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LUXEMBOURG LAW

NEWSLETTER

SEPTEMBER 2018

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Asset management and investment funds

Investment fund managers and registrar agents: New CSSF Circular

On 23 August 2018, the CSSF issued a new **Circular 18/698** ("**Circular**") repealing **CSSF Circular 12/456**.

The new Circular relates to the approval process and organisation of both (i) UCITS management companies and (ii) alternative investment fund managers ("**AIFMs**") subject to Chapter 2 of the Luxembourg Law of 12 July 2013 concerning AIFMs (together being referred to in the Circular as *Gestionnaires de Fonds d'Investissement* or *GFI* ("**Investment Fund Managers**"). It also applies to self-managed UCITS and self-managed AIFs and contains certain provisions regarding management companies subject to Chapter 16 of the Luxembourg Law of 17 December 2010 concerning undertakings for collective investment. Finally, in the context of combatting anti-money laundering it contains provisions which are not only applicable to Investment Fund Managers but also to registrar agents.

Although the Circular reflects the CSSF's most recent practice for authorisation of Investment Fund Managers, it reflects substantially more detailed requirements than the previous CSSF Circular 12/546 and therefore existing Investment Fund Managers will need to review their internal organisation, policies and procedures to assess their compliance with the new Circular.

More information on the Circular is available on our website (see **our Newsflash** "New CSSF Circular for Luxembourg investment fund managers and AML requirements applicable to investment fund managers and registrar agents").

Non-UCITS depositaries: New CSSF Circular

On 23 August 2018, the CSSF published **Circular 18/697** which is applicable to non-UCITS depositaries. The key points of this Circular are highlighted in a **Newsflash** which is available on our website "New CSSF Circular 18/697 on non-UCITS depositaries".

PRIIPS: CSSF FAQ and ESAs Q&A updates

CSSF FAQ: Update

On 14 August 2018, the CSSF updated its **FAQ** on the AIFM Law (Question 23 b) and its **FAQ** on non-AIF SICARs and non-AIF SIFs in order to reflect the possibility for those investment structures to produce a UCITS KIID and to benefit from the temporary exemption from the obligation to comply with the **PRIIPs Regulation**.

The **PRIIPs Law** indeed allows SICARs and UCIs other than UCITS to establish a KID in the UCITS format (i.e. not a PRIIPs KID but a UCITS KIID), provided that this KID expressly states that the SICAR or UCI, as applicable, does not qualify as a UCITS. In this case, and in the absence of any contrary position taken by the competent authorities of any host Member States where a Luxembourg SICAR or UCI would be marketed, the PRIIPs manufacturer is exempt from the obligations stated in the PRIIPs Regulation.

Pursuant to the provisions of the PRIIPs Regulation, this exemption will be valid until 31 December 2019,

subject to an extension of this transitional regime by the EU authorities.

PRIIPS Q&A ESAs

In July 2018, the European Supervisory Authorities ("**ESAs**") updated their **Q&A on the PRIIPs KID**. According to the newly added questions:

- As regards the publication of the KID: the KID must be published on the public section of the website of the PRIIPs manufacturer in order to ensure its widespread dissemination and availability.
- As regards the performance scenarios of a PRIIP for which the recommended holding period ("**RHP**") is less than one year: in such an event, it should be assumed that the performance scenarios should reflect the projected return over the RHP (the disclosure obligations in the performance scenarios for over a year and a half of the RHP would not be applicable).
- As regards the case where the moderate scenario shows a total loss of capital or even a negative return (i.e. it is less than or zero): this should not be used to present the costs (as in this case the Reduction-in-Yield would suggest no costs or very low costs). According to the ESAs, point 71(c) of Annex VI of the PRIIPs Delegated Regulation should be applied in order to avoid potential errors in the calculation, i.e. the performance should be assumed to be 3% annual growth for the purposes of determining the reduction in yield.

On the same date, the ESAs also published a new version of the **flow diagram for the risk and reward calculations** in the PRIIPs KID, which includes a new calculation example for Category 3 PRIIPs stress performance scenario.

AIFMD: ESMA Q&A update

A new question on the supervisory responsibilities of competent authorities in host Member States has been added to the **ESMA Q&A on the application of the AIFM Directive**. The question relates to the case where an AIFM provides its investment services through a branch established in the host Member State.

ESMA clarifies that supervisory powers are shared between the relevant competent authorities as follows:

- the competent authority of the host Member State is responsible for the supervision of the branch's compliance with conduct rules referred to in Article 45(2) of the **AIFM Directive**; and
- the competent authority of the home Member State is responsible for the supervision of the other requirements provided under the relevant applicable framework.

According to ESMA, the same principle should apply in case of performance of MiFID services (Article 6.4 AIFM Directive), i.e. the host Member State is responsible for ensuring that the services provided by the branch in its territory comply with the **MiFID II** requirements under Articles 24 ("General principles and information to clients") and 25 ("Assessment of suitability and appropriateness and reporting to clients") of MiFID II (Art. 35(8) of MiFID II).

UCITS: ESMA Q&A update

In July 2018, new questions were added to the **ESMA Q&A on UCITS Directive**. They cover the following matters:

- **Possibility for a UCITS to invest in other UCITS with different investment policies:** ESMA states that in this case (i) the prospectus of the UCITS should clearly disclose, where relevant, that the target fund(s) might have different investment strategies or restrictions, and (ii) UCITS management companies ("**UCITS ManCos**")/self-managed UCITS carry out proportionate due diligence to ensure that it does not result in a circumvention of the investment strategies or restrictions of the fund (as set out in the rules or instrument of incorporation and prospectus of the investing UCITS).
- **Supervision of branches:** The question relates to the case where a UCITS ManCo provides its investment services through a branch established in a host Member State. ESMA clarifies that supervisory powers are shared between the relevant competent authorities as follows:

  - the competent authority of the host Member State is responsible for the supervision of the branch's compliance with conduct rules referred to in Article 17(5) of the **UCITS Directive**; and

  - the competent authority of the home Member State is responsible for the supervision of the other requirements provided under the relevant applicable framework.

  According to ESMA, the same principle should apply in the case of performance of MiFID services (Article 6.3 UCITS Directive), i.e. the host Member State is responsible for ensuring that the services provided by the branch in its territory comply with the **MiFID II** requirements under Articles 24 ("General principles and information to clients") and 25 ("Assessment of suitability and appropriateness and reporting to clients") of MiFID II (Art. 35(8) of MiFID II).
- **Possibility for depositaries to act as counterpart in a transaction relating to assets that they hold in custody:** According to ESMA, it is subject to the following requirements: (i) the four conditions under Article 22(7)(a) to (d) of the UCITS Directive which relate to the reuse of assets of a UCITS are complied with, (ii) conflicts of interest are properly managed, and (iii) the transaction is conducted on an arms-length basis.
- **Issuer concentration:** The question relates to the possibility for a UCITS to take into account netting and hedging arrangements for the purposes of calculating issuer concentration limits pursuant to Article 52 of the UCITS Directive. According to ESMA, only netting arrangements in accordance with the definition and conditions set out in the guidelines on Risk Measurement and the Calculation of Global Exposure and Counterparty Risk for UCITS (Ref. **CESR/10-788**) may be taken into account when calculating issuer concentration limits.

Money market funds: Recent developments

In a Press Release dated 20 July 2018 (**Press Release 18/24**), the CSSF reminded the collective investment funds industry that UCIs that fulfil the criteria set forth in the Money Market Funds ("**MMF**") Regulation (**Regulation (EU) 2017/1131**) are within the scope of the MMF Regulation and have to be authorised as MMF.

UCITS and AIFs are required to self-assess whether they are within the scope of the MMF Regulation and they are liable for this assessment. An application questionnaire for MMF is available on the CSSF **website**. For funds which qualify as MMF within the meaning of the MMF Regulation, the CSSF expects this questionnaire to be completed once the prospectus is filed with the CSSF for review. The CSSF has

also published an **FAQ on the MMF Regulation**

In addition, the CSSF indicates in its Press Release 18/24 that, in accordance with Article 5 of the MMF Regulation, an AIF can only be authorised as MMF if its AIFM is duly authorised under the AIFM Directive to manage a MMF.

As a consequence, Luxembourg AIFMs will have to obtain prior authorisation by the CSSF before being able to manage MMFs which qualify as AIFs. The CSSF has indicated that a new questionnaire will be published on its website which will have to be completed and sent to the CSSF for approval by all AIFMs which intend to manage MMFs.

The impact that this additional AIFM requirement may have on the timing for a fund to be authorised as MMF will have to be duly considered.

Also on 20 July 2018, the CSSF published **CSSF Circular 18/696** which implements the **ESMA's Guidelines** on stress test scenarios under Article 28 of the MMF Regulation.

As regards the MMF level 2 measures, a Commission delegated act (**(EU) 2018/990**) was published in the OJEU on 13 July 2018. This delegated act further specifies the requirements applying to MMF which invest in securitisations or asset-backed commercial papers (ABCPs). It also details the requirements for assets received as part of reverse repurchase agreements and the criteria to be used by UCITS management companies and AIFMs when implementing their internal credit quality assessment methodologies.

EMIR: New CSSF questionnaire

In August 2018, the CSSF added a new **EMIR questionnaire** to the list of documents and forms that an AIFM, a UCITS management company and a Chapter 16 ManCo[1] (together referred to as an Investment Fund Manager or "**IFM**") must complete and return to the CSSF in order to be authorised. This questionnaire was updated in September 2018.

The information required mainly relates to the classification of the IFM under the **EMIR Regulation**, the derivative transactions concluded by type of funds/sub-funds under the management of the IFM and the derivative transactions concluded on behalf of the IFM (only for hedging purposes) with a focus on the reporting and the risk mitigation techniques, intragroup transactions and clearing obligations.

The questionnaire has also been sent to existing IFM in order to be completed and returned to the CSSF.

1. "**Chapter 16 Manco**" refers to a management company regulated by Chapter 16 of the Luxembourg Law of 17 December 2010 on undertakings for collective investment.

Benchmarks: New CSSF questionnaire

As a reminder, the Benchmark Regulation (**Regulation (EU) 2016/1011**) has been applicable to UCITS and certain AIFs since 1 January 2018 and has been supplemented in Luxembourg by an implementing law ("**Benchmark Law**") which was published on 19 April 2018.

In that context and in order to enable the CSSF to effectively perform its supervision function, a

dedicated **benchmark questionnaire** has been added to the list of documents and information that all UCITS management companies ("**UCITS ManCos**") and alternative investment fund managers ("**AIFMs**") must give to the CSSF in view of the authorisation of a new fund or sub-fund. For funds or sub-funds using a benchmark within the meaning of the Benchmark Regulation, the CSSF expects this questionnaire to be completed once the prospectus is filed with the CSSF for review.

UCITS ManCos and AIFMs must notably confirm that (i) the administrator(s) and the related used benchmark(s) (if applicable) are listed on the ESMA benchmark register, (ii) robust written plans, setting out the actions to be taken should a benchmark materially change or cease to be provided, are established and maintained, and (iii) those procedures are reflected in the contractual relationship with clients.

CSSF Annual Report 2017

The report on the CSSF's activities and the development of the financial centre in 2017 has been released and is available for consultation on the **CSSF website** and can be downloaded in French or in English.

Banking and financial services

PSD2 Law entered into force

The **Luxembourg Law of 20 July 2018** implementing the revised Payment Services Directive (EU) 2015/2366 ("**PSD2**") and amending the Law of 10 November 2009 on payment services ("**LPS**"), which had implemented the first Payment Services Directive ("**PSD1**"), entered into force on 29 July 2018.

The main changes introduced to bring the LPS in line with PSD2 can be summarised as follows.

The scope of application of the LPS is modified in different ways, including, in particular:

- Regulation of two new types of third-party providers ("**TPPs**") as payment service providers: (i) account information service providers ("**AISPs**"), which collect and consolidate information on the different bank accounts of a consumer in a single place, and (ii) payment initiation service providers ("**PISPs**"), which facilitate internet payments by initiating a payment from the user account to the merchant account on the customer's demand.
- Revision of certain existing exemptions: limitation of the telecom exemption mainly to micro-payments for digital services, limitation in scope of the limited networks exemption and notification when the activities of limited networks reach a certain value, and limitation of the commercial agents' exemption to those acting for either the payer or the payee (not both).
- Geographical scope: extension of certain obligations to transactions with third countries when only one of the payment service providers is located within the EU (so–called "one-leg transactions") and application of the PSD2 framework to intra-EU/EEA payments that are made in a currency other than the euro or another Member State's currency.

Further, banks must grant TPPs access to online payment accounts through an access interface, subject

to customer consent. The security of payment transactions is enhanced, however, through the requirement for payment service providers to apply strong customer authentication ("**SCA**") for electronic payment transactions. To that end, the Commission adopted **Delegated Regulation (EU) 2018/389** with regard to regulatory technical standards for strong customer authentication and common and secure open standards of communication ("**RTS**") setting out, in particular, how SCA is to be applied as well as obligations relating to access interfaces. The RTS apply from 14 September 2019.

Other than through enhanced security measures, customer protection is increased through various features: reduced liability (50 euros) for unauthorised payments, improved refund rights, the responsibility of banks managing the account for initiation of unauthorised payments through a PISP, and increased incident reporting obligations on payment service providers as well as the notification of customers in case of major incidents.

Finally, transitional provisions allow AISPs and PISPs already active under the PSD1 regime to continue their activities without authorisation until 14 September 2019, the application date of the abovementioned RTS.

Payment transactions - Guidelines on missing payee/payer information

By **Circular 18/680** of 23 January 2018, the CSSF adopted the Joint Guidelines of the European Supervisory Authorities ("**ESAs**") under Article 25 of **Regulation (EU) 2015/847** on the measures payment service providers should take to detect missing or incomplete information on the payer or the payee, and the procedures they should put in place to manage a transfer of funds lacking the required information ("**Guidelines**"). Regulation 2015/847 aimed to bring EU law in line with certain recommendations of the Financial Action Task Force, which sets international anti-money laundering standards.

The Guidelines, applicable as of 16 July 2018, are addressed to payment service providers ("**PSPs**") where they act as the PSP of the payee as well as to intermediary payment service providers ("**IPSPs**"), notions defined in Regulation 2015/847. They indicate what these entities should do to comply with Regulation 2015/847 and are also addressed to competent authorities responsible for supervising compliance.

They set out the factors PSPs and IPSPs should consider when establishing and implementing procedures to detect and manage transfers of funds that lack required information on the payer and/or the payee as well as the measures they should take to manage the risk of money laundering or terrorist financing ("**ML/TF**") where the required information on the payer and/or the payee is missing or incomplete. They have to establish effective policies and procedures proportionate to the nature, size and complexity of their business and proportionate to the ML/TF risks to which they are exposed setting out clearly, for instance, which transfers of funds have to be monitored in real time and which transfers of funds can be monitored on an ex-post basis.

In addition, as the CSSF recalls, PSPs and IPSPs have to take into account the **Guidelines of the ESAs on risk factors** discussed in its **Circular CSSF 17/661**, in particular where a country associated with high ML/TF risk has been identified. They set out factors firms should consider when assessing the ML/TF risk associated with a business relationship or occasional transaction.

Finally, the Guidelines contain certain documentation and record-keeping obligations for the entities concerned.

Renewable energy covered bonds

By the **Law of 22 June 2018**, the Luxembourg legislator introduced renewable energy covered bonds through a modification of the relevant provisions of the Law of 5 April 1993 on the financial sector, as amended ("**LFS**").

Renewable energy covered bonds are a new covered bonds class in the LFS, testifying the innovative attitude which Luxembourg adopts in this area, the development of green finance being part of the diversification strategy for the financial sector and the Luxembourg economy. Hence, new opportunities for covered bond banks in Luxembourg are created.

Further, several changes strengthen the existing legal framework for the issuance of covered bonds.

Renewable energy covered bonds are covered bonds backed by loans secured by rights in rem or by charges on immovable or movable renewable energy property and by step-in rights into the material contracts of the financed project. They present a high quality standard since any material property linked to the financing of the renewable energy project has to be pledged in favour of or transferred as security to the covered bond bank financing the transaction. Several rules further define the validity and use of these new instruments.

Changes introduced in the LFS with regard to the general regime for covered bonds include the introduction of a cover pool liquidity buffer requirement, the expansion of eligible substitute collateral to public entity commitments, and certain measures to increase transparency of the Luxembourg covered bond market.

Insurance: IDD implementation

The **Law of 10 August 2018** implementing Directive (EU) 2016/97 of 20 January 2016 on insurance distribution ("**IDD**") into Luxembourg law ("**IDD Law**") will enter into force on 1 October 2018. This Directive replaces the first Directive in relation to the distribution of insurance products, the Insurance Mediation Directive 2002/92.

The purposes of the Directive are mainly to promote a level playing field and competition on equal terms between intermediaries and to strengthen the protection of the clients, regardless of the channel through which they buy insurance products. The following points of the Directive and IDD Law can be outlined:

- Insurance/reinsurance distributors shall ensure that the products they distribute meet the interests and needs of the client;
- The information of the client is strengthened, among other things through pre-contractual standard documentations, the Insurance Product Information Document (**IPID**) for non-life insurance products and the Key Information Document (**KID**) for insurance-based investment products;
- New rules are imposed on insurance intermediaries in relation to conflicts of interest and remuneration transparency *vis-à-vis* the client;
- The scope of the definition of insurance distribution is extended, with the result that more insurance players will have to provide proof of their professional competence to operate in the insurance sector. In addition, each intermediary and employee of an insurance company shall attend at least 15 hours of professional training and development annually;
- A new status of ancillary insurance intermediary is created, when its principal professional activity is other than insurance distribution and the insurance product offered to clients is complementary

to goods or to a service. Except where exempted, registration in the distributor register is required, as well as the proof of its honourability and professional knowledge.

AML Law on information from fiduciaries

The **Law of 10 August 2018** relating to the information to be obtained and held by fiduciaries transposes into national law the provisions under Article 31 of the 4th EU Directive on anti-money laundering and terrorist financing ("**AML/TF**") (**Directive (EU) 2015/849**).

Drawing on the EU Directive, the Law sets tougher rules for professionals than before and provides national authorities with enhanced powers. In particular, Article 2 of the Law provides that fiduciaries of any *fiducie* shall obtain and hold information on beneficial ownership regarding the *fiducie*. That information shall include: the settlor, the fiduciary (or fiduciaries), the protector (if any), the beneficiaries or class of beneficiaries and any other natural person exercising effective control over the *fiducie*. In addition, the information shall be regularly updated (Art. 3) and shall be retained by the fiduciaries for five years as of the end of their involvement in the *fiducie* (Art. 4).

Fiduciaries shall disclose their status and provide the information mentioned above to professionals (Art. 6) when entering into a business relationship or carrying out an occasional transaction above a certain threshold[1]. Fiduciaries shall also provide this information to national authorities upon request (Art. 5).

Meanwhile, the CSSF, the *Commissariat aux Assurances* (**CAA**) and the *Administration de l'Enregistrement et des Domaines* (**AED**) are in charge of monitoring the implementation by fiduciaries of their new obligations (Art. 7) and benefit from all the supervisory and investigatory powers that are necessary for this matter, including the right to carry out on-site inspections with seizure of any relevant documents (Art. 8). These authorities may also impose administrative sanctions ranging from warnings to fines amounting to 1,250,000 euros (Art. 9).

Further transparency is expected when it comes to beneficial ownership of companies and fiduciaries, as the EU Parliament has already adopted a 5th AML Directive (**Directive 2018/843**), which is intended to establish beneficial ownership registers. The registers of beneficial owners of companies will be accessible to the general public, whereas the registers of beneficial owners of fiduciaries will be accessible to a limited public (the authorities and financial intelligence units, obliged entities, natural or legal persons that can demonstrate a legitimate interest and natural or legal persons that file a written request). In addition, the national registers will be interconnected at EU level through a European central platform. This matter is already under parliamentary discussion in Luxembourg within the Bills of Law **7217** (for companies) and **7216B** (for fiduciaries) and the requirements of the 5th AML Directive should see the light in the near future.

1. Such thresholds are set out in Article 3 § 1 points b), ba) and bb) of the Law of 12 November 2004 relating to AML and TF, as amended.

New capital requirements for securitisations

A new EU regulatory framework on securitisation has been adopted. It is composed of **Regulation (EU)**

2017/2402 of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation ("**Securitisation Regulation**"), and of **Regulation (EU) 2017/2401** of 12 December 2017 amending Regulation 575/2013 on prudential requirements for credit institutions and investment firms ("**CRR Amending Regulation**"). Both regulations will be applicable to securitisations whose securities are issued on or after 1 January 2019. Secondary measures completing the new framework will follow in the future, as policy-makers are currently working on it.

The two regulations intend to revitalise the EU securitisation market with a focus on high-quality securitisations and to increase the securitisation issuance volumes in the EU, as these remain below their pre-financial crisis peak.

To that end, the new framework creates a common set of rules governing securitisations in the EU as well as a special and more favourable framework for simple, transparent and standardised securitisations ("**STS Securitisations**"), being considered securitisations of a higher quality. Under the CRR Amending Regulation, STS Securitisations (whether they are part of an asset-backed commercial paper programme/transaction or not) are eligible for a more favourable differentiated capital and prudential treatment than securitisations that do not meet the criteria of STS Securitisation, in order to encourage investors to invest in STS Securitisations.

The rules applicable to the general regime are common to all types of investors, originators, sponsors or original lenders. Under the previous framework, different texts governed the securitisations depending on whether the relevant entity was governed by **Regulation 575/2013** on prudential requirements for credit institutions and investment firms ("**CRR Regulation**"), **Directive 2009/138/EC** on the taking-up and pursuit of the business of insurance and reinsurance ("**Solvency II Directive**") or by **Directive 2011/61/EU** on alternative investment funds managers ("**AIFM Directive**"). With the new regime, the same text is applicable to all market players. The common requirements remain substantially similar to the previous requirements concerning notably the retained interest of 5% and the five structural methods of risk retention, due diligence obligations, additional risk weight, credit granting and disclosures to investors.

Lastly, subject to certain legitimate purposes exceptions, the Securitisation Regulation prohibits the issuance of re-securitisations in the EU market. Indeed, the Securitisation Regulation states that the underlying exposures used in a securitisation shall not include securitisation positions. The legitimate purposes exceptions include the avoidance and facilitation of the winding-up of a credit institution, an investment firm or a financial institution. In addition, fully supported asset-backed commercial paper programmes shall not be considered to be re-securitisations and are therefore not banned.

Commercial

Simplified business permit regime

The business permit regime has been simplified for certain professional activities covered by the Law of 2 September 2011 regulating access to the professions of craftsman, trader, industrialist and certain liberal professions, as amended ("**Law**"). The changes made thereto by the amending **Law of 18 July 2018** (published on 26 July 2018) came into force on 30 July 2018.

The most significant changes are the following:

- The specific permit relating to large-scale retail stores (*grandes surfaces*) has been abolished, which translates into a less administrative burden for initiating this type of project.

  Indeed, former Article 35 (which has now been repealed) provided for the need for a specific permit for any creation, extension, takeover, transfer or change of the main commercial sector(s) of a large-scale retail store having a commercial space with a sales area exceeding 400 sq. m.

  The authors of the amending Law of 18 July 2018 rightly saw this as a duplication of the existing instruments in competition law matters and in spatial and urban planning matters.

  According to the same authors, the decision to abolish the specific permit relating to large-scale retail stores should foster the competitiveness of Luxembourg's commercial sector in the Greater Région[1].

- The requirement relating to the professional qualification of persons carrying out "commercial activities not otherwise regulated" (*activités commerciales non autrement réglementées*) has been abolished.

  Any legal person wishing to carry out an activity regulated by the Law must designate an executive (*dirigeant*) who will appear as such on the business permit to be issued. The executive is the person who effectively and permanently manages the company's activities.

  The executive had to prove, among other things, that he or she met the legal requirements of professional qualification and integrity.

  From now on, with respect to "commercial activities not otherwise regulated " (i.e. any act of commerce that is not otherwise referred to by the Law, e.g. sales in clothing stores) the executive only needs to prove his or her professional integrity.

  This being said, the company concerned still has to prove that it has appropriate premises to carry out its activity, the executive's effective and permanent management (including his or her power of signature), and the actual and effective relationship between the executive and the company (either an employment contract or any interest in the capital).

- The categories "economic adviser" and "adviser in" have been abolished and persons carrying out these activities will now obtain a business permit for "commercial services and activities" under the new regime applicable to "commercial activities not otherwise regulated".

  As a result, any person providing services and advice in micro- and macroeconomic matters, as well as in business management, will no longer have to prove that he or she has the professional qualifications required therefor.

1. Being Luxembourg and the bordering areas of its neighbouring countries: France, Belgium and Germany.

Dispute resolution

New Civil Procedure Code : Law of 18 July 2018

The **Law of 18 July 2018** supplements the Law of 17 May 2017 on the implementation of **Regulation** (EU) 655/2014, which established a European Account Preservation Order ("**EAPO**") procedure, as an alternative to existing legal debt recovery procedures in each EU country.

The EAPO procedure was focused on the conservatory phase of the attachment procedure and referred to the national law of each country for the executory phase (i.e. the recovery of the debt) after obtaining an EAPO.

The Law of 18 July 2018 which entered into force on 4 August 2018 now supplements the new Code of Civil Procedure by introducing a *Titre VIIbis* (Article 718-1) dealing with the recovery of the debt procedure during the executory phase after obtaining an EAPO.

In practice, the attaching creditor serves a deed of conversion (*acte de conversion*) on the garnishee containing various information such as information on the obtained EAPO, the title on which it is based, the calculation of the amount due and a request for payment. A copy of this deed is served on the attached debtor who has the right to challenge the deed in Court within 15 days.

In the absence of any such challenge, the bailiff establishes a certificate which allows the garnishee to pay the amount due to the attaching creditor.

EU law, competition and antitrust

Brexit: Update

Following the approval in March 2018 of the Draft Agreement on the UK's withdrawal from the EU (see our **Newsletter April 2018**), including arrangements on a transition period to run until 31 December 2020, the UK Government adopted a **White Paper** on 12 July 2018, setting out its proposals for Brexit and containing a blueprint of its view on the future relationship with the EU.

In the White Paper, the UK Government proposed an economic partnership to the EU comprising, *inter alia*, a new free trade area for goods. On financial services, the White Paper included a proposal to conclude a bilateral framework of treaty-based commitments respecting the regulatory autonomy of both parties and including an expansive equivalence regime. The White Paper also envisaged the possibility for the UK to establish an independent trade policy with the rest of the world and set out principles for a future security partnership as well as institutional arrangements for the future relationship, including the recognition of the European Court of Justice as ultimate arbiter of EU law.

In view of the deadline of 29 March 2019, EU and Member State authorities have urged economic players and citizens to prepare for the possibility of the absence of an agreement on withdrawal being reached in time and the UK leaving the EU on 30 March 2019 without a transition period:

- On 25 June 2018, the European Banking Authority published an **Opinion** relating to the risks posed by the lack of preparation by financial institutions for the departure of the UK from the EU;
- On 12 July 2018, the European Securities and Markets Authority ("**ESMA**") issued a **Public Statement** emphasising the importance of making timely requests for authorisation to National Competent Authorities and ESMA for regulated entities wishing to relocate in the context of Brexit;
- On 19 July 2018, the European Commission adopted a **Communication** calling upon Member States, regional entities, economic players and private citizens to step up preparations to minimise the impact of a possible withdrawal, including sectoral illustrations of preparedness challenges and actions;
- On 25 July 2018, the CSSF issued **Press Release 18/25**. Referring also to ESMA's publication mentioned above, the CSSF reminded investment fund managers (alternative investment fund managers or UCITS fund managers) wishing to relocate business to Luxembourg in the context of Brexit that the time required for analysing authorisation requests can be substantial and depends on numerous factors and urged them to submit their applications to the CSSF as soon as possible.

No resale price maintenance by Luxlait

By **Decision 208-FO-03** of 26 June 2018, the Competition Council ("**Council**") closed the file against Luxlait for the alleged imposition of resale prices (so-called "resale price maintenance") in violation of the Law of 3 October 2011 on Competition, as amended ("**Law**") and Article 101 of the Treaty of the Functioning of the European Union ("**TFEU**"), without imposing a fine.

The case was launched in 2010 by a complaint from a retail distributor alleging that Luxlait refused to enter into a contract with him. This distributor explained the refusal by his aggressive pricing policy seeking to maintain the lowest prices in the market whereas Luxlait would have wanted to control resale prices and also alleged involvement by Luxlait to prevent him from establishing a commercial relationship with a wholesale distributor for certain Luxlait products.

The Council defined the relevant market as the national market for the retail distribution of milk products.

After dismissing various procedural arguments raised by Luxlait, including a claim alleging a violation of its rights of defence given the length of the procedure, the Council rejected the complaint on the merits.

The Council recalled that the imposition of resale prices constitutes a 'by object' infringement of competition contrary to Article 3 of the Law and Article 101 TFEU prohibiting agreements restricting competition.

However, in order to examine whether such an infringement was established in this case, and, in particular, whether an agreement within the meaning of Article 3 of the Law and Article 101 TFEU could be found, the Council applied a three-prong test, based in particular on French jurisprudence, requiring proof of the fact that resale prices were discussed between supplier and distributor, that a pricing policy including at least a price surveillance was put in place by the supplier and that the prices discussed were effectively applied in practice.

Despite the evidence cited and the conclusion in the statement of objections that all three conditions were fulfilled so that an infringement was established and a fine needed to be imposed, the Council

found that there was insufficient proof of the second condition being fulfilled, i.e. the existence of a pricing policy. It held, in particular, that if proof existed that Luxlait followed the pricing practices of its distributors, this showed at most an interest of Luxlait in the prices they applied but no elements were provided of the implementation of measures aimed to have these prices respected or of retribution measures against commercial partners not applying them.

The decision evidences a high burden of proof weighing on complainants of resale price maintenance practices.

Google fined in relation to Android

On 18 July 2018, the European Commission ("**Commission**") adopted a decision in Case AT.40099 – Google Android imposing a fine of 4.34 billion euros on Google LLC ("**Google**") for abusing its dominant position on the market for general internet search in violation of Article 102 of the Treaty of the Functioning of the European Union ("**TFEU**").

According to the Commission's **press release** (the public version of the decision is not yet available), with regard to its very popular Android mobile operating system, Google has, since 2011, imposed various illegal restrictions on Android device manufacturers and mobile network operators to cement its dominant position in general internet search at a time when the importance of mobile internet was growing significantly.

The condemned practices concern, in essence, alleged illegal tying of Google's search and browser apps, payments conditional on exclusive pre-installation of Google Search, as well as the alleged illegal obstruction of development and distribution of competing Android operating systems.

Google must bring the contested conduct to an end within 90 days or face penalty payments of up to 5% of the average daily worldwide turnover of Alphabet Inc., its parent company.

Google can challenge this decision before the Court of Justice of the European Union.

ICT, IP and data protection

Luxembourg Law complementing the GDPR

The **Regulation (EU) 2016/679** of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (**General Data Protection Regulation**) ("**GDPR**") which entered into force in May 2018 provides for the possibility for the EU Member States to adopt additional rules and provisions with respect to certain specific matters. In that respect the Luxembourg legislator has adopted the **Law of 1 August 2018 on the organisation of the *Commission Nationale pour la Protection des Données*** ("**CNPD**") [the Luxembourg data protection supervisory authority] and the general data protection regime ("**Law**").

The Law (i) provides for more details about the mission, procedure and competences (including regarding sanction powers) of the CNPD in its capacity as national supervisory authority, as well as provisions on its internal organisation and (ii) introduces provisions regarding certain specific processing situations, in particular with respect to:

- Processing and freedom of expression and information where Luxembourg applies an exception for personal data processing for journalistic purposes and the purposes of academic, artistic or literary expression.
- Processing for scientific or historical research purposes or for statistical purposes. The Law provides that where the controller implements appropriate additional measures to ensure the safeguarding of the rights and freedoms of the data subject it may process special categories of data in the context of Article 9 2 j) of the GDPR and may derogate from certain rights of the data subject if such rights would prevent or seriously hinder the achievement of the research project. The Law provides for list of the appropriate additional measures.
- Processing of genetic data for the purpose of exercising the rights of the controller in respect of labour law and insurance. The Law prohibits such processing.
- Processing in the context of employment. The Law amends the current provisions of the Labour Code regarding processing of personal data for monitoring purposes and introduces a prior mandatory information procedure to be completed by the employer towards the professional staff representative bodies other competent bodies. The staff delegation or employees can request the prior opinion of the CNPD on the conformity of the intended processing for monitoring purposes. The Law also provides that employees may lodge a complaint before the CNPD in relation to the proposed monitoring.

The provisions introduced in relation to specific processing situations (see (ii) above) are only applicable to controllers and processors established on Luxembourg territory.

Tax

Multilateral instrument: Bill of Law

On 7 June 2017, Luxembourg together with 67 other jurisdictions, signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS ("Multilateral Instrument" or "**MLI**"). One of the main purposes of the MLI is to update international tax rules and lessen the opportunity for tax avoidance by multinational enterprises by transposing the results from the BEPS project into more than 2,000 tax treaties worldwide.

On 3 July 2018, the Luxembourg Government submitted **Bill of Law 7333** approving the MLI to the Luxembourg Parliament.

All 81 tax treaties concluded by Luxembourg that are currently in force are designated as "Covered Tax Agreements" ("**CTAs**"). However, the extent to which these CTAs will be amended as a result of the MLI will depend on whether or not the other contracting state signed the MLI and on the reservations and options taken by the signatory contracting state.

The MLI contains agreed minimum standards to counter treaty abuse (BEPS Action 6) and to improve dispute resolution mechanisms (BEPS Action 14). It also contains a number of alternatives or optional provisions that will generally apply only if all contracting states to a CTA have chosen to apply that particular alternative or option.

For more details regarding the MLI and the reservations and options chosen by Luxembourg, see the article "**Bill of Law on the Multilateral Instrument**" published on our website.

VAT group regime available in Luxembourg

The **Law of 6 August 2018** implements the Value Added Tax ("**VAT**") group regime in Luxembourg (the "**VAT Group**"). The Law introduces a new Article 60ter in the Luxembourg VAT law[1] in accordance with Directive 2006/112/EU. This comes in response to the recent judgment of the European Union's Court of Justice which has restricted the scope of the VAT exemption applicable to services provided by independent groups of persons ("**IGP**").

The main advantage of this regime is that all members of a VAT Group will be considered as one single taxable person for VAT purposes so that supplies between group members will be disregarded for VAT purposes.

This feature makes the VAT group attractive for financial and insurance groups using the former IGP regime but also generally for groups performing VAT-exempt supplies without a (or with limited) VAT recovery right in Luxembourg (e.g. in the private equity, real estate, asset management sectors) or groups which aim at improving their cash-flow.

For further information, see the article "**VAT group regime available in Luxembourg**" published on our website.

> 1. Luxembourg Law of 12 February 1979.

Tax treatment of virtual currencies

On 26 July 2018, the Luxembourg direct tax authorities published Circular L.I.R. No. 14/5 – 99/3 – 99bis/3 ("**Circular**") providing useful guidance on the tax treatment of income generated by Luxembourg taxpayers through virtual currencies ("**VCs**"), in particular in the framework of their disposal or creation (mining).

The Circular sets out the following main points:

- VCs do not constitute any currency. Thus, Luxembourg taxpayers can neither establish their accounts nor declare their taxable income in VCs.
- VCs are considered intangible assets for Luxembourg tax purposes.
- The use of VCs in a transaction does not influence the nature of any such transaction for Luxembourg tax purposes.
- Income generated by VCs is taxable to the extent it qualifies either as income from commercial activity (*bénéfice commercial*, Article 14 L.I.R.) or as miscellaneous net income (*revenus nets divers*, Article 99 L.I.R.).

The Circular provides the following practical guidelines:

- Income and gains as well as operating or other expenses expressed in VCs must be converted to euro or to another currency for which the European Central Bank establishes and publishes exchange rates. This conversion should be done based on the daily exchange rate published by an exchange platform approved by the CSSF.
- The taxpayer should maintain consistent and continuous documentation regarding VCs, notably as regards to their acquisition or creation date and the related expenses. The onus of proof regarding the acquisition date is resting with the taxpayer.
- In cases where it is difficult to determine the acquisition price of the VCs, such a price should be obtained based on the weighted average price method. The application of the “first-in, first-out” or “last-in, first-out” methods may not be applied.

By clicking on the following links, you may access to the **original French document of the Circular** and to our **April 2018 Newsletter article on warnings of CSSF regarding VCs**.

For any further information please contact us or visit our website at **www.elvingerhoss.lu**.

The information contained herein is not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific legal advice concerning particular situations.

We undertake no responsibility to notify any change in law or practice after the date of this newsletter.