ELVINGER HOSS PRUSSEN

ELVINGER HOSS

LUXEMBOURG LAW

NEWSLETTER

OCTOBER 2020

Dispute resolution

Tax

Covid-19

Global update

For an update on the latest communications and initiatives in the Covid-19 context affecting our clients, see our dedicated **webpage** and/or click on the relevant section below:

- **Asset management and investment funds**
- **Banking and Finance**
- **Corporate, mergers and acquisitions**
- **Commercial**
- **Dispute resolution**
- **Employment and pensions law**
- **EU law, competition and anti-trust**
- **Finance**
- **ICT, IP, media and data protection**
- **Insolvency and restructuring**
- **Regulatory and compliance**
- **Tax advice and structuring**

Asset management and investment funds

Sustainable finance : Latest developments and new interactive compilation

From 10 March 2021, investment fund managers and the funds that they manage will need to comply with the new ESG transparency requirements provided for in the Disclosure Regulation (EU) 2019/2088.

1. Disclosure Regulation: The challenging application date of 10 March 2021

For an overview of the key points of this Regulation, the issues and possible delay, our recommendations in term of actions to be taken in view of the deadline of 10 March 2021, and the situation in Luxembourg, see our new article "**Sustainable finance: The challenging compliance date of 10 March 2021**" on our website.

2. Sustainable Finance Disclosure and Taxonomy Regulations: New compilation

To facilitate navigation through the upcoming Sustainable Finance legislation, an interactive compilation of the Disclosure Regulation (EU) 2019/2088 is available on our website. The **electronic version** of this compilation provides direct access to a consolidated version of the Disclosure Regulation and the draft level 2 disclosure text ("**Draft Implementing Regulation**") as well as the relevant articles of the Taxonomy Regulation (EU) 2020/852 and the annexes of the Draft Implementing Regulation. The European Commission's proposals to amend the UCITS and AIMD level 2 measures are also included.

AML legislation: Amendments

AML Luxembourg legislation and CSSF regulation further amended with immediate effect.

On 20 August 2020, two pieces of legislation amending the applicable AML/CFT legal and regulatory framework were published:

- **Grand-ducal Regulation of 14 August 2020** amending Grand-ducal Regulation of 1 February 2010 providing details on certain provisions of the Law of 12 November 2004 on the fight against money laundering and terrorist financing, as amended ("**AML GDR**"); and
- **CSSF Regulation 20-05 of 14 August 2020** amending CSSF Regulation 12-02 of 14 December 2012 on the fight against money laundering and terrorist financing ("**AML CSSF Regulation**").

Coordinated versions of both the **AML GDR** and the **AML CSSF Regulation** are available on the CSSF website.

In addition to the changes tending to align wordings and references with the latest revisions made to the AML Law, other key amendments notably include:

- clarifications on the tasks and duties of the AML/CFT Officer (RC) and AML/CFT Compliance Officer (RR);
- reinforcement of the oversight obligations on the third parties to which implementation of AML/CFT professional obligations is delegated (e.g. enhancement of contractual requirements);
- enhanced requirements in terms of formalisation of the AML/CFT procedures;
- clarifications of CSSF expectations in terms of controls on the assets (screening, risk analysis);
- precisions on KYC information to be gathered;
- examples of simplified due diligence measures and of mitigation measures applying to non face-to-face relationships are now provided.

All targeted entities, including investment funds and their investment fund managers should therefore ensure that their own AML/CFT policies and procedures are updated to take into account the recent modifications made to the AML GDR and the AML CSSF Regulation.

They should further liaise with their delegates involved in the implementation of the AML/CFT obligations (i) to ensure their own procedures are updated and, where necessary, identify the incomplete due diligence files in light of the new requirements and define a remediation plan in that respect, and (ii) where necessary, to review and update the contractual arrangements in place.

NAV calculation error and investment breaches

The CSSF clarifies its expectations in relation to CSSF Circular 02/77 on NAV calculation error and investment breaches.

An **FAQ** in relation to the provisions set out in CSSF Circular 02/77 concerning the protection of investors in case of NAV calculation error and correction of the consequences resulting from non-compliance with the investment rules applicable to UCIs was published on 7 July 2020 on the CSSF website.

This FAQ applies to UCITS and Part II UCIs[1]. It also outlines the principles to be applied by SIFs.

As part of the organisational requirements of the investment fund managers ("**IFMs**"), the CSSF requests the latter to put in place robust policies, processes and procedures governing the treatment of NAV calculation errors and investment breaches. In this respect, the CSSF further requires that a detailed policy is established and implemented by the IFMs and approved by their board of directors and, if applicable, the board of directors of the UCIs.

The FAQ also gives guidelines on the items to be covered by the policy mentioned above and the related operational procedures (e.g. governance process, the NAV error threshold applied, the methodology used for the calculation of the financial impact in case of active breach, definition of active and passive breaches). The CSSF recommends that this policy is also drawn up and implemented by Part II UCIs which are not managed by an authorised AIFM and SIFs subject to Part I of the SIF Law.

Chapter II of the FAQ provides that the board of directors of the IFM and, if applicable, the board of directors of the UCIs are also in charge of the internal policy governing the treatment of an investment breach and, as such, are the ultimate body responsible for choosing between the economic or the accounting method used by the Funds for the determination of the compensation amount.

Chapter III of the FAQ also provides for clarification on the tolerance threshold specifying for instance that (i) it is not applicable in the event of overcharged fees and costs borne by a UCI (i.e. fees and costs higher than those specified in the UCI prospectus), (ii) the CSSF should be notified even if the tolerance threshold applies, and (iii) how the tolerance threshold applies to fund of funds, index trackers and feeder funds.

> 1. "**Part II UCIs**" refer to Undertakings for Collective Investment subject to Part II of the Luxembourg Law of 17 December 2010 relating to UCIs, as amended.

Non-eligibility of loans for UCITS

Loans qualifying as money market instruments can no longer be held by UCITS funds.

On 7 August 2020, the CSSF **completed** its **FAQ on the UCI Law** by adding question 1.13 on the eligibility of loans. The CSSF states that loans no longer constitute eligible investments for UCITS.

The FAQ only formalises a position taken by the CSSF in its regulatory practice several months ago.

UCITS invested in loans have to disinvest from those positions by 31 December 2020, taking into account the best interests of investors. In addition, the prospectuses of those UCITS, offering the possibility to invest in loans, have to be updated by 31 March 2021 at the latest, in order that they no longer provide for the possibility for such investments.

Cross-border services by third-country firms

CSSF recognises first equivalent third countries and clarifies when an investment service is rendered in Luxembourg.

On 2 July 2020, the CSSF published two important documents in relation to the provision of cross-border services by third-country firms:

- **CSSF Regulation 20-02** which lists the first third countries with equivalent supervision regimes for MiFID II services performed to *per se* professional clients or eligible counterparties in Luxembourg; and
- **CSSF Circular 20/743** which amends an existing circular (**Circular 19/716**) on the regime applicable to third-country firms wishing to provide investment services to clients in Luxembourg in accordance with Article 32-1 of the Financial Sector Law, which transposed the third-country regime of MiFID II Directive and MiFIR.

The clarifications in the CSSF Circular 20/743 are particularly relevant for investment funds and their managers.

They imply that:

- the provision of investment management services to Luxembourg UCITS and AIFs by an investment manager established outside the EU/EEA (in the typical scenario where a UCITS management company or an AIFM delegates investment management to an investment manager established outside the EU/EEA) should not be deemed to be a provision of services "in Luxembourg" for the purpose of the Financial Sector Law (as long as the third-country manager is not established in Luxembourg or does not otherwise provide its services in Luxembourg);
- MiFID II rules do not apply to such provision of services. Application of Article 32-1 of the Financial Sector Law (and related CSSF authorisation process) is therefore not triggered. Only the investment management delegation rules set forth in the UCITS Law[1] and the AIFM Law[2] apply in that case.

For more information on CSSF Regulation 20-02 and CSSF Circular 20/743, see the **Newsflash** on our website.

1. "**UCITS Law**" refers to the Law of 17 December 2010 on undertakings for collective investment, as amended.
2. "**AIFM Law**" refers to the Law of 12 July 2013 on alternative investment fund managers, as amended.

CSSF annual report 2019

*The report on the CSSF activities and on the development of Luxembourg's financial centre in 2019 has been released and is available on the **CSSF website**.*

The annual report includes, in addition to statistical data, information on the CSSF's regulatory practice in all areas (including investment funds, management companies and AIFMs) where the CSSF is the competent authority.

For more insights on the points raised by the CSSF in relation to the supervision of investment fund managers and UCIs in this report, see the article "**CSSF Annual report 2019: Key points for investment fund managers and UCIs**" on our website.

Corporate, banking and finance

Professional guarantees

On 10 July 2020, the Luxembourg Parliament (*Chambre des Députés*) adopted a new law relating to professional payment guarantees.

The law introduces a special regime for personal guarantees granted in a professional context among parties who wish to benefit from greater contractual freedom in determining the features and the legal consequences of a guarantee.

More detailed information on the law can be found in our related article "**Professional Guarantees**" published on our website.

Further specification of AML/CFT obligations

Professionals must update their AML/CFT policies and procedures to take account of recent modifications to the AML Grand-Ducal Regulation and AML CSSF Regulation and review the impact on their arrangements with delegates and agents.

Following the recent amendment of the AML legal framework in the context of the transposition of AMLD5 (see our **Newsflash** on this topic), two level two texts further specifying the obligations of professionals were published:

- **Grand-ducal Regulation of 14 August 2020** amending Grand-ducal Regulation of 1 February 2010 providing details on certain provisions of the Law of 12 November 2004 on the fight against money laundering and terrorist financing, as amended ("**AML GDR**"); and
- **CSSF Regulation 20-05 of 14 August 2020** amending CSSF Regulation 12-02 of 14 December 2012 on the fight against money laundering and terrorist financing ("**AML CSSF Regulation**").

Coordinated versions of the **AML GDR** and the **AML CSSF Regulation** are available on the CSSF website.

In addition to changes tending to align wordings and references with the latest revisions of the AML Law, other key points notably include:

- clarifications on the tasks and duties of the person responsible for AML/CFT compliance at management level and the AML/CFT compliance officer;
- reinforcement of the oversight obligations on third parties to which implementation of certain AML/CFT professional obligations is delegated in the context of an outsourcing or agency relationship (e.g. enhancement of contractual requirements);
- enhanced requirements in terms of formalisation of the AML/CFT procedures;
- clarifications of CSSF expectations in terms of controls on investments (screening, risk analysis);
- precisions on KYC information to be gathered;
- further guidance with regard to simplified and enhanced due diligence measures as well as on mitigation measures applying to non face-to-face relationships.

The register of fiducies and trusts

New register for beneficial owners of fiduciary arrangements and express trusts complementary to the register of beneficial owners for legal entities.

On 17 July 2020, the Law of 10 July 2020 creating a register of *fiducies* and trusts ("**RFT Law**") entered into force.

The RFT Law provides, in particular, for the mandatory registration of certain personal data on the beneficial owners of trusts and *fiducies* in a newly created register of *fiducies* and trusts.

More information on this subject can be found in the **newsflash** published on our website.

Cross-border services by third-country firms

CSSF recognises first equivalent third countries and clarifies when an investment service is rendered in Luxembourg.

On 2 July 2020, the CSSF published a regulation listing the first third countries with equivalent supervision regimes as well as a circular amending an existing circular on the regime applicable to third-country firms wishing to provide investment services to clients in Luxembourg in accordance with Article 32-1 of the amended Law of 5 April 1993 on the financial sector ("**1993 Law**"), which transposed the third-country regime of MiFID II[1] and MiFIR[2].

The third-country regime of Article 32-1 of the 1993 Law is indeed clarified by the CSSF in Circular 19/716, discussed in our previous publication available **here**. Circular 19/716, in particular, lays out the conditions for the provision of investment services by third-country firms to per se professional clients or

eligible counterparties in Luxembourg on a cross-border basis in accordance with Article 32-1(1), second paragraph of the 1993 Law ("**national regime**"), which applies to the extent that there is no EEA-wide equivalence regime by the European Commission in accordance with MiFIR. The national regime requires a prior authorisation from the CSSF, including a decision on the equivalence of the third-country supervisory regime, which is the purpose of the new regulation.

The Regulation

CSSF Regulation 20-02 on equivalence of certain third countries establishes a list of countries outside the EU/EEA for which the CSSF considers that the supervision and authorisation rules for investments firms are equivalent to those of the 1993 Law. With this decision, the regulator is opening the way for investment firms from these countries to benefit from the national regime, pending the adoption of any Commission equivalence decisions. At this stage, the regimes of Canada, Switzerland, the United States of America, Japan, Hong Kong and Singapore are deemed equivalent for purposes of the national regime. It is expected that the United Kingdom will similarly benefit from such a decision and be added to the list upon the end of the (Brexit) transition period.

The Circular

Circular 20/743 ("**Circular**") amends Circular 19/716 and clarifies, in particular, when an investment service provided by a third-country firm is deemed provided in Luxembourg, i.e. on Luxembourg territory. The CSSF considers this is deemed to be the case if one of the following conditions is met: the third-country firm has a branch in Luxembourg, the investment service is provided to a retail client established or situated in Luxembourg, or the place of the "characteristic performance" of the service, i.e. the essential service for which payment is due, is deemed to be in Luxembourg.

It is the third-country firm's responsibility to analyse whether the investment service is provided in Luxembourg or not. In the latter case, the investment service is out of scope and no branch requirement or authorisation under the national regime applies to its cross-border provision to per se professional clients or eligible counterparties. As the Circular recalls, that is similarly the case when the investment service is provided on the basis of reverse solicitation.

1. Directive 2014/65/EU of 15 May 2014 on markets in financial instruments.
2. Regulation (EU) 600/2014 of 15 May 2014 on markets in financial instruments.

Sustainable finance

Sustainable finance is a key component of the European Commission's strategy for the implementation of the **European Green Deal**. Next to the impact on the investment funds sector, various ESG transparency obligations affect other financial sector players, such as credit institutions and investment firms, notably when they provide portfolio management services or investment advice. At this stage, these obligations are set out in the Disclosure Regulation (EU) 2019/2088 and become applicable on 10 March 2021. Relevant players will need to prepare ahead of this date, including by taking into account the interaction with the requirements provided for in the Taxonomy Regulation (EU) 2020/852.

As mentioned in the European Green Deal communication, a review of the Non-Financial Reporting Directive 2014/95/EU is pending.

You can find more information about the key points of and practical challenges posed by the evolving

legal framework around the Disclosure Regulation and the Taxonomy Regulation in the article under this **link**. To facilitate navigation through these texts and currently available implementing legislation, please refer to the interactive compilation of texts available under this **link**.

CSSF annual report 2019

*The report on the CSSF activities and on the development of Luxembourg's financial centre in 2019 has been released and is available on the **CSSF website**.*

The annual report contains numerous interesting practical details on the execution of the CSSF's regulatory and supervisory role in all supervised areas. We have flagged some interesting points for the banking and financial services sector below.

- Regarding financial innovation, one of the CSSF's priority areas, the annual report describes in particular the challenges posed by the regulation of virtual asset service providers, including requests received by the CSSF concerning the establishment conditions for the exchange of cryptocurrencies or the issuance of tokens. The CSSF also describes the efforts for regulation of virtual assets, continued in 2020, notably with respect to the AML/CFT obligations of virtual asset service providers.
- On the supervision of banks, the CSSF mentions the withdrawal of the banking licence of one Luxembourg entity and describes the close cooperation with the ECB as the direct supervisor of the entity and the competent authority regarding withdrawal. As far as PFS supervision is concerned, the CSSF intervened six times in 2019 to question the day-to-day management of specialised PFS, notably with regard to insufficient presence or involvement of managers in the day-to-day management or the need for reorganisation of administrative or management bodies.
- Regarding market abuse, the CSSF processed a large number of requests for assistance from foreign authorities and suspicious transaction reports from professionals established in Luxembourg. In the context of its supervisory function, it undertook on-site inspections and started a thematic supervision with a large sample of banks and investment firms to recall technical standards and measure compliance. These efforts continue in 2020.
- On the CSSF's instruments for supervision, the annual report contains a detailed section on the procedures and work of its "On-site inspection" (OSI) department. Three ad hoc on-site inspections occurred in 2019, concerning, in particular, governance and AML/CFT. Other inspections concerned notably topics ranging from operational risk, credit risk, corporate governance, business model and profitability assessment, MiFID compliance, the depositary function or IT risks. An interesting overview is provided of types of infringements having led to administrative sanctions.
- Finally, in a separate chapter devoted to financial crime, another priority area of the CSSF, its extensive control of regulatory compliance by AML professionals carried out through off-site and on-site supervision is detailed for all types of players.

Dispute resolution

Consumer law class action

Bill of law 7650 ("**Bill**"), which was recently presented by the Government, aims to introduce a class action procedure allowing for the compensation of damages suffered by a group of consumers resulting from the same illicit behaviour by, or practice of, a professional.

Inspired by Belgian and French precedents, the Bill anticipates the adoption by the European Union of what is still a **proposal for a directive** on representative actions for the protection of the collective interests of consumers.

According to the Bill, class actions could be brought before the court, and the group represented by, either a consumer who is part of the group or a qualified entity such as, in particular, a consumer organisation. If successful, a judge could order a cessation or prohibition of a wrongful or illegal practice, as well as a compensation for damage suffered by the group of consumers.

Several categories of disputes would nevertheless be excluded from the proposed class action procedure, such as:

- Disputes in relation to anti-competitive practices; and
- Disputes between consumers and professionals supervised by the *Commission de Surveillance du Secteur Financier* (CSSF) or the *Commissariat aux Assurances* (CAA), except those concerning consumer loans, mortgage loans, as well as contracts for financial services concluded remotely and insurance contracts concluded remotely.

The Bill provides for several procedural particularities, such as, *inter alia*, an admissibility pre-phase during which a judge shall rule whether the specific admissibility conditions provided for by the Bill were respected, the possibility for the judge to determine whether to apply an opt-in or an opt-out procedure, the possibility for a consumer representing the group to sue (as opposed to reserving the class action procedure to qualified entities) as well as the appointment of a liquidator for the distribution of the amounts allocated to the consumers.

An update will be circulated as soon as the Bill is adopted by Parliament.

Unfair trading practices in B2B relationships in the agricultural and food supply chain

Bill of Law 7646 ("**Bill**") aims to increase protection of small and medium-sized suppliers against unfair trading practices by powerful buyers within the agricultural and food supply chains through various mechanisms. It transposes **Directive** (EU) 2019/633 of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain ("**Directive**").

In line with the Directive, the Bill establishes a minimum list of prohibited unfair trading practices related to, *inter alia*, payment deadlines, unexpected cancellation of orders as well as unilateral modifications of supply agreements. Certain prohibitions are of public order, while other practices are prohibited only in the absence of contrary contractual provisions.

Enforcement is entrusted to the Competition Council, which can investigate following a complaint, including by representative organisations of suppliers, or on its own initiative. As in the field of

competition law, the Competition Council will have the power to carry out unannounced on-site inspections within the framework of its investigations. The Bill provides for the power to impose fines (max. EUR 120,000) and, in line with the Directive, cooperation arrangements for coordination between enforcement authorities of different Member States.

Bill of Law – Residential leases

A new Bill of law amending the Law of 21 September 2006 on residential leases, as amended, and amending certain provisions of the Civil Code ("**Bill**") was introduced into Parliament on 31 July 2020 Bill of Law 7642).

The objective of the Bill is to transpose some aspects of the government's programme to improve the situation of tenants by, among other things, facilitating access to rental housing in the private market.

The key elements of the Bill are:

- Sharing the costs of the real estate agency: the agency's costs will be mandatorily shared equally between the landlord and the tenant;
- Limitation of the deposit: the maximum deposit is reduced from three to two months' rent (excluding charges);
- Repayment of the deposit: If, at the end of the tenancy, the fixtures and fittings do not show any damage, the deposit must be repaid to the outgoing tenant within 2 months of handing over the keys; for properties in co-ownership, half the deposit must be repaid within 2 months of handing over the keys and the balance within 2 months of the approval of the annual charges by the general meeting of co-owners of the property;
- Creation of a joint tenancy agreement: joint tenancy agreements will be recognised as a form of residential lease and will be subject to a specific system, notably providing for joint and several liability between the joint tenants;
- To provide details of how the invested capital is calculated: the fact of furnishing a property no longer makes it possible to double the maximum amount of rent allowed, the costs of the fittings and furnishings can be taken into account under certain conditions;
- Removal of the concept of "luxury accommodation";
- Extended lease: an extended lease agreement becomes an open-ended contract.
- Rent Commission: the possibility to apply directly to a justice of the peace in the event that the Rent Commission is unable to give a ruling.

Employment and pensions law

New agreement on teleworking

Following the opinion approved unanimously by its members, issued on 11 September 2020 by the *Conseil économique et social* ("**CES**"), the social partners LCGB, OGBL and UEL signed a new agreement on 20 October 2020 on teleworking ("**Agreement**"), which will come into force once it has been declared "*d'obligation générale*" by Grand-Ducal regulation, which is expected before the end of the year 2020.

This Agreement upholds the voluntary nature of teleworking for both employee and employer but innovates on various aspects, in particular:

- the definition of telework is revisited by being more specific and the scope of the Agreement is clarified by explicit exclusions;
- the terms of regular and occasional telework are clarified by setting a threshold for occasional telework;
- the involvement of employee representatives is accrued;
- the rule of non-discrimination/equal treatment between teleworkers and other workers is introduced; and
- the rights and obligations of the parties with regard to data protection, work equipment, health and safety, work organisation and training are provided for.

Once the Grand-Ducal regulation declaring this Agreement "*d'obligation générale*", the agreement, entered into on 21 February 2006, on teleworking currently in force, will elapse.

Redeployment of employees

The Law of 24 July 2020 amending the Labour Code, the Social Security Code and the Law of 23 July 2015 concerning the internal and external redeployment system ("**Law**") is applicable from 1 November 2020.

This Law aims to optimise the procedures in force for professional redeployment and introduces numerous changes, in particular:

- the conditions for referral to the Joint committee (*Commission mixte)* are less severe, the employee will no longer be required to hold a risk position and have ten years' seniority. It will be sufficient for the employee to be in possession of an aptitude certificate for the last job or to have 3 years' seniority with his employer;
- in the event of external redeployment, the employer is required to pay the redeployed employee a lump-sum indemnity which will vary according to the employee's length of service;
- the indemnity to compensate for the difference in salary between the old and new salary ("**Compensatory Indemnity**") must be requested within six months from the date of the start of execution of the amendment to the employment contract or the new employment contract;
- the Compensatory Indemnity will be calculated differently. It will be reduced by the financial benefits granted by the employer to its employees, so that the redeployed employee will not benefit from it and will always remain at the same level of remuneration;
- decisions following internal or external redeployment will fall under the jurisdiction of the Employment Development Agency (*Agence pour le développement de l'emploi*); and

- the employee will benefit from special protection against dismissal as soon as the reclassification procedure is initiated.

EU law, competition and antitrust

Brexit update

Since the UK's withdrawal from the EU on 31 January 2020, in accordance with the **Withdrawal Agreement** concluded between the UK and the EU to ensure an orderly departure and legal certainty, EU law continues to apply to and in the UK in important areas during the transition period ending 31 December 2020. The UK having refused an extension as allowed by the Withdrawal Agreement, the transition period will necessarily end on 31 December 2020.

In July 2020, the European Commission issued a Communication on readiness at the end of the transition period between the EU and the UK (see the **link** here) as well as a Brexit Readiness Checklist (see **link** here). Indeed, even if the EU and the UK conclude a partnership by the end of 2020 covering all areas agreed in the **Political Declaration** relating to their future relationship, the UK's withdrawal from the EU acquis, the internal market and the Customs Union will, at the end of the transition period, inevitably create new barriers to trade.

Regarding financial services, it results from the Communication that, contrary to what was foreseen in the Political Declaration, the Commission could not conclude its equivalence assessments by the end of June 2020. At this stage, it seems highly unlikely that the Commission will adopt equivalence decisions which would allow UK entities privileged access rights for the provision of financial services in the EU Internal Market in those areas where this is envisaged by EU financial regulation.

With regard to investment services, the Commission clarifies in the Communication that it will not adopt an equivalence decision in the short or medium term. However, as far as derivatives central clearing counterparties ("**CCPs**") are concerned, the Commission adopted **Implementing Decision 2020/1308** determining, for a limited period, that the UK regulatory framework applicable to CCPs is equivalent to the requirements set out in Regulation (EU) 648/2012 (EMIR). Since this decision expires on 30 June 2022, EU clearing members thereby get an additional 18 months to reduce their exposure to the UK market infrastructures and develop their capacity to clear relevant trades.

As regards market surveillance, investment services and asset management activities, the European Securities and Markets Authority ("**ESMA**") confirmed in a **publication** of 17 July 2020 that the "no-deal Brexit" Memoranda of Understanding ("**MoUs**") on cooperation and information exchange concluded with the UK's Financial Conduct Authority ("**FCA**") on 1 February 2019 (see link **here**) remain relevant and will come into effect at the end of the transition period. In particular, a multilateral MoU between EU/EEA securities regulators and the FCA will allow fund manager outsourcing and delegation to continue to be carried out by UK-based entities on behalf of counterparties based in the EEA.

A helpful **briefing** published by the European Parliament on 8 October 2020 gives a global overview of the repercussions of the UK's withdrawal from the EU on financial services and recalls the guidance issued by EU supervisory and resolution authorities in this respect.

At a general level, negotiations on the future EU-UK partnership are ongoing. The most recent EU statements confirm that, although significant progress has been made, differences in certain key areas must still be overcome in order to allow for an agreement on the future relationship with the UK in due time.

New rules on online platform transparency

New EU platform-to-business rules aimed at enhancing transparency of online platforms for business users are now applicable. Implementation of certain procedural aspects in Luxembourg is pending. An enforcement role is given to the Competition Council.

Regulation (EU) 2019/1150 of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services ("**Regulation**") has been applicable since 12 July 2020. It aims to ensure the fair and transparent treatment of business users by online search engines and online intermediation services (online platforms) such as, *inter alia*, online marketplaces, social media and creative content outlets, application distribution platform, price comparison websites or collaborative economy marketplaces ("**Providers**"). They are in scope irrespective of their place of establishment or residence and irrespective of the law otherwise applicable if they offer services to business users in the EU.

In a nutshell, the Regulation imposes obligations on Providers on the following topics:

- terms and conditions - these shall be easily accessible to business users, written in plain and intelligible language and contain specific information such as grounds for restriction, suspension, and termination of the contractual relationship;
- treatment of goods and services – the general criteria of ranking of goods and services have to be set out and justified and the treatment by Providers of their own goods and services compared with those of business users has to be transparent;
- complaint-handling system – a complaint-handling system has to be provided;
- data access - general polices on the type of data generated through the services have to be published;
- imposed restrictions –the economic, commercial, or legal reasons for limiting business users' ability to offer better conditions to other parties through means other than through the Provider's services have to be explained.

Member States must ensure adequate and effective enforcement of the Regulation. In Luxembourg, the methods are provided in Bill of law 7537, currently discussed in Parliament ("**Bill**"). According to the Bill, certain organisations and associations shall be empowered to act before the court to cease or prohibit any act violating the Regulation. Any failure to comply with the injunctions or prohibitions issued by a court decision is proposed to be punishable by a fine of up to 1 million euros.

The Competition Council will also have the power to introduce such court procedures. Hence, platform transparency will become an additional field of action for the Competition Council next to the powers newly allocated to it by Bill of law 7646 regarding the prohibition of unfair trading practices in B2B relationships in the agricultural and food supply chain. This latter Bill is discussed in the **Dispute Resolution section** of this Newsletter.

PSD2 not incompatible with the GDPR but attention required

In July 2020, the European Data Protection Board adopted Guidelines on the interplay of the Second Payment Services Directive ("**PSD2**") and the (EU) Regulation 2016/679 ("**GDPR**") . The Guidelines were open for public consultation until the end of June 2020 and the (EU)

You may wish to read our full article regarding these guidelines **here**.

EU Decision on rules concerning the EU Commission Data Protection Officer

On 6 July 2020, the European Commission published a decision laying down implementing rules concerning the Data Protection Officer, restrictions of data subjects' rights and the application of Regulation (EU) 2018/1725 governing the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies. The latter Regulation sets out rules and principles governing the processing of personal data within EU institutions while relying on the similar principles as those provided under the (EU) Regulation 2016/679 ("**GDPR**").

Comparable to certain principles contained in the GDPR, each Union institution or body shall be able to designate a Data Protection Officer.

More detailed information on this decision can be found in the related **article** published on our website.

EU Assessment of two years of GDPR

On 24 June 2020, the European Commission published its first evaluation of the General Data Protection Regulation ("**GDPR**") since its entry into application on 25 May 2018.

The Report focuses on international transfers and the manner in which the cooperation and consistency mechanisms provided for under the GDPR are applied. It also refers to several issues surrounding the GDPR's implementation amongst which are the challenges faced by small and medium-sized enterprises ("SMEs") as to their compliance with the GDPR or the way specific technologies such as artificial intelligence, blockchain or the Internet of Things implement GDPR principles.

For more information on this evaluation, please have a look at our article **here**.

EDPS Opinion on AI White Paper

Earlier this year, the European Commission published a white paper on artificial intelligence ("**AI**") "A European approach to excellence and trust " aimed at outlining and discussing the policy options on how

to promote artificial intelligence while addressing the possible risks, such as discrimination or intrusion into our privates lives. In response, the European Data Protection Supervisor ("**EDPS**") published an Opinion on the White Paper providing its analysis from a data protection perspective.

For more developments with regard to this Opinion, have a look at our article available **here**.

Our latest issue of EHLO

Please click **here** to read the latest issue of EHLO, our dedicated ICT, IP, Media and Data Protection news.

Insurance and reinsurance

Further specification of AML/CFT obligations

Professionals must update their AML/CFT policies and procedures to take account of recent modifications to the AML Grand-Ducal Regulation and the AML CAA Regulation and review the impact on their arrangements with delegates.

Following the recent amendment of the AML legal framework in the context of the transposition of AMLD5 (see our **Newsflash** on this topic), two level two regulatory texts further specifying the obligations of professionals were published:

- **Grand-ducal Regulation of 14 August 2020** amending Grand-ducal Regulation of 1 February 2010 providing details on certain provisions of the Law of 12 November 2004 on the fight against money laundering and terrorist financing, as amended; and
- **CAA Regulation N° 20/03** of 30 July 2020 replacing and repealing the amended CAA Regulation No. 13/01 of 23 December 2013 on the fight against money laundering and terrorist financing ("**AML CAA Regulation**").

A useful **commentary** of the changes brought to the existing regime by the AML CAA Regulation is available on the CAA website.

In addition to changes tending to align wordings and references with the latest revisions of the AML Law, other key points notably include:

- clarifications on the tasks and duties of the person responsible for AML/CFT compliance at management level and the AML/CFT compliance officer;
- reinforcement of obligations when certain AML/CFT professional obligations are outsourced (e.g. risk assessment in relation to the outsourced functions prior to the outsourcing);
- enhanced requirements in terms of formalisation of the AML/CFT procedures;
- specification of due diligence required in the event of a portfolio transfer;

- precisions on KYC information to be gathered;
- further guidance with regard to simplified and enhanced due diligence measures as well as on mitigation measures applying to non face-to-face relationships.

Tax

Draft Budget Law for the year 2021

On 14 October 2020, Luxembourg's Minister of Finance, Pierre Gramegna, tabled before the Parliament the draft budget law for the year 2021 ("**Draft Budget Law**").

The Draft Budget Law proposes amendments which aim at restoring tax justice. In this context, it is noteworthy that some of the most salient tax measures included therein would affect the real estate industry and the current stock-option regime.

Please read our **article** which will give you the key takeaways of the tax measures proposed in the Draft Budget Law.

Exchange of information : AG Opinion

In the joined cases **C-245/19** and **C-246/19**, the referring court wished to know how to interpret the Charter of Fundamental Rights of the European Union in the context of the procedure for the exchange of information based on Council Directive 2011/16/EU of 15 February 2011.

According to Advocate General ("**AG**") Kokott of the Court of Justice of the EU (CJEU), the decision by which a tax authority requires a person to provide information on a taxpayer or third parties can be challenged by that person, the taxpayer and concerned third parties before the courts of the requested tax authority's jurisdiction.

Please read our **article** for more details on this topic.

CJEU Decision in the Blackrock case

On 2 July 2020, the Court of Justice of the European Union ruled in the case **C-231/19** (Blackrock Investment Management (UK) limited v. Commissioners for her Majesty's Revenue and Customs) that a single supply of management services used to manage both special investment funds and other funds, could not be VAT exempt as funds management services.

Please read our **article** for more details on this topic.

New FATCA and CRS obligations

From 1 January 2021, Luxembourg reporting financial institutions will be subject to new filing and compliance obligations, increased penalties in case of non-compliance, and probably to more regular FATCA and CRS audits. The Luxembourg tax authorities published a recent newsletter on 10 July 2020 clarifying these new CRS and FATCA obligations and sanctions introduced by the **Law of 18 June 2020**.

Read our **article** in order to be prepared to comply with the new CRS and FATCA obligations imposed on Luxembourg reporting financial institutions.

State aid: Apple wins EU appeal

The General Court of the European Union **annulled** the 2016 decision of the European Commission regarding the illegal State aid granted by Ireland to Apple through the issuance of two tax rulings.

Please read our **article** for more details on this topic.

New EU tax package

On 15 July, the European Commission adopted a new **Tax Package** for fair and simple taxation. The Tax Package aimed at reinforcing the fight against tax abuse, help tax administrations to keep pace with the evolving economy and ease administrative burdens for citizens and companies. The Commission intends to lead the transition into a more fair, efficient and sustainable taxation while ensuring that European Union ("**EU**") tax policy supports the EU's economic recovery from the COVID-19 crisis and long-term sustainable growth through sufficient public revenue.

The tax package contains the following three complementary initiatives:

- An **Action Plan** for fair and simple taxation supporting recovery: the Action Plan sets out 25 actions (as included in its **annex**) to be implemented by 2024, with the aim to (i) reduce tax obstacles for businesses in the Single Market and enhance competitiveness and economic growth, and (ii) help Member States enforce existing tax rules and improve tax compliance.
- A **legislative proposal** for the revision of the EU Mutual Assistance Directive (2011/16) on administrative cooperation in the field of taxation (DAC7): the proposal introduces the automatic exchange of information between Member States' tax administrations for income/revenues generated by sellers on digital platforms. It aims at increasing efficiency and effectiveness of administrative cooperation with the introduction of simplifications in order to ease the burden of tax administrations and with the introduction of other measures such as the creation of a legal framework to allow joint tax audits between two or more Member States.
- A **communication** on Tax Good Governance in the EU and beyond: this communication aims to further promote transparency and fair taxation. It includes a proposal for the reform of the Code of Conduct on Business Taxation (scope, criteria and governance) and improvements to the EU list of non-cooperative jurisdictions (geographical scope, criteria, transparency and accountability, strengthen tax good governance in agreements with third countries) to address tax competition and tackle harmful tax practices within the EU.

The Tax Package is the first part of a comprehensive and ambitious EU tax agenda for the coming years. The Commission announced that it will work to set out the rules of a new modernised approach to business taxation ensuring that all multinationals pay their fair share. It is expected that the Commission will present a dedicated action plan on business taxation by the end of the year addressing the digitalised economy building up on conclusions reached at international level on this topic. The Commission will also make proposals in the context of the Green Deal to ensure that taxation supports the EU's objective of climate neutrality by 2050. Based on the press release, this multi-leveled tax reform aims to make taxation "fairer, greener and fit for the modern economy, thus contributing to long- term, sustainable, inclusive growth".