BSP Newsletter

2023 February edition

BSP

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SUMMARY

CSSF | INCREASE IN FEES WITH ADOPTION OF NEW GRAND-DUCAL REGULATION

The CSSF levies fees on supervised persons and institutions to cover personnel costs as well as general financial and operating costs. The level of fees is set by a Grand-Ducal Regulation which is updated from time to time and most recently by the Grand-Ducal Regulation of 23 December 2022 (the "**New Grand-Ducal Regulation**") which entered into force on 1 January 2023 replacing the preceding Grand-Ducal Regulation of 17 December 2021.

The New Grand-Ducal Regulation introduces quite significant increases on the fees compared to previous years; the significant increase has been justified by the CSSF on the basis of projected future budgets needs of the CSSF, which are expected to be higher due to the lack of significant increases during the last few years, inflation as well as increased staffing needs.

Of particular note, are the following increases:

- For credit institutions and professionals of the financial sector ("**PFS**"), in addition to an increase in the annual fees, the single lump sum fee for the examination of each authorisation request of a new credit institution has increased from EUR 50,000 to EUR 75,000; the single lump sum fee for the examination of each authorisation request of specialised and support PFS, payment institutions and electronic money institutions has increased from EUR 20,000 to EUR 30,000;

- As regards issuers for which Luxembourg is the home Member State under the Transparency Law or persons who have applied without the consent of an issuer for admission of its securities to trading on a regulated market, the annual fee has increased from EUR 20,000 to EUR 30,000; for issuers of shares with a market capitalisation rate of more than EUR 10,000,000,000 as at 31 December of the financial year preceding the billing year, the annual flat fee has increased from EUR 65,000 to EUR 90,000;

- Most of the fees in connection with the Takeover Law have also increased quite significantly; for example the fixed portion of the fee payable by persons making a public takeover bid or bid falling within the scope of the Takeover Law, where the CSSF is the competent authority for the supervision of the bid, has increased from EUR 50,000 to EUR 70,000.

MAR AND CSDR | ESMA UPDATES ITS Q&AS

In October and November 2022, ESMA updated its Questions and Answers ("**MAR Q&A**") on Regulation (EU) No. 596/2014 (the "**Market Abuse Regulation**" or "**MAR**"), and its Questions and Answers ("**CSDR Q&A**") on Regulation (EU) No. 909/2014 (the "**CSDR**").

With the latest update of the MAR Q&A, ESMA amended its answer to an existing question (Q&A 6.1). ESMA had previously confirmed that the obligation to detect and identify market abuse or attempted market abuse under Article 16(2) of MAR applies broadly, and "persons professionally arranging or executing transactions" thus includes buy-side firms, such as investment management firms (AIFs and UCITS managers), as well as firms professionally engaged in trading on own account (proprietary traders). ESMA has now amended its answer to confirm that Article 16(2) should be interpreted as also applying to investment firms providing direct electronic access (DEA providers) with respect to their DEA clients' trading activity.

Regarding the updates to CSDR Q&A, ESMA added various new Q&A regarding settlement discipline. Most of the new Q&A concerned cash penalties – calculation, scope, costs and process. Furthermore a new Q&A was added regarding settlement fails. Pursuant to Commission Delegated Regulation (EU) No. 2018/1229 of 25 May 2018 supplementing Regulation (EU) No. 909/2014 of the European Parliament and of the Council with regard to regulatory technical standards on settlement discipline ("**RTS on settlement discipline**") central securities depositories shall publish the information set out in Annex III of that delegated regulation, for the securities settlement system it operates. Such information must be published on their website for free, including the relevant values in EUR, on an annual basis. ESMA has clarified in this latest update to its CSDR Q&A that, to ensure a level playing field, the annual disclosure should be made by the end of February of each year and for the first time by the end of February 2023.

DLT PILOT REGIME | NEW ESMA GUIDELINES AND Q&AS

In December 2022, ESMA published new guidelines and Q&As regarding Regulation (EU) 2022/858 of 30 May 2022 on a pilot regime (the "**DLT Pilot Regime**") for market infrastructures based on distributed ledger technology (DLT) (the "**DLT Pilot Regime Regulation**"). On 15 December 2022, ESMA published its final report including guidelines on standard templates, forms and formats to apply for permission to operate a DLT market infrastructure (the "**Final Report**"). On 16 December 2022, ESMA published for the first time questions and answers on the implementation of the DLT Pilot Regime Regulation ("**Q&A**").

Final Report

The guidelines contained within the Final Report include templates to be used by market participants to apply for specific permission to operate any type of DLT market infrastructure (i.e. a DLT multilateral trading facility (MTF), a DLT settlement system or a DLT trading and settlement system) under the DLT Pilot Regime Regulation. The guidelines also include templates for the applicant operators of DLT market infrastructures to request limited exemptions from specific requirements under MiFIR, MiFID II or CSDR, provided they comply with certain conditions.

The guidelines will enter into force on 23 March 2023. National competent authorities will need to publish on their websites instructions on how to submit the information described in the preceding paragraph.

Q&A

In this first version of the Q&A, ESMA provides clarity in the application of the DLT Pilot Regime in relation to transaction reporting, financial instruments reference data and order record keeping.

EU LISTING ACT | INTERESTING REGULATORY CHANGES IN THE PIPELINE

On 7 December 2022, the European Commission put forward a set of measures to further develop the EU Capital Markets Union (**"CMU"**). These measures which are commonly referred to collectively as the "**Listing Act**" comprise proposals for:

1. an amending regulation amending Regulation (EU) 2017/1129 ("**Prospectus Regulation**"), Regulation (EU) 600/2014 ("**MiFIR**") and Regulation (EU) 596/2014 ("**MAR**");
2. an amending directive amending Directive 2014/65/EU (**"MiFID"**) and repealing Directive 2001/34/EC (the "**Listing Directive**");
3. a new directive on multiple-vote shares for small and medium-sized enterprises ("**SMEs**").

Background

The Listing Act is part of the wider CMU initiative, which was originally launched in 2015 with the aim of broadening access to market-based sources of financing for EU companies at each stage of their development. In this context, the Listing Act aims to simplify the listing requirements, including post-listing, in order to make public capital markets more attractive for EU companies and facilitate access to capital for SMEs.

Proposed amendments to existing legislation

The Listing Act proposes various amendments to existing capital markets legislation. We summarise some of the key proposed amendments below.

Proposed amendments to the Prospectus Regulation:

- Exemption for secondary issuances expanded – the exemption from publishing a prospectus in case of admission to trading on a regulated market of new securities fungible with securities already admitted to trading to be amended so that it will apply if new securities represent less than 40% (increased from 20%) of the number of securities already admitted; it is also proposed to extend this exemption so that it applies to offers to the public.
- Introduction of a new exemption from the obligation to publish a prospectus for secondary issuances of securities that are fungible with securities that are already admitted to trading for at least 18 months, either on a regulated market or an SME growth market, subject to fulfilment of certain conditions (which shall include the making available of a short summary document).
- Introduction of a new EU "Follow-on Prospectus" for secondary issuances which would replace the simplified prospectus for secondary issuances, where the company cannot rely on any of the other exemptions available. The “Follow-on Prospectus” would have less burdensome disclosure requirements than the simplified prospectus.
- Shortening of minimum IPO offer period from six days to three days.
- Introduction of a new EU Growth *issuance document* which would replace the EU Growth *prospectus*. This issuance document would have lighter requirements than the EU Growth prospectus.
- Introduction of a new harmonised threshold of EUR 12 million (based on total consideration of all offers made by the same issuer over a 12-month period) below which all offers of securities to the public shall be exempted from obligation to publish a prospectus.
- Introduction of a standardisation requirement for the format and content of all prospectuses (in particular regarding the order of disclosure) and introduction of a 300-page limit for IPO prospectuses.
- Clarification of rules regarding prospectus supplements – in particular confirming that investors may withdraw their subscriptions within three working days from when an issuer publishes a supplement correcting material mistakes or inaccuracies or adding significant new factors.

Proposed amendments to MAR:

- Narrowing of the scope of the disclosure obligation regarding inside information in relation to “protracted processes”.
- Provision of detailed conditions to be satisfied to justify the delay of disclosure of inside information.
- Change in timing for when the obligation arises to notify competent authorities of a delay in disclosure

of inside information so that this must be done immediately after the decision is taken to delay disclosure, rather than immediately after the disclosure of the information to the public.
- Granting of more protection to “Disclosing market participants” carrying out market soundings in accordance with the MAR from allegations of unlawfully disclosing inside information. There will not be a presumption that the disclosing market participant has unlawfully disclosed inside information in case of non-compliance with the relevant information and record-keeping requirements.
- Lightening of the requirements to keep insider lists so that issuers shall only be required to keep a list of “permanent insiders”.
- Increase of the threshold (from EUR 5,000 to EUR 20,000) over which "managers transactions" (i.e. transaction in securities conducted by persons discharging managerial responsibilities and persons closely associated with them) need to be notified. Insofar as competent authorities are authorised to raise the threshold at a national level, this has been raised from EUR 20,000 to EUR 50,000.

Changes to MiFID:

- Introduction of an increase in the threshold under which the “unbundling rules” under MiFID shall not apply. This should increase the availability of research for companies, SMEs in particular. The proposed threshold under which the "unbundling rules" would not apply is EUR 10 billion.

Repeal of Directive 2001/34/EC

The Commission has proposed to repeal the Listing Directive (which by its nature is a minimum harmonisation directive) because it is viewed as giving Member States a broad discretion to deviate from its rules leading to fragmentation. It is also noted that most of the Listing Directive is now redundant due to various amendments over time. The full repeal of the Listing Directive has met with some criticism however. The Listing Directive makes a distinction between *being listed on an official list* and *admission to trading on a trading venue*. As most companies whose shares are admitted to trading are also listed on an official list, these two concepts have begun to be considered as one, namely that a company is “listed”. However, these are distinct concepts: companies can be named on an official list without having been admitted to trading on a trading venue – as is the case with companies listed on the Securities Official List of the Luxembourg Stock Exchange. If the Listing Directive is repealed as currently proposed by the Commission, this important distinction will almost certainly be lost.

Introduction of a new directive on multiple vote shares

The Commission, through the Listing Act, has proposed to introduce a new minimum harmonisation directive in order to ensure that there is consistent implementation of multiple vote share structures across all Member States: companies listing for the first time on SME Growth Markets could use multiple-vote share structures.

Next steps

The proposals set out by the Commission in the Listing Act are the result of feedback received during a public consultation period, which opened on 19 November 2021 and closed on 25 February 2022. The Listing Act is currently open to feedback until 14 March 2023. The Commission will submit the feedback to the European Parliament and the Council. The timing for final adoption of the proposal at the level of the European Parliament and Council is unknown at this point.

LUXEMBOURG STOCK EXCHANGE | NEW RULES AND REGULATIONS AND NEW EURO MTF FAST-LANE PROCEDURE

Updated Rules & Regulations of the Luxembourg Stock Exchange

On 18 October 2022, Luxembourg Stock Exchange ("**LuxSE**") published an updated LuxSE Rules & Regulations 2022 and LuxSE Trading Manual 2022. The purpose of this update was the introduction of a new Fast-Lane procedure for admission to trading on the Euro MTF.

Euro MTF Fast-Lane Procedure

The Fast-Lane procedure exempts a list of specified groups of securities from the mandatory prospectus approval process as mentioned in Chapter 2 of the LuxSE Rules and Regulations 2022. The list of exempt Securities is listed in Rule 401 of the LuxSE Rules and Regulations 2022 as follows:

- Non-equity securities and equity convertible bonds issued by Issuers whose shares are admitted to trading on an EU regulated market or equivalent;
- Non-equity securities issued or guaranteed by states (Member States excluded), their regional or local authorities;
- Non-equity securities issued by or guaranteed by Member States' regional or local authorities;
- Non-equity securities issued by multilateral institutions which are not Public International Bodies, and of which at least one OECD Member State is a member;
- Securities issued by central banks; and
- Securities issued by associations with legal status or non-profit-making bodies, recognized by a Member State or an OECD Member State, in order to obtain the means necessary to achieve their non-profit-making objectives.

Admission Document

To apply for admission of exempt securities (as listed in Rule 401 of the LuxSE Rules and Regulations 2022) to trading on the Euro MTF (including on its professional segment) using the Fast-Lane procedure, applicants shall submit a completed Fast-Lane Application Form together with an admission document; the admission document must be prepared in a searchable electronic format and must contain the terms and conditions of the securities.

It is important to note that LuxSE will not approve the admission document and they reserve the right to ask the securities to submit additional documents that they deem necessary for the examination of the admission to trading request.

A draft admission document must be filed at least three business days prior to the expected listing date and the final version must be submitted to LuxSE by the issuer, for publication on the LuxSE website, by the beginning of the admission to trading, at the latest.

LuxSE has stated that for the avoidance of doubt, exempt securities admitted through the Fast-Lane procedure are still subject to all applicable ongoing disclosure obligations, including market abuse related obligations, following their admission to trading.

SECURITISATION | RECENT REGULATORY DEVELOPMENTS

New technical standards for synthetic securitisation

On 13 October 2022, Commission Implementing Regulation 2022/1929 of 31 March 2022 was published (the "**New Implementing Regulation**"). The New Implementing Regulation amended the implementing technical standards laid down in Implementing Regulation (EU) 2020/1227 as regards the templates for the provision of information in accordance with the STS (simple, transparent and standardised) notification requirements for on-balance-sheet synthetic securitisations. This was necessary following the extension of the STS securitisation framework to on-balance sheet synthetic securitisations pursuant to Regulation (EU) 2021/557.

Pursuant to Regulation (EU) 2021/557, STS on-balance-sheet securitisations should feature a sequential amortisation system to be eligible for the STS label and in that context, on 20 September 2022, the EBA published its final draft regulatory technical standards (the "**draft RTS**") specifying the performance-related triggers for STS on-balance-sheet securitisations that feature non-sequential amortisation.

While the New Implementing Regulation entered into force on the twentieth day following its publication, the draft RTS still need to be submitted to the Commission for adoption and for scrutiny by the European Parliament and the Council.

ESAs' advice on the review of the securitisation prudential framework

In pursuit of reviving the EU securitisation market and in response to the European Commission's call for advice on the review of the securitisation prudential framework, the Joint Committee of the European Supervisory Authorities (EBA, EIOPA and ESMA) published its joint advice on 12 December 2022.

The joint advice, which consists of two parts (review of the securitisation prudential framework for banks and review of the securitisation framework in Solvency II applicable to (re)insurers), includes targeted recommendations to support the securitisation market in a prudent manner and to promote the issuance of resilient securitisations qualifying for a more beneficial capital treatment, without jeopardizing investor protection and financial stability.

EBA GUIDELINES ON LOAN ORIGINATION AND MONITORING

European Banking Authority guidelines on loan origination and monitoring (EBA/GL/2020/06)

On 29 May 2020, the European Banking Authority (the "**EBA**") issued final guidelines on loan origination and monitoring (the "**Guidelines**"). The purpose of the Guidelines is to ensure that in-scope entities have adequate loan origination and monitoring procedures in place in order to prevent loans from eventually becoming non-performing loans ("**NPLs**"). The Guidelines also address the protection and fair treatment of consumers with respect to loan granting.

The Guidelines are a response to the European Council's invitation to the EBA to issue "detailed guidelines on banks' loan origination, monitoring and internal governance which could in particular address issues such as transparency and borrower affordability assessment". While the Guidelines are not directly enforceable, national competent authorities must inform the EBA whether they comply or intend to comply with the Guidelines and if not, explain why.

Application by the CSSF of the EBA Guidelines

On 22 December 2022, the CSSF published Circular CSSF 22/824 in order to inform that, in its capacity as national competent authority, it will apply the Guidelines. Consequently, the Guidelines will become part of the CSSF's administrative and regulatory practice. Circular CSSF 22/824 applies from **31 March 2023.**

The Guidelines will apply to non-significant Luxembourg credit institutions, that is credit institutions that are not significant supervised entities within the meaning of Article 2(16) of Regulation (EU) No. 468/2014 of the European Central Bank of 16 April 2014, Luxembourg branches of credit institutions having their registered office in a third country and, in respect of certain sections of the Guidelines, professionals performing lending operations under Article 28-4 of the Luxembourg law on the financial sector of 5 April 1993, as amended, (the "**LFS**"), and creditors within the meaning of Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property or Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers. In addition, the consumer-protection provisions contained in the Guidelines will also apply to significant credit institutions and Luxembourg branches of EU credit institutions. Other provisions of the Guidelines will not apply to them.

What is the scope of the Guidelines?

All credit facilities granted by in-scope entities are captured by the Guidelines, excluding derivatives, debt securities and securities financing transactions. Section 5 (*Loan origination procedures*) and section 6 (*Pricing*) of the Guidelines do however only apply to "loans and advances", that is, amongst others, credits for consumption, mortgage loans, credit card debt, revolving loans and overdrafts, syndicated loans, financial leases and trade loans.

Section 5 and Section 6 do not apply to "loans and advances" made to credit institutions, investment firms, financial institutions, insurance and reinsurance undertakings, central banks and sovereigns, including central governments, regional and local authorities and public sector entities.

In addition, Section 5 and 6 only apply to loans originated after 31 March 2023 and loans and advances that already existed on 30 June 2021 if their terms and conditions change after 31 March 2023 and provided that such changes follow a specific credit decision approval, and if their implementation requires a new loan agreement with the borrower or an addendum to the existing agreement.

As to Section 7 (*Valuation of immovable and movable property*), it applies to any valuation, monitoring and revaluation of immovable property and movable property collateral, excluding financial collateral, conducted after 31 March 2023.

If in-scope entities do not have all the relevant information and data to be used for the monitoring of existing borrowers or credit facilities granted before 31 March 2023, as regard to Section 8 (*Monitoring framework*) of the Guidelines, they should collect them until 30 June 2024 through regular credit review of borrowers.

TRANSPARENCY LAW | CSSF ENFORCEMENT PRIORITIES

Background

On 2 January 2023, the CSSF published a press release for the attention of issuers of securities subject to the law of 11 January 2008 on transparency requirements for issuers of securities, as amended (the "**Transparency Law**") and their auditors (the "**Press Release**").

With this Press Release, the CSSF highlights, in the context of the preparation of the financial statements of issuers for the financial year ending 31 December 2022 ("**FY2022**"), in accordance with the International Financial Reporting Standards (the "**IFRS**") and/or the preparation of the non-financial report of issuers in accordance with the law of 23 July 2016, a number of points that shall be subject to specific monitoring by the CSSF during 2023.

European common enforcement priorities

ESMA together with the European national accounting enforcers, including the CSSF, have identified European common enforcement priorities (the "**ECEPs**") for the 2022 annual reports, which are detailed in ESMA's public statement of 28 October 2022.

Focus points of CSSF enforcement campaign

The CSSF noted the following with respect to its upcoming enforcement campaign:

Climate related matters

The CSSF supports the ESMA recommendation to group climate related disclosures into one single note or, at least, to provide a guidance on where climate related matters are disclosed in the notes.

Direct financial impacts of Russia's invasion of Ukraine

Issuers concerned must present clear and detailed qualitative and quantitative information on the financial impacts, both at the balance sheet and comprehensive income levels, as well as the judgments and assumptions made.

Macroeconomic environment

The current challenging macroeconomic environment must be assessed and reflected by issuers. The main elements to be considered cover the increase in inflation, interest rates and energy costs.

In this context, when focusing on impairment of non-financial assets, employee benefits, revenue from contracts with customers, and financial instruments, the CSSF will pay particular attention to:

1. discount rate - the interest rate increase by the European Central Bank has a significant impact for issuers with respect to a potential impairment of non-financial assets; and
2. inflation - issuers have been asked to disclose sufficient information on how inflation affects their profits, margins, liquidity as well as on their overall level of activity and explain how the forecasts have been revised to take into consideration price increase.

Issuers are asked to assess the effect of this new macroeconomic environment when applying the following standards (in addition to those mentioned in the ESMA statement): IAS 1; IAS 2; IAS 10; IAS 12; IAS 37; IFRS 2; IFRS 13; and IFRS 16.

- As reminded by ESMA, non-financial statements shall include information on the impact of climate change in application of the Non-Financial Reporting Directive and in anticipation of the requirements of the future European Sustainability Reporting Standards that will apply with the forthcoming Corporate Sustainability Reporting Directive.
- The FY2022 is the first year for which non-financial undertakings are required to disclose taxonomy eligibility, alignment of their economic activities with climate change mitigation and adaptation objectives.
- The CSSF recommended that entities effectively measure their environmental and social scopes across their entire chain, and encouraged issuers to provide transparency on the robustness of their data collection processes when preparing non-financial reporting.
- Alternative performance measures ("**APMs**"): The CSSF will pay particular attention to the following

requirements during its campaign:

- APM labels should be meaningful and clear in order to avoid confusing or misleading the users of these measures;
- issuers should identify every APM presented in management reports or press releases; and
- disclosure of APMs should not be more prominent than other measures that stem directly from the financial statements.

Finally, noting that issuers have been obliged since financial year 2021 to prepare their annual financial reports in compliance with the European Single Electronic Format (ESEF), the CSSF reminds issuers and auditors that for their 2022 annual financial reports further mandatory elements will have to be marked up if they are present in the consolidated financial statements.

CROWDFUNDING | TRANSITIONAL PERIOD EXTENSION | NEW DELEGATED AND IMPLEMENTING REGULATIONS | NEW ESMA Q&AS

Extending the Transitional Period Referred to in Regulation (EU) 2020/1503

On 21 October 2022 and having regard to Regulation (EU) 2020/1503 ("**Crowdfunding Regulation**") on European crowdfunding service providers ("**CSPs**") for business, the Commission Delegated Regulation (EU) 2022/1988 of 12 July 2022, extending the transitional period referred to in the Crowdfunding Regulation ("**Transition Period Extending Regulation**") was published.

Article 48(1) of the Crowdfunding Regulation, which amended Regulation (EU) 2017/1129 and Directive (EU) 2019/1937, provided CSPs with a transitional period until 10 November 2022, during which they could continue to provide their services pursuant to applicable national law instead of the Crowdfunding Regulation.

Article 48(3) of the Crowdfunding Regulation placed an obligation on the European Commission to make an assessment (after consulting with ESMA) on the application of the Crowdfunding Regulation and to monitor its impact on the development of national crowdfunding markets and on access to finance. Article 48(3) provided that the Commission, based on that assessment, may extend the transitional period once, for a period of 12 months.

The Commission undertook the relevant assessment: following receipt of technical advice prepared by ESMA on 19 May 2022, and cognisant that certain competent authorities may be unable to complete authorisation procedures for CSPs by 10 November 2022, the Commission concluded that an extension of the transition period is necessary to "*avoid disruptions in large national crowdfunding markets*".

Article 1 of the Transitional Period Extending Regulation states that the extension period is now until 10 November 2023.

CSSF press release 22/27

On 25 November 2022, the Commission de Surveillance du Secteur Financier ("**CSSF**") published press release 22/27 drawing CSPs' attention to the Transitional Period Extension Regulation and confirmed that pursuant to the regulation, CSPs operating under Luxembourg law who have not received authorisation may continue to provide services until 10 November 2023 at the latest. The CSSF took the opportunity to clarify that this extension does not apply to legal persons who were not providing crowdfunding services prior to 10 November 2021; such legal persons must be duly authorised by the CSSF before providing any crowdfunding services. The CSSF, in the same press release, drew the public's attention to the Commission's publication of a number of crowdfunding delegated and implementing regulations on 8 November 2022.

Publication of delegated and implementing regulations

On 8 November 2022, the European Commission, having regard to the Crowdfunding Regulation and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937 published four Commission Implementing Regulations: (EU) 2020/2120, (EU) 2020/2121, (EU) 2020/2122 and (EU) 2020/2123, and nine Commission Delegated Regulations: (EU) 2020/2111, (EU) 2020/2112, (EU) 2020/2113, (EU) 2020/2114, (EU) 2020/2115, (EU) 2020/2116, (EU) 2020/2117, (EU) 2020/2118 and (EU) 2020/21119, all dated 13 July 2022 (the "**Implementing Regulations"** and the **"Delegated Regulations**").

The Delegated Regulations provide the following clarification in respect of the relationships between CSPs and their clients:

- pursuant to Article 8(3) of the Crowdfunding Regulation, CSPs are required to put in place internal rules depicting steps to prevent, identify and manage conflict of interest. The Delegated Regulations now place a requirement to review the internal rules on a periodic basis, at least on an annual basis, to ensure any deficiencies are addressed appropriately;
- guidelines on the information that should be requested, and the level of reliance on such

information, as part of the entry knowledge test for prospective non-sophisticated investors, pursuant to Article 21(3) of the Crowdfunding Regulation;

- the methodology that should be used by CSPs when calculating the actual and expected default rates of loans offered to their clients on the crowdfunding platform, by risk categories, assigned by the CSPs;
- a detailed description of the regulatory technical standards and a template of the key investment information sheet model;
- guidelines on the CSPs' complaint handling procedure, along with a standard template, which shall be published in each of the languages of the key investment information sheet, pursuant to Articles 23 and 24 of the Crowdfunding Regulation;
- an outline of the elements to be included in the description of the method used to assess credit risk and an overview of the policies, procedures and organisational arrangement required with regard to contingency funds; and
- provisions for a uniformed minimum content of the business continuity plan to ensure the continuity of the provision of critical services and sound administrative agreements.

The Implementing Regulations set out the following provisions relating to the relationship between CSPs and the competent authorities:

- details of the uniformed application process, including a template of the application for authorisation as a CSP;
- guidelines governing the reporting of information to competent authorities and the exchange of such information between the competent authorities, such as the Commission and ESMA, for investigation, supervision and enforcement procedures; and
- an outline of the process, including the provision of standard forms and templates for the notification on national marketing requirements applicable to CSPs by the competent authorities to ESMA.

The Delegated Regulations and the Implementing Regulations entered into force on 28 November 2022.

New ESMA Q&As

On 16 December 2022, ESMA updated its Questions and Answers ("**Q&As**") in relation to the Crowdfunding Regulation.

In this latest update, ESMA has provided clarity on the exemptions from the scope of the Crowdfunding Regulation pursuant to Article 1(2) of that regulation. ESMA has also responded to various questions regarding investor protection and marketing communications, in particular regarding (i) when the key investment information sheet ("**KIIS**") needs to be made available to prospective investors, (ii) whether the project owner is responsible for the translation of the KIIS content and (iii) whether the marketing efforts of a CSP can focus on a specific project or a specific category of projects.

Finally, as regards authorisation and supervision of a CSP, ESMA confirmed that the Crowdfunding Regulation does not preclude a national competent authority (the "**NCA**") from authorising a legal entity with a management body composed of a single member, as a CSP, provided that the applicant has demonstrated that it is capable of providing effective and prudent management. In the event of a change in circumstances, the NCA as part of its on-going assessment of the CSP, may request the appointment of additional members to the management body of the authorised CSP. ESMA confirmed that a CSP can operate under different trading names so long as this would not have the potential to create confusion and subject to the requirement that all trading names must be communicated to the NCA.

“WOMEN ON BOARDS” DIRECTIVE: ONE MORE STEP TOWARDS GENDER EQUALITY IN BUSINESS

On 7 December 2022, the Official Journal of the EU published Directive (EU) 2022/2381 of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures (the “**Directive**”). The Directive aims at ensuring the application of the principle of equal opportunities between women and men and achieving a gender-balanced representation among top management positions. The Directive seeks to achieve this by establishing a set of procedural requirements concerning the selection of candidates for appointment or election to director positions based on transparency and merit, whilst allowing the concerned companies sufficient time to make the necessary arrangements.

Who is impacted?

The Directive applies to "listed companies" which are defined as those companies having their registered office in an EU Member State and whose shares are admitted to trading on an EU regulated market. Micro, small and medium-sized enterprises (“**SMEs**”) are excluded from the scope of the Directive.

Which Member State is competent and which national rules shall apply?

The Member State competent to regulate matters covered by this Directive in respect of a given listed company shall be the Member State in which that company has its registered office. The applicable law shall be the law of that Member State.

What is changing?

Following transposition of the Directive into the national law of the Member States, listed companies will need to comply with a number of new requirements with respect to the composition of their boards and the related selection process.

Quota: Listed companies must comply with either of the following objectives **by 30 June 2026**:

- members of the underrepresented sex to hold **at least 40 % of non-executive director positions**;
- members of the underrepresented sex to hold **at least 33 % of all director positions**, including both executive and non-executive directors (unless individual quantitative objectives are set).

Selection process: Listed companies which do not achieve these objectives shall **adjust the process for selecting candidates for appointment or election to director positions**. For that purpose,

- *selection’s criteria* must be clear, neutrally formulated and unambiguous and shall be applied in a non-discriminatory manner throughout the entire selection process;
- when choosing between candidates who are equally qualified in terms of suitability, competence and professional performance, *priority is given to the candidate of the underrepresented sex* unless, in exceptional cases, reasons of greater legal weight exist;
- listed companies are obliged to *inform the candidate* (upon request) of the following:
  - the qualification criteria upon which the selection was based;
  - the objective comparative assessment of the candidates under those criteria; and
  - where relevant, the specific considerations exceptionally tilting the balance in favour of a candidate who is not of the underrepresented sex.

Reporting: Listed companies shall provide information to the competent authorities, once a year, about:

- the gender representation on their boards, distinguishing between executive and non-executive directors and regarding the measures taken with a view to achieving the applicable objectives;
- where a listed company has not achieved one of the objectives, the reasons for not achieving the objectives and a comprehensive description of the measures which the listed company has already taken or intends to take in order to achieve them.

Next steps?

Although the Directive is only required to be transposed into the national law of Member States by 28 December 2024, listed companies are recommended to already take steps to inform the decision makers of the future requirements imposed by the Directive and where necessary, start adjusting the selection process for board appointments already.

DRAFT LAW NO. 7989 | NEW PROVISION PROPOSING TO EXTEND THE GEOGRAPHICAL SCOPE FOR THE HOLDER OF THE BUSINESS LICENSE

Context

On 8 April 2022, the *Ministre des Classes Moyennes* presented the draft law 7989 (the "**Draft Law**") aimed at amending the law of 2 September 2011 regulating access to the professions of craftsman, trader and industrialist and to certain professions.

Objectives

Ten provisions characterise the Draft Law to encourage the entrepreneurial spirit and to simplify business creation.

For the purpose of this paper, we will focus on a proposal to simplify the requirements for the holder of the business license.

Simplification of the business license holder requirements

Today, the holder of the business license must ensure the effective and permanent management of the company's affairs. In this respect, the practice is to designate as the holder of the business license a person who resides permanently on the territory of the Grand Duchy of Luxembourg and who has a real link with the company in his capacity as owner, partner, shareholder or employee.

There is, however, a tolerance on the part of the *Ministre des Classes Moyennes* consisting in extending this geographical residence requirement to what is commonly called the "*Grande Région*". This means that the residence cannot be located beyond the “Thionville basin” (*bassin thionvillois*) for France, in a small part of the Saarland for Germany, and as far as the Arlon region for Belgium.

If the Draft Law is adopted, the major change will be to consider the management as effective, even if the holder of the business license does not reside in Luxembourg but in another State part of the European Economic Area under the condition that he can demonstrate a regular and effective presence in the Luxembourg establishment.

In the current state of the Draft Law, there is no indication of what will or not characterise the justification of an effective and regular presence in the establishment located in Luxembourg. Accordingly, unless the Draft Law is amended to give some precision as to this issue, it will take some time in practice to determine what is considered as constituting this double condition within the Luxembourg establishment.

Furthermore, the Draft Law in order to reinforce the direct relationship between the company and the holder of the business license provides that only the owner of the company can be the holder of the license if the activity is carried out in his personal name, or if the activity is carried out in the corporate form the person shall be a registered person (*mandataire*) in the Luxembourg Commerce and Companies Register.

A significant change is made by the fact that it will no longer be necessary to be a partner, shareholder or employee to hold a business license following the adoption of the Draft Law. In addition, the Draft Law intends to establish more directly the link between the director and the company in order to avoid more effectively the recourse to intermediaries that could sometimes be the case. However, this last argument must be tempered by the fact that the use of intermediaries is an outmoded practice. Indeed, the persons who proposed to hold a business license and to ultimately bear all the responsibilities and risks attached to the daily management on behalf of a third party, without being an effective and decisional body of the company, are in the minority and nowadays tend to completely disappear, while this practice, if not qualified as illegal in the strict sense of the term, had the effect of circumventing the regime in place.

Persons who proposed to hold a business license on behalf of a third party not located in Luxembourg, even if they were registered as a management body of the company, as a shareholder or as an employee delegated to the daily management, never effectively performed the prerogatives attached to their function.

Finally, the restriction of recourse to intermediaries proposed by the Draft Law is not as revolutionary as it seems, since the practice it seeks to limit is already destined to disappear.

French version: [Projet de loi n° 7989 - Nouvelle disposition proposant d'élargir la zone géographique pour le titulaire de l’autorisation d’établissement]

CSSF UPDATED Q&A ON AUTHORISATION AND ORGANISATION OF ENTITIES ACTING AS UCI ADMINISTRATOR

The Luxembourg Commission de Surveillance du Secteur Financier (the "**CSSF**") published on 16 May 2022 Circular 22/811 (the "**Circular**") on the authorization and organization of entities acting as UCI Administrator.

The Circular replaces Chapter D of Circular IML 91/175 and provides detailed guidance on UCI administration activities and clarifies, *inter alia*, delegation models.

On 21 June 2022, the CSSF published its Q&A on authorisation and organisation of entities acting as UCI Administrator (the "**CSSF Q&A**") covering a number of key aspects of the Circular with the objective of bringing further clarity on the supervisory expectations of the competent authority.

An updated version of the CSSF Q&A has been published on 2 December 2022 to clarify the following points:

1. The Circular only applies to the entities listed under point 2.1 of the Circular which perform, in Luxembourg, all or any of the three functions as defined under point 10 of the Circular to UCI(s). This means that the Circular doesn't apply to any other entity, which is not listed under point 2.1 of the Circular, and which is permitted to provide one or more UCI administration functions (for instance, when the administration of an unregulated UCI established in Luxembourg is performed by the UCI itself or by its registered AIFM).
2. The Circular does not apply to UCI or Investment Fund Managers ("**IFM**") having wholly delegated the UCI administration functions. However, the sectorial legislation requires that the UCI or the IFM monitor any delegate and the Circular defines information exchange and cooperation requirements in this context.
3. Only one service provider may be designated and is responsible for a specific UCI administration function (there are 3 distinct administration functions listed in the Circular) but it does not exclude the possibility to appoint a different service provider for each of the three functions.
4. The UCI Administrator is responsible for the function(s) for which it has been appointed. However, this does not mean that such UCI Administrator needs to perform all the tasks related to a given administration function itself. Both delegation and support from third parties are permissible under the conditions, and within the limits, set out in the Circular and other applicable sectorial legislations.

PRIIPS KID | CSSF UPDATE OF FAQ

On 24 June 2022, the European Commission published the Commission Delegated Regulation (EU) 2022/975 (the "**Delegated Regulation**") in the Official Journal of the EU. This Delegated Regulation postponed the application date of particular disclosure requirements under Regulation (EU) No 1286/2014 on key information documents for packaged retail and insurance-based investment products ("**PRIIPS**"). The Delegated Regulation also extended the application of Article 14(2) of Commission Delegated Regulation (EU) 2017/653 until 31 December 2022. As both of these expiration dates have now passed, the Commission de Surveillance du Secteur Financier (the "**CSSF**") have amended a number of FAQ documents in order to reflect these regulatory changes.

CSSF Update of FAQ concerning the Luxembourg law of 12 July 2013 on AIFMs

Section 23 of the FAQ relating to the AIFM Law sets out a number of questions and answers relating to the impact of the PRIIPS Regulation. Question A and B have been amended to reflect the implementation of the changes described in the opening paragraph, over the past month. The first confirms that manufacturers of Luxembourg Alternative Investment Funds ("**AIFs**"), the units of which are being advised on, offered or sold to retail investors, are required to draw up a PRIIPS Key Information Document ("**KID**"). The second clarifies that manufacturers of Luxembourg AIFs can no longer rely on the exemption from the requirement to prepare a KID, under Article 32(2) of the PRIIPS Regulation and all UCITS like Key Investor Information Documents ("**KIID**") defined bellow will need to be replaced with PRIIPS KIDs as of 1 January 2023 unless the AIF in question is no longer available to retail investors with the EU/EEA.

CSSF Update of FAQ concerning the Luxembourg law of 17 December 2010 relating to UCIs

The FAQ on the 2010 Law has been updated to conform to the requirement to prepare a PRIIPS KID as of 1 January 2023. This FAQ confirms that Luxembourg UCITS that are made available to retail investors in the EU/EEA are now required to draw up a PRIIPS KID i.e. they can no longer continue to use the UCITS KIID. UCITS that are solely available to professional investors or to investors outside the EU/EEA can continue to use the UCITS KIID. The PRIIPS KIDs for UCITS should have been filed on 1 January 2023. The CSSF are however accepting filings up to 31 January 2023. The CSSF is of the opinion that manufacturers of Luxembourg UCITS are not required to prepare a PRIIPS KID where a Luxembourg UCITS is no longer available to retail investors as of 1 January 2023. Manufacturers of Luxembourg retail UCITS whose offer was closed on 31 December 2022 are still required to annually update their UCITS KIID. Finally, the CSSF clarifies that the contents of the CSSF's FAQ concerning the UCITS KIID are still of relevance to those UCITS being made available to professional investors or outside the EU/EEA and may continue to provide guidance, to UCITS using the PRIIPs KID in certain circumstances.

CSSF Update of FAQ on KIID

Questions 2, 9 and 11 of the FAQ relating to the KIID have been amended to provide clarifications on the procedure for filing KIIDs and the steps that must be fully completed before a UCITS may issue a unit/share class of a UCITS or compartment thereof. These steps now include the filing of the KIID relating to the unit/share class concerned, with the CSSF.

CSSF Update of FAQ concerning SIFs and SICARs that do not qualify as AIFs

This FAQ relating to SIFs and SICARs has been updated to clarify that manufacturers of Luxembourg SIFs and SICARs that do not qualify as AIFs, the units of which are being advised on, offered or sold to retail investors, are now required to draw up a PRIIPS KID. All references to the UCITS KIID and the exemption contained in Article 32 (2) of the PRIIPS Regulation have now been removed.

REPORT ON INCORPORATING ESG RISKS IN THE SUPERVISION OF INVESTMENT FIRMS

Background

On 24 October 2022, the European Banking Authority ("**EBA**") published a report (the "**Report**") on how to incorporate Environmental, Social, and Governance ("**ESG**") risks in the supervision of investment firms. The Report was produced under the EBA's mandate provided by Article 35(d) of the Directive 2019/2034 (the "**Investment Firms Directive**"). This report complements the report of the EBA from June 2021 (The "**Earlier Report**") on the management and supervision of ESG risks for credit institutions and investment firms (in accordance with Article 98(8) Capital Requirement Directive (CRD)) and Article 35 of the Investment Firms Directive). The Earlier Report provides common definitions of ESG risks and elaborates on the arrangements, processes, mechanisms, and strategies to be implemented by credit institutions and investment firms to identify, assess, and manage ESG risks. The earlier report also provides recommendations as to how ESG risk considerations should be included in the supervisory review and evaluation of institutions performed by competent authorities. The Report further sets out the foundation for integration of the ESG considerations in the process of supervisory review and evaluation of investment firms in a proportionate matter.

In order to ensure the integration of ESG considerations in supervision, the EBA considers it necessary to integrate ESG factors and risks into the scope of the Supervisory Review and Evaluation Process ("**SREP**") and in particular on the business model analysis, assessment of internal governance and risk management and on assessment of risks.

The business model analysis

In order to reflect ESG factors and risks in the supervisory evaluation, the EBA considered it is necessary to incorporate these factors into business model analysis:

- consideration by the competent authorities of ESG factors and risks in their assessment of the investment firm's main activities, geographic presence and market.
- a quantitative analysis, to understand investment firm's financial performance, and a qualitative analysis, to understand the success drivers and key dependencies of its business. In addition, the strategy and financial plans of Investment Firms including the assessment of short-term viability and medium-term sustainability of the business model must be taken into account.

Assessment of internal governance and risk management

The report sets out criteria that the competent authorities should use when assessing internal governance and investment firm-wide controls. Where relevant it is important that competent authorities consider how ESG factors and ESG risk management have been integrated into the overall internal governance framework, more specifically regarding:

1. suitable and transparent organisation and operational structure with clearly defined and allocated responsibilities regarding ESG factors and risks monitoring, including those of the management body and its committees;
2. sound internal governance framework including an internal control framework that considers ESG factors and risks, including by the compliance function and, where appropriate and proportionate, an internal risk management and internal audit function;
3. effective provision of services in the field of ESG investment, with sufficient human and technical resources;
4. consideration of ESG factors and risks in the investment firms' business and risk strategy and risk appetite; and effective policies and processes to identify, assess, manage and mitigate ESG factors and risks, appropriately reflecting specificities of ESG risk drivers and their impact.

Furthermore, the report states that the management body (sufficient skills, expertise and knowledge related to the management of ESG risks), the risk culture, the remuneration policies and practices, risk management and information systems and internal controls must also be taken into account from the point of view of ESG considerations.

Assessment of risks

ESG risks can materialise in the form of existing risks to capital or liquidity risk. The SREP guidelines set out the criteria for competent authorities when assessing risks to capital and risks to liquidity, into which competent authorities may decide to incorporate ESG considerations, where such risks are material. As a matter of example one may consider risks:

- Relating to the client

Competent authorities should assess risk-to-client arising from investment firms' assets under management, client money held, assets safeguarded and administered.

- Relating to the firm

Competent authorities should assess risk-to-firm arising from different risk factors such as exposure to the default of trading counterparties, operational risk from daily trading flow, and concentration risk due to large exposures, the book value of assets, the failure of counterparties, the positions in financial instruments and commodities.

- Relating to the market

The Report states that competent authorities should assess risk-to-market arising from exposures on the trading book of an investment firm dealing on own account. In addition, competent authorities could also consider ESG factors in their assessment of the investment firm's liquidity risk. The Report includes the conduct risk, the regulatory, legal and fiscal risks and the reputational risk.

NEW CSSF FAQ ON SUSTAINABLE FINANCE DISCLOSURE REGULATION (SFDR)

On 2 December 2022, the CSSF issued a FAQ (the "**CSSF FAQ**") in relation to the Sustainable Finance Disclosure Regulation (EU) 2019/2088 of 27 November 2019 on sustainability-related disclosures in the financial services sector ("**SFDR**") and Commission Delegated Regulation (EU) 2022/1288 ("**SFDR RTS**"). The CSSF FAQ (i) defines which financial market participants ("**FMPs**") and which financial products are covered and (ii) aims at providing further clarity on the SFDR. The CSSF FAQ was published a few weeks after the publication of a Q&A on SFDR by the European Supervisory Authorities (the "**ESAs**").
The FMPs to which the CSSF FAQ applies are alternative investment fund managers, management companies of undertakings for collective investment in transferable securities, managers of a qualifying venture capital fund and managers of a qualifying social entrepreneurship fund. The CSSF FAQ applies further to alternative investment funds (AIFs) and undertakings for collective investment in transferable securities (UCITS).
According to the CSSF, the CSSF FAQ is to be read in conjunction with the Q&A issued by the EU Commission (the "**Commission Q&A**"), clarifications of the ESAs and *CSSF Communiqués* on SFDR.

The FAQ in a nutshell

The CSSF FAQ covers the following topics: updates of prospectuses/issuing documents, website disclosures, pre-contractual disclosures and periodic disclosures.

- **Updates of prospectus/issuing documents**
  The CSSF FAQ states that changes follow the same regime as any other changes made to the prospectus/issuing document. The mere introduction of Article 8 and Article 9 SFDR RTS pre-contractual templates following the entry into force of SFDR RTS to a prospectus shall not necessarily be considered as a "material change" . However, a "material change" may occur if the inclusion of the said SFDR RTS annex results in a change to (i) figures such as minimum committed percentages, (ii) the binding elements of the investment strategy and/or (iii) the benchmark. Such changes are assessed on a case-by-case basis by the CSSF.

- **Website disclosure**
  The investment fund manager ("**IFM**") is and remains responsible for the website disclosure requirements of Article 10 SFDR in relation to the relevant financial product for which its acts as FMP, even if the portfolio management function has been delegated to a portfolio manager. The IFM is also responsible for ensuring that all relevant information under Article 10 of the SFDR is available on its website or on another website if this is where fund-related documentation is usually made available to investors.

- **Pre-contractual disclosures**
  As clarified in the Commission Q&A, the CSSF FAQ clarifies that "sustainable investments" made by funds disclosing under Article 9 SFDR must be qualified as such, in accordance with the conditions of Article 2(17) SFDR, at all times i.e. from the date of the current investment and on an ongoing basis during the life cycle of the fund. Funds disclosing under Article 8 SFDR shall provide a description of how the investment strategy meets the environmental and/or social characteristics. Should only an exclusion strategy be applied as a key element of the ESG strategy applicable to the relevant fund, the CSSF would expect the detailed exclusion strategy to allow investors to understand how the fund’s environmental and/or social characteristics are being met. For funds disclosing under Article 9 SFDR, the sole application of an exclusion strategy is not acceptable. Such funds must invest in "sustainable investments" which requires a positive investment selection process in order to demonstrate how all underlying investments meet the conditions of Article 2(17) SFDR. Minimum thresholds of investment disclosed by funds under Article 8 or Article 9 SFDR in their prospectus shall be considered as binding commitments of the investment strategy of the fund. IFMs must ensure ongoing compliance with all the rules set out in the prospectus/issuing document of the fund they

manage, with the depositary being in charge of monitoring the compliance of investment restrictions according to applicable legal provisions.

- **Periodic disclosures**
  The CSSF states that UCITS and AIFs disclosing pursuant to Article 8 or Article 9 SFDR must comply with periodic disclosure requirements under Article 11 SFDR and the SFDR RTS (using the prescribed templates set out in the Annexes to the RTS) in their annual reports issued after 1 January 2023.

CSSF FEEDBACK REPORT | ESMA COMMON SUPERVISOR ACTION ON SUPERVISION OF COSTS AND FEES IN UCITS

Background

In January 2021, ESMA launched a Common Supervisory Action ("**CSA**") with national competent authorities ("**NCAs**") on the supervision of costs and fees of UCITS across the EU. The aim was to assess the compliance of supervised entities with the relevant cost-related provisions in the UCITS framework and the obligation of not charging investors with undue costs. It was agreed to notably consider ESMA's supervisory briefing on the supervision of costs in UCITs and AIFs (the "**Supervisory Briefing**") and Commission Regulation 583/2010 as regards key investor information. The CSA also covered entities employing efficient portfolio management ("**EPM**") techniques to assess whether they adhere to the requirements set out in the UCITS framework and ESMA Guidelines on ETFs and other UCITS issues ("**ESMA Guidelines**").

The CSSF started the CSA in March 2021 by asking 36 Luxembourg management companies managing UCITS ("**IFMs**") to complete a dedicated questionnaire. ESMA published the results of the CSA at EU level in a report and the objective of the CSSF's feedback report published on 20 October 2022 (the "**Feedback Report**") is to inform the industry about the main observations that the CSSF made in the context of its CSA supervisory work as well as about the related recommendations for improvements.

Scope and timing

In the Feedback Report the CSSF asks all IFMs to conduct as soon as possible and at the latest by the end of March 2023 a comprehensive assessment with regard to the compliance of their policy, approach and arrangements related to costs, and to take, if applicable, the necessary corrective measures.

As the Supervisory Briefing applies both to UCITS and AIFs, the CSSF requires that the review of the pricing process is also performed by AIFMs for their AIFs under management.

The CSSF further asks all IFMs to conduct, at the latest by the end of March 2023 a comprehensive assessment with regard to the compliance of the set-up of their EPM activities in relation to the observations made by ESMA and the CSSF and to take, if applicable, the necessary corrective measures.

CSSF's observations

Pricing Process

The Supervisory Briefing provides that management companies develop and periodically review a structured pricing process. The pricing process adopted by the management company should allow a clear identification and quantification of all costs charged to the fund.

The CSSF observed several weaknesses regarding the pricing process and confirmed that it expects IFMs regardless of their size to:

- Define and implement a structured and formalised pricing process;
- Perform an independent (i.e. from the portfolio manager) analysis of the fee structures;
- Periodically review the level of cost, at least on an annual basis, and monitor it in order to compare the estimated ongoing charges with the actual expenses incurred and, where possible, reduce the level of fees; and
- Ensure the viability and competitiveness of the fund over time by taking due care of the sustainability of the costs over time.

The notion of undue costs

Article 25(4) of CSSF Regulation 10-4 requires IFMs to act in such a way as to prevent undue costs being charged to the UCITS and its unitholders. The Supervisory Briefing sets common criteria for assessing the notion of undue costs and supervising the obligation to prevent undue costs being charged to investors. The CSSF reminds IFMs that the pricing process must take these criteria into account.

Related party transactions

The CSSF observed that, for a small number of IFMs, the identification of diverse situations of conflict of interest was not properly performed as their conflicts of interest register and/or their conflicts of interest policy do not adequately refer to related party transactions.

The CSSF therefore asks IFMs to ensure that an adequate conflicts of interest policy and comprehensive conflicts of interest register are in place to ensure an effective mitigation of conflicts of interest in related party transactions.

Quantitative findings

The CSSF identified breaches of guidelines in respect of what types of charges should be included in the ongoing charges figures in the Key Investor Information Document (“**KIID**”). As such, the CSSF reminds IFMs to develop and implement a documented internal approach for the definition of what charges and payments shall or shall not form part of the amount to be disclosed as ongoing charges in the KIID for supporting the disclosure in the KIID.

The CSSF observed a high level of ongoing charges in certain outlier funds with a low amount of assets under management. Pending a further analysis on this point the CSSF wishes to draw the attention of IFMs to the fact that these situations of high costs concerning funds with low Asset under Management ("**AuM**") must not persist for long periods. The CSSF further asks all IFMs to assess the current and foreseeable level of costs associated with their low AuM funds in order to ensure that no undue costs are charged to investors and to verify the viability of these funds in terms of their ability to provide a positive return to their investors.

USE of EPM techniques by UCITS

Of the IFMs that contributed to the CSA, 10 were selected which employ EPM techniques. The objective was to assess whether the IFMs complied with the requirements of the ESMA Guidelines.

The CSSF observed that while most IFMs had documented policies and procedures in place governing use of EPM techniques, these needed to be enhanced by addressing in a detailed manner those matters highlighted in the Feedback Report.

A certain disparity concerning the fixed fee splits operated for the securities lending transactions with practices varying. It was also noted that IFMs generally have to enhance the level of granularity of the specific documented assessment/analysis for justifying the operational costs deducted from the gross revenue earned on EPM techniques. Some IFMs could not provide sufficient quantitative information to justify the relevance of the underlying cost drivers.

On that basis the CSSF asks IFMs to enhance the control framework around operational costs/fees deducted from the gross revenues arising from EPM techniques.

The CSSF noted that the conflicts of interest policies of IFMs did not specifically cover the use of the EPM techniques. As such the CSSF asks IFMs to cover adequately the conflicts of interest arising from the use of EPM techniques.

Finally the CSSF asks IFMs to provide for an adequate and periodic involvement of the compliance and internal audit functions for verifying the compliance of the activities concerning the EPM techniques with applicable regulation.

NEW REDUCED SUBSCRIPTION TAX FOR SUSTAINABLE UCIS

On 23 December 2022, the Law of 23 December 2022 concerning the State revenue and expenditure budget for the year 2023 (the "**Law**") was published.

As a reminder, under the Law on the State revenue and expenditure budget for the year 2021, a reduced subscription tax was introduced for investment funds, with a share of invested assets corresponding to the criteria of the European taxonomy, defining economic activities which are considered sustainable.

Through an amendment to Annexes I and II of the Delegated Regulation (EU) 2021/2139, which was published in the Official Journal of the EU on 15 July 2022, the European Commission decided to define natural gas and nuclear power as sustainable economic activities in the taxonomy.

Nevertheless, the Government of the Grand Duchy of Luxembourg has long pursued a policy of opposition to nuclear power, so that **the purpose of this Law is to exclude natural gas and nuclear investments from the tax benefit of the reduced subscription tax for investment funds** by the amendment of Article 174(3) of the amended Law of 17 December 2010 (regarding undertakings for collective investment).

1. How to benefit from the new reduced subscription tax?

If the proportion of the net assets of an undertaking for collective investment ("**UCI**") or of an individual compartment of an umbrella UCI, invested in ***sustainable economic activities*** represents:

- at least 5% of the total net assets of the UCI or of the individual compartment of an umbrella UCI ► this rate is 0.04% for the share of net assets invested in such sustainable economic activities;
- at least 20% of the total net assets of the UCI or of the individual compartment of an umbrella UCI ► this rate is 0.03% for the share of net assets;
- at least 35% of the total net assets of the UCI or of the individual compartment of an umbrella UCI ► this rate is 0.02% for the share of net assets;
- at least 50% of the total net assets of the UCI or of the individual compartment of an umbrella UCI ► this rate is 0.01% for the share of net assets.

As a reminder, an *economic activity qualifies as environmentally sustainable* where that economic activity:

- *contributes substantially to one or more of the following environmental objectives*: climate change mitigation, climate change adaptation, sustainable use and protection of water and marine resources, transition to a circular economy, pollution prevention and control and protection and restoration of biodiversity and ecosystems,
- *does not cause significant harm to any of these environmental objectives*;
- *is carried out in accordance with the minimum safeguards* of the procedures that a company engaged in economic activity implements to comply with the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights; and
- *complies with the technical screening criteria* established by the Commission.

2. When is the benefit of a reduced subscription tax excluded?

By way of exception, the following will not benefit from a reduced *taxe d'abonnement*. The share of the net assets of the UCI or of an individual compartment of an umbrella UCI invested in:

- economic activities which concern natural gas and nuclear power. This includes economic activities based on:
  - the pre-commercial stages of advanced technologies for the production of energy from nuclear processes with minimal waste from the fuel cycle;
  - the construction and safe operation of new nuclear power plants, for the generation of electricity or heat, including for hydrogen production, using best-available technologies;
  - the electricity generation from nuclear energy in existing installations;

  - the electricity generation from fossil gaseous fuels;
  - the high-efficiency co-generation of heat/cool and power from fossil gaseous fuels;
  - the production of heat/cool from fossil gaseous fuels in an efficient district heating and cooling system,

- and if this economic activity does not cause significant harm to any of the other environmental objectives.

3. When is the new reduced subscription tax to be implemented?

The law enters into effect as of January 1, 2023. However the legislator clarified:

- certified certificates, which have already been submitted by UCIs to the relevant tax administration, before the entry into force of this amendment (before 1st January 2023) remain valid, i.e. the tax rate resulting from the percentage of the net assets stated in the submitted certificate remains applicable for a total of four quarters;
- tax returns for the subscription tax filed after the entry into force of this amendment (after 1st January 2023) shall take into account the exclusion of economic activities involving natural gas and nuclear power.

ECJ C-885/19P AND C-898/19P: NO UNLAWFUL STATE AID IN THE EUROPEAN COMMISSION'S FIAT CASE

On 8 November 2022, the Court of Justice of the European Union (the "**ECJ**") ruled that the Advance Pricing Agreement ("**APA**") granted by Luxembourg tax authorities to Fiat Finance & Trade Ltd ("**FFT**") is not an illegal State aid.

Facts of the case

In 2014, the European Commission opened an investigation on the APA that was granted by Luxembourg tax authorities to FFT because the Commission deemed this APA to be an illegal tax advantage as defined by EU State aid laws. The Commission argued that this tax ruling was unjustifiably reducing FFT's tax burden and therefore resulted in a selective tax advantage.

In 2015, both the Luxembourg State and FFT made an appeal of this decision and sought its cancellation before the General Court. In 2019, the General Court confirmed the Commission's arguments and thus upheld the aforesaid decision: the APA granted by Luxembourg to FFT constituted a selective advantage. An appeal was then filed by FFT before the ECJ.

Notion of State aid

As a reminder, Article 107 of TFEU aims at situations in which companies are unjustifiably granted financial State aid. In the context of taxation, State aid usually consists of a "selective advantage" that only benefits to one specific entity, therefore implying competition risks on the market. Four conditions have to be met in order for a national measure to qualify as State aid:

- There must be an intervention by the State or through State resources;
- The intervention must be liable to affect trade between the Member States;
- It must confer a selective advantage on the beneficiary;
- It must distort or threaten to distort competition.

ECJ's decision

In the case at hand, the Court concluded there was no illegal State aid involved in the matter. The ECJ proceeded to apply the conditions required by Article 107 (1) TFEU in order to qualify a national measure as a State aid, as previously exposed.

According to the ECJ, an error of law was committed in the previous decision regarding the determination of the "normal tax system" used to underline the existence of a "selective advantage". The Court considered that *"in dismissing the relevance of Article 164(3) of the Tax Code and Circular No. 164/2, the Commission applied an arm's length principle different from that defined by Luxembourg law."* In addition, she stated that by endorsing such an approach, the General Court failed to take account of the requirement provided by Article 107 (1) TFEU.

In the future, the European Commission will have to make sure that, when performing a State aid investigation in tax cases, the determination of the reference system or "normal tax system", that is a key element in this process, must be based on the domestic tax legislation of the Member State concerned.

ECJ RULES REPORTING REQUIREMENTS UNDER DAC 6 INCOMPATIBLE WITH LEGAL PROFESSIONAL PRIVILEGE

In a judgment dated 8 December 2022 in the case C-694/20 *Orde van Vlaamse Balies*, the European Court of Justice ("**ECJ**" or the "**Court**") sitting in Grand Chamber handed down a decision concerning the compatibility of Directive 2011/16/EU on administrative cooperation in the field of taxation as amended by Direction 2018/822 ("**DAC 6**") with legal professional privilege.

Background

As a reminder, DAC 6 imposes an obligation on intermediaries (any person who designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement), to report certain aggressive tax border arrangements, as defined ("**cross-border arrangement**") to the competent tax authorities. This obligation extends, under certain special circumstances, to lawyers who are bound by legal professional privilege.

In the case at hand, the Flemish decree transposing DAC 6 provides that, when an intermediary involved in cross-border tax planning is bound by legal professional privilege (the "**lawyer-intermediary**"), he/she must inform the other intermediaries that he or she cannot make that report him/herself. The Belgian Constitutional Court asked the ECJ to examine the validity, in light of Articles 7 and 47 of the Charter of Fundamental Rights of the European Union (the "**Charter**"), of the obligation on lawyers, when acting as intermediaries within the meaning of DAC 6, to notify any other intermediary who is not his or her client of that intermediary's reporting obligations in relation to the transaction.

Findings of the Court

First of all, the ECJ recalled that Article 7 of the Charter protects confidentiality of all correspondence between individuals and affords strengthened protection to exchanges between lawyers and their clients, including legal advice. The Court found that the obligation laid down by Article 8ab(5) of DAC 6 for a lawyer-intermediary where he/she is exempt from reporting directly to the competent tax authorities on account of the legal privilege he/she is bound, to notify other intermediaries of their reporting obligations necessarily entails that other intermediaries become aware of the identity of the notifying lawyer-intermediary. The Court found that in so far as those intermediaries did not have knowledge of the identity of the lawyer-intermediary and of him/her having been consulted on the cross-border arrangement, the obligation to notify entails an interference with the right to respect for communications between lawyers and their client. Furthermore, the fact that the intermediary must inform the competent authority of the identity of the lawyer-intermediary when making a reporting also constitutes an infringement of Article 7 of the Charter. The Court found that these interferences were not strictly necessary in order to attain the objectives of DAC 6, namely combating aggressive tax planning and preventing the risk of tax avoidance and evasion, since other intermediaries are required to file that information with the competent tax authorities. No intermediary can claim that he or she was unaware of the reporting obligations - which are clearly set out in DAC 6- to which he or she is directly and individually subject.

As regards Article 47 of the Charter and the right to fair trial, the Court held there was no sufficient link between judicial proceedings and the reporting requirements to constitute an infringement to the right to a fair trial.

Conclusion

This judgment should affect the position of Luxembourg based lawyers who are also under an obligation to notify other intermediaries of their reporting obligations under DAC 6 in relation to a particular transaction, although no guidance has been issued. One could nonetheless consider it regrettable that the judgment does not call into question the obligation on lawyers to advise the relevant taxpayer that a transaction may be reportable under DAC 6. In this respect, the judgment does not examine the issue of the lawyer's obligation to notify a taxpayer that may not be their client, which may raise similar difficulties under Article 7 of the Charter.

FINAL LOSSES OF PERMANENT ESTABLISHMENT | NEW ECJ DECISION

Background

On 22 September 2022, the Court of Justice of the European Union ("**ECJ**") rendered its judgment in case C-538/20 *(i.e., Finanzamt B and W AG)* finding that Germany **does not infringe the freedom of establishment in not allowing the tax-deduction of final losses** which a German company had incurred in its permanent establishment ("**PE**") situated in the United Kingdom, **because Germany has waived**, as State of residence**, its power to tax the profits (and/or deduct losses) of that PE** by virtue of the UK-Germany double tax treaty ("**UK-Germany DTT**").

Fact pattern

The complainant was a German bank, which owned a loss-making PE situated in the UK. The complainant **claimed the tax deduction of the final losses, incurred by its foreign PE, in its German tax returns** filed for the fiscal year during which its PE was closed in the UK. The German tax authorities disregarded the final losses of the UK PE for the complainant's corporate tax and trade tax. The complainant made the case before the German Federal Fiscal Court (i.e., *Bundesfinanzhof*) that the German tax authorities' construction of the UK-Germany DTT, according to **which an exemption of profits from a UK PE** means that **losses are also excluded**, **violates the freedom of establishment**.

As being unsure whether the losses incurred by a foreign PE located in the UK should not be taken into account for the calculation of the tax payable by the complainant in Germany in the light of the principle of the freedom of establishment, The Federal Fiscal Court referred the case to the ECJ.

ECJ judgment

In order to issue the present ruling, the ECJ **made in particular reference to its judgment C-650/16 rendered on 12 June 2018** (i.e., *A/S Bevola and Jens W. Trock ApS v. Skatteministeriet*). As a reminder, under that ruling the ECJ enacted **the principle of the tax allocation of a PE's final losses to its head office/parent company** located in another EU Member State.

However, in its present judgement, the ECJ considers that its decision rendered in the C-650/16 ruling does not provide **a clear answer** in the particular case where **the tax exemption of foreign profits incurred by a PE is provided for by a double tax treaty** (rather than by national laws as t was the case under C-650/16). In this latest judgmeent, the ECJ further confirmed in what circumstances losses incurred by **a foreign PE characterized by virtue of international tax rules must be regarded as 'final', within the meaning of that case-law, and how the amount of those losses is to be determined**. On this particular point, the ECJ ruled, under the scenario where the contracting state of residence refrained from exercising its power to tax the profits (and losses) of the foreign PE under a double tax treaty, the **situation of a resident company with a PE located in another Member State that is not objectively comparable to the situation of a resident company located in a Member State with a domestic PE** (and on which a taxation right is waived by virtue of a domestic law). Therefore, **the freedom of establishment is not infringed by the unequal treatment of the two situations** and there is **no requirement under EU law to deduct final losses of the foreign PE at the level of an EU head office/parent company**.

BUDGET LAW 2023 PASSED | BRIEF OVERVIEW OF THE MAIN TAX CHANGES

The Budget Law for the year 2023 (the “**2023 Budget Law**”), although falling short of the long awaited substantial tax reform, does provide for some tax amendments that may be of interest to individuals and employers as well as to corporations and investment funds.

The 2023 Budget Law contains measures aimed at improving the administrative burden of taxpayers by extending the deadline for the filing of income tax returns for both corporations and individuals to 31 December of the year following the relevant tax year. Similarly, the deadline for the joint non-revocable application for individual taxation of resident and non-resident partners and for resident spouses has been set at 31 December of the year following the relevant tax year.

The 2023 Budget Law tax measures for corporations and investment funds are focusing on:

- a clarification to Article 168 quarter LITL on the reversal anti-hybrid rules by foreseeing that (i) entities treated as tax transparent under Luxembourg law will not become taxable in Luxembourg if the jurisdiction of the partner of the Luxembourg entity does not tax the partner because of a subjective exemption, (ii) the net income of a reverse hybrid entity is only taxable up to the portion attributable to an associated enterprise; and
- the portion of net assets that a Luxembourg investment fund invests in natural gas and nuclear energy does not benefit from a reduced subscription tax despite the fact that these energy sources are now considered sustainable sources of energy by the European taxonomy.

For individuals and employers, the 2023 Budget Law tax incentives can be summarised as follows:

- a reduction of the salary threshold for an impatriate to be qualified as a highly qualified employee and benefit from the related tax exemptions from EUR 100,000 to EUR 75,000;
- a consideration of tax consolidation for the 50% tax-exempt participatory bonuses paid by employers to their employees so that the amount of the bonus that should not exceed 5% of the profit of the employer will be calculated at the level of the tax consolidation if the employer is part of a tax consolidation;
- an adaptation of the income ranges to benefit from the minimum social wage tax credit to the increase of the minimum social wage;
- an increase in the maximum income to benefit from the single-parent tax credit from EUR 35,000 to EUR 60,000 as well as an increase of the amount of the tax credit from EUR 1,500 to EUR 2,505;
- a limitation of the accelerated depreciation of 4%, per taxpayers to two buildings or parts of buildings used for rental housing, acquired or built after 31 December 2022;
- an abolition of the special real estate allowance for buildings or parts of buildings built, acquired or established as from 1 January 2023.

Finally, the 2023 Budget Law provides for a reduction of the VAT tax rates, except the super-reduced rate that remains at 3%. A super-reduced rate of 3% will apply to the supply of solar panels and their installation and a reduced rate of 8% will now apply to the repair of household appliances and to the sale, hire or repair of bicycles, including electric bicycles.

EU COMMISSION PROPOSES AMENDMENT OF COUNCIL DIRECTIVE 2011/16/EU ON ADMINISTRATIVE COOPERATION IN THE FIELD OF TAXATION

New transparency rules will require service providers to report crypto-asset transactions

On 8 December 2022, the European Commission published its proposal for an eighth amendment to the Council Directive 2011/16/EU on administrative cooperation ("**DAC8**"), which aims to prevent tax fraud, tax evasion, and tax avoidance in the EU, and to strengthen administrative cooperation and exchange of information on tax matters.

Content

The European Commission proposed new tax transparency rules for all service providers facilitating transactions in crypto-assets for customers resident in the European Union. The proposal puts forward changes to existing provisions on exchanges of information and administrative cooperation. It also extends the scope of the automatic exchange of information with respect to information reported by reporting crypto-asset service providers.

Scope

Reportable transactions are exchange transactions and transfers of reportable crypto-assets. Both, domestic and cross-border transactions are in the scope of the proposal.

A crypto-asset user is an individual or entity that is a customer of a reporting crypto-asset service provider for the purposes of carrying out reportable transactions. An individual or entity, other than a financial institution or a reporting crypto-asset service provider, acting as a crypto-asset user for the benefit or account of another individual or entity as agent, custodian, nominee, signatory, investment adviser, or intermediary, is not treated as a crypto-asset user, and such other individual or entity is treated as the crypto-asset user.

Due diligence procedures

A reporting crypto-asset service provider shall carry out due diligence procedures in order to identify reportable users. The due diligence procedures apply to individual crypto-asset users as well as entity crypto-asset users to be identified as reportable users.

Automatic exchange of information between competent authorities

Information reported by a reporting crypto-asset service provider has to be communicated to the competent tax authorities where the reporting crypto-asset service provider is resident for tax purposes within 2 months following the end of the calendar year to which the reporting requirements applicable to reporting crypto-asset service providers relate.

Penalties

DAC8 does not provide for a minimum penalty. However, it states that "the penalties and other compliance measures provided for in the Directive are to be effective, proportionate and dissuasive."

Entry into force

DAC8 will need to be implemented by Member States by the end of 2025 and will come into effect on 1 January 2026.

ADMINISTRATIVE COURT RULING | COMMUNICATION OBLIGATIONS OF THE LUXEMBOURG TAX AUTHORITIES

In a judgment dated 20 December 2022, the Luxembourg Higher Administrative Court (*Cour administrative*, hereinafter the "**Court**") ruled on the application of paragraph 205, sub-paragraph 3 of the General Tax Law (*Abgabenordnung* or "**AO**") in the context of the examination of a claim by the Director of the Direct Tax Administration ("**DTA**").

In the present case, a taxpayer (the "**Taxpayer**") challenged on 29 July 2016, by way of a claim, the income tax and long-term care insurance contribution in the tax assessments issued by the DTA for the fiscal year 2014. The Director of the DTA considered the claim well founded and reformed the income tax assessment *in pejus*. In particular, according to the Director, the activities carried out by the Taxpayer were of a commercial nature so that the tax authorities should have taxed such income as business profit and not as capital income in the meaning of Article 97 of the Luxembourg Income Tax Law ("**LITL**").

The Taxpayer brought the matter to the Lower Administrative Court (*Tribunal administratif*), which decided to annul the Director's decision on the grounds that the Director failed to comply with the obligation set out in paragraph 205, sub-paragraph (3) AO. The DTA filed an appeal against this decision. The Higher Administrative Court recalled that pursuant to paragraph 205, sub-paragraph (3) AO the DTA is under the obligation, prior to the issuance of a tax assessment, to communicate the elements in respect of which the DTA intends to diverge from the taxpayer's tax return. According to the Higher Administrative Court, this provision is applicable in the same way to the claim procedure as to the taxation procedure. As a result the Director is obliged to respect the provision of paragraph 205, sub-paragraph (3) AO when examining a claim, which implied, in the present case, that the Director must have informed the Taxpayer of its intention to requalify the declared income.

The Higher Administrative Court further recalled that paragraph 205, sub-paragraph (3) AO applies only to substantial modifications ("*wesentliche Abweichung*") to the detriment of the taxpayer, including cases in which the competent tax authority intends to take into account a legal or factual factor which (i) is likely to affect the taxation decision and (ii) differs from the situation declared by the taxpayer.

Furthermore, the substantial modification to the detriment of the taxpayer must result from a divergence in the information and documents provided to the tax authorities, and subsequently to the Director, and should not be a simple matter of application and interpretation of the tax law.

However, in the present case, the requalification made by the Director resulted not only in a substitution of the category of income concerned, but also in a fundamental modification in the method of determining that income, which is such as to influence the level of income to be retained. Indeed, while capital income is determined by the difference between the income and the expenses, in accordance with the Article 103 of LITL, business profit is, by contrast, computed by comparison of the net asset value of the investments between the beginning and the end of the financial year, in accordance with Article 18, paragraph (1) of the LITL.

Hence, the requalification of income in the present case cannot be considered as the result of an analysis of a simple matter of application and interpretation of the law.

By failing to inform the Taxpayer in advance of his intention to requalify the capital income as business profit, the Director did not allow him to provide clarification in relation to factual elements newly made necessary and relevant for the determination of profit based on the comparison of the net assets invested.

Conclusion

The fundamental principle of "*Recht auf Gehör*" as enacted by paragraph 205, sub-paragraph (3) AO is of application within the claim procedure so that the Director therefore fails to comply with this principle when substantial modifications affecting the tax position of the taxpayer are contemplated and the taxpayer is not put in a position to provide factual elements to clarify his tax situation.

OBLIGATION TO ADJUST DEDUCTIONS OF VAT IF A TAXABLE PERSON IS PLACED IN LIQUIDATION

On 3 October 2022, following a preliminary ruling requested by the Lithuanian Supreme Court (*Lietuvos vyriausiasis administracinis teismas*), the European Court of Justice ("**ECJ**") decided on case C-293/21 concerning the obligation to adjust deductions of VAT if a taxable person is placed in liquidation and removed from the register of VAT payers.

More specifically, the main issue related to the interpretation of Articles 180 to 187 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

A Lithuanian company (the "**Company**") acquired goods and services on which VAT was chargeable in order to produce capital goods and sought to use such capital goods as part of its future taxable activity. However, as a result of losses incurred and considering the absence of orders and potential income, it was decided to discontinue the Company's activity. As a result, the Company's sole shareholder resolved to place the Company in liquidation.

Pursuant to a tax audit from the Lithuanian VAT authorities, the Company had been ordered to repay the input VAT deducted on the goods and services acquired, since, according to the tax authorities, the Company had an obligation to adjust the deduction of input VAT.

Questions referred to the ECJ

The Lithuanian Supreme Court hence asked the following questions to the ECJ:

- Are Articles 184 to 187 of the VAT Directive to be interpreted as meaning that a taxable person is (or is not) obliged to adjust deductions of VAT charged on the acquisition of goods and services for the purposes of producing capital goods in the case where those goods are no longer intended to be used in the course of taxable economic activities because the shareholder of the taxable person decides to place it in liquidation and that taxable person submits a request that it be removed from the register of VAT payers ?
- Is the answer to that question affected by the fact that the decision to liquidate the Company was taken because of growing losses, absence of orders and the shareholder's doubts as to the Company's profitability?

ECJ decision

When considering the questions referred to it, the ECJ recalled that the right of taxable persons to deduct the VAT due or already paid on goods purchased and services received as inputs from the VAT which they are liable to pay, is a fundamental principle of the common system of VAT established by EU legislation and that said fundamental principle may not, in principle, be limited.

The ECJ also emphasised that the right of deduction, once it has arisen, is retained even if, subsequently, the intended economic activity was not carried out and, therefore, did not give rise to taxable transactions.

However, the ECJ stated that, even though the right of deduction must be retained even where an activity is brought to an end before it gives rise to any taxable transactions, it must be combined with the rules of the VAT Directive regarding the adjustment of deductions. Indeed, these rules aim at establishing a close and direct link between the right to deduct the input VAT paid and the use of the goods or services concerned for taxed output transactions.

The ECJ thus reached the conclusion that if the taxable person no longer plans to use the goods or services concerned in order to carry out taxed output transactions, the close and direct link which must exist between the right to deduct the input VAT paid and the carrying out of the planned taxed transactions is broken, and it must result in the application of the adjustment mechanism provided for in Articles 184 to 187 of the VAT Directive.

Based on this reasoning, the ECJ ruled that a taxable person is indeed "*under an obligation to adjust deductions of input VAT relating to the acquisition of goods or services intended to produce capital goods in the case where, as a result of the decision of the owner or sole shareholder of that taxable person to place it in liquidation and of the taxable person's request to be* *removed, and it being removed, from the register of VAT payers, the capital goods produced have not been used – and will never be used – in the course of taxable economic activities. The reasons for the decision to place that taxable person in liquidation (…) have no bearing on the taxable person's obligation to adjust the deductions of VAT concerned, in so far that taxable person no longer has – and will never have – any intention of using the capital goods for the purposes of taxable transactions.*"

VAT: WELCOME TO THE DIGITAL AGE

On 8 December 2022, the European Commission issued a legislative proposal for amendments to the EU VAT Directive, the Council Implementing Regulation and the Council Regulation on Administrative Cooperation as part of the package of legislation on VAT in the Digital Age initiative ("**ViDA**"). The VAT package offers a series of measures to modernize the current VAT system in order to resist against tax fraud and adapt VAT to the digital age.
The EC's action plan is based on three pillars: (i) modernising VAT reporting obligations and introducing e-invoicing for cross-border transactions, (ii) addressing the challenges of the VAT treatment applicable to the platform economy, and (iii) avoiding the need for multiple VAT registrations in the EU.

ViDA key features

VAT is an important source of revenue for Member States. However, in recent years, a loss of revenue has been noted, in particular due to VAT fraud linked to intra-EU trade. In order to respond to these issues, the European Commission proposed measures to modernize the current VAT system because international tax rules are no longer adapted to the realities of the modern global economy.
The ViDA package proposed by the European Commission features the following changes to the currently applicable VAT rules :

- **Modernizing VAT reporting obligations and introducing mandatory e-invoicing**

This first pillar introduces a real-time digital reporting system based on e-invoicing for businesses that operate cross-border within the EU.
In practice, an e-invoice will need to be issued for all intra-community B2B supplies of goods and services.
In addition, for these transactions, a real-time digital reporting will be introduced. The purpose of this system is to transmit information from taxpayers to the tax authorities in an electronic format in real time and to ensure that VAT is collected.

- **Addressing the challenges of the VAT treatment applicable to the platform economy**

This second pillar introduces an obligation for platform economy operators providing passenger transport and short term accommodation to collect and pay VAT to the tax authorities when service providers do not, for example because they are a small business or individual provider.
In practice, platforms will be considered as "deemed suppliers", meaning that they will be considered to receive the relevant service from the accommodation or transport supplier and provide this same service to the end-customer. Together with other clarifications, this will ensure a uniform approach across all Member States and contribute to a level playing field between online and traditional short-term accommodation and transport service provisions.

- **Create a single EU VAT registration**

The aim of this measure is to facilitate VAT registration for businesses operating cross-border within the EU.
The European Commission proposes to establish a single VAT registration system, by improving the existing One-Stop Shop ("**OSS**") and Import One-Stop Shop ("**IOSS**") systems.
The pillar allows companies operating in the European market to register only once via a one-stop shop and in one language for the entire EU. Fulfilment of VAT obligations is also intended to take place via a single online portal and in one single language. Administrative charges and related costs will be reduced by this measure.
The measures introduced by the European Commission's legislative proposals are intended to enter into force gradually between 2025 and 2028, once adopted by all EU Member States.

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