

SILVIA ALLEGREZZA - GRAZIA BRUZZESE*

THE ANTI-MONEY LAUNDERING REGULATION
AND THE HANDLING OF FINANCIAL INFORMATION
IN LUXEMBOURG

SUMMARY: 1. CRIMINAL LAW AND ANTI-MONEY LAUNDERING LAW. – *a.* Overview of the Luxembourgish criminal legislation on money laundering. – *b.* The Luxembourgish approach on relevant predicate offences: The list-model. – *c.* On predicate offences committed abroad and the requirement of dual criminality. – 2. ADMINISTRATIVE ENFORCEMENT AGAINST MONEY LAUNDERING. – *a.* The national implementation of the EU Directives. – *b.* Coordinating, monitoring and guaranteeing compliance to the AML provisions: a brief overview of the involved national authorities. – *c.* Structure and power of the national coordination authority: Focus on the ‘Commission de sécurité du Secteur Financier’ (CSSF). – *d.* A brief overview of the obliged entities. – 3. STATUS, FUNCTIONS AND GOVERNANCE OF THE FIU. – *a.* The institutional setting of the national FIU: the ‘Cellule de renseignement financier’. – *b.* Information obtained from the obliged entities and reporting procedures: overview of the structure and content of STRs, SARs, UTRs. – *c.* Requesting data and information from obliged entities. – *d.* On the conditions and limits to obtain information. – *e.* FIU’s access power to national registers. – *i.* The central register or retrieval systems of the bank accounts’ owners. – *ii.* The central register of the beneficial owners. – *iii.* Central register of the real estate owners. – *iv.* Other financial and administrative information accessible by the FIU according to domestic law. – *v.* Other police information accessible by the FIU, including those provided for implementation of art. 8 Directive 1153/2019. – 4. COOPERATION WITH OTHER FIUS. – *a.* Rules on autonomous and on request dissemination of information

* Though present essay is the fruit of collaboration between the Authors. However, Silvia Allegrazza mostly drafted Parts I, II and V whereas Grazia Bruzzese drafted parts III and IV.

from the domestic FIU to other European FIUs (art. 53). – *b*. On the conditions and limits to the dissemination of information to other European FIUs. – *i*. Structure and content of the request. – *ii*. Nature or status of the requesting FIU. – *iii*. Differences between national law definitions of predicate crimes. – *iv*. National provisions on secrecy or confidentiality. – *v*. Inquiry, investigation or proceeding underway in the requested Member State. – *vi*. Other limits and conditions. – 5. COOPERATION WITH LAW ENFORCEMENT AND JUDICIAL AUTHORITIES. – *a*. The dissemination of information to National investigative authorities according to national rules. – *b*. The dissemination of information to supranational authorities: the case of EPPO, Europol and OLAF. – *c*. Admissibility of the information and analyses of the CRF in criminal proceedings.

1. CRIMINAL LAW AND ANTI-MONEY LAUNDERING LAW

a. Overview of the Luxembourgish criminal legislation on money laundering

Criminal law enforcement against money laundering is composed by many provisions describing the criminal offence, the related confiscation of proceeds of crime and is governed by specific procedural rules extending the competence *ratione personae* and *ratione loci* of Luxembourg criminal authorities. Domestic criminal law on anti-money laundering (AML) has been amended by the Law of the 17th December 2021¹ implementing Directive 2018/1673. Many articles of the national criminal code and of the code of criminal procedure have been amended accordingly.

Money laundering is defined as a criminal offence by Article 506-1 of the Luxembourg Criminal Code (CC) which consists of knowingly facilitating, by any means whatsoever, the misleading

¹ Loi du 17 décembre 2021 portant modification: 1° du Code pénal; 2° du Code de procédure pénale; 3° de la loi modifiée du 17 mars 1992 portant approbation de la Convention des Nations Unies contre le trafic illicite de stupéfiants et de substances psychotropes, faite à Vienne, le 20 décembre 1988; 2. modifiant et complétant la loi du 19 février 1973 concernant la vente de substances médicamenteuses et la lutte contre la toxicomanie; 3. modifiant et complétant certaines dispositions du Code d'instruction criminelle aux fins de transposition de la directive (UE) 2018/1673 du Parlement européen et du Conseil du 23 octobre 2018 visant à lutter contre le blanchiment de capitaux au moyen du droit pénal.

justification of the origin, the placement, the disposition or the movement of properties constituting the direct or indirect object of one or more of the predicate offences (see below).

Moreover, the offence includes knowingly participating in an investment, dissimulation, disguise, transfer or conversion transaction of property constituting the object or the direct or indirect proceeds of a predicate offence or constituting a pecuniary benefit of any nature whatsoever from one or several of these offences (Article 506-1(2) CC).

Anyone having acquired, held or used the property constituting the object or the direct or indirect proceeds of a predicate offence or constituting a pecuniary benefit of any nature whatsoever from such predicate offence, knowing, at the time s/he received them, that they originated from one or several of the predicate offences or from the participation in one or several of these offences, shall be punishable for money laundering (Article 506-1(3) CC).

One special criminal offence outside the Criminal Code is provided for by Article 8 of the Law of the 19th February 1973 that sanctions all the aforementioned criminal conducts of laundering money whenever they derive from drug trafficking. This includes its production, manufacture, extraction, sale, transport, importation and exportation. Possession and purchase with a view to engage in activities linked with drug trafficking are also considered, as are the manufacture, transport and distribution of precursors. Incitement to drug trafficking, aiding and abetting such activity, and attempting to traffic in drugs are also regarded as offences.²

² Art. 8-1 loi 19 février 1973 concernant la vente de substances médicamenteuses et la lutte contre la toxicomanie: «Sont punis d'un emprisonnement d'un à cinq ans et d'une amende de 1.250 à 1.250.000 euros, ou de l'une de ces peines seulement:

1) ceux qui ont sciemment facilité par tout moyen, la justification mensongère de la nature, de l'origine, de l'emplacement, de la disposition, du mouvement ou de la propriété des biens ou revenus tirés de l'une des infractions mentionnées à l'article 8, paragraphe 1., *a)* et *b)*;

2) ceux qui ont sciemment apporté leur concours à une opération de placement, de dissimulation, de déguisement, de transfert ou de conversion de l'objet ou du produit direct ou indirect de l'une des infractions mentionnées à l'article 8, paragraphe 1., *a)* et *b)*;

It is important to mention that the Luxembourgish law punishes self-laundering as a criminal offence. Indeed, the criminal offences foreseen by Article 506-1 CC are punishable “when committed by persons who committed, or were involved in, the criminal activity from which the property was derived”.³

The penalty can go from one to five years of imprisonment and from 1.250 euros to 1.250.000 euros of pecuniary penalty, applied jointly or separated. The same penalties apply to the attempt to commit money laundering (Article 506-1(4) CC). Consequently, the non-aggravated criminal offence of money laundering represents a *délit* and not a *crime*, according to the traditional distinction between *crimes*, *délits* and *contraventions* of the systems influenced by the French tradition.

In addition to the conviction, interdiction from public offices can be applied⁴.

3) ceux qui ont acquis, détenu ou utilisé l'objet ou le produit direct ou indirect de l'une des infractions mentionnées à l'article 8, paragraphe 1., *a*) et *b*), sachant au moment où ils le recevaient, qu'il provenait de l'une de ces infractions ou de la participation à l'une de ces infractions;

4) Les infractions visées aux points 1) à 3) sont également punissables:

- lorsque l'infraction primaire a été commise à l'étranger,
- lorsque l'auteur est aussi l'auteur ou le complice de l'infraction primaire.

5) Les infractions visées aux points 1) à 3) sont punissables indépendamment de toutes poursuites ou condamnations pour l'une des infractions mentionnées à l'article 8, paragraphe 1., *a*) et *b*).

Seront punis des mêmes peines ceux qui auront acquis, détenu ou utilisé des biens, sachant, au moment où ils les recevaient, qu'ils provenaient de l'une des infractions mentionnées à l'article 8 sous *a*) et *b*) ou de la participation à l'une de ces infractions.

Article 8, paragraphe 1., *a*) et *b*) inclus 1. *a*) ceux qui auront, de manière illicite, cultivé, produit, fabriqué, extrait, préparé, expédié, importé, exporté, vendu ou offert en vente ou de quelque autre façon offert ou mis en circulation l'une ou l'autre des substances visées à l'article 7;

b) ceux qui auront, en vue de l'usage par autrui, de manière illicite, transporté, expédié, détenu ou acquis à titre onéreux ou à titre gratuit l'une ou plusieurs de ces substances, ou qui auront agi, ne fût-ce qu'à titre occasionnel, comme courtier ou comme intermédiaire en vue de l'acquisition de ces substances.

³ Article 506-4 CC.

⁴ Article 506-2 CC. Art. 24. (L. 13 juin 1994) Les cours et tribunaux peuvent, dans les cas prévus par la loi, interdire en tout ou en partie aux condamnés à une peine correctionnelle l'exercice des droits énumérés à l'article 11, pour un terme de cinq à dix ans.

As for the aggravating circumstances, the penalty is increased from a minimum term of 15 years to a maximum term of 20 years of imprisonment and a pecuniary penalty from 1.250 euros to 1.250.000 euros when the offence was committed within the framework of a criminal organisation as a main or ancillary activity.⁵

In order to adapt the national system to Article 6(1) of Directive 2018/1673, the Law of the 17th December 2021 added an additional aggravating circumstance when the offender is an obliged entity within the meaning of Article 2 of the Law of the 12th November 2004 (referring to Article 2 Directive (EU) 2015/849) and the offence has been committed in the exercise of their professional activities.⁶

As for the concept of ‘property’, the rules on money laundering refer to the rules on confiscation, adopting a very large definition of ‘property’, including assets of any kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or an interest in, such assets.⁷

The criminal offence of money laundering in the Grand-Duchy is an intentional crime. To this aim, all the aforementioned conducts are punishable only when committed ‘knowing’ the illicit origin of the property implied. As for the intent to be proved, the case law is very prone to accept a low standard of evidence: *«La preuve de l'élément moral de l'infraction de blanchiment résulte de toutes les circonstances de fait qui doivent nécessairement éveiller la méfiance de celui qui prend possession des choses et qui*

⁵ Article 506-5(2) CC: «2. Les infractions visées à l'article 506-1 sont punies d'un emprisonnement de quinze à vingt ans et d'une amende de 1.250 euros à 1.250.000 euros ou de l'une de ces peines seulement, si elles constituent des actes de participation à l'activité principale ou accessoire d'une association ou organisation».

⁶ Article 506-5(1) CC: «(L. 11 août 1998) 1. Les infractions visées à l'article 506-1 sont punies d'un emprisonnement de trois à cinq ans et d'une amende de 1.250 euros à 1.250.000 euros ou de l'une de ces peines seulement, si elles ont été commises, dans l'exercice de son activité professionnelle, par un professionnel visé à l'article 2 de la loi modifiée du 12 novembre 2004 relative à la lutte contre le blanchiment et contre le financement du terrorisme».

⁷ Article 31 CC.

*constituent des présomptions suffisamment graves, précises et concordantes pour conclure à l'existence de l'élément de connaissance».*⁸

More specifically, *«pour que l'infraction de l'article 506-1 point 3 du Code pénal soit constituée, il suffit que l'agent sache ou ait conscience que le bien acquis, détenu ou utilisé provenait d'un crime ou d'un délit et décide de participer néanmoins à leur blanchiment, sans qu'il soit nécessaire que le blanchisseur ait eu la connaissance précise ni de la nature, des circonstances de temps, de lieu, d'exécution, ou de la qualification exacte de l'infraction principale, ni de la personne de la victime ou de celle de son auteur, d'autant moins que souvent les biens blanchis peuvent provenir de multiples infractions. La preuve de la conscience de l'origine frauduleuse des fonds est déduite d'un faisceau d'indices permettant de retenir que le prévenu ne pouvait ignorer l'existence frauduleuse, respectivement devait nécessairement connaître l'origine frauduleuse».*⁹

Hence, Luxembourg did not implement the optional extension of criminal liability for money laundering provided for by Article 2 of Directive 2018/1673 according to which “Member States may take the necessary measures to ensure that the conduct referred to in paragraph 1 is punishable as a criminal offence where the offender suspected or ought to have known that the property was derived from criminal activity”.

As for legal entities, Article 34 CC¹⁰ provides for a specific criminal liability of legal entities that also covers money launder-

⁸ Trib. Arr. Diekirch, déc. 340/2020, 30 July 2020, no. 100082440 with reference to Cour de cassation belge, (2e ch.), 29/09/2010, Pas., 2010/9, p. 2438-2443.

⁹ CSJ, crim., 29 mars 2017, n° 14/17.

¹⁰ Art. 34 CC (L. du 12 mars 2020).

(L. 3 mars 2010) Lorsqu'un crime ou un délit est commis au nom et dans l'intérêt d'une personne morale par un de ses organes légaux, par un ou plusieurs de ses dirigeants de droit ou de fait ou par toute personne, agissant soit individuellement soit en tant que membre d'un organe de la personne morale, qui exerce un pouvoir de direction en son sein, sur la base d'un pouvoir de représentation de la personne morale ou d'un pouvoir de prendre des décisions au nom de la personne morale ou d'un pouvoir d'exercer un contrôle au sein de la personne morale, la personne morale peut être déclarée pénalement responsable et encourir les peines prévues par les articles 35 à 38.

La personne morale peut également être déclarée pénalement responsable et encourir les peines prévues par les articles 35 à 38 lorsqu'un défaut de surveillance ou de

ing offences. The Grand-Duchy had been pressured by the EU and several international organizations (the Council of Europe, the Organization for Economic Cooperation and Development, and the United Nations) to provide for a criminal liability regime for legal entities. The new Law introduced in 2010 (Law of the 3rd March 2010) was necessary to implement several international treaties signed by Luxembourg that include such liability. Until its adoption, only members of a legal entity's board of directors could be found criminally liable. The provisions of the Law have been incorporated into the Criminal Code and the Code of Criminal Procedure (CCP).

The current legal framework applies to almost all types of legal entities, except for the State of Luxembourg and Luxembourg's municipalities which are expressly excluded.¹¹ Criminal liability of the legal entity will arise whenever a felony or a lesser offence¹² is committed by one or more of the entity's legal representatives or one or more of its legal or *de facto* directors on behalf of and for the benefit of the entity.¹³ The law further provides that the criminal liability of the legal entity does not preclude the criminal liability of the natural persons, authors, or accomplices who committed the relevant offences.¹⁴

The following penalties may be imposed:

– Fines: the minimum fine applicable to a legal entity is €500, while the maximum rate in felony cases is €750,000.¹⁵ This maximum rate may be multiplied by five for certain offences, including offences against the security of the state, terrorism, financing of terrorism, trafficking in human beings, and money laundering¹⁶;

contrôle de la part d'une personne visée à l'alinéa 1er du présent article a rendu possible la commission d'un crime ou d'un délit, dans l'intérêt de ladite personne morale, par une personne soumise à son autorité.

La responsabilité pénale des personnes morales n'exclut pas celle des personnes physiques auteurs ou complices des mêmes infractions.

Les alinéas précédents ne sont pas applicables à l'État et aux communes.

¹¹ Article 34(4) CC.

¹² Article 34(1) CC.

¹³ Article 34 CC.

¹⁴ Article 34(4) CC.

¹⁵ Article 36 CC.

¹⁶ Article 37 CC.

- Confiscation of assets¹⁷;
- Exclusion from participating in public contracts¹⁸; or
- Dissolution of the legal entity if it was created for the purpose of committing the offence (id. at art. 35). This penalty is not imposed in the case of public law entities.¹⁹

As for money laundering, Article 37 CC provides that the minimum pecuniary penalty can be quintuplicated²⁰.

Articles 66 and 66-1 CCP, related to the freezing of assets, and Articles 31, 32 and 35 CC, related to their confiscation, are effectively implementing Article 9 of Directive 2018/1673. Further developments related to Regulation (EU) 2018/1805 of the 14th November 2018 on the mutual recognition of freezing orders and confiscation orders should be considered as a tool to foster judicial cooperation for EU transnational cases.

b. The Luxembourgish approach on relevant predicate offences: The list-model

Crimes or offences which generate the funds to be laundered are commonly referred to as money laundering predicate offences. The list provided for by Article 506-1 CC has increased over the years according to the duty for the Grand-Duchy to comply with international and European obligations. Until 1998, money laundering as a criminal offence was only related to properties derived by drug trafficking. At the time, the only relevant provisions were articles 8-1 and 8-2 of the Law of the 19th February 1973, introduced by the Law of the 7th July 1989 and completed by the Law of the 17th March 1992 implementing the 1988 UN Vienna Convention on drug trafficking.

The Law of the 11th August 1998 first introduced Article 506-1 CC with a first and very limited list of predicate crimes (organised crime, corruption, arms and explosives, kidnapping or sexual exploitation of minors). In the following years, the list in-

¹⁷ Article 35 CC.

¹⁸ Article 35 CC.

¹⁹ Article 38 CC and Article 36 CC.

²⁰ Art. 37 CC.

creased progressively following the development of EU law and of the FATF Recommendation no. 1 (version 2003). In particular, the Law of the 17th July 2008 added many predicate offences as well as a general clause according to which every other crime punished with more than 6 months of imprisonment as a minimum term shall be considered as a valid predicate offence. This amendment was already criticised as excessively wide and potentially breaching the link between the nature of the predicate offence and the goal to pursue an illicit economic advantage of the offender.²¹ In 2016 and in 2020 the list has been increased following a tax reform extending the concept of ‘fiscal fraud’ and including VAT frauds (see *infra*).

Lastly, the Law of the 17th December 2021 increased the list of predicate offences in order to comply with obligations stemming from Directive 2018/1673. A long debate intervened between the government and the *Conseil d’État*, also involving the opinions of the Prosecutorial offices, the Court judges and the Bar association, to find out whether to abandon the list-model in favour of a general provision considering all criminal offences as predicate offences, in line with the French and the Belgian systems. Consequently, Article 506-1 CC would have been redrafted without any list but with a general reference to money laundering as any conduct involving property derived from a *crime* or a *délit*.²² Because of the strong opposition of some stakeholders, mainly the Bar association, the list-option was finally confirmed. The main argument to retain the current format has been the lack of any duty to abolish such a list for Member States stemming from the Directive. Furthermore, a general definition of predicate offences as any criminal offence would have deviated from the seriousness of the crime as a criterion indicated by the FATF Recommendation no. 3. Thirdly, and more importantly, extending money laundering to profits generated by every criminal conduct would have led to an enormous increase of the cases of self-laun-

²¹ Catherine BOURIN-DION, *La course à la législation antiblanchiment ou «Qui peut montrer patte blanche?»*, in *Journal des Tribunaux Luxembourg*, No 3 du 12 juin 2009, p. 75.

²² Projet de loi no. 7533 du 18 mars 2022. All the preparatory documents are available at <https://www.cbd.lu/fr/dossier/7533>.

dering, including those where the offender risks a very low penalty for the main conduct and up to five years for laundering the profits of a minor crime.²³

As a result of this strong opposition, Article 506-1 CC has not been amended and currently contains a few cases in which the penalty foreseen by Luxembourg does not satisfy the requirement of six months of imprisonment. This is the case for some minor cases of passport falsification and use of a false passport²⁴, counterfeiting of electronic storage devices²⁵ and, more importantly, radioactive waste, all criminal offences mentioned in Article 2(1) of Directive 2018/1673.

Article 506-1 CC also provides for four references to laws that have been repealed and replaced by new ones.²⁶ They still represent valid predicate offences as their minimum term of imprisonment is more than six months. However, it would have been a better option to amend those provisions while implementing Directive 2018/1673.

As a reaction to the current Ukrainian invasion, the Law of the 20th July 2022 added the case of breach of economic sanctions imposed by the EU to the list of predicate offences.

The list of predicate offences in Luxembourg includes the following crimes:

– Terrorism or terrorism financing and crimes against international or foreign officials,

²³ Avis de l'Ordre des Avocats du Barreau, 9th September 2020, at <https://wdocspub.chd.lu/docs/exped/0112/056/224568.pdf>.

²⁴ Article 198 CC.

²⁵ Article 488 CC.

²⁶ 4 renvois vers des lois abrogées:

– la loi du 9 mai 2006 relative aux abus de marché a été abrogée par une loi du 23 décembre 2016 relative aux abus de marché;

– la loi modifiée du 19 janvier 2004 concernant la protection de la nature et des ressources naturelles a été abrogée par une loi du 18 juillet 2018 concernant la protection de la nature et des ressources naturelles;

– la loi modifiée du 17 juin 1994 concernant la prévention et la gestion des déchets a été abrogée par une loi du 21 mars 2012 relative à la gestion des déchets;

– loi modifiée du 29 juillet 1993 concernant la protection et la gestion de l'eau a déjà été abrogée en 2008 par une loi du 19 décembre 2008 relative à l'eau.

- Participation in a criminal organisation or in a criminal association,
- Trafficking in human beings, sexual exploitation, including of children, kidnapping, illegal detention and hostage-taking,
- Pornography including child pornography,
- Fraud and scam (including procurement and non-procurement frauds),²⁷
- Corruption,
- Illegal use of weapons and weapons trafficking,
- Illegal revelation of business or industrial secrets and counterfeiting,
- Theft,
- Insider trading,
- Cybercrimes,
- Criminal offences related to electronic commerce,
- Offences related to data protection,
- Art crimes including crimes to the historical heritage,
- Illicit trafficking of narcotic drugs,
- Organ and human substances trafficking,
- Copyright crimes,
- Environmental crimes (air, water, waste...),
- Customs offences,
- Market abuse,
- Tax crimes (aggravated fiscal frauds, including VAT frauds),
- Breach of restrictive measures imposed by the EU,
- Counterfeiting of money,
- Every other crime punished with a minimum term of more than 6 months of imprisonment.

In order to fully implement Article 3(3)(a) and (b) of Directive 2018/1673, Luxembourg amended Article 506-8 CC in order to make money laundering offences punishable even in the absence of a previous conviction related to the predicate offence. Additionally, it provides that, where it is established that the property was derived from a criminal activity, it is not necessary to

²⁷ For procurement frauds, they are sanctioned by Articles 491-1 CC, 492(1) CC and 493s CC.

establish all the factual elements or all the circumstances relating to that criminal activity, including the identity of the perpetrator of the predicate offence.²⁸

These amendments are in line with the previous case law of the Luxembourg criminal courts, according to which: *«Il importe peu que cette infraction originelle ait été commise hors du territoire luxembourgeois et il est même indifférent qu'en fin de compte l'auteur principal n'a pas été poursuivi ni condamné parce que mort, en fuite ou inconnu. Il faut cependant que soit établie de manière précise l'existence d'une action qualifiée crime ou délit et qu'ils en soient relevés les éléments constitutifs. Les juges du fond, saisis d'une poursuite du chef du délit de blanchiment, doivent constater, à tout le moins de manière implicite, mais certaine, l'existence des éléments constitutifs de l'infraction de base, notamment l'origine délictueuse des fonds ainsi que la circonstance que le prévenu avait connaissance de cette origine délictueuse. Les juges peuvent asseoir leur conviction sur un ensemble de présomptions précises et concordantes, puisant leur conviction dans n'importe quel élément de preuve direct ou indirect, à condition qu'il soit versé aux débats et soumis à la libre discussion des parties. Il n'est toutefois pas requis que l'auteur de l'infraction primaire ait fait l'objet de poursuites ou qu'il ait fait l'objet d'une condamnation identifiant le crime ou le délit à l'aide duquel les avantages patrimoniaux ont été obtenus».*²⁹

As for VAT offences, they represent a valid predicate offences for the crime of money laundering. In 2020 Luxembourg amended tax fraud provisions in order to comply with Directive 2017/1371 on the protection of the EU financial interests.³⁰ Arti-

²⁸ Art. 506-8 CC (L. 17 décembre 2021) (L. 27 octobre 2010) Les infractions visées à l'article 506-1 sont punissables indépendamment de toutes poursuites ou condamnations pour une des infractions primaires de l'article 506-1 et sans qu'il soit nécessaire d'établir tous les éléments factuels ou toutes les circonstances propres à cette infraction primaire, en ce compris l'identité de l'auteur.

²⁹ Trib. Arr. Diekirch, déc. 340/2020, 30 July 2020, no. 100082440, referring to Conseil Supérieur de la Justice, 10 July 2001, no. 270/01.

³⁰ Loi du 12 mars 2020 portant modification: du Code pénal; du Code de procédure pénale; de la loi modifiée du 12 février 1979 concernant la taxe sur la valeur ajoutée; aux fins de transposition de la directive (UE) 2017/1371 du Parlement européen et du Conseil du 5 juillet 2017 relative à la lutte contre la fraude portant atteinte aux intérêts financiers de l'Union au moyen du droit pénal.

cle 80 of the Law of the 12th February 1979 provides for specific criminal sanctions related to VAT aggravated fraud.³¹ These provisions represent a solid legal basis for the EPPO competence.

c. On predicate offences committed abroad and the requirement of dual criminality

In order to comply with the duty to increase the territorial competence stemming from Directive 2018/1673, the Law of the 17th December 2021 rewrote Article 5-1 CCP and Article 506-3

³¹ Art. 80. Le paragraphe 1er est modifié de manière à lui donner la teneur suivante:

«1. Si l'infraction visée à l'article 77, paragraphe 3, commise ou tentée, porte, par période déclarative, sur un montant supérieur au quart de la taxe sur la valeur ajoutée due sans être inférieur à 10.000 euros ou sur un remboursement indu supérieur au quart du remboursement effectivement dû sans être inférieur à 10.000 euros, ou si la taxe sur la valeur ajoutée éludée ou le remboursement indûment obtenu est supérieur à la somme de 200.000 euros par période déclarative, l'auteur sera puni, pour fraude fiscale aggravée, d'un emprisonnement de un mois à trois ans et d'une amende de 25.000 euros à un montant représentant le sextuple de la taxe sur la valeur ajoutée éludée ou du remboursement indûment obtenu.

S'il a de façon systématique employé des manœuvres frauduleuses dans l'intention de dissimuler des faits pertinents à l'administration ou à la persuader des faits inexactes, ou s'il est membre d'une bande organisée, et que la fraude ainsi commise ou tentée porte, par période déclarative, sur un montant significatif de taxe sur la valeur ajoutée éludée ou de remboursement indûment obtenu soit en montant absolu soit en rapport avec la taxe sur la valeur ajoutée due par période déclarative ou de remboursement effectivement dû par période déclarative, l'auteur sera puni, pour escroquerie fiscale, d'un emprisonnement de un mois à cinq ans et d'une amende de 25.000 euros à un montant représentant le décuple de la taxe sur la valeur ajoutée éludée ou du remboursement indûment obtenu.

Il pourra, en outre, être privé en tout ou en partie, pendant cinq ans au moins et dix ans au plus, des droits énumérés par l'article 11 du Code pénal. Toutes les dispositions du livre premier du Code pénal et les dispositions du Code d'instruction criminelle sont applicables à ces infractions.

Les autorités judiciaires sont seules compétentes dans les cas visés aux alinéas 1 et 2.

La prescription de l'action publique est interrompue lorsqu'une réclamation est faite contre les bulletins portant rectification ou taxation d'office. La prescription commence à courir de nouveau à partir de la date de notification indiquée dans la décision directoriale portant sur la réclamation.

La prescription de l'action publique est interrompue lorsqu'un recours judiciaire est introduit contre la décision directoriale ou, en l'absence de décision directoriale, contre le bulletin qui fait l'objet de la réclamation. La prescription commence à courir de nouveau à partir d'une décision de justice passée en force de chose jugée».

CC to allow Luxembourg's criminal law enforcement authorities to prosecute money laundering offences committed in Luxembourg even if the primary offence was committed abroad.

As for the existence of the crime, Article 506-3 CC provides for a double-track system of prosecution when the predicate offence has been committed abroad.

A first case concerns a list of crimes for which no double criminality is required. Accordingly, Luxembourg authorities can prosecute money laundering even when the related predicate offences do not constitute a crime in the country in which they have been committed. These crimes are:

(a) participation in an organised criminal group and racketeering, including any offence set out in Framework Decision 2008/841/JHA;

(b) terrorism, including any offence set out in Directive (EU) 2017/541 of the European Parliament and of the Council;

(c) trafficking in human beings and migrant smuggling, including any offence set out in Directive 2011/36/EU of the European Parliament and of the Council (10) and Council Framework Decision 2002/946/JHA;

(d) sexual exploitation, including any offence set out in Directive 2011/93/EU of the European Parliament and of the Council;

(e) illicit trafficking in narcotic drugs and psychotropic substances, including any offence set out in Council Framework Decision 2004/757/JHA;

(f) corruption, including any offence set out in the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and in Council Framework Decision 2003/568/JHA.

It is of the utmost importance to signal that Luxembourg courts were, in line with Belgian case law, very keen to admit as predicate offence even conducts not considered as predicate offences in the country where they had been committed: *«Il est d'autre part admis que la qualification de l'infraction primaire commise à l'étranger dépend de la loi du juge saisi du délit de blanchi-*

*ment et non pas de la loi de l'État où cette infraction a été commise».*³²

For all the other cases, double criminality is mandatory, and the predicate offence should be punishable in the country where it has been committed.³³

Once the existence of the criminal offence of money laundering involving a predicate crime committed abroad has been established, Articles 5 and 5-1 CCP foresee the territorial competence for the Luxembourg authorities to prosecute those crimes.

Territorial competence of Luxembourg authorities is generously foreseen by Articles 5 and 5-1 CCP. It includes all forms of active and passive criteria to establish the territorial competence, including some recently added cases of extraterritorial competence when the Luxembourg citizen, permanent resident or foreigner caught on the territory of the Grand-Duchy has committed crimes abroad. In the latter case, no dual criminality is required for *crimes* (over 5 years of imprisonment) whereas dual criminality is mandatory for *délits*. No extraterritorial jurisdiction is foreseen for *contraventions*. In both cases, no special referral or formal request from the foreign jurisdiction is required.³⁴ A special

³² CSJ, 3 juin 2009, no. 279/09 X. «Pour déclarer le prévenu coupable de blanchiment, il suffit que soient établies la provenance ou l'origine illégale des choses et la connaissance requise qu'il en avait ou devait en avoir, sans qu'il soit nécessaire que le juge connaisse l'infraction précise, à la condition que, sur la base des données de fait, il puisse exclure toute provenance ou origine légale». (Cour de cassation belge, (2e ch.), 29/09/2010, Pas., 2010/9, p. 2438-2443).

³³ Article 506-3 CC: «(L. 11 août 1998) Les infractions prévues à l'article 506-1 sont également punissables lorsque l'infraction primaire a été commise à l'étranger. Toutefois, à l'exception des infractions pour lesquelles la loi permet la poursuite même si elles ne sont pas punissables dans l'État où elles ont été commises, cette infraction doit être punissable dans l'État où elle a été commise».

³⁴ Article 5-1 CCP as modified by several laws. (L. du 20 juillet 2018) (L. du 17 décembre 2021) (L. 29 juillet 2022) (L. 29 juillet 2022) (1) Tout Luxembourgeois, toute personne qui a sa résidence habituelle au Grand-Duché de Luxembourg, de même que l'étranger trouvé au Grand-Duché de Luxembourg, qui aura commis à l'étranger une des infractions prévues aux articles 112-1, 135-1 à 135-6, 135-9 et 135-11 à 135-16, 162, 164, 165, 166, 178, 179, 198, 199, 199-*bis*, 210-1, 240, 245 à 252, 310, 310-1, 322 à 324-*ter*, 348, 368 à 384, 385-2, 389, 409-*bis*, 468 à 470, 496-1 à 496-4 et, dans les conditions de l'article 506-3, à l'article 506-1 du Code pénal, pourra être poursuivi et jugé au Grand-Duché de Luxembourg, bien que le fait ne soit pas puni par la législation du pays où il a été commis et que l'autorité luxembourgeoise n'ait pas reçu soit

provision extends to money laundering offences that are qualified as *délits* namely the same rule applicable to *crimes*: no need for the predicate offence to be qualified as a crime in the foreign jurisdiction where it took place and no need for the foreign country to send a formal denunciation or request³⁵.

2. ADMINISTRATIVE ENFORCEMENT AGAINST MONEY LAUNDERING

a. *The national implementation of the EU Directives*

Luxembourg has various laws and regulations to fight money laundering and terrorist financing, implementing the various EU Directives approved over the years. Known as Luxembourg's primary AML and terrorist financing law, the first comprehensive AML law was published on the 7th July 1989. It was also updated twice, in 1998 and 2004 (the current Law dates from the 12th November 2004).

Luxembourg's essential regulator is the 'Commission de Surveillance du Secteur Financier' (CSSF). The CSSF is responsible for overseeing lenders, investment companies, funders, and all other financial professionals (see the list below at point 2).

From a criminal law point of view, the Luxembourg authority which is mainly competent for AML/CTF is the Financial Intelligence Unit ("FIU") of the Public Prosecutor's Office.

The FIU is in charge of receiving suspicious transaction reports in respect of money laundering and/or terrorist financing from professionals, and of analysing and using them, where appropriate, in investigations or criminal proceedings.

une plainte de la partie offensée, soit une dénonciation de l'autorité du pays où l'infraction a été commise.

³⁵ Article 5-1 (2) CC: «Pourra être poursuivie et jugée au Grand-Duché de Luxembourg, toute personne qui aura commis un délit prévu à l'article 506-1 du Code pénal, même lorsque l'infraction primaire prévue au paragraphe 1er aura été commise l'étranger, par un étranger qui n'a pas sa résidence habituelle ou qui n'a pas été trouvé au Grand-Duché de Luxembourg, bien que le fait ne soit pas puni par la législation du pays où il a été commis et que l'autorité luxembourgeoise n'ait pas reçu soit une plainte de la partie offensée, soit une dénonciation de l'autorité du pays où l'infraction a été commise».

As for Luxembourg's AML legal framework, the following regulations form the latter:

- Law of 12 November 2004 (coordinated version) Updated on 12 August 2022 on the fight against money laundering and terrorist financing (hereinafter the AML/CTF Law);
- Law of 10 July 2020 (coordinated version) Updated on 12 August 2022 establishing a Register of Fiduciaries and Trusts;
- Law of 25 March 2020 (coordinated version) Updated on 5 July 2022 establishing a central electronic data retrieval system related to IBAN accounts and safe-deposit boxes;
- Law of 27 October 2010 (coordinated version) Updated on 28 December 2020 enhancing the anti-money laundering and counter terrorist financing legal framework; organising the controls of physical transport of cash entering, transiting through or leaving the Grand Duchy of Luxembourg;
- CSSF Regulation No 12-02 14 December 2012 - Updated on 26 August 2020 (coordinated version) of 14 December 2012 on the fight against money laundering and terrorist financing;
- CSSF Regulation No 20-05 (only in French) of 14 August 2020 amending CSSF Regulation No 12-02 of 14 December 2012 on the fight against money laundering and terrorist financing;
- Grand-ducal Regulation of 1 February 2010 (coordinated version) providing details on certain provisions of the amended Law of 12 November 2004 on the fight against money laundering and terrorist financing.

Luxembourg has implemented, in 2020, the 5th AML EU Directive in its regulatory framework, which led to many changes to be implemented into companies' AML/CTF framework. Most recent changes to key pieces of legislation occurred between March 2020 and August 2022, extending the duties related to the register of beneficial owners.

In the areas of Asset and Wealth Management, the legislation is driven by a sector risk analysis that the CSSF performed in 2020. This leads to Luxembourg having an AML/CTF framework that has specific elements included to cover the specific risks identified. As for example: AML/CTF measures on assets and AML/CTF measures on Nominees, distributors, intermediaries

(including potential look through). The Role of the AML Responsible for the AML Control (RC or MLRO) and Responsible for the Respect (Conducting Officer in charge of AML/CTF compliance for the ManCo and BoD for an investment fund) has been clarified and responsibilities have been clearly defined.

b. Coordinating, monitoring and guaranteeing compliance to the AML provisions: a brief overview of the involved national authorities

The main national authority in charge of coordinating actions in AML/CTF is the CSSF. Many other supervisory authorities are in charge of specific sectors.

The Law of the 12th November 2004 offers a comprehensive list of these several authorities³⁶:

(1) The ‘CSSF’ is the supervisory authority in charge of ensuring compliance by the credit institutions and by the professionals supervised, authorised or registered by it, including by branches of the foreign professionals notified to the CSSF and by the professionals incorporated under foreign law notified to the CSSF which provide services in Luxembourg without establishing a branch, with their professional obligations as regards the fight against money laundering and terrorist financing provided for in Articles 2-2 to 5 and their implementing measures.

“Moreover, the CSSF is the supervisory authority in charge of ensuring compliance with the professional obligations as regards the fight against money laundering and terrorist financing provided for in Articles 2-2 to 5 and in their implementing measures by tied agents established in Luxembourg of credit institutions or PFS licensed or authorised to carry out their activity in Luxembourg pursuant to the Law of the 5th April 1993 on the financial sector, as amended, as well as by agents established in Luxembourg of payment institutions and electronic money institutions licensed or authorised to carry out their activity in Luxembourg pursuant to the Law of 10 November 2009 on payment services, as amended.

³⁶ Law 12 November 2004, Article 2-1 as modified by Law of 13 February 2018.

The CSSF is the supervisory authority in charge of ensuring compliance with the professional obligations as regards the fight against money laundering and terrorist financing provided for in Articles 2-2 to 5 and in their implementing measures by foreign institutions for occupational retirement provision authorised pursuant to the Law of the 13th July 2005 concerning the activities and supervision of the institutions for occupational retirement provision, as amended, to provide services to sponsoring undertakings in Luxembourg”.

(2) The ‘Commissariat aux assurances’ (CAA) is the supervisory authority in charge of ensuring compliance by the natural and legal persons including by branches of the foreign professionals notified to the CAA and by the professionals incorporated under foreign law notified to the CAA which provide services in Luxembourg without establishing a branch.

(3) The ‘Institut des réviseurs d’entreprises’ shall ensure compliance with AML/CTF by its members who are natural and legal persons as well as by branches of audit professionals incorporated under foreign law and by audit professionals incorporated under foreign law which provide services in Luxembourg without establishing a branch.

(4) The ‘Ordre des experts-comptables’, shall ensure compliance by its members who are natural and legal persons as well as by branches of the professionals incorporated under foreign law which carry out their activities in Luxembourg without establishing a AML/CTF branch.

(5) The ‘Chambre des Notaires’, shall ensure compliance by the notaries with their professional obligations as regards AML/CTF.

(6) The ‘Ordre des avocats de Luxembourg’ shall ensure compliance by lawyers who carry out in Luxembourg their activities.

By way of derogation from the first subparagraph, the ‘Ordre des avocats de Diekirch’ shall ensure compliance by its members with their professional obligations on AML/CTF.

(7) The ‘Chambre des huissiers’ shall ensure compliance by the bailiffs with their professional obligations as regards the fight against money laundering and terrorist financing provided for in Articles 2-2 to 5 and their implementing measures.

(8) The ‘Administration de l’Enregistrement’ (AED) is the supervisory authority in charge of ensuring compliance by the professionals not referred to in paragraphs 1 to 7 with their professional obligations as regards the fight against money laundering and terrorist financing.

Additionally, the Minister of Finance is specifically responsible for international financial sanctions, in particular with respect to the fight against terrorist financing.

The AML/CTF approach taken to implement AML/CTF compliance must be fully coherent, and every company (Management Companies and investment funds) must have their own AML framework. The key elements (i.e., AML risk appetite and KPIs, AML risk assessment and risk scoring of investors, assets and distributors, investor and investment KYC as well as a commensurate risk-based approach) must be in place. It needs to be supplemented by suspicious transaction monitoring and sanction screening, staffing, training and cooperation with authorities.

Luxembourg ManCos further need to reply to an annual AML/CTF questionnaire and submit a detailed AML report to the CSSF on 31 May of each year.

c. Structure and power of the national coordination authority: Focus on the ‘Commission de sécurité du Secteur Financier’ (CSSF)

The CSSF is governed by the following organs:

- The Board
- The Executive Board
- The Resolution Board
- Council for the Protection of Depositors and Investors (CPDI)
- External auditor
- Internal Audit

- Information security
- Risk management
- Consultative Committees.

The governance structure is highly transparent and the many boards of the CSSF are presented in detail at the following website: <https://www.cssf.lu/en/governance-cssf/>

The CSSF is, in its capacity as financial sector supervisory authority, responsible for the preventive part of the fight against money laundering and terrorist financing, i.e., compliance with the professional obligations with respect to AML/CTF by all the persons subject to its supervision/licence/registration, as well as to prevent the use of the financial sector by criminals.

Within the framework of its statutory mission³⁷, the CSSF is in charge of ensuring that all the persons subject to its supervision/licence or registration comply with the professional AML/CTF obligations. The CSSF ensures that professionals implement a risk-based approach in order to allocate the appropriate means and resources to the customers and products which represent higher risks. Moreover, the CSSF ensures that persons maintaining relationships with organised crime, including, inter alia, money laundering or terrorist financing offences, cannot take control, in any form whatsoever, over persons subject to its supervision. Professionals are required to fully cooperate with the CSSF as well as the FIU with respect to AML/CTF.

The CSSF, in turn, cooperates closely with the FIU. These two authorities are authorised to exchange information necessary to perform their respective duties. Moreover, the CSSF can also exchange information with other AML/CTF competent authorities, on a national or on an international level.

The AML/CTF supervision (off-site and on-site supervision) by the CSSF is organised pursuant to the principles of a risk-based approach that takes into account the money laundering and terrorist financing risks to which the supervised entities and the sectors at large are exposed to.

³⁷ See Law 12 November 2004.

The CSSF has all the supervisory and investigatory powers provided for in the AML/CTF Law of 2004 and in various sectoral laws for the purpose of carrying out its duties. For instance, the CSSF is entitled to have access to any document it deems necessary and to obtain a copy thereof. It may also request information from any person subject to its supervision, notably by summoning this person or by carrying out on-site inspections.

Where a person subject to the AML/CTF supervision of the CSSF does not comply with the provisions relating to AML/CTF, the CSSF has a power of injunction against this person. If after expiry of the time limit set by the CSSF, the supervised person has not fixed the situation, the CSSF may follow up with an administrative sanction against this person.

The CSSF has broad sanctioning powers. It may issue warnings, reprimands, administrative fines or occupational prohibitions against persons subject to its AML/CTF supervision. These sanctions will, generally, be made public by the CSSF. Such administrative or prudential sanctions are without prejudice to the imposition of criminal sanctions (imprisonment and/or a fine) by criminal courts against professionals which deliberately violated the legal provisions which apply to them in this regard. These sanctions will, generally, be made public by the CSSF.

d. A brief overview of the obliged entities

Article 2 of the Law of the 12th November 2004 provides for a detailed list of the obliged entities. Some categories go beyond the specific duties stemming from Directive 2015/849: based on a risk approach, Luxembourg considered some peculiarities of the financial hub and included special markets such as art dealing in free ports or wealth management services. The list increased over the years in order to include new professions or new sectors (such as more recently the cryptoassets market):

1. credit institutions and professionals of the financial sector (PFS) licensed or authorised to exercise their activities in Luxembourg in accordance with the Law of 5 April 1993 on the financial sector, as amended; “payment institutions”, and “electronic money institutions” licensed or authorised to exercise their activ-

ities in Luxembourg (Law of the 10th November 2009) or the natural and legal persons benefiting from the waiver in accordance with Article 48 or 48-1 of the Law of the 10th November 2009 on payment services;

2. insurance undertakings licensed or authorised to exercise their activities in Luxembourg in accordance with the “Law of 7 December 2015 on the insurance sector, as amended”, in connection with operations covered by “Annex II of the Law of 7 December 2015 on the insurance sector, as amended,” and insurance intermediaries licensed or authorised to conduct business in Luxembourg in accordance with the “Law of 7 December 2015 on the insurance sector, as amended,” when they act in respect of life insurance and other investment related services; (Law of 12 July 2013 on professionals of the insurance sector) “2a. the professionals of the insurance sector authorised to carry out their business in Luxembourg pursuant to the “Law of 7 December 2015 on the insurance sector, as amended”;

3. pension funds under the prudential supervision of the Commissariat aux assurances;

4. undertakings for collective investment and investment companies in risk capital (SICAR), which market their “units, securities or partnership interests” and to which the Law of 17 December 2010 relating to undertakings for collective investment, as amended, or the Law of 13 February 2007 relating to specialised investment funds or the Law of 15 June 2004 relating to the Investment company in risk capital (SICAR) applies;

5. management companies (ManCos) under the Law of 17 December 2010 relating to undertakings for collective investment, as amended, and alternative investment fund managers governed by the Law of 12 July 2013 on alternative investment fund managers, as amended;

6. pension funds under the prudential supervision of the CSSF; 6.a managers and advisors of undertakings for collective investment, investment companies in risk capital (SICAR) and pension funds; 6b. securitisation undertakings, when they per-

form trust and company service provider activities; 6c. insurance and reinsurance undertakings and their intermediaries whenever they perform credit and surety operations; 6e. any person carrying out the Family Office activity within the meaning of the Law of 21 December 2012 relating to the Family Office activity;

7. the other financial institutions carrying out their activities in Luxembourg;

8. *réviseurs d'entreprises* (statutory auditors), *réviseurs d'entreprises agréés* (approved statutory auditors), *cabinets de révision* (audit firms) and *cabinets de révision agréés* (approved audit firms) within the meaning of the Law of 23 July 2016 concerning the audit profession, as amended;

9. accountants, within the meaning of the Law of 10 June 1999 on the organisation of the accounting profession; (*Law of 17 July 2008*) 9a. accounting professionals, within the meaning of Article 2(2)(d) of the Law of 10 June 1999 on the organisation of the accounting profession;

10. real estate agents within the meaning of the Law of 2 September 2011 regulating the access to the professions of craftsman, salesman, industrial as well as to some liberal professions, as amended, established or acting in Luxembourg, including when acting as intermediaries in the letting of immovable property, but only in relation to transactions for which the monthly rent amounts to EUR 10,000 or more; (*Law of 25 March 2020*) 10a. real estate developers within the meaning of the Law of 2 September 2011 regulating the access to the profession of craftsman, salesman, industrial as well as to some liberal professions, as amended, established or acting in Luxembourg, including when they are, in their capacity as intermediary, involved in purchase and sale transactions of immovable property;

11. notaries, within the meaning of the Law of 9 December 1976 on the organisation of the profession of notary, as amended; (*Law of 13 February 2018*) 11a. bailiffs within the meaning of the Law of 4 December 1990 on the organisation of bailiffs, as amended, where they carry out valuation and public sales of furniture, movables and harvests;

12. lawyers, within the meaning of the Law of 10 August 1991 on the legal profession, as amended, when: (a) assisting in the planning or execution of transactions for their customer concerning the: (i) buying and selling of real property or business entities, (ii) managing client money, securities or other assets, (iii) opening or management of bank, savings or securities accounts, (iv) organisation of contributions necessary for the creation, operation or management of companies, (v) creation, domiciliation, operation or management of trusts, companies or other similar structures, (b) or acting for and on behalf of their customer in any financial or real estate transaction; (c) or providing a service of a trust and company service provider; (d) or carrying out the activity of Family Office; (Law of 29 July 2022) (e) or acting as depositaries of bearer shares;

13. persons other than those listed above who: (a) exercise in Luxembourg by way of “a business relationship”, an activity of tax advice; (b) exercise in Luxembourg, by way of “a business relationship”, one of the activities described in point (12)(a) and (b), or (c) undertake to provide, directly or by means of other persons to which they are related, material aid, assistance or advice on tax matters as principal business or professional activity; (Law of 17 July 2008) 13a. persons other than those listed above who exercise “by way of a business relationship” in Luxembourg a trust and company service provider activity;

14. providers of gambling services governed by the Law of 20 April 1977 on gaming and betting on sporting events, as amended, acting in the exercise of their professional activities; (Law of 24 July 2015) 14a. operators in a free zone authorised to carry out their activity pursuant to an authorisation by the *Administration des douanes et accises* (customs and excise) within the Community control type 1 free zone located in the municipality of Niederanven Section B Senningen called Parishaff L-2315 Senningerberg (Hoehenhof);

15. (Law of 17 July 2008) persons trading in goods, only to the extent that payments are made “or received” in cash in an amount of EUR “10,000” or more, whether “the transactions or

series of transactions are executed” in a single operation or in several operations which appear to be linked;

16. (Law of 25 March 2020) virtual asset service providers;

17. safekeeping or administration service providers;

18. persons trading or acting as intermediaries in the trade of works of art, including when this is carried out by art galleries and auction houses, where the value of the transaction or a series of linked transactions amounts to EUR 10,000 or more;

19. persons storing, trading or acting as intermediaries in the trade of works of art when this is carried out by free ports, where the value of the transaction or a series of linked transactions amounts to EUR 10,000 or more.

The scope of application of this title and hence the notion of professional also includes branches in Luxembourg of foreign professionals as well as professionals established under the laws of foreign countries who supply services in Luxembourg without establishing any branch in Luxembourg.

With regards to the limitations, as provided by Article 2(3) Directive 2015/849, Article 1(15) of the Law of the 12th November 2004 states that:

“Persons engaging in a financial activity on an occasional or very limited basis” shall mean natural or legal persons who engage in a financial activity which fulfils the following criteria:

(a) the financial activity is limited in absolute terms and does not exceed a sufficiently low threshold fixed by grand-ducal regulation depending on the type of financial activity;

(b) the financial activity is limited as regards transactions and does not exceed a maximum threshold per customer and per transaction, whether the transaction is carried out in a single operation or in several operations which appear to be linked, this threshold being fixed by grand-ducal regulation according to the type of financial activity at a sufficiently low level in order to ensure that the types of transactions in question are an impractical and inefficient method for laundering money or for terrorist financing, and shall not exceed EUR 1,000;

(c) the financial activity is not the main activity, the turnover of the financial activity in question does not exceed 5% of the total turnover of the natural person or legal person concerned;

(d) the financial activity is ancillary and directly related to the main activity;

(e) the main activity is not an activity exercised by the professionals listed in Article 2(1), with the exception of activities of such persons referred to in Article 2(1)(15);

(f) the financial activity is provided only to the customers of the main activity and is not generally offered to the public.”

3. STATUS, FUNCTIONS AND GOVERNANCE OF THE FIU

a. *The institutional setting of the national FIU: the ‘Cellule de renseignement financier’*

In Luxembourg, the central authority for reporting is the Financial Intelligence Unit (*Cellule de renseignement financier*) or FIU, established under the direction of the deputy State Public Prosecutor of the Luxembourg District Court (*tribunal d’arrondissement de Luxembourg*). Its statute, composition and functions are established by Article 74-1 and ff. of the *Loi sur l’organisation judiciaire*³⁸ as modified by the Law of the 10th August 2018.

³⁸Law 7 March 1980 as modified by Law 10 August 2018. 1) La CRF est l’autorité nationale qui a pour mission de recevoir et d’analyser les déclarations d’opérations suspectes et les autres informations concernant des faits suspects susceptibles de relever du blanchiment, des infractions sous-jacentes associées ou du financement du terrorisme.

(4) Les déclarations d’opérations suspectes et les autres informations visées au paragraphe 1, comprennent celles qui sont transmises à la CRF:

1° par les professionnels soumis à la lutte contre le blanchiment et le financement du terrorisme, en application de l’article 5, paragraphe 1^{er}, a) de la loi modifiée du 12 novembre 2004 relative à la lutte contre le blanchiment et contre le financement du terrorisme;

2° par toute autorité constituée, tout officier public ou fonctionnaire, ainsi que tout salarié ou agent chargés d’une mission de service public, qu’il soit engagé ou mandaté en vertu de dispositions de droit public ou de droit privé, qui est tenu d’informer sans délai, de sa propre initiative, la CRF lorsqu’il sait, soupçonne ou a de bonnes raisons de soupçonner qu’un blanchiment ou un financement du terrorisme est en cours, a eu lieu, ou a été tenté, notamment en raison de la personne concernée, de son

The CRF, the Luxembourg Financial Intelligence Unit, was created in 2004 within the office of the Public Prosecutor of Luxembourg (the *Parquet*).

In line with the French roots of the Luxembourg criminal justice system, the *Parquet* depends on the Ministry of Justice which, hypothetically, could indicate which cases the *parquet* should prosecute.³⁹ As such, the Government might influence the prosecutorial choices that are possible thanks to the principle of opportunity (prosecutorial discretion). Conversely, the Government has no power to stop an investigation or a prosecution once the *Parquet* decides to act. However, the Government never exercised such a power in the last decades. Luxembourg recognises a wide *de facto* independence to the Prosecutorial Office, and a large debate is currently ongoing, advocating in favour of modifying the Luxembourgish Constitution to fully recognise the *Parquet's* independence from the Ministry of Justice.

Furthermore, specific rules of the *Loi sur l'organisation judiciaire* dedicated to the CRF indicate that the national FIU is completely operationally independent and autonomous from the *Parquet*, the latter being in charge of a mere "administrative surveillance".⁴⁰ The CRF «a l'autorité et la capacité nécessaires d'exercer librement ses fonctions, y compris celle de décider d'une manière autonome d'analyser, de demander et de disséminer des informations spécifiques aux services et autorités compétents en matière de lutte contre le blanchiment et le financement du terrorisme».⁴¹

The CRF is composed by a principal prosecutor (the Director), two main substitutes and three substitutes. Financial analysts and administrative support complete the office.

The FIU is the national authority with exclusive competence to assess and evaluate all other suspicious transaction declarations. The FIU ensures that the Luxembourg District Court dedicates

évolution, de l'origine des avoirs, de la nature, de la finalité ou des modalités de l'opération, et de fournir promptement à la CRF tous les renseignements, procès-verbaux et actes qui y sont relatifs, et cela nonobstant toute règle de confidentialité ou de secret professionnel lui étant applicable le cas échéant.

³⁹ Cf. Article 19 CCP and Article 70 of the *Loi du 7 mars 1980 sur l'organisation judiciaire* (Law 7 March 1980).

⁴⁰ Article 74-1(1) Law 7 March 1980.

⁴¹ Article 74-1(1) Law 7 March 1980.

magistrates to the full-time prosecution of money laundering and terrorism financing cases, and provides professionals, as defined in the Law of 12 November 2004, with current information on money laundering and terrorism financing practices and signs to identify suspicious transactions. The FIU works with other relevant national supervisory authorities, authorities of self-regulating professions and professional associations to ensure understanding of anti-money laundering and terrorism financing laws, regulations and recommendations to ensure their proper application and sufficient cooperation with the authorities. All organizations obliged to comply with the regulations must create a Suspicious Transaction Report for any activity involving money laundering risk and report it to the CRF. The FIU is not bound by any “speciality rule” but has jurisdiction over all offences detected in STRs.

It has two main functions⁴²:

1. Operational analysis of individual cases and specific elements or of specific information selected among the reports received.
2. Strategic analysis on the trends and forms of money laundering and terrorism financing.

The STR and other information communicated to the CRF may come from the professionals listed above or from any other authority, public official who has the duty according to public or private law to transfer that information to the CRF when a suspicion of money laundering or terrorism financing arises. Communication shall specify the origin, the modality and all the relevant data of the operation, together with potential additional information already collected by the authority.⁴³ No confidentiality or professional secrecy rules are applicable.⁴⁴

Since the 27th October 2010 amendment to the Law of 12 November 2004, because of attorney-client confidentiality issues with respect to disclosing suspicious transactions, lawyers must address to the President of the Law Society (*Bâtonnier de l'Ordre des avocats*, hereafter the ‘Bâtonnier’). The Bâtonnier may only as-

⁴² Article 74-2(5) Law 7 March 1980.

⁴³ Article 74-2(4) Law 7 March 1980.

⁴⁴ Article 74-2(4) Law 7 March 1980.

sess the lawyer's compliance with the rules and any derogation therefrom and must then transmit the information as quickly as possible to the FIU.

Moreover, the Bar Council (*Conseil de l'Ordre*) may issue internal regulations on anti-money laundering and terrorism financing obligations and attorney monitoring/inspection procedures, particularly the procedures for inspecting the offices of bar members. The Bar Council is vested with powers to inspect bar member offices and demand any information it deems necessary to verify a member's compliance with his obligations in this area. If a bar member does not comply with his anti-money laundering and terrorism financing obligations or obstructs the Bar Council's exercise of powers related thereto, a bar member is subject to sanctions such as a warning; a reprimand; temporary suspension of his law license; permanent disbarment; and/ or a maximum fine of 250,000 euros.

Despite the pandemic, the FIU reports a decrease in the number of reports received from financial sector professionals. While the number of reports had been rising steadily until 2018, reaching a peak of 55,948, the trend was then slightly reversed over the following two years. In 2020, the FIU counted 40,882 reports received.

While the FIU received only four reports related to the covid pandemic in March 2020, the number of similar reports exploded in the following months to 94 in April and 219 in May. In total, the FIU received 1,933 covid-related reports in 2020, out of which 98% came from online providers and 2% from banks. Covid-related reports represented 4.7% of the total notifications sent to the FIU in 2020.

b. Information obtained from the obliged entities and reporting procedures: overview of the structure and content of STRs, SARs, UTRs

Pursuant to Article 5 of the AML/CFT law⁴⁵ obliged persons and entities falling under its scope (professionals, officers, etc.)

⁴⁵ Loi du 12 novembre 2004 relative à la lutte contre le blanchiment et contre le

must fully cooperate with the CRF (1st obligation) and inform it, without delay and *motu proprio*, whenever they know, suspect or have reasonable grounds to suspect that money laundering is or has been committed (or even attempted) (2nd obligation).⁴⁶

Nonetheless, Article 5 of the same law does not precise nor foresee the modalities for such reports to be made.

To have an overview of the structure and the content of STRs/ SARs / UTRs as well as the reporting procedures, reference should be made to goAML, a dedicated IT tool allowing obliged entities to proceed to the reports.

When it comes to the modalities to make a suspicious report, the CRF itself publicized several documents explaining the procedure to be undertaken, among which the 2021 Suspicious reports operations guideline. To summarize its point 4 on how to make a suspicious transaction report, the first step to be undertaken is to register as a reporting entity on the goAML website all while designating at least one compliance officer (1). Once the application is validated by the CRF, the account information will be sent, including an identification number (2). It is only after this registration that it will be possible to file reports, either as an online report or by downloading XML files (3). To be noted that the goAML web offers different forms, distinguishing between ML and TF but also between STR and SAR.

Also, since Article 5 of the AML law imposes the duty to cooperate upon obliged entities, the latter may be required to respond to a request for information by the CRF. In such a case, the procedure to be undertaken does not really differ from the one for the reports. Indeed, obliged entities, which will need to be registered in advance to the goAML web, will have to respond using the feedback forms available on the latter website.

financement du terrorisme portant transposition de la directive 2001/97/CE du Parlement européen et du Conseil du 4 décembre 2001 modifiant la directive 91/308/CEE du Conseil relative à la prévention de l'utilisation du système financier aux fins du blanchiment de capitaux.

⁴⁶ Cf. CRF "2021 Suspicious operations report - Guideline applicable from 1.4.2021", p. 2.

c. *Requesting data and information from obliged entities*

Under the already mentioned Article 5(1) (b) of the 2004 AML law obliged entities must provide the CRF with all the necessary information (“*fournir audit procureur d’État, à sa demande, toutes les informations nécessaires conformément aux procédures prévues par la législation applicable*”), very broad terms that seem to suggest that there are no limits to the information that might be requested by the CRF as long as it is relevant for AML purposes?⁴⁷

An exception to the abovementioned obligation can be found in Article 7⁴⁸ of the same law which lies down several exceptions when it comes to the information on clients that might

⁴⁷ It is worth noting, for the interest of comparison, that when it comes to countering terrorism financing, a “Guide de bonne conduite” was put in place by the ministry of Finances, which specifies that “*Les personnes physiques et morales qui doivent appliquer les mesures restrictives financières sont obligées de coopérer avec les autorités nationales responsables de la mise en œuvre de ces mesures. Il faudra fournir aux autorités nationales compétentes toute information pertinente sur, inter alia, les comptes gelés, l’identité des personnes désignées, les crédits éventuels sur ces comptes, les tentatives de contourner le régime des sanctions financières, les cas d’homonymie. Les informations transmises aux autorités nationales ne peuvent pas être utilisées à d’autres fins que celles pour lesquelles elles ont été transmises, à savoir la mise en œuvre effective des mesures restrictives.*”

Cf. <https://mfin.gouvernement.lu/dam-assets/dossiers/sanctions-financi%C3%A8res-internationales/documentation/guidesheader2021/Guide-de-bonne-conduite-Sanctions-financieres-TF-FR.pdf> (p. 12s).

⁴⁸ Pour les avocats visés à l’article 2 point 12 de la présente loi, les règles suivantes sont d’application:

1) Les avocats ne sont pas soumis aux obligations prévues à l’article 5 paragraphe (1) pour ce qui concerne les informations reçues d’un de leurs clients ou obtenues sur un de leurs clients lors d’une consultation juridique, lors de l’évaluation de la situation juridique de ce client ou dans l’exercice de leur mission de défense ou de représentation de ce client dans une procédure judiciaire ou concernant une telle procédure, y compris dans le cadre de conseils relatifs à la manière d’engager ou d’éviter une procédure, que ces informations soient reçues ou obtenues avant, pendant ou après cette procédure.

2) En lieu et place d’une déclaration directe au procureur d’Etat auprès du tribunal d’arrondissement de Luxembourg, les faits visés à l’article 5 paragraphe (1) point a) doivent être déclarés au bâtonnier de l’Ordre des Avocats au tableau duquel l’avocat déclarant est inscrit conformément à la loi du 10 août 1991 sur la profession d’avocat. Dans ce cas le bâtonnier de l’Ordre des Avocats vérifie le respect des conditions prévues au paragraphe précédent et à l’article 2 point 12. Dans l’affirmative, il est tenu de transmettre les informations reçues au procureur d’Etat auprès du tribunal d’arrondissement de Luxembourg.

be gathered by lawyers. Indeed, although paragraph 2 specifies that reports under Article 5(1) *a*) on suspicious transaction etc. need to be addressed to the Bâtonnier instead of the *tribunal d'arrondissement*, there is no *lex specialis* with regards to the information that might be requested by the CRF. Hence, it seems that the *lex generalis* of Article 7(1) should be applied with regards to specific information gathered by lawyers in the exercise of their profession.

It is also interesting to note that when it comes to national cooperation with other administrations, Article 74-6 of the *Loi sur l'organisation judiciaire*, as amended by a 2018 law⁴⁹, lays down more specific rules when it comes to the information that might be requested by the CRF from the latter.

d. On the conditions and limits to obtain information

Pursuant to Article 74-6 of the *Loi sur l'organisation judiciaire*, as amended by the 2018 law, the CRF may have to ask and motivate the access to information contained in instruction and inquiry folders. Furthermore, it will have to ask, although a simple request is sufficient, public administrations to be granted access to financial and administrative information. Nonetheless, no provision requiring previous court orders or STR/SAR could be found.

A list of predicate offences can still be found under article 506-1 CC, since the initial proposal of getting rid of this list was not accepted. Nonetheless, although the list is very broad, encompassing various predicate offences to money laundering activities, a question may arise, namely whether the information that the CRF may require from obliged entities is somehow limited to

⁴⁹ Dans le cadre de l'exercice de sa mission, la CRF a un accès direct aux données, en matière pénale, traitées par les autorités judiciaires, au bulletin N° 1 du casier judiciaire et aux banques de données visées à l'article 48-24 du Code de procédure pénale.

La CRF peut accéder, sur demande sommairement motivée, aux informations et pièces des dossiers d'enquête et d'instruction, en cours ou clôturés.

La CRF peut accéder, sur simple demande, aux informations administratives et financières nécessaires pour remplir ses missions, détenues par toute autre administration publique.

the predicate offences under Article 506-1. In other words, could the CRF ask for information with regards a potential offence that is not foreseen under Article 506-1? The answer is not straightforward, and no definitive one seems to be found in the various laws, if not for the fact that as already mentioned the information needs to be relevant for AML purposes.

e. FIU's access power to national registers

In accordance with article 32(4) of Directive 849/2015, the CRF, as national FIU, has been granted under several national laws the right to access information on various registers, notably the five that will be briefly mentioned hereinafter.

i. The central register or retrieval systems of the bank accounts' owners

Under Article 8(1) of the «*loi du 25 mars 2020 instituant un système électronique central de recherche de données concernant des comptes de paiement et des comptes bancaires identifiés par un numéro IBAN et des coffres-forts tenus par des établissements de crédit au Luxembourg*», the CRF has been granted direct, immediate and non-filtered access to the central register or retrieval system of bank accounts and safes held by credit institutes exercising here in Luxembourg. Similarly, the direct access to the register of fiducies and trusts.⁵⁰

ii. The central register of the beneficial owners

To comply with article 30 of the 849/2015 Directive, Article 11 of the *Loi du 13 janvier 2019 instituant un Registre des bénéfici-*

⁵⁰ Loi du 10 juillet 2020 portant transposition de l'article 31 de la directive (UE) 2015/849 du Parlement européen et du Conseil du 20 mai 2015 relative à la prévention de l'utilisation du système financier aux fins du blanchiment de capitaux ou du financement du terrorisme, modifiant le règlement (UE) n° 648/2012 du Parlement européen et du Conseil et abrogeant la directive 2005/60/CE du Parlement européen et du Conseil et la directive 2006/70/CE de la Commission, tel que modifié par la directive (UE) 2018/843 du Parlement européen et du Conseil du 30 mai 2018 modifiant la directive (UE) 2015/849 relative à la prévention de l'utilisation du système financier aux fins du blanchiment de capitaux ou du financement du terrorisme ainsi que les directives 2009/138/CE et 2013/36/UE.

ciaires effectifs, grants the CRF, in its role of national authority access to the information foreseen under Article 3⁵¹ of the same law.

With regards to the recent judgment of the CJEU which put an end to the unrestricted and general access to the Register of Beneficial Owners⁵², it should be noted that clearly this measure did not impact the access by the CRF to the mentioned register.

⁵¹ (1) Les informations suivantes sur les bénéficiaires effectifs des entités immatriculées doivent être inscrites et conservées dans le Registre des bénéficiaires effectifs:

- 1° le nom;
- 2° le(s) prénom(s);
- 3° la (ou les) nationalité(s);
- 4° le jour de naissance;
- 5° le mois de naissance;
- 6° l'année de naissance;
- 7° le lieu de naissance;
- 8° le pays de résidence;
- 9° l'adresse privée précise ou l'adresse professionnelle précise mentionnant:

a) pour les adresses au Grand-Duché de Luxembourg: la résidence habituelle figurant dans le registre national des personnes physiques ou, pour les adresses professionnelles, la localité, la rue et le numéro d'immeuble figurant au Registre national des localités et des rues, tel que prévu par l'article 2, lettre g) de la loi modifiée du 25 juillet 2002 portant réorganisation de l'administration du cadastre et de la topographie, ainsi que le code postal;

b) pour les adresses à l'étranger: la localité, la rue et le numéro d'immeuble à l'étranger, le code postal et le pays;

10° pour les personnes inscrites au Registre national des personnes physiques: le numéro d'identification prévu par la loi modifiée du 19 juin 2013 relative à l'identification des personnes physiques;

11° pour les personnes non résidentes non inscrites au Registre National des Personnes Physiques: un numéro d'identification étranger;

12° la nature des intérêts effectifs détenus;

13° l'étendue des intérêts effectifs détenus.

(2) Par exception au paragraphe 1er, les sociétés dont les titres sont admis à la négociation sur un marché réglementé au Grand-Duché de Luxembourg ou dans un autre État partie à l'accord sur l'Espace économique européen ou dans un autre pays tiers imposant des obligations reconnues comme équivalentes par la Commission européenne au sens de la directive 2004/109/CE du Parlement européen et du Conseil du 15 décembre 2004 sur l'harmonisation des obligations de transparence concernant l'information sur les émetteurs dont les valeurs mobilières sont admises à la négociation sur un marché réglementé et modifiant la directive 2001/34/CE inscrivent uniquement le nom du marché réglementé sur lequel leurs titres sont admis à la négociation.

⁵² CJEU, 22 nov. 2022, C-37/20 and C-601/20, *VM and Sovim SA v. Luxembourg Business Registers*.

iii. Central register of the real estate owners

No specific provision seems to be found, since the Register of the real estate owners is held by a public administration (Administration du Cadastre et Topographie), the provision of Article 74-6 (cf. *infra*) should apply.

iv. Other financial and administrative information accessible by the FIU according to domestic law

Under Article 74-6 of the *loi sur l'organisation judiciaire*, a simple request towards public administrations will be sufficient for the CRF to be granted access to financial and administrative information.

v. Other police information accessible by the FIU, including those provided for implementation of art. 8 Directive 1153/2019

Pursuant to Article 74-6 of the *loi sur l'organisation judiciaire*, as amended by the already mentioned 2018 law, the CRF will have to ask and motivate the access to information contained in instruction and inquiry folders.

4. COOPERATION WITH OTHER FIUS

The CRF is a member of the Egmont Group, which aims at fostering cooperation between member Financial Intelligence Units by i.a. facilitating the exchange of financial intelligence related to money laundering, associated predicate offences and terrorist financing. To that end, the Egmont Group provides its members with a secure encrypted IT communication tool (the Egmont Secure Web). In addition to the Egmont Secure Web, the CRF uses the FIU.Net for exchanging financial intelligence in a secure and encrypted manner with its EU counterparts pursuant to the requirements of article 53 of the 4th AML Directive.⁵³

⁵³ Ministry of Justice, *ML/TF Vertical Ertical Risk Assessment - Legal Persons And Legal Arrangements*, February 2022, pp. 44-5. <https://mj.gouvernement.lu/dam-assets/dossiers/blanchiment/ML-TF-Vertical-Risk-Assessment-Feb-2022.pdf>.

- a. *Rules on autonomous and on request dissemination of information from the domestic FIU to other European FIUs (art. 53)*

According to Article 74-5 (1)⁵⁴ of the *Loi sur l'organisation judiciaire*, as modified by Article II of the *Loi du 10 août 2018*, the CRF is allowed to exchange pertinent information with other FIUs spontaneously or upon request.

It is also worth noting that: “*Luxembourg law does not require the CRF to enter into any special agreement to exchange financial information related to ML, associated predicate offences or TF with other FIUs. However, a number of foreign FIUs are bound by the obligation of a prior agreement and the CRF has therefore signed memoranda of understanding with the following foreign FIUs (as at 18 January 2022): Andorra, Australia, Belgium, Benin, Canada, Chile, China, Finland, France, Indonesia, Israel, Japan, Mauritius, Macedonia, Monaco, Panama, Philippines, the Republic of Congo, Romania, Russia, San Marino, Senegal, Singapore, South Africa, South Korea, Tunisia, Turkey and the Vatican City*”.⁵⁵

With regards to cross-border report (XBR) exchange of information, this kind of exchange is applicable to:

- Online providers with a head office in Luxembourg & which operate under an EU passport in other MS
- Reports that respect the standards put in place between the CRF and the concerned entities
- Reports on typologies defined by the CRF and the concerned entities.

⁵⁴ La CRF peut échanger, spontanément ou sur demande, avec une CRF étrangère, quel que soit son statut, toutes les informations et pièces susceptibles d’être pertinentes pour le traitement ou l’analyse d’informations en lien avec le blanchiment, les infractions sous-jacentes associées ou le financement du terrorisme et la personne physique ou morale en cause, même si la nature de l’infraction sous-jacente associée n’est pas identifiée au moment de l’échange. Sont visées les données à caractère personnel et les autres informations et pièces dont elle dispose ainsi que celles qu’elle peut obtenir spontanément en vertu de l’article 74-3, paragraphe 4, et, sur demande, en vertu de l’article 5, paragraphe 1^{er}, b) de la loi modifiée du 12 novembre 2004 relative à la lutte contre le blanchiment et contre le financement du terrorisme.

⁵⁵ Ministry of Justice, *ML/TF Vertical Risk Assessment - Legal Persons And Legal Arrangements*, February 2022, p. 44. <https://mj.gouvernement.lu/dam-assets/dossiers/blanchiment/ML-TF-Vertical-Risk-Assessment-Feb-2022.pdf>.

As for the XBR system, it is not used by the CRF for exchanges in relation to terrorism and/or its financing.

With regards to cross-border dissemination (XBD) exchange of information (cf. rapport CRF 2020, pp. 18-19).

b. On the conditions and limits to the dissemination of information to other European FIUs

i. Structure and content of the request

Article 74-5 (2) of the *Loi sur l'organisation judiciaire* enumerates the information that foreign FIUs asking for cooperation need to provide for, namely: the pertinent facts, their context, the reasons for the request and indications on how the information sought will be used. Furthermore, this same Article entitles the CRF to agree on an automatic modality of information exchanges with foreign FIUs.

ii. Nature or status of the requesting FIU

Article 74-5 (1) of the above-mentioned law provides the CRF with a broad margin of cooperation with foreign FIUs. Indeed, pursuant to the latter the CRF may exchange information with a foreign FIU “whatever its status” (*quel que soit son statut*).

iii. Differences between national law definitions of predicate crimes

Although it is not mentioned *expressis verbis*, different articles seem to suggest that the differences among national definitions of predicate offences do not play a role when they occur within national laws of EU Member States. According to Article 74-5(1) of the *Loi sur l'organisation judiciaire* exchange of information is possible even if the predicate offence is not identified at the moment of the exchange. Pursuant to Article 74-5(4) the CRF may only exceptionally refuse (the refusal must be motivated) the exchange of information with another EU FIU namely when such an exchange is contrary to its national fundamental principles (no definition of the latter). Whereas Article 74-5(5) gives an exhaustive list of cases when the CRF may refuse the exchange of information with a third country FIU, notably when the exchange

“does not enter into the application scope of the legal provisions on AML or CFT”. Article 74-5(7) only and explicitly refers to tax offences while stating that the differences between national law definitions of the latter do not prevent the CRF to exchange information or help a FIU of another EU Member State.

iv. National provisions on secrecy or confidentiality

No provision on secrecy and/or confidentiality can be found in the Law on judicial organization.

What is more, Article 74-2(4) forces any authority, public officer and public agents or employees to inform to the CRF of suspicious operations notwithstanding any rule on secrecy or confidentiality.

v. Inquiry, investigation or proceeding underway in the requested Member State

No provision concerning an ongoing inquiry, investigation or proceeding in the requested Member State can be found in the *loi sur l'organisation judiciaire* (especially article 74(5)) with regards to EU countries FIUs.

Article 74(5) 2° of the same law allows the CRF to refuse an exchange of information in case it would undermine an ongoing procedure or inquiry. Yet, this same provision specifies that the latter should come from a third country (outside the EU).

vi. Other limits and conditions

With regards to the compliance by national rules to Article 50(a) of Directive 849/2015 or the ‘Principles for Information Exchange between FIU’ of the EGMONT Group, it should be noted that the former do not seem to contain any measure that could be seen as a limit to collaboration between FIUs. Article 74-5(8) of the *loi sur l'organisation judiciaire* grants the CRF the possibility to subordinate the exchange of information to another foreign FIU to the condition that the latter will be used for the ends they were required for. Yet, this accuracy does not seem contrary to Article 50(a) of Directive 843/2018.

5. COOPERATION WITH LAW ENFORCEMENT AND JUDICIAL AUTHORITIES

a. *The dissemination of information to National investigative authorities according to national rules*

According to Article 74-2 of the *Loi sur l'organisation judiciaire*⁵⁶, the mission of the CRF is not only to collect and analyse the information on suspicious operations and transactions but also to disseminate them among competent authorities (in particular the ones listed above under 2) and to the competent judicial authorities. This dissemination can be spontaneous or upon request of the one of the aforementioned authorities. The CRF draws a distinction between active cooperation – when the CRF spontaneously or upon request disseminates information – or passive cooperation – when, on the contrary, the CRF is requested to do so by other competent authorities or the CRF receives information collected by other authorities.

The content of the information includes the report received by the CRF as well as its analysis of the latter and every additional information collected on the case, in relation to money laundering, terrorism financing and their related predicate offences (the ones listed under Article 506-1 CC and Article 8 Law 19 February 1973 on drugs⁵⁷).

As long as possible, the spontaneous dissemination has to be “selective”: the CRF has to select only the information that are relevant for the specific counterpart, in a way to “allow the authorities to focus on cases and information that are pertinent to fulfil their tasks”.⁵⁸

Here below some figures from the last CRF Annual Report on 2020⁵⁹:

⁵⁶ Article 74-2 Law 7 March 1980 as modified by Law 10 August 2018.

⁵⁷ Article 74-2(2) Law 7 March 1980 as modified by Law 10 August 2018.

⁵⁸ Article 74-2(2) Law 7 March 1980 as modified by Law 10 August 2018: «Dans la mesure du possible, la dissémination spontanée des informations est faite de manière sélective, de façon à permettre aux services et autorités récipiendaires de se concentrer sur les cas et informations pertinents pour l'accomplissement de leurs missions respectives».

⁵⁹ Rapport annuel 2020 Rapport d'activité de la Cellule de renseignement financier, Décembre 2021.

Autorités de contrôle	Coopération active			Coopération passive		
	2020	2019	Variation	2020	2019	Variation
Administration de l'enregistrement, des domaines et de la TVA (AED)	18	18	0	9	6	+3
- en tant qu'autorité fiscale	12	11	+1	7	6	+1
- en tant qu'autorité de contrôle LBC/FT	1	1	0	0	0	0
- demandes	5	6	-1	2	0	+2
Commissariat aux assurances (CAA)	1	4	-3	1	1	0
Commission de surveillance du secteur financier (CSSF)	5	9 ¹⁹	-4	81	66	+15
Total	24	49	-15	91	73	+18

Autres autorités	Coopération active			Coopération passive		
	2020	2019	Variation	2020	2019	Variation
Administration des contributions directes (ACD)	92	72	+20	0	4	-4
Administration des douanes et accises (ADA)	0	1	-1	20	15	+5
Service de renseignement de l'État (SRE)	17	16	+1	15	12	+3
Total	109	89	+3	35	31	+4

Without any explicit mention, these provisions are though implementing the information sharing foreseen by Directive 1153/2019.

As for the information related to bank accounts, the institution now has access to the central register of Luxembourg bank accounts. In its work of collecting and analysing financial intelligence, the FIU has had a key piece in its arsenal of tools since 2020⁶⁰: access to the central electronic research system concerning bank accounts and safes. Indeed, each financial institution regulated in Luxembourg must provide the financial sector regulator, the Financial Sector Supervisory Commission (CSSF), with access to their client files. This allows the CSSF to consolidate a central register of bank account holders in Luxembourg in order to facilitate its checks on the entities under its regulation.

⁶⁰ Law 25 March 2020 (La loi modifiée du 25 mars 2020 instituant un système électronique central de recherche de données concernant des comptes de paiement et des comptes bancaires identifiés par un numéro IBAN et des coffres-forts tenus par des établissements de crédit au Luxembourg).

In its latest annual report, the FIU states that it has direct access to the central register of bank accounts since 2020. As a result, its analysts can quickly check whether a person holds bank accounts in Luxembourg and in which financial institutions. This tool is used regularly, in fact whenever there is an indication of financial flows passing through Luxembourg. However, the tool as foreseen in the original version of the Law 25 March 2020 had its limits. Managed by the CSSF, the FIU did not have administrator access. Thus, each FIU analyst wishing to access it had to do it manually via a dedicated and secure web interface. With Law 22 June 2022, Luxembourg amended Article 8 Law 25 March 2020 granting to the CRF direct, instantaneous, and non-filtered access to those registers.⁶¹

In order to further strengthen their collaboration in the fight against money laundering and the financing of terrorism, the Luxembourg Bankers' Association (ABBL), the CRF and the CSSF have signed a Public Private Partnership on 13 September 2022. Such a public-private dialogue helps providing clarity on risks related to specific activities, typologies of crimes, regulatory expectations, and also aims at identifying specific areas or issues where more regulatory guidance is needed. This signature is the culmination of a procedure launched three years ago. In the course of the year 2019, the ABBL's Private Banking Cluster became associated to the process initiated by the CSSF and four working meetings between the CSSF and the ABBL were organised.

On 1 December 2019, the CSSF published the first Private Banking Sub-Sector Risk assessment in Luxembourg.

In 2020, a permanent joint Expert Working Group on ML/FT risks in Private Banking was created with representatives of the Private Banking sector, the ABBL, the CRF and the CSSF. The first meeting took place on 25 February 2020 and meetings continued on a regular schedule afterwards to discuss topics that are relevant to ML/FT prevention in Private Banking. The need

⁶¹ Article 8 Law 25 March 2020 as modified by Law 22 June 2022: «Dans le cadre de ses missions, la CRF a accès au système électronique central de recherche de données visé au chapitre 3 de manière directe, immédiate et non filtrée afin d'effectuer des recherches dans les données visées à l'article 2, paragraphe 1^{er}».

to enlarge the discussions to banking in general progressively arose and in 2022, the members of the Expert Working Group decided to create an overarching Expert Working Group on ML/FT risks in the banking sector in Luxembourg, called Expert Working Group - Compliance, made up with Chief Compliance Officers of the banking sector in Luxembourg, representatives of the ABL, the CSSF and the CRF.

As for the cooperation with the public prosecutors and other judicial authorities, it follows the aforementioned dissemination of information, spontaneously or upon request. Article 74-6 Loi sur l'organisation judiciaire authorizes the CRF to have access to the Prosecutorial Digital Data Base (JU-CHA). According to the 2020 CRF Report, it is essential for the national FIU to immediately know whether the person concerned by a STR is already under investigation for money laundering or correlated crimes.

On the contrary, the Parquet has no direct access to the CRF data bases. Access to information is granted upon request of the Parquet according to Article 74-4 Loi sur l'organisation judiciaire.

In 2019 a new agreement has been signed between the CRF and the Parquet⁶² in order to make operational the choice to focus on the most serious cases, this option being possible given the opportunity principle governing prosecutorial choices.

Considering the importance of Luxembourg as an international financial hub, the CRF coordinates the efforts together with other FIUs as well as the Parquet. Many cases are related to predicate crimes committed abroad or to victims located abroad. A strict cooperation of both FIUs and prosecutorial offices with foreign counterparts is though essential.

The 2020 CRF Report states that a joint initiative with the Parquet brought to an increase of international cases investigated at national level⁶³, including cases in which the predicate offence is the crime of *non-justification de ressources* (Article 324-*quater* CC)⁶⁴.

⁶² The agreement is not accessible for the public.

⁶³ 2020 CRF Report, p. 70.

⁶⁴ The minimum term of imprisonment being of 1 year, it is considered as a predicate offence according to Article 506-1 CC.

In 2020, 197 spontaneous information have been sent to the Parquet on the following cases⁶⁵:

	AA	EP	IJ	JR	EC	RE	Total
Blanchiment	5	29	3	1	7	0	45
Corruption	0	0	0	0	1	0	1
Cybercriminalité	1	0	0	0	0	0	1
Enlèvement, séquestration et prise d'otages	0	0	0	1	0	0	1
Exploitation sexuelle y compris celle des enfants	2	0	0	0	0	0	2
Faux	4	5	1	0	3	0	13
Faux monnayage	1	1	0	0	0	0	2
Fraude	30	32	21	2	18	5	108
Infractions fiscales pénales	0	1	0	0	4	0	5
Terrorisme et/ou financement du terrorisme	0	0	1	0	2	0	3
Trafic illicite de stupéfiants et de substances psychotropes	1	1	0	0	0	0	2
Vol	0	1	0	0	0	0	1
Autre	2	2	0	6	3	0	13
Total	46	72	26	10	38	5	197

According to the 2020 CRF Report, the low number of final decisions and of cases under prosecution is due to the complexity of money laundering cases⁶⁶. The previous figures only refer to information spontaneously transmitted from the CRF to the parquet. Here below the amount of request for information received and processed by the CRF. More concretely, the CRF received in the year 2019, 60 cooperation requests from the *Parquet* of Luxembourg and 12 from the *Parquet* of Diekirch.⁶⁷

b. The dissemination of information to supranational authorities: the case of EPPO, Europol and OLAF

The European Public Prosecutor's Office (EPPO) signed a Memorandum of Understanding with the Financial Intelligence Unit of Luxembourg (CRF) on 18 August 2022.

⁶⁵ As for the abbreviations: AA Ad acta classement sans suite; EP Enquête préliminaire ordonnée par le parquet; IJ Instruction judiciaire par le juge d'instruction; JR Jugement rendu; EC Analyse du dossier en cours au parquet; RE Renvoi par la chambre du conseil.

⁶⁶ 2020 CRF Report, p. 71.

⁶⁷ *Ibid.*, p. 71.

This Memorandum of Understanding provides a structured framework for cooperation between the bodies. It aims to facilitate the exchange of information concerning suspicious transactions or activities reports regarding suspicious facts that might fall within EPPO's competence. It also underlines the efforts of both parties to make the fight against money-laundering and associated predicate offences adversely affecting the European Union's financial interests as efficient as possible.

No specific agreement seems to exist with Europol nor with OLAF but previous years' reports mention the fact that the CRF took part to many meetings with those authorities.

c. Admissibility of the information and analyses of the CRF in criminal proceedings

According to Article 74-4 of the *Loi sur l'organisation judiciaire*, the CRF should comply with the requests of information coming from national competent authorities, including the judicial authorities (but not the parquet). Non execution is though possible if there are reasons to fear that the communication of such information might have a negative impact on the CRF investigation or, in exceptional cases, when the communication would be manifestly disproportionate in relation to the legal interests of an individual or a legal entity, or it appears not relevant with the content of the request.⁶⁸

However, the CRF cannot refuse to transfer information and elements to the prosecutor unless that information has been received from a foreign FIU that specifically opposed the dissemination.⁶⁹

All the competent authorities, including the judicial authorities and the parquet, should communicate to the CRF a follow-up on the information they received from the CRF.⁷⁰

The reports of the CRF may represent a valid *notitia criminis*, as it is witnessed by statistics in the previous section.

⁶⁸ Article 74-4(2) *Loi sur l'organisation*.

⁶⁹ Article 74-4(2) *Loi sur l'organisation*.

⁷⁰ Article 74-4(3) *Loi sur l'organisation*.

As for the admissibility of the information and analyses of FIU's report, no specific concern exists in terms of evidence law. Luxembourg code of criminal procedure dates back to 1808, i.e., the Napoleonian code. It follows an inquisitorial system amended multiple times to accommodate the necessary reforms in terms of guarantees but still does not provide for rigid barriers in terms of evidence. As a consequence, every report coming from administrative authorities is in principle admissible and assessed by criminal courts according to the principles of *loyauté de la preuve* and *intime conviction*.⁷¹

⁷¹ Arrêt n° 983/20 Ch.c.C. du 3 novembre 2020 (Not.: FRE-2020-XXX).