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Banking and financial services

Anti-Money Laundering: Directive 2015/849 (AMLD 4) is already under review at EU level and a proposal for a directive amending AMLD 4 is currently being discussed. The negotiations between the EU Commission, the Council of the EU and the EU Parliament pertaining to such proposal appear, however, to have stalled.

Under Luxembourg law, several bills of law have been filed with Parliament in respect of AMLD 4.

Bill of law 7208 implements Directive 2016/2258 as regards access to anti-money laundering information by tax authorities, notably information collected in client due diligence procedures and information on beneficial ownership.

Bill of law 7128 partially implements AMLD 4 into Luxembourg law to the extent that it provides rules regarding (i) an extension of the scope of anti-money laundering and counter terrorism financing, (ii) a reshaped risk-based analysis and (iii) the strengthening of the sanctioning powers of the relevant competent authorities. Bill of law 7128 also aims at facilitating the application of EU Regulation 2015/847 regarding information accompanying transfers of funds.

Bills of law 7216 and 7217 implement new transparency measures including the setting-up of two central registers, namely (i) a central register of beneficial owners of corporate and other legal entities and (ii) a central register of the beneficial owners of fiduciary arrangements. The two bills of law set out strict rules to allow for protection against improper access to the information on beneficial owners. Read more…

An additional bill of law is expected to implement the remaining key element of AMLD 4, namely the mandatory cooperation framework between the competent authorities and the EU Commission.

Securitisation: On 12 December 2017, the President of the EU Parliament and the President of the Council of the EU signed the EU Regulation establishing common rules for securitisation and creating a specific European framework for simple, transparent and standardised securitisation.

Capital Requirement Directive and Capital Requirement Regulation (CRD IV - CRR): A proposal for a directive amending CRD IV with respect to exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures was adopted in 2016 and discussions are currently still ongoing.

A proposal for a regulation 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, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements is currently under discussion, notably within the Council.

Bank Recovery and Resolution Directive (BRRD): Two proposals of the EU Parliament and of the Council of the EU aiming at amending BRRD with respect to (i) the ranking of unsecured debt instruments in insolvencies and (ii) the loss-absorbing and recapitalisation capacity of credit institutions and investment firms are still under discussion.

Payment Services Directive: Bill of law 7195 aiming at implementing Directive 2015/2366 on Payment Services (PSD 2) into Luxembourg law *inter alia* updates the amended law of 10

November 2009 on payment services by introducing notably the new categories of payment services and payment services providers foreseen under PSD 2.

Payment Account Directive: The law of 13 June 2017 relating to the comparability of fees concerning payment accounts, switching of payment accounts and the access to payment accounts with basic services has implemented Directive 2014/92 into Luxembourg law.

European Account Preservation Order procedure: The law of 13 June 2017 has implemented EU Regulation 655/2014 establishing a European account preservation order procedure to facilitate cross-border debt recovery in civil and commercial matters into Luxembourg law. Only the preservation stage of the order procedure is concerned by the law, the remainder being covered by the EU Regulation.

Bill of law 7203 is intended to supplement the account preservation order procedure to the extent that it provides rules for the validation procedure of the order.

Central Securities Depositories (CSD): Bill of law 7165 aims at implementing EU Regulation 909/2014 on improving securities settlement in the European Union and on CSD into Luxembourg law and appoints the *Commission de Surveillance du Secteur Financier* (CSSF) as competent authority in charge of (i) granting licenses, (ii) supervising CSDs and (iii) exercising all national powers set forth in said Regulation.

MiFID 2: Directive 2014/65 (MiFID 2) and EU Regulation 600/2014 (MiFIR) are being implemented into Luxembourg law through bill of law 7157, which will (i) amend *inter alia* the amended law of 5 April 1993 on the financial sector and (ii) repeal the law of 13 July 2007 on markets in financial instruments. At the time of this publication, bill of law 7157 is still pending with the Luxembourg legislator.

MiFID 2 Delegated Directive 2017/593 is being implemented into Luxembourg law by a draft Grand Ducal regulation regarding the protection of financial instruments and clients' assets, product governance and inducements. Such draft repeals the Grand Ducal regulation of 13 July 2007 relating to organisational requirements and rules of conduct in the financial sector and it amends the Grand Ducal regulation of 13 July 2007 on the keeping of the official listing for financial instruments.

Professional Secrecy: Bill of law 7024 aiming at amending the rules applicable to professional secrecy and notably taking into account data transfers occurring in the context of outsourcing arrangements has been subject to various opinions of public bodies and related governmental amendments and is at the time of this publication in the final steps of the adoption process.

Securities Financing Transactions Regulation (SFTR): Part of EU Regulation 2015/2365 (SFTR) will be implemented into Luxembourg law through bill of law 7194 which will confer upon the CSSF new sanctioning powers.

Legislative proposals to amend EMIR / Exchange of variation margin under review: In May 2017, the EU Commission published a legislative proposal for a Regulation to amend EMIR. The proposal does not contain fundamental changes to the core requirements of EMIR, but suggests simplifying certain rules and eliminating disproportionate costs and burdens on certain derivative counterparties (e.g. clearing obligations for non-financial counterparties for classes of derivatives above a certain clearing threshold). Legislative proposals by the EU Commission are to be reviewed by the EU Parliament and by the Council of the EU. The latter has started its review process and has recently published its third compromise proposal. The legislative proposal for a Regulation to amend EMIR follows a review of EMIR conducted by the EU Commission in 2016.

In June 2017, the EU Commission published another legislative proposal for a Regulation to amend EMIR as regards the procedures and authorities involved in the authorisation of central counterparties (CCPs) and requirements for the recognition of third-country CCPs. The proposal seeks to introduce a more pan-European approach to the supervision of EU CCPs and suggests targeted amendments to the supervisory regime for third-country CCPs (e.g. a rigorous recognition process for and supervision of third-country CCPs with a key systemic importance for the EU).

Earlier this week, the ESAs have proposed amendments to the relevant regulatory technical standards regarding a possible permanent exemption for certain counterparties entering into certain non-centrally cleared OTC FX hedging derivatives. In November 2017, the Joint Committee of the ESAs published a press release announcing a review of variation margin requirements for physically settled FX forwards.

Extension of ESAs' powers: In September 2017, the EU Commission published legislative proposals that will give additional powers and responsibilities to the European Supervisory Authorities (ESAs) (i.e. the EBA, ESMA and EIOPA). The EU Commission intends to give the ESAs a number of additional general powers and responsibilities including the supervision of outsourcing, delegation and risk transfer arrangements in third countries ex-ante and on an ongoing basis. The EU Commission has invited the EU Parliament and the Council of the EU to agree on these proposals before the end of the current legislative term in 2019. At a first meeting of the Council of the EU held early November 2017, it appeared that the proposals are highly controversial as the proposed amendments go beyond the range of issues consulted on by the EU Commission. See also the sections "Fund formation" and "Insurance law".

PRIIPs: Please refer to the sections "Fund formation" and "Insurance law".

Bridging the pension gap: Please refer to the section "Insurance law".

Company law – Capital markets

Company law reform: Luxembourg companies have until 22 August 2018 to update their articles of association in order to comply with the mandatory rules introduced by the law of 10 August 2016 modernising the Luxembourg company legal framework. After that date, any provisions which are contrary to the new mandatory law will be deemed non-applicable.

Benchmarks Regulation: The Benchmarks Regulation on indices used either as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds will apply fully in January 2018. It aims at restoring trust in indices used as financial benchmarks in response to the LIBOR and EURIBOR manipulation scandals. The Regulation is directly applicable. Bill of law 7164 designates the *Commission de Surveillance du Secteur Financier* (CSSF) and the *Commissariat aux Assurances* (CAA) as the competent authorities with respect to the entities under their supervision and entrusts them with specific supervisory, investigation and sanctioning powers in this respect. The CSSF has been designated as the authority responsible for coordinating cooperation and the exchange of information with the EU Commission, ESMA and other Member States' competent authorities.

Prospectus: In June 2017, the EU Regulation on the prospectus to be published when securities are offered to the public or admitted to trading was published in the Official Journal of the EU. The new regulation will provide for a single regime throughout the EU governing the content, format, approval and publication of the prospectuses. Most of the provisions will apply as of July 2019. The

prospectus reform was one of the first actions of the Capital Markets Union action plan. For more information, please refer to our Back to 2015…

Competition

In November 2014, the Competition Council fined Post Luxembourg, the historic postal and telecom service provider in Luxembourg, for abuse of a dominant position on the telecoms market. The Competition Council considered that the rebates granted to its customers who subscribed to the offer known as Integral, which bundled fixed line telephone, mobile telephone and Internet services into one contract, led to the anticompetitive exclusion of its competitors on those markets. The Competition Council fined Post Luxembourg 2,520,000 euros, which is the highest fine the Competition Council has ever pronounced.

Post Luxembourg brought an action for annulment against this decision before the Luxembourg Administrative Tribunal. The Court annulled the decision by judgment of November 2016. It criticised (i) the length of the procedure before the Competition Council, (ii) certain procedural irregularities and (iii) the Council's analysis of the effects of the rebates on competition.

The Competition Council appealed this judgment before the Administrative Appeal Court of Luxembourg. In its judgment rendered on 1 June 2017, the Court did not analyse the merits of the Competition Council's decision as it considered that the Administrative Court was right to annul the decision on other grounds. These related to several procedural irregularities as well as the breach of the requirement to come to a decision within a reasonable time period and the absence of an in-depth analysis of whether or not a specific market for multiproduct packages, such as the Integral offer, existed.

This judgement shows the great importance that the Administrative Court of Appeal attached to the length of the Competition Council's procedure (eight years) even in the absence of any impact on the rights of defence of the undertaking involved (as required by the case-law of the Court of Justice of the European Union to justify an annulment).

Data protection

Luxembourg to supplement the European General Data Protection Regulation (GDPR): Bill of law 7184 (the Bill) was introduced on 12 September 2017 and is to be read together with the GDPR. The Bill complements the European framework set by the GDPR which will directly apply to all EU Member States as of 25 May 2018 by adopting the necessary local legal provisions. The Bill in particular supplements the GDPR by (i) requiring the Luxembourg data protection supervisory authority to adapt the requirements of the GDPR, such authority remaining the *Commission Nationale pour la Protection des Données* (the CNPD), but acquiring new powers in order to carry out the missions defined under the GDPR and (ii) providing specific provisions on aspects for which the GDPR required the adoption of complementary national laws. Read more…

Over the past few months, the CNPD has been very active in participating in workshops and seminars organised by public and private organisations, including at the Luxembourg Chamber of Commerce and itself has organised training courses on the GDPR and its practical implications.

The CNPD is planning to launch the "GDPR Compliance Support Tool", a tool allowing companies not only to manage their register of processing operations, as well as any other documents necessary to evidence their compliance with the GDPR, but also to follow up on the development the maturity level of their companies in terms of data protection. Go to CNPD's website.

Employment law

Reform of the acquisition of Luxembourg citizenship: The law of 8 March 2017 entered into force on 1 April 2017 with the aim of granting easier access to the Luxembourgish nationality in a manner which is fair and encourages social cohesion. The main change relates to the minimum duration of residence in Luxembourg required to acquire the nationality which has been reduced from seven uninterrupted years to five non-consecutive years (in addition to the final year which must be uninterrupted). Another key component is the introduction of *'jus soli'* enabling people born in Luxembourg of non-native resident parents to obtain nationality when they turn 18 (provided they have resided in Luxembourg for at least five consecutive years before their 18th birthday).

Reform concerning organisation of working time: The law of 23 December 2016 on organisation of working hours entered into force on 1 January 2017. The aim of the law is to introduce more flexibility for employers by entitling them to increase the duration of the legal reference period up to 4 months. In consideration of such increase employees subject to a *Plan d'Organisation du Travail* must be granted additional leave and new maximum monthly working hours must be respected to avoid the performance of overtime. Read more…

Reform concerning residence permit: The law of 8 March 2017 amending the 2008 Immigration Act came into force on 12 March 2017 and introduced four new categories of residence permits (investors, temporary inter-company transfers, seasonal workers, transfer of employees within the framework of a business continuity plan of non-EU companies). The law has further amended the 2008 Immigration Act notably by increasing the duration of the residence permit for highly qualified employees from two to a maximum of four years. Read more…

Reform concerning posting of workers: The law regarding the posting of workers came into force on 24 March 2017 and mainly introduces new liabilities for the companies in the subcontracting chains as well as new administrative requirements and supervisory measures. This law has also introduced the obligation for all employers in Luxembourg to maintain a detailed work time register for its employees. Read more…

Reform on co-financing of professional training: The law of 29 August 2017 which came into force on 12 September 2017 introduced new rules on State co-financing of professional training. The law will be applicable for State financing requests made by employers for the 2018 financial year. Employers may be entitled to a direct subsidy of 15% (instead of 20% under previous legislation) of their investment in training and the investment in training taken into consideration by the Luxembourg State will now be capped according to the size of the company.

Reform of leave for personal reasons: Bill of law 7060 dated 13 September 2016 which contemplates amending the duration of certain types of leave (*inter alia* paternity leave, family care leave, postnatal maternity leave and partnership leave) should enter into force on 1 January 2018.

Reform of social elections date: Bill of law 7138 dated 17 May 2017 aims at postponing the next social elections of staff delegations from November 2018 to February or March 2019.

Monitoring of the use by an employee of a professional instant messaging service for personal purposes: court decision in Bărbulescu v. Romania: On 5 September 2017, the European Court of Human Rights (ECHR) examined the issue of the monitoring of electronic communications of an employee by a private employer. The decision overturns a ruling made less than two years earlier in the same case. The ECHR had then held that the monitoring by the employer of the communications of the concerned employee had been reasonable in the context of disciplinary proceedings deeming that the domestic courts had struck an adequate balance between the employee's right to respect for his private life and correspondence and the employer's interests. In the light of the facts of the decision it is highly advisable that employers eager to implement a monitoring system to ensure that their employees spend their working time performing their professional duties, should make sure that they observe a particular time schedule as well as follow the methodology suggested by the ECHR.

Fund formation

AIF

EuVECA – EuSEF: The EU Regulation amending the two EU regulations on European Venture Capital Funds (EuVECAs) and European Social Entrepreneurship Funds (EuSEFs) was adopted in November 2017 and will apply as from 1 March 2018. The amending Regulation (2017/1991) aims at addressing the lack of success of the EuVECA and EuSEF labels. In this respect, the following main measures have been adopted: (i) authorised alternative investment fund managers will be permitted to manage EuVECAs and EuSEFs as from day one, (ii) the definition of "qualifying portfolio undertaking" for EuVECAs has been broadened, (iii) the initial capital and own funds requirements have been harmonised and (iv) the role of the competent authorities of the fund and the manager as well as the cooperation between such competent authorities has been clarified. Read more…

Minimum EU-wide rules on asset segregation: In July 2017, ESMA published an opinion on asset segregation applying depositary delegation rules to central securities depositories. Through its opinion, ESMA proposes to set up a regime that will ensure that assets are clearly identifiable as belonging to AIFs or UCITS (consistent with any reuse where this is permitted by the applicable legislation). Furthermore, the proposed regime should also ensure that investors receive protection, by preventing the ownership of the assets being called into question in case of the insolvency of any of the entities in the custody chain. ESMA also proposes to distinguish the application of depositary delegation rules amongst issuer central securities depositories. At the time of this publication, the Luxembourg policymakers have not followed up on this concept.

ESMA's opinion follows a consultation paper and a call for evidence previously issued by ESMA on the same subject in December 2014 and July 2016 respectively. Based on the feedback received, ESMA concluded that only a minimum number of EU-wide segregation requirements should be prescribed, leaving room for stricter requirements in national law.

The pieces of the puzzle on PRIIPs KID fall into place: 2017 has seen a flurry of legislative and regulatory activity as regards the PRIIPs Regulation. With its publication of regulatory technical standards (PRIIPs-RTS) in March 2017, the EU Commission brought clarification on aspects such as the presentation, content, review and revision of the key information documents (KIDs). The PRIIPs-RTS also provide for the conditions pursuant to which PRIIPs manufacturers will have to provide KIDs. Read more… In July 2017, the regulatory framework for the PRIIPs KID was finally completed with the publication of Q&As by the European Supervisory Authorities (ESAs) and the issuance of further guidelines by the EU Commission, the latter with the intention to facilitate the implementation of the PRIIPs Regulation by smoothing out potential interpretative divergences throughout the EU. From a Luxembourg perspective, the CSSF issued a set of FAQs on 6 July 2017 thus publishing its expectations in this regard. Read more…

The PRIIPs KID is a mandatory three-page A4 information document to be provided to consumers before they purchase Packaged Retail and Insurance-based Investment Products (PRIIPs). It will become a compulsory document as from 1 January 2018.

A new legal framework for Money Market Funds (MMFs): Close to four years after the EU Commission had published its first proposal, EU Regulation 2017/1131 on Money Market Funds (MMF Regulation) was adopted earlier this year and entered into force on 20 July 2017. The Regulation provides rules for all Money Market Funds (MMFs) that are established, managed or marketed in the EU. It is therefore applicable to any collective investment undertaking which (i) requires a UCITS or an AIF authorisation, (ii) invests in short-term assets, and (iii) has distinctive or cumulative objectives offering returns in line with money market rates or preserves the value of instruments. The MMF Regulation introduces three types of MMFs: (i) the VNAV-MMF (variable net asset value MMF), (ii) the public debt CNAV-MMF (constant net asset value MMF) and (iii) the LNAV-MMF (low volatility net asset value MMF) and provides for an extensive set of rules which all types of MMFs will have to comply with. These rules cover in particular the financial instruments considered eligible and the conditions for such eligibility, the valuation of the assets, the diversification rules, the risk management rules, and the reporting requirements.

The MMF Regulation will apply from 21 July 2018. Existing MMFs will be granted a grandfathering period of 18 months, i.e. until 21 January 2019.

Late start for the review of the AIFMD: In October this year the EU Commission appointed an external contractor to produce a report on the functioning of the AIFMD. The external contractor has one year to provide the study, i.e. until October 2018. According to the EU Commission, the consultation with stakeholders, based upon which the Commission should have started its review in accordance with the provisions set out in the AIFMD, will probably take place only after the beginning of 2019. According to EU sources, the AIFMD review shall focus among other things on the extension of the marketing passport to third countries.

Extension of ESAs' powers: On 20 September 2017, the EU Commission published a package of legislative proposals to reform the EU's supervisory structure to further strengthen and integrate EU financial market supervision. In order to achieve this goal, the EU Commission proposes to reinforce the coordination role for all three ESAs (EBA, ESMA and EIOPA) and to equip ESMA with new direct supervisory powers. As regards the investment fund industry, the legislative proposals suggest that ESMA is to be notified where a delegation of activities to third countries occurs. In addition, ESMA shall receive direct supervision for EuVECAs, EuSEFs and ELTIFs and for certain prospectuses under the EU Prospectus Directive (e.g. securitisation). The legislative proposals will need to be reviewed by the Council of the EU and the EU Parliament. At a first

meeting of the Council of the EU held in early November 2017, it appeared that the proposals are highly controversial as the proposed amendments go beyond the range of issues consulted on by the EU Commission. At the date of this publication, the EU Parliament has not yet started its debate. The legislative proposals follow a consultation by the EU Commission held in spring 2017 on the operations of the ESAs. Strengthening the supervisory convergence throughout the EU is part of the CMU.

Bridging the pension gap: Please refer to the section "Insurance law".

Marketing of atypical assets: The bill of law that 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 is still pending before the Luxembourg Parliament. The following are considered to be atypical assets: wines, diamonds, insurance contracts, art, animals and the economic rights of football players (non-exhaustive list).

UCITS

Common principles for share classes in UCITS: On 30 January 2017, ESMA issued an opinion which sets out four high-level principles which a UCITS must follow when setting up different share classes: (i) common investment objective, (ii) non-contagion, (iii) pre-determination, and (iv) transparency. Having identified diverging national practices as to the types of share classes that are permitted, ranging from very simple share classes (e.g. with different levels of fees) to much more sophisticated share classes (*e.g.* which may potentially have different investment strategies), ESMA issued its opinion in order to ensure a harmonised approach across EU Member States. To the extent that ESMA's opinion imposed a number of new operational requirements (e.g. stress tests in relation to contagion risk), which raised major questions concerning their interpretation, the CSSF granted a grace period and requires UCITS to comply with these new operational requirements by 31 December 2017 at the latest. Read more… The opinion requires that affected share classes were to be closed for investment by new investors by 30 July 2017 and for additional investment by existing investors by 30 July 2018. The opinion follows two discussion papers previously issued by ESMA on the same subject in December 2014 and April 2016.

Insolvency

Cross-border insolvency proceedings: In the context of cross-border insolvency proceedings, Regulation 2015/848 of the EU Parliament and of the Council of 20 May 2015 on insolvency proceedings (Regulation 2015/848) is applicable in all Member States of the European Union with the exception of Denmark to insolvency proceedings opened as from 26 June 2017. It replaces Regulation 1346/2000 of the Council of 29 May 2000 on insolvency proceedings, as amended, (Regulation 1346/2000) which continues however to apply to insolvency proceedings that have been opened before 26 June 2017.

Like former Regulation 1346/2000, Regulation 2015/848 defines a legal framework for cross-border insolvency proceedings as it governs in particular issues linked to jurisdictional competence, the recognition of insolvency proceedings and applicable law.

Moreover, Regulation 2015/848 introduces certain improvements, such as the extension of the scope of insolvency proceedings caught under Regulation 2015/848, the clarification of the concept of the "centre of main interests" (COMI), the measures intended to fight forum shopping, an improvement in the relations between main proceedings and secondary proceedings, the establishment of a coordination regime for dealing with insolvencies within a group of companies.

The Luxembourg insolvency proceedings referred to in Regulation 2015/848 are:

- bankruptcy;
- controlled management;
- composition with creditors;
- the special winding-up regime applicable to notaries; and
- the procedures applicable to collective debt settlement in the context of over-indebtedness.

Insurance law

Insurance Distribution Directive (IDD): Directive 2016/97 on insurance distribution (IDD) is to be implemented into national law before 23 February 2018. Bill of law 7215 aims at implementing the IDD into Luxembourg law. The bill of law notably aims at facilitating the exercise of the activities of insurance intermediaries within the EU and ensuring improved protection of policyholders. The Luxembourg legislator took the opportunity afforded by the implementation of IDD to review the current regime of preferential rights granted to insurance creditors (policyholders, insured persons or beneficiaries) in case of insolvency of the insurance company. The reorganisation aims at better protecting the various classes of insurance creditors in view of their specific situations. For more information, please refer to our Back to 2016 - Forward to 2017…

Professional Secrecy: Please refer to the section "Banking and financial services" as the contemplated amendment also applies to professional secrecy in the insurance sector.

PRIIPs: EU Regulation 1286/2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) aims at establishing standard pre-contractual information on packaged financial products (such as but not limited to investment funds, derivatives, savings life insurance products) to be offered to retail clients, the so-called "key information document" (KID). Bill of law 7199 implements PRIIPs into Luxembourg law to the extent that it empowers the *Commission de Surveillance du Secteur Financier* (CSSF) and the *Commissariat aux Assurances* (CAA) to ensure compliance with PRIIPs. Such authorities may require the originator of a retail and insurance-based packaged investment product or the person selling a retail and insurance-based packaged investment product to notify the KID in advance to its competent authority. Nevertheless, the main points concern the sanctioning powers and administrative measures that may be exercised by the CSSF and CAA and which are set forth in the bill of law. Finally, it provides many details regarding (i) the numerous cases where administrative sanctions and penalties may be imposed and (ii) the amount of the financial sanctions.

Extension of ESAs' powers: A proposal for an EU Regulation provides new governance rules for managing EIOPA and a new funding system based on annual contributions made by the institutions directly or indirectly supervised by EIOPA. To ensure prudential convergence from a supervisory perspective, EIOPA shall (i) create and maintain an up-to-date handbook relating to the supervision of the insurance and reinsurance companies in the EU, (ii) take into consideration environmental, social and governance risks and technological innovations, (iii) request information directly from the competent authorities and/or from the financial institutions in the context of specific investigations, (iv) receive information on internal models for solvency ratio calculation and opine thereon, (v) supervise outsourcing, delegation and risk transfer arrangements in third countries ex-ante and on an on-going basis. Moreover, Directive 2009/103 on motor insurance is now within the scope of the EU Regulation establishing EIOPA.

Bridging the pension gap: In June 2017, the EU Commission adopted a legislative proposal for a Regulation on a pan-European Personal Pension Product (PEPP). In introducing a voluntary personal pension scheme that will offer consumers a new, simple and cost-effective pan-EU option to save for retirement, the proposal lays down the foundation for a PEPP market within the EU. It provides for an EU-wide standardisation of the core product features (e.g. investment rules, disclosure) and facilitates portability and switching (i.e. although a long-term investment by definition, consumers will be able to switch to another PEPP or to take their PEPPs with them if they change employment and/or move to another Member State). The PEPP is complementary to existing pension plans (whether state-based, occupational or personal pensions) and once authorised in one EU Member State, it will be possible to market a PEPP in other EU Member States (EU passport). It is expected that the PEPP will be offered by a range of financial services companies, including insurers, banks, occupational pension funds, investment firms and asset managers.

The legislative proposal forms part of the CMU Action Plan published by the EU Commission in September 2015. It will now be considered by the EU Parliament and by the EU Council.

Litigation

Enforcement of pledges and conservatory measures: On 15 February 2017, the Court of Appeal confirmed two decisions handed down by a judge sitting in summary matters on 12 August 2016 and 26 August 2016 and declared the claim seeking conservatory measures following the execution of collateral governed by the law on collateral agreements dated 5 August 2005 (the Law of 2005) to be inadmissible.

In the case at hand, a debtor had granted several pledges to secure a loan agreement. At the maturity date of the loan agreement the debtor was not able to reimburse the agreement and the parties entered into negotiations for a "forbearance agreement" according to which the creditor agreed to refrain from enforcing the pledges. As the debtor was still not able to reimburse the loan agreement six months after the initial maturity date of the loan agreement and at the term of the forbearance period, the secured creditor enforced the pledges.

The debtor raised three arguments in support of its action:

- The pledges would have been enforced at a time negotiations in relation to a forbearance agreement were still ongoing.
- The lender would have tried to make the borrower believe that he would be willing to maintain the forbearance period, whereas he had already planned to enforce the pledges.
- The enforcement of the pledges would have been excessively profitable: the lender obtained the shares for one dollar per share, although the underlying assets would be valued at several millions.

The debtor sought to obtain conservatory measures, in particular to obtain a receivership on the pledged shares, since the suspension of a decision taken by the secured creditor in his capacity as new shareholder followed the enforcement of the pledges in the company previously owned by the debtor and the appointment of a provisional administrator for the same company.

The underlying question in this case is whether a judge relying on the provisions of the Law of 2005 can interfere with the enforcement of a pledge. In its order dated 15 February 2017, the Court of Appeal restated that the provisions of the Law of 2005 were introduced in order to protect secured creditors. Preparatory works of the Law of 2005 and legal doctrine confirm the interpretation that the enforcement of collateral should not be questioned. The judge therefore cannot interfere with the enforcement of a pledge and can only intervene in case of apparent fraud.

Arbitrability of an action for the annulment of a corporate decision: On 13 July 2017, the District Court of Luxembourg entered a no jurisdiction judgment holding that annulment claims against corporate decisions of general meetings based on Article 12*septies* of the amended Law on Commercial Companies (LCC) can be resolved through arbitration.

The claimants in this case had issued proceedings in order to reverse what they regarded as an unlawful decision to remove and replace the general partner of a Luxembourg special limited partnership (*société en commandite spéciale*).

The defendants had argued amongst others that the Court should refuse jurisdiction over the claim as it was caught by an arbitration clause contained in the limited partnership agreement.

The claimants rebutted that the arbitration clause was inapplicable as the subject matter of the claim could not be resolved by arbitration. They argued that the very wording of Article 12*septies* (2) of the LCC specifically states that general meeting decisions can only be annulled in a “judicial decision” (*décision judiciaire*). Such a requirement, they alleged, was justified by the fact that an annulment judgment would have an effect on third parties and should be published as per requirement of the law.

The District Court of Luxembourg rejected these arguments and found in favour of the defendants. It considered that an arbitral award should be given a status equivalent to a judicial decision as it can be invoked by, and held against, third parties. According to the District Court, the LCC does not provide that annulment claims based on Article 12*septies* are inarbitrable.

This first instance judgment is currently subject to an appeal.

Duties of the third party in an attachment procedure / déclaration affirmative du tiers-saisi: In attachment matters, creditors clearly have an interest in knowing if the third party is the debtor's debtor and to what extent this is the case. This is the main object of the affirmative declaration (*déclaration affirmative*) procedure.

Article 704 of the New Civil Procedure Code provides that the third party may not be assigned to file a statement (known as a *déclaration affirmative*) unless there is an authentic instrument or unless a judgment has declared the attachment or the opposition valid.

The legislator has implemented the provisions of this Article 704 in order to prevent creditors from interfering in the relationship between the debtor and the third party unless they have at least strong presumptions in favour of the validation of the attachment.

Nonetheless, the Court of Appeal considers that the authenticity of the instrument/title is sufficient and it is not necessary for the title to have acquired the force of res judicata (CA, 1 July 2015, no 41792). Hence, if a judgment declares the attachment or opposition valid, the creditor may assign to obtain the statement. He may even undertake this assignment during the opposition procedure or during an appeal directed against the said judgment.

Article 568 of the Civil Procedure Code (current Article 704 of the New Civil Procedure Code) merely requires a judgment; it does not require the judgment to be final.

One should not forget that the creditor is only informed of the effectiveness of the attachment once the third parties have made their statement. It is crucial that this information is provided as soon as possible in order for the creditor to be able to react in case of a negative declaration and to take alternative enforcement measures. Waiting for the judgment to be final would delay the procedure and could be prejudicial for creditors.

In the present case, even if the 6-month term taken by the bank to file its statement may appear excessive, this fact was not sentenced based upon Article 713 of the Civil Procedure Code, which provides that a third party which does not file its statement or which does not provide the related evidence, is declared a debtor purely and simply ("*débiteur pur et simple*") and the Court correctly ruled that the statement filed by the bank does not satisfy the conditions foreseen by Article 709 of the Civil Procedure Code. Nonetheless, the bank has been ordered to pay the fees and expenses of the procedure since it is recognised that the fees and expenses of this procedure must be borne by the third party if the statement is made excessively late.

Enforcement of a foreign arbitral award – New York Convention - *favor arbitrandum* provision: In a judgment rendered on 27 April 2017, the Luxembourg Court of Appeal has held that Article 1251 of the New Code of Civil Procedure (NCPC) must be interpreted as meaning that in the event of the application of the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards (NY Convention), the domestic provisions will not apply and the judge will only take into account the provisions of the NY Convention.

This is a confirmation by the Court of its reversal of practice as initiated by a judgment of the Court of Appeal of 25 June 2015. For background please refer to our Back to 2015…

The Court further finds that the "*favor arbitrandum*" provision - Article VII, first paragraph of the NY Convention - does not require Article 1251 of the NCPC to be interpreted in such a way that it would allow the enforcement in Luxembourg of annulled foreign arbitral awards.

The fact that the annulment of the foreign arbitral award in the State of origin is not specifically listed in Article 1251 of the NCPC as a ground for refusal of the enforcement does not mean that

Luxembourg domestic rules allow, as a matter of principle, for the enforcement of annulled foreign arbitral awards. On the contrary, a combined reading of both Articles 1250 and 1251 of the NCPC leads to the conclusion that Luxembourg domestic law does not allow for the enforcement in Luxembourg of a foreign arbitral award which is not enforceable in the country in which it was made. Article 1251 of the NCPC therefore does not exclude Article V, first paragraph, indent (e) of the NY Convention.

On the basis of this new practice, the judgment of 27 April 2017 revoked the Luxembourg enforcement order of a foreign arbitral award which had been set aside by a competent authority of the country in which that award was made.

The previous reading of Article 1251 of the NCPC, which had been in place since a judgment of the Court of Appeal of 28 January 1999, is therefore undermined.

Exemption from liability in cases of *force majeure*: In a first instance judgement, handed down on 30 May 2017 by the Luxembourg District Court (docket numbers 143.147, 134.148, 134.149 and 134.150), regarding the liability of a railway carrier towards passengers, the action of a person who caused a fire in a train is considered to be a case of a *force majeure* for the carrier.

In application of Article 1784 of the Civil Code, the carrier is presumed to be liable for accidents suffered by passengers unless the carrier proves that the damages incurred are due to an extraneous cause which cannot be attributed to it.

The question raised was whether the action of a person who intentionally caused a fire in a train carriage which resulted in damages to other passengers could be considered unforeseeable, unavoidable and of an external nature for the carrier, relieving it of any liability towards the passengers.

Several experts were appointed by the court to determine whether technical or safety measures could have been taken by the carrier to prevent the damages suffered by the passengers.

According to the experts' reports, it has not been conclusively established that any technical or safety measure could have prevented a person from causing a fire in the train carriage or to avoid the damages suffered by the passengers.

In the present case, the Court ruled that the action of the arsonist is to be considered as of an unforeseeable, unavoidable and external nature for the carrier, relieving it of any liability towards the passengers.

Inadmissibility of a legal action brought by a company: In two recent first instance judgements handed down on 11 November 2016 and 31 May 2017 (docket numbers 154.909 and 180.898), the Luxembourg District Court, relying on Article 22 of the law dated 19 December 2002 on the trade and companies' register and the accounting and annual accounts of undertakings, as amended (the "Law of 2002"), declared the legal action brought by a commercial company to be inadmissible.

According to Article 22 of the Law of 2002, any application, counterclaim or accessory claim which is based on a commercial activity for which the claimant was not registered with the trade and companies' register is not admissible before the court.

The two judgements declared the legal action brought by a company inadmissible in relation to a commercial activity as the said commercial activity was outside the scope of its corporate object, as filed and published with the trade and companies' register.

As provided by Article 22 of the Law of 2002, the inadmissibility should be raised *in limine litis*, before any defense regarding the substance. However, in both judgements, the Luxembourg District Court declared the legal action inadmissible although the demurrer was not raised in *limine litis* by the opposing party but, for the first time, in its summary conclusions.

In the judgement of 2016, the Court even referred the case file to the public prosecutor as it might be of interest for public policy.

New criminal offence of deliberately endangering others: The Luxembourg government presented a bill of law in November 2017 aiming to introduce the offence of deliberately endangering another person under Article 422-1 of the Criminal Code.

This draft bill is inspired by French legislation and seeks to incriminate wrongful and dangerous behaviour that by mere chance did not result in any harmful implications for a third party. The new offence is not limited as to its scope and targets any behaviour that could lead to another person's death or severe injury.

A person may be held liable for the abovementioned offence if two conditions are met.

Firstly, a person has deliberately infringed a duty of security or caution foreseen by a legal provision or a regulation. Secondly, the person has thereby exposed a third party to an immediate threat of death, mutilation or permanent incapacity.

Courts may hand down a sentence of imprisonment of between one month and three years as well as a fine of between 500 and 5,000 euros.

Public procurement

Implementation of the new Directives on Public Procurement: Bill of Law 6982 providing for the implementation of Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EU and Directive 2014/25/EU on procurement by entities operating, in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EU.

The new regulation to be implemented is intended to clarify, consolidate and modernise the existing rules and more specifically to:

- allow public procurement to become an instrument of political strategy (in the social and environmental areas) as well as an instrument in favour of innovation,
- simplify public procurement and alleviate the burden for public procurers and economic operators,
- prevent conflicts of interest, favouritism and corruption.

The bill of law was tabled before the Luxembourg Parliament in May 2016 and the law could be adopted before the end of 2017 or in early 2018.

Space strategy

Space resources: The law on the exploration and use of space resources of 20 July 2017 has positioned Luxembourg among the most innovative space-orientated nations in the world. The law deals with the ownership of space resources and the authorisation regime for the exploration and use of such resources. Read more… and download our factsheet on the space sector...

Tax law

New Circular on stock options: The new Circular letter L.I.R. - No. 104/2 of 29 November 2017 has replaced the former Circular letter on stock option plans. The Luxembourg tax regime of stock options granted by an employer to its employees distinguishes between (i) individual or virtual options and (ii) freely negotiable options. The new Circular letter also increases the effective tax rate of freely negotiable options from 13.27% to 22.75% maximum. However, such increase still remains attractive and taxes the benefit in kind at the same level as an extraordinary income subject to the half-global rate method. Read more…

2018 budget bill: The main tax-related provisions of the budget bill, which will enter into force on 1 January 2018, include (i) clarification of the tax treatment of capital gains in the case of business restructurings, (ii) improvements of the investment tax credit for zero emission cars and software that has been acquired by an enterprise, (iii) an extension of the VAT exemption to the management of collective internal funds held by a life-insurance undertaking, (iv) the introduction of 3 assessment options for resident spouses/partners and (v) an extension of the inheritance tax exemption for spouses/partners without common descendants. In addition, it is worth mentioning that further to the decision of the Court of Justice of the European Union in the Berlioz case (C-682/15), the possibility for the information holder to challenge the legality of the information request addressed by the Luxembourg tax authorities has been re-introduced. Read more…

New IP Box: Bill of law 7163 of 4 August 2017 has unveiled the framework for the new Luxembourg intellectual property (IP) box applicable as of 1 January 2018. Inspired by the various recent "Base Erosion Profit Shifting (BEPS) compliant" IP legislation in Europe, the newly proposed Article 50ter of the Income Tax Law allows a Luxembourg resident company or individual to benefit from a partial exemption of 80% on the adjusted and compensated net income obtained after application of the nexus approach and derived from the eligible IP assets that have been created, developed or improved after 31 December 2007. The application of such tax incentive leads to an effective taxation rate of +/- 5.2%. The eligible IP assets also benefit from a total net wealth tax exemption. Read more…

Confirmation of the end of the VAT exemption regime for financial IGPs: On 4 May 2017, the Court of Justice of the European Union (CJEU) upheld the action for failure to fulfil obligations brought by the Commission and declared that the Luxembourg legislation on Independent Groups of Persons (IGP) does not comply with the VAT Directive in the case Commission v. Luxembourg (C-274/15). Luxembourg has not correctly transposed the VAT Directive because (i) the services of the IGP should be directly necessary for VAT-exempt activities or for non-VATable activities; (ii) the members of the IGP may not deduct the VAT payable or paid in respect of goods or services provided to the IGP from the amount of VAT which they are liable to pay; and (iii) any transaction between the IGP and one of its members must be regarded as a transaction between two distinct taxable persons and thus as falling within the scope of VAT. Read more…

Following the Luxembourg case C-274/15, the series of cases relating to the scope of the cost-sharing VAT exemption also referred to as IGP continued with the release on 21 September 2017 of three judgements by the CJEU: Aviva (C-605/15), DNB Banka (C-326/15) and European Commission v. Federal Republic of Germany (C-616/15). In these three cases, a major step has been taken with the CJEU putting an end to the current debate on the scope of the VAT exemption regime for IGPs and sending a shock wave through the current practice within the European Union as regards to the use of IGPs in the financial and insurance sectors. Read more…

Signature of the MLI – reservations made by Luxembourg: The official ceremony for the signing of the multilateral instrument (MLI) took place on 7 June 2017. Luxembourg adopted a restrictive approach towards the provisions provided for under the MLI and has sought to limit the scope and impact of this new layer of international legislation to the minimum standards required. Key features include the principal purpose test clause and an improved dispute mechanism system. The related provisions will apply to all its double tax treaties that are in force. Read more…

Ratification of the Luxembourg - Ukraine Double Tax Treaty and its Protocol: The first Treaty between Luxembourg and Ukraine, signed on 6 September 1997 as amended by a Protocol signed on 30 September 2016, has been ratified by Ukraine on 14 March 2017, after its ratification by Luxembourg. The Treaty and Protocol should come into effect as from 1 January 2018. Read more…

ECOFIN agrees on amendments to the ATAD regarding hybrid mismatches with third countries: On 21 February 2017, the Economic and Financial Affairs Council of the EU (ECOFIN) agreed on a new proposal for a Council Directive (ATAD II) amending the so-called Anti-Tax Avoidance Directive (ATAD I). The main changes consist in the extension of the scope of the provisions on hybrid mismatches from EU Member States to third countries in order to align the ATAD with the rules recommended by the OECD in the 2015 final report on Action 2 of the Base Erosion Profit Shifting project. Read more…

2017 changes for VAT on immovable services: EU Regulation 1042/2013 introduced new VAT rules applicable since 1 January 2017 as regards the place of supply of services with immovable properties. The Regulation provides definitions, clarifications and guidelines to help economic operators. Read more…