CLIFFORD CHANCE

Luxembourg Legal Update

January 2012

contents

If you would like to know more about the subjects covered in this publication or our services, please contact:

Christian Kremer
François-Xavier Dujardin
Claudie Grisius
Joelle Hauser
Steve Jacoby
Marc Mehlen
Albert Moro

Telephone: +352 48 50 50 1

To email one of the above, please use
firstname.lastname@cliffordchance.com

2-4 Place de Paris, B.P. 1147, L-1011 Luxembourg, Grand-Duché de Luxembourg

www.cliffordchance.com

Banking, Finance & Capital Markets

Legislation

Law of 28 October 2011

Implementation of the Credit Rating Agency Regulation

This new law implements article 36 of the Credit Rating Agency Regulation[1] by specifying the administrative sanction powers that the CSSF[2] or the Commassu[3] have vis-à-vis persons or entities subject to their supervision, which for regulatory purposes are obliged to use credit ratings issued by credit rating agencies established within the EU and registered in accordance with the Credit Rating Agency Regulation.

The sanction powers the CSSF has vis-à-vis persons subject to its supervision are extended to issuers, offerors or persons asking for admission to trading on a regulated market who breach their obligation under article 4 (1) of the Credit Rating Agency Regulation to include clear and prominent information whether or not the credit rating to which reference is made in the prospectus is issued by a credit rating agency established within the EU and registered in accordance with the Credit Rating Agency Regulation.

The new law also introduces a provision into the Financial Sector Law permitting the CSSF to impose appropriate capital requirements above the minimum requirement to a specific credit institution or investment firm to take into account the specific risks such credit institution or investment firm is exposed to. The CSSF may now also force a credit institution or investment firm to use net profits to strengthen its capital base. The law also implements Directive 2009/49/EC for the insurance sector.

As to further innovations introduced by this new law regarding remuneration policies and practices to be applied by credit institutions or investment firms, we kindly refer you to the **Employment** section.

[1] Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies.

[2] *Commission de surveillance du secteur financier,* Luxembourg supervisory authority of the financial sector.

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

Bill N° 6366
Family Offices

The Luxembourg Parliament is currently examining a new bill for the introduction of a dedicated regulatory framework for family office activities. The bill covers professional activities of advice or estate related services provided to individuals, families or their investment vehicles.

The bill currently envisages that only credit institutions, investment advisors, portfolio managers as well as certain other types of financial professionals or other regulated professions (e.g. lawyers or auditors) may use the denomination of and exercise the activity of a family office. A specific licence for family office activities will be introduced into the Financial Sector Law. The bill also sets out family office obligations regarding the fight against money laundering and terrorism financing, professional confidentiality and remuneration transparency.

Bill N° 6327
Dematerialisation of Securities

The Luxembourg Parliament is currently examining a bill amending various Luxembourg laws, in order to introduce a general regime for the dematerialisation of securities.

The aim of this bill is to modernise Luxembourg securities law by introducing the possibility for Luxembourg companies to issue dematerialised equity securities and for any issuer to issue dematerialised debt securities governed by Luxembourg law. While the ownership of units and shares issued in registered or bearer form and their transfer shall continue to be governed by the Companies Law[4], ownership and transfer of dematerialised units or shares shall be governed by the law of 1 August 2001 on the circulation of securities (as amended by the present bill).

The bill proposes a comprehensive legal framework applicable to securities issued in dematerialised form and introduces, besides the clearing institution (*organisme de liquidation*) as an account holder, the new central securities depository (*teneur de compte central*), category of professional of the financial sector, into the Financial Sector Law. Only Luxembourg credit institutions or investment firms, or Luxembourg branches of EU/EEA credit institutions or investment firms, are eligible to obtain a central securities depository license as a special license in addition to their existing license.

[4] Luxembourg law of 10 August 1915 on commercial companies

This new legal framework will, however, not affect existing *de facto* dematerialisation practices, e.g. the practice of issuing temporary global certificates in bearer form deposited physically with a depository and representing securities transferrable by way of book entry.

In addition, the bill does not impose a mandatory dematerialisation of the securities, but instead limits itself to providing certain procedural rules and requirements for conversion if the issuer decides to dematerialize its securities. The possibility to convert and the modalities for the conversion of equity securities or investment fund units in bearer or registered form into equity securities in dematerialised form need to be foreseen in the articles of association or management regulations of the issuer.

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

Bill N° 6319
Amendments to Prospectus Law and Transparency Law – Implementation of Directive 2010/73/EU

The Luxembourg Parliament is currently further examining a bill amending the Prospectus Law[5] and the Transparency Law[6] by implementing into national law Directive 2010/73/EU[7] (which has amended the Prospectus Directive[8] and the Transparency Directive[9]).

Major changes to the Prospectus Law include:

- a reduction in the amount of information that needs to be provided in case of public offers or admissions to trading on a regulated market of securities by small and mid-sized companies or of securities that benefit from an EU member state guarantee;
- adaptation and standardisation of the format and content of the prospectus summary;
- clarification of exemptions from the obligation to publish a prospectus in cases where undertakings use intermediaries to sell the securities or attribute shares to their employees;
- harmonisation of the definition of qualified investor in the Prospectus Directive with the notions of *"professional client"* and *"eligible counterparty"* in the MiFI Directive[10;]
- abolition of the obligation of securities issuers to provide an annual document containing or mentioning the information they have published during the last twelve months to comply with EU and national securities laws and regulations;
- adaptation of certain thresholds to market reality. For example, the threshold between retail and professional investors has been increased from EUR 50,000 to EUR 100,000.

These changes also apply to offers of securities which are outside the scope of the Prospectus Directive.

The Transparency Law modifications also include an increase of the threshold from EUR 50,000 to EUR 100,000 to make a distinction between retail and professional investors.

The bill is intended to enter into force on 1 July 2012. A few provisions are however expected to enter into force on the day of publication of the law in the *Memorial* in order to permit those persons concerned to benefit from certain provisions of Directive 2010/73/EC as soon as possible. These provisions of immediate application concern, for example, the abolition of the issuer obligation to provide an annual document or certain increased thresholds to benefit from an exemption from the obligation to publish a prospectus, e.g. offers of securities addressed to less than 150 (currently 100) persons other than qualified investors per Member State.

Regulatory Developments

CSSF Circular 11/521
Conduct of Business Rules and Control by External Auditors

The CSSF has issued a new Circular amending and supplementing certain provisions of its Circular 01/27 relating to practical rules concerning the role of approved statutory auditors (*réviseurs d'entreprises agréés*). The new Circular updates and widens the scope of control to be carried out by the external auditors of a Luxembourg

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

[6] Law of 11 January 2008 on transparency obligations concerning information on issuers whose securities are admitted to trading on a regulated market.

[7] Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.

[8] Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC.

[9] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC.

[10] Directive 2004/39/EC of the European Parliament and of the Council dated 21 April 2004 on markets in financial instruments.

credit institution or a Luxembourg branch of a non-EU/EEA credit institution. Going forward, they will also be required to control compliance with conduct of business rules other than conduct of business rules arising under the MiFI Directive and the application of related internal procedures. Such other conduct of business rules include payment services conduct of business obligations.

CSSF Circular 11/528
Abolition of Transmission of Suspicious Transaction Report Copies to the CSSF

This circular dated 15 December 2011 in principle abolishes the obligation that professionals supervised by the CSSF and subject to AML legislation transmit a copy of any suspicious transaction reports made to the CRF[11] concurrently to the CSSF. The abolition is based on the fact that the CSSF and the CRF closely cooperate and exchange appropriate information concerning suspicious transaction reports.

However, professionals supervised by the CSSF will have to continue to provide a copy to the CSSF if the suspect is a professional subject to CSSF's supervision or is, to the knowledge of the reporting professional, an employee or board member of a professional subject to CSSF's supervision, or if the reported information is capable of having a wider impact on the financial sector.

Update of CSSF Questions and Answers relating to PFS

The CSSF has published on its website an updated version of its "*Questions and Answers*" Paper relating to PFS[12]. The update takes into account the legal and regulatory developments since the first version was published in 2010 (see the **January 2011 edition of our Luxembourg Legal Update**). It further introduces clarifications and innovations relating to:

- the competent authority to authorize amendments to a PSF's statute or a new PSF statute,
- the withdrawal of a PFS licence,
- the absence of licence requirements for the establishment of a Business Continuity Centre,
- licence requirements for trade repositories (*référentiels centraux*),
- legal persons as members of a PSF's board,
- the provision of compliance services to a UCITS management company by a PSF licensed as a professional providing company constitution and management services.

The updated version also extends and specifies the information that needs to be included in a PFS licence application, which now includes detailed information relating to IT policy and infrastructure, outsourcing arrangements, business continuity plans and disaster recovery plans.

[11] *Parquet du tribunal d'arrondissement de Luxembourg, Cellule de Renseignement Financier*, the department of the Luxembourg state prosecutor competent for AML.

[12] *Professional of the financial sector other than a credit institution and subject to CSSF's supervision in accordance with the Financial Sector Law.*

Payment Institutions and Electronic Money Institutions

CSSF Circular 11/520
Central Administration and Infrastructure Requirements for Electronic Money Institutions

The CSSF has issued a new Circular specifying the central administration and infrastructure requirements applicable to electronic money institutions. In particular, it sets forth that the principles and provisions as regards central administration and infrastructure applying to Luxembourg credit institutions and investment firms now apply *mutatis mutandis* to electronic money institutions.

CSSF Circular 11/522
Periodic Reporting Requirements for Electronic Money Institutions

This CSSF Circular sets forth the periodic reporting requirements for electronic money institutions vis-à-vis the CSSF. The circular includes respective reporting tables and related instructions, including on the financial situation of the electronic money institution and its shareholders

CSSF Circulars 11/523 and 11/524
External Audit of Local Activity of Foreign Payment and Electronic Money Institutions

Circular 11/523 specifies the obligations of EU/EEA payment institutions acting through a Luxembourg branch or agent with respect to the external audit of such branch or agent. The scope of the mandate of the external auditor includes in particular annual control of compliance with Luxembourg AML/CTF legislation and payment services conduct of business rules for which the CSSF is competent in its capacity as host member state authority.

Circular 11/524 applies to EU/EEA electronic money institutions acting through a Luxembourg branch or agent or a person through which an EU/EEA money institution intends to distribute or repay electronic money in Luxembourg. The control of the Luxembourg branch by an external auditor also extends to control of the relevant Luxembourg host member state provisions on the issuing and repayment of electronic money as well as on the prohibition of interest on electronic money. The external auditor's control is limited to compliance with applicable Luxembourg AML/CTF legislation.

CSSF Press Release dated 16 September 2011
Licensing and Passporting Forms for Electronic Money Institutions

In a recent press release the CSSF has published the forms that must be used for applications to obtain a license as a Luxembourg electronic money institution. The press release also publishes a form that must be used by an electronic money institution intending to use an agent. The CSSF also published other forms that must be used concerning EU/EEA passporting by a Luxembourg electronic money institution, either for the establishment of a branch, the free provision of services or the use of agents and intermediaries in another Member State.

Case Law

Court of Appeal, 4 May 2011
Proof of a Transfer Order and Tacit Ratification of a Bank Transfer Due to the Account Holder's Silence

A bank had transferred money from a client's account to a third party. The client asked for damages on the basis that he had not instructed the bank to do so and also demanded to have his account recredited. The bank argued that it had received the client's order by telephone.

In a recent decision[13], the Court recalled that against a non-merchant client, proof of a contract must be given according to the civil law rules (if the transfer involves an amount above EUR 2,500, proof must be given in writing). The testimony of the bank's employee certifying that he had received a telephone order from the client was therefore not sufficient as proof.

The client's claim was however rejected because the bank's general terms and conditions contained a clause stating that the client was bound to make any claim in relation to a specific transaction in writing within 30 calendar days from the receipt of the account statement. As the client failed to make such a claim within this period, it was deemed to have approved the operations stated in the documents addressed to him.

Here, the bank and its client had agreed that the client elected domicile for its correspondence at the registered office of the bank. With regard to this clause, any mail was deemed to have been received by the client on the date indicated on said correspondence. The court considers that clients should regularly inform themselves of the status of their bank accounts[14]. Such contractual clauses are valid if they have been agreed freely by the parties at the time of opening the account, they do not depend on the will of either party (in this case the bank) and they do not establish an imbalance to the detriment of the client.

[13] Court of Appeal, 4 May 2011, n° 34452.
[14] See also, Court of Appeal, 25 June 2009, n°33124 (see **May 2011 edition of our Luxembourg Legal Update**).

The court considered that ratification of an agent's acts covered them whether they fell out of the limits of its power of attorney, whether they were made with an invalid power of attorney or whether they were made even without such power. The approval of the account statements is a ratification covering the transfer made by the bank on behalf of its client.

Against this background, the court ruled that there was tacit ratification of the transaction as the client had failed to challenge the contentious operation within the period set out by the general terms and conditions. Thus the client could not base his claim on the lack of the bank's power to make the contested payment.

Corporate, M&A

Legislation

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

Bill N° 5978
Squeeze-out and sell-out

The Luxembourg Parliament is currently examining a bill relating to squeeze-out and sell-out procedures for companies whose securities are listed or have been listed for trading on a regulated market.

The aim of the bill is to implement in Luxembourg (i) a squeeze-out process pursuant to which shareholders holding 95 % of the share capital and 95 % of the voting rights of a Luxembourg company may force the minority shareholders to sell their remaining shares in the company, as well as (ii) a sell-out process making it possible for minority shareholders to require the purchase of their shares by a shareholder holding 95 % of the share capital and 95 % of the voting rights of the Luxembourg company.

These new procedures shall be under the supervision of the CSSF, which may have a significant role in the determination of the fair price for the shares to be sold or repurchased.

Scope of the Bill

The new squeeze-out and sell-out procedures shall not apply to all Luxembourg companies but shall be reserved to Luxembourg companies whose securities (*i.e.* shares with voting rights and certificates representing share capital with voting rights attached thereto):

- are listed on a Member State regulated market;
- have been listed on a Member State regulated market, and have not listed on such regulated market for more than 5 years;
- have been subject to a takeover bid, for which a prospectus has been published in accordance with applicable laws or an exemption of publication has been obtained, provided that such takeover bid was not started for more than 5 years beforehand.

The bill however contains a transitory provision which effectively allows recourse to these new procedures to Luxembourg companies which have been delisted after the end of 1990, provided that these procedures are initiated within a period of three years after the entry into force of the bill.

Notification Requirement

The draft bill creates requirements for notification and reporting to the CSSF. According to the provisions of the bill:

- a Majority Shareholder (*i.e.* a natural or legal person, who holds, alone or with persons acting in concert with him, directly or indirectly, shares representing 95% of the capital carrying voting rights and 95% of the voting rights in the company); or
- a Majority Shareholder who has gone under the 95 % threshold mentioned above; or
- a Majority Shareholder who proceeds to an additional acquisition of shares in the company;

has an obligation to notify the company and the CSSF, as soon as possible and within 4 days after the occurrence of one of the above situations, with the following information:

- the exact percentage of its shareholding in the company;
- a description of the transaction which has led to this mandatory notification;
- the date at which this transaction occurred;
- its identity; and
- the form of its shareholding (*e.g.* direct and indirect participation in the company).

The CSSF may require other relevant information to be provided.

The Squeeze-out Procedure

The squeeze-out procedure allows shareholders holding 95 % of the share capital and 95 % of the voting rights of a Luxembourg company to force the minority shareholders to sell their remaining shares in the company to them, against the payment of a cash compensation. In the event of issuance of different classes of shares, the squeeze-out procedure may only apply to certain classes of shares.

The squeeze-out procedure is initiated by the Majority Shareholder informing the CSSF of its intention to benefit from the squeeze-out procedure and undertaking to complete the purchase of the remaining shares. Then it shall inform the company so that all shareholders will be aware of the transaction in a manner which does not discriminate between the shareholders. The information transmitted to the company shall contain at least the following elements:

- the identity of the Majority Shareholder;
- the name of the independent expert which shall be in charge of determining the cash compensation for the shares to be repurchased;
- the payment terms of such cash compensation; and
- the other conditions precedent for completing the squeeze-out process.

The squeeze-out has to be executed at a fair price determined by an independent expert (appointed by the Majority Shareholder) through objective valuation methods. The fees related to the independent expert shall be borne by the Majority Shareholder. The fair price shall be transmitted by the Majority Shareholder to the CSSF within one month after the notification of its intention to start the squeeze-out procedure. The fair price is then communicated to the company and published.

The remaining shareholders may object to the price proposed during a period of one month following the publication of the price. In the absence of objection, the price is accepted by the CSSF and the Majority Shareholder shall publish a notice related to the terms of payment of the fair price.

In case of an objection, a new independent expert may be appointed by the CSSF to determine the fair price of the shares to be transferred. The fees related to the independent expert shall be borne by the Majority Shareholder. The CSSF decides whether the price is fair, and it publishes the price. As a matter of fact, no sell-out can be introduced when a squeeze-out has not been completed yet.

The Sell-out Procedure

The sell-out procedure allows minority shareholders of a Luxembourg company to require the Majority Shareholder to purchase their shares at a fair price, provided that such minority shareholders have informed the CSSF of their intention to have their shares repurchased and that the last sell-out process concerning the Luxembourg company was launched not less than 2 years ago.

The sell-out procedure is quite similar to the one applicable to a squeeze-out. The minority shareholder shall inform the Majority Shareholder of its intention to benefit from the sell-out procedure. The information transmitted to the Majority Shareholder shall contain at least the following elements:

- the identity of the minority shareholder exercising the sell-out procedure; and
- the evidence of property of the shares held by the minority shareholder, as well as the number of shares held by such minority shareholder.

The sell-out has to be executed at a fair price determined by an independent expert appointed by the Majority Shareholder using objective valuation methods. The fees related to the independent expert shall be borne by the Majority Shareholder. The fair price is transmitted by the Majority Shareholder to the CSSF within one month after the notification by the minority shareholder of its intention to start the sell-out procedure. The fair price is then transmitted to the company and published.

The minority shareholder may contest the price proposed during a period of one month following to the publication of the price. In the absence of an objection, the price is accepted by the CSSF and the Majority Shareholder shall publish a notice related to the modalities of payment of the fair price.

In case of an objection, a new independent expert may be appointed by the CSSF to determine the fair price of the shares to be transferred. The fees related to the independent expert shall be borne by the Majority Shareholder. The CSSF resolves if the price is fair, and will publish the price.

Supervision by the CSSF

The CSSF shall be the competent authority in Luxembourg for the supervision of these two procedures. In order to ensure compliance with the provisions of the future law, the CSSF shall have several powers and means for the purpose of efficiently executing its mission such as, *e.g.*:

- asking for additional information from shareholders, companies, persons acting in concert, statutory auditor or *Réviseur d'entrepise agréé*;
- refusing or suspending a squeeze-out or a sell-out procedure launched in violation of law; and
- punishing certain violations of the provisions of the law by fines (EUR 125 to EUR 125,000) and/or prison (8 days to 5 years).

This new law shall probably enter into force around May-June 2012.

Circular

RCSL Circular 11/3
Liquidation of Companies

The RCSL Circular 11/3 issued on 21 October 2011 by the Register of Commerce clarifies the position currently adopted by the RCSL[15] regarding the opening of a liquidation of a Luxembourg company.
Thus, the RCSL considers that the decision of the shareholders to voluntarily liquidate a Luxembourg company has a definitive effect and cannot be revoked at a further stage by the shareholders of the company. Therefore, the RCSL now clearly specifies that it will not accept the filing of shareholders' decisions deciding to revoke the opening of a voluntary liquidation of a Luxembourg company.

Case Law

European Court of Justice, 20 October 2011
Transfer of a Company's Centre of Main Interest

In a case where a company has moved its registered office from one Member State to another before becoming insolvent, the ECJ[16] has clarified the rules on certain issues regarding the construction of the Insolvency Regulation:

- Where is a company's centre of main interests (COMI), within the meaning of article 3(1) of the Insolvency Regulation?
- When is a company's COMI deemed to be transferred from one Member State to another?
- What sort of activity is required in a Member State for its courts to have jurisdiction to open secondary insolvency proceedings?

Regarding the first question, and following the principles established in an earlier decision[17], the ECJ defines the elements required to identify a company's COMI.

The COMI is presumed to be where the registered office is. This presumption cannot be rebutted if the "*bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions of the company are taken, in a manner that is ascertainable by third parties, in that place*". However, this presumption can be rebutted if the former conditions are not met and if it is shown that the company's "*actual centre of management and supervision and of the management of its interests*" is situated in a different Member State. In this view, the ECJ sets out certain criteria:

- the factors which show that the company's *central administration* is somewhere else must be both *objective* and *ascertainable*;
- a factor is *ascertainable* if it is in the public domain and can thus be known and verified by third parties; and
- the presence of assets in another Member State and the existence of contracts entered into in this Member State may be regarded as objective and ascertainable factors, but they are not sufficient to rebut the presumption.

Regarding the second question, the court holds that the relevant date for determining the COMI is the date on which "*a request to open insolvency proceedings is lodged*". Thus, "*where a debtor company's registered office is transferred before a request to open insolvency proceedings is lodged, the company's centre of main activities is presumed to be the place of its new registered office*". Consequently, where the registered office is moved after the relevant date, the courts of the first Member State have jurisdiction.

The third question regards the opening of secondary proceedings in accordance with article 3(2) of the Insolvency Regulation. Such an opening is only possible if the company has an "*establishment*" in the relevant Member State. An establishment supposes "*a non-transitory economic activity with human means and goods*" and according to the ECJ, the company must have "*a structure consisting of a minimum level of organisation and a degree of stability necessary for the purpose of pursuing*

[15] Register of Commerce and Companies Luxembourg.

[16] ECJ, 20 October 2011, C-396/09 (Interedil Srl).

[17] ECJ, 2 May 2006, C-341/04 (Eurofood IFSC).

an economic activity". The presence alone of goods, assets or bank accounts is not sufficient to retain the qualification of establishment.

Court of Appeal, 6 July 2010 & 12 July 2011
Non-publication of Annual Accounts

According to articles 79 of the RCSL law and 163 of the Companies Law, companies have to publish their accounts at least once per year, at the latest, 7 months after the end of the business year. Directors who do not respect these rules can be held criminally liable.

In a first case, the Court[18] held that the existence of a criminal offense required a material element and a moral element. It is necessary that there has been a transgression of a rule, and this transgression has to happen consciously and freely. The person not respecting a rule could thus assert that it has not been free in its decision and thus has had to transgress the rule.

In the case at hand, the directors assert that they respected the internal rules of their employer and that they had material difficulties getting the annual accounts approved as it had been particularly difficult to reach the shareholders of several companies, so that no annual meetings could be organised.

It appeared however that the delays were due to the fact that the directors started the proceedings in preparation of the annual accounts too late, which is the directors' responsibility only. Furthermore, the courts held that in their capacity as directors of commercial companies they could not invoke the internal rules of their employer to justify their negligence. In fact, in their capacity as directors they have to respect the law, and they are not subject to the internal rules of their employers.

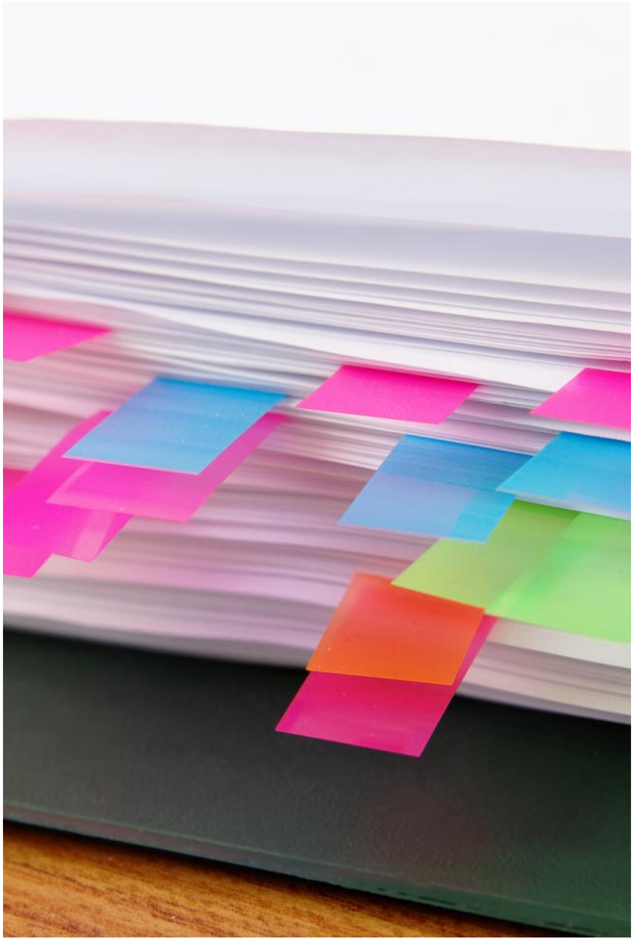
In a second, similar case[19], the defendants raised different arguments. They mainly asserted that the prosecution of directors not publishing the annual accounts was not systematic, and pointed to a ministerial circular addressed to the head of the RCSL which set out a grace period. For these reasons, they considered that the proceedings against them were arbitrary and thus contrary to articles 6 and 7 of the European Convention on Human Rights.

The Court held that even if not all breaches of the rules regarding publication of the annual accounts were prosecuted, the proceedings could not be deemed to be arbitrary mainly for two reasons: (i) the defendants have been directors in a number of companies which have not respected the legal requirements and (ii) these companies were domiciled with professionals.

Court of Appeal, 12 July 2011
Legal Personality after the Closing of Bankruptcy Proceedings

The Court of Appeal[20] has recently answered the question as to whether the closing of bankruptcy proceedings of a commercial company automatically entailed the loss of its legal personality.

According to the Court, in the absence of any legal provision, even if the bankruptcy proceedings of a company end with it being wound up or with the assignment of all its assets (*abandon d'actif*), it does not automatically lose its legal personality. It still exists until the publication of the winding up, and even until the company's dissolution (*dissolution*) has been voted or pronounced.



[18] Court of Appeal, 6 July, n°307/10 V.
[19] Court of Appeal, 12 July 2011, n° 380/11 V.
[20] Court of Appeal, 12 July 2011, n° 380/11 V.

Funds & Investment Management

Legislation

Bill N°6318
Specialised Investment Funds

As indicated in **the September 2011 edition of our Luxembourg Legal Update**, bill N°6318 proposing amendments of the 2007 Law[21] was adopted by the Luxembourg Government Council on 1 July 2011 and introduced to the Luxembourg Parliament (*Chambre des Députés*) on 12 August 2011.

On 6 October 2011, the bill was referred to the Finance and Budget Committee (*Commission des Finances et du Budget*). The State Council (*Conseil d'Etat*) delivered its opinion on 6 December 2011.

Clifford Chance has prepared a **client briefing** which provides an overview of the main changes to the 2007 Law brought about by the bill and its impact for SIFs.

Regulatory Developments

CSSF Newsletter N° 130
CSSF Requires Prospectus Disclosure Regarding the Use of Nominees

In its **Newsletter N° 130** published on 23 November 2011 (pages 3 and 4), the CSSF requires UCITS subject to Part I of the 2010 Law and other UCIs[22] subject to Part II of the 2010 Law to include in their prospectuses a paragraph on the legal status of investors investing through a nominee. The text of such paragraph shall be worded as follows (to be adapted in accordance with the legal form of the UCITS or other UCIs):

"*The [investment company, FCP, UCI(TS)/management company] draws the investors' attention to the fact that any investor will only be able to fully exercise its investor rights directly against the UCI(TS), [beside others the right to participate at general shareholder meetings - for UCI(TS) incorporated in form of an investment company] in the event the investor is registered himself and in its own name in the shareholder register [for UCI(TS) incorporated in form of an investment company] / in the unitholder register [for UCI(TS) incorporated in form of an FCP] of the UCI(TS). In cases where an investor invests in the UCI(TS) through an intermediary investing into the UCI(TS) in its own name but on behalf of the investor, it may not necessarily be possible for the investor to exercise certain shareholder rights [for UCI(TS) incorporated in form of an investment company] or unitholder rights [for UCI(TS) incorporated in form of an FCP] directly against the UCI(TS). Investors are advised to take advice on their rights*."

Newsletter N° 130 also provides French and German versions of this paragraph.
This paragraph must from now on be included in prospectuses of newly created UCITS or other UCIs. Existing UCITS or other UCIs may include this paragraph in their prospectuses when the next prospectus update is undertaken, however, they must be amended to include that paragraph at the latest by 30 June 2012.

CSSF Circular 11/512
Amendment of CSSF Circular 08/356

CSSF Circular 08/356 dated 4 June 2008 on rules applicable to undertakings for collective investment when they employ certain techniques and instruments relating to transferable securities and money market instruments was amended by CSSF Circular 11/512 relating to UCITS risk management (with regard to other revisions brought about by CSSF Circular 11/512 please refer to our **client briefing** in that respect). The amendments to CSSF Circular 08/356 concern the limits for risk exposure to a single counterparty as well as the risk diversification of cash collateral received by the UCITS in the context of securities lending transactions, sale with right of repurchase transactions and/or reverse repurchase/repurchase transactions.

Modification of the Counterparty Risk Limitation

CSSF Circular 08/356 provided that the risk exposure to a single counterparty of the UCITS arising from one or several securities lending transactions, sale with right of repurchase transactions and/or reverse repurchase/repurchase transactions should not exceed 10% of its assets when the counterparty was a credit institution having its registered office within the European Economic Area (EEA) or in a third country whose prudential rules were considered by the CSSF as equivalent to those laid down in EU law, or 5% of its assets in other cases.
These specific limits of 5% or 10% are no longer applicable. Instead, the net exposures (i.e. the exposures of the UCITS less the collateral received by the UCITS) to a counterparty arising from the above-mentioned transactions shall now be taken into account in the 20% limit provided for in Article 43(2) of the 2010 Law. As a reminder, Art. 43 (2) of the 2010 Law lays down a limit of

[21] Luxembourg law of 13 February 2007 (as amended) relating to SIFs.
[22] Undertakings for Collective Investment.

20% for the combined investments in a single body through transferable securities or money market instruments issued by that body, deposits made with that body and exposures arising from OTC derivative transactions undertaken with that body.

New Risk Diversification Requirement for Reinvestment of Cash Collateral

CSSF Circular 08/356 provided that the reinvestment of cash received as a guarantee was not subject to the diversification rules generally applicable to UCITS. UCITS were only required to avoid an excessive concentration of their reinvestments, both at the issuer level and at the instrument level (which requirement did not apply to collateral provided in the form of shares or units in money market funds subject to certain conditions or to certain short-term government bonds).
This provision is replaced by the requirement that exposures arising from the reinvestment of collateral received by the UCITS within securities lending transactions, sale with right of repurchase transactions and reverse repurchase agreement transactions/ repurchase agreement transactions shall be taken into account within the diversification limits applicable under the 2010 Law.

AIFM Directive: ESMA Publishes Final Advice on Implementing Measures

On 16 November 2011, ESMA[23] published its final advice (ESMA/2011/379) to the EU Commission on possible measures implementing the AIFM Directive[24] (ESMA's Final Technical Advice).

Background

After a political compromise was reached on the final text of the AIFM Directive, in December 2010, the EU Commission sent a request to CESR[25] (now ESMA) for technical advice on the measures implementing for the Alternative Investment Fund Managers Directive.

As further detailed in the **December 2010** and **April 2011** editions of our Luxembourg Quarterly Update, the EU Commission's request for advice was divided into four sections:

- Part I covers general provisions of the AIFM Directive, authorisation and operating conditions for AIFMs26;
- Part II covers provisions relating to depositary requirements;
- Part III covers provisions relating to transparency requirements and leverage; and
- Part IV covers provisions relating to the supervision of AIFMs, including third-country AIFMs.

On 13 July 2011, ESMA published a consultation paper (ESMA/2011/209) setting out its proposals for the detailed measures implementing the AIFM Directive covering Parts I, II and III of the EU Commission's request for assistance, to which amongst others EFAMA[27] and ALFI[28] replied.

On 23 August 2011, ESMA published a consultation paper (ESMA/2011/270) covering Part IV of the EU Commission's request for assistance and setting out its proposals for the detailed rules on supervision and third-country under the AIFM Directive, to which EFAMA and ALFI also replied.

Overview of the Implementation Measures Proposed by the ESMA's Final Technical Advice

ESMA's Final Technical Advice covers four broad areas:

General Provisions for Managers, Authorisation and Operating Conditions

The first part (pages 16-135) of the ESMA's Final Technical Advice clarifies the operation of the thresholds that determine whether a manager is subject to the AIFM Directive. ESMA proposes to require AIFMs to have additional own funds and/or professional indemnity insurance to cover risks arising from professional negligence. Many of the rules in this section, such as on conflicts of interest, record keeping and organisational requirements are based on the equivalent provisions of the MiFID[29] and UCITS[30] frameworks.

Governance of AIFs' depositaries

This part of the ESMA's Final Technical Advice (pages 136-187) sets out the framework governing depositaries of

[23] European Securities and Markets Authority.
[24] Directive of the European Parliament and of the Council on Alternative Investment Fund Managers.
[25] Committee of European Securities Regulators (replaced by ESMA).
[26] Alternative Investment Funds Managers.
[27] European Fund and Asset Management Association.
[28] Association of the Luxembourg Fund Industry.
[29] Market in Financial Instruments Directive.
[30] Undertakings for Collective Investment in Transferable Securities.

AIFs[31]. Key issues include the criteria for assessing whether the prudential regulation and supervision applicable to a depositary established in a third country has the same effect as the provisions of the AIFM Directive. ESMA has identified a number of criteria for this purpose, such as the independence of the relevant authority, the requirements on eligibility of entities wishing to act as depositary and the existence of sanctions in the case of violations.

Another crucial point is the liability of depositaries, the first element of which relates to the circumstances in which a financial instrument held in custody should be considered as "lost". This assessment is crucial in determining whether a depositary must subsequently return an asset. ESMA's Final Technical Advice proposes three conditions, at least one of which would have to be fulfilled in order for an asset to be considered lost. These are that a stated right of ownership of the AIF is uncovered to be unfounded because it either ceases to exist or never existed ; the AIF has been permanently deprived of its right of ownership over the financial instruments ; or the AIF is permanently unable to directly or indirectly dispose of the financial instruments. Another important concept which ESMA's Final Technical Advice aims to clarify relates to which events would constitute external events beyond the reasonable control of the depositary. Finally, the advice clarifies the objective reasons that would allow a depositary to contractually discharge its liability.

Transparency Requirements and Leverage

One of the key objectives of the AIFM Directive is to help prevent the build-up of systemic risk. To help achieve this aim, ESMA's Final Technical Advice clarifies (pages 188-239) the definition of leverage, how it should be calculated and in what circumstances a competent authority should be able to impose limits on the leverage a particular AIFM may employ. ESMA considers it appropriate to prescribe two different calculation methodologies for the leverage (commitment and gross methods) as well as a further option (the advanced method) that can be used by managers on request and subject to certain criteria. The AIFM Directive also aims to increase transparency of AIFs and their managers. In this context, ESMA's Final Technical Advice specifies the form and content of information to be reported to competent authorities and investors, as well as of the information to be included in the annual report.

[31] Alternative Investment Funds.

Third Countries

With a view to ensuring the smooth functioning of the new requirements with respect to third countries, the AIFM Directive puts in place an extensive framework regarding supervisory co-operation and exchange of information. ESMA's Final Technical Advice (pages 240-246) envisages that the arrangements between EU and non-EU authorities should take the form of written agreements allowing for exchange of information for both supervisory and enforcement purposes.

Next Steps

ESMA was asked to submit its advice to the EU Commission by 16 November 2011. It is now for the EU Commission to prepare the implementing measures on the basis of this advice.

Bill N°6327
Dematerialisation of Securities

According to the bill, corporate investment funds and management companies of common funds falling under the law of 17 December 2010 or the law of 13 February 2007 on specialized investment funds will be allowed to issue, in addition to registered securities or bearer securities, book-entry securities. Written certificates may be issued to evidence the book-entry.

A fund may exclusively issue book-entry securities. It shall however also be possible to combine, within one and the same sub-fund or class of shares or units, book-entry securities, bearer securities and registered securities.

For a general analysis of the bill, see **Banking, Finance & Capital Markets** section.

Litigation

Legislation

Law of 23 October 2011
New Competition Law

On 2 February 2012, the new competition law[32] will come into force in Luxembourg. It abrogates and replaces the competition law of 17 May 2004. The new law foresees the general principle of the freedom to set prices as well as certain limits to this freedom. Thus, prices may be fixed by

[32] Competition law of 23 October 2011.

grand ducal regulations in case of structural issues resulting in insufficient competition or in case of escalating prices due to the economic situation. For petroleum products, *contrats de programmes* or maximum prices may be envisaged.

Cartel agreements with the object or the effect of distorting competition are void. Nevertheless, some agreements aiming at the improvement of production or distribution of products or promotion of technical progress are valid. Abuse of a dominant position on the market by one or several undertakings is prohibited. In order to ensure compliance with the rules on cartels and abuses of dominant position, the law provides for an independent administrative authority, the Council of competition (*Conseil de la concurrence)*.

The council has large powers in this respect, and notably the power of investigating, automatically or further to a complaint, the infringements of those rules. It may thus require undertakings to provide the necessary information, under penalty of fines or periodic penalties. The council will appoint, among the officials being part of its staff, investigators who are qualified as investigating officers (*officiers de police judiciaire*).

Said investigators may question any person or carry out inspections on the spot, access the undertaking's premises and take copies of any professional books or documents. They may also conduct searches or seizures of documents upon authorization of the president of the District court concerned. Such searches may take place even outside the undertaking's premises if there are reasonable suspicions that professional and relevant documents can be found.

If the council notices an infringement, it may intervene on its own initiative. Moreover, a case may be referred to it upon the request of the relevant minister or any concerned person. As soon as the council adviser identifies facts likely to be prosecuted by the council, he shall inform the undertakings of his complaints. The parties thus have access to the file. During the investigation, the undertakings concerned may ask that the information provided remain confidential and undisclosed.

As soon as the case has been referred to the council, the latter may take conservatory measures, if necessary under periodic penalties, if the reported practice seriously and irreparably harms the public order or the plaintiff. If, further to a contradictory procedure, the existence of an infringement to the Luxembourg or European competition rules is established, the council may force the infringing parties to stop the illegal practice and order fines and/or periodic penalties.

Such penalties must be proportionate to the situation and the undertaking. The maximum amount of the fine is equal to 10% of the amount of the consolidated worldwide turnover of the infringing party. The periodic penalty shall not exceed 5% of the daily turnover per day of delay. If the infringing party commits, prior to any decision of the council, to take the necessary measures, the council may limit its decision to making those commitments mandatory.

The council may also exempt the infringing party from any fine, or reduce such fine, if the infringing party has provided *prima facie* evidence relating to a cartel and if the council did not have any evidence about this party at the time of the claim, or if the evidence provided adds significant value compared to what the council had in its possession. In order to benefit from said leniency, the infringing party must end its participation to the cartel and fully cooperate with the council.

The council's decisions may be challenged before the administrative jurisdictions. The council is allowed to file a brief or make oral comments in said proceedings. The council may also carry out market studies or inform the undertakings on its interpretation of applicable principles. The council has also a consultative mission. It may carry out sector enquiries and issue opinions on legislative and executive proposals. The council is bound by professional secrecy. Finally, the council is the authority cooperating with the European commission and the competition authorities of the other Member States.

Law of 2 September 2011
Business Licenses (*autorisations d'établissement*)

The law of 2 September 2011 regulating the access to the professions of craftsman, merchant, industrial as well as certain liberal professions entered into force on 25 September 2011. It abrogates and replaces the law of 28 December 1988 regulating the access to the professions of craftsman, merchant, industrial as well as certain liberal professions, as amended in 1997 and 2004. The fact that this former legislation has been formally abrogated instead of being amended does however not mean that its rules have been abandoned. To the contrary, the new law maintains most of the basic legal requirements and principles that were in force under the former legislation while adapting some of them and creating new ones.[33]

[33] This law aims in particular at (i) complying with the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market which has been implemented in Luxembourg through the law on 30 May 2011 on services in the internal market (see Clifford Chance Luxembourg Legal Update, September 2011, page 15), (ii) eliminating certain conditions that were so far more restrictive for Luxembourg nationals than for EU nationals and (iii) simplifying the administrative procedure preceding the issuance of a business license.

The new law provides, as a general principle, that no individual or legal entity may carry out an activity of merchant, craftsman, industrial or one of the liberal professions referred to in said law without holding a business license.

The activity of merchant means any activity that consists in selling goods or providing services within the meaning of the Code of Commerce, with the exception of industrial and craft activities.
The liberal professions that fall within the scope of the law are expressly listed therein. This list includes, among others, the activity of chartered accountant, accountant, economic advisor, intellectual property advisor as well as any other activity of advisor (*conseil*). This last category is new. It is defined as an activity that is not otherwise regulated and that consists in providing services and advice in a specific sector of activities and that require high qualifications.
It must however be underlined that no business license is required for services that a company provides to another company belonging to the same group of companies.
Various conditions need to be met by the applicant for obtaining a business license, namely:

- having an establishment (*établissement*), i.e. a fixed place of operation located on the territory of the Grand Duchy of Luxembourg that needs, in turn, to be adapted to the nature and the extent of the contemplated activity, it being understood that a domicile within the meaning of the law of 31 May 1999 on the domiciliation of companies as amended may not be considered as an establishment;
- meeting the criterion of professional respectability (*honorabilité professionnelle*); this criterion aims at guaranteeing the integrity of the profession concerned as well as the protection of the future customers and contracting partners; and
- having professional qualifications: these qualifications are set forth by the law and depend on the type of activity for which the business license is sought.

In the case where the applicant is a legal entity, the conditions of professional respectability and professional qualifications have to be fulfilled by at least one individual who is designated as the manager (*dirigeant*) of the entity concerned for the purpose of the business license.[34] The condition of professional respectability is also required from the holder of the majority of the shares or from the persons that are able to have significant influence over the management of the company.

The relevant authority, namely the minister in charge of delivering business licenses[35], has to issue its decision within three months as from the receipt of the complete application. In the absence of a decision within this timeframe, the business license is by law considered as being implicitly granted.

The creation, takeover, extension, transfer and change in the business line of sales areas of more than 400 sqm remain subject to a specific authorisation (*autorisation particulière*) that is delivered by the relevant minister after consultation of a commission. In accordance with the Directive 2006/123/EC on services in the internal market, this specific authorisation is no longer subject to economic criteria, but the applicant has now to show that the project meets different requirements in relation to country planning, public transport, quality of town planning and protection of consumers.

Beside the activities which a firm permanently established in Luxembourg may carry out and for which a business license is required, the law provides for the right of any undertaking established in another Member State of the EU, of the EEA or in Switzerland, to freely provide services in Luxembourg on an occasional and temporary basis.[36] Such activities are not subject to business licenses from the Luxembourg authorities (based on the principle of free movement of services). Nevertheless, undertakings that carry out craft activities need to comply with the requirements provided for by articles 22 and 23 of the law of 19 June 2009 on the recognition of professional qualifications, i.e., in turn, (i) prior declaration to be filed by the undertaking with the relevant Luxembourg authorities and (ii) verification by said authorities of its professional qualifications (in the case where the activities in question may have an impact on health or public security).
Finally, the new law also provides that any data in relation to a given business license, namely the number of the business license, the name of the undertaking, the address of the establishment, the activities that the undertaking is entitled to carry out as well as the name of its manager shall be made available online by the relevant minister.

[34] The law defines said manager as the individual who conducts effectively and on a permanent basis the daily management of the company. This person has to have an effective link with the company concerned as owner, shareholder or employee thereof.

[35] Currently, the relevant minister is the Minister of Middle Classes and Tourism.

[36] The law further provides that the occasional and temporary nature of said provision of services is appreciated on a case-by-case basis, based, in particular, on the duration, the frequency, the periodicity and the continuity of the activity concerned.

Regulatory Developments

Data Protection Agency:
New position on information of clients about voice recording

Before any voice recording for monitoring purposes may be carried out, the Data Protection Law notably requires that such processing be authorised by the Data Protection Agency and that the clients be informed about the processing.

Until very recently, in cases where a pre-recorded voice message was not issued at the beginning of each telephone conversation, the Data Protection Agency required that the information on the telephone recording be given to the clients by way of a signature of a specific convention.

In a letter sent to the ABBL on 3 August 2011, the Data Protection Agency has reviewed its position and now considers that the execution of a "*specific convention*" is not any longer required and that the information on the telephone recording may be included in the company's general terms and conditions provided that said information is given to the clients in a "*special chapter in the bank's general terms and conditions*".

Case Law

Court of Appeal, 4 May 2011
Proof of a Transfer Order and Tacit Ratification of a Bank Transfer Due to the Account Holder's Silence

Please see **Banking, Finance & Capital Markets** section.

Employment

Legislation

Law of 28 October 2011
Remuneration Policies in the Financial Sector

Until very recently, Luxembourg had not implemented in its legislative environment the provisions of the CRD III related to the remuneration policies. Indeed, while the CRD III had been restated in two circulars of the CSSF[37], such circulars do not have, strictly speaking, the power of law. This has been remedied by a Law dated 28 October 2011, which has among other things, amended articles 5 and 17 of the Financial Sector Law. This law entered into force on 6 November 2011.

Credit institutions and investment firms are now legally required, as part of their governance arrangements, to have remuneration policies and practices in place (even though said financial institutions would not pay any variable remuneration to their staff) that are consistent with and promote sound and effective risk management.
The CSSF has also been given the power to require from credit institutions and investment firms to limit the variable remuneration as a percentage of the total net revenues where such a remuneration is not compatible with a sound financial basis.

For an analysis of the other aspects of the law, please see **Banking, Finance & Capital Markets** section.

Case Law

Court of Appeal, 31 March 2011
Holiday Entitlement of Employees on Long-term Absence

The Labour code provides that employees are obliged to take their holidays before the end of the calendar year. Only if it has not been possible for the employee to take his holidays until year end, due to a refusal by the employer, can the holidays be forwarded to the next calendar year; they then must be taken before 31 March of the following year.

Luxembourg case law has held in the past that holidays that have not been taken by an employee in due time lapse, even if the employee could not take the holidays due to maternity leave or long-term sickness leave. In a decision dated 20 January 2009, the ECJ held however that this forfeiture of the holiday entitlement was not in line with European law, and that to the contrary, the untaken holidays have to be maintained and the employee must have the possibility to take these holidays on return from his sickness leave / maternity leave.

In the case submitted to the Court of Appeal[38], the court had to rule under which conditions the holiday entitlement lapses on the return of the employee from his long-term absence. The court held, by referring to the case law of the ECJ, that if the holiday entitlement cannot lapse during a long-term sickness leave / maternity leave, the employee is nevertheless obliged to take the outstanding holidays upon his return as soon as possible and prior to 31

[37] CSSF Circular 10/496 (amending CSSF Circular 06/293) and CSSF Circular 10/497 (amending CSSF Circular 07/290) which implemented in full (i.e. without any deviation) the provisions of the CRD III.

[38] Court of Appeal, 31 March 2011, n°35911

December of the relevant year, respectively 31 March of the following year.

Only if the employer refuses to grant these holidays due to business reasons, will the outstanding holidays have to guaranteed beyond 31 December, respectively 31 March. To the contrary, if the employee had the possibility to take these holidays prior to 31 December / 31 March and did not do so, his entitlement will lapse.

Court of Appeal, 26 May 2011
Voidness of a Settlement Agreement due to Insufficient Concessions

Under Luxembourg law, a settlement agreement is only valid if the two parties to the settlement agreement have made concessions i.e. if they have renounced to a part of their respective claims. It belongs to the court to verify if the concessions that have been made by the parties are sufficient. If this is not the case, a court has the right to declare the settlement agreement null and void.

In a case that had been submitted to the Court of Appeal[39], an employer had terminated the employment contract of his employee with notice.

The employee was entitled to a six months' notice period, to a statutory severance indemnity (*indemnité de départ légale*) of 3 months, to an indemnity for untaken holidays, and arguably to damages for unfair dismissal. In the settlement agreement, the employee accepted to reduce the notice period from 6 months to 2-5 months and renounced to any other claims and amounts. As counterparty, the employer granted him a dispensation from work during this reduced notice period. The court held that the concessions made by the employer were not sufficient, and hence ruled that the settlement agreement was null and void. By way of consequence, the employee was granted an indemnity for the part of the statutory notice period to which he had renounced, the amount due as statutory severance indemnity, the amount due for untaken holidays and in addition damages for the moral prejudice suffered as consequence of the dismissal that had been considered as being unfair.

Court of Appeal, 27 October 2011
No Obligation to Propose a New Function to the Employee

In this decision, the Court of Appeal[40] confirms its position that the employer has the right to take any decision which is necessary for the good running of the business, including the decision to make employees redundant.

The Labour Court may only verify whether the reasons the employer has indicated in order to justify the redundancy are valid reasons. In addition, the courts have not got the right to substitute themselves to the employer concerning the assessment and the choices that the latter made, and in particular the employer has the freedom to decide which employees will be made redundant. The only limit to this freedom of choice is an abuse of rights committed by the employer.
In addition, the court ruled that the financial difficulties of the company have only to be assessed at the level of the employer and not at a group level.
The court also overruled the judgment of the first instance because it had decided that before being entitled to make an employee redundant, the employer has to try to offer a new job to this employee either within the employer or within the group of companies to which belongs the employer. The court indeed held, correctly, that no statutory provision foresees such an obligation.

Court of Appeal, 27 January 2011
Termination of an Employment Contract in Breach of the Rules Governing Collective Redundancies

Article L.166-1 of the Labour Code provides that an employer who contemplates termination of the employment contracts of his employees for reasons other than personal reasons (i.e. for organization or economic reasons), has to negotiate a social plan, if the number of redundancies envisaged equals or exceeds for the same period of 30 days at least 7 employees, or for the same period of 90 days at least 15 employees.

Any redundancy notified in breach of this statutory provision will be declared null and void by the President of the Labour Court if the employee files an application within 15 days as from the day on which the termination of the employment contract has been notified. In its decision of 27 January 2011, the Court of Appeal ruled that if an employee does not file an application in order to have the redundancy declared null and void within the required timeframe, he will, as foreseen by the relevant provisions of the Labour Code, still have the right to file a claim for damages if he considers that the dismissal is unfair.

The court ruled that in that case the Labour Court has to analyze this question with reference to articles L.124-11 and L.124-12 of the Labour Code, which are the general provisions on unfair dismissals. Hence, at least implicitly, the court ruled that a redundancy notified in breach of the rules governing collective redundancies is not

[39] Court of Appeal, 26 May 2011, n° 36087
[40] Court of Appeal, 27 October 2011, n° 35913.

automatically to be declared as being unfair (but of course the employee may apply for the voidness of the redundancy within the above-mentioned timeframe of 15 days), but the court has to verify on a case-by-case basis and in consideration of the factual elements whether this redundancy is based on valid reasons.

Court of Appeal, 3 March 2011
Emails and Confidentiality of Correspondence

The Luxembourg courts have ruled in the past that employees have a legitimate expectation of privacy at their workplace, which is not overridden by the fact that employees use communication devices or any other business facilities of the employer. This entails that communications identified by the employees as private or marked by the employees as private (including electronic mails) at the workplace are covered by the principle of confidentiality of correspondence.

In the case at hand an employer dismissed one of his employees on the basis that the latter carried out acts of unfair competition. This had been revealed via information obtained by the employer from the professional laptop of another employee (who had been previously dismissed). As the employer noticed that certain items and programs on the laptop of that former employee had been deleted, he indeed decided, in the presence of a bailiff, to have all the deleted items restored by an expert. One of these restored items was a document, titled "brainstorming.doc", setting out acts of unfair competition including several employees of the company. This document was sent from the private email address of an employee to the private email addresses of other employees of the company, including the dismissed employee.

The dismissed employee argued that the document was a confidential correspondence and could therefore not be used as evidence for his dismissal, which should hence be an unfair dismissal.

The Labour Court[41] considered (on the basis of the confidentiality of correspondence) that the evidence produced by the employer before the court was illegally obtained (i.e. in violation of the fundamental right to privacy and especially the right to confidentiality of correspondence as guaranteed *i.a.* by the European Convention of Human Rights) which lead to the rejection of said evidence by the courts.

In a recent decision the Court of Appeal[42] overruled the decision of the Labour Court and ruled that the email (which was addressed to various employees and which did not appear to be private), although sent from a non-professional email address to another non-professional email address, did not constitute illegally obtained evidence. The court pointed out that although employees have a right to privacy (in particular a right to confidentiality of correspondence identified as private) at work, such right is not absolute and the employer is hence entitled to infringe the employees' privacy under certain circumstances.

In the case at hand the court considered that the employer had not violated the principle of confidentiality of correspondence and considered that the interference into the private sphere of the employee was legitimate and proportionate and that the evidence obtained could therefore not be rejected by the court.

[41] Labour Court, 8 October 2009.
[42] Court of Appeal, 3 March 2011, n° 35462.

Tax

Legislation

Bill N° 6326
Mutual Assistance for the Recovery of Tax

This bill implements the EU directive on mutual assistance in recovery of the tax claims. The directive aims at (i) facilitating the exchange of information between member states and (ii) allowing a member state to recover tax claims for the benefit of other member states. The main points of interest of the directive are set-out in the **September 2011 edition of our Luxembourg Legal Update.**

The law dated 20 December 2002 on the recovery of the tax claims should be abolished and replaced by the provisions of the new bill as from as from 1 January 2012.

Bill N° 6355
Withdrawal of Luxembourg VAT Identification Numbers

This bill purports to amend the Luxembourg VAT law by confirming the tax authorities' right to withdraw the VAT identification number to operators when the conditions for the attribution of the VAT identification number are no longer fulfilled. This follows the EU Council Regulation dated 7 October 2010 on administrative cooperation combating fraud in the field of value added tax. This regulation requires that EU Member States ensure the completeness and accuracy of the data furnished by the operators for the purposes of VAT identification. This implies that the VAT identification number is shown as invalid in the electronic system when the operators have ceased their economic activity. The cases where the tax authorities would be able to withdraw VAT identification number may evolve in the future.

Approval of New Double Tax Treaties and Additional Treaty Protocols

On 16 July 2011, the Luxembourg parliament ratified the new double tax treaties with Barbados and Panama and amended the existing ones with Japan, Portugal, Hong Kong, Sweden and San Marino.

For more detailed information on the new double tax treaties with Barbados and Panama, please refer to the **September 2011 edition of our Luxembourg Legal Update**. The new and amended double tax treaties include specific articles on the exchange of information upon request that are in line with the OECD international standards on tax information exchange.

	Entry into force	*Applicable as from*
Barbados	August 2011	January 2012
Japan	December 2011	January 2012
Hong-Kong	August 2011	January / April 2012
Mexico	November 2011	January 2012
Panama	November 2011	January 2012
Sweden	September 2011	January 2010

The amendment to the double tax treaty with Mexico (ratified on 31 March 2010) entered into force as at 21 October 2011. The only amendment to the treaty is related to the exchange of information (to align the treaty with the OECD international standards on tax information exchange). The new provision of the double tax treaty applies as from 1 January 2012.

On 21 November 2011, Luxembourg and Russia signed an amendment to the 28 June 1993 double tax treaty. The amendment will be in force as from January 1 following the date on which the formalities legally required in the respective states have been complied with. For more detailed information, please refer to our **Client Briefing** dated 24 November 2011.

Regulatory developments

CSSF Circular 11/526
Taxation of the reversal of the lump-sum provision

According to the Circular, Luxembourg banks have to reverse their lump provision in case of losses resulting from the financial markets turmoil (use of the lump provision at the closing of 2011 accounting year).

The objective is to mitigate potential impact of the market turmoil on the financial institutions' results through the reversal of these provisions. The circular mainly concerns the credit institutions that still prepare their financial statements in accordance with Luxembourg GAAP.

The credit institutions that have already converted their financial statements to IFRS cannot reverse the said lump provision (as the provision has been reallocated accounting wise to non-distributed profit at the date of the conversion to IFRS). For those banking institutions, the

CSSF confirmed that they should discuss their tax position with the direct tax administration.

IP Income Tax Regime: New Form

On September 2011, the tax authorities published a new form relating to the IP tax regime (**form 750**). For more detailed information on the Luxembourg IP derived income tax regime, please refer to our **Client Briefing** dated 22 September 2010.

General developments

European Commission Proposal, 28 September 2011
Financial Transaction Tax

On 28 September 2011, the EU Commission has presented a proposal for a financial transaction tax (FTT) in the 27 Member States of the European Union. If enacted, most transactions in financial instruments involving a financial institution are likely to become subject to the FTT from 1 January 2014, if at least one party is established in the EU. The revenues of the tax would be shared between the EU and the Member States.

However, a small damper is that some countries, among the EU Member States, are currently not in favor of the Commission's project, such as the UK, Ireland and Sweden, which might put difficulties to the entry into force of the FTT.

For more detailed information on this matter, please refer to the **Clifford Chance Client Briefings** dated **September** and **October** 2011.

Tax Transparency

The **Global Forum on Transparency and Exchange of Information for Tax Purposes** granted a positive report to Luxembourg and confirmed that the Luxembourg legal and regulatory framework with regard to tax transparency and exchange of information complies with the international standard. For more detailed information, please refer to the following **OECD web page.**

The Global Forum acknowledged the efforts of Luxembourg to comply with the OECD recommendations (e.g. exchange of information upon request for banking information) and to fight against tax evasions. The Global Forum however recommends Luxembourg adopting adequate measures in order to ensure that the ultimate holder of securities can be identified (i.e. amending the legal provisions related to bearer shares in order to ensure that such identification can always be done).

With respect to tax evasion, the Global Forum held in Paris on 25 and 26 and October 2011 underlined that since 2009 about EUR 14 billion in additional tax revenues have been collected thanks to the enhanced cooperation between jurisdictions. Concurrently, a Progress Report "*Tax Transparency 2011*" prepared by the Global Forum has been delivered during the G20 on 4 November 2011 in Cannes.

Savings Directive and Withholding Tax Exemption Certificates

According to the EU savings directive, Luxembourg paying agents (e.g. Luxembourg banks) may levy a 35% withholding tax on certain interests paid or attributed to non-Luxembourg resident individuals. The directive envisages however that no withholding tax should be withheld by a Luxembourg bank, if the individual taxpayer provides the bank:

- either with an exemption certificate, which shall be issued by the tax authorities of the taxpayer's country (upon taxpayer's request),
- or with a **mandate** given to the bank to automatically report nominative information on all interest paid or attributed to the taxpayer to the tax authorities of his /her country of residence.

The Luxembourg Banking Association disclosed on its website various model forms from several Member States (e.g. Belgium, France and Germany). The model certificate can be downloaded from the **ABBL website**. Alternatively, clients may ask their banker to provide them with the appropriate certificate.

Recommendation of the EU Commission, 15 December 2011
Double Taxation of Inheritances

The European Commission issued a recommendation regarding relief for double taxation of inheritances. This matter will surely be followed by the Luxembourg private banking players being of great interest for the clientele.

Member of Parliament Question N° 1678
Highly Qualified Expatriate Regime

Further to the Member of Parliament question on the tax regime for highly qualified expatriates (n° 1698), the Minister of Finance confirmed that the tax authorities validated 23 requests out of 49 submitted (until October 2011).

Member of Parliament Question N° 1782
E-Book and Reduced VAT Rate

Further to an MP question on e-books, the Minister of Finance confirmed the application of the reduced VAT rate of 3% to e-books.

Case law

European Court of Justice, 27 October 2011
Purchase of Non-performing Receivables

Since Luxembourg is a prime location for performing debt restructuring, this decision is of great importance for Luxembourg: it strengthens and clarifies the position regarding the VAT treatment of the discounted acquisition of defaulted debts portfolios.

The ECJ[43] has ruled that an operator, which has bought defaulted debts for a discounted price - i.e. acquisition of the debts for a lower value than the face value - has not carried out a "*supply of service*" from a VAT point of view (no specific commission was foreseen in this specific case). The ECJ considered that the consideration paid by the operator for the acquisition of the debts merely reflect the actual economic value of the debt at the time of the purchase (mirroring in turn the risk of default of the debtor) rather than a remuneration for a service.

European Court of Justice, 29 November 2011
Exit Taxes

Based on Dutch tax law, a company migrating its place of effective management outside of the Netherlands could be taxed on specific unrealized gains; the so called "*exit tax*" on unrealized gains.

The ECJ[44] stated that the Dutch exit tax constitutes a prohibited restriction to the freedom of establishment. The ECJ acknowledged that the said restriction can be justified by the need to ensure a balanced allocation of the power to impose taxes between two Member States. The ECJ however considered that such a provision is not a proportionate measure and ruled that a national legislation should offer the choice for taxpayers to opt either for the immediate payment of the exit tax or for the payment of the tax when the gain is actually realized. The Member State of departure could indeed request (i) a bank guarantee, (ii) the possibility if late interest and (iii) does not have to take into account subsequent losses for the computation of the exit tax.

[43] European Court of Justice, 27 October 2011, C-93/10.
[44] European Court of Justice, 29 November 2011, C-371/10.

European Court of Justice, 6 October 2011
Taxation of Dividend Paid to Pension Funds

Under Portuguese tax law, dividends paid to pension funds set up and operating in accordance with the Portuguese legislation, are exempt from withholding tax. Concurrently, dividends paid to a non-resident pension fund (resident in the EU/EEA) do not benefit from the said tax exemption but are subject to a 21.5% tax (20% before 1 January 2011).

The ECJ[45] ruled that this difference of treatment between Portuguese and non-Portuguese pension funds constitutes a prohibited restriction to free movement of capital as the investments in Portuguese companies is less attractive for EU/EEA pension funds.

The Portuguese Government's argument was that the restriction could be justified by reasons relating to the coherence of the Portuguese tax system and the need to guarantee the effectiveness of fiscal supervision. The ECJ rejected these arguments and ruled that Portugal had failed to fulfil its EU obligations.

[45] European Court of Justice, 6 October 2011, C-493/09.

CLIFFORD CHANCE

Luxembourg Contacts

Contacts

Banking, Finance & Capital Markets

Christian Kremer
Managing Partner
T : +352 48 50 50 201
E : christian.kremer@
cliffordchance.com

Steve Jacoby
Partner
T : +352 48 50 50 219
E : steve.jacoby@
cliffordchance.com

Marc Mehlen
Partner
T : +352 48 50 50 305
E : marc.mehlen@
cliffordchance.com

Stefanie Ferring
Counsel
T : +352 48 50 50 253
E : stefanie.ferring@
cliffordchance.com

Litigation, Employment

Albert Moro
Partner
T : +352 48 50 50 204
E : albert.moro@
cliffordchance.com

Isabelle Comhaire
Counsel
T : +352 48 50 50 402
E : isabelle.comhaire@
cliffordchance.com

Olivier Poelmans
Counsel
T : +352 48 50 50 421
E : olivier.poelmans@
cliffordchance.com

Claude Eischen
Counsel
T : +352 48 50 50 268
E : claude.eischen@
cliffordchance.com

Investment Funds

Joëlle Hauser
Partner
T : +352 48 50 50 203
E : joelle.hauser@
cliffordchance.com

Caroline Migeot
Counsel
T : +352 48 50 50 258
E : caroline.migeot@
cliffordchance.com

Jacques Schroeder
Of Counsel
T : +352 48 50 50 217
E : jacques.schroeder@
cliffordchance.com

Tax

François-Xavier Dujardin
Partner
T : +352 48 50 50 254
E : francois-xavier.dujardin@
cliffordchance.com

Corporate/M&A/Private Equity

Christian Kremer
Managing Partner
T : +352 48 50 50 201
E : christian.kremer@
cliffordchance.com

Claudie Grisius
Partner
T : +352 48 50 50 280
E : claudie.grisius@
cliffordchance.com

Yoanna Stefanova
Counsel
T : +352 48 50 50 285
E : yoanna.stefanova@
cliffordchance.com

Gavin Solomons
Of Counsel
T : +352 48 50 50 427
E : gavin.solomons@
cliffordchance.com

François Lerusse
Counsel
T : +352 48 50 50 266
E : francois.lerusse@
cliffordchance.com

Dunja Damjanovic-Pralong
Counsel
T : +352 48 50 50 222
E : dunja.pralong-damjanovic@
cliffordchance.com

Worldwide contact information
33* offices in 23 countries

Abu Dhabi
Clifford Chance
9th Floor
Al Sila Tower
Sowwah Square
PO Box 26492
Abu Dhabi
United Arab Emirates
Tel +971 (0)2 613 2300
Fax +971 (0)2 613 2400

Bucharest
Clifford Chance Badea
Excelsior Center
28-30 Academiei Street
12th Floor, Sector 1
Bucharest, 010016
Romania
Tel +40 21 66 66 100
Fax +40 21 66 66 111

Istanbul
Clifford Chance
Kanyon Ofis Binasi Kat 10
Büyükdere Cad. No. 185
34394 Levent
Istanbul
Turkey
Tel +90 212 339 0001
Fax +90 212 339 0098

Moscow
Clifford Chance
Ul. Gasheka 6
125047 Moscow
Russian Federation
Tel +7 495 258 5050
Fax +7 495 258 5051

Rome
Clifford Chance
Via Di Villa Sacchetti, 11
00197 Rome
Italy
Tel +39 06 422 911
Fax +39 06 422 91200

Warsaw
Clifford Chance
Norway House
ul. Lwowska 19
00-660 Warszawa
Poland
Tel +48 22 627 11 77
Fax +48 22 627 14 66

Amsterdam
Clifford Chance
Droogbak 1A
1013 GE Amsterdam
PO Box 251
1000 AG Amsterdam
The Netherlands
Tel +31 20 7119 000
Fax +31 20 7119 999

Doha
Clifford Chance
QFC Branch
Suite B, 30th floor
Tornado Tower
Al Funduq Street
West Bay PO Box 32110
Doha
State of Qatar
Tel +974 4491 7040
Fax +974 4491 7050

Kyiv
Clifford Chance
75 Zhylyanska Street
01032 Kyiv
Ukraine
Tel +380 44 390 5885
Fax +380 44 390 5886

Munich
Clifford Chance
Theresienstraße 4-6
80333 Munich
Germany
Tel +49 89 216 32-0
Fax +49 89 216 32-8600

São Paulo
Clifford Chance
Rua Funchal 418 15th Floor
04551-060 São Paulo SP
Brazil
Tel +55 11 3019 6000
Fax +55 11 3019 6001

Washington, D.C.
Clifford Chance
2001 K Street NW
Washington, DC 20006 - 1001
USA
Tel +1 202 912 5000
Fax +1 202 912 6000

Bangkok
Clifford Chance
Sindhorn Building
Tower 3
21st Floor
130-132 Wireless Road
Pathumwan
Bangkok 10330
Thailand
Tel +66 2 401 8800
Fax +66 2 401 8801

Dubai
Clifford Chance
Building 6, Level 2
The Gate Precinct
Dubai International
Financial Centre
PO Box 9380
Dubai
United Arab Emirates
Tel +971 4 362 0444
Fax +971 4 362 0445

London
Clifford Chance
10 Upper Bank Street
London, E14 5JJ
United Kingdom
Tel +44 20 7006 1000
Fax +44 20 7006 5555

New York
Clifford Chance
31 West 52nd Street
New York, NY 10019-6131
USA
Tel +1 212 878 8000
Fax +1 212 878 8375

Shanghai
Clifford Chance
40th Floor
Bund Centre
222 Yan An East Road
Shanghai 200002
China
Tel +86 21 2320 7288
Fax +86 21 2320 7256

Barcelona
Clifford Chance
Av. Diagonal 682
08034 Barcelona
Spain
Tel +34 93 344 22 00
Fax +34 93 344 22 22

Düsseldorf
Clifford Chance
Königsallee 59
40215 Düsseldorf
Germany
Tel +49 211 43 55-0
Fax +49 211 43 55-5600

Luxembourg
Clifford Chance
2-4 place de Paris
B.P. 1147
L-1011 Luxembourg
Grand-Duché de Luxembourg
Tel +352 48 50 50 1
Fax +352 48 13 85

Paris
Clifford Chance
9 Place Vendôme
CS 50018
75038 Paris Cedex 01
France
Tel +33 1 44 05 52 52
Fax +33 1 44 05 52 00

Singapore
Clifford Chance
One George Street
19th Floor
Singapore 049145
Singapore
Tel +65 6410 2200
Fax +65 6410 2288

Beijing
Clifford Chance
33/F, China World Office 1
No. 1 Jianguomenwai Dajie
Chaoyang District
Beijing 100004
China
Tel +86 10 6535 2288
Fax +86 10 6505 9028

Frankfurt
Clifford Chance
Mainzer Landstraße 46
60325 Frankfurt am Main
Germany
Tel +49 69 71 99-01
Fax +49 69 71 99-4000

Madrid
Clifford Chance
Paseo de la Castellana 110
28046 Madrid
Spain
Tel +34 91 590 75 00
Fax +34 91 590 75 75

Perth
Clifford Chance
Level 12, London House
216 St Georges Terrace
Perth, Western Australia 6000
Australia
Tel +618 9262 5555
Fax +618 9262 5522

Sydney
Clifford Chance
Level 16
No. 1 O'Connell Street
Sydney NSW 2000
Australia
Tel +612 8922 8000
Fax +612 8922 8088

Brussels
Clifford Chance
Avenue Louise 65 Box 2
1050 Brussels
Belgium
Tel +32 2 533 5911
Fax +32 2 533 5959

Hong Kong
Clifford Chance
28th Floor
Jardine House
One Connaught Place
Hong Kong
Tel +852 2825 8888
Fax +852 2825 8800

Milan
Clifford Chance
Piazzetta M.Bossi, 3
20121 Milan
Italy
Tel +39 02 806 341
Fax +39 02 806 34200

Prague
Clifford Chance
Jungmannova Plaza
Jungmannova 24
110 00 Prague 1
Czech Republic
Tel +420 222 555 222
Fax +420 222 555 000

Tokyo
Clifford Chance
Akasaka Tameike Tower, 7th Floor
17-7 Akasaka 2-Chome
Minato-ku, Tokyo 107-0052
Japan
Tel +81 3 5561 6600
Fax +81 3 5561 6699

Riyadh
(Co-operation agreement)
Al-Jadaan & Partners Law Firm
PO Box 3515, Riyadh 11481
Fifth Floor, North Tower
Al-Umam Commercial Centre
Salah-AlDin Al-Ayyubi Street
Al-Malaz, Riyadh
Kingdom of Saudi Arabia
Tel +966 1 478 0220
Fax +966 1 476 9332

*Clifford Chance also has a co-operation agreement with Al-Jadaan & Partners Law Firm in Riyadh

C L I F F O R D

C H A N C E