BSP Newsletter

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SUMMARY

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DLT | SIGNIFICANT DEVELOPMENTS AT EU AND NATIONAL LEVEL

EU Regulation now applicable

As of 23 March 2023, Regulation (EU) 2022/858 on a pilot regime for market infrastructures based on distributed ledger technology (the "**DLT Pilot Regime Regulation**") is applicable (noting that certain provisions thereof were applicable from an earlier date). The DLT Pilot Regime Regulation aims to support the development of crypto-assets that qualify as financial instruments and for the development of DLT more generally, while still preserving a high level of investor protection and market integrity.

New Luxembourg Law

On 20 March 2022, Luxembourg law No. 8055 on distributed ledger technology (the "**DLT Law**") which transposes the DLT Pilot Regime Regulation into national legislation was published in the Luxembourg Official Gazette. The DLT Law amends (i) the law of 5 April 1993 on the financial sector (the "**Financial Sector Law**"), (ii) the law of 5 August 2005 on financial collateral law (the "**Financial Collateral Law**") and (iii) the law on 30 May 2018 on markets in financial instruments (the "**Markets in Financial Instruments Law**").

In an article published on 6 October 2022, we summarised the highlights of the DLT Law, which was in draft form at the time. For an overview of the amendments introduced by the DLT Law, we refer you to our previous newsletter article on the topic.

The DLT law is fully in effect since 23 March 2023.

Updated ESMA Q&A

On 3 February 2023, ESMA updated its questions and answers on the implementation of Regulation (EU) 2022/858 of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology ("**DLT**") (the "**DLT Pilot Regime Q&A**") with the addition of four new questions and answers.

In the area of transaction reporting, ESMA has clarified how a DLT multilateral trading facility ("**DLT MTF**") / a DLT trading and settlement system ("**DLT TSS**") should report on behalf of natural persons that are not subject to Article 26 Markets in Financial Instruments Regulation ("**MiFIR**"). Pursuant to Article 26 MiFIR trading venues shall report on behalf of those firms that are not subject to the transaction reporting regime.

On the topic of financial instruments reference data, ESMA clarified how "issuer or operator of the trading venue identifier" data that needs to be provided in accordance with RTS 23 should be populated for DLT financial instruments (i) that are digital representations of previously issued financial instruments and (ii) that are exclusively created on the DLT platform and do not represent a previously issued financial instrument. RTS 23 are contained within Commission Delegated Regulation (EU) 2017/585 of 14 July 2016 which supplements MiFIR with regulatory technical standards for the data standards and formats for financial instrument reference data and technical measures in relation to arrangements to be made by ESMA and competent authorities.

Finally, on transparency, ESMA confirmed, for complying with post-trade transparency obligations under the RTS 1 and RTS 2, which identification codes should be provided by trading venues, investment firms and approved publication arrangements for DLT instruments in the relevant reporting fields. RTS 1 are contained within Commission Delegated Regulation (EU) 2017/587 of 14 July 2016 which supplements MiFIR with regulatory technical standards on transparency requirements for trading venues and investment firms in respect of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments and on transaction execution obligations in respect of certain shares on a trading venue or by a systematic internaliser. RTS 2 are set out in Commission Delegated Regulation (EU) 2017/583 of 14 July 2016 which supplements MiFIR with regulatory technical standards on transparency requirements for trading venues and investment firms in respect of bonds, structured finance products, emission allowances and derivatives.

Please note that, for ease of reference, RTS have been numbered in this document in accordance with the numbering used in the package sent by ESMA to the Commission in September 2015 (ESMA/2015/1464). Readers are nevertheless invited to consult the Commission and European Parliament websites for updated versions of those RTS.

New ESMA Guidelines on Permissions to Operate DLT Market Infrastructures

On 8 March 2023, ESMA published guidelines on standard forms, formats and templates to apply for permission to operate a DLT market infrastructure (the "**Guidelines**"). The Guidelines were published in order to establish consistent, efficient and effective supervisory practices regarding the information to be provided for applications to obtain permissions to operate DLT market infrastructures from the relevant competent authorities.

The Guidelines set forth the information that must be provided by all applicants seeking specific permission to operate a DLT market infrastructure (including a DLT MTF, a DLT settlement system and a DLT TSS). They also elaborate on the further information which must be provided by the relevant applicant depending on its regulatory status and on the nature if its application request.

The Guidelines apply as from 23 March 2023.

PROSPECTUS REGULATION | UPDATE OF ESMA Q&A

On 3 February 2023, ESMA updated its questions and answers on the implementation of Regulation (EU) 2017/1129 of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC (the "**Prospectus Regulation Q&A**"). Article 1(4)(d) of the Prospectus Regulation creates an exemption from the requirement to publish a prospectus with regards an offer of securities addressed to investors who acquire securities for a total consideration of at least EUR 100,000 per investor, for each separate offer. The Prospectus Regulation Q&A now clarifies that a purchase of securities via a joint account, e.g. held by husband and wife, can be considered as a purchase by one investor for the purpose of calculating this threshold.

ECJ CASE C-555/21 | CONSUMER'S RIGHT TO EARLY REPAYMENT UNDER THE MCD

The Austrian Supreme Court referred a question to the European Court of Justice (the "**ECJ**") for a preliminary ruling. The question concerned whether Article 25(1) of Directive 2014/17/EU of 4 February 2014 on credit agreements for consumers relating to residential immovable property (the "**MCD**") "must be interpreted as precluding national legislation which provides that the consumer's right to a reduction in the total cost of the credit in the event of early repayment of that credit includes only interests and costs which are dependent on the duration of the agreement".

Article 25(1) of the MCD provides that in case of early repayment "the consumer shall be entitled to a reduction in the total cost of the credit to the consumer, such reduction consisting of the interest and the costs for the remaining duration of the contract". The corresponding Austrian law on mortgage loans was, until 31 December 2020, worded in way that costs which are not dependent on the duration of the credit were not reduced in case of early repayment.

The ECJ held that **Article 25(1) of the MCD does not preclude "national legislation which provides that the consumer's right to a reduction in the total cost of the credit in the event of early repayment of that credit includes only interests and costs which are dependent on the duration of the contract".**

In forming its decision, the ECJ considered that "the aim of the right to reduction provided for in Article 25(1) of [the MCD] is not to place the consumer in the situation in which he or she would have been if the credit had originally been granted for a shorter period, were for a smaller sum or, more generally, had been granted under different conditions […] but to adapt that agreement according to the circumstances of the early repayment".

The ECJ held that in "those circumstances, that right [to reduction] cannot cover costs which, irrespective of the duration of the contract, are payable by the consumer to either the creditor or third parties for services previously rendered in their entirety at the time of early repayment".

The ECJ furthermore noted that in order to ensure that a creditor does not abusively present costs that are actually related to the duration of the credit as fixed costs incurred irrespective of the duration of the credit, national courts must satisfy themselves that such costs are indeed not linked to the duration of the credit.

DRAFT LAW NO. 8185 | TRANSFER OF NON-PERFORMING LOANS

On 24 March 2023, a draft law No. 8185 (the "**Draft Law**") has been submitted to the Luxembourg Parliament (*Chambre des Députés*). The Draft Law aims to (i) transpose Directive (EU) 2021/2167 of 24 November 2021 on credit managers and credit purchasers, (ii) implement Regulation (EU) 2022/2036 of 19 October 2022 amending Regulation (EU) 575/2013 and Directive 2014/59/EU as regards the prudential treatment of global systemically important institutions with a multiple-point-of-entry resolution strategy and methods for the indirect subscription of instruments eligible for meeting the minimum requirement for own funds and eligible liabilities, and (iii) amend:

- the Luxembourg Consumer Code;
- the amended Luxembourg law of 5 April 1993 on the financial sector;
- the amended Luxembourg law of 23 December 1998 establishing the financial sector supervisory commission (CSSF);
- the amended Luxembourg law of 22 March 2004 on securitisation; and
- the amended Luxembourg law of 18 December 2015 on the failure of credit institutions and certain investment undertakings.

Transfer of creditor's rights legal framework

The transposition of Directive (EU) 2021/2167 of 24 November 2021 on credit managers and credit purchasers, and amending Directive 2008/48/EC and 2014/17/EU ("Directive 2021/2167")

The purpose of Directive 2021/2167 is to establish a European framework in relation to the transfer of a creditor's rights under a non-performing loan ("**NPL**") or the NPL itself, thus permitting credit institutions to deal with the issues of NPLs on their balance sheets.

Directive 2021/2167 is a complement to the existing EU rules that require credit institutions to set aside sufficient funds for their NPLs, encouraging them to divest of their NPLs and avoid excessive accumulation. In this respect, Directive 2021/2167 establishes a framework to enable credit institutions, if their outstanding NPLs become too high, to be able to sell these NPLs on the secondary market to other operators with the risk appetite and expertise needed to manage them.

The Draft Law covers loans initially concluded by a credit institution that turn into NPLs within the meaning of Article 47*bis* of Regulation (EU) 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms. According to the Draft Law, purchasers of NPLs will have to comply with certain obligations, including the **obligation to appoint a credit manager** in order to manage an NPL concluded with a consumer, or even, for purchasers from non-EU/non-EEA countries, to manage NPLs concluded with natural persons and micro, small and medium-sized enterprises (as referred to in Article 2 of the annex to the Commission Recommendation 2003/361/EC). The CSSF must ensure that credit purchasers are complying with a certain number of obligations set out in the Draft Law. The Draft Law provides certain fundamental principles governing the relationship of credit purchasers and credit managers with borrowers in this respect: credit purchasers and credit managers must act in **good faith, loyally and professionally**.

In addition, Directive 2021/2167 regulates the activity of credit managers who, on behalf of a credit purchaser, manage and enforce the rights and obligations associated with the creditor's rights under a NPL, or with the NPL itself, and who carry out one or more credit management activities. The Draft Law introduces credit managers in Luxembourg law as a **new type of PFS** which must be authorised by the CSSF and which is subject to its prudential supervision. The amended law of 5 April 1993 on the financial sector will introduce provisions regulating the authorisation and the exercise of the activity of credit managers and will also allow a credit manager to choose to manage loans with or without the possibility of receiving and holding borrowers' funds, in which case additional obligations will apply, such as the segregation of funds. A European passport for the free provision of credit management activities within the EU will be sought, as this is a new entity that is being introduced at European level. On a general note, the Draft Law will empower the CSSF to supervise, investigate and sanction, if necessary, credit managers for certain violations.

Directive 2021/2167 also makes specific amendments to Directive 2008/48/EC on credit agreements for consumers, by amending the Consumer Code and in particular by providing for the **communication of information to consumers** in the event of changes to the terms and conditions of agreements, as well as new provisions on late payment and late performance, and to Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property.

Globally systemically important institutions treatment

Implementation of Regulation (EU) 2022/2036 of 19 October 2022 amending Regulation (EU) 575/2013 and Directive 2014/59/EU as regards to the supervisory treatment of global systemically important institutions ("Regulation 2022/2036")

The Draft Law also aims to implement Regulation (EU) 2022/2036 of 19 October 2022 amending Regulation (EU) 575/2013 and Directive 2014/59/EU as regards the prudential treatment of global systemically important institutions with a multiple-point-of-entry resolution strategy and methods for the indirect subscription of instruments eligible for meeting the minimum requirement for own funds and eligible liabilities. The Draft Law transposes the one-off amendments that Regulation 2022/2036 makes to Directive 2014/59/EU, which deals with the legal framework for the recovery and resolution of credit institutions and investment firms, into the law of 18 December 2015 on the failure of credit institutions and certain investment firms, as amended. These amendments aim to strengthen the applicable normative framework for bank resolution by reviewing the treatment of banking groups with multiple entry points in their resolution strategy, as opposed to a single entry point strategy, in order to better align this treatment with that provided for by international standards and to better take into account third country entities within them.

THE IMMUNITY OF FINANCIAL COLLATERAL ARRANGEMENTS FROM COLLECTIVE PROCEEDINGS

On 19 January 2023, the Luxembourg Court of Appeal provided an interesting clarification on the scope of the immunity of financial collateral arrangements provided for by the Law of 5 August 2005 (the "**2005 Law**").

In this case, a pledgee had applied to the District Court (“*Tribunal d’arrondissement*”) of and in Luxembourg for the compulsory realisation of a pledge against his debtor who had subsequently been put into judicial liquidation before the entry into force of the 2005 Law. Based on the 2005 Law, which established the immunity of financial collateral arrangements from insolvency proceedings, the pledgee requested the compulsory enforcement of the pledge, notwithstanding the existence of the insolvency proceedings.

The debate between the parties centred on the question of whether this immunity could also apply to collective proceedings that had been opened before the 2005 Law came into force.

The judges of the first instance ruled that the 2005 Law could not apply to collective proceedings opened before its entry into force on the grounds that such application would have the effect of making the 2005 Law retroactive, which would be prohibited by Article 2 of the Civil Code.

In an interlocutory judgment of 19 January 2023, the Court of Appeal disagreed with the judges of first instance. The Court of Appeal first recalled the principle that only the legislator can give retroactive effect to the law. Then, in this case, it held that the legislator had expressly intended to give retroactive effect to the 2005 Law in Article 27 which provides that financial collateral arrangements entered into before its entry into force are subject to the 2005 Law. After reaffirming the retroactive nature of the 2005 Law, the Court of Appeal finally ruled that the immunity provided for by the 2005 Law applies to both current and future collective proceedings.

With this decision, the Court of Appeal reaffirmed the retroactive nature of the 2005 Law and its immediate and full application, even in the case of collective proceedings opened before its entry into force.

CIRCULAR CSSF 23/829 | LIQUIDITY REQUIREMENT EXEMPTION

On 19 January 2023, the CSSF issued circular 23/829 (the "**Circular**") on the application of the guidelines on the criteria for the exemption of investment firms from liquidity requirements in accordance with Article 43(4) of Regulation (EU) 2019/2033 (the "**Investment Firms Regulation**").

The Circular applies to all investment firms that meet the conditions for qualifying as small and non-interconnected investment firms set out in Article 12(1) of the Investment Firms Regulation.

With this Circular, the CSSF informs that, in its capacity as competent authority, it applies the Guidelines on the criteria for the exemption of investment firms from liquidity requirements in accordance with Article 43(4) of Investment Firms Regulation published on 29 July 2022 by the European Banking Authority (the "Guidelines").

In-Scope Entities

As a reminder, the Guidelines have been drafted in the context of the mandatory liquidity requirements that apply under Article 43 of the Investment Firms Regulation.

The Guidelines set out the criteria that competent authorities (i.e. CSSF for Luxembourg) should take into account when exempting small and non-interconnected investment firms from liquidity requirements set out in the Investment Firms Regulation.

The Guidelines specify that small and non-interconnected investment firms as defined in Article 12(1) Investment Firms Regulation (the "**In-Scope Entities**") are eligible for the exemption if they fulfil the criteria set out in sections 4.1 and 4.2 and point 20 of section 4.3 of the Guidelines.

Prior authorisation from the CSSF

In-Scope Entities that wish to be exempted from the aforementioned liquidity requirements must receive prior authorisation from the CSSF.

The CSSF performs a case-by-case assessment in accordance with sections 4.3 and 4.4 of the Guidelines, taking into account In-Scope Entities' risks to its clients and the firm itself, the nature, scope and complexity of its activities and the types of activities performed by the firm and, if available, any outcome of the supervisory review and evaluation carried out in accordance with Part III, Chapter 4, Section 4 of the law of 5 April 1993 on the financial sector as well as any other relevant information.

In-Scope Entities shall submit their authorisation request by email to their usual point of contact at the CSSF with copy to ei@cssf.lu.

Entry into force of circular

The Circular enters into force with immediate effect.

ENTRY INTO FORCE OF THE AMENDED LUXEMBOURG COMPETITION LAW

Strengthening the Luxembourg competition authority

The law of 30 November 2022 on competition, as amended by the law of 17 March 2023 (the "**Law**"), transposes Directive 2019/1 of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (the "**Directive**").

The Directive aims to ensure that national competition authorities enjoy independence and have the adequate tools to investigate anti-competitive behaviours, in terms of both powers and resources. The driver behind this reform is the wish to ensure the effective enforcement of the EU competition rules as well as Luxembourg domestic competition rules.

Consistently, the Law should therefore allow avoiding the risks of an uneven application of material and procedural competition rules across the EU and preserving the system of parallel powers designed under Council Regulation 1/2003, which first introduced the European Competition Network composed of the European Commission and national competition authorities (the "**ECN**").

Against this backdrop, the object of the Law is twofold:

- in conformity with the Directive, it redesigns the nature, organisation, powers and procedures of the Luxembourg competition council (*Conseil de la concurrence*), which, following the entry into force of the Law, has been renamed into "Competition Authority of the Grand Duchy of Luxembourg" (*Autorité de la concurrence du Grand-Duché de Luxembourg*) (the "**Competition Authority**") and
- it reforms the Luxembourg competition law, by repealing the amended law of 23 October 2011 on competition.

The scope of the Law is procedural and organisational, as this does not provide any substantial change to the material competition rules applicable by the Competition Authority.

The Law, which entered into force on 1 January 2023, has now been amended by the law of 17 March 2023, which transposes a handful of provisions of the Directive not taken into account in the enactment of the Law. The few envisaged changes affect particularly the calculation of fines to associations of undertakings (Article 50) and the use of information in the framework of leniency procedures (Article 74).

A new framework for the independence of the Luxembourg competition authority

Under the provisions of the Law, the Competition Authority has now become a public institution (*établissement public*) having legal personality and financial and administrative autonomy (Article 6). As such, it is now capable of autonomously standing in judicial proceedings. Specific provisions reinforce the independence of the institution (Article 7) and the transparency of the recruiting process (Article 12).

More intense investigating powers, responsibilities and guarantees

The provisions of the Law reinforce and clarify the investigation powers of the Competition Authority, in the framework of a revised and more articulated procedure:

- Under its renewed controlling powers (*pouvoirs de contrôle*), the Competition Authority can access companies' business premises and, *inter alia*, ask questions to the staff, request to check documents stored therein and make copies thereof (Article 24).
- In case of unannounced on-site inspections (*inspections inopinées*), the Competition Authority enjoys increased powers to, *inter alia*, access the business premises, check books and documents stored therein, obtain copies or extracts thereof. The staff on the premises may be requested to cooperate with the authority's agents (Article 25).

In view of balancing such enhanced investigatory powers, the Law also adds further responsibilities for the Competition Authority, as well as procedural assurances in favour of companies under investigation and complainants:

- The rejection of a complaint filed with the Competition Authority will now need to be duly motivated and the complainant can appeal the relevant decision (Article 5).

- In case of exercise of controlling powers, the access to private places (*lieux à usage d'habitation*) annexed to business premises requires a specific judicial authorisation (Article 24).
- A dawn raid can be organised only upon authorisation by the competent Luxembourg judiciary, insofar as it is consistent with and proportionate to the underlying purpose (Article 25). Companies can request to be assisted by a lawyer (Article 26(6)).
- Correspondence between the company and its lawyers is confidential and covered by privilege (*secret des communications avocat-client*) (Article 26(7)). In case of dispute on the nature of the correspondence during a dawn raid, the company can appeal before the judiciary, pending which the Competition Authority cannot access it (Article 26(12)).
- Appeals can be brought against not only judicial orders authorising an inspection, but against the conduction of the inspection itself (Articles 25(8) and 26(12)).

Incentives to put an end to the breach of competition rules

Under the Law companies intending to admit having violated the EU and/or Luxembourg rules on competition may protect themselves through new leniency and settlement provisions.

A harmonised leniency framework (*programme de clémence*) offers to companies applying for immunity a faculty to request a "marker" for a place in a queue for leniency before they formally submit the application for immunity, so as to gain the necessary time to gather evidence to meet the relevant evidential threshold (Article 55).

Companies may also admit they committed a breach of such competition rules and accept to enter into a settlement agreement with the Competition Authority allowing them to obtain a reduction of the applicable fines by up to 30% (Article 47).

The way forward

The enactment of the Law is expected to strengthen the role and effectiveness of the Competition Authority and enhance the cooperation among national competition authorities, in line with the policy underlying the Directive. The independency of the authority should be strengthened, which may result in a more active role both as an actor in the Luxembourg institutional framework and with respect to the interplay with the European Commission and other national authorities in the ECN. Due to the design of more thorough powers, the Competition Authority is likely to enlarge its size and recruit new staff members pursuant the enactment of the Law.

WHAT RESTRICTIONS APPLY TO THE SUBLEASE SPECULATION?

On 23 December 2022, the Luxembourg Constitutional Court (the “**Court**”) delivered Judgment No. 176 (the "**Judgment**") to clarify its position on the issues on the right to engage in commercial real estate speculation through subletting.

What happened in facts?

On 1 June 2002, a company (the "**Lessee**") leased commercial premises for a monthly rent of EUR 7,950, which was reduced to EUR 5,000 as from 1 April 2018.

On 1 September 2014, the Lessee sublet the said commercial premises to another company (the "**Sub-Lessee**") for a monthly rent of EUR 16,000, reduced to EUR 14,500 as from 1 September 2017.

Consequently, the sublease of the commercial premises earned the Lessee a profit of approximately EUR 6,350, at its lowest (i.e., for the period from 1 September 2017 to 1 April 2018) and up to EUR 9,500 at its highest (i.e., as from 1 April 2018).

What does the Law say?

In order to avoid commercial real estate speculation, the law of 3 February 2018 on commercial leases and amending certain provisions of the Civil Code introduced an Article 1762-6 (4) in the Civil Code. This article provides that "Except in the case of a sublease where investments specific to the sub-lessee's activity have been made by the lessee, the rents paid to the lessee by the sub-lessee may not exceed the rents paid by the lessee to the lessor".

Therefore, except in specific investment cases, the rent for a sublease cannot exceed the rent paid by the Lessee.

What is the Court being asked?

The court magistrate (*juge de paix*) of Esch-sur-Alzette referred to the Court for prejudicial questions ruling on whether **Article 1762-6 (4) of the Civil Code is in conformity with**:

- **the freedom of trade and industry** guaranteed by Article 11(6) of the Constitution, which covers the freedom to set the price of goods and services subject to economic transaction by agreement, and
- **the general principle of legal security**, which implies that any legal rule must not only be sufficiently clear and accessible, but also foreseeable.

What does the Court say?

The Judgment clarifies that Article 1762-6(4) of the Civil Code, insofar as **it does not allow** an economic operator who has leased commercial premises, to sublease them for a price that covers his operating costs relating to the sublease and **to receive a reasonable profit from the sublease**, **<u>is contrary to the freedom of trade and industry</u>**.

In doing so, a lessee should at least be able - through subletting - to recover their operating costs, including in particular overheads and administrative costs, and expect a "reasonable profit". However, it will remain for the trial judges (*juges du fond*) to assess the notion of "reasonable profit" on a case by case basis.

Furthermore, according to the Judgment, "it results from a reasonable application of the law under consideration that the notion of "investments specific to the activity of the sub-lessee" refers to **investments made by the lessee in the direct interest of the activity carried out by the sub-lessee**, and that the proof by the lessee of having made such investments gives rise to the possibility of an <u>increase in the rent</u>, over and above that paid under the main lease, <u>which is proportionate to the scale of the investment thus proved and allows for appropriate amortisation</u>". So, according to the Court, Article 1762-6(4) of the Civil Code does **<u>not infringe the general principle of legal security</u>**.

What do we learn from the Court's ruling?

The rent paid by a sub-lessee to a lessee should reasonably be allowed to be increased by:

- the investment’s amortisation made in the direct interest of the activity carried out by the sub-lessee (the increase must be proportionate to the scale of the investment);
- the operating costs incurred by the lessee, including overheads and administrative costs; and
- possibly, a "reasonable profit" which in any event must be adequate and proportionate to the economic

transaction in question.

What should the reaction of the legislator be?

The Luxembourg legislator should react to the Court's ruling which decided that Article 1762-6 (4) of the Civil Code is not in conformity with the Constitution. Following the indications given by this judgment, it should amend the law and, in particular, define the evasive notion of "reasonable profit" to be derived from a subletting operation.

GRAND-DUCAL REGULATION ON THE ADMINISTRATIVE DISSOLUTION PROCEDURE WITHOUT LIQUIDATION

On the 6 February 2023, the Grand-Ducal regulation of 3 February 2023 amending the amended Grand-Ducal regulation of 23 January 2003 executing the amended law of 19 December 2002 on the trade and company register (the "**TCR**") and the accounting and annual accounts of companies (hereinafter the "**GDR**") was published on the Luxembourg Mémorial (*official gazette*). The GDR entered into force on the 10 February 2023, amended the list of companies to be automatically removed from the TCR and introduced new provisions regarding the consultation of the insolvency register.

Amended list of companies to be automatically removed from the TCR

Further to the adoption of the law of 28 October 2022 creating the procedure of administrative dissolution without liquidation (the "**Law creating the procedure of administrative dissolution without liquidation**"), the GDR supplements the list of companies/entities that shall be automatically removed from the TCR in certain circumstances, such as:

- **commercial companies whose administrative dissolution procedures without liquidation have been closed;**
- **commercial companies whose insolvency proceedings have been closed**, with the exception of companies:
  - whose insolvency proceedings have been closed prior to the entry into force of the Law creating the procedure of administrative dissolution without liquidation (i.e. prior to the 1 February 2023) and
  - which have updated their registrations in the TCR after the judgment closing the insolvency proceedings.

New provisions regarding the consultation of the insolvency register

The GDR states that the **search for data in the insolvency register can be made based on**:

- the name of the natural person trader, the name or business name of the legal person or entity registered with the TCR or by means of the TCR registration number;
- the name or business name of the judicial representative, when such a representative has been registered with the TCR.

In addition, the **TCR administrator is now entitled to issue extracts from the insolvency register**. Those extracts supply a limited list of information such as the identity of an appointed judicial liquidator and attest that no decision in connection with an insolvency proceeding is registered with the TCR.

See more details on the procedure of administrative dissolution without liquidation in our previous BSP Newsflash.

ONGOING LUXEMBOURG TRANSPOSITION OF DIRECTIVE (EU) 2021/2101 CONCERNING THE DISCLOSURE OF INCOME TAX INFORMATION

On 24 February 2023, draft law No. 8158 transposing Directive (EU) 2021/2101 of 24 November 2021 amending Directive 2013/31/EU as regards disclosure of income tax information by certain undertakings and branches (the "**Directive**") and amending: 1° the law of 10 August 1915 on commercial companies, as amended; 2° the law of 19 December 2002 on the register of commerce and companies as well as on the accounting and annual accounts of undertakings, as amended (the "**Draft Law**") was submitted to the Luxembourg Parliament (*Chambre des Députés*).

Cornerstone to ensure the proper functioning of the internal market, the Directive aims to promote transparency of income tax information and responsible commitment of multinational companies and groups with significant turnover established in the EU.

Scope of the income tax information disclosure

The Directive requires companies to **publish certain corporate tax information**. Four categories of **companies will be concerned** by this annual publication requirement:

- **Ultimate parent companies** whose consolidated group turnover exceeds EUR 750 million per year over two consecutive financial years;
- **Autonomous companies** governed by the law of a Member State whose annual turnover exceeds EUR 750 million over two consecutive financial years;
- **Medium-sized and large enterprises** governed by the law of a Member State which are subsidiaries of an ultimate parent enterprise not governed by the law of a Member State whose consolidated turnover exceeds EUR 750 million per year;
- **Branches opened in the EU** by an enterprise which is not governed by the law of a Member State and which itself has a net turnover exceeding EUR 8,8 million in Luxembourg and of which the enterprise of which it is an offshoot belongs to a group with a consolidated net turnover in excess of EUR 750 million per annum or to an autonomous enterprise with a net turnover in excess of EUR 750 million per annum. The ultimate parent company of this company must be established outside the EU.

Penalties

The Directive sets a **fine between EUR 500 and EUR 25,000** that shall be imposed on:

- **Managers or directors and supervisory bodies** who have not drawn up, published or made available within 12 months of the closing date of the financial year to which it relates, the declaration of information relating to corporate income tax;
- **The permanent representatives** of the company for the activity of the branch.

The Luxembourg approach

As regards the arrangements for transposing the Directive in Luxembourg, its scope will be restricted to:

- **public limited company** (*société anonyme* ("SA")) and similar entities (limited partnership by shares (*société en commandite par actions* ("SCA")), limited liability company (*société à responsabilité limitée* ("Sàrl"));
- **partnerships** (general partnerships (*société en nom collectif* ("SNC")) and common limited partnership (*société en commandite simple* ("SCS")) when their direct or indirect partners who are indefinitely liable are organized as limited liability companies or similar;
- **branches opened in the Grand Duchy of Luxembourg** by multinational groups or autonomous companies established outside the EU.

Thus, entities established under another legal form such as **special limited partnerships** (*société en commandite spéciale* ("SCSp")) are **outside the scope of the rules**.

The Directive sets out options for derogating from the statement requirement. The exercise of these options is envisaged in Luxembourg. They are as follows:

- The possibility for companies **to defer the publication of certain information for a maximum**

period of five years when its publication would be seriously prejudicial to the commercial position of the companies to which it relates (e.g. protection of business secrets).
- The possibility to **exempt companies from the obligation to publish the corporate income tax information statement on their website,** provided that the statement is made publicly available in machine-readable electronic format on the website of the commercial register, free of charge and to any third party located in the EU.

Entry into force

The Directive requires Member States to bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 22 June 2023 and will apply to financial years beginning on or after 22 June 2024. However, **for companies with a calendar year accounting** period, the first corporate income tax information return will be for the year 2025 and must be published **before the end of 2026**.

ELTIF 2.0 | PUBLISHED

On 20 March 2022, Regulation (EU) 2023/606 of 15 March 2023 amending Regulation (EU) 2015/760 as regards the requirements pertaining to the investment policies and operating conditions of European long-term investment funds ("**ELTIF**") and the scope of eligible investment assets, the portfolio composition and diversification requirements and the borrowing of cash and other fund rules (the "**ELTIF Regulation 2.0**") was published in the Official Journal of the EU.

For an overview of the main amendments introduced by the ELTIF Regulation 2.0, we refer you to our previous newsletter article on the topic.

While the ELTIF Regulation 2.0 will enter into force 20 days following the date of its publication, amendments introduced shall apply from 10 January 2024. Nevertheless, in order to give ELTIF managers sufficient time to adapt to the new requirements, the ELTIF Regulation 2.0 provides for a transitional period of five years. For more details, we refer you to our previous newsletter article from 20 February 2023 on the topic.

UPDATE TO CSSF FAQ ON SUSTAINABLE FINANCE DISCLOSURE REGULATION ("SFDR")

On 13 March 2023, the CSSF updated the FAQ on SFDR by adding three additional questions and answers.

1. **Use of the environmental, social, and governance ("ESG") and/or sustainability related terminology in fund names: are there any ESG and/or sustainability related considerations that financial market participants ("FMPs") need to take into account with respect to the fund names?**

The CSSF reminds FMPs that information required by SFDR should be easily accessible, simple, fair, clear and not misleading which also applies to fund names. Consequently fund's names should not be misleading and disclosure of sustainability characteristics should be commensurate with the effective application of those characteristics to the fund.

FMPs must align fund investment objectives and policies with the relevant principles-based guidance on fund names given by the ESMA Supervisory Briefing on sustainability risks and disclosures in the area of investment management (as well as any further development on the topic at European level). Such supervisory briefing notably sets forth the use of terms such as "ESG", "green", "sustainable", "impact" and other ESG–related terms which should only be used when supported in a material way by evidence of sustainability characteristics.

2. **Methodology used to define sustainable investments: shall the methodology used to define sustainable investments be made available to investors?**

European supervisory authorities ("**ESAs**") have included in their list of additional SFDR queries a question to the European Commission to understand whether an investment in an investee company which has one economic activity among several other economic activities that contributes to an environmental or social objective (and none of the economic activities significantly harm any environmental or social objective and the company follows good governance practices) would be considered to be "sustainable investment" as a whole or in part.

While awaiting clarification at European level, the CSSF would in the meantime expect that the methodology used for the definition of a sustainable investment within the meaning of Article 2(17) SFDR, as well as, where applicable, the applied thresholds be made available by the FMPs to investors through, for instance, mandatory disclosure templates, prospectus/issuing document and/or website disclosures (all in accordance with Article 2 SFDR regulatory technical standards and Article 10 SFDR).

3. **Efficient portfolio management techniques ("EPM"): can EPM techniques used for hedging purposes fall within the remaining portion of the investment portfolio of funds disclosing under Article 9 SFDR?**

An Article 9 SFDR fund may, next to "sustainable investments", also include investments or techniques used for hedging purposes or relating to cash as ancillary liquidity, provided those are in line with the sustainable investment objective of the fund.

As such the CSSF considers that when used for hedging purposes, EPM techniques fall within the "remaining portion" of the investment portfolio of funds disclosing under Article 9 SFDR.

Attention should also be made to CSSF Circular 08/356 stating that EPM techniques may be used for different purposes, including for the purpose of risk reduction. As such, FMPs are responsible for assessing the precise purpose of the use of EPM techniques and whether those could fall in the "remaining portio" of the investment portfolio (if and when used in the context of funds disclosing under Article 9 SFDR).

FAQ CROSS-BORDER NOTIFICATION PROCEDURES

Background

On 16 March 2023, the CSSF updated its Frequently Asked Questions (the "**FAQs**") in relation to the rules regarding cross-border distribution of collective investment undertakings (as introduced into the Luxembourg laws of 17 December 2010 ("**UCI Law**") and of 12 July 2013 (the "**AIFM Law**")).

Updated FAQs on UCITS

The CSSF provides the following main clarifications:

1. the CSSF is of the opinion that Article 54-1 of UCI Law, which sets out the conditions pursuant to which a de-notification can be done, does not apply (although a de-notification letter still needs to be submitted for:
    - a non-voluntary de-notification of marketing arrangements of a UCITS share class or sub-fund in case of a life-cycle event, i.e. in case of a termination, liquidation, merger or at the end of a limited term of such share class or sub-fund, or
    - a voluntary de-notification if no investors residing in the host Member State are invested in the relevant share class or sub-fund at the time of de-notification in such Member State;
2. the CSSF provided an electronic link to the the two types of de-notification letter available: de-notification letter UCITS share class and de-notification letter UCITS compartment.

Updated FAQs on AIFM

- **Notification procedure**

The CSSF clarified that for pre-marketing notifications, the Luxembourg AIFM/ Luxembourg European Venture Capital Fund ("**EuVECA**") Manager and Luxembourg European social entrepreneurship funds ("**EuSEF**") Manager is required to submit a pre-marketing request via the CSSF eDesk portal. The CSSF specified that the information on how to access the eDesk portal is available on the CSSF website.

- **De-notification for AIFs**

The CSSF specified that in the case of a de-notification, emails are no longer accepted by the CSSF. The AIFM needs to submit a de-notification letter to the CSSF via the eDesk Cross-border Marketing Notifications Tool which requires a Luxtrust authentication product.

The CSSF also gave additional information on the elements to be taken into account after submitting a de-notification request via eDesk and a link to the template de-notification letter.

As for UCITS, the CSSF clarified that that Article 29-1 and respectively Article 30-1 of AIFM Law do not apply (although a de-notification letter still needs to be submitted) for:

1. a non-voluntary de-notification of marketing arrangements of a sub-fund in case of a life-cycle event, i.e. in case of a termination, liquidation, merger, replacement of the AIFM or at the end of a limited term of such sub-fund, or
2. a voluntary de-notification if no investors residing in Luxembourg or in the relevant host Member State are invested in the relevant sub-fund at the time of de-notification in such Member State. In such case, a comment should be added in the de-notification letter under the section additional information which states that no investors are left and thus cannot be contacted.

The CSSF further clarified that the end of a capital raising period in case of closed-ended funds is not a life-cycle event.

SFDR DATA COLLECTION FOR LUXEMBOURG INVESTMENT FUNDS

On 24 March 2023, the CSSF followed up on a press release published on 27 July 2022 announcing their intention to launch a data collection exercise related to Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector (the "**SFDR**") and Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment (the "**Taxonomy Regulation**").

The objective of the recent press release is to provide industry participants with information on the launch of the data collection exercise relating to pre-contractual product disclosure documents and templates.

Scope

The following financial market participants ("**FMPs**") are required to participate in this exercise:

- UCITS management companies based in Luxembourg or in another Member State of the EU, in relation to all Luxembourg-domiciled UCITS they manage;
- authorised alternative investment fund managers ("**AIFMs**") based in Luxembourg in relation to the Luxembourg-domiciled AIFs (regulated or unregulated, including European long-term investment fund ("**ELTIFs**")) that they manage;
- authorised AIFMs based in another Member State of the EU in relation to all Luxembourg-domiciled regulated AIFs, as well as Luxembourg-domiciled unregulated AIFs (only when they qualify as ELTIFs) that they manage;
- registered AIFMs, subject to Article 3(3) of the Law of 12 July 2013 on alternative investment fund managers ("**Law of 12 July 2013**"), based in Luxembourg or in another Member State of the EU, in relation to all Luxembourg-domiciled regulated AIFs that they manage; and
- Institutions for occupational retirement provision ("**IORPs**"), subject to the Law of 13 July 2005.

FMPs who are subject to Articles 2(2) or 3(1) of the Law of 12 July 2013 may also participate on a voluntary basis in relation to Luxembourg-domiciled regulated AIFs that they manage.

Those in scope must provide a set of information relating to pre-contractual product disclosures for each of the financial products mentioned above.

The data, which includes sustainability-related information in the pre-contractual disclosure of financial products, in accordance with the SFDR and the Taxonomy Regulation, must be provided to the CSSF for each fund/sub-fund managed by the FMPs listed above (regardless of the regime application to the fund under SFDR i.e. Article 6, 8 or 9 SFDR).

Deadline for Submission

The deadline for submission of the initial report is 15 June 2023. FMPs must ensure that after initial submission, the information they have provided is kept up-to-date.

Methods of Submission

The SFDR data can be submitted via the following channels:

- submission of a structured file through S3 (simple storage service) protocol; or
- via eDesk for manual input by the FMPs for each fund/sub-fund they manage.

Please note that the second channel will not be available until 2 May 2023.

Further Information

The CSSF has produced a user guide, which contains further information on the data to be provided and the process. In particular the annexes thereto contain a synopsis of the information to be collected.

UPDATE AND MODERNISATION OF LUXEMBOURG FUNDS' TOOLBOX

On 27 March 2023, draft law No. 8183 (the "**Draft Law**") has been submitted to the Luxembourg Parliament (*Chambre de Députés)*. The Draft Law proposes to amend the following Luxembourg laws:

- the law of 15 June 2004 as amended, relating to the investment company in risk capital (SICAR) (the "**SICAR law**");
- the law of 13 February 2007 as amended, relating to specialised investment funds (SIF) (the "**SIF law**");
- the law of 17 December 2010 as amended, relating to undertakings for collective investment (UCI) (the "**UCI law**");
- the law of 12 July 2013 as amended, on alternative investment fund managers (AIFM) (the "**AIFM law**"); and
- the law of 23 July 2016 as amended, on reserved alternative investment funds (RAIF) (the "**RAIF law**").

The Draft Law includes relevant provisions of draft law No. 6936 (introduced in 2016), which has been withdrawn from the roll.

Objective

The objective of the Draft Law is to improve and modernise the Luxembourg toolbox for investment funds and thereby increase the attractiveness and competitiveness of the financial sector. The Draft Law amends the five sectoral laws, which currently regulate investment funds and fund managers in Luxembourg.

Main Amendments

The most notable amendments proposed by the Draft Law are as follows:

1. Certain of the proposed amendments are common to the SIF, RAIF and SICAR laws, as follows:

- to modify the definition of "well-informed investor" (*investisseur averti*) contained in the SICAR law, the SIF law and the RAIF law respectively, in order to reinforce the coherence between the laws and to align the Luxembourg regime with the European standard, by referring to the professional investor concept under Directive 2014/65, updating the legislative references, allowing an AIFM to evaluate the status of a well-informed investor and lowering the current investment threshold from EUR 125,000 to EUR 100,000;
- to extend the period by which the minimum capital must be reached, for funds governed by the SICAR law, the SIF law, and the RAIF law, from 12 months to 24 months;
- providing that the issue and redemption of shares/units would be prohibited where the fund has no depositary or upon liquidation or insolvency of the depositary;
- removal of the reference to the two-month notice period applicable to the replacement of the depositary and the addition of a requirement to replace the depositary within the notice period provided under the depositary agreement, failing which the CSSF will remove the fund from the official list; and
- to clarify the rules applicable to the appointment and duties of the supervisory commissioner if the fund is liquidated.

2. The SIF Law and RAIF Law are to be specifically amended as follows:

- to clarify that a SIFs minimum capital can also include the value of any amount constituting partnership interests and also that the requirement that a SIF's capital be entirely subscribed and paid up to 5% only applies to the *société anonyme, société en commandite par actions* and the *société à responsabilité limitée*;
- In order to encourage investment into European Longer Term Investment Funds ("ELTIFs") it is proposed to amend the SIF Law and RAIF Law to provide that investments into ELTIFs by SIFs or RAIFs are exempt from subscription tax; and
- Removal of the requirement to do a *constat de constitution* for a RAIF that has been incorporated before a notary.

3. The SICAR Law is to be updated in light of the experience gained by the CSSF and to align it with similar provisions of the SIF Law:

- to implement the practice developed by the CSSF regarding conditions of delegation by a SICAR;
- to require that the persons responsible for portfolio management be subject to the CSSF's prior approval;
- to update the CSSF of any material amendment to the information pursuant to which the CSSF based its authorisation of the SICAR ; and
- to prohibit the issue of Shares/units in a SICAR from the date of the event triggering its liquidation.

4. The changes to the UCI Law largely concern Part II Funds and management companies:

- it is proposed to introduce the possibility for SICAVs subject to Part II of the UCI Law to adopt, in addition to the form of a public limited company, the form of a partnership limited by shares, a limited partnership, a special limited partnership, a limited liability company or a cooperative society organised as a public limited company;
- In relation to Part II Funds it is proposed to increase the period by which the minimum capital is to be reached, from 6 to 12 months;
- It is proposed to remove the requirement for units/shares of closed ended funds to be issued at NAV;
- Clarification that the provisions of Article 100 of the UCI law relating to foreign undertakings for collective investment, does not apply to the marketing to retail in Luxembourg of units/shares of AIFs carried out in accordance with the provisions of the AIFM Law; and
- Amendments to the regime for judicial and non-judicial legislation of management companies.

5. Finally, the most notable amendments to the AIFM law include:

- A proposal to introduce the possibility for AIFMs to use tied agents, thus aligning the legal framework applicable to them with that of management companies authorised under Part IV, Chapter 15 of the UCI law;
- Similar amendments to the UCI Law in order to update the regime for judicial and non-judicial legislation of AIFMs; and
- A proposal to modify the provisions of the AIFM Law governing marketing of AIFs to retail investors in order to add SIFs and SICARs to those funds subject to supervision designed to protect investors and thus remove any ambiguity about offering such funds to well-informed investors in Luxembourg.

Next steps

The Council of State will now review the Draft Law.

AUTONOMY OF INVESTMENT FUND COMPARTMENTS | JUDGMENT NO. 99/22

Background

On 24 May 2022, the Court of Appeal (the "**Court**") rendered judgment No. 99/22 (the "**Judgment**") relating to the autonomy of a compartment of an umbrella investment company with variable capital (*Société d'Investissement à Capital Variable*) (the "**SICAV**") subject to the Law of 13 February 2007 relating to specialised investment funds (the "**SIF Law**") and constituted as a limited partnership with shares ("**SCA**").

In this case, the sole limited partner (the "**Sole Limited Partner**") held 100% of the assets of a compartment of the SICAV. The general partner of this SICAV (the "**General Partner**") was asked by the Sole Limited Partner to convene a general meeting of the sub-fund (the "**Sub-Fund**") to discuss the liquidation of the latter. The General Partner refused to call such meeting. Therefore, the Sole Limited Partner submitted an application to the Court for the appointment of an *ad hoc* representative for the convening of the general meeting of the compartment, in application of Article 450-8 of the law of 10 August 1915 on commercial companies, as amended (the "**1915 Law**").

The district court (*tribunal d'arrondissement*) agreed with the Sole Limited Partner and appointed the representative. The SCA appealed this decision to the Court, which confirmed the judgment of the district court *(Tribunal d'arrondissement*).

Grounds for Appeal

The SCA argued, *inter alia*, that the Sole Limited Partner did not have the right to request the convening of a general meeting at the level of the sub-fund.

Article 450-8 of the 1915 Law states that the board of directors, the management board, as the case may be, as well as the supervisory board and the auditors are entitled to convene the general meeting. They are obliged to convene it in such a way that it is held within a period of one month, if shareholders representing one tenth of the share capital so request in writing, indicating the agenda. If such general meeting is not held within the prescribed period, the meeting may be convened by a proxy appointed by the president of the district court at the request of one or more shareholders representing the same percentage of the share capital.

The appellant stated that Article 450-8 of the 1915 Law was not applicable in this case.

The SCA recalled that this article is included in the 1915 Law under the title relating to public limited companies and that even if, in accordance with Article 600-2 of the 1915 Law, "*the provisions relating to public limited companies are applicable to partnerships limited by shares, except for the modifications indicated in this title*", it would be inapplicable by virtue of Article 600-9 of the 1915 Law which requires, except in the event of a provision to the contrary in the articles of association, the agreement of the General Partner in order to convene the general meeting.

The SCA further claimed that this article is applicable only to the SCA as a whole and not, in the absence of legal personality, to each of the compartments in isolation. The Sole Limited Partner did not have 10% of the entire capital of the SCA and therefore did not meet the conditions of Article 450-8.

Analysis by the Court

The Court limited itself to examining if the request of the Sole Limited Partner met the conditions of Article 450-8. The only matter contested in this regard was whether the Sole Limited Partner met the 10% requirement.

The Court noted that Article 71(1) of the SIF law which provides that unless derogated therefrom in the articles of the relevant SIF, each compartment was to be treated as a distinct pool of assets and that the rights of investors and creditors in a compartment are limited to the assets of that compartment. In relations between investors each compartment is to be treated as a separate entity unless the articles of incorporation provide otherwise.

While it was noted that the articles of incorporation of the SCA did not have specific provisions dealing with the rights of shareholders of a compartment to request the convening of a meeting at the level of the compartment, the articles did not derogate from Article 71(1). The articles provided that general meetings of shareholders of sub-funds could be held. Further, any decisions taken at shareholder meetings at fund level that impacted on specific compartments required the vote of shareholders of that compartment. Such provisions confirmed the existence of a certain autonomy of each compartment.

The Court therefore concluded that the shareholders of a compartment holding one tenth of the share capital could validly request the convening of a general meeting relating to that compartment. The one tenth should be calculated on the basis of the capital of that compartment and not the capital of the fund as a whole.

INTRODUCTION OF CULTURAL LEAVE IN LUXEMBOURG LAW

Background

While cultural leave was introduced in 1994 and then repealed in 2014, a draft law No. 7948 has been submitted to the Luxembourg Parliament (*Chambre des Députés*) on 13 January 2022, the purpose of which was to reintroduce cultural leave into the legal system by providing it with a modernised legal framework adapted to the current needs of the cultural scene.

At the end of the legislative procedure, the law of 6 January 2023 introducing cultural leave (the "**Law**") was adopted and came into force on 1 February 2023.

Purpose of this leave

The purpose of cultural leave is to allow cultural actors to participate in high-level cultural events both within the Grand Duchy of Luxembourg and abroad or to participate in specialised training in the cultural sector organised by a body approved as a continuous professional training organisation.

Beneficiaries of leave

The following are eligible for cultural leave:

- Cultural actors within the meaning of the Law, i.e:
  - creative and performing artists in the fields of visual and audio visual arts, multimedia and digital arts, performing arts, literature and publishing, music and architecture; or
  - any other person involved in a film, audio visual, musical, performing arts, graphic, plastic, visual or literary arts project or production, whether at the preparation, creation, execution, distribution or promotion stage.
- Employees with the status of administrative manager in a federation, national network or association in the cultural sector, meeting the conditions of new Article L. 234-11 of the Labour Code.
- Employees appointed by national federations, networks or associations in the cultural sector to participate in high-level cultural events in Luxembourg and meeting the conditions of new Article L. 234-12 of the Labour Code.
- Self-employed persons who carry out their cultural activity as an accessory to their self-employed activity.

Conditions to benefit from cultural leave

To be eligible for cultural leave, an employee must *inter alia* meet the following conditions:

- be continuously affiliated to the Luxembourg social security system for at least six months prior to the date of application for cultural leave;
- demonstrate a "well-known commitment" to the Luxembourg cultural and artistic scene;
- be normally employed in a workplace located on Luxembourg territory;
- be bound by an employment contract to an employer legally established and active in the Grand Duchy of Luxembourg;
- have at least six months' seniority with the employer with whom he/she is in an employment relationship at the time of submitting the application.

Duration and reason for entitlement to cultural leave

The length of and reason for the leave vary depending on the person requesting it. For example, for cultural actors, the Law provides that they must have been invited to participate in high-level cultural events both in the Grand Duchy of Luxembourg and abroad or to participate in specialised training in the cultural sector organised by a body approved as a continuous professional training body (the eligible events being listed in the law). The duration of cultural leave in this case is limited to 12 days per year and per beneficiary.

For administrative staff of national federations and networks in the cultural sector, the annual duration of cultural leave per organisation is limited to i) five days for national federations and networks in the cultural sector whose affiliated associations or institutional members together have less than 1000 active members and ii) ten days if together they have more than 1000 active members.

Application procedure

The employer must give their opinion on the request for leave within eight working days.

Ultimately, the Minister of Culture may refuse to grant cultural leave if the absence of the employee on the leave requested is likely to have a major negative impact on the operation of the business, the proper functioning of public administration or public services, or the smooth running of the annual paid leave of other staff members.

Cultural leave scheme

The duration of cultural leave shall be treated as a period of actual work. During the period of cultural leave, all the provisions on social security and labour protection remain applicable to the beneficiaries.

Employees outside the state sector receive a compensatory allowance for each day of leave equal to the average daily wage, but not exceeding four times the minimum social wage (the "**SSM**") for unskilled workers (i.e. currently EUR 2,508.24 index 921.40 on 1 April 2023).

The employer advances the compensatory allowance. Then, the State reimburses the employer for the compensation and the employer's share of the social security contributions advanced, up to a maximum of four times the SSM for unskilled workers, upon presentation of a declaration.

PROHIBITION OF THE "ZERO-HOUR CONTRACTS"

On 7 February 2023, draft law No. 8147 amending Article 211-4 of the Labour Code (hereinafter the "**Draft Law**") has been submitted to the Luxembourg Parliament (*Chambre des Députés*).

The Draft Law aims at prohibiting the practice of so-called "zero-hour contracts".

Zero-hour contracts are defined as employment contracts in which the working time may vary from one week to another potentially reaching a minimum which of zero hours on a weekly basis, i.e. such contracts include a clause that provides for a minimum working time of zero hours and the payment of a salary on an hourly basis.

The employee is consequently only required to work upon request of the employer and will only be paid if he is able to perform the services under the contract. The employee will not be paid and no social security contributions will be payable, should the employee not be requested to work.

This type of employment contract places the employees in a precarious situation.

The Draft Law proposes to include explicit provisions in the Labour Code where:

- It would be prohibited to set a minimum working time at zero hours, and
- If the working time is expressed in time intervals which may vary from one week to another, the minimum working time may not be less than 10 hours.

The purpose of the prohibition of "zero-hour contracts" is to expressly clarify that this type of contract has never fallen within the scope of the Labour Code and that the Government does not wish to support recourse to this type of contract. It is crucial for social cohesion to strengthen the rights of employees by offering them employment contracts that give them a minimum degree of security as to their working time as well as fixed and guaranteed wages.

NEW PROVISIONS ON POSTING OF EMPLOYEES

Draft law No. 7901, which was submitted to the Luxembourg Parliament (*Chambre des Députés*) on 18 October 2021, was intended, on the one hand, to transpose Directive (EU) 2020/1057, which lays down specific rules on the posting of drivers in the road transport sector and, on the other hand, to adapt certain general provisions of the Labour Code relating to posting.

Following its exemption from the second constitutional vote, the law of 23 December 2022 (the "**Law**") was adopted and entered into force on 27 December 2022.

New specific provisions in the road transport sector

The Law provides that the road transport company referred to in the Law, established outside Luxembourg and temporarily posting drivers, are among others, subject to the following obligations:

- At the latest, as soon as the posting on Luxembourg territory begins, the road transport company must submit a posting declaration via a standard multilingual form of the public interface, connected to the internal market information system "**IMI**" by filling in the information agreed in the Law.
- The company must ensure that the mobile employee has at his disposal, on paper or in electronic form, a copy of the posting declaration submitted via IMI, proof of transport operations taking place on national territory, such as an electronic consignment note ("**eCMR**") and tachograph records, and in particular the country symbols of the Member States where the mobile employee has been present when carrying out international road transport operations or cabotage transport. The mobile employee is obliged to keep these documents and to transmit them on request, in the event of a roadside check.
- In case of an express request from the Labour and Mines Inspectorate ("**ITM**"), the company must send, after the period of posting and at the latest eight weeks after the request, via the "IMI" interface, a copy of the proof of the transport operations taking place in Luxembourg, the tachograph records, the documents relating to the remuneration of the mobile employee for the period of posting, the employment contract or any equivalent document within the meaning of Article 3 of Directive 91/533/EEC of 14 October 1991 on the obligation of employers to inform workers of the conditions applicable to the contract or employment relationship, the time sheets relating to the work of the mobile employee and proof of payment of these hours.

As an important and timely clarification, Article L.145-2 of the Labour Code further specifies that bilateral transport operations of goods or passengers, transit operations, additional activities of a bilateral transport operation and combined transport operations would not qualify as posting.

Amendment of certain general rules on posting

As far as the general rules are concerned, the Law simplifies the posting formalities by providing for *inter alia*:

- a reduction in the list of information to be sent to the ITM, at the latest, as soon as the work begins on Luxembourg territory, without prejudice to the possibility of an earlier declaration decided by the posting company (Article L.142-2 of the Labour Code) (e.g., the "identification data" information is deleted and replaced by the sole information of the identity, address, as well as electronic and telephone contact details of the posting employer, of the legal or natural person, freely and clearly determined by the posting company, and of the direct subcontracting company. The address on Luxembourg territory where the documents are kept must now also be communicated to the ITM).
- a reduction in the list of documents requested by the ITM. The concerned company must keep these documents for the duration of the posting, at the workplace of the posted employee on Luxembourg territory or in any place accessible to the reference person for communication with the ITM (Article L.142-3 of the Labour Code).
- the joint and several liability (provided for in Article

L.281-1 of the Labour Code) which applied in the context of a company or subcontracting contract is now limited to the situation of subcontracting chains.

Finally, certain provisions have also been modified concerning the accommodation conditions of posted employees and new sanctions have been added to reinforce the protection of the latter. In particular, it is provided that failure to comply with health, hygiene, safety and habitability criteria for accommodation is now punishable by a criminal fine of between EUR 251 and EUR 125.000 and imprisonment for between eight days and five years, or one of these penalties only.

GDPR | CLARIFICATION OF THE ECJ ON THE RIGHT OF ACCESS OF THE DATA SUBJECTS

In a decision of 12 January 2023, the European Court of Justice ("**ECJ**") clarified the scope of Article 15(1)(c) of Regulation (EU)2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data ("**GDPR**").

Legal context and background

Article 15(1)(c) of the GDPR establishes a **right of access** of the data subject and enables the data subject to obtain from the controller confirmation as to whether or not his or her personal data are being processed, and, where that is the case, access to this data and to the **recipients or categories of recipient** to whom the personal data have been or will be disclosed.

Based on this Article, the claimant, an Austrian citizen, asked the Österreichische Post ("**Post**") in January 2019 (i) to be given access to his personal data and (ii) in the event that the data had been disclosed to third parties, information on the identity of the recipients.

Post refused to access the claimant's request.

Proceedings before the Austrian courts and referral to the ECJ

The claimant initiated a legal action against Post before the Austrian courts, seeking an order for Post to provide him with the identity of the recipients of the personal data disclosed. During the proceedings, Post informed the claimant of the categories of recipients to whom the data are transferred.

The courts on first instance and on appeal **dismissed** the claimant's action on the ground that Article 15(1)(c), by referring to "*recipients or categories of recipient*", gives the controller the option of informing the data subject only of the categories of recipient, without having to identify by name the specific recipients to whom personal data are transferred.

The claimant brought an appeal before the Austrian Supreme Court, which decided to **refer to the ECJ** for a preliminary ruling, as it considered that it was not clear if Article 15(1)(c) grants the data subject the right of access to information relating to the specific recipients of the disclosed data, or if the controller has discretion as to how to respond to a request for access to information about the recipients.

Decision of the ECJ - obligation on the part of the controller to provide the data subject with the identity of the recipients

The ECJ first noted that the terms "recipients" and "categories of recipients" used in Article 15(1)(c) are used in succession, without it being possible to infer an order of priority between them.

The ECJ then referred to recital 63 of the GDPR, which states that data subject must have the right to know and obtain communication in particular with regard to the **recipients of the personal data**. Recital 63 does not state that that right may be restricted solely to categories of recipient.

The ECJ further highlighted that in accordance with the principle of **transparency**, the data subject must have information about how his or her personal data are processed and that that information be easily accessible and easy to understand.

The ECJ finally reminded that the exercise of the right of access must enable the data subject to verify that his or her data have been **disclosed to authorized recipients**.

Based on the above reasoning, the ECJ concluded that the data subject **must have the right to be informed of the identity of the specific recipients where his or her personal data have already been disclosed.**

The information provided to the data subject must be as precise as possible. In particular, the ECJ ruled that that right of access entails the ability of the data subject to **obtain from the controller information about the specific recipients to whom the data have been or will be disclosed or, alternatively, to elect merely to request information concerning the categories of recipient**. The choice is hence on the data subject and not on the controller.

Exceptions identified by the ECJ

The ECJ reminded that the right to the protection of personal data is not an absolute right, and that it must be balanced against other fundamental rights, in accordance with the principle of **proportionality**.

As a consequence, the ECJ ruled that the right of access may be **restricted to information about categories of recipient if it is impossible to disclose the identity of specific recipients, in particular where they are not yet known**.

In addition, the ECJ reminded that, under Article 12(5)(b) of the GDPR, the controller may refuse to act on requests from a data subject where those requests are **manifestly unfounded or excessive**.

Conclusion

While this decision of the ECJ is in line with the core principles established by the GDPR, it has the merit of providing an interesting clarification on how to address the right of access of the data subjects.

NEW DOUBLE TAX TREATY BETWEEN LUXEMBOURG AND THE UK

The first Double Tax Treaty ("**DTT**") entered into between Luxembourg and the UK dates back to 1967 and has been amended three times since. As the last formal amendment dates back to 2009 and the last indirect modification took place through the Multilateral Instrument ("**MLI**") in 2019, the tax treaty has been renegotiated to reflect the changing circumstances between these two countries (e.g. BREXIT) and the evolving tax environment. As a result, a new double tax treaty has been negotiated and was finally signed on 7 June 2022, which contains the following notable changes:

Resident

The notion of resident is expanded to include "states", "political subdivisions" and "pension funds" which are defined as, in the case of Luxembourg:

- Pension-savings companies with variable capital (*sociétés d'épargne-pension à capital variable*) (« **SEPCAV** »);
- Pension-savings associations (*associations d'épargne-pension*) (« **ASSEP** »);
- Pension funds subject to supervision and regulation by the Insurance Commissioner (*Commissariat aux assurances*); and
- the Social Security Compensation Fund (*Fonds de Compensation de la Sécurité Sociale*) (« **SICAV-FIS** »).

This also includes, in the case of the UK, pension schemes (other than a social security scheme) registered under Part 4 of the Finance Act 2004, including pension funds or pension schemes arranged through insurance companies and unit trusts where the unit holders are exclusively pension schemes.

In addition, the DTT now provides for the mutual agreement procedure to be applied to solve double tax residency issues for companies, by the contracting states, taking into account the place of effective management, the place of incorporation as well as all other pertinent factors. In the case that no agreement can be reached by the contracting states, no treaty entitlement will arise for the taxpayer in question.

Taxation of capital gains

According to the OECD model, capital gains are taxed exclusively in the jurisdiction in which the seller is resident. In line with the real estate rich clause foreseen by the OECD model, the new DTT includes an exception regarding the gains derived from **real estate rich companies** (i.e. *who derive* ***50% or more of their gross value****, directly or indirectly, from* ***immovable property located in the jurisdiction***) where the taxing right is no longer absolute. Indeed, the capital gain derived from the indirect sale of real estate located in one of the contracting states, made by a resident of the other contracting states, is taxed in the state where the assets are **located**.

Dividends

The former DTT created a maximum rate of withholding tax of 5% on dividend distributions for companies and of 15% for individuals. This is now reduced to 0%, irrespective of whether they are paid to an individual or a company, but excluding payments made by Real Estate Investment Trusts (so called "**REITs**"). In that case, a 15% maximum withholding tax rate will apply.

Interests and royalties

While taxation rights on interest payments are only granted to the recipient's country, as was previously the case, the same now also applies to royalty payments made to beneficial owners resident in the other contracting state (previously 5%).

Miscellaneous items

While part of the arbitration procedure included in the previous DTT post application of the MLI has not been retained in the DTT, an entitlement to benefits clause stating that a person or entity will not be granted the benefits of the new DTT, if an analysis of the circumstances leads to conclude that "obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this DTT", has been agreed upon.

Investment funds

While the new DTT foresees in its protocol, that tax opaque collective investment vehicles (encompassing UCITS, Part II UCIs, SIFs, RAIFs as well as any other investment fund, arrangement or entity established in Luxembourg which the competent authorities of the contracting states agree to regard as a collective investment vehicle) established in Luxembourg are to be treated as an individual resident in Luxembourg for the purposes of the DTT; it nonetheless foresees an anti-treaty shopping rule to avoid misuse by third country investors. Indeed, treaty entitlement and beneficial ownership will only arise if equivalent beneficiaries own the collective investment vehicle, i.e. residents of Luxembourg or of any other jurisdiction with which the UK has arrangements, that provide for **effective and comprehensive information exchange** and that would be entitled under a double tax treaty to a tax rate on income, that is **at least as low as the rate claimed under the new DTT** by the collective investment vehicle. If at least 75% of the beneficial interests in the collective investment vehicle are owned by equivalent beneficiaries (as defined above), or if the collective investment vehicle is a UCIT within the meaning of Directive 2009/65/CE, the collective investment vehicle shall be treated as a resident of Luxembourg and as the beneficial owner of all of the income it receives.

Entry into force

The new DTT will enter into force as from 1 January of the year following the exchange of notification between the contracting states. In Luxembourg the ratification of the new DTT requires a law, the draft of which (No. 8160) was submitted to the Luxembourg Parliament (*Chambre des Députés*) on 24 February 2023. The entry into force of said law is expected in the course of the year, so that the new DTT would likely enter into force as of 1 January 2024.

DRAFT LAW NO. 8159 CONCERNING THE TELEWORK AGREEMENT BETWEEN LUXEMBOURG AND FRANCE

On 3 February 2023, the Luxembourg government submitted to the Luxembourg Parliament (*Chambre des Députés*) draft law No. 8159, aiming at ratifying the recent amendment to the Double Tax Treaty between Luxembourg and France (the **"DTT"**) on remote workdays, as agreed and signed on 7 November 2022 in Brussels (the "**Draft Law**").

Increase of the remote workdays tolerance threshold for cross-border workers

The Draft Law foresees the **increase of the remote workdays tolerance threshold for cross-border workers from 29 to 34 days** for the application of Article 14 of the DTT pertaining to employment income and allocation of taxation rights. By application of this increase of the tolerance threshold, cross-border workers, tax resident in France within the meaning of the DTT, employed in Luxembourg and exercising their salaried activity for up to 34 days outside of the Luxembourg territory, shall remain subject to tax in Luxembourg on such employment income.

Further, the 34 remote workdays tolerance threshold is extended to persons covered by Article 18, paragraph 1) b) of the DTT, relating to public functions. Consequently, a French tax resident of French nationality, or holding dual French and foreign nationalities (except Luxembourgish), employed with the Luxembourg State is now covered by the tolerance threshold.

Entry into force

Upon adoption of the Draft Law, these amendments will apply as from 1 January 2023.

DRAFT LAW NO. 8149 TO REVIVE THE LUXEMBOURG REAL ESTATE MARKET

On 8 February 2023, a draft law No. 8149 (the "**Draft Law**") with the purposes of reviving the Luxembourg real estate market has been submitted to the Luxembourg Parliament (*Chambre des Députés*). The Draft Law proposes the creation of an advantageous and time-limited tax climate, with the objective of supporting private investment in real estate.
The following measures are foreseen:

Value added tax ("VAT") at the super-reduced rate of 3%

The Draft Law proposes to re-introduce the super-reduced VAT rate of 3% for the creation of rental housing.
Furthermore, the Draft Law aims to increase the current threshold for the application of the super-reduced VAT rate from EUR 50,000 to EUR 100.000 per created and/or renovated home.

Tax credit on notarial acts

The Draft Law proposes to increase the tax credit on registration and transcription fees applicable to any person willing to acquire a property for personal use from the current amount of EUR 20.000 for a single person and EUR 40.000 for a couple to EUR 50.000 for a single person and EUR 100.000 for a couple.

Accelerated amortization

The Draft Law proposes to introduce an accelerated depreciation of 6% per annum for rental housing in the year of completion of the building, and the following six years.

Increase of the deductible passive interest threshold

The Draft Law proposes to double the annual ceiling for tax-deductible passive interest in relation to owner-occupied accommodation. The threshold would be increased to EUR 4,000 for the six first years of occupation, to EUR 3,000 for the next five years, and to EUR 2,000 for the years beyond.

Period of application

According to the Draft Law, the aforementioned measures are temporary and will only apply to the 2023 and 2024 fiscal years.

ECJ DECISION | RESPONSIBILITIES OF TAXABLE PEOPLE TAKING PART IN THE SUPPLY OF ELECTRONIC SERVICES

On 28 February 2023, following a preliminary ruling requested by the UK First-tier Tribunal (Tax Chamber), the European Court of Justice ("**ECJ**") decided on case C-695/20 concerning the applicability of Article 9*bis* of the regulation No. 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, as amended by regulation No. 1042/2013 (the "**Regulation**").

More specifically, the main issue related to the validity of Article 9*bis* of the Regulation in light of (notably) Article 28 of the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended (the "**VAT Directive**").

Background

In the matter at hand, a company registered for VAT purposes in the UK (the "**Company**") operates on the internet a platform offered to users that are divided into two categories: the "creators" and the "fans" (the "**Platform**"). The Company provides not only the Platform but also the device enabling financial transactions to be carried out and, in addition, sets the general terms and conditions for the use of the Platform. The Company levies a 20% commission on any sum paid by a fan to a creator. A 20% VAT is applied by the Company on its commission.

Pursuant to a tax audit performed by the UK VAT authorities, the Company received VAT assessments imposing VAT on the entire amount paid by the fan and not only on the 20%-commission. The legal basis relied upon by the UK VAT authorities is the Article 9*bis* of the Regulation, which provides that, *"for the application of Article 28 of Directive 2006/112/EC, where electronically supplied services are supplied through a telecommunications network, an interface or a portal such as a marketplace for applications, a taxable person taking part in that supply shall be presumed to be acting in his own name but on behalf of the provider of those services unless that provider is explicitly indicated as the supplier by that taxable person and that is reflected in the contractual arrangements between the parties"*.

Questions referred to the ECJ

The UK First-tier Tribunal asked the following question to the ECJ:

- Is Article 9*bis* of the Regulation invalid on the basis that it goes beyond the implementing power or duty on the Council established by Article 397 of the VAT Directive as far as it supplements and/or amends Article 28 of that Directive?

As a reminder, Article 28 of the VAT Directive provides that: "*Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself*".

ECJ decision

To reach its conclusion, the ECJ proceeded in three steps. First, it concluded that the provisions of Article 9*bis* of the Regulation comply with the essential general aims of the VAT Directive and, in particular, those of Article 28 thereof. Secondly, the ECJ confirmed the necessity of Article 9*bis* of the Regulation for a uniform implementation of Article 28 of the Directive. Finally, it ruled that, by its adoption of Article 9*bis* of the Regulation, in order to ensure a uniform application in the EU of Article 28 of the VAT Directive, the Council did not exceed the implementing powers conferred on it by Article 397 of that Directive. As a result, the ECJ confirmed the validity of Article 9*bis* of the Regulation.

NEW CIRCULAR OF LUXEMBOURG TAX AUTHORITIES | CLARIFICATION OF RULES APPLICABLE TO PRIME PARTICIPATIVE REGIME

On 27 February 2023, the Luxembourg Direct Tax Administration (*Administration des contributions directes*) issued circular L.I.R. No. 115/12 (the "**Circular**") aiming at clarifying the rules applicable to the prime participative. The Circular replaces the previous circular L.I.R. No. 115/12 dated 8 March 2021.

Background

The Luxembourg 2021 budget law of 19 December 2020 (the "**2021 Budget Law**") introduced a profit-sharing bonus tax regime (*prime participative*). Under this tax scheme, employees receiving a bonus from their employer can benefit from an income tax exemption of 50% of the bonus amount, upon fulfilment of certain conditions.

One condition rests on the realisation by the employer of an accounting positive result in the tax year preceding the one in which the bonus is paid to employees, with the amount of the profit-sharing bonus paid out not exceeding 5% of such accounting profit.

The Luxembourg 2023 budget law of 23 December 2022 (the "**2023 Budget Law**"), amended the aforementioned condition by providing that the profit-sharing bonus can be assessed according to the positive algebraic sum of the results of the members of the integrated group, within the meaning of Article 164*bis* L.I.R., to which the employer belongs ("profit sharing of integrated group"). In such case the 5% limit is to be calculated on the basis of the positive algebraic sum of the results of the members of the integrated group.

The Circular, provides with some guidance concerning the application of the profit-sharing bonus tax regime, notably with respect to (i) mandatory reporting, (ii) the non-deductibility of social security contributions, as well as (iii) the situation of executive directors/managers and shareholders. As in respect of items (ii) and (iii) this updated version of the Circular is identical to the former version, please refer to our previous newsletter for further information on this.

Mandatory reporting

As a reminder, the previous version of the Circular introduced the obligation for the employer, to submit a detailed report, as prescribed by the Luxembourg tax authorities, to the appropriate tax office (i.e., the relevant RTS office) in charge of assessing payroll tax on the employee's remuneration. Late filing or omission of filing of the form results in (i) the retroactive cancellation of the employee 50% income tax exemption and (ii) necessary adjustments, pursuant to the procedure applicable for withholding tax adjustments on salaries and pensions. Furthermore, the personal liability of the employer mandatorily in charge of withholding income taxes on salaries can be engaged.

The Circular further mentions the need to file a specific form in case of a profit-sharing bonus within an integrated group. This form includes, in particular, the list of the names, by employer, of the employees of the integrated group benefiting, during the concerned tax year, from the profit-sharing bonus regime. This form has to be filed together with a joint application from all companies who are members of the integrated group. This application must contain the name of the concerned Luxembourg company, its Luxembourg Trade and Companies Register number, its tax registration number, and must be signed by the legal representatives of all the companies who are members of the integrated group. The form and the joint application must be sent by the integrated group's parent company or by the integrated subsidiary company, at the time the profit-sharing bonus is made available, to the relevant RTS office for verification.

STAY OF EXECUTION GRANTED DUE TO THE ABSENCE OF A DECISION BY THE DIRECTOR OF TAX ADMINISTRATION

By an order of 13 January 2023, the President of the Lower Administrative Court (*Tribunal administratif*) granted a request for a stay of execution on net wealth tax assessments. The case concerned a Luxembourg company which held a participation in a Swiss company. On the basis of the tax treaty between Switzerland and Luxembourg, the Luxembourg company considered that the participation was exempt for net wealth tax purposes. The tax office considered that the participation should not benefit from such an exemption and issued a net wealth tax assessment, which indicated a considerable tax liability. The company filed a complaint against the wealth tax statement with the director of the Direct Tax Administration (*Administration des contributions directes*) ("**DTA**"). Despite the absence of a suspensive effect of a complaint, the company did not pay the disputed tax debt. As the director of the DTA did not respond within the legal deadline, the company brought the case before the Lower Administrative Court. Together with its application, the company asked the President of the Lower Administrative Court to grant a stay of execution in order to suspend the enforceability of the disputed tax debt.

In his role as interim relief judge (*juge référé*), the President of the Lower Administrative Court is called upon to examine whether the conditions for a stay of execution are fulfilled without being able to assess the merits of the case:

- The first condition is that the arguments put forward by the applicant are sufficiently serious for the appeal on the merits to have a serious chance of success. If the President finds, after a summary examination of the arguments presented, that there are substantial doubts as to the legality of the administrative act, the first condition is met. In the case in question, the President noted that the Director of the DTA had not replied to the complaint lodged by the company even though he is legally obliged to reply. The President, acknowledging that the case involved a complex tax matter, deduced from the lack of a reply of the Director that the DTA did not have good arguments to invalidate the detailed arguments put forward by the company. The President therefore came to the conclusion that the arguments were serious enough to have a real doubt about the legality of the disputed net wealth tax assessments.
- The second condition for a stay of execution to be granted requires that the administrative act lead to a serious and definitive damage for the claimant. In the present case, the President considered that despite the fact that the company could not prove the harmful consequences that the payment of the tax debt would have for it, the significance of the amount was sufficient for him to conclude that the condition was met.

As both conditions for a stay of execution were met, the President of the Lower Administrative Court granted it to the company.

This decision can be seen as a clear sign by the Lower Administrative Court that it expects the DTA to follow its legal obligation to process all claims filed by taxpayers instead of letting the six-month period lapse, after which the taxpayer can directly file the complaint in front of the Lower Administrative Court. Indeed, the purpose of filing a claim in front of the Director of the DTA is not only to avoid having to litigate in front of the courts if the cases can be solved at the level of the administration, but also to preserve the taxpayer's right of defence, which needs to know the position of the Administration in order to adequately assess the opportunity to litigate in front of the courts or not.

THE EU GENERAL COURT OVERTURNS THE DECISION OF THE EU COMMISSION APPROVING ROMANIAN AID TO TIMIȘOARA INTERNATIONAL AIRPORT IN FAVOUR OF WIZZAIR (CASE T-522/20)

The EU General Court (the "**Court**") **annuls,** through its ruling dated 8 February 2023, **the decision of the EU Commission** approving Romanian aid to Timișoara International Airport in favour of Wizz Air.

Facts

Timișoara International Airport is operated by Societatea Națională 'Aeroportul Internaţional Timişoara – Traian Vuia' SA ("**AITTV**"), a joint stock company in which the Romanian State holds 80% of the shares.

AITTV received financing from the Romanian State for the construction of a terminal for non-Schengen flights and for security equipment within the context of Romania's accession to the European Union in 2007. More particularly, AITTV signed in 2008 agreements with Wizz Air, a Hungarian low-cost airline, for the use of the airport infrastructure and services by the latter (the "**2008 Agreements**"). Two of those agreements were amended in 2010 by way of a new discount scheme agreed between Wizz Air and AITTV (the "**2010 Amendment Agreements**"). Under the Aeronautical Information Publications ("**AIPs**") of 2007, 2008 and 2010, Wizz Air also received discounts and rebates on airport charges.

In 2010, the Romanian regional airline Carpatair SA submitted a complaint to the EU Commission challenging the aid granted by the Romanian authorities to Timișoara International Airport in favour of Wizz Air.

The EU Commission's Decision

Following the complaint, the EU Commission issued its decision of 24 February 2020 (the "Contested Decision"), whereby it has been considered the following:

1. the public financing provided in the period between 2007 and 2009 to AITTV for the non-Schengen terminal development constitutes State aid which is compatible with the internal market within the meaning of Article 107(3)(c) of the Treaty on the Functioning of the European Union (the "TFEU"); and
2. the EU Commission found that the public financing of the access road and the development of the parking area in 2007 and for the security equipment in 2008, the airport charges in the 2007 AIP, 2008 AIP and 2010 AIP, and the 2008 Agreements with Wizz Air, including the 2010 Amendment Agreements, do not constitute State aid within the meaning of Article 107(1) TFEU.

Carpatair SA brought an action for the annulment of the Contested Decision in so far as the EU Commission found that neither the discounts and rebates on the airport charges in the 2010 AIP nor the 2008 Agreements, as amended in 2010, constitute State aid.

Findings of the Court

The Court finds, as regards the substance, that the Contested Decision is vitiated by several errors of law which affect the conclusion that neither the discounts and rebates on the airport charges in the 2010 AIP nor the agreements concluded with Wizz Air in 2008, as amended in 2010, **constitute State aid within the meaning of Article 107(1) TFEU**, since, according to the EU Commission, **the former are not selective in nature and the latter do not confer an economic advantage to Wizz Air**.

As regards, in the first place, **the selective nature of the discounts and rebates** on the airport charges in the 2010 AIP, the Court recalls that, although only measures which confer a selective advantage fall within the concept of *'State aid'*, it is apparent from the case-law that interventions which, *prima facie*, apply to undertakings in general may, in relation to their effects, be to a certain extent selective and, accordingly, **be regarded as measures designed to favour certain undertakings or the production of certain goods**. Such *de facto* selectivity can be established in cases **where the structure of the measure is such that its effects significantly favour a particular group of**

undertakings.

In that context**, the EU Commission also did not take a position on the question whether airlines other than Wizz Air had in their fleet aircrafts of the relevant sizes and sufficient frequencies which actually enabled them to benefit from certain rebates**. In the light of those observations, the Court concludes that, **by failing to examine whether all types of reduction, taken in isolation, favoured Wizz Air owing to the conditions governing its application, as Carpatair SA maintains, the EU Commission erred in law**.

As regards, in the second place, the question whether an economic advantage was conferred to Wizz Air by the 2010 Amendment Agreements, the Court points out that the **assessment is made in principle by applying the "private operator in a market economy" test**. In order to examine whether or not the Member State or the public body concerned has adopted the conduct of a prudent private operator in a market economy, the only relevant evidence is the information which was available, and the developments which were foreseeable, at the time when the decision to conduct the operation in question was taken. However, the conclusion reached by the EU Commission in the Contested Decision, **was based entirely on evidence established *ex post* and, in particular, on a report drawn up in 2015**.

In that regard, the Court states that the view cannot be taken as the 2015 report relates **to an *ex ante* analysis capable of demonstrating compliance with the private operator in a market economy test**.

Accordingly, the Court finds that the EU Commission failed to state grounds in law for its conclusion that the 2008 Agreements and the 2010 Amendment Agreements had not conferred an economic advantage on Wizz Air.

In light of those considerations, the Court upholds the action and annuls the Contested Decision in so far as it concludes that the airport charges in the 2010 AIP and the 2008 Agreements, including the 2010 Amendment Agreements, do not constitute State aid.

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