ELVINGER HOSS PRUSSEN

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LUXEMBOURG LAW

NEWSLETTER

APRIL 2017

EMIR collateral margin reform

Under EMIR and as part of the obligation to use risk-mitigation techniques, financial counterparties (including most investment funds) and large non-financial counterparties are required to exchange collateral where OTC derivatives are not centrally cleared.

In December 2016, the EU regulatory technical standards (**Commission Delegated Regulation 2016/2251**) supplementing EMIR with regard to the risk-mitigation techniques applicable to non-centrally cleared OTC derivatives ("**Margin RTS**") were published in the Official Journal of the EU.

The Margin RTS specify the various procedures that counterparties must include in their risk management procedure. They also set out the methodology to be used for calculating initial and variation margins as well as the eligibility and diversification criteria with which they have to comply.

The Margin RTS provide various phase-in dates for its application and exemptions. In a nutshell:

- For initial margin: the implementation will vary depending on the size of the counterparties from 4 February 2017 (for the largest market participants with an aggregate average notional amount ("**AANA**") of non-centrally cleared derivatives above EUR 3 trillion) until 1 September 2020 (for counterparties with an AANA above EUR 8 billion). Accordingly, counterparties whose AANA is below the EUR 8 billion threshold will be exempt from initial margin requirement.
- For variation margin, the obligation to calculate and provide variation margin applies:
    - as from 4 February 2017, where the two counterparties to a non-centrally cleared derivative have both, or belong to groups each of which has, an AANA above EUR 3 trillion;
    - as from 1 March 2017, for all other counterparties, including most investment funds.

- In contrast with other jurisdictions, FX forwards, FX swaps, currency swaps are in scope. However, there is no obligation to collect initial margins for such derivatives. In addition, with respect to FX forwards only, the requirement to exchange variation margins is postponed until (presumably) 3 January 2018.

On 23 February 2017, the European Supervisory Authorities ("**ESAs**") published a **paper** (in the form of a communication) on variation margin exchange set out in the Margin RTS in which they acknowledged that the entry into force of the variation margin requirement as from 1 March 2017 appears mainly to pose a challenge for smaller counterparties. Although the ESAs stated that the postponement of this requirement would need to be implemented formally through EU legislation, they indicated that national competent authorities can take into account the size of the exposure to the counterparty and its default risk in assessing compliance of counterparties with Margin RTS requirements. The ESAs underlined that this approach does not entail a general forbearance, but a case-by-case assessment from the competent authorities on the degree of compliance and progress. On the same day, IOSCO also published a similar **statement**.

The *Commission de Surveillance du Secteur Financier* ("**CSSF**") has not yet formally taken a position on this new obligation; however, one may reasonably expect that that they will adopt a softer approach for

smaller counterparties and will be less flexible with large counterparties.

In all cases, once the Margin RTS apply to them, management companies AIFM and, if applicable, investment managers, will need to take all necessary steps to comply with these new rules (in particular updating the relevant credit support documentation and establishing specific risk management procedures).

Banking and financial services

Law on market abuse

By a **Law dated 23 December 2016**, the Luxembourg legislator adopted draft Bill of law 7022 (a) implementing (i) Directive 2014/57/EU on criminal sanctions for market abuse as well as (ii) the Commission Implementing Directive 2015/2392/EU with regard to reporting to competent authorities of actual or potential infringements in relation to the market abuse regulation; (b) supplementing specific provisions of Regulation 596/2014/EU on administrative measures and sanctions and (c) amending the Law of 11 January 2008 on transparency requirements for issuers ("**Law**").

When implementing these provisions, the Luxembourg legislator did not go beyond what was required pursuant to the provisions of said directives.

Chapter 2 of the Law relates to the administrative sanctions and the powers conferred on the *Commission de Surveillance du Secteur Financier* ("**CSSF**") in that context. Chapter 3 relates to the criminal law sanctions and implements the relevant provisions of Directive 2014/57/EU.

To a large extent, Chapter 2 confirms the powers already provided under the Law of 9 May 2006 (repealed) given to the CSSF as competent administrative authority and provides for further precisions or extensions of the CSSF's investigative powers.

With the implementation of Article 32 of the Market Abuse Regulation 596/2014 ("**MAR**") in the Law, a specific regime for "whistleblowers" is put in place. The CSSF is hereby required to put into place procedures which allow the efficient notification to the CSSF of effective or potential violations of MAR. Employers are further required to implement appropriate internal procedures which allow their employees to notify any such violations of MAR.

In order to avoid any violation of the *ne bis in idem* principle, the Law maintains the mechanisms already introduced under the Law of 9 May 2006 (repealed), laying down a consultation procedure between the CSSF and the State prosecutor.

The Law was published in the Luxembourg official gazette on 27 December 2016.

In this context it should also be noted that ESMA provided a **non-exhaustive and indicative list** setting out examples where the legitimate interests of an issuer could justify the delay of disclosure of inside information. The guidelines have been applicable since 20 December 2016.

Corporate, mergers & acquisitions

Anti-money laundering: New primary offences and amended procedures

With effect from 1 January 2017, the **Law of 23 December 2016 relating to the implementation of the 2017 tax reform** has included aggravated tax evasion ("*fraude fiscale aggravée*") and tax fraud ("*escroquerie fiscale*") (or attempts to commit such offences) as criminal tax offences constituting primary offences ("*infractions primaires*") of money laundering under Article 506-1 of the Luxembourg Criminal Code. This means that the re-investment of the proceeds resulting from criminal tax offences committed as from 1 January 2017 constitutes a money-laundering offence under the Law of 12 November 2004 relating to the fight against money laundering and financing of terrorism ("**AML Law**").

In this context, the Luxembourg financial supervisory authority (*Commission de Surveillance du Secteur Financier* ("**CSSF**")) issued **Circular CSSF 17/650** on 17 February 2017 for the attention of all professionals of the financial sector supervised by the CSSF. The Circular has been prepared by the CSSF together with the financial intelligence unit established at the public prosecutor's office ("**CRF**") and gives specific details on the practical application of the rules by professionals of the financial sector and providing also a list of situations and circumstances that may be indicators of tax related offence.

The Circular does not amend existing regulations but emphasises that professionals of the financial sector have to adapt their due diligence measures with respect to these new primary offences in tax matters, irrespective of whether the customers are Luxembourg tax resident or not.

It should be noted that the CRF has issued two new guidelines, effective as from 1 January 2017, for the attention of all professionals subject to the AML Law:
(a) The « ***Déclaration des opérations suspectes*** », replacing CRF Circular 22/10 dated 8 November 2010, requiring that declarations of suspicious transactions are to be made according to the procedure of the new electronic secured and standardised communication system, named "**goAML**", already used by several foreign financial intelligence units[1] .

A prior registration with goAML has to be made by the professionals which require the use of a so-called LuxTrust certificate for the professional to access the registration process. The guidelines describe the declaration process to goAML and refer to additional leaflets detailing how to complete the various standard forms.

(b) The guidelines with respect to the "***Blocage des transactions suspectes***", replacing CRF Circular 2015/01 dated 6 January 2016, provides guidelines with respect to procedure in case of suspicious transactions, the handling of blocked transactions and the interaction with the CRF.

> 1. already used by 15 foreign financial units (among others, South Africa, Morocco, The Netherlands, Finland and Denmark) and to be put in place in (Germany, Ireland, Liechtenstein, Monaco, United Arab Emirates).

EU law, competition and antitrust

Commitment decision in public procurement context

By Decision 2017-E-01 dated 8 March 2017, the Luxembourg Competition Council has accepted commitments offered by two companies operating in the passenger transport market in response to concerns regarding the conformity of their tender for public procurement contracts with competition law.

On 3 May 2014, the Ministry of Sustainable Development and Infrastructures ("**Ministry**") launched a public tender for the transportation of passengers with special needs. The tender submitted by Transport Union Lëtzebuerg ("**TUL**"), a joint venture between the two most important companies operating in the Luxembourg passenger transport market, was the only one that met the requirements laid down in the tender documents.

On 16 July 2014, the Ministry cancelled the tender because of concerns that TUL's submission constituted an infringement of competition law.

Pursuant to the statement of objections issued by the Competition Council on 25 April 2016, TUL was placed under the sole and immediate control of its shareholders and had no autonomous decision-making power with the result that it was not an undertaking within the meaning of competition law. It further stated that an exchange of information took place between the undertakings participating in the tender submitted by TUL and that the creation of this joint venture company by them constituted an agreement between undertakings within the meaning of Article 3 of the Law of 23 October 2011 on competition ("**Competition Law**") and Article 101 of the Treaty on the Functioning of the European Union ("**TFEU**").

Without taking a definite position on possible justifications for the agreement within the meaning of Article 4 of the Competition Law and Article 101, paragraph 3, TFEU, as alleged by the two companies concerned, or on the existence of an infringement, the Competition Council has decided, in accordance with Article 13 of the Competition Law, to accept and make binding the commitments offered by these companies in order to address any competition concerns identified in the statement of objections. The companies have undertaken (i) to dissolve TUL at the latest before 1 July 2017, (ii) to organise information, training and awareness sessions in relation to competition law for their staff, and (iii) to keep data and information for 5 years which relate to negotiations and commercial exchanges with competitors in the context of their next submission with respect to the same public procurement contracts.

Insurance and reinsurance

Dispute resolution

European account preservation order

Regulation (EU) 655/2014 of 15 May 2014 establishing a European Account Preservation Order procedure ("**Regulation**") became applicable on 18 January 2017. As of that date, creditors have a new instrument at their disposal to obtain cross-border collection of their pecuniary claims.

The procedure established by the Regulation is an additional and optional means for the creditor who remains free to make use of national measures, such as the attachment procedure under Luxembourg law. The European Account Preservation Order ("**EAPO**") can be an effective instrument as it allows creditors to freeze funds held in bank accounts that are located in several Member States by submitting a single application based on a standard form. Creditors may apply for an EAPO (i) prior to initiating proceedings on the substance of the matter, (ii) at any stage of such proceedings, and (iii) after having obtained a judgment.

However, the claimant will have to prove that there is an urgent need for protective measures due to a real risk that, without such a measure, the subsequent enforcement of the claim will be impeded or made substantially more difficult.

Furthermore, the Regulation establishes a mechanism allowing the creditor to request that the information needed to identify the debtor's account is obtained by the court, which is not possible under Luxembourg domestic law.

Banks upon which an EAPO has been served must implement it without delay. According to the Regulation, banks must (i) identify the account(s) subject to the EAPO, (ii) preserve the amount specified in the EAPO by ensuring that that amount is not transferred or withdrawn from the account(s) and (iii) issue a declaration within three working days following the implementation of the EAPO indicating whether and to what extent funds in the debtor's account(s) have been preserved.

Banks may be held liable if they fail to comply with their obligations under the Regulation, the liability of the notified bank being governed by the law of the Member State of enforcement.

The EAPO procedure only relates to the freezing of bank accounts, therefore creditors have to apply national enforcement measures in order to receive payment of frozen funds.

The Bill of Law 7083 aiming at implementing the Regulation (**Bill**") was submitted to the Luxembourg Parliament on 27 October 2016. The Bill has not been passed yet with the result that, thus far, no authority has been named for obtaining and transmitting account information at the request of a court of a Member State. Currently, the Bill provides for the banking authority (*Commission de Surveillance du Secteur Financier* ("**CSSF**")) to be named as the authority.

Employment and pensions law

Religious symbols at work: European Court decision

On 14 March 2017, the Court of Justice of the European Union ("**CJEU**") rendered two preliminary rulings concerning the interpretation of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ("**Directive**") by which it clarifies the power of employers to ban religious symbols in the workplace.

In relation to **Case C-157/15**, the CJEU found that the prohibition on wearing an Islamic headscarf, which arises from an internal rule of a private undertaking imposing a blanket ban on the visible wearing of any political, philosophical or religious sign in the workplace, does not constitute a direct discrimination prohibited by the Directive, i.e. where one person is treated less favourably than another person in a comparable situation, on the grounds, inter alia, of religion. The internal rules at issue cover any manifestation of political, philosophical and religious beliefs without distinction and must therefore be

regarded as treating all employees of the undertaking in the same way.

The CJEU stressed, however, that it is not inconceivable that the internal rules at issue are an indirect discrimination, i.e. where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief at a particular disadvantage compared with other persons. Such rules are not, however, considered to be discriminatory if they are objectively justified by a legitimate aim that is pursued by appropriate and necessary means.

According to the CJEU, the employer's desire to display an image of neutrality towards customers is, in principle, legitimate, notably when the rule only applies to employees who are required to come into contact with customers.

The prohibition on wearing visible signs of political, philosophical or religious beliefs is appropriate, provided that the neutrality policy is genuinely pursued in a consistent and systematic manner. Furthermore, the prohibition must qualify as being strictly necessary if the prohibition covers only employees who interact with customers. The CJEU notes that the national court must assess whether it would have been possible for the employer to offer the employee a post not involving any visual contact with customers.

In **Case C-188/15**, the CJEU took a similar approach by stating that a rule prohibiting the wearing of any visible sign of political, philosophical or religious belief may constitute an indirect discrimination. The CJUE referred explicitly to the guidance given in Case C-157/15 for the assessment of the legitimacy, appropriateness and necessity of such a rule.

In the absence of an internal rule, the ban on wearing Islamic headscarves is a direct discrimination which could, however, be justified by a 'genuine and determining occupational requirement provided that the objective is legitimate and the requirement is proportionate'. The CJEU stressed that a 'genuine and determining occupational requirement' is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out and cannot cover subjective considerations, such as the willingness of the employer to comply with a request from a customer.

In conclusion, the CJEU recognises the legitimacy of general bans on religious symbols if they are part of a neutrality policy that is genuinely pursued in a consistent and systematic matter and applies to visible symbols of all kinds of political, philosophical or religious belief. Such bans may not, however, target specific faiths. Hence the importance for undertakings to establish a general and undifferentiated policy if they want to control the appearance of their employees.

It will be up to the national courts to analyse on a case-by-case basis, whether a direct or an indirect discrimination will be given in the context of the prohibition of wearing visible signs of political, philosophical or religious beliefs.

ICT, IP and data protection

Data protection Regulation: Compliance starts today

The requirements imposed by the **General Data Protection Regulation 2016/679** ("**GDPR**") entail extensive work for undertakings processing personal data under the threat of heavy administrative sanctions (up to 4% of worldwide annual turnover or EUR 20,000,000, whichever is higher). This concerns data controllers (i.e. legal or natural persons who determine the purposes and the means of the

processing) as well as data processors (i.e. legal or natural persons who process the data on behalf of the controller and upon his instructions). It also involves a profound change in the approach to personal data processing within businesses. For the accountability duty towards the authorities that will be of paramount importance to all concerned, this will affect their corporate internal organisation - starting next year on 25 May 2018.

The accountability principle means that the controller must comply with the GDPR. It also means that it must be able, at any time, to demonstrate such compliance to the competent authorities and notably to prove that all personal data it processes is under control, mapped, secured, lawfully transferred and only used for determined purposes in accordance with the GDPR.

Even though the prior filing of formalities with the *Commission Nationale pour la Protection des Données* ("**CNPD**") will be abandoned under the GDPR, controllers will have to meticulously document and monitor their data processing-related activities, notably by conducting impact assessments, i.e. in-depth analysis of the processing, where required. The management of the processing must be internalised rather than declared to the CNPD. Under the GDPR, these obligations will also, to a certain extent, be incumbent on data processors with respect to the data that they process on behalf of a controller under a servicing agreement. Until the GDPR applies, only the controllers are responsible for complying with the data protection law.

Given the extent of the task incumbent on controllers and processors, which starts with the identification of (i) the type of personal data that is processed, (ii) the data subjects, (iii) the legal grounds, (iv) the purposes of the processing, (v) the recipients of the data transfers and the guarantees for the data subjects, (vi) the retention period, (vii) the security applied, etc., it is essential to start planning the roadmap today in order to be prepared for and compliant with the GDPR when it becomes effective.

As a starting point, and on the basis of the formalities already filed with the CNPD (if any) controllers and processors should create an inventory of all personal data collected and processed and identify the purposes of that processing (bottom-up approach). If the personal data processed cannot be precisely identified, another approach would be to rely on the list of purposes published by the CNPD available on its **website**. Indeed, controllers and processors will have to keep a specific register of all their data processing activities stating detailed information, except in very limited situations (i.e. where (i) the undertaking employs fewer than 250 employees, (ii) the processing is occasional, (iii) the processing is not likely to result in a risk to the rights and freedoms of data subjects, (iv) the processing does not include special categories of data). The controllers and processors who are exempt from keeping such a register will, however, still be accountable towards the competent authorities for complying with the GDPR. They may therefore keep a register of their data processing activities on a voluntary basis.

Controllers and processors will under certain conditions (e.g. where the core activities consist of processing operations which require regular and systematic monitoring of data subjects on a large scale or consist in the processing of special categories of data on a large scale) have to designate a Data Protection Officer ("**DPO**"). Any company that qualifies as a "controller" or "processor" is allowed to designate a DPO on a voluntary basis. Undertakings may wish to consider the possibility of designating a DPO as of today to ensure an efficient and smooth transition to the GDPR regime. The **guidelines** of Article 29 Data Protection Working Group Party on DPOs adopted on 13 December 2016 (WP 243) give valuable and practical direction.

The changes introduced by the GDPR embrace the idea that businesses relying on and processing personal data will have to consider the processing of such data as an integral part of their business strategy. Businesses will thus be well advised to continue and reinforce their ongoing efforts in terms of compliance with data protection regulations and in particular with the forthcoming application of the GDPR and to take appropriate legal and technical advice in that respect.

BEPS: Luxembourg Law of 23 December 2016

In the context of action 13 of the base erosion and profits shifting ("**BEPS**") action plan, Luxembourg parliament adopted the L**aw dated 23 December 2016** implementing country-by-country reporting requirements for entities that are part of a multinational enterprise group ("**MNE Group**") ("**CBCR Law**") implementing the Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.

A) MNE Groups concerned

MNE Groups are subject to the provision of the CBCR Law provided the total consolidated revenue of the MNE Group amounts to at least EUR 750 million as of January 2015 during the fiscal year preceding the reporting fiscal year.

MNE Groups with a consolidated group revenue lower than EUR 750 million are considered as excluded MNE Groups and are thus not subject to reporting.

B) Reporting entities

Luxembourg resident entities ("**Reporting Entity**") shall file a country-by-country-report ("**Report**") with the Luxembourg tax authorities if that entity is either:

1. The "**Ultimate Parent Entity**" of a MNE Group (meaning that it prepares consolidated financial statements under accounting principles generally applied in Luxembourg or would be required to do so if its equity interests were traded on a public securities exchange;

2. A "**Surrogate Parent Entity**" appointed by the MNE Group, as a sole substitute for the non-Luxembourg Ultimate Parent Entity when

a. the Ultimate Parent Entity of the MNE Group is not obliged to file a Report in its tax residence jurisdiction; or

b. the jurisdiction in which the Ultimate Parent Entity is resident for tax purposes has no qualifying competent authority agreement in force with Luxembourg; or

c. there has been a systemic failure of the jurisdiction of the tax residence of athe Ultimate Parent Entity that has been notified by the Luxembourg tax administration to the Luxembourg resident constituent entity1 .

3. Any Luxembourg tax resident entity if one of the above conditions under 2.A. to C. applies.

C) Reportable information

The CBCR Law requires the Reporting Entity to provide (i) information on revenues (excluding, however, payments qualifying as dividends under the law of source of such dividend), profits, taxes paid, capital, earnings, employees, and tangible assets on a country-by-country basis (ii) the list by country of the entities forming part of the MNE Group and their principal activity and (iii) any other information that the MNE Group deems necessary.

D) Notification

Each Luxembourg resident constituent entity of an MNE Group shall, before the end of the relevant financial year (except for 2016 where the tax authorities postponed the notification to the 31 March 2017) notify its status to the Luxembourg tax administration, i.e. whether it is a Reporting Entity or is not a non-reporting entity, in which case it shall identify the Reporting Entity.

The notification must be performed by the relevant entities on an electronical platform via the government portal "guichet.lu"[2].

E) Filing of the Report and exchange of information

The first Report relating to the 2016 fiscal year information is to be filed with the Luxembourg tax authorities within 12 months from the end of the relevant fiscal year (i.e. 31 December 2017 for a fiscal year-end on 31 December 2016).

The exchange of information by the tax authorities shall then be made within 15 months from the end of the relevant fiscal year (except for the exchange of information related to the 2016 fiscal year which shall be made within 18 months therefrom).

A Grand-Ducal decree listing the country with which Luxembourg will exchange the information is still to be published.

F) Penalties

Each Reporting Entity or constituent entity can incur a fine of up to EUR 250,000 in case of failure to file or late filing of the Report.

G) Automatic exchange of information

The Luxembourg tax administration shall then exchange the information so collected by means of automatic exchange.

> 1. The term "constituent entity" is defined in Section 1, paragraph 6 of the annex of the CBCR Law and basically refers to every entity (separate business unit) that is included in the consolidated financial statements of the MNE Group for financial reporting purposes.
> 2. http://www.guichet.public.lu/entreprises/fr/fiscalite/impots-benefices/declaration-pays-pays/declaration-pays-pays-notification/index.html.

Urban zoning

What remains of the Omnibus Bill of Law?

Announced as a pioneering bill of law when it was submitted to the Luxembourg Parliament on 16 July 2014, the so-called **Omnibus law** ("**Omnibus Law**") was finally adopted by the Luxembourg Parliament on 8 February 2017.

What was presented as the strength of the bill of law, i.e. the bringing together of several disparate legislative changes into a single text, has proved to be its major weakness. As a consequence, the Omnibus Law was only adopted more than two years after it was deposited with the Luxembourg Parliament.

One of the aims of the Omnibus Law is to reduce administrative complexity, notably in the field of urban planning. The most significant changes can be summarised as follows:

- Municipalities having a technical service department with at least one urban planner or urban developer are, from now on, themselves allowed to draft general or special development plans (*plans d'aménagement général ou particulier*), without having to use the services of an external person;
- The initiative to draft a special "new district" development plan (*plan d'aménagement particulier "nouveau quartier"*) can come from any person with a qualification for such a purpose. This entitlement must be consented to in writing by at least half of the landowners, together holding at least half the surface of the land concerned. Thus, it is no longer necessary to obtain the consent of all the landowners concerned in order to draft a special "new district" development plan;
- For every special "new district" development plan which envisages more than 25 housing units, at least 10% of the gross constructed area dedicated to housing must be reserved for low-cost housing;
- The deadline within which the assessment unit (*cellule d'évaluation*) has to issue its opinion with a view to adopting special development plans is reduced from three months to one month;
- The Omnibus Law introduces a simplified procedure for specific amendments to a special development plan. It also introduces the principle of tacit authorisation concerning the Minister's approval of the municipal council's decisions relating to the implementation agreement (*convention d'exécution*) and implementation project (*projet d'exécution*) of a special "new district" development plan.
- In their municipal regulation on buildings (*règlement sur les bâtisses*), municipalities may define smaller-scale works for which no building permits are required. The municipal regulation on buildings may provide that some or all of these works have to be notified to the mayor;
- The fixed term of a building permit can be extended twice, each time for a maximum period of one year. Before the Omnibus Law, the fixed term could only be extended once.

The Omnibus Law entered into force on 1 April 2017.

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