BSP Newsletter

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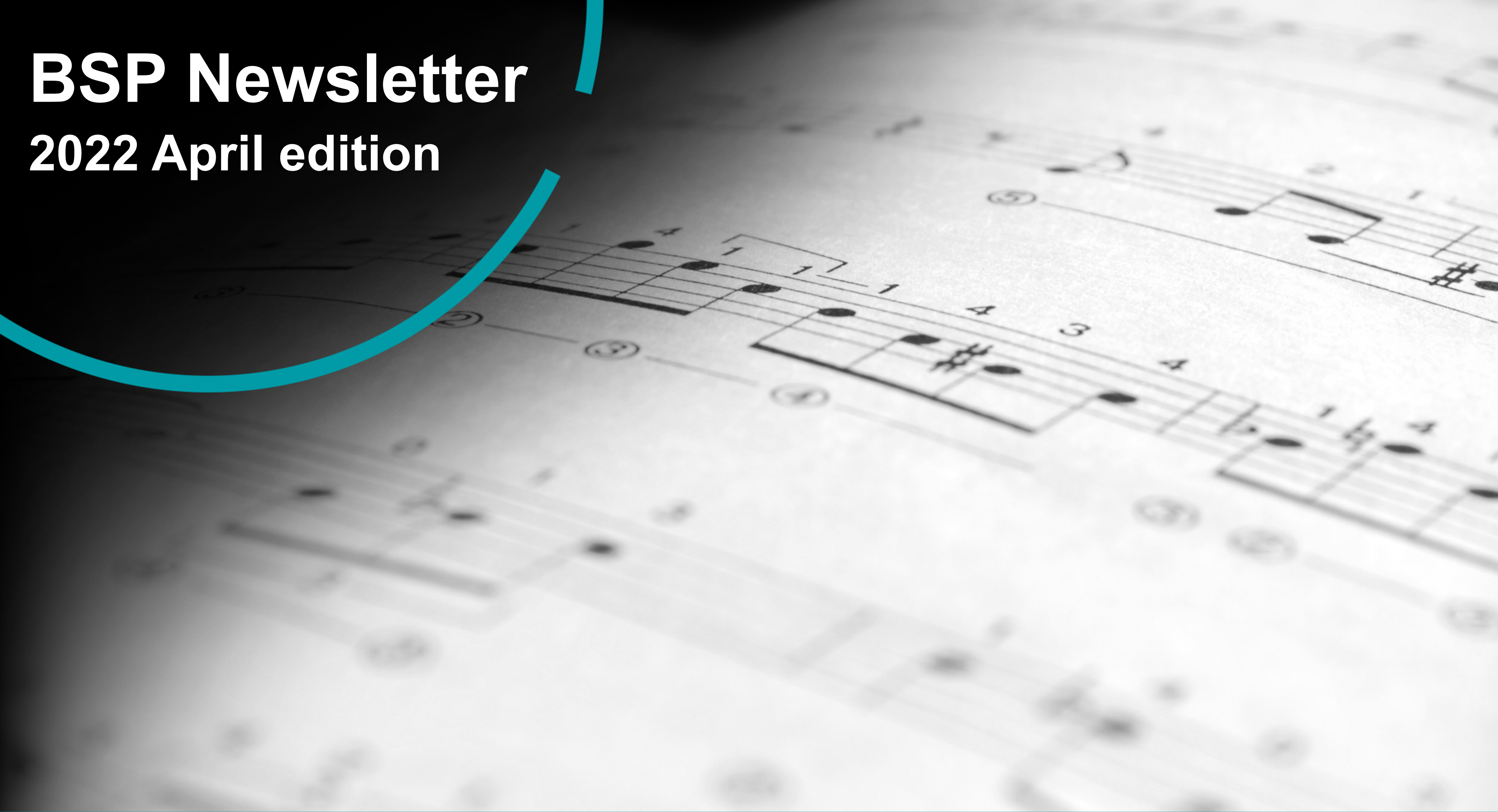

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SUMMARY

CSSF FAQS ON THE AML/CFT RC REPORT

On 28 March 2022 the CSSF published frequently asked questions (the **"FAQs"**) in relation to the annual completion and transmission of the fight against money laundering and terrorist financing compliance officer's summary report (the "**AML/CFT RC report**") as defined in Article 42 (6) and 42 (7) of the CSSF Regulation 12-02.

As a reminder, every Luxembourg investment fund and Luxembourg investment fund manager supervised by the CSSF for AML/CFT purposes (respectively the "**Fund**" and the "**IFM**") is legally required to appoint, *both* a responsible person for compliance ("*responsable du respect des obligations*" (the "**RR**")) and a compliance officer ("*responsable du contrôle du respect des obligations*" (the "**RC**")).

The FAQs include the following topics:

1. Entities that must file the AML/CFT RC report

The present FAQs are of interest for all funds and IFMs. FAQs specify that, if the entity is dissolved and placed into non-judicial liquidation, the AML/CFT RC reports are no longer required after the start date of the non-judicial liquidation. The liquidator remains responsible for AML/CFT compliance during the liquidation.

2. Formalities to file the AML/CFT RC report

The AML/CFT RC report shall be filed **within five months** following the end of the professional's financial year via:

- *e-file* communication platform or *Sofie* communication platform for entities subject to CSSF Circular 19/708 (i.e: the undertakings for collective investment as defined in Circular 19/708, the securitisation undertakings subject to the Law of 22 March 2004, the pension funds subject to the 2005 Law, the SICARs and the Luxembourg investment fund managers as defined in Circular 19/708);
- eDesk module "*Demandes Génériques*" with the specific mention "AML/CFT RC report", for registered AIFMs.

3. Form of the AML/CFT RC report

The AML/CFT RC report shall be (i) dated and signed by the RC and (ii) submitted to the CSSF by the RR.

The FAQs list the elements to state in the AML/CFT RC report and specify that the AML/CFT RC report shall be a consistent and accurate description of the work performed by the RC and of the related findings. In this respect, the AML/CFT RC report shall:

- Include quantitative results; that means, for the section regarding the investors: the number of newly accepted or rejected investors for the reference period, as well as the total number of investors in the shareholder register, the type of initial and ongoing due diligences performed on the investors, as for example an enhanced due diligence on higher risk investors, and the investors' file review frequency based on its risk scoring.
- Provide information of a qualitative nature to explain the assessment by the RC of all the work performed.
- Include the information of "no findings", if the inquiries and diligences conducted by the RC raised no shortcomings.

4. Extent of the RC's liability irrespective of his/her nomination date

If the recently appointed RC identifies that:

- **The outgoing RC did not file the annual AML/CFT RC report**, the CSSF expects the incoming RC to ensure that the AML/CFT RC report is submitted to the CSSF;
- **No AML/CFT due diligence has been performed by the exiting RC**, the CSSF expects the board of the entity to submit a letter to explain the situation and the oversight performed by the board / RR on the work of the leaving/exiting RC.

5. CSSF sanctions for non-submission of the AML/CFT RC report

Professionals who would not provide the AML/CFT RC report can be subject to sanctions as detailed in Article 8-4 of the AML Law of 12 November 2004 as amended including

CSSF FAQS ON THE AML/CFT RC REPORT

administrative sanctions and administrative measures such as: a warning; a reprimand; a public statement which identifies the natural or legal person and the nature of the breach; a temporary ban, for a period not exceeding 5 years, to exercise a professional activity of the financial sector, to carry out one or several transactions or to exercise managerial functions; maximum administrative fines of twice the amount of the benefit derived from the breach, where that benefit can be determined, or EUR 1,000,000 at the most.

TRANSPARENCY LAW AND MARKET ABUSE REGULATION | CSSF LAUNCHES NEW eRIIS FILING PLATFORM

The CSSF's new electronic filing platform "electronic Reporting of Information concerning Issuers of Securities" (**eRIIS**) is live since 4 March 2022 and can be accessed at this link. eRIIS provides issuers and other persons subject to the Luxembourg law of 11 January 2008 on transparency requirements for issuers, as amended (the "**Transparency Law**") and Regulation (EU) 596/2014 of the European Parliament and of the Council on market abuse, as amended (the "**Market Abuse Regulation**") with a regulatory filing system and a secure channel of communication with the CSSF.

The two main CSSF Circulars 08/337 and 08/349 relating to the Transparency Law have been updated by CSSF Circulars 22/799 and 22/800, respectively, and now include details on the new filing process through the eRIIS platform.

1. Types of filings

eRIIS supports the filing of all ongoing and periodic information to be published by issuers pursuant to the Transparency Law and major holdings notifications pursuant to the Transparency Law. It also supports the filing of the various notifications/disclosures required in accordance with the Market Abuse Regulation.

2. Access requirements

A user account is required to access eRIIS and each user account must be linked to a reporting entity in order to perform filings on behalf of such a reporting entity. User accounts can be linked to more than one reporting entity.

3. Next steps

A LuxTrust certificate is required to access the eRIIS platform and to get an eRIIS user account. As a consequence, persons who do not already possess a LuxTrust certificate should order one as soon as possible.

The CSSF encourages that concerned entities switch to filing through eRIIS as quickly as possible. However, in order to give the relevant persons sufficient time to set themselves up to use eRIIS, filings pursuant to the Transparency Law and Market Abuse Regulation may continue to be made via email until 30 May 2022.

The CSSF has provided detailed guidance on the eRIIS platform in the form of user guides and frequently asked questions, which are available on the dedicated page of the CSSF website, which can be accessed by clicking here.

We at BSP remain available to guide you through the process of using the eRIIS platform including the obtaining of a user account and/or LuxTrust certificate.

DLT AND BLOCKCHAIN TECHNOLOGY | CSSF WHITE PAPER

BACKGROUND

As a global financial centre, Luxembourg has traditionally been amongst the frontrunners in bringing financial innovation under its regulatory umbrella. This again seems to be the case with regard to blockchain technology and digital assets too. Already in 2019, the Grand Duchy had legislation in place referencing blockchain technology at a time when the proposal of the Markets in Crypto Assets Regulation ("**MiCA**") was still under preparation by the European Commission.

On 21 January 2022, the CSSF released a White Paper titled "Distributed Ledger Technologies & Blockchain – Technological Risks and Recommendations for the Financial Sector" ("**the White Paper**"). The aim of the White Paper is to guide professionals in their due diligence process, if they wish to make use of distributed ledger technology ("**DLT**") in Luxembourg's financial services sector. The document is non-binding, and the CSSF emphasised that it remains technologically neutral but open to accommodating technological innovation if its risks are assessed appropriately.

SCOPE OF THE WHITE PAPER

1. Definitions and Characteristics of DLT

DLT is a rapidly developing technology and as such, its definition remains fluid. Therefore, the CSSF refrained from using previous definitions by EBA in its July 2018 report or by the European Commission in its "Pilot regime for DLT market infrastructures". Instead, for the purpose of the White Paper the following definition was adopted:

"DLT is a technology allowing a network of independent and often geographically dispersed computers to update, share and keep a definitive record of data (e.g. information, transactions) in a common decentralised database in a peer-to-peer way, without the need for a central authority."

The CSSF further elaborated on the above definition by setting out a useful list of common characteristics by which DLTs can be identified, namely:

- **the use of a peer-to-peer consensus mechanism through a network of nodes** to ensure that transactions are legitimate. In this manner, local additions to the decentralised ledger are validated through the consensus of all nodes, and
- **the use of cryptography to ensure:**
  - i) **Immutability**, making it impossible to retroactively alter a transaction;
  - ii) **Non-repudiation**, making it impossible to deny the authenticity of the transaction; and
  - iii) **Authorisation**, making sure that users initiate transactions using their dedicated public and private keys.

In addition to the above characteristics, the CSSF identified various different types of distributed ledgers classified according to their key properties: e.g. access rights (**public vs private and unrestricted vs restricted**), transaction validation rights (**permissioned vs permissionless/semi-permissioned**) and consensus mechanisms.

2. Use Cases and the DLT Ecosystem

The White Paper is more than just a cautionary tale about the risks of DLT. Prior to presenting the various risks associated with DLT, the CSSF first describes the impact that a chosen DLT can have on a given project and gives an overview of sample DLT applications which the CSSF has observed over the year – so-called "use-cases".

According to the CSSF, decentralised ledgers could prove to be a solution for streamlining **KYC processes**, **improving payment services and asset transfers**, and developing more efficient **fund distribution platforms**.

There is already an ecosystem of various upstream and downstream actors developing such solutions. In order to facilitate governance of this new sector, the CSSF identifies these different actors as:

1. DLT Developers
2. Infrastructure Service Providers
3. Solution Providers
4. Users/End Users

DLT AND BLOCKCHAIN TECHNOLOGY | CSSF WHITE PAPER

LEGAL, GOVERNANCE AND TECHNOLOGICAL RISKS OF DLT

The White Paper concludes by highlighting to industry participants that current risk assessment standards need to be adjusted to different DLT architectures. The risks highlighted by the authority fall into the categories of governance, legal risks and technological risks.

1. Governance

The CSSF encourages financial service providers to weigh the risks against the benefits of the use of DLT before opting for the technology. Furthermore, it emphasises the importance of choosing a DLT model that fits with the regulatory requirements of the business.

2. Legal Risks

Secondly, the authority encourages entities using DLT to stay up-to-date with required licences, define clearly who is responsible for malfunctions of the technology, instate dispute resolution mechanisms and formalise smart contracts used by the entity.

3. Technological Risks

Finally, financial service providers should mitigate risks related to the design of the distributed ledger, safeguard the privacy of users and ensure satisfactory smart contract and node management.

OTHER DLT DEVELOPMENTS

Along with the White Paper, there have been other developments in the Luxembourgish and European legal framework on DLT and digital assets. As described in a recent newsflash, the Luxembourg Stock Exchange now admits security tokens representing conventional debt instruments to its Securities Official List (“**SOL**”). So far, three issues of security tokens have been registered on the SOL representing covered bonds issued by Société Générale.

Meanwhile, there has been progress made concerning MiCA, one of the EU’s flagship proposals concerning DLT in finance. On 14 March, the European Parliament voted on a new draft of the regulation, which notably omits language banning Proof of Work based consensus mechanisms.

SECURITISATION REGULATION | ESMA LAUNCHES NEW STS REGISTER

On 3 February 2022, ESMA launched its Simple, Transparent and Standardised Register (the "**STS Register**") which, going forward, shall list all traditional securitisations notified to ESMA by the originators and sponsors as meeting the Simple, Transparent and Standardised ("**STS**") requirements set out in Articles 19 to 26 of Regulation (EU) 2017/2402 of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for STS securitisation (the "**Securitisation Regulation**").

All reporting entities must be registered at the new STS Register, and thereafter shall submit their STS notifications through a designated Extranet Register Portal. This replaces the interim solution which has been in place until now whereby all STS notifications were sent to the following address: STSnotifications@esma.europa.eu.
Importantly, the STS Register shall list traditional securitisations only and therefore originators and sponsors shall continue to notify their synthetic securitisations eligible for the STS label using the interim STS solution.

For practical guidance on how to register with the new ESMA STS Register and how to make notifications through the Extranet Register Portal, ESMA has published a short user guide.

PAYMENT SERVICES | EBA RELEASES GUIDELINES ON LIMITED NETWORK EXCLUSION

On 24 February 2022, the European Banking Authority ("**EBA**") published its guidelines (the "**Guidelines**") on the limited network exclusion ("**LNE**") under Directive (EU) 2015/2366 on payment services in the internal market ("**PSD2**").

BACKGROUND

Pursuant to Article 3(k) of PSD2 services based on specific payment instruments that can be used only in a limited way, are excluded from the scope of that directive – the LNE. Specific instruments that fall within the scope of the LNE include cards that can only be used in a particular chain of stores or a particular shopping centre, fuel cards, membership cards, public transport cards, parking ticketing, meal vouchers and others.

Article 37(2) of PSD2 sets a threshold of EUR 1 million for the value of payment transactions, which, if being exceeded, would require the issuers excluded under Article 3(k)(i) or (ii) of PSD2 to notify the respective competent authority (CA). CAs, in turn, shall assess whether the activity qualifies as a limited network or whether it requires authorisation as a payment or electronic money institution.

MAIN AIM OF THE GUIDELINES

The Guidelines aim at clarifying specific aspects of the application of the LNE requirements, including on how a network of service providers or a range of goods and services should be assessed in order to qualify as ‘limited’, the use of payment instruments within limited networks, the provision of excluded services by regulated financial institutions and the submission of notification CAs.

NEXT STEPS

The Guidelines will apply as of 1 June 2022 with an additional 3-month transitional period for issuers that already benefit from the exclusion to submit a new notification to their national competent authority.

INACTIVE BANK ACCOUNTS, SAFE DEPOSIT BOXES AND UNCLAIMED LIFE INSURANCE POLICIES | NEW LAW

CONTEXT

The Luxembourg Parliament (*Chambre des Députés*) has passed a law on inactive (also sometimes referred to as dormant) bank accounts and safe deposit boxes and on unclaimed life insurance policies (the "**Law**"), thereby creating a specific legal framework on matters that until now were governed by contracts and general civil law rules.

The Law was published in the [Luxembourg Official Gazette (the Mémorial A)] on 1 April 2022 and will become effective on 1 June 2022.

DEFINITIONS OF INACTIVITY

1. Bank Accounts

An inactive account is one on which the account holder has not carried out any transaction, provided that in addition he has not transacted on any other account or safe-deposit box held with the same credit institution. Furthermore, the holder must not have made himself known through any other means to the credit institution.

2. Safe-deposit Boxes

A safe-deposit box is considered inactive when its holder has not made himself known to the credit institution that maintains the safe-deposit box. A transaction on an account held with the same credit institution is considered as sufficient to signal activity.

3. Insurance Policies

An inactive life insurance policy is one towards which no beneficiary has asserted a claim for amounts due. Inactivity ceases after any representation made by a beneficiary to the insurance undertaking.

LEGISLATIVE AIMS

The Law aims to accomplish three main goals:

- Assure that credit institutions and insurance undertakings impose **preventative measures** to avoid inactivity by keeping in contact with holders/ beneficiaries, monitoring accounts, safe-deposit boxes and life insurance policies and establishing procedures for reactivation. Credit institutions and insurance undertakings must attempt to inform holders/beneficiaries of inactivity and its legal consequences and conduct further research on holders/beneficiaries if they were unable to re-establish contact. Credit institutions and insurance undertakings are also under an obligation to report annually on a consolidated basis on dormant accounts, safe deposit boxes and life insurance contracts to their respective regulators and to the tax authorities.
- Assure that after a prolonged period of inactivity (10 years for accounts and safe-deposit boxes (50 years for certain assets) and 6 years for life insurance contracts), the credit institutions and insurance undertakings **must deposit the assets** (or assets of equivalent value) to the Consignment Fund (*Caisse de Consignation*). Once the assets are deposited, the inactive accounts and safe-deposit boxes are deemed closed and the life insurance policies are deemed terminated by operation of law.
- Assure that wherever possible, approved applicants to the Consignment Fund receive **restitution** for claims that are ascertained to be owned by them. In order to validate claims, the Consignment Fund may request information from the relevant credit institution or insurance undertaking.

SANCTIONS

The regulators may impose administrative sanctions if credit institutions or insurance undertakings fail to comply with their legal obligations or refuse to cooperate. Criminal sanctions may also apply in certain circumstances.

THE EUROPEAN COMMISSION'S PROPOSAL FOR A DIRECTIVE ON CORPORATE SUSTAINABILITY DUE DILIGENCE

On 23 February 2022, the European Commission published a proposal for a Directive on Corporate Sustainability Due Diligence (the "**Directive**").

The Directive will set out a horizontal framework to foster the contribution of businesses operating in the single market to the respect of human rights and the environment in their own operations and through their value chains, by identifying, preventing, mitigating and accounting for their adverse human rights, and environmental impacts, and having adequate governance, management systems and measures in place to this end.

In particular, the Directive will:

- Improve corporate governance practices to better integrate risk management and mitigation processes of human rights and environmental risks and impacts;
- Avoid fragmentation of due diligence requirements in the single market;
- Increase corporate accountability for adverse impacts, and ensure coherence for companies regarding obligations under existing and proposed EU initiatives on responsible business conduct;
- Improve access to remedies for those affected by adverse human rights and environmental impacts of corporate behaviour; and
- Complement other measures in force or proposed, which directly address some specific sustainability challenges or apply in some specific sectors, mostly within the European Union.

In this regard it is important that the Directive is consistent with existing policy in this area.

It will further complement the current Non Financial Reporting Directive (the "**NFRD**"). The NFRD has been transposed into Luxembourg law by the law of 26 July 2016 and is applicable since 1 January 2017. It requires large undertakings (exceeding on their balance sheet dates the criterion of the average number of 500 employees during the financial year), which are public interest entities to disclose information on environmental, social and employees matter, respect for human rights and anti-corruption and bribery matters.

The proposed amendments will be adding a substantive corporate duty for some companies to perform due diligence to identify, prevent, mitigate and account for external harm resulting from adverse human rights and environmental impacts in the company's own operations, its subsidiaries and value chain.

The Directive will also support the Sustainable Finance Disclosure Regulation (the "**SFDR**") that has recently entered into force and applies to financial market participants, where for instance financial market participants are required to publish, among others, a statement on their due diligence policies with respect to principal adverse impacts of their investment decisions on sustainability factors on a comply or explain basis.

In addition, this Directive will complement the Taxonomy Regulation. It imposes public reporting requirements and by requiring companies to identify their adverse risks in all their operations and value chains, the Directive aims to help in providing more detailed information to investors.

THE SCOPE

The Directive shall apply to:

a. a company that had more than 500 employees on average and had a net worldwide turnover of more than EUR 150 million in the last financial year;

b. a company that did not reach the threshold under point a) but had more than 250 employees on average and had a net worldwide turnover of more than EUR 40 million in the last financial year provided that at least 50% of this net turnover was generated in one or more of the following sectors:

    - the manufacture of textiles, leather and related products (including footwear), and the wholesale trade of textiles, clothing and footwear;
    - agriculture, forestry, fisheries;
    - the manufacture of food products and the wholesale trade of agricultural raw materials, live animals, wood, food and beverages;

THE EUROPEAN COMMISSION'S PROPOSAL FOR A DIRECTIVE ON CORPORATE SUSTAINABILITY DUE DILIGENCE

- the extraction of mineral resources regardless of where they are extracted, the manufacture of basic metal products, other non-metallic mineral products and fabricated metal products, and the wholesale trade of mineral resources, basic and intermediate mineral products.

It will also apply to companies set up in third countries under the following conditions:

- Net turnover of more than EUR 150 million in the EU in the financial year preceding the last financial year;
- Net turnover of more than EUR 40 million but not more than EUR 150 million in the EU in the financial year preceding the last financial year, provided that at least 50% of this net worldwide turnover was generated in one or more of the sectors listed under b) above.

OBLIGATIONS OF COMPANIES WITHIN THE SCOPE

It will cover obligations regarding:

- Due-diligence obligations
- Identifying actual and potential adverse impacts
- Preventing potential adverse impacts
- Complaints procedure
- Monitoring
- Combatting climate change
- Communicating
- Civil Liability

SUPERVISORY AUTHORITIES

Each Member State shall designate one or more supervisory authorities to supervise compliance with the obligations as laid down in the Directive.

The competent supervisory authority must be that of the EU Member State in which the company has its registered office (for companies incorporated in the EU), in which the company has a branch (for non-EU in-scope companies) or in which the company generated most of its net turnover in the EU in the financial year preceding the last financial year.

SANCTIONS

The Directive contains a range of public and private sanctions which must be effective, proportionate and dissuasive.

NEXT STEPS

The European Parliament and the Council will now review and amend the text in order to reach political agreements amongst the EU institutions.

The Directive should in principle be adopted in 2023 but will then need to be transposed into national law.

REACTIVATION OF THE IFM NOTIFICATIONS ON FUND ISSUES AND LARGE REDEMPTIONS

IMPLEMENTATION OF A SPECIFIC MONITORING OF THE LARGEST INVESTMENT FUND MANAGERS

As a result of the prevailing market conditions relating to the current situation in Ukraine, the CSSF implemented on 25 February 2022 a specific monitoring of the largest investment fund managers ("**IFM**") in view of the specific circumstances and risks to which these companies are exposed.

AIM OF THE MONITORING

Through the information collected, the CSSF performs its daily supervision and uses the information as a basis to support discussions with other authorities and with market players to identify issues at an early stage and to assist with the resolution of these.

WHO IS CONCERNED?

All IFM concerned by the notification on fund/IFM issues and/or large redemptions have been contacted by the CSSF.

For the IFM that have been contacted by the CSSF, some specific additional information has also been requested if the IFM manage individual (sub-)fund(s) with a combined direct or indirect exposure (including exposure gained through derivatives) exceeding 10% of their total net assets to Russian and/or Ukrainian issuers.

An IFM notification has to be transmitted to the CSSF via eDesk only if the following events occur:

- Significant events/issues affecting the functioning of the IFM or the investment funds managed by the IFM (e.g. valuation, liquidity), including also the impact of restrictive measures in response to the current situation in Ukraine if applicable;
- Larger redemptions at the level of Luxembourg regulated investment funds (UCITS, Part II UCI, SIF) managed by the IFM (i.e. daily net redemptions exceeding 5% of the NAV, net redemptions over a calendar week exceeding 15% of the NAV and/or application of gates/ deferred redemptions).

Further details on the IFM notification, the scope of application and additional explanations assisting IFM in filling in the notification are outlined in the dedicated section of the CSSF eDesk Portal homepage.

The IFM notification remains in place until further notice by the CSSF.

For a full access to the CSSF's communication click here.

ESMA UPDATED Q&A ON BENCHMARKS AND THE SECURITIES FINANCING TRANSACTIONS REGULATION

BENCHMARK

On 28 January 2022 and 1 April 2022, the European Securities and Market Authority ("**ESMA**") published its updated FAQ on Benchmark Regulation (BMR).

ESMA clarified that temporary disruptions to the provision of a benchmark do not require supervised entities to initiate their written plans established for the event of cessation of a benchmark pursuant to Article 28(2) of the Benchmark Regulation 2016/1011.

ESMA clarified that an administrator does not have to take into account in the key elements of the methodology all the ESG factors listed in Annex II of the Delegated Regulation (EU) 2020/1816 supplementing Regulation (EU) 2016/1011 as regards the explanation in the benchmark statement of how environmental, social and governance factors are reflected in each benchmark provided and published. When an administrator takes into account ESG factors in the methodology of the calculation of the benchmark, it should not provide information on all, voluntary and non-voluntary, ESG factors listed in Annex II of the Delegated Regulation (EU) 2020/1816 but only on those factors that are taken into account in the benchmark methodology for the selection, the weighting and any exclusion of the underlying assets.

SFTR

On 25 January 2022, ESMA published its updated FAQ on SFTR data reporting.

ESMA clarified the definition of "settle fail" to mean *"the non-occurrence of settlement, or partial settlement of a securities transaction on the intended settlement date, due to a lack of securities or cash and regardless of the underlying cause*". ESMA also clarified that in case of a settlement fail that takes place after S+1 and (i) there is no possibility to update the maturity date or (ii) the Securities Financing Transaction (the "**SFT**") has been terminated early and there is no possibility to revert the early termination, the counterparties should report the remaining SFT with a new Unique Transaction Identifier and specify accordingly the complete and accurate details of that SFT and in particular its maturity date.

CSSF CIRCULAR 21/790 | REPORTS ON eDESK

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) imposing an obligation on regulated funds, for financial periods ending on or after 30 June 2022, to complete a questionnaire in order to evaluate conformity with legal and regulatory requirements and to have the auditor draw up a report on such questionnaire. The circular also provides guidance on the information to be provided to the CSSF in the case of a modified audit opinion and guidance relating to Management Letters.

FINAL PROVISIONS

The eDesk Portal contains further explanations on the practicalities of preparing and submitting the Self-Evaluation Questionnaire (the "**SAQ**"), the Management Letter (the "**ML**") and the Separate Report (the "**SR**").

As and from 31 March 2022 the SAQ, the SR and the ML are available in the CISERO module on eDesk. Only the SAQ and SR (SR for UCITS and Part II Funds only) and the ML for regulated funds with a financial year ending between 30 June 2022 and 30 November 2022 are currently available in the module.

In addition, specific information that regulated UCIs have to transmit to the CSSF in case the approved statutory auditor issues a modified audit opinion is made available on the CSSF website in a dedicated section concerning the periodic transmission of information for the type of UCI falling within the scope of the Circular.

BENCHMARK REGULATION | AMENDMENT TO LAW OF 17 APRIL 2018

On 25 February 2022, the Luxembourg Parliament (*Chambre des Députés*) published an amendment (the "**Amendment Law**") to the law of 17 April 2018 that had implemented Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds (the "**Benchmark Regulation**").

The Amendment Law is aimed at aligning the Luxembourg legislative framework with the amendments introduced to the Benchmark Regulation by Regulation 2021/168 (relating to the designation of replacements for certain benchmarks), Regulation 2019/2175 (relating to the designation of ESMA as the supervisory authority for critical benchmarks) and Regulation 2019/2089 (regarding EU Climate Transition Benchmarks and EU Paris-Aligned Benchmarks).

For further information on the amendments we refer you to our previous newsletter. A coordinated version of the law of 17 April 2018 is available on the website of the CSSF.

ESMA LAUNCHES COMMON SUPERVISORY ACTION ON VALUATION OF UCITS AND OPEN-ENDED AIFS

On 20 January 2022, the European Securities and Markets Authority (the "**ESMA**") launched a Common Supervisory Action (the "**CSA**") with national competent authorities (the "**NCAs**") on valuation of UCITS and open-ended AIFs (the "**CSA on Valuation**") across the European Union (the "**EU**").

BACKGROUND OF THE CSA ON VALUATION

The CSA on Valuation follows a recommendation issued by the European Systemic Risk Board, in May 2020 in the context of the Covid crisis, that ESMA should coordinate with NCAs on a focused supervisory engagement with investment funds that have significant exposures to corporate debt (different from Money Market Funds) and real estate, in order to assess their preparedness to potential future redemptions and valuation shocks.

THE PURPOSE AND FUNCTIONING OF THE CSA ON VALUATION

The purpose of the CSA on Valuation is to assess the compliance of supervised entities with the relevant valuation-related provisions in the UCITS and AIFMD frameworks, in particular the valuation of less liquid assets.

One core objective of ESMA through this exercise is ultimately to achieve consistent and effective supervision of valuation methodologies, policies and procedures of supervised entities to ensure that less liquid assets are valued fairly both during normal and stressed market conditions, in line with applicable rules.

The work under the CSA on Valuation will be done, consistently with ESMA practices, using a common assessment framework developed by ESMA, which sets out the scope, methodology, supervisory expectations and timeline for how to carry out a comprehensive supervisory action in a convergent manner.

The CSA on Valuation is taking place in collaboration with the 27 EU NCAs and is expected to take place in different phases throughout 2022. Over the year, NCAs will share knowledge and experiences through ESMA.

The first phase started in early March 2022.

MANAGERS IMPACTED AND WHAT IS REQUESTED

The CSA on Valuation focuses on UCITS and authorised investment fund managers of open-ended AIFs investing in less liquid assets.

Mid-March 2022, the *Commission de Surveillance du Secteur Financier* (the "**CSSF**") contacted a representative sample of Luxembourg based UCITS and AIF managers, as well as a limited number of EU UCITS and AIF managers (the "**Managers**") providing them with a questionnaire to be filled in. Managers who have not received the said questionnaire as of 11 March 2022 are not concerned by the exercise. However, Managers who did receive it shall fill it in for all UCITS and AIFs they manage.

The response questionnaire will have to be submitted by the Managers through a dedicated communication channel set up by the CSSF which will be accessible in due course. The industry will be informed once the communication channel will be available and additional guidance on how to file the response questionnaire should be provided at the same time.

The CSSF also informed the industry on 24 January 2022 through a Communiqué that any complementary guidance from ESMA that may become available in that context at a later stage will also be made available and the communication channel updated accordingly.

As a reminder, this is the third CSA that ESMA and NCAs have launched in respect of the asset management industry. The first two CSAs covered UCITS liquidity risk management in January 2020 and supervision of costs and fees of UCITS in January 2021. Following the first CSA, ESMA issued the Guidelines on liquidity stress testing in UCITS and AIFs.

PERFORMANCE FEE MODELS | CSSF REMINDER

On 5 April 2022, the CSSF issued a communiqué inviting investment fund managers ("**IFMs**") to declare via a dedicated eDesk application the performance fee models applicable to Luxembourg UCITS or AIFs they manage.

BACKGROUND

In the context of the ESMA guidelines on performance fees applicable to UCITs and certain types of AIFs published in November 2020 and the CSSF Communication dated 22 September 2021, the CSSF reminds IFMs that they must undertake a self-assessment and declare, where applicable, which performance fee models are used by the investment funds they manage. For further information, please see our previous article on the subject.

WHAT IS REQUESTED

IFMs are requested for Luxembourg-based UCITS or AIFs they manage to complete a dedicated performance fee declaration via the eDesk application on performance fees. The application is updated on a regulator basis and the *communiqué* contains details on the latest features.

DEADLINES

The deadline for the initial declaration is the latest before the corresponding financial year close of each fund. As from January 2022 the declaration is being requested for the funds whose financial year is ending between January 2022 and June 2022.

EU SECURITISATION VEHICLES TO BE EXCLUDED FROM INTEREST LIMITATION RULE EXCEPTION

On 9 March 2022, the Luxembourg Ministry of Finance published the draft law No. 7974 (the "**Draft Law**") which relates to the interest limitation rules. The purpose of the Draft Law is to amend Article 168*bis* of the Luxembourg income tax law (the "**LITL**") by removing the reference to securitisation vehicles regulated by the EU Regulation 2017/2402 (the "**EU Regulation**") from the current list of exempt vehicles.

BACKGROUND

As a reminder, in May 2020, the European Commission issued a letter of formal notice requesting Luxembourg to correctly transpose the interest limitation rules as it is foreseen by the Anti-Tax Avoidance Directive 2016/1164 (the "**ATAD 1**"). According to the European Commission, Luxembourg went beyond the exemptions provided by ATAD 1 by including securitization vehicles regulated by the EU Regulation into the scope of the exempted vehicles.

In this respect, in December 2021, the European Commission sent a reasoned opinion to Luxembourg that detailed the mistakes made by Luxembourg while transposing ATAD 1. The European Commission finally concluded that Luxembourg did not comply with its obligation to proceed with a correct transposition of the European directive. As the case could have been brought in front of the ECJ, the legislator decided to propose the following amendment to its domestic legislation.

KEY FEATURES

The Draft Law intends to **modify the definition of financial undertakings** as described in the current version of Article 168*bis* LITL by removing reference to securitisation vehicles regulated by the EU Regulation. Henceforth, securitisation vehicles regulated by the EU Regulation will therefore be **included in the scope of the interest limitation rules**. Thus, the securitisation vehicles' exceeding borrowing costs (i.e. the interest expenses in excess of the interest income) will only be tax deductible either at 30% of its taxable EBITDA, or at EUR 3,000,000, whichever is the highest.

CONCLUSION

Luxembourg securitisation vehicles regulated by the EU Regulation will be subject to the interest limitation rules as from **January 2023**.

OECD RELEASED A PUBLIC CONSULTATION DOCUMENT CONCERNING A NEW GLOBAL TAX TRANSPARENCY FRAMEWORK

On 22 March 2022, the Organisation for Economic Co-operation and Development ("**OECD**") released a public consultation document concerning a new global tax transparency framework to provide for the reporting and exchange of information with respect to crypto-assets, as well as proposed amendments to the Common Reporting Standard ("**CRS**") for the automatic exchange of financial account information between countries.

BACKGROUND

According to the OECD, the financial landscape is constantly evolving, notably with the development of new technologies and products that are changing investment and payment practices, especially the crypto-assets, and new digitalised ways of payment. Therefore, the risk lies on crypto-assets being used to undermine existing international tax transparency initiatives, (such as CRS) since such assets can be transferred and held without the intervention of traditional financial intermediaries, unlike traditional financial products. Further, crypto-assets transactions imply a multiplicity of intermediaries who are for instance subject to limited regulatory obligations.

The aim of the consultation document is thus to seek input from global policymakers concerning a new crypto-asset reporting framework ("**CARF**") as well as to the proposed related amendments to CRS.

OECD'S PROPOSALS

1. CARF

In essence, the new due diligence procedures proposed under the draft guidelines would require individuals and entities carrying out as a business, services to exchange crypto-assets against other crypto-assets, to "identify their customers" and provide the "aggregate values of the exchanges and transfers for such customers on an annual basis."

2. CRS amendments

Firstly, new digital financial products are foreseen to fall within the scope of the CRS, as they may constitute a credible alternative to holding money or financial assets in an account that is currently subject to CRS reporting. In this regard, the proposal extends the scope of the CRS to cover electronic money products and Central Bank Digital Currencies. Further, in light of the development of the CARF, the proposal also includes changes to the definitions of "Financial Asset" and "Investment Entity", to ensure that derivatives that reference crypto-assets and are held in Custodial Accounts and Investment Entities investing in crypto-assets are covered by the CRS. At the same time, the proposal contains new provisions to ensure an efficient interaction between the CRS and the CARF, in particular to limit instances of duplicative reporting.

Secondly, the amendments seek to improve the due diligence procedures and reporting outcomes under the current CRS, with a view to increasing the usability of the information for tax administrations and limiting burdens on financial institutions, where possible.

NEXT STEP

The OECD has invited all interested parties to comment on the newly proposed CARF rules by the end of April before finalizing the rules based on the feedback and updating proposed by the G20 in October.

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

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

As a result, as of 14 March 2020, any days of presence of a cross-border worker at his home, in particular to carry out teleworking, are not to be taken into account for the calculation of the 34-day (Belgium) or 29-day (France) period. The measures applying to French and Belgian cross-border workers were applicable until 30 August 2020. Since then, six renewals of agreements have been signed. The last renewals, signed on 12 and 15 December 2021 respectively, provide for an extension of these exceptional measures until 31 March 2022, with an automatic renewal until 30 June 2022, unless either party terminates the agreements before its expiry. As no such termination has taken place, the agreements with Belgium and France will remain valid until 30 June 2022.

The measure applying to German cross-border workers was applicable as of 11 March 2020 and lasted until 30 April 2020, at which point an automatic monthly renewal took place, which will continue unless Germany or Luxembourg terminate the agreement. On 6 September 2021, Luxembourg and Germany have agreed that their agreement will apply until 31 December 2021. On 7 December 2021, Germany and Luxembourg further agreed upon the extension of the agreement until 31 March 2022. Finally, on 23 March 2022, the Luxembourg Government has announced the extension of that agreement until 30 June 2022.

As a reminder, the agreements signed with Belgium, France and Germany to maintain the exceptional arrangement not to take into account teleworking days linked to the COVID-19 pandemic for the determination of the social security legislation applicable to cross-border workers remain applicable until 30 June 2022 (publication dated 15 January 2021).

LUXEMBOURG COURT OF CASSATION RULES ON THE EFFECTS OF A STAY OF EXECUTION

CONTEXT

The Luxembourg Supreme Court (*Cour de cassation*), through its decision on 3 February 2022 (No. Cas-2020-00163), overruled a judgment issued by the Court of Appeal (*Cour d'Appel*) on 8 July 2020 (No. 97/20-VII-CIV) and confirmed that **a stay of execution** (*sursis à exécution*) granted by the direct tax office (*Administration des Contributions Directes*) to a taxpayer **constitutes an interruptive act *vis-à-vis* the statute of limitations** applicable in the field of direct tax collection.

FACTS

In the matter at hand, a married couple filed a claim and a request for a stay of execution against two tax assessments issued (respectively in 2005 and 2006) by the direct tax office adjusting their income tax liability determined in fiscal years 2000 and 2001 (the "**Disputed Tax Liability**"). Upon filing of each claim, the direct tax office agreed to grant (respectively in 2005 and 2006) **a stay of execution that prevented the direct tax office to pursue any enforceable action in respect of the Disputed Tax Liability collection** until a final tax directorial decision (*vis-à-vis* the two claims) was issued. Subsequently, the direct tax office initiated two attachment procedures (*sommation à tiers détenteur*) for the Disputed Tax Liability due in respect of the fiscal year 2000, and cancelled in 2013 the application of the benefits of the two stays of execution. Over the course of 2016 and 2017, the married couple proceeded with several payments of tax liabilities via wire transfers (the "**Payments**") but in connection with the fiscal years subsequent to the fiscal years 2000 and 2001 (the "**Subsequent years**"). In the absence of full payment of the Disputed Tax Liability and the fiscal debt charge related to the Subsequent years (part of the Payments were incorrectly accounted by the tax collector for the settlement of the 2000 Disputed Tax Liability), the direct tax office issued in 2017 a recovery notification followed by a payment order in respect of the outstanding debt liabilities for 2001 and the Subsequent year.

The married couple **disagreed with the enforcement procedure and the partial netting realised by the direct tax office** in respect of the 2016 and 2017 tax payments *vis-à-vis* the Disputed Tax Liability. Therefore, the married couple **lodged an opposition to the payment order and brought their case before the Distric Court** (*Tribunal d'arrondissement*) to have the recovery notification declared *nil* and void. Through a civil judgment rendered by the *Tribunal d'arrondissement*, **the recovery notification** issued by the direct tax office **was cancelled.**

Not succeeding in the first-instance judgement, the **tax collector appealed the adverse decision before the Court of Appeal** and before the *Cour de Cassation* afterwards.

ANALYSIS PERFORMED BY THE *COUR D'APPEL*

In order to maintain the application of the payment order, the tax collector argues that the statute of limitation was suspended in this case, because the tax authorities were unable to act under the rule "*contra non valentem agere non currit praescriptio*", having regard to the stays of execution granted at the spouses' request.

With regard to the adage "*contra non valentem agere non currit prescriptio*" as a cause of suspension of the statute of limitation, the Court of Appeal notes that the spouses invoke a decision rendered by the *Cour administrative* on 4 October 2001 (No. 13043C) having confirmed a judgment of the *Cour administrative* of 31 January 2001 (No. 11906) having held that "*One cannot accept the reasoning based on the (aforementioned) adage, which consists in admitting that* ***the statute of limitations would have been suspended or interrupted during the period in which the administrative judge was seized of the appeal,*** *because it is not correct to state that the parties, in particular the State, would have found it de facto impossible to act before the final decision of the appeal body, on the contrary (…),* ***the tax collector is not only not prevented from pursuing the recovery during the proceedings****, but the tax collector* ***has***

LUXEMBOURG COURT OF CASSATION RULES ON THE EFFECTS OF A STAY OF EXECUTION

the power and even the obligation to pursue and take acts of execution*, which unlike the acts of the tax office, interrupt the statute of limitation*".

It must therefore be held that the stays of execution granted in 2005 and 2006 respectively **did not have the effect of suspending the running of the statute of limitation on the Disputed Tax Liability**, and which, in the absence of acts interrupting the 5-year statute of limitation, had passed.

Consequently, the Payments made in 2016 and 2017 **could not be set off against the Disputed Tax Liability** and the **order to pay** of 5 April 2017 **should be cancelled**.

DECISION RENDERED BY THE *COUR DE CASSATION*

Further to the appeal received from the tax collector, the *Cour de cassation* reminds that paragraph 251 of the amended General Tax Act of 22 May 1931 (the "**General Tax Law**") states:

"The lodging of an appeal does not suspend the effect of the contested decision and, in particular, does not prevent the tax authority from taking legal proceedings. The authority which issued the decision may suspend its execution against security";

together with the general principle of law *"Contra non valentem agere non currit praescriptio"*.

The *Cour de cassation* declared that the Disputed Tax Liability recognised as prescribed by the Court of Appeal was not effectively time-barred as the two stays of execution were granted before the end of the statute of limitation and that the two stays of execution have effectively constituted a **legal obstacle** for the tax authorities to collect the Disputed Tax Liability **which interrupts the legal statute of limitation applicable in the field of direct taxation matters**. As a result, the judges of the *Cour d'Appel* violated the general principle of law *"Contra non valentem agere non currit praescriptio"* combined with paragraph 251 of the General Tax Law and cancels the related second instance decision.

HIGHER ADMINISTRATIVE COURT RULES TAX ADMINISTRATION MUST ADEQUATELY EXPLAIN THE POSITION TAKEN IN A TAX ASSESSMENT

In a judgment dated 17 March 2022, the Luxembourg Higher Administrative Court (*Cour administrative*) ruled that tax assessments issued by the Luxembourg Tax Administration ("**LTA**") must adequately explain the reasons justifying the position taken therein in order to enable the taxpayer to understand the substance and scope of the tax imposed.

FACTS OF THE CASE

In the case at hand, the company (the "**Company**") failed to submit a tax declaration for the year 2015. The LTA therefore issued an *ex officio* tax assessment pursuant to § 217 of the General Tax Law. The *ex officio* assessment was based on the Company's published financial accounts but did not recognise an impairment booked by the Company on the value of certain securities. As a result, the taxpayer's taxable result was increased by approx. 11 million euros.

The Company challenged the *ex officio* assessment but the Director of the LTA rejected this administrative appeal on the grounds that the claim was time-bared since it had been filed after the three month deadline.

The Company brought the matter to the Lower Administrative Court, which rejected the taxpayer's claims. In an appeal to the Higher Administrative Court, the Company argued that the *ex officio* assessment did not meet the formal requirements of § 211 sub-paragraph (2) of the General Tax Law since it failed to adequately explain the tax basis computation and the rationale of the denial of the impairment. Failure to meet this requirement should result, according to the case law, in the three months period of limitation not being applicable.

FINDING OF THE COURT

The Higher Administrative Court first confirmed that the requirements set out by § 211 sub-paragraph (2) of the General Tax Law apply to *ex officio* assessments.

Secondly, the Higher Administrative Court found that §211 sub-paragraph 2 requires that the tax office motivates its decision regarding the tax imposed by indicating in the tax assessment the tax base(s) applied. The Higher Administration Court added that § 211 sub-paragraph 2 did not require that the LTA provide an exhaustive explanation of the tax bases **but must at a minimum make explicit the underlying reasons for the taxation imposed in a manner which allows the taxpayer to understand their scope and substance**. According to the Higher Administrative Court, the LTA may not simply limit itself to general and abstract comments without specifying the reasons and justifications of the decision. Such comments may, as in the present case, amount to a lack of motivation of the LTA's decision, which prevents the taxpayer from formulating a successive appeal and inhibits judicial review of the tax imposed.

In the case at hand, the LTA should have briefly explained why it rejected the value impairment booked in the Company's accounts when it relied on those same accounts to determine the remainder of the Company's tax liability. The LTA should have substantially justified its decision to reject the value impairment. Thus, the tax assessment did not meet the requirement of § 211 sub-paragraph (2) of the General Tax Law.

As a result, the Higher Administrative Court held that the Company's administrative claim was admissible since **failure to meet the formal requirements of § 211 sub-paragraph (2) implies that the three month deadline to appeal the tax assessment had not started to run**.

CONCLUSION

The case presents a welcome clarification in favour of the taxpayer of the obligation on the LTA to justify its position in tax assessments. In particular, **the judgement makes clear that the LTA cannot limit its justifications to vague and abstract explanations, even in case of *ex officio* taxation,** but must give a specific and concrete explanation of its position in a manner which enables the taxpayer to understand the position taken.

DECISION OF THE COURT OF CASSATION ON THE DEDUCTIBILITY OF VAT INCURRED ON GENERAL EXPENSES

In a recent decision, the Luxembourg Supreme Court (*Cour de Cassation*) rejected an appeal (*pourvoi en cassation*) lodged by Luxembourg VAT authorities (*Administration de l'enregistrement, des domaines et de la TVA, "**AEDT**")* against a decision of the Court of Appeal (*Cour d'appel*).

The case involved a group of companies active in the real estate sector. Among the group companies, a Luxembourg company ("**LuxCo**") was performing activities both within and outside the scope of VAT. In the course of its activities, LuxCo acquired services from an associated company established in France. These services were invoiced as a whole to LuxCo. Since it was not possible to identify any direct link between the acquired services and a specific activity of LuxCo, said services were treated/classified as general expenses incurred by LuxCo. Luxembourg VAT was applied on the services rendered by the French company under the reverse charge system. Following the acquisition of the services, LuxCo re-invoiced them to other companies of the group. As there was a large disproportion between the self-assessed input VAT and the output VAT collected, LuxCo claimed a refund of the excess input VAT. As regards the deductibility of VAT paid on general expenses, while the AEDT did not contest that VAT on general expenses is in principle deductible, the deductibility of VAT paid on general expenses is, according to the AEDT, only possible to the extent that the
general expenses are actually fully incorporated in the price of the output transactions. In the case at hand, as the value of the services acquired exceeded the value of the services re-invoiced, the total amount of the general expenses was considered by the authorities as not incorporated in the price of the output operations. As a result, the AEDT limited the deductibility of the input VAT paid to the VAT paid on the costs actually re-invoiced.

In its judgment, the Court of Appeal recalled the case law of the Court of Justice of the European Union according to which the general expenses are presumed to relate directly and immediately to the economic activity carried out by a VAT taxable person, falling within the scope of VAT. Furthermore, it recalled that the economic result realised by the VAT taxable person is not a condition for deductibility and that deductibility must even exist if the economic activity for which the costs were incurred is never realised. Finally, the Court of Appeal refers to an expert opinion on the link between input costs and output revenues produced by LuxCo to reject the arguments of the AEDT. In the appeal in cassation, the Court of Cassation confirms the judgment of the Court of Appeal, which gave sufficient reasons for its decision, and rejects any request for a preliminary ruling to the CJEU.

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