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FINE-TUNED
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SUMMARY

FIGHT AGAINST MONEY LAUNDERING AND TERRORIST FINANCING | AMENDMENTS TO THE REQUIREMENTS FOR PERSONS SUBJECT TO THE AML LAW

On 12 August 2022, the law of 29 July 2022 entered into force (hereinafter the "**Law**") amending 1) the Code of criminal procedure, 2) the amended law of 8 August 2000 on international judicial assistance in criminal matters, 3) the amended law of 12 November 2004 on the fight against money laundering and terrorist financing (the "**AML Law**") and 4) the amended law of 10 July 2020 on the central fiduciary and trusts register (the "**RFT Law**").

The Law aims to further clarify, in a targeted manner, various legal provisions relating to the fight against money laundering and terrorist financing ("**AML/CTF**") and to bring them into line with international standards on AML/CTF and the recommendations of the Financial Action Task Force ("**FATF**"). The Law aims to clarify certain concepts in order to make them more precise and less susceptible to interpretation.

Change to the definition of persons subject to the AML Law

Changes are made to the definition of persons subject to the AML Law and specifically to the definition of a trust and company service provider ("**Trust and Company Service Provider**"). Thus, the undefined term "in a professional capacity" (à *titre professionnel*) is replaced by the term "*by way of a business relationship*" (*au titre d'une relation d'affaires*) which is defined by the AML Law.

Hence, a Trust and Company Service Provider is any natural or legal person who in "a business relationship" provides any of the services listed in the AML Law to third parties.

Among these services, the Trust and Company Service Provider may perform certain functions including that of "director" and "secretary" of a company. The Law adds "manager, director, member of the management board" (*gérant, administrateur, membre du directoire*) alongside the term "director" to clarify the functions that the Trust and Company Service Provider may also perform.

Customer due diligence and UBO identification

The professional subject to the AML Law is now under the obligation to identify both the client and the beneficial owner and to consult the register of beneficial owners ("**RBO**") and/or the register of trusts ("**RFT**") and to report to the RBO and to the RFT the existence of erroneous data, a lack of registration, modification or write-off in such registers. Professionals are also subject to this obligation in the context of the exercise of the monitoring of the business relationship.

The enhanced due diligence requirements for politically exposed persons ("**PEPs**") are more closely aligned with the wording of FATF Recommendation 12 relating to PEPs. In addition to the normal customer due diligence measures professionals will be required to apply enhanced measures provided for in the AML Law with regard to PEPs, "*whether the client, the person purporting to act for and on behalf of the client or the Beneficial Owner*" may be regarded as PEP as defined in the AML Law. Accordingly, professionals will need to verify the identity of persons with whom they start (or are in) a business relationship.

A closer cooperation between supervisory authorities

The Law allows the supervisory authorities to request their foreign counterpart authorities to carry out an investigation or inspection in the territory of that counterpart authority under certain conditions laid down in the Law.

Amendment of the Law on the register of trusts

The Law amends the RFT Law and specifies that trustees and fiduciaries are required to notify any change to the beneficial owner to the RFT within one month.

LUXEMBOURG FINANCIAL COLLATERAL LAW | AMENDMENT LAW ADOPTED

On 20 July 2022, the Luxembourg law amending, amongst others, the Luxembourg law of 5 August 2005 on financial collateral arrangements, as amended (the "**Financial Collateral Law**") was published in the Luxembourg official gazette (the "**New Law**"). The New Law became effective on 24 July 2022.

Key changes

In an article published on 14 January 2022, we summarised the highlights of the draft of this New Law (Draft law No. 7933). The New Law provides helpful clarification on what can be deemed an enforcement event in a financial collateral arrangement and also amends the provision of the existing law which describes the methods of enforcement. For a comprehensive overview of the changes introduced by the New Law we refer you to our previous newsletter article on the topic.

MARKET ABUSE | NEW IMPLEMENTING REGULATION AND UPDATED ESMA Q&A

New implementing regulation on insider lists

On 14 July 2022 and having regard to Regulation (EU) 596/2014 on market abuse ("**MAR**"), the Commission Implementing Regulation (EU) 2022/1210 of 13 July 2022 laying down implementing of technical standards for the application of MAR with regard to the format of insider lists and their updates ("**New Implementing Regulation**") was published.

The New Implementing Regulation repealed Implementing Regulation (EU) 2016/347 (the "**Former Implementing Regulation**").

Like its predecessor, the New Implementing Regulation provides templates for the insider lists which are required to be kept by issuers pursuant to MAR.

As regards the general format of the standard insider lists required pursuant to Article 18(1) of MAR, there have been no significant amendments to the template (provided as Template 1 in Annex 1). As regards the permanent insiders section of the insider lists, the template (provided as Template 2 in Annex 1), there have been no significant changes. However, the New Implementing Regulation provides more explanation on who can be included in the "permanent insiders" section in the insider lists by describing them as *persons, who due to the nature of their function or position have access to all inside information at all times*.

MAR was amended most recently by Regulation (EU) 2019/2115 (the "**2019 MAR Amending Regulation**") which introduced (in the first subparagraph of Article 18(6) of MAR) less stringent requirements for issuers whose financial instruments are admitted to trading on an SME growth market ("**SME growth market issuers**") by limiting the persons listed who, *due to the nature of their function or position within the issuers, have regular access to inside information*. A new template insider list is provided as Template 1 in Annex 2 to the New Implementing Regulation.

The 2019 MAR Amending Regulation allows Member States, where justified, to require SME growth market issuers to include in their insider lists all persons who have access to inside information. However, in that case, the disclosure regime should be lighter which is reflected in the new template provided as Template 2 in Annex 2 to the New Implementing Regulation. In a similar vein, a "lighter" template for the permanent section of the insider list of SME growth market issuers is provided as Template 3 in Annex 2.

The New Implementing Regulation is in effect since 3 August 2022 and therefore the relevant updated templates for insider lists should be used by issuers as from that date.

Updated Q&A on inside information

On 23 September 2022, ESMA updated its Questions and Answers ("**Q&A**") on MAR to add two new questions regarding disclosure of inside information.

With this latest update of the Q&A, ESMA clarifies:

- that if a piece of information is identified by an issuer as inside information within the meaning of Article 7 of MAR while preparing the financial guidance, half-year or annual reports, the issuer is obliged to publish that information without delay (unless delayed disclosure under Article 17 applies), and
- that issuers must take into consideration all available information when determining whether a piece of information constitutes inside information within the meaning of Article 7 of MAR and in that context, all available information would include the consensus of market analysts' expectations, if applicable.

CROWDFUNDING REGULATION | NEW ESMA Q&AS

On 23 September 2022, ESMA updated its Questions and Answers ("**Q&As**") in relation to Regulation (EU) 2020/1503 of 7 October 2020 on European crowdfunding service providers for business ("the **Crowdfunding Regulation**").

In this latest update, ESMA clarifies in the "general provisions" section of the Q&As*:*

- that the same internet-based information system can be used on the one hand, for crowdfunding services, and on the other hand, for MiFID II investment services and activities, so long as they are clearly separated in different sections (albeit with the same sign-on authentication);
- that offers to the public of transferable securities made by a project owner in its capacity as offeror pursuant to the exemptions under Article 1(4) points (a) and (b) of EU Prospectus Regulation should not be taken into account when calculating the EUR5.000.000 threshold applicable under Article 1(2) point (c) of the Crowdfunding Regulation;
- while noting that the operation of a non-internet based crowdfunding platform does not constitute a crowdfunding service as defined in point (a) of Article 2(1) of the Crowdfunding Regulation, that a Crowdfunding Service Provider (**"CSP"**) can engage in other activities including the operation of a non-internet based crowdfunding platform subject to compliance with any other applicable legislation; ESMA flags that the CSP would not be able to benefit from Article 18 of the Crowdfunding Regulation in relation to such non-internet based activity;
- while noting that the offering of a crowdfunding project to a sole investor does not constitute crowdfunding services as defined in point (a) of Article 2(1) of the Crowdfunding Regulation, that a CSP can engage in other activities including the offering of a crowdfunding project to a sole investor subject to compliance with any other applicable legislation;
- that an entity offering its own project to investors on a publicly available internet based information system does not need to be authorised as a CSP (albeit that, depending on the specific features of the project, other legislation may be applicable).

In this latest update to the Q&As, the European Commission has also provided a number of clarifications on various investor protection matters, notably on:-

- the simulation of the ability of non-sophisticated or prospective non-sophisticated investors to bear loss in Article 21(5) of the Crowdfunding Regulation;
- the entry knowledge test under Article 21(7) of the Crowdfunding Regulation; and
- the conflict of interest provision in Article 8(1) of the Crowdfunding Regulation.

DLT UPDATE | NEW DRAFT LAW AND ESMA'S REPORT ON DLR PILOT REGIME

New Luxembourg draft law on distributed ledger technology

On 28 July 2022, draft law No. 8055 regarding the financial market and distributed ledger technology ("**DLT**") (the "**Draft Law**") was submitted to the Luxembourg Parliament (*Chambre des Députés*).

The main purpose of the Draft Law is the transposition of Regulation (EU) 2022/858 of the European Parliament and of the Council of 30 May 2022 on a pilot scheme for market infrastructures based on DLT (the "**DLT Pilot Regime Regulation**").

The DLT Pilot Regime Regulation aims to support the development of crypto-assets that qualify as financial instruments and for the development of DLT more generally, while still preserving a high level of investor protection and market integrity. The **pilot regime** is intended to allow for certain DLT market infrastructures to be temporarily exempted from some of the specific requirements of financial services legislation that could otherwise prevent operators from developing solutions for the trading and settlement of transactions in crypto-assets that qualify as financial instruments, without weakening any existing requirements or safeguards applied to traditional market infrastructures.

To effectively transpose the DLT Pilot Regime Regulation, it is intended that the Draft Law will amend three laws as follows:-

- the law of 5 April 1993 on the financial sector (the "**Financial Sector Law**") and the law of 30 May 2018 on markets in financial instruments (the "**Markets in Financial Instruments Law**") will each be amended to include in the definition of "financial instruments" those financial instruments issued through DLT (with reference to the definition of *distributed ledger technology* in the DLT Pilot Regime Regulation), and
- the law of 5 August 2005 on financial collateral arrangements will be amended so that the definition of "financial instruments" includes financial instruments transferable by distributed electronic registers or databases.

The amendments to the Financial Sector Law and the Markets in Financial Instruments Law should apply from 23 March 2023.

ESMA report on the DLT Pilot Regime

On 27 September 2022, ESMA released its report on the DLT Pilot Regime on the call for evidence on the DLT Pilot Regime and compensatory measures on supervisory data (the "**Report**"). The DLT Pilot Regime Regulation requires ESMA to assess whether the regulatory technical standards (RTS) developed under MiFIR and relating to certain pre- and post-trade transparency and data reporting requirements need to be amended to be effectively applied also to securities issued, traded and recorded on DLT. While ESMA's conclusion in the Report is that there is no need to amend the RTS on transparency and data reporting requirements before the DLT Pilot Regime starts applying in March 2023, ESMA also gives guidance on certain technical elements and makes recommendations on compensatory measures on supervisory data to ensure a consistent application by DLT market infrastructures from the start of the regime.

TEMPORARY SUSPENSION OF EVICTIONS FOR RESIDENTIAL LEASES

Context

On 30 September 2022, the Government Council having regard to the inflationary pressures due to the current economic environment, which continues to weigh on households, including those with a lower income, gave its approval to the draft law No. 8076 (the "**Draft Law**"), which, once it will be definitively adopted, will temporarily suspend evictions for residential leases.

The objectives of the Draft Law

The Draft Law aims to protect the most vulnerable households. It aims to temporarily suspend the execution of evictions concerning housing leases for a determined period.

Entry into force

The current version of the Draft Law proposes to be effective until after the "winter break" which is set at 31 March 2023 inclusive.

Therefore, if the Draft Law should be adopted, it would mean that landlords would not be able to evict a defaulting tenant until 1 April 2023. The need to protect tenants who could find themselves without housing with the impossibility of rehousing under the current situation prevails and solidarity takes precedence.

This being said, some landlords could also find themselves in difficult situations taking into account potentially conflicting situations that will have to be analysed on a case-by-case basis.

Limitation of the scope of suspension

Nevertheless, the Draft Law includes precisions concerning its scope. In this respect, certain exceptions are provided such as eviction in divorce cases when the enjoyment of the lodging is attributed to one of the spouses, as well as in cases of domestic violence, situations that would not fall within the scope of the suspension of the evictions envisaged. The same applies to commercial leases, which are outside the scope of the Draft Law.

Towards the introduction of a winter break?

Finally, and in view of the difficult economic situation that is likely to persist in the years to come, would this Draft Law not be the initiator of a much more profound reform that would aim to put in place a real protection as regards evictions from residential leases by instituting, as already exists in France, a winter break period during which no evictions can be ordered.

THIS ARTICLE IS ALSO AVAILABLE IN FRENCH HERE: *Suspension temporaire des déguerpissements en matière de bail d'habitation*

DRAFT LAW ON TRANSPARENT AND PREDICTABLE WORKING CONDITIONS

Following the proclamation of the European Social Rights Framework by the EU institutions in November 2017, Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union was adopted on 20 June 2020 (the "**Directive**"). The Directive aims, *inter alia*, **to improve workers' access to essential information applicable to their employment relationship and to ensure that workers are protected against any adverse treatment or consequences**. Draft Law No. 8070 (the "**Draft Law**"), introduced in the Luxembourg Parliament on 7 September 2022, is intended to transpose the Directive.

The Draft Law provides for changes to certain rules concerning employment contracts, apprenticeship contracts, temporary employment contracts, contracts of employment with pupils or students (excluding paid internship contracts) and maritime employment contracts. As it aims, among other things, to amend the mandatory clauses to be included in the above-mentioned contracts and to regulate certain clauses such as exclusivity clauses or the trial period, this Draft Law will affect many employers. It is therefore strongly recommended that employers adapt their contracts now.

A more in-depth analysis of the **Draft Law on transparent and predictable working conditions** is available.

CHINA AND AUSTRALIA ADDED TO CSSF'S LIST OF THIRD COUNTRY EQUIVALENT JURISDICTIONS

On 22 July 2022, the Luxembourg financial sector supervisory authority (the "**CSSF**") published [CSSF Regulation 22-04]() amending CSSF Regulation 20-02 on the equivalence of certain third countries with respect to supervision and authorisation rules for the purpose of providing investment services or performing investment activities and ancillary services in Luxembourg by third-country firms (the "**CSSF Regulation 22-04**").

The CSSF Regulation 22-04 adds China and Australia to the CSSF's list of third countries which are considered as providing a regulatory framework equivalent to that of Luxembourg for investment services and ancillary services ("**MiFID Services**").

As a result, investment firms having their central administration or registered office in China or Australia can now apply for the Luxembourg national equivalence regime for the purpose of providing MiFID Services to Luxembourg eligible counterparties and *per se* professional clients on a cross-border basis.

The CSSF Regulation 22-04 came into force on 20 July 2022.

UPDATE OF THE CSSF SICAR FAQ

Background

In June 2022, the CSSF updated its FAQ relating to the investment companies in risk capital ("**SICARs**"). The updates are linked to the requirements regarding prudential reporting with which SICARs have to comply.

Monthly prudential reporting

The FAQ first clarify that the prudential reporting regarding SICARs should not only be made half-yearly or yearly but also on a monthly basis. Indeed, the monthly financial information relating to SICARs shall be drawn up (if applicable, separately for each sub-fund) in accordance with table U 1.1 as defined in Circular CSSF 15/627. This reporting obligation starts from the authorisation date of the SICAR (or the sub-fund) even if the SICAR (or the sub-fund) has not been launched (meaning no subscription has been made).

The information to be submitted is detailed in the document "Guidelines on the U1.1 reporting" and should be sent via the transmission channels in XML format.

Starting point of the half-yearly financial information

The FAQ further clarify the starting point regarding the half-yearly financial information by informing that it should start from the date of the first subscriptions of the SICAR (or the sub-fund). A reporting is not required in the event that only subscription commitments have been received.

Modification of an audit opinion

Pursuant to section 2.2 of Circular CSSF 21/790 and for the financial years closing on or after 30 June 2022, for every audit report drawn up by the *réviseur d'entreprises agréé* that includes a modified audit opinion at the level of one or more sub-funds of the SICAR and/or of the SICAR as a whole, the SICAR's *dirigeants* must send a letter to the CSSF. This letter should be sent without having been expressly required by the CSSF and should contain the reasons for the modified audit opinion, its impact on the SICAR and its investors as well as the corrective measures, including the timeline for their implementation, taken by the *dirigeants*. This letter must be submitted to the CSSF within one month after the publication of the annual report. More details concerning the information to be transmitted to the CSSF and the arrangements for filing are given at the following link.

Pursuant to Circular CSSF 21/790, for the financial years closing on or after 30 June 2022, the form of management letter is made available to the *réviseur d'entreprises agréé* on the eDesk portal (https://edesk.apps.cssf.lu). Once finalised by the *réviseur d'entreprises agréé*, the SICAR's *dirigeants* must submit the management letter to the CSSF via the eDesk portal.

Self-assessment questionnaire

In addition, Circular CSSF 21/790 introduced the obligation for SICARs to submit to the CSSF, via the eDesk portal, as from the financial years closing on or after 30 June 2022, a self-assessment questionnaire for each year or period in respect of which a statutory audit was carried out. The questionnaire must be transmitted to the CSSF within a maximum period of four months after the end of the financial year.

Circular CSSF 21/790 also requires the *réviseur d'entreprises agréé* of a SICAR to complete, for each year or period in respect of which a statutory audit was carried out, a separate report, the purpose of which is notably to ensure the reliability of the answers provided by the SICARs in the self-assessment questionnaire and to provide answers to a set of questions determined by the CSSF.

This requirement applies to SICARs as from the financial years closing on or after 30 June 2023. Once the separate report is completed and validated by the *réviseur d'entreprises agréé*, the SICAR must submit it to the CSSF within a maximum period of six months after the end of the financial year.

HANDBOOK ON AML/CFT PROFESSIONAL OBLIGATIONS FOR RAIFS

In order to prevent and raise awareness among reserved alternative investment funds ("**RAIFs**") which are subject to the law on the fight against money laundering and terrorist financing of 12 November 2004 (the "**AML/CFT Law**"), the Luxembourg Registration Duties, Estates and VAT Authority (*Administration de l'enregistrement, des domaines et de la TVA)* ("**AED**"), as supervisory and control authority, issued a handbook on 25 May 2022 in order to assist RAIFs in the implementation of their professional AML/CFT obligations (the "**Handbook**").

The AED reminds RAIFs of the three main pillars of AML/CFT professional obligations: the duty of care, the professionals' internal organisation, and the obligation for professionals to cooperate.

The duty of care

- **Identification of the client/agent**

The identification of clients should be done before entering into any relationship and should continue over time.

The AED reminds that the identification and verification of the client's identity is based on documents, data or information from reliable and independent sources, such as identity card, passport or any other document from a reliable and independent source. These documents must be understandable, intelligible and decipherable for the RAIF and the control authorities, including the AED.

When the client is a legal entity or a trust, the RAIF must identify the beneficial owner(s) and take all reasonable steps to verify such beneficial owners' identity by verifying the legal status or trust by collecting, as a matter of example, but not limited to, the proof of incorporation, corporate form, name of the directors of the board of directors, etc.

The obligation to verify the identity of the legal persons necessarily implies to understand the activity of the legal person, verify the name and legal set up, as well as to obtain a certain amount of information as listed in the AED guide. If the identification is not possible, no entry into a relationship is possible.

- **Identification of the beneficial owner**

A RAIF must take reasonable steps to verify the identity of the beneficial owner using relevant information or data obtained from a reliable and independent source. The handbook specifies the type of documents that may be used to support the confirmation. RAIFs are required to maintain constant monitoring, updating and vigilance of client and beneficial owner identification information.

- **Procedure for entering into a business relationship**

The Handbook states that the RAIF must avoid any business relationship with a client who does not wish to be transparent (desire for anonymity, failure to obtain the information requested, etc.).

- **Types of vigilance**

The AED specifies that the type of vigilance exercised by a RAIF must be consistent with its internal procedure formalizing the risk analysis and determination of the client's risk profile allowing it to apply simplified or enhanced due diligence where necessary.

The professionals' internal organisation

- **The implementation of an internal procedure by the RAIF**

The AED specifies that the RAIF is required to set up an internal organization that is adequate and proportionate to the size of its business and the services it provides in the course of its professional activity. This obligation implies the establishment of an internal procedure manual, regardless of the size of the company and its activity (instructions for use), which details the procedure implemented, in order to prevent the risks of money laundering and terrorist financing.

The internal procedure manual must be accessible to all staff.

- **Appointment of a *responsable du respect des obligations ("RR")* and a *responsable du contrôle du respect des obligations ("RC")***

The AED reminds that the appointment of an RR and an RC is mandatory and provides clarifications and sets out expectations which are in line with those of the Luxembourg financial sector supervisory authority (the CSSF) for regulated funds (based on the CSSF's FAQs on RR and RC).
The RR and the RC shall:
- be reachable by the AED and the Luxembourg financial intelligence unit (the "**FIU**");
- have sufficient knowledge of the Luxembourg AML/CFT requirements; and
- have understanding of investment and distribution strategies of the RAIF.

- **The implementation of a risk analysis by RAIFs**

The AED specifies that the RAIFs are required to take appropriate measures to identify, assess and understand money laundering and terrorist financing risk, such as the identification of AML and CFT risk or qualifying, managing and mitigating the risk for each client and each client will be classified according to its risk profile (i.e. low, medium, or high risk).
The risk profile of the client may be classified on the basis of different criteria and it is important to point out that there is no "one-size-fits-all" methodology for assigning a specific level of AML/CFT risk to a client. Each RAIF will need to include in its internal organization the procedure

Obligation for professionals to cooperate

A RAIF is required to inform the FIU without delay and on its own initiative of any fact or transaction that could be indicative of money laundering and/or terrorist financing. All suspicious transactions, including attempted suspicious transactions, must be reported. The RAIF itself, its RC and RR must be registered on the goAML portal in order to be able to transmit a suspicious transaction report to the FIU in the name and on behalf of the RAIF, if necessary.
In order to oversee the RAIFs, the AED requires the provision of the following documents:

- **The RAIF RC RR identification form;**
- **AML/CFT risk questionnaire;**
- **Legal documentation related to the RAIF RC RR identification form; and**
- **The RC's AML/CFT report**.

Sanctions

Article 8-4 of the AML/CFT Law sets forth the different sanctions that may be imposed on RAIFs for failure to comply with their professional obligations.
In order to respect the principle of proportionality of the sanctions, they are pronounced in a gradual manner.
The AED specifies that a RAIF has the right to appeal to the Administrative Court against the AED's administrative decisions imposing an AML/CFT sanction.

NEW REQUIREMENTS FOR INVESTMENT FUND MANAGERS TO TAKE INTO ACCOUNT SUSTAINABILITY RISKS

Background

The Commission Delegated Directive (EU) 2021/1270 amends the Commission Directive 2010/43/EU which implements the UCITS directive, by imposing obligations on UCITS management companies ("**ManCos**") to integrate sustainability considerations into their decision-making and risk management processes, as well as in their structure and organisation ("**Commission Delegated Directive**").

The Commission Delegated Directive has been transposed into Luxembourg law by CSSF regulation 22-05 of 27 July 2022 ("**CSSF Regulation 22-05**") amending CSSF regulation 10-4 of 20 December 2010 transposing Commission Directive 2010/43/EU ("**CSSF Regulation 10-04**").

Consideration of sustainability risks by investment fund managers

The new additional sustainable finance requirements for ManCos brought by the CSSF Regulation 22-05 are the following:

1. taking into account sustainability risks when complying with rules for organisational requirements laid down in Article 5(1) of the CSSF Regulation 10-04;
2. retaining necessary resources and expertise for the effective integration of sustainability risks alongside with other obligations for resources pursuant to Article 6 of the CSSF Regulation 10-04;
3. ensuring that their senior management is responsible for the integration of sustainability risks in their activities referred to in Article 10(2)(a) – 10(2)(f) of the CSSF Regulation 22-05;
4. when identifying conflicts of interests that may damage UCITS they manage, they must include those that may arise from the integration of sustainability risks in their processes, systems, and internal control;
5. integrating sustainability risks in their risk management policy;
6. integrating sustainability risks in the management of UCITS, taking into account the nature, scale and complexity of the business;
7. taking into account sustainability risks when acting in the best interests of UCITS and their investors, as required by Article 25 of the CSSF Regulation 10-04;
8. where they or, where applicable, investment companies take into account the main negative impacts of investment decisions on sustainability factors, they or investment companies shall ensure that they take into account such principal adverse impacts when complying with the requirements to act in the best interests of UCITS and their investors, as required by Article 25 of the CSSF Regulation 10-04.

As a result, ManCos will have to **update their internal policies**.

Alternative Investment Fund Managers (the "**AIFMs**") are not excluded as the Commission Delegated Regulation 2021/1255 of 21 April 2021 imposes, *mutatis mutandis*, the same obligations detailed in points (i.) to (v.) above on AIMFs as of 1 August 2022.

The CSSF Regulation 22-05 came into force on **31 July 2022**.

CSSF UPDATE ON CROSS-BORDER DISTRIBUTION OF INVESTMENT FUNDS

On 20 September 2022, the CSSF published an FAQ on Cross Border Distribution of Funds - Guidance on Marketing Communication (the "**FAQ**") which aims to address a number of key aspects of the application of Article 4 of the regulation 2019/1156 of the European Parliament and of the Council of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings (the "**CBDF Regulation**") and the ESMA Guidelines on marketing communications under the CBDF Regulation (the "**ESMA Guidelines**"). According to Article 4 of the CBDF Regulation marketing communications shall be identifiable as such and shall describe the risks and rewards related to the subscription of shares of an alternative investment fund ("AIF") or an undertaking for collective investment in transferable securities ("**UCITS**") in a similar way and be fair, clear and not misleading. Under the same Article 4, the European Securities Market Authority (the "**ESMA**") was entrusted to prepare guidelines in relation to the requirements applicable to marketing communications, which lead to the issue of the ESMA Guidelines.

The key aspects relate to the scope of application of Article 4 of the CBDF Regulation, the governance requirements to be put in place by investment fund managers ("**IFM**") and to the information to be provided to the CSSF.

In June 2022, the CSSF also introduced a new E-Desk module – E Passporting, to be used by supervised entities to proceed with marketing notification and de-notification procedures.

The FAQ

Scope of application of Article 4 CBDF

The FAQ clarifies that the requirements related to marketing communications apply:

- To all IFMs in scope of CSSF Circular 22/75 ("**In-Scope IFMs**") which are:
  - UCITS management companies and authorised AIFMs;
  - UCITS or AIF internally managed, meaning those which have not designated a management company or an external AIFM; and
  - EuVECA and EuSEF managers.
- To all UCITS, regulated and non regulated AIFs ("**Funds**") managed by In-Scope IFMs including non-Luxembourgish Funds;
- When a Luxembourgish or non-Luxembourgish Fund managed by a Luxembourgish IFM is solely notified for distribution in Luxembourg, i.e. outside of a cross-border distribution;
- To all marketing communications addressed to all types of investors or potential investors, even those targeting professional investors.

The FAQ further clarifies that the requirements related to marketing communications **do not** apply to:

- In-scope IFMs when they act as distributor or intermediary in relation to funds that they do not manage;
- Distributors or intermediaries involved in the distribution of the Funds regardless of whether they are related to the IFMs by a contractual relationship or not; and
- Marketing Communications addressed to investors or potential investors, which are not resident in the European Economic Area ("**EEA**").

Governance and organisation rules

The CSSF draws the attention of the industry to the latest version of the ESMA Q&A on the application of the AIFM Directive pursuant to which IFMs "*are responsible to ensure compliance with Article 4 CBDF Regulation, irrespective of who is the actual entity marketing the fund and of the relationship it has with the third party distributor (whether it is contractual or not).*"

As part as their governance and organisation requirements, the CSSF expects the In-Scope IFMs to identify, prepare, validate, oversee marketing communications and to have relevant procedures in place. In this respect In-Scope IFMs must:

- Implement measures allowing them to identify and flag marketing communications;
- Be involved in the process of preparation and validation of the marketing communications ensuring

that a review process based on the four-eyes principle is always applied;
- Implement procedures and arrangements allowing it to ensure compliance of marketing communications with Article 4 of the CBDF Regulation;
- Ensure a proper validation of the consistency between the marketing communications and legal and regulatory documents, as foreseen under Article 4 of the CBDF Regulation and points 18 to 21 of the ESMA Guidelines.

Finally it is worth noting that compliance with Article 4 shall be part of the report of the compliance officer of the In-Scope IFMs and that breaches of compliance have to be reported to the senior management of the In-Scope IFMs.

The CSSF also expects IFMs to update their marketing procedures to take into account the process of identification/flagging of marketing communications.

In-Scope IFMs are also authorised to use delegates, within the group they belong to or a third party, in relation to the preparation and validation of marketing communication.

The delegation will be governed by the same rules regarding delegation of function by In-Scope IFMs and shall be formalised by a contract and adequately overseen by the In-Scope IFMs. In addition, the IFM shall ensure that the governance and organisation requirements above are continuously met.

Information on marketing communications to be provided by IFMs to the CSSF

In relation to provision of marketing communications to the CSSF, the FAQ clarifies that, as of 16 September 2022, the following information shall be provided upon request by In-Scope IFMs and top-up MiFID license IFMs in relation to their discretionary portfolio management and investment advice activities, in relation to the Funds/financial instruments they manage :

- Types of marketing communications used:
- Country(ies) of dissemination of the marketing communications (EEA only); and
- Target Investors.

As from 1 April 2023 In-Scope IFMs must also be able to link the above information to their relevant Fund(s) (or sub-funds) and identify if the marketing communications include information with regards to ESG in the context of the application of Article 13 of SFDR and of the ESMA Supervisory briefing on Sustainability risks and disclosures in the area of investment management.

In addition, the CSSF clarifies that as part of the verifications of the compliance with Article 4 of the CBDF Regulation it may request legal and regulatory documents of the Funds, including PRIIPs KID or the Article 23 AIFMD disclosure and that any non-compliance with the requirements of Article 4 and the ESMA Guidelines is considered as a breach of Article 4.

The CSSF also reminds that Article 4 is applicable since 2 August 2021 and the ESMA Guidelines since 2 February 2022.

E-Desk module – E Passporting

Since 1 July 2022, UCITS, Luxembourg AIFMs and AIFMs managing Luxembourg EuVeca or EuSEF are required to proceed with the marketing notification, de-notification procedures, including any updates, through a new E-Desk module – E passporting. Please see our previous article on this.

The eDesk Portal can be accessed at the following address: https://edesk.apps.cssf.lu/edesk-dashboard/dashboard/getstarted and a User Guide accessible at the following address has also been prepared by the CSSF: Guide utilisateur – eDesk – module ePassporting.

OBLIGATION TO LEVY VAT ON TRANSPORT SERVICES ON THE MOSELLE CONDOMINIUM BETWEEN LUXEMBOURG AND GERMANY

On 1 August 2022, the European Court of Justice ("**ECJ**") ruled in its case C-294/21 that Luxembourg and Germany are obliged to levy VAT on passenger transport services which take place on a section of the Moselle river which constitutes a common territory under the joint sovereignty of both Member States by virtue of an international treaty of 19 December 1984.

The case concerned the Luxembourg company Navitours, which organises boat trips on the Moselle. According to the above-mentioned treaty between Germany and Luxembourg, the relevant section of the Moselle constitutes a so-called "condominium", which means that it falls under the joint sovereignty of both Member States. Because of this common sovereignty status, the Luxembourg VAT authorities never levied Luxembourg VAT on the sale of transport tickets by Navitours. Following a decision of the Luxembourg Court of Appeal in the context of the acquisition of a vessel by Navitours, this position of the Luxembourg VAT authorities changed and it issued *ex officio* tax assessments levying Luxembourg VAT on the sale of the tickets. Navitours challenged the *ex officio* tax and the case reached the Supreme Court (*Cour de cassation*), which referred a question to the ECJ for a preliminary ruling. In its question the Supreme Court asked whether Luxembourg can levy VAT on passenger transport services performed within a common territory under the joint sovereignty of two Member States.

The ECJ first considered that the services provided were indeed transport services within the meaning of the VAT Directive, even though the boat tours operated by Navitours end in the same place in which they began and their purpose is of a tourist nature. The ECJ also found that the transport service was carried out "within the territory of the country" of both Luxembourg and Germany, within the meaning of the VAT Directive, insofar as the relevant section of the Moselle was not among the territories excluded from the scope of the VAT Directive. As a consequence, and in the absence of any specific provisions in the VAT Directive, services such as those at stake in the case at hand may in principle be taxed by each of the two Member States.

The ECJ rejects Germany's argument that the VAT taxation of one of the two countries would have required the prior agreement of the other State. According to the ECJ, such an approach would allow Member States to create territories in which services supplied there would escape any levying of VAT. The ECJ also considers that such an approach would be contrary to the principle of fiscal neutrality, according to which operators carrying out the same transactions must not be treated differently as regards the levying of VAT. The ECJ concludes that transport services on the relevant section of the Moselle must be subject to the VAT of one of the two Member States. However, the taxation of these services by one of the Member States prevents the other Member State from taxing them in turn. Both Member States are free to agree on the manner of taxation, provided that non-taxation of revenue and double taxation are avoided.

THE DENIAL OF INPUT VAT DEDUCTION RIGHT SHALL BE SUBJECT TO THE PRINCIPLES OF NEUTRALITY AND PROPORTIONALITY

On 3 June 2022, following a preliminary ruling requested by the Hungarian Supreme Court (*Kúria*), the European Court of Justice ("**ECJ**") decided on case C-188/21 concerning the proportionality of a national measure denying a taxable person's right to input VAT deduction.

More specifically, the main issue related to the interpretation of Articles 63, 167 and 168, 178 to 180, 182 and 273 of the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended ("**VAT Directive**"), as well as of the principle of VAT neutrality.

Background

In the matter at hand, based on a national measure aimed at fighting against the underground economy, the Hungarian tax authorities deleted the tax identification number of a Hungarian VAT taxable person, which was failing to file and publish its annual accounts. Following the filing of its annual accounts, the taxable person's tax identification number was subsequently reinstated.

However – and although no fraud or damage to the state budget had been alleged or established – the taxable person was denied the right to deduct input VAT incurred before the deletion of its tax identification number.

ECJ decision

Prior to reaching its conclusion (detailed below), the ECJ reminded firstly that the principle of VAT neutrality is a fundamental right which, in principle, cannot be limited and secondly that this fundamental principle requires deduction of input VAT to be allowed if the material conditions are satisfied, even if the taxable person has failed to comply with some formal conditions.

The ECJ emphasised also that a taxable person may be allowed to deduct input VAT even if it has not exercised its right during the period in which it arose, i.e. during the period where VAT became payable.

Furthermore, the ECJ recalled that, while the Hungarian government rightly pointed out that, in accordance with Article 273 of the VAT Directive, Member States may adopt measures to ensure the correct collection of the tax and to prevent fraud, such as penalties for failure to comply with the formal conditions relating to the exercise of the right to deduct VAT, such measures must not, however, pursuant to the principle of proportionality, go beyond what is necessary to achieve such objectives and must not jeopardise the neutrality of VAT.

Based on this reasoning, the ECJ ruled with respect to the case at hand that: "*the principles of VAT neutrality and proportionality must be interpreted as precluding a national measure under which a taxable person for VAT purposes whose tax identification number was cancelled on the ground that it had failed to file and publish its annual accounts, and subsequently reinstated, following the rectification of that omission, is deprived of its right to deduct input VAT paid during the period preceding such deletion, even though the substantive requirements for entitlement to such deduction are satisfied and that taxable person has not acted fraudulently or improperly in order to be able to exercise that right.*"

HIGHER ADMINISTRATIVE COURT RULES ON CONCEPT OF HIDDEN DIVIDEND DISTRIBUTION

In a judgment dated 27 July 2022, the Luxembourg Higher Administrative Court (*Cour administrative*) (the "**Court**") handed down a decision concerning hidden dividend distributions.

Facts of the case

In the case at hand, an individual (the "**Director**") was the shareholder of a foreign company ("**Company Y**"), which in turn was the shareholder of a Luxembourg company ("**Company X**").

The Director made a number of advances to Company X, which were subsequently reimbursed by Company X to the Director. In addition, Company X applied 8% interest to these advances. These cash advances were mostly recorded in the financial accounts as advances/loans granted by the Director to Company X even though the wording of the cash movement was not always accurate.

According to the Direct Tax Administration (*Administration des contributions directes*) ("**DTA**"), the advances were to be considered as hidden capital contributions so that any reimbursement of these advances should be treated as hidden dividend distributions in favour of the Director and thus should be subject to 15% withholding tax. In addition, the DTA considered the 8% interest to be "excessive" on the ground that such interest rate was not in line with the market conditions and reduced it to 3%. The difference was also characterised as a dividend distribution subject to 15% withholding tax. In the first instance, the Luxembourg Lower Administrative Court (*Tribunal administratif*) rejected the DTA's approach and ruled that the payment made to the Director constituted a reimbursement of advances made to Company X and did not qualify as a hidden distribution.

Findings of the Court

Firstly, the Court recalled that in application of Luxembourg tax law a hidden dividend distribution can only be recognised (i) when a shareholder, group member, or interested third party receives an advantage that should be analysed as an expenditure of income without adequate consideration, and (ii) that the shareholder, group member or interested party would not have been able to obtain in the absence of the shareholder link.

Secondly, the Court held that a person who is the ultimate economic beneficiary of a corporate structure, holding indirect rights in the company deemed making a hidden dividend distribution can meet the definition of "interested third party" for the purposes of establishing such hidden dividend distribution. The Court underlined that this criterion is not sufficient as such and the DTA must establish that the company has suffered a financial imbalance in order to exclude transactions that comply with the arm's length principle. Further, the Court held that the burden of proof lies on the DTA to establish that a hidden dividend distribution has occurred and, to do so, it should outline a body of evidence that makes this distribution probable.

In the present case, the Court highlighted that the DTA must prove that (i) Company X has suffered a decrease or forgone an increase in its net assets and (ii) payments were made to a shareholder, member of the corporate group, or interested third party. The Court concluded that the DTA had not demonstrated that Company X had provided a financial advantage without consideration to the Director to its detriment.

Finally, with regard to the interest rate, the Court held that an interest rate is normally determined according to the financial strength of the borrower, the maturity of the loan, eventual guarantees, and rates applied on financial markets. Since the DTA had not provided any substantial analysis to demonstrate that a 3% rate was more appropriate than 8%, the Court rejected the DTA's argument. In sum, the Court found that the DTA had not met its burden of proof in establishing a hidden dividend distribution had occurred and confirmed the first instance judgment.

EUROPEAN COMMISSION PUBLIC CONSULTATION | TACKLING THE ROLE OF ENABLERS THAT CONTRIBUTE TO TAX EVASION AND AGGRESSIVE TAX PLANNING

On 6 July 2022, the European Commission (the "**Commission**") announced a public consultation on tackling the role of intermediaries (referred to as "**Enablers**") in facilitating complex tax schemes. The consultation period runs from 6 July through 12 October 2022 and aims at collecting feedback on possible measures to tackle the role of Enablers, including non-EU based enablers that provide tax advisory services on tax arrangements that could lead to tax evasion or an aggressive tax structure.

This initiative will interact with existing regulations adopted to fight tax evasion and aggressive tax planning such as the Council Directive (EU) 2018/822 amending the Directive on Administrative Cooperation in the field of (direct) taxation ("**DAC6**") which already requires EU intermediaries to report to the tax administrations of Member States information on reportable cross-border arrangements that could potentially lead to aggressive tax planning.

Commission proposals

The Commission underlines that the purpose of these measures "*is to prohibit enablers who design, market and/or assist in the creation of tax arrangements or schemes in non-EU countries that lead to tax evasion or aggressive tax planning for the EU Member States*". To achieve this objective, the contemplated options are threefold and can be summarized as follows:

Option 1: Requirement for all Enablers to carry out dedicated due diligence procedures

Pursuant to this option, Enablers would be prohibited from assisting with the creation of arrangements abroad that lead to tax evasion or aggressive tax planning. This option foresees the requirement for all Enablers to carry out beforehand a test to check whether the arrangement or scheme they are facilitating should lead to tax evasion or aggressive tax planning. It also requires the Enablers to maintain records of these due diligence procedures in all cases.

Option 2: Prohibition to facilitate tax evasion and aggressive tax planning combined with due diligence procedures and a requirement for Enablers to register in the EU

Under this second option, the Enablers would be required to carry out enhanced due diligence procedures as outlined under Option 1. In addition, non-EU based Enablers that provide advice or services of a tax nature to EU taxpayers or residents would be required to register in an EU Member State. Meaning that only registered Enablers should be allowed to provide advice or services of a tax nature to EU taxpayers or residents.

Option 3: Code of conduct for all Enablers

Under this option, it is proposed to implement the requirement for all Enablers to follow a code of conduct that obliges Enablers to ensure that they do not facilitate tax evasion or aggressive tax planning.

Additional measures on taxpayers

EU taxpayers (individuals or legal persons) would be required to declare in their tax returns any participation over 25% in any non-listed company located outside the EU.

The public consultation opens the discussion about the potential sanctions such as a monetary sanction to prevent Enablers from providing further services. It does however not provide for any details on e.g. the content and implementation of the proposed code of conduct, the types of structures targeted, the retained criteria, and how this type of reporting will interact with existing regulations and/or the professional secrecy privilege.

As the Commission's ambition is to have a reporting regime implemented by first quarter 2023, additional information should be available shortly. Finally, the most appropriate legal basis for this initiative is still under consideration. In the event Article 115 of the Treaty on the Functioning of the European Union (TFEU) is to be followed, any proposal could only be adopted by unanimity of the EU Member States.

ADJUSTMENT OF INPUT VAT DEDUCTION | ECJ DECISION

On 7 July 2022, the European Court of Justice (“**ECJ**”) decided on case C-194/21 concerning the adjustment of input VAT deductions within the meaning of Articles 184 and 185 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (“**VAT Directive**”).

Background

The case at hand concerned the possibility for a taxable person who did not exercise his right of deduction before the expiry of a limitation period to make this deduction in the context of an adjustment at the time of the actual use of the purchased good.

The facts involved a Dutch company that sold plots of land to an individual VAT taxable person and contractually committed, at the same time, to construct mobile homes with accessories, which were intended to be sold together with the land on which they stood. The net proceeds of the sale of the developed plots were to be divided between the two parties in equal shares.

The VAT invoiced by the company to the purchaser for the supply of the plots of land had not been deducted by the purchaser.

Approximately seven years later, when it became clear that the planned development of the plots was not carried out due to economic circumstances, the parties agreed that the initial supplier would redeem the land from the initial purchaser. The initial purchaser then claimed a deduction of the input VAT, paid at the time of the initial acquisition of the land, against the output VAT collected on its resale.

Since the Dutch tax authorities did not grant the deduction, the matter ended up before the Dutch Supreme Court. The latter noted that, while the VAT Directive defines the adjustment obligation of input VAT as broadly as possible, such a broad interpretation does not necessarily amount to allowing the right of deduction to be exercised without any temporal limit and referred the question to the ECJ, specifically asking whether the absence of fraud or abuse of rights would affect the ECJ’s response.

The ECJ’s decision

The ECJ ruled that *“Articles 184 and 185 of the VAT Directive must be interpreted as not precluding a taxable person who failed to exercise, before the expiry of the limitation period laid down by national law, the right to deduct VAT relating to the acquisition of goods or services, from being denied the possibility of subsequently making that deduction, by way of an adjustment, at the time when those goods or services are first used for the purposes of taxed transactions, even where no abuse of rights, fraud or loss of tax revenue has been established”.*

The ECJ recalled that even if the right to deduct is an integral part of the VAT scheme and may not, in principle, be limited, the possibility of exercising this right without any temporal limit would be contrary to the principle of legal certainty.

Indeed, the VAT Directive establishes the principle that the right to deduct VAT must be exercised during the same period as that in which it has arisen, namely at the time the tax becomes chargeable (i.e. when the goods or the services are supplied).

Articles 180 and 182 of the VAT Directive however allow a VAT taxable person to make a deduction even if they did not exercise their right during the period in which the right arose, subject to compliance with certain conditions and procedures determined by national legislation.

Thus, the ECJ considers that a limitation period, the expiry of which has the effect of penalising a taxable person who has not been sufficiently diligent and has failed to claim deduction of the input VAT, by making them forfeit their right to deduct VAT, cannot be regarded as incompatible with the regime established by the VAT Directive provided that:

- The limitation period applies in the same way to analogous rights in tax matters founded on domestic law and to those founded on EU law; and
- It does not in practice render impossible or excessively difficult the exercise of the right to deduct VAT.

According to the ECJ, the adjustment mechanism provided for by the VAT Directive is not intended to apply where the taxable person failed to exercise the right to deduct VAT and has lost that right as a result of the expiry of a limitation period. The absence of fraud, abuse of rights or detrimental impact on the tax revenue of the Member State cannot justify a taxable person being able to circumvent a limitation period.

DAC6 NOTIFICATION REQUIREMENT FOR LAWYERS COVERED BY LEGAL PROFESSIONAL PRIVILEGE

Context

On 5 April 2022, Advocate General Rantos opined in a pending preliminary ruling (i.e., **Case C-694/20**) submitted by the Belgian Constitutional Court to the European Court of Justice ("**ECJ**") on the validity of the provisions of the EU Council's Directive 2018/822 ("**DAC6**" or the "**Directive**") in application of which intermediaries benefiting from a legal professional privilege ("**LPP**") are subject to certain notification obligations, and notably whether such obligations are compatible with Articles 7 and 47 of the EU Charter of Fundamental Rights, related to the right to respect for private life and the right to a fair trial.

Reminder on legal background

The main purpose of DAC6 is to prevent the promotion and use of potentially **aggressive tax planning schemes** by **intermediaries** and **taxpayers**. To achieve this purpose the Directive requires intermediaries to report **certain cross-border arrangements** to **tax authorities** of EU Member States (the "**Reporting Obligation**"). Relevant information is shared between the EU tax authorities on a quarterly basis. Additionally, DAC6 grants **a waiver of certain reporting obligations** (the "**Waiver**") to intermediaries benefiting from the LPP, such as **lawyers, chartered accountants and auditors**. These intermediaries may only be entitled to a Waiver to the extent that **they operate within the limits of the relevant national laws that define their professions**.

While released from reporting obligations, intermediaries acting under the LPP still remain under the obligation to notify without delay another intermediary (not entitled to any Waiver) of cross-border arrangements (the "**Notification Requirement**") failing within the scope of a Reporting Obligation in application of **Article 8, bis ter, §5 of DAC6**.

Facts of the case

In the present case, *Orde van Vlaamse Balies* and *the Belgian Association of Tax Lawyers* (the "**Applicants**"), claimed, upon an appeal lodged with the Belgian Constitutional Court on 21 December 2020, for clarification as to whether the mandatory exchange of information required between intermediaries such as lawyers under Article 8bis ter, §5 of DAC6 is compatible with **Articles 7 (right to privacy) and 47 (right to a fair trial and to an effective remedy)** of the Charter of Fundamental Rights of the European Union (the "**EU Charter**"), related to the right to respect for private life and the right to a fair trial.

In particular, the Applicants argued that the Notification Requirement as foreseen under DAC6 interferes with the exercise of LPP, **even in the absence of legal proceedings**, since the lawyer is obliged to share taxpayer's information with any other intermediary not benefiting from any LPP. Such information being **obtained by a lawyer in the course of the essential activities of his profession, namely, representing or defending clients in legal proceedings and giving legal advice**, the Applicants concluded that such a Notification Requirement was likely to **infringe fundamental rights** in that their effectiveness can only be ensured if **a taxpayer has a guarantee that his personal information will not be disclosed.**

Advocate General Rantos' conclusions in a nutshell

First, **Advocate General Rantos** addressed that the Notification Requirement does not arise within the context of a legal proceeding and therefore does not fall within the scope of Article 47 of the EU, so that no infringement to **the rights protected by Article 47 of the EU Charter** should be considered.

With respect to Article 7 of the EU Charter, **Advocate General Rantos** specified that disclosure of the name and the data regarding the lawyer-intermediary conflicts with Article 7 of the EU Charter when the **lawyer's identity has been disclosed by another intermediary to the tax authorities**.

Advocate General Rantos concluded in his opinion that the ECJ should answer that Article 8 bis ter, § 5 of DAC6, which requires a lawyer acting as a Waived intermediary as per the LPP to notify another intermediary of a Reporting Obligation incumbent on him/her under DAC6, **does not violate the right to**

respect for private life guaranteed by Article 7 of the EU Charter, provided that **the name of this lawyer is not disclosed to the tax authorities** within the context of a Notification Requirement.

Similar other cases

The French Council of State (*Conseil d'État)* lodged on 28 June 2021 a preliminary ruling in **Case C-398/21** *the Conseil National des Barreaux, the Conférence des bâtonniers and the Ordre des avocats du Barreau de Paris* before the ECJ, raising the incompatibility of DAC6 with the right to **a fair trial, the right to respect for correspondence and the right to privacy** which are guaranteed by the EU Charter.

More particularly, as lawyers acting in **judicial assistances** are bound in principle, by virtue of their status as intermediaries, to tax information obligations in cross-border arrangements, the *Conseil d'Etat* has referred a question to the ECJ for a preliminary ruling as to whether the provision is **compatible with the right to a fair trial**. It also asks whether this provision is compatible with **the right to respect for correspondence and privacy**, as lawyers are also under these obligations when they assess their clients' legal situation. No preliminary conclusion has been issued so far, any further development on Case C-398/21 shall be closely monitored.

INPUT VAT DEDUCTION ON SERVICES | ECJ JUDGMENT

On 8 September 2022, the Court of Justice of the European Union (the "**ECJ**") issued a judgment in case C-98/21 concerning the right to deduct input VAT for a holding company making shareholder contributions-in-kind, by providing services to the benefit of its subsidiaries.

Facts of the case

The facts of the case involved an active holding company, which held shares in two subsidiaries and provided accounting and management services to the latter.

The parent company agreed to make shareholder contributions in kind to both of its subsidiaries by supplying, free of charge, architectural services, static calculation services, planning services for heat and sound isolation as well as other services relating to properties to be built by its subsidiaries. The holding company partly provided these services by procuring goods and services from third party undertakings. It incurred input VAT on these acquisitions, the deduction of which was refused by the German tax authorities. The dispute was brought to the Federal Finance Court (*Bundesfinanzhof*), which referred to the ECJ for a preliminary ruling.

The ECJ's decision

The ECJ recalled that input VAT deduction in principle requires the existence of a direct and immediate link between a particular input transaction and a particular output transaction giving rise to the right to deduct. A taxable person however also has a right to deduct even where there is no direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct where the costs of the services in question are part of his or her general costs. According to the ECJ, in either case, it is necessary that the cost of the input goods or services be incorporated either in the cost of particular output transactions or in the cost of goods or services supplied by the taxable person as part of his or her economic activities.

On the basis of these principles, the ECJ examined the actual use of the goods and services at stake and found that the latter were not used by the holding company to be able to offer the accounting and management services, provided to its subsidiaries. The expenditure incurred by the holding company can thus not, according to the ECJ, be regarded as being part of the components of the price of its taxed output services giving rise to a right to deduct.

The ECJ subsequently turned to the question as to whether the input goods and services could be considered as being part of the general costs of the holding company, such that they constitute components of the price of the goods or services which it supplies and therefore have a direct and immediate link with its economic activity as a whole. Since these goods and services have been the object of the holding company's shareholder contributions to its subsidiaries, the ECJ concluded that they were to be considered as related to the holding of shares, which does not amount to an economic activity within the meaning of the VAT Directive and therefore does not give rise to a right to deduct input VAT. The ECJ in particular emphasised that the goods and services acquired had been transferred free of charge to the subsidiaries in the context of the holding company's shareholder contributions and that, therefore, the costs cannot be part, as general costs, of the components of the holding company's economic activity (consisting in providing management and accounting services).

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