THE CONTEXT OF THE COVID-19 PANDEMIC

The Luxembourg Government has once again reached agreements 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, as of 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 30 August 2020. Since then, five renewals of agreements have been signed with Belgium and France. The last ones, respectively signed on 21 and 15 September 2021, provide for an extension of these exceptional measures at least until 31 December 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 was to continue unless Germany or Luxembourg terminate the agreement. On 6 September 2021, Luxembourg and Germany nonetheless agreed that their agreement will apply at least until 31 December 2021.

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 December 2021 (publication dated 15 January 2021).

DECISIONS OF THE LOWER ADMINISTRATIVE COURT ON THE SUPERVISION OF SPFS

On 15 September 2021, the Lower Administrative Court issued four decisions on the lack of competence of the Luxembourg Direct Tax Authorities (hereinafter "**ACD**") to supervise family asset management companies (hereinafter "**SPFs**"). According to the law of 11 May 2007 on the creation of SPFs (hereinafter the "**SPF Law**"), SPFs are exempted from corporate income tax, municipal business tax and net wealth tax. Furthermore, according to the SPF Law the competence to control SPFs lies with the Indirect Tax Authorities (hereinafter "**AEDT**").

The facts that led to the decisions of the Lower Administrative Court concerned two Luxembourg SPFs that held bonds issued by other Luxembourg companies. While the SPF Law allows SPFs to hold bonds and other debt securities, the parliamentary discussions surrounding the adoption of the SPF Law specify that an SPF should not grant interest-bearing loans. By analysing the assets held by the two SPFs in question, the ACD considered that the bonds held by the SPFs were in fact interest-bearing loans granted to companies. Therefore, the ACD concluded that the SPFs should not benefit from the derogatory tax regime provided for by the SPF Law and as a consequence should be subject to direct taxes and thus its supervision. The ACD required the SPFs to file income tax, municipal business tax and income tax returns under the threat of fines. Due to the refusal of the SPFs to comply with this request, the ACD imposed a fine and issued *ex officio* tax assessments for the years 2010 to 2016. The SPFs appealed to the Lower Administrative Court on the grounds that the ACD had no competence to supervise them and to oblige them to file tax returns.

In its decisions, the Administrative Court relied on the SPF Law, which provides for a derogatory regime and explicitly states that the authority in charge of the fiscal supervision of SPFs is the AEDT. Furthermore, the judges point out that as long as the director of the AEDT has not removed such status, a company incorporated as an SPF retains this form and benefits from the derogatory tax regime. In the case at hand, the judges referred to a letter from the Director of the AEDT from which it is clear that at the time of the debates the Director still considered the companies as SPFs. The Lower Administrative Court therefore concluded that, as the Director of AEDT had not withdrawn the SPF status, the ACD had no competence to supervise them. Due to this lack of competence, the Decision of the Director of the ACD that upheld the orders to file tax returns were annulled by the Lower Administrative Court. It remains to be seen whether the State will appeal against these decisions.

CIRCULAR ON THE TREATMENT OF TAX LOSS CARRY FORWARDS FOR MUNICIPAL BUSINESS TAX PURPOSES

CONTEXT

On 10 August 2021, the Luxembourg Tax Administration issued an administrative circular *ICC* No. 31 (the "**Circular**") providing further clarifications in respect of the treatment of loss carryforwards in the field of municipal business tax ("**MBT**").

BACKGROUND

Paragraph 9bis of the Municipal Business Tax Law (the "**MBTL**") regulates the carryforward of losses for MBT matters and determines the conditions under **which operating losses recognized during previous fiscal years are to be deducted from a Luxembourg taxpayer's taxable basis** realized during a given fiscal year.

Paragraph 9bis of the MBTL **was replaced, with effect from the 2017 tax year,** by Article 4 of the law of 23 December 2016 (implementing the 2017 tax budget reforms) **to align with the provisions concerning the carryforward of losses** for corporate income tax ("**CIT**") currently foreseen under article 114 of the Income Tax Law ("**ITL**"). As a result, **the operating losses which are incurred from the 2017 tax year can no longer be carried forward indefinitely both for CIT and MBT purposes.**

LIMIT IN TIME

The Circular reiterates that, according to paragraph 9bis of the MBTL, **the operating profit incurred by a Luxembourg taxpayer** (the amount of which is positive) **is to be reduced by the amount of the tax losses observed during previous fiscal years** by application of paragraphs 7 to 9 of the MBTL as long as such tax losses could not be used before. Paragraph 9bis of the MBTL **restricts the tax deduction of losses over time by providing that only tax losses realized during the previous 17 fiscal years are deductible from operating profit for a given fiscal year**.

Paragraph 9bis of the MBTL makes the deduction of tax losses incurred during a previous fiscal year subject to the condition that the operator (*exploitant*) has **kept regular accounts during the fiscal years in which the tax losses occurred**.

Paragraph 9bis of the MBTL foresees that **the oldest tax losses are to be deducted first for MBT purposes. Tax losses, for which the deferral period is unlimited in time, are therefore deducted as a priority over those that fall under the limitation of 17 fiscal years**.

TREATMENT OF PERSONAL SOCIAL CONTRIBUTIONS

Additionally, the Circular specifies that personal social contributions incurred by an individual operator (*exploitant individuel*) or by a co-operator (*co-exploitant*) of a partnership are to be considered as **private expenses**. Hence, such expenses should not be taken into account for the determination of operating profit in accordance with the provisions of ITL. Similarly, the Circular also specifies that **personal social contributions do not constitute deductible expenses** within the meaning of paragraph 9 of the MBTL. Consequently their related amount should in principle **have no influence on the operating profit** within the meaning of paragraph 7 of the MBTL. Indeed, personal social security contributions are to be deducted in accordance with paragraph 11, subparagraph 2 of the MBTL after the determination of the operating profit and **hence not allowing for any potential loss carryforwards for MBT purposes.**

INVOICE REQUIREMENTS APPLICABLE TO INTRA-COMMUNITY TRIANGULAR TRANSACTIONS

On 8 April 2021, the Supreme Administrative Court (*Verwaltungsgerichtshof*) of Austria submitted several questions to the European Court of Justice (the "**ECJ**") for a preliminary ruling in connection with invoicing requirements under the EU VAT rules for intra-Community triangular transactions (case C-247/21).

BACKGROUND

In principle, in situations involving two supplies of goods between three VAT-registered taxpayers in three different EU Member States, and where the goods are directly transported from the first supplier to the final recipient (i.e. so-called triangular transactions), VAT should not be charged on any of the two supplies and none of the two suppliers should be obliged to register for VAT purposes in one of the foreign Member States involved in the transaction. Instead, the final recipient of the goods should self-assess local VAT in its Member State.

In the case at hand, the applicant company, a private limited company established in Austria purchased vehicles from a supplier based in the United Kingdom (before Brexit), and then resold them to a Czech company, with the vehicles being transported directly from the United Kingdom to the Czech Republic. The three European companies were all registered for VAT purposes in their home countries.

The Austrian company issued invoices to the Czech company, indicating "*VAT-exempt intra-Community triangular transaction*". These invoices however did not mention the obligation, for the purchasing taxpayer, to self-assess local VAT.

The Czech company was later identified in the Czech Republic as a "missing trader" by the local tax authorities which had not declared nor paid any VAT on the triangular transactions at stake and which could not be contacted by the local tax authorities.

On the basis of the failure to mention the purchasing taxpayer's obligation to self-assess local VAT on the invoices issued by the Austrian supplier, the Austrian VAT authorities considered the specific provisions relating to triangular transactions as inapplicable and assessed Austrian VAT on a deemed intracommunity acquisition of goods by the Austrian supplier.

The taxpayer appealed this decision by the Austrian authorities in front of the Austrian courts. In parallel, the taxpayer issued corrected invoices, including the required indication of the purchaser's obligation to self-assess local VAT, which invoices however, could not be successfully delivered to the purchaser.

QUESTIONS REFERRED FOR PRELIMINARY RULING

In the context of the above facts, the Supreme Administrative Court (*Verwaltungsgerichtshof*) of Austria decided to stay the proceedings and referred several questions, for preliminary ruling, to the ECJ.

It first asked whether the mere reference to an *"exempt triangular transaction"* in itself was or was not sufficient to meet the requirement of the VAT Directive to mention the purchaser's liability to self-assess local VAT.

In the event of a negative answer by the ECJ to that first question, the Austrian judges asked whether a corrective invoice would have the effect of rectifying the initial omission of an explicit reference to the VAT liability in the Member State of the purchaser, and, if so, whether such rectification would or not only be effective if there was proof that the purchaser actually received the corrective invoice. Finally, the Austrian court queried whether the correction of the invoice would or would not have a retrospective effect.

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BSP