BSP Newsletter

2025 January edition

BSP

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LUXEMBOURG

SUMMARY

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BLOCKCHAIN IV | NEW LAW ADOPTED

On 19 December 2024, the Luxembourg Parliament (*Chambre des Députés*) voted and adopted the Blockchain Law IV (or the "**New Law**"), a landmark step in advancing the country's legal framework for distributed ledger technology ("**DLT**"). This legislation facilitates the issuance of digital securities and promotes tokenisation by integrating DLT into payment, reconciliation, and smart contract processes.

The New Law enhances the existing Luxembourg legal framework for Blockchain, in a continuous effort of the Luxembourg legislators to ensure legal certainty, flexibility, and transparency of digital financial services.

We take this opportunity to provide a brief recap on the state of (legal) play for Blockchain in Luxembourg.

Existing blockchain legal regime in Luxembourg

Blockchain Law I, passed on 1 March 2019, amended the law of 1 August 2001 on the circulation of securities. The notable changes included, among others, defining blockchain-related concepts, thus recognizing the use of DLT to register and hold securities account and to transfer securities. Pursuant to Blockchain Law I, securities transactions conducted via DLT were afforded legal validity equal with the traditional methods.

Blockchain Law II, adopted on 22 January 2021, amended the law of 6 April 2013 on dematerialised securities and also expanded the scope of the law of 5 April 1993 on the financial sector. Firstly, by defining the "*issuance account*" it recognized the alternative to issue and maintain dematerialised securities on a blockchain. Secondly, it opened the possibility for any credit institution or investment firm authorised in a Member State of the EEA to act as central account keepers for unlisted debt securities.

Blockchain Law III, enacted on 14 March 2023, introduced key amendments to further modernise Luxembourg's financial framework for digital assets. It updated the Luxembourg law of 5 August 2005 on financial collateral arrangements, to explicitly recognise financial instruments registered on DLT systems as equivalent to traditional book-entry securities, ensuring their legal validity in collateral arrangements. The law also transposed the EU DLT Pilot Regime, enabling firms to operate DLT-based trading and settlement systems under a flexible regulatory framework. Additionally, it redefined financial instruments in line with EU regulations, such as MiFID, reinforcing legal certainty and paving the way for secure, blockchain-based financial operations.

We reported on the above laws in our previous newsletter articles of March 2019, January 2021 and March 2023.

Blockchain IV

The main changes brought by the New Law are (1) the introduction of a control agent, (2) the extension of DLT application and (3) payments streamlining. A general overview of the New Law, in particular the control agent's role, has been provided in our last newsletter.

As a reminder, the control agent oversees critical aspects of the securities lifecycle. These tasks are executed through secure DLT systems, reducing the reliance on intermediaries and offering issuers a cost-effective and efficient pathway for issuing and managing digital securities. The control agent must notify the CSSF at least two months before launching their activities. Additionally, the agents must meet strict prudential requirements on governance, IT security, and operational standards.

This alternative custody structure is a technological bridge offering issuers the ability to transition gradually by adopting DLT-based solutions without abandoning traditional frameworks entirely and without undergoing a full-scale technological overhaul.

The New Law broadens the scope of DLT and tokenisation, by allowing the digital issuance, holding, and transfer of a wider range of financial assets, including equity securities such as shares, partnership interests or fund units, as well as enabling the tokenisation of physical assets like real estate and luxury goods. This step may open new investment opportunities, for instance, the access of retail investors to secondary private market solutions.

Furthermore, through smart contracts automating payment obligations of the issuer, (of, for example, interest or dividends and repayments), the payments are instantly settled after the issuer transfers the relevant amounts to the paying agent, settlement agent or central account keeper. The intention is to reduce procedural hurdles and intermediaries, thus enhancing operational efficiency.

The progressive development and the refining of the regulations around blockchain facilitates a smooth integration of the DLT-based systems into the process of issuing and trading dematerialised securities. This approach makes blockchain a viable alternative to traditional frameworks and increases the likelihood of a positive reception by the market.

LUXEMBOURG DRAFT LAW NO. 8460 | THE NEW AGE OF INSTANT CREDIT TRANSFERS IN LUXEMBOURG

Since 2017, European banks and other payment service providers ("**PSPs**") have been able to offer instant credit transfer ("**ICT**") services, to their customers (i.e. payment service users ("**PSUs**"), that allow them to make euro transfers immediately, 24 hours a day and every day of the year. These services enable instant euro transfers not only between account holders within the same Eurozone country, but also to recipients with accounts in other Single Euro Payments Area (SEPA) countries.

With the aim of moving towards a unified market for instant euro credit transfers, where transactions are conducted under standardised rules, the Regulation (EU) 2024/886 of 13 March 2024 amending Regulation (EU) No 260/2012, Regulation (EU) 2021/1230, Directive 98/26/EC and Directive (EU) 2015/2366 as regards instant credit transfers in euro (the "**ICT Regulation**") entered into force on 8 April 2024; the ICT Regulation:

- has made offering ICT services mandatory for all PSPs that handle euro credit transfers;
- has made certain amendments to the Regulation (EU) 260/2012 of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation (EC) No 924/2009 (the "**SEPA Regulation**");
- has created a new security framework for ICTs by requiring the PSPs to offer a service of checking and matching beneficiary names and IBANs and to follow a harmonised control procedure for financial restrictive measures, and
- has amended the Directive 98/26/EC (the "**Settlement Finality Directive**") and Directive 2015/2366 (EU) ("**PSD 2**"), to permit direct access of payment institutions ("**PIs**") and electronic money institutions ("**EMIs**") to the payment systems at the national level, as well as to central banks to safeguard customer funds.

In view of effective implementation of the ICT Regulation, and the transposition of the amendments to the Settlement Finality Directive and PSD 2, the Draft Law No. 8460 (the "**Draft Law**") amending the Payment Services Law of 10 November 2024 (the "**Payment Services Law**") has been submitted to the Luxembourg Parliament (*Chambre des Députés*) on 20 November 2024.

Key provisions of the Draft Law

New Safeguarding Option for PIs and EMIs for their received funds

The Draft Law shall introduce an amendment to the Payment Services Law, according to which the PIs and EMIs will have an option to safeguard their received funds in a segregated account opened in the central bank in addition to their option to deposit such funds into a segregated account in a credit institution or invest them in low-risk, liquid and safe assets. This is the transposition of the relevant provision of the ICT Regulation, which amends the corresponding provision of PSD 2.

Direct Participation of PIs and EMIs to the payment systems

Moreover, in line with the amendments made by the ICT Regulation to the PSD 2, the Draft Law shall also make targeted amendments to the Payment Services Law to provide PSPs direct access to the payment systems within the meaning of Settlement Finality Directive, i.e. without relying on a third party, which would usually be a credit institution.

The Draft Law provides the general conditions that should be met, in order for the PIs and EMIs to have direct access to the said payment systems, i.e. the PIs and EMIs should have the following in place prior to applying for participating to the relevant payment systems:

- a description of measures taken to protect client funds;
- a description of the applicant PI's or EMI's governance arrangements and internal control mechanisms, including administrative, accounting and risk management procedures, as well as a description of the arrangements concerning the use of the PI's or EMI's information and communication technology services within the meaning of Regulation (EU) 2022/2554 of 14 December 2022 on digital operational resilience for the financial sector

(DORA); and

- a liquidation plan in the event of failure.

PIs and EMIs intending to participate in a payment system must provide a notification to the CSSF at least 2 months prior to their participation, which includes information demonstrating compliance with the above requirements. The CSSF shall approve the participation within 2 months of application, if the conditions are met. If not, CSSF will provide further guidance regarding measures to be taken by the applicant PI or EMI within this deadline.

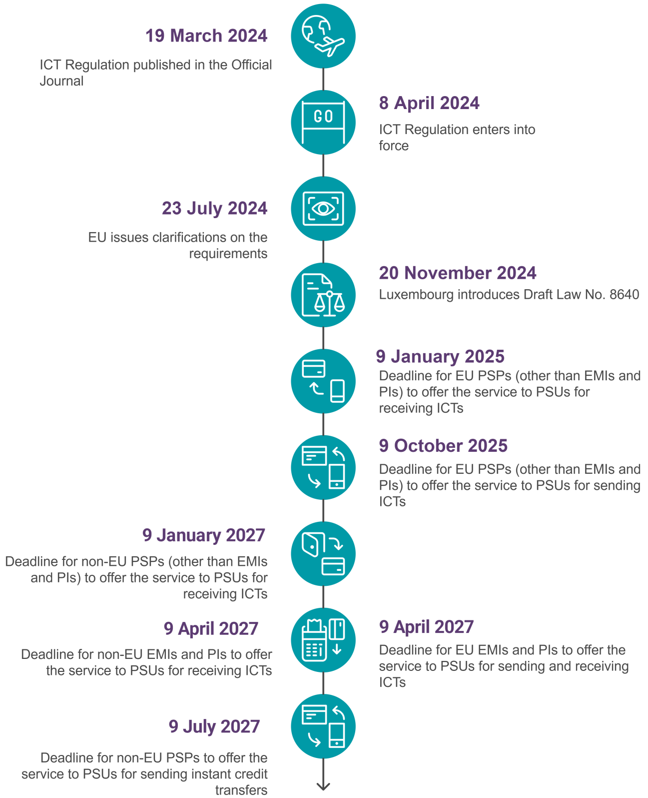
New Penalty Regime for Breaches of SEPA Regulation

Finally, a new penalty regime for the violations of the SEPA Regulation, as amended by the ICT Regulation, shall be established by the Draft Law's amendments to the Payment Services Law.

Accordingly, CSSF, who is the body responsible for overseeing compliance to the SEPA Regulation, will have the power to order sanctions to the PIs and EMIs that are in breach of the SEPA Regulation (including the new provisions introduced by the ICT Regulation) ranging from warnings and reprimands to administrative monetary fines.

In case of a breach to Article 5 (d) of the SEPA Regulation however, more severe fines are envisaged. New Article 5 (d) of the SEPA Regulation sets forth the requirements for the PSPs offering ICTs to apply a certain screening procedure for verifying whether a payment service user is a person or an entity subject to targeted financial restrictive measures. If these requirements are violated, the CSSF may apply an increased amount of administrative fines which would be calculated based on the annual net turnover, if the breaching PSP is a legal entity.

Key Milestones in the Implementation of Regulation (EU) 2024/886



CONSUMER CREDIT | CSSF GUIDELINES

Continuation of the temporary LTV adjustment for buy-to-let consumer residential real estate loans

CSSF Regulation No. 24-10 of 30 December 2024 extends a temporary adjustment to CSSF Regulation N° 20-08 which regulates maximum LTV ratios applicable to residential real estate loans for immovable property located on the Luxembourg territory. As a result of CSSF Regulation No. 24-10, lenders may continue to apply until 30 June 2025 LTV ratios of up to 95% for buy-to-let residential real estate loans granted for immovable property located on the Luxembourg territory as opposed to a maximum LTV ratio of 80%. The up-to-95% exemption can only be applied to 10% of a lender's annual production of such buy-to-let residential real estate loans. The continuation of the 95% LTV exemption was prompted by cyclical trends in the Luxembourg real estate market.

TRANSPARENCY LAW | CSSF ENFORCEMENT PRIORITIES

On 5 December 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.

With this press release, the CSSF highlights several key points that will be specifically monitored in 2025, in the context of issuers preparing their financial statements for the financial year ending 31 December 2024 ("**FY2024**") in accordance with IFRS and/or their sustainability report in accordance with the Commission Delegated Regulation (EU) 2023/2772 ("**ESRS**").

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 2024 annual reports, which are detailed in ESMA's public statement of 24 October 2024.

Focus points of CSSF enforcement campaign

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

IFRS financial statements: liquidity considerations

Amid economic uncertainties driven by inflation and fluctuating interest rates, the CSSF highlights:

- the need to comply with IAS 1 and IFRS 7 disclosure requirements for loans, especially in cases of defaults, breaches, or renegotiations. Recent IAS 1 amendments provide guidance for assessing the risk of liabilities becoming repayable within twelve months after the reporting period;
- the importance of accurate classification and disclosure in the statement of cash flows. The CSSF urges issuers to ensure transparency by clearly communicating the accounting policies and judgments used in classifying cash flow.

IFRS financial statements: accounting policies, judgements, and significant estimates

The CSSF reminds issuers of the following:

- Disclosures of material accounting policies, judgements, and estimation uncertainties should be tailored to the entity, aligned with the financial statements, and avoid generic restatements of IFRS requirements.
- Any material uncertainties that could raise significant doubt about the ability to continue as a going concern must be disclosed. Issuers should provide detailed, entity-specific information about the significant judgments involved.
- IFRS 12 *Disclosure of Interests in other entities* requires customised disclosures about significant judgments made when determining control, joint control, or significant influence.
- issuers must ensure compliance with IAS 1 (paragraphs 122 and 125) by providing appropriate disclosures when a provision is not recognised because the obligation cannot be reliably estimated.

Sustainability report: materiality considerations when reporting under ESRS

The CSSF reminds issuers of the following:

- issuers are encouraged to use EFRAG's Implementation Guidance on Materiality Assessment to effectively apply the relevant ESRS requirements, particularly for double materiality assessments.
- all disclosure requirements and data points specified in ESRS 2 are mandatory, regardless of the materiality assessment.

Sustainability report: scope and structure of the sustainability report

The CSSF emphasises the following:

- the sustainability report must cover the same entity as the financial statements and include the full value chain. Issuers must outline efforts to gather value chain information during the three-year transitional relief period.
- ESRS 1 (Section 8 and Appendix D) offers guidelines for structuring sustainability reports, allowing incorporation by reference under certain conditions. Alternative formats must meet general presentation objectives.
- there must be clear connectivity, consistency, and transparency between the sustainability report and the financial statements, with direct references

aligning with relevant sections.

ESEF Reporting: common mark-up errors

The CSSF wishes to make issuers aware of common errors seen in previous years that will be focused on in this year's enforcement campaign. These issues are:

- correctness of mark-ups;
- extension of taxonomy elements and anchoring;
- consistency and completeness of mark-ups;
- correctness of signs, scaling and accuracy;
- consistency of calculations.

EU SECURITISATION REGULATION | RECENT UPDATES

ESMA feedback statement on consultation on the securitisation disclosure templates under Article 7

On 21 December 2023, ESMA launched a consultation paper (the "**Consultation**") on the securitisation disclosure templates under Article 7 of the Regulation (EU) 2017/2402 (the "**EU Securitisation Regulation**") and on 20 December 2024, ESMA published its feedback statement (the "**Feedback Statement**") on that Consultation.

The Consultation had presented different implementation options to effectively and efficiently address the industry challenges felt by the different entities involved in securitisation transactions; below is a summary table of the different options extracted from the Feedback Statement.

TABLE 1 - SUMMARY OF THE IMPLEMENTATION OPTIONS

Topic	Option A	Option B	Option C	Option D
Loan-Level Disclosure	Keep	Keep	Shift to Aggregated Data for certain asset classes	Shift to Aggregated Data for certain asset classes
Content	Maintain Current Framework	Include additional metrics, e.g. climate risk metrics	Slight simplification of current framework	Complete overhaul of the current framework: heavily simplified templates
Private Securitisation	No Change	No Change	Introduce a simplified template for private deals	Same simplified template for public and private
ND Options	No Change	Tighter use of NDs	Keep NDs, amend conditionality of certain fields	Shift from NDs to Mandatory/Optional

The feedback from stakeholders on the Consultation indicates that any immediate amendments to the disclosure templates should remain limited and targeted; this being the preferred approach mainly due to the fact that the Level 1 text of the EU Securitisation Regulation is up for review. ESMA will assess, in close collaboration with the European Commission, whether targeted adjustments to the technical standards (in particular regarding the information to be provided for private securitisations) could be introduced pending the ongoing review of the Level 1 text of the EU Securitisation Regulation.

Other news in securitisation – EBA guidelines and circular CSSF 24/868

In 2018, the EBA had issued guidelines (EBA/GL/2018/08 and EBA/GL/2018/09) in accordance with the EU Securitisation Regulation on the harmonised interpretation and application of the STS criteria (Simple, Transparent and Standardised) set out:

- in Articles 20, 21 and 22 of the EU Securitisation Regulation for non-ABCP securitisation (Asset Backed Commercial Papers (the "**Non-ABCP STS Guidelines**")); and
- in Articles 24, 25 and 26 of the EU Securitisation Regulation for ABCP securitisation (the “**ABCP STS Guidelines**”).

On 27 May 2024, the EBA issued new guidelines (EBA/GL/2024/05) in accordance with Article 26a(2) of the EU Securitisation Regulation (hereinafter the “**New Guidelines**”) on the STS criteria for on-balance sheet securitisation and amending the Non-ABCP STS Guidelines and the ABCP STS Guidelines (together, the "**Original Guidelines**").

The New Guidelines include a limited set of targeted amendments to the Original Guidelines.

The CSSF published Circular CSSF 24/868 on 9 December 2024 which amends the previous Circular CSSF 19/719 to take into account the amendments provided for by the above-mentioned New Guidelines.

The consolidated versions of the amended Non-ABCP STS Guidelines and ABCP STS Guidelines have not yet been published.

MICA | RECENT EU AND LUXEMBOURG DEVELOPMENTS

The Markets in Crypto-Assets Regulation ("**MiCAR**") and the various recent legal and regulatory developments related to MiCAR are contributing to the establishment of a more **comprehensive and cohesive legal framework regulating the crypto-asset markets in the EU**. In this article, we will summarise some of the latest and most important developments, since our last newsletter, regarding the regulation itself, the implementing regulations published by the European Commission ("**EC**") as well as other guidance/materials issued by the European Supervisory Authorities ("**ESAs**").

MiCAR fully applicable

As noted in our July newsletter article on MiCAR, **Titles III and IV** of MiCAR are applicable since **30 June 2024**, while the remaining provisions, particularly those related to a cryptoasset service providers ("**CASPs**"), became applicable on 30 December 2024. Now that MiCAR is fully applicable, CASPs and crypto asset issuers must ensure that they are in compliance with the extensive laws and regulations under the MiCAR regime.

Implementing Regulations published by EC

Various Implementing Regulations from EC supplementing MiCAR have been published recently in the Official journal of the European Union ("**OJ**").

1. Implementing Regulation (EU) 2024/2861
   - Laying down implementing technical standards ("**ITS**") establishing guidelines on the disclosure of inside information by issuers, offerors, and those seeking crypto-asset market admission.
   - Applicable since 3 December 2024.
2. Implementing Regulation (EU) 2024/2545
   - Laying down ITS regarding standard forms, templates, and procedures for cooperation and exchange of information between competent authorities.
   - Applicable since 16 December 2024.
3. Implementing Regulation (EU) 2024/2902
   - Laying down ITS on the reports of specified information related to ARTs and to EMTs denominated in a non-official EU currency that issuers provide on a quarterly basis to the competent authorities.
   - Applicable since 1 January 2025.
4. Implementing Regulation (EU) 2024/2984
   - Laying down ITS on forms, formats and templates for crypto asset white papers.
   - Applicable from 23 December 2025.

Additionally, various draft delegated regulations have been published by the EC and are currently going through the legislative process.

ESAs' updates

EBA has been very active in recent months in the implementation of MiCAR with its publication of the following:

1. 22 October 2024: a decision (EBA/DC/558) specifying details on the procedure for the classification of asset-referenced tokens ("**ARTs**") and e-money tokens ("**EMTs**") as significant, on the transfer of supervisory powers and on reporting obligations.
2. 10 December 2024: a response to the EC's letter regarding the overlap between the MiCAR and the revised Payment Services Directive ("**PSD2**") in respect of the provision by CASPs of payment services with EMTs under MiCAR, that could be considered as an "execution of payment transactions" under PSD; the EBA intends to respond to the issues flagged in the letter by April 2025.
3. 12 December 2024: a report raising awareness of tokenised deposits, noting the growing interest from banks in distributed ledger technology and emphasizing the importance of a convergent approach to crypto-asset classification and consistent monitoring.
4. 18 December 2024: a final report with its guidelines in respect of reporting templates aiming at improving the collection of the data by the issuers from CASPs and the supervision by the NCAs and the EBA.

On its side ESMA has issued the following publications contributing to MiCAR implementation:

1. 12 December 2024: New Q&As were published

providing clarifications, in respect of CASPs authorisation (2342), requirements (and 2343) and audited financial statements (2344).

2. 17 December 2024: ESMA published its final report with draft RTS (the "**RTS**") specifying certain requirements in relation to the detection and prevention of market abuse under MiCAR. The European Commission shall decide on whether to adopt the RTS within 3 months, and
3. 17 December 2024: several final reports containing guidelines (the "**ESMA Guidelines**") were published on reverse solicitation, investor protection, the qualification of crypto-assets as financial instruments and on systems and security access protocols for offerors and persons seeking admission to trading of crypto-assets other than ARTs and EMTs.

The ESMA Guidelines shall be applicable 3 months after their publication on the ESMA website into the official EU languages.
Recent joint contributions of the ESAs aiding the implementation of MiCAR include:

- 10 December 2024: the EBA, EIOPA and ESMA published joint guidelines to facilitate consistency in the regulatory classification of crypto-assets under MiCAR, which include a standardised test for classification as well as templates for market participants to use when communicating to supervisors the regulatory classification of a crypto-asset;
- 16 January 2025: EBA and ESMA published a joint report on recent developments in cryptoassets under Article 142 of MiCAR.

Luxembourg law to operationalise MiCAR

On 22 January 2025, the first vote has been passed by the Luxembourg legislator on Draft Law No. 8387 which aims to amend several pieces of Luxembourg legislation to operationalise various European regulations including MiCAR. The exemption by the Council of State (*Conseil d'Etat*) from a second vote is awaited. For a snapshot of the most important MiCAR related provisions of the draft law, we refer you to our July newsletter article.

ENTRY INTO FORCE OF LISTING ACT | KEY UPDATES

On 4 December 2024, the "**Listing Act**", entered into force which includes:

- Regulation (EU) 2024/2809 amending Regulation (EU) 2017/1129 (the "**Prospectus Regulation**"), Regulation (EU) 600/2014 ("**MiFIR**") and Regulation (EU) 596/2014 ("**MAR**") to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises ("**Listing Act Regulation**").
- Directive (EU) 2024/2811 amending Directive 2014/65/EU ("**MiFID II"**) to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises and repealing Directive 2001/34/EC (the "**Listing Act Directive**").
- a new Directive (EU) 2024/2810 on multiple-vote shares for small and medium-sized enterprises ("**SMEs**" and the "**Multiple Vote Directive**").

We have previously discussed the key aspects of Listing Act can be found in our previous July 2024 newsletter.
The Listing Act Regulation entered into force on 4 December 2024 with some provisions taking effect after 15 months and others, after 18 months. Member States will have 18 months to transpose the provision of the Listing Act Directive which amends MiFID II; they have two years to transpose the Multiple-Vote Directive.

In this article, we outline some key recent publications of the CSSF and ESMA which relate to the implementation of the Listing Act.

CSSF updates Circular CSSF 19/724 to align with the Listing Act Regulation

On 6 December 2024, the CSSF published an update of circular CSSF 19/724 on technical specifications regarding submission to the CSSF of documents under Prospectus Regulation and the Luxembourg law of 16 July 2019 on prospectuses for securities and general overview of the regulatory framework on prospectuses (the "**Circular**"):

- The CSSF summarised the key changes introduced by the Listing Act Regulation to make EU capital markets more accessible and attractive.
- The CSSF explained that the time limit for the CSSF to decide on prospectus approval has been reduced to 7 working days for EU Follow-on prospectuses related to shares (except for transfers from SME growth markets to regulated markets).
- Noting that issuances of fungible securities, as presented in point (da) and (db) of the first subparagraph of Article 1-(4) or in point (ba) of Article 1-(5) of the Prospectus Regulation, are now exempt from publishing a prospectus under certain conditions, the CSSF explains that issuers must henceforth file a document containing the required information (Annex IX of the Prospectus Regulation) with the CSSF via email at prospectus.filing@cssf.lu, including contact person details.

ESMA - consultation papers

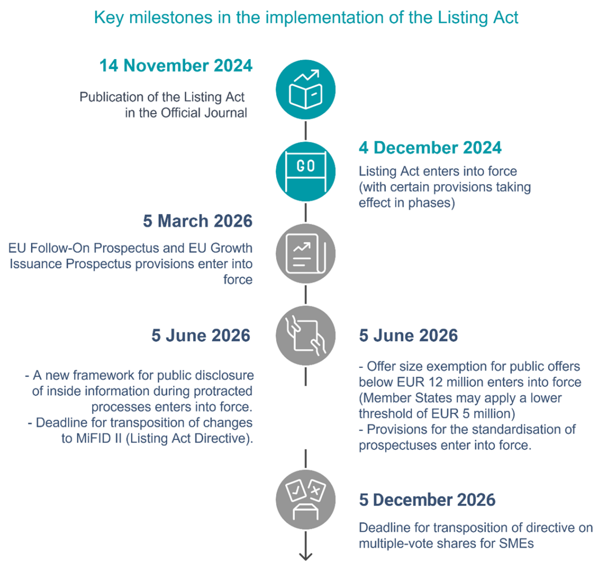
To support the successful implementation of the Listing Act, ESMA will release a series of consultation papers and final reports for each legislative area, aimed at identifying the changes needed to achieve its objectives. Several public consultations are already open:

- On 28 October 2024, ESMA published a consultation paper on draft technical advice concerning the Prospectus Regulation and on updating the Commission Delegated Regulation (EU) 2019/979 on metadata. It covers the following areas:
  - a new building block for additional information for non-equity securities advertised as considering ESG factors or pursuing ESG objectives;
  - suggested updates to Commission Delegated Regulation 2019/980 (on scrutiny and disclosure) to enhance criteria and processes for prospectus approval;
  - the data for the classification of prospectuses taking into accounts (i) the fact that there will be new types of prospectuses under the Listing Act (ii) prospectuses for European Green Bonds (iii) interaction with ESAP and (iv) the need to enhance data collection.
- On 12 December 2024, ESMA published a consultation paper on draft technical advice concerning MAR and MiFID II SME growth marker

which addresses the following:

- Draft technical advice on final events or circumstance in protracted processes and relevant moment of disclosure, as well as situations where there is a contrast between inside information to be delayed and the issuer's latest public announcement or communication;
- Draft technical advice on the requirements necessary for an MTF or a segment thereof to be registered as an SME growth market.

ESMA intends to publish a consultation paper on draft guidelines specifying the circumstances in which a supplement is to be considered as introducing a new type of security into a base prospectus in the first quarter of 2025.



DORA | ENTRY INTO APPLICATION

The Digital Operational Resilience Act (Regulation (EU) 2022/2554) ("**DORA**" or the "**Regulation**") entered into application on 17 January 2025. In the final months leading up to this significant milestone, there have been several noteworthy developments aimed at facilitating compliance with DORA, in particular during the initial period.

DORA mainly addresses **three levels** of the financial sector:

- the in-scope financial entities as defined under Article 2(1)(a) to (t) of DORA ("**Financial Entities**");
- the national competent authorities (the "**Competent Authorities**"), as defined under Article 46; and (3)
- European Supervisory Authorities (the "**ESAs**").

Additionally, the information and communication technology third-party service providers (the "**ICT TPSPs**"), will also be indirectly affected by DORA, as these must cooperate with the Financial Entities to ensure accurate reporting.

We have been following DORA developments in our previous newsletters since October 2023, and reported notable developments equally in July 2024 and October 2024.

Financial Entities and ICT third-party service providers – the struggle to comply

Financial Entities and, indirectly, the ICT TPSPs, face a notable **pressure to comply within DORA's legislative ecosystem**. The wealth of regulatory developments adjacent to the Regulation's main body has been reported in our previous newsletters. It became increasingly evident that in-scope entities face an uphill battle to adapt in time, given lack of a transition period, unclear definitions of key concepts and delays in adoption of all relevant guidelines.

It was only recently (on 29 November 2024) that the European Commission adopted the Implementing Regulation (EU) 2024/2956, providing Financial Entities access to the **standard templates for maintaining registers**, as developed by the ESAs in accordance with Article 28(9) of DORA. As of the date DORA entered into application, the regulatory technical standards concerning the **subcontracting of ICT services** supporting critical or important functions had still not been adopted by the Commission. The interested entities were however encouraged to consult the final draft of the ESAs joint report and to revise their agreements accordingly.

The ESAs and the Competent Authorities carried out a **dry run exercise** from April to August 2024 to simulate the reporting process and to help over 1,000 Financial Entities involved to identify points of improvement. Significant issues were identified, particularly regarding data quality, prompting individual feedback to be provided to competent authorities and participating Financial Entities to address sanctionable errors. A report published on 17 December highlighted the most frequently encountered issues, offering valuable insights into common oversights, such as missing mandatory information and difficulties with unique identifiers, along with recommendations on how to avoid them.

On 4 December 2024, the ESAs issued a statement on the application of DORA, particularly noting that the **lack of a transitional period** raises the need for Financial Entities to adopt a timely, robust, structured approach to meet their DORA obligations, and ICT TPSPs to assess their operational set-up against DORA requirements.

Such statements help **preventing obligations from being overlooked** or disregarded by those concerned, in a context where:

- certain Financial Entities have already been subject to piecemeal sectorial guidelines and regulations on ICT risk management, incident reporting and outsourcing for years; and
- ICT TPSPs do have direct positive obligations stemming from the regulation.

DORA is a far-reaching regulation, raising the bar on compliance standards thus requiring all in-scope entities to identify and address all compliance gaps. ICT TPSPs face market pressure from their client-Financial Entities to implement contractual amendments ensuring DORA compliance.

Indeed, the Competent Authorities and the ESAs also displayed efforts facilitating the transition into compliance by clarifying the wider implications of DORA, as well as the **interplay with existing**

legislation.

For instance, on 15 November 2024, the European Insurance and Occupational Pensions Authority (EIOPA) issued an opinion highlighting a scope overlap between DORA and the Solvency II Directive. Due to increased size thresholds under Solvency II Temporary, DORA would apply to small insurance and reinsurance undertakings, considered disproportionate by EIOPA. As a result, on 19 December 2024, EIOPA announced the revocation of two sets of guidelines issued in the context of Solvency II on ICT security, governance, and outsourcing to cloud providers, and the amendment of an opinion on the supervision of operational risks faced by IORPs.

More information on the published guidance is available in our previous newsletters references above.

Last minute guidance from the CSSF

In Luxembourg, the CSSF and the *Commissariat aux assurances* (CAA) are the designated Competent Authorities. Competent Authorities are expected to collect from Financial Entities all reporting on ICT TPSP registers ahead of the **submission deadline 30 April 2025.**

The CSSF issued last minute guidance:

- on 5 December, a communication with reminders and advice on preparedness; and
- on 15 January 2025 (two days before the entry into application of DORA), a publication covering the list of **circulars overruled by DORA**, and a last-minute checklist of practicalities to be considered, and the obligations of Financial Entities intending to outsource the reporting obligation by to third parties.

All relevant information and applicable legislation relating to DORA for Luxembourg entities is available on the dedicated DORA page of the CSSF website.

EUROPEAN GREEN BOND LABEL I NEW REGULATION FOR SUSTAINABILITY IN FINANCE

The European Parliament has recently introduced Regulation (EU) 2023/2631 of 22 November 2023 on European Green Bonds (the "**EuGB Regulation**"). The EuGB Regulation aims to provide a unified standard for green bond issuance in the EU, supporting both EU and non-EU issuers, public and private entities, in financing environmentally sustainable projects.

The Green Bond label is designed to complement existing market standards offering issuers a new tool to attract funds for green initiatives. The EuGB Regulation is built around three core principles:

- **Alignment with EU Taxonomy**: Green bond proceeds must fund activities aligned with the EU Regulation 2020/852 of 18 June 2020 on the establishment of a framework to facilitate sustainable investment (the "**EU Taxonomy Regulation**"), which classifies environmentally sustainable economic activities. This alignment ensures that investments contribute meaningfully to the EU's environmental goals.
- **Transparency**: issuers will be required to disclose detailed information before and after issuance using standardised templates, ensuring accountability and clear communication about the use of funds.
- **External review**: bonds must undergo pre- and post-issuance reviews by registered external reviewers, adding a layer of credibility to the process.

Key requirements for issuers

To use the designation 'European Green Bond' or 'EuGB', issuers must ensure that bond proceeds are directed towards projects that align with the EU Taxonomy Regulation. Additionally, the EuGB Regulation allows for some flexibility, such as allocating up to 15% of funds to activities without defined taxonomy criteria, providing room for growth in emerging areas of sustainability.

Issuers must comply with specific disclosure requirements laid down in Article 15 of the EuGB Regulation, namely:

- **before the bond is issued:** produce a *factsheet* outlining how the funds will be allocated, submit it for a pre-issuance review and obtain a positive opinion from an external reviewer;
- **after the bond is issued:** provide annual *allocation reports* to demonstrate how the funds were spent;
- **once all bond proceeds are allocated:** submit a *post-issuance review* and an *impact report*, detailing the environmental outcomes of the funded projects.

Issuers shall notify ESMA of the publication of all documents referred to in Article 15 of the EuGB Regulation within 30 days of their publication.

Moreover, unless the issuer is exempt under the EU Regulation 2017/1129 of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (the "**EU Prospectus Regulation**"), the issuance should be accompanied by an EU Prospectus Regulation compliant prospectus.

Sovereign issuers and securitisation bonds

Sovereign issuers benefit from some flexibility, including the option to use state auditors for post-issuance reviews and the ability to avoid demonstrating project-level taxonomy alignment for certain public expenditure programmes.

In the case of securitisation bonds, the EuGB Regulation permits the use of the "Green Bond" label if the bond proceeds are used in line with the EU Taxonomy Regulation, although specific exposures are excluded from scope, such as fossil fuel-related activities. Securitisation bonds issued for the purpose of a synthetic securitisation are not for the time being eligible to use the designation "European Green Bond".

Optional disclosure for other ESG bonds

The EuGB Regulation also introduces optional disclosure templates for bonds marketed as environmentally sustainable or sustainability-linked. Issuers of these bonds must provide information on how proceeds contribute to environmental goals, ensuring transparency for investors. The European Commission is mandated to publish guidelines and adopt delegated acts with a view to establishing voluntary templates for these disclosures.

Role of external reviewers

External reviewers play a crucial role in verifying the alignment of bonds with the EU Taxonomy Regulation. They must be registered with ESMA and meet specific governance requirements. Both pre- and post-issuance reviews are mandatory, ensuring that the bonds remain aligned with the green objectives throughout their lifecycle.

Role of the CSSF

The CSSF is the competent authority in Luxembourg to ensure compliance by issuers and, where applicable, originators and securitisation vehicles with their respective obligations under the EuGB Regulation, i.e.:

- **where a "Green Bond" prospectus is published** and the CSSF is the competent authority of the home Member State designated pursuant to the EU Prospectus Regulation, issuers shall notify the CSSF of the publication of each of the documents referred to in Article 15 of the EuGB Regulation via the e-prospectus application without undue delay after each publication;
- **for securitisation "Green Bonds"**, where the CSSF is the competent authority designated in accordance with Article 29(5) of Regulation (EU) 2017/2402 of 12 December 2017 laying down a general framework for securitisation (the "**Securitisation Regulation**"), originators shall notify the CSSF via email to prospectus.filing@cssf.lu of the publication of each of the documents referred to in Article 15 of the EuGB Regulation, using the filing form for originators which is available on the CSSF website, without undue delay after each publication;
- the **CSSF will also be responsible for supervision** of issuers that use the optional post-issuance disclosure templates as regards compliance with those templates.

On 22 January 2025, the Luxembourg Parliament (*Chambre des Députés*) voted the Draft Law No. 8387, which *inter alia* amends the Luxembourg law of 16 July 2019 on the operationalisation of European regulations in the area of financial services to implement Article 49 of EuGB Regulation by defining the administrative sanctions and other administrative measures that the CSSF may impose to ensure compliance with the EuGB Regulation.

In summary, the EU Green Bond label introduced by the EuGB Regulation (which is directly applicable in all EU Member States since 21 December 2024, except for certain provisions set forth in Article 72), offers a comprehensive and transparent framework for financing sustainable projects, setting clear guidelines and responsibilities for issuers, reviewers, and investors alike. With its introduction, the EU aims to drive forward its environmental goals while fostering confidence in green finance.

RCS AND RBE I NEW REQUIREMENTS WITH THE LAW OF 25 JANUARY 2025

The Law of 25 January 2025 was published in the *Journal Officiel du Grand-Duché de Luxembourg* on 27 January 2025 and will enter into force on 1 February 2025. This new legislation is designed to:

- **adapt the legislation to current practice**,
- **improve the quality of information**,
- **provide the administrators of the RCS and RBE (as both terms are defined below) with new resources** to effectively and actively monitor registered persons and entities, ensuring compliance with registration and filing obligations.

The text amends:

- the Law of 19 December 2002 on the Trade and Company Register (hereinafter, "**RCS**") and companies and on bookkeeping and annual accounts of companies, and
- the Law of 13 January 2019 establishing the Register of Beneficial Owners (hereinafter, "**RBE**") (the "**RBE Law**").

Key amendments

Communication of email addresses: the Law requires the communication of the electronic mail address of registered persons, if available.

New Article 11ter introduces identification information requirements for individuals and entities registered in the file of the RCS, distinguishing between:

- physical persons (required notably to communicate their Luxembourg national identification number (LNIN) and gender).
- legal entities established in Luxembourg.
- legal entities established in a foreign country.

Automatic updates oblige the RCS and RBE administrators to automatically update information received from various national registers.

Administrative sanctions and measures allow the administrator of the RCS and/or RBE to:

1. display non-compliance notices on its website after a 30-day registered mail warning,
2. issue certificates attesting non-compliance,
3. impose an administrative fine of EUR 3,500.- or EUR 250.- for non-profit associations or foundations) (by the administrator of the RCS),
4. impose daily penalties (by the administrator of the RBE),
5. automatically remove the person or entity from the RCS without dissolution, subsequent compliance by the registered person can lead to the removal of measures 1), 2) and 4) above.

Reinforcement of the obligation of professionals to consult the RBE and inform the RBE administrator if they detect:

- erroneous data,
- missing data,
- failure to register, modify, or delete data.

CSSF FEEDBACK ON DELEGATION OF PORTFOLIO MANAGEMENT FUNCTIONS BY IFMS

Following a supervisory review of the monitoring put in place by selected investment fund managers ("**IFMs**") in relation to the delegation of the portfolio management function, the CSSF published in October 2024 its main observations and related recommendations for improvement in a feedback report.

CSSF Circular 18/698 sets out extensive provisions relating to delegation by IFMs. The CSSF's observations and recommendations in the feedback report are not aimed at introducing new rules but rather center on how they expect the provisions of the Circular to be implemented in the context of portfolio management. While the review related to the portfolio management function the recommendations should also be applied to other delegated functions.

Observations on monitoring

Irrespective of their size, IFMs must have in place operational procedures to monitor the delegation. The procedures must clearly define "who does what, when and how" and must be supported by documents to prove the existence of such controls.

Initial and on-going due diligence processes cannot rely solely on the reception of self-assessment questionnaires or on onsite visit memos. The analyses should be contained in written reports that are validated, dated and signed by the relevant staff members.

Business continuity plans of the delegate should be verified and tested on a regular basis by the IFM.

In terms of having adequate resources to monitor the delegated functions the CSSF has set out criteria to be considered by the IFM in determining whether the human and technical resources available are sufficient, including (i) the number of delegates, (ii) the volume of assets under management where the portfolio management function has been delegated, (iii) the number of UCIs/Sub-funds concerned by the delegation and (iv) the nature and complexity of the investment policies.

The CSSF highlights that the internal audit of the IFM should include in its internal audit plan the monitoring of the delegated activities covering all aspects of the delegation.

Contingency Plans

The CSSF reiterates that each delegation contract contains a clear clause giving the IFM the right to withdraw the mandate with immediate effect when justified by the investors' interests. In anticipation of such an even the CSSF now specify that the IFM should have in place contingency plans. In this regard the CSSF makes a number of recommendations including that:

- the contingency plan should describe the exit strategies developed by the IFM, consisting of transferring the delegated function either to another delegate or by integrating the function within the IFM itself;
- the IFM should evaluate the impacts of the exit strategy, estimating the exit costs, resources and time required;
- the IFM should proceed to a periodic reassessment of the feasibility of each exit strategy developed.

Recommendations

IFMs should monitor compliance with applicable rules of conduct in the context of the portfolio management delegation. In this regard the CSSF recommends that the rules of conduct should be covered by the **internal audit plan**.

A further recommendation is that **requirements on personal transactions** in the context of the portfolio management delegation be covered by the internal audit plan.

Pursuant to the regulatory framework applicable to alternative investment fund managers they should be able to demonstrate the objective reasons for delegation and ensure that such reasons are properly documented and that the analysis is made available upon request. The CSSF recommend that UCITS management companies apply the same principle. **Excessive reliance on delegates from the same group is to be avoided.**

Next Steps

The CSSF have invited all IFMs to perform, at the latest by the end of Q1/2025, a comprehensive assessment of how they monitor the delegation of their portfolio management function in the light of their observations and applicable regulatory requirements. While there is no express requirement to feed back to the CSSF on the results of such assessment it can be assumed that there will be follow up by the CSSF on this point.

CIRCULAR 24/856 I NAV CALCULATION ERRORS: NEW NOTIFICATION PROCEDURE FOR ERRORS AND INSTANCES OF NON-COMPLIANCE

New UCI notification procedure

On 17 December 2024, the CSSF announced the availability of the new notification forms for errors and instances of non-compliance on the eDesk platform, as set out in the new Circular 24/856 on investor protection in the event of NAV calculation errors and non-compliance with investment rules.

As of **1 January 2025**, any errors and/or instances of non-compliance detected need to be notified **exclusively** through the following two submission methods:

- Initial submission and follow of notification in the dedicated eDesk procedure.
- Automated submission of the notification via API (S3 protocol), then follow-up of the notification in the dedicated eDesk procedure.

Practical and technical guidance

The CSSF published alongside its announcement the practical and technical guidance detailing the transmission methods (the "**Guidance**").

The Guidance provides guidelines on the type of notifications, concerned funds, who submits the notification and when the notification should be provided. Within the section *practical guidance*, information to be transmitted is listed for the different errors at UCI level, instances of non-compliance and other errors. The section *technical guidance* provides information on the system and eDesk processes

Further questions on the notification procedure may be submitted to the CSSF under edesk@cssf.lu.

Please find here our article with further detail on the provisions of Circular 24/856.

CSSF CIRCULAR 24/856 I NEW FAQ ON INVESTOR PROTECTION IN CASE OF A NAV CALCULATION ERROR, AN INSTANCE OF NON-COMPLIANCE WITH THE INVESTMENT RULES AND OTHER ERRORS AT UCI LEVEL

New FAQ

On 24 December 2024, the CSSF published the FAQ on the new Circular 24/856 concerning the protection of investors in case of an NAV calculation error, an instance of non-compliance with the investment rules and other errors at UCI level (the "**Circular 24/856**"). With the entry into force of Circular 24/856 on 1 January 2025, the former CSSF FAQ on Circular 02/77 has been repealed.

The updated CSSF FAQ retains certain questions from the previous FAQ on Circular CSSF 02/77, provided they remain relevant under the new framework established by Circular CSSF 24/856. However, most questions from the earlier FAQ have been withdrawn, as their clarifications are now incorporated into the new circular.

In addition, the revised FAQ introduces new questions addressing key topics, including the scope of Circular CSSF 24/856, the application of tolerance thresholds to closed-ended UCIs, and the handling of non-compliant cost or fee payments at the UCI level.

The FAQ on Circular CSSF 02/77 will continue to apply to errors or instances of non-compliance identified before 1 January 2025. The updated CSSF FAQ will govern errors and non-compliance detected on or after 1 January 2025.

With the entry into force of Circular CSSF 24/856, references to Circular CSSF 02/77 and its FAQ, along with related minor updates, will be incorporated into the following CSSF FAQs:

- FAQ concerning the Luxembourg Law of 17 December 2010 relating to undertakings for collective investment;
- FAQ concerning Money Market Funds Regulation;
- FAQ concerning the application of the swing pricing mechanism.

Key topics in FAQ

Among the key topics handled in the new FAQ, the following noteworthy questions arise:

- **RAIFs and other UCIs** not authorised by the CSSF do no fall into the scope of the Circular 24/856 except if they fall into the category of UCIs covered by section 2.1 of the circular which the CSSF is the competent authority (this includes, ELTIFs, Money Market Funds, EuVECA or EuSEF).
- **Closed-ended UCIs** fall out of scope of chapter 4 of Circular 24/856 which deals with NAV calculation errors at UCI level and, as a consequence, the requirements on the tolerance thresholds do not apply to them. However, such closed ended UCIs have to:
  1. comply with the NAV calculation rules provided for by regulations and UCI documents on an ongoing basis; and
  2. have policies and procedures in place ensuring a reliable valuation of its assets and liabilities in accordance with the regulations and UCI documents which allows for limiting as much as possible risks of a NAV calculation error emerging and detecting errors that do occur.

Notification procedure and technical guidance

The CSSF has also published the new notification procedure on NAV calculation errors and instances of non-compliance.

For further information on the provisions of Circular 24/856 we refer you to our previous article which can be found here.

MMF I CSSF CIRCULAR 24/866 STREAMLINING DATA COLLECTION FOR INVESTMENT FUNDS

New rules redefine reporting for MMFs and non-MMF investment funds

Following the ECB Regulation 2024/1988, the CSSF Circular 24/866, issued in collaboration with the Banque Centrale du Luxembourg (“**BCL**”), is here to develop how Money Market Funds (“**MMFs**”) and non-MMF investment funds report their data. This is a leap towards a smarter, streamlined, and globally aligned reporting process.

What is new in circular CSSF 24/866?

The new circular introduces a modernised, efficient approach to statistical data collection. Whether you are managing a traditional fund or a MMF, these updates are set to make reporting smoother and more aligned with international standards.

Main modifications to BCL reporting obligations

- Monthly balance sheet reporting, mandatory for all funds, except non-UCITS with a valuation of their assets on a less frequent basis than monthly.
- Quarterly balance sheet reporting required for non-UCITS funds valuing their assets on a less frequent basis than monthly.
- New items added in the monthly and quarterly balance sheet reporting and monthly security-by-security reporting.
- New quarterly reporting to collect financial information on alternative investments funds non-authorised by the CSSF.
- New annual reporting to collect information about marketing countries for shares/units issued by investment funds (Report S4.4).

Main modifications to CSSF reporting obligations

- New items added to the monthly financial information reporting (Report U1.1).
- No more O4.1 ("*renseignements financiers annuels*") and O4.2 (“*interventions sur les marchés à terme et les marchés d’options*") reports for SIFs and K3.1 (half-yearly financial information) reports for SICARs.

Digital transformation

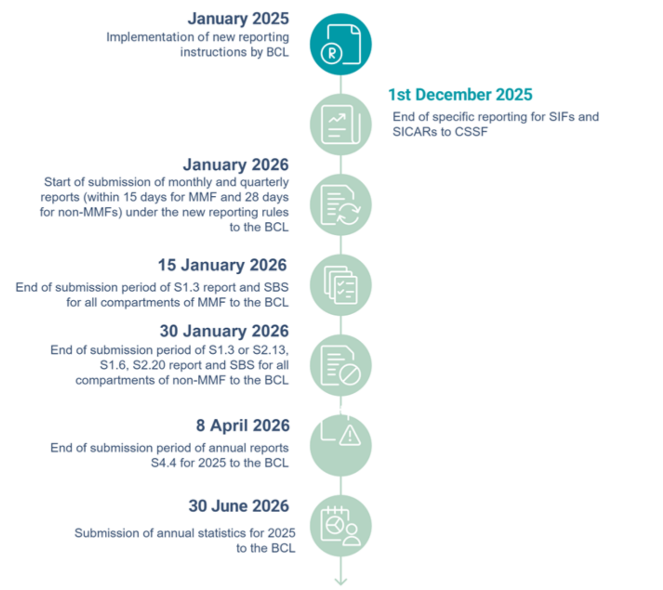
- Reporting has gone digital, with updated templates and submission processes designed to reduce errors and save time.

What's in it for you?

Let’s face it, regulations aren’t always fun. But Circular 24/866 is different. By simplifying processes and clarifying expectations, it is a win-win for compliance teams and investors alike. Here is how:

- **smarter workflows**: simplified templates and clear reporting timelines reduce administrative burdens.
- **better data quality**: enhanced data verification ensures accuracy, boosting confidence among regulators and investors.
- **global credibility**: alignment with ECB regulations reinforce Luxembourg’s position as a trusted financial hub.

Key dates to remember



MMF I FAQ UPDATES: COMPLIANCE CLARIFICATIONS ON WAL, WAM, AND LIQUIDITY THRESHOLDS

Navigating WAL, WAM, and liquidity thresholds under MMFR

Recent updates to the FAQ on Money Market Funds Regulation ("**MMFR**") (the "**FAQ**") bring clarity to compliance with Weighted Average Life ("**WAL**"), Weighted Average Maturity ("**WAM**"), and liquidity thresholds.

Scope of Circular CSSF 24/856: WAL and WAM Limits

The CSSF has confirmed in the new question 3C of the FAQ that breaches of WAL and WAM limits fall squarely under the protective umbrella of Circular CSSF 24/856.

What are WAL and WAM?

- **WAL** measures the average time to legal maturity of all of the underlying assets in the MMF.
- **WAM** measures the average length of time to legal maturity or, if shorter, to the next interest rate reset to a money market rate, of all the underlying assets in the MMF.

Portfolio rules for MMFs require them to provide for a maximum allowable WAM and WAL. To the extent these maximums are breached this is a situation that falls under Circular 24/856.

Liquidity threshold breaches: Overview

In the context of the MMFR (Regulation EU 2017/1131), the MMFR mandates:

- **Daily liquidity minimums**: *Article 24(1)* requires a minimum of 10% of the fund's assets to be held in instruments maturing daily.
- **Weekly liquidity minimums**: *Article 25(1)* mandates at least 30% of the fund's assets must be available within a week.

These measures ensure investor protection by reducing the risk of liquidity shortfalls. Any failure to meet these thresholds fall within the scope of CSSF 24/856 as it is now stated in the added question 3D of the FAQ.

These clarifications reinforce the CSSF's stance: **investor protection is non-negotiable**. Fund managers must stay vigilant about WAL, WAM, and liquidity thresholds to avoid costly errors.

AML/CFT I CSSF LAUNCHES 2024 ANNUAL QUESTIONNAIRE ON FINANCIAL CRIME

The CSSF has announced the 2024 annual AML/CFT questionnaire (the "**2024 questionnaire**") will be accessible on the eDesk platform from 24 February 2025, with a submission deadline of 4 April 2025.

The initiative aims to collect standardised information on money laundering and terrorism financing risks and assess measures implemented by supervised entities to mitigate these risks.

While the questionnaire remains mostly unchanged from the 2023 version, certain questions have been moved, deleted or modified as indicated in the questionnaire.

The 2024 questionnaire must be completed and validated by the *responsable du contrôle du respect des obligations professionnelles (*RC*)* or the *responsable du respect des obligations professionnelles (*RR*)*, who hold ultimate responsibility for the submission. While this responsibility cannot be transferred, the task of completing the questionnaire may be delegated to another employee or third party, provided they have an authenticated eDesk account via LuxTrust.

To ensure a smooth submission process, entities should confirm their access to the eDesk platform and consult the "eDesk Authentication User Guide" available on the portal.

Whilst the deadline for submission is some way off, supervised entities are encouraged to prepare in advance to facilitate timely and accurate submissions.

AML/CFT I CSSF CLARIFIES ASSET DUE DILIGENCE RULES

New FAQ on AML/CFT asset due diligence obligations provides practical guidance on CSSF Regulation No 12-02

On 13 December 2024, the CSSF published their first version of FAQ on AML/CFT asset due diligence. The FAQ was published in the context of Article 34 (2) of CSSF Regulation 12-02 which imposes an obligation on supervised entities to carry out on going due diligence on investments.

Professionals' role in managing ML/TF risks

The CSSF emphasises that professionals bear full responsibility for conducting money laundering ("**ML**") and terrorist financing ("**TF**") risk assessments. Mitigating measures should directly address the risks identified during these assessments. This proactive approach ensures compliance and strengthens safeguards against ML/TF activities.

Lower risk for regulated market securities

Securities traded on regulated markets are considered low-risk for ML/TF due to stringent market disclosures and controls. The CSSF have indicated therefore that it is not necessary to carry out an ML/TF risk assessment on such securities. Professionals must, however, be ready to demonstrate, if requested, that assets are indeed admitted to such markets. This streamlined approach reduces unnecessary due diligence while maintaining compliance.

Annual risk assessments: flexible requirements

The CSSF acknowledges that annual risk assessments for assets not traded on regulated markets are not always necessary. If no significant changes to the asset's risk profile have occurred within one year, renewal is not required. This adjustment eases administrative burdens without compromising risk oversight.

When to perform due diligence?

AML/CFT due diligence is mandatory in two key scenarios:

- For assets not traded on regulated markets, due diligence must align with the assessed risk level.
- When operations take place on assets (e.g., purchase, transfer, sale) that are not admitted to trading on a regulated market and/or when a change in the asset has resulted in a higher ML/TF risk.

Key takeaways for professionals

- Understand and document ML/TF risks comprehensively.
- Adjust risk assessments dynamically to reflect asset changes.

This FAQ underscores the CSSF's commitment to a risk-based approach, offering clarity while reinforcing compliance. For more details, professionals are encouraged to consult the full document on the CSSF website.

UCI I CSSF FAQS UPDATED

On 19 December 2024 and 2 January 2025, the CSSF has updated its Frequently Asked Questions ("**FAQs**") regarding the Luxembourg Law of 17 December 2010 on undertakings for collective investment ("**UCITS**")("**the 2010 Law**").

New questions were introduced by the CSSF (12.1) providing specific **guidance on the portfolio transparency requirements for actively managed UCITS ETFs**.

The CSSF specifies that Asset managers ("**IFMs**") of actively managed UCITS ETFs must publish detailed portfolio information for the funds they manage while protecting proprietary information. According to ESMA guidelines, IFMs must publish this information at least once a month, with a maximum delay of one month. The information published must include the identity and quantities of holdings. IFMs may choose a different frequency and time lag for the publication of portfolio details compared to the Portfolio Composition File ("**PCF**") but must justify their approach. PCFs must be sent simultaneously to Authorised Participants ("**APs**") and Market Makers ("**MMs**") via a secure channel, and intraday transactions should not be communicated in detail. Managers must also ensure that APs and MMs comply with confidentiality rules, particularly with regard to sensitive information about pending transactions.

The CSSF also clarified in point 1.16 of the FAQ, that a UCITS is required to **clearly disclose in its investment policy the categories of eligible assets listed** under Article 41(1) of the 2010 Law in which it may invest, including those aimed at achieving investment goals, for treasury purposes, or under unfavourable market conditions. If a UCITS invests in assets not foreseen in its investment policy, the provisions of Circular CSSF 24/856 will apply.

The CSSF specifies in the point 7.6 of the FAQ the **hedge ratio compliance**, stating that breaches of the 105% over-hedged and 95% under-hedged positions do not fall under Circular CSSF 24/856. Instead, UCITS management companies are expected to establish proper monitoring and control procedures to ensure compliance with the ESMA Opinion's hedge ratio requirements.

The CSSF outlines in the point 11.4 of the FAQ, the necessary actions when a **UCITS experiences an active breach of the Value-at-Risk** ("**VaR**") limit. The breach must be reported to the CSSF by email, providing details such as the legal names and identifiers of the notifying entity and fund, VaR computation method, internal VaR limits, breach timeline, and reasons for the breach. The CSSF may request further information but prohibits using UCI forms for such notifications.

ESG I UPDATE OF CSSF FAQ ON SFDR

On 18 December 2024, CSSF published updated FAQ on SFDR

The update consisted in removing questions 2 (SFDR templates as a material change), 9 (EPM techniques) and 10 (application date for periodic disclosures) as well as to update Q&A 6 and 7.

Q&A 6 was updated in order to specify that investment funds disclosing under article 9 may include, in addition to sustainable investments, other investments "*used for hedging or relating to cash held as ancillary liquidity, which need to fit the overall sustainable investment objective of the fund*" (the previous FAQ referred to "*other investments for certain specific purposes such as hedging or liquidity*").

Q&A 7 was updated in order to integrate ESMA's guidelines on funds names using ESG or sustainability-related terms (the "**Guidelines**") implemented by CSSF circular 24/863. The CSSF expects IFMs regardless of whether they disclose under article 6, 8 or 9 of the SFDR to carry out a self-assessment of the applicability of the above mentioned Guidelines to the products they manage but also to ensure compliance of these. The IFM is to ensure the ongoing compliance with all applicable thresholds and exclusions foreseen in the Guidelines, the depositary being in charge of the independent monitoring of such compliance according to its depositary oversight duties.

ESG I THE EUROPEAN COMMISSION ISSUES DRAFT FAQS ON EU TAXONOMY

On 29 November 2024 the EC published the draft Notice containing FAQs relating to the EU Taxonomy

The European Commission ("**EC**") published further guidance on the EU Taxonomy in the form of a draft Notice containing FAQs, (the "Draft Commission Notice on the interpretation and implementation of certain legal provisions of the EU Taxonomy Environmental Delegated Act, the EU Taxonomy Climate Delegated Act and the EU Taxonomy Disclosures Delegated Act") ("**the draft Notice**"). The draft Notice contains FAQs aiming to facilitate the use of the Taxonomy and is part of the EC's simplification agenda on reducing the administrative burden on companies applying the EU sustainable framework.

The draft Notice contains FAQs that tackle questions and answers on general aspects of the **Taxonomy,** the **environmental objectives**, the **generic DNSH criteria** ("Do No Significant Harm') and the T**axonomy Disclosures Delegated Act**. The European Commission will use these FAQs as a tool subject to regular updates as necessary.

FAQ topics

Topics dealt with in the draft Notice on the Taxonomy Climate Delegated Act relate to the objectives of climate change mitigation and climate change adaptation.

Questions concerning the Taxonomy Environmental Delegated Act deal with the objectives of:

- water and marine resources;
- the transition to a circular economy;
- pollution prevention and control; and
- biodiversity and ecosystems.

Questions related to the generic DNSH criteria deal with criteria on:

- climate change adaptation;
- pollution prevention and control; and
- protection and restoration of biodiversity and ecosystems.

ESG I ESMA Q&A ON GUIDELINES ON FUNDS' NAME USING ESG OR SUSTAINABILITY-RELATED TERMS

On 13 December 2024, ESMA published Q&As containing further details on specific aspects of the practical application of the Guidelines on funds' names using ESG or sustainability-related terms

The Q&As apply to UCITS and AIF and are covering three specific topics:

- green bonds (ESMA QA 2368 for UCITS and ESMA Q&A 2370 for AIF),
- the convergence on “meaningfully investing in sustainable investments” (ESMA QA 2373 for UCITS and ESMA QA 2374 for AIF), and
- the definition of controversial weapons (ESMA QA 2371 for UCITS and ESMA QA 2372 for AIF).

The objective is to ensure a smooth application of the Guidelines through common understanding of key concepts:

- the Q&A on **green bonds** specify that investment restrictions related to the exclusion of companies do not apply to investments in European Green Bonds. For other green bonds, fund managers may use a look-through approach to assess whether the activities financed are relevant for the exclusion;
- the Guidelines provided that funds using sustainable terms in their name have to commit to “**invest meaningfully in sustainable investments**”. The Q&As clarify that while national competent authorities should carry out a case-by-case analysis of how any sustainability-related term is used in the name of a fund, national competent authorities may find that investment funds with "sustainable" terms in their names investing less than 50% of the proportion of investments in sustainable investments are not "meaningfully investing in sustainable investments". That amount could be higher, subject to the circumstances of the case; and
- the Q&A on **controversial weapons** specifies that the reference for the exclusion related to controversial weapons should be the one referred to in SFDR principal adverse impact indicator 14 of Table 1 of Annex 1 of the SFDR Level 2 regulation (Commission Delegated Regulation (EU) 2022/1288).

Please refer to our previous newsletter on the guidelines on funds names for further information on this matter.

ELTIF 2.0 I REGULATORY TECHNICAL STANDARDS PUBLISHED IN THE EU OFFICIAL JOURNAL

On 25 October 2024, the European Commission adopted Delegated Regulation (EU) 2024/2759, supplementing Regulation (EU) 2015/760 (the "**ELTIF Regulation**") as amended by Regulation (EU) 2023/606 ("ELTIF 2.0"). The new regulatory technical standards ("**RTS**"), published in the Official Journal of the EU, entered into force on 26 October 2024. These RTS introduced detailed requirements aimed at enhancing the attractiveness, flexibility, and operational clarity of ELTIFs while maintaining investor protection. Below, we summarize the key aspects of this regulatory update.

Key legal provisions of Delegated Regulation (EU) 2024/2759

Redemption policy and liquidity management

The RTS clarify Article 18(3) of the ELTIF Regulation, introducing detailed criteria for implementing redemption policies in semi-liquid ELTIFs. Key points include:

- conditions under which redemptions may occur prior to the ELTIF's maturity, ensuring alignment with the fund's investment strategy and liquidity profile;
- the introduction of liquidity management tools such as redemption gates, notice periods, and in-kind redemptions, designed to balance investor liquidity demands and asset liquidity constraints.

Investment restrictions and eligible assets

The RTS provide additional guidance on eligible assets under Article 10 of the ELTIF Regulation, focusing on:

- the conditions for direct and indirect investment in real assets;
- criteria for investments in qualifying portfolio undertakings, including SMEs and real estate;
- expanded flexibility for investments in UCITS and AIFs to improve diversification opportunities.

Cost disclosure and transparency

To improve investor protection, the RTS implemented detailed cost disclosure requirements under Article 23. The fund managers are now required to provide:

- clear, concise, and standardized pre-contractual disclosures regarding fees and charges;
- periodic cost breakdowns to enhance transparency and comparability across ELTIFs.

Marketing to retail investors

The RTS further aligned ELTIF marketing practices with MiFID II requirements. For example:

- managers must ensure that the target market assessment for retail investors is robust and suitable for the long-term nature of ELTIFs.
- enhanced requirements for distributing ELTIFs via financial intermediaries, ensuring that investors understand the fund's illiquid nature and associated risks.

Timeline for compliance and implications for market participants

The Delegated Regulation entered into force on 26 October 2024, and the revised framework will apply to all ELTIFs launched thereafter. Existing ELTIFs must assess their structures and documentation to ensure compliance with the new rules, particularly regarding liquidity management, cost disclosures, and marketing strategies.

The ELTIF 2.0 regime seeks to address the operational and practical hurdles that previously limited the popularity of ELTIFs, particularly among retail investors. The updated RTS provide much-needed clarity for fund managers and offer enhanced flexibility to meet the growing demand for long-term, sustainable investment opportunities across the EU.

AIFMD I ESMA RELEASES NEW Q&AS ON SAFEKEEPING AND DELEGATION RULES

ESMA has published two new Q&As under the alternative investment fund managers directive ("**AIFMD**"). These updates address safekeeping of client money and delegation of portfolio or risk management to non-supervised undertakings outside the EU, providing clearer regulatory guidance for AIFMs.

AIFMs cannot safekeep client money

ESMA clarified that AIFMs are not permitted to hold client money. According to Article 6(4)(b)(ii) of Directive 2011/61/EU, AIFMs may only safekeep shares or units of collective investment undertakings. Safekeeping of client money is explicitly excluded.

Impact of new amendments

The revised AIFMD (Directive (EU) 2024/927) does not change this prohibition. AIFMs must maintain their focus on investment management activities, ensuring that their responsibilities do not overlap with those of depositaries or custodians.

Key considerations for AIFMs

- Scope limitations: safekeeping services under AIFMD are limited to shares or units of collective investment undertakings.
- Investor protection: prohibiting client money safekeeping avoids potential conflicts of interest and ensures fund integrity.
- Legislative consistency: this clarification aligns with the broader goals of AIFMD, reinforcing the separation of management and safekeeping roles.

Delegation of functions to non-supervised entities

Delegating portfolio or risk management functions to undertakings established outside the EU is subject to strict regulatory conditions. ESMA highlighted the following:

- **cooperation agreements**: such delegation requires effective cooperation between the national competent authorities of the AIFM's home Member State and the supervisory authority of the third-country entity;
- **regulatory framework**: Article 20(1)(d) of Directive 2011/61/EU and Article 78(3) of Commission Delegated Regulation (EU) No 231/2013 outline the conditions for ensuring cooperation.

ESMA clarified that delegation to non-supervised entities outside the EU is not permitted. This prevents regulatory gaps and enhances investor confidence.

Key points for AIFMs

- **Compliance with AIFMD**: delegation must not undermine the AIFM's accountability or oversight responsibilities.
- **Regulatory oversight**: proper supervision is critical for ensuring delegated functions are performed in line with EU standards.
- **Investor protection**: these measures ensure consistent governance and reduce risks associated with third-country delegation.

No new obligations

These updates do not impose additional requirements on AIFMs. Instead, they clarify the scope and application of current rules, providing guidance for both AIFMs and competent authorities.

AIFMD I ESMA CONSULTS ON TECHNICAL STANDARDS FOR OPEN-ENDED LOAN-ORIGINATING FUNDS

On 12 December 2024, ESMA released a consultation paper on regulatory technical standards (RTS) for open-ended loan-originating funds under the revised alternative investment fund manager directive ("**AIFMD**"). According to the revised AIFMD, loan-originating Alternative Investment Funds ("**LO AIFs**") shall be closed-ended unless their manager can demonstrate to its home national competent authority that their liquidity risk management system is compatible with their investment strategy and redemption policy. The consultation aims to receive feedback on the draft Regulatory Technical Standards (**RTS**) that set out the requirements with which LO AIFs shall comply to maintain an open-ended structure. The consultation is open until 12 March 2025, with final RTS submission to the European Commission expected by late 2025.

Key Points

- **Liquidity management**: managers must establish a robust system, including appropriate redemption policies, availability of liquid assets, regular stress testing, and ongoing monitoring. Requirements are broad to allow national authorities flexibility.
- **Redemption policy**: the RTS outline various factors for managers to consider when developing redemption policies for open-ended loan origination AIFs. These include targeted credit quality of the loans, amount of liquid assets held by the fund and expected incoming cash flows. The RTS allow national authorities to deem a redemption policy inappropriate for additional reasons.
- **Stress testing**: managers shall conduct a liquidity stress testing with conservative scenarios at least quarterly. Assets and liabilities of the relevant fund should be stress tested separately and scenarios for liquidity stress testing must be conservative (including those with low probability).
- **Ongoing monitoring**: AIFMs need to continuously monitor essential metrics, including level of liquid assets, potential future liabilities, early signs of loan impairment and repayment schedules. They must also ensure that the liquidity management procedures remain aligned with the redemption policy offered to investors.

SHORTENING SETTLEMENT CYCLE IN THE EU

The CSSF has published a *communiqué* drawing attention to the Final Report providing the assessment of the shortening of the settlement cycle in the European Union (EU), published on 18 November 2024 by the European Securities and Markets Authority (ESMA) (the "**ESMA Report**").

The ESMA Report proposes a move to T+1 as of 11 October 2027, identified as the optimal date for the implementation of a one-business-day settlement cycle for all relevant instruments in the European Union. This date aims to ensure alignment with the United Kingdom in their shift to T+1.

New "T+1" Settlement Cycle

The transition to T+1 follows similar changes already implemented in the United States, Canada, and Mexico (please refer to our previous article for details on the United States).

Currently, most securities transactions in the European Union operate under a T+2 settlement cycle. This means transactions are settled two business days after the trade date. For example, if you sell shares of X stock on Monday, the transaction would be completed, or "settled", on Wednesday.

The ESMA Report proposes aligning the European Union's practices with this shift already implemented in the United States. Consequently, this change will mean that securities transactions will settle just one business day after the trade date. For instance, if you sell shares of X stock on Monday, the transaction will now settle on Tuesday instead of Wednesday.

Context and Implications

The ESMA Report outlines key benefits, including risk reduction, margin savings, and cost efficiencies achieved through alignment with other major jurisdictions. However, it also identifies challenges, such as the need to amend regulations and harmonise practices. Operational processes between fund managers and associated parties such as the fund's depositary bank may need to be reviewed to take into account the shortened period. There will be less time to process trade information and instruct settlement which could impact the NAV calculation process. To address these issues, ESMA intends to work closely with the European Commission and the European Central Bank on T+1 governance.

The CSSF recognises the potential impact of the T+1 transition on operational processes, systems, and resources. It encourages affected entities to initiate the necessary analyses and technical preparations to adapt effectively. Entities should assess whether substantial functional or organisational changes are required, maximise the use of existing tools and mechanisms, and explore new solutions to ensure a smooth transition to T+1.

AI I LUXEMBOURG DRAFT LAW IMPLEMENTING THE EU ARTIFICIAL INTELLIGENCE ACT

On 23 December 2024, Draft Law No. 8476 was issued to implement key provisions of Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024, which establishes harmonized rules on artificial intelligence (the **AI Regulation**). The Draft Law, currently pending approval by Luxembourg's Parliament (*Chambre des Députés*), focuses on implementing the organizational and procedural aspects of the AI Regulation in preparation for the application of certain of its provisions in February 2025. The measures proposed in the draft law align with the European Union's (**EU**) well-established regulatory framework. As such, its adoption presents an opportunity to gain a deeper insight into the procedural aspects of the AI Regulation.

Background

The AI Regulation is a landmark legislative effort, establishing the first comprehensive global framework to regulate the increasingly widespread use of artificial intelligence (AI). It reflects the European Union's ambition to lead in governing delicate, unregulated areas and to steer the global economy toward sustainability, much like its efforts in the environmental, social, and governance (ESG) domain - see several contributions from our October 2024 Newsletter for more on this topic.

With the rise of so-called Big Tech companies, primarily based in the United States, and the growing market for AI-embedded products and services, the AI Regulation requires an extensive regulatory structure. This framework must effectively identify high-risk AI systems and implement appropriate remedies within the EU's common market of twenty-seven Member States.

The organizational structure, powers, and procedures outlined in Draft Law No. 8476 are largely inspired by Regulation (EU) 2019/1020 on market surveillance and compliance of products (the **Compliance Regulation**). As the cornerstone of EU market surveillance, the Compliance Regulation establishes mechanisms for ensuring adherence to harmonized EU rules, defining enforcement powers, sanctions, and cooperation procedures for national authorities.

The AI Regulation does not detail all procedural aspects of its enforcement, instead delegating to Member States the responsibility of identifying the competent authorities in accordance with the principles set out in the Compliance Regulation. Draft law No. 8476 thus helps bridging this regulatory gap within Luxembourg's national framework.

Notifying and Conformity Assessment Bodies

As with other sectors governed by EU regulations, market entry for AI products and services relies primarily on conformity self-assessment by national producers and service providers. AI providers deploying non-high-risk AI systems, such as chatbots or AI-based recommendation engines, must ensure compliance with the transparency and ethical principles outlined in the AI Regulation. However, these providers are not required to obtain prior approval before introducing their products to the market. Each provider must determine whether their AI system falls under the "high-risk" category using the criteria defined in annex III of the AI Regulation.

Conversely, providers of high-risk AI systems are not only under an obligation of self-assessment but need to make sure that the authorities of the member state where they are established are formally notified about their deployment. For this purpose, under the AI Regulation certain national authorities, designated as "notifying authorities", have the role of informing the European Commission and other national authorities of the notifications received. Draft Law No. 8476 clarifies that in Luxembourg such notifying authorities essentially are (Article 2 thereof):

- The *Office luxembourgeois d'accréditation et de surveillance* (OLAS);
- The *Agence luxembourgeoise des médicaments et produits de santé* (ALMPS) with respect to high-risk AI systems applied to medical devices and their accessories, and diagnostic medical devices; and
- The *Commissariat du gouvernement à la protection des données auprès de l'État* (CGPD) with respect to AI systems potentially affecting personal data as needed in procedures managed by the state and its ministries and bodies.

Given the risk of regulatory capture vis-à-vis the need for an unbiased application of the AI Regulation, Draft Law No. 8476 expressly establishes that notifying authorities need to exercise their powers independently, impartially and without bias (Article 5 thereof, elaborating on Article 31 (6) of the AI Regulation). As bodies entrusted of functions of general interest, notifying authorities are expected to exert a crucial role in ensuring respect for fundamental rights.

It is worth noting that the assessment of high-risk AI systems is not immediately carried out by the notifying authorities, but by conformity assessment bodies (**CABs**). These are independent organizations designated by notifying authorities themselves to assess compliance of AI systems classified as high-risk with the rules of the AI Regulation, based on standards, documentation, testing, and audits and respect for safety, transparency and human oversight requirements. As CABs ultimately prepare the relevant notifications for notifying authorities, they are regulated entities subject to the requirements of the AI Regulation (among which impartiality) and remain under the surveillance of the notifying authorities.

Due to the sensitive nature of the data involved, the case of high-risk AI systems for the use of law enforcement, immigration or asylum authorities or EU institutions or bodies, the assessment normally carried out by CABs is afforded to the *Commission nationale pour la protection des données* ("**CNPD**") (Article 6 of Draft Law No. 8476).

Surveillance Authorities

Surveillance authorities have tasks of wider scope than notifying authorities, encompassing the oversight of compliance with the AI Regulation by all market operators. Draft Law No. 8476 adopts a competence-based approach to identify surveillance authorities in Luxembourg. It expands the tasks of existing authorities and bodies to include oversight of all relevant stakeholders of AI systems (e.g., suppliers, distributors, deployers, operators). Consistently, the following entities are identified as surveillance authorities, insofar as AI systems are placed on the market, put into service or used by entities subject to their supervision (Article 7 of Draft Law No. 8476):

- the *Commission nationale pour la protection des données* (CNPD);
- the *Autorité de contrôle judiciaire*;
- the CSSF and the *Commissariat aux assurances* (CAA);
- the *Institut luxembourgeois de la normalisation, de l'accréditation, de la sécurité et qualité des produits et services* (ILNAS);
- the *Institut luxembourgeois de régulation* (ILR);
- the *Agence luxembourgeoise des médicaments et produits de santé* (ALMPS); and
- the *Autorité luxembourgeoise indépendante de l'audiovisuel (ALIA)*.

Among these, the CNPD is designated as the horizontal market surveillance authority by default, which is easily explained as a large amount of data processed by AI systems are personal data and most of AI practices covered by the AI Regulation involve the use of personal data. It is also worth noting that, in conformity with the rules of the banking union, the CSSF is urged to communicate to the European Central Bank any information on AI systems, as identified in the course of its market surveillance activities, which could be of potential interest for the prudential supervision tasks thereof.

In an effort of regulatory completeness, Draft law No. 8476 defines the list of missions of surveillance authorities by expressly referring to the list of missions contemplated under the Compliance Regulation (Article 8 thereof). With respect to AI-embedding products or services marketed in the EU common market, these can be summarised as (i) oversight of market operators, (ii) adoption of appropriate and proportionate corrective actions in case of non-compliance with the AI Regulation, and (iii) proportionate and adequate sanctioning, where required.

Furthermore, Draft Law No. 8476 also refers to the list of powers considered under the Compliance Regulation (Article 9 thereof), the most significant of which are the following:

- obtaining documents and, in general, information of any kind on AI systems, as relevant for the enquiry, from market operators;
- launching enquiries and starting investigations on market operators;
- carrying out inspections and dawn raids as well as physical checks of products;
- obtaining access to premises, land, means of

transporting, etc.;
- requiring market operators to take appropriate actions to end non-compliance or eliminate risks;
- taking measures in case of failure to take corrective actions or eliminate risks, including restricting the availability of products on the market, or ordering to withdraw or recall them;
- sanctioning market operators; and
- acquiring product samples, including under a cover identity, to inspect them.

Similarly to notifying authorities, surveillance authorities also need to exercise their powers independently, impartially and without bias (Article 11 thereof, elaborating on Article 31 (6) of the AI Regulation). Thus, by ensuring compliance with the AI Regulation, surveillance authorities play a critical role in fostering trust in AI systems while safeguarding public interests.

Cooperation among EU National Authorities

Draft law No. 8476 also contain rules aimed at clarifying the provisions of the AI Regulation relating to cooperation among national authorities (both notifying and surveillance), which is crucial to ensure a uniform application of the regulation across EU member states, thereby enhancing the fairness and predictability of its enforcement. In this framework, the CNPD is designated as the single contact point (in accordance with Article 70(2) of the AI Regulation).

In this framework, in conformity with the principle of loyal cooperation (Article 4(3) of the Treaty on the Functioning of the European Union), national authorities need to coordinate and cooperate where required for the application of the AI Regulation. In line with these objectives, in AI regulation and other regulated sectors, national authorities may establish formal cooperation agreements to enhance information sharing and coordination.

Under the AI Regulation, oversight decisions taken by a national authority to correct cases of incompliance potentially exceeding the member state's territory are notified to the European Commission and fellow surveillance authorities. In case of non-compliance with such corrective decisions, national authorities may prohibit or restrict the marketing of incompliant AI systems (Article 79 of the AI Regulation). Where even such restricting measures remain unobserved, the European Commission may step in to steer a Union safeguard procedure involving national authorities and operators, which could terminate with a decision effective towards these as well as for the whole EU common market (article 81 of the AI Regulation).

In accordance with Article 14 of Draft law No. 8476, professional secrecy – although protected under various Luxembourg sectoral regulations – must not obstruct cooperation and the exchange of information when necessary to ensure effective market surveillance and enforcement of the AI Regulation.

The Way forward

Draft law No. 8476 significantly aligns Luxembourg's regulatory landscape with the EU's ambitious efforts to establish an AI harmonized framework aimed at ensuring that AI systems entering the market adhere to transparency, ethical, and safety requirements. From this standpoint, both the establishment of a competence-based approach to surveillance and designation of the CNPD as the single contact point reflect the critical role of expertise and data protection in AI governance, underscoring the need for robust oversight mechanisms, especially for high-risk AI applications.

As in the case of other EU regulated areas, effective cross-border coordination, information sharing and reacting against incompliant operators will be essential to prevent regulatory gaps and inconsistencies potentially undermining the overarching objectives of the AI Regulation. Achieving the right balance between innovation and regulatory oversight will be crucial in ensuring that AI technologies contribute positively to society while mitigating potential risks. This is particularly significant considering that AI systems are massively driven by non-European based industry.

With respect to this, the reliance on CABs for high-risk AI systems, though not unknown in other EU common market areas, also introduces potential challenges, including the risk of regulatory fragmentation and forum shopping across EU Member States. Ensuring that CABs operate independently, impartially, and in close coordination with notifying authorities will be one of the crucial points to maintaining public trust and ensuring consistent enforcement across jurisdictions.

KEY CHANGES IN THE LUXEMBOURG TAX LANDSCAPE FOR 2025

Significant changes have taken place in the Luxembourg tax landscape in the course of the year 2024, as demonstrated by the intense legislative activity until the last days of 2024, with several measures taking effect as from fiscal year 2025, as summarised below.

Corporate taxpayers

- **Corporate income tax reduction by 1%** bringing the standard rate from 17% to 16% resulting in an aggregate tax rate of up to 23.87% (incl. municipal business tax and solidarity surcharge) instead of 24.94% for a company with its registered seat in Luxembourg-City (see our July 2024 newsflash).
- **Minimum net wealth tax is simplified** as from 2025 with only three brackets (EUR 535, EUR 1,605 and EUR 4,815) and reliance only on the total balance sheet size (see our May 2024 newsflash).
- **Share redemption tax regime** is clarified on the basis of previous case law with specific conditions now set out in the law (see our May 2024 newsflash).
- **Opt-out mechanism for dividends and capital gains exemption:** as from fiscal year 2025, where an exemption of dividends/capital gains is available under the participation exemption regime solely relying on the minimum acquisition price threshold or where the requirements to obtain a 50% exemption on dividends are met, the taxpayer can opt out of the exemption annually and per participation (see our May 2024 newsflash).
- The rules limiting the deduction of interest expenses are amended as from fiscal year 2025 for entities forming a single entity group.
- **Tax credit for investment**, applicable to corporate taxpayers and entrepreneurs, is amended as from fiscal year 2024, reaching up to 18% of eligible investments or expenses with specific rules for digital transformation, ecological and energetic transition (see our dedicated newsflash).
- **Simplified liquidation** and its related tax regime has now been clarified by the Luxembourg direct tax administration by way of a circular (see our dedicated newsflash).
- **Mandatory digital filing for tax returns** is extended as from fiscal year 2025 to include several withholding tax returns and most notably the withholding tax returns for directors' fees (see our May 2024 newsflash).

Actively managed ETFs and Private wealth management companies ("SPF")

- **Actively managed ETFs** now benefit from a full subscription tax exemption.
- **SPFs**: the minimum subscription tax is increased from EUR 100 to EUR 1,000 and audit measures are reinforced.

Pillar Two

Luxembourg legislator continued the update of the Luxembourg domestic Pillar Two legislation introduced in 2023 (see our July 2024 newsflash). Amendments include several measures from subsequent OECD administrative guidance issued until July 2024 and have been reflected in the Law of 20 December 2024 (Official Gazette N° 576 of 23 December 2024) with retroactive effect to fiscal years starting 31 December 2023.

The Government aims at maintaining the Luxembourg Pillar Two legislation compliant with OECD requirements and to provide in-scope taxpayers with the highest amount of legal certainty, thus further updates can be expected depending on future developments at OECD level.

Tax measures enhancing the employment market

The following measures apply, unless mentioned otherwise, as from fiscal year 2025 (see our July 2024 newsflash):

- **Impatriate tax regime is simplified** with a 50% exemption of the salary up to an annual gross salary of EUR 400,000.
- **The participative bonus regime** providing for a 50% exemption of the bonus paid to employees in connection with the employer's profits is enhanced with the increase of applicable thresholds.
- **Employees entering the workforce** can benefit from a **75% tax exemption for the bonus** paid by the first Luxembourg employer under a permanent contract for a 5-year period. The employee must be

below 30 at the beginning of the year and the annual salary below EUR 100,000.

- **A tax credit for cross border workers' overtime hours subject to taxation in their country of residence** is introduced subject to certain conditions which, in practice, should mainly apply to German residents.
- A **partially tax-exempt** (25%) **rent subsidy** that can be paid by the employer to its employee below 30 since 1 June 2024, subject to certain conditions (see our dedicated newsflash).
- **The tax credit for the hiring of unemployed persons** is extended until 31 December 2026.

Tax measures targeting the real estate sectors

The Government adopted several measures to ease existing tensions on the real estate sector (see our February 2024 newsflash):

- **Short term targeted measures only for 2024** include (i) an increase by EUR 10,000 of the allowance for registration and transcription duties for the acquisition of the main residence, (ii) a EUR 20,000 allowance for registration and transcription duties for investment in rental properties (sold in future state of completion, "**VEFA**") by individuals, (iii) a reduced tax rate for capital gains on Luxembourg real estate held for more than 2 years, (iv) a roll-over of real estate capital gains and (v) a special deduction which adds to the usual amortisation for rented real estate acquired in 2024 in future state of completion.
- **Long term measures** include (i) an increase of the holding period from 2 to 5 years to benefit from the more favourable long term real estate capital gains regime, (ii) the extension of the favorable regime for disposals and rentals through organism in charge of social housing and (iii) an increase in the tax deductibility of interest expenses in relation with the acquisition of the main residence.

Draft Law No. 8470 has been submitted to the Luxembourg Parliament (*Chambre des Députés*) on 18 December 2024, in order to extend the short-term measures of 2024 to the first semester of 2025, but it has not been voted yet.

In addition, the 2025 budget law reduced by 50% the taxable basis for registration and transcription duties applicable to real estate acquisitions between 1 October 2024 and 30 June 2025, subject to certain conditions (see our dedicated newsflash).

Tax measures for individuals

As from fiscal year 2025, an adjustment to the tax scale with 2.5 indexation tranches has taken effect together with targeted measures alleviating the tax burden for taxpayers within Class 1a, for single parents, taxpayers with children outside the household and taxpayers paid the minimum tax wage (see our July 2024 newsflash).

Looking forward, the Government is working towards the implementation of a single tax class for individuals with a first project to be issued in 2026.

Tax administration and procedure

In March 2023, the Government had submitted to the Luxembourg Parliament Draft Law No. 8186 aiming at implementing an ambitious reform of Luxembourg tax procedures. Pursuant to initial backlash on the erosion of taxpayer rights foreseen in the draft law, the project has been split in two, and while the first significant part of the reform is still undergoing legislative process, the second part has been introduced through the Law of 20 December 2024 (Official Gazette N° 571 of 23 December 2024), with the following notable measures for taxpayers:

- **Payment of the tax liability in instalments**: corporate and individual taxpayers can request a payment through instalments of their tax liability directly to the officer in charge of tax collection (*receveur*). Taxes concerned are corporate income tax, municipal business tax and net wealth tax for corporate entities and income tax for individuals (excluding withholding taxes and tax advance payments). Several conditions apply:
  - a specific and motivated requested should be addressed to the tax collector,
  - the payment of the initial tax liability must result in considerable difficulties for the taxpayer and
  - the tax claim must not be jeopardised by the granting of the additional deadline (the tax authorities can request guarantees). The payment in instalments does not prevent the application of interests for late payments. The relevance of this additional procedure compared to the pre-existing request for a deferred payment, is that the new procedure can take place after the due date for payment.
- **Statute of limitations and exit tax**: amendments

clarify that in case a deferred payment of the tax liability is obtained in the context of the application of an exit tax, the statute of limitation is suspended, thus ensuring that the exit tax liability is not extinguished by the statute of limitation prior to its payment within the standard statute of limitation period.

Other relevant measures notably include the implementation of exchange of information possibilities between the tax authorities and the CSSF as well as the *Commissariat aux assurances* to enhance their cooperation within their respective fields of supervision.

VAT I NEW CIRCULAR AND PROCEDURE FOR THE REIMBURSEMENT OF VAT ON DIRECTOR FEES

On 11 December 2024, the Luxembourg Indirect Tax Authorities (*Administration de l'enregistrement, des domaines et de la TVA*) issued a new circular No. 781-2 on the VAT treatment of director's fees following the decision of the European Court of Justice (the "**ECJ**") in case C-288/22, *TP* v. *Administration de l'enregistrement, des domaines et de la TVA* and the subsequent judgment of the Luxembourg civil tribunal, 3rd Chamber dated 22 November 2024 No. 2024TALCH03/00180.

VAT treatment of directors' fees

On 22 November 2024, the Luxembourg civil tribunal handed down its decision on the VAT treatment of director fees applying the ECJ's decision. The civil tribunal found that the director of a Luxembourg limited company (*société anonyme*) carries out, in principle, an economic activity within the meaning of the law dated 12 February 1979 on value added tax (**VAT Law**), as the activity of company director is **remunerated and permanent in nature.** It however found that this activity is not carried out independently within the meaning of the VAT Law because, despite the fact that the board member (i) is free to arrange how he or she performs their work, (ii) receives the emoluments making up his or her income, (iii) acts in his or her own name and (iv) is not subject to an employer-employee relationship – he or she does not act on their own behalf or under their own responsibility and does not bear the economic risk linked to their activity.

It follows that a member of the board of directors of a limited company who (i) does not act on their own behalf or under their own responsibility and (ii) does not bear the economic risk linked to their activity, does not exercise his activity as board member independently and therefore cannot be considered as a taxpayer within the meaning of VAT**. Director fees are therefore not subject to Luxembourg VAT**.

Scope of the circular and reimbursement process

Per their newly published circular No. 781-2, the Luxembourg Indirect Tax Authorities have announced that the consequences of this decision will **extend to all company forms under Luxembourg law**, if the director meets the above description.

Eligibility for VAT reimbursement

Thus, all directors which meet the above criteria may benefit from a reimbursement of VAT collected in the exercise of their directorship. Directors may apply for a reimbursement for all years which are not time-barred. In addition, the administration has announced that it will waive the prescription for the years 2018 and 2019, if the **reimbursement request is filed before 1 July 2025**. To obtain reimbursement, directors should file an online request accessible on myguichet.lu which will be accessible **until 30 June 2025** (https://pfi.public.lu/fr/services-en-ligne.html).

Impact on input VAT deductions

The administration will not reexamine input VAT deductions for simple expenses which the director may have incurred during the exercise of this directorship. However, significant deductions such as capital expenditure may be re-examined.

Impact on non-resident directors

Finally, directors who meet the above criteria, but are not established in Luxembourg do not have a right to request a reimbursement since the VAT on director fees was collected by the Luxembourg company who received the service. Those companies may correct their VAT position for all years concerned in their next annual return.

UCI I NEW CIRCULAR ON TAX RESIDENCY CERTIFICATES TO BE ISSUED

On 24 December 2024, the Luxembourg Direct Tax Authorities issued the new circular L.G.-A No. 61 replacing the previous circular dated 8 December 2017 (please see our previous newsletter dated 8 February 2008 for more details) which outlines the procedure for applying for tax residency certificates for collective investment funds (the "**Circular**").

The main change compared with the previous version of the Circular concerns the scope of double tax treaties covered by the Circular. Such scope has indeed been extended to include amended double tax treaties and those which have been newly entered into by Luxembourg (i.e. the double tax treaties with Botswana, Cyprus, Ethiopia, France, Hungary, Kosovo, United Kingdom, and Rwanda). All of these new double tax treaties include a positive provision treating investment funds incorporated under the form of companies as "residents" within the meaning of the double tax treaty.

LUXEMBOURG CASE LAW I HIGHER ADMINISTRATIVE COURT RULES ON THE VALUATION METHOD TO BE RETAINED FOR SHARES RECEIVED BY WAY OF DONATION

Key takeaways

On 21 November 2024, the Luxembourg Higher Administrative Court (*Cour administrative*) handed down a decision regarding the acquisition value and the acquisition date to be ascribed to shares received by way of donation. This was particularly relevant in the context of the computation of liquidation proceeds in the present case.

Facts of the case

Mr. and Mrs. A received, free of charge by way of a donation from their daughter Mrs. A2, the shares in the Company B in December 2016. The shares in Company B were originally subscribed, in July 2016, by Mrs. A2 through a contribution in cash and a contribution-in-kind of shares in the Company C (which were themselves acquired by Mrs. A2 in 2014) (the "**C Shares Contribution**"). Mrs. A2 was tax-resident in Switzerland at the time of the incorporation of Company B.

In 2019, Company B was liquidated under the ownership of Mr. and Mrs. A resulting in the distribution of liquidation proceeds (the "**Liquidation Proceeds**"). Following an audit, the Direct Tax Authorities (*Administration des contributions directes*) (“**DTA**”) issued a letter informing the two Luxembourg taxpayers that the DTA intended to reassess their joint income tax return on the grounds that the Liquidation Proceeds constitute taxable “miscellaneous revenues” in the spouses’ hands (the "**Rectifying Tax Assessment**"). The spouses filed a claim against the Rectifying Tax Assessment whereby they provided a valuation report (issued ex post) evidencing that the amount of the Liquidation Proceeds should be *reduced by the value of the Company B at its incorporation* resulting into a tax loss into the hands of the spouses as such a historical value of Company B’s shares should be effectively higher than the receipt of the Liquidation Proceeds. More particularly, the applicants argued that the historical cost of Company B’s shares subscribed by their daughter should coincide with the fair market value of the Company C’s shares as determined at the date of the C-Shares Contribution and thus evidenced by the ex-post valuation report provided by the spouses. Nonetheless, neither the DTA nor the Lower Administrative Court (*Tribunal administratif*) recognised the characterisation of a tax loss into the hands of the spouses upon the receipt of the Liquidation Proceeds, the spouses therefore had to file an appeal before the Higher Administrative Court.

Decision of the Higher Administrative Court (*Cour administrative*)

Acquisition cost of the Company B’s share determined by the Higher Administrative Court

The acquisition cost of a participation representing the share capital of the company B, acquired by Mr. & Mrs. A free of charge by way of a donation should coincide with the acquisition priced paid by the previous holder who last acquired the property against consideration (art. 100 and 102 (3) of the Luxembourg Income Tax Law (the "**LITL**"). On this point, the Higher Administrative Court confirmed that the historical date of acquisition and historical acquisition values of the shares in the Company B to be recognized into the hands of Mr. & Mrs. A should stem from the acquisition date and acquisition values at which their daughter subscribed for shares in the Company B in exchange of the C-Shares Contribution. According to the Higher Administrative Court, such a share-for-share exchange should in principle be performed at its estimated disposal value (*valeur estimée de réalisation*) considering that none of the conditions for the application of the tax-neutral share-for-share exchange regime were met in the case at hand.

Determination of the estimated disposal value of the shares held by Mrs. A2 in the Company B

The Higher Administrative Court reminds that the estimated disposal value should coincide with the value that should “*be obtained during a normal and freely consented alienation of the carefully considered taking into account all circumstances and conditions affecting the price, except for abnormal or personal circumstances and conditions*”. In order to identify said value, the Higher Administrative Court assessed the value retained for the purposes of the C-Shares Contribution for which a valuation report had been prepared by an independent auditor at the time of the transaction. In particular, such historical valuation report evidenced that the fair market value of Company C's shares should at least equal the issuing value of the Company B's shares.

In the absence of any other supporting documentation sustaining a different fair market value embedded into Company C's shares from the contributor's perspective (Mrs. A2) at the time of the C-Share Contribution, the Higher Administrative Court therefore considered that the subscription price of the shares issued by Company B attributed to Mrs. A2 (upon the C-Shares Contribution) should be regarded as the initial acquisition cost of Company B's shares held by Mrs. A2. Indeed, and as per the Court's argumentation, such a subscription value should be regarded as the "*price to be considered as the one determined by the parties in the context of the normal and freely consented alienation of the contemplated property.*" Therefore, this same acquisition value should be fiscally attributed to Mr. & Mrs. A by reason of their acquisition of Company B's shares by way of donation.

As a result of all the above, the Higher Administrative Court ruled that both the DTA and the Lower Administrative Court retained the correct valuation method pertaining to the historical cost of the shares held in Company B by Mr. & Mrs. A and thus confirming the realisation of a taxable profit i.e., the Liquidation Proceeds, upon the dissolution of the Company B rather than a tax loss.

DOUBLE TAX TREATY I LUXEMBOURG – OMAN

On 16 October 2024, the Grand Duchy of Luxembourg and the Sultanate of Oman have signed a treaty 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**"). The ratification of the DTT is currently pending in Luxembourg.

The DTT will take effect on 1st January of the year following the exchange of notifications, between the contracting states, confirming that the procedures required by their respective legislations for the entry into force have been satisfied. In other words, the earliest the DTT could become applicable would be 1 January 2026, if the procedures are completed in both countries this year.

Withholding taxes

Withholding tax on dividends paid to beneficial owners who are resident in the other Contracting State cannot exceed 0%, if the beneficial owner is a company that holds, directly or indirectly, at least 10% of the capital of the paying company. In all other cases, the withholding tax on dividend distributions shall not exceed 10%.

Interest arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that other Contracting State. This means that no withholding tax can be levied by the Contracting State on interest payments. By providing for the exclusive taxation of interest payments in the Residence State, the DTT diverges from the OECD model convention.

Withholding tax on royalty payments made to beneficial owners in the other Contracting State cannot exceed 8%. On this point, the DTT diverges again from the OECD model convention, which provides for exclusive taxation of royalties in the Residence State only.

Independent personal services

Interestingly, the DTT also includes a specific provision for professional services of or other activities of an independent character in Article 14, which shall especially include independent scientific, literary, artistic, educational or teaching activities, as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants. Any such income derived by a resident of one Contracting State may be taxed in the other Contracting State, in case the professional services are carried out through a fixed base regularly available to the taxpayer in that other Contracting State. On this point again, the DTT diverges from the current OECD model convention, which recommends to not independently refer to independent personal services, but to include them in the general taxation of business profits section.

Capital gains

In line with the OECD model convention, the DTT generally provides that capital gains are taxed only in the Contracting State where the alienator is a resident. However, no real estate rich clause has been included, as currently recommended by the OECD model convention.

Elimination of double taxation

In general, Luxembourg will apply the exemption method for the purpose of eliminating double taxation for most types of income. In certain situations, like business profits, dividend, royalties and capital gains, Luxembourg will apply the credit method. However, concerned taxpayers may nevertheless rely on the domestic participation exemption provided they meet the conditions, with the specific addition that the comparable taxation test should be met, even if the Omani company is exempted from tax or taxed at a reduced rate in the Sultanate of Oman and if these dividends are derived out of profits from activities in agriculture, industry, infrastructure or tourism in the Sultanate of Oman.

Entitlement to benefits

As recommended by the OECD model convention, the DTT includes an entitlement to benefits clause, which however remains limited, by solely including a principal purpose test and foreseeing the possibility of discretionary relief.

Certain collective investment vehicles may benefit from the DTT

The governments of Luxembourg and Oman agreed, in a protocol to the DTT, that they will consider any collective investment vehicles which are established in a Contracting State, and which are treated as a body corporate for tax purposes in that Contracting State as residents and as the beneficial owner of the income they receive for the purpose of the DTT. Likewise, collective investment vehicles which are established in a Contract State and which are not treated as a body corporate for tax purpose shall be considered as resident individuals and as the beneficial owner of the income they receive for the purpose of the DTT.

EUROPEAN COURT OF JUSTICE DENIES THE TAX DEDUCTION OF (ARM'S LENGTH) INTEREST EXPENSES IN THE CONTEXT OF A NON-GENUINE ARRANGEMENT

On 4 October 2024, the European Court of Justice (the "**ECJ**") (Case C-585/22) ruled that Article 49 of the Treaty on the Functioning of the European Union (the "**TFEU**"), which guarantees the freedom of establishment, does not preclude national legislation from fully denying the deduction of interest paid on loans from related entities used to acquire or increase a stake in another entity, which is or becomes, following that acquisition or increase, a related entity, provided that such debt constitutes a wholly artificial arrangement or is part of one, even if the debt is on arm's length terms and the amount of interest does not exceed that which independent undertakings would have agreed upon.

Facts

In the case at hand, a Dutch company (the "**DutchCo**"), wholly owned subsidiary of a Belgian company (the "**ParentCo**"), received arm's length loans from a Belgian direct sister company (the "**SisterCo**") benefiting from a special tax regime as a "coordination center" under Belgian tax law, to finance the acquisition of a majority stake in an unrelated Dutch entity (the "**Target**").

The Dutch tax authorities refused to deduct the interest payments made by DutchCo to SisterCo under the Article 10a of the Netherlands Corporate Tax Law (the "**Article 10a**"), which foresees the non-deduction of interest paid by an entity subject to tax and resident in the Netherlands on intra-group loans used for, *inter alia*, acquiring or increasing an interest in an entity, which is or becomes a related entity following that acquisition or increase, unless if it can be demonstrated, *inter alia*, that one of two exceptions is met: (i) economic justification: commercial / economic rationale behind the transaction or (ii) sufficient taxation: a reasonable profit-based tax of at least 10% per the Netherlands criteria is levied by the lender's jurisdiction on the interest income, without offset with carried-forward losses or charges resulting in no tax (except if the loan offsets losses or charges which arose during the year or will arise in the short term).

DutchCo challenged the refusal first before the competent District Court and subsequently before the Court of Appeal in the Netherlands. The latter held that the Article 49 of the TFEU does not preclude the application of Article 10a, unless one of the two exceptions is satisfied. Following this decision, DutchCo lodged an appeal before the Supreme Court of the Netherlands, which referred questions to the ECJ for a preliminary ruling. The ECJ was asked, in essence, to determine whether this national legislation is compatible with Articles 49, 46, and 63 of the TFEU, which guarantee the freedom of establishment, free movement of services, and free movement of capital, respectively.

Reasoning of the ECJ

The ECJ recalled that any difference in treatment (between an entity of a Member State and an entity of another Member State) resulting from a national legislation to the detriment of companies exercising their freedom of establishment is permissible, only if it relates to situations which are not objectively comparable, or if it is justified by an overriding reason in the public interest and is proportionate to that objective.

The three-step reasoning of the ECJ started first by analysing whether there is effectively a difference of treatment, then whether the situations were comparable and thirdly whether the difference of treatment may be justified by an overriding reason in the public interest and whether it is proportionate to that objective.

The difference of treatment

The ECJ considered that even though the two conditions of the Article 10a under which such a deduction is possible, is applicable without distinction to national and cross-border situations, the referring Court was of the view that the criteria of Netherlands law, requiring a taxation of at least 10% of the taxable profit determined in accordance with Dutch rules, nevertheless has the effect of placing cross-border situations at a disadvantage. Indeed, the referring Court considered that the condition at issue is generally satisfied for a resident entity while it is less often fulfilled for a non-resident entity due to potential discrepancies between the foreign profit determination rules and the Dutch ones.

Although the EU judges deferred to the referring Court as to assess and interpret the national legislation, it considered that if a taxation at a rate of less than 10% was not practised under the Netherlands tax regime, the condition at issue affects only cross-border situations. Hence, they held that this national legislation involves a difference in treatment which is liable to affect the exercise of freedom of establishment and examined subsequently whether the situations are not objectively comparable.

The comparability of the situations

The EU judges ruled that, regarding tax advantages, such as deducting interest on intra-group debts, a taxpayer's situation does not differ based on whether the recipient entity is in the same Member State or another with more favourable tax treatment. They concluded that a taxpayer is not in a different situation solely because the recipient entity is established in another Member State, where the interest is taxed at a rate not exceeding 10% on a taxable profit determined in accordance with Dutch rules.

Justification

The ECJ, after identifying a difference in treatment, examined whether it could be justified by an overriding reason of public interest and whether it was proportionate to that objective.

Justification by overriding reason of public interest

In accordance with its constant case-law, the ECJ emphasized that the objective of preventing tax fraud and tax evasion as well as combatting wholly artificial arrangements lacking economic substance (aimed at avoiding taxes on profits generated within a national territory) constitutes overriding public interest, justifying a restriction on the freedom of movement guaranteed by the TFEU.

The EU judges found that the legislation at hand intends to address the artificial nature of transactions arising from the redirection and conversion of own funds into loan capital and this, regardless of whether the taxpayer and its subsidiary are already or become related following the acquisition or increase in ownership.

The proportionality with the objective pursued

The ECJ first assessed whether the legislation effectively achieves its anti-abuse objective in a consistent and systematic manner without exceeding what is necessary.

It concluded that to pursue such a tax anti-abuse objective, national legislation can establish a presumption of tax abuse if there is *prima facie* evidence or objective indicators of fraud, provided that taxpayers can rebut this presumption by demonstrating the transaction's economic substance. In the present case, borrowing loans from a related entity for the acquisition or increase of an interest in an entity which, following that acquisition or increase, is or becomes a related entity were considered indicators of artificial arrangements, with taxpayers allowed to rebut the presumption by satisfying the conditions outlined in Article 10a.

The ECJ then addressed whether intra-group loans agreed at arm's length terms could avoid classification as artificial arrangements. It clarified that non-arm's length loans trends toward an objective element of an artificial arrangement, without inferring that compliance with arm's length terms alone does not automatically rule out an arrangement being artificial. It highlighted that the assessment relates not only to the terms of the loans but also to the overall economic reality of the transaction, beyond its formal conditions.

The ECJ reiterated that EU law cannot be used to obtain a right or advantage when the transaction is purely artificial economically and designed to circumvent the application of the national legislation. It emphasized proportionality in the treatment of intra-group loans: where interest rates are exceptionally high but reflect economic reality, only the portion exceeding market rates may be disallowed. However, loans not economically justified that exist only due to the relationship and because of the tax advantages being sought, denying the full deduction is appropriate to prevent wholly artificial arrangements.

Therefore, according to the EU judges, when a purely artificial arrangement lacking economic substance is established and aimed at circumventing the national legislation, denying the deduction of all interest expenses resulting from such an arrangement is proportionate under EU law, regardless of whether the loan was concluded on arm's length terms.

EC DAC9 PROPOSAL | EXCHANGE OF PILLAR TWO INFORMATION RETURNS

On 28 October 2024, the EU Commission ("**EC**") introduced a proposal to amend Directive 2011/16/EU on administrative cooperation in the field of taxation ("**DAC**") to ease the exchange for Pillar Two information returns within the EU (the "**EC Proposal**").

Background

On 20 December 2021, the OECD and G20 Inclusive Framework on Base Erosion and Profit Shifting had issued Model Rules for the implementation of Pillar Two designed to guarantee a minimum level of taxation of a multinational enterprise ("**MNE**") group.

On 14 December 2022, Directive 2022/2523 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union (the "**Pillar Two Directive**") was adopted. This Directive is based on the OECD Model Rules and had to be transposed by EU Member States by 31 December 2023.

Article 44 of the Pillar Two Directive addresses reporting obligations and provides that each constituent entity of an MNE or domestic group must file a Top-up Tax information return with its local tax authorities. As an exception, the Ultimate Parent Entity ("**UPE**") or a designated constituent entity, can file a single information return for the entire group under the condition that an agreement for the exchange of information is in place between the jurisdictions where the MNE group is established. According to the EC, the latter reporting procedure relying on a single point of filing is expected to be the main approach adopted by groups in scope of Pillar Two.

On 17 July 2023, the OECD released the GloBE Information return ("**GIR**"), a standard template for Pillar Two reporting, with an updated version released on 15 January 2025.

At Luxembourg level, the Pillar Two Directive has been transposed by the law of 20 December 2023 introducing a Top-up Tax, an undertaxed profits rules and a qualified domestic Top-up Tax as well as the reporting obligations foreseen by the Pillar Two Directive. This law has been updated by the law of 20 December 2024 to include subsequent OECD guidance and set the GIR as applicable reporting format.

Update to the DAC

The aim of the EC Proposal is to update the DAC to provide for the exchange of information of the Top-up Tax information return within the EU, thus making operational within the EU the possibility for a single information filing provided by Article 44 of the Pillar Two Directive (see above). The exchange of information with non-EU countries remains subject to the entry by each EU Member State into a relevant agreement (models of bilateral and multilateral agreements being developed at OECD level).

The Top-up Tax information return will be prepared under the format agreed by the Inclusive Framework, the GIR which would be an Appendix to the DAC. In addition, the possibility will be granted to the EC to take further procedurals acts to maintain the reporting format in line with potential developments at the level of the Inclusive Framework.

The filing deadlines provided by the Pillar Two Directive remain unchanged for relevant groups (see our previous newsflash in that respect) (as a reminder, the Top-up Tax information return should be filed within 15 months after the last day of the fiscal year (extended to 18 months for the first fiscal year).

The Member State receiving the Top-up Tax information return (i.e., Member State of the UPE or of the designated constituent entity) would exchange information with relevant Member States within 3 months (6 months for the first year) after the deadline to file the information return.

On the level of exchange, the EC Proposal adopts the "dissemination approach" as approved by the OECD, under which (i) the Member State of the UPE receives the entire Top-up Tax information return, (ii) Member States having a qualified IIR and/or UTPR receive the full general section, (iii) Member States having a QDMTT receive parts of the general section and (iv) Member States having taxing rights under the Pillar Two Directive receive jurisdictional sections.

Transposal

Once approved at EU level, the EC Proposal should be implemented by EU Member States by 31 December 2025.

TAX

Key Milestones in the Implementation of Pillar Two

- **20 December 2021** – OECD and G20 issue Model Rules for Pillar Two
- **14 December 2022** – Adoption of EU Pillar Two Directive
- **17 July 2023** – OECD releases GloBE Information Return
- **20 December 2023** – Luxembourg transposes Pillar Two Directive
- **20 December 2024** – Luxembourg updates law with OECD guidance
- **31 December 2025** – Deadline for EU Member States to implement EC Proposal

VAT I AGREEMENT ON VAT IN THE DIGITAL AGE PACKAGE

Introduction

On 5 November 2024, the Council adopted several measures aimed at conforming the value added tax ("**VAT**") rules to the digital age. The ViDA package will bring major changes to the VAT system.
The ViDA package is based on three main pillars:

- **Pillar 1: digital VAT reporting**

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

- **Pillar 2: VAT for the platform economy**

This second pillar introduces an obligation for platform economy operators providing passenger transport and short-term accommodation to collect and pay VAT to the tax authorities when service providers do not, for example because they are a small business or individual provider. In practice, platforms will be considered as "deemed suppliers", meaning that they will be considered to receive the relevant service from accommodation or transport supplier and provide this same service to the end-customer. This should ensure a uniform approach across the EU, contribute to a level playing field between online and offline providers and simplify life for SMEs, relieving them from having to understand and comply with VAT rules sometimes throughout several Member States.

- **Pillar 3: one-stop shop for VAT registration**

The aim of this measure is to facilitate VAT registration for businesses operating cross-border within the EU. A single VAT registration system will be established, by leveraging on the existing One-Stop Shop ("**OSS**") and Import One-Stop Shop ("**IOSS**") systems. This pillar allows companies operating in the European market to register only once and in one language for the entire EU. Fulfilment of VAT obligations is also intended to take place via a single online portal and in one single language. Administrative charges and related costs should thus be reduced by this measure.

Background and next steps

On 8 December 2022, the European Commission issued a legislative proposal concerning VAT in the Digital Age. The Commission's proposal specifically targets (i) Council directive amending directive 2006/112/EC regarding VAT rules for the digital age, (ii) Council regulation (EU) No 904/2010 as regards the VAT administrative cooperation arrangements needed for the digital age, and (iii) Council implementation regulation amending implementing regulation (EU) No 282/2011 as regards information requirements for certain VAT schemes.
The Commission's intention is to create a package with a series of measures to modernize the current VAT system to resist against tax fraud and adapt VAT to the digital age.
Originally, the proposal will enter into force gradually between 2024 and 2028. However, the Council has established a new timeline for Member States to adapt the new system between 2031 and 2032.
The text will now go through technical and linguistic checks before being presented to the Council for formal adoption. The texts will then be published in the EU's Official Journal and enter into force.
For more information, please refer to our previous newsletter on this topic.

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E-Invoicing and OSS Evolution

Early 2025
Implementation of domestic e-invoicing without EU Commission approval

January 2027
OSS extension to cross-border energy supplies (natural gas, electricity, heating, and cooling)

July 2028
OSS extension to include all B2C supplies of goods and services and intra-EU stock transfers

July 2030
- DRR/e-invoicing obligations for intra-EU transaction
- Harmonisation of domestic DRRs introduced after January 2024
- Mandatory deemed supplier rule for platforms (optional from 1 July 2028)

January 2035
Harmonisation of domestic e-invoicing introduced before 2024

FASTER I COUNCIL OF THE EUROPEAN UNION ADOPTS THE DIRECTIVE

On 10 December 2024, the Council of the European Union ("**Council**") formally adopted the [Directive for Faster and Safer Relief of Excess Withholding Taxes](#) ("**FASTER Directive**"). The FASTER Directive was subsequently published in the Official Journal of the European Union on 10 January 2025.

Key Measures Introduced by the FASTER Directive

The FASTER Directive introduces several key measures to streamline and harmonise withholding tax ("**WHT**") procedures across EU Member States:

- **Fast-track procedures**:
  - **relief-at-source procedure**: allows the application of reduced WHT rates or exemptions directly at the time of dividend or interest payment.
  - **quick refund procedure**: ensures refunds for over-withholding are processed within 60 days from the payment date.
- **Certified financial intermediaries ("CFIs")**:
  - CFIs, in collaboration with investors will assist in navigating the fast-track procedures.
  - CFIs are required to register in a national register and adhere to standardised reporting obligations to enhance transparency and reduce fraud.
- **Digital tax residence certificates ("eTRC")**:
  - introduction of a harmonized EU digital tax residence certificate, necessary for investors to benefit from the fast-track procedures.

For more information, please refer to our previous newsletter on this topic [here](#).

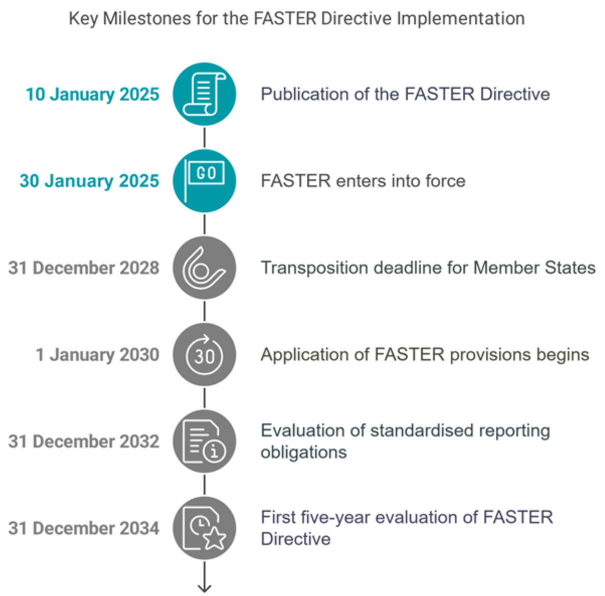
Next steps - Calendar

The FASTER Directive will enter into force on the 20th day following its publication in the Official Journal, on 30 January 2025.

Member States must transpose the Council Directive into their national legislation by 31 December 2028 and apply the provisions from 1 January 2030.

The Commission shall, by 31 December 2032, evaluate the impact of the mechanisms of standardised reporting obligations applicable to the CFIs and the option not to apply the relief procedure for certain EU Member States.

The Commission shall also, by 31 December 2034 and every five years thereafter, examine and evaluate the functioning of the FASTER Directive, including the potential need to amend specific provisions, and submit a report to the European Parliament and the Council.



LUXEMBOURG CASE LAW I COMPLIANCE WITH THE PRINCIPLE OF ADVERSARIAL PROCEEDINGS IN RELATION TO FINES FOR TAX OFFENCES

On 16 October 2024, the Lower Administrative Court (*Tribunal administratif*) annulled a decision by the Director of the Luxembourg Tax Authorities ("**LTA**") (*Administration des contributions directes*) to uphold and increase the amount of a fine imposed by the Tax Office on a tax consultancy company for unintentional tax fraud. The case concerns a tax fine that was imposed on the tax consultancy company for having unintentionally participated in a tax fraud committed by one of its clients by preparing fraudulent tax returns for him. The fine amounted to 5% of the tax evaded by the company's client. The company lodged a claim against this fine with the Director of the LTA. As part of his decision, the Director not only rebutted the Company's request, but also increased the fine to 10% of the tax evaded, i.e. it reformed *in pejus*.

In its appeal against the decision of the Director, the company first argued that the person who had signed the decision was not competent because no delegation of signing authority had been published by the Director of the LTA. According to the Lower Administrative Court, the law does not require the delegation of signing authority by the Director of the LTA to be published, so that the decision was validly signed.

Secondly, the company claimed that the principle of adversarial proceedings had been breached because the tax authorities had not contacted the company to find out about its activities and had not given it the opportunity to express its views before taking the decision. On this point, the Lower Administrative Court upheld the company's argument. Notably due to the penal nature of the decisions, the Lower Administrative Court emphasised the essential nature of the respect of principle of adversarial proceedings. The Lower Administrative Court found that neither the Tax Office nor the Director warned the taxpayer of their intention to impose (or to increase) the fine or communicated the reasons for their decisions to the taxpayer before imposing (or increasing) the fine. As the taxpayer had no opportunity to comment before the decisions were issued, no adversarial proceedings took place before the issuance of the Director's decision and the Lower Administrative Court thus annulled the Director's decision.

While the decision did not go further into the technicalities of application of fines to (tax) advisors for unintentional tax fraud, a type of fine the LTA increasingly started to use, it nonetheless provides helpful guidance as to the procedural aspects that need to be respected when trying to impose such fines.

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