



Luxembourg newsflash 20 December 2016

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Banking & Financial Services

Anti-money laundering: To better counter the financing of terrorism and increase transparency, a proposal for a directive amending Directive 2015/849 has been adopted. This proposal is aimed, *inter alia*, at (i) extending the list of obliged entities to virtual currency exchange platforms and custodian wallet providers, (ii) reducing the thresholds below which reduced Customer Due Diligence (CDD) may be applied in relation to certain pre-paid instruments, (iii) enabling FIUs and competent authorities to have access to information on accounts by requiring Member States to put in place automated centralised mechanisms for this purpose, such as centralised registries, (iv) setting up a minimum set of requirements to be applied by all Member States for the application of enhanced CDD when dealing with persons established in high-risk third countries and (v) granting public access to certain beneficial ownership information (in this context, the 25% shareholding threshold used to identify beneficial owners of corporate entities is lowered to 10% with respect to certain limited types of entities which are exposed to a specific risk of money laundering or tax evasion). The proposal also suggests bringing forward the date of implementation of the AML IV Directive to 1 January 2017.

Delegated Regulation 2016/1675 lists the third-country jurisdictions which have strategic deficiencies in their AML/CTF regimes and must therefore be considered as high-risk third countries.

Circular 16/645, relating to FATF publications on high-risk and non-cooperative jurisdictions, was published on 27 October 2016 by the *Commission de Surveillance du Secteur Financier* (CSSF).

Bank Recovery and Resolution Directive (BRRD): New level 2 measures have been issued and others are still being drafted.

New proposals for directives amending BRRD have been adopted. These proposals are aimed at implementing the Total Loss-absorbing Capacity Term Sheet issued by the Financial Stability Board.

Single Resolution Fund (SRF) in Luxembourg: On 5 February 2016, Luxembourg ratified the Agreement concerning the transfer and the mutualisation of contributions to the Single Resolution Fund which was signed in Brussels on 21 May 2014 and entered into force on 1 January 2016.

CSSF Regulation 16-06 sets up the *ex ante* contributions to be paid to the Luxembourg Resolution Fund.

Single Resolution Mechanism (SRM): The SRM has been fully operational since 1 January 2016 and since then the Single Resolution Board has been able to fully exercise the powers granted to it in this context. The SRM implements the BRRD in the Euro area. A proposal for a regulation amending Regulation 806/2014 that is aimed at implementing the Total Loss-absorbing Capacity Term Sheet issued by the Financial Stability Board has been adopted. Level 2 measures are still being drafted.

Central counterparties: A proposal for a regulation on a framework for the recovery and resolution of central counterparties and amending Regulations 1095/2010, 648/2012 and 2015/2365 has been adopted. This proposal is also aimed at laying down rules and procedures relating to the recovery and resolution of central counterparties and rules relating to arrangements with third countries in the field of recovery and resolution of central counterparties.

Capital Requirement Regulation (CRR): Certain provisions of Regulation 575/2013 on prudential requirements for credit institutions and investment firms became applicable only as of 1 January 2016. New level 2 measures have been issued and others are still being drafted.

A proposal for a regulation amending CRR has been adopted. This proposal, which takes into account recent international developments, is aimed *inter alia* at (i) clarifying the conditions under which competent authorities may waive the application of own funds and liquidity requirements on an individual level for subsidiaries, (ii) implementing the standards recently developed by the Financial Stability Board and the Basel Committee on Banking Supervision (for instance, in terms of exposures to central counterparties, trading book/market risk or large exposures, interest rate risks for banking book positions, etc.), (iii) enhancing proportionality as regards the regulatory reporting and disclosure regimes and (iv) introducing rules on a binding net stable funding ratio.

Capital Requirement Directive (CRD IV): A proposal for a directive amending CRD IV has been adopted. This proposal, which takes into account recent international developments, is aimed *inter alia* at (i) empowering the EU Commission to exempt specific institutions or categories of institutions from CRD IV, provided that certain pre-defined criteria are complied with, (ii) clarifying the information to be included in requests for authorisation to operate as a credit institution, (iii) providing for an authorisation procedure for financial holding companies and mixed financial holding companies, (iv) imposing an obligation to set up a duly authorised intermediate EU parent undertaking where two or more institutions established in the Union have the same ultimate parent undertaking in a third country, (v) introducing a revised framework for capturing interest rate risks for banking book positions, (vi) providing for more proportional remuneration rules for small and non-complex institutions and for staff members with low variable remuneration, (vii) clarifying the conditions under which competent authorities can set additional own funds requirements and (viii) amending the rules on restrictions on distributions. New level 2 measures have been issued and others are still being drafted.

Systemically important credit institutions in Luxembourg: On 8 November 2016, the CSSF published Regulation 16-08 specifying which financial institutions authorised in Luxembourg can be qualified as “systemically-important credit institutions”. It also sets out the capital buffer they have to build up. It will enter into force on 1 January 2017.

Central Securities Depositories (CSD): New level 2 measures have been issued and others are still being drafted.

European Deposit Insurance Scheme (EDIS): The proposal for a Regulation amending Regulation (EU) 806/2014 in order to establish a European Deposit Insurance Scheme (which will constitute the third pillar of the Banking Union) is still under discussion at the European level.

Deposit Guarantee Scheme (DGS): On 15 September 2016, the European Forum of Deposit Insurers (EFDI, an international non-profit association representing depositor insurers across Europe) published a deposit guarantee scheme co-operation agreement which is compliant with the EBA’s guidelines on co-operation agreements between Deposit Guarantee Schemes (DGS) as well as a related cooperation rulebook. The agreement regulates the relationship between DGS in relation to cross-border payouts of depositors, transfer of contributions and mutual lending. The rulebook deals with the operational aspects of the cooperation.

Circulars CSSF-CPDI (*Commission de Surveillance du Secteur Financier - Conseil de protection des déposants et des investisseurs*): In accordance with the Luxembourg law of 18 December 2015, in case of bankruptcy of eligible institutions, the *Fonds de garantie des dépôts Luxembourg* (FGDL) is competent to reimburse clients’ deposits while the *Système d’indemnisation des investisseurs Luxembourg* (SIIL) is competent for all claims pertaining to the refunding of financial instruments or funds related to investment transactions. Circular CSSF-CPDI 16/02 clarifies certain eligibility criteria with respect to the FGDL and the SIIL and Circular CSSF-CPDI 16/01 defines the method for calculating the risk-based contributions to the FGDL.

MiFID II - MiFIR: New level 2 measures have been issued and others are still being drafted.

Directive 2016/1034 and Regulation 2016/1033 amend MiFID II and MiFIR respectively. The purpose of such amendments is to postpone the date of the implementation of MiFID II into national law to 3 July 2017 and the date of application of both MiFID II and MiFIR to 3 January 2018.

The above texts also amend MiFID II and MiFIR with respect to limited points regarding the pre-trade transparency requirements applicable to package transactions, the exclusion from the scope of MiFID II of non-financial entities which execute transactions on a trading venue to reduce risks directly relating to their commercial or treasury financing activities or those of their groups and the exemptions from transparency requirements applicable to securities financing transactions.

Remuneration policies: The EBA guidelines on sound remuneration policies under Articles 74(3) and 75(2) of Directive 2013/36 and disclosures under Article 450 of Regulation 575/2013 were adopted in their final form on 27 June 2016. They will apply from 1 January 2017 onwards.

Regarding remuneration of sales staff and in order to mitigate the risk of misconduct and mis-selling by staff of financial institutions and thus enhancing consumer protection, EBA adopted new guidelines on the remuneration of sales staff related to the provision and sale of retail banking products and services on 28 September 2016. They will apply from 13 January 2018 onwards.

Payment Services Directive 2 (PSD 2): The level 2 measures are expected in 2017.

Payments: Regulation 2015/751 on interchange fees for card-based payment transactions has been applicable since 9 June 2016. Bill of law 7024 was tabled before the Luxembourg Parliament on 29 July 2016 in order to implement certain provisions of the regulation, in particular, an option offered to Member States as regards the level of interchange fees.

A bill of law aimed at implementing the Payment Accounts Directive 2014/92/EU (PAD) into Luxembourg law was tabled before the Luxembourg Parliament on 16 December 2016.

Luxembourg professional secrecy: Bill of law 7024 (mentioned above) also aims to supplement the rules of Article 41 of the law of 5 April 1993 on the financial sector in relation to exceptions to the professional secrecy obligation.

Luxembourg implementation of Mortgage Credit Guarantee (MCD): A bill of law implementing Directive 2014/17 on credit agreements for consumers relating to residential immovable property was tabled before the Luxembourg Parliament on 29 July 2016.

For PRIIPS, please refer to the section “Investment Management”.

For the Luxembourg tax reform, please refer to the section “Tax Law”.

For the European Account Preservation Order procedure Regulation, please refer to the section “Litigation”.

Investment Management

Implementation of the UCITS V Directive in Luxembourg: On 1 June 2016, the Luxembourg law implementing the UCITS V Directive and amending the Luxembourg UCI Law entered into force providing the UCI(TS) investment fund industry with a modified depositary regime and a new sanctions regime. Furthermore, the amended UCI Law also introduced a requirement for UCITS management companies to establish remuneration policies. [Read more...](#)

More detailed depositary regime for UCITS: On an EU level, the modified depositary regime for UCITS received further legislative guidance through a Commission Delegated Regulation ((EU) 2016/438) (CDR) which became applicable on 13 October 2016. The CDR provides for a requirement to have a contract in writing evidencing the appointment of the depositary for UCITS, for the minimum content of such an agreement and for details of the means and procedures regarding the obligations of the depositary relating to oversight, due diligence, asset segregation and insolvency protection. Furthermore, the CDR introduces the requirement that functional independence must exist between management or investment companies, depositaries for UCITS and third parties to whom the safekeeping function has been delegated. [Read more...](#)

On a Luxembourg level, the CSSF provided some regulatory guidance in March 2016 in order to assist the UCI(TS) fund industry in its adaptation phase. [Read more...](#)

With Circular 16/644, which was published on 12 October 2016, the CSSF completed the set of depositary rules provided by the UCITS V Directive and the CDR with a set of clarifications applicable to Luxembourg based depositaries for UCITS, management companies and self-managed UCITS. [Read more...](#)

To further clarify the scope of the UCITS and AIFMD depositary regimes in Luxembourg, a legislative proposal was submitted to the Luxembourg Parliament to ensure that a significant number of so-called Part II UCIs will remain within the scope of the AIFMD depositary regime. In accordance with the legislative proposal, only Part II UCIs which are distributed to retail investors in Luxembourg shall fall within the scope of the more stringent UCITS depositary regime. [Read more...](#)

At the date of this publication, the related bill of law is still pending.

Asset segregation: On 15 July 2016, ESMA published a call for evidence on asset segregation and custody services under the AIFMD and the UCITS Directive. This call for evidence followed a previous consultation by ESMA on asset segregation under the AIFMD which was published in December 2014. In light of the feedback and certain objections received, as well as the implementation of the UCITS V Directive introducing asset segregation requirements under the UCITS framework, ESMA decided to carry out a further consultation with the aim of gathering evidence in relation to the arguments of objective stakeholders, of broadening the scope of the workstream to also cover the UCITS asset segregation rules and of resolving residual uncertainty on how the depositary delegation rules should apply to central securities depositaries. At the date of this publication, a report by ESMA on asset segregation is still pending.

Remuneration policies for UCITS management companies: On 14 October 2016, ESMA published guidelines on sound remuneration policies for UCITS (UCITS remuneration guidelines). The guidelines apply in relation to the remuneration policies and practices for UCITS management companies or self-managed UCITS (UCITS Managers) and their identified staff. The principles on remuneration as set out in the UCITS V Directive which are to be put in place by UCITS Managers substantially mirror those of the AIFMD and include a number of requirements similar to those contained in the CRD IV Directive. As a consequence, the UCITS remuneration guidelines are a balancing act between an alignment with the AIFMD remuneration rules and an obligation to cooperate with the European Banking Association (EBA) to ensure consistency with the requirements of the CRD IV Directive. It is with the principle of proportionality where ESMA could not reconcile the diverging approaches taken by the AIFMD for the asset management sector and by the CRD IV Directive for the banking industry. In a letter to the EU Commission dated 31 March 2016, ESMA implies that, for the asset management industry, the principle of proportionality should operate in such a way as to allow for the disapplication of certain specific requirements of the payout process. At the date of this publication, clear guidance on this issue from the European legislators is still pending. The UCITS remuneration guidelines will be applicable as of 1 January 2017.

Enhanced sanctions regime for UCIs, management companies and depositaries: With the implementation of the UCITS V Directive, an expanded catalogue of infringements to be sanctioned together with additional and stricter administrative and sanctioning measures has been introduced into the Luxembourg UCI Law. Measures such as a public statement identifying the person(s) responsible and the nature of the infringement or higher administrative pecuniary sanctions have been included. As regards the latter, fines may now amount to a maximum of EUR 5,000,000 or 10% of the total turnover for a legal person, a maximum of EUR 5,000,000 for a natural person, or alternatively, may be as high as at least twice the amount of the benefit deriving from the infringement. Furthermore, the Luxembourg UCI Law now requires UCIs, management companies, depositaries and any undertaking contributing towards the activities of the UCI which is subject to supervision by the CSSF to establish whistle-blowing mechanisms. In line with this

enhanced sanctions regime, the CSSF's investigative powers have also been extended. [Read more...](#)

UCITS share classes: On 6 April 2016, ESMA published a second discussion paper on UCITS share classes. This second discussion paper builds on the feedback received in relation to ESMA's first discussion paper on this issue which was published in December 2014. In view of diverging national practices as to the types of share classes permitted, ESMA seeks stakeholders' views on common principles which could form the basis for a regulatory framework that all UCITS share classes should comply with. While discussing such common principles, it may be noted that ESMA seems to approve the existence of share classes with currency hedging. However, ESMA raises doubts as to whether duration-risk-hedged or volatility-risk-hedged share classes would be compatible with the principles discussed in ESMA's paper. [Read more...](#)

At the date of this publication, a report by ESMA is still pending.

Delay for the PRIIPs KID: In early December 2016, the EU Parliament and Council adopted a legislative proposal amending the PRIIPs Regulation to delay the application date of the PRIIPs KID by 12 months, *i.e.* until 1 January 2018. The EU Commission proposed such a delay in November in the interests of ensuring a smooth implementation. [Read more...](#)

To further ensure legal certainty for the fund industry and to address some of the concerns raised, the EU Commission also proposed changes to the draft delegated regulation (draft RTS) which it published in June. In addition, it requested the ESAs to submit an opinion on the proposed amendments and to develop further guidance. The EU Parliament rejected the draft RTS in September, claiming that the document would contain inadequacies which could lead to different interpretations in the Member States. [Read more...](#)

At the date of this publication, the opinion by the ESAs is still pending.

Money market funds: On 14 November 2016, more than three years after the EU Commission had published a proposal for new rules on money market funds (MMFs), a political agreement on the proposed EU money market funds regulation (Proposed MMFR) was reached by the EU co-legislators. The Proposed MMFR will apply to all MMFs investing in money market instruments, regardless of whether the MMF is governed by the UCITS framework or whether the MMF operates as an alternative investment fund (AIF) in line with the definition in the AIFMD. Pursuant to the political agreement, the Proposed MMFR will contain rules for the VNAV-MMF (variable net asset value MMF), the public debt CNAV-MMF (constant net asset value MMF) and the LNAV-MMF (low volatility net asset value MMF), the latter being new categories of MMFs introduced on the initiative of the EU Parliament in spring 2015. Pending some finishing work on the text, the Proposed MMFR remains subject to a plenary vote in the EU Parliament and a vote by the Council. Once adopted, the MMFR will introduce a general framework of requirements to enhance the liquidity and stability of MMFs and as such will introduce an additional layer of product rules over and above the (amended) UCITS Directive and the AIFMD. At the date of this publication, the final text of the Proposed MMFR to be voted on has not yet been published.

For AIFMD, please refer to the section "Private Equity".

Company law reform: The Law of 10 August 2016 (the Company Law) amending the law of 10 August 1915 on commercial companies is a milestone in the modernisation process of the Luxembourg company legal framework. The key features of the reform are the following:

The *société à responsabilité limitée* (S.à r.l.), which is one of the most commonly used corporate forms in Luxembourg, has become even more attractive. An authorised capital may now be created, allowing management to issue new shares. The majority requirements at general meetings have been simplified so as to no longer require a headcount majority (save for liquidations). The S.à r.l. is entitled to issue beneficiary units, redeemable shares as well as issue bonds which may be offered publicly and/or listed.

The *société par actions simplifiée* (S.A.S.) is a new form of company, inspired by the well-known French S.A.S. The main characteristics of the Luxembourg S.A.S. is the contractual freedom afforded with respect to shareholder governance thus offering quite extensive flexibility to organise shareholder meetings, including any quorum or majority requirements. The S.A.S. is ultimately managed by a President, which facilitates control over the management subject to bespoke governance arrangements at shareholder level.

More flexibility has been introduced in various other areas:

- a simplified regime governing non-voting shares
- further simplified and harmonised convening procedures
- a clearer and more flexible regime regarding changes of corporate form, and
- tracking shares for Luxembourg companies of all types.

The Law now also formally recognises contractual arrangements on voting rights and lock-up or other transfer provisions.

As regards shareholders' rights, additional shareholder protection has been added. In addition to recognising limited grounds for invalidating shareholder resolutions, the Law consecrates 10% as the uniform threshold that triggers shareholders' rights: the right to convene a general meeting (including upon liquidation), the right to request the prorogation of a general meeting, the right to ask written questions to the board, the right to add items to the agenda of a general meeting and the right to minority shareholders' action. [Read more...](#)

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SARL-S with 1 euro of share capital: In July, Luxembourg introduced a simplified form of the *société à responsabilité limitée* (SARL-S) into the company law framework. This simplified form is reserved to natural persons and is intended to be an easy-to-create company. As a consequence, the SARL-S does not require documentation in the form of a notarial deed and the starting share capital can be set as low as 1 euro. The SARL-S will be available as from 16 January 2017. [Read more...](#)

Reform of the legal publication regime: The law of 27 May 2016 on the new publication regime (the Law) is the third and final pillar of the modernisation of the Luxembourg Trade and Companies' Register started in 2003. The Law is aimed at reducing unnecessary administrative burdens and creating a one-stop shop for legal publications. The main change is the replacement

of corporate publications in hard copy in the *Mémorial C* by publications on an electronic platform called “RESA”. Publications will be free of charge, automatic and faster. The Law further introduces a system of incrementally increased costs for the late filing of annual accounts. The Law also imposes new obligations on Luxembourg FCPs (“*fonds communs de placement*” or “common funds”) which must be registered with the Trade and Companies’ Register via RESA. [Read more...](#)

Non-financial disclosure by large companies: Luxembourg has adopted a law implementing Directive 2014/95 amending the Accounting Directive (Directive 2013/34/EU) which requires certain large companies and groups to disclose non-financial and diversity information. Only large companies or groups (namely listed entities as well as other public interest entities such as notably credit institutions and insurance companies) which fulfil certain materiality conditions will be required to disclose non-financial information. The new obligations will be effective from the financial period starting on 1 January 2017. [Read more...](#)

Audit reform: Luxembourg has adopted a law implementing Directive 2014/56/EU on statutory audits. As a consequence the 2009 law on the audit profession has been repealed. It should be noted that the legal and regulatory framework of the audit profession has not substantially changed for audited companies, but there has been a redefinition of the role of the auditor, further restriction of the audit mission period and a clarification of the missions of the supervisory bodies. [Read more...](#)

Transparency Law: A law of 10 May 2016 has implemented Directive 2013/50/EU, the so-called Transparency Amending Directive. The law is aimed at (i) improving the previous regime by making regulated markets more attractive to small and medium-sized issuers as well as (ii) increasing the transparency of the ownership and prices of listed shares. The main changes relate to a clarification of the definition of the home Member State and a simplification of administrative burdens regarding periodic financial information (*i.e.* the obligation for issuers to publish quarterly financial information has been abolished and the deadline for publication of the half-year financial report has been extended). [Read more...](#)

Market abuse: The Market Abuse Regulation (Regulation 596/2016, MAR) has been in force since 3 July 2016. A bill of law implementing the directive on criminal sanctions for insider dealing and market manipulation (Directive 2014/57/EU, CSMAD) was adopted by the Luxembourg Parliament on 13 December 2016. [Read more...](#)

Proposal for an amending Prospectus Directive: In September, the EU Parliament adopted, with amendments, the EU Commission’s proposal for a regulation on the prospectus to be published when securities are offered to the public or admitted to trading. The new regulation will repeal the Prospectus Directive 2003/71/EC. The vote on the legislative resolution remains open. The main amendments of the EU Parliament version relate to the scope of the Regulation; the obligation to publish a prospectus and exemption; the drawing-up of a prospectus; the summary of the prospectus and risk factors to be included. The proposal to reform the prospectus was one of the first actions of the Capital Markets Union action plan.

Benchmark Regulation: Regulation 2016/1011 of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) 596/2014 (Benchmarks Regulation) was published in the Official Journal of the EU of 29 June 2016. It will apply from 1 January 2018 except for Article 56 (which amends some provisions of the Market Abuse Regulation) which has applied from 3 July 2016. The Benchmark Regulation is aimed at restoring trust in indices used as financial benchmarks in response to the LIBOR and EURIBOR

manipulation scandals. Its main objectives are to ensure that the benchmarks used are reliable and not subject to manipulation and that protection for investors is improved through transparency.

Societal impact company: A law of 12 December 2016 has introduced a new legal framework for companies having a social or societal impact: the *société d'impact sociétal* (the SIS). The purpose of the legislator is to formally recognise the specificity of companies dedicating their activities to supporting people in fragile situations or contributing to the preservation or development of specific social or societal issues, including the protection of the environment. [Read more...](#)

EU insolvency proceedings: The EU Insolvency Regulation 1346/2000 has been repealed by EU Recast Regulation on Insolvency Proceedings 2015/848 of 20 May 2015. The Recast Regulation aims to improve cross-border insolvency proceedings efficiency. The Recast Regulation will apply from 26 June 2017.

Reserved alternative investment funds (RAIF): The law of 23 July 2016 on reserved alternative investment funds, published on 28 July 2016, introduced a new investment fund product that does not require any prior authorisation or supervision from the *Commission de Surveillance du Secteur Financier*. The RAIF benefits from legal structuring flexibility, as well as from all the advantages of the highly appreciated SIF and SICAR regimes, such as the umbrella structure and the AIFMD passport that allows AIFMs to market shares, units or interests to institutional, professional or well-informed investors upon notification to the relevant regulators. [Read more...](#)

Loan origination: On 9 June 2016, the CSSF published an updated version of the FAQ on the AIFM law. In the tenth version of its FAQ document, the CSSF confirms that loan origination is a permitted activity for AIFs in Luxembourg and introduces two new definitions of loan origination and loan participation/acquisition. The CSSF highlights certain aspects that should be considered by an AIFM or, where applicable, by an AIF before and when performing loan activities. The main operational requirements are the obligation to address all aspects and risks of these activities and also to ensure proper organisational and governance structures. Furthermore, in order to ensure an adequate overall risk and liquidity management process, the AIFM/AIF should have the necessary expertise and experience in origination activities combined with appropriate technical and human resources. [Read more...](#)

Application of the AIFMD passport to non-EU AIFMs and AIFs: In July, ESMA published its second advice to the EU Parliament, the Council and the EU Commission on the extension of the AIFMD passport to 12 third countries. ESMA gave its green light to some third countries (e.g. Guernsey, Jersey, Switzerland) but has expressed reservations concerning certain third countries mainly as regards their AIFMs. ESMA has mentioned that it will continue to work on its assessment of other non-EU countries. The EU Commission was required (if ESMA's advice was positive) to adopt a delegated act within three months (i.e. by mid-October 2016) in order to activate the third country passport. It seems at this stage that the extension of the passport will be delayed.

Remuneration policies: In March, ESMA amended its guidelines on remuneration policies under the AIFMD. The amendments relate to the application of the remuneration rules in a group context and are intended to acknowledge the potential outreach of the CRD (capital requirement directive) rules in a banking group. These guidelines will come into force on 1 January 2017.

EuVECA - EuSEF amending regulations: In July, the EU Commission published a legislative proposal in order to amend the European Venture Capital Funds Regulation 345/2013 (EuVECA) and the European Social Entrepreneurship Funds Regulation 346/2013 (EuSEF). The legislative proposal forms part of the EU Commission's Capital Markets Union action plan. The EU Commission proposes to (i) extend the range of managers eligible to market and manage EuVECA and EuSEF funds to include larger fund managers, (ii) to expand EuVECA eligible assets, to allow investment in small mid-caps and SMEs listed on SME growth markets and (iii) to decrease the costs imposed by competent authorities of host Member States, simplifying registration processes and determining the minimum capital required to become a manager.

Marketing of atypical assets: With a view to protecting investors, a bill of law contemplates restricting the marketing of UCIs' units subject to Part II of the UCI Law or SIFs' units investing in atypical assets to professional investors only. The following are considered to be atypical assets: wines, diamonds, insurance contracts, art, animals, and the economic rights of football players (non-exhaustive list). Please note that the text was tabled before the Luxembourg Parliament in January 2016 and is still pending.

2017 Luxembourg tax reform: Bill of law 7020 adopted by the Luxembourg Parliament on 14 December 2016 includes changes to individual and corporate taxation. For companies, the main measures are: (i) a decrease in the statutory corporate income tax rate (from 21% in 2016 to 19% as of 1 January 2017 and 18% as of 1 January 2018), (ii) a limitation of the loss carry forward up to 17 years as of 2017, (iii) an increase and extension of the investment tax credits (from 12% to 13% for qualifying additional investments and from 7% to 8% for global investments), (iv) an increase in the minimum net wealth tax (from EUR 3,210 to EUR 4,815) and (v) the introduction of new VAT obligations and an increase in the penalties to limit VAT fraud or evasion. In addition, it is worth mentioning that criminally-sanctioned tax frauds are included in the list of predicate offences which may give rise to the offence of money laundering. For individuals, the bill of law covers amendments to the progressive income tax rate schedule as well as the abolition of the temporary equalisation tax of 0.5%. [Read more...](#)

2017 budget law: The 2017 budget law contains various tax-related provisions which will enter into force on 1 January 2017 such as the introduction into domestic law of the basic transfer pricing principles set out in Actions 8-10 of the OECD Base Erosion Profit Shifting (BEPS) report, an increase in the annual turnover threshold of the special VAT scheme for small enterprises and the cancellation of the tax guarantee for immigrants. [Read more...](#)

New EU initiatives in the field of taxation: On 25 October 2016, the EU presented three new proposals for Council Directives. The first proposal amends the Anti-Tax Avoidance Directive (ATAD) to include hybrid mismatches with third countries. The two others relaunched the Common Consolidated Corporate Tax Base proposal of 2011 which has been split into two parts: a proposal for a Common Corporate Tax Base (CCTB) and a proposal for a Common Consolidated Corporate

Tax Base (CCCTB). The latter would apply to companies under certain conditions (e.g. minimum consolidated group revenue exceeding EUR 750 million, minimum shareholding required to qualify as parent company or qualifying subsidiary, etc.) with a view to harmonising the EU tax system. [Read more...](#)

OECD adopts multilateral convention to implement BEPS measures: On 24 November 2016, 100 jurisdictions agreed upon a multilateral instrument (MLI) which is aimed at the swift implementation of the tax related provisions contained in the OECD/G20 BEPS package (*i.e.* Action 2 on hybrid mismatches, Action 6 on treaty abuse, Action 7 on avoidance of permanent establishment status and Action 14 on dispute resolution). The MLI will directly amend bilateral tax treaties (more than 2,000) that are in force between the signatory States. The MLI will be opened for signature as of 31 December 2016 until the formal signing ceremony which should be held in June 2017 in Paris. [Read more...](#)

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VAT treatment of directors' fees: The Circular letter published by the VAT authorities on 30 September 2016 clarifies VAT treatment of directors' fees. Accordingly, independent directors have the status of taxable persons (*i.e.* VAT entrepreneurs) and their activities are subject to VAT at the standard rate of 17%. For non-resident directors, VAT director fees must be self-assessed by the company under the "reverse charge" mechanism, unless the company is not engaged in any economic activity. [Read more...](#)

VAT - New landmark case law for the fund industry: On 10 August 2016, the Luxembourg Court of Appeal overturned the decision of the Luxembourg lower administrative court regarding the VAT treatment of fund investment management services supplied by a Luxembourg based asset manager to an Irish SICAV and entirely delegated to a US provider. This case offers certain perspectives in terms of VAT impacts for cross-border transactions especially in an environment which is not harmonised from an EU VAT perspective. [Read more...](#)

Employment Law

Reform of social dialogue: The law of 23 July 2015 on the reform of the social dialogue, which significantly modifies staff representation within companies, entered into force on 1 January 2016. [Read more...](#)

Reform of parental leave: The law concerning the reform of parental leave came into force on 1 December 2016. The key objectives of the reform are to allow for greater flexibility for parents wishing to take parental leave thereby creating an improved work-life balance and encouraging both parents to take parental leave.

Under the new law, each parent is able to choose from among three options that can be further broken down into six parental leave arrangements (as opposed to two previously): four or six months full-time leave, eight or twelve months half-time leave and split parental leave of one day off per week over twenty months or of four periods of one month of parental leave within a maximum period of twenty months.

The former fixed allowance of EUR 1,778.31 (net of taxes) previously allocated to the employees concerned is replaced by an income subject to tax and social insurance contributions determined on the basis of employees' monthly wages (from EUR 1,922.96 up to a maximum of EUR 3,204.93 gross per month). [Read more...](#)

Reform of criminal record checks: The new legislation in criminal record checks adopted in July will be applicable as from 1 February 2017. The employer will be permitted to obtain criminal records in the context of staff recruitment only if such check is duly specified in the job offer and motivated by specific job requirements. Copies of criminal records obtained from job candidates may therefore not be kept for more than one month after the employment contract has been entered into. In addition, several new certificates referencing various items of information from the criminal record will be introduced and only some of these items may be requested by employers.

Reform of the acquisition of the Luxembourg citizenship: Bill of law 6977 which proposes to grant easier access to the Luxembourgish nationality in a manner which is fair and encourages social cohesion was tabled before the Luxembourg Parliament in March. The adoption of the law is expected around March 2017.

Reform concerning organisation of working time: Bill of law 7016 dated 21 July 2016 intends to ensure health and safety of employees at work and to enhance the collective bargaining which is currently being debated.

Reform of leave for personal reasons: Bill of law 7060 dated 13 September 2016 contemplates amending the duration of certain types of leave (*inter alia* paternity leave, family care leave and postnatal maternity leave) in order to make sure that the duration of these types of leave is in line with the beneficiaries' practical requirements.

Reform concerning residence permit: Bill of law 6992 dated 18 May 2016 which aims to supplement the existing provisions relating to the right to enter and to stay within the national territory aims to introduce more flexibility regarding the possibilities to lawfully immigrate to Luxembourg.

Insurance Distribution Directive (IDD): The IDD was published on 20 January 2016 and must be implemented into national laws before 23 February 2018. It recasts the amended Directive 2002/92 which is repealed as such. Many delegated acts are expected. The IDD sets out the framework for the distribution of insurance products applicable in all EU Member States. It also aims to improve the information provided to customers in order to facilitate making comparisons between insurance products, including insurance-based investment products, and thus to identify the most suitable insurance policy. Moreover, IDD clarifies the rules governing cross-border activities as well as the supervision and sanctions of insurance distributors.

Mutual Insurance: Bill of law 7058 (the Bill) concerns mutual insurance and amends the law of 19 December 2002 relating to the Trade and Companies' Register and to the accounting and annual accounts of companies.

It offers a practical and modern reform of existing legislation on mutual insurance undertakings. It provides *inter alia* a definition of mutual insurance and a new scope for the law in order to emphasise solidarity between members, contrary to the insurance sector which is governed by the

practice of private agreements. In return, the Bill is expected to set up an authorisation procedure for conducting mutual insurance business and for introducing a mechanism for the suspension or even withdrawal of the authorisation for non-compliance with mutual insurance legal or statutory provisions.

Securities deposit: Circular letter 16/9 of the CAA (*Commissariat aux Assurances*) replaces Circular letter 15/4 pertaining to the custody of transferable securities and liquid assets used as assets underlying the technical provisions of insurance undertakings. Its principal purpose is to update legal references to the provisions of the law of 7 December 2015, as amended, such law having replaced the former amended law of 6 December 1991 on the insurance sector. The attached template deposit agreement has also been updated and adapted to the new applicable provisions. It is also important to note that the English and German versions of the template deposit agreement are now available. Please note, however, that Circular letter 15/4 remains in force for pension funds.

Solvency II: The Solvency II Directive entered into application on 1 January 2016. Whereas level 2 measures are still being drafted, the EIOPA has addressed many questions with respect to its Guidelines and Final reports through public responses.

Litigation

Bankruptcy requirements and payment claims subject to prior proceedings: On 20 January 2016, the Court of Appeal entered a judgment in a controversial bankruptcy case. Amongst other conditions, bankruptcy requires cessation of payments of certain, determined and due claims. In this matter, the claimant sued the defendant for bankruptcy arguing it had failed to repay a series of bond issues. The crux was that the defendant had initiated prior legal proceedings claiming that these same bonds were void. The District Court of Luxembourg found in favour of the claimant and declared the defendant bankrupt, but was overturned by the Court of Appeal.

Faced with the question of whether the bonds were certain, determined and due, the Court noted that the defendant had initiated prior proceedings to have these bonds declared void. While the Court of Appeal considered that it could not foretell the outcome of these currently pending proceedings, it concluded that the payment claims were “at this stage” not certain, determined and due meaning that the defendant was not in a state of bankruptcy.

The appeal judgment does not specifically address the question of whether a bankruptcy judge has jurisdiction to make binding determinations on payment claims that are subject to prior proceedings on the merits. It also leaves room for interpretation as to what exactly justifies the Court of Appeal’s finding that the claims are not certain, determined and due. Was it because the defendant raised serious challenges to these claims or because they are subject to prior proceedings on the merits that need to be concluded before any finding on bankruptcy can be made?

The claimant filed for cassation so it is likely that the forthcoming cassation judgment will clarify these outstanding interpretational issues.

Cross-border asset freezing: Regulation (EU) 655/2014 of the EU Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order (EAPO) procedure to facilitate cross-border debt recovery in civil and commercial matters (the Regulation) will be implemented as from 18 January 2017.

In order to facilitate the enforcement of cross-border debts, the Regulation introduces a uniform procedure across the participating Member States of the European Union (the United Kingdom and Denmark are not bound by this Regulation), whereby the creditor can file one single application in standard form with the competent court of a participating Member State to freeze the debtor's bank accounts in another participating Member State(s) without further freezing order(s). An EAPO can be requested at any stage of the proceedings, even before and/or after the issuance of a judgment.

A bill of law 7083 aims to implement the Regulation. [Read more...](#)

Abusive attachment (*saisie-arrêt*): In a first instance judgment handed down on 22 April 2016 by the Luxembourg District Court (docket number 152.515 - not final yet), regarding the validation of attachment, an award-creditor has been ordered to pay EUR 95,000 as damages to the defendant, on the basis of abusive attachment procedure.

In order to have the attachment in place, the award-creditor had filed an *ex parte* application for attachment. The application was addressed to two companies of the same group and was based on an arbitration award. However, one of the companies - the defendant - was not a party to the arbitration procedure. Moreover, the award had previously been annulled by the Courts of the country in which the award was made.

According to the Court, the non-disclosure of these two elements by the award-creditor in its application filed with the President of the Court constitutes intentional fault and serious misconduct. As a result, the award-creditor has been found liable for the losses caused by the said faults.

The amount of EUR 95,000 is intended to compensate the material and moral damages of the defendant, *i.e.* (i) EUR 15,000 for the material and moral damages (freezing of assets and harm to reputation) (ii) EUR 80,000, assessed on an *ex aequo bono* basis, as a compensation for the lawyers' fees incurred to the defendant for the procedure.

Duties of the third-party in attachment (*déclaration affirmative du tiers saisi - saisie-arrêt*): In a first instance judgment of 5 October 2016 (docket number 171.013 - not final yet), the District Court of Luxembourg drew attention to the duties of the bank, served as a third party (*tiers-saisi*) to attachment procedure.

The Court points out that as a matter of principle, the bank is to file its statement with the Court on a genuine basis, together with evidence as to the content of the statement. In the present case, the bank had filed a negative statement, *i.e.* the debtor was owed nothing. The creditor challenged the statement, arguing that it was not clear enough, since the bank did not state that it had ever been a debtor of the debtor, but rather stated that the bank was not a debtor of the debtor at the time the deeds of attachment were served upon the bank, without providing any further evidence.

The Court recalls that the possibility for the third party to be declared outright debtor of the underlying debt of the creditor towards the debtor (Article 713 of the New Code of Civil Procedure) is restrictively applied: it is up to the creditor to provide tangible elements in order to validly challenge the bank's statement and the evidence so brought should show that the bank intended to willfully hinder the creditor's rights.

Only the provision of such evidence may enable the Court to rule against the bank. In case such elements are tendered, the Court will first hand down a judgment against the bank which will order the bank to provide a full genuine statement together with evidence. Only where the bank fails to comply with the said preliminary judgment may the bank be declared the outright debtor of the underlying debt of the creditor towards the debtor.

In the present case, the Court found that the creditor failed to provide evidence that the bank's statement was not genuine and released the bank from any further obligation in this regard.

Inadmissibility of a request for voluntary intervention and the discontinuation of proceedings (*péremption*) by a third party (*tiers saisis*): In a first instance judgment handed down on 16 November 2016 (docket numbers 163.095 and 177.604 – not final yet), the Luxembourg District Court declared inadmissible the voluntary intervention of a third party (in the present case a bank) and its subsequent request for the discontinuation of proceedings aimed at the validation of an attachment.

In a procedure between a creditor and its debtor for the validation of an attachment, no procedural act had been conducted for more than three years. The third party to the attachment, *i.e.* a bank where the accounts of the debtor had been frozen, filed an application for voluntary intervention and requested the discontinuation of the proceedings.

The third party claimed that the ongoing attachment gave rise to operational costs and therefore that it had an interest in having the attachment lifted. The District Court however held that in the absence of particular circumstances, the third party to an attachment does not have an interest or the necessary capacity to intervene in the validation procedure and/or to request the discontinuation of proceedings.

Data Protection

A new data protection framework: The new General Data Protection Regulation (GDPR) was formally approved by the EU Parliament in April 2016. This long-awaited GDPR will replace the current Directive 95/46/CE as from 25 May 2018. This leaves companies a year and a half to become compliant with the GDPR. This compliance process should be carried out bearing in mind the tougher sanctions provided for by the Regulation. Organisations in breach of the provisions of the GDPR can indeed incur fines of an amount of up to 4% of their annual global turnover or EUR 20 million – whichever is higher.

The GDPR provides for a number of steps to be taken by companies, such as complying with the principle of accountability, keeping records of data processing activities, carrying out impact assessments in some cases, appointing a data protection officer, implementing and/or adapting the documentation (*i.e.* information clauses of data subjects, data processing agreements etc.), notifying data breaches, etc.

In order to decide on the measures to be taken, each company would have to determine and define its data processing activities and map data flows, especially regarding transfers to the US after the Court of Justice of the EU struck down the Safe Harbor agreement in October 2015. [Read more...](#)

In this context, the EU Commission also adopted the decision on the EU-US data flows on 12 July 2016 (the Privacy Shield). This new framework was intended to replace the Safe Harbor, but is already being challenged before the Court of Justice of the EU.

The Luxembourg legislator is already anticipating the GDPR with the preparation of a new regime to remove the CNPD authorisation requirements in certain cases (Bill of law 7049).

Space resources: In November 2016, a bill of law on the legal and regulatory framework for space resources utilisation activities in Luxembourg was published. It consists of two main components dealing respectively with the ownership of space resources (which Luxembourg will recognise for Luxembourg companies irrespective of their ownership structure) and the authorisation regime for the exploration and use of such resources. [Read more...](#)



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