Luxembourg Newsflash - 5 December 2019

Table of contents

AML - RBO

The European Union and Luxembourg have strengthened their anti-money laundering and counter-terrorism financing (AML/CTF) legislation. This topic constitutes one of Luxembourg's top priorities for 2020.

Directive (EU) 2018/843 (AMLD 5) which amends Directive (EU) 2015/849 (AMLD 4) will be implemented into Luxembourg law, namely through:

(i) bill of law 7467 primarily on professional obligations and powers of supervisory authorities regarding AML/CTF,

(ii) amended bill of law 7216B on the establishment of a register of beneficial owners of trusts and similar fiduciary arrangements.

Read more...

Furthermore, also in view of AMLD 5, Luxembourg established a Register of Beneficial Owners (RBO), which already complies with the requirements of AMLD 5 in this field. Read more here… and here…

In addition, Directive (EU) 2019/1153 grants access to and use of financial information and bank account information to national competent authorities (NCAs) for the prevention, detection, investigation or prosecution of serious criminal offences, subject to specific conditions. Cooperation and exchange of information (i) between Financial Intelligence Units (FIUs) and NCAs or (ii) among several FIUs or (iii) between FIUs, NCAs and Europol are also described in this Directive. Additional provisions concern data protection.

AMLD 4 has been supplemented by Commission Delegated Regulation (EU) 2019/758 which specifies the minimum action and the type of additional measures credit and financial institutions must take to mitigate money laundering and terrorist financing risks in certain third countries.

Bill of law 7465 aims at implementing into Luxembourg law Directive (EU) 2018/822 as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (DAC 6). Banks are concerned to the extent that they may act as intermediaries which design, market, organise or make available for implementation or manage the implementation of a reportable cross-border arrangement. Read more...

Bill of law 7395 was filed with the Luxembourg Parliament on 15 January 2019. It basically follows the principles set out in the law of 27 October 2010 (2010 Law) on the implementation of United Nations Security Council resolutions and acts adopted by the EU containing prohibitions and restrictive measures in financial matters against certain persons, entities and groups in the context of the fight against terrorist financing. The bill of law however also extends its scope, previously limited under the 2010 Law to the fight against terrorist financing, to other objectives such as the protection of peace and global security, the fight against the proliferation of weapons of mass destruction and the fight against violations of international law. Consequently, this bill of law, once adopted, will repeal the above-mentioned 2010 Law.

Brexit and third country regime

Bill of law 7401 which became the law of 8 April 2019 provides for amendments to relevant Luxembourg legislation to mitigate the risks of a no-deal (or hard) Brexit as regards financial stability, financial markets including their actors and clients, depositors, investors, shareholders and insurance policyholders and sets out temporary measures which will apply for a maximum period of 21 months after a no-deal Brexit. Read more…

The Luxembourg government has launched a specific page of Guichet.lu which deals with Brexit, irrespective of whether there is a no-deal Brexit or a Brexit deal. It is supplemented by a citizen Brexit page and a business Brexit page.

More specifically, Circular 19/716 of the *Commission de Surveillance du Secteur Financier* (CSSF) provides guidance on the rules and restrictions which apply to third country financial service providers when providing MiFID investment services, activities and ancillary services to Luxembourg clients. Read more…

In July 2019, the CSSF also issued a press release requiring certain UK firms to notify the CSSF of their intention and way forward to continue to provide services in Luxembourg in the event of a no-deal Brexit. Read more… A dedicated notification portal was opened on 2 August 2019.

At the EU level and in view of the recent developments around Brexit, the European Supervisory Authorities (ESAs, i.e. the EBA, ESMA and EIOPA) released recommendations in this context and reminded all relevant actors that the reference date for a hard Brexit in all of their previously published documentation should, following the decision by the European Council of 30 October 2019 to extend the period under Article 50(3) of the TFEU, be read as meaning 31 January 2020. With regard to the regulatory situation in Luxembourg and the above-mentioned duty of certain UK firms to notify the CSSF of their intention and way forward, the CSSF published a press release in this respect.

BRRD 2 - SRM 2 - CRD 5 - CRR 2

A package of legislative measures amends Directive (EU) 2014/59 (recovery and resolution of credit institutions and investment firms, BRRD) and Regulation (EU) 806/2014 (Single Resolution Mechanism, SRM). Directive (EU) 2019/879 (BRRD 2) and Regulation (EU) 2019/877 (SRM 2) are intended to reduce risks in the banking sector insofar as they strengthen banks' capital and liquidity requirements.

In pursuing in essence the same objectives, Directive (EU) 2013/36 (access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, CRD 4) and Regulation (EU) 575/2013 (prudential requirements for credit institutions and investment firms, CRR) were amended by Directive (EU) 2019/878 (CRD 5) and Regulation (EU) 2019/876 (CRR 2) insofar as they provide (i) for a specific approval procedure and direct supervisory powers over certain financial holding companies and mixed financial holding companies, and (ii) for new requirements regarding *i.a.* several ratios, own funds and eligible liabilities, counterparty credit and market risk, large exposures, reporting and disclosure.

BRRD 2, SRM 2 and CRD 5 must be implemented by Member States by 28 December 2020, whereas CRR 2 becomes fully applicable as of 28 June 2023.

Furthermore, CRR is amended by Regulation (EU) 2019/630 which requires credit institutions and investment firms, *i.a.*, to keep own funds to deal with non-performing loans and to comply with several capital conservation measures.

Counterfeiting

Directive (EU) 2019/713 aims (i) to ensure the prevention of criminal offences on this topic, (ii) to establish the definition of such offences, (iii) to set up appropriate and harmonised criminal penalties, (iv) to support the victims, and (v) to treat cross-border fraud more efficiently. It covers both traditional and new non-cash related means of payment such as bank card, electronic money, mobile payments and virtual currencies. It must be implemented into national law before 31 May 2021.

CSSF fees

Pursuant to the Grand-Ducal regulations published on 1 March 2019 and on 26 October 2019, the fees for certain aspects of the prudential supervision of the CSSF were raised notably for some on-site inspections. Additionally, central securities depositories and persons applying for admission to trading on a regulated market, offerors or issuers requesting approval of a document under Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market are also now subject to prudential supervisory fees.

Amendments to the EMIR framework

On 17 June 2019, the EMIR Refit Regulation (Regulation (EU) 2019/834) entered into force. Without changing the substance of EMIR, the EMIR Refit Regulation amends EMIR (Regulation (EU) 648/2012) through a simplification of certain rules and the elimination of disproportionate costs and burdens on certain derivative counterparties (e.g. introduction of a new category of counterparty, the small financial counterparties, and related thereto, the introduction of clearing obligations for financial counterparties for classes of derivatives above certain clearing thresholds, etc.). Read more…

With the aim of strengthening the supervision of central counterparties (CCPs) in the EU and third countries, the EU co-legislators have adopted further amendments to EMIR through a Regulation on the procedures and authorities involved for the authorisation of CCPs and requirements for recognition of third country CCPs. At the time of this publication, the Regulation has not yet been published in the Official Journal of the EU.

Mortgage loans

The bill of law 7218 permits the Luxembourg authorities to take macro-prudential measures regarding residential mortgage loans in case they pose a threat to the financial stability of the Luxembourg financial system. It also introduces easy access for the *Banque Centrale du Luxembourg* to data in this field available from state administrations and public institutions.

Outsourcing

CSSF Circular 17/654 on IT outsourcing relying on a cloud computing infrastructure was amended insofar as *i.a.* its scope has been extended to investment fund managers and clarifies the regulatory framework governing IT outsourcing relying on a cloud computing infrastructure provided by an external provider. Finally, it introduces a register to be maintained by investment fund managers, credit institutions, professionals of the financial sector, payment institutions and electronic institutions, which includes all the cloud computing outsourcing of material as well as non-material activities.

Furthermore, it is important to bear in mind that the EBA has released new Guidelines on outsourcing arrangements which entered into force on 30 September 2019 and apply to all outsourcing arrangements entered into, reviewed or amended on or after this date. Such guidelines are intended to ensure a sound outsourcing policy within a relevant institution including in terms of supervision and internal control and especially where service providers are located in third countries or where critical or important functions are outsourced. In all cases, competent authorities are required to effectively supervise financial institutions' outsourcing arrangements. Consequently, the EBA 2006 guidelines on outsourcing have now been repealed.

PRIIPs

Please refer to section "Fund Formation" and section "Insurance Law".

PSD

Concerning the implementation of PSD 2, the EBA central register containing information on payment institutions and electronic money institutions was launched in March 2019 and strong customer authentication (SCA) came into force on 14 September 2019. However, according to the EBA, the deadline and process for completing the migration to SCA for e-commerce card-based payment transactions may be delayed until 31 December 2020.

A proposal for a directive amending Directive (EC) 2006/112 aims at introducing certain requirements for payment service providers to solve the problem of e-commerce VAT fraud by (i) strengthening the cooperation between tax authorities and payment service providers and (ii) establishing new requirements for certain payment service providers. For instance, they must settle a register with sufficiently detailed records of the payees and of the payment transactions in relation to payment services they execute for each calendar quarter to enable NCAs to carry out controls of the supplies of goods and services. Domestic payments are not included within the scope of this proposal.

Securities

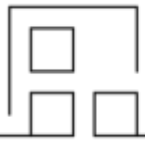
The law of 1 March 2019 amends the law of 1 August 2001 on the circulation of securities to allow account keeping entities to use distributing ledger technology in order to maintain securities accounts. As a consequence, securities transfers can be performed using blockchain technology with the legal certainty afforded by the law of 2001.

Securitisation

The law of 16 July 2019 laying down the rules for the proper application of *i.a*. Regulation (EU) 2017/2402 on simple, transparent and standardised securitisation sets forth the sanctions that the CSSF may impose in this context.

SFTR

Several level 2 measures were released in the Official Journal of the EU dated 22 March 2019 to specify *i.a.* (i) the details of securities financing transactions (SFTs) to be reported to trade repositories (TRs), (ii) the details and format of applications for registration and extension of registration of TRs, (iii) the access to the data and to details of SFTs reported in TRs, (iv) the collection, verification, aggregation, comparison and publication of data on SFTs by TRs, (v) the fees charged by ESMA to TRs and (vi) the procedures and forms for the exchange of information on sanctions, measures and investigations.



Fund Formation

Clarification for the management of an FCP RAIF

On 22 July 2019, two amendments to the law of 23 July 2016 on reserved alternative investment funds (RAIF Law) entered into force. The first amendment to Article 8 clarifies that management companies authorised pursuant to Chapters 15, 16 and 18 of the law of 17 December 2010 on UCIs (UCI Law) are permitted to manage common funds (*fonds commun de placement* or FCP) subject to the RAIF Law. Where a management company authorised pursuant to Chapter 15 of the UCI Law acts as a management company of an FCP-RAIF, it must appoint, for the relevant fund, an external manager in accordance with Article 4 of the RAIF Law. This external manager may be the Chapter 15 management company itself, provided that it has also been authorised as an AIFM in compliance with Chapter 2 of the law of 12 July 2013 on AIFMs. The second amendment made to Article 49 of the RAIF Law provides for the possibility of converting a RAIF set up in the form of an FCP into a RAIF set up in the form of a SICAV (*société d'investissement à capital variable*).

Transitional regime in case of Brexit

Luxembourg has provided for transitional relief through two laws of 8 April 2019 on measures to be taken in relation to the financial sector in case of a no-deal withdrawal of the UK and Northern Ireland from the EU (Brexit Laws). The first Brexit Law gives the CSSF the power to continue to apply, for a maximum period of 21 months as of the date of a hard Brexit, the EU passporting provisions for the freedom to provide services and the freedom of establishment in favour of UK-based institutions when providing their services in Luxembourg. Read more... After the publication of the first Brexit Law, the CSSF issued a press release requiring UK-based AIFs and UCITS as well as their managers to notify the CSSF of their intention and way forward to continue to provide services in Luxembourg in the event of a no-deal Brexit. Read more... A dedicated notification portal was opened on 2 August 2019. As regards the extension of the deadline for Brexit, the CSSF announced that UK entities that had not yet applied for the transitional regime must notify the CSSF through the dedicated notification portal and must submit a subsequent application for authorisation no later than 15 January 2020.

The second Brexit Law provides for a transitional regime as regards (i) the eligibility of UK assets held by Luxembourg based UCITS, UCIs subject to Part II of the UCI Law and specialised investment funds subject to the law of 13 February 2007 on SIFs at the time of Brexit, and (ii) the marketing to retail investors in Luxembourg of shares or units of UK-based UCITS in case of Brexit.

Uniform rules for the cross-border marketing of investment funds

On 1 August 2019, the new regime under the CBDF framework entered into force. The CBDF framework consists of a Directive with regard to cross-border distribution of collective investment funds and a Regulation on facilitating cross-border distribution of collective investment funds. The new regime will introduce uniform EU rules regulating the pre-marketing of alternative investment funds (AIFs). Furthermore, the CBDF framework will provide for uniform rules and conditions for the discontinuation of the marketing of some or all shares or units in an UCITS or an AIF in one or several host Member States, and for the arrangements UCITS and AIFMs distributing to retail investors will need to make available in each EU Member State where they intend to market investment funds. Read more… Although the new regime under the CBDF framework will only fully apply as of 2 August 2021, the distribution channels and marketing approaches for investment funds will have to be reviewed and adapted where necessary much sooner.

Pace of the AIFMD review is picking up

On 10 January 2019, the EU Commission published a report established by an external contractor on the operation of the AIFMD. The main conclusion of the report is that the AIFMD has played a major role in helping to create an internal market for AIFs and a harmonised and stringent regulatory and supervisory framework for AIFMs. But the report also sees room for improvement with regard to the monitoring and managing of risks, the functioning of the marketing passport, and the workings of the national private placement regimes, among other aspects. The report did not include recommendations. The EU Commission is currently making its own ongoing assessment that will potentially be accompanied by the launch of a public consultation in early 2020. The EU Commission's report is expected to be submitted to the EU Parliament and the Council of the EU in Q2 2020. At the time of this publication, the extent of the review is still unclear. It is to be expected though that the above-mentioned findings are currently being reflected on by the EU Commission.

Clarification on certain obligations of depositaries relating to the delegation of safekeeping functions

On 30 October 2018, two amending Commission Delegated Regulations on safekeeping duties of depositaries were published in the Official Journal of the EU with the aim of clarifying certain obligations of depositaries relating to the delegation of safekeeping functions to third parties. The two new EU Regulations amend already-existing level 2 measures for the AIFMD and the UCITS Directive in the context of asset segregation and the information flow between the depositary and a third party to whom safekeeping functions have been delegated. Back to 2018… Depositaries should evaluate the impact on their safekeeping model currently in place (including the newly introduced recordkeeping obligations) as well as any contractual arrangements with sub-custodians and/or third parties such as collateral agents and prime brokers to implement and ensure compliance with the new requirements by 1 April 2020, when the changes introduced by the two Regulations become applicable.

Continued co-existence of the UCITS KIID and the PRIIPs KID until 2022

The EU co-legislators have adopted a legislative proposal to delay the application of the PRIIPS Regulation to UCITS and consequently to delay the possible replacement of the UCITS KIID by two years. Respective amendments to the PRIIPs Regulation entered into force on 1 August 2019. UCITS may therefore continue to use the UCITS KIID until 31 December 2021. The amended PRIIPs Regulation provides for the EU Commission to review the PRIIPs Regulation by 31 December 2019 and to assess, among other aspects, whether (i) the above-mentioned exemption for the UCITS KIID will be prolonged, whether (ii) the UCITS KIID will be replaced by the PRIIPs KID, or whether (iii) the UCITS KIID will be considered equivalent to the PRIIPs KID. Where the EU Commission comes to the conclusion that the UCITS KIID must be replaced, UCITS, in the absence of legislative changes, will need to produce a PRIIPs KID and a UCITS KIID as from 1 January 2022.

PRIIPs KID again under further scrutiny

On 16 October 2019, the Joint Committee of the ESAs (i.e. EBA, ESMA and EIOPA) published a consultation paper on proposed amendments to the PRIIPs Delegated Regulation. With this consultation the Joint Committee addressed two main topics: (i) the main regulatory issues identified by stakeholders and supervisors since the PRIIPs KID became applicable in 2018, and (ii) the appropriate application of the PRIIPs KID by UCITS, subject to the potential end of the temporary exemption of UCITS from the PRIIPs Regulation by 31 December 2021. The proposals addressed in this consultation paper follow a previous consultation paper of the ESAs in November 2018, which had similar aims, but proposed more targeted amendments to the PRIIPs Delegated Regulation. Back to 2018… Based on the feedback received in response to the first consultation and considering the decision by the EU co-legislators to extend the exemption for UCITS, the ESAs decided to launch a second consultation on more substantive changes. The following main issues are addressed in the second consultation paper: (i) illustration of performance scenarios, (ii) information on costs, and (iii) specific issues for so-called "multi-option products", i.e. PRIIPs offering a range of options for investments. The consultation period closes on 13 January 2020. The Joint Committee intends to conclude the review and to submit its final proposals to the EU Commission by the end of the first quarter of 2020. The proposed amendments could be applicable to existing PRIIPs during the course of 2021; however, the application of some of the proposed amendments may be deferred to be aligned with the expected end of the UCITS exemption.

Sustainable finance in support of a greener future

The work of the EU co-legislators to lead Europe's financial industry towards a greener future has reached the next level with the adoption of several legislative proposals during the course of 2019. Of relevance for the investment funds industry are the adoption of the Regulation on disclosures relating to sustainable investments and sustainability risks in the financial services sector (Disclosure Regulation) and the Regulation amending the Benchmarks Regulation (Regulation (EU) 2016/1011) on low carbon benchmarks and positive carbon impact benchmarks (Low Carbon Benchmarks Regulation). The Disclosure Regulation sets out how financial market participants and financial advisors must integrate environmental, social or governance (ESG) risks and opportunities into their processes, as part of their duty to act in the best interest of clients, and how those financial market participants should inform investors about their compliance with the integration of ESG risks and opportunities. At the time of this publication, the Disclosure Regulation has not yet been published in the Official Journal of the EU. It will fully apply after 15 months following the date of publication in the Official Journal of the EU. The Low Carbon Benchmarks Regulation provides for a harmonised, reliable tool to pursue low-carbon investment strategies by establishing two new regimes, comprised of two types of financial benchmarks: the EU climate transition benchmarks and the EU Paris-aligned benchmarks. At the time of this publication, the Regulation has not yet been

published in the Official Journal of the EU. It will fully apply as of 30 April 2020. Read more…

The EU Regulation on the establishment of a framework to facilitate sustainable investment (often referred to as the 'Taxonomy Regulation') has entered the trilogue phase, i.e. the phase where the three EU co-legislators negotiate the final wording of the legislative text. The Taxonomy Regulation will provide for a unified EU-wide classification system ('taxonomy'), setting up harmonised criteria for determining whether an economic activity is environmentally sustainable. At present, there is no common classification system at EU or global level which defines an environmentally sustainable economic activity. There is political pressure to finalise the negotiations by the end of 2019 in order to ensure the full application of the rules by the end of 2022.

The EU Commission, with the aim to integrate environmental, social and governance considerations into the investment decision-making process has published a number of legislative proposals on sustainable finance. Back to 2018…

Review of the supervisory powers of the ESAs

The EU Commission's legislative proposal relating to the powers, governance and funding of the ESAs was disputed until the end. The text finally adopted for amendments to the ESMA Regulation no longer provides for direct supervisory powers for ESMA over certain investment funds (i.e. EuSEFs, EuVECAs and ELTIFs). These funds will remain within the remit of the national competent authorities. Furthermore, the *de facto* confirmation role initially foreseen for ESMA regarding substantial delegations to third countries has been abandoned. In its place, following a compromise proposed by the Council of the EU, the adopted text foresees the creation of so-called "coordination groups". Such groups (in which the national competent authorities must participate) may discuss any topics that potentially require coordination at the EU level. Finally, ESMA must contribute to the work of the EBA, whose powers have been strengthened in the context of AML supervision. The EBA will take the lead in AML-related policies and supervision. The adopted texts state that the amendments to the respective ESA Regulations will apply as of 1 January 2020. At the time of this publication, the amendments have not yet been published in the Official Journal of the EU.

Pan-European Pension Product

Please refer to the section "Insurance Law".

Company Law – Capital Markets

Company conversions, mergers and divisions

New rules were adopted on 18 November 2019 to facilitate EU companies' cross-border conversions, mergers and divisions. These rules introduce the new regime cross-border EU demerger and conversion and update it for cross-border mergers. It will be possible to waive certain reports for members and employees when specific conditions are met (such as the agreement of all the shareholders of the company).

The Directive introduces a mandatory anti-abuse control procedure. The agreed text provides for similar rules on employee participation rights in cross-border conversions, mergers and divisions. Employees must be adequately informed and consulted about the expected impact of the contemplated transaction. Minority and non-voting shareholders' rights will benefit from an increased protection and additional safeguards for creditors are included.

Finally, the Directive encourages the use of digital tools throughout the cross-border transaction.

The Directive must now be published in the Official Journal of the EU and Member States will have 36 months to implement it into their domestic law.

Shareholders' rights

Luxembourg implemented the so-called Shareholders' Rights Directive II last August. The main changes aim to, among other things, improve the communication of listed companies to their shareholders and increase transparency between companies and investors. As a consequence, issuers must have in place a remuneration policy, draw up a remuneration report and related party transactions must be authorised by the management body of the relevant issuer. In addition, new obligations are imposed on Luxembourg asset managers with respect to their investments in EEA listed companies such as the drafting of an engagement policy. New rules also affect institutional investors, intermediaries maintaining securities accounts and proxy advisors. It is worth mentioning that directors are jointly and severally liable for any damages resulting from the breach of their obligations under this law. Read more…

Prospectus

Luxembourg has adapted its legislation for the new Prospectus Regulation (Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market). Among other things, it should be noted that the legislator has opted to exempt offers of securities to the public with a total consideration of less than EUR 8,000,000 in the EU over a period of 12 months from the obligation to publish a prospectus in accordance with the Prospectus Regulation with an intermediary threshold of EUR 5,000,000 above which only an information notice will be required. This new exemption could be helpful for start-ups and SMEs seeking to raise capital without having to publish a prospectus in compliance with the Prospectus Regulation. Read more…

From EONIA to €STR – shift in the EU interbank offered rates (IBORs)

As a response to the challenges set out by the new EU regulatory framework on benchmarks and the historic vulnerability of some IBORs to conflicts of interest and resulting misconduct, a transition away from some of the main IBORs to new benchmarks, primarily risk-free rates, has been encouraged by the central banks for the key currencies. Read more… For the euro-denominated transactions, the transition away from EONIA (the Euro Overnight Index Average) to a new interest rate based exclusively on actual transactions, the euro short-term rate or €STR, began on 2 October 2019 with the first publication of €STR by the ECB. Read more… The transition from EONIA to €STR will need to be completed by all market participants by 3 January 2022, when EONIA will be discontinued. In addition to EONIA, in the next two years: (i) the EURIBOR will be transformed into HYBRID EURIBOR, and (ii) the LIBOR will be discontinued with the GBP LIBOR replaced by SONIA (Sterling Overnight Interbank Average Rate), the USD LIBOR replaced by SOFR (Secured Overnight Financing Rate), the CHF LIBOR replaced by SARON (Swiss Average Rate Overnight) and the JPY LIBOR replaced by TONAR (Tokyo Overnight Average Rate). Watch our video…

Extension of the transitional period for third country benchmarks and critical benchmarks

Supervised entities will benefit from an extension of the transitional period until 31 December 2021 for the new use of non-compliant benchmarks issued by third country administrators as well as for the use of non-compliant benchmarks designated as critical benchmarks in accordance with the Benchmarks Regulation (Regulation (EU) 2016/1011, BMR). Read more… The respective EU Regulation amending the Benchmarks Regulation has been adopted by the EU co-legislators and is awaiting publication in the Official Journal of the EU.

Please refer to the section “Fund Formation” concerning further amendments made to the BMR through the Low Carbon Benchmarks Regulation.

Restructuring & Insolvency

EU Restructuring Directive

On 16 July 2019, the Directive (EU) 2019/1023 of 20 June 2019 entered in force with a view to global harmonisation of the local restructuring procedures. The Directive provides for flexible and preventive tools to be implemented in order to promote early stage restructurings rather than insolvency proceedings for EU companies. The main points addressed by the Directive are the development of early identification signals, a second chance for over-indebted entrepreneurs, a "debtor in possession" principle and a right to submit a restructuring plan where only "affected parties" would have the possibility to vote. Read more…

IP, Communication & Technology

Trade secrets

The law of 26 June 2019 on the protection of trade secrets has implemented Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure which aims at ensuring sufficient and consistent sanctions in the event of the unlawful acquisition, use or disclosure of a trade secret. The law provides for the principle of full compensation for the damage suffered.

Copyright and related rights

Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market was adopted on 17 April 2019. The Directive has three main objectives: (i) to adapt certain key exceptions to copyright to the digital and the cross-border environment, (ii) to improve licensing practices and ensure wider access to content, and (iii) to achieve a well-functioning marketplace for copyright. The Directive has not yet been implemented in Luxembourg.

Electronic communications networks and services

Bill of law 7443 (the Bill) amending the law of 27 February 2011 on electronic communications networks and services (the Law) aims to amend the Law further to the entry into force of the Regulation (EU) 2018/1971 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office). The Bill gives the "*Institut Luxembourgeois de Régulation*" (the Luxembourg Regulator) powers to impose sanctions in case of breach of the Law.

E-commerce

Further to the adoption of the Regulation (EU) 910/2014 on electronic identification and trust services for electronic transactions in the internal market, bill of law 7427 amending the law of 14 August 2000 on e-commerce (the Law) aims to designate the supervisory authority in charge of e-commerce regulation for the Luxembourg market, as well as to give such body the required powers to control and sanction any breaches of the Law.

Consumers' protection

The Directive as regards better enforcement and modernisation of EU consumer protection rules was adopted at first reading on 17 April 2019 (the Directive), but has not yet been published in the Official Journal of the EU at the time of this publication. It provides for rules to improve awareness among consumers, traders and legal practitioners about consumer rights and to improve enforcement of consumer rights and consumer redress, while the choice of the type of penalties to be imposed will remain to be addressed by national laws, including the relevant procedures to impose penalties in the event of infringements of the directives amended by this Directive.

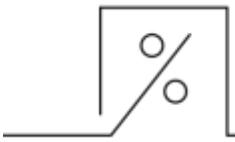
Further to the adoption of Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation), bill of law 7456 (the Bill), published on 11 July 2019, aims to amend as a consequence thereof the Luxembourg Consumer Code, the law of 11 April 1983 on drugs marketing and advertising, the law of 27 July 1991 on electronic media, the law of 14 August 2000 on e-commerce, the law of 24 May 2011 on the internal market and the law of 23 December 2016 on sales and misleading and comparative advertising. The Bill proposes amendments to the Consumer Code providing the Luxembourg supervisory authorities in charge of controlling the implementation in Luxembourg of consumers' protection with enforcement powers deriving from Article 9 of the Regulation, such as the power to investigate (search and seizure powers) and to execute (powers to adopt interim measures to avoid the risk of serious harm to the collective interests of consumers and to remove content or to restrict access to an online interface or to order the explicit display of a warning to consumers when they access an online interface, to order a hosting service provider to remove, disable or restrict access to an online interface, and to order domain registries or registrars to delete a fully

qualified domain name and to allow the competent authority concerned to register it).

Recreational cannabis

The law of 20 July 2018 amending the law of 19 February 1973 (the 1973 Law) on the sale of medicinal substances and combating drug addiction has legalised the use of cannabis for medicinal purposes.

The legalisation of cannabis for recreational use is, as foreseen in the coalition agreement 2018-2023 of the current government, now under discussion with Parliament, and a specific working group was constituted in this respect. The Ministry of Economy and Health announced that a bill of law regarding legalisation of recreational use of cannabis should be presented before the end of this year. Until the adoption of such legislation, the cultivation, production, manufacturing extraction, preparation, importation, exportation, sale, distribution or putting on the market, in any way, of cannabis and cannabis-based products (with a THC level higher than 0.3%) are subject to a fine of up to EUR 1,250,000 and 5 years of imprisonment (Article 8 of the 1973 Law). It is worth mentioning that the cultivation, production, manufacturing extraction, preparation, importation, exportation, sale, distribution or putting on the market of CBD products (i.e. products containing less than 0.3% of THC) is however not prohibited.



Tax Law

Decrease of the corporate income tax rate

The budget law for 2019 reduced the maximum corporate income tax (CIT) rate for net profits exceeding EUR 200,000 from 18% to 17%. Accordingly, the aggregate rate of CIT, municipal business tax in the city of Luxembourg and the contribution to the employment fund has been reduced from 26.01% to 24.94%. The measure is applicable as from the tax year 2019. Read more...

Deposition of OECD Multilateral Instrument

On 9 April 2019, Luxembourg deposited with the Organisation for Economic Cooperation and Development (OECD) its instrument of ratification of the Multilateral Instrument (MLI), after having passed the ratification law on 14 February 2019. The entry into effect of the MLI provisions for each covered tax treaty depends on the entry into force of the MLI for the other contracting state and on the type of taxes concerned - withholding taxes or other taxes. However, the MLI provisions that affect withholding taxes shall apply for most of Luxembourg's covered tax agreements as from 1 January 2020 only. Read more…

Ratification of the new tax treaty between Luxembourg and France

On 2 July 2019, the Luxembourg Parliament ratified the new double tax treaty signed on 20 March 2018 between Luxembourg and France, which will replace the current double tax treaty dated 1 April 1958. The new provisions will enter into force as from 1 January 2020.

The new Article 10 on dividends is expected to have the most significant impact on existing cross-border investments, in particular on Luxembourg companies investing in French exempt real estate vehicles (typically established as *organismes de placement collectif en immobilier* or OPCI, or as *sociétés d'investissement immobilier cotées* or SIIC). Distributions made by such French exempt real estate vehicles to a Luxembourg company directly holding at least a 25% participation in the distributing vehicle, which had been subject under the current tax treaty to a reduced withholding tax rate of 5%, will now, under the new tax treaty and French domestic law, be subject to withholding tax at a rate of 30%. Such distributions could nevertheless still benefit from a 15% withholding tax rate under French domestic law, provided that the beneficiaries are collective investment vehicles (CIVs) that can be assimilated to French CIVs. Read more…

Implementation of ATAD II

On 8 August 2019, the Luxembourg government filed with Parliament bill of law 7466 implementing into domestic law Directive (EU) 2017/952 of 29 May 2017 (ATAD II), which amends Directive (EU) 2016/1164 (ATAD I) as regards hybrid mismatches with third countries. The new provisions should apply to financial years starting as from 1 January 2020 except for the rules on reverse hybrids which should apply as from 1 January 2022. The new measures are expected to have a significant impact on Luxembourg corporate taxpayers having cross-border operations with third countries. Specific measures have however been introduced to address unintended consequences for investment funds. Read more…

Implementation of DAC 6

On 8 August 2019, the Luxembourg government filed with Parliament bill of law 7465 (the Bill) implementing the provisions of the Directive (EU) 2018/822, commonly called DAC 6, which requires intermediaries (including *i.a.* lawyers, tax advisers, accountants, and banks) and in certain cases taxpayers to report to their tax authorities information on cross-border arrangements that contain at least one of the hallmarks laid down in the Bill (i.e. a characteristic or feature that presents an indication of potential risk of tax avoidance). As from 1 July 2020, information on reportable arrangements should be filed within 30 days from the first to occur: (i) the day after the reportable arrangement is made available for implementation, (ii) the day after the reportable arrangement is ready for implementation, or (iii) the day when the first step in the implementation of the reportable arrangement has been made. In addition, reporting should be made by 31 August 2020 for reportable cross-border arrangements for which the first step was implemented between 25 June 2018 and 30 June 2020. Non-

compliance with the obligation to report all available data in connection with the arrangement in due time should constitute an administrative offence subject to a fine of up to EUR 250,000. Read more…

Budget 2020: advance tax confirmations (ATCs) granted before 1 January 2015 no longer binding

The budget bill provides that ATCs granted by the Luxembourg tax authorities before 1 January 2015 (i.e. under the administrative procedure in force until 31 December 2014) will no longer be binding after the end of the 2019 financial year. Taxpayers that are affected by this measure will be able to introduce a new request in compliance with the current administrative procedure. Read more...

VAT developments

On 18 January 2019, the Luxembourg VAT authorities published a new Circular which clarifies the provisions of Article 28, §3, of the VAT Law on transfer pricing and VAT. In a supply between closely related parties, for which the agreed or charged fee value is different from the normal value of the operation and where VAT is not neutral for any of the parties, the VAT base will be constituted by the normal value of the operation (i.e. its fair market value). Read more...

In the course of 2019, the Luxembourg Tribunal rendered two decisions in relation to the VAT treatment of the leasing of buildings and the rent free period. The VAT authorities challenged the input VAT deduction right exercised by Luxembourg landlords for the rent free period for the reason that there were no economic activities performed during this period. The court rejected this approach. Read more...

ECJ case law – "Danish cases"

On 26 February 2019, the ECJ rendered landmark decisions interpreting the concepts of abuse and beneficial owner in the context of the Parent Subsidiary Directive (Directive 90/435/EEC) and the Interest and Royalties Directive (Directive 2003/49/EC). The interpretation given by the ECJ could possibly be followed in the future by national tax authorities and tax courts in EU Member States also when interpreting double tax treaties. Read more...

The time savings account (CET)

The law of 12 April 2019 introduced "time savings accounts" (CET) into the private sector. A CET allows an employee to accumulate paid leave on an ongoing basis to be used for example to organise longer periods of leave (on a full-time or part-time basis), in order to carry out a personal project or to follow vocational training. The establishment of a CET is at the discretion of the employer but can only be carried out within the framework of a collective agreement.

Employees with at least two years' seniority in the company can contribute to their CET. The CET is supplied in hours and is limited to 1,800 hours or 45 weeks at 40 hours. Upon the employee's written request, the CET can be supplied with several types of hours (overtime hours, up to five untaken days of recreational leave, a compensatory day granted following work on a Sunday or a public holiday falling on a Sunday, etc.).

Each employee can freely use his/her CET by making a prior written request at least one month in advance. The use of acquired rights on the CET is considered as working time.

One additional day of annual paid leave and one additional public holiday

The law of 25 April 2019, amending Articles L. 232-2 and L. 233-4 of the Labour Code (as well as Article 28-1 of the amended law of 16 April 1979 establishing the general status of public servants) (i) increased the minimum paid annual leave from 25 days to 26 days and (ii) declared the 9th May to be a new public holiday in Luxembourg, increasing the annual total of public holidays to 11 days per year. The date of the entry into force of the Law has been set retroactively to 1 January 2019. Read more…

Increase of the minimum wage

The law of 12 July 2019, amending Article L. 222-9 of the Luxembourg Labour Code, applied retroactively to 1 January 2019. As from 1 January 2019 the minimum social wage increased by 0.9%. The new legal provisions entail that the minimum wage for unskilled workers rose from EUR 2,071.10 gross (index 814.40) to the current EUR 2,089.75 gross (index 814.40). Read more…

New index increase expected

The index applicable to employees' wages will be increased in all likelihood shortly before or shortly after the end of 2019. This index increase will result in a 2.5% increase in the gross salary paid to employees with employment contracts subject to Luxembourg law.

Wage indexation is an automatic mechanism for the adjustment of salaries to keep pace with evolving living costs, as determined by the statistics and economic studies bureau STATEC.

Bill of law introducing internships for pupils and students

Bill of law 7265 on the introduction of internships for pupils and students (the Bill) aims to regulate internships for pupils and students in Luxembourg. The Bill currently specifies three types of occupations for pupils and students in companies: (i) during school holidays, (ii) during mandatory internships provided by an educational institution, and (iii) during voluntary internships to acquire professional experience.

In particular, the Bill determines the formal requirements of the internship agreement/convention. The agreement will henceforth have to mention the name, date of birth and place of residence of the student, the name and address of the employer, the start and end date, the nature and location of the work to be performed, the daily and weekly working time, etc.

The current Bill also sets out the remuneration requirement, where relevant, to be observed in each specific case, subject to certain conditions: (i) during school holidays remuneration equivalent to a minimum of 80% of the minimum social wage for unskilled workers, (ii) during mandatory internships either discretionary remuneration for internships under four weeks or remuneration of at least 30% of the minimum social wage for unskilled workers, if the internship is of a duration of more than four weeks, and (iii) during voluntary internships either discretionary remuneration for internships under four weeks or remuneration of at least 40% of the minimum social wage for unskilled workers and up to 100% of the minimum social wage for skilled workers depending on the duration of the internship, the age and the qualification of the intern.

New Directive on work-life balance for parents and carers

Directive (EU) 2019/1158 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU was published in the Official Journal of the EU on 12 July 2019 and entered into force on 2 August 2019. The EU Member States have until 2 August 2022 to implement this Directive into their national legislations.

Although Luxembourg has undertaken substantial measures on work-life balance with the reform of parental leave in 2016, followed by changes in paternity and maternity leave as well as family leave (notably in the event of illness of a child), provisions arising from the Directive will need to be implemented. In particular, provisions concerning the right to more flexible working arrangements such as the use of remote working, flexible working hours or a reduction in working time for workers who are parents or caregivers are certain areas which will need to be implemented in the coming months/years into Luxembourg legislation.

New Directive on transparency regarding working conditions

Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union was published in the Official Journal of the EU on 11 July 2019 and entered into force on 1 August 2019. The EU Member States have until 1 August 2022 to implement this Directive into their national legislations.

The Directive aims to improve working conditions by promoting more transparent and predictable employment whilst ensuring labour market adaptability. The Directive sets the minimum requirements that apply to every worker in the EU who has an employment relationship with a company domiciled in the EU. In particular, the Directive provides that workers must be fully informed about their essential working conditions, (e.g. salary, paid leave, working hours, etc.) and this information should be provided in a timely manner and in a written form to which workers have easy access.

As Luxembourg law already provides for the minimum criteria foreseen by the Directive, its implementation into national law should not raise any difficulties.

New Directive protecting whistleblowers

Directive (EU) 2019/1937 on the protection of persons reporting on breaches of Union law was published in the Official Journal of the EU on 26 November 2019 and will enter into force on 17 December 2019. The EU Member States have until 17 December 2021 to implement this Directive into their national legislations.

The Directive provides for the minimum standards that EU Member States must respect to protect whistleblowers, intermediaries and relatives of the reporting person, who report EU law breaches. Enhanced whistleblower protection will raise the overall level of the protection of workers, in line with the aims of the European Pillar of Social Rights and in particular the principles 5 (fair working conditions) and 7b (protection in case of dismissals). Providing a common high level of protection to people who acquire the information they report through their work-related activities (irrespective of their nature) and who run the risk of work-related retaliation will safeguard the rights of workers in the broadest sense. The Directive also aims to oblige mid-size companies to create an internal process for internal breach-reporting.

This Directive is particularly interesting for Luxembourg as no specific current legislation other than for CSSF regulated entities is in place regarding whistleblowing procedures or protection.

Insurance Law

AML - RBO

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

Brexit

Bill of law 7401 which became the law of 8 April 2019 provides for amendments to relevant Luxembourg legislation to mitigate the risks of a no-deal (or hard) Brexit on financial stability, financial markets including their actors and clients, depositors, investors, shareholders and insurance policyholders and sets out temporary measures which will apply for a maximum period of 21 months after a no-deal Brexit. Read more…

In the case of a hard Brexit, EIOPA published recommendations for the insurance sector, mainly based on Directive (EU) 2009/138, the so-called Solvency 2 and Directive (EU) 2016/97 on Insurance Distribution (IDD), related to authorisation of third-country branches, portfolio transfer, distribution activities and changes in the residence or establishment of the policyholder. The *Commissariat aux Assurances* (CAA) stated that it will fully implement such recommendations, which will apply from the date of Brexit.

The CAA also specifies the temporary permission regime for insurance companies that still wish to carry out activities in the United Kingdom after a hard Brexit while they seek a permanent authorisation.

IDD

CAA Regulation 19/01 brings together in a single CAA regulation all the provisions on the distribution of insurance and reinsurance. *I.a.*, it also specifies the documents and information to be provided regarding the applications for licences or registration in the register of distributors. In the same way, Circular letter 19/13 of the CAA relates to the honorability assessment of sub-brokers, insurance agents and any person who, within insurance or reinsurance undertakings, directly takes part in the distribution of insurance products.

The CAA also provides for a non-exhaustive list of general good rules in the field of insurance and reinsurance distribution in Luxembourg exceeding the minimum provisions of IDD.

Furthermore, the CAA issued Circular letter 19/2 which amends Circular letter 15/3 on investment rules for insurance products linked to investment funds. The amendments concern (i) notification of the analysis of the client's needs, (ii) notification to subscribers (reference is made to the PRIIPs KIDs and the UCITS KIIDs for minimum

information purposes), (iii) the hedge fund item and (iv) the list of financial instruments for consistency with MiFID 2.

EIOPA also published a framework which aims to protect the consumer and conduct effective supervision while assessing conduct risk through the lifecycle of an insurance product.

Pension - IORP - PEPP

Bill of law 7372 is intended to implement Directive (EU) 2016/2341 on the activities and supervision of institutions for occupational retirement provision (IORPs). It also aims to facilitate the cross-border activities of IORPs and the cross-border transfers of the occupational pension scheme. Such implementation should be completed in the coming weeks.

In Circular 19/726, the CSSF displayed information on new annual and quarterly reporting in the regulatory framework applicable to Luxembourg domiciled institutions for occupational retirement provision subject to the law of 13 July 2005, *i.a.* IORPs in the form of pension savings companies with variable capital (*sepcav*s) and IORPs in the form of pension savings associations (*assep*s). This information contains key principles, instructions and technical provisions for drawing up and submitting the reports.

Furthermore, EIOPA issued four opinions and templates on the governance and risk management of pension funds relating to (i) the use of governance and risk assessment documents in the supervision of IORPs, (ii) the practical implementation of the common framework for risk assessment and transparency for IORPs, (iii) the supervision of the management of operational risks faced by IORPs, and (iv) the supervision of the management of environment, social and governance risks faced by IORPs.

Regulation (EU) 2019/1238 on a pan-European Personal Pension Product (PEPP) was published in the Official Journal of the EU on 25 July 2019. Read more…The PEPP Regulation will become applicable 12 months after the publication of the delegated acts referred to in the regulation. This is not expected to be the case before the end of 2021.

Unenforceability of a company's internal statutory limitations against third parties

By a civil judgment dated 17 October 2019 (Docket No. 164577), the Luxembourg District Court reiterated that third parties cannot request that a contract validly signed by the company's representatives be cancelled because of irregularities in the company's internal allocation of powers and authorities.

In accordance with the statutory principle of the unenforceability against third parties of internal limitations on the legal allocation of powers between the general meeting of shareholders and the board of directors, third parties may not invoke internal limitations contained in the articles of association to obtain the cancellation of a transaction authorised by the board of directors.

In this case, the Luxembourg District Court considered that the transaction contested by a third party had been approved by the board of directors whereas it should have been decided by the general meeting of shareholders. The Court confirmed that corporate bodies validly represent the company in any legal transaction and that the statutory allocation of corporate powers and authorities has a purely internal effect that cannot be relied on by a third party.

Collateral arrangements under Article 1865*bis* of the Civil Code

By a decision dated 13 November 2019 (Appeal No. 142/19), the Luxembourg Court of Appeal made one of its first rulings on the provisions of Article 1865*bis* of the Luxembourg Civil Code, which provides the option of dissolving a wholly-owned subsidiary without any prior liquidation through the universal transfer of assets and liabilities to the parent company. In the event that the parent company dissolves its wholly-owned subsidiary through Article 1865*bis* of the Luxembourg Civil Code, a creditor of the company may make an application to the President of the District Court, sitting as in summary proceedings, for security collateral arrangements within 30 days of the publication of the dissolution.

In its analysis, the Court emphasised that it could only reject an application for the collateral arrangements if the creditor already possesses adequate safeguards or if the safeguards are not necessary in light of the assets of the single shareholder. The assessment of the ability to make collateral arrangements and the state of the assets must be made with respect to the single shareholder of the dissolved company, not the dissolved company itself.

Furthermore, the Court of Appeal also held that the obligation to make security collateral arrangements in accordance with Article 1865*bis* of the Luxembourg Civil Code (in this case a deposit into an escrow account) is a duty to act and not necessarily a payment obligation, which may therefore be accompanied by a court-ordered late payment penalty.

Commercial

Acceptance of an invoice as proof of a sales contract

In a decision dated 24 January 2019 (No. 16/2019), the Luxembourg Court of Cassation held that under Article 109 of the Commercial Code acceptance of an invoice necessarily gives rise to an irrefutable legal presumption of the existence of a claim only for invoices resulting from sales contracts between businesspeople.

In so ruling, the Court overturned the decision of the Court of Appeal which had held that the legal presumption also applied to an invoice for real estate agent fees resulting from a contract for services (*contrat d'entreprise*). Earlier decisions of the Luxembourg District Court and Court of Appeal had similarly expanded the application of Article 109 to find that an accepted invoice constituted proof of a commercial contract other than a sales contract.

In this case, the Court of Cassation rejected this generalised application of Article 109 and made it clear that in the context of invoices resulting from commercial contracts other than sales contracts the judge is free to accept or reject the acceptance of an invoice only as a rebuttable presumption that a claim exists, but not as an irrefutable legal presumption under Article 109.