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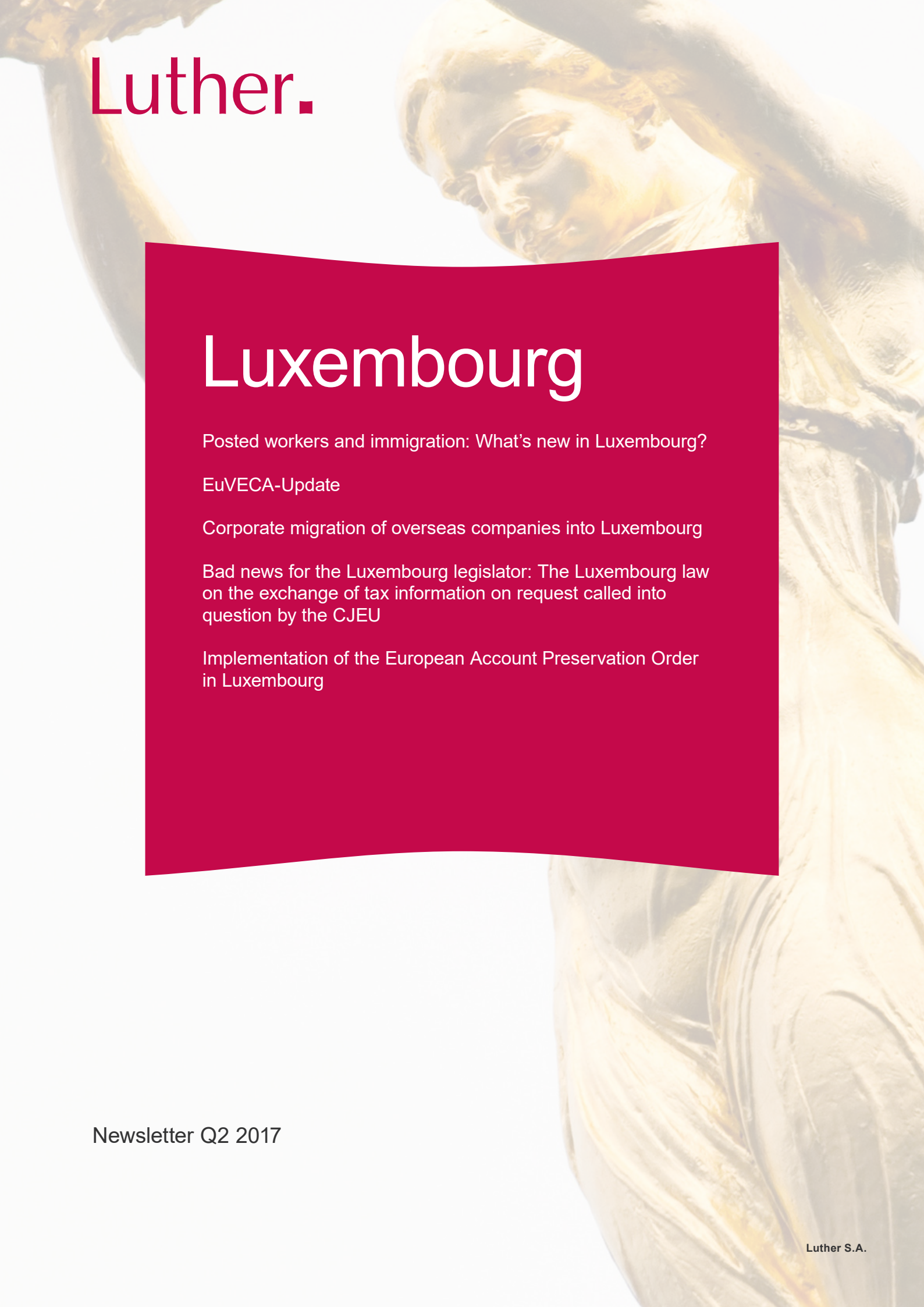

Luxembourg

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Posted workers and immigration: What's new in Luxembourg?

Immigration: Luxembourg is playing the attractiveness card

The law of 8 March 2017 transposing the directive 2014/66/UE related to the conditions of entry and stay of third-country nationals (the "**Immigration Law**") was published on 20 March 2017 and entered into force on 24 March 2017.

The law modifies the law of 29 August 2008 on the free mobility of persons and on immigration and introduces new categories of residence permits:

1. Residence permit for seasonal workers:

The sectors of activities for seasonal work are strictly defined by the Grand-Ducal regulation dated on 11 July 1989; in particular are considered eligible activities such as tourist guidance, holidays animation, etc.

Such permits can be delivered for a maximum period of five months over a twelve months period.

The applicant will have to submit (i) a copy of his employment agreement concluded with an entity established on the Luxembourg territory, (ii) the proof that he will have an adequate and suitable accommodation and finally (iii) an evidence as regards his affiliation with the health insurance.

2. Residence permit for investors:

The new legislation is aiming at attracting further investments in Luxembourg by facilitating the entry and stay of investors. Nevertheless, the legislator requires the compliance with certain conditions in order to give a certain substance to such investments.

The following investors will be eligible:

i. Investors investing at least EUR 500.000.- in an existing commercial, industrial or craft oriented company having its registered office in the Grand-Duchy of Luxembourg, and committing themselves to maintain their investment and the workforce in place within at least five years;

ii. Investors investing at least EUR 500.000.- in a commercial, industrial or craft oriented company to be incorporated in the Grand-Duchy of Luxembourg, and committing themselves to create at least 5 employments within the 3 years of the incorporation of the company;

iii. Investors investing at least EUR 3.000.000.- in an investment and management structure existing or to be incorporated in the Grand-Duchy of Luxembourg and committing themselves to maintain a certain substance in Luxembourg and to employ at least two persons; and

iv. Investors deposing at least EUR 20.000.000.- within a Luxembourg financial institution and committing themselves to maintain their investment for at least five years.

To be noted that investments made, directly or indirectly, in real estate are non-eligible. Furthermore investments mentioned under items (i) to (iii) shall consist of at least 75% of own funds and the maximum remaining 25% can be raised through loans having a maximal duration of 3 years whereas investments mentioned under item 4 shall consist of 100% of own funds.

The permits will have a limited duration of three years and it is important to stress out that 12 months after the issuance of such permit, the Luxembourg Ministry of Foreign and Europeans Affairs will check if all the prerequisites are still given and if it is not the case, it will require the applicant to regularize his/her situation.

3. Residence permit for employees in case of temporary intra-company transfers (ICT):

The essence of the Immigration Law is to facilitate the mobility of employees within a group company which has entities dispersed not only within the EU, but also in third-countries. Thus, are regulated by the Immigration Law:

- The entry and residence of third-country nationals into the territory of a Member State within the context of an ICT; and
- The mobility within the EU of third-country nationals who have obtained an ICT permit.

3.1. Conditions in relation to the issuance of an ICT permit in Luxembourg:

The host entity is ought to file an application and :

- prove that the sending company established in the third country belongs to its group;

- evidence the employment of the transferred employee during an uninterrupted period of 3 up to 12 months immediately preceding the date of the transfer for managers and specialists, such duration requirement will be of at least 3 up to 6 uninterrupted months for trainees;

- provide the employment agreement or mission letter detailing the duration of the transfer, remuneration, etc;

- evidence the professional qualification and expertise of the transferred employee; and

- provide a proof regarding the affiliation of the transferred employee with the health insurance.

The ICT issued for experts and senior executives will have a maximum duration of 3 years whereas the ICT issued for trainees will only have a duration of one year.

3.2. Mobility throughout the EU

Third country nationals having obtained an ICT permit in a Member State can be authorized to work in an entity of the group located in the Grand-Duchy under the fulfillment of some specific conditions. The Luxembourg hosting company shall notify the contemplated transfer to the Ministry of Foreign and Europeans Affairs by (i) mentioning the link between the sending company and the receiving entity, (ii) providing a copy of the employment agreement or of the mission letter and (iii) providing the proof that the concerned employee is subject to an ICT transfer. The stay in the Grand-Duchy is in principle limited to a maximum period of 90 days (on a period of 180 days). Nevertheless a long stay permit can be delivered and additional information is required to be communicated to the Ministry of Foreign and Europeans Affairs.

4. Residence permit for business continuity plans

In case of a serious incident in an entity having its registered office in a third country, employees can temporarily be transferred to a Luxembourg entity being part of the group, under the condition that the sending entity has been registered in Luxembourg. To be registered, the sending entity will in particular need to provide a description of its activities and of the group's activities, to evidence the capitalistic links with the Luxembourg company, to detail the business continuity plans and list the identity and functions of the employees who will be transferred in case of an incident. The registration will be valid for a duration of one year.

Once a serious incidents occurs in the third country entity, it will have to notify to the Ministry of Foreign and Europeans Affairs in Luxembourg about it and provide the list of the employees being transferred as well as a description of their tasks in Luxembourg.

Should the prerequisites be fulfilled, then the employees will be granted a residence permit of a duration of one year with a one year renewal option.

Posting of employees: Introduction of new formalities and intensification of controls

The law of 14 March 2017 concerning the transposition of the directive 2014/67/UE (relating to the implementation of the Directive n°96/71/CE) for the posting of workers was published on 20 March 2017 and entered into force on 24 March 2017 (the "**Posting Law**").

The Posting Law aims to prevent any fraud and to prevent aggressive social dumping within the EU.

The main goals of the law are therefore notably :

- to give a legal framework to the electronic platform launched by the Labour Inspection ("*Inspection du Travail et des Mines - ITM*") which is used to issue the called "*badge social*", delivered to each employee posted in Luxembourg and containing his identification data. The ITM will through this platform also collect relevant documents as the employment agreement, salary pay slip, a copy of the residence permit, a copy of the pre-hiring medical examination. This collection of documents will thus reinforce the power of control of the Labour Inspection;

- to oblige the Luxembourg company to check that all his co-contractor (and subcontractor if any) with posted employees in Luxembourg complies with all legal requirements. In such aim, they will not only have an information and verification obligation but will also have an injunction power in order to request the termination of any infringement and an obligation to report any contravention to the Labour Inspection;

- to reinforce collaboration between the Labour Inspection and the other administrations in Luxembourg (as for example Immigration Minister, Luxembourg Police and Accident Insurance Association (AAA), etc.) for more efficiently;

- to introduce administrative sanctions which can be pronounced in case of non-respect of the legal obligations related to a posting of employees (i.e. : between EUR 1.000 and 5.000 per posted worker and between EUR 2.000 and 10.000 in case of repeated offence);

- to authorize the Labour Inspection to order emergency measures to stop any violation of specific rules relative to safety and health at work. The Director of the Labour Inspection can notably stop the work of the posted workers if specific legal obligations are not respected; and

- to introduce a right for the posted worker to launch a claim before the Luxembourg Courts concerning his posting conditions even after he left the Grand-Duchy.

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EuVECA-Update

Alongside the adoption of the Directive 2011/61/UE on Alternative Investment Fund Manager ("**AIFM**"), European legislators adopted Regulation (EU) no 345/3013 on European venture capital funds (the "**EuVECA Regulation**") which established the EuVECA regime. This EuVECA regime has been available since 2013 but did not get the traction EU officials would have expected as only a small number of funds have to date been set-up under that regime.

The European Commission then decided to bring forward the review of the EuVECA Regulation and on 14 July 2016 a legislative proposal was published. It was understood that a trilogue between the European Commission, the Council of the EU and the European Parliament on such proposal would take place. On 11 May 2017 the first trilogue has indeed taken place.

The aim of this trilogue was to exchange on some of the concerns related to the impediments to a proper implementation of the EuVECA regime, main ones being:

- Co-existence of the AIFM and EuVECA regime;

- Eligible assets;

- Level of own funds: it was acknowledged that the EuVECA regime should not be too burdensome while taking into account the concerns of certain Member States; and

- Management passport and definition of marketing.

On 30 May 2017, the European Commission published a press release concerning the agreement reached between the European institutions, particularly regarding the following proposals:

- To extend the range of managers eligible to market and manage EuVECA funds to larger fund managers;

- To expand the ability of EuVECA funds to invest in small mid-caps and Small and medium-sized enterprises ("**SMEs**") listed on SME growth markets.

- To decrease the costs by explicitly prohibiting certain fees imposed by competent authorities of host Member State.

- To simplify the registration process and determine the minimum capital necessary to become a manager.

The press release is available on the European Commission's website.

http://europa.eu/rapid/press-release_IP-17-1477_en.htm

ESMA publishes updated AIFM and UCITS Q&A

On 24 May 2017, the European Securities and Markets Authority (**"ESMA**") published an updated question and answers document ("**Q&A**") on the application of the Alternative Investment Fund Managers Directive ("**AIFM**") and the Undertakings for the Collective Investment in Transferable Securities Directives ("**UCITS**").

The following new questions and their respective answers have been included in the AIFM Q&A:

1. Reporting to National Competent Authorities ("**NCAs**") and breakdown between retail and professional investors;

2. Notification of AIFMs on the Alternative Investment Funds ("**AIFs**") to be managed, if domiciles in another Member State; and

3. Use by an AIF of the exemption for intragroup transactions under Article 4 (2) of Regulation (EU) 648/2012 ("**EMIR**"), if subject to the clearing obligation of Article 4(1) of EMIR.

The AIFM Q&A is available on ESMA's website.

https://www.esma.europa.eu/sites/default/files/library/esma34-32-352_qa_aifmd.pdf

Regarding the UCITS Q&A, the following new question and its respective answer has been included:

- Application to UCITS of the exemption for intragroup transactions under article 4 (2) of EMIR, if subject to the clearing obligation of Article 4 (1) of EMIR.

The UCITS Q&A is available on ESMA's website.

https://www.esma.europa.eu/sites/default/files/library/esma34-43-392_qa_ucits_directive.pdf

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Corporate migration of overseas companies into Luxembourg

There has been a rise in migration of offshore companies into Luxembourg over the past few years.

A company which transfers its registered office along with its central administration to Luxembourg becomes subject to Luxembourg laws.

The process of migration into Luxembourg is straightforward and requires efficient cooperation between the advisors of the overseas and the Luxembourg jurisdictions.

The process for an overseas company to migrate to Luxembourg

Prior to implementation of the process, a preliminary analysis shall be conducted:

Preliminary analysis

- do the laws of the overseas jurisdiction allow the continuity of the legal personality of the company following the migration into Luxembourg?
- which legal form shall be adopted by the company in Luxembourg?
- make sure that migration will not result in dual nationality.
- tax advice shall be sought to make sure that migration does not trigger a tax charge on exit.

A certain number of formalities shall be completed in the overseas jurisdiction and Luxembourg:

Formalities in the overseas jurisdiction

These formalities shall be conducted in compliance with the laws of the overseas jurisdiction. The overseas jurisdictions, very often, would need to be provided with the following documents:

- decision of the competent corporate bodies of the company taken under the laws of the jurisdiction of origin approving the migration;
- copy of the legal opinion issued by Luxembourg counsels evidencing the company's continuation, once the company has been continued into Luxembourg.

Advice of the overseas counsels shall be sought in that respect.

Formalities in Luxembourg

A meeting with a Luxembourg notary shall be organised to enact (i) the migration and (ii) the adoption of the articles of association of the company in compliance with Luxembourg laws. The notary, very often would request the following documents:

- certified copy of the articles of association of the company under the laws of the jurisdiction of origin;
- copy of a certificate of good standing with respect to the company;
- copy of the decision of the competent corporate bodies of the company under the laws of the jurisdiction of origin;
- certified copy of the shareholders' register of the company;
- copy of the Luxembourg independent auditor's report confirming that the value of the net assets of the company migrating is equal to at least the minimum share capital set under Luxembourg law;
- copy of the legal opinion issued by the overseas counsel confirming that pursuant to the laws of the overseas jurisdiction, the company continues its existence in Luxembourg without any loss or interruption of the company's legal personality;
- draft of the articles of association of the company adjusted in compliance with Luxembourg laws.

It has to be noted that Luxembourg law does not provide for any specific protection of the creditors of the company since it is considered that the migration would not affect the assets of the company migrating into Luxembourg.

Effects of migration of an overseas company into Luxembourg

- the company will have it's central administration and registered office in Luxembourg.
- the legal personality of the company will continue with all its assets and liabilities.
- the company adopts the Luxembourg nationality.
- the company becomes subject to the laws of Luxembourg including its corporate laws.
- the company becomes a Luxembourg tax resident.

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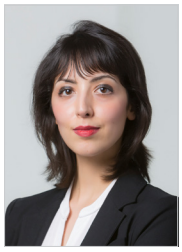

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Bad news for the Luxembourg legislator: The Luxembourg law on the exchange of tax information on request called into question by the CJEU

The judgement of the Court of Justice of the European Union (CJEU) of 16 May 2017 challenges the Luxembourg law of 25 November 2014 laying down the procedure applicable to the exchange of information on request in tax matters (hereinafter the "*Law of 25 November 2014*").

The CJEU was called to check the compliance of the Law with the European Directive 2011/16 on the exchange of information on request and the Charter of Fundamental Rights of the European Union and in particular the right to an effective remedy.

The matter opposed a Luxembourg entity to the Luxembourg tax authorities concerning a pecuniary penalty which the latter imposed on the Luxembourg entity for its refusal to respond to a request for information in the context of an exchange of information with the French tax authorities.

The judgement of the CJEU is in accordance with the views of the Advocate General of the CJEU (see our newsletter Q1 2017), according to which both the Luxembourg tax authorities and the requested third party should have an effective opportunity to each summarily review and challenge in court the foreseeable relevance of the requested information from another Member State tax authorities.

The conclusions of the Court are the following:

1. The Luxembourg law is implementing the Directive 2011/16 and therefore the Charter of Fundamental Rights of the European Union is applicable.

2. In application of article 47 "*Rights to an effective remedy and to a fair trial*" of the Charter of Fundamental Rights of the European Union, the national court hearing an action against the pecuniary administrative penalty imposed for failure to comply with an information order, must be able to examine the legality of that information order.

3. Contracting Member states are not at liberty "*to engage in fishing expeditions*", nor to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. On the contrary, there must be a reasonable possibility that the requested information will be "*foreseeably relevant*".

4. Verification by the requested authority is not limited to the procedural regularity of the request, but must enable the requested authority to satisfy itself that the information sought is not deprived of any foreseeable relevance. When an action is brought by a relevant person against a penalty which was imposed on him/her by the requested authority for non-compliance with an information order issued by that authority, the national court not only has jurisdiction to vary the penalty imposed, but also has jurisdiction to review the legality of that information order (which relates to the foreseeable relevance of the requested information).

5. In case of a judicial review by a national court of a Member State to which the request was addressed, that court must have access to the request for information which addressed by the requesting Member State to the requested Member State. The relevant person does not have a right of access to the entirety of that request for information, but it should contain the "*minimum information*" in order to properly present his/her case before the court.

This decision could lead to a radical change of the approach of the requested third parties in Luxembourg when receiving a request for information which they consider to be obviously abusive.

Implementation of the European Account Preservation Order in Luxembourg

The Law of 17 May 2017 concerning the implementation of the Regulation (UE) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order ("EAPO", see our newsletter Q1 2017) in civil and commercial matters came into force on 27 May 2017.

According to the EU Regulation, a creditor may now freeze multiple bank accounts of his debtor that are located in several Member States with a single EAPO. Therefore the creditor no longer needs to obtain a court order in each Member State in which he would like to freeze an account.

On the one hand the Law of 17 May 2017 rules the revocation and the limitation of an EAPO in Luxembourg.

The Law of 17 May 2017 modified the Luxembourg civil procedure (by introducing the article 685-5 of the *Nouveau Code de Procédure Civile*) and the amended law of 23 December 1998 concerning the "*Commission de surveillance du secteur financier*" ("CSSF").

Under the new article 685-5 of the *Nouveau Code de Procédure Civile*, the creditor should file its request for an EAPO before the "*Juge de paix*" for a debt under an amount of EUR 10.000 and before the "*Président devant le Tribunal d'arrondissement*" for a debt exceeding EUR 10.000.

In case of a refusal by the jurisdictions to deliver the EAPO, the creditor can respectively lodge an appeal before the "*Président du Tribunal d'arrondissement*" or before the Court of appeal within a period of 30 days.

A claim in revocation or in limitation is also possible for the debtor before the "*Juge de paix*" or respectively the "*Président du Tribunal d'arrondissement*" both acting as judge sitting in summary matters. It is possible to lodge an appeal of the decisions of the "*Juge de paix*" or the "*Président du Tribunal d'arrondissement*" within a period of 15 days.

The summary matters proceedings and the short delays provided in the Luxembourg Law seem to be in accordance with the aims of this new European Union procedure allowing,

in cross-border cases, for the preservation, in an efficient and speedy way, of funds held in bank accounts.

On the other hand, the Law of 17 May 2017 designates the CSSF, as the designated information authority, from which a creditor can obtain information to identify the debtors bank accounts in Luxembourg.

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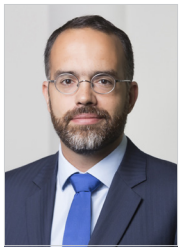

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