BSP Newsletter

2022 January edition

FINE-TUNED
LEGAL ADVICE
MADE IN
LUXEMBOURG

BSP

Right by you in Luxembourg

SUMMARY

AML

◊ ANNUAL ONLINE AML SURVEY P. 03
◊ CIRCULAR CSSF 21/788: NEW AML/CFT EXTERNAL REPORT P. 04

BANKING & FINANCIAL SERVICES - CAPITAL MARKETS

◊ PUBLICATION OF THE NEW LUXEMBOURG LAW ON COVERED BONDS P. 05
◊ PROPOSED CHANGES TO THE LUXEMBOURG FINANCIAL COLLATERAL LAW P. 06
◊ DRAFT LAW ON THE GRANTING OF A STATE GUARANTEE TO SUPPORT FGDL CREDIT LINES P. 09
◊ NEW CSSF FAQ ON VIRTUAL ASSETS ADDRESSED TO CREDIT INSTITUTIONS P. 10
◊ MIFID II AND MIFIR - ESMA | UPDATED Q&AS AND FINAL REPORT ON APPROPRIATENESS AND EXECUTION-ONLY REQUIREMENTS P. 11
◊ EU SECURITISATION REGULATION – ESMA| UPDATED Q&AS AND FINAL REPORT ON SYNTHETIC SECURITISATION NOTIFICATION P. 12
◊ EU CROWDFUNDING REGULATION – ESMA | UPDATED Q&AS AND FINAL REPORT P. 13
◊ MAR – ESMA | UPDATED GUIDELINES ON DELAYED DISCLOSURE OF INSIDE INFORMATION P. 14
◊ TRANSPARENCY LAW | CSSF ENFORCEMENT PRIORITIES P. 15

CORPORATE AND M&A

◊ FILING FORMALITIES WITH THE RCS FROM 31 MARCH 2022 P.16

INVESTMENT MANAGEMENT

◊ DELEGATED ACTS FOR PRIIPS PUBLISHED BY THE EUROPEAN COMMISSION P.17
◊ CSSF Q&A ON UCITS P.18
◊ CSSF COMMUNICATION ON CESSATION OF EONIA AND LIBOR P.19
◊ PROPOSAL FOR A DIRECTIVE TO AMEND AIFMD AND UCITS DIRECTIVE P.20
◊ CSSF COMMUNICATION ON VIRTUAL ASSETS P.21
◊ ESMA UPDATES ON UCITS AND AIFM Q&A P.23
◊ ELECTRONIC TRANSMISSION OF DOCUMENTS FOR SICARS TO THE CSSF P.25
◊ NEW REPORTING REQUIREMENTS - CSSF CIRCULAR 21/790 P.26

TAX

◊ COVID-19 PANDEMIC: EXTENSION OF TELEWORKING FOR CROSS-BORDER WORKERS P.28
◊ ADMISSIBILITY OF A COURT CASE FILED BY A TRAINEE LAWYER: JUDGMENT OF HIGHER ADMINISTRATIVE COURT P.29
◊ THE EUROPEAN COMMISSION RELEASES ITS PROPOSAL FOR A DIRECTIVE TO PREVENT THE MISUSE OF SHELL ENTITIES AND ARRANGEMENTS P.30
◊ ECJ DECISION - REFUSAL OF THE VAT RIGHT OF DEDUCTION WHERE THE TRUE SUPPLIER HAS NOT BEEN IDENTIFIED P.32
◊ LOWER ADMINISTRATIVE COURT RULING ON POSSIBILITY TO MODIFY AN ERROR IN FINANCIAL ACCOUNTS P.33
◊ EUROPEAN COMMISSION DIRECTIVE PROPOSAL: MINIMUM GLOBAL TAX RATE FOLLOWING OECD PUBLICATION OF BEPS 2.0 - PILLAR TWO RULES P.34

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.

ANNUAL ONLINE AML SURVEY

BACKGROUND

On 15 February 2022, the CSSF will start the annual online survey for the year 2021 (the "**Survey**"). The Survey remains mostly unchanged compared to the previous year. However, some questions have been removed, added or amended. For ease of reference, the new questions have been highlighted in the Survey.

PURPOSE

The purpose of the Survey remains the same (check our previous newsflash) and consists in the collection of standardised key information concerning money laundering and terrorism financing risks ("**ML/TF**") to which professionals under CSSF supervision are exposed and the implementation of measures to mitigate these risks.

The Survey contributes to the CSSF's ongoing assessment of ML/TF risks present in the financial sectors under its supervision and forms part of the AML/CFT risk-based supervision approach put in place by the CSSF.

BY WHEN IS THE SURVEY TO BE SUBMITTED?

The Survey has to be completed and submitted through the CSSF eDesk Portal by 15 April 2022 at the latest.

BY WHOM IS THE SURVEY TO BE SUBMITTED?

The Survey has to be completed (i) for credit institutions, investment firms, investment fund managers including registered AIFMs, Luxembourg branches of AIFM, investment companies which did not designate a management company within the meaning of Article 27 of the Law of 17 December 2010 relating to undertakings for collective investment, internally managed alternative investment funds within the meaning of the Law of 12 July 2013 on alternative investment fund managers and investment funds which did not designate an investment fund manager, payment institutions and electronic money institutions, specialised professionals of the financial sector (PFS) and central securities depositories incorporated under Luxembourg law and (ii) for all Luxembourg branches of the entities mentioned under (i) having their registered office in an EU country or a third country.

The Survey must be initiated and submitted through the CSSF eDesk Portal either by:

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

The CSSF indicates that the completion of the Survey can also be performed by another employee of the entity or a third party provided it has an eDesk account and LuxTrust authentication, while bearing in mind that the ultimate responsibility for the adequacy of the information contained in the Survey remains with the RC or RR.

CIRCULAR CSSF 21/788 | NEW AML/CFT EXTERNAL REPORT

BACKGROUND

On 17 December 2021, the CSSF issued CSSF Circular 21/788 regarding guidelines for the Collective Investment Sector on the CSSF AML/CFT external report (the "**Circular**").

PURPOSE

The purpose of the Circular is to provide guidance on the report dedicated to anti-money laundering and terrorism financing risks (the "**Report**") that is to be drawn up by an external auditor and submitted to the CSSF.

SCOPE

The requirement to prepare and submit the Report applies to all Luxembourg investment fund managers, including registered AIFMs and to all Luxembourg investment funds supervised by the CSSF for AML/CFT purposes.

The legal basis for such requirement arises from Article 8-2(1) of the law of 12 November 2004 on the fight against money laundering and terrorist financing which allows the CSSF to require auditors to carry out on site verifications or investigations of persons subject to its supervisory powers and Article 49 of CSSF Regulation 12-02 of 14 December 2012 on the fight against money laundering and terrorist financing (the "**Regulation**"), pursuant to which the audit of a professional's annual accounts shall also include compliance with the legal and regulatory AML/CFT obligations and which specifically foresees the introduction of such a report.

EXEMPTIONS

The Report is not required for Luxembourg investment funds, which have appointed an investment fund manager (whether the investment fund manager is established in Luxembourg or abroad).

For exempted funds, the external auditor of the investment funds must nevertheless perform anti-money laundering work as foreseen under Article 49(1) of the Regulation.

WHO PREPARES THE REPORT?

All professionals, which have the legal requirement to appoint a *réviseur d'entreprises agréé* (approved statutory auditor or "**ASA**"), shall also appoint the same ASA to prepare the Report.

All other professionals subject to the Circular but not under an obligation to appoint an ASA for purposes of auditing their annual accounts must mandate an ASA for the specific purpose of preparing the Report.

CONTENT OF THE REPORT

The Report is divided into two sections: (i) a section concerning the corroboration of answers given by the supervised entity in scope in the context of the CSSF's annual AML/CFT online survey, and (ii) a section dedicated to sample testing or specific work to be performed by the ASA. The ASA shall review the latest AML/CFT online survey that is submitted on the CSSF's eDesk platform by the supervised entity in scope and respond to a number of questions determined by the CSSF.

The Report also allows the ASA and the supervised entity in scope to comment on the results of the work performed.

SUBMISSION OF THE REPORT

The compliance officer in charge of the control of compliance with the professional obligations ("*responsable du contrôle du respect des obligations professionnelles*" - RC)) or the person responsible for compliance with the professional obligations ("*responsable du respect des obligations professionnelles*" – RR) or a member of the board of the entity (or equivalent) remains in charge of submitting the Report via eDesk. It is to be submitted on an annual basis within six months of the end of the financial year.

For the year ended December 31, 2021 an extension of three (3) extra months is granted for the submission.

A user guide has been made available on eDesk to supervised entities in scope and ASAs.

PUBLICATION OF THE NEW LUXEMBOURG LAW ON COVERED BONDS

On 9 December 2021, the Luxembourg law of 8 December 2021 on the issuance of covered bonds (i) transposing into Luxembourg law Directive (EU) 2019/2162 of 27 November 2019 on the issue of covered bonds and covered bond public supervision, and (ii) implementing Regulation (EU) 2019/2160 of 27 November 2019 as regards exposures in the form of covered bonds, was published in the Luxembourg official gazette (the "**Covered Bonds Law**").

KEY CHANGES

In our previous newsletter published on 10 May 2021 on the draft law that resulted in the Covered Bonds Law, we set out some of the highlights of the draft law which have now been adopted in the Covered Bonds Law.

First, the Covered Bonds Law abolishes current restrictions on issuing entities. Under the current Luxembourg framework, only credit institutions authorised by the CSSF as covered bond banks (*banques d'émission de lettres de gage*) and only dedicated to such activity could issue covered bonds. Under the Covered Bonds Law, all Luxembourg banks will be able to issue covered bonds, without a need to obtain previous authorisation as specialised covered bond banks, subject however to certain financial limitations. In this way, Luxembourg universal banks will be able to expand their field of activity by issuing covered bonds.

Second, the Covered Bonds Law adds two types of covered bonds to the existing list of covered bonds under Luxembourg law:

- European covered bonds *(obligations garanties européennes)*, issued in respect of loans secured by physical assets (typically real estate) subject to public registration or in respect of loans granted to, or secured by, public sector entities; and
- (high-quality) European covered bonds *(obligations garanties européennes (de qualité supérieure))*, issued in respect of loans secured by high quality eligible assets (including certain public sector, immovable and movable property assets) meeting the criteria set out under Article 129 of Regulation (EU) 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms.

The Covered Bonds Law will enter into force on 8 July 2022.

PROPOSED CHANGES TO THE LUXEMBOURG FINANCIAL COLLATERAL LAW

On 20 December 2021, a draft law No. 7933 (the "**Draft Law**") was lodged with the Luxembourg Parliament (*Chambres des Députés*). While the main aim of the Draft Law is to implement Regulation (EU) 2021/23 of 16 December 2020 on a framework for the recovery and resolution of central counterparties (the "**CCP Recovery and Resolution Regulation**"), the Draft Law also takes the opportunity to bring a number of changes to the Luxembourg law of 5 August 2005 on financial collateral arrangements, as amended (the "**Financial Collateral Law**"), which transposes Directive 2002/47/EC of 6 June 2002 on financial collateral arrangements (the "**Financial Collateral Directive**") into Luxembourg law. This publication will focus on such proposed changes to the Financial Collateral Law.

The Financial Collateral Law is extensively used in both cross-border and domestic financing transactions and governs pledges and title transfers for security purposes over financial instruments (including equity and debt securities) and claims and repurchase agreements over any kind of assets. The Financial Collateral Law is widely recognised as offering a robust and flexible framework to parties. The Draft Law aims to further strengthen the Financial Collateral Law.

INCLUSION OF A REFERENCE TO THE CCP RECOVERY AND RESOLUTION REGULATION IN THE FINANCIAL COLLATERAL LAW

The Draft Law proposes to introduce a reference to the CCP Recovery and Resolution Regulation in Article 2-1 of the Financial Collateral Law. As a result, such article would provide that the provisions of the Financial Collateral Law shall apply without prejudice to Part I of the Luxembourg law of 18 December 2015 on the failure of credit institutions and certain investment firms, as amended, and Part IV of the Luxembourg law of 5 April 1993 on the financial sector, as amended, and to the laws and regulations of other EU Member States which transpose Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms and the CCP Recovery and Resolution Regulation (including any restrictions imposed by such legal instruments on the enforcement or the effect of a financial collateral arrangement or a close-out netting or set-off provision). This proposed amendment reflects a corresponding amendment to be made from 12 August 2022 by the CCP Recovery and Resolution Regulation to the Financial Collateral Directive.

CLARIFICATION ABOUT ENFORCEMENT EVENTS OF PLEDGES

The Draft Law proposes to make two helpful clarifications relating to enforcement events of pledges.

First, it proposes to further clarify that any event agreed between the parties to a pledge agreement can serve as an enforcement event. Although this was already provided for in substance in the Financial Collateral Law, the Draft Law specifies that an enforcement event is a default or any other event 'whatsoever' (in French: 'quelconque') agreed between parties. Such addition confirms that the agreed enforcement events entitling the collateral taker to enforce a pledge can be events other than payment defaults, such as, according to the commentary accompanying the Draft Law, violations of financial covenants or other events or circumstances relating to the general framework or to certain specific aspects of a transaction. In the past, there had been discussions about which events could be agreed as enforcement events of a pledge governed by the Financial Collateral Law. The Luxembourg Court of Appeal has for instance confirmed in a court decision of 22 January 2020 that the mere violation of a financial covenant could in itself constitute an agreed enforcement event of a pledge.

Second, the Draft Law proposes to introduce in the Financial Collateral Law a new paragraph that provides that where the obligations secured by a pledge are not yet due and payable at the time the pledge is enforced, the proceeds of enforcement shall, unless otherwise agreed, be applied in discharge of the obligations the pledge secures.

Where parties agree that a pledge can be enforced on the basis of an enforcement event that may occur prior to a time at which the underlying secured obligations have become due and payable, there have been interrogations in the past on how enforcement proceeds should be treated, more particularly on whether they should be applied immediately in

PROPOSED CHANGES TO THE LUXEMBOURG FINANCIAL COLLATERAL LAW

discharge of the underlying secured obligations or could be held as continuing security. The Draft Law helpfully clarifies that the proceeds shall be applied in discharge of the underlying secured obligations unless otherwise agreed between parties, thus offering flexibility to the parties to agree on the application of proceeds.

AMENDMENTS TO THE ENFORCEMENT METHODS OF PLEDGES

The Draft Law proposes to modernise Article 11 of the Financial Collateral Law dealing with enforcement methods of pledges.

First, the Draft Law proposes to specify in Article 11 that pledged assets that are admitted to trading on a trading venue could be sold on such trading venue at their market price. A trading venue is, according to the Draft Law, a regulated market, a multilateral trading facility or an organised trading facility.

Second, the Draft Law proposes to better distinguish between (i) an appropriation of financial instruments admitted to trading on a trading venue (which appropriation could, unless the parties have otherwise agreed, be made at the market price of such financial instruments), and (ii) an appropriation of units or shares in a collective investment undertaking, which could, unless the parties have otherwise agreed, either be made at their market price, provided that such units or shares are admitted to trading on a trading venue, or at the price of the last published net asset value by, or for that, collective investment undertaking, provided that the last publication of the net asset value is not older than one year.

Third, the Draft Law introduces two new paragraphs to Article 11 of the Financial Collateral Law which deal with the enforcement of pledges over units or shares in a collective investment undertaking and claims resulting from insurance contracts (including life insurance and capitalisation policies).

The new paragraphs would provide that (i) with respect to units or shares in a collective investment undertaking, the collateral taker can enforce the pledge by requesting the redemption of the pledged units or shares of such collective investment undertaking at their redemption price in accordance with the constitutional documents of that collective investment undertaking, and (ii) with respect to a pledge over claims arising from insurance contracts, the collateral taker may enforce such pledge by exercising all the rights arising under the pledged insurance contract, including, in the case of a life insurance contract or capitalisation transaction, the right to surrender, or demand payment from the insurance company of any sums due under, such insurance contract.

The new paragraph on the enforcement of pledges over claims arising under insurance contracts should also have the benefit of putting to rest doubts that had been raised by certain legal authors about the applicability of the Financial Collateral Law to pledges over insurance contracts. It should however be noted in this respect that a pledge over a Luxembourg life insurance contract would still need to comply with Articles 116 and 117 of the Luxembourg law of 27 July 1997 on the insurance contract, which is not being amended by the Draft Law. Such articles provide, amongst other things, that a life insurance contract may only be pledged by an endorsement signed by the policyholder, the collateral taker and the insurer and, where the benefit of a life insurance contract has already been accepted, with the consent of the beneficiary.

Fourth, the Draft Law proposes to fundamentally change the public auction enforcement method for pledges, which was rarely, if at all, used. Currently, the Financial Collateral Law foresees that a public auction would, unless otherwise agreed, be made at, and by, the Luxembourg Stock Exchange. Such an enforcement method has been rendered obsolete by the fact that the Luxembourg Stock Exchange no longer benefits from a governmental concession, but is now one of many regulated professionals of the financial sector and it has therefore become inappropriate to delegate such a mission to the Luxembourg Stock Exchange.

The Draft Law proposes to provide in the Financial Collateral Law for a new public auction procedure

PROPOSED CHANGES TO THE LUXEMBOURG FINANCIAL COLLATERAL LAW

which would apply unless parties agree otherwise. The public auction would be carried out by a Luxembourg notary or bailiff and the Draft Law regulates such procedure in detail, including by factoring into such procedure potential authorisations that may be required to be obtained from Luxembourg or foreign public authorities in the event of an enforcement of a pledge over the shares in a regulated entity.

Although an amendment of the current procedure is helpful and was somehow inevitable, it remains to be seen whether in practice parties would often use this new public auction enforcement procedure which would likely be longer and more costly than an enforcement by way of appropriation or sale.

OTHER NOTABLE AMENDMENTS

The Draft Law also aims to:

- specify that the safeguarding of asset rules introduced into the Financial Collateral Law by the Luxembourg law transposing, and implementing, Directive 2014/65/EU on markets in financial instruments ("**MiFID II**") and thereto relating regulations also apply to repurchase agreements governed by the Financial Collateral Law. Such rules prohibit credit institutions, when providing investment services or performing investment activities (within the meaning of MiFID II) and investment firms from concluding a title transfer for security purposes with a retail client within the meaning of MiFID II. They also oblige such credit institutions and investment firms to analyse and document the appropriateness of title transfers entered into with professional clients and eligible counterparties within the meaning of MiFID II and highlight risks relating thereto to such persons;
- clarify that sequestration measures (*séquestre*) do not prejudice financial collateral arrangements and set-off (including their enforcement); and
- correct certain clerical mistakes contained in the Financial Collateral Law.

NEXT STEPS

The Draft Law should now normally be examined within the designated commission(s) of the Luxembourg Parliament, be subject to review by the State Council and the applicable professional bodies and eventually be put to a vote. Such process can result in amendments being made to the Draft Law and, as a result, if voted, the binding law that may result from the Draft Law may differ from the Draft Law examined in this publication.

DRAFT LAW ON THE GRANTING OF A STATE GUARANTEE TO SUPPORT FGDL CREDIT LINES

On 28 October 2021, draft law 7905 (the "**Draft Law**") on the granting of a state guarantee to support credit lines contracted by the Luxembourg Deposit Guarantee Fund (*Fonds de Garantie des Dépôts Luxembourg (FGDL)*) was submitted to the Luxembourg Parliament (*Chambre des Députés*).

BACKGROUND

The FGDL is a public body established under Article 154 of the Law of 18 December 2015 on the failure of credit institutions and certain investment firms. It is the recognised Luxembourg deposit guarantee scheme referred to in Article 4(1) of the Directive 2014/49/EU of 16 April 2014 on deposit guarantee schemes. It collects the contributions due by participating credit institutions and manages the financial means. In the event of insolvency of a member institution, it makes the repayments as instructed by the *Conseil de protection des déposants et des investisseurs* (CPDI, Council for the Protection of Depositors and Investors) which is the internal executive body of the CSSF in charge of managing and administering the FGDL.

KEY POINTS OF DRAFT LAW

The Draft Law shall, if adopted, amend the aforementioned Luxembourg law of 18 December 2015 to enable the Luxembourg state to grant guarantees, capped at a maximum total amount of EUR 1 billion, for credit lines contracted by the FGDL. Such guarantees will be granted for an appropriate remuneration.

NEW CSSF FAQ ON VIRTUAL ASSETS ADDRESSED TO CREDIT INSTITUTIONS

BACKGROUND

In the context of the growing popularity of virtual assets amongst investors throughout Europe, the CSSF published on 4 January 2022 the anticipated FAQ on virtual assets addressed to credit institutions (the "**FAQ**"). These FAQ followed the recent publication by the CSSF of FAQ on virtual assets addressed to undertakings for collective investment.

THE FAQ IN A NUTSHELL

In these FAQ, the CSSF clarifies:

- that credit institutions may invest directly in virtual assets (hereafter "**VAs**") subject to certain accounting and capital-related considerations;
- that credit institutions may open accounts to deposit VAs (the "**VAs Accounts**") similar to securities accounts for the safekeeping of traditional financial instruments, provided that those VAs Accounts are segregated from the credit institutions' own assets; credit institutions may not open traditional bank accounts in virtual assets nor take deposits in virtual currencies and/or facilitate or execute payment settlements in virtual currencies;
- what registrations/notifications are needed for credit institutions which intend to provide virtual asset services;
- what the expectations of the CSSF are toward credit institutions that use specialised virtual assets exchange and custody platforms, in particular, as regards custody services;
- the CSSF requirements with regard to investor protection in the context of the provision of virtual asset services which in short entails the requirement to set up an investor protection framework keeping investors informed of the underlying risks of holding VAs;
- that credit institutions offering services or being party to transactions in VAs are required to observe the general principles and obligations of sound and prudent banking set out by CSSF Circular 12/552;
- that a Luxembourg fund depository may act as depository for investment funds investing directly in virtual assets subject to compliance with some specific requirements.

MiFID II AND MiFIR - ESMA | UPDATED Q&AS AND FINAL REPORT ON APPROPRIATENESS AND EXECUTION-ONLY REQUIREMENTS

Since we last provided an update on ESMA's Questions and Answers (**"Q&As"**) on Directive 2014/65/EU of 15 May 2014 on markets of financial instruments ("**MiFID II**") and Regulation (EU) 600/2014 of 15 May 2014 on markets of financial instruments ("**MiFIR**") in our July 2021 newsletter, the following have been updated:

- Q&A on MiFID II and MiFIR investor protection topics (the "**Investor Protection Q&A**")
- Q&A on MiFID II and MiFIR transparency topics
- Q&A on MiFIR data reporting

In this article, we will only focus on the Investor Protection Q&A, which includes one new Q&A relating to product governance.

In addition, on 3 January 2022, ESMA published its final report (the "**Final Report**") on the guidelines on certain aspects of the appropriateness and execution-only requirements under MiFID II (the "**Guidelines**").

INVESTOR PROTECTION Q&A - PRODUCT GOVERNANCE

This new Q&A clarifies that the mere presence of a make-whole clause is not sufficient for a financial instrument to be exempt (according to Article 16a of MiFID II) from product governance requirements. For illustrative purposes, ESMA has included practical examples of bonds and indicated which are subject to the product governance requirements and which are not.

FINAL REPORT - GUIDELINES

The Guidelines contained with the Final Report provide guidance on:

- the appropriateness process, including the information to be provided to clients about the purpose of appropriateness assessment, the arrangements necessary to understand clients and products, and the effectiveness of warnings;
- the level of record-keeping and controls necessary to ensure compliance with the appropriateness requirements;
- the circumstances during which the 'execution-only' exemption applies.

The Guidelines will be translated into the official languages of the EU and published on ESMA's website. Upon the publication of the translations, a two-month period will ensue during which national competent authorities must notify ESMA whether they comply or intend to comply with the Guidelines. The Guidelines will apply six months after the date of the publication on ESMA’s website in all EU official languages.

EU SECURITISATION REGULATION - ESMA | UPDATED Q&AS AND FINAL REPORT ON SYNTHETIC SECURITISATION NOTIFICATION

On 19 November 2021, ESMA updated its Questions and Answers ("**Q&A**") in relation to Regulation (EU) 2017/2402 of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation (the "**Securitisation Regulation**").

In addition, on 13 October 2021, ESMA published its final report (the "**Final Report**") on the draft technical standards specifying content and format of the simple, transparent and standardised ("**STS**") notification for on-balance sheet securitisations under the Securitisation Regulation (synthetic securitisations).

SECURITISATION REGULATION Q&A

In this latest update ESMA modified some of the existing Q&A regarding disclosure requirements and templates and also added new Q&A clarifying how to complete specific fields in specific scenarios.

FINAL REPORT FOR STS SYNTHETIC SECURITISATION NOTIFICATIONS

The Final Report contains *inter alia*:

- the draft regulatory technical standards ("**RTS**") which specify the information that is required to be disclosed in STS notifications;
- the draft implementing technical standards ("**ITS**") which establishes the STS templates for synthetic securitisation to be used for notifying ESMA.

The Final Report has been submitted to the European Commission for endorsement. For the time being, originators may use the interim STS notification templates for notification of synthetic securitisations which are available on ESMA website.

EU CROWDFUNDING REGULATION - ESMA | UPDATED Q&AS AND FINAL REPORT

On 19 November 2021, ESMA updated its Questions and Answers ("**Q&A**") in relation to Regulation (EU) 2020/1503 of 7 October 2020 on the European crowdfunding service providers for business (the "**Crowdfunding Regulation**").

In addition, on 10 November 2021, ESMA published its final report (the "**Final Report**") on the draft technical standards under the Crowdfunding Regulation.

CROWDFUNDING REGULATION Q&A

Six new questions split across four different categories were added with the European Commission providing all answers, confirming the following:

- Question 2.1 (Transitional period) - "national law" applicable during the transitional period can be either a specific crowdfunding regime or applicable legislation or the private law applicable to crowdfunding services in the Member State.
- Question 3.1 (General provisions) - the concept of "business activity" within a meaning of crowdfunding project is interpreted in a broad sense.
- Question 3.2 (General provisions) - individual portfolio management of loans remains in the nature of service that facilitates the granting of loans. The Crowdfunding Regulation imposes additional requirements over a minimum set of standards, which are applied to providers of facilitation of granting of loans.
- Question 4.1 (Provisions of crowdfunding services and organisation and operational requirements) - the concept of "routing of orders" means any form of practice to direct prospective investors to a particular offer, unless that practice is based on objective criteria that are disclosed *ex ante* (such as filtering or search engines).
- Question 5.1 (Investor protection provisions) - second subparagraph of Article 21(6) of Crowdfunding Regulation shall not apply to Article 21(7) of the Crowdfunding Regulation.
- Question 5.2 (Investor protection provisions) - the project owner is the one ultimately responsible for the information provided in the key investment information sheet, while the crowdfunding service provider is responsible for the procedures in place to verify that the information provided is complete, correct and clear.

CROWDFUNDIG REGULATION FINAL REPORT

The Final Report contains:

- the draft regulatory technical standards ("**RTS**"), and
- the draft implementing technical standards ("**ITS**"),

on a variety of topics connected to the Crowdfunding Regulation.

The Final Report has been submitted to the European Commission for adoption who shall take a decision, within three months, on whether to adopt these RTS and ITS.

MAR – ESMA | UPDATED GUIDELINES ON DELAYED DISCLOSURE OF INSIDE INFORMATION

On 5 January 2022, ESMA published its final report presenting the amended version of the ESMA guidelines (the "**Guidelines**") on delayed disclosure of inside information, specifically addressing the interplay between the issuers' obligation to disclose inside information under Regulation (EU) 596/2014 of 16 April 2014 on market abuse ("**MAR**") and the EU prudential supervisory framework applicable to them.

BACKGROUND

Under Article 17 of the MAR, issuers are obliged to inform the public as soon as possible of inside information. However, the disclosure of inside information may be delayed if certain conditions are met. Under Article 17(4) of MAR, issuers can delay the disclosure of inside information when the following conditions are cumulatively met:

- immediate disclosure is likely to prejudice an issuer's legitimate interest;
- delay of disclosure is not likely to mislead the public; and
- the issuer is able to ensure the confidentiality of that information.

In line with its mandate under the MAR, ESMA has previously issued Guidelines providing a non-exhaustive and indicative list of legitimate interests of the issuers that are likely to be prejudiced by immediate disclosure of inside information, and hence, if all other conditions are met, disclosure can be delayed.

KEY CHANGES TO THE GUIDELINES

The amended Guidelines add two new cases to the existing list of legitimate interests:

- the case where the issuer is an institution subject to Regulation (EU) 575/2013 of 26 June 2013 on prudential requirements for credit institutions ("**CRR**") and a decision to carry out redemptions, reductions and repurchases of own funds has been taken but is not yet authorised by the competent authority;
- the case where the issuer is an institution subject to prudential supervision under Directive 2013/36/EU of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions ("**CRD**") and has received a draft supervisory review and evaluation process ("**SREP**)" decision or preliminary information related thereto, which will become final at a later stage upon completion of the decision-making process of the competent authority.

Moreover, a separate section is introduced to the Guidelines clarifying that Pillar 2 capital requirements ("**P2R**") are highly likely to meet the definition of inside information under MAR, while Pillar 2 capital guidance ("**P2G**") may be inside information under MAR, whenever assessed as price sensitive. Where assessed to be inside information, P2G will, of course, require public disclosure as soon as possible, unless the conditions for delayed disclosure under MAR are met.

NEXT STEPS

A translation procedure will follow, with the Guidelines entering into force two months after the publication of translations.

TRANSPARENCY LAW | CSSF ENFORCEMENT PRIORITIES

BACKGROUND

On 17 December 2021, the CSSF has published a press release for the attention of issuers of securities subject to the law of 11 January 2008 on transparency requirements for issuers of securities, as amended (the "**Transparency Law**") and their auditors (the "**Press Release**").

The CSSF wishes to highlight, in the context of the preparation of the financial statements of issuers for the financial year ending 31 December 2021 in accordance with the International Financial Reporting Standards (the **"IFRS"**) and/or the preparation of the non-financial report of issuers in accordance with the law of 23 July 2016, a number of points that shall be subject to specific monitoring by CSSF during 2022.

EUROPEAN COMMON ENFORCEMENT PRIORITIES

ESMA together with the European national accounting enforcers, including the CSSF, have identified European common enforcement priorities (the "**ECEPs**") for the 2021 annual reports which are detailed in ESMA's public statement of 29 October 2021 available at this link. In that public statement, ESMA also sets priorities in relation to non-financial statements and addresses some points regarding alternative performance measures.

OTHER FOCUS POINTS OF CSSF ENFORCEMENT CAMPAIGN

In addition to the ECEPs, the CSSF 2022 enforcement campaign will focus on the following topics:

Classification and measurement requirements under IFRS 9

The CSSF will pay close attention to (i) the disclosure of accounting policies for financial instruments, in particular for those requiring significant judgement, and (ii) the assessment of the “Solely Payment of Principal and Interest” for loans or bonds with interest rates linked to sustainability targets.

Interest rate benchmark reform

The CSSF will continue to monitor the impact of the interest rate benchmark reform on issuers’ financial statements, which was triggered by the introduction of 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.

Presentation of primary financial statements

The CSSF notes that the International Accounting Standard Board (the "**IASB**") is currently working on proposals to set out new requirements for presentation and disclosure in financial statements. In the context of the tentative decisions of the IASB already available as part of the project "Primary financial statements", the CSSF encourages issuers to undertake a comprehensive review of presentation of profit and loss and challenge the subtotals presented.

In light of IASB proposals, the CSSF also intends to perform a thematic review on the presentation of the statement of profit and loss.

UPCOMING ENTRY INTO FORCE OF NEW REQUIREMENTS

Finally, the Press Release reminds issuers of the entry into force of the following new requirements:

- as from financial year 2021, issuers shall prepare their annual financial statements in compliance with European single electronic format (ESEF).
- as from 1 January 2022, issuers will need to comply with the new disclosure obligations under Article 8 of Regulation (EU) 2020/852 of 18 June 2020 on the establishment of a framework to facilitate sustainable investment (Taxonomy Regulation).

FILING FORMALITIES WITH THE RCS FROM 31 MARCH 2022

Further to the article published in our Newsletter of October 2021 (Luxembourg Business Register (LBR) – New RCS Filing Formalities), the RCS has now provided clarifications regarding the new filing rules that will apply from 31 March 2022.

LUXEMBOURG NATIONAL IDENTIFICATION NUMBERS

All physical persons (whether they be Luxembourg nationals or foreigners) registered or to be registered with the RCS in respect of different functions for Luxembourg companies (as shareholder, director, statutory auditor etc) will need to have a Luxembourg national identification number ("**LNIDN**").

In case such persons are not yet in possession of a LNIDN, they have to apply for the issue of such a number. For these purposes they will need to provide to the RCS their complete name, date, place and state of birth, their gender, nationality and private address and additionally provide evidence of the accuracy of such information in the form of a valid passport or national identity card and, as proof of the private address, either a residency certificate provided by the municipality, a certified declaration of the relevant person or, if such documents are not available, a utility bill. The information on gender, nationality and private address will not become publicly available on the RCS.

INSCRIPTIONS DURING THE TRANSITORY PERIOD

From 31 March 2022, the provision of the LNIDN to the RCS is already obligatory in connection with the following filing formalities:

- New inscription of any company or other entity with the RCS involving the inscription of physical persons; and
- Changes to the details of any physical person already registered with the RCS

In respect of the inscription of other changes on the RCS not involving details of a physical person (e.g. change of registered office of a company or changes to the capital), it is not yet obligatory to provide the LNIDN of physical persons whose LNIDN is still missing in the files of a registered company but the applicant may decide to complete the files with the missing information.

Even outside of the completion of any filing formalities, an applicant can decide to provide the LNIDN of physical persons whose LNIDN is still missing in the files of a registered company or request the issue of a new LNIDN.

INSCRIPTIONS AFTER THE TRANSITORY PERIOD

After the end of the transitory period (of which the end date has not yet been advised), it becomes obligatory for all entities registered with the RCS to communicate the missing LNIDN before they are able to effect any filing with the RCS. If such LNIDN for any physical person is still missing, any attempt to make any filing (whether or not involving a physical person) for a registered entity will be blocked.

COMMUNICATION OF LNIDN

The LNIDN will not be made public. It will only be communicated to the private address of the physical person concerned or to the person effecting the filing if duly authorised by such physical person.

As a consequence of these changes to the filing procedures all entities registered with the RCS will need to act as soon as possible to obtain the LNIDN of all physical persons undertaking functions within such entities.

DELEGATED ACTS FOR PRIIPS PUBLISHED BY THE EUROPEAN COMMISSION

On 7 September 2021, the European Commission published delegated regulation to the PRIIPs regulation amending regulatory technical standards developed by the European supervisory authorities in the Commission Delegated Regulation (EU) 2017/653. The latter defining the presentation and content of the KID.

The main amendments of the delegated regulation can be summarised as relating to:

- New methodologies underpinning the calculation of appropriate performance scenarios and a revised presentation of said scenarios, to ensure that retail investors do not have inappropriate expectations about the potential return on investment they may receive,
- Revised summary cost indicators and changes to the content and presentation of information on the costs of PRIIPs,
- Modified methodology underpinning the calculation of transaction costs to address practical challenges that arise when applying existing rules,
- Modified rules for PRIIPs that offer a range of options for investment to ensure clarity of the information on their cost implications.

To be noted in particular, the new chapter IIa setting out specific KID requirements for certain UCITS and AIFs providing specific provisions to be contained in the KID for investment compartments, share classes, funds of funds, master feeder, as well as structured funds.

The delegated regulation is accompanied by amendments to Directive 2009/65/EC (“**UCITS Directive**”), to avoid, from 1 July 2022, investors receiving two pre-contractual disclosure documents i.e. the PRIIPs KID and the KID.

The delegated regulation is also providing amendments to Regulation 1286/2014 (on key information documents for packaged retail and insurance-based investment products) to extend the transitional arrangement for certain investment funds laid down in Article 32 of that regulation by six months i.e. to 30 June 2022.

It allows manufacturers of PRIIPs that offer investment funds as the only underlying investment options to continue using for the purposes of drawing up PRIIPs KID, UCITS KID documents drawn up in accordance with the UCITS Directive.

The delegated regulation applies from 1 July 2022.

CSSF Q&A ON UCITS

HOLDING OF ANCILLARY LIQUID ASSETS BY UCITS

On 3 November 2021, 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 in transferable securities (the "**UCITS FAQ**") providing clarifications on the holding of ancillary liquid assets by UCITS. In that regard, six new questions were added, with the aim of clarifying the circumstances and the extent to which UCITS are allowed to hold ancillary liquid assets.

To these questions, the CSSF provided following answers:

- Ancillary liquid assets that UCITS may hold pursuant to Article 41(2)(b) of the law of 2010 consist of bank deposits at sight, such as cash held in current accounts with a bank accessible at any time. The holding of such ancillary liquid assets is limited to 20% of the net assets of a UCITS. The 20 % limit may only be temporarily breached where exceptionally unfavourable market conditions so require and where such breach is justified by the interests of investors.
- Bank deposits, money market instruments or money market funds that meet the criteria of Article 41(1) of the law of 2010 are eligible assets for UCITS and cannot be included in the ancillary liquid assets under Article 41(2)b).
- A UCITS is only authorised to invest in bank deposits, money market instruments or other eligible assets listed under Article 41(1) of the law of 2010 if this is clearly provided for in its investment policy. In case a UCITS invests in a category of assets that is not foreseen in its investment policy, the provisions of CSSF Circular 02/77 apply.
- Margin accounts do not qualify as bank deposits under Article 41(1)(f) of the law of 2010, neither do they qualify as ancillary liquid assets under Article 41(2)(b) of the law of 2010.
- The 20% limit on deposits made by a UCITS with a same body under Article 43(1) of the law of 2010 applies to ancillary liquid assets.
- The 20% limit on deposits made with a same body under Article 43(1) of the law of 2010 does not apply to margin accounts.

INVESTMENTS IN SPECIAL PURPOSE ACQUISITION COMPANIES BY UCITS

On 17 December 2021, the CSSF published an updated version of the UCITS FAQ. This time, only one question was added and it aims at clarifying investments in Special Purpose Acquisition Companies ("**SPACs**") by UCITS.

The CSSF points out that SPACs are eligible investments for UCITS, but only if they qualify, at any point of their life cycle, as transferable securities within the meaning of Article 1(34) and Article 41 of the law of 2010 and Article 2 of the Regulation 2008 (Grand-ducal regulation of 8 February 2008 relating to certain definitions of the amended law of 20 December 2002 on undertakings for collective investment). Nevertheless, due to different kinds of risks that SPACs may present and due to the complexity that their structure might have, UCITS shall perform a detailed risk assessment covering all material risks that these investment could bring about.

Pursuant to Article 26 (4) of the CSSF Regulation 10-4, the CSSF also highlights that such an assessment shall comply with the requirement that management companies should formulate, on the basis of reliable and up-to-date information both in quantitative and qualitative terms, forecasts and perform analyses concerning the investment's contribution to the UCITS' portfolio composition, liquidity and risk and reward profile.

In light of the foregoing, the CSSF ultimately considers that a UCITS' investment in SPACs should in principle not exceed a maximum of 10% of a UCITS' NAV, provided that such SPAC investments fulfil all applicable eligibility requirements, are adequately disclosed in UCITS prospectuses and are subject to the risk management process of the UCITS.

CSSF COMMUNICATION ON CESSATION OF EONIA AND LIBOR

On 19 November 2021, the **CSSF** published Press Release 21/28 addressed to undertakings for collective investment (“**UCIs**”) and investment fund managers (“**IFMs**”) in the context of the imminent cessation of the widely used interest benchmarks EONIA and LIBOR.

The Press Release is a reminder of the actions that UCIs and IFMs shall have put in place in the context of the cessation of both benchmarks and also inform about the new designated replacement benchmarks in case no replacement has been set in the fallback provisions.

EONIA

EONIA has been discontinued since 3 January 2022 and is no longer published by its administrator European Money Markets Institute (“**EMMI**”). Therefore, UCIs and IFMs are no longer authorised to use this benchmark, for instance as a basis of the calculation of a performance fee or to determine the interest rate applicable to a contract, and shall use the replacement benchmark designated in their fallback provision in lieu of EONIA.

Where no replacement benchmark to EONIA has been provided in the fallback provision, the Commission Implementing Regulation (EU) 2021/1848 of 21 October 2021 on the designation of a replacement for the benchmark Euro overnight index average (the “**EONIA Implementing Regulation**”), which applies as of 3 January 2022, has designated the €STR as the replacement benchmark to EONIA. The €STR will apply in lieu of EONIA in any contract and in any financial instrument in case such contracts or instruments do not contain fallback provisions or suitable fallback provisions in relation to the replacement of EONIA.

The €STR is published by the European Central Bank since 2 October 2019.

LIBOR

Regarding LIBOR, the CSSF reminded in its communication that all 35 settings of the LIBOR benchmark will cease to be provided by any administrator or will no longer be representative according to the following schedule:

- immediately after 31 December 2021, in the case of all GBP, EUR, CHF and JPY settings, and the 1-week and 2-month USD settings; and
- immediately after 30 June 2023, in the case of the remaining USD settings.

Regarding the 1-, 3- and 6-month GBP and JPY LIBOR settings, the UK Financial Conduct Authority (“**FCA**”) required the Libor administrator to publish these settings under a “synthetic” methodology, based on term risk-free rates, for the duration of 2022 in order to avoid disruption to legacy contracts that reference it. In this respect the CSSF reminded UCIs and IFMs that such settings of the LIBOR can be used:

- for the duration of 2022, and
- after 2022, only in legacy contracts and are not for use in new business.

As for the LIBOR CHF settings, where no replacement benchmark has been provided in the fallback provision, SARON settings have been designated in the Commission Implementing Regulation 2021/1847 of 14 October 2021 as a replacement for the CHF LIBOR, as of 1 January 2022. The relevant SARON settings will apply in lieu of the relevant LIBOR CHF settings in any contract and in any financial instrument in case such contracts or instruments do not contain fallback provisions or suitable fallback provisions in relation to the replacement of LIBOR CHF.

In terms of a viable replacement for the LIBOR GBP settings, two different recommendations were issued: SONIA and SOFR. However, those replacements rates are only a recommendation and it is not yet certain whether the European Commission will use its power to designate replacement benchmarks with respect to those settings and/or to the JPY one, similar to what it did for CHF and for EONIA. Therefore, UCIs and IFMs are strongly encouraged by the CSSF to actively reduce their exposure to such LIBOR settings and not to wait for the European Commission to designate a replacement for the abovementioned LIBOR settings.

EURIBOR

In case EURIBOR is used as a reference rate by UCIs and IFMs, the CSSF has drawn the attention of markets participants to the publications of the Euro Risk Free Rate Working Group as of 11 May 2021 with respect to EURIBOR fallback trigger events and €STR-based EURIBOR fallback rates.

PROPOSAL FOR A DIRECTIVE TO AMEND AIFMD AND UCITS DIRECTIVE

On 25 November 2021, the European Commission ("**EC**") published a legislative proposal to amend the Alternative Investment Funds Manager Directive (the "**AIFMD**") and the Undertakings for the Collective Investment in Transferable Securities Directive (the "**UCITS Directive**") (the "**Proposal**"). The EC intends to address market concerns that have arisen since the AIFMD and the UCITS Directive came into force. Some of the more important topics subject of the Proposal are the following:

LOAN-ORIGINATING AIFS

In an effort to harmonise requirements for loan originating funds ("**LOFs**") the Proposal contains a number of provisions relating to LOF. It is proposed to amend Annex I of the AIFMD, which sets out the investment management and ancillary functions that an AIFM can carry out, to add loan origination and servicing securitisation special purpose entities as legitimate activities for AIFMs (provided the application of numerous requirements). In addition, it is proposed to introduce new requirements for risk and liquidity management policies for LOF.

DEPOSITARY

The Proposal aims to allow, as an exception to Article 21(5)(a) of the AIFMD, National Competent Authorities to approve the appointment of a depositary for an AIF that is not situated in the same Member State as the AIF or the AIFM. This is to allow smaller markets to access depositary services on a cross-border basis.

It is also proposed to clarify that the provision of services by a central securities depositary acting in the capacity of an issuer CSD shall not be considered a delegation of the depositary's custody functions.

ADDITIONAL OVERSIGHT OF DELEGATION ARRANGEMENTS

Given that different national supervisory practices in fulfilling EU requirements for delegation can create inconsistencies and reduce investor protection, changes are proposed to both the AIFMD and the UCITS Directive on delegation requirements. Additional information will be required when applying for authorisation. Local regulators will need to notify the European Securities and Markets Authority (ESMA) if an AIFM or the UCITS management company delegates more of the risk or portfolio management functions than it retains to entities located outside Europe. The aim of this is to avoid the formation of "letterbox" entities.

REPORTING REQUIREMENTS

The supervisory reporting template for AIFMs and UCITS management companies will be changed to avoid duplicative reporting requirements that exist under European and national legislations by creating a common data space to minimise reporting costs and burden.

In addition it is proposed to amend pre-contractual disclosure requirements for AIFMs to include more information regarding the use of LMTs, information on originated loan portfolios and further information on fees and charges to be borne by the AIF or the AIFM on behalf of the AIF.

Proposed amendments to Article 24 of AIFMD relating to reporting obligations to competent authorities indicate that further information on markets and instruments in which the AIF trades will be required.

LIQUIDITY MANAGEMENT

In order to harmonise rules round use of liquidity management tools it is proposed to add an annex to both the AIFMD and the UCITS Directive setting out a harmonised list of such LMTs for open-ended AIFs and UCITS. Fund managers of open-ended funds would be able to suspend the repurchase/redemption of the shares temporarily but would also be required to choose at least one other liquidity management tool of their choice. In addition it is proposed to add provisions whereby the NCAs will have the power to require an open-ended AIF or UCITS to activate an LMT if it is in the interests of the unit-holders or the public.

ANCILLARY SERVICES

The Proposal extends the list of ancillary services that AIFMs can provide in addition to collective investment management to include administration of benchmarks and credit servicing. In addition it is proposed to clarify what provisions of Directive 2014/65 (MiFID II) apply to AIFMs providing ancillary services involving financial instruments.

The Proposal is open for feedback for a minimum of 8 weeks i.e. until 17 March 2022. Thereafter it will be presented to the European Parliament and Council where it will continue its legislative journey.

CSSF COMMUNICATION ON VIRTUAL ASSETS

In a communication of the 29 November 2021 (the "**Communication**"), the CSSF, whilst acknowledging that virtual assets have generated a strong interest as a potential new asset class, addressed the challenges raised by virtual assets since this category of assets comes with a variety of rights that are complex to assess.

The communication does not refer to a definition of virtual assets but pursuant to the law of 12 November 2004 on the fight against money laundering and terrorist financing they are defined as follows :

" *a digital representation of value, including a virtual currency, that can be digitally traded, or transferred, and can be used for payment or investment purposes, except for virtual assets that fulfil the conditions of electronic money within the meaning of point (29) of Article 1 of the Law of 10 November 2009 on payment services, as amended, and the virtual assets that fulfil the conditions of financial instruments within the meaning of point (19) of Article 1 of the Law of 5 April 1993 on the financial sector, as amended*". The latter are hereinafter referred to as "**Digital Assets**".

The CSSF noted that many of the questions around virtual assets concerned investments in virtual assets by investment funds, direct investments in virtual assets or depositary duties in the context of virtual assets. Thus, in addition to the guidance in the Communication, the CSSF published an FAQ for UCIs and an FAQ for credit institutions to be updated from time to time. This article focuses on the Communication and the FAQ for UCIs.

GENERAL GUIDELINES IN THE COMMUNICATION

- **Due diligence:** any supervised entity interested in pursuing an activity involving virtual assets bears the responsibility to carry out thorough due diligence related to the risks associated with the proposed virtual assets activity.
- **Internal governance:** the internal governance of such entity must ensure a sound and prudent management of all the activities of the entity and the internal governance arrangements shall include a clear risk-taking process including a risk appetite that is formally and precisely defined in all areas of the business and a rigorous decision-making process.

Thus, the management body is responsible for developing:

- ◊ A business strategy with respect to the activities involving virtual assets taking into consideration the specific risks.
- ◊ A risk strategy concerning virtual assets including notably the definition of the risk appetite and the overall framework for risk-taking and risk management.

- **Regulatory Updates:** the CSSF reminds supervised entities that regulatory developments and in particular those concerning the prudential treatment of virtual assets and the related practical implications are regularly updated and should be taken into consideration.

Professionals are invited to proactively engage with the CSSF when planning any activity involving virtual assets.

UCI FAQ

A. Investment in Virtual Assets by UCIs

UCITS and UCIs addressing non-professional investors and pension funds may not invest directly or indirectly in virtual assets.

Digital Assets are not subject to the above position and could potentially fall within the scope of eligible investments for UCITS.

AIFs marketing their units only to professional investors and having an authorised AIFM the authorisation of which extends to the strategy "Other-Other Fund Virtual assets" may invest directly and indirectly in virtual assets.

B. Authorisation Requirements for the Management of virtual assets

Virtual assets present specificities such as their volatility, liquidity and technological risks, which can

CSSF COMMUNICATION ON VIRTUAL ASSETS

significantly affect the risk profiles of investment vehicles. Each authorised Investment Fund Manager ("**IFM**") which intends to manage an alternative investment fund, regulated or not, investing in virtual assets needs to obtain prior authorisation from the CSSF for the strategy "Other-Other Fund Virtual assets". In this context, the CSSF expects to receive, among others, the following information/documents:

- Description of the project and of the different services providers/delegates involved;
- Information on whether or not the investments in virtual assets will be made directly or indirectly (by the means of derivatives for example);
- An updated risk management policy including in particular how the risks in relation to the virtual assets are managed;
- An updated valuation policy including the rules as to how the value of the virtual assets will be determined;
- Description regarding the experience of the portfolio manager (and other involved entities in the investment management process) in virtual assets;
- Description of how the custody of the assets will be organised by the depositary;
- Information regarding the targeted investors, as well as any information on the distribution channels of the AIF;
- The IFM's Anti-Money Laundering ("**AML**") and Counter-Terrorist Financing ("**CTF**") analysis on the assets side.

Note that the initiator of an AIF should present its project to invest in virtual assets beforehand to the CSSF. If the IFM is also a virtual assets provider ("**VASP**") a complete application file for registration as a VASP needs to be submitted to the CSSF before the start of the activity (click here for more details on registration).

C. AML and CTF Risk

The mitigation measures implemented by the supervised entity must take into consideration the increased risk of AML/CTF and proliferation financing. The *Responsable du Respect* (RR) and the *Responsable du Contrôle* (RC) of supervised entities investing in virtual assets must possess and demonstrate an understanding of the specific risks and mitigating measures with regards to virtual assets.

In this regard, the CSSF refers to the national vertical risk assessment of money laundering and terrorist financing related to VASPs, which provides elements of information as regards risks linked to virtual assets.

D. Depositary

Luxembourg fund depositaries may act as such for investment funds investing directly in virtual assets subject to adequate organisation and an appropriate operation model considering the specific risks related to the safekeeping of virtual assets.

In relation to depositary services, for virtual assets that qualify as "other assets", the depositaries' liability is limited to safekeeping duties.

A depositary providing administrative and depositary services to an investment fund investing in virtual assets triggers an obligation for the depositary to register as a VASP, if the depositary directly provides services relating to the safekeeping or the administration of virtual assets. In such case, virtual assets are recognised in the off-balance sheet and the depositary has an obligation of restitution. The CSSF has to be informed of the plans to directly safeguard virtual assets beforehand. Where the depositary does not offer safekeeping or administration types of services for the virtual assets and the IFM/Investment fund directly appoint a specialised virtual assets provider offering a custodian wallet type of service, it is the specialised services provider, which becomes liable for the restitution of the assets.

ESMA UPDATES ON UCITS AND AIFM Q&A

On 17 December 2021, the European Securities and Markets Authority ("**ESMA**") published updated version of both its Q&A Application of the UCITS Directive (the "**UCITS Q&A**") and its Q&A Application of the AIFMD (the "**AIFMD Q&A**"). The UCITS Q&A was also amended in November 2021. The updates cover a variety of topics, such as issuer concentration, share-class marketing notification, rebates for UCITS and the scope of application of the AIFMD for managers of crypto-assets undertakings.

UCITS Q&A

Issuer Concentration

Two new questions have been added under Question 5 "Issuer Concentration".

The first new question regards the possibility provided under Article 54 of the UCITS Directive for UCITS to invest up to 100% of their assets in different transferable securities and money market instruments issued or guaranteed by a Member State, one or more of its local authorities, a third country, or a public international body to which one or more Member States belong (the "**Entities**"). ESMA clarified that within the framework of such investment all transferable securities and or money market instruments must be guaranteed by an Entity and that each issue (at least six) shall not account for more than 30% of the total assets under management of the UCITS/sub-fund.

The second new question under Question 5 relates to the calculation of the counterparty risk limit in the context of currency hedging. ESMA clarified that unrealized forward exchange (FX) profits and losses shall be included in the net asset value of the relevant hedged share-class and thus taken into consideration when calculating the 10%/5% counterparty risk.

Share-class marketing notification

A new question Question 8 "Advance notice for the marketing of new share classes of UCITS notified for cross-border marketing" has been created.

ESMA clarified that the intention to market a new share-class in a Member State where a UCITS is already authorised for distribution on a cross-border basis shall be given at least one month before the marketing of the new share-class starts. This clarification follows the recent implementation of the Directive 2019/1160 with regard to cross-border distribution of collective investment undertakings.

Rebates and other arrangements

Finally, in November 2021, ESMA also clarified that (i) rebates to a third party, such as an individual investor, paid out of the management company's own resources and (ii) payment of fees from the management company's own resources to separate investors, (e.g. by the conclusion of side letters with institutional investors) where management companies prevent undue costs being charged to the UCITS and its shareholders, fall under the scope of the restrictions on payment of rebates and other arrangements as laid down in Article 29 of the UCITS Level 2 Directive 2010/43/EU (the "**UCITS Level 2 Directive**") and that those payments shall comply with the conditions set out in such article to be acceptable. In particular those arrangements should be:

- Transparent and meet the conditions laid down in Article 29 (1) (b) of the UCITS Level 2 Directive, and
- The management company should be able to demonstrate that:
  - ◊ they enhance the quality of the relevant service provided to the UCITS; and
  - ◊ they will not impair compliance with the management company's duty to act in the best interest of the UCITS.

The management companies should be able to provide accurate and documented justifications that the above conditions are met if and when requested by their national competent authority.

AIFMD Q&A

A new question 2 has been added under Section XI: "Scope" of the AIFMD Q&A.

The question relates to the qualification of undertakings investing in crypto-assets and whether

ESMA UPDATES ON UCITS AND AIFM Q&A

their managers would be subject to the AIFMD. ESMA clarified that whether an undertaking investing in crypto-assets qualifies as an alternative investment fund ("**AIF**") shall be assessed on a case-by-case basis and as per the definition provided in the AIFMD of an AIF.

As a reminder an undertaking will qualify as an AIF, and thus its manager will be subject to the AIFMD, if:

- It raises capital from a number of investors (in the case of a crypto undertaking to invest in crypto-assets);
- It invests the capital raised from its investors according to an investment policy; and
- It invests for the benefit of its investors.

ESMA also stressed that there is no restriction on the assets in which an AIF can invest, and an AIF can in principle invest in crypto-assets provided that their AIFM can ensure compliance with the AIFMD. It was also noted that additional restrictions on this type of investment can exist at national level.

ELECTRONIC TRANSMISSION OF DOCUMENTS FOR SICARs TO THE CSSF

CSSF Circular 19/708 extended the secured electronic communication of documents to the CSSF to, among others, investment companies in risk capital (SICAR). The annex of said circular listed the documents that should only be transmitted to the CSSF by electronic means. Final versions of the documents should be transmitted via a secured system for electronic transmission i.e. e-file or the Sofie communication platform.

According to the CSSF communiqué dated 17 December 2021, from 16 December 2021, investment companies in risk capital should submit their prospectus/issuing documents to the CSSF only by using the electronic secured system recognised by the CSSF notably through e-file or the communication platform Sofie. No other electronic communication mean can be used for prospectuses submitted for visa.

NEW REPORTING REQUIREMENTS | CSSF CIRCULAR 21/790

BACKGROUND

On 17 December 2021, the CSSF issued Circular 21/790 (the "**Circular**") applicable to Luxembourg regulated funds (UCITS, Part II Funds, SIFs and SICARs). The Circular covers a number of topics applicable to the regulated funds themselves and to their auditors:

a. It introduces an obligation for such funds to complete and submit a self-evaluation questionnaire each year.
b. It specifies the information, which such funds must spontaneously provide to the CSSF if the auditor issues a modified audit opinion to the annual accounts.
c. It specifies the role of the auditor in its audit of annual accounts.
d. It introduces a specific regulatory framework for the management letter.
e. It introduces an obligation for the auditor to prepare a separate distinct report in relation to the fund in question.

SELF-EVALUATION QUESTIONNAIRE

Each regulated fund will be required, for financial periods on or after 30 June 2022, to complete a questionnaire which will be made available on the CSSF's eDesk. The questionnaire will comprise questions around pre-defined themes. In particular, it is aimed at having funds self-evaluating their conformity with legal and regulatory requirements. AML themes are not included.

The directors/managers of the fund in question are responsible for the information in the questionnaire. It must be submitted within 3 months of the end of the financial year for UCITS and 4 months for all other regulated funds.

In case a fund is removed from the official list, the questionnaire needs to be completed for the period from the end of the last financial year to the date of such removal.

INFORMATION TO BE PROVIDED IN CASE OF A MODIFIED AUDIT OPINION

A "modified audit opinion" includes a qualified opinion, an unfavourable opinion or a refusal to give an opinion, by the fund's auditor.

Each time the audit report, established by the auditor, contains such a modified opinion the directors/ managers of the fund must spontaneously send a letter to the CSSF explaining the underlying reasons for the qualified opinion, its impact on the fund and its investors, an outline of what corrective measures are being taken and the timing of such measures.

The CSSF give further information on the specific information to be provided on their website.

PRACTICAL RULES RELATING TO THE ROLE OF THE AUDITOR

The Circular specifically provides that the fund subject to an audit obligation or the relevant auditor shall inform the CSSF of the removal or resignation of the auditor in the course of a mandate and explain the reasons for such removal or resignation. Upon a request for change of auditor the CSSF will analyse the reasons for the change and whether or not the fund in its procedure to choose a new auditor has adequately evaluated the competence and resources of the auditor vis-à-vis the type and volume of activity of the fund in question.

THE MANAGEMENT LETTER

For each financial period, the auditor has to prepare a management letter to be addressed to the managers/directors of the relevant fund. A template letter is available on the eDesk portal. Once received the managers/directors have to submit the management letter to the CSSF via the eDesk Portal. This applies for financial periods ending on or after 30 June 2022 and it needs to be submitted, for UCITS and Part II Funds, within 4 months of the end of the financial year and for SIFs and SICARs within 6 months of the end of the financial year.

The Management Letter should highlight any weaknesses or points for improvement in the operation of the fund, which, in the auditor's professional judgement, need to be highlighted to the managers/directors and the CSSF. The Management Letter should also refer to any points raised in

NEW REPORTING REQUIREMENTS | CSSF CIRCULAR 21/790

management letters from previous financial periods that have not been closed out.

Each point raised by the auditor needs to relate to a theme in a pre-determined list set out by the CSSF (in the template Management Letter on the eDesk). The auditor also needs to provide complementary information by responding to a questionnaire attached to the template Management Letter. This is to allow the CSSF to determine the level of risk for each weakness or point of improvement.

In addition, each weakness or point of improvement needs to be accompanied by a commentary from the managers/directors of the fund in question including an explanation as to why this situation occurred, information on measures taken to correct the situation accompanied by a remediation plan.

If the managers/directors do not respond in a reasonable time, the auditor should issue the Management Letter specifying that they received no comments from the managers/directors.

If the auditor has no points to be included in a Management Letter then they nevertheless need to validate the Management Letter on the eDesk Portal utilising the filed “No comment ML”.

THE REPORT ON THE SELF-EVALUATION QUESTIONNAIRE

The Circular introduces an obligation for the fund’s auditor to prepare a report on the Self-Evaluation Questionnaire (the “**Report**”) to be completed via the eDesk Portal. The Report consists of responses to certain pre-defined questions and the aim is to assess the reliability of certain responses to the Self-Evaluation Questionnaire. This Report is to be submitted within 5 months of the end of the financial year for UCITS and within 6 months of the end of the financial year for the other regulated funds.

The requirement for a Report applies to financial years ending on or after 30 June 2022 for UCITS and Part II Funds and 30 June 2023 for SIFs and SICARs.

In case a fund is removed from the official list, the Report needs to be completed for the period from the end of the last financial year to the date of such removal.

FINAL PROVISIONS

The eDesk Portal contains further explanations on the practicalities of preparing and submitting the Self-Evaluation Questionnaire, the Management Letter and the Report. The Circular abrogates CSSF Circular 02/81 as well as chapter P of Circular IML 91/75. For financial years ending on or after 30 June 2022, the Management Letter should no longer be submitted to the CSSF pursuant to the provisions of Circular 19/708.

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.

COVID-19 PANDEMIC: 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 secured an agreement on “exceptional measures” with the Belgian, French and German Governments regarding the taxation of Belgian, French and German cross-border workers, who would usually be working in Luxembourg but who are currently teleworking from their homes across the border.

Based on that agreement, any days of presence of a cross-border worker at his home, as from 14 March 2020, in particular if such person is teleworking, are not to be taken into account for the calculation of the 34-day (Belgium) or 29-day (France) period. The exceptional measures applying to French and Belgian cross-border workers were initially applicable until 30 August 2020. Since then, six renewals have been agreed between Luxembourg and each of Belgium and France; the most recent renewal agreements were signed on 12 and 15 December 2021 and provide for an extension of these exceptional measures until 31 March 2022.

Furthermore, the measures applying to German cross-border workers were applicable as from 11 March 2020 until 30 April 2020, from which point there has been an automatic monthly renewal, which shall continue until such time as Germany or Luxembourg terminate it. On 6 September 2021, Luxembourg and Germany agreed to an extension of the measures until 31 December 2021. On 7 December 2021, Germany and Luxembourg further agreed upon an extension of the measures until 31 March 2022.

As a reminder, as regards the determination of social security arrangements, the agreements signed between Luxembourg and each of Belgium, France and Germany to maintain the exceptional arrangement not to take into account teleworking days linked to the COVID-19 pandemic, remain applicable until 30 June 2022. We refer you to our previous newsletter article on this topic.

ADMISSIBILITY OF A COURT CASE FILED BY A TRAINEE LAWYER | JUDGMENT OF HIGHER ADMINISTRATIVE COURT

On 11 November 2021, the Higher Administrative Court (*Cour administrative*) issued a judgment on an appeal lodged by a taxpayer against a judgment of the Lower Administrative Court (*Tribunal administratif*) that deemed a case lodged before it as inadmissible due to the fact that it was filed by a trainee lawyer (*Avocat*) registered on List II of the Luxembourg Bar.

As a general rule, only a fully qualified lawyer (*Avocat à la Cour*) registered on List I or V of the Luxembourg and/or Diekirch Bar is permitted to lodge a case before the Administrative Courts. By exception, and in tax matters only, a taxpayer may himself lodge his application against a decision of the Director of the Luxembourg tax authorities or, as the case may be, against a tax assessment before the Lower Administrative Court. Also by way of exception, the taxpayer may be represented by a chartered accountant (*expert-comptable*) or an external auditor (*réviseur d'entreprise*) *in lieu* of a qualified lawyer. The above mentioned exceptions merely apply to applications before the Lower Administrative Court. Before the Higher Administrative Court, a qualified lawyer registered on List I or V of the Luxembourg and/or Diekirch Bar remains the only person permitted to represent a taxpayer.

In the case at hand, a trainee lawyer registered on List II of the Luxembourg Bar filed a case before the Lower Administrative Court against a decision of the Luxembourg tax authorities confirming the merits of a recourse in warranty (*appel en garantie*).

While trainee lawyers were previously listed as persons exceptionally authorised to lodge applications before the Lower Administrative Court in tax law alongside chartered accountants and external auditors on behalf of taxpayers, a change in the law in 2011 had the effect to exclude trainee lawyers from that list. As the Higher Administrative Court pointed out in its decision, such list of authorised persons has not been amended to intentionally exclude trainee lawyers, but the deletion rather results from an “oversight” by the legislator. However, the strict interpretation of an exception and the strict reading of a clear text must prevail over the interpretation of the intention of the legislator. Consequently, a trainee lawyer may continue to assist a fully qualified lawyer before the Administrative Courts but is not permitted to file a court case for and on behalf of a taxpayer.

THE EUROPEAN COMMISSION RELEASES ITS PROPOSAL FOR A DIRECTIVE TO PREVENT THE MISUSE OF SHELL ENTITIES AND ARRANGEMENTS

OVERVIEW

On 22 December 2021, the European Commission released a legislative proposal for a Council Directive ("**Draft Directive**" or "**Draft ATAD 3**") laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU on administrative cooperation in the field of taxation.

The European Commission proposes that Member States transpose the Draft Directive into their national law by 30 June 2023 with a targeted date of 1 January 2024 for its entry into force.

BACKGROUND

The Draft ATAD 3 is a response to the *Communication on Business Taxation for the 21st Century* released on 18 May 2021 by the European Commission presenting a plan of action to pursue the implementation of the Base Erosion and Profit Shifting project and to enhance Europe's recovery from the COVID-19 pandemic. The main objective of the Draft Directive is to address tax avoidance in the area of direct taxation conducted through the use of so-called "shell companies". To do so, the Draft Directive aims at introducing a "substance test" through new reporting obligations on EU taxpayers (i.e., so-called "undertakings" within the meaning of the Draft ATAD 3) upon filing of their tax returns. Such a substance test has been designed in accordance with a number of objective standards to be assessed towards undertakings (such as their respective level of turnover, existence of staff and presence of premises). The Draft Directive foresees additional provisions on the field of automatic exchange of information by amending Directive 2011/16/EU on administrative cooperation in the field of taxation.

More importantly, the Draft Directive requires Member States to levy minimum penalties applicable against the violation of the reporting obligations amounting to at least 5% of the undertaking's turnover.

SCOPE OF APPLICATION

Undertakings that meet the following cumulative criteria are subject to reporting obligations, unless they fall outside of the scope of the Draft Directive's:

a) deriving 75% of their income from "relevant income" (i.e., to be broadly understood as passive income) in the preceding two fiscal years such as interest, royalties and dividends;

b) mainly engaging in cross-border activities or passing on revenues to foreign shareholders (more than 60% of the book value of the undertaking's assets was located outside the Member State of the undertaking in the preceding two tax years OR at least 60% of the undertaking's relevant income is earned or paid out via cross-border transaction); and

c) outsourcing day-to-day administration and decision-making for significant functions in the preceding two tax years.

An undertaking that meets the aforementioned cumulative criteria may, however, request an exemption from its reporting obligation, if it can provide evidence that its existence does not reduce the tax liability of the beneficial owner(s) or of its group. **This exemption is granted for one year and can be extended up to five years**.

Furthermore, the Draft Directive includes several **carveouts and exceptions**, for example for listed entities, specific regulated financial entities (e.g. AIF, UCITS, AIFM); certain holding entities located within the same Member State of their respective operational businesses; or entities deemed with sufficient recourses (i.e. with at least five own full-time equivalent employees exclusively carrying out the activities generating the relevant income).

REPORTING OBLIGATIONS FOR IN-SCOPE UNDERTAKINGS

An undertaking within scope of the Draft Directive is obliged to report its substance level in its tax return (and through additional documentary evidence) by indicating whether the following cumulative criteria (the "**Gateways**") are met: (i) the entity has premises available for its exclusive use, (ii) the entity has at

THE EUROPEAN COMMISSION RELEASES ITS PROPOSAL FOR A DIRECTIVE TO PREVENT THE MISUSE OF SHELL ENTITIES AND ARRANGEMENTS

least one bank account in the EU and (iii) the entity has at least one exclusive local director dedicated to the group OR full-time employees (the director and the majority of the employees should be residing close to the undertaking).

PRESUMPTION OF LACK OF MINIMUM SUBSTANCE AND TAX ABUSE

An entity is to be considered at risk when it does not meet the three aforementioned Gateways and is therefore to be treated as a shell company for the purposes of the Draft Directive.

Should an entity's reporting reveal that all Gateways are passed, the undertaking should be presumed not to be a shell company. However, this presumption does not exclude that the tax administrations still find that such undertaking:

a. is a shell for the purposes of the Draft Directive because the documentary evidence produced does not confirm the information reported; or

b. is a shell or lacks substantial economic activity under domestic rules other than the Draft Directive, taking into account the documentary evidence produced and/or additional elements; or

c. is not the beneficial owner of any stream of income paid to it.

REBUTTABLE PRESUMPTION

The undertaking which is presumed to be a shell within the meaning of the Draft Directive has **the right to provide that it has substance** or in any case it **is not misused for tax purposes**. To rebut the presumption of shell entity the taxpayers **should produce concrete evidence of the activities they perform and how they realize them** (commercial reasons; information on the entity's resources; assessment of key decisions on the value generating activities; etc.).

PRACTICAL TAX CONSEQUENCES FOR SHELL ENTITIES FAILING AT THE MINIMUM SUBSTANCE TEST

Tax consequences arising in the Member State other than the undertaking's Member State*:*

a. Member States shall deny the application of any tax treaties, Articles 4, 5 and 6 of Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States and Article 1 of Directive 2033/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States;

b. The Member State of the undertaking's shareholders shall tax the relevant income of the undertaking in accordance with its national law as if it had directly accrued to the said shareholder (but still without prejudice to any tax treaty provisions if applicable). This should apply regardless of the undertaking's country of residence for tax purposes;

c. When the undertaking's shareholder is not resident for tax purposes in a Member State, the Member State of the payer of the relevant income shall apply withholding tax in accordance with its national law (but still without prejudice to tax treaty provisions if applicable).

Tax consequences arising in the Member State of the shell entity:

The Member State of residence of the shell entity either shall deny the granting of a tax residency certificate to the shell company or shall grant a certificate which prescribes that the shell entity is not entitled to the benefits of tax treaties.

EXCHANGE OF INFORMATION BETWEEN MEMBER STATES

All Member States will have access to information on EU shells (which shall be exchanged automatically), at any time and without a need for recourse to request for information. Moreover, a Member State would be able to request the Member State of the entity to conduct an audit on an entity, if it suspects that this entity lacks the minimal substance.

NEXT STEPS

The adoption at EU level of ATAD 3 is to be expected for the first quarter of 2022.

ECJ DECISION | REFUSAL OF THE VAT RIGHT OF DEDUCTION WHERE THE TRUE SUPPLIER HAS NOT BEEN IDENTIFIED

On 9 December 2021, the European Court of Justice ("**ECJ**") decided on case C-154/20 concerning the material requirements for the deduction of input VAT. In the current case, the main question was to rule on the ways to demonstrate and prove that the supplier of the service is a taxable person within the meaning of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ("**VAT Directive**").

BACKGROUND

The Supreme Administrative Court of the Czech Republic requested a preliminary ruling concerning the right to deduct VAT in cases of alleged tax evasion or abuse.

More specifically, the Supreme Administrative Court of the Czech Republic submitted the following questions to the ECJ for a preliminary ruling:

- Is it compatible with the VAT Directive for the right to deduct input VAT to be conditional on the taxable person fulfilling the obligation to prove that the taxable supply received was made by another specific taxable person?
- If the first question is answered in the affirmative and the taxable person fails to fulfil that evidentiary obligation, can the right to deduct input tax be refused without it being established that that taxable person knew or could have known that, by acquiring the goods or services in question, he [or she] was participating in tax fraud?

ECJ DECISION

The ECJ ruled that the VAT Directive *"must be interpreted as meaning that deduction of input VAT must be refused (without the tax administration having to prove that the taxable person committed VAT evasion or knew or ought to have known of evasion) if the taxable person fails to prove that the true provider of the services in question was a 'taxable person"*. However, this only applies if the information needed to verify whether the true supplier or provider of services was a taxable person is missing, based on the supporting information and/or evidences provided by the taxable person.

In this context, the ECJ provided further explanations:

- The fundamental principle of VAT neutrality requires deduction of input VAT to be allowed if the material conditions are satisfied, even if the taxable person has failed to comply with some of the formal conditions.
- The position may be different if non-compliance with formal requirements effectively prevents the production of conclusive evidence that the substantive requirements have been satisfied.

Thus, although in the context of fighting VAT fraud, a taxable person wishing to exercise the right to deduct VAT cannot, as a general rule, be required to check that the supplier of the goods or services concerned has 'taxable person' status, the position is different if establishing that status is necessary for the purpose of verifying that the material condition governing the right of deduction is satisfied. In the latter situation, it is for the taxable person to establish, based on objective evidence, that the supplier has the status of taxable person, unless the tax authorities have the information necessary to check that that material condition governing the right to deduct VAT is satisfied. In that regard, it follows from the wording of Article 9(1) of the VAT Directive that the concept of 'taxable person' is defined widely, based on factual circumstances, and therefore that the supplier's status as a taxable person may be apparent from the circumstances of the case.

CONCLUSION

In this decision the ECJ considered, consistent with previous case law, that it would be in opposition with the principle of fiscal neutrality to deny a taxable person the right to deduct VAT based on the fact that the true supplier of goods or services has not been identified, and that the taxpayer failed to prove that said supplier was a taxable person, provided that "it clearly follows from the factual circumstances that that supplier necessarily had that status". In a nutshell, to exercise that right, the taxable person cannot in every case be required to prove, where the true supplier of the goods or services concerned has not been identified, that that supplier has the status of taxable person.

LOWER ADMINISTRATIVE COURT RULING ON POSSIBILITY TO MODIFY AN ERROR IN FINANCIAL ACCOUNTS

In a judgment dated 30 November 2021, the Luxembourg Lower Administrative Court (*Tribunal administratif*) ruled that a taxpayer may not successfully modify a material error in his financial accounts in a way that has the effect of amending financial accounts of a previous year for which a tax assessment has become definitive (*coulé en force de chose décidée*).

FACTS OF THE CASE

In the case at hand, a subsidiary received a dividend from a sub-subsidiary located in the United Kingdom. The subsidiary passed on this dividend to its parent company located in Luxembourg (the "**Company**") as a reimbursement of share premium account. Due to a material error, these two transactions were not registered in the Company's 2014 accounts and incorrectly reported in the 2015 accounts. The Luxembourg Tax Administration ("**LTA**") issued tax assessments for the years 2014 and 2015. Following receipt of its 2015 tax assessment, the Company filed a modified tax return as well as an administrative appeal against the 2015 tax assessment. In addition, the Company filed corrected financial accounts for the years 2014 and 2015 which were communicated to the LTA.

The LTA rejected the Company's administrative appeal on the basis that Article 41(3) of the Luxembourg income tax law provides that a taxpayer may not rectify or modify a balance sheet that has served as a basis for taxation, except in the event that the taxation in question is still subject to modification or the modification will not result in a change in taxation.

FINDING OF THE COURT

Regarding the year 2015, the Lower Administrative Court held that the taxation was still subject to modification as a result of the Company's timely appeal against the 2015 tax assessment. However, the Lower Administrative Court found that the accounting principle of continuity of balance sheets prohibits a company's opening balance sheet for a given year from diverging from the previous year's closing balance sheet. The Lower Administrative Court ruled that this principle was also applicable in tax matters. As a result, an ex-post accounting correction in a year that has been definitively taxed which impacts a subsequent year cannot be made through a simple adjustment to the opening balance sheet of a year for which taxation has yet to be determined.

Since, in the case at hand, the ex-post accounting correction was first registered for the 2014 financial year and the 2014 taxation had become definitive, the Company was prevented from modifying its 2015 financial accounts (by an amendment of the opening balance sheet) although the 2015 taxation still remained subject to modification. The Lower Administrative Court thereby confirmed the LTA's decision to reject the Company's appeal.

CONCLUSION

Taxpayers and their advisors should keep this judgment in mind when considering the timing of ex-post amendments to financial accounts which may impact the taxpayer's tax position in the relevant years; close attention should be paid to the deadlines for challenging tax assessments issued for those relevant years.

EUROPEAN COMMISSION DIRECTIVE PROPOSAL | MINIMUM GLOBAL TAX RATE FOLLOWING OECD PUBLICATION OF BEPS 2.0 - PILLAR TWO RULES

OVERVIEW

On 20 December 2021, the OECD released detailed rules, the so-called Global Anti-Base Erosion ("**GloBE**") rules under BEPS 2.0 - the Pillar Two Model ("**Pillar Two Model**"), to assist in the implementation of a global minimum 15% tax rate to Multinational Enterprises ("**MNEs**") applicable as from 2023. Shortly following the OECD release, the European Commission has made public on 22 December 2021 a legislative proposal for a draft directive in view of the implementation of the GloBE rules (the "**Draft Directive**").

BACKGROUND

The Pillar Two Model provides OECD-countries a precise template for taking forward solutions to address the tax challenges arising from digitalization and globalization of the economy such as the introduction of a global minimum tax rate for MNEs with revenue above EUR 750 million. Such global minimum corporate tax is expected to generate around USD 150 billion in additional annual global tax revenues. For the most part, the GloBE rules expand on the contents of an OCED statement agreed in October 2021 by 137 countries and jurisdictions under the OECD/G20 Inclusive Framework on BEPS ("**OECD/G20 Inclusive Framework**"). Following this, the European Commission initiated the design of local rules in line with the EU legal framework. Nonetheless, it is expected that the OECD will release its commentary relating to the GloBE rules in early 2022 and will also address the co-existence with the US Global Intangible Low-Taxed Income rules. Consequently, it is very likely that further adjustments will be made to the current version of the Draft Directive.

THE GLOBE RULES

The GloBE rules are a set of interlocking rules: an income inclusion rule ("**IIR**") that allows the tax authorities of the parent entities to impose a top-up tax on low-taxed income of affiliated entities, and the undertaxed payments rule ("**UTPR**") that denies deductions or requires an equivalent adjustment for payments to low-tax affiliated entities that have not been subject to tax under an IIR.

IMPLEMENTATION OF THE GLOBE RULES UNDER THE DRAFT DIRECTIVE

Scope of application

The Draft Directive applies to "constituent entities" located in the EU that are members of MNE groups or large-scale domestic groups that meet the annual threshold of at least EUR 750 million of consolidated revenue in at least two of the last four consecutive fiscal years.

In line with the OECD/G20 Inclusive Framework, the following entities are excluded from the scope of the Draft Directive: Government entities, international organizations, non-profit organizations, pension funds, investment entities and real estate investment vehicles that are the ultimate parent companies of a group, and entities that are owned at least 95% by excluded entities.

Furthermore, the Draft Directive provides for a *de minimis* exclusion for MNE groups or large-scale domestic groups that have average revenues of less than EUR 10 million and an average qualifying income or loss of less than EUR 1 million in a given jurisdiction. Such MNE groups or large-scale domestic groups should not pay a top-up tax even if their effective tax rate is below the minimum tax rate applicable in that jurisdiction.

Key differences between the GloBE rules and the Draft Directive

Although the Draft Directive mainly follows the GloBE rules, some differences appear to guarantee conformity of the proposed text with EU primary law (e.g., the fundamental freedom of establishment). The key substantive differences are as follows:

a. **Application of the IIR to large-scale domestic groups**: the Draft Directive broadens the scope of the GloBE rules and the application of the IIR **to**

EUROPEAN COMMISSION DIRECTIVE PROPOSAL | MINIMUM GLOBAL TAX RATE FOLLOWING OECD PUBLICATION OF BEPS 2.0 - PILLAR TWO RULES

purely domestic groups established in a Member State if they reach the EUR 750 million threshold.

b. **Domestic top-up tax**: Member States **can opt to apply the top-up tax domestically to constituent entities located in their territory**. This election allows the top-up tax to be allocated to and collected in the low-tax jurisdiction, instead of collecting the additional tax at the level of the ultimate parent entity of the group. When a Member State chooses to elect this option, the amount of top-up tax due by the ultimate parent entity shall be reduced (up to zero) by the amount of top-up tax due by the constituent entities.

c) **UTPR**: The Draft Directive provides that the **UTPR is applicable when the ultimate parent entity is located outside the EU** in a jurisdiction that has not implemented the IIR. In addition, the Draft Directive provides that the UTPR is also applicable when the ultimate parent entity is located in a jurisdiction outside the EU that has implemented the IIR, but the ultimate parent entity (together with the other constituent entities in that jurisdiction) is low-taxed. Based on the UTPR, the top-up tax corresponding to the jurisdiction of the ultimate parent entity is allocated to all entities that have implemented the UTPR, including those located in a Member State. **The UTPR, however, is not applicable when the ultimate parent entity is located in a Member State**, because an ultimate parent entity located in a Member State applies by definition the IIR principles.

d) **Assessment framework**: the Draft Directive includes an additional Chapter, which outlines conditions that third-country regimes should meet to be considered equivalent to the qualified IIR in the meaning of the Draft Directive.

e) **Filing obligations**: The Draft Directive foresees **tax filing obligations for constituent entities located in a Member State**. Such entities need to file a 'top-up tax information report' comprising of the information points mentioned under the Draft Directive. More importantly, the Draft Directive requires Member States to levy **minimum penalties applicable against the violation of such reporting obligations amounting to at least 5%** of the constituent entity's turnover.

NEXT STEPS AND TIMING

Member states will need to unanimously approve the text of the Draft Directive and adopt the directive in the Council of the EU. The EU Council Presidency currently targets for an agreement within the next 6 months.

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with the Draft Directive by 31 December 2022. Provisions under the Draft Directive shall be applicable from 1 January 2023 with the exception of the UTPR, which shall apply as of 1 January 2024.

BSP

Right by you in Luxembourg

CONTRIBUTORS

Henrique Arcoverde, Elena Bassi, Marc-Alexandre Bieber, Laetitia Deffo, Fahri Dogan, Nuala Doyle, Eda Dripps, Myriam Fellag, Xavier Gomez, Deniz Günez Türktas, Sabine Hinz, Isabel Høg-Jensen, Sophie Labruyère, Evelyn Maher, Laurie Masson, Pol Mellina, Maria Natsiou, Marylou Poncin, Daniel Riedel, Linda Scannell, Olivier Schank, Laura Simmonds, Elzbieta Tumko, Katarzyna Waniek, Clint Wanschoor, Nicolas Widung.

BSP