New financial sector legislation: what do you need to know?

On 6 February 2018, the Luxembourg Parliament adopted two long-awaited laws namely draft bill 7024 which amends inter alia rules regarding professional secrecy, facilitates outsourcing and clarifies the depositary regime of Part II funds (the so-called “Omnibus Law”) and draft bill 7128 which implements Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (“AMLD IV”) other than the provisions regarding the ultimate beneficial owner’s register (the “UBO Law”) and which amends inter alia the amended law of 12 November 2004 on the fight against money laundering and terrorist financing (the “AML Law”). To this date, the second vote exemption on the Omnibus Law has not been granted yet (such exemption could be voted as soon as 20 February 2018). The UBO Law has already been signed on 13 February 2018 and published in the Mémorial A on 14 February 2018.

1 Omnibus Law - key messages

1.1 Amendments to the law of 5 April 1993 on the financial sector

(i) A new framework for outsourcing

- Additional conditions for outsourcing by credit institutions and investment firms
  - Service agreement required
  - Full liability of the credit institutions and investment firms to ensure continuous and satisfactory services to clients
  - Prior approval from the CSSF or the ECB
  - Sound security mechanism to protect data flows
- New organisational measures for outsourcing applicable to professionals of the financial sector other than investment firms

Above requirements extended to professionals of the financial sector other than investment firms

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(ii) Professional secrecy

- **Broader scope**

Extension to (i) natural or legal persons involved in reorganisation and winding-up proceedings as well as resolution measures under BRRD and (ii) Luxembourg entities supervised by the ECB or by any other competent authority in relation to activities falling under the scope of the law of 5 April 1993 on the financial sector (i.e. Luxembourg branches of EU or foreign entities)

- **New exemptions and various amendments to existing exemptions**

  - In the case of outsourcing

  Outsourcing from Luxembourg regulated entity to Luxembourg regulated entity: exemption for persons subject to professional secrecy established in Luxembourg and supervised by the CSSF, the ECB or the Commissariat aux Assurances, where the information communicated is provided under a service agreement

  Other outsourcing scenarios: exemption for persons in charge of the outsourced services together with their employees or other persons working for them provided that the client agreed, in accordance with the law or according to the information procedures agreed between parties, to the outsourcing, the type of information provided and the country of establishment of the subcontractor

  - In the case of prudential supervision

  Direct communication of information to EU institutions or agencies such as EBA, ECB, ESMA, EIOPA provided that requests from said EU institutions or agencies to a Luxembourg supervised entity are permitted under Luxembourg law

  - Vis-à-vis shareholders and partners

  Enhanced conditions: to the extent strictly necessary to the valuation of consolidated risks, calculation of leverage ratio on a consolidated basis or the proper and prudent management

The above provisions are without prejudice to the provisions of the law of 2 August 2002 on data protection and replicated *mutatis mutandis* in the law of 10 November 2009 on payment services and the law of 7 December 2015 on the insurance sector.
1.2 Amendments to the 2010 law on undertakings for collective investments

Depositary regime applicable to Part II funds

- UCITS V depositary regime applicable only to Part II funds managed by an authorised AIFM or by a registered AIFM that are distributed to retail investors on Luxembourg territory; and

- (i) Other Part II funds subject to the law on alternative fund managers, if managed by an authorised AIFM, or (ii) funds set up under the law of 13 February 2007 on specialised investments funds, if managed by a registered AIFM or a manager located in a third country, are subject to the AIFMD depositary rules

1.3 Implementation measures regarding EU Regulation on interchange fees for card-based payment transactions

Interchange fee cap applicable to domestic payments with a debit card in Luxembourg set at 0.12% of the value of the transaction (0.2% being the cap for interchange fee under the Regulation)

1.4 Amendments to the law of 5 August 2005 on financial collateral arrangements

Clarification on the priority of resolution or write down measures taken in compliance with the law of 18 December 2015 or similar laws implementing Directive 2014/59/EU (BRRD) over financial collateral arrangements

2 UBO Law - key messages

2.1 Broader and enhanced definition of (ultimate) beneficial owner in the case of trusts or other legal entities such as foundations and legal arrangements similar to trusts: Read more

2.2 Extended scope

- New in-scope categories of professionals, i.e. financial institutions carrying out their activities in Luxembourg and not otherwise listed
in the AML Law, persons carrying out family office activities, and providers of gambling services (including e-gambling)

- Certain non-EU professionals, including branches, having their registered office located in the European Union or in a third-country

- Lowered thresholds for payments in cash made or received by natural or legal persons trading goods from EUR 15,000. - down to EUR 10,000.

2.3 New risk assessment obligation for in-scope professionals

- Assessment consisting in an identification and evaluation of the risks to which they are exposed, taking into accounts various factors (e.g. risk, geographical and sector-related factors)

- Setting-up of appropriate policies, controls and procedures to mitigate and manage effectively the risk of money laundering and terrorist financing and, as applicable, at the level of the group

2.4 Refined customer due diligence with rigorous vigilance measures (capturing high risk) and simplified measures (lower risk)

2.5 Consistent third-country policy

- Enhanced customer due diligence measures applicable to natural persons or legal entities established in high-risk third countries

- Prohibition of reliance on third parties established in such high-risk third countries

2.6 Next steps

- Regime expected to evolve in the near future as a proposed revision of AMLD IV under discussion at the European level ("AMLD V")

- AMLD V aiming at further broadening the scope, lowering thresholds and creating automated centralised mechanisms in reaction to technological innovation, Panama Papers and recent terrorist attacks
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