BSP Newsletter

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BSP

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MADE IN
LUXEMBOURG

SUMMARY

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FINANCIAL SERVICES CONTRACTS CONCLUDED AT A DISTANCE | NEW DIRECTIVE ENTERS INTO FORCE

Introduction

The use of digital tools by consumers has been increasing at a rapid pace in recent years, including for the conclusion of financial services. It is in this context that the European Commission has taken action to increase consumer protection by updating the EU's legislative arsenal, which until recently consisted mainly of Directive 2011/83/EU as regards financial services contracts (the "**2011 Directive**") and Directive 2002/65/EC concerning the distance marketing of consumer financial services (the "**2002 Directive**"). This initiative of the European Commission culminated in the adoption of **Directive (EU) 2023/2673 of 22 November 2023** (the "**New Directive**") amending the 2011 Directive and repealing the 2002 Directive. The Directive entered into force on **18 December 2023**.

Repeal of the 2002 Directive

The progressive introduction in recent years of EU sector-specific legislation has resulted in significant overlaps of that legislation with the 2002 Directive. Furthermore, significant developments in digitalisation have led to significant changes to the financial services market which were simply not envisaged that the time of drafting of the 2002 Directive. These factors cumulatively exacerbated the need to repeal the 2002 Directive (with effect from 19 June 2026).

Amendment of the 2011 Directive with the introduction of new Chapter III bis

The New Directive has introduced a **new Chapter III bis (*Rules on distance contracts for financial services*)** to the 2011 Directive thereby extending the scope of that directive to cover financial services (which were previously excluded from scope). Certain contained within the 2002 Directive which were deemed to be still relevant and necessary have been incorporated into this new Chapter III bis of the 2011 Directive.

Some of the key provisions introduced pursuant to the New Directive include the following (some of which have been carried over from the 2002 Directive):

- ***Dark patterns* forbidden**: practices that materially distort or impair the ability of consumers to make autonomous and informed choices or decisions will be forbidden.
- **Pre-contractual information**: consumers' rights to pre-contractual information including adequate explanations on proposed contracts, have been enhanced.
- **Right to human intervention**: consumers shall have the right to request and to obtain human intervention at the pre-contractual stage, and if justifiable, after the a distance contract has been concluded.
- **A withdrawal button**: while the 2002 Directive already included rights of withdrawal, a specific withdrawal function/button shall in the future be prominently displayed on the online interface and easily accessible.

Interaction with other laws

These rules will apply to all financial services except where such services are covered by specific sectoral legislation. Where this is an EU legislative act governing specific financial services, barring some exceptions, the **provisions of that specific act should be applied**.

Transposition into national law

Member States have until **19 June 2025 to transpose the Directive into national law** and until **19 June 2026 to apply it**. In transposing the New Directive, Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in the New Directive, resulting in a different level of consumer protection throughout the EU, unless otherwise provided for in the New Directive.

MIFID II, MIFIR, BMR AND CROWDFUNDING REGULATION | ESMA UPDATES

Updates on MiFID II and MiFIR

On 15 December 2023, ESMA updated their questions and answers ("**Q&A**") on Directive 2014/65/EU of 15 May 2014 on markets of financial instruments ("**MiFID II**") and Regulation (EU) 600/2014 on markets of financial instruments ("**MiFIR**") with respect to the investor protection and intermediaries.

ESMA has updated the Q&A on aggregating charges and costs to clarify the requirement for all in-fees; and included a new question as to how investment firms should indicate the parts of the total costs and charges paid in or represented in an amount of foreign currency in their ex-ante and ex-post costs and charges disclosure.

Updates on Benchmark Regulation

On 15 December 2023, ESMA also updated its Q&As on Regulation (EU) 2016/1011 on benchmarks (the "**Benchmark Regulation**").

With the updated Q&A, ESMA clarified the question on whether contribution to and provision of benchmarks used outside the EU only fall within the scope of the Benchmark Regulation; and revised the question on the transitional provisions applicable to third country benchmarks.

Updates on Crowdfunding Regulation

On 15 December 2023, ESMA updated its Q&As in relation to Regulation (EU) 2020/1503 of 7 October 2020 on European crowdfunding service providers for business (the "**Crowdfunding Regulation**").

ESMA has added three new questions as to:

- whether a crowdfunding service provider can only accept sophisticated investors;
- how the placement should be taken into account without a firm commitment and reception and transmission of orders as referred to in Article 2(1) of the Crowdfunding Regulation; and
- how National Competent Authority (NCA) should apply Article 11(2)(c) of the Crowdfunding Regulation for authorisation purposes and to what extent an insurance policy can be combined with own funds.

NPL DIRECTIVE | UPDATE ON TRANSPOSITION INTO LUXEMBOURG LAW

Directive (EU) 2021/2167 of 24 November 2021 on credit servicers and credit purchasers and amending Directives 2008/48/EC and 2014/17/EU (the "**Directive**") which will regulate the sale, purchase and servicing of non-performing loans originated by EU Banks should have been transposed in all Member States by end of 2023. Until now, only a small number of EU Member States (Denmark, Germany, Ireland, Greece, France, Croatia and Sweden) have managed to comply with this deadline.

Indeed, draft law No. 8185 (the "**Draft Law**") was submitted to the Luxembourg Parliament (*Chambre des Députés*) on 24 March 2023 and is currently under review by the *Conseil d'Etat*. For further information on the Draft Law, we refer you to our previous newsletter.

Market participants are eagerly awaiting the approval of the final Draft Law so that they can properly assess the impact the new rules will have on their business lines.

SECURITISATION | RECENT REGULATORY DEVELOPMENTS

New technical standards on risk retention requirements for securitisation

On 19 October 2023, Commission Delegated Regulation (EU) 2023/2175 of 7 July 2023 was published (the "**Delegated Regulation**"). The **Delegated** Regulation supplements the Regulation (EU) 2017/2402 (the (“**EU Securitisation Regulation**”) with regard to regulatory technical standards (the “**RTS**”), specifying in greater detail the risk retention requirements for originators, sponsors, original lenders and services.

The RTS, in accordance with Article 6(7) of the EU Securitisation Regulation, specify the risk retention requirements and, in particular: (i) requirements on the methods of retaining risk; (ii) the measurement of the level of retention; (iii) the prohibition on hedging or selling the retained interest; (iv) the conditions for retention on a consolidated basis; (v) the conditions for exempting transactions based on a clear, transparent and accessible index; (vi) the methods of retaining risk in case of traditional securitisations of non-performing exposures; and (vii) the impact of fees paid to the retainer on the effective material net economic interest.

The Delegated Regulation repealed the Commission Delegated Regulation (EU) 625/2014.

SHADOW BANKING AND CRR REPORTING | NEW DELEGATED REGULATION

New technical standards for identification of shadow banking entities

On 12 December 2023, Commission Delegated Regulation (EU) 2023/2779 of 6 September 2023 was published (the "New Delegated Regulation"). The New Delegated Regulation supplements Regulation (EU) 575/2013 (the "**Capital Requirements Regulation**") by specifying the criteria to identify shadow banking entities for the purposes of reporting large exposures pursuant to Article 394(2) of the Capital Requirements Regulation.

Article 394(2) of the Capital Requirements Regulation, as amended by Regulation (EU) 2019/876 ("**CRR2**"), sets out the additional reporting obligation for an institution that is required to report its 10 largest exposures to shadow banking entities which carry out banking activities outside the regulated framework on a consolidated basis.

The New Delegated Regulation specifies the criteria for identifying shadow banking entities and defines banking services and activities. Accordingly, any entity (i) that offers banking services or performs banking activities as defined under the New Delegated Regulation and (ii) is not already authorised and supervised in accordance with any of the EU legislative acts listed in the Annex to the New Delegated Regulation shall identify as a shadow banking entity. Also among the entities identified as shadow banking entities are any undertaking for collective investment in transferable securities where those undertakings are authorised as money market funds (certain conditions apply) and certain alternative investment funds including those authorised as money market funds, those employing leverage on a substantial basis or those which are not prohibited from originating loans in the ordinary course of business or from purchasing third-party lending exposures for its own account on the basis of its rules or instruments of incorporation. The New Delegated Regulations also sets out the criteria for excluding entities established in third countries from being deemed to be shadow banking entities.

The New Delegated Regulation entered into force and is directly applicable in all Member States since 1 January 2024.

REGULATION ON EUROPEAN GREEN BONDS | ENTRY INTO FORCE

Entry into force of new regulation and its purpose

On 30 November 2023, Regulation (EU) 2023/2631 of 22 November 2023 on European Green Bonds and optional disclosures for bonds marketed as environmentally sustainable and for sustainability-linked bonds (the "**EuGBs Regulation**") was published in the Official Journal of the EU.

This EuGBs Regulation lays down uniform requirements for issuers of bonds who wish to use the designation « **European Green Bond** » or « **EuGB** » for their bonds that are made available to investors in the EU. These requirements are aligned with the framework of the European taxonomy, which defines the economic activities that the EU considers to be environmentally sustainable.

The EuGBs Regulation shall, for the most part, apply from 21 December 2024 except for some provisions which already apply since 20 December 2023 and a few provisions which shall only apply from 21 June 2026.

Who can issue an EuGB and the main conditions

European Green Bonds can be issued by financial and non-financial undertakings, as well as non-corporate entities such as sovereigns.

To qualify as an EuGB, the proceeds of the bond must be used to finance economic activities having a lasting positive impact on the environment. The EuGBs Regulation distinguishes between a gradual and a portfolio approach:

- **The gradual approach** implies that issuers must ensure that 85 % of the net proceeds of the bond are allocated to taxonomy-aligned activities before bond maturity. In essence, the proceeds of the EuGB can be allocated to fixed assets, capital and operation expenditures or financial assets that relate to economic activities that meet taxonomy requirements or to assets and expenditures of households.
- **Under the portfolio approach,** issuers can also allocate EuGB proceeds to a portfolio of fixed assets or financial assets in accordance with taxonomy requirements.

Further requirements applicable to the issuers

Issuer of EuGBs must comply with certain transparency and external review requirements, including:

- **The appointment of an independent external reviewer** who will be responsible for delivering a pre-issuance review of European Grenn Bond factsheet and a post-issuance review of the European Green Bond annual allocation reports (with the conditions regarding the external reviewers being set out in Title IV of the EuGBs Regulation),
- **The publication of a prospectus** pursuant to EU Prospectus Regulation (EU) 2017/1129 of 14 June 2017.

There are specific conditions which must be complied with for the use of the designation "European Green bonds" or "EuGB" in respect of securitisation bonds.

The EuGBs Regulation provides that optional disclosure templates shall be made available for issuers of bonds marketed as environmentally sustainable and for sustainability-linked bonds in the EU.

Supervision

Title VI of the EuGBs Regulation sets out the supervisory powers of ESMA and the national competent authorities in respect of compliance with the EuGBs Regulation as well as the available penalties/administrative measures in case of non-compliance.

TRANSPARENCY LAW | CSSF ENFORCEMENT PRIORITIES

Background

On 8 January 2024, 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 2023 ("**FY2023**"), 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 2024.

European common enforcement priorities

As in previous years, ESMA together with the European national accounting enforcers, including the CSSF, have identified European common enforcement priorities (the "**ECEPs**") for the 2023 annual reports, which are detailed in ESMA's public statement of 25 October 2023.

Focus points of CSSF enforcement campaign

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

IFRS financial statements: climate related matters

The CSSF stresses out that the disclosures on climate-related topics need specific and relevant information on how climate related risks were factored in the financial statements. The CSSF also underlines the importance of considering climate-related risks and opportunities in terms of impairment testing of non-financial assets. With respect to expected cash flows, the CSSF invites issuers to envisage various probability-weighted assumptions as well as a correlation between them.

IFRS financial statements: Macroeconomic environment – increase in interest rates and impact on (re)financing

The recent interest rate hikes might have significant consequences for issuers highly dependent on financial debt. In this context, the CSSF explains that:

- issuers should provide information on how changes in the macroeconomic environment affect their risk exposures (distinguishing between floating rate and fixed rate financial instruments) and how such risks are managed;
- a sensitivity analysis, showing how profit or loss and equity would have been affected by reasonably possible changes in interest rates, is important;
- issuers should consider providing disclosures about covenants and the impact of any potential breaches, and
- renegotiated financings during the relevant year merit adequate disclosure.

IFRS financial statements: Macroeconomic environment – fair-value measurement and disclosures

The CSSF encourages issuers:

- to explain how all key valuation inputs were determined in the case of investment properties measured according to the fair value model; the decline in the volume of real estate transactions should be considered;
- to provide sensitivity analysis for key observable input. Issuers should also describe any significant changes in valuation techniques and inputs used, and
- to disclose the fair value of each class of financial assets and liabilities, including those that are measured at amortised cost.

Non-financial statements

With respect to non-financial statements, the CSSF:

- reminds that the EC adopted delegated acts related to *Regulation* (EU) 2020/852 ("**Taxonomy Regulation**") which include updated tables of mandatory reporting obligations and technical screening criteria.
- encourages issuers to anticipate the entry into force of the Directive (EU) 2022/2464 ("**CSRD**") and the

related European sustainability reporting standards by adapting their policies and procedures timely.

The CSSF will continue to assess how issuers comply with alignment of their economic activities with climate change mitigation and adaptation objectives. The CSSF underlines the importance of disclosures on climate-related targets, actions and progress.

Alternative performance measures ("APM")

The CSSF draws the attention of issuers to the treatment of capital and operating expenditure ("**CapEx**" and "**OpEx**"). If a CapEx and OpEx measure is not calculated in compliance with definition provided in the Taxonomy Regulation, then it shall be considered as APM. The CSSF notes that the place of disclosure in the management report may be relevant in determination if a CapEx and OpEx shall be treated as APM.

PREVIOUSLY PUBLISHED IN BANKING & FINANCIAL SERVICES | CAPITAL MARKETS

- ESMA | Public statement on sustainability disclosure in prospectuses
- EU Securitisation Regulation – ESMA | Updated Q&A
- Draft Law No. 8291 on the digital operational resilience of the financial sector
- MiFID II and MiFIR | ESMA and CSSF updates
- Virtual Asset Service Providers | New CSSF Q&A

RECAP ON THE ENTRY INTO FORCE OF THE EU FOREIGN SUBSIDIES REGULATION

Introductory note

Regulation 2022/2560 on foreign subsidies distorting the internal market was adopted on 23 December 2022 and entered into force on 12 July 2023 (the "**Regulation**"). Nonetheless, certain of its provisions, relating, in particular, to the involvement of national officials in inspection procedures led by the European Commission apply from 12 January 2024. It is therefore timely to provide a brief recap of the aims and structure of the Regulation.

Policy purposes

The EU system of state aid control ensures fair conditions for all enterprises engaging in economic activities on the internal market, thereby preventing Member States from granting aid which would unduly distort competition in the common market. Nonetheless, private and public enterprises may receive subsidies from third countries to, *inter alia*, strengthen their position in the common market, in particular by launching concentration initiatives and participating in public procurement procedures, often relating to strategic assets such as critical infrastructure and innovative technologies. As such, the Regulation essentially provides EU institutions with the means to control the impact of foreign subsidies, which are not subject to EU state aid rules, on the common market.

Foreign subsidies and the distortion of competition

For the purpose of the application of the Regulation, foreign subsidies would exist if a third country provides, directly or indirectly, financial contributions conferring benefits on a limited basis to one or more enterprises engaging in economic activities on the common market. Foreign subsidies can consist in the transfer of funds or liabilities (such as grants, loans, capital injections, guarantees, etc.) as well as tax exemptions or the granting of special or exclusive rights without adequate remuneration.

Notification obligations and powers of the European Commission

As from 12 October 2023, companies are under an obligation to notify the European Commission of the foreign subsidies they have received, in case they intend to participate in a concentration operation or a public procurement procedure.

A *concentration* shall be notified if:

- At least one of the merging enterprises, the acquired enterprise or a joint venture is established in the EU and generates an aggregate turnover in the EU of at least EUR 500,000,000 and
- The merging undertakings, *or* the acquirer(s) and the acquired enterprise, *or* the enterprise creating the joint venture and the joint venture itself were granted combined aggregate financial contributions of more than EUR 50,000,000 from third countries in the three years preceding the conclusion of the announcement of the public bid, or the acquisition of a controlling interest, or the agreement.

The *participation in a public procurement procedure* shall be notified if:

- The estimated value of that public procurement is at least equal to EUR 250,000,000, and
- During the three years prior to notification, the economic operator – including subsidiaries without commercial autonomy, holding companies, and, where applicable, main subcontractors and suppliers involved in the same tender – was granted aggregate financial contributions of at least EUR 4,000,000 million per third country.

The Commission enjoys vast powers of investigation, so that any enterprise and Member State can lodge a complaint against (potential) foreign subsidies triggering an *ex officio* investigation.

Assessment of the foreign subsidies and balancing test

In line with the functioning of state aid rules, foreign subsidies would be illegal if, by boosting the competitive position of an enterprise, they distorted competition on the common market. Aid granted to ailing companies, unlimited guarantees for debts of certain enterprises or facilitating acquisitions or advantaging in procurement procedures would be

presumed to distort the common market. Subsidies in lower amounts than EUR 4,000,000 over a three-year period would be considered *de minimis*.
After establishing that a foreign subsidy distorts competition, the European Commission shall assess whether such distortion may be counterbalanced by benefits entailed for the subsidised economic activity and EU objectives at large. If the distortive effects prevail, in line with EU rules on competition and merger control, subsided enterprises may negotiate commitments (such as asset divestment and restitution of aid). However if the European Commission finds these to be insufficient or ineffective, it may prohibit the concentration operation or the participation in tender procedures.

The way forward

The enactment of the Regulation is to be welcomed as it introduces a long-awaited means to protect EU markets against third-country subsidised competitors, thereby adding to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings and Regulation (EU) 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union to control the potential influence of the penetration of foreign capital in Europe.

PREVIOUSLY PUBLISHED IN GENERAL COMMERCIAL

- Court of Justice of the European Union cast shadow over Meta's business model

EU INTERCONNECTED CHECK OF DIRECTOR'S POSITION

On 24 November 2023, draft law No. 8342 transposing directive (EU) 2019/1151 of 20 June 2019 amending directive (EU) 2017/1132 as regards the use of digital tools and processes in company law and amending the amended law of 19 December 2002 on the register of commerce and companies and the accounting and annual accounts of companies (the "**Draft Law**") has been submitted to the Luxembourg Parliament (*Chambre des Députés*).

As directive 2019/1151 was partially transposed by the Law of 7 July 2023, the Draft Law proposes to complete the full transposition of Directive 2019/1151 by transposing provisions concerning "revoked directors".

These provisions aim to enable Member States to check whether a person proposed for a position as director of a company is subject to a management ban in another Member State. The Luxembourg Business Registers ("**LBR**") should be able to make such a request for information by means of the interconnected system of European company registers.

In Luxembourg, the LBR will be enabled to proceed to certification in relation to any position as "director" including director (of a public limited liability company), manager (of a private limited liability company), auditor (*commissaire*), statutory auditor (*réviseur d'entreprises*), approved statutory auditor (*réviseur d'entreprises agréé*) or any position conferring the power to bind a company. The LBR will refuse to register the appointment of new "directors" that are subject to a management ban (either in Luxembourg or in the EU) and can also deregister the inscription of such a person that is already registered in the Trade and Companies Register.

The check will apply to the following types of companies: public limited company (*société anonyme*), partnership limited by shares (*société en commandite par actions*) and limited liability company (*société à responsabilité limitée*).

PUBLICATIONS WITH REGARD THE REFORM OF THE PRESERVATION OF COMPANIES AND THE MODERNISATION OF BANKRUPTCY LAW

On 30 November 2023, Ministerial regulation of 29 November 2023 amending the Ministerial Regulation of 27 May 2016 laying down the criteria for the presentation and form of documents intended for publication in the Electronic Register of Companies and Associations ("**ERCA**") and for filing with the Trade and Companies Register ("**TCR**") (the "**Ministerial Regulation**") has been published.

In accordance with the new law of 7 August 2023 on the preservation of companies and the modernisation of bankruptcy law (the "**Law**"), the purpose of the Ministerial Regulation is to add to the list of documents that must be published in the ERCA and filed with the TCR extracts of the decisions referred to in Articles 21, 22, 23 and 24 of the Law, notably including the following decisions :

- the decision to close the judicial reorganisation proceedings (*procedure de réorganisation judiciaire*);
- the judgment ordering the total or partial discharge of the bankrupt's debts;
- the judgment granting the request of a natural person, who had provided personal security for the bankrupt person free of charge, to be discharged of all or part of his obligation.

The Ministerial Regulation entered into force on 30 November 2023.

PREVIOUSLY PUBLISHED IN CORPORATE AND M&A

- New Luxembourg Draft Law on business concentrations
- Digitalisation of corporate procedures

2024 SOCIAL ELECTION

On the 20 November 2023, the Ministerial Decree of 13 October 2023 setting the date for the renewal of staff delegations for the period 2024 to 2029 was published on the Luxembourg Official Gazette.

Any Luxembourg company, regardless of the nature of its activity, which employs at least 15 employees over a 12-month period must organise social elections for the appointment of staff representatives. These social elections take place every five years on a date set by the Minister of Labour. The last social elections took place in 2019, so the next ones will be held in 2024.

The purpose of this Ministerial Decree is therefore to set the day of the next social elections, so that the polling day for the appointment of staff representatives is set for **12 March 2024**.

However, in companies where the organisation of work does not allow voting to take place on 12 March 2024, voting may begin on 10 March 2024 at the earliest, but the closing and counting of votes must take place on 12 March 2024.

For more details on social elections, please consult our dedicated page here (French version available here).

PREVIOUSLY PUBLISHED IN EMPLOYMENT, COMPENSATIONS & BENEFITS

- New provisions in favor of highly qualified third-country workers
- Social Elections 2024: are you ready?

CIRCULAR CSSF 23/844 | REPORTING OBLIGATIONS FOR ALTERNATIVE INVESTMENT FUND MANAGERS

On 2 November 2023, the CSSF issued circular CSSF 23/844 (the "**Circular**") aiming to clarify the technical details regarding reporting obligations for Alternative Investment Fund Managers ("**AIFMs**"). The Circular repeals the CSSF circular 14/581.

Reporting obligations of AIFMs

Directive 2011/61/EU of 8 June 2011 on AIFMs (the "**AIFMD**") requires, among others, periodical information from the managers concerned at a frequency depending on their assets under management, their investment strategies and their use of leverage.

On 19 December 2012, the European Commission adopted Delegated Regulation (EU) No 231/2013 (the "**Regulation**") supplementing the AIFMD which provides details on the reporting obligations. Among others, Annex IV of the Regulation contains a reporting template that AIFMs must use to comply with their reporting obligations.

On 15 November 2013, ESMA published its final report on the ESMA guidelines on AIFMD reporting obligations under Articles 3 and 24 of the AIFMD as well as AIFM reporting XSD schema and samples. Further details and technical supporting material (a consolidated reporting template, detailed IT guidance for filing of the XML and the XSD schema) were also published by ESMA.

This guidance was updated following the implementation in November 2023 of the revised IT technical guidance introduced in ESMA's AIFMD Reporting Technical Guidance – revision 6.

The Circular requires that the reporting files be submitted according to the specifications detailed in the technical guidance.

CSSF 2023 SURVEY ON FINANCIAL CRIME

In a press release dated 22 November 2023, the CSSF announced its 2023 Financial Crime Survey ("**2023 Survey**") will start on 19 February 2024.

Scope of application

All financial professionals and entities subject to the supervision of the CSSF are required to participate in the 2023 Survey.

The aim is to collect key information on the money laundering and terrorist financing (“**ML/TF**”) risks faced by professionals subject to CSSF supervision, and on the implementation of measures to mitigate these risks.

Key changes

Overall, there are few changes in the 2023 survey compared to the previous year. The main changes are:

- An update to the list of countries with the addition of Palestine to the list (ISO code PS).
- The CSSF has updated questions; indeed, some questions have been removed, added, or amended.
- Set up by the CSSF of an innovative Application Programming Interface (“**API**”) to streamline data submission. The API solution is based on the use of a structured exchange file to be submitted to the CSSF. This file will then pre-fill the survey available on the CSSF eDesk platform. The entity will also be able to update directly in eDesk. The CSSF specifies that a dedicated user guide will soon be made available. It will include technical details as well as the enrolment process.

By whom is the 2023 Survey to be submitted?

The CSSF points out that the completion of the survey, may be assigned within the CSSF eDesk Portal to another employee of the entity or third party, while bearing in mind that the ultimate responsibility for the adequate completion of the survey shall remain with:

- The *"responsable du contrôle du respect des obligations professionnelles"* (“**RC**”),
- Or the person responsible for compliance with the professional obligations (“*responsable du respect des obligations professionnelles*” (“**RR**”)).

By when is the 2023 Survey to be submitted?

The CSSF reminds that the final submission to the survey questions will have to be completed through the CSSF eDesk Portal by 1 April 2024 at the latest.

ESMA FINALISES THE DRAFT RTS ON ELTIF

Background

On 19 December 2023, ESMA published a final report on the proposed level 2 regulatory technical standards (the "**Final Report**") for Regulation (EU) 2015/760 of 29 April 2015 on the European Long-term Investment Fund, as amended (the "**ELTIF Regulation**"). The amended ELTIF Regulation entered into force on 10 January 2024, following the amendments of the ETLIF Regulation (EU) 2023/606 of 15 March 2023 (the "**ELTIF 2.0**"). The Final Report has been submitted to the European Commission for its endorsement.

The Final Report seeks to reach a balance by proposing prescriptive rules, while allowing ELTIF managers to deviate from these under specific circumstances.

Key points covered in the draft RTS

The Final Report covers:

- The circumstances in which the ELTIF's life is compatible with the life cycles of its individual assets and the different features of the ELTIF redemption policy;
- The circumstances for the use of the matching mechanism, i.e. the possibility of full or partial matching (before the end of the life of the ELTIF) of transfer requests of units or shares of the ELTIF by existing ELTIF investors with transfer requests by potential investors; and
- The costs disclosures.

Specifically the following points were covered:

- **Minimum holding period**

The Final Report defines that the minimum holding period for an investor will be determined by the ELTIF manager which must consider various factors such as the investment strategy, the asset classes, the investor base, the liquidity profile, the valuation procedures, the extent of borrowings, lending and securities financing transactions used, the portfolio, the assets' life, the redemption policy, and the investment phase of the ELTIF. The ELTIF manager must also demonstrate to the competent authority of the ELTIF the appropriateness of the minimum holding period (Article 3 of the Final Report).

- **Selection of one minimum liquidity management tool and maximum quarterly redemption frequency**

On the one hand, if an ELTIF allows redemptions during its life, it must adopt a maximum quarterly redemption frequency, unless the ELTIF manager can justify to the competent authority of the ELTIF why a higher frequency would be more appropriate. The ELTIF manager must provide to the competent authority of the ELTIF at the time of its authorisation detailed information on the redemption policy, the frequency of redemption, the valuation procedures, the liquidity stress tests and the liquidity management tools of the ELTIF and inform it of any material changes within three business days (Article 5(4a) of the Final Report).

On the other hand, to manage liquidity, the ELTIF manager must choose and apply at least one of these tools: anti-dilution levies, swing pricing or redemption fees. However, if these tools are inadequate for the ELTIF, the ELTIF manager can explain to the competent authority why other tools may be more in the investors' interest. The Final Report gives the possibility to the ELTIF manager, if the ELTIF is only marketed to professional investors, to request an exemption from using these types of tools.

- **Impact of the notice period for redemptions on the minimum liquid assets and redemption limits**

According to the Final Report redemptions would only be permitted if a notice period of at least 12 months is provided. However, the Final Report provides exceptions to such notice period based on the minimum percentage of liquid assets and imposes redemption gates. For example, if liquid assets represent a minimum of 27% the redemption notice period can be reduced to 6-9 months. In such a situation there should be a redemption gate of 45%.

If the notice period is less than three months, the ELTIF manager must further justify to the competent authority of the ELTIF the consistency of the notice period with the redemption policy requirements and the investors' interest (Article 5(4a) of the Final Report). However, the ELTIF manager may request an exemption from this requirement for ELTIFs marketed solely to professional investors (Article 5(10) of the Final Report).

- **Matching mechanism**

The Final Report specifies the rules and procedures for the matching of transfer requests between existing and new investors. The ELTIF manager must disclose in the constitutional documents of the ELTIF the format, process, timing, frequency, duration, dealing dates, deadlines, settlements and pay-out periods, the safeguard of investors' interests and the notice period, if any. The Final Report also requires the ELTIF manager to clearly disclose the differences between the redemptions and matching mechanisms in terms of frequency, periods, execution price and notice period (Article 7 of the Final Report).

The Final Report also provides for rules for dealing with any imbalance between exit and purchase orders, ensuring that the requests are either cancelled, carried over, or executed based on a criterion established by the ELTIF manager. The pro rata conditions shall be based on the size of each exit order and the available assets of the ELTIF, unless the ELTIF manager can justify a different approach (Article 8 of the Final Report).

- **Cost disclosures**

The Final Report sets rules on the calculation and disclosure of costs, using common definitions, calculation methodologies, and presentation formats for the different types of costs. They aim to align the cost disclosure with the existing cost disclosure requirements in other regulatory frameworks, such as the Regulation (EU) No 1286/2014 of 26 November 2014 on key information documents for packaged retail and insurance-based investment products, as amended (the "**PRIIPs Regulation**"), to the extent possible. The Final Report defines the costs of setting up the ELTIF, the costs related to the acquisition of assets, the management and performance related fees, the distribution costs, and the other costs, and provides the methodologies for expressing them as percentages of the capital of the ELTIF. The Final Report also sets a definition of the overall cost ratio of the ELTIF as the ratio of the total costs to the capital of the ELTIF and provides the formula for the calculating thereof based on the sum of the annual costs and the average of the fixed costs referred to above over the recommended holding period of the ELTIF. The Final Report requires the costs section of the prospectus of the ELTIF to contain a presentation of costs in the form laid down in the Annex "Format for the Presentation of Cost" of the Final Report, which includes a table with the one-off and ongoing costs.

The Final Report also imposes that the prospectus of the ELTIF contains narratives presenting both the PRIIPs overall reduction in yield figure and the ELTIF's overall cost ratio and explanations of any potential differences between those figures, in the case of ELTIFs subject to the PRIIPs Regulation (Article 12 of the Final Report).

Conclusion

The European Commission has three months (which may be extended by another month) to adopt the Final Report. It may also amend the Final Report and send it to the ESMA for further review and consideration. Once the European Commission adopts the Final Report, the European Parliament and European Council have three months to scrutinize it.

ESAS FINAL REPORT ON THE REVIEW OF SFDR DELEGATED REGULATION

On 4 December 2023, the European Supervisory Authorities ("**ESAs**") published a final report setting out proposals to amend the draft regulatory technical standards ("**RTS**") to Commission Delegated Regulation 2022/1288 (the "**SFDR Delegated Regulation**").

The final report responds to a mandate sent by the European Commission ("**Commission**") in April 2022 to review certain aspects of the operation of SFDR Delegated Regulation including the disclosures of principal adverse impacts ("**PAI**") of investment decisions on sustainability factors and to introduce disclosure of financial products' decarbonisation targets. The ESAs published a consultation paper in April 2023 and having considered the feedback to the consultation the ESAs have adjusted the draft RTS in several areas.

The purpose of the ESAs review is to extend and simplify sustainability disclosures.

Main proposed changes to the SFDR Delegated Regulation

Extension of the list of social indicators for principal adverse impacts

The final report presented **mandatory** social indicators for PAI such as, for instance, but not limited to:

- the "amount of accumulated earnings in non-cooperative tax jurisdictions applying to investee companies where the total consolidated revenue on their balance sheet date for each of the consecutive financial years exceed a total of EUR 750 Mio" (this by adjusting the title of the indicator to make it clear that it only applies to companies in scope of the Accounting Directive (Directive 2013/34/EU)).
- the "exposure to companies active in the cultivation and production of tobacco". This addresses the uncertainty about what "involvement" means.

The ESAs also made further changes to the list of newly proposed **opt-in** social indicators such as, for instance, but not limited to:

- Interference in the formation of trade unions or elections of workers representative. Some concerns were raised around the data point of this indicator and hence this was the reason why the ESAs decided to include this in the list of opt-in indicators.

The ESAs did also make some technical adjustments to other indicators in table 3 and made some changes to other PAI.

Changes to PAI framework

An important structural question was carefully examined by the ESAs in their consultation as regards the basis on which the PAI indicators are calculated, whether on "all investments" (as currently in the SFDR Delegated Regulation) or "relevant investments". The ESAs opted not to change the calculation basis.

As regards, "disclosure of share of estimates", the ESAs believe, that the best practice following which the share of the PAI based on data from investee companies and the share that is estimated should be disclosed, should be reflected in the legal text of the SFDR Delegated Regulation. Hence the financial market participant making the PAI disclosure should disclose what share of the adverse impact was based on data from the investee company and what was estimated or subject to reasonable assumptions.

DNSH disclosure design options

In the light of potential changes coming in the future, the ESAs have decided not to make any changes for the moment. The draft RTS will nevertheless include a requirement to disclose the thresholds or criteria for the PAI indicators that the financial product uses to determine that its sustainable investments comply with the DNSH principle in the website disclosure.

As regards disclosure related to "safe harbour", the ESAs confirmed the existence of such safe harbour for any investments in taxonomy-aligned economic activities that will automatically be considered sustainable investments.

Amendments regarding GHG emissions reduction targets

The ESAs have received the mandate from the Commission to develop draft RTS that incorporate new disclosures for financial products information provided "in pre-contractual documents, on websites and in periodic reports on GHG emissions reduction targets including intermediary targets and milestones and actions pursued".

Such disclosures aim to help deliver on the Commission's objective to improve target-setting, disclosure and monitoring of the financial sector's commitments.

The new disclosures apply to products having GHG emissions reduction as their investment objective under Article 9(3) SFDR. For products that passively track EU Climate Transition or Paris-Aligned Benchmarks a simplified disclosure applies.

Such new disclosures are meant to provide comprehensible information to investors and will affect pre-contractual documents, but also periodic reports and the website of the financial market participants ("**FMP**").

FMP will be asked to provide information about the way the target will be achieved or what is their approach to reducing financed GHG emissions.

Simplifications of the templates

Templates have been updated by simplifying the language and restructuring information provided to avoid repetitions.

ESAs in order to make the disclosures more understandable have introduced a dedicated "dashboard" to provide key information. Four essential elements are included in the dashboard: sustainable investments, taxonomy-aligned investments, PAI consideration, and GHG emissions reduction targets.

Next steps

The Commission will review the final report and decide whether to endorse them within three months. The revised RTS would be applied independently of the comprehensive assessment of the SFDR announced by the Commission in September 2023 and before changes resulting from that assessment would be introduced. Any amendments to the SFDR Delegated Regulation that would be adopted by the Commission following this final report must be published in the official journal of the EU.

As a consequence, the amended RTS are hence not expected to enter into effect before Q2 2024 at the earliest.

2023 CSSF FAQ VIRTUAL ASSETS UCI UPDATES: NAVIGATING NEW WATERS IN VIRTUAL ASSET MANAGEMENT

The Virtual Assets FAQ, a go-to resource for understanding virtual assets in fund management, has seen notable changes in 2023. Here is what you need to know.

Revised Question 2: The New Rulebook for Virtual Asset Investments

Question 2 has undergone a significant revamp in 2023. It is not just about compliance anymore; it is about smarter investment strategies in the virtual asset arena. Fund managers now face the challenge of conducting a case-by-case assessment of how these investments affect the risk profile of the investment fund. This means a deep dive into each virtual asset's characteristics and potential risks. The goal is clear: ensure that investors are fully informed in a transparent and timely manner and that the fund documentation is always kept up to date. This shift demands a more proactive and informed strategy from fund managers, emphasizing investor education and rigorous risk assessment.

New Kid on the Block: Question 3A

This is where it gets interesting. Question 3A dives into the practical details of managing Alternative Investment Funds (“**AIFs**”) with a taste for virtual assets.

Even when an extension of licence is not required for a Luxembourgish investment fund manager managing an AIF investing in virtual assets through one or several target funds (“**TF**”), the fund manager is still expected to undertake an assessment of the ability of the TF’s manager to identify and manage the risks pertaining to investments in virtual assets.

Fund managers are now expected to develop comprehensive strategies that address the unique challenges posed by virtual assets, including volatility, liquidity concerns, and regulatory compliance.

Tweaked Question 3: A Clearer Path for Fund Managers

The revision in Question 3 clears the fog around authorization requirements for Luxembourg Investment Fund Managers. The key takeaway? A more transparent and streamlined process, but with no room for error. The CSSF expects that each initiator of an AIF which intends to invest in virtual assets presents its project beforehand to the CSSF.

Practical Insights

What do these changes mean on the ground? For starters, expect more paperwork and due diligence. Fund managers will need to beef up their compliance teams and systems. There is also a greater emphasis on educating investors about the nuances of virtual assets. It is not just about ticking boxes; it is about understanding the landscape and staying ahead.

In a nutshell, the CSSF is setting the stage for a more robust, transparent, and informed virtual asset market. For professionals in the field, these updates are not just regulatory hoops to jump through; they are opportunities to refine strategies, enhance investor trust, and lead in a dynamic market.

PREVIOUSLY PUBLISHED IN INVESTMENT MANAGEMENT

- Changes to the subscription tax introduced by the law and Grand-Ducal regulation of 21 July 2023
- ESMA opinion on undue costs requirements for AIFS and UCITS
- Update on CSSF circular 21/789 impacting investment fund managers
- Modification to the FAQ | Submission of closing documents and financial information by managers
- Circular LBR 16/02 | LBR registration of RAIFS

DRAFT ECOFIN REPORT TO THE EUROPEAN COUNCIL ON TAX ISSUES NOVEMBER 2023 – ATAD 3

Background

On 22 December 2021, the European Commission released a legislative proposal for a Council Directive ("**Draft Directive**" or "**Draft ATAD 3**") laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU on administrative cooperation in the field of taxation. The proposal aims to fight against the misuse of shell entities for improper tax purposes and to ensure that shell companies in the EU that have no or minimal economic activity are unable to benefit from tax advantages. For more details on ATAD 3, we invite you to refer to our previous publication dated 10 January 2022.

The Economic and Financial Affairs Council of the EU ("**ECOFIN**") under the Spanish Presidency published its report to the European council on tax issues dated on 30 November 2023 (available here).

Proposition of the ECOFIN

The ECOFIN report notes that during the term of the Spanish Presidency, a compromise text was presented in September, and on this text, delegations expressed diverging views which prevented them from reaching an agreement and, as an alternative, suggested a two-stage approach:

- a first stage in which the Draft Directive would includes an automatic exchange of information based on a number of agreed hallmarks, that would take place together with the application of domestic tax consequences;
- a second stage, best practices about the use of that information to apply tax consequences among the Member States would be exchanged.

In addition, it was suggested that after an evaluation of such practices a new proposal may be launched in the future, if appropriate.

Although the principle of a two-stage approach was supported to some extent, several delegations considered that the main pending issues would not be solved by this approach and a number of delegations considered that it may require further analysis.

The Commission suggested an alternative way forward that could be based on a minimum standard approach and a tool-box of consequences. The Spanish Presidency submitted this proposal to the November working group in order to check whether this could be an acceptable alternative way forward. However, there was no agreement on this new proposal within reach that would be acceptable for everybody, so further discussions will be needed in order to find compromise solutions on outstanding issues.

Conclusion

A consensus among member states regarding ATAD 3 remains elusive. Efforts to reach an agreement on the Draft Directive are anticipated to continue in the foreseeable future, despite several Member States questioning the pertinence of the initiative.

EUROPEAN COUNCIL: BIANNUAL UPDATE OF THE EU LIST OF NON-COOPERATIVE JURISDICTIONS FOR TAX PURPOSES

On 17 October 2023, the European Council (the "**Council**") has updated the list of non-cooperative jurisdictions for tax purposes. **Antigua and Barbuda**, **Belize** and **Seychelles** have been added to the EU list of non-tax cooperatives jurisdictions. The EU List is published as an annex to the conclusions adopted by the ECOFIN Council (Annex I). The purpose of this EU List is to encourage jurisdictions, through cooperation, to make positive changes to their tax legislation and practices.

As a reminder, in 2016 the Council tasked the Code of Conduct Group to carry out the preparatory work with a view to drawing up a list to help promote good tax governance worldwide.

The Code of Conduct Group has established a list of 92 jurisdictions on the basis of the following criteria:

- Their economic ties with the EU;
- Their institutional stability;
- The importance of the country's sector.

The first EU list was issued on 5 December 2017 and included jurisdictions that had not made sufficient commitments in response to the EU's concerns.

The tax cooperative jurisdictions' assessment is made on a series of criteria established by the Council, mainly focusing on:

- **Tax transparency**;
- **Fair taxation**; and
- **Measures against base erosion and profit shifting**.

Since its creation in 2017, the EU List has been regularly updated to consider the following elements:

- Updating the criteria in line with international tax standards;
- Screening countries against these criteria;
- Engaging with countries that do not comply;
- Listing and de-listing countries as they undertake reforms; and
- Monitoring developments to ensure that jurisdictions do not backtrack on previous reforms.

Whilst since October 2023, Antigua and Barbuda, Belize and Seychelles are treated as non-compliant with the standard concerning the exchange of tax information on request, the following three jurisdictions have been removed from the EU List:

- **British Virgin Islands** further to amendment to its framework on exchange of information on request;
- **Costa Rica** upon amendments of its harmful aspects of its foreign source income exemption regime; and
- **Marshall Islands** which made significant progress in enforcement of economic substance requirements.

As a result, the EU list now includes 16 jurisdictions: **American Samoa, Anguilla, Antigua and Barbuda, Bahamas, Belize, Fiji, Guam, Palau, Panama, Russia, Samoa, Seychelles, Trinidad and Tobago, Turks and Caicos Islands, US Virgin Islands and Vanuatu**.

The next revision of the EU List should be conducted in February 2024.

LUXEMBOURG CONSTITUTIONAL COURT: THE ABSENCE OF PRECISE LEGAL CRITERIA FOR THE ALLOCATION AND CONTRIBUTION OF FUNDS TO AND BY MUNICIPALITIES IS CONTRARY TO THE PRINCIPLE OF MUNICIPAL AUTONOMY

In four rulings dated 17 November 2023, the Luxembourg Constitutional Court answered preliminary questions put to it in disputes involving the municipalities of Leudelange and Niederanven.

The question relates to the definition of the concept of "adjusted population" (*population ajustée*), which is used by two laws affecting the financial resources of the municipalities in Luxembourg. One of the laws uses the concept to determine the amount to be paid to each municipality from the balance of the "Global Endowment Fund for Municipalities" (*Fonds de dotation globale des communes*) and the other law uses the concept to determine the amount of contributions that each municipality must pay to the "Employment Fund" (*Fonds de l'Emploi*).

In 2017 and 2018, none of the aforementioned laws gave a precise definition of the concept of "adjusted population". The Constitutional Court was asked whether the absence of a precise legal definition would be consistent with the constitutional principle of municipal autonomy provided for in Article 107 of the Constitution and Article 9 of the European Charter of Local Self-Government of 15 October 1985. According to the Constitutional Court, the absence of a precise legal definition is contrary to the principle of municipal autonomy, given that requirements relating to the financial resources of municipalities must be determinable by a legal text on the basis of sufficiently precise conditions and procedures set out in the law.

The Court's conclusion should not have a major impact on Luxembourg legislation insofar as, from 2019, a legislative amendment has introduced a precise definition into Luxembourg legislation.

LUXEMBOURG-GERMANY DOUBLE TAX TREATY | LAW RATIFYING THE AMENDING PROTOCOL ADOPTED AND ADDITIONAL CLARIFICATIONS

On 22 December 2023, the Luxembourg parliament adopted the law ratifying the Protocol amending the Double Tax Treaty between Luxembourg and Germany (the "**DTT**"), as agreed and signed on 6 July 2023 in Berlin (the "**Law**").

The requirements for the entry into force of the above-mentioned Protocol, having been fulfilled on 29 December 2023, said Protocol entered into force in respect of both States on that date.

For more information regarding the amendments made to the DTT, please refer to our newsletter dated 16 October 2023.

In this context, on 11 January 2024, the competent authorities of both States signed a mutual agreement pursuant to consultation, which provides additional clarifications regarding Articles 14 (income from employment), 17 (pensions, annuities and similar remunerations) and 18 (public functions) of the DTT.

Some of the clarifications provided are very useful in practice, notably for the cross-border workers and state employees. For instance, it is clarified that:

- days on which working hours are reduced also count as full workings days;
- the *de minimis* limit of 34 working days per calendar year, prescribe in Article 14(1) of the agreement, also applies to part-time work and work carried out only during part of the year. In these cases, there is no proportional reduction in the *de minimis* limit of 34 working days;
- A shift which begins on a working day and ends on the following calendar day (e.g. from 8 p.m. to 6 a.m. the following day) does not give rise to an additional working day to be taken into account for the *de minimis* threshold.
- With regard to payments from a Luxembourg source, partial unemployment (*chômage partiel*), sick pay in the event of incapacity for work, as well as continued salary in the event of maternity leave, leave for pregnant women and adoption leave in the event of the adoption of a child, are considered to be social security benefits within the meaning of Article 17(2) of the DTT.

LUXEMBOURG HIGHER ADMINISTRATIVE COURT RULES ON DEBT/EQUITY QUALIFICATION OF INTEREST FREE LOANS FOR TAX PURPOSES

On 23 November 2023, the Luxembourg Higher Administrative Court handed down a decision regarding the tax qualification of an interest free loan ("**IFL**") granted by a parent company to a Luxembourg resident company.

In the case at hand, a non-resident parent company granted its subsidiary, a Luxembourg company, (the "**Company**") an IFL. The Company had deducted for tax purposes a notional interest determined according to a transfer pricing study. According to the facts of the case, the parent company had booked a corresponding notional interest income for tax purposes. The Luxembourg tax administration (the "**LTA**") considered that the IFL should be classified as a hidden capital contribution and denied the deductibility of the notional interest. At first instance, the Lower Tribunal agreed with the LTA that the IFL should be reclassified as a hidden capital contribution and the notional interest deductions should be annulled.

The Higher Administrative Court held that the debt or equity classification of the IFL should be made according to an economic and financial analysis of the instrument. In other words, the Higher Administrative Court stressed the importance of a "substance over form" approach and identifying the economic reality of the transaction according to an overall assessment. The Higher Administrative Court drew on parliamentary commentary and previous case law to set out the following criteria to assess the debt or equity qualification of the instrument:

- **Documentation of the loan**: the Higher Administrative Court considered that a delay of several months in documenting the IFL was not evidence of a hidden capital contribution. On the contrary, the Court noted that capital contributions are as a matter of principle more formalistic than loan agreements.
- **The debt/equity ratio**: contrary to the LTA's submission, the Higher Administrative Court found that the Company did not have a disproportionate debt/equity ratio since its ratio was lower than the 99/1 debt/equity ratio commonly accepted at the time (c.f. Circular LIR 164/2 of 28 January 2011).
- **A maturity of 8-10 years** was not considered as evidence of an equity contribution as insufficiently long-term. In addition, the Higher Administrative Court noted that in the case at hand, the IFL had in fact been reimbursed prior to its term date.
- **The absence of a right to participate in profits and liquidation proceeds**, as well as the **absence of voting rights** attached to the IFL were considered as evidence of a debt instrument, although the IFL had been granted by a sole shareholder.
- The **use of the funds** borrowed under the IFL was considered relevant, the Court noting that the funds had not been used for long term investments.
- **Limited recourse clause** was not evidence of an equity instrument since the limited recourse clause did not affect the repayment obligation.
- **Subordination of the loan**: the fact that the IFL was subordinated to the Company first reimbursing any bank loans was evidence of an equity instrument.
- The **absence of interest** on the IFL was considered an equity instrument' indicator.
- The **absence of a stappling clause** was also considered as evidence of a debt instrument since the lender could freely transfer the loan to a third party.

The Higher Administrative Court stressed that a criteria should not be deemed decisive on a stand-alone basis and an overall assessment is required. The Higher Administrative Court concluded that the IFL in question should be qualified as a debt instrument based on its characteristics and therefore annulled the decisions of the Lower Administrative Tribunal and the LTA.

This decision is a welcome addition to the case law on the qualification of debt or equity of IFLs and other financial instruments.

LUXEMBOURG TAX AUTHORITIES ISSUED FAQ ON NEW OBLIGATIONS OF DIGITAL PLATFORM OPERATOR

Key takeaways

The Luxembourg tax authority published a "frequently asked question" ("**FAQ**") on 7 December 2023 providing guidance on application of the new EU obligations of digital platform operators (Council Directive (EU) 2021/514) on administrative cooperation in the field of taxation introducing new obligations for digital platform operators ("**DAC 7**").

Background

On 16 May 2023, the Luxembourg Parliament adopted a law implementing DAC7. As a reminder DAC 7 extends the EU tax transparency rules to digital "platforms" and introduces an obligation on "reporting platform operators" to assess, verify and report specific information with respect to "reportable sellers" that have undertaken "relevant activities" through their platforms. To this effect please refer to our previously published article on DAC 7 Law for further insights.

Following the enactment of the DAC 7 Law, the Luxembourg Tax administration ("**LTA**") issued the FAQ with the aim to provide additional information on the due diligence process and the submission requirements to be met by the digital platform operators within the meaning of DAC7 (the "**Operators**").

In Scope-Entities

The DAC 7 Law applies to **digital platform Operators**, defined as entities having a contractual relationship with sellers and making all or part of a platform available to them.

The activities falling within the scope of the DAC 7 Law encompass the rental of immovable property, the personal services, the sale of goods and the rental of any mode of transport, carried out through platforms.

The DAC 7 Law and the FAQ define a **Reporting Operator** as any Operator that is resident in Luxembourg for tax purposes or, in the absence of tax residence in the EU, (i) has been incorporated in accordance with the laws of Luxembourg, (ii) has its place of management in Luxembourg or (iii) has a permanent establishment in Luxembourg.

Key filing deadlines

In general, an Operator must complete the due diligence procedures by **31 December of each calendar year of its operations**. For the first reporting period, however, an extension applies **until 31 December 2024**. This applies with respect to sellers which were already registered on the platform on **1 January 2023**, or on the date when an entity first qualifies as a reporting Operator.

An Operator must report for **each calendar year by 31 January of the following year**. However, the **actual deadline for reporting is determined by the date when the Operator recognises a seller as a reportable seller**. As soon as a registered seller is recognised as a reportable seller, it must be reported in the following year by the platform operator together with all supporting information. However, when an extension applies for completing the due diligence procedures by the end of the second reporting period, the information about the sellers falling within the scope for the extension, must be reported **by 31 January of the year following the second reporting period**.

Notification

An Operator which **opts to fulfil its filing DAC 7 obligation in another Member State**, shall have notified the LTA by **31 December 2023**. When the Operator initiates reportable activities after 31 December 2023, the latter must notify his/her choice of "reporting Member State" no later than the date on which the Operator has initiated his/her reportable activities.

The registered Operator must notify the LTA of any change to the information provided at the time of its initial registration no later than one month after the change is made.

Where the Operator no longer carries out any activity as an Operator, it shall notify the LTA within one month as from the end of his/her reportable activity.

Automatic exchange of information

Information pertaining to reportable sellers is exchanged with another Member State within two months of the end of the reporting period to which the reporting obligations relate. The first exchange shall take place on 29 February 2024 for the period running from 1 January 2023 to 31 December 2023.

LUXEMBOURG-UK DOUBLE TAX TREATY | ENTRY INTO FORCE

The new Double Tax Treaty between the Grand Duchy of Luxembourg and the United Kingdom of Great Britain and Northern Ireland for the elimination of double taxation with respect to taxes on income and on capital and the prevention of tax evasion and avoidance (the "**DTT**"), and the related protocol (the "**Protocol**"), entered into force on 22 November 2023.

As a reminder, the DTT and the Protocol, signed in London on 7 June 2022 and approved in Luxembourg by the law of 18 September 2023, have introduced a number of significant changes, notably in the definition of the concept of a resident and in the taxation of capital gains and dividends. For further details regarding the significant changes, please refer to our previous newsletters of 18 July 2022 and 22 March 2023.

NEW RULES FOR THE LUXEMBOURG INVESTMENTS TAX CREDIT

As from fiscal year 2024, new rules apply to the Luxembourg investment tax credit ("**ITC**") mechanism provided by Article 152*bis* of the Luxembourg income tax law ("**LITL**"). The mechanism has been revised, and its benefits extended to investments and expenses incurred in the context of digital transformation as well as energy and ecological transition, subject to the completion of a specific process.

Summary of existing rules

Until fiscal year 2023 the ITC had the following key features:

- **Global ITC** granted for investment in *new* eligible assets during the fiscal year computed on the basis of the acquisition price or cost of the assets. It amounted to 8% for the first tranche of investment up to EUR 150,000 and 2% for the portion exceeding EUR 150,000 (rates of 9% and 4% applied to fixed assets eligible to the special amortization scheme under Article 32*bis* LITL generally corresponding to investments made in the interests of environmental protection, energy saving and the adaptation of workstations for disabled workers.).
- A **complementary ITC** was granted for *additional* investments in eligible assets during the fiscal year. It amounted to 13% and was computed on the difference between the net book value of eligible assets at year-end and the average book value of eligible assets during the previous five years (a minimum EUR 1,850 applied).

Eligible assets notably include depreciable tangible assets other than buildings, farm livestock and mineral and fossil deposits. The ITC was **credited against the tax liability** of eligible taxpayers (enterprises realizing commercial profits which includes fully taxable corporate entities) and unused amounts could be carried forward for 10 years.

Overview of the new rules as from fiscal year 2024

- The **complementary ITC** is no longer applicable.
- **Global ITC:** A single rate of 12% will apply on the acquisition price or cost of the assets (14% for assets qualifying for the special amortization scheme). Any unused amount of the global ITC will continue to be carried forward for 10 years except when granted in relation to a software. Investments in software eligible for the new ITC, as described below, are not eligible for the global ITC. Other rules relating to the global ITC continue to apply.
- A **new ITC** for investments and operating expenses to engage in digital transformation, ecological and energy transformation (the "**New ITC**"). Key features are detailed below.

New ITC – Eligible investments and expenses

Updated Article 152bis LITL lists the types of investments and expenses eligible to the New ITC and the objectives to be achieved by such investments and expenses to be eligible.

Type of investments and expenses

- Investments in tangible depreciable assets (other than buildings, livestock, and mineral and fossil deposits), investments in software or patents other than those acquired from a related party (as defined under Luxembourg transfer pricing rules);
- Expenses incurred for the use or the right to use, patents or software other than those granted by a related party (as defined under Luxembourg transfer pricing rules);
- Expenses on consultancy, diagnostic and technical support services provided by external service providers that are not related to the normal operating expenses of the company, such as regular tax or legal advisory services, or advertising;
- Expenses on staff directly assigned to the company's digital transformation or ecological and energy transition;
- Training costs for staff directly assigned to the company's digital transformation or ecological and energy transition.

Objectives

The above listed expenses and investments must also meet one of the listed objectives in relation to either digital transformation or ecological and energy transition.

For digital transformation, the objectives include: (i) significantly redefining an entire production process to improve productivity, energy, or material efficiency, (ii) implementing an innovative economic model (including circular economy), (iii) significantly redefining the service delivery process, (iv) significantly transforming the business organisation or (v) substantially strengthening the IT security of all processes.

For the ecological and energy transformation, the objectives include: (i) improve the energy efficiency of a production process by at least 20% compared to the average consumption of the five years prior to the implementation of the process, (ii) decarbonise a production process by reducing greenhouse gas emissions by at least 40% compared to the average emission of the five years prior to the implementation of the process, (iii) produce or store renewable energy (as defined by law) for own consumption (iv) improve the material efficiency of a production process resulting in a reduction in the use of primary raw materials of at least 15% or the substitution of primary raw materials by by-products or secondary raw materials of at least 20% compared to the average use of primary raw materials in the five years preceding the implementation of the process, or (v) promote the extended use of products through reuse.

Exclusions and limitations

Assets depreciated over a period of less than three years, self-propelled vehicles and investments and expenses aimed at complying with obligations arising from environmental protection legislation and legal and regulatory provisions applicable to the establishment and operation of industrial and commercial undertakings companies are excluded.

New ITC – Amount and procedure

Amount and basis of calculation

- Eligible expenses and assets (other than depreciable tangible assets): 18%, calculated on the tax-deductible portion of the eligible expense or the assets' acquisition price or cost.
- Eligible depreciable tangible assets: 6% (reaching 18% in combination with the 12% global ITC) calculated on the basis of acquisition price or cost of the assets.
- The New ITC is creditable against the income tax liability of the Luxembourg enterprise (or Luxembourg company's corporate income tax liability) due the same year. The remaining amount can be carried forward for 10 years.

Procedure

- **Before making the investment or expense**, taxpayers must apply to the Ministry of Economy for a *statement of eligibility* to the New ITC. The application should detail several aspects of the investment/expense, in particular their financing, nature and objective. The application will be analysed by a specific commission, which should provide an answer within three months.
- **After the end of the fiscal year**, taxpayers must request a *certificate of compliance* from the Ministry of Economy which should verify the reality and eligibility of the investments and/or expenses based on the documentation provided by the taxpayer. The **deadline** for the request is two months after the end of the fiscal year and the response should be provided within nine months of the end of the fiscal year.
- **When filing tax returns**, in addition to the existing ITC forms, taxpayers must attach the certificate of compliance issued by the Ministry of Economy.

Conclusion and next steps

The changes to the ITC mechanism provide a significant incentive for taxpayers engaged in digital transformation, energy and ecological transition.

The New ITC will require taxpayers to apply for a statement of eligibility before proceeding with the relevant expenses or investment. A fully digital procedure to request such a statement will be introduced and, in the meantime, appropriate forms are already available online for taxpayers to proceed with such a request.

OECD PILLAR ONE | AMOUNT A DRAFT MULTILATERAL CONVENTION RELEASED

On 11 October 2023, the OECD released a draft multilateral convention ("**MLC**") in relation to Amount A of Pillar One. The draft reflects the current consensus achieved so far amongst members of the OECD/G20 Inclusive Framework on BEPS ("**IF**"). On 18 December 2023, the OECD issued a statement according to which IF members commit to finalize the MLC by the end of March 2024 and open the MLC for signature by July 2024.

Background

Pillar One is part of the OECD Two-Pillar solution to address the tax challenges arising from the digitalisation of the economy. It aims at solving the inadequacy between the existing international tax framework and the development of activities taking place without a material presence. Certain jurisdictions already acted to solve these issues by implementing digital services taxes ("**DSTs**"). Pillar One relies on Amount A which would reallocate part of the profits realized by in-scope multinational groups to source jurisdictions and Amount B which would simplify transfer pricing rules for "baseline marketing and distribution activities" notably through the implementation of pricing matrices.

Scope

Amount A would apply to multinational groups ("**Covered Groups**") cumulatively meeting two thresholds: (i) Adjusted Revenues greater than EUR 20 billion and (ii) a pre-tax profit margin greater than 10%. Adjusted Revenues correspond to the revenues reported in the consolidated financial statements after specific adjustments under the MLC. Profits from regulated financial services and extractive activities are excluded from the rules. The MLC provides for a future and conditional reduction of the revenue threshold from EUR 20 billion to EUR 10 billion.

A group that was not considered as a Covered Group in the two previous financial periods should meet two additional criteria to be considered as a Covered Group: (i) the group has a pre-tax profit margin greater than 10% in at least two of the four periods immediately preceding the period under review, and (ii) the average pre-tax profit margin over the five periods ending in the current period exceeds 10%.

Excluded entities notably include governmental entities, international organizations, investment funds, not-for-profit organizations, and pension funds.

Overview of Amount A mechanism

Amount A mechanism can be summarized as follows:

- **Identify market jurisdictions entitled to an additional taxing right:** The Covered Group's revenues are classified per category and sources based on reliable indicators and allocation keys (both defined in the MLC). Nexus with a jurisdiction is established where revenue sourced in that jurisdiction is equal or greater to EUR 1 million or EUR 250,000 (for jurisdictions with GDP below EUR 40 million).
- **Profit calculation and allocation:** Profits reported in the consolidated financial statements are subject to several adjustments (i.e., the relevant group profits). Amount A corresponds to 25% of the relevant group profits reduced by the normal profits (10% of adjusted revenues). Allocation to source jurisdictions with nexus is proportionate to the adjusted revenues sourced from such jurisdiction.
- Allocated Amount A is **adjusted downward** with the marketing and distributions profits safe harbour designed to adjust for existing taxation rights of the source jurisdiction.
- Specific rules are then applied to **eliminate double taxation** that may result from the application of the existing allocation of taxing rights based on the "return on depreciation and payroll" in each jurisdiction.
- Several mechanisms are available to **grant certainty** to taxpayers.
- **DSTs:** The MLC provides for a list of DSTs that IF members commit to remove as well as the commitment to not introduce similar measures.

Next steps

Work on Amount A aims to resolve existing objections expressed by some IF members as reflected in the draft MLC. For the MLC to enter into force, it needs to be ratified by at least 30 jurisdictions including the headquarters jurisdictions of at least 60% of expected Covered Groups.

At EU level, on 9 November 2023, the European Commission welcomed the progress made with respect to the MLC and called on EU Member States to swiftly sign and ratify the MLC.

Regarding DSTs, the existing standstill agreement amongst IF members on DSTs is still subject to renewal for 2024. The Luxembourg government stated in its 2024-2028 coalition program that it would not support the implementation of DSTs.

PILLAR TWO | SUBJECT TO TAX RULE MULTILATERAL CONVENTION

On 3 October 2023, the OECD published the multilateral convention ("**MLC**") to facilitate the implementation of the Pillar Two Subject to Tax Rule ("**STTR**") together with an explanatory statement.

The STTR is part of Pillar Two together with the GloBE Rules (i.e., Income Inclusion Rule and Undertaxed Profits Rule) and designed as a treaty-based rule providing for a partial and conditional reallocation of taxing rights to the source country on certain intra-group payments. The STTR would apply before the GloBE Rules and tax levied under the STTR is creditable when computing the effective tax rate under these rules.

The STTR was developed to take into consideration priorities of developing countries part of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting ("**IF**"). IF members applying a nominal corporate tax rate below 9% to certain payments committed to implement this rule when requested to do so by a developing IF member (otherwise countries are free to request implementation of the STTR).

Per the IF agreement, a jurisdiction is considered as developing when its gross national income per capita, calculated using the World Bank Atlas method, is of USD 12,535 or less in any of 2019, 2020, 2021 or 2022. In October 2023, the OECD stated that more than 70 IF members should be considered as developing countries.

The STTR is relevant regarding intra-group payments of targeted income (e.g., interest, royalties) which are subject in the hands of the recipient to a tax rate below 9% taking into account any applicable preferential regime.

Multilateral Convention

The MLC is intended to simplify the process of STTR integration within double tax treaties ("**DTT**") currently in force although amendments through bilateral negotiations remains possible. IF members choosing to sign the MLC will need to notify which DTTs are to be considered as covered tax agreements ("**CTAs**"). The MLC will act as a protocol to the DTT by adding the relevant annex to the treaty without amending the text of the DTT. In addition, the instrument does not provide for the possibility of contracting States to have reservations.

Annexes to the MLC are composed of mandatory Annex I which includes the STTR mechanism, Annex II is applicable in case a contracting State computes taxes on covered income other than on a net income basis, and, Annex III is applicable in case a contracting State levies tax on covered income only upon distribution. Contracting States can opt to include Annex IV to apply a specific definition of recognized pension fund for the purpose of the STTR and Annex V providing a "circuit breaker provision" allowing automatic suspension or application of the STTR based on the classification of contracting States as high-income economy (as defined in the MLC).

Conditions for the STTR application

Payments within the scope of the STTR ("**Covered Income**") include (i) interest, (ii) royalties, (iii) payments for the use or right to use distribution rights in respect of a product or service, (iv) insurance and reinsurance premiums, (v) fees to provide a financial guarantee, or other financing fees, (vi) rent or any other payment for the use of, or the right to use, industrial, commercial or scientific equipment, (vii) any income received in consideration for the provision of services. Specific exclusions are applicable to shipping activities.

To ensure the STTR application remains targeted, it is enclosed within two limitations:

- **Mark-up on Covered Income:** At the level of the recipient, Covered Income, other than interest and royalties, must exceed the costs incurred in relation with that income plus an 8.5% mark-up on those costs. Specific rules are provided for the determination of the mark-up.
- **Materiality threshold:** Covered Income paid from the source country to a connected person resident of the other contracting State shall exceed EUR 1 million (lowered to EUR 250,000 per year where one of the contracting jurisdictions has a GDP of less than EUR 40 billion).

The STTR applies to payments between related parties ("**Connected Persons**"). Entities are considered as Connected Persons where, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same person. Two persons will be considered as Connected Persons where one person holds in another (or a third person holds in two persons) more than 50% of the beneficial interest or aggregate vote and value of the company's shares or beneficial equity interest in the company.

Certain **persons are excluded:** The STTR does not apply when the payer of the Covered Income is an individual or the recipient is an individual, a pension fund, a non-profit organization, the other contracting State and governmental entities, international organizations, certain investment vehicles and persons held by an excluded person (under conditions).

Finally, the STTR contains a **targeted anti-abuse rule** ("**TAAR**"). Per the OECD, the TAAR mainly targets two situations, the interposition of unconnected persons between two Connected Persons and the routing of Covered Income through a high-taxed connected person. The TAAR would apply where (i) covered income is paid to an intermediary resident of either contracting jurisdiction, (ii) the intermediary makes, within a 365-day period, a tax deductible payment (in case the income was included in its tax base) of an amount equal to the initial payment to a person connected to the original payer, (iii) the ultimate payee is subject on such payment to a tax rate below 9% in its jurisdiction and a statutory rate below 9% in the jurisdiction of the intermediary, and (iv) it is reasonable to conclude that the intermediary would not have made the related payments in the absence of the original payment. The TAAR neutralizes the effects of such interposition whether the intermediary is resident in the source jurisdiction or in the other contracting jurisdiction.

STTR taxation

The source country is allowed to levy additional tax on the gross amount of Covered Income at an adjusted tax rate. The adjusted tax rate is equal to the difference between 9% and the nominal rate applicable in the recipient's jurisdiction further reduced by the source taxation rate already granted under the DTT.

The nominal rate applicable in the recipient's jurisdiction is adjusted where a preferential adjustment is applicable. A preferential adjustment is defined as a permanent reduction in the amount of the covered income subject to tax, or the tax payable on that income which takes the form of either an exemption, a deduction from the tax base computed based on income received or a tax credit computed on the basis on the amount of income or related tax (excluding credit for foreign taxes) to the extent that it is directly linked to the item of Covered Income or that arises under a regime that provides a tax preference for income from geographically mobile activities.

In practice, the additional taxation is assessed and payable after the end of the fiscal year in which the taxpayer derives the payments of covered income. The MLC provides that DTT provisions on the elimination of the double taxation shall not affect the effectiveness of the STTR by granting an additional tax credit or exemption.

Entry into force

The MLC is open for signature since 2 October 2023 and will enter into force for a CTA three calendar months after the second instrument of ratification is deposited. The STTR, will come into effect the first day of a fiscal year beginning on or after the expiration of a period of six calendar months from the date the MLC entered into force for the CTA.

PILLAR TWO ENTERS INTO FORCE IN LUXEMBOURG

On 20 December 2023, the law (the “**Pillar Two Law**”) transposing Council Directive (EU) 2022/2523 of 15 December 2022 (the “**Pillar Two Directive**”) has been adopted by the Luxembourg parliament, thus ensuring the Income Inclusion Rule (“**IIR**”) and the Qualified Domestic Minimum Top-up Tax (“**QDMTT**”) apply in fiscal years starting on or after 31 December 2023 and the Undertaxed Profits Rule (“**UTPR**”) applies in fiscal years starting on or after 31 December 2024.

Main additions to the initial draft law

The initial draft law (see our previous newsflash), which closely followed the Pillar Two Directive, was amended by the Government on 13 November 2023 to include certain elements from the February and July 2023 OECD administrative guidance. All proposed amendments have been adopted as part of the Pillar Two Law and include notably the following:

- **QDMTT computation:** The QDMTT computation for Luxembourg constituent entities should be based on the local accounting standard, which would be either Luxembourg GAAP or IFRS, where one of these standards is used by all Luxembourg constituent entities and they have the same fiscal year than the Group they belong to (otherwise the general rule, the application of the ultimate parent entity accounting standard, applies) (July 2023 OECD administrative guidance).
- **QDMTT scope:** investment entities and insurance investment entities are excluded from the QDMTT as per the July 2023 OECD administrative guidance.
- **QDMTT Safe Harbour:** The Pillar Two Law includes the QDMTT Safe Harbour rule and the requirements for a QDMTT rule to be considered eligible as provided for in the July 2023 OECD administrative guidance. This safe harbour intends to reduce compliance obligations by providing the option to not compute the IIR for constituent entities subject to an eligible QDMTT as described in the July 2023 OECD administrative guidance.
- **UTPR Safe Harbour:** The Pillar Two Law includes the optional UTPR Safe Harbour provided for under the July 2023 OECD administrative guidance. This safe harbour will be available during tax years starting prior to 1 January 2026 and ending prior to 31 December 2026 and would deem the UTPR in the jurisdiction of the ultimate parent entity to be zero if this jurisdiction has a nominal corporate tax rate of at least 20%. The parliamentary comments note that Luxembourg would be eligible to such safe harbour.
- **Permanent Safe Harbour:** The OECD work on the Permanent Safe Harbour is not yet finalized but the OECD report on Safe Harbours and Penalty Relief issued on 15 December 2022 already provided for the general framework that would apply. The Luxembourg Pillar Two Law provides for this general framework around the three alternative tests, the Routine Profits Test, the De Minimis Test and the ETR Test which should be applicable once further details are made available by the OECD.
- **Transferable and Marketable Tax Credits:** The Pillar Two Law includes the possibility to issue a Grand Ducal Decree to assimilate the Pillar Two treatment of such tax credit to the one of Qualified Refundable Tax Credits (i.e., treatment as income rather than reduction of the tax due) as developed in the July 2023 OECD administrative guidance. According to parliamentary discussions, the Luxembourg investment tax credit regime (i.e., a non-refundable tax credit granted for certain investments reducing the corporate income tax liability) might evolve in the future to remain efficient in the context of Pillar Two.
- **Asymmetric treatment of dividends and distributions:** The Pillar Two Law includes the provisions related to the asymmetric treatment of a financial instrument within a Multinational Group or Large Domestic Group as developed in the February 2023 OECD administrative guidance which aims at aligning the treatment of a financial instrument at the level of the subscriber with the treatment adopted by the issuer.
- **Other notable additions** to the rules governing the adjustments to determine the qualifying income or loss: The Pillar Two Law also includes (i) the Equity Gain or Loss inclusion election developed under section 2.9 of the February 2023 OECD

administrative guidance creating an option to include certain capital gains or losses in the calculation of qualifying profit or loss, (ii) the Excluded Equity Gains or Loss and hedges of investments in foreign operations (February 2023 OECD administrative guidance - section 2.2) providing the option to treat certain foreign exchange gains or losses on hedging instruments as excluded capital gains or losses and (iii) the Simplification for Short-term Portfolio Shareholdings (February 2023 OECD administrative guidance - section 3.5) providing the option to include all dividends and distributions received or receivable in respect of portfolio shareholdings.

Interpretation and future amendments

Regarding the interpretation of the Pillar Two Law, the parliamentary work reiterated that Recital 24 of the Pillar Two Directive provides that Member States can use the OECD guidelines "*as a source of illustration or interpretation in order to ensure consistency in application across Member States to the extent that those sources are consistent with this Directive and Union law*." On 9 November 2023, the European Commission stated that it is "*of the view that the administrative guidance endorsed by the OECD/G20 Inclusive Framework on BEPS in December 2022, February 2023 and July 2023 is compatible*" with the Pillar Two Directive.

The Pillar Two Law has been voted on time to meet the required transposition deadline although the legislative work will continue to ensure Luxembourg legislation stays up to date with ongoing OECD developments.

PREVIOUSLY PUBLISHED IN TAX

- CJEU judgement on VAT treatment of directors' fees
- ECJ Rules in favour of Amazon in State aid case
- The minimum net wealth tax rules for holding companies ruled unconstitutional
- EC Proposal for a Transfer Pricing Directive
- Directive proposal establishing a head office tax system for SMEs in Europe
- Modernization of Luxembourg accounting legislation
- Luxembourg starts transposition of the Pillar Two Directive
- Double tax treaty Luxembourg | Cape Verde
- Directive proposal on business in Europe | Framework for income taxation (BEFIT)
- ECJ admits direct claim filed for reimbursement of overpaid input VAT paid to suppliers
- Secondary residence | Introduction of tax benefits
- Amendments to the Luxembourg - Germany double tax treaty signed on 6 July 2023
- Luxembourg lower tribunal rules on tax treatment of redemption of classes of shares
- A suspension of the tax limitation period complies with principles of legal certainty and effectiveness of EU law
- Reference for preliminary ruling to the ECJ regarding legal professional privilege and exchange of information

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