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Practical cross-border insights into ESG law

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1 Setting the Scene – Sources and Overview

1.1 What are the main substantive ESG-related regulations?

The ESG framework in Luxembourg comprises a number of EU regulations, EU legislative measures amending existing regulatory frameworks, national legislation and regulatory guidance, including:

(i) Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector (the "**SFDR**");

(ii) Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment (the "**Taxonomy Regulation**");

(iii) Regulation (EU) 2019/2089 of the European Parliament and of the Council of 27 November 2019 amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks (the "**Low Carbon Benchmark Regulation**");

(iv) five Commission Delegated Regulations and Commission Delegated Directives integrating sustainability issues and considerations into the following EU legislative regimes: (i) UCITS Directive 2009/65/EC, amended by Commission Delegated Directive (EU) 2021/1270; (ii) AIFMD 2011/61/EU, amended by Commission Delegated Regulation (EU) 2021/1255; (iii) MiFID II 2014/65/EU, amended by Commission Delegated Regulation (EU) 2021/1253 and Commission Delegated Directive (EU) 2021/1269; (iv) Solvency II Directive 2009/138/EC, amended by Commission Delegated Regulation (EU) 2021/1256; and (v) Insurance Distribution Directive EU/2016/97, amended by Commission Delegated Regulation (EU) 2021/1257;

(v) the law of 23 July 2016 on the publication of non-financial information (the "**2016 Law**"), which transposed Directive 2014/95 of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups into Luxembourg law; and

(vi) the *Commission de Surveillance du Secteur Financier* (the "**CSSF**") circular 21/773 on the management of climate-related and environmental risks for all credit institutions designated as less significant institutions under the Single Supervisory Mechanism and to all branches of non-EU credit institutions.

1.2 What are the main ESG disclosure regulations?

The main ESG disclosure regulations are: (i) the 2016 Law, which requires certain large undertakings and groups to disclose information relating to environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters; (ii) the SFDR; (iii) the Taxonomy Regulation; and (iv) the Low Carbon Benchmark Regulation.

1.3 What voluntary ESG disclosures, beyond those required by law or regulation, are customary?

Voluntary disclosures beyond those required by law or regulation include the consideration of principal adverse impacts of investment decisions on sustainability factors. In addition, certain other ESG-related regulations have introduced voluntary disclosures; for example, the Low Carbon Benchmark Regulation has introduced two new categories of low-carbon benchmarks, namely: (i) a climate-transition benchmark; and (ii) a specialised benchmark that brings investment portfolios in line with the Paris Agreement regarding the goal to limit the global temperature increase. The categories are voluntary labels designed to assist investors who are looking to adopt a climate-conscious investment strategy. The Luxembourg Finance Labelling Agency ("**LuxFLAG**") promotes the raising of capital for sustainable investments by awarding a label to eligible investment vehicles on a voluntary basis. The categories that are covered include, among others, Environmental, ESG, Climate Finance and Green Bonds. Other voluntary ESG regimes include: (i) Principles for Responsible Investment; (ii) the Financial Stability Board's Task Force on Climate-related Financial Disclosures; (iii) the Global Reporting Initiative; (iv) the Sustainability Accounting Standards Board; (v) the Climate Disclosure Standards Board; (vi) the International Integrated Reporting Council; and (vii) CDP Global (formerly the Carbon Disclosure Project). The vast number of voluntary ESG regimes can pose challenges for companies incorporating and/or being evaluated by multiple frameworks, in particular as these are not always standardised, consistent and comparable in terms of scope, approaches to materiality and reporting standards.

1.4 Are there significant laws or regulations currently in the proposal process?

In addition to the ESG disclosure regulations noted above, there are several other legislative proposals in various stages of the EU's legislative process and these include the Non-Financial Reporting Directive (soon to become the

Corporate Sustainability Reporting Directive), an EU Green Bond Standard ("**EU GBS**"), the EU Ecolabel, Corporate Governance, the Solvency II Directive and Credit Ratings.

1.5 What significant private sector initiatives relating to ESG are there?

There are a number of private-public initiatives relating to ESG. Two significant initiatives include: (i) the Luxembourg Sustainable Finance Initiative ("**LSFI**"); and (ii) LuxFLAG. LSFI is a not-for-profit association that designs and implements the Sustainable Finance Strategy for Luxembourg's financial centre. Its objective is to raise awareness, promote and help develop sustainable finance initiatives in Luxembourg. LuxFLAG is a non-profit organisation that aims to promote capital raising for sustainable investments by awarding a recognisable label (see above) to eligible investment vehicles. Its objective is to reassure investors that the labelled investment vehicles invest in the responsible investment sector. In addition to these ESG initiatives, there are also a number of ESG-related public sector initiatives.

2 Principal Sources of ESG Pressure

2.1 What are the views and perspectives of investors and asset managers toward ESG, and how do they exert influence in support of those views?

Investors are increasingly looking to align their investment decisions with their personal priorities. They are now not only focused on financial returns but also on non-financial outcomes and are seeking to invest in companies that have the capabilities to both achieve and maintain strong financial and ESG performance. This increased investor interest in ESG reflects the growing recognition that performance and value can be enhanced by the inclusion of ESG metrics into companies' business operations and investment decisions.

As ESG has become an integral part of the conversation between asset managers and investors and with many institutional investors actively pursuing a sustainable and responsible investing agenda, asset managers are embracing ESG in order to align stakeholders' interests and avoid short-term investments and results, in return for long-term incentives aligning investment practices with social responsibilities and principles in order to meet investor demands. Investors are also recognising the potential for ESG factors to affect the valuation and performance of companies they invest in, and this has resulted in investors pressurising companies to increase the amount of information disclosed to investors on ESG-related matters.

2.2 What are the views of other stakeholders toward ESG, and how do they exert influence in support of those views?

ESG and sustainable finance is an area that is continuously evolving and growing to meet the expectations of a wide number of stakeholders, including shareholders, policymakers, regulators and central banks. Within the EU and Luxembourg, new regulatory frameworks are being introduced to address and support the European Commission's revised Action Plan on Sustainable Finance. This includes a number of regulations outlined above, including the Taxonomy Regulation, the SFDR, the Low Carbon Benchmark Regulation and the supporting secondary legislation with regard to the delegated acts. There are also a number of matters in progress, including the development of the EU GBS, the EU Ecolabel for financial products, and updating corporate financial reporting under the Non-Financial Reporting Directive. This is in addition to the European Green Deal, the European Commission's plan to make the EU's economy sustainable, which sets out an action plan to boost the efficient use of resources by moving to a clean, circular economy, restoring biodiversity and cutting pollution with the aim of the EU being climate neutral in 2050 with the proposed European Climate Law, which turns the political commitment into a legal obligation. Furthermore, shareholders have placed increasing pressure on companies with respect to social and governance issues, including gender and racial diversity on boards, requiring companies to adopt policies, and enhanced disclosure with respect to ESG matters.

In addition, the CSSF, as the supervisory authority of the financial sector in Luxembourg, is committed to contributing to the achievement of the objectives of the Paris Agreement. For example, it became an official member of the network of greening the financial system ("**NGFS**") in 2019. NGFS' purpose is to help strengthen the global response required to meet the goals of the Paris Agreement and to enhance the role of the financial system in managing risks and mobilising capital for green and low-carbon investments in the broader context of environmentally sustainable development. Moreover, the Luxembourg Government has also launched several initiatives to promote innovative financial ideas to fight against climate change.

2.3 What are the principal regulators with respect to ESG issues, and what issues are being pressed by those regulators?

The principal financial regulator in Luxembourg is the CSSF. The Environment Agency (*Administration de l'environnement*) is responsible for protecting the environment and the quality of the local living environment and may issue fines in certain circumstances.

More broadly within the EU, bodies such as the European Commission, the European Securities and Markets Authority ("**ESMA**"), the European Banking Authority, the European Insurance and Occupational Pensions Authority and the Technical Expert Group (the "**TEG**") are the principal regulators with respect to ESG issues. The key issues being pressed by these bodies are the renewed sustainable finance strategy and the action plan on financing sustainable growth, which includes the following: (i) developing an EU classification system for environmentally sustainable economic activities; (ii) developing EU standards (such as the EU GBS) and labels for sustainable financial products (via Ecolabel) to protect the integrity and trust of the sustainable finance market; (iii) fostering investment in sustainable projects; (iv) incorporating sustainability in financial advice; (v) developing sustainability benchmarks; (vi) sustainability in research and ratings; (vii) disclosures by financial market participants; and (viii) sustainability in prudential requirements, strengthening sustainability disclosures by corporates and fostering sustainable corporate governance and promoting long-termism.

2.4 Have there been material enforcement actions with respect to ESG issues?

At the broader European level, there have been a number of material enforcement actions with respect to ESG issues regarding issuers whose securities are admitted to trading on a regulated market. Investors are also increasingly demanding reliable and relevant disclosure on ESG factors. On 6 April 2021, ESMA, the EU securities markets regulator, published its annual report on enforcement and regulatory activities of European enforcers in 2020. The report presents the 2020 activities of ESMA and of European accounting enforcers when examining compliance of financial and non-financial statements provided by European issuers. In light of the increased importance of companies' ESG disclosures, European enforcers increased their enforcement activities on non-financial information in 2020, leading to examinations of 737 non-financial statements or 37% of the total estimated number of issuers required to publish a non-financial statement. These examinations brought about 39 enforcement actions, constituting an action rate of 5%.

2.5 What are the principal ESG-related litigation risks, and has there been material litigation with respect to ESG issues, other than enforcement actions?

The principal litigation risks arise from shareholder activism and related investor claims against companies and their directors, particularly in relation to materially false or misleading ESG disclosures or representations made in prospectuses or investor reports. We are not aware of any material decisions by the Luxembourg Courts in relation to ESG issues. Nonetheless, the trend of ESG-related litigation, which has arisen elsewhere, may surface to some degree in Luxembourg in the future.

2.6 What are current key issues of concern for the proponents of ESG?

The key issues of concern for ESG proponents are lack of transparency and lack of reporting standards. In addition, a lack of uniformity with respect to the various classifications available under the SFDR is also a concern for proponents of ESG. Many asset managers for whom ESG and responsible investing have been a cornerstone of their businesses are concerned that certain competitors may be gaining an unfair advantage as a result of these new classifications. The SFDR does not prescribe how an asset manager should determine the category to which its funds belong. The lack of guidance with respect to the exact measurement methodology as well as the potential to incorrectly categorise a fund may make it difficult to compare investment options and may potentially lead to greenwashing. Furthermore, there is a concern that asset managers may not have sufficient data to support certain SFDR classifications, as data does not exist for certain asset classes.

3 Integration of ESG into Business Operations and Planning

3.1 Who has principal responsibility for addressing ESG issues? What is the role of the management body in setting and changing the strategy of the corporate entity with respect to these issues?

ESG is no longer the sole responsibility of a company's sustainability officer. Instead, in light of investors' expectations that boards and senior management are fully engaged on ESG and managing companies for long-term success, they have an essential role in ensuring compliance with various ESG-related legislation, addressing an organisation's ESG issues and for assessing the potential impact of such ESG issues on the organisation's operating model. The key issue for management bodies is to identify ESG themes that are emerging as industry drivers ahead of their competitors in order to gain a competitive advantage. This requires management bodies to identify the various stakeholders, their incentives and the matters that may bring about change with respect to ESG, including obtaining insight in respect of the companies' social or environmental impact. By connecting business goals with the demands of investors with respect to ESG issues and differentiating from competitors, companies can increase revenue and gain competitive advantage. In order to set and change the strategy of a corporate entity with respect to ESG matters, management bodies should adopt strategic practices to establish accountability structures for ESG, identify and create a suitable corporate purpose and culture, enhance investor transparency, and ultimately seek to balance investors' ESG preferences against business priorities. Management bodies play a key role and are responsible for ensuring a company's mission is achieved.

3.2 What governance mechanisms are in place to supervise management of ESG issues? What is the role of the board and board committees?

The structures and processes in place to supervise management of ESG issues depend on the nature and scale of each individual company. Boards play an important role in driving ESG development within their companies, and board oversight on ESG issues can help businesses better manage their ESG-related risks and opportunities. This includes a board's oversight responsibilities. Boards also play an essential role in assessing an organisation's environmental and social impacts and understanding the impact of ESG issues on the organisation's operating model. Boards have a crucial role to ensure companies are aware of, and are able to navigate, the ever-changing landscape and exercise oversight in this respect; such oversight should be informed, strategic and aligned with the company's business model to create long-term value. The board will also play a role in identifying the issues as well as evaluating and recommending steps to be taken with respect to ESG issues.

Investors are increasingly turning towards the boards of companies for accountability. Key performance indicators ("**KPIs**") are also in place to supervise the management of ESG issues, used as a tangible measurement to quantify the extent to which a company is achieving its goals. Investors expect board members to be competent in the area of ESG matters.

With regard to providing oversight and supervision in this area, consideration should be given to allocating oversight responsibilities to consider: (i) which activities should be overseen by the board and those that should be delegated to a committee, for example, a sustainability committee, which could include providing guidance to management; (ii) disclosure of information with regard to information that should be shared between the board and management including, for example, KPIs and metrics in order to understand the importance of certain ESG issues; and (iii) ESG as part of the board's oversight and strategy by incorporating ESG initiatives into the overall company strategy, and establishing metrics to include ESG initiatives to assess these performance indicators against the overall company strategy and ensuring oversight of ESG integration.

3.3 What compensation or remuneration approaches are used to align incentives with respect to ESG?

A large number of companies are introducing ESG targets in executive remuneration packages to hold executives to account for the delivery of sustainable business goals and using compensation or remuneration incentives to align executive compensation with shareholder interests with respect to ESG. Examples of such policies include paying bonuses only when shareholder return targets are reached for a number of years in succession. The desired outcome being that the company will increase transparency for shareholders and create more responsible standards for achieving long-term company growth and shareholder value over executive pay. One approach used to align incentives with respect to ESG is to have bonuses depend largely, or solely, on executives' success in respect of strategic opportunities related to sustainability, while continuing to monitor and disclose aspects of ESG performance, and insisting on seeing ESG metrics to ensure executives act responsibly, mitigate risk and comply with regulations. Compensation committees can use their discretion to adjust pay after the fact for sustainability performance in these areas. In order to integrate ESG issues into executive pay, companies should firstly adopt a clear process for identifying appropriate ESG metrics that relate to sustainable shareholder returns and company strategy. Linking ESG metrics to a reward system in a manner that forms a substantial component of the overall remuneration framework, and integrating ESG targets within a particular time frame that corresponds with the business strategy, will ensure that such ESG factors are used to incentivise high performance.

3.4 What are some common examples of how companies have integrated ESG into their day-to-day operations?

ESG is fast becoming an inextricable part of how companies do business and in order to remain competitive and respected, companies must establish an ESG strategy. To this end, companies are taking proactive steps to integrate ESG into their business operations. One example of this is the creation of reward systems that link performance with ESG metrics and tying this in with employee compensation. This in turn may lead to the attraction of, and retention of, talent. Other examples include ensuring ESG considerations form part of the company's strategic objectives as well as offering ESG-focused solutions to existing and future challenges.

In addition, with regard to social issues such as insufficient diversity of talent as well as gender and racial inequality, companies have addressed this through their recruitment process, putting in place committees and policies to improve diversity and inclusion. Companies are also setting measurable goals (with a defined timeline) to increase diversity among senior leadership.

Environmental matters have also been integrated into the day-to-day operations of companies by reducing the amount of energy and resources used by companies, with certain companies committing to net-zero carbon emissions by 2040.

4 Finance

4.1 To what extent do providers of debt and equity finance rely on internally or externally developed ESG ratings?

Issuers of debt and equity finance rely on both internally and externally developed ESG ratings and not just financial data in order to add value by both improving performance and reducing volatility returns. In the past decade, there has been a significant increase in the use of ESG information in the investment process with providers of debt and equity finance and investors alike recognising that ESG ratings have real value in driving investment performance. ESG ratings can complement existing factors such as liquidity, volatility and performance. Investors are increasingly considering a company's ESG rating when making investment decisions. Companies that produce low ESG ratings can be subject to criticism, whereas companies that produce high ESG ratings may see an increase in investor demand and investment flows.

4.2 Do green bonds or social bonds play a significant role in the market?

Both green bonds and social bonds play a significant role in the market. Green bonds are debt securities issued to finance or refinance green projects with positive environmental outcomes while social bonds tend to be used to finance or refinance projects with positive social outcomes.

In 2007, the Luxembourg Stock Exchange (the "**LuxSE**") listed the world's first green bond. Since then, the LuxSE has become the leading venue for this asset class. The Luxembourg Green Exchange ("**LGX**"), the world's first platform dedicated to green bonds, was launched in 2016. Today, LGX is the world's leading centre for the listing of green bonds and the European leader in responsible investment fund assets. LGX has now expanded to include social, sustainability and sustainability-linked bonds.

4.3 Do sustainability-linked bonds play a significant role in the market?

Sustainability-linked bonds ("**SLBs**") play an increasingly significant role in the market. SLBs aim to further develop the key role that debt markets can play in funding and encouraging companies that contribute to sustainability. However, unlike green bonds and social bonds, there are no restrictions on how the proceeds from SLBs may be used. SLBs are any type of bond instrument for which the financial and/or structural characteristics can vary depending on whether the issuer achieves the predefined sustainability/ESG objectives within a set timeline. They represent a source of financing for companies (from any sector) that set clear and ambitious science-based targets to become more sustainable.

4.4 What are the major factors impacting the use of these types of financial instruments?

The green bond principles ("**GBPs**"), social bond principles ("**SBPs**") and sustainability-linked bond principles ("**SLBPs**") published by the International Capital Market Association (the "**ICMA**") provide guidelines relating to green bonds, social bonds and SLBs, respectively, including disclosure and reporting guidelines, and are a major factor impacting the use of these financial instruments. The GBPs, SBPs and SLBPs are voluntary for issuers and their advisors in structuring, disclosing and reporting on green bonds, social bonds and SLBs that outline best practices to incorporate forward-looking ESG outcomes and promote integrity in the development of the SLB market, as well as providing issuers with guidance on the key components involved in SLBs. The GBPs, SBPs and SLBPs emphasise the required transparency, accuracy and integrity of information that will be disclosed and reported by issuers to stakeholders through core components and key recommendations.

4.5 What is the assurance and verification process for green bonds? To what extent are these processes regulated?

Industry-accepted GBPs developed by the ICMA ensure such "green bonds" meet the rules of the GBPs. There are also standards such as the Climate Bonds Standard and Certification

Scheme, an investor-focused organisation that seeks to mobilise investors, industry and government to catalyse green investments at the speed and scale required to avoid dangerous climate change and meet the goals of the Paris Agreement. The Certification Scheme allows investors, governments and other stakeholders to identify and prioritise "low-carbon and climate-resilient" investments and avoid greenwashing. In addition, following the establishment of the TEG on sustainable finance in 2018 by the European Commission, the TEG has made recommendations to establish the EU GBS. The TEG has proposed that any type of listed or unlisted bond or capital market debt instrument issued by a European or international issuer that is aligned with the EU GBS should qualify as an EU green bond. The TEG has also published the "EU Green Bond Standard Usability Guide" (the "**Guide**"), which offers recommendations from the TEG on the practical application of the EU GBS. The Guide aims to support potential issuers, verifiers and investors of EU green bonds. The TEG proposes that the use of the EU GBS remains voluntary, and builds on market best practices such as the GBPs developed by the ICMA. At present, issuers having an EU green bond voluntarily verified by an external verifier has become common practice. Guidance on voluntary verification has been available thanks to the ICMA's Guidelines for External Reviews. The EU GBS builds on these foundations while formalising it and requiring additional processes. It institutes mandatory prior verification of the alignment of green bond issues. The TEG has recommended that oversight and regulatory supervision of external review providers eventually be conducted via a centralised system organised by ESMA.

With respect to Luxembourg specifically, LuxFLAG launched a label for green bonds in 2017. The "Green Bond Label" is granted to eligible instruments that finance green projects but only after a rigorous assessment. It evaluates true investment strategy commitments and helps investors in the selection of products, and applicants must submit independent third-party assurance reports.

5 Impact of COVID-19

5.1 Has COVID-19 had a significant impact on ESG practices?

Although ESG issues dominated the regulatory and public arena prior to the outbreak of COVID-19, there was a concern that interest in ESG would fade in the face of tough market conditions. However, the opposite appears to have occurred with COVID-19 seemingly accelerating ESG investing and sustainability practices. COVID-19 has provided companies worldwide with the opportunity to reflect on ESG, their business practices and responsible investing. It has also been the first test of whether investors and asset managers alike are truly dedicated to sustainable investments and ESG, or if ESG is just another case of greenwashing or PR spin. COVID-19 has increased investor focus on ESG, highlighting the role that good businesses and practices play in society; emphasising the social elements of ESG as well as the direct link between social responsibility and investing; and illustrating that a company's value is linked to ESG performance. ESG practices have aided companies throughout the crisis, and investors are increasingly looking toward sustainable investment strategies when making investment decisions. Companies that focus on ESG practices are more likely to be resilient in the face of a crisis such as COVID-19 if they are managed for the long term in line with societal megatrends. In addition, COVID-19 is likely to increase the efforts of boards with regard to governance and disclosures, and how companies address governance factors is likely to impact businesses going forward.

6 Trends

6.1 What are the material trends related to ESG?

Demand for ESG products and the number of investors expressing an interest in such products has already increased markedly and is set to continue on an upward trajectory. The inflows in ESG products are increasing with the launch of new funds, as well as the repurposing of non-ESG funds, and this has continued despite the impact of COVID-19. In the fixed income market, green bonds are the fastest-growing market. Asset managers are increasingly looking to integrate ESG factors in portfolio selection and investors are increasingly asking ESG questions as part of their discussions with asset managers. In addition, socially responsible and ESG exchange-traded funds have become an increasingly popular area of focus for investors and asset managers alike. Following COVID-19, new opportunities may arise for categories of impact funds such as health and wellbeing as key areas of the response to the pandemic. COVID-19 seems to be further widening the scope of strategies. The pandemic has also brought human capital and the broader group of stakeholders (including employees) into sharp focus, and board and workplace diversity and inclusion will be a critical consideration for companies going forward. For example, certain institutional investors have already articulated their expectations in relation to board and workplace diversity and inclusion, including requests for companies to provide specific disclosures with respect to matters related to diversity and inclusion. There may also be a greater drive for a more meaningful integration of ESG targets in executive remuneration packages.

6.2 What will be the longer-term impact of COVID-19 on ESG?

Early indicators show that COVID-19 is accelerating the demand for sustainable investing, introducing a renewed focus on climate change, increasing the importance of the social element of ESG and requiring both asset managers and investors to focus on a sustainable approach to investing. As a result of the impact of COVID-19 on the global economy, policymakers and investors are looking at alternative investments, including those relating to climate change, and ways to define and integrate social performance into investment frameworks. COVID-19 may be pivotal for ESG investing alongside traditional financial investing in the long term. Recent studies have highlighted the fact that investors see COVID-19 as increasing investor awareness in other areas such as climate change and societal issues, which should have a positive impact on ESG, particularly in the long term. The COVID-19 crisis is likely to increase the measures taken by boards and markets to factor in systemic risk, including disclosures related to ESG. It is also likely to increase pressure on companies to consider their wider group of stakeholders and enhance efforts around issues such as diversity and inclusion and community engagement. COVID-19 has led to enhanced scrutiny from investors in respect of ESG metrics. ESG products have performed strongly relative to non-ESG products during the market downturn, and it is expected that investors will add these relative performance metrics to their asset selection preference. To date, with respect to investment funds, much of the focus has been on environmental products, but the impact of COVID-19 on society is likely to see growth in social impact funds.

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