Luxembourg Newsflash – 14 December 2022

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Inactivity in accounts, safe-deposit boxes and insurance contracts

The new law on inactive (bank) accounts, safe-deposit boxes and unclaimed insurance contracts was published in the Luxembourg Official Journal on 1 April 2022 and entered into force on 1 June 2022.

The law introduces a completely new and rather prescriptive and stringent legal framework in this field, which applies not only to dormant accounts and safe-deposit boxes (for banks) but also to life insurance contracts in respect of which benefits remain unclaimed. It can be summarised under three main pillars:

- Prevention – obligations to maintain contact and thus prevent inactivity in relation to bank accounts, safe-deposit boxes and life insurance contracts.
- Consignment – mandatory consignment of assets after a prolonged period of inactivity or period of unclaimed benefits under life insurance contracts.
- Restitution – helping facilitate arrangements for the return of deposited assets.

It should be noted that the law includes administrative sanctions which can be imposed by the CSSF or the CAA for certain specific breaches of the law (along with a possible "name and shame" process). In addition, criminal sanctions can be imposed for a number of other breaches. Read more...

Central administration, internal governance and risk management

On 22 April 2022, the CSSF published Circular 22/807 which amends Circular 12/552 on central administration, internal governance and risk management.

With a view to integrating both the newly revised EBA Guidelines on internal governance and the joint ESMA and EBA Guidelines on assessment of the suitability of members of the management body, CSSF Circular 12/552 has been amended as follows:

- A definition of ESG risks has been added, together with an explicit requirement to take ESG risks into account in the business plan and in various guiding principles.

- The roles and responsibilities of the Chief Compliance Officer and the AML/CFT compliance function have been set out in further detail and now also include a requirement for the yearly summary report of the compliance function to describe progress made in the implementation of the "compliance monitoring plan".

- The guiding principles to be set by the management body in relation to equality and non-discrimination must now take account of a considerably expanded list of criteria.

- A specific section dedicated to the documentation of loans granted to members of the management body and their related parties has been included, which notably sets out the information to be gathered and, if requested, made available to the competent authority.

- The internal control framework must now adequately cover prevention of fraud and AML/CFT risks.

- The section relating to outsourcing arrangements has been considerably shortened and now includes references to the outsourcing rules in the new general CSSF Circular 22/806 on outsourcing arrangements and CSSF Regulation 12-02 on the fight against money laundering and terrorist financing.

The relevant updates entered into force on 30 June 2022. Read more...

Outsourcing

On 22 April 2022, the CSSF published Circular 22/806 on outsourcing arrangements, addressed to: credit institutions; financial sector professionals, including investment firms, payment institutions and electronic money institutions; investment fund managers (IFMs); UCITS with a designated management company; central counterparties; approved publication arrangements and authorised reporting mechanisms; market operators of trading venues; central securities depositories and administrators of critical benchmarks, including their branches.

The Circular sets out internal governance requirements for planning, implementing, monitoring and managing outsourced activities, and imposes ongoing obligations relating to governance, risk management, conflicts of interest, internal controls, professional secrecy, data protection, business continuity and exit planning. Additionally, the Circular lists requirements for the contents of outsourcing agreements.

The Circular sets out specific rules on information communication technologies (ICT) outsourcing, which only apply to actual outsourcing of ICT (and not to arrangements that concern outsourcing of entire functions which may happen to rely on ICT solutions). Where ICT outsourcing relies

on cloud solutions, additional rules apply that are similar to those previously included in CSSF Circular 17/654 (now repealed). Read more...

Distributed Ledger Technology Pilot Regime

On 2 June 2022, Regulation (EU) 2022/858 of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology (DLT Pilot Regime) was published in the Official Journal of the EU.

The DLT Pilot Regime is part of the EU Commission's digital finance package. It sets out operating conditions for DLT market infrastructures, permissions required to make use of them and details of the supervision and cooperation of competent authorities and ESMA.

The Regulation will enter into force on 23 March 2023, and permissions will be granted for 6 years.

AML

Against a backdrop of constantly evolving restrictive measures in Europe and around the world, the law of 20 July 2022 creating a monitoring committee for restrictive measures in financial matters was published in the Luxembourg Official Journal.

The law establishes a committee tasked with monitoring the implementation of restrictive measures in financial matters and expands the list of primary offences in the fight against money laundering and terrorist financing.

Notably, improper implementation of restrictive measures in financial matters or enforcement measures and decisions referred to in the law of 19 December 2020 has been added to the list of primary offences as defined under Article 506-1 of the Criminal Code. Read more...

In addition, a law of 29 July 2022 amending the AML law (law of 12 November 2004) was published in the Luxembourg Official Journal. Apart from a few limited and technical changes, the main objectives of this law are to align the Luxembourg AML law with the wording of FATF recommendations (especially as regards the need to assess potential discrepancies in respect of RBO filings) and increase international co-operation between supervisory authorities for investigations and on-site inspections.

The law of 29 July 2022 also amended the Register of Fiducies and Trust law (law of 10 July 2020), clarifying that the obligation to update the beneficial owner information after any change within a reasonable period of time, is to be understood as referring to a period not exceeding one month.

Finally, the Grand-Ducal regulation of 25 October 2022 amended the Grand-Ducal regulation of 1 February 2010 by, among others, introducing a new Article 6 on customer due diligence. The effect is that, when relying on a third party for the performance of customer due diligence measures, obliged entities under the AML law must now apply a risk-based approach, taking into account the available information on the level of risk related to the countries in which the third party is established.

Register of beneficial owners (RBO)

On 22 November 2022, the Court of Justice of the European Union held that the "public access" feature of the Luxembourg register of beneficial owners (as required under Article 30 of Directive (EU) 2018/843 (AMLD 5)) is invalid in light of the Charter of Fundamental Rights of the EU and, more specifically, that it constitutes a serious interference with the fundamental rights to private life and to the protection of personal data.

Since the invalidity only relates to the public access feature of the RBO, the Luxembourg Business Registers (LBR) swiftly issued a press release to that effect. The press release also indicated that, while the LBR will take into account the outcome of the ruling going forward, it will need to review the ruling in more detail in order to draw all the appropriate conclusions from it.

The LBR immediately suspended all access to the RBO. It also indicated that it is working on a solution to allow obliged entities under the AML law to regain access to the RBO shortly, so that they are able to comply with their professional obligations in this area.

In the meantime, LBR has reported that access to the RBO has been re-established for a number of professionals who already had identified access to the RCS and the RBO and that access will be restored for representatives of the press who have a legitimate interest in being able to consult the RBO in the context of their journalistic research. Read more...

EBA Guidelines on remote customer onboarding

On 27 November 2022, EBA published its final Guidelines on the use of remote customer onboarding solutions.

The Guidelines apply to all credit and financial institutions that are within the scope of the AML Directive. As the AML Directive does not set out in detail what is, and what is not, allowed in a remote and digital context when onboarding new customers, the published Guidelines (which are technology neutral) define common EU standards for the steps to be taken when choosing a remote onboarding tool and assessing the adequacy and reliability of that tool.

Sound remuneration policies for credit institutions and CRR investment firms

On 31 January 2022, the CSSF published Circular 22/797 to announce that it applies the Guidelines of the EBA on sound remuneration policies under Directive (EU) 2013/36 (EBA/GL/2021/04) (EBA Guidelines). Consequently, the CSSF has integrated the EBA Guidelines into its administrative practice and regulatory approach to promote supervisory convergence in this field at European level. CSSF Circular 22/797 applied from 31 January 2022 and repealed CSSF Circulars 17/658 and 11/505 from that date.

Credit institutions and CRR investment firms must apply the EBA Guidelines that concern remuneration policies for all staff and remuneration policies for identified staff (*i.e.* staff whose professional activities have a material impact on an institution's risk profile).

Finally, remuneration policies must be gender neutral and comply with the principle of equal pay for male and female workers for equal work or work of equal value.

ESMA Guidelines on certain aspects of the MiFID II appropriateness and execution-only requirements

On 3 January 2022, ESMA published its final report on its Guidelines on certain aspects of the MiFID II appropriateness and execution-only requirements.

The Guidelines cover several important aspects of the appropriateness process, including the information to be provided to clients about the purpose of the appropriateness assessment, the arrangements required to understand clients and products, the matching of clients with appropriate products and the effectiveness of warnings. ESMA also clarified the execution-only exemption and related record-keeping and controls.

The Guidelines were implemented in Luxembourg by CSSF Circular 22/817. They are applicable to investment firms and credit institutions and entered into force as from 12 October 2022.

ESMA Guidelines on MiFID remuneration requirements

On 31 March 2022, ESMA published its final report on its Guidelines on certain aspects of the MiFID II remuneration requirements.

These Guidelines replace the 2013 Guidelines on remuneration policies and practices issued in relation to the MiFID I conflict of interest and conduct of business requirements applicable in the area.

The purpose of the Guidelines is to ensure the common, uniform and consistent application of the MiFID II remuneration requirements in Article 27 of the MiFID II Delegated Regulation, as well as the conflicts of interest requirements in MiFID II. In addition, the Guidelines clarify the application of the governance requirements in the area of remuneration under Article

9(3) of MIFID II, as well as the conduct of business rules set out in Article 24(1) and (10) of MiFID II. Read more...

Integration of ESG considerations into the MiFID II framework

The two delegated instruments (Delegated Regulation (EU) 2021/1253 and Delegated Directive (EU) 2021/1269) amending the MiFID II framework to integrate sustainability risks and factors into banks' organisational requirements, rules of conduct and product governance obligations entered into force in 2022:

- As of 2 August 2022, banks that provide investment advice or portfolio management to professional and retail clients are required to consider clients' sustainability preferences in their suitability assessments. Sustainability preferences are a (potential) client's choices on whether, and to what extent, financial instruments including certain specific ESG features are to be integrated into their investment portfolio.

  In this context, on 23 September 2022, ESMA published revised Guidelines on certain aspects of the MiFID II suitability requirements, which specify how to integrate sustainability factors, risks and preferences into institutions' organisational requirements and operating conditions.

  The Guidelines will enter into force six months after translations into all official EU languages have been published. Read more...

- As of 22 November 2022, banks that qualify as product manufacturers and/or distributors are required to integrate sustainability considerations into their overall product governance process:

  - Manufacturers that create and issue financial instruments must integrate sustainability factors and objectives into the definition of their target markets, specify the sustainability-related objectives that a financial instrument is compatible with, and ensure that a financial instrument's sustainability factors are compatible with the sustainability-related objectives of the target market.

  - Distributors that offer, recommend or sell investment products and services must ensure that these are compatible with the sustainability-related objectives of the target market and remain consistent with those objectives. Read more...

The above requirements have been implemented into Luxembourg law via the Grand-Ducal regulation of 27 July 2022, which was published on 4 August 2022. Read more...

Integration of ESG considerations into the CRR framework	Article 449a CRR requires large credit institutions to disclose prudential information on ESG risks, including transition and physical risk, as part of their Pillar 3 disclosures. These requirements apply as of 28 June 2022.
SFDR compliant pre-contractual disclosures	Please refer to the "Fund Formation – Investment Management" section.
Extension of the taxonomy	Please refer to the "Fund Formation – Investment Management" section.
Modernisation of the Luxembourg securitisation framework	The law of 9 February 2022 amends, among others, the law of 22 March 2004 on securitisation by increasing the flexibility of the securitisation law, while retaining and strengthening other features valued by market players. The law, which benefits both existing and new securitisation vehicles, intends to further increase flexibility by (i) creating new opportunities in the active management of securitisation vehicles (CLOs), (ii) extending financing arrangements for securitisation vehicles, (iii) expanding the ability of securitisation vehicles to grant security, and (iv) making it easier for securitisation vehicles to securitise tangible assets. The law implements the main amendments contained in the bill of law submitted to Parliament. Back to 2021…
Securitisation Regulation	In October 2022, the EU Commission delivered a report to the EU Parliament and the Council of the EU on the functioning of the EU Securitisation Regulation. The report assesses various matters relating to the EU Securitisation Regulation, including its interpretation of the jurisdictional scope of the Article 7 transparency requirements on the obligation to make specific information available to institutional investors where none of the originator, sponsor or Securitisation Special Purpose Entity (SSPE) is established in the EU. The EU Commission's position aims to prevent EU institutional investors from investing in third-country securitisations without receiving disclosures required under Article 7.
Financial collateral arrangements	In July 2022, the law of 5 August 2005 on financial collateral arrangements was amended. The changes include, most notably, (i) modernisation of the means of enforcement, (ii) recognition of the exercise of rights over insurance contracts, (iii) incorporation of any payment institution or any electronic institution into the definition of financial sector professional, (iv) fine-tuning of enforcement event, and (v) clarification that sequestration does not prevent enforcement of financial collateral arrangements. Read more…

Looking forward

AML Package

As mentioned in our Back to 2021, the AML Package was published on 20 July 2021 by the EU Commission. It aims to strengthen the EU's rules on anti-money laundering and countering terrorism financing. The AML Package includes:

- A proposal to create a new EU authority to fight money laundering.
- 6th Directive on AML/CFT to replace the existing AMLD 5.
- A proposal for a regulation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.
- Revision of the 2015 Regulation on Transfers of Funds.

The Council of the EU discussed the AML Package during 2022 and reached its position on 5 December 2022. Trilogue negotiations will now take place. The EU Commission has set 2024 as a target for the entry into force of the AML Package, so it is expected to be published during 2023.

MiCA Regulation

The proposal for a regulation on Markets in Crypto-assets (MiCA Regulation) is part of the digital finance package published by the EU Commission. On 5 October 2022, the Council of the EU approved the final version of MiCA.

On 9 October 2022, the proposal was approved by the EU Parliament's Economic Affairs Committee. It is now waiting for the EU Parliament to vote, which is expected in Q1 2023.

The MiCA Regulation will provide a definition of crypto-assets. It also aims to harmonise the provision of crypto-asset services and provide legal certainty to both service providers and investors, as well as ensuring market integrity.

The Regulation will apply to any crypto-asset that is not already subject to EU regulation, such as virtual currencies, asset-referenced tokens, stable-coins, e-money tokens and utility tokens. It will not apply to virtual assets qualifying as financial instruments or deposits.

The Regulation will introduce authorisation requirements and passporting rights for crypto-asset service providers. In addition, a comprehensive set of rules will be introduced for the issue and offering of crypto-assets to the public, including obligations to complete regulatory filings and issue white

papers. Finally, the Regulation anticipates a market abuse regime in the crypto-assets area.

DORA

The Digital Operational Resilience Act (DORA) proposal is, together with the above-mentioned MiCA Regulation, part of the digital finance package published by the EU Commission on 24 September 2020.

DORA aims to address the increasing dependency of the financial sector on software and digital processes and the inherent information communication technologies (ICT) risks.

The Regulation will enhance and streamline financial entities' conduct of ICT risk management, establish a thorough testing of ICT systems, and increase supervisors' awareness of cyber risks and ICT-related incidents faced by financial entities. It will also introduce powers for financial supervisors to oversee risks stemming from financial entities' dependency on third-party ICT service providers.

The EU Parliament and the Council of the EU adopted the Regulation in November 2022. DORA will enter into force 20 days after its publication in the Official Journal of the EU. It will apply 24 months after it enters into force.

CRD/CRR

On 27 October 2021, the EU Commission published the Banking Package, proposing amendments to CRD and CRR.

The proposed CRD VI and CRR III aim to finalise the implementation of the Basel III agreement in the EU, contributing to the green transition, harmonising supervisory powers and tools and improving access to banks' prudential data.

The legislative proposals to amend CRD and CRR focus, among others, on the Fit & Proper framework, the integration of ESG risk, new supervision powers, the output floor and third country branches rules.

The Banking Package is still being discussed within the Council of the EU before entering a final trilogue negotiation round.

Corporate Sustainability Reporting Directive

Please refer to the "Company Law - Capital Markets" section.

Corporate Sustainability Due Diligence Directive

Please refer to the "Company Law - Capital Markets" section.

ESMA Consultation Paper - Review of the Guidelines on MiFID II product governance requirements

On 8 July 2022, ESMA launched a public consultation on revised Guidelines on MiFID II product governance requirements, with the intention of updating the Guidelines published in 2017.

The proposed revised Guidelines aim, in particular, to provide guidance on specification of any sustainability-related objectives a product is compatible with, use of a clustering approach when identifying a target market, determination of a compatible distribution strategy, and periodic review of products, including the application of the proportionality principle.

The consultation closed on 7 October 2022 and ESMA is expected to publish its final report in Q1 2023.

EBA final draft implementing technical standards on prudential disclosures on ESG risks in accordance with Article 449a CRR

On 24 January 2022, EBA published its final draft implementing technical standards (ITS) on prudential disclosures on ESG risks.

This draft aims to support institutions in their public disclosure of meaningful and comparable information on how ESG-related risks and vulnerabilities, and in particular climate change risks, may exacerbate other risks in their balance sheet. It seeks to enable investors and stakeholders to compare the sustainability performance of institutions and their financial activities. Furthermore, it aims to help institutions to provide transparency on how they are mitigating sustainability risks, including information on how they are supporting their customers and counterparties in the adaptation process to, for example, climate change, and in the transition towards a more sustainable economy.

EBA is expected to publish the final ITS on prudential disclosures on ESG risks in 2023.

Instant payments proposal

On 26 October 2022, the EU Commission adopted a legislative proposal on instant payments in euros.

The EU Commission's proposal centres around, among others, the following key measures that aim to fuel both the supply and demand for instant payments in euros:

- Requirement to offer Instant Credit Transfers to all customers.
- Mandatory offer of a service which checks the 'match' between the account number 'International Bank Account Number' (IBAN) and the name of the payment beneficiary and warns of any detected discrepancy as it could suggest fraud or a mistake.
- Creation of a harmonised procedure for sanctions screening, based on daily checks of clients against EU sanctions lists.

The proposal is now open for feedback until January 2023 and will then follow the legislative debate procedure.

Mortgage Credit Directive review

In November 2021, the EU Commission launched a public consultation on the review of the Mortgage Credit Directive.

With this review, the EU Commission aims to ensure that simple, timely and relevant information is provided to consumers, adapt the rules to the digital environment, and foster cross-border provision of mortgage credit. Consumer protection in cases of economic disruptions such as COVID-19 will also be strengthened and the uptake of energy-efficient mortgages boosted.

The deadline for consultation expired in February 2022, and the EU Commission is expected to propose amendments in 2023.

Consumer Credit Directive

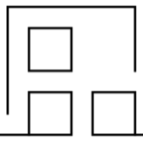
On 30 June 2021, the EU Commission published a proposal to revise Directive 2008/48/EC on credit agreements for consumers.

The proposal aims, among others, to amend the Directive's scope of application and improve information provided to consumers.

The Council of the EU and the EU Parliament reached a provisional agreement on the new Consumer Credit Directive proposal on 2 December 2022, and it is now subject to final approval.

Financial collateral arrangements

Bill of law 8055, which was submitted to the Luxembourg Parliament on 27 July 2022, aims: to (i) provide additional legal certainty in relation to pledges and other financial collateral arrangements on financial instruments booked in accounts held on distributed ledger technology (DLT), via an amendment of the law of 5 August 2005 on financial collateral arrangements and (ii) facilitate the implementation of the DLT Pilot Regime (Regulation (EU) 2022/858 of 30 May 2022) (please refer to "DLT Pilot Regime") by introducing certain technical changes to the MiFID implementation legislation including the law of 5 April 1993 on the financial sector. This proposal is a further step to create a robust legal framework enabling financial market participants to take full advantage of the opportunities offered by this new technology.



Fund Formation – Investment Management

Back to 2022

Digitisation of notification and de-notification procedures for cross-border marketing activities

The CSSF started to digitise its procedures for notification and de-notification of cross-border marketing activities. Accordingly, it issued CSSF Circular 22/810 on the notification and de-notification procedures to be observed by Luxembourg undertakings for collective investment (UCIs) and investment fund managers (IFMs) for pre-marketing and cross-border marketing. The digitised procedures are accessible through a designated module on the CSSF's eDesk platform. At the time of publication, Luxembourg alternative investment fund managers (AIFMs) and managers of Luxembourg EuVECAs and EuSEFs must notify their marketing and pre-marketing activities through the CSSF's eDesk platform. Luxembourg UCITS, even though they are within the scope of CSSF Circular 22/810, must still proceed in accordance with CSSF Circular 11/509 on the notification procedures to be followed by Luxembourg UCITS. The CSSF intends to gradually update its designated module on the eDesk platform to include further notification procedures. Consequently, CSSF Circular 11/509 will ultimately be repealed. The CSSF will publish information about the evolution of the procedures available under its eDesk platform.

CSSF guidance on marketing communications

Parallel to the entry into application of ESMA's Guidelines on marketing communications, the CSSF issued Circular 22/795 and integrated the ESMA Guidelines into its administrative practice. In a new FAQ, the CSSF clarified its expectations concerning certain key aspects of the application of Article 4 of Regulation (EU) 2019/1156 (CBDF Regulation) and the ESMA Guidelines. As such, the CSSF has provided clarification on several questions concerning (i) the scope of the ESMA Guidelines, (ii) governance and organisation for Luxembourg-based IFMs in relation to the process of preparing and validating marketing communications, and (iii) the information to be provided to the CSSF. Read more...

From 16 September 2022, IFMs within the scope of the Circular must, upon request, provide the CSSF with information about marketing communications. Furthermore, from 1 January 2023, this information must be linked to the funds (and sub-funds) managed by those IFMs.

Digitisation of the long form report

The CSSF revised its regime for the long form report. The aim of the revision was to improve the CSSF's risk-based supervision, both for prudential and AML/CFT purposes, of IFMs and regulated investment funds. To this effect, the CSSF published three new Circulars. CSSF Circular 21/789 and CSSF Circular 21/790 each introduced a self-assessment questionnaire to be completed by, respectively, IFMs and regulated investment funds, including SIFs and SICARs. The self-assessment questionnaire must be supplemented by a management letter and a newly introduced separate report, both drawn up by the independent auditor of the IFM or the regulated investment fund, respectively. CSSF Circular 21/788 introduced the AML/CFT external report to be prepared by an independent auditor.

The CSSF launched a designated module (CISERO) under its eDesk platform through which all reports required under CSSF Circulars 21/788, 21/789 and 21/790 must be completed and submitted to the CSSF. The revised long form reporting regime under CSSF Circular 21/790 repeals CSSF Circular 02/81 and Chapter P of IML Circular 91/75 and provides for a phased implementation. All IFMs within the scope of CSSF Circular 21/789 and all professionals within the scope of CSSF Circular 21/788 must comply with the respective Circulars for financial years ending on or after 31 December 2021. Read more...

Modernisation of the Luxembourg central administration activities

New CSSF Circular 22/811 on the authorisation and organisation of entities acting as UCI administrator provided the fund industry with a comprehensive and modern regulatory framework for central administration activities in Luxembourg. Within the scope of the Circular are, among others, Luxembourg IFMs and regulated Luxembourg UCIs, when pursuing the activity, or part of the activity, of UCI administration as defined in the Circular. Foreign IFMs carrying on UCI administration for Luxembourg UCIs are also subject to the rules in the Circular. Read more... The CSSF completed the framework in CSSF Circular 22/811 with a dedicated FAQ on the authorisation and organisation of entities acting as UCI administrator.

CSSF Circular 22/811 entered into force on 16 May 2022. Under transitional arrangements, entities acting as UCI administrator on the day of entry into force have until 30 June 2023 to ensure that their activities comply with the new provisions. CSSF Circular 22/811 repeals Chapter D of IML Circular 91/75.

Harmonised Luxembourg framework for outsourcing arrangements

With CSSF Circular 22/806 on outsourcing arrangements, the CSSF introduced a harmonised Luxembourg regulatory framework that governs all outsourcing arrangements made by any of the entities within the scope of the new Circular. In an accompanying FAQ, the CSSF clarified that IFMs and UCITS that have designated a management company only have

to comply with the Circular in relation to ICT outsourcing. For non-ICT outsourcing, IFMs must continue to follow CSSF Circular 18/698.

CSSF Circular 22/806 entered into force on 30 June 2022 and applies to all outsourcing arrangements entered into, reviewed or amended on or after that date. All ICT outsourcing arrangements must be reviewed and amended, if necessary, by no later than 31 December 2022. If the review and amendment will not be finalised by 31 December 2022, the CSSF must be informed in a timely manner.

Please refer to the "Banking & Financial Services" section.

Guidance on liquidity management in today's geopolitical situation

In a new FAQ on the application of liquidity management tools (LMTs) by investment funds, the CSSF published guidance containing temporary as well as more structural measures for dealing with assets rendered illiquid due to the Ukraine crisis and the restrictive measures taken by the EU and other countries in this context.

While the FAQ mainly relates to UCITS, it may also be applicable to AIFs. At the time of publication, the FAQ contains three questions. The first two questions focus on the LMTs that the CSSF considers suitable for addressing the issue of illiquid assets, depending on the percentage represented by those assets in the relevant fund's portfolio. The third question specifically discusses the creation of side-pockets. The CSSF emphasised that the approach taken, including the choice of LMTs and the valuation to be applied to affected assets, is the responsibility of the governing body of the respective investment fund. In addition, the CSSF also clarified that it is not setting a precedent for the systematic use of side-pockets in investment funds, as the FAQ only applies to illiquid assets resulting from the Ukraine crisis. Read more...

Sustainability preferences

UCITS management companies and external AIFMs providing investment advisory or discretionary portfolio management services must obtain specific information about their clients' preferences regarding sustainable investments and follow those preferences, while also meeting their clients' other investment objectives and taking into account their financial situation, knowledge and experience.

Please refer to the "Banking & Financial Services" section.

Integration of sustainability risk

With CSSF Regulation 22-05 amending CSSF Regulation 10-4 on organisational requirements for UCITS, the CSSF integrated Commission Delegated Directive (EU) 2021/1270 as regards sustainability risks and sustainability factors into its regulatory framework. From 1 August 2022, UCITS management companies were required to have integrated any sustainability risks and sustainability factors into their decision-making and organisational processes.

Commission Delegated Directive (EU) 2021/1270 for the UCITS environment and the directly applicable Commission Delegated Regulation (EU) 2021/1255 for the AIF environment required UCITS management companies and AIFMs respectively to integrate sustainability risks into their decision-making and operational processes by 1 August 2022. Back to 2021... ESMA set out its related expectations in a supervisory briefing on sustainability risks and disclosure in the area of investment management.

SFDR compliant pre-contractual disclosures

In July 2022, Commission Delegated Regulation (EU) 2022/1288 (SFDR RTS) was published in the Official Journal of the EU. The SFDR RTS sets out key principles and specific guidance on interpreting SFDR obligations for financial products caught by Articles 8 and 9 of the SFDR. This includes templates detailing the pre-contractual disclosure required under the SFDR, including the taxonomy-related information needed for Article 8 and 9 products. Read more... The SFDR RTS will apply as from 1 January 2023. Managers of financial products in Luxembourg and across Europe must update the pre-contractual disclosures of their funds managed in accordance with the SFDR RTS by 1 January 2023.

Following publication of the SFDR RTS, the CSSF published its expectations concerning the required updates and expected UCITS and CSSF authorised AIFs to submit their documents by 31 October 2022 to ensure that the documents could be reviewed in time. Read more... The CSSF stated that filings submitted after 31 October 2022 will be processed on a best effort basis in view of the application date of the SDFR RTS.

To complete the SFDR disclosure framework, the CSSF published an FAQ providing further clarity on aspects of the SFDR. Read more... In addition, the ESAs (that is, EBA, EIOPA and ESMA) also clarified certain questions and recently published a Q&As document on the SFDR. Earlier this year, the EU Commission provided answers to certain questions put forward by the ESAs on the interpretation of the SFDR.

Extension of the taxonomy

Regulation (EU) 2022/1214 (Taxonomy Complementary Climate Delegated Regulation) sets out the conditions under which fossil gas and nuclear energy activities can be included in the list of economic activities covered by the Taxonomy Regulation. The Taxonomy Complementary Climate Delegated Regulation will apply from 1 January 2023.

The EU Commission adopted a draft Delegated Regulation amending the SFDR RTS to reflect the information that should be provided in pre-contractual documents, on websites and in periodic reports about the exposure of financial products to investments in fossil gas and nuclear

energy activities. At the time of publication, the adopted draft Delegated Regulation is still pending with the EU co-legislators.

A grown-up KID and an abandoned KIID

Amendments to Regulation (EU) 2017/653 (PRIIPs KID Delegated Regulation) were adopted in 2021 (Back to 2021...). To reflect those amendments, entities subject to the PRIIPs KID Delegated Regulation need to update their PRIIPs KID by 1 January 2023. In view of this, the ESAs clarified certain questions and published an updated version of their Q&As on the requirements for the PRIIPs KID.

From the same date, 1 January 2023, UCITS will have to provide a PRIIPs KID to retail investors and either a UCITS KIID or a PRIIPs KID to non-retail investors.

CSSF guidance for drafting a UCITS prospectus

The CSSF published a standardised model prospectus. The standard document is available in English and is suitable for the set-up of a UCITS fund with multiple sub-funds of low to average complexity that is either established as an investment company with variable capital (SICAV) or managed by a Luxembourg or EU-domiciled management company. The CSSF stated that the standard document aims to demonstrate good practice and serves as guidance to ultimately reduce overall processing time. The CSSF also clarified that using the standardised model prospectus is neither a regulatory requirement nor a guarantee for approval.

Looking forward

Comprehensive assessment of cost and fee arrangements

Following ESMA's Common Supervisory Action on UCITS costs and fees, the CSSF published its own feedback report. The CSSF concluded that the overall analysis of compliance for Luxembourg IFMs is mostly consistent with the conclusions published by ESMA earlier this year. However, the CSSF identified some shortcomings. As well as engaging on a bilateral basis with certain IFMs in relation to the observations made, the CSSF also requires all IFMs to assess compliance of their policy, approach and arrangements related to costs with the observations made by ESMA and the CSSF and to take any necessary corrective measures by the end of Q1 2023. The CSSF explicitly clarifies that AIFMs must also review the pricing process for their AIFs under management.

Slowed-down review of the AIFMD and UCITS framework

Earlier this year, the EU co-legislators started their scrutinisation of the EU Commission's legislative proposal for fine-tuning the AIFMD framework and targeted harmonisation with the UCITS framework (Back to 2021...). In June 2022, the Council of the EU agreed its general approach. Among other things, the Council stressed the importance of consistent harmonisation in liquidity risk management, supported the creation of an EU framework for loan-origination funds and proposed new reporting requirements on delegation arrangements to address the

concerns raised through the legislative proposal. At the time of publication, the EU Parliament is still discussing its position. Once the EU Parliament has agreed on its negotiation stance, the EU co-legislators will arrange informal meetings, so-called trilogue sessions, with the aim of reaching a compromise acceptable to all three EU co-legislators. These trilogue sessions are expected to start in Q1 2023. The text as proposed by the EU Commission states that, following its adoption, Member States must implement the amendments within 24 months after its entry into force.

Tapping into the retail market with ELTIF 2.0

The Council of the EU and the EU Parliament reached a political agreement (Political Agreement) on the review of the Regulation on European long-term investment funds (ELTIF Regulation). The Political Agreement sets out amendments to the ELTIF Regulation that render the ELTIF framework more attractive and easier to invest in, and aims to channel more financing to small and medium-sized and long-term projects. To achieve this, the redesigned ELTIF framework (ELTIF 2.0) significantly broadens the investment universe, removes obstacles to investment by professional investors and makes it easier for retail investors to invest in ELTIFs, while ensuring strong investor protection. ELTIF 2.0 has the potential to access an untapped retail market and strengthen the ELTIF's role as a complementary source of financing for the real economy.

The Political Agreement is an informal agreement reached between the EU Parliament and the Council of the EU. Following technical and legal revision, the finalised text requires formal approval by both institutions. We expect the approved text to be published in the Official Journal of the EU early 2023. ELTIF 2.0 will enter into application during 2023, with an option for early application.

SFDR compliant disclosure in annual reports

Following publication of the SFDR RTS, the CSSF reminded market participants that annual reports of UCITS and AIFs issued on or after 1 January 2023 must comply with the SFDR RTS. Read more... The SFDR RTS contain templates detailing the periodic reporting disclosures required under the SFDR.

ESG fund names

ESMA published a consultation paper about its draft Guidelines on the use of ESG or sustainability-related terms in fund names. The draft Guidelines aim to ensure investor protection and to provide national competent authorities (NCAs) and asset managers with clear and measurable criteria to assess fund names that include ESG or sustainability-related terms.

The consultation closes on 20 February 2023.

Regulatory focus on ESG disclosure

ESMA changed its Union Strategic Supervisory Priorities (USSPs) to include ESG disclosures. The new priority replaces costs and performance in retail investment products. In its 2023 work programme, ESMA also announced its intention to launch a Common Supervisory Action on sustainability early in 2023.

The USSPs are one of the tools through which ESMA coordinates supervisory action with NCAs on specific topics. NCAs are required to take these priorities into account when drawing up their work programme.

Corporate Sustainability Reporting Directive

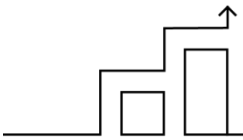
Please refer to the “Company Law – Capital Markets” section.

Corporate Sustainability Due Diligence Directive

Please refer to the “Company Law – Capital Markets” section.

DORA, MiCA, DLT

Please refer to the “Banking & Financial Services” section.



Company Law – Capital Markets

Back to 2022

New RCS filing formalities still on hold

The Luxembourg Business Registers (LBR) announced at the end of 2021 that new filing formalities will be introduced. In particular, the Luxembourg national identification number will have to be provided for any natural person registered within the file of a registered entity with the RCS. Individuals who do not have a number will receive one when they register with the RCS (the number will not be published). Initially, the LBR announced that these new formalities would apply from the end of Q1 2022. However, this has been postponed and the date of application of the new regime is yet to be released.

Diversity on boards of listed companies

On 7 December 2022, Directive (EU) 2022/2381 of 23 November 2022 to improve gender diversity among directors of EU listed companies, excluding small and medium-sized enterprises, (known as the “Women on Boards Directive”) was published in the Official Journal of the EU. Among other things, the Directive aims to introduce:

- Targets to be reached by 30 June 2026: (i) 40% of non-executive director positions held by members of the under-represented sex or (ii) 33% if all board members are included.

- Board appointment procedures: listed companies must put in place a clear and transparent procedure to ensure that priority is given to the candidate of the under-represented sex where candidates are equally qualified for the position.

- Reporting requirements: listed companies must report annually to their competent authority about gender representation on their board and publish that information on their website. The information about gender balance, where applicable, should also be included in the company's corporate governance statements. If a company does not fulfill the objectives, it must explain why and provide information on how it will fulfill them.

- Penalties: Members States must put in place effective, dissuasive and proportionate penalties.

Next steps: the Directive will enter into force 20 days after publication. Member States will have to adopt national implementation measures by 28 December 2024.

Looking forward

Cross-border conversions, mergers and divisions

In July 2022, bill of law 8053 was submitted to Parliament to implement Directive (EU) 2019/2121 regarding cross-border conversions, mergers and divisions. Back to 2019...

The bill of law implements common EU rules for cross-border conversions and divisions and updates existing rules on cross-border mergers, with strong safeguards against abuse. The main amendments are:

- Restricted scope as permitted by the Directive: SAS and cross-border divisions by absorption are out of scope.

- At national level: introduction of two new forms of merger by absorption (i) upstream merger (cross-border merger by absorption carried out by the company holding all the shares and other securities conferring the right to vote at general meetings of the companies being acquired) and (ii) sidestream merger (cross-border merger by absorption carried out by a person who directly or indirectly holds all the shares of the merging companies or where the shareholders of the merging companies hold their

securities and shares in the same proportion in all the merging companies).

- At EU level: cross-border conversions and cross-border divisions by incorporation of new companies between EU Member States will be possible.
- Shareholders, creditors and employees will be granted additional rights in cross-border conversions, mergers and divisions between EU Member States, including a right for shareholders to opt out of the relevant transaction.
- A notary must carry out the first control of legality of an EU cross-border conversion, merger or division (issue of a pre-transaction certificate), followed by a second control of legality (approval that the European cross-border transaction complies with all the relevant conditions).

Digital companies

In February 2022, bill of law 7968 implementing Directive (EU) 2019/1151 of 20 June 2019 (amending Directive (EU) 2017/1132) as regards the use of digital tools and processes in company law was submitted to Parliament. The key points are:

- It will be possible for SAs, SCAs and SARLs to be incorporated online without physical presence.
- Introduction of a general principle that notarial deeds may be drawn up in electronic format if certain conditions are met.
- Notaries will remain responsible for the accuracy of the identity of the parties to the deed and for the statements and indications that they certify in the deed. Notaries will have discretion as to the type of electronic signature they require.
- Strengthening the exchange of information between Member States' Trade and Companies registers.

Correcting inconsistencies in the Company law

In May 2022, a bill of law was submitted to Parliament to correct some clerical errors and inconsistencies following 2016's significant reform modernising the Company law. These include, notably, (i) a decision to transfer the registered office of an SARL with a sole shareholder can be made by the board of managers; (ii) shares whose voting rights have been suspended (either by decision of the board or because the shareholder has decided to waive them) are not taken into account in calculating the quorum and majority rules in relation to shareholders' meetings.

Corporate Sustainability Reporting Directive

The proposal for a Corporate Sustainability Reporting Directive (CSRD) was adopted by the EU Parliament on 10 November 2022.

The CSRD aims to make businesses more publicly accountable, end greenwashing, strengthen the EU's social market economy and lay the groundwork for sustainability reporting standards at a global level. It revises the Non-Financial Reporting Directive (NFRD).

Under the CSRD, sustainability reporting requirements will apply to all large companies, whether or not they are listed, as well as to listed SMEs. Non-EU companies with substantial activity in the EU will also be covered.

The Council of the EU adopted the proposal on 28 November 2022. The CSRD will enter into force 20 days after it is published in the Official Journal of the EU. The rules will come into effect between 2024 and 2028. Read more…

Corporate Sustainability Due Diligence Directive

In February 2022, the EU Commission adopted a proposal for a Directive on Corporate Sustainability Due Diligence which aims to introduce a sustainability due diligence duty on large EU companies and non-EU-companies with significant EU activities to address adverse human rights and environmental impacts of their own operations, and of their subsidiaries and value chains.

Points of interests include:

- The definition of "company" includes regulated financial undertakings (as well as AIFs and UCITS) and applies to (i) companies with more than 500 employees and an annual turnover exceeding EUR 150 million; (ii) limited liability companies operating in high impact sectors (such as textiles or mineral extraction) with more than 250 employees and an annual turnover exceeding EUR 40 million and (iii) certain non-EU companies. SMEs are not within the scope of the Directive.

- The largest companies must adopt a plan to ensure that their business strategy is compatible with the Paris Agreement and the goal to limit global warming to 1.5°C.

- The directors' duty of care is clarified to require them to integrate sustainability matters, including, where applicable, human rights, climate change and environmental consequences, into their decisions, in the short, medium and long term.

- Members States can impose sanctions for infringements of national provisions adopted pursuant to the Directive, and pecuniary sanctions can be based on the company's turnover.

- The victims of a breach will have the right to bring a civil liability claim for damages in the national courts.

This proposal is in line with the European Green Deal and will complement the Taxonomy Regulation.

Next steps: the proposal will be presented to the EU Parliament and the Council of the EU for approval. Once adopted, Member States will have two years to implement the Directive into national law.

Capital Markets Union new proposals

On 7 December 2022, the EU Commission published a package of legislative proposals to further develop the Capital Markets Union. They include:

- A proposal for a new directive on multiple-vote share structures in companies seeking admission to trading of their shares on an SME growth market. The objective is to encourage SMEs to access public markets more easily, while ensuring investor protection.

- A proposal for a regulation to amend the EU Prospectus Regulation, the EU Market Abuse Regulation and EU MiFIR. The proposed regulation aims to ensure a more cost-efficient regulatory regime and reduce compliance costs for listed companies and those seeking to list (*e.g.* shorter and more streamlined prospectuses; harmonised thresholds for prospectus exemption for small offers of securities to the public; replacement of the EU Growth prospectus with a new EU Growth issuance document). In addition, the regulation will simplify and clarify some market abuse requirements.

- A proposal for a directive to amend MiFID II and repeal Directive 2001/34/EC. This proposal will help companies to be more visible to investors by amending the rules on investment research. It repeals most requirements in the outdated Listing Act and transfers the few remaining relevant provisions to MiFID II.

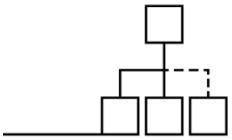
Foreign direct investment screening

Bill of law 7885 on foreign investments in Luxembourg (submitted to Parliament in September 2021) is still pending. The bill of law aims to introduce a national screening mechanism that will apply to foreign direct investment in a Luxembourg entity carrying out critical activities in Luxembourg, where the investment is likely to affect security or public order. Note that the bill of law does not apply to holding companies

controlling an operational activity that takes place abroad. It is not clear when the bill of law will be adopted by Parliament. Back to 2021...

ASBLs & foundations

Luxembourg is contemplating a fundamental review of the ASBLs and foundations legal framework. In July 2021, the government proposed amendments to the initial bill of law. For more details on the main changes proposed, consult our Back to 2021... It is still unclear whether the bill of law will be adopted in 2023.



Restructuring & Insolvency

Back to 2022

New administrative dissolution procedure without liquidation tackling "zombie" companies

The law of 28 October 2022 introduces a new procedure allowing certain companies to be dissolved through an administrative procedure without resorting to formal judicial dissolution and liquidation, in cases where the company has breached criminal laws, the Commercial Code or the laws governing commercial companies. In particular, the change aims to prevent the prolonged existence of so-called "zombie" companies. The law will enter into force on 1 February 2023. Read more...

Looking forward

Luxembourg reform of reorganisation proceedings

Following adoption of the law of 28 October 2022, Parliament is now focusing on the more important bill of law on business preservation, which includes implementation of EU Restructuring Directive 2019/1023. This means that a significant reform to modernise the old bankruptcy legal framework is now well-advanced, with the focus on recovery to avoid bankruptcy proceedings. Back to 2021...

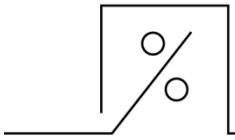
The bill of law is expected to be adopted in 2023. Consult our Restructuring & Insolvency page…

More harmonised EU rules on corporate insolvency

On 7 December 2022, the EU Commission published a package of legislative proposals to further develop the Capital Markets Union which includes a legislative proposal for a new Insolvency Directive harmonising certain aspects of substantive law on insolvency proceedings.

Key points are: (i) actions to preserve the insolvency estate (ensuring debtors do not reduce the value creditors can get and tracing assets across borders more easily); (ii) improving the representation of creditors' interests; (iii) introduction of a pre-pack sales procedure (*i.e.* a planned

insolvency procedure where the assets are sold to a designated purchaser); (iv) obligation on directors to file for insolvency without undue delay; and (v) introduction of a simplified regime for microenterprises.



Tax Law

Back to 2022

Unshell proposal (ATAD 3)

At the end of December 2021, the EU Commission issued a proposal introducing measures to prevent the misuse of shell entities, with a multi-step test to facilitate their identification. The proposal also introduces automatic exchange of information on all in-scope entities by amending Directive (EU) 2011/16 (DAC).

All entities (and legal arrangements) engaged in economic activity and considered to be tax resident in a Member State (and eligible to receive a tax residence certificate) are in scope of the draft Directive.

The draft Directive is proposed to be adopted and published for implementation into Member States' national law by 30 June 2023, and to come into effect from 1 January 2024. However, it is likely that the entry into effect of the Unshell Proposal will be postponed by one year, with several amendments. Read more…

Pillar II proposal

At the end of December 2021, the EU Commission issued a proposal on ensuring a global minimum level of taxation for multinational groups in the EU. The draft Directive is built on an agreement known as Pillar II on a global minimum tax at OECD level (Global Anti-Base Erosion Rules or GloBE rules), which aims to ensure that large multinational groups pay a minimum level of tax on the income arising in each of the jurisdictions where they operate, by imposing a top-up tax whenever the effective tax rate, determined on a jurisdictional basis, is below the minimum rate of 15%. The rules would apply to any large group, domestic or international, with combined financial revenues of more than EUR 750 million a year and a parent company or a subsidiary located in a Member State (with certain exceptions). Read more…

On 12 December 2022, the Council of the EU reached an agreement on the adoption of the Directive and formal adoption by written procedure will follow. Member States will have to adopt national implementation measures by the end of 2023.

OECD updated Transfer Pricing Guidelines

In January 2022, the OECD issued an update to its July 2017 Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (Transfer Pricing Guidelines). There are significant changes to the guidance in respect of the profit split method, hard-to-value intangibles (HTVI) and financial transactions. While the Transfer Pricing Guidelines are 'soft law' only and have no direct binding effect on taxpayers, the Luxembourg tax authorities and courts nonetheless refer to the Transfer Pricing Guidelines regarding the application of the Luxembourg transfer pricing rules. Hence the importance of ensuring that controlled transactions involving Luxembourg comply with the updated Transfer Pricing Guidelines. Read more…

VAT fixed establishment in parent-subsidiary supplies

The Court of Justice of the European Union (CJEU) has further clarified the concept of 'fixed establishment' for VAT purposes and whether the place of taxation can be shifted on the basis of third-party human and technical resources in *Berlin Chemie A. Menarini (Decision C-333/20, 7 April 2022*). The CJEU held that a foreign subsidiary that provides services exclusively to its parent company established in another Member State does not automatically qualify as a fixed establishment of the parent company. In its decision, the CJEU recalled that, for a location to qualify as a fixed establishment, (i) the company must have its own human and technical resources there (or resources at its disposal as if they were its own), and (ii) this structure of resources must allow the company to receive services supplied to it and to use them for the purposes of its own economic activity. The CJEU added that the same human and technical resources cannot be understood to provide and receive the same services at the same time. Read more…

Unexpected decision by Luxembourg administrative court on participation exemption regime (115 account)

The Luxembourg higher administrative court (the Court) upheld a decision of the lower administrative court (the Tribunal), leading to the denial of a refund of withholding tax on dividends, on the basis that, in this specific case, contributions made by a Luxembourg company to a "115 account" (capital contribution without issue of shares) of another Luxembourg company cannot be taken into account in the determination of the acquisition price of the participation when applying the Luxembourg dividend withholding tax exemption. This decision (which is final) is particularly relevant for the Luxembourg market, as it goes against the commonly accepted practice of including contributions to a "115 account" in the assessment of whether the minimum participation acquisition price of EUR 1.2 million has been reached under the participation exemption regime. The position adopted by the Court is totally unexpected and raises numerous practical questions. From now on, one must be cautious when assessing the minimum threshold requirement of EUR 1.2 million where the acquisition price is determined using amounts contributed to the 115 account. Read more…

EU Commission issued draft Directive providing a debt-equity bias reduction allowance

In May 2022, the EU Commission issued a draft Directive proposing a debt-equity bias reduction allowance (DEBRA Proposal) which is expected to have a significant impact on EU corporate taxpayers.

The DEBRA Proposal lays down rules to provide, under certain conditions, for the tax deductibility of notional interest on increases in equity. It also contains rules to limit the tax deductibility of exceeding borrowing costs. They would apply in parallel with the existing interest limitation rule in Article 4 of Directive (EU) 2016/1164 (ATAD) but the rule in the DEBRA Proposal would apply first. The DEBRA Proposal would apply to all taxpayers that are subject to corporate income tax in one or more Member States (with certain exceptions). Read more…

New double tax treaty signed between the United Kingdom and Luxembourg

In June 2022, the governments of Luxembourg and the United Kingdom (UK) signed a new double tax treaty that will replace the current one (New Treaty). The most notable amendments are (i) insertion of a "land-rich provision" in the article on capital gains on shares in companies holding, directly or indirectly, immovable property and (ii) Luxembourg collective investment vehicles will be able to access the New Treaty under certain conditions (set out in the Protocol to the New Treaty). The New Treaty will enter into force once Luxembourg and the UK have completed their respective ratification and notification processes. Read more…

Implementation of DAC 7

In June 2022, a bill of law was submitted to Parliament to implement the sixth amendment to Directive (EU) 2011/16 on administrative cooperation in the field of taxation (DAC 7). DAC 7 requires platform operators to report information on income earned by sellers on their platforms, and Member States to automatically exchange this information. Other amendments to the DAC aim to improve the exchange of information (such as information on groups of taxpayers) between the tax authorities of different Member States, add royalties to the categories of income subject to mandatory automatic exchange of information, improve the rules for carrying out simultaneous controls and provide a framework for Member States to conduct joint audits.

The new rules should apply from 1 January 2023. The new framework on joint audits should apply from 1 January 2024 at the latest. However, to date there is no detailed information on when the law will be published. Read more…

Revision of the EU "blacklist"

In October 2022, the Council of the EU revised the EU list of non-cooperative jurisdictions for tax purposes (EU blacklist) to include the Bahamas, Anguilla, and Turks and Caicos. Taxpayers undertaking transactions with related entities located in jurisdictions included on the EU blacklist need to carefully assess the impact of the measure on their

transactions, bearing in mind that the EU blacklist is generally updated twice a year. Read more…

Budget 2023

In October 2022, the government submitted the budget bill to Parliament, with no major tax reforms due to the current economic situation (Budget Bill). The proposed tax measures comprise only certain tax reductions and clarifications. In particular, the Budget Bill clarifies one condition for application of the reverse hybrid rule, so that the rule will only apply where there is a non-taxation of income (neither in Luxembourg nor in any other jurisdiction) resulting solely from a difference in characterisation between the jurisdictions involved. This means that the rule should not apply in cases involving tax-exempt investors. If adopted, this clarification could apply to the 2022 tax year. Read more…

CJEU Fiat case – no state aid granted by Luxembourg

On 8 November 2022, the CJEU set aside the judgment of the General Court and annulled the decision of the EU Commission. The EU Commission decided that the tax treatment granted by Luxembourg to Fiat for intra-group transactions amounted to State aid. The General Court upheld the EU Commission's approach. However, the CJEU held that the General Court had made an error of law in the application of Article 107 of the Treaty on the Functioning of the EU, which is the legal basis for State aid control, and that the arm's length principle must be interpreted and applied in accordance with the concepts of national law which enshrines that principle.

Looking forward

Telework – cross-border employees

Depending on an employee's country of residence (Belgium, France or Germany), different thresholds apply below which employment income remains taxable in Luxembourg despite the activities being physically performed elsewhere (whether in the country of residence or in a third country):

- Belgium: 24 days per year (increased to 34 days once the amendment to the tax convention is in force).
- France: 29 days per year. On 7 November 2022, Luxembourg and France signed an amending protocol to the double tax treaty to increase the threshold to 34 days per year from 1 January 2023 (subject to ratification procedures in each country).
- Germany: 19 days per year (negotiations to increase this limit are likely to be launched).

Read more…

Temporary reduction of VAT rates

A law published at the end of October 2022 provides for a 1% reduction of most VAT rates for the period from 1 January 2023 to 31 December 2023. This law is part of the government's package of measures to mitigate the effects of energy and consumer prices on households and businesses. At present, there are four VAT rates under Luxembourg VAT law: the standard rate of 17%; the intermediate rate of 14%; the reduced rate of 8%; and the super-reduced rate of 3%.

From 1 January 2023, the standard, intermediate and reduced rates will each decrease by 1% to 16%, 13% and 7%, respectively. The super-reduced rate will remain at 3%. Read more…

DAC 8

On 8 December 2022, the EU Commission issued a proposal to update Directive (EU) 2011/16 on administrative cooperation in the field of taxation (DAC 8). The amendment creates new reporting obligations for all service providers or operators involved in providing crypto-asset services for EU resident customers. The proposal also includes an extension of the scope of exchange of information on tax rulings to cover advance cross-border rulings and advance pricing arrangements for high net worth individuals and a minimum financial penalty for non-compliance with certain reporting obligations. Read more…

BEFIT

The EU Commission has launched a public consultation on the Business in Europe: Framework for Income Taxation (BEFIT) to propose a Directive which will create a common rulebook for groups of companies operating in the EU. The proposal is expected to be issued by Q3 of 2023. This new proposal will replace the pending Common Consolidated Corporate Tax Base (CCCTB) proposal. Read more…

Pillar I

The objective of Pillar I is to ensure a fairer distribution of profits and taxing rights among countries. It will reallocate some taxing rights from the home countries of large multinationals, which have a certain rate of return on revenues, to the market jurisdictions where they have business activities. Entities in scope are MNEs with a global turnover above EUR 20bn and profitability above 10%. Countries are aiming to sign a multilateral convention to implement this rule by July 2023. Read more…

Initiative aimed at tackling non-EU shell entities

The EU Commission has launched a public consultation on an initiative to tackle the role of enablers that facilitate tax evasion and aggressive tax planning in the EU (Securing the Activity Framework of Enablers – SAFE). SAFE is aimed at tackling the role of enablers that facilitate arrangements or schemes with complex structures in non-EU countries leading to the erosion of the tax base of Member States through tax evasion and aggressive tax planning. The proposal is expected to be issued Q1 of 2023 and is a follow-up to the Unshell Proposal. Read more…

Back to 2022

Outsourcing

On 19 August 2022, the *Commissariat aux Assurances* (CAA) published Circular Letter 22/16, which clarifies the regulatory requirements that are applicable to the outsourcing of critical or important operational activities and functions.

The Circular Letter contains definitions of the terms "outsourcing agreement" and "service provider", and focuses on four main topics:

- the pre-contractual analysis that insurance and reinsurance companies must perform;
- the assessment of important or critical operational activities or functions;
- the subcontracting service providers' compliance with insurance secrecy; and
- the terms and scope of the obligation to notify the CAA.

The Circular Letter entered into force on 1 November 2022. Any outsourcing arrangements that are amended or concluded as from this date must comply with the Circular Letter. Read more…

Inactivity in accounts, safe-deposit boxes and insurance contracts

The new law on inactive (bank) accounts, safe-deposit boxes and unclaimed insurance contracts was published in the Luxembourg Official Journal on 1 April 2022 and entered into force on 1 June 2022.

The law introduces a completely new and rather prescriptive and stringent legal framework in this field, which applies not only to dormant accounts and safe-deposit boxes (for banks) but also to life insurance contracts in respect of which benefits remain unclaimed. It can be summarised under three main pillars:

- Prevention – obligations to maintain contact and thus prevent inactivity in relation to bank accounts, safe-deposit boxes and life insurance contracts.

- Consignment – mandatory consignment of assets after a prolonged period of inactivity or period of unclaimed benefits under life insurance contracts.

- Restitution – helping facilitate arrangements for the return of deposited assets.

It should be noted that the law includes administrative sanctions which can be imposed by the CSSF or the CAA for certain specific breaches of the law (along with a possible "name and shame" process). In addition, criminal sanctions can be imposed for a number of other breaches. Read more...

Board of directors of insurance and reinsurance undertakings

On 29 July 2022, the CAA published Circular Letter 22/15 setting out regulatory requirements for the composition and functioning of the board of directors of insurance and reinsurance undertakings.

The Circular Letter sets out, in particular:

- requirements for the collective and individual suitability criteria of the board and its directors;

- definitions of the concepts of independent director (*administrateur indépendant*) and non-executive director (*administrateur non-exécutif*);

- conditions under which a legal person may be appointed as a director;

- mandatory provisions that the articles of association must include;

- requirements to notify the CAA;

- requirements about the functioning of the board and its specific tasks and composition.

The provisions on changes to board composition entered into force on 30 September 2022. The rules governing board composition and the mandatory provisions to be included in undertakings' articles of association will enter into force on 31 March 2023. Read more…

Integration of sustainability considerations into the Solvency II framework

The Solvency II Delegated Act (Commission Delegated Regulation (EU) 2015/35) was amended by the Commission Delegated Regulation (EU) 2021/1256, published on 2 August 2021, to integrate sustainability risks into the risk management frameworks of insurance and reinsurance undertakings.

As of 2 August 2022, insurance and reinsurance undertakings are required to integrate sustainability risks into their overall system of governance and to integrate sustainability considerations into their implementation of the prudent person principle.

This regime has been supplemented by the Application Guidance on running climate change materiality assessments and using climate change scenarios in the Own Risk and Solvency Assessment (ORSA) published by EIOPA on 2 August 2022.

The Guidance describes the different parts of the ORSA, in which undertakings can address climate change risks, and provides general insights on the materiality assessment that undertakings must perform and the climate change scenarios they must consider. EIOPA also provides some practical examples, by using mock ("dummy") non-life and life companies to help undertakings determine how to set up their materiality assessment and run their climate change scenarios. Read more…

Integration of sustainability considerations into the IDD framework

The IDD framework was amended by the Commission Delegated Regulation (EU) 2021/1257, published on 2 August 2021, to integrate sustainability factors, risks and preferences into product governance requirements and rules of conduct.

- As of 2 August 2022, insurance undertakings that advise on insurance-based investment products are required to consider clients' sustainability preferences in their suitability assessments.

  These requirements have been further clarified in the Guidance on the integration of sustainability preferences in the suitability assessment under the Insurance Distribution Directive (IDD) published by EIOPA on 20 July 2022. Read more...

- As of the same date, insurance undertakings that manufacture and/or distribute insurance products are required to:

  - embed sustainability objectives and factors into the definition of their target markets;

  - integrate their clients' sustainability objectives into their product approval and testing process;

  - ensure that the staff involved in product development have the necessary competences, knowledge and expertise to understand clients' sustainability objectives.

Read more…

SFDR compliant pre-contractual disclosures

In July 2022, Commission Delegated Regulation (EU) 2022/1288 (SFDR RTS) was published in the Official Journal of the EU. The SFDR RTS sets out key principles and specific guidance on interpreting SFDR obligations for financial products caught by Articles 8 and 9 of the SFDR. This includes templates detailing the pre-contractual disclosure required under the SFDR, including the taxonomy-related information needed for Article 8 and 9 products. Read more... The SFDR RTS will apply as from 1 January 2023. Managers of financial products in Luxembourg and across Europe must update the pre-contractual disclosures of their funds managed in accordance with the SFDR RTS by 1 January 2023.

Following publication of the SFDR RTS, the CSSF published its expectations concerning the required updates and expected UCITS and CSSF authorised AIFs to submit their documents by 31 October 2022 to ensure that the documents could be reviewed in time. Read more... The CSSF stated that filings submitted after 31 October 2022 will be processed on a best effort basis in view of the application date of the SDFR RTS.

To complete the SFDR disclosure framework, the CSSF published an FAQ providing further clarity on aspects of the SFDR. Read more... In addition, the ESAs (that is, EBA, EIOPA and ESMA) also clarified certain questions and recently published a Q&As document on the SFDR. Earlier this year, the EU Commission provided answers to certain questions put forward by the ESAs on the interpretation of the SFDR.

Extension of the taxonomy

Regulation (EU) 2022/1214 (Taxonomy Complementary Climate Delegated Regulation) sets out the conditions under which fossil gas and nuclear energy activities can be included in the list of economic activities covered by the Taxonomy Regulation. The Taxonomy Complementary Climate Delegated Regulation will apply from 1 January 2023.

The EU Commission adopted a draft Delegated Regulation amending the SFDR RTS to reflect the information that should be provided in pre-contractual documents, on websites and in periodic reports about the exposure of financial products to investments in fossil gas and nuclear energy activities. At the time of publication, the adopted draft Delegated Regulation is still pending with the EU co-legislators.

Looking forward

Solvency II

On 22 September 2021, the EU Commission adopted a review of Solvency II, in order to make the insurance and reinsurance sector more resilient and better protect policyholders.

The EU Commission proposal aims to better inform consumers about the financial situation of their insurer and protect them when buying insurance products in other Member States. The proposal also seeks to improve proportionality, long-term guarantee measures and cross-border supervision, and create macroprudential tools.

The Solvency II review is still being discussed within the Council of the EU.

IRRD

On 22 September 2021, the EU Commission adopted a proposal for an Insurance Recovery and Resolution Directive.

To ensure that insurers and relevant authorities in the EU are better prepared in cases of significant financial distress, the EU Commission proposal introduces a new orderly resolution process, which aims to better protect policyholders, the financial system and ultimately taxpayers.

The proposed Directive will create a harmonised framework for recovery and resolution planning for EU insurance and reinsurance companies and require (re)insurers to design pre-emptive recovery plans to facilitate prompt remedial actions. New resolution colleges and resolution authorities will be established.

The IRRD review is still being discussed within the Council of the EU.

Corporate Sustainability Reporting Directive

The proposal for a Corporate Sustainability Reporting Directive (CSRD) was adopted by the EU Parliament on 10 November 2022.

The CSRD aims to make businesses more publicly accountable, end greenwashing, strengthen the EU's social market economy and lay the groundwork for sustainability reporting standards at a global level. It revises the Non-Financial Reporting Directive (NFRD).

Under the CSRD, sustainability reporting requirements will apply to all large companies, whether or not they are listed, as well as to listed SMEs. Non-EU companies with substantial activity in the EU will also be covered.

The Council of the EU adopted the proposal on 28 November 2022. The CSRD will enter into force 20 days after it is published in the Official Journal of the EU. The rules will come into effect between 2024 and 2028.
Read more…

Corporate Sustainability Due Diligence Directive

In February 2022, the EU Commission adopted a proposal for a Directive on Corporate Sustainability Due Diligence which aims to introduce a sustainability due diligence duty on large EU companies and non-EU-companies with significant EU activities to address adverse human rights

and environmental impacts of their own operations, and of their subsidiaries and value chains.

Points of interests include:

- The definition of "company" includes regulated financial undertakings (as well as AIFs and UCITS) and applies to (i) companies with more than 500 employees and an annual turnover exceeding EUR 150 million; (ii) limited liability companies operating in high impact sectors (such as textiles or mineral extraction) with more than 250 employees and an annual turnover exceeding EUR 40 million and (iii) certain non-EU companies. SMEs are not within the scope of the Directive.

- The largest companies must adopt a plan to ensure that their business strategy is compatible with the Paris Agreement and the goal to limit global warming to 1.5°C.

- The directors' duty of care is clarified to require them to integrate sustainability matters, including, where applicable, human rights, climate change and environmental consequences, into their decisions, in the short, medium and long term.

- Members States can impose sanctions for infringements of national provisions adopted pursuant to the Directive, and pecuniary sanctions can be based on the company's turnover.

- The victims of a breach will have the right to bring a civil liability claim for damages in the national courts.

This proposal is in line with the European Green Deal and will complement the Taxonomy Regulation.

Next steps: the proposal will be presented to the EU Parliament and the Council of the EU for approval. Once adopted, Member States will have two years to implement the Directive into national law.

Employment Law

Back to 2022

Employers' COVID-19 obligations and CovidCheck regime

Several specific CovidCheck obligations affecting how all companies in Luxembourg function flow from the law of 16 December 2021. This law introduced new measures with effect from 15 January 2022 and imposed a "3G" CovidCheck regime at work. Read more... From 11 February 2022, COVID-19 restrictions have been progressively lifted. Read more here, here and here.

Index increase

On 1 April 2022, the index applicable to employee wages increased from 855.62 to 877.01. This resulted in a 2.5% rise in the gross salary paid to employees with Luxembourg law employment contracts. Read more...

Staff delegation involvement in remote working matters

Following the 20 October 2020 agreement on teleworking, signed by the social partners (labour unions and employer representatives) and declared to impose a general obligation on 22 January 2021, the law of 1 April 2022 enshrined in Luxembourg law the staff delegation's involvement in remote work arrangements. Employers must ensure that the staff delegation has been informed and consulted or has given its consent (depending on the size of the company) before implementing or modifying a remote working agreement, to avoid penalties. Read more...

Remote working for cross-border employees

Following the COVID-19 pandemic, and the lifting of tax and social security derogations (read more...), new arrangements have been negotiated between the cross-border countries (Belgium, France and Germany) and Luxembourg. Read more here about the different taxation rules and here about the latest French cross-border workers arrangements.

Looking forward

Transparent and predictable working conditions

Bill of law 8070 implementing Directive (EU) 2019/1152 on transparent and predictable working conditions will impose new obligations on employers, requiring them to review their employment contract templates and internal procedures. Penalties ranging from EUR 251 to EUR 5,000 for natural persons and EUR 500 to EUR 10,000 for legal persons will be incurred for each employee affected by the employer's failure. Read more...

Legalisation of cannabis

Bill of law 8033 aims to introduce initial measures to relax the historically repressive approach to cannabis. The aim is to permit recreational use and to reduce the penalties for solely personal possession or use. This will impact employers as they have a responsibility regarding drug use. Read more...

Offences with discriminatory intent

Bill of law 8032 aims to supplement the criminal code with a new aggravating circumstance for offences motivated by discrimination. Employers are exposed to a range of criminal risks on a day-to-day basis, as several areas of labour legislation provide for fines and/or terms of imprisonment. It will be very important for employers to verify that existing internal procedures do not contain discrimination, bearing in mind that indirect discrimination – which is not immediately apparent – is prohibited as well. Read more...

Better work-life balance

Bills of law 8016 and 8017 will implement Directive (EU) 2019/1158 of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU. The bills of law aim to establish parental and carer leave, as well as flexible working arrangements for workers who are parents or carers. In particular, they will introduce the right to 10 days leave on the birth of a child to any person recognised as an equivalent second parent by the relevant national legislation. This right will also apply to self-employed individuals. A new leave on grounds of *force majeure* for urgent family reasons in the case of illness or accident making the immediate attendance of the employee indispensable, will also be introduced. These measures will directly impact employers, who may have to update their internal policies.

Whistleblowing

On 10 January 2022, bill of law 7945 was submitted to Parliament to implement Directive (EU) 2019/1937 of 23 October 2019 on the protection of persons who report breaches of EU law. Luxembourg has until 17 December 2023 to implement the Directive into its national legislation in relation to employers in the private sector with between 50 and 249 workers. Such employers will have to set up internal channels allowing their employees to report breaches of law and employees will be protected against retaliation measures.

Right to disconnect

Bill of law 7890, which would enshrine a right to disconnect into law, was submitted to Parliament on 28 September 2021. In particular, the bill of law requires that a regime ensuring respect for the right to disconnect outside working hours be defined, and that this regime must be appropriate for the particular features of the relevant company/sector. In practice, this means that operational procedures and technical measures for disconnection, along with awareness-raising, training and compensation measures must be provided. The specific regime may be defined by means of a collective bargaining agreement or at company level, in compliance with the prerogatives of the staff delegation, if one exists. Finally, the bill of law prescribes a fine for non-compliance.

Special leaves

Several bills of law aim to increase the number of leaves available for certain specific events. Bill of law 7994 introduces a hospitality leave of 10 days for individuals welcoming a minor into their family (with or without family connection). Bill of law 7955 aims to set up a sport leave of up to 90 days per year and bill of law 7948 re-introduces a cultural leave of up to 12 days per year. This will impact employers, who may have to update their internal policies.

Moral harassment

On 23 July 2021, a bill of law establishing a legal framework relating to protection against moral harassment at work (workplace bullying) was submitted to Parliament. The bill of law provides a definition of moral harassment, as well as employers' obligations to protect employees against it. It provides that an employee who is a victim of moral harassment may refuse to continue the performance of the contract and terminate the contract with immediate effect for serious misconduct by the employer. Finally, the bill of law prescribes a fine for non-compliance with the obligation to prevent moral harassment.

Back to 2022

Digital Services Act

In October 2022, the Council of the EU formally adopted the Digital Services Act (DSA) as part of a general trend aimed at implementing rules at EU level to further protect consumers and users in the digital space and to supervise the activities of the various providers of digital services. The DSA clarifies and upgrades the responsibilities and the accountability of providers of digital services with respect to any illegal content they intermediate or disseminate whilst retaining existing principles. It has a broad scope as it applies to all providers and is designed to complement existing sectoral legislation. Affected companies will be confronted with a large number of new transparency obligations and strict requirements to ensure greater safety online. Next step: the DSA will enter into force on 1 January 2024

EDPB's Guidelines

The European Data Protection Board (EDPB) adopted several guidelines of interest in 2022:

Guidelines 01/2022 on data subject rights - Right of access

These guidelines contain detailed guidance on the implementation of the data subject's right to access. In particular, the guidelines provide further clarifications on the scope of the right to access, how to provide access and the limits and restrictions attached to the right.

Guidelines 3/2022 on Dark patterns in social media platform interfaces: How to recognize and avoid them

These guidelines offer practical recommendations to designers and users of social media platforms on how to assess and avoid so-called "dark patterns", which are deceptive designs put in place to mislead the user. In relation to the data protection compliance of such designs, the EDPB underlines the applicability of the principles of the GDPR, particularly those set out in Article 5 of the GDPR (including fair processing and transparency).

Guidelines 9/2022 on personal data breach notification under GDPR

These Guidelines are a proposed updated version of the Guidelines on personal data breach notification adopted by Working Party 29 in 2017.

The proposed update can be found in paragraph 73 of the Guidelines. It seeks to impose on controllers who are not established in the EU but still subject to the GDPR, the obligation to notify every single authority for which affected data subjects reside in their Member State. This differs from current guidance which specifies that non-EU controllers are only required to notify the EU supervisory authority in the Member State where the controller's representative is established.

As public consultation on this update was open until 29 November, a final version should be published soon.

CNPD Recommendations on processing personal data in the context of a health crisis

The EU has been experiencing a health crisis due to COVID-19 since March 2020. In April 2022, the CNPD updated its Recommendations on the processing of personal data in the context of a health crisis, which were originally published in 2020. According to the CNPD, private and public entities may process personal data in accordance with the GDPR when it is strictly necessary for compliance with their legal obligations. Employers should therefore not record whether employees are vaccinated against COVID-19. The CNPD also encourages all individuals and professionals to follow the recommendations of the Ministry of Health and only collect data relating to the health of individuals which has been requested by the Health Inspection.

Reform of conformity rules on tangible goods

As indicated last year, bill of law 7818 was adopted in 2021 (Back to 2021). The resulting law of 8 December 2021 entered into force on 1 January 2022. It amended the Consumer Code and implemented both Directive (EU) 2019/770 of 20 May 2019 on certain aspects of contracts for the supply of digital content and services and Directive (EU) 2019/771 of 20 May 2019 on certain aspects of contracts for the sale of goods.

Electronic communications code

The European Electronic Communications Code (EECC) introduced by Directive (EU) 2018/1972 aims to update the rules governing the telecommunication sector under one regulatory framework designed to boost connectivity and better protect users throughout Europe. It represents a central piece of legislation to achieve Europe's Gigabit society and to ensure full participation of all EU citizens in the digital economy and society. Also, the Body of European Regulators for Electronic Communications (BEREC) has developed a significant number of guidelines which contribute to a transparent and successful implementation of the EECC. In Luxembourg, the law of 17 December 2021 on electronic communications networks and services implemented the EECC, repealing the former regime set out in the law of 27 February 2011.

Clarification and modernisation of consumer protection

The law of 30 November 2022 implementing Directive (EU) 2019/2161 of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU as regards better implementation

and modernisation of the EU's consumer protection rules (Omnibus Directive) entered into force on 4 December 2022.

The aim of the Omnibus Directive is to achieve better implementation and modernisation of the EU's consumer protection rules and consequently amend the Consumer Code. The implementation of the Omnibus Directive (i) clarifies and harmonises consumer protection sanctions, (ii) clarifies the structure dedicated to the implementation of consumer law, and (iii) improves and modernises consumer rights.

Looking forward 

Data Governance Act

The Data Governance Act (DGA) is the first legislative act of the European data strategy, and it was published in the Official Journal of the EU on 3 June 2022. The DGA aims to facilitate the safe reuse of certain categories of public sector data for commercial or non-profit purposes within the EU and increase trust in data sharing across public sector bodies, users, data users, and data holders. It proposes a new business model for data intermediation services and promotes data altruism for the common good.

Next steps: the DGA will come into effect on 24 September 2023.

DORA

Please refer to the “Banking & Financial Services” section.

Data Act

On 23 February 2022, the EU Commission published a proposal for a Data Act setting out new rules on who can use and access data generated in the EU, which has been under-used to date. The Data Act applies to all categories of data and to all companies that generate, hold or transfer data in the EU. The Data Act mainly provides new rules on the sharing of data from connected products and related services (such as easy and secure access for users to the data they generate and easy switch between cloud, edge and other data processing services). In addition, the Act provides that SMEs should not be charged for industrial data beyond the actual administrative cost.

Next steps: negotiations on the Data Act are ongoing and a final version has not yet been reached.

ePrivacy

In January 2017, the EU Commission proposed a Privacy and Electronic Communications Regulation (ePrivacy Regulation), which is intended to replace the existing ePrivacy Directive of 2002 and supplement the GDPR. The ePrivacy Regulation will apply to electronic communications data and will bind so-called over-the-top services (Messenger, WhatsApp or Skype), as well as traditional telecom providers and electronic communication providers. The current proposal reinforces the principle of confidentiality of electronic communications and introduces, *inter alia*, obligations for companies to remind end-users of their right to withdraw

their consent at periodic intervals of no less than 12 months. The regulation is expected to implement a penalty regime similar to the GDPR (that is, maximum fines of EUR 20 million or 4% of total worldwide annual turnover, whichever is greater).

Next steps: negotiations on the ePrivacy Regulation are ongoing and a final version has not yet been reached.

NIS 2

On December 2020, in response to the growing threats posed by digitalisation and cyber-attacks, the EU Commission submitted a proposal, commonly referred to as NIS 2, to replace the NIS Directive, whose implementation proved difficult, resulting in fragmentation at different levels across the internal market. The NIS 2 Directive aims to strengthen security requirements and introduce more stringent supervisory measures. The proposed expansion of scope, which effectively obliges more entities and sectors to take technical and organisational measures to manage risks, would indeed assist in increasing the level of cybersecurity in Europe.

Next steps: the Council of the EU adopted the proposal on 28 November 2022. NIS 2 must now be published in the Official Journal of the EU and will enter into force 20 days after publication. Member States must implement NIS 2 by 21 months after its entry into force.

eIDAS 2

On 3 June 2021, the EU Commission published a proposal for a European Digital Identity Regulation, the EDIR proposal, which consists entirely of amendments to the "old" eIDAS Regulation. The version of the eIDAS Regulation as amended is generally referred to as eIDAS 2. It will expand the scope of the eIDAS Regulation and introduce a European identification system (eID) with the European Digital Identity Wallets (digital wallets that will enable users to do things securely, such as identifying themselves online and offline). The eID system will apply to both the public sector and to the private sector.

Next steps: negotiations on eIDAS 2 are ongoing and a final version has not yet been reached.

European Health Data Space Regulation

In May 2022, the EU Commission published a proposal for a regulation to achieve a quantum leap forward in the way healthcare is provided to people across Europe and create a "European Health Union". The Regulation will empower individuals to control and utilise their health data in their home country and in other Member States, create the "MyHealth@EU" platform which will facilitate exchanges of electronic health data and impose specific obligations on economic operators. It provides a consistent, trustworthy and efficient framework to use health data for research, innovation (in particular through Artificial Intelligence

and Machine Learning technology), professional, policy-making and regulatory activities.

Next steps: negotiations on the proposal are ongoing and a final version has not yet been reached.

EU Cyber Resilience Act

In September 2022, the EU Commission published a proposal for a regulation on horizontal cybersecurity requirements for products with digital elements and amending Regulation (EU) 2019/1020 on market surveillance and compliance of products. The main objective of this Cyber Resilience Act is to strengthen cybersecurity standards through the fulfilment of conformity requirements and reporting obligations that make hardware and software products more secure. Also, the Act is applicable to all products that are directly or indirectly connected to another device or a network, thus including both internet of things and software products, with exceptions for products already covered by existing EU rules such as medical devices, aviation and cars.

Next steps: negotiations on the proposal are ongoing and a final version has not yet been reached. Once adopted, economic operators and Member States will have 24 months after the entry into force of the regulation to apply the new requirements.

AI proposals

With the aim of turning Europe into the global hub for trustworthy AI, the EU Commission proposed two complementary pieces of legislation: the AI Act in April 2021 and the AI Liability Directive in September 2022. Both proposals will apply to AI systems, as defined in the AI Act. With the aim of preventing AI-related harms, the AI Act provides a list of AI practices which are prohibited and qualifies certain AI systems as high risk. In addition, the AI Liability Directive contains a rebuttable presumption of causal link between (i) the fault of the defendant; and (ii) the output produced by the AI system (or the failure of the AI system to produce an output). The Directive also introduces a right for victims of high-risk AI systems to obtain access to evidence from companies using AI in their products and suppliers.

Next steps: both acts still need to be approved by the Council of the EU and the EU Parliament. Once adopted, the AI Act will be directly applicable in all Member States and the AI Liability Directive will have to be implemented into national law.

Privacy Shield 2.0

At the end of March 2022, the EU Commission and the US announced that they had reached an agreement in principle on a new Trans-Atlantic Data Privacy Framework, also known as Privacy Shield 2.0. The Framework will facilitate Trans-Atlantic data flows and addresses the concerns raised by the Court of Justice of the European Union in the

Schrems II decision. Under the Framework, the US agrees to put new privacy safeguards in place.

Next steps: following the Executive Order signed on 7 October 2022 with President Biden, the EU Commission announced the preparation of a draft adequacy decision. This is just the first step in a longer process involving review by Member States and the European Data Protection Board.

Automated driving

On 29 July 2022, bill of law 8059 was proposed which approves the amendment to the 1968 Vienna Convention on Road Traffic opened for signature on 14 January 2021. The amendment will allow signatory countries to incorporate automated driving into their national legislation according to their respective needs, without infringing the provisions of the Convention. As the emergence of automated driving is incompatible with the current version of the Convention (which places the driver of the vehicle at the centre of many obligations), multiple jurisdictions had proposed amending the Convention by adding definitions of "automated driving system" and "dynamic control", as well as a new article setting out the role of the driver in the context of automated driving.

Business licence

Bill of law 7989 amending the law of 2 September 2011 regulating access to the professions of craftsman, trader, industrialist, and certain liberal professions, as amended, was published on 8 April 2022 in the Luxembourg Official Journal.

The main goal is to stimulate entrepreneurship by responding to changes in the regulatory, economic, technical, technological, entrepreneurial and craft environment and by reducing the fear of failure, which is the main obstacle to entrepreneurship.

The main proposed changes aim to: (i) facilitate the right to a second chance as soon as possible after bankruptcy; (ii) strengthen the protection of any new manager taking over a business from a previous director acting in bad faith; (iii) encourage the takeover of businesses by addressing the issues arising from the transfer of a business; (iv) develop the right of establishment in view of changes in technical and technological practices; (v) modernise the administrative procedure for examining applications for establishment permits; and, of course, (vi) better protect consumers.

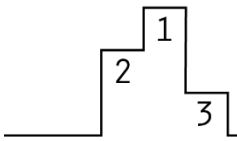
Extension of the right of association for doctors and health professionals – Bill of law 8013

It is currently not possible in the Grand Duchy of Luxembourg for doctors and health professionals to organise as a company, even though this option exists for many other professions, such as lawyers, architects, and engineers. In May 2022, the government therefore proposed amendments to the law to include this option, largely inspired by an earlier bill of law amending the law on the profession of lawyer. The aim is to incorporate the many advantages that organising as a company could bring to health

professionals and to patients, including: (i) continuity of care even in the absence of the treating doctor; (ii) improved access to care; (iii) faster multidisciplinary care; and (iv) improved quality of care due to pooling of skills, greater capacity for innovation and adaptation to changes in the profession and to patients' expectations. The proposed changes provide for these advantages while respecting at the same time basic medical principles, such as the patient's freedom of choice of provider.

Increase in the number of medical imaging centres

Bill of law 8009 was submitted to Parliament in May 2022. Its goal is to be at the forefront of medical progress by adapting the current framework to the needs and challenges of society. The objective is to respond to demographic changes and to the increase in chronic diseases by creating additional hospital sites and by adapting existing ones.



Competition Law

Back to 2022

Foreign Subsidies Regulation

On 28 November 2022, the EU adopted the Foreign Subsidies Regulation, which adds a pillar to EU competition law by creating a new control regime for third country subsidies which distort the internal market. The Regulation aims to ensure a level playing field and restore fair competition between all companies operating in the internal market (both European and non-European). It entrusts the EU Commission with far-reaching powers to control third country subsidies and is structured around three tools: two prior authorisation tools (for mergers and public procurement procedures) and a general market investigation tool for investigating all other market situations.

Legal framework for the Luxembourg Competition Authority

The law of 30 November 2022 on competition aims to provide the Luxembourg Competition Authority (LCA) with the necessary means to implement competition rules more effectively. The main objective of the new law is to allow the LCA to act more independently. The new rules are also expected to give greater legal certainty to the LCA's activities, especially in relation to its investigative powers and the options to close proceedings. This is achieved by introducing additional procedural guarantees and further clarifications to the relevant procedures. The new rules will be effective as of 1 January 2023. Read more...

Vertical Block Exemption

On 1 June 2022, the new Vertical Block Exemption Regulation (VBER), accompanied by new Guidelines, became effective and replaced the 2010 rules. The VBER exempts agreements between businesses at different

levels of the supply chain that meet certain conditions from the prohibition of anticompetitive agreements (Article 101(1) of the Treaty on the Functioning of the EU). The new rules provide more flexibility and have been simplified and updated to take account of important developments in e-commerce. Certain restrictions relating to online sales are now included in the VBER safe harbour (including dual pricing and the use of the principle of equivalence). However, the rules are more restrictive and the scope has been narrowed as regards dual distribution and parity obligations.

Digital Markets Act

On 1 November 2022, the Regulation on contestable and fair markets in the digital sector, the Digital Markets Act (DMA), entered into force. The DMA is the first instrument regulating competition effects in the digital sector *ex ante*. It applies to core platform services provided or offered by large online platforms designated as 'gatekeepers' to business users and end users established or located in the EU. The DMA aims to complement the enforcement of competition law by imposing obligations on gatekeepers. This includes obligations to allow business users to access the data they generate and to allow customers to contract outside the gatekeeper's platform. Furthermore, gatekeepers must not treat their own products and services more favourably than those of other business users (so-called "self-preferencing"). Gatekeepers must also inform the EU Commission of any intended concentration, irrespective of whether it is notifiable to the EU Commission under the EU Merger Regulation.

Temporary Crisis Framework

On 23 March 2022, the EU Commission adopted a Temporary Crisis Framework (TCF). The TCF provides specific criteria for assessing the compatibility with the internal market of State aid measures taken by Member States to remedy the economic effects following (i) Russia's aggression against Ukraine and (ii) the sanctions imposed by the EU and international partners, and the counter-measures introduced. Luxembourg adopted two legal acts to implement the TCF: one implementing a State aid regime in the form of guarantees to support the Luxembourg economy, and the other one implementing a State aid regime for companies particularly affected by the rise in energy prices. The system of state guarantees of new loans granted by banks headquartered in Luxembourg applies to almost all undertakings, with a few exceptions. It covers investment loans and working capital loans with a maximum duration of six years. The TCF has been extended until 31 December 2023.

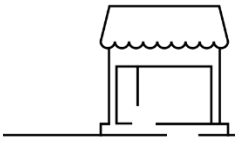
Looking forward

Luxembourg merger control

On 20 January 2022, the Luxembourg Ministry of the Economy launched a public consultation procedure on the introduction of a national merger control regime which would aim to scrutinise the impact of certain transactions on competition in Luxembourg. This would constitute a fundamental shift in competition law policy in Luxembourg, currently the only Member State without a merger control regime. Read more… According to the preliminary report published on 13 July 2022, the new regime should take broad inspiration from pre-existing rules and concepts used by the EU Commission and other national competition authorities in the EU. The Ministry's report also stresses that this regime should not be detrimental to Luxembourg's financial sector. Country-specific factors are expected to be taken into account with regards to the notification system (mandatory, voluntary or hybrid), the turnover thresholds (triggering notification) and a potential political veto over merger control decisions. A bill of law is expected to be submitted to Parliament in spring 2023, following which the bill will be debated according to national legislative procedure. Read more…

Foreign direct investment screening

Please refer to the "Company Law - Capital Markets" section.



Commercial

Back to 2022

Electronic invoicing

The law of 13 December 2021 creates an obligation, applying to all electronic invoices issued in the context of a public procurement or concession contract, for economic operators to issue and transmit invoices to contracting authorities/entities as electronic invoices that comply with the most recent version of the European standard on electronic invoicing. This obligation applies only in the context of public contracts, not to invoicing between companies or individuals. The law entered into force on 18 December 2021 and applies to large economic operators as of 18 May 2022 and medium economic operators as of 18 October 2022. Small economic operators must comply with the law from 18 March 2023.

Back to 2022

Luxembourg withdraws from the Energy Charter Treaty

On 18 November 2022, the Luxembourg government announced its decision to withdraw from the Energy Charter Treaty, citing the treaty's incompatibility with the goals of the Paris Climate Agreement. The treaty was originally intended to protect investments in the energy sector following the Cold War and allows investors to claim compensation for policies that harm their interests using investor-state arbitration. Critics of the treaty point out that it prioritises legal protection of investments in fossil fuels and nuclear energies. Luxembourg joins a growing number of EU countries that have announced their intention to withdraw from the treaty, including Germany, France, the Netherlands, Poland and Spain, effectively blocking the EU Commission's attempt to negotiate a reform of the treaty.

Luxembourg terminates all intra-EU Bilateral Investment Treaties

The Agreement for the Termination of Bilateral Investment Treaties (BIT) between the Member States of the EU entered into force for Luxembourg on 26 August 2022. 23 EU Member States signed this agreement on 5 May 2020 following the decision of the Court of Justice of the European Union in Case C-284/16 *Slowakische Republic v Achmea BV*, which found investor-state dispute settlement provisions (arbitration clauses) in bilateral investment treaties (BITs) between Member States to be contrary to EU law.

The entry into force of the Agreement results in the termination of BITs between Luxembourg and other signatories to the Agreement. Luxembourg also made an accompanying declaration calling upon the EU Commission and Member States to start a process for protection of investments within the EU.

Arendt Case Review

For summaries of recent notable decisions of the Luxembourg and European Courts, please see the Arendt Case Review: Arendt Case Review #13, Arendt Case Review #14.

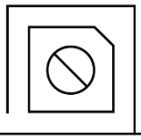
Looking forward

Collective recourse

Luxembourg will soon introduce collective recourse procedures into consumer law. Back to 2021… This will bring Luxembourg law in line with Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers, which requires Member States to adopt and publish necessary changes to their laws by 25 December 2022.

Modernisation of Luxembourg arbitration law

The eagerly awaited reform of Luxembourg arbitration law continues to work its way through the legislative process. Bill of law 7671 is currently pending with Parliament and aims to make arbitration in Luxembourg more attractive by adapting the existing legal framework to international arbitration standards. Back to 2021…



Criminal Law

Back to 2022

Luxembourg and the European Public Prosecutor's Office

The law of 22 July 2022 aims to implement Council Regulation (EU) 2017/1939 concerning enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO).

The EPPO investigates, prosecutes and brings to judgment crimes against the financial interests of the EU, such as fraud and money laundering. The EPPO started operations on 1 June 2021 and reported the opening of 576 investigations in its first seven months of operation. Frequent types of reported crimes affecting the EU budget include procurement expenditure fraud, non-procurement expenditure fraud, VAT revenue fraud, non-VAT revenue fraud and corruption.

The law introduces new provisions to the Luxembourg Code of Criminal Procedure in order to delineate the investigative scope and authority of the European Delegated Prosecutors, whose role encompasses aspects of prosecutor and investigating judge at the national level as they handle specific cases on behalf of the EPPO. The law also lays out procedural rules concerning jurisdiction between the European Prosecutor and the Luxembourg national judicial authorities.

Enhanced management and recovery of seized or confiscated assets

The law of 22 June 2022 on the management and recovery of seized or confiscated assets makes changes to the regime for the confiscation and seizure of assets and aims to complete implementation of Directive (EU) 2014/42 (freezing and confiscation of instrumentalities and proceeds of crime in the EU) as well as Council Decision 2007/845/JHA (cooperation between Asset Recovery Offices of the Member States).

The law creates two national offices: (i) an Asset Management Office, under the authority of the Minister of Justice, that will ensure the management of sums and property seized during national or foreign criminal proceedings; and (ii) the Asset Recovery Office, under the supervision of the Public Prosecutor's Office of Luxembourg, that will identify and trace property for the purpose of seizure or confiscation.

The Asset Recovery Office will notably have the power to investigate a convicted person's estate after a final conviction for a criminal offence to permit the full execution of confiscation orders. Luxembourg law did not previously allow for such post-judgment investigations into a convicted person's estate. The law also gives persons claiming to have a right to seized property the right of access to a lawyer, and gives persons entitled to compensation for harm suffered due to a criminal offence the right to obtain payment out of confiscated assets from the Asset Management Office as a matter of priority.

New Committee to monitor financial sanctions

The law of 20 July 2022 establishes a new committee to monitor financial sanctions as defined in the law of 19 December 2020 (the Committee). The Committee includes members representing the Minister for Finance, the Minister of Foreign and European Affairs, the Minister of Justice, the CSSF and *Commissariat aux Assurances*, the Registration, Domain and VAT Administration, and the financial intelligence unit.

The Committee monitors financial restrictive measures that have been adopted by the United Nations Security Council and the EU including in the context of the fight against terrorist financing and against the proliferation of weapons of mass destruction, as well as financial sanctions decided at the national level.

Please refer to the "Banking & Financial Services" section.

Looking forward

AML

Please refer to the "Banking & Financial Services" section.

Legalisation of cannabis

Please refer to the "Employment Law" section.

Offences with discriminatory intent

Please refer to the "Employment Law" section.