Luxembourg Newsflash - 3 December 2020

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AML

Two laws dated 25 March 2020 were published to finalise the implementation into Luxembourg law of Directive (EU) 2018/843 (Anti-Money Laundering Directive, AMLD 5) and of other AML/CFT European texts. The first law establishes a central electronic system for retrieving data concerning payment and bank accounts identified by an IBAN number and safe-deposit boxes held by credit institutions in Luxembourg. Read more… The second one provides for several amendments to the amended law of 12 November 2004 on the fight against money laundering and terrorist financing (AML Law) i.a. extension of the scope of the professionals subject to AML requirements (now including virtual asset service providers and any person which commits to provide, directly or via another person to whom it is related, a material assistance or advice from a tax perspective as a principal economic or professional activity) and new rules for third party introducers. Read more… These laws are supplemented by CSSF Circulars 20/742, 20/744 and 20/747.

Article 31 of Directive (EU) 2015/849 (AMLD 4) was implemented into Luxembourg law by the law of 10 July 2020 on the Luxembourg register for *fiducies* and trusts. A Grand-Ducal regulation which shall supplement this law is still expected. Read more… The EU Commission issued a report assessing whether Member States have duly identified and made subject to the obligations of AMLD 4 all trusts and similar legal arrangements governed under their laws.

To supplement the implementation of AMLD 4 and AMLD 5 into Luxembourg law, CSSF Regulation 12-02 on AML/CFT and the Grand-Ducal regulation of 1 February 2010 providing details on certain provisions of the AML Law were duly amended and updated accordingly. Read more…

The law of 3 March 2020 also amends the provisions on terrorism of the Criminal Code to the extent that it implements into Luxembourg law Directive (EU) 2017/541 on combating terrorism and consequently specifies some definitions such as “participation in a terrorist group” or “financing terrorism” laid down in Article 135 of the Criminal Code.

At EU level and as part of the EU Commission’s action plan for a comprehensive Union policy on preventing ML/FT, a single rulebook on AML is expected in the forthcoming months. This single rulebook aims at gathering the directives and regulations and the additional legislative texts, such as EU delegated acts, regulatory technical standards, implementing technical standards, guidelines and related questions and answers.

CRD – CRR

Bill of law 7638 aims to implement two European directives into Luxembourg law, including Directive (EU) 2019/878 (CRD 5) with respect to exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures, and to lay down further implementing measures for certain provisions of a European regulation into Luxembourg law, notably including Regulation (EU) 2019/876 (Capital Requirements Regulation, CRR 2) amending CRR with respect to the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties (CCPs), exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR).

The EU Commission's Action Plan under CMU 2.0, the EU Commission's legislative package on a Digital Finance Strategy and the Capital Markets Recovery Package (CMRP) foresee proposals to amend, among others, the capital requirements framework.

BRRD

Bill of law 7638 aims to implement two EU directives in Luxembourg law and to lay down further implementing measures for certain provisions of a EU regulation into Luxembourg law, notably including Directive (EU) 2019/879 (BRRD 2) amending Directive (EU) 2014/59 (BRRD) with respect to the loss-absorbing and recapitalisation capacity of credit institutions and investment firms.

Capital Markets Recovery Package

Considering the impact of the COVID-19 pandemic, the EU Commission published, as part of its overall coronavirus recovery strategy, a capital markets recovery package (often referred to as the "Quick-fixes") where it proposes, among others, amendments to Regulation (EU) 575/2013 (Capital Requirements Regulation, CRR) with respect to adjustments to the securitisation framework, and Directive (EU) 2014/65 (MiFID 2).

CMU 2.0

Regarding banking and financial services, the EU Commission's Action Plan considers, *i.a.*, to amend (i) the securitisation framework, (ii) MiFID 2 relating to retail investors, inducements and disclosure, (iii) Directive (EU) 2016/97 (Insurance Distribution Directive, IDD), (iv) Directive (EU) 2009/138 (Solvency II Directive), (v) CRD 4 and amended CRR, and (vi) Regulation (EU) 909/2014 (Central Securities Depositories Regulation, CSDR).

COVID-19

Luxembourg and EU authorities released new or amended legislation, reports, recommendations and statements including guidelines and Q&As on measures regarding the impact of the COVID-19 outbreak on the financial markets, including (i) the question of the distribution of dividends, (ii) the postponement of some deadlines and (iii) Regulation (EU) 2020/873 which introduces some changes in CRR to temporarily facilitate capital requirements and thus enables credit institutions to increase their lending capacities. Read more…

In its report "COVID-19-related money-laundering and terrorist financing risks and policy responses", dated 4 May 2020, the Financial Action Task Force identified new cases of money laundering, *i.a.* related to the use of internal audit procedures temporarily undermined by teleworking, misuse of online financial services and virtual assets, etc. The report also described policy responses that jurisdictions may put in place. It finally provided for a list of statements and guidelines in this respect, which were issued by national authorities in several countries to mitigate ML/FT risks.

Crowdfunding

Directive (EU) 2020/1504 and Regulation (EU) 2020/1503 on crowdfunding service providers for business are part of measures to enhance the CMU. They aim to improve crowdfunding in the EU and enhance investors' protection, notably through an EU harmonised framework for crowdfunding platforms subject to the authorisation and supervision of the national competent authorities (NCAs).

CSD

The entry into force of the RTS on settlement discipline, which was postponed to 1 February 2021, may be once again postponed to 1 February 2022.

The EU Commission's Action Plan under CMU 2.0 and the EU Commission's legislative package on a Digital Finance Strategy contains proposals to amend *i.a.* CSDR.

Digital Finance Strategy

The EU Commission provided a legislative package to support digital finance. This package includes:

- A proposal for a Regulation on crypto-assets: it is intended (i) to provide uniform rules for crypto-asset service providers and issuers at EU level, (ii) to establish specific rules for stablecoins, and (iii) to set out definitions for different types of crypto-assets.
- A proposal for a Directive: it aims to strengthen digital operational resilience, and to establish a temporary exemption for multilateral trading facilities. Consequently, it amends *i.a.* Solvency II Directive, amended CRD 4, amended MiFID 2, Directive (EU) 2015/2366 (Payment Services Directive, PSD 2) and Directive 2016/2341

(Institutions for Occupational Retirement Provision Directive, IORP II Directive).

- A proposal for a Regulation on digital operational resilience for the financial sector: it lays down (i) requirements for financial entities relating to information and communication technology (ICT) risk management, and to the contractual arrangements concluded between financial entities and ICT third-party service providers, and (ii) an oversight framework for critical ICT third-party service providers when providing services to financial entities. Consequently, it amends *i.a.* EMIR, MiFIR (Regulation (EU) 600/2014 Markets in Financial Instruments Regulation) and CSDR.
- A proposal for a Regulation on a pilot regime for market infrastructures based on distributed ledger technology (DLT): it intends to establish uniform requirements for operations of market participants wishing to operate a DLT market infrastructure and to provide their services across all Member States.

The EU Commission's legislative package on a Digital Finance Strategy proposes to amend *i.a.* EMIR.

FinTech

Bill of law 7637 aims to modernise the law of 6 April 2013 on dematerialised securities and confirm the possibility of using DLT in this context, to the extent that it provides for a new definition of an issue account (confirming the possibility to keep/operate such an account on DLT), and it broadens the eligibility to keep central accounts for unlisted debt securities to EU and Luxembourg credit institutions and investment firms having the necessary capacities. Read more…

Guarantee

The law of 10 July 2020 on professional guarantees for payment establishes a new professional guarantee, alongside the independent guarantee and suretyship, which combines elements of the suretyship with other elements from the independent guarantee.

New prudential regulations for investment firms

Directive (EU) 2019/2034 (Investment Firms Directive, IFD) and Regulation (EU) 2019/2033 (Investment Firms Regulation, IFR) will introduce a new framework for investment firms. Under the new regime investment firms will be categorised according to their size and complexity and each category will be subject to a specific prudential framework. A so-called class 1 investment firm that is the "bank-like investment firm" will remain under the more stringent CRD/CRR regime, small and non-interconnected investment firms are categorised under class 3 and benefit from lighter provisions under the IFD/IFR regime. All other investment firms fall within the scope of class 2 and are subject to the full IFD/IFR regime. The new regime introduces a new approach to the calculation of the regulatory capital requirements and new remuneration rules. Internal governance and reporting requirements will

also be introduced. The new framework addresses requests from investment firms to define a new prudential regime that better reflects the risks they face rather than the one-size-fits-all approach defined by the CRD/CRR. The IFD/IFR will become fully applicable on 26 June 2021. In November 2020, bill of law 7723 was filed with the Parliament to implement *i.a.* IFD and IFR into Luxembourg law.

MiFID/MiFIR regulatory framework under review

In February 2020, the EU Commission launched a review process of the MiFID 2/MiFIR regulatory framework (MiFID 2 regime) with the publication of a consultation paper. Among other changes, the EU Commission is considering potential changes to the investor protection rules, potential actions to foster research coverage for SMEs, and the possible introduction of a new transparency tool that allows investment managers, investment advisers and their clients to have access to "live" asset prices across the EU in a consolidated format. Considering the impact of the COVID-19 pandemic, the EU Commission published, as part of its overall coronavirus recovery strategy, a capital markets recovery package (often referred to as the "Quick-fixes") where it proposes, among other things, amendments to the MiFID 2 regime. The aim of the MiFID 2 Quick-fixes is to contribute to the EU's recovery by facilitating investments in the real economy and freeing up resources for both firms and investors. Certain topics only recently approached within the context of the review of the MiFID 2 regime were now brought forward in an attempt to have these dealt with separately and with the required urgency. The areas for modification are: (i) amendments to the information requirements, such as, for example, the phase-out of the paper-based default method for communication, and (ii) changes to the rules concerning the energy derivative markets for which the underlying value is a commodity, such as gas or electricity. The EU Commission also published a draft Commission Delegated Directive amending Delegated Directive (EU) 2017/593 in respect of the regime for research on small and mid-cap issuers and on fixed income instruments to help the recovery from the pandemic. At the time of this publication, the MiFID 2 Quick-fixes are still pending with the EU co-legislators.

Following its assessment of over 200 third-country trading venues against criteria published in opinions in 2017, ESMA published two updated opinions related to post-trade transparency and to position limits.

A final report on the compliance function under MiFID reviewed the previous guidelines on the same topic dated 2012. Though the main principles remain unchanged, the final report contains specifications such as, for instance, the reporting obligations of the compliance function. It also sets forth the list of information to be included in mandatory compliance reports, taking into account the new product governance arrangement provided for by MiFID 2.

The EU Commission's Action plan under CMU 2.0, its legislative package for a Digital Finance Strategy and the CMRP are intended to amend *i.a.* MiFID 2 and MiFIR.

Provision of investment services and activities in the EU by third-country firms

The new IFD/IFR regime will also entail changes to the MiFID 2/MiFIR regime as regards the provision of investment services and activities in the EU by third-country firms. These changes include new reporting obligations for third-country firms to ESMA and mention the possibility for ESMA to require third-country firms registered with ESMA to provide data relating to all orders and all transactions in the EU. Furthermore, new reporting requirements from branches of third-country firms to NCAs have also been introduced. Within this context, ESMA published in September 2020 its final report on the provision of investment services and activities in the EU by third-country firms. ESMA's report includes in its Annex IV the draft technical standards (RTS) and in its Annex V the draft implementing technical standards (ITS) in relation thereto. The draft RTS specify the information necessary for the registration of a third-country firm with ESMA and the information to be reported to ESMA on an annual basis, whereas the draft ITS specify the format of such information. Once approved by the EU co-legislators, the RTS will become applicable as of 26 June 2021, together with the new powers entrusted to ESMA under this regime to temporarily prohibit or restrict the provision of investment services or activities in the EU by a third-country firm where, among others, the third-country firm has failed to comply with its reporting obligations to ESMA.

Clarification on the Luxembourg national (discretion) third-country regime

With Regulation 20-02 and Circular 20/743, the CSSF provided for a first list of equivalent jurisdictions and also clarified at the same time the territorial scope of investment services and ancillary services under such national regime and as previously specified in CSSF Circular 19/716 Read more… As a reminder, until the first equivalence decisions will be rendered at EU level by the EU Commission so that the EU-wide third-country regime can then fully deploy its effects, the provision in Luxembourg of investment services and ancillary services by third-country firms will have to be assessed pursuant to the Luxembourg national third-country regime.

Brexit

Regarding, *i.a.* rules relating to CCPs in accordance with EMIR, the EU Commission, ESMA, ECB and ISDA® released papers to analyse the impact of Brexit and to suggest actions to mitigate them. In such a context, the EU Commission released a decision on a temporary equivalence for UK CCPs that will apply as of 1 January 2021 and until 30 June 2022.

PSD 2

Directive (EU) 2020/284 aims to increase the detection of tax fraud in cross-border transactions. Thus, it notably provides for two new main requirements for payment service providers: (i) to keep records of cross-border payments relating to e-commerce and (ii) to make them available to national tax authorities under strict conditions. This Directive shall be implemented into Luxembourg law by 31 December 2023 at the latest. No bill of law is currently pending in this respect.

Commission Delegated Regulation (EU) 2020/1423 supplements PSD 2 regarding the criteria for appointing central contact points within the field of payment services and on the functions of those central contact points.

The CSSF has provided guidance on the definition of payment accounts within the meaning of the law of 10 November 2009 on payment services, which are addressed to all payment service providers (including banks, payment institutions and electronic money institutions) that offer payment accounts and are established in Luxembourg.

The EU Commission's legislative package on a Digital Finance Strategy contains proposals to amend *i.a.* PSD 2.

Securitisation

The current legislation was enhanced with several expected ESMA Guidelines and EU Commission Regulations specifying, *i.a.* (i) the details, format and template of the disclosure of information on a securitisation, (ii) the format of applications for registration as a securitisation repository, (iii) the securitisation repository operational standards and (iv) the treatment of OTC derivatives in connection with certain simple, transparent and standardised securitisations for hedging purposes. Consequently, EBA then provided for a documentation tool called "Single Rulebook on Securitisation".

The reporting requirements under the STS Securitisation Regulation entered into force on 23 September 2020. The final draft RTS published on 31 July 2018 by the EBA have not yet been adopted by the EU Commission and therefore Commission Delegated Regulation (EU) 625/2014 of 13 March 2014 supplementing CRR by way of RTS specifying the requirements for investor, sponsor, original lender and originator institutions relating to exposures to transferred credit risk still applies.

A legislative proposal amending the STS Securitisation Regulation which is intended to increase banks' capacity to provide loans to households and companies by extending the STS securitisation to on-balance sheet securitisation is ongoing at the EU level.

The EU Commission's Action Plan for a CMU 2.0 and the CMRP are proposing to amend *i.a.* the securitisation framework.

Future relationship with the UK

During the course of 2020, Luxembourg has not provided for further transitional relief other than the laws already adopted in 2019. Back to 2019… In the unlikely event of a hard Brexit, the multilateral memorandum of understanding between ESMA and the EU national competent authorities (NCAs) on the one hand and the FCA on the other hand would come into play as announced by ESMA on 1 February 2019. Going forward, the outsourcing and delegation of activities to UK-based investment managers by Luxembourg UCITS or alternative investment funds (AIFs) will continue to remain possible. As regards the provision of investment services by third-country firms in Luxembourg, the CSSF issued guidance on 1 July 2020 in the form of Circular 20/743 amending Circular 19/716. On the same day, it also published Regulation 20-02 setting up a first list of "equivalent" jurisdictions under the Luxembourg (national) third-country regime. The UK has not yet been included on this list. Read more… At the time of this publication, the CSSF has neither published any further guidance nor indicated any further regulatory forbearance for firms immediately after a hard Brexit.

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

UCITS may no longer invest in loans

On 7 August 2020, the CSSF announced that Luxembourg-domiciled UCITS may no longer invest in loans. This decision, published in the form of a new Q&A 1.13 under the CSSF's FAQ on the law of 17 December 2010 on undertakings for collective investments (UCI Law), extended a new administrative practice to the public that the CSSF had already been implementing. Read more… Luxembourg-domiciled UCITS that are invested in loans are required to disinvest from these positions by 31 December 2020. The prospectuses of these UCITS will have to be updated by 31 March 2021 at the latest so that they no longer allow for investments in loans.

Regulatory measures under the COVID-19 pandemic

With Luxembourg already having a broad palette of liquidity management tools available, the CSSF focussed during the height of the pandemic on evidenced good governance and quite generally on an enhanced transparency towards the regulator itself and the investors. The weekly investment fund manager (IFM) questionnaire, published for the first time on 9 April 2020, served the purpose of providing the CSSF with regular information on financial data (total net assets, subscriptions and redemptions) and on governance arrangements in relation to the activities performed by the IFM. Certain large IFMs were also required to separately notify large redemptions to the CSSF. General regulatory

guidance, among others on swing pricing, the proceedings concerning non-compliance with investment limits and the preparation and publication of annual reports, was provided through a dedicated FAQ published by the CSSF. The CSSF dealt with questions on redemption gates on a case-by-case basis. Arendt has created a Q&A containing more detailed information on the legal and regulatory developments in this context. Read more…

New rules on performance fees to be applied by UCITS and certain types of retail AIFs

On 3 April 2020, ESMA published its guidelines on performance fees in UCITS and certain types of AIFs (Guidelines). The Guidelines are applicable to all UCITS and have been extended to alternative investment fund managers (AIFMs) which market AIFs to retail investors in accordance with Article 43 of the AIFMD, with the exception of (a) closed-ended AIFs and (b) open-ended AIFs that are European venture capital funds (EuVECAs) (or other types of venture capital AIFs), European social entrepreneurship funds (EuSEFs), private equity AIFs or real estate AIFs. The aim of the Guidelines is to ensure supervisory convergence regarding performance fee structures and to set out the circumstances in which performance fees can be paid. Read more… On 6 November 2020, ESMA published the translation of the Guidelines triggering hereby the two-month period during which NCAs have to notify ESMA as to whether they intend to comply with the Guidelines. It is expected that the CSSF will announce its intention to comply. The Guidelines will apply as from 6 January 2021. Consequently, new investment funds and existing investment funds introducing a performance fee for the first time will have to comply as from 6 January 2021. Existing investment funds that already provide for a performance fee will benefit from a grandfathering period of 6 months as from 6 January 2021 plus any remaining period until the start of their next financial year.

The AIFMD framework under scrutiny

On 22 October 2020, the EU Commission launched a consultation on the review of the EU Directive on alternative investment fund managers (AIFMD) that aims to gather views from industry participants on potential changes to the AIFMD. The consultation contains a set of 102 questions that are divided into seven sections: (1) scope and authorisation - seeking views on improving the AIFM passport and the overall competitiveness of the EU AIF industry, (2) investor protection - raising questions on investor access taking into account the differences between retail and professional investors, (3) international relations - seeking views on how best to achieve the equitable treatment of non-EU AIFs, (4) financial stability - requiring feedback on how to ensure NCAs and AIFMs have the tools necessary to effectively mitigate and deal with systemic risks seeking in particular input on how to improve the supervisory reporting template set out in the AIFMR and on the increased activities of debt funds, (5) investing in private companies - seeking views on the effectiveness of the current rules and their potential enhancement, (6) sustainability – requiring input on how the alternative

investment sector can participate effectively in the areas of responsible investing, and (7) powers of supervisory authorities - raising questions on ESMA and if it should have additional powers and be entrusted with the authorisation and supervision of all AIFMs. Questions are also being asked on the treatment of UCITS where a more coherent approach may be warranted. The consultation closes on 29 January 2020. The EU Commission is expected to put forward a legislative proposal amending the AIFMD in Q4 2021 or Q1 2022.

Earlier this year, on 10 June 2020, the EU Commission published its report to the EU Parliament and the Council of the EU on the scope and the application of the AIFMD. The report concludes that while the AIFMD has contributed to the creation of the EU AIF market, provided a high level of protection to investors and facilitated monitoring of risks to financial stability, there are a number of areas where the legal framework could be improved. This report by the EU Commission follows a report established by an external contractor and published by the EU Commission in January 2019. Back to 2019… On 18 August 2020, following the publication of this report, ESMA published a letter to the EU Commission highlighting the areas where it considers improvements to the AIFMD framework could be made. Annex I to the letter contains ESMA's views on the key topics of the AIFMD review and a list of recommendations.

Enhancing the ELTIF legal framework

On 19 October 2020, the EU Commission launched a consultation concerning the review of the EU Regulation on European long-term investment funds (ELTIF). Considering the low uptake of the ELTIF market since the adoption of the ELTIF legal framework in 2015 and the specific recommendation by the High Level Forum on the Capital Markets Union calling, among others, for a broadening of the investment universe and for a reduction of potential distribution barriers taking into account the differences between retail and professional investors, the review of the EU Commission aims to (i) enhance the attractiveness of the ELTIF legal framework for long-term investment projects, (ii) promote the ELTIF label as pan-European quality label for alternative investment funds and (iii) potentially embed ELTIFs in the European Green Deal and post-Covid-19 recovery strategy for the EU real economy. The consultation seeks feedback on the following topics: (1) scope on the ELTIF authorisation and process, (2) investment universe, eligible assets and qualifying portfolio undertakings, (3) borrowing of cash and leverage, and (4) rules on portfolio composition and diversification. The consultation closes on 19 January 2021. The EU Commission intends to adopt a report on the review in Q3 2021.

Continuing work towards greener financial products

On 23 April 2020, the Joint Committee of the ESAs launched a consultation on proposed regulatory technical standards (RTS) on content, methodologies and presentation of disclosures under Regulation (EU) 2019/2088 (SFDR or Disclosure Regulation). Back to

2019… The draft RTS relate to several disclosure obligations under the SFDR, in particular to the details of the presentation and content of the information in relation to the principle of "do not significantly harm", pre-contractual information for so-called Article 8 and Article 9 products, a related information on the entity's website and the information to be published in periodic reports. The consultation closed on 1 September 2020. The RTS may not be available by the end of December 2020 as initially foreseen due to unprecedented delays caused by the pandemic. The EU Commission nevertheless expects market participants to comply with the SFDR's high level and principle-based requirements as from 10 March 2021.

With the entry into force on 12 July 2020 of the Regulation on the establishment of a framework to facilitate sustainable investment, often referred to as the "Taxonomy Regulation", another piece of the EU's sustainable investment framework fell into place. The aim of the Taxonomy Regulation establishes an EU-wide classification system intended to provide businesses and investors with a common language to identify to what degree economic activities can be considered environmentally sustainable. The Taxonomy Regulation contemplates a phased implementation (1 January 2022, respectively 1 January 2023) depending on the targeted environmental object.

Please also refer to the section "Company Law – Capital Markets".

Completing the legal framework for the cross-border distribution of investment funds

On 9 November 2020, ESMA launched a consultation on guidelines on marketing communications under the Regulation (EU) 2019/1156 on facilitating cross-border distribution of collective investment undertakings (CBDF Regulation). The proposed guidelines, set out in Annex IV of the consultation paper, aim to establish common principles for the identification as such of marketing communications, the description of risks and rewards of purchasing units or shares of AIFs or UCITS in an equally prominent manner, and the fair, clear and not-misleading character of marketing communications, taking into account online aspects of such marketing communications. ESMA clarifies that the proposed guidelines do not replace existing national requirements on the information to be provided. The consultation, representing the first step in the development of the final guidelines, closes on 8 February 2021. ESMA intends to issue the final guidelines by 2 August 2021. The CBDF framework entered into force on 1 August 2020 and will be fully applicable as of 2 August 2021. Back to 2019… By then, distribution channels and marketing approaches for investment funds will have to be reviewed and adapted where necessary.

PRIIPs KID – the never ending story

The ESAs (i.e. EBA, ESMA and EIOPA) were expected to officially approve the revised RTS under the PRIIPs Regulation by end of April 2020. The RTS were finalised following a consultation launched on 16 October 2019. Back to 2019… On 19 July 2020, the Joint Committee of

the ESAs published a letter to the EU Commission, informing the latter that the ESAs were not in a position to formally submit the RTS failing the unanimous adoption by the three ESA boards. The ESAs explained that board members that did not support the amendments to the PRIIPs KID RTS were generally of the view that a partial revision of the PRIIPs Delegated Regulation would not be appropriate prior to a comprehensive review of the PRIIPs Regulation. Also, a number of board members were indicating that for investment funds, they would prefer the past performance graph from the UCITS KIID to be included in the PRIIPs KID itself, rather than in a separate publication. With no formally adopted draft RTS prepared by the ESAs, the EU Commission finds itself once again in this matter in an unprecedented situation. At the time of this publication, the EU Commission has not yet officially announced how to further proceed. Possible options are (i) to endorse the non-approved RTS, (ii) to ask the ESAs for a new RTS compromise, (iii) to do nothing until the UCITS exemption expires on 1 January 2022, or (iv) to commence the outstanding review of the PRIIPs Regulation.

Please also refer to the section “Insurance Law”.

Costs and performance under continued scrutiny

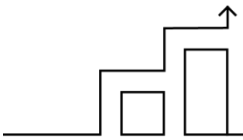
Earlier this year, on 4 June 2020, ESMA published a supervisory briefing on the supervision by NCAs of costs applicable to UCITS and AIFs. The supervisory briefing came in response to the need to improve convergence across NCAs in the approach to undue costs. Indeed, ESMA already identified a respective need in its annual statistical report on costs and performance of retail investment products in January 2019. Following ESMA’s publication, the CSSF published on 25 June 2020 a press release announcing its intent to comply with the supervisory briefing. Going a step further, ESMA issued on 13 November 2020 a press release stating that costs and performance for retail investment products will be a Union strategic supervisory priority for NCAs in 2021. A common supervisory action by ESMA in this context is expected to occur in 2021.

CMU 2.0

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

Pan-European Pension Product

Please refer to the section “Insurance Law”.



Company Law – Capital Markets

Holding meetings

Flexible measures on how companies and other legal entities are permitted to hold meetings have been introduced in Luxembourg to address the COVID pandemic context. These measures enable companies to hold shareholder meetings and management meetings without the need for physical attendance, even when this is not provided for in the company's articles of association. The law of 25 November 2020 extended these measures until 30 June 2021 (inclusive). Read more…

Annual accounts

As part of its targeted efforts to mitigate the negative effects of the COVID-19 outbreak in Luxembourg, the law of 22 May 2020 grants companies a period of 10 months to approve their annual accounts. The law extends the filing and publication deadlines for annual accounts, consolidated accounts and related reports (such as consolidated management reports and audit reports) to avoid exposing company managers and directors to liability and sanctions that are disproportionate given the exceptional circumstances. Read more…

European company (SE) general meetings

Regulation (EU) 2020/699 of 25 May 2020 introduced temporary measures concerning the general meetings of European companies enabling them to hold the annual general meeting within 12 months of the end of the financial year provided that the meeting is held by 31 December 2020.

Digital company law

Directive (EU) 2019/1151 of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law must be implemented in Luxembourg by 1 August 2021. The objective of the Directive is to enable companies to register, file and update their data in the relevant company registers fully online, without the need to appear physically before a business registry or intermediary (unless fraud is suspected). A bill of law is expected to be filed with Parliament soon. Back to 2018…

Non-financial reporting regime

In its 11 December 2019 Communication on the European Green Deal, the EU Commission committed to review the Non-Financial Reporting Directive in 2020 as part of the strategy to strengthen the foundations for sustainable investment. Reviewing this Directive is part of the EU Commission's effort to scale up sustainable finance by improving

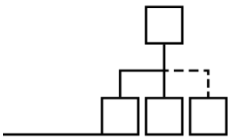
transparency and providing all stakeholders with more comparable and relevant information on sustainable business activities.

CMU 2.0

In September 2020, the EU Commission published its second action plan for a capital markets union setting out 16 action points in order to achieve 3 key objectives: (i) supporting a green, inclusive and resilient economic recovery by making financing more accessible to European companies, (ii) making the EU a safer place for long-term investment, and (iii) integrating national capital markets into a single market.

LuxSE rules & regulations

The Luxembourg Stock Exchange updated rules and regulations entered into force on 31 January 2020. The key changes relate to prospectus requirements for the admission of securities on the Euro MTF, including among other things the following: (i) introduction of clearly structured "building blocks" for issuers and securities across asset classes that can be used as check and validation lists for prospectuses, (ii) unified regime for the admission to trading on the Euro MTF, (iii) a broader scope of prospectus exemptions, and (iv) lighter requirements for listed entities and convertible debt.



Restructuring & Insolvency

Suspension of the obligation to file for bankruptcy until 30 June 2021

To address the COVID-19 pandemic situation, a Grand-Ducal regulation of 1 April 2020 notably suspended the deadline applicable to mandatory filings for bankruptcy under Article 440 of the Commercial Code. This deadline was extended by an additional six months from the end of the state of emergency in a law dated 20 June 2020. More recently, the law of 25 November 2020 further extends this deadline to 30 June 2021 (inclusive).

EU Restructuring Directive

The EU Restructuring Directive 2019/1023 aiming at introducing a minimum standard among EU Member States for preventive restructuring frameworks must be implemented by Member States by 17 July 2021. It is worth mentioning that the Directive provides for a derogation for Member States that encounter particular difficulties in implementing this Directive and that can benefit from an extension of a maximum of one year of the implementation period. To benefit from this extension, the Member State shall notify the EU Commission by 17 January 2021 of the need to make use of this option. It is still unclear whether Luxembourg would like to opt for the derogation. Back to 2019…

Luxembourg reform of reorganisation proceedings

After long and lasting discussions and even if the amendments of the government are still pending, the modernisation of bankruptcy law could be finalised during the 2020-2021 parliamentary session. There is a good likelihood that the next iteration of the bill of law dealing with the proposed reform will also include the provisions necessary to implement the EU Restructuring Directive into Luxembourg law.

Data Protection – Intellectual Property

Copyright and related rights

On 3 April 2020, the law of 18 April 2001 on copyright (author's rights), related rights and databases in view of the implementation of Directive (EU) 2017/1564 was amended for the purpose of introducing some derogations to authors' rights for certain authorised uses of certain works and other objects protected by author's rights and related rights in favor of the blind, the visually impaired and persons with other difficulties in reading printed texts, thus amending the amended law of 18 April 2001 on copyright, related rights and databases. It specifically provides for a legal framework for the adaptation of some works of art into a format accessible to the blind, the visually impaired and persons with other difficulties in reading printed texts, without prior authorisation by the author.

Data Protection

ECJ Ruling "Schrems II" pronounced the invalidity of the Privacy Shield, an auto-certification mechanism that was initially adopted to protect transfers of personal data between the EU and the US and was thus far used by entities from each side of the Atlantic. As a result, any transfer of personal data to the US using this mechanism became immediately illegal, irrespective of whether or not such transfers were carried out between entities of the same group or to external entities. This decision of the European Court of Justice (ECJ) also challenges the use of another safeguard mechanism called "Model Clause" or "Standard

Contractual Clauses" (SCCs), a mechanism adopted by the EU Commission that is used as an alternative to safeguard personal data transferred to countries located outside the EEA. Following this ruling, data exporters thus need to analyse whether the local law of the country in which the data importer is located does not prevent the SCCs from effectively implementing the requirements of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (GDPR).

COVID-19 and processing of employees' personal health data

The *Commission Nationale pour la Protection des Données* (CNPD), the Luxembourg data protection authority, issued specific COVID-19 recommendations for the processing of employees' personal data in which the CNPD expressly states that "*it is not their* [employers'] *role to carry out investigations or 'contact tracing'. This task falls to the Health Inspection from the moment when an employee or agent tests positive for COVID-19*". Therefore, although employers should ensure the protection and health of the employees in the workplace, contact tracing goes beyond this obligation. In accordance with the principle of data minimisation governing processing of personal data under the GDPR, employers should use methods that are less invasive to employees' privacy rather than tracing them by collecting location data, for example by asking them to immediately inform the employer should they test positive for COVID-19 and/or in the event of suspicion of contamination.

Processing of personal data by insurers

Bill of law 7511, filed with Parliament on 23 December 2019 and amending the amended law of 7 December 2015 on the insurance sector, aims to explicitly legitimise the processing of health-related data in the field of insurance and reinsurance after the entry into force of the GDPR and the law of 1 August 2018 on the organisation of the National Commission for Data Protection. The GDPR prohibits the processing of special categories of personal data, such as health-related data, unless certain requirements are met. This bill of law thus explicitly suggests legitimising such processing of personal data by invoking that it is necessary for reasons of substantial public interest (Article 9(2)(g) of the GDPR).

Electronic communications networks and services

Bill of law 7526 amending the law of 30 May 2005 on specific data protection provisions in the sector of electronic communications was filed with Parliament on 16 July 2020. It introduces a new Article 7, §5*bis* in the law of 30 May 2005 according to which providers and operators of fixed or mobile phone services providing access to the unique European emergency call number "112" as well as to other emergency numbers determined by the "*Institut Luxembourgeois de Régulation*" (ILR) will now be required to make available callers' location data (if available) to the emergency call centers. Location data will have to be made available even when the location function has been deactivated and such data will have to be deleted within a maximum of 24 hours.

Bill of law 7632 implementing Directive (EU) 2018/1972 establishing the European Electronic Communications Code introduces many novelties having their source in the Directive to be implemented, notably:

- Number-independent interpersonal communications services: the scope of the current legislation is broadened to include so-called "over-the-top players" (OTT) through the definition of "number-independent interpersonal communications services", as opposed to the definition of traditional communication services based on numbering. These include messaging services such as Apple iMessage, WhatsApp, Facebook Messenger, Webmail services (e.g. Gmail) or voice/video calls such as FaceTime or Skype. However, the mere use of a cell phone number as an identifier does not in itself make these services number-based interpersonal communication services.
- Migration from *ex post* to *ex ante* regulation of dominant operators: the bill of law is intended to stimulate investment in new, very high capacity networks that encourage innovation in content-rich internet services and strengthen competitiveness. The new legal framework seeks to address barriers to access to infrastructure by stimulating consumer choice through predictable and consistent regulation.
- Framework to enable the deployment of very high capacity communications networks.
- Facilitating the deployment of limited range wireless access points. Strengthening consumer protection.

Media

Bill of law 7651 amending the amended law of 27 July 1991 on electronic media was filed with Parliament in August 2020 (Electronic Media Law). It proposes to align the amended Electronic Media Law with the new obligations arising from Directive (EU) 2018/1808, the so-called directive on the “Audiovisual Media Services”, and limits itself to faithfully implement the provisions of this Directive. The Audiovisual Media Services directive *i.a.* slightly adapts the criteria for determining the Member State to which a media service provider is legally subject. It also provides for better protection of minors against harmful content with regard to both television and video-on-demand services by imposing on video-sharing platforms the obligation to put in place appropriate measures to protect minors, and provides for a quantified obligation (minimum 30%) for the broadcasting of European works which providers of on-demand audiovisual media services will have to highlight in their catalog. The new obligations arising from this Directive directly apply to video-sharing platform services such as Youtube and Dailymotion, which should implement tools to ensure that the content created and posted by their users complies with the fundamental principles of the Directive (protection of minors, prohibition against content containing incitement to hatred prohibition against discrimination).

E-commerce

On 7 July 2020, amendments to the law of 14 August 2000 on e-commerce (e-Commerce Law) were adopted in order to comply with Regulation (EU) 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market (eIDAS Regulation). The amendments made to the e-Commerce Law aim to clarify the role played by the relevant supervisory body in Luxembourg. Read more…

Platform to Business

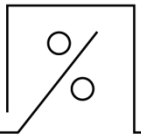
On 12 July 2020, Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services (P2B Regulation) entered into force. The P2B Regulation introduces the first set of EU rules applying to intermediation services, in particular framing the relationship between providers of online platforms and business users. The P2B Regulation aims to redress the imbalance between both actors, notably by ensuring the fair and transparent treatment of business users by providers and creating a predictable and innovation-friendly regulatory environment within the EU. Read more…

Bill of law 7537 on certain rules with respect to the application and on the sanctioning of the P2B Regulation was filed with Parliament on 24 March 2020. The bill of law specifies (i) the entities qualified to bring an action for an injunction with regard to the protection of the interests of user companies and users of company websites, (ii) their powers, (iii) the procedure of the action before the courts, and (iv) the applicable sanctions.

Consumers' protection

Bill of law 7456 aims to locally supplement Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) 2006/2004. This regulation lays down a cooperation framework to allow national authorities from all countries in the European Economic Area to jointly address breaches of consumer rules when the trader and the consumer are established in different countries. The bill of law proposes to amend Article L.311-5 of the Consumer Code listing different authorities ((i) the *Commission de surveillance du secteur financier* (CSSF), (ii) the *Commissariat aux Assurances* (CAA), (iii) the Health Ministry, (iv) the CNDP and (v) the *Communauté des transports*), which are each competent to ensure respect of the protection of consumer's interests by the persons who fall under their oversight by adding the *Commissariat aux affaires maritimes,* the *Autorité luxembourgeoise indépendante de l'audiovisuel,* and the *Direction de l'aviation civile.* Each of the above-listed authorities is now granted the broad powers provided for by Article 9 of the Regulation (*i.e.* notably the powers to audit, investigate, carry out on-site inspection, carry out mystery shopping, provide information to consumers, order in writing the cessation of infringements and to impose penalties).

Bill of law 7650 was filed with Parliament on 14 August 2020 for the purpose of introducing a class action mechanism in Luxembourg consumer law. The aim of the class action is to provide consumers with an efficient access to justice specifically in the case of mass damages due to the failure of a professional. The proposed procedure thus allows for the compensation of damages suffered by a large number of consumers resulting from the same illicit behavior or practice of a professional.



Tax Law

OECD transfer pricing guidance on financial transactions

On 11 February 2020, the OECD released its transfer pricing guidance on financial transactions. The new guidance provides recommendations regarding the application of the arm's length principle to financial transactions and addresses the pricing of intra-group loans, cash pooling, guarantees and captive insurance premiums.

The application of the new guidance may allow tax administrations to reclassify intra-group loans into equity contributions for transfer pricing purposes, thus denying interest deductions and applying potential dividend withholding taxes, in cases where the taxpayer does not produce comprehensive transfer pricing documentation.

Taxpayers engaged in intra-group financial transactions should double check their compliance with the new guidance of their transactions and related transfer pricing documents in order to avoid reclassification issues or interest adjustments. Read more…

Revision of the EU "blacklist" and Luxembourg bill of law on payments to EU "blacklist" countries

On 18 February 2020, the EU's Economic and Financial Affairs Council (ECOFIN) revised the EU list of non-cooperative jurisdictions for tax purposes (EU blacklist) to include the Cayman Islands, Palau, Panama and the Seychelles. Cayman Islands and Oman were subsequently removed whereas Anguilla and Barbados were added to the list by the Council of the EU on 6 October 2020. Read more...

On 30 March 2020, the Luxembourg government filed a bill of law implementing guidelines approved by the Council of the EU on 5 December 2019 relating to the non-tax deductibility of interest and royalty payments made to entities located in jurisdictions included on the EU blacklist. This new measure would apply to accruals and payments made to related parties as of 1 January 2021, based on a list of jurisdictions to be proposed by the Luxembourg government in the

second half of 2020. The list, yet to be issued, would be based on the version of the EU blacklist in force at that time. Read more...

DAC 6 implementation in Luxembourg

On 21 March 2020, the Parliament passed a law implementing Directive (EU) 2018/822 of 25 May 2018 amending Directive (EU) 2011/16 as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (DAC 6 Law). Certain intermediaries and, in certain cases, taxpayers will have to report information on reportable cross-border arrangements to the Luxembourg tax authorities within a specific timeframe. A reportable cross-border arrangement covers any cross-border arrangement that contains at least one hallmark (*i.e.* a characteristic or feature that presents an indication of a potential risk of tax avoidance) as set out in the DAC 6 Law. A cross-border arrangement will only fall within the scope of the DAC 6 Law if its first step was implemented between 25 June 2018 and 30 June 2020 or if one of the following triggering events occurs as from 1 July 2020: the arrangement is made available for implementation, the arrangement is ready for implementation, the first step of the implementation of the arrangement is made, or aid, assistance or advice is provided with respect to designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement.

Following the law of 24 July 2020, which implements Directive (EU) 2020/876 of 24 June 2020, which amends Directive (EU) 2011/16 to address the urgent need to defer certain time limits for the filing and exchange of information in the field of taxation because of the COVID-19 pandemic, the reporting obligation in Luxembourg will start as from 1 January 2021.

By this time, therefore, each Luxembourg intermediary and relevant taxpayer should be able to assess whether an arrangement falls within the scope of the DAC 6 Law and should have all internal reporting and notification processes in place. Late, incomplete or inaccurate reporting, or non-reporting shall be subject to a maximum fine of 250,000 euros. Read more...

FATCA & CRS

On 9 June 2020, the Parliament passed a law amending both the CRS law of 18 December 2015 (CRS Law) and the FATCA law of 24 July 2015 (FATCA Law). The law clarifies that Luxembourg reporting financial institutions will have an obligation to file a "nil report" in the absence of reportable accounts under CRS as well as document actions taken and evidence used in a specific register to ensure the fulfilment of their reporting and due diligence obligations. The applicable statute of limitations of the Luxembourg tax authorities' powers of investigation will be ten years from the end of the calendar year in which the Luxembourg reporting financial institution is required to disclose information. Read more...

In the context of COVID-19, the law of 24 July 2020 introduced provisions amending the CRS Law and the FATCA Law to extend the reporting deadline for the year 2019 by 3 months (*i.e.* this information was to be reported by 30 September 2020). Read more...

COVID-19 tax measures

Various other tax measures have also been taken by the Luxembourg government to support the economy in the context of COVID-19, including *i.a.* the cancellation of quarterly (corporate) income tax advances and municipal business tax advances for Q1 and Q2 2020, a 4-month extension of the payment deadline (with no penalty) for any (corporate) income tax, municipal business tax or net wealth tax due on or after 1 March 2020, and the extension of the 5-year statute of limitations with respect to direct taxes due to expire on 31 December 2020 to 31 December 2021. Read more...

BlackRock VAT case

On 2 July 2020, the European Court of Justice (ECJ) held that a "single supply" of management services provided by a third party supplier via a software platform for the benefit of a fund management company managing both specialised investment funds (SIFs) and other funds does not fall within the VAT exemption provisions. Luxembourg fund managers should review their existing structuring in light of this judgment as such narrow interpretation may have a direct impact on their relations with third-party suppliers. Read more...

Exchange of information in tax matters upon request

On 6 October 2020, the ECJ held that the right to an effective remedy guaranteed by Article 47 of the Charter of Fundamental Rights of the EU required that persons who hold information requested by the national administration, in the context of a cooperation procedure between Member States, must be able to bring action against such a request. A request for information from the national administration may relate to categories of information where such categories are considered to be "foreseeably relevant". Read more…

Amendment to the Luxembourg/France Double Tax Treaty

Following an amendment to the Luxembourg/France Double Tax Treaty, which clarifies an aspect of the French mechanism to rule out double taxation of French resident cross-border workers who perform an employment activity in Luxembourg, the applicable tax credit should be equal to the amount of the French tax calculated on the said income. In order to benefit from the tax credit, the Luxembourg-sourced employment income must have been subject to tax in Luxembourg. The Amendment will have retroactive effect from 1 January 2020. Read more…

Taxation of cross-border commuters

Under the relevant agreements between the Luxembourg authorities and the French/German/Belgian authorities concerning cross-border commuters in the context of the COVID-19 pandemic, days teleworked from France/Germany/Belgium can receive the same tax treatment as days worked in Luxembourg until 31 December 2020. Read more…

Budget bill of law 2021: tax measures to address the impact of COVID-19

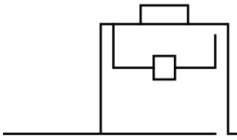
The budget bill of law 2021 filed with Parliament on 14 October 2020 introduces several tax measures in favour of social equity aiming to address the impact of COVID-19 and support a sustainable recovery. It does not increase the rates of existing taxes, nor does it introduce any new wealth tax or succession duties.

The key tax measures include introduction of a new “participating bonus” regime for employees (benefiting from a 50% tax exemption under conditions), which will replace the current “stock option” regime to be abolished with effect from 1 January 2021; revision of the scheme for highly skilled and qualified workers (including *i.a.* the possibility for the employer to grant an "impatriation bonus" benefiting from up to 50% tax exemption for an amount not exceeding 30% of the annual remuneration of the impatriate; reduced subscription tax for sustainable investment funds with a rate that decreases depending on the degree of investment in sustainability; and introduction of a lump-sum 20% real estate levy on gross income (rents and capital gains) derived from real estate located in Luxembourg by SIFs, UCIs and RAIFs. Read more…

OECD blueprints on taxation of the digital economy

On 12 October 2020, the OECD published its latest update on the proposed changes to the international tax principles and the two-pillar approach to taxing the digital economy. This includes the Blueprint for Pillar 1 concerning a revision of profit allocation and nexus rules so that, in a digital age, the allocation of taxing rights with respect to business profits is no longer exclusively circumscribed by reference to physical presence. This also includes the Blueprint for Pillar 2 concerning a global minimum taxation, which proposes a set of rules that attempt to determine that large internationally operating businesses pay a minimum level of tax regardless of where they are headquartered or the jurisdictions in which they operate. The Blueprints are the subject of a public consultation seeking stakeholder input running from 12 October to

14 December 2020, with a virtual meeting to take place in January 2021. The initial timeline for the work had contemplated an agreement by the end of 2020, but the stated goal is now to find a consensus by mid-2021.



Employment Law

New law on internships for pupils and students

The law of 4 June 2020 amending the Labour Code and introducing an internship scheme for pupils and students entered into force on 9 June 2020.

The law differentiates between three types of occupation of pupils and students by companies: (i) during school holidays, (ii) during mandatory internships required by an educational institution and (iii) during voluntary internships to acquire professional experience.

In particular, the law determines the formal requirements of the internship agreement/convention. The law also sets out the remuneration requirement, where relevant, to be observed in each specific case, subject to certain conditions: (i) during school holidays remuneration must be equivalent to a minimum of 80% of the minimum social wage for unskilled workers, (ii) for mandatory internships of less than 4 weeks, remuneration remains discretionary, however remuneration of at least 30% of the minimum social wage for unskilled workers is now mandatory for all internships of over 4 weeks, and (iii) for voluntary internships of less than 4 weeks, remuneration remains discretionary, however for internships of more than 4 weeks 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 is now mandatory.

New law on internal and external employee reclassification

The law of 24 July 2020 which entered into force on 1 November 2020 amends the provisions on internal and external reclassification of employees.

This law notably defines the missions and powers of the Mixed Committee, the body that is competent regarding decisions on internal or external reclassification, as well as the status of the person undergoing occupational reclassification, the adaptation of working hours, the compensation fee, the rehabilitation, the reconversion or the continuous vocational training measures for persons under internal reclassification.

The new conditions of eligibility for internal or external reclassification measures are also set out in this law (*i.e.* employees are now eligible to reclassification if their seniority is of at least 3 years or if they obtained a certificate of suitability for the job established at the time of hiring).

In addition, the law provides that employers which, on the day the request is submitted to the Mixed Committee, employ at least 25 employees and which do not occupy the number of employees benefiting from internal or external reclassification within the limits of the rates relating to the employment of disabled workers provided for by the Labour Code, are obliged to reclassify the employee concerned by this measure. To this end, the law reintroduced the provisions where employees benefiting from internal or external reclassification are considered as disabled workers for threshold purposes.

This new law also amended the conditions for granting the compensatory allowance in the event of reclassification as well as its calculation, payment and its consideration for unemployment or pension allowances for example. Furthermore, the law provides that individuals under reclassification status who are at the end of their unemployment compensation rights (including any extension), may benefit from a waiting professional indemnity under the condition that they can demonstrate at least 5 years of suitability in their last job or 5 years of seniority. In case of fraud concerning compensatory allowances or professional waiting indemnities the Labour Code now provides for a prison sentence of 1 to 6 months and/or a fine of 500 to 5,000 euros. Attempted fraud is punishable by imprisonment from 8 days to 3 months and/or a fine of 251 to 2,000 euros.

New agreement on the legal regime of teleworking

On 20 October 2020, a new Agreement on the legal regime of teleworking was signed between the social partners *Union des Entreprises Luxembourgeoises*, OGBL and LCGB. This new Agreement replaces the previous 2006 version and updates the teleworking framework for employers and employees.

Under the Agreement, employees and employers may freely choose the organisation of remote work, subject to applicable provisions, either when the employee is hired or at any point during the course of employment. Employees who choose to telework must be treated equally to employees working on-site for the business. In the case that an employee refuses to telework, the employer may not take action to dismiss the employee on the sole basis of such refusal.

With respect to regular teleworking, the employer must provide the employee with the equipment needed for the job at its own cost. This obligation does not apply however to occasional teleworking which is a new concept introduced by this Agreement and is defined as telework that represents less than 10% of the normal annual working time of the

teleworker or telework that responds to unforeseen events (such as COVID-19).

The Agreement does not cover secondment, the transport sector (generally speaking, except for administrative positions), sales representatives, co-working spaces, smart-working (occasional work via smartphone or laptop outside of the usual workplace), and all services provided to clients outside of the business.

A Grand-Ducal regulation making this Agreement a general obligation applicable to all employees is expected by the end of 2020.

Introduction of a series of health and safety measures to fight against COVID-19

During the state of emergency (18 March 2020 – 24 June 2020), a Grand-Ducal regulation introduced a series of health and safety measures to fight against COVID-19 that were applicable to employers from 17 April 2020 until the end of the state of emergency, after which this Grand-Ducal regulation and the sanctions included therein no longer applied.

On 21 July 2020, a bill of law reflecting the provisions of the Grand-Ducal regulation was filed with Parliament. However, on 5 November 2020, a Grand-Ducal decree withdrew this bill of law. Luxembourg currently has no planned COVID-19 related health and safety measures that are specific to employers.

Secondment

A bill of law implementing Directive (EU) 2018/957 amending Directive 96/71/EC concerning the secondment of workers in the framework of the provision of services and amending the Labour Code was filed with Parliament on 23 January 2020.

In practice, the purpose of this bill of law is to extend several provisions relating to the secondment to Luxembourg of employees from a company established abroad, in accordance with the latest European directive on this subject. The bill of law broadens the compulsory provisions applicable to seconded employees. It also further specifies the provisions applicable to long-term secondments (*i.e.* those of over 12 months). In addition, the bill indicates that the provisions on secondments will also be applicable to temporary work agencies established abroad when they second employees to Luxembourg. A new title regulating the accommodation conditions of employees who are away from their usual place of work will also be included in the Labour Code. The powers (control and sanctions of the above-mentioned requirements) and the number and scope of information and documents that can be requested by the employment agency (*Inspection du travail et des mines* or ITM) will also be expanded through this bill of law. Finally, this bill of law underlines that its provisions will not be applicable to the road transport sector

Right to disconnect

The Luxembourg Minister of Labour has requested the *Conseil économique et social* (CES) to draft an opinion on workers' right to disconnect from work with the objective of introducing a bill of law in the first half of 2021. The Labour Code does not expressly provide for a right to disconnect, although the Luxembourg Court of Appeal held for the first time in 2019 that employees have the right to be disconnected during their paid leave. The new Agreement on the legal regime of teleworking also notably mentions that all provisions relating to the right to disconnect for traditional employees will also apply to employees who telework.

Protection of whistleblowers

The Luxembourg Ministry of Justice plans to present its bill of law to implement Directive (EU) 2019/1937 on the protection of persons reporting on breaches of legal provisions early in 2021. EU Member States have until 17 December 2021 to implement this Directive into their national legislations. The Luxembourg government has indicated that it plans to widen the scope of application of the Directive to all national law. Luxembourg law currently provides for limited protection of whistleblowers, for example within CSSF regulated entities, and whistleblowers in Luxembourg have relied on the European Convention on Human Rights rather than national provisions to escape punishment for leaking information obtained through their work. Implementation of the Directive will alter the protections applicable to Luxembourg employees who report information acquired through work-related activities and will also provide defined mechanisms and channels of reporting.

Increase of the minimum social salary and subsequent aid

The government recently announced that a bill of law amending Article L. 222-9 of the Labour Code has been filed with Parliament. This bill of law aims to increase the minimum social salary (SSM) by 2.8% as of 1 January 2021.

In this framework, a bill on compensation aid for the increase in the social minimum wage in the context of the COVID-19 pandemic has also been filed with Parliament. This bill aims to introduce a financial aid in the framework of the increase in the minimum social wage for companies in the sectors most seriously affected by the COVID-19 pandemic and whose financial situation makes it difficult to bear the new burden resulting from the increase in the minimum social wage scheduled for 1 January 2021. The concerned companies are those defined in the law of 24 July 2020 aimed at setting up a recovery and solidarity fund and an aid scheme for certain companies (*e.g.* hotels and restaurants, travel agencies, artistic and event agencies, etc.). In order to be eligible, concerned companies must meet 4 cumulative requirements: (i) have a valid business licence; (ii) be affiliated with social security; (iii) having carried out their activities before 31 December 2020; and (iv) encounter temporary financial difficulties directly linked to the COVID-19 pandemic.

AML

Following the finalisation of the implementation of AMLD 4 and the implementation of AMLD 5 into Luxembourg law, the *Commissariat aux Assurances* (CAA) issued Regulation 20-03, together with comments. Read more…

The law of 3 March 2020 also amends the provisions on terrorism of the Criminal Code to the extent that it implements Directive (EU) 2017/541 on combating terrorism into Luxembourg law and consequently specifies some definitions such as “participation to a terrorist group” or “financing terrorism” laid down in Article 135 of the Criminal Code.

At EU level and as part of the EU Commission action plan for a comprehensive Union policy on preventing ML/FT, a single rulebook on AML is expected in the forthcoming months. This single rulebook aims at gathering the directives and regulations and the additional legislative texts, such as EU delegated acts, RTS, ITS, Guidelines and related Q&As.

Brexit

The CAA explained the consequences of a possible hard Brexit on (i) unit-linked contracts invested in external funds, internal collective funds and internal dedicated or specialised funds and on (ii) the deposit of assets underlying the technical provisions of direct insurance undertakings. Read more…

IDD

Concerning EIOPA Guidelines under IDD on insurance-based investment products (IBIPs) that incorporate a structure which makes it difficult for the customer to understand the risks involved, the CAA explained which guidelines must be complied with, in Circular Letter 20/09. This Circular Letter only concerns distributors who market or have the intention to market IBIPs by “execution only” regime.

Insurance contract

Bill of law 7511 is based on substantial public interest as provided for by Regulation 2016/679 (GDPR). It allows the processing of health-related data in the context of insurance and reinsurance by insurance undertakings, when professional secrecy is respected and when appropriate measures to respect the rights and liberties of concerned persons are implemented. This bill of law is still under discussion. Please also refer to the section “Data Protection – Intellectual Property”.

Pension - IORP - PEPP

EIOPA prepared a set of draft RTS and ITS and an advice on Delegated Acts to implement the framework for the design and delivery of the Pan-European Personal Pension Product (PEPP) based on Regulation (EU) 2019/1238 (PEPP Regulation). They *i.a.* specify (i) the requirements on information documents, on the costs and fees included in the cost cap and on risk-mitigation techniques for the PEPP, (ii) additional information regarding supervisory reporting, (iii) EIOPA product intervention powers, and (iv) format of supervisory reporting to the competent authorities and the cooperation and exchange of information between competent authorities and EIOPA.

EIOPA set out model Pension Benefit Statements to provide practical guidance on the implementation of the annual information document that institutions for occupational retirement are required to send to their members pursuant to the IORP II Directive.

PRIIPs KID

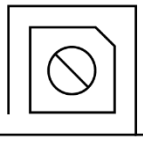
The ESAs informed the EU Commission of the outcome of the review conducted by the ESAs on an awaited draft RTS regarding the key information document (KID) for packaged retail and insurance-based investment products (PRIIPs). Such draft RTS were to specify the presentation and content of the KID, including methodologies for the calculation and presentation of risks, rewards and costs, and the review of the KID. As the three ESA boards did not adopt it, it will not be submitted to the EU Commission.

The CAA issued Circular Letter 20/2, which provides further details on the scope of PRIIPs mainly to specify the terms of supply, format and content of the KID.

Supervision – Solvency

Bill of law 7638 aims (i) to implement two European directives into Luxembourg law and (ii) to lay down further implementing measures for certain provisions of a European regulation into Luxembourg law regarding the banking sector, *i.e.* (i) CRD 5, (ii) CRR 2 and (iii) BRRD 2. It consequently supplements *i.a.* Article 219 of the law of 7 December 2015 on the insurance sector, as amended, with a new paragraph on the cooperation of the CAA with others authorities on a consolidated basis.

In Circular Letter 20/13, the CAA informed insurance and reinsurance undertakings that they have to comply with EIOPA Guidelines on outsourcing to cloud service providers. Read more…



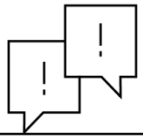
Criminal Law

Adjustments to criminal liability of legal persons

For the purpose of implementing Directive (EU) 2017/1371, the law of 12 March 2020 makes adjustments to Article 34 of the Criminal Code concerning the criminal liability of legal persons. It specifies that where a lack of supervision or control on the part of a director has made it possible for a person under his authority to commit a crime or offence in the interest of the legal person, the legal person may also be held criminally liable. This law also formally extends the scope of public corruption offences (and related offences) to acts of corruption involving foreign officials, foreign judges or arbitrators, officials of bodies of the EU, and officials of international organisations. Finally, this law amends Article 5-1 of the Code of Criminal Procedure in order to give Luxembourg judges jurisdiction to hear cases of money laundering committed by (i) any Luxembourg national, (ii) any Luxembourg resident, or (iii) any foreigner present in Luxembourg, even if the act is not punishable under the legislation of the country where it was committed, and even if the Luxembourg authorities have received neither a complaint from the victim nor a denunciation from the country where the predicate offence was committed.

COVID-19 and proceedings in criminal matters

The COVID-19 pandemic has had a significant impact on the functioning of the judicial system, and in particular the criminal justice system which operates largely through oral auditions and hearings and where human contact is of paramount importance. The law of 20 June 2020, which introduced various restrictions and barrier measures related to the fight against the pandemic, replaced, among other things, oral procedures with written procedures to a certain extent. This might, depending on the circumstances, put the defendants' rights of defence at risk. The law of 24 July 2020 amending the law of 20 June 2020 restored a balance between the security and barrier measures still in force because of the COVID-19 pandemic and the rights of defence of individuals who should assert their fundamental right to "see their judge". Thus, the proceedings which were in writing during the state of emergency are now once again oral in nature, in accordance with the relevant provisions of the Code of Criminal Procedure.



Commercial, Litigation & Dispute Resolution

Collective recourse

On 14 August 2020, the Minister for consumer protection tabled bill of law 7650 introducing collective recourse procedures into consumer law.

Under the bill's current language, it will be possible for a representative consumer or entity to initiate a collective action on behalf of a group of prejudiced consumers against professionals for a breach of their legal or contractual duties, or for wrongdoing established during a cessation action.

Entities under the supervision of the *Commission de Surveillance du Secteur Financier* or the *Commissariat aux Assurances* (in most cases) do not currently fall within the scope of the bill, and are therefore ineligible to be defendants in collective actions.

The procedure will be divided into two different phases: an admissibility phase and a merits phase. During the admissibility phase, topics such as consumer representation and class action financing will come under scrutiny of the Court.

During the merits phase, the Court will be asked to issue judgment determining the professional's liability, identifying the group of prejudiced consumers and the detriment done to them, identifying the measures that should be taken to hold the consumers harmless and identifying whether the class of consumers is subject to an opt-in or opt-out system.

In its judgment on the merits, the Court will also be asked to appoint a liquidator whose duties will be to oversee and to ensure enforcement of the merits judgment until all consumers have been held harmless by the professional.

A simplified procedure is also currently planned for cases in which the number and identities of prejudiced consumers are known and in which they have suffered broadly equivalent harm.

With a view to promoting alternative dispute resolution, the parties will have to attend a compulsory information meeting on mediation following the admissibility judgment. After this meeting, the parties remain free to choose to mediate according to the procedure set out in the bill of law, in the presence of a mediator who is specially qualified in class action mediation.

Indirect shareholders' standing to sue

In a judgment dated 5 June 2020, the President of the District Court sitting as in summary matters held that indirect shareholders can have standing to request interim relief measures when it comes to protecting the interests of entities belonging to the same group of companies.

The judge determined that, in accordance with French case law, no general principle of law exists that would render requests of an indirect shareholder inadmissible for lack of standing to sue.

In this case, the judge allowed indirect minority shareholders to request the appointment of an ad-hoc administrator so as to temporarily disable a cash pooling system. The judge nevertheless denied the request in *inter partes* proceedings because it could not be shown why the measure was justified.

Preliminary ruling on the temporary restriction of public access to a beneficial owner's information

The amended law of 13 January 2019 establishing the Register of Beneficial Owners, which implements Directives 2015/849/EU (AMLD IV) and 2018/843/EU (AMLD V), provides that public access to a beneficial owner's information can be temporarily restricted in 'exceptional circumstances', as further detailed in the legislation.

The Luxembourg District Court asked the CJEU to give a preliminary ruling on the interpretation and scope of the concepts of 'exceptional circumstances' and 'risk' set out in Directive (EU) 2015/849 and the corresponding national provisions.

In practical terms, the CJEU is asked to state the limits (if any) on the discretion of national legislation and courts in defining and applying the concept of exceptional circumstances. One objective is to clarify whether the concept of a 'disproportionate risk' constitutes an exceptional circumstance on its own, as well as the extent to which any risk present must be qualified.

The outcome of this proceeding will likely clarify which justifications may be used to request a temporary restriction on public access to a beneficial owner's information in the RBO. The preliminary ruling is expected to be entered in the course of 2021.

COVID-19 and procedural deadlines

In response to the COVID-19 crisis, the government took action to adapt the functioning of the legal system during and after the state of emergency, including through modifications to procedural deadlines. Regulations dated 25 March, 1 April, 17 April and 29 April 2020 suspended deadlines for nearly all proceedings before Luxembourg courts. Deadlines to introduce legal proceedings before the courts of first instance that would normally have expired during this crisis period were extended until after the end of the crisis. A law dated 20 June 2020 prolonged some of these measures from one to six months after the end of the state of emergency on 24 June 2020. Bill of law 7721, filed with

Parliament on 26 November 2020, aims to repeal the law of 20 June 2020 in order to consolidate and prolong certain measures applicable to, *i.a.*, written proceedings before the courts, until a later date in 2021 (31 March, 30 June or 15 September 2021, depending on the measure).

Modernisation of Luxembourg Arbitration Law

On 15 September 2020, the Minister of Justice submitted bill of law 7671 to reform the procedural framework applicable to arbitration in Luxembourg. The bill of law is currently pending with Parliament.

The bill of law incorporates elements of French procedural rules and the UNCITRAL Model Law on International Commercial Arbitration. Notable provisions include the establishment of the role of the supporting judge (*juge d'appui*) to resolve procedural difficulties and the designation of the Court of Appeal as the only court that can hear requests to set aside an award, thus removing the requirement to first seek relief from the District Court before appealing to the Court of Appeal.

The bill of law is based on a proposal from the Think Tank for Arbitration, a group of experienced Luxembourg-based practitioners and academics interested in arbitration. The bill of law aims to make arbitration in Luxembourg more attractive by setting up an efficient, arbitration-friendly ecosystem that adapts the country's existing legal framework to widely recognised international arbitration standards.

Liability of a specialised investment fund's (SIF) transfer agent

In a decision dated 18 March 2020 (Docket No. 00488), the Luxembourg District Court held that unless otherwise provided, a central administration, transfer and registrar agent and domiciliation agent of a SIF cannot in principle be held liable for the non-payment by the SIF of redemption proceeds to the investors. In the case at hand, the Court was seized of a tort claim by a company having invested in a sub-fund of a SIF. The action was brought against the SIF's central administration, transfer and registrar agent and domiciliation agent that, according to the claimant, was responsible for the payment of the company's redemption request.

The Court however found that in the case at hand, the duties of the central administration, transfer and registrar agent and domiciliation agent have never included an obligation to pay, but that its duties were limited notably to the administration of the fund and the correct calculation of the net asset value of the shares. The company's tort action based on Articles 1382 and 1383 of the Civil Code was therefore declared unfounded. The judgment is currently under appeal.

The rules in relation to security for costs and penalty (*cautio*

On 1 July 2020, the Luxembourg District Court held that an American claimant acting against a defendant residing in Luxembourg is not released from providing a *cautio judicatum solvi,* notwithstanding the existence of a treaty of friendship, establishment and navigation from 23

judicatum solvi) apply to an American claimant

February 1962 concluded between Luxembourg and the United States. The latter notably provides that American nationals shall have access to all competent judicial and administrative channels, in the same way as Luxembourg nationals. Also, the treaty provides for the full legal and judicial protection of the persons and rights of both nationals. However, the Court decided that this treaty does not provide for a derogation to provide a *cautio judicatum solvi*, neither explicitly, nor implicitly, since it does not refer to the practice of *cautio judicatum solvi*.

The rules in relation to security for costs and penalty (*cautio judicatum solvi*) do not apply to the UK parent company of its Luxembourg branch

By a commercial judgment dated 29 July 2020 (Docket No. 169649), the Luxembourg District Court held that a *cautio judicatum solvi* may only be granted to defendants who are domiciled or resident in Luxembourg, the latter benefiting from the same rights as those granted to Luxembourg nationals.

The Court held that a UK company and its Luxembourg branch are not to be considered to find themselves in the same legal situation, and only the latter may benefit from the *cautio judicatum solvi*. In its analysis, the Luxembourg District Court emphasised that the branch is not a distinct legal person from the parent company, and is merely to be considered an extension of the parent company to the outside world.

In this case, the Court considered that the branch is economically and legally dependent upon the parent company. The mere fact that the branch has a certain degree of autonomy based on its ability to enter into some contracts with third parties, or its registration in a trade and companies register, does not provide it with an independent legal personality. The foreign parent company of a Luxembourg branch thus does not enjoy the same rights as the latter.

The opposability of a bank's general terms and conditions towards the successors of the contracting party

In a decision dated 29 July 2020, the Luxembourg District Court (Docket No. 08378) concluded that the successors of a deceased person are bound by the terms of an agreement concluded between the bank and the deceased party, including the general terms and conditions that were duly accepted by the deceased.

The Court held that the bank was therefore under no obligation to specifically communicate the general terms and conditions to the successors of the deceased. The judges also ruled that the clause included in the general terms and conditions of the bank, reducing the extinctive prescription period, does not constitute an oppressive provision.

More specifically, the judges held that by accepting a shortened limitation period, a person does not lose the ability to take legal action against the bank. A contractual clause reducing the extinctive prescription period is therefore in line with Article 2220 of the Civil Code, which provides that a limitation period cannot be waived.