CLIFFORD CHANCE

Luxembourg Legal Update

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Banking, Finance & Capital Markets

CSSF Activity Report 2010

The CSSF published its Activity Report for 2010 at the end of April. In addition to statistical information concerning the Luxembourg financial sector, the Report contains information on the exercise by the CSSF of its regulatory powers. The following points, without being exhaustive, are of relevance for banks and other actors of the financial sector. The Report also contains a section on investment funds and SICARs which will be discussed in the **Funds & Investment Management** section of this newsletter.

General Supervision Measures and Reforms

The CSSF underlines in its Report that the reputation of the Luxembourg financial place and its acceptance require the application of a zero tolerance policy with respect to reprehensible or clearly illegal behavior of financial professionals. In this respect, the CSSF, amongst others, will continue to increase the number of onsite inspections it carries out and stresses its focus on enforcement action. During 2010 the CSSF has doubled the size of the team dedicated to onsite inspections. The CSSF has also prepared a draft bill which will strengthen the enforcement measures (*police administrative*) at its disposal.

Furthermore, the CSSF mentions its practice carrying out "welcome visits" to newly established financial professionals, generally, within the first six months after the granting of a licence. This practice has turned out to be rather beneficial for both the CSSF and the professional. The CSSF has also enhanced its internal procedures in order to deal with files within shorter deadlines.

Prudential Supervision of Securitisation Vehicles

The CSSF announced that it will soon publish a Questions & Answers (Q&A) document providing a global view on the prudential approach applied by the CSSF. This document will be issued after a review of certain general positions of the CSSF published in its Activity Report for 2007. While only securitisation undertakings issuing securities to the public on a continuous basis are regulated by the CSSF, the positions taken by the CSSF can be used as guidance *mutatis mutandis* for unregulated securitisation undertakings as well.

Please also refer to the **Funds & Investment Management** section.

Support PFS

The Report contains several clarifications on the supervisory practice of the CSSF with respect to Support PFS.

The CSSF emphasises that the activity of making available staff to a financial sector professional does not require a licence as a Support PFS under the Financial Sector Law[1]. For instance a contract whereby IT technology specialists are made available to a financial sector professional, is not deemed, *a priori,* to be contract requiring and justifying a Support PFS licence. This practice is different from outsourcing, since outsourcing would require a transfer of liability to the service provider.

The CSSF further emphasises that it is obliged to withdraw the licence of a Support PFS which does not have at least one contract justifying its licence.

The CSSF has observed that important decisions concerning Support PFS have been taken in a unilateral manner on group level without taking into account the specific Luxembourg regulatory requirements. In other cases, the Luxembourg management has admitted its ignorance of activities outsourced to group companies or its powerlessness to impose compliance with the Luxembourg regulatory requirements. The CSSF stresses that it may in such cases come to the conclusion that the Support PFS does not fulfil the conditions set out in its licence. This may lead to the withdrawal of the Support PFS's licence.

The CSSF further clarifies the scope of the licence of IT system operators Support PFS (Art. 29-3 and 29-4 of the Financial Sector Law). Where the service provided is not only a pure IT service (*e.g.* in case of an outsourcing of back-office activities), an additional licence as an administrative agent of the financial sector (Article 29-2 of the Financial Sector Law) may be needed.

Finally, the CSSF has clarified that facilities' management services, such as establishment maintenance or security services, do not fall within the scope of the supervision exercised by the CSSF. The CSSF has in particular been confronted with circumstances where a professional of the financial sector had contracted with a facilities' manager who then outsourced certain non-facilities management

[1] Law of 5 April 1993 on the financial sector, as amended.

activities as such requiring a Support PFS licence to a Support PFS. The CSSF clarifies that, on the one hand, this does not constitute a financial sector activity for the Support PFS justifying its licence because it has not concluded a contract with a professional of the financial sector. On the other hand, the facilities' manager directly contracting with a professional of the financial sector (other than Support PFS) would need to have a Support PFS licence. But if the facilities' manager does not effectively provide a licensable Support PFS service itself, it would be unable to obtain such licence. The CSSF therefore offers an alternative: The Support PFS directly enters into the service provision contract with the professional of the financial sector. The CSSF also encourages Support PFS to apply particular care with regard to the content of their service contracts, both concerning the description of the services provided and the identity of their counterparty.

Prospectus Law, Market Abuse Law and Transparency Law

The CSSF has issued an important clarification regarding buy-back or exchange offers by or on behalf of the issuer of debt instruments. According to the Luxembourg Transparency Law[2] an issuer of debt instruments admitted to trading on a regulated market and having Luxembourg as its home Member State has the obligation to ensure the equal treatment of the holders of debt instruments having the same rank with respect to the rights attached to these instruments. The CSSF clarifies that in its view the "rights attached" do not include a right of the debt instrument holders to be addressee of an offer in case of repurchase of the debt instruments by or for the account of the issuer. This clarification is important for issuers or entities acting for their account, because they thus have the possibility to limit offers for the repurchase or exchange of debt instruments to qualified investors within the meaning of the Prospectus Law[3] only. Such limitation of the offer scope permits them to benefit from the "private placement" exemption from the obligation to publish a prospectus in compliance with the Prospectus Law. The CSSF however draws the attention of issuers to the fact that they will have to comply with applicable provisions of the Market Abuse Law[4], including information obligations.

[2] Law of 11 January 2008 on transparency obligations of securities issuers.

[3] Law of 10 July 2005 on securities prospectuses.

[4] Law of 9 May 2006 on market abuse, as amended.

Takeover Law

As regards the Takeover Law[5], the CSSF has clarified its position regarding the concept of "*a change of control*" in case of restructuring and reorganisation transactions. The CSSF makes a difference between material changes of the situation of control of a target company and merely formal changes thereof not affecting the minority shareholders. The CSSF however does not further define what it considers to constitute a merely *formal* as opposed to *a material* change of control. The CSSF reiterates that the obligation to make a mandatory public takeover offer to all shareholders requires both the acquisition as well as obtaining control. This is not the case of a merely formal change of control. In contrast, a material change of the control due to a restructuring in the shareholding structure, generally, triggers the obligation to make a public takeover offer. However, the CSSF has the power to derogate from such obligation if the reorganisation does not hurt the rights and interests of the minority shareholders and therefore does not require a specific protection of the minority shareholders under the Takeover Law.

Transparency Law

The CSSF has also given guidance on specific questions concerning the application of the major shareholding notification obligations under the Transparency Law. These clarifications include, amongst others, that shares with suspended rights must nevertheless be included in the calculations of the shareholding. Major shareholding notification rules also apply to indirect holders or economic beneficiaries of shares. In addition, issuers who are obliged to publish the total amount of capital and voting rights at the end of each calendar month during which a capital increase or decrease has occurred, also have to publish immediately any substantial change of the amount of voting rights or capital resulting thereof which could be considered as inside information, by virtue of their *ad hoc* publication duty for inside information under the Market Abuse Law.

Finally, some issuers are totally or partially exempted from the obligation to publish periodic information according to the Transparency Law, either by virtue of the specific type of securities admitted to trading or because they fall under other specific exemptions (*e.g.* states and certain other public bodies; credit institutions in certain cases). If they nevertheless publish financial reports, the CSSF stresses that such reports have to be considered as regulated

[5] Law of 19 May 2006 implementing directive 2004/25/EC of 21 April 2004 concerning public acquisition offers.

information within the meaning of the Transparency Law if they fulfill the conditions for being inside information under market abuse legislation. As a consequence, the publication modalities under the Transparency Law apply to such reports, while the provisions of the Transparency Law concerning content and timeframe do not apply to such reports.

Consolidation of IT Systems Intra-Group

The CSSF states that the consolidation process of IT systems of Luxembourg subsidiaries with their parents group or specialised companies has continued in 2010. The Report reminds professionals of the financial sector of their obligations in such cases, in particular concerning outsourcing, professional confidentiality and data protection. The CSSF emphasises that the authorised managers of a Luxembourg institution have to ensure that the process does not lead to a situation of non-compliance with Luxembourg laws and regulations imposed by the group.

The CSSF also clarifies, amongst others, that the level of confidentiality which must be respected in such circumstances depends on the areas of activity.

The CSSF also mentions that more and more Luxembourg institutions receive IT services from different operators and counterparties. The CSSF outlines the risks inherent to the interconnectivity of the systems of the different professionals involved and the legal requirements both in terms of the control of systems and the confidentiality of information.

Virtualisation and Pooling of Network Protection Systems

In the context of cloud computing, Support PFS propose virtualised and/or pooled firewalls when implementing a pooled infrastructure. Technically speaking, the CSSF states that there is no real obstacle against such solutions from a regulatory perspective, as the respective IT tools are very performing and reliable. The CSSF has however identified the risk of losing control over the environments to the extent that the number of firewalls can become uncontrollable for the Support PFS having as a consequence a non-detected security lack.

The CSSF has also detected a pickup of IT architectures based on only one firewall containing more than two network interfaces The CSSF recommends the use of two cascading firewalls of different brands in order avoid a direct intrusion in the internal network of the financial institution in case of a security deficiency in the firewall software program.

Customer Complaints

The Report highlights that the ABBL, the Luxembourg Bankers' Association has recommended its members to respond, after having carried out usual verifications, to persons researching accounts in the name of a deceased even if the deceased did not have any account opened in their books. The ABBL argues that if no account of the deceased exists, the bank does not infringe its professional confidentiality obligation by responding to the request of a heir. This ABBL recommendation is backed by the CSSF. This approach should avoid complaints by persons not receiving an answer to a request simply because the deceased did not have an account with the relevant bank.

The CSSF further explains in its Report that it may use different means of reaching its opinion in case of client complaints. While the CSSF has limited investigation powers in customer complaint cases and can notably not rely on witness statements or put a person under oath, the CSSF analysis can be based on written documents as well as recordings of telephone conversations. The CSSF again strongly recommends, as in its Circular 93/101 and in its Activity Report for 2009, that PFS record telephone conversations with their clients in accordance with applicable laws. The CSSF also draws attention to the Consultation Document of the European Commission of 8 December 2010 concerning the revision of the MiFID[6] which proposes to render mandatory the recording of telephone conversations with clients acting for their own account, while at the same time complying with applicable data protection and confidentiality rules.

Consumer Code & New Consumer Credit Legislation

A law of 8 April 2011 introduces into Luxembourg law a Consumer Code repealing the individual laws that have hitherto been dealing with different aspects of consumer protection. The provisions of these laws, including the law of 25 August 1983 on the legal protection of consumers and the law of 18 December 2006 on the distance marketing of consumer financial services, are codified, without substantial changes, in the new Code. The main innovations relate to the consumer credit legislation where

[6] Markets in Financial Instruments Directive 2004/39/EC.

the Law implements the Consumer Credit Directive[7]. In this respect, the main changes are:

- the introduction of a legal obligation to assess the solvency of any consumer receiving a consumer credit under the directive, Luxembourg lenders should have the right to access the relevant databases in other Member States in cases of cross-border credits;
- the right for consumers to withdraw from consumer credit agreements within 14 calendar days;
- and the pre-contractual information to consumers will have to be provided in the form of the European standards attached to the directive and which will be published by a Grand-Ducal regulation in Luxembourg.

The Consumer Credit Directive aims to achieve a maximum harmonisation and consequently very little discretions and options were available and the provisions of the Consumer Code closely mirror the corresponding provisions of the Consumer Credit Directive. The Luxembourg legislator has however made use of the following options left to the Member States:

- credit agreements which provide for arrangements for a deferred payment or amending the repayment terms in case where the consumer is already in default on the initial credit agreement are, if certain conditions are fulfilled, exempt from certain legal requirements, including the general pre-contractual information requirements, the obligation to assess the solvency of the consumer, the right of withdrawal and the rights of the consumer in case of an assignment of the loan to a third party;
- for overdraft facilities to be repaid on demand or within three months, the annual percentage rate of charge does not need to be provided;
- the right of the consumer to withdraw from the consumer credit agreement does not apply to credit agreements which by law are required to be concluded in front of a notary given that the notary provides certain confirmations as regards the pre-contractual information of the consumer and the contents of the consumer credit agreement[8];
- the lender may exceptionally claim a higher indemnity for early repayment of the consumer credit if it can prove that the loss it suffered from early repayment exceeds the statutory indemnity;
- and the lender can request an indemnity for early repayment from the consumer only if the amount of the early repaid loan exceeds EUR 10,000 over a period of 12 months.

Fight against Money Laundering and Terrorism Financing

CSSF Circular 11/502
Jurisdictions List

CSSF Circular 11/502 contains a list of jurisdictions whose AML[9] regime has substantial and strategic deficiencies and a list of jurisdictions whose AML regime is not satisfactory. The circular reflects and draws the attention of professionals to the underlying new FATF declarations issued in February 2011. CSSF Circular 10/490 (see the **January 2011 edition of our Luxembourg Legal Update**) has been repealed by CSSF Circular 11/502.

CSSF Press Release 11/08
Principal Elements to Avoid Holding of Suspicious Assets

The CSSF has issued on 7 March 2011 a press release reminding Luxembourg financial institutions of the principal elements of the legislation seeking to prevent Luxembourg financial institutions from holding suspicious assets, including in particular the prevention against, the detection and the treatment of potentially suspicious assets.

Ministerial Regulations of 10 February, 11 March, 25 March and 12 May 2011

Four Ministerial Regulations to the Grand Ducal regulation of 29 October 2010 add names of certain persons, subject to restrictive measures and prohibitions under AML laws.

Commassu Circular 11/2

The Commassu[10] has issued its Circular Letter 11/2 dated 8 February 2011 on the evaluation of exposure to money-laundering risks and on the related preventive measures. The Circular Letter 11/2 applies to life insurance undertakings only. The Commassu has announced the issuance of subsequent circular letters regarding non-life insurance and reinsurance undertakings.

[7] Directive 2008/48/EC of 23 April 2008 on credit agreements for consumers.

[8] There currently are no such agreements under Luxembourg law.

[9] Anti-money laundering and counter-terrorism financing.

[10] *Commissariat aux Assurances*, the Luxembourg insurance sector regulator.

The Commassu has decided to implement a system of supervision and control on the national level based on the money laundering and terrorism financing risks assessed by the different entities subject to its supervision. The Commassu has issued for the purpose of harmonising the risk assessment on a single entity basis and on a national level (i) assessment forms to be used by all insurance undertaking when entering into a new contract with a client, (ii) a questionnaire addressed to all insurance undertakings and to be returned before 15 March 2011 in order to assess objectively the level of measures of internal organisation and policy decisions taken by such undertakings to prevent money laundering and terrorism financing risks, and (iii) harmonised forms for annual statistical data collection in this respect.

Bill N° 6164
Financial Collateral, Clearing and Settlement and E-Money Institutions

The Luxembourg Parliament is currently examining a bill amending Luxembourg legislation on financial collateral arrangements, settlement finality and electronic money institutions. The bill is described in more detail in the **January 2011 edition of our Luxembourg Legal Update**.

The legislative process for this bill has advanced in the last months. The Chamber of Commerce and the State Council have provided their comments on the bill and the parliament commission has issued a revised bill with certain rather minor changes to the electronic money institutions related parts of the bill. The bill is now expected to be adopted and to enter into force in the course of May 2011.

Capital Requirements Directives[11]

Law of 28 April 2011

The Luxembourg Parliament has adopted bill N° 6165 by a law dated 28 April 2011. The new law has amongst others implemented (i) certain parts of Directive 2009/111/EC amending the CRD, (ii) certain parts not yet transposed of Directive 2009/14/EC amending the Deposit Guarantee Systems, and (iii) Directive 2009/49/EC concerning certain publicity obligations for mid-sized companies and their obligation to establish consolidated accounts. The law will amend certain laws concerning the financial sector including the Financial Sector Law[12] and the CSSF Law[13].

These amendments are particularly important for non-EU/EEA professionals providing services in Luxembourg, because they will extend license requirements under the Financial Sector Law to non-EU/EEA incorporated entities which are not established in Luxembourg, but which come occasionally and temporarily to Luxembourg, notably to take deposits or other repayable funds from the public as well as to provide any other service within the scope of the Financial Sector Law in Luxembourg.

The new law entered into force on 9 May 2011.

For further changes to current financial sector legislation, we kindly refer you to the **January 2011 edition of our Luxembourg Legal Update.**

Remuneration Policies in the Financial Sector
Guidance Issued by the CSSF

Please see **Employment** section.

Islamic finance

CSSF Press Release
Rules Applicable to "Sukuk"

"Sukuk" constitute a specific type of Islamic finance debt instruments similar to an asset-backed bond. As the traditional Western interest paying bond structure is not permissible under Islamic law (*Sharia*), "sukuk" achieve a similar result by alternative structuring. Broadly speaking, they are securities representing an entitlement to a claim or share where both the income and capital are indexed upon the performance of the issuer's underlying assets subject to a cap. The holder benefits from a right to proportional ownership on these assets that he can exercise in the case of default by the issuer.

In a press release dated 26 January 2011, the CSSF has clarified in that “Sukuk” can be treated as an asset backed security pursuant to the Prospectus Regulation or, subject to certain conditions, as guaranteed debt securities. This increases legal certainty for the issuers and at the same time ensures investor protection.

[11] Capital Requirements Directives 2006/48/EC and 2006/49/EC.

[12] Law dated 5 April 1993 on the financial sector.

[13] Law dated 23 December 1998 on the establishment of the CSSF.

Miscellaneous

CSSF Circular 11/503 - Communication and Publication of Financial Information

Please see **Funds & Investment Management** section.

Case Law

District Court 20 May 2010
Concept of *"Normal Commercial Conditions"* within the Meaning of the Financial Collateral Law

The Luxembourg District Court[14] had to determine the meaning of the concept of *"normal commercial conditions"* in a case in which a participation of 32% in a company had been sold by enforcement of a pledge.

In April 2008, this participation had been valued at around EUR 86 million. In November 2009, the company had been valued between 0 and EUR 1.7 million, and the participation had been sold for EUR 1 million to a third party. The pledgor wanted this sale to be voided as it considered that the sale had not been made at normal commercial conditions.

Article 11 (1) b of the Financial Collateral Law does, in this respect, provide that, *"if an enforcement event occurs, the pledgee may, unless otherwise provided for, without prior notice […] assign or cause to be assigned the pledged collateral by private sale at normal market conditions […]"*.

The court analyses the concept from two angles. First, it indicates certain criteria which permit to appreciate whether a private sale has taken place at normal commercial conditions. Secondly, it determines the sanction if these conditions have not been met.

According to the court, normal commercial conditions exist if:

- there is a real negotiation between parties taking into account the available information on supply and demand at the moment of enforcement of the pledge;
- if there is no specific market for the financial instruments, the pledgor tries to determine their objective value, for example with the help of an expert, but, because this value can never be considered final, he has to take into account the best possible offer in the given circumstances.

If the pledgor argues that these conditions have not been met, the burden of the proof lies with him. Additionally, unless the pledgee abuses his right to sell the pledged property, it is not possible to force him to wait for an increase of the price of the financial instruments.

Regarding the sanctions, the court rules that the sale cannot not be voided if it has not been made at normal commercial conditions. If such conditions have not been met, the pledgee may only be liable to pay damages to the pledgor.

Court of Appeal 3 November 2010
Enforcement of Pledges: No a priori Control

Please see **Litigation** section.

[14] Luxembourg District Court, 20 May 2010, n°705/2010.

Constitutional Court 1 April 2011
CSSF Liability Regime

The Law dated 1 September 1988 on the liability of the State and Public Entities contains a general principle that the State is liable for any damage caused by the dysfunction of the Civil Service.

Certain laws do however limit the liability of specific public authorities such as the CSSF. Article 20 (2) of the Law of 23 December 1998 establishing the CSSF provides, in this respect, that "*for the CSSF to assume civil liability for individual damage incurred by the companies or professionals subject to its supervision, their clients or third parties, it must be demonstrated that the damage was caused by gross negligence in the choice and application of the means implemented to carry out the CSSF's public service mission*". The liability of the CSSF is thus limited to gross negligence.

This Article's constitutionality has been challenged with regard to Article 10*bis* of the Luxembourg Constitution which establishes the principle of equal treatment.

In a decision of 1 April 2011, the Constitutional Court[15] held that Article 20 (2) of the 1998 Law is constitutional. The Constitutional Court decides that the principle of equal treatment does not prohibit a different treatment if it is justified. The Legislator may thus treat certain public entities differently, if the difference of treatment is justified by objective disparities and if it is proportionate.

According to the Constitutional Court, the limitation of liability to gross negligence is justified by the CSSF's special attributions regarding prudential supervision of the financial sector. It adds that the Commassu[16] and the *Institut de régulation*, which have similar functions in their respective sectors, also benefit from a limitation of their liability to gross negligence. Furthermore, the Luxembourg legislation in this respect is very similar to that regarding foreign entities in charge of prudential supervision.

District Court 4 March 2011
Liquidation of UCITS, Information Requests

In the course of a winding up, the liquidators of a UCITS requested the communication of certain documents from the CSSF as they were of interest in the course of actions against certain entities having a potential liability to the UCITS.

The CSSF rejected this demand on the grounds that it is bound by a professional obligation of confidentiality.

In two recent decisions, the Luxembourg District Court[17] decided that Article 134 of the Law dated 17 December 2010 on UCITS did not prohibit the exchange of information in Luxembourg between the CSSF and liquidators or legal administrators during winding-up, insolvency proceedings or other similar proceedings regarding UCITS, if this information was requested and used in due course of such proceedings. Furthermore, the exchange of information was possible if the liquidator was held to professional confidentiality. According to the court, the liquidators, a lawyer and an authorised auditor, were both held by professional confidentiality obligations. Their request regarding the communication of certain documents should thus be taken into consideration.

It was argued that the information request did not concern the company in liquidation but other entities under its supervision. The court answered that liquidators could start legal action against any person having contributed to the aggravation of the situation of the company in liquidation and for such purposes request information from the CSSF.

Another point was whether the liquidators had to prove that the requested documents were useful and necessary for the proceedings. The court ruled that as Article 134 of the UCITS Law provided for the possibility of an exchange of information without requiring such information to be necessary or useful, it did not need to take into consideration whether the communication of documents was useful or necessary.

The court also decided that the exchange of information was not contrary to the principle of equality of arms as the information transmitted to the liquidators was necessarily known to the entities against which a claim would be brought.

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[15] Constitutional Court , 1 April 2011, n°00063.

[16] *Commissariat aux assurances*, the Luxembourg insurance sector regulator.

[17] Luxembourg District Court, 4 March 2011, n°296/11 & 297/11.

Corporate, M&A

Legislation

No recent legal changes have occurred in the general provisions of the Luxembourg corporate law during the period covered by the present newsletter. However, some significant changes, which could affect the activities of Luxembourg companies, are expected to enter into force in the coming months.

Bill N° 6128

Reform of Shareholders' Rights in Shareholders' Meetings of Listed Companies

The Luxembourg parliament is currently examining a new bill relating to the exercise of shareholders' rights in shareholders' meetings of listed companies and implementing into Luxembourg law the provisions of the Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies.

The bill contemplates to introduce additional rights for shareholders of Luxembourg companies whose shares and nonvoting shares are listed on a regulated market established in a Member State or in a non Member State.

The aim of the bill is to implement measures in Luxembourg (i) ensuring the provision of sufficient and adequate information to shareholders in a timely manner prior to general meetings, notably through modern technologies which offer possibilities to make information instantly accessible (*e.g.* on Internet websites), and (ii) facilitating the participation of shareholders at shareholders' meetings and the exercise of voting rights by way of proxy or other electronic means of communication.

The main measures contained in the bill may be summarised as follows:

- A principle of equal treatment of shareholders of Luxembourg listed companies pursuant to which a company ensures equal treatment for all shareholders who are in the same position with regard to the participation and the exercise of voting rights at general meetings shall be introduced.

- The minimum convening notice period for shareholders' meetings shall be extended from sixteen (16) days to thirty (30) days. Thus, convening notices for any general meeting of Luxembourg listed companies shall be made at least thirty (30) days prior to the date of the general meeting by a publication in the *Memorial* and in media which are quickly and easily accessible on a non-discriminatory basis and effectively disseminate information to the public throughout the European Union. In case the quorum requirements have not been fulfilled and another meeting has to be convened, the company may send a convening notice for the meeting at least seventeen (17) days in advance of the meeting if no new items are added to the agenda of the original meeting.

- The minimum content of convening notices for general meetings, is specified: (a) precise indication of the date, time and location of the general meeting, and the proposed agenda for the general meeting; (b) a clear and precise description of the procedures that shareholders must comply with in order to be able to participate and to cast their vote at the general meeting; (c) an indication of the record date (being the 14th clear day prior to a general meeting) for participation at a general meeting and an explanation that only those who are shareholders on that date shall have the right to participate and vote at the general meeting; (d) an indication where and how the full, unabridged text of the documents to be submitted to the general meeting and draft resolutions may be obtained; and (e) indicating the address of the Internet site where the information referred to in the following bullet point is made available.

- It is also proposed that companies shall make information on certain issues available to their shareholders prior to general meetings. For a continuous period beginning no later than the day of publication of the convening notice of the general meeting, as outlined in the point above, until the day of the general meeting, the company shall make available to its shareholders on its Internet site the following information: (a) the convening notice referred to above; (b) the total number of shares issued and voting rights in existence at the date of the convening notice (including separate totals for each class of shares where the company’s capital is divided into two or more classes of shares); (c) the documents to be submitted to the general meeting; (d) a draft resolution or, where no resolution is proposed to be adopted, a statement from the board of directors of the company for each item on the proposed agenda of the general meeting; and (e) where applicable, the forms to be used to vote by proxy and to vote by correspondence, unless those forms are sent directly to each shareholder.

- In order to enhance the participation of shareholders in general meetings, it is further proposed to decrease the minimum threshold required for shareholders to add new items to the agenda of general meetings from 10% of the share capital to 5% of the share capital.

- The rights of a shareholder to participate at a general meeting and to vote in respect of his shares shall be determined with respect to the shares held by that shareholder on the 14th clear day prior to the general meeting. Such date shall be called the record date. At the latest on the record date, a shareholder shall indicate to the company his intention to participate at the general meeting.

- In order to enhance the participation of shareholders at general meetings, the articles of association of companies may offer to shareholders the possibility to participate at a general meeting by electronic means, ensuring, notably, any or all of the following forms of participation: (a) a real-time transmission of the general meeting; (b) a real-time two-way communication enabling shareholders to address the general meeting from a remote location; and (c) a mechanism for casting votes, whether before or during the general meeting, without the need to appoint a proxyholder who is physically present at the meeting.

- It is also proposed to introduce into Luxembourg law a right for every shareholder to ask questions related to items on the agenda of the general meeting. The company shall answer these questions, subject to any measures which the company may take to ensure the identification of shareholders, the good order of general meetings and their preparation, and the protection of confidentiality and business interests of the company. The company may provide one overall answer to questions which have the same objective.

- Furthermore the law shall clearly define the various requirements related to the participation of shareholders at general meetings through proxy forms.
- It is also proposed to introduce specific rules related to the participation of shareholders at general meetings through electronic means or by correspondence.

- Finally the deliberation process at general meetings is to be clarified by detailing the results of the shareholders' votes on the resolutions submitted to the meeting. As a minimum requirement, the company shall be required to ascertain for each resolution the number of shares for which votes have been validly cast, the proportion of the share capital represented by those votes, the total number of votes validly cast as well as the number of votes cast in favour of and against each resolution and, where applicable, the number of abstentions. However, if no shareholder requests a full count of the votes, it shall be sufficient for the company to ascertain the voting results to the extent needed to ensure that the required majority is reached in respect of each resolution.

It is anticipated that this bill will be approved and adopted by the Luxembourg Parliament in the very near future, particularly in the light of the recent decision of the European Court of Justice[18] condemning the Grand Duchy of Luxembourg for failing to implement the European Directive 2007/36/CE within the timeline provided by the directive.

Bill N° 6227

Reform of Reporting and Documentation Requirements in Cases of Mergers and Divisions of Companies

The Luxembourg Parliament is currently examining a bill relating to reporting and documentation requirements in cases of mergers and divisions of companies and transposing into Luxembourg law the provisions of Directive 2009/109/EC of the European Parliament and of the Council of 16 September 2009[19].

The bill contemplates to reform certain obligations regarding the information requirements imposed on Luxembourg companies in the framework of merger or

[18] Decision of the European Court of Justice of 14 April 2011, Case No. C-390/10.

[19] Amending Council Directives 77/91/EEC, 78/855/EEC and 82/891/EEC, and Directive 2005/56/EC as regards reporting and documentation requirements in cases of mergers and divisions.

division processes[20]. It is proposed that a written report[21] will not be required if all the shareholders (and the holders of other securities conferring a right to vote) of each of the companies involved in the merger have so agreed.

Moreover, it is also proposed that a special accounting statement[22] is not required if (i) the company publishes a biannual financial report in accordance with Article 5 of Directive 2004/109/EC and makes it available to its shareholders, or (ii) all the shareholders (and the holders of other securities conferring a right to vote) of each of the companies involved in the merger have so agreed.

The bill finally proposes to offer the possibility to merging companies to communicate the information/documents related to the merger through their respective Internet websites.

Circular

IRE Technical Note NT2010-03

On 17 June 2010, the Luxembourg *Institut des Réviseurs d'Entreprises* has issued a technical note (published on its website in January 2011) whereby it expresses the view that further to the amendment of article 69 of the Luxembourg law dated 19 December 2002 relating to the register of commerce and companies as well as the accounting and the annual accounts of companies, as amended by the law of 18 December 2009 concerning the audit profession, a Luxembourg company whose accounts are audited by an independent auditor no longer needs to appoint an additional "*commissaire aux comptes*".

Case law

District Court 24 October 2008
The Liability of the Manager of a Commercial Company and the Detachable Fault (*faute détachable*)

Please see Litigation section.

[20] In order to reduce the administrative burden weighing on Luxembourg companies.

[21] The report will outline the draft terms of a merger and setting out the legal and economic grounds for it (in particular the share exchange ratio), to be prepared by the management bodies of each of the merging companies.

[22] To be drawn up by each of the merging companies and to be made available to shareholders at least one month prior to the day fixed for the general meeting which is to decide on the draft terms of a merger.

Funds & Investment Management

AIFM Directive: Latest Developments

The draft proposal for an alternative investment fund managers directive was published by the EU Commission in April 2009, with the expectation that the legislation would be finalised by end of 2009. However, the initial text drew criticism from many quarters and, following intensive and lengthy negotiations between the Council, the EU Parliament and the EU Commission, it is only in late October 2010 that an agreed text was achieved. On 11 November 2010, the EU Parliament formally approved the compromise text. This text also requires the formal approval of the Council before the AIFM Directive[23] comes into force.

Expected Timing

In a letter sent to ESMA[24] on 21 February 2011, the EU Commission indicates that it has learned from the Council's and EU Parliament's lawyer linguists that the AIFM Directive "*will most likely not enter into force before June 2011*"; this is later than the EU Commission initially expected. The finalised AIFM Directive, once adopted by the Council, will then come into force twenty days after its publication in the Official Journal of the EU. It will enter national laws by the EU Member States within two years of such publication, *i.e.* by 2013.

We refer you to the **January 2011 edition of our Luxembourg Legal Update** for an analysis of the key provisions of the latest version of the AIFM Directive.

Responses to CESR's Call for Evidence on Implementing Measures

In January 2011, ESMA published the responses to CESR's[25] December 2010 call for evidence seeking stakeholders' input in relation to the provisional request for assistance from the EU Commission regarding ESMA's technical advice on the implementing measures on the AIFM Directive. In view of the workload involved in

[23] Directive of the European Parliament and the Council on alternative investment fund managers.

[24] European Securities and Markets Authority.

[25] Committee of European Securities Regulators (replaced by ESMA).

preparing the technical advice, the EU Commission has decided to extend the deadline for the receipt of ESMA's advice to 16 November 2011.

In Luxembourg, ALFI's[26] answer to the question on the categories of AIFMs[27] and AIFs[28] that may or will fall within the scope of the AIFM Directive is that Luxembourg law currently provides for three potential AIFMs regimes and four potential AIFs regimes.

According to ALFI, the three categories of AIFMs which will fall within the scope of the AIFM Directive are:

- managers of non-coordinated foreign UCIs referred to in Article 28-8 of the Financial Sector Law[29];
- management companies of Luxembourg UCIs[30];
- and self-managed AIFs, *i.e.* the categories of AIFs listed below that may qualify as AIFMs where they are self-managed.

The four categories of Luxembourg investment funds which may fall within the scope of the AIFM Directive where there are self-managed AIFs are:

- Part II UCIs subject to the 2010 Law (including SICAVs, SICAFs and FCPs),
- SIFs subject to the SIF Law[31],
- SICARs subject to the SICAR Law[32],
- and unregulated investment vehicles or similar arrangements under Luxembourg corporate law which may also (partly) fall under the definition of an AIF under the AIFM Directive.

ESMA Seeks Preliminary Views on Implementing Measures

ESMA published on 15 April 2011 a discussion paper setting out its proposed approach, including alternative options, where relevant, for developing the implementing measures of the AIFM Directive.

[26] Association of the Luxembourg Fund Industry.

[27] Alternative investment fund managers.

[28] Alternative investment funds.

[29] ALFI outlines that managers of non-coordinated UCIs are professionals engaging in the management of undertakings for collective investment other than UCIs established in Luxembourg and other than UCITS authorised in accordance with the UCITS Directive (as amended).

[30] Undertakings for collective investment, including for the avoidance of doubt UCITS and non-UCITS as well as Luxembourg SIFs.

[31] Luxembourg law dated 13 February 2007 (as amended) relating to SIFs.

[32] Luxembourg Law dated 15 June 2004 (as amended) relating to SICARs.

ESMA's paper seeks views from market participants on the policy options ESMA has identified with regard to the EU Commission's mandate. In particular, the discussion paper invites stakeholders' views on:

- how to identify the portfolios of AIFs under management by a particular fund manager and the calculation of the total value of assets under management;
- how leverage influences the assets under management;
- how to determine the value of the assets under management by an AIF for a given calendar year;
- how to treat potential cases of cross-holding among the AIFs managed by a fund manager;
- how to treat AIFMs whose total assets under management occasionally exceed and/or fall below the relevant threshold;
- what the registration requirements for entities falling below the threshold should be;
- how the obligation to register with national competent authorities should be implemented and establishing what the suitable mechanisms for gathering information might look like;
- and what the procedures should be for small managers to "opt-in" to the AIFM Directive.

ESMA has indicated that it intends to use the responses to the discussion paper to narrow down its policy approach, and to develop a formal proposal for possible implementing measures in the summer of 2011. The proposal will be subject to a public consultation, the results of which will be used by ESMA to finalise its advice to the EU Commission by mid-November 2011.

CSSF Circular 11/508
New Requirements for UCITS IV Management Companies and Self-Managed SICAVs

On 15 April 2011, the CSSF issued Circular 11/508 on the requirements that apply to UCITS management companies governed by Chapter 15 of the 2010 Law (UCITS IV Management Companies) and self-managed SICAV governed by Article 27 of the 2010 Law[33] (UCITS IV Self-Managed SICAVs).

Circular 11/508 details the provisions of the 2010 Law and CSSF Regulation 10-04[34] applying to the organisational

[33] Luxembourg law of 17 December 2010 relating to undertakings for collective investment.

[34] CSSF Regulation 10-04 transposing Commission Directive 2010/43/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organisational requirements,

requirements, conflicts of interest, conduct of business rules and risk management of UCITS IV Management Companies and UCITS IV Self-Managed SICAVs. These requirements must be complied with by 1 July 2011 and will apply to every UCITS IV Management Company whether it manages UCITS, UCIs or SIFs and to every UCITS IV self-managed SICAV.

Pursuant to the new circular, existing Chapter 13 management companies and self-managed SICAVs created under the 2002 Law[35] must file with the CSSF, by 1 June 2011 at the latest, an update of their application file evidencing compliance with the new UCITS IV requirements. The documents and information to be provided to the CSSF by each of these management companies and self-managed SICAVs are detailed in Annex I of Circular 11/508.

CSSF Circular 11/509
New Notification Procedures for UCITS

CSSF Circular 11/509 dated 15 April 2011 contains new notification procedures to be observed by UCITS incorporated under Luxembourg law which intend to market their units/shares in another EU Member State and by UCITS from another EU Member State which intend to market their units/shares in Luxembourg.

The new circular reflects the provisions of the UCITS IV Directive and the 2010 Law and draws attention to the key elements of the new notification procedures which include the *"regulator-to-regulator"* communication and the use of electronic communication during the notification process. In accordance with the 2010 Law, however, UCITS shall notify the regulator of the host Member State in the event of any amendments to the information or marketing modalities previously communicated.

CSSF Circular 11/503
Communication and Publication of Financial Information

3 March 2011 the CSSF issued Circular 11/503 in order to remind certain entities that are under its supervision, their obligations with respect to the communication and publication of financial information, as well as the relating deadlines. The supervised entities concerned are, *inter alia*, UCIs, SIFs, SICARs and PFS. Annex 1 of the new circular lists all applicable legal provisions by distinguishing obligations resulting from specific laws and obligations resulting from commercial law. Circular 11/503 also applies to auditors (*réviseurs d'entreprises agréés*) of the relevant supervised entities.

CSSF Activity Report 2010

Below is a summary of some selected information and/or positions confirmed by the CSSF in Chapter 3 and Chapter 5 of its annual report concerning the prudential supervision of Luxembourg UCIs, management companies and SICARs in 2010.

Prudential Supervision of Management Companies

Scope of the CSSF Circular 10/437

In its activity report, the CSSF has confirmed that management companies subject to chapter 13 or chapter 14 of the 2002 Law fall within the scope of Circular 10/437 relating to guidelines concerning the remuneration policies in the financial sector. As a result, these management companies shall establish a remuneration policy in compliance with the said circular.

Management Company and Securitisation Activity

Facing the question of whether a management company subject to chapter 13 of the 2002 Law may provide administrative services to a securitisation vehicle, the CSSF has confirmed that such a management company may carry out these services if it has appropriate human and technical resources. A file describing the services carried out shall be submitted beforehand for approval to the CSSF.

Prudential Supervision of SICARs

Authorisation Procedure

In May 2010, the CSSF published on its website the document entitled "*Information request for authorisation*" to be completed and attached to any request for authorisation of a SICAR with the CSSF. This application familiarises the initiators of SICAR projects with the key elements requested for the purpose of the authorisation of a SICAR and allows the CSSF to be provided with these important pieces of information according to a predetermined scheme.

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conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company.

[35] Luxembourg law of 20 December 2002 (as amended) relating to undertakings for collective investment.

After considering the request for authorisation, the CSSF takes the initiative to schedule an interview in order to meet, within the authorisation procedure, the initiator and the directors/managers of the future SICAR.

If the authorisation file does not give raise to any objection after examination, the CSSF communicates its agreement in principle by mail. This mail specifies, among others, that the CSSF reserves the right to reconsider the validity of the agreement in the case where the final documents necessary for registration of the SICAR on the official list are not transmitted within three months.

The CSSF also stresses that it requests to receive, prior to the registration of any SICAR on the official list, the letter of intent of the auditor duly signed, confirming acceptance of its mandate for the future SICAR.

Changes Regarding the Acceptance Procedure of the Prospectuses

After having reviewed a prospectus, whether as part of the examination of a new file or within the context of further amendments to an existing prospectus, the CSSF will confirm by separate letter its awareness of the marketing of the SICAR on the basis of the prospectus received. This letter does not constitute an official approval of the content of the prospectus by the CSSF, but only expresses that it has taken note of it since the prospectus is established under the responsibility of the directors/managers of the SICAR. The CSSF will mark the prospectus with a stamp for identification purposes. This new procedure replaces the traditional "visa" procedure for the acceptance of prospectuses.

"Frequently Asked Questions"(FAQ)

A FAQ document regarding SICARs will be published soon on the CSSF website.

Luxembourg Quarterly Update Relating to Investment Funds and Other Investment Vehicles

A special newsletter dedicated to investment funds and other investment vehicles was published in April 2011 by Clifford Chance Luxembourg. Amongst other things, the themes developed in this newsletter deal with:

- the adoption of CESR's guidelines on UCITS IV (Level 3 measures);
- the EU Commission's feedback on changes to depositary function and managers' remuneration under UCITS V;
- the responses to ESMA's call for evidence on possible delegated acts concerning the amended Prospectus Directive;
- the responses to the EU Commission's consultation paper on possible legislative steps for the PRIPs[36] initiative;
- and some selected legal and regulatory developments affecting Luxembourg investment vehicles such as recent news from and/or positions taken by the CSSF.

Tax Status of Management Companies Managing One FCP

Please see Tax section.

Case Law

District Court 2 March 2010
Liability of the Asset Manager of a UCITS

Please see Litigation section.

Commercial Court 4 March 2011
Liquidation of UCITS, Information Requests

Please see Banking, Finance & Capital Markets section.

Administrative Court 4 April 2011
Withdrawal of a SICAV from the Official List of SIFs

The SIF Law provides that the entering and the maintaining of a SIF on the official list kept by the CSSF shall be subject to observance of all legislative, regulatory or contractual provisions relating to the organisation and operation of SIFs and the distribution, placing or sale of their securities. According to the SIF Law, an appeal may be lodged against the decision by the CSSF concerning the withdrawal from the official list with the Administrative Court, which will judge the merits of the case.

In a case submitted to the Administrative Court[37], a SICAV has been withdrawn by the CSSF from the official list of SIFs as it failed to justify both the conditions imposed upon it by the SIF Law and its articles of incorporation:

[36] Package retail investment products.

[37] Administrative Court, 4 April 2011, n°26456.

- The investment policy was not respected, which violated the provisions of the SIF Law according to which the prospectus must include up-to-date information necessary for investors to be able to make an informed judgment of the investment proposed to them and, in particular, of the risks attached thereto.
- The SICAV decided to suspend its net asset value calculation and all subscriptions and redemptions requests from investors in one of its sub-funds, and it appeared to the CSSF that this irregular situation was likely to continue for an undetermined period of time, in violation of the provisions of the SIF Law and the SICAV's articles of incorporation, according to which securities shall be issued at any time by the SICAV and may be redeemed at the request of its investors.
- The SICAV did not establish the legally required annual report.

The SICAV challenged the CSSF's decision by alleging that the CSSF abused its power and infringed the SIF Law to the extent that its decision did not respect the aim of the SIF Law. In particular, the SICAV considered that the CSSF did not act in view of the sole protection of the investors, which would have been in a more favourable situation had the SICAV not been removed from the official list. The court rejected the argument of the SICAV, stressing that the CSSF's mission, as laid down in the SIF Law, is not to protect the investors of SIFs but to carry out its duties exclusively in the public interest and to ensure that SIFs (and their directors) comply with the applicable rules.

It was also argued by the SICAV that the principle of contradictory proceedings had not been respected by the CSSF, as its definitive withdrawal decision partially was based on issues not raised with the defendant. The court did not accept this argument, mainly for two reasons. On the one hand, the CSSF had to take into consideration the information it had at the time of its decision, including new elements. On the other hand, the court considered that there had been a constant flow of information, discussions and meetings between the CSSF and the SICAV allowing the SICAV to be kept informed of the CSSF's views and to take position in this respect.

The SICAV also argued that the CSSF abused its power because it did not take into account the SICAV's propositions regarding its restructuring, focusing almost exclusively on factual elements having occurred abroad rather than on Luxembourg factual and legal elements.

The court also rejected this argument considering that the CSSF could take into account these foreign elements which were disclosed in the SICAV's prospectus, as 90% of the concerned sub-fund's net assets had been invested in foreign target entities. According to the court, the CSSF, by examining the situation of the relevant foreign target entities, has acted in accordance with its legal mission to ensure that the provisions of the SICAV's prospectus are complied with.

Litigation

Case law

District Court 24 October 2008
Liability of the Manager of a Commercial Company and the Detachable Fault (*faute détachable*)

The Companies Law provides that managers are liable towards their company for any management faults and towards the company and third parties for any violation of the laws or the constitutional documents of the company.

Notwithstanding this rule, managers may be personally liable towards third parties (*e.g.* creditors of the company) for faults committed in the framework of their functions. Even though the managers' acts are considered as being made by the company, and as a result render the company liable, any manager having committed a fault may be held directly liable by third parties on the basis of general laws on tortuous liability if the alleged misbehaviour may be considered as wrongful independently from the manager's position as an agent of the company.

The Luxembourg District Court[38] has now moderated this risk. According to the court, the liability of the manager may only be claimed if the wrongful act is a detachable fault, which may be separated from the exercise of its functions (*faute détachable, séparable de ses fonctions*). Such a fault exists *e.g.* if a manager has acted outside its normal functions, in which case the manager's act could therefore not be attributed to the company's activity.

This concept is directly inspired from case law of the French Supreme Court[39], which has stated that the

[38] Luxembourg District Court, 24 October 2008, n° 84529 and 106650. See also, Luxembourg District Court, 28 November 2007, n° 98585 and Luxembourg District Court, 6 December 2006, n° 98375.

[39] Supreme Court France (Comm. Ch), 20 May 2003, n° 99-17.092.

detachable fault is an intentional fault of particular seriousness which is not compatible with the normal functioning of the company[40].

Applying this rule, French courts have held, that certain faults *e.g.* (i) a manager placing a purchase order, knowing that the invoices would not be paid; (ii) having the denomination of a company modified in order to defraud rights of a third party; (iii) having committed acts of forgery by placing false labels on the company products; or (iv) having failed to satisfy the agreed formalities of a subcontractor; were not to be considered as separable from the manager's functions and do hence not trigger its personal liability.

Recently, the French Supreme Court specified that the liability of a manager is not subject to the proof of a detachable fault where a claim is brought by a shareholder of the company.

Court of Appeal 1 April 2009
Real Estate - Sale of the Same Property to Two Successive Purchasers

Pursuant to the Law on the Registration of Real Estate[41] any agreement that transfers real estate rights such as sale and purchase agreements has to be registered with the Mortgage Office (*Bureau des Hypothèques*) of the district where the property is located. However, only judgments, deeds executed before a notary (*actes authentiques*) or administrative deeds (*actes administratifs*) can be registered with the Mortgage Office.

In absence of such a registration the transfer of the real estate right has no effect against third parties. Until such registration, real estate rights arising from deeds and judgments may not be enforced against third parties who have acquired rights *in rem* on a given property from the same person (*i.e.* from the same owner/seller).

As a result, if the owner of a property sells his property to two (successive and distinct) purchasers, the purchaser who has registered the transfer of ownership first will be able to enforce it against the other purchaser.

In a recent decision the Court of Appeal[42] has confirmed this principle but has ruled in the same time that the acquisition of a property by a purchaser who perfectly knew that this property had been sold beforehand (by the same owner) to another purchaser constitutes a fault that prevents the second purchaser from relying on the above-mentioned legal provisions. In other words, even though the second purchaser - *i.e.* the purchaser in bad faith - has registered the transfer of the real estate right with the Mortgage Office first, this registration and thus the property right of the second purchaser has no effect against the first purchaser since the second purchaser was aware of the first transaction when concluding the second transaction.

The Court of Appeal has however further ruled that in the case of resale of the property by the purchaser in bad faith to a third party acting in good faith, this third party may benefit from the above-mentioned rules and enforce its property right against the first seller.

Court of Appeal 25 June 2009
Banks' General Terms and Conditions and Consumer Protection

Banks' general terms and conditions (GTC) generally contain a clause stating that the client is bound to make any claim in relation to a specific transaction in writing within 30 calendar days from the receipt of the account statement. If the client fails to make such a claim within the above-mentioned period, it is alleged that the client has approved the operations stated in the documents addressed to him.

Often, the bank and its client also agree that the client may domicile correspondence at the registered office of the bank.

The GTC often state in this respect that any hold mail is deemed to have been notified to the client the day following the date indicated on said correspondence. Moreover, clients oblige themselves to regularly inform themselves of the status of their bank accounts.

In a case submitted to the Court of Appeal[43], the client had opened an account through which he sold call or put options. The client had entered into a hold mail agreement with his bank. A dispute arose between the parties regarding the execution of some orders. The bank's general terms and conditions included the above-mentioned clauses.

[40] *Une faute intentionnelle d'une particulière gravité, incompatible avec l'exercice normal des fonctions sociales.*

[41] Articles 1 and 2 of the Law of 25 September 1905 on the Registration of Real Estate Rights.

[42] Court of Appeal, 1 April 2009, n° 32451.

[43] Court of Appeal, 25 June 2009, n° 33124

The bank claimed that the client had failed to challenge the various contentious operations within the period foreseen by the general terms and conditions and that hence it was precluded from making a claim now.

The client challenged the application of said contractual clauses by alleging that they conflicted with the Consumer Act[44] which provides that may be considered as unfair, and therefore void, a clause imposing on the consumer an abnormally short period to make a claim. According to the client, the clause of GTC providing that the client is supposed to have received his domiciled correspondence the day following its issuance as well as the clause which limits the client's right of claim to 30 days after the date of said correspondence should be considered as unfair.

In its decision, the court did not accept that argument. According to the court, the hold mail clause defines the timeframe in which the client is supposed to have received the correspondence. This is therefore not related to a timeframe for making a claim. Furthermore, the court considered that the period of one month to make a claim, in view of the promptness requirement on the one hand, and the security requirements, necessary in financial transactions, on the other hand, may not to be qualified as an abnormally short period to make a claim.

Administrative Court 25 February 2010
Public Contracts versus Concessions of Public Services

Luxembourg law requires public institutions wishing to award and enter into a public contract to follow the procedure foreseen by the Public Contracts Law.

In a case submitted to the Administrative Court[45], a local administration (*Administration communale*) had entered into a management agreement with a company in respect of a broadband telecommunications network, without complying with the procedures foreseen by the Public Contracts Law.

Another network management company brought an action for annulment against this decision before the Administrative Court.

In their defence, the local administration and its contracting party argued that the Public Contracts Law could not apply, as the agreement entered into was a public service concession agreement that did not meet the definition of public contract (*marché public*) to which the Public Contracts Law applies.

They argued that the management agreement over the telecommunications network was not an onerous agreement insofar as it did not foresee the payment of a fee by the company to the local administration (as consideration for the right to operate the local telecommunications network). The claimant responded by arguing that the absence of a fee does not permit to consider that the deal is not a public contract as the onerous nature of the agreement does not necessarily result from the payment of a price, but can result from a write-off of amounts due to the public authority by its contracting party.

The claim was dismissed by the Administrative Court.

In its judgment, the court first stated that according to the Public Contracts Law, a public contract for services involves a compensation that is directly paid by the contracting authority to the service provider. An onerous agreement is understood to be any agreement in which the service provider receives remuneration for an activity it may carry out either for the contracting authority or for third persons and for which the advantages of that activity go to the contracting authority or to the relevant third person. In the case at hand, the court indicated that in absence of remuneration directly paid by the local administration to the managing company, the agreement could not be considered as being a public contract pursuant to the Public Contracts Law.

The court qualified the agreement instead as a concession of public services, *i.e.* an agreement by which a public authority puts a private (or sometimes public) person in charge of operating or managing a public service at the latter's own expenses and risk, under the control and according to the modalities that the public authority has established, against a remuneration consisting in the fee paid by the users or even in a price paid by the public authority. Concessions of a public service are not assimilated to public contracts, provided that by granting the concession, it is not intended that the authorities obtain goods or services necessary to their action, but rather that the authorities decide on the organisation of a public service.

[44] Law of 25 August 1983 concerning the legal protection of the Consumer. This law has been abolished by the law of 8 April 2011 introducing the Consumer code Articles L.211-2 à L-211-7 of the *Consumer code* restate the principles previously foreseen in the Consumer act.

[45] Administrative Court, 25 February 2010, n° 24953.

The court therefore upheld the local administration's decision not to apply the procedure applicable in the framework of a public contract before signing the agreement with the network manager.

The court also specified that although concessions over public services are not governed by the Public Contracts Law, the public authorities which enter into such agreements are nevertheless bound to comply with the fundamental rules of the EU Treaty, namely the principles of non discrimination because of the nationality, equal treatment and transparency.

In the case at hand, the court noticed that the local administration had launched calls for tenders in view of the attribution of the telecommunication network management, that it resulted from the elements of the file that the attributions had occurred after competition and that no breach of the principles of equal treatment, non-discrimination and transparency had occurred.

District Court 2 March 2010
Liability of the Assets Manager of a UCITS

A UCITS had delegated the investment management of its assets to a bank. The management agreement provided that the bank had to respect the investment objectives and restrictions stated in the UCITS' prospectus. Nevertheless, the bank had invested most of the assets under management in three structured instruments with leverage. As a result of a manager fraud, these assets had lost their value. Consequently, the UCITS instigated a legal action against the bank.

The District Court[46]. accepted the UCITS' request. To do so, the court first established that the board of directors of the investment fund was not an expert in respect of alternative funds for which reason they had asked the bank to manage their investments. The bank could therefore not allege that the UCITS had ratified the investment policy implemented by the bank.

The court also blamed the bank for "*giving the board of directors of the UCITS a mass of documents without providing any analysis",* and considered that the bank was responsible, as an investment manager, to highlight all elements that were of a nature to support its investment decisions.

The court also rejected the argument of the bank that its aggressive investment policy had been approved by the beneficial owner of the funds, with whom the bank had been in contact several times in order to discuss the policy he followed, since the management agreement had been concluded with the UCITS and that no contractual relationship existed with the beneficial owners, having no power to represent the UCITS.

In addition, the court considered that the bank was negligent in concentrating its investments on one underlying asset, all the more so because the bank had relationships with the group with which it had entered into a partnership through crossholdings and with which it had already been in negotiations at the time of the first contacts with the UCITS. The court therefore judged that the bad management resulting from the concentration of risks and the non respect of objectives and restrictions stated in the UCITS' prospectus was aggravated by the conflicts of interest and the fact that the bank did not manage the assets in the exclusive interest of the clients.

The court then appointed an expert in order to evaluate the damage suffered by the UCITS as a consequence of such negligence. It stated that the damage had to be assessed on the basis of the differential between the theoretical situation which would have resulted from the compliance with the investment instructions of the prospectus and management regulations, by taking into account a risk profile corresponding with the performance objective of 12% and by taking into consideration the situation of the markets for the concerned period.

Court of Appeal 3 November 2010
Enforcement of Pledges: No *a priori* Control

In December 2009, the District Court[47] sitting in summary proceedings considered that Luxembourg law does not prevent debtors from starting summary proceedings to block the enforcement procedure of a pledge.

In a recent decision, the Court of Appeal has reversed that decision[48].

The court started by recalling that even in a case where the conditions of a serious dispute and of emergency are met, the intervention of the judge sitting in summary proceedings may appear to be unjustified, after having put into the balance the parties' respective interests.

[46] Luxembourg District Court 2 March 2010, n° 122629.

[47] Pres. Luxembourg District Court (ref), 4 December 2009, n°123551.

[48] Court of Appeal (ref), 3 November 2010, n°35824 - see the **September 2010 edition of our Luxembourg Legal Update**.

According to the court, the Financial Collateral Law aims at protecting financial collateral arrangements against potential challenges and aims at introducing a framework within which lending institutions can safely operate. This is in line with the Financial Collateral Directive, the whereas (17) of which allows member States to keep the possibility to permit *a posterior* control of enforcement actions.

As a result, the court concluded that judges sitting in summary proceedings cannot order measures that would delay or block enforcement proceedings of financial collateral arrangements.

This decision seems to clearly confirm that pledges subject to the Financial Collateral Law cannot be subjected to *a priori* control by the judge sitting in summary proceedings. The enforcement of a financial collateral arrangement may however be subject to an *a posteriori* control and any violation of the terms of the Financial Collateral Law or of the financial collateral arrangement may potentially result in the liability of the collateral receiver.

Employment

Legislation

CSSF Circular 11/505
Remuneration Policies in the Financial Sector: Guidance Issued by the CSSF on Circulars Implementing the CRDIII

On 11 March 2011, the CSSF issued a circular[49] which provides some guidance as regards (i) the scope of the CSSF Circulars 10/496 and 10/497[50] and (ii) the principle of proportionality. Circular 11/505 has entered into force with immediate effect.

This Circular is of high importance as the Circulars 10/496 and 10/497 did not provide comprehensive guidelines as to the concrete implementation of the CRDIII.

No concrete figures were indeed provided in the Circulars, as they implemented in full (*i.e.* without any deviation) the relevant CRDIII provisions. With respect to the practical implementation of the Circulars, the CSSF limited itself to refer in the Circulars to the CEBS[51] Guidelines (which were attached, as annexes to the Circulars), asking credit institutions and investment firms to follow these guidelines when establishing their remuneration policies.

The main points of the Circular may be summarised as follows.

- Although a remuneration policy may be established at group level, the principles contained in the guidance must be applied for the Luxembourg entities of the group, as the criteria/thresholds set in the guidance have been established by taking into account the specificities of the Luxembourg financial sector.

[49] Details relating to the application of the principle of proportionality when establishing and implementing remuneration policies that are consistent with sound and effective risk management as laid down in Circulars CSSF 10/496 and CSSF 10/497 (CRD III Circulars), transposing Directive 2010/76/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2006/48/EC and 2006/49/EC as regards capital requirements for trading book and re-securitisations, and the prudential supervision of remuneration policies ("CRD III").

[50] CSSF Circular 10/496 implements the CRDIII for credit institutions and CSSF Circular 10/497 implements the CRDIII for investment firms and management companies within the meaning of chapter 13 of the law of 20 December 2002.

[51] Committee of European Banking Supervisors.

- A credit institution whose balance sheet total exceeds the amount of EUR 5 billion and who has own funds requirements exceeding EUR 125 million (base 100 %), respectively EUR 1,562.5 million (base 8 %)[52], cannot rely on the principle of proportionality at the level of the entity.
- For investment firms that are approved to provide the investment services of dealing on own account and underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis[53], the CSSF considers that the principle of proportionality at the level of the entity cannot apply if the net result generated by one of these activities exceeds 20 % of the net global result before taxes of the entity in question. In the case where an establishment engages into several or all of these activities, the principle of proportionality cannot be relied upon, if the net global result generated by the total of such activities exceeds 20 % of the net global results before taxes.
- Any individual whose annual variable remuneration would be less than or equal to EUR 100,000 may be reasonably considered "*as a material risk taker having only a minor impact on the risk profile of the company*".

Fight Against Corruption

A law of 13 February 2011 has, among others, added a new section to the Labour Code, entitled *Protection of employees in relation to the fight against corruption, traffic of influence and the misuse of privileged information*[54].

Pursuant to these new rules, no sanctions (*e.g.* disciplinary sanctions, dismissal, etc.) may be taken against an employee who:

- refuses to take part into what he considers, in good faith, to be corruption, traffic of influence or misuse of privileged information (whether the prohibited action has been committed by his employer, superiors, colleagues or any third person who has a relationship with the employer);
- or has reported this prohibited action to a superior or to the relevant authorities or has testified in relation to this prohibited action.

Any contractual provision or any action that does not comply with the above legal principle (and notably any termination of the employment contract in violation of these legal rules) is null and void.

In case of termination of the employment contract by the employer, the employee may file a request with the president of the relevant Labour Court within 15 days following the notification of the dismissal and ask for his reinstatement. Alternatively, the employee may bring a lawsuit against his employer and claim damages for unfair dismissal.

Once the employee has established facts that give reason to assume that unlawful measures have been taken, the employer has to prove that the sanctions are justified by other objective and permissible elements.

Case law

Supreme Court 15 July 2010
Settlement Agreement Following the Dismissal of an Employee

In case of a dispute following the dismissal of an employee with notice period or with immediate effect (*i.e.* without notice period) for gross misconduct, the parties have the possibility to settle the dispute by concluding a settlement agreement, *i.e.* an agreement by which they agree to put an end to the dispute by making mutual concessions.

This settlement agreement - which generally relates to damages claimed by the dismissed employee for alleged unfair dismissal and, in the case of dismissal with immediate effect, also to amounts compensating the remuneration that the employee should have received during the notice period if the employee had been dismissed with a notice period - may occur prior to any court action. In this scenario, the settlement agreement prevents the parties (and in particular the employee) from further bringing a court action in relation to this dismissal. Such a settlement agreement may also occur after a court action has been brought, which will then immediately put an end to the proceedings.

In a certain number of cases, the State of Luxembourg, in its capacity as manager of the Employment Fund (*Fonds pour l'Emploi*)[55] has to be a party to the proceedings. The Labour Code indeed provides that the State has to be involved by the dismissed employee who has applied for

[52] These two conditions apply cumulatively.

[53] Listed in annex I, section A, points 3 and 6 of the MiFI directive 2004/39/EC,

[54] *Protection des salariés en matière de lutte contre la corruption, le trafic d'influence et la prise illégale d'intérêts*.

[55] The Employment Fund is the state body in charge of the management of the funds dedicated to unemployment benefits.

unemployment benefits as a result of the dismissal in any proceedings where the employee challenges the dismissal. In such cases and if the court holds that the dismissal with prior notice is unfair (or if it considers that the dismissal for gross misconduct is unjustified), it must order the employer to reimburse to the Employment Fund the unemployment benefits paid by the latter to the employee.

In case of dismissal for gross misconduct, the employee is even legally obliged to bring a court action against the employer and to involve the State in the proceedings before applying for (provisional) unemployment benefits.

On several occasions in the past, Luxembourg courts have considered whether the employee and the employer could conclude a settlement agreement without including the State as a party to this agreement and thus without its consent. Certain decisions have held that the State, as a party to the proceedings, necessarily also needs to be a party to the settlement agreement that puts an end to the proceedings and that failing this, the settlement agreement is considered null and void or, at least unenforceable against the State. This means that the State may continue to demand in court the reimbursement of the unemployment benefits paid to the employee. In other court decisions, courts have deemed that such a settlement agreement between the employee and the employer is valid and puts an end to the State's claim.

The Supreme Court[56] previously held that a settlement agreement concluded by an employee and an employer in the course of the proceedings without the State being associated with this agreement puts an end to the State's claim and to the proceedings given the absence of a court decision on the unfair nature of the dismissal.

This position of the Supreme Court was further applied by Labour Courts and by the Court of Appeal[57].

It must nevertheless be stressed that the above decisions of the Supreme Court and of the Court of Appeal were related to dismissals with a notice period, and not to dismissals with immediate effect for gross misconduct.

In a recent decision[58], the Supreme Court held, in a case where an employee had been dismissed with immediate effect, that (i) the settlement agreement entered into between the employee and the employer has no effect against the State which is a party to the proceedings and which is demanding the reimbursement of the provisional unemployment benefits granted to the employee and that (ii) this settlement agreement does not put an end to the proceedings relating to the State's claim. The Supreme Court then reversed the decision of the Court of Appeal that had ruled that the settlement agreement concluded by the employee and the employer had put an end to the State's claim.

As a result of the above and given the current state of the case law, it is no longer advisable for an employee dismissed without notice period and his former employer to conclude a settlement agreement during the course of the proceedings without including the State in this agreement (except in circumstances where the employee would not request unemployment benefits).

It may also be noted that the decision did not take a position on the question as to how the State may in practice pursue in court its demand concerning the reimbursement of provisional unemployment benefits. Indeed, to determine the party (employee or employer) that has to reimburse the State, the relevant Labour Court must beforehand assess whether the dismissal was justified or not. If it is found to be justified, the court will condemn the employee to reimburse. If it is not justified, the Court will condemn the employer to pay. Yet, given the fact that the settlement concluded by the employee and the employer puts an end to their dispute, there will be no further debate between them on that question before the court. It will, therefore, belong to the Labour Courts to decide how to handle this situation in practice.

It may finally be noted that this recent decision, which specifically relates to dismissal without notice, does not seem, in our opinion, to affect the prior position of the Supreme Court and the Court of Appeal that had held that a settlement agreement concluded by an employer and an employee in the context of a dismissal with a notice period puts an end to the proceedings and thus to the State's claim. It however cannot be excluded that the Supreme Court will modify its position in the future.

[56] Supreme Court, 18 March 2004, n° 25/04.

[57] Court of appeal, 6 April 2006, n° 29833.

[58] Supreme Court, 15 July 2010, n° 51710.

Tax

EU Directives and Regulations

Directive 2011/16/EU of 15 February 2011 on Administrative Cooperation in Direct Tax Matters Adoption of the Directive.

The adoption of the directive follows an agreement reached at the ECOFIN Council meeting on 7 December 2010. The directive intends to enable the Member States to combat tax evasion and tax fraud more effectively. The deadline for implementation of the directive into the national laws of the Member States is 1 January 2013 as far as exchange of information upon request is concerned. Moreover, an automatic exchange of information should begin as from 1 January 2015 and may apply only for some categories of income (for further information see the **January 2011 edition of our Luxembourg Legal Update**).

Regulation 5531/11 on the Common System of VAT

At its meeting of 14 and 15 March 2011, the ECOFIN Council adopted a new regulation laying down the rules for the implementation of directive 2006/112/EC (which replaced the so-called "Sixth VAT directive") on the common system of VAT. The new regulation recasts regulation 1777/2005 and should ensure uniform application of the current VAT system by clarifying certain aspects of directive 2006/112/EC, in particular in respect of taxable persons, the supply of goods and services, and the place of taxable transactions.

On 28 March 2011, the Luxembourg VAT authorities issued Circular 753 implementing this new regulation.

Proposal for a Directive on VAT Rules Applicable to Insurance and Financial Services

On 31 March 2011, the Hungarian presidency issued a compromise text on the VAT treatment of insurance and financial services (FISC 26 (directive) and FISC 27 (regulation)). This text was issued further to the debate held by the EU Council on 17 November 2010 which aimed to clarify the VAT rules applicable to insurance services and other financial services.

The compromise text should contribute to the modernisation of the definitions of exempt services.

Proposal for a Directive on the Common Consolidated Corporate Tax Base ("CCCTB")

The EU Commission proposed a common system for calculating the tax base of cross-border companies operating in the EU on 16 March 2011.

The main purpose of this proposal is to significantly reduce the administrative burden and compliance costs that cross-border companies in the EU currently face in having to abide by up to 27 different national systems for determining their taxable profits.

The proposed CCCTB would offer these companies one single set of rules to follow in order to calculate their taxable profits. The CCCTB would be optional rather than compulsory (companies would have to opt-in to the CCCTB for a minimum of five years and in respect of all qualifying subsidiaries).

Under the CCCTB system, cross-border companies should be able to:

- file a single consolidated tax return with one administration for their entire activity in the EU;
- calculate the consolidated tax base of the group under a common set of accounting principles applied independently of national law or accounting rules;[59]
- neutralise the intra-group transactions and thus remove transfer pricing issues and arm's length discussions;
- and re-distribute the consolidated taxable profits of the group to the individual companies on the basis of an agreed pre-set formula based on three equally weighted factors (assets, payroll, sales) so that each company will pay taxes in its own Member State at the relevant tax rate.

If the proposal were to be adopted, EU cross-border companies would presumably have to re-evaluate their EU tax strategy and consider ways in which adjustments might be made in order to optimise their benefits.

However, the introduction of the CCCTB remains subject to the next EU procedural steps. The proposal will be discussed within the EU Council, where the technical and

[59] The tax base is calculated as the company's revenues, minus exempt revenues and other deductions. There is no loss carry-back, but the loss carry-forward is indefinite.

planning aspects will be addressed. Therefore, if the CCCTB was adopted, this may be in an amended form.

General Luxembourg Developments

Circular Letter N°152 *bis*/3 of 31 March 2011
Expansion of the Geographic Scope of the Investment Tax Credit under Article 152 *bis* of the Income Tax Law (ITL)

The granting of an investment tax credit within the meaning of article 152 *bis* ITL is no longer limited to eligible investments permanently located in Luxembourg and physically used on the national territory, but also applies to investments used on the territory of other Member States of the European Economic Area agreement (*i.e.* the 27 EU Member States, Iceland, Liechtenstein and Norway). However, Circular Letter n°152 *bis*/3 (the "Circular") specifies that such investments still must be made by an establishment located in Luxembourg.

The Circular arises from a ruling of the European Court of Justice ("ECJ"), dated 22 December 2010, which states that: *"Article 56 on the Treaty of the Functioning of the European Union is to be interpreted as precluding a provision of a Member State pursuant to which the benefit of a tax credit for investments is denied to an undertaking which is established solely in that Member State on the sole ground that the capital goods, in respect of which that credit is claimed, are physically used on the territory of another Member State."* (for further information see the **January 2011 edition of our Luxembourg Legal Update**).

The Circular will be applicable to all assessments that have not yet been finalised.

Circular Letter N°164/2 *bis* of 8 April 2011
Transfer Pricing Rules for Intra-Group Financing Transactions

The Luxembourg direct tax authorities issued Circular Letter n°164/2 *bis* (the "New Circular") which clarifies the conditions for the application of the initial circular issued on 28 January 2011 (the "Initial Circular") relating to the tax treatment of intra-group financing transactions (see Client Briefing dated February 2011).

Although the Initial Circular gave no date for its entry into force, it was the common understanding of most market players that the rules laid down in the Initial Circular only applied as from January 2011. The New Circular now provides some clarification in this respect (see Client Briefing dated April 2011).

Exempt Tax Status of Management Companies Managing One Single FCP

The Luxembourg tax authorities clarified the tax status of management companies managing a single FCP. These management companies are fully taxable entities and do not benefit from any specific tax regime. This clarification follows the abolition of the Holding 1929 law. Restructuring solutions may help to mitigate potential adverse tax consequences of the conversion into a fully taxable entity and ongoing tax leakage.

Approval of New Double Tax Treaties and Additional Treaty Protocols

On 2 March 2011 the Luxembourg Ministry of Finance submitted to the Parliament a bill providing for the approval of new double tax treaties with Barbados and Panama, as well as for the approval of amendments to several existing double tax treaties with Japan, Sweden, Portugal, San Marino, Hong Kong Special Administrative Region and the People's Republic of China. The new agreements and amendments to existing double tax treaties include an article on information exchange upon request.

This bill is designed to implement the Luxembourg government's plans to modify a certain number of double tax treaties in order to ensure that they comply with the OECD international standards on tax information exchange.

Exclusion of Luxembourg from the Brazilian and Spanish "Black Lists"

On 28 March 2011, the Brazilian tax authorities issued a regulation, which definitely excludes Luxembourg from the list of countries with preferential tax regimes (the decision was taken by the Brazilian authorities further to the abolition of the Holding 1929 tax regime).

In addition, following the entry into force of a protocol modifying the provision on exchange of information in the Luxembourg-Spain double tax treaty, Luxembourg has also been removed from the Spanish tax havens list as from 16 July 2010 (the exchange of information provision in the Luxembourg-Spain double tax treaty complies now with the OECD model).

VAT - VAT Free Zone

The Luxembourg Government has recently presented a bill providing for the setting up of VAT free zones in Luxembourg. The bill introduces a suspension regime with limited tax obligations in terms of VAT, customs and excise duties for goods stored in a free zone. Certain services performed in the VAT free zone should also benefit from this exemption regime. This exemption being a temporary relief, the payment of VAT will occur when the goods exit the VAT free zone.

Such VAT free zones should encourage the development of a logistics industry in Luxembourg.

Circular of the German Ministry of Finance - German Cross Border Workers

On 12 April 2011 the German ministry of finance issued a circular (the "Circular") related to the taxation of employment income earned by German resident employees working in Luxembourg (i.e. German cross border workers). The aim of the Circular is to address the current uncertainty with regard to the application of the German-Luxembourg double tax treaty to such employees.

Based on the Circular, German tax offices have been requested to suspend tax assessment for German cross border workers, who only have taxable income in Germany due to the performance of "*non-productive*" workdays outside of Luxembourg (e.g. training, sickness leave, vacation…). The suspension of tax assessment relates to tax years up to 2010.

Case Law

Administrative Court of Appeal 6 January 2011 Liabilities of Managers

According to paragraph 103 and subsequent paragraphs of the *Abgabenordnung* (General Tax Law), a legal representative of a Luxembourg company (including both *de facto* and *de jure* managers) must fulfil all the tax obligations applicable to a Luxembourg company towards the Luxembourg tax authorities.

The Administrative Court of Appeal[60] confirmed that a legal representative may be held jointly and severally liable in case of the wrongful violation (*inexécution fautive*) of the company's obligations leading to a reduction of the tax legally due (such as the failure to withhold withholding tax). In the case before the court, a representative was held jointly and severally liable with the company for the payments of the withholding tax on salaries that should have been paid to the company's employees.

Administrative Court 27 January 2011 Determination of the Global Tax Rate

In a case before the Administrative Court[61], a Belgian resident had opted to be assimilated as a Luxembourg resident for income tax purposes. He argued that only the net amount of his spouse's Belgium income should be taken into account for the determination of the global tax rate (which only applies to his Luxembourg source income).

The court confirmed that foreign source income must be taken into account after deduction of costs and expenses admitted by the Luxembourg tax law in order to determine the global tax rate.

European Court of Justice 10 March 2011 VAT Exemption of Underwriting Fees

The ECJ[62] confirmed the VAT exemption of services supplied by a credit institution in the form of an underwriting guarantee to a company issuing shares. The exemption applies where, under that guarantee, the credit institution undertakes to acquire the shares which are not subscribed within the period for share subscription.

The ECJ applied the criteria developed in the CSC Financial Services case law. According to this case law, transactions in securities within the meaning of Article 13B(d)(5) of the Sixth Directive refer to transactions which are liable to create, alter or extinguish parties' rights and obligations in respect of securities. The ECJ confirmed that the underwriting guarantee meets the requirements laid down in the CSC case law and must therefore benefit from the VAT exemption.

Administrative Court of Appeal 7 April 2011 Debt Waiver

Recent case law[63] relating to debt waivers[64] has described the conditions required by the tax authorities in order to

[60] Administrative Court of Appeal, 6 January 2011, n° 27126 C.

[61] Administrative Court, 27 January 2011, n° 26106.

[62] ECJ, 10 March 2011, C-540/09.

[63] Administrative Court of Appeal, 7 April 2011, 27616 C.

[64] *Gain d'assainissement.*

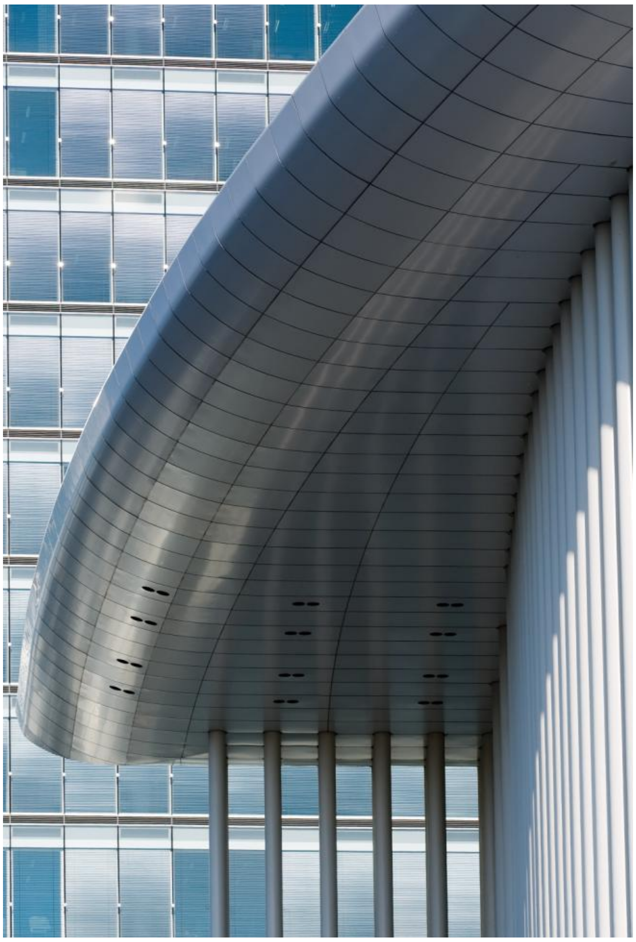
benefit from article 52 ITL providing for the exemption of "*gain d'assainissement*" (see the **January 2011 edition of our Luxembourg Legal Update**).

In this case law, the taxpayer did not formally claim before the tax authorities that the gain resulting from a debt waiver should be excluded from the taxable income according to article 18 ITL (*i.e. notion d'apport caché*). Even if it was not formally claimed by the taxpayer, the court confirmed that the tax authorities should have analysed the case in the light of the said article 18.

Based on the specific factual background, the court will hence have to establish whether the waiver granted by a shareholder/creditor could be tax exempt by application of article 18 ITL.

Administrative Court of Appeal 28 April 2011
Tax Unity

The Administrative Court of Appeal[65] confirmed its position on horizontal tax unity denying the application of article 164 *bis* ITL to Luxembourg sister companies held by a Belgian resident company (see the **January 2011 edition of our Luxembourg Legal Update**).



[65] Administrative Court of Appeal, 28 April 2011, n° 27626 C.

CLIFFORD CHANCE

We have the pleasure to announce the appointment of three new counsels in our banking, corporate and litigation practices:

Stefanie Ferring

Stefanie Ferring joined the Banking & Finance team of Clifford Chance in April 2004. She has been a member of the Luxembourg Bar since May 2004. Stefanie specialises in acquisition finance, fund financing and real estate finance, acting for lenders and borrowers in cross border and local transactions, as well as general financing and structured finance. Stefanie also works on regulatory, insolvency and restructuring matters, including restructuring work involving financial institutions.

François Lerusse

François Lerusse joined the Corporate M&A practice of Clifford Chance in 2007. François' practice focuses on general corporate and financial transactions, with particular emphasis on cross-border mergers and acquisitions and leveraged buyouts. He regularly advises on international restructuring matters for clients in Europe, the United States and Asia. François previously worked for two Big 4 audit firms and is a member of the Brussels Bar.

Claude Eischen

Claude Eischen joined the Litigation and Dispute Resolution team of Clifford chance in April 2004. He has been a member of the Luxembourg Bar since May 2004. Claude specialises in commercial and banking dispute resolution. He focuses on advisory and negotiation of contractual matters for banks, companies and institutions, as well as litigating claims before all Luxembourg courts. Claude also has experience in employment law.

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