

# 2023's most significant legal developments and what to look out for in 2024

UPDATE

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In 2023, in Luxembourg, we witnessed a number of significant legal developments in the areas of Banking & Finance, Restructuring & Insolvency, Corporate, Investment Funds and Tax. In 2024, new legislation which will impact upon businesses and their investment strategies are expected to be introduced.

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## SIGNIFICANT LEGAL DEVELOPMENTS IN 2023

### Banking & Finance / Restructuring & Insolvency

#### 1 Law of 7 August 2023 on business preservation and modernisation of bankruptcy law

On 1 November 2023, a new restructuring framework has been implemented in Luxembourg with the law of 7 August 2023 on business preservation and modernisation of bankruptcy law (the **Bankruptcy Law**) coming into force.

The Bankruptcy Law implements Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 and replaces outdated restructuring proceedings with a series of new tools allowing debtors to address financial distress ahead of insolvency:

- the appointment of a conciliator (*conciliateur d'entreprise*): the conciliator will assist the debtor in negotiating a settlement agreement, a reorganisation plan or the transfer of all or part of its assets or business;
- the consensual reorganisation (*réorganisation par accord amiable*): a flexible out-of-court negotiation framework which is not public and not subject to any specific conditions aiming at the adoption of a settlement agreement between a debtor and its creditors. The settlement agreement may be confirmed by a court upon the debtor's request; and
- the judicial reorganisation (*réorganisation judiciaire*): a public and court-monitored restructuring proceeding that may be opened at the request of the debtor when the future of its business is in peril, in the short or long term. In principle, the debtor remains in control of its assets and the day-to-day operation of its business. Individual enforcement actions are stayed, with certain exceptions (in particular, the financial collateral arrangements governed by the law of 5 August 2005 (the **Collateral Law**) which remain enforceable). The proceeding aims at adopting a reorganisation plan and/or allowing a transfer by court order of all or part of the assets or the business of the debtor.

The Bankruptcy Law applies to:

- (i) traders within the meaning of article 1 of the Commercial Code;
- (ii) commercial companies and special limited partnerships within the meaning of article 100-2 of the law of 10 August 1915 on commercial companies;
- (iii) craftsmen; and
- (iv) civil companies.

It does not apply to professionals in the financial sector which fall under the scope of specific insolvency regimes.

## **2 Blockchain Law III of 15 March 2023**

Luxembourg, a pioneer in embracing financial innovation, has introduced in March 2023 the Blockchain Law III (the **Blockchain Law**), mainly to implement the EU DLT Pilot Regime Regulation which clarifies and expands the legal status of financial instruments held on Distributed Ledger Technology (the **DLT**).

The Blockchain Law includes financial instruments issued through DLT within the definition of financial instruments contained in the law of 5 April 1993 on the financial sector, the law of 30 May 2018 on market financial instruments and the Collateral Law.

The Blockchain Law provides clarification and certainty on the qualification of such financial instruments by including them on the scope of such laws. Additional legal certainty is then provided for pledges or other financial collateral arrangements on financial instruments issued through DLT.

This amendment is a significant stride towards ensuring legal certainty, allowing, for instance, securities accounts on DLT to be pledged without disrupting the efficient system established by the Collateral Law.

## **Corporate & Investment Funds**

### **1 New competition law which was adopted by the Luxembourg parliament on 24 November 2022 entered into effect on 1 January 2023**

On 24 November 2022, a new piece of legislation in the area of competition law implementing Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018, was adopted, entering into force on 1 January 2023 (the **Competition Law**).

The aim of the Directive is to ensure that national competition authorities possess the necessary guarantees of independence, resources, and enforcement and fining powers.

One of the key structural changes introduced by the Competition Law is the transformation of the Competition Council (*Conseil de la concurrence*) into a public establishment, now renamed the National Competition Authority (*Autorité de la concurrence du Grand-Duché de Luxembourg*) (the **Authority**).

This transformation not only signifies a shift in form but also empowers the Authority to represent itself in court, bolstering its capacity to address competition-related matters more effectively.

The Competition Law focuses on refining complaint procedures, offering clarity on the content of complaints and the Authority's decision-making processes in case of the rejection of a complaint.

Importantly, the Competition Law mandates the Authority to provide detailed motives for closing a case, promoting accountability and transparency in its decision-making. Additionally, the Competition Law introduces a settlement program which allows companies to reach an agreement with the Authority if they recognize their violation of competition laws.

### **2 Law of 1 September 2023 on foreign direct investments (FDI) - new law to establish a national screening process for foreign direct investment**

On 1 September 2023, the new law of 14 July 2023 (the **FDI Law**) on the introduction of a national screening mechanism for FDI likely to undermine security or public order entered into force.

The FDI Law specifically targets investments made by individuals or entities from outside the European Economic Area in critical sectors such as water, energy, health, defence, and media. Notably, portfolio investments are exempt from the FDI Law's purview, provided they are made with the sole intention of financial investment without seeking control over the Luxembourg-based company.

Transactions falling within its scope must be formally notified to the Luxembourg Ministry of the Economy (the **Ministry**) which will assess the potential impact of the foreign investment on national security and public order. The Ministry will then decide on whether the proposed investment can proceed or if it raises concerns that warrant further investigation.

### 3 Law of 26 July 2023 reforming the right of establishment in the professions of tradespeople and craftspeople relating to the requirements for business license holders

Luxembourg passed a law on 26 July 2023 amending the law of 2 September 2011 regulating access to the profession of craftsman, trader, industrialist, and certain liberal professions (the **RoE Law**). The goal of the RoE Law is to modernize the right of establishment and cultivates a more entrepreneur-friendly environment.

The RoE Law introduces the 'new chance' mechanism, a provision aimed at individuals who have faced bankruptcy or have been involved in such proceedings. This mechanism extends an opportunity for a fresh start, allowing individuals to undertake a second activity under specified conditions.

The RoE Law also amends the definition of activities subject to obtaining a business license and creates a new list of professional activities that do not require any professional qualifications.

### 4 Law of 21 July 2023 on Investment Funds

With the aim of maintaining and strengthening the country's attractiveness and competitiveness in terms of investment funds, the Luxembourg chamber of deputies adopted the law of 21 July 2023 (the **Funds Law**) - a text that represents a significant step forward in the modernisation of Luxembourg's legislative framework.

The Funds Law impacts the law of 12 July 2013 on alternative investment fund managers (**AIFMs**), and the four laws governing different types of funds, including the law of 15 June 2004 on venture capital investment companies (**SICARs**), the law of 13 February 2007 on specialised investment funds (**SIFs**), the amended law of 17 December 2010 on undertakings for collective investment (**UCIs**) (the **UCI Law**), and the law of 23 July 2016 on reserved alternative investment funds (**RAIFs**).

The main changes include:

- (i) the redefinition of the term 'well informed investor' with the lowering of the minimum investment threshold to EUR 100,000 in the SICAR, SIF and RAIF laws; and
- (ii) the extension of the minimum capital formation period from 12 months to 24 months for funds governed by the SICAR, SIF and RAIF laws, and from 6 to 12 months for funds governed by Part 2 of the UCI Law.

The Funds Law also introduces new legal forms for SICAVs governed by Part II of the UCI Law, with the new possibility of being established in the form of:

- (i) a partnership limited by shares (*société en commandite par actions*) (**SCA**);
- (ii) a common limited partnership (*société en commandite simple*) (**SCS**);
- (iii) a special limited partnership (*société en commandite spéciale*) (**SCSp**);
- (iv) private limited liability company (*société à responsabilité limitée*) (**S.à r.l.**); or
- (v) a cooperative in the form of a public limited company (*société coopérative organisée sous forme de société anonyme*) (**ScoopSA**).

The Funds Law also harmonises non-judicial liquidation requirements between funds and management companies / AIFMs. It allows AIFMs to market AIFs in the form of SICARs, SIFs and RAIFs to well-informed investors established or residing in Luxembourg. It implements tax changes designed to promote long-term investment: European long-term investment funds (**ELTIF**) and pan-European individual retirement savings products (PEPP) can now benefit from an exemption from Luxembourg subscription tax. The Funds Law also introduces reductions and exemptions with respect to subscription tax applicable to UCIs, RAIFs and SIFs.

The Funds Law responds to market demands for flexibility and structuring capacity, and is designed to consolidate Luxembourg's position as a major financial centre and a leader in the world investment fund industry.

## Tax

### **1 Bill of law (reference 8292) (the Pillar 2 Bill) transposing Council Directive (EU) 2022/2523 of 15 December 2022 (the Pillar 2 Directive) into Luxembourg law voted by Luxembourg Parliament on 20 December 2023**

The Pillar 2 Bill introduces new rules on taxing the profits of large multinational and domestic groups with a consolidated turnover of at least EUR 750 million based on consolidated financial statements at a minimum effective tax rate of 15%.

A top-up tax will apply to constituent entities located in Luxembourg that are members of multinational enterprises group or large domestic groups, where the effective tax rate is below 15%.

It is contemplated that the rules will apply from the 2024 tax year. However, within a transition period, multinational enterprises groups may apply for safe harbour rules which provide transitional relief, with a top-up tax equal to zero, subject to certain conditions.

### **2 Bill of law (reference 8186) submitted by Luxembourg Government on 28 March 2023 amending certain tax procedures and transfer pricing rules**

On 28 March 2023, the Luxembourg finance minister tabled a draft law (reference 8186) in parliament proposing several changes to the Abgabenordnung (AO) which sets the rules applicable to dispute procedures in relation to direct taxes.

It aims at simplifying and modernising for the tax framework but the proposed changes also tend to provide less flexibility to the taxpayers with respect to their direct tax matters.

The draft law provides, inter alia, for a new deadline for filing a proceeding before the administrative tribunal, the possibility to pay taxes in instalments under certain conditions, the formalisation of administrative appeal, a new limitation regarding the challenge of ex officio tax assessments, and new adverse consequences related to the late filing of annual accounts with the trade register.

In addition, the draft law introduces new obligations with respect to the compliance with transfer pricing rules: upon request, transfer pricing documentation must be made available to the tax authorities. In addition, a new specific procedure will apply to bilateral and multilateral advance pricing agreement under double tax treaties.

### **3 Recent case law on tax treatment of the redemption of share classes**

In two decisions dated 27 January 2023 (no. 42432) and 14 June 2023 (no. 45759), the Luxembourg lower administrative court clarified the tax treatment of the redemption of share classes and provided guidance with respect to a widespread practice in Luxembourg.

In the decision dated 14 June 2023, the Luxembourg administrative tribunal confirmed the principles laid down in a decision taken by the administrative appeal court in 2017: the redemption of a share class made at market value is not economically different from a sale of a participation to a third party and should be exempt from withholding tax.

The above-mentioned decisions of the Luxembourg lower administration court highlight the importance of complying with a set of good practices when setting up and redeeming / cancelling share classes.

In addition, a crucial takeaway from these decisions is the importance of the economic justification in the context of the use of the partial liquidation mechanism.

### **4 Law ratifying UK double Tax Treaty**

The law of 18 September 2023 ratified the new double tax treaty reflecting the latest OECD standards regarding tax erosion and profit shifting (the DTT). The DTT has entered into force on 1 January 2024 in Luxembourg.

Among the major changes, the DTT provides:

- the taxation in the UK of capital gains realised on the sale of a 'UK-property-rich' Luxembourg company;

- an application of the DTT to collective investment vehicles (including, UCITS, SIF, RAIF);
- a full relief from withholding tax on dividends, subject to certain exceptions, and on royalties, provided that their amount is at arm's length.

## **5 New Circular on reverse hybrid rules issued by the Luxembourg tax authorities on 9 June 2023**

On 9 June 2023, a new circular was issued by the Luxembourg tax authorities providing guidance on the practical application of reverse hybrid rules as per article 168quater of Luxembourg income tax law (LITL).

Based on the new circular, a reverse hybrid entity will not be subject to article 164ter LITL on controlled foreign companies provisions, article 166 LITL on participation exemption rules, article 168bis LITL on interest deduction limitation rules and article 168ter LITL on anti-hybrid rules.

In addition, the new circular provides guidance on the determination of the income that would be subject to tax at the level of the reverse hybrid entity.

Finally, the new circular clarifies that a reverse hybrid entity will not be subject to Luxembourg withholding tax.

## **6 Unconstitutionality of the minimum net wealth tax provision**

On 10 November 2023, the Constitutional Court stated the flat minimum net wealth tax (NWT) of EUR 4,815, which applies when a Luxembourg company holds financial assets, receivables on related entities, transferable securities and cash at bank exceeding 90% of their total balance sheet and EUR 350,000, was unconstitutional as it puts the taxpayer at a disadvantage compared to certain taxpayers in a similar situation.

A legislative update should follow to formalize the ruling. In the meantime, Luxembourg taxpayers meeting the 90% threshold as mentioned above and having a total balance sheet amount ranging between EUR 350,000 and EUR 2,000,000 will be subject to a minimum NWT of EUR 1,605 instead of the flat minimum NWT of EUR 4,815.

## **7 Law reducing income tax for Luxembourg residents**

On 22 December 2023, the Luxembourg parliament voted a law which introduces a reduction of the income tax scale for resident. The reduction will be applicable as from 1 January 2024.

## **8 Court of Justice of the European Union (the CJEU) ruling on VAT applicable on director's fees**

On 21 December 2023, the CJEU stated that the remuneration of a director of a Luxembourg company for its activity as member of the board of directors should not be subject to VAT.

This decision goes against the current Luxembourg applicable practice as documented in the Circular n°781 issued by the VAT administration on 30 September 2016.

## **9 CJEU ruling on Amazon state aid case**

On 14 December 2023, the CJEU ruled that the European Commission had not established that the tax ruling granted to Amazon by Luxembourg constituted State aid incompatible with the internal market.

In tax ruling granted in 2003, the Luxembourg tax authorities confirmed the arm's length nature of deductible royalty payments made by a Luxembourg company to a tax transparent Luxembourg partnership.

In this respect, the EU Commission considered that Luxembourg had granted Amazon State aid of approximately EUR 250 million incompatible with the internal market.

Luxembourg and Amazon challenged the EU Commission's ruling before the General Court of the European Union. In May 2021, the Court ruled that the Commission had not demonstrated to the requisite legal standard that the Amazon subsidiary concerned had benefited from an undue reduction in its tax burden. It found that Luxembourg had not granted any selective advantage to this subsidiary and therefore annulled the Commission's decision.

The EU Commission appealed against the judgment of the General Court before the CJEU which dismissed the appeal against the General Court's judgment. It considered that the Court wrongly recognised the general applicability of the arm's length principle.

## COMING IN 2024

### 1 Proposed transposition of Directive (EU) 2019/2021 of 27 November 2019 on cross-border conversions, mergers and divisions (the Mobility Directive) into Luxembourg law

The new bill of law (reference 8053) prepared in order to transpose the Mobility Directive into Luxembourg law (the **Mobility Bill**) was introduced to the Luxembourg Parliament on 27 July 2022.

The Mobility Bill intends to open up both internal and cross-border mergers, divisions and contributions to special limited partnerships (*sociétés en commandite spéciale*) (SCSps) and exempt single-member companies from the requirement to prepare a management report and to obtain a report from an independent expert on the draft terms of mergers and divisions. The Mobility Bill fixes the date of effect of the merger, both cross-border and domestic, as the date of the publication of the resolutions of the general meeting of the acquiring company.

Regarding cross-border conversions, the Mobility Bill states that a company incorporated under the laws of Luxembourg may convert into a company governed by a foreign law without being dissolved or liquidated and without interruption of its legal personality under certain conditions, provided the destination jurisdiction does not prevent this.

The Mobility Bill introduces a special regime for cross border mergers, and provides various details concerning these operations especially regarding the draft terms of the merger and the rights of the shareholders who voted against the proposed operation.

The timing of the transposition of the Mobility Bill into law remains to be confirmed but is one to keep an eye on for the early part of 2024.

### 2 New Accounting Law

On 28 July 2023, a new bill of law (reference 8286) reshaping the Luxembourg accounting law has been published (the **Accounting Bill**). The aim is to cover all accounting obligations in a single accounting law and broaden its scope of application by including additional types of undertakings.

The changes are expected to provide more clarity to all users, to clarify requirements which were not self-explanatory and to integrate accounting doctrines or market practices into the Luxembourg accounting law.

The main changes introduced by the Accounting Bill are the following:

- Bottom-up approach: considering that small-sized undertakings represent a large majority of Luxembourg entities, the Accounting Bill outlines a shift from the current top-down structure to a bottom-up approach in Luxembourg's accounting framework. This change aims to improve clarity and applicability by categorising the common regime for small entities as the norm, while additional obligations are layered for medium and for larger entities;
- Creation of a micro-entity regime and increased thresholds for small-sized entities: the most important exemption for these micro-entities is the cancellation of the notes to the accounts;
- Audit requirement for large holding companies: a new concept of large holding companies has been introduced and defined as those whose balance sheet exceeds EUR 500 million. Such large holding companies will be subject to the obligation to have their financial statements audited annually by an independent auditor;
- Filing requirements for the SCSp: the Accounting Bill provides that the special limited partnership (*société en commandite spéciale*) (SCSp) is generally exempt from the obligation to prepare annual financial statements, provided that they annually submit their trial balances as outlined in the Luxembourg Standard Chart of Accounts (SCA). However, certain SCSp entities, namely those falling within the sector of insurance companies, credit institutions, and other SCSp subject to prudential supervision by the CSSF, as well as those preparing their annual financial statements according to IFRS, those with the status of securitisation companies not subject to prudential supervision by the CSSF, and

those with the status of RAIF, are exempt from filing their trial balance under the SCA format but are required to establish financial statements in accordance with the Luxembourg accounting law;

- Abolition of the *Commissaire* (supervisory auditor) function;
- New requirements for entities in liquidation / dissolved: the general accounting principles will continue to apply before and after dissolution with liquidation; and
- Introduction of the definition of control for consolidation purposes.

The Accounting Bill introduces obligations for various Luxembourg businesses. As some of them will apply as from the financial year 2024, it would be prudent for businesses to check how these changes will impact them.

### **3 AIFMD II Final Compromise Text of 13 November 2023**

On 13 November 2023, the long-awaited final compromise text amending the Alternative Investment Fund Managers Directive (AIFMD II) was published by the European Commission.

The introduction of a pan-European loan origination regime stands out as the most significant alteration for AIFMs and the alternative investment funds (AIFs) they oversee. Despite the new requirements, it's noteworthy that AIFMD II explicitly allows loan origination as a recognized investment activity for EU AIFMs. AIFMD II encompasses various other changes, including adjustments to the current authorization process, modifications to delegation provisions (noting that AIFMD II exempts marketing activities by distributors from being considered delegation), and the permission to appoint depositaries in Member States other than their home Member State, subject to conditions.

The next phase involves Member States' anticipated approval of AIFMD II before its formal adoption. The projection is for AIFMD II to be published in the Official Journal by the close of the first quarter of 2024. Subsequently, Member States will have a two-year window to transpose AIFMD II into their national laws.

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