ELVINGER HOSS PRUSSEN

ELVINGER HOSS LUXEMBOURG LAW

NEWSLETTER

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Sustainable Finance Disclosure Regulation: EU and Luxembourg updates

The Disclosure Regulation **(EU) 2019/2088** ("SFDR") became applicable on 10 March 2021.

From that date, investment fund managers must publish ESG-related information on their website. They must also ensure that ESG information is provided (i) in the prospectus (for UCITS) and in disclosures to investors (for AIFs), and, depending on whether the fund promotes ESG characteristics or has a sustainable investment objective, (ii) in the fund's annual report. This last obligation must, however, in principle be complied with from 2022 subject to a further possible clarification by the EU Commission that the reports targeted by the SFDR level 2 regulatory technical standards are not those established in 2022 but those covering a reporting period starting in 2022.

During February and March 2021, additional important documents complementary to SFDR have been published by the European Supervisory authorities and various measures and initiatives have been taken by the authorities in Luxembourg.

Those documents and measures are detailed in the Article "**Sustainable Finance Disclosure Regulation: EU and Luxembourg updates**" on our website: Elvinger Hoss Prussen.

UCITS/AIFs: Supervision of costs and fees

On 6 January 2021, ESMA launched a **common supervisory action** ("CSA") with national competent authorities ("NCAs") on the supervision of costs and fees of UCITS. The CSA follows and will take into account the **Supervisory Briefing on the supervision of costs** published by ESMA in June 2020.

The CSA's aim is to assess the compliance of supervised entities with the relevant cost-related provisions in the UCITS framework and the obligation of not charging investors undue costs. The CSA will also cover entities employing Efficient Portfolio Management (EPM) techniques to assess whether they adhere to the requirements set out in the UCITS framework and **ESMA Guidelines on ETFs and other UCITS issues**.

In this context, in a **Communiqué dated 5 March 2021**, the CSSF indicated that the first phase of the CSA will consist of asking a sample of Luxembourg-based UCITS management companies ("UCITS ManCos") to complete a dedicated questionnaire for all UCITS managed, i.e. Luxembourg-domiciled UCITS and foreign-domiciled UCITS. The questionnaire is available on the eDesk Portal.

As a reminder, in the Supervisory Briefing on the supervision of costs published in June 2020, ESMA stated that NCAs should:

- require that UCITS ManCos and AIFMs develop and periodically review a structured pricing process addressing the specific aspects/elements listed in point 19 of the Supervisory Briefing; and
- incorporate the review of the UCITS ManCos/AIFMs' pricing processes in their activity at different stages and in case of materialisation of undue costs charged to investors, NCAs should assess the possibility to request different actions including (but not limited to) investor compensation (where

allowed under national provisions) or reduction of fees.

The first phase of the CSA in Luxembourg only concerns UCITS ManCos.

UCITS/certain types of AIFs: ESMA Guidelines on performance fees

On 5 November 2020, ESMA published **Guidelines on performance fees in UCITS and certain types of AIFs** ("**Guidelines**") on its website in all EU official languages.

The Guidelines became applicable on 6 January 2021 and in Luxembourg, by way of its **Circular 20/764**, the CSSF confirmed the integration of those Guidelines into its administrative practices and regulatory approach.

The Guidelines apply to UCITS management companies and to AIFMs of AIFs allowed by Member States to market their units to retail investors in their territory in accordance with Article 43 of the AIFM Directive, except for closed-ended AIFs and open-ended AIFs that are EuVECAs[1] (or other types of venture capital AIFs), EuSEFs[2], private equity AIFs or real estate AIFs.

The Guidelines provide guidance on (i) the performance fee calculation method, (ii) the assessment of the consistency between the performance fee model and the fund's investment objectives, strategy and policy (particularly when the fund is managed in reference to a benchmark), (iii) the frequency for crystallisation of the performance fee, (iv) recovery in case of negative performance and (v) disclosure of the performance fee model.

Investment Fund Managers ("**IFMs**") of any new funds created after the date of application of the Guidelines (i.e. 6 January 2021) with a performance fee, or any funds existing before the date of application that introduce a performance fee for the first time after that date, must comply with the Guidelines immediately in respect of those funds.

IFMs of funds with a performance fee existing before the date of application of the Guidelines, must apply the Guidelines in respect of those funds by the beginning of the financial year following 6 months from the date of application of the Guidelines.

As an example:

End of financial year of an investment fund with a performance fee and existing before 6 January 2021	Date of application of the Guidelines
31 December	1 January 2022
30 April	1 May 2022
30 September	1 October 2021

1. European Venture Capital Funds regulated by the European Venture Capital Fund **Regulation 345/2013**.
2. European Social Entrepreneurship Funds regulated by the European Social Entrepreneurship Funds **Regulation 346/2013**.

UCITS/UCIs/AIFs: Use of securities financing transactions

On 18 December 2020, and simultaneously with the publication of the results of its **Thematic Review Portfolio Management by UCITS**, the CSSF published an **FAQ** ("**FAQ**") on the use of the following securities financing transactions ("**SFTs**") by UCITS: securities lending transactions, reverse repurchase agreement transactions, repurchase agreement transactions, buy/sell-back and sell/buy-back transactions.

The objective of the FAQ is to bring further clarity concerning the use by UCITS of these SFTs, thereby taking into account the applicable regulatory framework as well as the supervisory experienced gained by the CSSF over the last years.

Although the focus of the FAQ is on the SFTs used by UCITS listed above, the CSSF also expects the following entities to consider the clarifications given in the FAQ:

- Luxembourg-authorised AIFMs;
- Luxembourg-registered AIFMs managing Luxembourg-domiciled regulated AIFs (Part II UCIs[1] and SIFs[2]);
- non-Luxembourg AIFMs managing Luxembourg domiciled AIFs;
- Luxembourg-domiciled regulated UCIs which do not qualify as AIFs (e.g. SIFs non-AIFs).

The disclosure clarifications provided for in the FAQ mainly refer to the pre-contractual information to be given to investors in accordance with Article 14 of the Securities financing Transaction Regulation **(EU) 2015/2365** ("**SFTR**") and Section B of the Annex to SFTR (i.e. in the prospectus for UCITS and in the disclosure to investors for AIFs, Part II UCIs and SIFs).

The following points of the FAQ can be noted, without being exhaustive:

- **Use of SFTs:** the CSSF recalls that the disclosure must include:
  - confirmation of whether SFTs will be used on a continuous or temporary basis or if the use of SFTs will be dependent on market conditions (in that event, a clear description of the circumstances under which the reliance will used);
  - the expected and maximum proportion of the AUM that can be subject to SFTs: this proportion should not be defined as an unduly large range (e.g. 0%-100% is considered too large and a disclosure of the maximum amount of AUM of 100% for a given SFT is not accepted unless if it is specifically requested and justified, etc.).

- **Risks incurred by the use of SFTs:** the risk description must adequately cover the risks linked to each individual SFT and include information on the potential impacts of those risks.
- **Disclosures related to costs/fees:** the percentage of gross revenues generated by the use of SFTs must be disclosed, with a breakdown of the overall percentage of direct/indirect operational costs/fees by service provider (e.g. lending agent) with an indication of the category of service provided.
- **Conflicts of interest:** the potential material conflicts of interest arising from SFTs concluded with or

involving related parties of the investment fund manager ("**IFM**") concerned must be disclosed.

  The CSSF also specifies the requirements in order (i) to identify and record the circumstances which may give rise to a conflict of interest entailing a material risk of damage to the interests of investors and (ii) to mitigate and manage those conflicts of interest.

- **Best execution:** SFTs must be covered in the best execution policy of IFMs and robust control processes must be in place to ensure that the best possible result as regards securities lending revenues (lending fee) and as regards the costs/fees charged to the related entity.

The CSSF expects the disclosure clarifications provided in the FAQ to be reflected in the prospectuses of UCITS and in the disclosure to investors of AIFs, Part II UCIs and SIFs **by 30 September 2021**.

> **1.** Undertakings for collective investment subject to Part II of the Luxembourg Law of 17 December 2010 relating to undertakings for collective investment.
> **2.** Specialised investment funds regulated by the Luxembourg Law of 13 February 2007 relating to specialised investment funds.

Marketing of foreign UCIs to retail investors in Luxembourg

CSSF Regulation 20-10 has been applicable since 1 January 2021. This Regulation lays down the procedures of the **Law of 17 December 2010** on undertakings for collective investment ("**UCIs**") with regard to the marketing of foreign UCIs other than the closed-end type to retail investors in Luxembourg.

For the purpose of this Regulation, "Foreign UCIs other than the closed-end type" ("**Foreign UCIs**") means UCIs other than UCITS and other than UCIs for which there is no redemption right for investors.

Foreign UCIs must, prior to the marketing of their units or shares to of retail investors in Luxembourg, have authorisation for such marketing which is granted by the CSSF in accordance with the conditions set forth in the Regulation.

Specific information and documents must be provided to the CSSF and in addition, Foreign UCIs must comply with the following rules in order to be eligible for marketing to retail investors in Luxembourg:

- The issue/redemption prices must be determined regularly and at least once a month;
- The foreign UCI must justify a sufficient spread of risks (as specified in the Regulation).

When the Foreign UCI is an alternative investment fund (AIF), the marketing authorisation under the Regulation cannot be granted until the marketing notification procedure under the **AIFM Law** has been completed with professional investors.

Foreign UCIs authorised for marketing to retail investors before the application of the Regulation are automatically authorised under the Regulation.

Money market funds update

1. Update of ESMA Guidelines on stress tests

On 16 December 2020, ESMA published its final report relating to the 2020 update of the **Guidelines on stress tests scenarios** ("**Guidelines**") under the Money Market Fund ("**MMF**") Regulation. The Guidelines are in the process of being translated into the official EU languages.

In particular, Section 5 of these Guidelines was updated. This section includes the calibration for the MMF stress tests the results of which have to be reported in accordance with Article 37 of the MMF Regulation.

The amendments introduced by the Guidelines will become applicable two months after the date of their publication on ESMA's website in all EU official languages.

UCITS management companies and AIFMs should therefore start measuring the impact of the 2020 update of the Guidelines in order to be compliant with the new requirements in due time.

2. CSSF Press Release on the publication of two IOSCO reports on MMF

By means of a **Communiqué** of 26 November 2020, the CSSF informed market participants about the publication by IOSCO of **two reports relating to MMF**:

- A **Thematic Review on consistency in implementation of MMFs reforms** ("**Thematic Review**");
- A **Thematic Note on Money Market Funds during the March-April Episode** ("**Thematic Note**").

In its Communiqué, the CSSF explains that the Thematic Review assesses the legislative and regulatory frameworks of the nine largest MMF domiciles in relation to the implementation of selected recommendations from the 2012 IOSCO Policy Recommendations on MMF. These recommendations had been elaborated in response to the stress observed during the global financial crisis in 2008 and were aimed at strengthening the resilience of MMF globally.

The CSSF states that, according to IOSCO, the participating jurisdictions have generally implemented MMF reforms in line with the assessed 2012 Recommendations. More specifically, the Thematic Review shows, among other things, that the four EU jurisdictions under review including Luxembourg are "fully consistent" with six out of the seven recommendations. Regarding one recommendation, being Recommendation 4 on the use of fair value and amortised cost method, the four EU jurisdictions are "broadly consistent" due to gaps identified notably in relation to the use of amortised cost accounting at the individual portfolio instrument level.

The Thematic Note focuses on the effects of the market dislocations related to the COVID-19 events on MMFs and seek to characterise the behaviour of MMFs of varying types and of currencies across the main MMF jurisdictions in March and April 2020. It also identifies areas for further consideration, e.g. the broader ecosystem and the functioning of the money markets, the behaviour of MMF investors and elements of existing regulatory frameworks which may have played a role in accelerating flows out of certain types of MMF and on that basis mentions areas which might merit further consideration for regulatory work.

CSSF position on transfer of investors' data

On 30 October 2020, the CSSF updated the FAQs listed below to clarify the applicable requirements in the event of transfer of data by central administrations (or investment funds or investment fund managers ("**IFMs**") acting as central administration) or depositary banks to a service provider (i.e. in the context of an outsourcing relationship). These requirements are independent from additional requirements stemming from the General Data Protection Regulation (EU) 2016/679.

- the FAQ on the **Law of 17 December 2010 on UCIs**;
- the FAQ on the **Luxembourg Law of 12 July 2013 on AIFs**;
- the FAQ on the **statuses of PFS (Part II)**;
- the **FAQ on the SICARs**;
- The FAQ on the **SIFs and SICARs that do not qualify as AIFs**.

In accordance with Article 41 (2a) of the **Law of 5 April 1993 on the Financial Sector**, any such transfer is possible if the central administration or the depositary bank has obtained the consent of its client (i.e. the investment fund) on (i) the outsourcing of the relevant outsourced services, (ii) the type of information transmitted in the context of the outsourcing and (iii) the country of establishment of the entities that provide the outsourced services.

The CSSF has requested over the past years that when such transfers relate also to investors' data, investors also consent to the transfer of data.

The updated FAQs reflect a more flexible position in that investors need now only to be informed in the event of transfer of their information.

- Any transfer of information related to investors should be disclosed to investors prior to the transfer, by the investment funds (or their IFM in case of common funds), through appropriate means, namely the prospectus and the application form combined, if appropriate, with a reference to a website.
- Existing investors should be informed by the investment funds (or their IFM if common funds) about any update of the fund documents aiming at the aforesaid disclosure, prior to the transfer of their information, by means of a letter, email or any other means of communication provided for by the prospectus.

The CSSF's position has therefore changed, as regards investors' data, from a consent regime to a disclosure regime.

Administrative law

Right of Members of Parliament to have access to documents

In a recent decision (N°44997C du rôle), the Luxembourg Administrative Court confirmed and even reinforced the right of Members of Parliament (*Chambre des Députés*) to have access to documents entered into by the government and a third party containing a confidentiality clause. The dispute arose between a Member of Parliament and the government in relation to the government's refusal to communicate the contracts and conventions concluded between the State and "RTL Group".

Please read our article **here**.

Preemption right: Procedure under the Law 'Pacte Logement'

The amended Law of 22 October 2008 *'Pacte Logement'* ("**Law**") granted a right of preemption to certain legal persons governed by public law designated by the Law, such as municipalities. Pursuant to this Law, municipalities can validly substitute themselves in an onerous transaction between a purchaser and a seller by taking the place of the purchaser and consequently acquiring the property under the same conditions as initially planned between the purchaser and the seller.

However, this preemption right can be implemented only for specific and defined properties subject to onerous transactions and only if the preemption pursues specific purposes, which are defined by the Law: housing works, road and public facilities works, collective facilities works.

In an important judgment dated 5 January 2021, No. 44939C, the administrative court of Luxembourg specified some of the implementation procedures ("modalities") of the right of preemption within the meaning of the Law.

Firstly, when a municipality wants to implement its right of preemption, the college of the mayor and aldermen ("*collège des bourgmestre et échevins*") can validly decree a decision implementing the right of preemption, provided the municipal council ("*conseil communal*") endorses this decision.

Secondly, when a municipality wants to implement its right of preemption, the municipality must clearly and precisely express the purpose it pursues when implementing its right of preemption by referring to one of the above specific purposes defined by the Law. Consequently, a municipality decision implementing the right of preemption has to state if this preemption right is implemented for the purpose of housing works, or for the purpose of road and public facilities works,or for the purpose of collective facilities works. Through its judgment, the administrative court of Luxembourg overruled the administrative tribunal jurisprudence, which required the municipality to express a tangible project when implementing its right of preemption.

Even if this solution seems to confer more flexibility on municipalities, they have to comply with precise obligations stated by the administrative court of Luxembourg: municipalities are required to indicate the purpose when the notary is notified of the municipality decision to implement its right of preemption; furthermore, municipalities have to carry out works according to the purpose they indicated without undue delay.

Ultimately, in its Circular No 3951 dated 19 January 2021, the Minister of Home Affairs advised Luxembourg municipalities to comply with the judgment of the administrative court of Luxembourg.

Sustainable finance developments

Since 10 March 2021, credit institutions and investments firms providing portfolio management services or investment advice, terms defined by MIFID II, must comply with Level 1 transparency obligations regarding the impact of ESG factors on their activities and products, as set out in the Disclosure Regulation (EU) 2019/2088 (**SFDR**). The insurance and pension sector is also affected, depending on activities and products offered.

Level 2 obligations will become binding only as of 2022.

Additional legislative work at EU level is underway to further the objectives on green finance set out in the **European Green Deal**.

For more details on this topic, please refer to the article **here**.

Further specifications to the AML Law

In order to perfect the transposition into Luxembourg law of the fourth EU AML Directive 2015/849, in line with GAFI recommendations, the Law of 12 November 2004 on the fight against money laundering and terrorism financing ("**AML Law**") was amended again. The Law of 25 February 2021 (see link **here**), brings clarification and further details to certain provisions. The modifications entered into force on 4 March 2021.

The following amendments are noteworthy:

- In the context of their risk-proportionate KYC obligations, it is now expressly confirmed that professionals must identify clients and beneficial owners in all cases;
- Numbered accounts, numbered savings books and numbered safes are prohibited (they no longer exist in practice);
- In addition to their duty to keep records, professionals must promptly disclose documents and information collected when fulfilling their professional obligations under the AML Law. Self-regulatory bodies are expressly included among the authorities having access to this documentation and can request information from professionals (these bodies are therefore subject to cooperation obligations between authorities);
- The wording of Article 3-2 (4) of the AML Law is reinforced and expressly indicates that credit and financial institutions have to take appropriate measures to establish the source of wealth and the origin of funds of clients and beneficial owners identified as politically exposed persons;
- Virtual service providers and providers of services to companies and fiduciaries subject to the supervision of registration duties, estates and VAT Authority (*Administration de l'enregistrement, des domaines et de la TVA* – AED) are now subject to a professional integrity requirement ("*honorabilité*"), assessed on the basis of criminal records and all elements likely to establish that

the persons at issue are of good repute and present all the guarantees of an irreproachable activity;

- The criteria for the application of the risked-based supervision function by authorities is further detailed and will include the risk specific to the professional, its group or the category of profession exercised. Authorities are obliged to take into account the risk situation factors set out in Annex IV (which was already the case in practice);
- In the context of cooperation between authorities, the use and transfer of information is strictly regulated. Authorities are expressly subject to a professional secrecy obligation.

New rules on corporate governance

Since 1 January 2021, new rules on corporate governance, as set out in two recent CSSF circulars, have applied to Luxembourg based banks and investment firms.

For banks, **Circular CSSF 20/759** updates key Circular 12/552 on central administration, internal governance and risk management to reflect the most recent thinking on good corporate governance and guidelines of the European Banking Authority.

In recent communications, the CSSF has underlined that there is a grace period for the implementation of rules by local banks until the end of the year. An FAQ is available on the CSSF's website discussing its answers to a number of questions regarding practical implementation (see link **here**).

As far as investment firms are concerned, **Circular CSSF 20/758** applies from now on. It broadly covers the same topics and principles as Circular 20/759 but adapts some requirements to investment firms.

Amendments to the latter Circular could be expected to take account of the new prudential regime for investment firms resulting from **Regulation (EU) 2019/2033** and **Directive (EU) 2019/2034**. The new prudential regime is introduced because the current CRR/CRD IV regime, which applies to both credit institutions and investment firms, focuses on typical banking risks and is viewed as not adapted to the risks run by investment firms. It will apply from 26 June 2021. In Luxembourg, the new regime is implemented through **Bill 7723**, which purports to modify a number of laws affecting the financial sector, and in particular the amended Law of 15 April 1993 on the financial sector.

Please read more on the two Circulars and the new corporate governance rules in our Newsflash **here**.

New Luxembourg framework for restrictive measures in financial matters

Luxembourg enhances the enforcement in its territory of international sanctions adopted at national, European and international levels.

The Law of 19 December 2020 relating to the implementation of restrictive measures in financial matters entered into force on 27 December 2020. It implements in Luxembourg restrictive measures in financial matters adopted at UN and EU levels against certain States, persons, entities and groups ("**Law**"). The Law repealed the Law of 27 October 2010, the scope of which was limited to terrorist financing. In a nutshell, international sanctions resulting from UN and EU restrictive measures will be implemented in Luxembourg through Grand Ducal regulations. They have to be complied with by Luxembourg citizens and legal entities as well as by other persons and entities operating in Luxembourg. Severe sanctions may apply in the event of non-compliance.

Key provisions of the Law include:

- a comprehensive definition of "restrictive measures", which comprise *inter alia* the prohibition to provide any financial services to sanctioned persons as well as the freezing of their funds, assets or other economic resources;
- supervision by supervisory authorities and self-regulatory bodies of compliance by legal entities with restrictive measures, where applicable; such authorities and bodies have at their disposal the same (broad) powers as those provided for in the AML Law (e.g. on-site inspections, access to documents);
- designation of in-scope restrictive measures by Grand Ducal regulation, either specifically (in a national context, under specific circumstances, e.g. the defence of the vital interests of the country) or by reference to a list appended to a UN or EU act;
- a 60-day application limit for restrictive measures adopted at Luxembourg level before relevant sanctions are adopted at UN or EU level, save for duly motivated 30-day extensions;
- a duty for legal entities bound to execute in-scope restrictive measures to inform the authorities of this execution;
- a new exception to the professional secrecy obligation incumbent upon certain legal entities (provided that disclosure of confidential information occurs in good faith for the purposes of compliance with the Law);
- severe sanctions for non-compliance with the Law, namely imprisonment (from 8 days up to 5 years) and fines (from EUR 12,500 up to EUR 5,000,000), or one of these sanctions only.

Right to silence for individuals charged with market abuse offences

In a recent **judgment** (case C-481/19, Consob), the Court of Justice of the European Union ("**CJEU**") has recognised for the first time that individuals subject to an administrative investigation for insider dealing cannot be penalised for refusing to provide answers to the competent authority when their answers might establish their liability for an offence punishable by administrative sanctions of a criminal nature or their criminal liability.

This preliminary ruling case concerns Directive 2003/6/EC and Regulation No 596/2014, both on market abuse, which provide that administrative sanctions must be determined for failure to cooperate in an investigation. In accordance with these provisions, the Italian financial markets authority, Consob, had imposed an additional penalty of EUR 50,000 on an individual, who had committed an administrative offence of insider dealing, for his failure to cooperate during the investigation since he had postponed the date of his hearing several times and had eventually refused to answer the investigators' questions.

The CJEU recalls that the right to silence is protected by Articles 47 (fair trial) and 48 (presumption of innocence and right of defence) of the Charter of Fundamental Rights of the European Union and is recognised by the European Court of Human Rights, in its case law on the right to a fair trial.

Pursuant to the CJEU, this right to silence is not confined to statements of admission of wrongdoing or to remarks which directly incriminate the person questioned, but rather also covers information on questions of fact which may subsequently be used in support of the prosecution and may thus have a bearing on the conviction or the penalty imposed on that person.

However, the right to silence recognised in market abuse proceedings is limited to natural persons and does not protect legal entities. Furthermore, this right to silence cannot justify every failure to cooperate with the competent authorities, such as a refusal to appear at a hearing planned by those authorities or using delaying tactics to postpone it.

Directive amending MiFID II in view of EU post-COVID 19 recovery

One of the recent measures adopted at EU level to help the EU's economic recovery from the COVID-19 pandemic is Directive (EU) 2021/338 of 16 February 2021 ("**Directive**"). The Directive amends the MiFID II Directive (2014/65/EU) on a number of points in order to facilitate that recovery.

The areas addressed by the Directive form part of the European Commission's capital markets recovery package. They include, in particular, amendments to the rules on client information, such as a simplification of information requirements, notably regarding disclosures of costs and charges. Other amendments concern product governance requirements or the energy derivatives markets. In this respect, the following elements are noteworthy:

- all MiFID client communications must from now on be provided in electronic form although retail clients can still request the communication to be provided on paper;
- services provided to professional clients and eligible counterparties are exempted from costs and charges disclosure requirements, except with regard to investment advice and portfolio management;
- the requirement for a cost-benefit analysis is relaxed when switching of financial instruments occurs in relation to services provided to professional clients, although they retain the possibility to opt in;
- a targeted exemption will allow banks and financial firms to bundle research and execution costs relating to small and mid-cap issuers;
- product governance requirements are removed for simple corporate bonds with "make-whole clauses";
- the position limit regime for commodity derivatives is adapted to help EU businesses to react to market volatility and to support the emergence and growth of euro-denominated commodity derivatives markets but the changes do not affect agricultural products, in particular products used for human consumption.

In addition, the obligation to produce best-execution under RTS 27 for execution venues and firms is suspended in light of the pandemic.

The Directive entered into force on 27 February 2021. Its measures shall be applied from 22 February 2022.

Hard Brexit for financial services

Since 1 January 2021, economic relations between the EU and the UK have been governed by the **Trade and Cooperation Agreement** ("**TCA**") agreed on 24 December 2020 between the EU and the UK as a third country (see link **here**). Since then, the EU and the UK have formed two distinct regulatory and legal spaces and the UK's relationship with the EU is now based on international law.

The TCA's primary focus is on trade in goods and it contains very little on financial services. Since 1 January 2021, UK financial service providers have no longer been able to rely on passporting rights to access the EU market and vice versa. This implies a de facto "hard Brexit" for financial services.

Please read more on the TCA and its impact in our Newsflash **here**.

At the EU's request, the provisional application of the TCA, initially foreseen until 28 February 2021, has been extended until 30 April 2021, allowing for more time to arrange for EU ratification.

Regarding financial services, a Memorandum of Understanding ("**MOU**") was expected to be concluded between the EU and the UK by March 2021 in order to establish the framework for cooperation on equivalence decisions. In a press release of 26 March 2021, the UK Government confirmed that technical discussions on the MOU have been concluded but that formal steps need to be taken on both sides before the MOU can be signed. The MOU will create a platform for voluntary regulatory cooperation in financial services between both parties.

No financial assistance criminal offence for S.à r.ls

The 2016 revision of the Luxembourg law of 10 August 1915 on commercial companies had introduced a clerical error in a criminal law provision relating to the prohibition of unlawful financial assistance. The error raised discussions among practitioners on whether or not the financial assistance prohibition would apply to S.à r.ls. The Luxembourg Government now rectifies this error through a new bill of law (no 7791), submitted to Parliament on 16 March 2021.

Read more on the new bill of law in our **Newsflash**.

Employment and pensions law

Telework

The new agreement on telework, signed on 20 October 2020 between the social partners LCGB, OGB-L and UEL, was declared of a general obligation by Grand Ducal Regulation of 22 January 2021, published in Mémorial A No 76 of 2021. As a result, this new agreement is now binding for all companies in Luxembourg, pursuant to Article L.164-8 of the Luxembourg Labour Code.

This Agreement confirms that teleworking is neither a right nor an obligation and requires a joint agreement between the parties. It can be put in place either at the time of hiring or during the performance of the employment contract.

Further to clarifying the legal framework, this Agreement introduces two forms of telework namely "occasional" and "regular":

- occasional telework applies (i) where telework is carried out to deal with unforeseen events (e.g. in the event of a national lockdown measure following the state of emergency declared during the Covid-19 crisis, in the event of a cancelled flight/train making it impossible for employees to travel, in the event of computer problems at the workplace, etc.) and/or (ii) where telework represents less than an average of 10% of the teleworker's normal annual working time (reference period calendar year) ;
- regular telework applies in all the other cases.

Common principles apply to both types of telework (e.g. voluntary basis of telework, equal treatment, non-discrimination, right to privacy, social integration, health and safety, information and training, of teleworkers etc.).

The implementation of occasional telework, however, offers more flexibility than regular telework. Notably, regular telework must be agreed in writing between the parties, hence regulating the applicable terms and conditions (e.g. place of telework, hours and days of telework during which the employee must be available, equipment provided to the teleworker, costs covered by the employers, eventual compensation replacing the loss of benefits in kind, etc.). In contrast, occasional telework does not require any particular formalism, even though a minimum written confirmation is recommended, for accident insurance reasons.

The COVID-19 health crisis has precipitated the massive recourse to telework, without even requesting the employees' prior consent, due to health and safety considerations. Employers who now wish to continue telework on a regular basis one year after the beginning of the crisis, are invited to take all necessary steps to formalise it.

Indeed, the current pandemic situation may no longer qualify as an unpredictable event, despite the appearance of new variants of the virus, so that the more flexible provisions of occasional telework should not apply. It is therefore recommended to sign addendums to the employment contracts in order to obtain the employees' formal consent to exercise the activity in the form of telework (even if it is on a temporary basis throughout the vaccination campaign) and eventually establish an internal policy providing the applicable framework.

Attention is also drawn to the fact that the implementation of an internal teleworking policy or scheme within a company is now subject to prior information and consultation of the staff delegation. The co-decision procedure applies for companies with at least 150 employees. As a general rule, the staff delegation should be regularly informed about the number of teleworkers and any changes therein within the company.

Parental leave guaranteed when unemployed at the time of birth or adoption

By a judgment of 25 February 2021 (C-129/20), the Court of Justice of the European Union (CJEU) found Luxembourg law to be non-compliant with the EU directive implementing the revised framework agreement on parental leave[1] (the "**Directive**").

Indeed, according to Luxembourg law[2], the right to parental leave is subject to the twofold condition that the worker is lawfully employed in a workplace and is affiliated in that regard to the social security scheme (i) at the time of the birth or of the reception of the child to be adopted and (ii) for a continuous period of at least 12 months immediately preceding the start of the parental leave.

In the case debated before the CJEU a dispute had arisen between a Luxembourg civil servant (parent) and the "*Caisse pour l'avenir des enfants*" (Luxembourg Children's Future Fund) which refused to grant the parental leave on the basis that the first condition was not met, i.e. the parent was not in a paid employment relationship on the date of birth.

The CJEU concluded that a Member States can require that a parent has been uninterruptedly employed during 12 months prior to the start of the parental leave, but cannot request from a parent to be employed on the date the child is born or adopted.

An amendment of Luxembourg law is to be expected to comply with the CJEU ruling.

1. Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC
2. Article L.234-43 of the Luxembourg Labour Code and Article 29 *bis* of the Law of 16 April 1979 fixing the general status of Luxembourg civil servants

Working time – Rest period

By a judgment of 17 March 2021 (C-585/19), the Court of Justice of the European Union ("**CJEU**") interpreted the Directive 2003/88/EC concerning certain aspects of the organisation of working time[1] ("**Working Time Directive**") in order to determine how to appraise the minimum daily rest period in case of multiple contracts with the same employer.

In the case debated before the CJEU a dispute had arisen between an employee and the University of Economic Studies in Bucharest (Romania) which refused to pay the salary for the hours exceeding the maximum daily working hours as a result of several employment contracts running in parallel for different projects/activities of the employee for the benefit of the University.

The CJEU concluded that the minimum daily rest period provided for in Article 3 of the Working Time Directive shall apply to all employment contracts taken as a whole and not separately to each contract.

Every worker is therefore entitled to a daily rest period of at least 11 consecutive hours per day, irrespective of whether he/she is employed under one or several employment contracts with the same employer. In other words, the signing of different contracts may not be considered to be a period of resting hours under one contract and as working time under another contract.

1. Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time

EU law, competition and antitrust

Luxembourg competition law update

Several decisions and judgments in the competition law field over the last quarter are noteworthy. A link to the 2020 Annual Report of the Competition Council is available **here**.

- Significant sanctions for vertical price-fixing in the food retail distribution sector

In three **decisions** of 19 November 2020, the Competition Council imposed significant fines on several players in the food retail distribution sector, the supplier Bahlsen and its distributors Cactus, Delhaize and Auchan for the fixing of retail prices of Bahlsen products between 2011 and 2015. Although the Council could not establish any (horizontal) collusion between the distributors regarding the retail prices of these products, it withheld that sufficient proof was found of prohibited vertical price-fixing between Bahlsen and each of them respectively. The decisions were adopted following an *ex officio* investigation by the Council. Following an inspection at its premises, Bahlsen had applied for leniency but this did not prevent the imposition of a (reduced) fine.

The decision in case 2020-FO-04 – Cactus is under appeal.

- No interim measures for alleged abuse of dominance by *Laboratoires National de Santé*

In an interim **decision** of 17 December 2020, the President of the Competition Council rejected the request for interim measures against *Laboratoire National de Santé* ("LNS") for an alleged abuse of dominant position in the field of COVID 19 testing. A complaint, accompanied by a request for interim measures, had alleged abusive practices in the market for medical biology analyses and the supply of biology equipment, reagents and consumables contrary to the Law on Competition of 23 October 2011 and relevant EU Treaty provisions.

According to the complaint, LNS violated competition law notably by having been granted a dominant position by the State in carrying out virological and serological tests, by abusing this dominant position to limit the supplies of its competitors, and by practising an aggressive human resources policy.

The decision recalls that the Competition Council is not competent to examine the legality of State measures granting a dominant position and that the adoption of interim measures requires the existence of a *prima facie* infringement of competition law, proof of which was lacking in this particular case. The Decision is without prejudice to the final decision on the substance of the complaint.

- The administrative court confirms the absence of merger control competence for the Council

In a **judgment** of 25 January 2021, the Luxembourg Administrative Tribunal confirmed the absence of merger control powers of the Competition Council. It upheld its decision to dismiss a complaint by

Fédération des Artisans that an already completed acquisition of Paul Wagner et Fils by Encevo amounted to an abuse of dominance as the merged company would be dominant in several markets and could foreclose competitors. The Tribunal held that the Council correctly found that there was no evidence of a competition law infringement. The merger itself did not constitute an abuse of dominance since the companies were not direct competitors so it did not create or strengthen a dominant position that could harm competition.

Regulating fair market behaviour in digital markets

Some large online platforms act as "gatekeepers" in digital markets. On 15 December 2020, the European Commission published a **proposal** for a Regulation on contestable and fair markets in the digital sector ("**Digital Markets Act**"), establishing criteria for qualifying as "gatekeepers" the providers of the largest online platforms and imposing several new obligations on them. The Digital Markets Act aims to ensure that these gatekeepers behave in a fair way online.

Together with the Digital Services Act, discussed in the ICT, IP, media and data protection section of this Newsletter, the Digital Markets Act is a centrepiece of the EU's digital strategy.

For more information on the Digital Markets Act and its potential impact, read more **here**

ICT, IP, media and data protection

GDPR - Transfers of personal data in the UCI world after Schrems II

Undertakings for Collective Investments ("**UCIs**") process personal data about investors who are either natural persons or legal persons represented by natural persons. Most of the time, processing operations by UCIs based in Luxembourg include transfers of personal data from Luxembourg to countries outside of the EEA. These transfers are governed by the GDPR and impacted by the so-called "**Schrems II**" ruling of 16 July 2020 from the Court of Justice of the European Union in case C-311/18. Although the ruling particularly deals with transfers to the US, it's effects are not limited to transfers to the US.

Key takeaways about the impact of Schrems II for UCIs are available **here**.

Luxembourg law recognises issuance of dematerialised securities in blockchains

On 21 January 2021, the Luxembourg Parliament adopted the Law of 22 January 2021 modifying the Law of 5 April 1993 on the financial sector and the Law of 6 April 2013 on dematerialised securities ("**Law of 2021**").

The Law of 2021 aims at modernising the existing legal framework for dematerialised securities, by expressly recognising the possibility to issue dematerialised securities through distributed ledger technology such as blockchains.

Please read our article **here**.

The impact of the Brexit deal on personal data transfers from the EU to the UK

On 24 December 2020, the European Union ("**EU**") and the United Kingdom ("**UK**") finally struck a deal over Brexit. They notably reached a Trade and Cooperation Agreement.

In respect of personal data protection, this Trade and Cooperation Agreement provides for a temporary period during which transfers made to the UK will not be considered as transfers within the meaning of the laws of the EU law, insofar as – inter alia – the UK Data Protection Act 2018 ("**DPA**") as amended in 2019 applies. The DPA was amended to incorporate the principles of the GDPR and has become the so-called UK GDPR. It will be applicable from 1 January 2021.

Should the UK not be granted an adequacy decision by the end of the temporary period (ending at the end of April or, if extended, June 2021), the situation will then be as if no deal intervened in this respect.

Please read our article **here**.

The European Commission recently released two draft decisions on the adequate protection of personal data by the United Kingdom.

Please read our article **here**.

Focus on European Commission's proposal for a Digital Services Act

On 15 December 2020, the European Commission published the Digital Services Act Package, which includes two significant proposals:

- a **proposal for a Regulation on a Single Market For Digital Services** (Digital Services Act or "**DSA**") and amending Directive 2000/31/EC ("**e-Commerce Directive**"),
- a proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act or "**DMA**").

These proposals are expected to affect various types of providers of digital services (such as marketplaces, social media platforms, content-sharing platforms) in the European Union ("**EU**") and to create a safer and more open digital space while further developing the European Single Market for digital services.

The proposal for a Digital Services Act ("**DSA Proposal**") clarifies and upgrades the responsibilities and the accountability of the digital service providers with respect to any illegal content they intermediate or disseminate without wiping out past principles. The DSA Proposal sets out several layers of obligations, which shall apply to the digital service providers depending on the type of services they provide in the digital space.

For more information with respect to the DSA Proposal (context, entities targeted, key obligations, supervisory framework, sanctions), please read our article **here**.

As for the DMA, it will impose obligations for large online platforms (*e.g.* online search engines, video-sharing platform services, cloud computing services) that behave as "gatekeepers", such status being more fully defined in the DMA. The DMA aims to refrain from anti-competitive and unfair practices and ensure that gatekeepers themselves act in a way that guarantees an open online environment.

European Commission's Action Plan on Intellectual Property

On 25 November 2020, the European Commission ("**Commission**") published its Action Plan on Intellectual Property[1] ("**Action Plan**") which proposes to implement specific intellectual property ("**IP**") policies with the particular objective of modernising the European Union ("**EU**") framework in this field and helping small and medium enterprises ("**SMEs**") benefit from their inventions and creations, especially in times of health and economic crisis.

This Action Plan is an ambitious policy document with multiple proposals for actions ("democratising" IP, enhanced support to SMEs, fight against infringements of IP rights, etc.). It also highlights several developments that are expected with regard to patents, author's rights, databases, trade secrets or designs in the following months/years.

Please click **here** to read our article.

> 1. **Communication** from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of The Regions: "Making the most of the EU's innovative potential – An intellectual property action plan to support the EU's recovery and resilience".

The Data Governance Act - regulating access to data held by public authorities

On 25 November 2020, the European Commission published a Proposal for a Regulation on European data governance ("**Data Governance Act**"), part of a set of measures related to the **European data strategy** that aims at making the EU a leader in a data-driven society.

This proposal addresses sharing mechanisms for data held by public sector bodies that is subject to rights of others (such as documents on which third parties hold intellectual property rights) so that legal entities may gather such data from individuals for projects of general public interest.

Please read our article **here**.

Regulating access to Open Data - free access to data held by public bodies

On 25 April 2018, as part of a package of measures aiming to facilitate the creation of a common data space in the EU, the European Commission ("**Commission**") proposed to review the Open Data Directive 2003/98/EC (as amended). Following an impact assessment carried out by the Commission, a recast of the Open Data Directive was adopted on 20 June 2019 resulting in **Directive (EU) 2019/1024 on open data and the re-use of public sector information** ("**New Open Data Directive**").

The New Open Data Directive repeals the Open Data Directive from 17 July 2021 and focuses notably on increasing business opportunities by encouraging the dissemination of dynamic data via application programming interfaces (APIs).

The Luxembourg Parliament is currently discussing a Bill of Law 7643 with a view to transposing the New Open Data Directive into Luxembourg law, which once adopted will repeal the amended Law of 4 December 2007 on the re-use of public-sector information.

Please read the article **here**.

ePrivacy Regulation: The return?

On 10 February 2021, the Council of the European Union published a **press release** according to which the Member States' representatives at the Council (Committee of Permanent Representatives or "**Coreper**") have agreed to grant a negotiating mandate to the Council for the revised rules on the protection of privacy and confidentiality in the use of electronic communications services.

Hence, after years of a certain legislative slowdown following the publication in 2017 of the EU Commission's proposal for a regulation on the respect for private life and the protection of personal data in electronic communications ("**e-Privacy Regulation**") aiming to replace the e-Privacy Directive 2002/58/EC, such mandate of negotiation will finally permit the launch of a "trilogue" legislative process (between the Parliament, the Council and the Commission) in view to reach a final agreement on the content on the said e-Privacy Regulation (not expected any time soon though).

That said, it is interesting to note that – thanks to the GDPR itself – many businesses have already voluntarily adopted certain of the mechanisms referred to in the legislation in preparation as regards the use of cookies (cookies being one of the main blocking point of discussion). In particular, informing users about the use of cookies is now quite widespread behaviour. In contrast, dealing with consent collection is still quite inconsistent across the board.

Read more about the e-Privacy Regulation (and its interplay with GDPR) **here**.

Tax

VAT treatment of cross-border company cars

On 20 January 2021, the Court of Justice of the European Union ("**CJEU**") released a decision in case C-**288/19**, concerning the VAT treatment of company cars provided by a Luxembourg established employer to its staff employees, residing in Germany.

In this decision, the CJEU had the opportunity to clarify the conditions under which the professional and private use by an employee of a company car put at his disposal by an employer is subject to VAT.

Following the CJUE's decision, the Luxembourg VAT authorities issued a **Circular 807** on 11 February 2021 confirming the application of the ruling of the CJUE.

The VAT treatment of cross-border company cars resulting from the above CJUE decision and the Circular may (in certain circumstances) have negative consequences for Luxembourg established employers providing company cars to commuting employees.

Please refer to our **article** for more information.

Non-deductibility of interest and royalties due to "blacklisted countries"

Since 1 March 2021, interest and royalties due to associated enterprises established in a country or territory listed on the EU list of non-cooperative tax jurisdictions will no longer be tax deductible (under certain conditions) in accordance with the new Luxembourg Law of **10 February 2021** ("**Law**").

Please refer to our previous Newsletter dated **1 April 2020** for further background.

Compared to the Bill of Law, the following main changes were made during the legislative process:

- the new defensive tax measures are applicable since 1 March 2021 instead of 1 January 2021 as initially contemplated by the Bill of Law;
- only interest and royalties accrued from 1 March will be subject to the new measures. The Bill of Law originally envisaged covering interest and royalties payments (along with accruals). This would have led to a retroactive effect of the Law for payments made after the entry into force of the Law but stemming from accruals made before that time.

Blacklisted countries covered by the measures on 1 March 2021) are those listed in the most recent EU blacklist published by the EU Council, which was updated recently on **22 February 2021** and is composed of the following countries: American Samoa, Anguilla, Dominica, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, US Virgin Islands, Vanuatu, Seychelles.

Any country or territory added to the EU blacklist during a year will only be taken into account as of 1 January of the following year for the application of the new defensive tax measures.

Conversely, if a country or territory is removed from the EU blacklist during a year, the defensive tax measures would cease to apply as from the date of publication of the EU blacklist confirming that the country or territory concerned has been removed.

Luxembourg tax authorities' guidance on interest deduction limitation rule

On 8 January 2021, the Luxembourg tax authorities issued the long-awaited administrative **circular** providing guidance on certain aspects of the interest deduction limitation rule laid down in Article 168bis of the Luxembourg tax law.

Please read our **Newsflash** for further details on this topic.

Modernisation of Luxembourg VAT law

The **Law of 15 December 2020**, applicable as of 1 July 2021, implemented and completed the implementation of multiple EU VAT Directives into the Luxembourg VAT Law of 12 February 1979, as amended, which mainly aims at:

- modernising and adjusting existing VAT rules on e-commerce;

- harmonising and simplifying certain VAT rules applicable to intracommunity supplies of goods.

- Special provisions applicable to supplies of goods facilitated by electronic interfaces (Directives (EU) **2017/2455** and **2019/1995**)
    - The distance sale of goods by non-EU suppliers to EU private consumers will become subject to VAT in the same way as the supply of goods by EU suppliers is already subject to VAT;
    - The distance sale of goods or services for more than EUR 10,000 to private consumers within the EU will be subject to VAT in the Member State of arrival;
    - Online platforms will become accountable for VAT due on distance sales to EU private consumers carried out within their e-marketplace.

- Chain transactions facilitated through the use of an electronic interface (Directives (EU) **2017/2455** and **2018/1910**)

  In the case of successive transactions of goods delivered directly from the first supplier to the last consumer in the chain, Luxembourg VAT Law already provides that the transport is ascribed to the supply made to the intermediary operator, except where that intermediary operator communicates to the supplier the VAT identification number issued to him by the Member State from which the goods are transported, in which case the transport must be ascribed to the supply of goods made by the intermediary operator. It is now specified that these rules will not apply where the supply of goods within the EU or from third countries and having an intrinsic value not exceeding EUR 150, is made through the use of an electronic interface such as a marketplace, platform, portal or similar means.

The 2021 budget Law

The draft budget law for the year 2021 was passed on**19 December 2020** and the provisions included have been applicable since 1 January 2021. Please read our **article** with the key takeaways of the tax measures.

Thereafter, the Luxembourg indirect tax authorities issued a series of administrative **circulars** that mainly confirm the provisions of the new law.

Exchange of Information in Tax Matters – CJUE joined Cases C-245/19 and C-246/19

On 6 October 2020, the Court of Justice of the European Union ("**CJEU**") ruled in joined **cases C-245/19 and C-246/19** that the Luxembourg Law dated 25 November 2014 laying down the procedure applicable to the exchange of information on request in tax matters, as in force prior to the amendments introduced by the **Law of 1 March 2019** following the landmark **Berlioz** case, partially violated the Charter of Fundamental Rights of the European Union ("**EU Charter**").

The CJEU did not completely follow Advocate General Kokott's **Opinion** ("**AG Kokott**") released on 2 July 2020 and considered that whether national legislations must guarantee or may exclude the right to an effective judicial remedy within the context of an exchange of information in tax matters depends on the person involved:

- The absence of the right to an effective judicial remedy *of the person holding information* and to which an order is addressed by the Luxembourg tax authorities following the request of tax authorities of another Member State is contrary to Article 47 *(right to a fair trial)* of the EU Charter.
- Contrary to AG Kokott, the CJEU ruled that the right to an effective judicial remedy *of the taxpayer concerned by the investigation* of the tax authorities of another Member State, against the information order, may be limited given that the taxpayer concerned is neither subject to any legal obligation by the information order, nor exposed to the risk of receiving a penalty in case of non-compliance. The CJEU decided that it is sufficient for national law to be compliant with Article 47 of the EU Charter that the taxpayer concerned has the possibility to file an action against any corrected or adjusted tax assessments issued as a result of the investigations.
- For the same reasons, the right to an effective judicial remedy *of any third party concerned by the information at issue* against the information order may also be limited to the extent that such a third party has access to a court to obtain compensation for the harm suffered as a result of the infringement of EU Law and where that court has the possibility to review the act or measure that has given rise to that infringement or harm. The CJEU thus ruled that Luxembourg law was not contrary to Article 7 *(respect for private and family life)*, Article 8 *(protection of personal data)* and Article 47 of the EU Charter.

The CJEU has further clarified the condition of "foreseeable relevance" of the information requested by the relevant tax authorities for the purposes of the relevant investigation, which was already at issue in the Berlioz case mentioned above. The information order and initial information request are manifestly not devoid of any foreseeable relevance insofar as they state (i) the identity of the taxpayer concerned by the investigation, (ii) the period covered by that investigation and (iii) the identity of the person who holds information concerning contracts, invoices and payments concluded or carried out during that period and connected with that taxpayer.

The Luxembourg Administrative Court which had referred the preliminary ruling request to the CJEU rendered its final decision on 12 January 2021 (No. **41486Ca** and No. **41487Ca**) by adopting the CJEU solution.

CRS: Amended lists of participating and reportable jurisdictions

Luxembourg has published the **Grand-Ducal Regulation dated 22 January 2021** in the Official Gazette amending the list of reportable jurisdictions for the purpose of the Common Reporting Standard (CRS) according to which:

- Brunei Darussalam, New Caledonia and Peru have been added to the list of participating jurisdictions;
- Brunei Darussalam, Morocco, New Caledonia and Peru have been added to the list of reportable jurisdictions (as from 2020).

CbC reporting: Amended list of reportable jurisdictions

Luxembourg has published the **Grand-Ducal Regulation of 22 January 2021** in the Official Gazette amending the list of jurisdictions with which the Luxembourg Tax Authorities will exchange Country-by-Country ("**CbC**") reports.

Accordingly, as from 1 January 2018, Andorra, Monaco, Seychelles and Panama are included on the list of exchanging countries.

Therefore, MNE Groups that have an Ultimate Parent entity in one of these three jurisdictions would need to (i) either designate a reporting entity in a listed jurisdiction or in Luxembourg (called "Surrogate Parent") or (ii) submit a local CbC report in Luxembourg via its Luxembourg subsidiaries.

For more information on CbC reporting, please check our previous newsletters of **5 April 2017**

Application of the EU Participation Exemption Regime to Gibraltar companies

On 1 December 2020, the Luxembourg tax authorities ("**LTA**") issued the **Circular L.I.R. n° 147/2, 166/2 et Eval. n°63** ("**Circular**") providing for the non-applicability of the Parent-Subsidiary Directive 2011/96/EU ("**PSD**") to companies based in Gibraltar.

This publication of the LTA follows the decision of the Court of Justice of the European Union ("**CJEU**") in the case *GVC Services (Bulgaria) EOOD v. Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Sofia* (C-458/18) according to which companies incorporated in Gibraltar are not covered by the PSD as they are not included in the expressions "companies incorporated under the law of the United Kingdom" and the tax levied in Gibraltar cannot be considered as "corporation tax in the United Kingdom" for the purposes of the application of the PSD.

Further to the Circular and as of 1 January 2021:

- Luxembourg companies having subsidiaries in Gibraltar and relying on the Luxembourg participation exemption ("**LPEX**") for dividends, capital gains and net wealth tax will have to reassess whether they can still benefit from LPEX. Indeed, those companies will only be able to benefit from LPEX in future if their Gibraltar subsidiary meets the "comparable tax test" condition, requiring the foreign subsidiary to be a fully taxable resident company subject to an income tax comparable to the Luxembourg corporate income tax (for 2021, a rate of 8.5% on a comparable tax basis should satisfy this requirement).

- Luxembourg companies distributing dividends to Gibraltar companies will no longer be able to rely on the LPEX for the withholding tax exemption. Indeed, Luxembourg withholding tax exemption applies to non-EU recipients, fully taxable companies, resident in countries with which Luxembourg has concluded a double tax treaty. However, Luxembourg has not concluded a double tax treaty with Gibraltar and therefore the Luxembourg withholding tax exemption cannot apply in this case.

The Circular is more than welcomed as it usefully clarifies (i) the impact of the CJEU decision on the C-458/18 case for Luxembourg taxpayers as well (ii) the date from which the new interpretation shall apply.

Tax treaties news

- France publishes guidelines on tax treaty with Luxembourg

On 23 February 2021, the French tax authorities published **guidelines** on the France – Luxembourg Income and Capital Tax Treaty signed in 2018.

The guidelines provide many details and examples regarding:

- the scope of application of the new treaty;

- taxation rules applicable to each type of income, especially business income; and

- provisions on the elimination of double taxation and other provisions.

For further background on the Luxembourg-France Double Tax Treaty, please refer to our **April** 2018, **December** 2018 and **February** 2019 Newsletters.

- Albania ratifies Protocol to Tax Treaty with Luxembourg

On 18 February 2021, Albania ratified the amending protocol, signed on 21 October 2020, to the Albania - Luxembourg Income and Capital Tax Treaty signed in 2009.

Luxembourg must also ratify this protocol in order for it to enter into force.

- France ratifies Protocol to Tax Treaty with Luxembourg

On **27 January 2021**, France ratified the amending protocol, signed on 10 October 2019, to the France - Luxembourg Income and Capital Tax Treaty (2018) regarding the method used in France to mitigate double taxation with respect to Luxembourg-sourced income derived by French resident cross-border workers. This amending protocol entered into force on 18 February 2021, and has generally applied to tax periods starting as from 1 January 2020.

In Luxembourg, the amending protocol was implemented by the **Law of 25 March 2020** into Luxembourg domestic law.

For more information on this protocol, please refer to our **article**.

- New amending protocol to the Luxembourg - Russia Income and Capital Tax Treaty

On 6 November 2020, Luxembourg and Russia signed an amending protocol to update the Luxembourg - Russia Income and Capital Tax Treaty signed in 1993. The amending protocol amends the tax treaty in terms of increasing the withholding tax to 15% in respect of dividends and interest.

The amending protocol came into force on 5 March 2021 (i.e. the day both Contracting States have informed each other about the completion of the ratification process). The provisions of the amending protocol will then apply to tax periods starting as from 1 January

- MLI – Luxembourg Circular on changes to Luxembourg - Switzerland DTT

On 17 November 2020, the Luxembourg's tax authorities published the **Circular LG – Conv. DI No. 66**, setting out the changes made by the Multilateral Instrument ("**MLI**") to the Switzerland - Luxembourg Income and Capital Tax Treaty signed in 1993 ("**Switzerland – Luxembourg DTT**"). For more information on the MLI, please refer to our past articles of **25 February 2019** and **31 July 2018**).

As a reminder, Switzerland *covered tax agreements* only enter into effect (after the completion of the ratification process) when Switzerland has notified the OECD that is has completed its internal procedure to renegotiate the relevant double tax treaty (reservation for separate notifications pursuant to Article 35(7) MLI). In this respect, on 12 May 2020 Luxembourg and Switzerland signed an amicable agreement regarding the modifications made to the Switzerland - Luxembourg DTT and Switzerland notified the OECD of those modifications on 27 May 2020.

- Protocol to Tax Treaty between Kazakhstan and Luxembourg enters into force

On 6 November 2020, the amending protocol, signed on 14 October 2019, to the Kazakhstan - Luxembourg Income and Capital Tax Treaty signed in 2008 entered into force. The protocol generally applies from 1 January 2021.

