Luxembourg Legal Update

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CLIFFORD CHANCE

Contents

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We are pleased to provide you with the latest edition of our Luxembourg Legal Update.

The newsletter provides a compact summary and guidance on the new legal issues which may impact your business, particularly in relation to banking, finance, capital markets, corporate, litigation, employment, funds, investment management and tax law.

Banking, Finance & Capital Markets

EU Developments

EMIR: Commission Delegated Regulations published in Official Journal

The following six regulatory technical standards supplementing the European Market and Infrastructure Regulation (EMIR) have been published in the Official Journal of the EU:

- on the minimum details of the data to be reported to trade repositories (Commission Delegated Regulation EU N°148/2013)
- on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for OTC derivatives contracts not cleared by a central counterparty (CCP) (Commission Delegated Regulation (EU) N°149/2013)
- specifying the details of the application for registration as a trade repository (Commission Delegated Regulation EU N°150/2013)
- specifying the data to be published and made available by trade repositories and operational standards for aggregating, comparing and accessing the data (Commission Delegated Regulation EU N°151/2013)
- on capital requirements for CCPs (Commission Delegated Regulation EU N°152/2013)
- on requirements for CCPs (Commission Delegated Regulation EU N°153/2013).

The regulatory technical standards have entered into force on 15 March 2013, the twentieth day following their publication.

EMIR: ESMA Guidelines and Recommendations for CCPs' Interoperability Arrangements

On 15 March 2013, the European Securities and Markets Authority (ESMA) has published its final guidelines and recommendations regarding the assessment of interoperability arrangements for CCP clearing. The guidelines, which relate to EMIR, define what national competent authorities should analyse in assessing an interoperability arrangement and therefore on what aspects of the interoperable arrangement the relevant CCPs will need to focus their attention. They are intended to provide a level playing field for CCPs in the EU by improving the rigour and uniformity of standards applied in the assessments of CCPs' interoperability arrangements.

EMIR: ESMA Practical Guidance for Recognition of Third Country CCPs

On 12 March 2013, ESMA has published practical guidance on the recognition of third country CCPs under EMIR. The guidance covers:

- communication with ESMA prior to the application for recognition
- the timeframe for submission of an application
- the submission of an application and acknowledgment of receipt of the application
- deadlines
- the assessment of completeness, requests for additional information and notification of completeness
- the examination of and the decision on the registration application
- publication on ESMA's website
- notification of material changes.

EMIR: ESMA Q&A

ESMA has published a questions and answers (Q&A) document on the implementation of EMIR. The document is intended to promote common supervisory approaches and practices in the application of EMIR across the EU and provides responses to questions posed by the general public, market participants and competent authorities in relation to the practical application of EMIR. The content is aimed at competent authorities to ensure that their supervisory activities are converging along the lines set out in ESMA's responses, and it should also help investors and other market participants by providing clarity on EMIR's requirements.

EU Short Selling Regulation – ESMA Updates of Q&A

ESMA has published on 30 January 2013 an updated version of its Q&A on the application of the EU Short Selling Regulation N°236/2012.

The purpose of the Q&A is to promote common supervisory approaches and practices amongst the EU's national securities markets regulators on the requirements of the EU Short Selling Regulation, which came into force on 1 November 2012. The Q&As are also intended to provide clarity on the requirements of the new regime to market participants and investors.

Additional Q&As complement the sections relating to the scope of the regulation, including the treatment of ETFs and ADRs/GDRs, the calculation of net short positions, the calculation and reporting for the specific situation of group and fund management activities and the treatment of derivatives on sovereign debt with respect to duration adjustment issue. In addition, the updated Q&As include a new section dedicated to the application of the restriction on uncovered credit default swap positions.

Prospectus Directive and Regulation: ESMA Website Updates

ESMA has published the following updates on its website in relation to:

- the framework for the assessment of third country prospectuses under Article 20 of the Prospectus Directive (Directive 2003/71/EC (as amended))
- the consistent implementation of the Prospectus Regulation (Commission Regulation (EC) N°809/2004).

Legislation

Dematerialisation of Securities – Law of 6 April 2013

On 6 April 2013, the Luxembourg Parliament passed a new law in relation to dematerialised securities. The new law entered into force on 19 April 2013. The law establishes a comprehensive legal framework applicable to dematerialised securities, introduces new categories of regulated financial sector professions and substantial amendments to the regime governing fungible securities.

For detailed description please refer to the Corporate and M&A section of this Luxembourg Legal Update. The main features of the new law have also been summarised in the January 2012 edition of the Luxembourg Legal Update. Clifford Chance has also published a detailed client briefing on the new law.

Electronic Archiving – Bill N°6543

In relation to the provision of dematerialisation or storage services to Luxembourg or foreign regulated financial sector professionals such as for example banks, investment firms, investment funds or insurance or reinsurance undertakings, the bill introduces two new categories of Luxembourg financial sector support professionals.

These new service providers need to be certified and registered with the Luxembourg Institute for Standardisation, Accreditation, Security and Quality of Products and Services (ILNAS). In addition to registration with ILNAS as dematerialisation services provider or storage services provider they need to be licensed by the Luxembourg Minister of Finance being in charge of the financial sector. Only legal entities are eligible for such authorisation. Authorisation is subject to proof of a share capital of at least EUR 50,000 for the provision of dematerialisation services and of at least EUR 125,000 for the provision of storage services. The new types of financial sector support professionals will be supervised by the CSSF. The CSSF and ILNAS may cooperate for the purpose of their respective supervisory missions.

For further information on the bill generally we kindly refer you to the Data Protection section of this Luxembourg Legal Update.

Modalities Governing the Authorisation and Pursuit of Reinsurance Business – Grand Ducal Regulation dated 18 March 2013

The new regulation amends certain details of the Grand Ducal regulation dated 5 December 2007 specifying the modalities governing the authorisation and pursuit of reinsurance business. The changes relate in particular to the calculation of the theoretical maximum amount of the provision for claims fluctuation per risk or category of risks in case of a substantial change in the business plan of a reinsurance company.

Fees Levied by the CSSF – Grand Ducal Regulation dated 18 February 2013

The new Grand Ducal regulation amends the Grand Ducal regulation of 29 September 2012 relating to the fees to be levied by the CSSF. Besides some technical amendments, the new regulation in particular introduces an annual lump sum fee for the newly introduced family office professionals and decreases the annual lump sum fee for authorised securitisation vehicles and fiduciary representatives intervening with securitisation vehicles from EUR 20,000 to EUR 12,000.

Luxembourg Central Bank (BCL) Regulation 2013/N°15 dated 3 May 2013

The new BCL regulation implements in Luxembourg the Guideline of the European Central Bank ECB/2013/4 dated 20 March 2013 on additional temporary measures relating to Eurosystem refinancing operations and eligibility of collateral and amending Guideline ECB/2007/9.

The new regulation provides for additional measures in relation to refinancing operations and the eligibility of collateral. It determines the conditions pursuant to which the BCL may accept as eligible assets for monetary policy operations:

- asset-backed securities and private claims that do not satisfy the Eurosystem eligibility criteria
- uncovered government-guaranteed bank bonds
- marketable debt instruments denominated in pounds sterling, yen or US dollars.

The regulation further specifies the procedure applicable to the early termination or reduction of longer-term refinancing operations by counterparties. It also sets forth that the Eurosystem’s credit quality threshold does not apply to marketable debt instruments issued or fully guaranteed by the central administrations of euro area Member States under a European Union/International Monetary Fund programme, unless the Governing Council of the ECB decides that the respective Member State does not comply with the conditionality of the financial support and/or the macroeconomic programme. However, marketable debt instruments issued or guaranteed in full by the central administration of the Greek Republic are subject to certain haircuts.

As of 1 March 2015, the BCL will no longer accept uncovered government-guaranteed bank bonds that have been issued by the counterparty itself or an entity closely linked to that counterparty as collateral. The BCL will also no longer accept as of that date covered bonds issued by the counterparty where the asset pool contains uncovered government-guaranteed bank bonds also issued by that counterparty or an entity closely linked to that counterparty.

The additional measures set out in this regulation apply temporarily, until the Governing Council of the ECB considers that they are no longer necessary to ensure an appropriate monetary policy transmission mechanism.

Regulatory Developments

Suitability Requirements and Assessment of Client Services – CSSF Circular 13/560

The CSSF Circular 13/560 dated 19 February 2013 transposes in Luxembourg the ESMA "Guidelines on certain aspects of the MiFID suitability requirements" published on 6 July 2012 by adding them to CSSF Circular 07/307 on conduct of business rules in the financial sector.

These guidelines clarify the suitability requirements when providing investment advisory or portfolio management services to a client. More specifically, ESMA's guidelines concern information to clients about the suitability assessment, as well as updating of client information. Moreover, the guidelines relate to the arrangements necessary to understand clients and investments, as well as the qualification of staff involved in the suitability assessment.

Internal Governance and Control for Credit Institutions Participating in the Euribor Panel – CSSF Circular 13/562

The circular dated 19 March 2013 transposes in Luxembourg the recommendations issued by the European Banking Authority (EBA) in coordination with ESMA on specific requirements with respect to internal governance and control for credit institutions participating in the Euribor panel.

Central Administration, Internal Governance and Risk Management – CSSF Circular 13/563

The purpose of this circular is to update CSSF Circular 12/552 on the central administration, internal governance and risk management addressed to banks, investment firms and to a certain extent to professionals lending to the public. The circular inserts by way of amendments the guidelines published by EBA on the assessment of the suitability of members of the management body and key function holders as well as the guidelines published by ESMA on certain aspects of MiFID relating to compliance function requirements into CSSF Circular 12/552. The amended CSSF Circular 12/552 will enter into force on 1 July 2013, except for the provisions on the assessment of professional skills and personal competencies of the board of directors of banks which will apply as of 1 January 2014.

Implementation of ESMA Guidelines on Market Making Activities and Primary Market Operations Exemption under the EU Short Selling Regulation – CSSF Circular 13/565

The CSSF Circular 13/565 dated 17 April 2013 transposes in Luxembourg the ESMA "Guidelines on the exemption for market making activities and primary market operations under article 17 of the EU Short Selling Regulation" published on 2 April 2013. For this purpose, the circular amends the CSSF Circular 12/548 on the entry into force of the EU Short Selling Regulation and details on certain practical aspects of notification, disclosure and exemption procedures and incorporated the ESMA guidelines into such circular.

Review of the Management Reports Published by the Issuers of Shares or Depositary Receipts in Respect of Shares Subject to the Transparency Law – CSSF Press Release 13/09

In a press release of 5 February 2013, the CSSF has provided some explanations and recommendations with respect to information to be published by the issuers of shares or depositary receipts in respect of shares subject to the Transparency Law in a management report. Pursuant to Article 11 of the Takeover Offer Law of 19 May 2006, the companies concerned have to publish in their management report certain information on the structures and measures that may hinder the taking and exercise of control over the company by an offeror. The CSSF reminds that such information must in principle be published in the management report. In the CSSF's view, it is however possible to include a precise reference in the management report to another document that contains the information in question, provided that such document is easily accessible to the public. Furthermore, the CSSF recommends that a specific section dedicated to the requirements of Article 11 of the Takeover Offer Law is included in the management report or a reference to a section of the annual report specifying the same information. For clarification purposes, the CSSF recommends issuers to indicate any information which is not applicable to their specific case. The CSSF announces that it will pay particular attention to the above points when reviewing the annual reports, including the management reports, of such issuers for 2013.

CSSF Activity Report 2012

The CSSF has published its Activity Report for 2012 at the beginning of May 2013. 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 sectors.

The report also contains a section on investment funds and SICARs which will be discussed in the Funds and Investment Management section as well as a section on client complaints which will be discussed in the Litigation section of this Luxembourg Legal Update.

Bank Secrecy Waivers

The CSSF publishes for the first time its general positions concerning the possibility for a bank customer to waive its right to confidentiality vis-à-vis the bank. The CSSF positions previously taken on specific topics relating to the possibility of providing a consent to the Luxembourg bank permitting disclosure, such as notably in the context of outsourcing, including Swift Gateway access outsourcing, to a group entity abroad or outsourcing of the IT function, are now generalised.

The CSSF positions are largely in line with the criteria for bank secrecy waivers set forth in the report of the *Comité des juristes* (CODEJU), an advisory committee to the CSSF, published in an annex to the 2003 Activity Report of the CSSF. The CSSF indicates that even though the statutory confidentiality obligation of a Luxembourg bank is part of Luxembourg public order (*ordre public*), the right to confidentiality of the customer is principally based on the private interest of the client. The CSSF deducts hence that the banker has no own right to confidentiality vis-à-vis the client and consequently has to comply with his orders. The banker cannot invoke an interest of the banking profession or public interest to refuse to comply with an instruction or waiver of a client.

In order to validly waive the right to confidentiality, the customer needs to commit a deliberate act intending to waive the customer's right to confidentiality. Such act needs to emanate from the interested person itself and needs to be free and informed. It is necessary that the waiver takes into account all circumstances which are capable to be detrimental to the interests of the client. Also, any definitive or unlimited waiver is void: the consent needs to be specific with respect to the content of the information to be disclosed, the recipient of the information, the purpose and the duration of the waiver.

The CSSF sets out that a confidentiality waiver does not have to adopt a specific form. The CSSF therefore admits that while express waivers are preferable, tacit waivers are also possible, provided that there is no doubt as to the intention of the interested person(s) to waive the confidentiality right. It is also preferable for the bank to obtain written confirmation of oral waivers for purposes of proof.

The CSSF concludes that banks can, on a one-time or continuous basis, transmit the entirety of data relating to their client to operational or IT data centres located in Luxembourg or abroad, provided they dispose of the consent of the client.

Correspondence of Financial Sector Support Professionals with the CSSF

The CSSF emphasises that it now requires that any disclosure documents (annual reports, internal audit reports, etc.) are duly signed by all directors in charge of the daily management of a financial sector support professional (*PSF de support*).

The CSSF further insists that any correspondence (authorisation requests, substantial change to the information submitted in the initial licensing file, major change in the organisation or the activities of the professional etc.) needs to be signed by each member of the authorised management or at least, where it is composed of more than two members, by a majority of the authorised management.

Supervision of IT Systems

The new CSSF Activity Report contains some explanations on the regulator's practice and requirements on several issues in the area of IT, including, amongst others, the following topics:

Use of Swift Gateways outside of Luxembourg

The CSSF reminds professionals of the position taken in its 2007 Activity Report that a delocalisation of the Swift Gateway access of a Luxembourg bank is possible to the extent that the client giving an order to the bank has knowledge of the fact that the asset transfer ordered includes the implicit mandate to provide identity information covered by the bank's statutory confidentiality obligation, with the aim to permit the finalisation of the transaction, i.e. the transfer of funds or other assets. The CSSF nevertheless imposes certain conditions with a view to limit the impact on the confidentiality of client data, given that the name of the order giver may be clearly readable on the Swift Gateway. The CSSF announces that these conditions will be published in detail in a technical note with the title "Utilisation of Swift Gateway outside Luxembourg" which will be published in 2013 on the CSSF website.

IT services provision by a Luxembourg bank to other entities

Banks wishing to offer IT system operating services to other Luxembourg or foreign financial sector professionals (IT insourcing) have to notify the CSSF. The CSSF in particular wants to be informed to ensure that the banking activity remains the principal activity of the Luxembourg bank, the bank has the required resources for the IT insourcing services provision, the financial risk for the bank is adequately covered (insurance, liquidity) and the envisaged architecture and organisation ensure walling-off between the bank's own IT environment and the IT environments of the client entities.

Management of data in case of professionals moving abroad or closure of an entity in Luxembourg

The CSSF reminds professionals that existing clients of a Luxembourg financial sector professional bound by statutory confidentiality obligations who wish to become clients of a newly created entity abroad have to sign a new contract with such entity. They also have to clearly authorise the transfer of their data (including historical data on the activities with the Luxembourg entity) from Luxembourg to the recipient country.

If existing clients prefer to interrupt the business relationship, all data concerning them (including historical data) mandatorily need to remain in Luxembourg for the whole duration of the legal record keeping period. The same applies to old clients who can no longer sign a contract authorising the transfer of their data.

Office tools in cloud mode

The CSSF considers that the use of office tools in cloud mode is not acceptable for a Luxembourg financial institution, unless such service is provided by a Luxembourg financial sector support professional (*PSF de support*) subject to the same prudential principles and legal framework as its financial sector client.

The report also contains recommendations in relation to the remote management of a virtual office infrastructure and in relation to the backup function of financial sector professionals such as banks or investment firms. The report also sets out technical and organisational requirements relating to bring your own device (BYOD) solutions applied by such professionals.

New Circular Letters Concerning the Insurance Sector

The Luxembourg insurance sector regulator, Commassu, has issued the following circulars:

- Circular Letter 13/1 modifying and supplementing Circular Letter 11/2 on risk assessment of exposure to money laundering and terrorist financing and on prevention measures
- Circular Letter 13/2 modifying and supplementing Circular Letter 03/2 on annual reporting of direct insurance companies in Luxembourg
- Circular Letter 13/3 modifying and supplementing Circular Letter 09/1 on a separate report to be provided by the auditor of direct insurance companies
- Circular Letter 13/4 modifying and supplementing Circular Letter 99/6 on the annual report of reinsurance companies
- Circular Letter 13/5 modifying and supplementing Circular Letter 09/2 on a separate report to be provided by the auditor of direct reinsurance companies
- Circular Letter 13/7 modifying and supplementing Circular Letter 98/1 on technical interest rates.

Case Law

The Banker's Liability with respect to a Transfer Order (*ordre de virement*)

Supreme Court 28 February 2013

Bankruptcy – Enforceable Title (*titre exécutoire*) and Grace Period

District Court Luxembourg, 19 April 2013

Fraud and Orders of Payment

Conciliation Committee, CSSF, Rapports d'activités 2012

Fee changes and duty to inform the client

Conciliation Committee, CSSF, Rapports d'activités 2012

Please refer to the Litigation section of this Luxembourg Legal Update for details of the above.

Corporate and M&A

Legislation

Dematerialisation of Securities – Law of 6 April 2013

On 6 April 2013, the Luxembourg Parliament passed a new law in relation to dematerialised securities. The new law entered into force on 19 April 2013.

The law establishes a comprehensive legal framework applicable to dematerialised securities, introduces new categories of regulated financial sector professions and substantial amendments to the regime governing fungible securities.

The main features of the new law have also been summarised in the January 2012 edition of the Luxembourg Legal Update. Clifford Chance has also published a detailed client briefing on the new law.

Scope of the law

Dematerialisation of securities shall not apply to all Luxembourg companies but shall be reserved to Luxembourg corporations (*sociétés par actions*) – i.e. public limited liability companies (*sociétés anonymes* or SA), corporate partnerships limited by shares (*sociétés en commandite par actions* or SCA) and European companies (*sociétés européennes*) – excluding Luxembourg private limited liability companies (*sociétés à responsabilité limitée*) whose securities must remain in registered form only.

Moreover, not all types of securities may be subject to dematerialisation. The law clearly specifies that only equity securities – including shares, profit shares (*parts bénéficiaires*), subscription rights (*droits de souscription*) and debt securities governed by Luxembourg law (excluding debt securities, e.g. bonds or notes, issued by a Luxembourg company but governed by a foreign law) – may be issued as or converted into dematerialised securities.

Issuance of dematerialised securities

The law opens the possibility of issuing dematerialised equity securities provided that prior to the issuance of such securities:

- dematerialisation of securities is expressly foreseen in the articles of association of the company
- all measures have been taken for the registration of all the dematerialised securities of the same nature (e.g. shares or subscription rights) with only one clearing institution (*organisme de liquidation*) or central securities depositary (*teneur de compte central*)

- the name and address of the selected clearing institution (*organisme de liquidation*) or central securities depositary (*teneur de compte central*) is published on the company's website and in a Luxembourg newspaper.

The name and address of the clearing institution or central securities depositary selected must also be published in the Mémorial.

If the companies intend to issue dematerialised debt securities, they must take measures to ensure that all dematerialised securities of the same type (e.g. bonds or notes) are registered with the same clearing institution or central securities depositary. The management of the company is responsible for choosing the clearing institution or central securities depositary.

Conversion of dematerialised securities

The law permits issuers to convert existing bearer or registered equity securities into dematerialised securities, provided that their articles of association are amended in order to foresee the following:

- the possibility for the company to issue dematerialised securities
- a clear definition which kind of securities may be converted into dematerialised form
- whether the conversion is optional or mandatory
- the conversion procedure to follow
- if the conversion is mandatory, the time limit for the conversion (which cannot be less than two years) and the sanction in case of non-conversion of securities within such time limit.

In practice, bearer and registered securities will be converted and dematerialised through their registration in a securities account held by a clearing institution, a central securities depositary or a securities depositary. The transfer of dematerialised securities shall occur by way of a wire transfer between accounts.

It should be noted that holders of dematerialised securities may also require, at any time, the conversion of their dematerialised securities into registered securities, unless the articles of association of the company expressly foresee that all of the securities of the company must be dematerialised.

Specific rules are also expressly foreseen by the law in the context of the mandatory conversion of bearer or registered securities into dematerialised securities, and certain sanctions will apply to securities which are not converted within a certain timeframe (e.g. the suspension of voting rights and distribution rights attached to these securities).

Specific corporate rules relating to dematerialised securities

Specific provisions have been included in the Luxembourg Companies Law (law of 10 August 1915 on commercial companies) with respect to the attendance of holders of dematerialised securities at the general shareholders' meeting. It is now foreseen that such holders may only attend the general meeting and exercise their rights in this respect if they hold such dematerialised securities no later than the fourteenth day preceding the general meeting.

Finally, a further innovation was introduced in the Companies Law concerning the signature requirements for bonds under bearer form. Collective bond securities issued under global bearer certificates deposited with a clearing system may now be signed by one or more persons authorised to do so by the company, and it is therefore no longer necessary that at least one director of the company signs it. Additionally, the number of securities represented by such global bearer certificates must be determined or determinable.

Late Payment in Commercial Transactions – Law of 29 March 2013

The law of 29 March 2013 on combating late payment in commercial transactions has implemented into national law the Directive 2011/7/EU of 16 February 2011 on combating late payment in commercial transactions and has amended in this respect the law of 18 April 2004 on payment periods and default interests.

The aim of the law is to strengthen the fight against late payments in commercial transactions, to ensure the proper functioning of the internal market and thereby fostering the competitiveness of the undertakings. The law provides for specific payment periods for commercial transactions between (i) undertakings[1] and (ii) undertakings and public authorities. The law also modernises the existing provisions relating to (iii) unfair contractual terms and practices and (iv) compensation for recovery costs.

Commercial transactions between undertakings

According to this law, if the creditor has fulfilled its contractual and legal obligations but has not received the amount due on time (unless the debtor is not responsible for the delay), the creditor is legally entitled to interest for late payment without the necessity of a notice or reminder. The creditor can thus claim interest for late payment from the day following the payment due date or the end of the payment deadline agreed upon by contract. In case no payment due date or payment deadline is contractually agreed, interest for late payment will start to run 30 days after certain time periods depending upon when the goods or services have been delivered or the relevant invoices received.

The applicable legal interest rate for late payment is published at the beginning of each semester in the Mémorial B. It is equal to the European Central Bank's key interest rate increased by a margin of 8 points[2]. The interest rate for late payment currently applicable in the first half of 2013 is hence equal to 8.75% (0.75 + 8). It should be noted that the parties can contractually fix an interest rate that is higher or lower than the legal interest rate provided however that such rate is not grossly unfair to the creditor.

Another major innovation is that the contractual payment deadline must in principle not exceed 60 days. However, there may be circumstances in which undertakings require more extensive payment periods, for example when undertakings wish to grant trade credit to their customers. It is therefore possible for the parties to expressly agree on a contractual deadline longer than 60 days provided, however, that such extension is not grossly unfair to the creditor.

Commercial transactions between undertakings and public authorities

As for the commercial transactions between undertakings, where the creditor has fulfilled its contractual and legal obligations and if the creditor has not received the amount due on time from the public authority concerned (unless this debtor is not responsible for the delay), the creditor is entitled to charge interest for late payment without giving any prior notice of non-performance reminding the debtor of its obligation to pay. Interest for late payment will begin to run 30 days after certain time periods depending upon when the goods or services are delivered or the relevant invoices received. The date of receipt of the invoice may however not be contractually agreed between the parties.

The applicable legal interest rate for late payment in transactions between undertakings and public authorities is the same as for transactions between undertakings.

Contrary to the rules applicable to commercial transactions between undertakings, the contractual payment deadline applicable to transactions between undertakings and public authorities must in principle not exceed 30 days (as opposed to 60 days for commercial transactions between undertakings). The parties can agree on a contractual deadline longer than 30 days provided it is objectively justified in the light of the particular nature or features of the contract. In any event the deadline has not to exceed 60 calendar days. As public authorities are supposed to benefit from more secure, predictable and continuous revenue streams than undertakings, the payment deadline is thus shorter than for the undertakings.

Unfair contractual terms and practices

The law of 18 April 2004 already provided for rules setting out the possibility for the District Court to order the cessation of grossly unfair clauses or practices relating to the payment date, the payment deadline, the interest rate for late payment or the compensation for recovery costs. The law of 29 March 2013 clarifies these rules by introducing criteria in order to determine whether a

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[1] I.e. any organisation, other than a public authority, acting in the course of its independent economic or professional activity, even where that activity is carried out by a single person.
[2] The margin to be added to the European Central Bank's key interest rate is hence increased by one percentage point compared to the one provided in the law of 18 April 2004.

contractual clause or practice is grossly unfair to the creditor. In order to determine whether a clause is grossly unfair, all circumstances of the case shall be considered, including:

- any gross deviation from good commercial practice, contrary to good faith and fair dealing
- the nature of the product or the service
- whether the debtor has any objective reason to deviate from the legal interest rate for late payment, from the payment deadline or from the fixed compensation sum for recovery costs.

Another major innovation is that the law now expressly provides that clauses which exclude interest for late payment, or clauses which exclude compensation for recovery costs, are considered to be grossly unfair.

These rules apply to commercial transactions between undertakings and to commercial transactions between undertakings and public authorities.

Compensation for recovery costs

Furthermore, the law also provides that where interest for late payment becomes payable in commercial transactions between undertakings or between undertakings and public authorities, the creditor is entitled to obtain from the debtor a fixed sum of EUR 40 as a compensation for its recovery costs. Compensation in the form of a fixed sum aims at limiting the administrative and internal costs linked to the recovery.

In addition to this lump sum, the creditor is entitled to obtain reasonable compensation from the debtor for any recovery costs exceeding that fixed sum and incurred due to the debtor's late payment. These costs include expenses incurred, in particular, in instructing a lawyer or a debt collection agency.

The rules set out above enable creditors to enforce their rights more efficiently in case of late payment and thus reduce the negative impact on their liquidity and competitiveness.

Case Law

Dismissal of Claims – Specialty of Legal Personality – Limitation of the Corporate Object – Failure to Register

Supreme Court, 22 December 2011

The Transfer of a Branch of Activity and the Transfer of Claims

Supreme Court, 14 March 2013

Liability of the Liquidator for not including in its Liquidation Accounts a Certain Claim of which he was Aware – No Legal Prohibition to Close the Liquidation of the Company before the Expiration of a Legal Warranty Period

Court of Appeal, 1 December 2011

Non-Publication of Annual Accounts by a French Company having a Branch in Luxembourg – Judicial Liquidation for Serious Contravention to the Provisions of the Companies Law – Proportionality of the Sanction

Court of Appeal, 14 December 2011

Opening of Bankruptcy Proceedings after the Closing of Liquidation Proceedings – Prescription for the Opening of Bankruptcy Proceedings

Court of Appeal, 18 January 2012

Conditions for a Judicial Appointment of a Provisional Director or an Expert in case of a Conflict between Shareholders

Court of Appeal, 29 February 2012

Appointment of Directors – Interpretation of the Provisions of the Articles of Association regarding Appointment from a list of Candidates – Conditions for Appointment of a Provisional Director

District Court, 31 March 2011

Bankruptcy of a Luxembourg SA – Sale of all the Assets of a Bankrupt Company by a Director to another Luxembourg Company in which he is also Director for an Insignificant Price – Clear and Serious Wrongdoing

District Court, 8 July 2011

Nullity of Shareholders Resolutions – Introduction of the Nullity Action against both a Company and the People who wish to Rely upon the Resolutions

District Court, 26 April 2012

Erroneous Filing of Information with the Luxembourg Register of Commerce and Companies and the Possibility of Modification or Return of Documents Filed

District Court, 8 March 2013

Please refer to the Litigation section of this Luxembourg Legal Update for details of the above.

Funds & Investment Management

EU Developments

AIFM Directive
Update on Level 2 and Level 3 Measures

EU Commission Delegated Regulation N°231/2013 AIFMD Exemptions, General Operating Conditions, Depositaries, Leverage, Transparency and Supervision

The delegated regulation N°231/2013 adopted by the European Commission on 19 December 2012 to supplement the AIFM Directive[3] has been published in the Official Journal of the European Union on 22 March 2013. This Regulation has entered into force on 11 April and shall apply from 22 July 2013. Please refer to the February 2013 edition of our Luxembourg Legal Update.

EU Commission Implementing Regulations N°447/2013 and 448/201

AIFMD Opt-in and Member State of Reference

On 15 May 2013, the European Commission adopted the following regulations published in the Official Journal of the European Union on 16 May 2013:

- implementing regulation N°447/2013 establishing the procedure for AIFMs which choose to opt in under the AIFM Directive (Regulation 447)
- implementing regulation N°448/2013 establishing a procedure for determining the Member State of reference of a non-EU AIFM pursuant to the AIFM Directive (Regulation 448).

Regulation 447 clarifies that there is no reason why small AIFMs (i.e. those with assets under management below the EUR 100/500 million thresholds) which choose to "opt in" under the AIFM Directive would use a different procedure for AIFM authorisation than the one applicable to AIFMs with assets under management above the EUR 100/500 million thresholds. The application for authorisation of small AIFMs shall thus follow the same procedure provided for in paragraphs 1 to 5 of Article 7 of the AIFM Directive and in the measures adopted in implementation thereof.

[3] Directive 2011/61/EU of 8 June 2011 of the European Parliament and the Council on alternative investment fund managers.

Regulation 448 clarifies the rules to be followed for determining the "Member State of Reference" of a non-EU AIFM from among several possible Member States of Reference. It further specifies that the procedure for determining the Member State of Reference is different from the procedure for applying for an EU passport under the AIFM Directive. As a result, once the Member State of Reference has been determined, the non-EU AIFM concerned has to apply for authorisation with the competent authority of that Member State of Reference, following the same procedure and subject to the same conditions as those applicable to EU AIFMs under Articles 7 and 8 of the AIFM Directive.

As a reminder, an EU Member State of Reference must be appointed for:

- each non-EU AIFM managing (even without marketing in the EU) an EU AIF
- each non-EU AIFM marketing in the EU an EU and/or non-EU AIF.

The competent authorities of that Member State of Reference will act as regulator of the non-EU AIFM. Specific rules are provided for the designation of the Member State of Reference in the AIFM Directive and its implementing measures, depending in particular on the EU Member States where the AIF is established or is intended to be marketed. In addition to the designation of the Member State of Reference, a so-called "Legal Representative" established in the Member State of Reference will also have to be appointed.

The two new regulations will enter into force on 5 June 2013 and will apply from 22 July 2013. However, regarding Regulation 448, it has to be noted that the application date of 22 July 2013 is without prejudice of (and must therefore be combined with) the delegated act to be adopted by the EU Commission by July/October 2015 in order to determine the exact date by when the rules relating to the Member State of Reference will apply.

AIFMD Standardised List of Issues

EU Commission Q&A

The European Commission has published Q&As on the AIFM Directive on its website.

The main standardised questions and answers cover the following topics: definition of an AIF, delegation requirements, depositary, valuation, cooperation between Member States' competent authorities, master AIFs and feeder AIFs, marketing to retail investors, MiFID firms and MiFID activities, own funds, passport issues, remuneration, reporting requirements, responsibility of Member States' competent authorities, transitional provisions and transposition in Member States.

ESMA Guidelines 2013/201

AIFMD Sound Remuneration Policies

On 11 February 2013, ESMA published its guidelines on sound remuneration policies under the AIFM Directive.

These guidelines aim at clarifying the remuneration rules AIFMs have to comply with when establishing and applying the remuneration policies required by the AIFM Directive for certain categories of identified staff whose professional activities have a material impact on the risk profiles of the AIFMs or of the AIFs they manage.

The key elements of ESMA remuneration guidelines include the following:

General governance

The governing body of each AIFM has to ensure sound and prudent remuneration policies/structures exist and are not circumvented.

Impacted staff

The guidelines apply to the AIFM's identified staff whose professional activities might have a material impact on the AIF’s risk profile. This includes senior management, risk takers, control functions and any employee receiving a total remuneration that takes them into the same remuneration bracket as the aforementioned categories of staff. In addition, ESMA's remuneration guidelines provide that the entities to which portfolio management or risk management activities will be delegated by the AIFM, regardless whether these delegated entities are located within or outside the EU, must also be subject to remuneration policies which are as effective as those applicable under ESMA remuneration guidelines or, alternatively, that ESMA remuneration guidelines are contractually imposed on these delegated entities.

Impacted remuneration

The remuneration covered consists of all forms of payments or benefits paid by the AIFM, of any amount paid by the AIF itself, including carried interest, and of any transfer of units or shares of the AIF, in exchange for professional services rendered by the identified staff. It appears from ESMA remuneration guidelines, which cover both components of the remuneration (i.e. fixed and variable), that AIFMs which exclusively grant a fixed remuneration to the relevant categories of their identified staff are not exempted from the scope of the AIFM Directive and ESMA remuneration guidelines.

Principle of proportionality

Certain of the remuneration requirements laid down in the AIFM Directive and further clarified by ESMA remuneration guidelines are subject to the principle of proportionality, which gives some flexibility to the AIFMs to take into account, in the application of these requirements, the nature, scale and complexity of their business. A limited number of remuneration principles (such as the remuneration committee requirement) may be disapplied or neutralised in their entirety. However, this principle of proportionality cannot be used or invoked to avoid the establishment and implementation of the remuneration policy itself, which is and remains applicable to all AIFMs regardless of their size or systemic importance.

ESMA remuneration guidelines will apply from 22 July 2013, subject to the transitional provisions of the AIFM Directive.

ESMA Final Report 2013/413

Technical Standards on types of AIFMs

On 2 April 2013, ESMA published its final report on draft regulatory technical standards (RTS) to determine types of AIFMs where relevant in the application of the AIFM Directive. The draft RTS distinguish AIFMs managing AIFs of the open-ended type and AIFMs managing AIFs of the closed-ended type, in order to apply the rules on liquidity management, the valuation procedures and the transitional provisions of the AIFM Directive.

In accordance with the RTS, an AIF will be deemed to be open-ended if (a) there is a right for the unitholders or shareholders to redeem their units or shares in the AIF at least once a year; and (b) the redemption price does not vary significantly from the net asset value per unit/share of the AIF available at the time when the price is determined in accordance with the instrument of incorporation or prospectus of the AIF.

The RTS also indicates that no account has to be taken of any holding periods set out in the instrument of incorporation or the prospectus of the AIF when determining whether an AIF is open-ended or not. In addition, any powers to exercise the use of side-pockets, gates or other special arrangements will not be considered when making a determination on the categorisation of the AIF as either an open-ended or closed-ended AIF.

The draft RTS will now be submitted to the European Commission for endorsement or rejection within 3 months of receipt. If adopted, the RTS will take the form of a European Commission Regulation that shall apply from 22

July 2013.

ESMA Final Report 2013/600

AIFMD Key Concepts

On 24 May 2013, ESMA published its final guidelines on key concepts of the AIFM Directive. The purpose of the guidelines is to ensure common, uniform and consistent application of the individual concepts that comprise the definition of an AIF under the AIFM Directive, i.e. collective investment undertaking, raising capital, number of investors and defined investment policy, by clarifying each of these concepts.

The guidelines will now be translated into the official languages of the EU, and the final texts will be published on the ESMA website. The deadline for reporting requirements will be two months after the publication of the translations and the guidelines will apply from that date.

Co-operation Arrangements for Third Countries Approval by ESMA and CSSF

In a press release dated 30 May 2013, ESMA indicated that it has approved co-operation arrangements between European securities regulators with responsibility for the supervision of AIFs and 34 of their global counterparts, including regulators from jurisdictions such as the USA, Canada, Brazil, India, Switzerland, Australia, Hong Kong and Singapore.

These co-operation arrangements allow European security regulators to supervise the way non-EU AIFMs comply with the rules of the AIFM Directive, and are a pre-condition to allowing non-EU AIFMs access to European markets or to perform fund management activities on behalf of European AIFMs. The arrangements will apply to non-EU AIFMs that manage or market AIFs in the EU and to EU AIFMs that manage or market AIFs in third countries. The arrangements also cover co-operation in the cross-border supervision of depositaries and AIFMs' delegates. The arrangements, which will apply from 22 July 2013, will facilitate the exchange of information, cross-border on-site visits and mutual assistance in the enforcement of the respective supervisory laws.

While ESMA has negotiated the co-operation arrangements centrally on behalf of all 27 European Member State securities regulators, they are bilateral agreements that must be signed between each European securities regulator and the non-European authorities. The actual supervision of AIFMs lies with the national securities regulators, and each authority decides with which non-European authorities it will sign a co-operation arrangement. In this respect, the CSSF published a press release on 31 May 2013 confirming that it has signed a memorandum of understanding with each of the non-European authorities referred to by ESMA.

ESMA Draft Guidelines 2013/592

AIFMD Reporting Obligations

On 24 May 2013, ESMA launched a consultation on reporting obligations under Article 3 and Article 24 of the AIFM Directive.

The consultation sets out draft guidelines which provide clarification on the information that AIFMs should report to national competent authorities, the timing of such reporting together with the procedures to be followed when AIFMs move from one reporting obligation to another. The consultation paper also includes:

- the reporting template set out in the Delegated Regulation
- a diagram summarising the reporting obligations of AIFMs, as determined by the total value of assets under management and the nature of the AIFs managed or marketed
- detailed IT guidance for filing.

ESMA will accept answers to the consultation until 1 July 2013.

Amendments to AIFM Directive and UCITS Directive New EU rules on Credit Rating Agencies

On 21 May 2013, the European Parliament and Council have adopted:

- a regulation (Regulation N°462/2013) amending regulation N°1060/2009 on credit rating agencies (CRAs)
- a directive (Directive 2013/14/EU) amending the UCITS IV Directive[4] and the AIFM Directive.

Both amendments reflect the political agreement on amending European rules on CRAs reached between the Council and the European Parliament in December 2012 and are related to the excessive reliance on credit ratings. Both documents have been published in the Official Journal on 31 May and will enter into force on 20 June 2013.

The main point introduced by Regulation N°462/2013 is the

[4] Directive 2009/65/EC of 13 July 2009 of the European Parliament and the Council on undertakings for collective investment in transferable securities.

mandatory rotation rule obliging issuers of structured finance products with underlying re-securitised assets who pay CRAs for their ratings ("issuer pays model") to switch to a different agency every four years. Mandatory rotation will not apply to small CRAs, or to issuers employing at least four CRAs, each rating more than 10% of the total number of outstanding rated structured finance instruments. A review clause provides the possibility for mandatory rotation to be extended to other instruments in the future.

In addition and in order to reduce the risk of over-reliance on credit ratings by asset managers of AIFs and UCITS carrying out investments on debt instruments, Directive 2013/14/EU modifies the UCITS IV Directive and AIFM Directive by introducing explicit requirement for the managers of AIFs and UCITS not to solely or mechanistically rely on external credit ratings for assessing the creditworthiness of the AIF/UCITS assets (external credit ratings may be used as one factor among others in this process but shall not prevail). In this respect, it has to be noted that Directive 2013/14/EU does not carry a legal obligation for asset managers (such as management companies) to build their own rating units. The main aim being to avoid excessive reliance on credit ratings, the text ensures flexibility in the way this is to be achieved.

According to EFAMA, existing risk management rules in UCITS and AIFMD already require this type of sound risk management procedures when assessing the counterparty, credit etc. risk of each investment. Therefore, the main idea is to integrate the required principle for a non-exclusive or mechanistic reliance on external ratings into sound risk management controls and procedures of asset managers.

Venture Capital and Social Entrepreneurship Funds

EU Regulations published in Official Journal

The two regulations of the European Parliament and Council of 17 April 2013 on European venture capital funds (EuVECA) and on European social entrepreneurship funds (EuSEF) have been published in the Official Journal on 25 April 2013. These regulations will enter into force on 15 May 2013, although the majority of their articles will apply from 22 July 2013, the same date as the AIFM Directive. Level 2 measures and technical standards are also expected to clarify some provisions of the regulations.

The overall objective of the regulations is to create an optional legislative framework tailored to the needs of EuVECA/EuSEF managers to make it easier for them to raise funds across the EU. To that end, new EuVECA and EuSEF designations or labels are introduced together with a new EU passport to allow EuVECA/EuSEF managers to market their funds across the EU and grow while using a single set of rules, provided that they comply with certain qualifying requirements.

The main characteristics of the regulations are summarised below:

Optional regime

Under the EuVECA and EuSEF regulations, managers will decide themselves whether or not they want to comply with the new regulations in order to make use of the EuVECA/EuSEF status and benefit from the new EU passport regime. In case where the managers do not voluntarily comply with the EuVECA and EuSEF regulations, existing national offering and marketing requirements of the EU Member States will continue to apply.

Conditions to be complied with by the manager

In order to be able to benefit from the proposed EuVECA/EuSEF status and passport in respect of all or some of its funds, the manager must be registered by the competent authority of its home Member State, in Luxembourg the CSSF. For that purpose, the manager must be established in an EU Member State and comply with a number of requirements, including the condition to have total assets under management below the EUR 500 million threshold laid down in the AIFM Directive and to comply with certain other conditions in respect of, *inter alia*, skill, care and diligence, prevention of conflict of interests, portfolio management, available own funds and human resources, delegation rules, information disclosure and reporting.

Conditions to be complied with by the fund

The EuVECA/EuSEF fund must be a collective investment undertaking qualifying as an AIF under the AIFM Directive and established in an EU Member State. It must invest at least 70% of its aggregate capital contributions and uncalled committed capital in qualifying investments (as defined in the regulations), such as equity and quasi-equity instruments issued by qualifying portfolio undertakings (as defined in the regulations), secured or unsecured loans granted to a qualifying portfolio undertaking and units or shares of one or several other EuVECAs/EuSEFs, provided that those EuVECAs/EuSEFs have not themselves invested more than 10% of their aggregate capital contributions and uncalled committed capital in EuVECAs/EuSEFs. As regards EuVECAs, qualifying portfolio undertakings should be SMEs employing less than 250 people with an annual turnover of less than EUR 50 million or an annual balance sheet not exceeding EUR 43 million. In the case of EuSEFs, qualifying portfolio undertakings mean undertakings that have the achievement of measurable, positive social impacts as primary objective, whose profits are used to achieve social objectives and which are managed in an accountable and transparent way.

Conditions to be complied with by the investors

EuVECAs/EuSEFs may only be offered to certain eligible investors, including:

- professional clients in the meaning of the MiFID Directive
- other investors (such as high net-worth individuals) provided that such any other investor commits to invest at least EUR 100,000 and confirms in writing that he is aware of the risks associated with the envisaged commitment or investment
- the executives, directors or employees involved in the management activities of the EuVECA/EuSEF manager.

No depositary requirement

The EuVECA and EuSEF regulations do not contain any provision imposing a depositary on EuVECAs/EuSEFs, but they require that the external auditor confirms at least annually that money and assets are held in the name of the EuVECA/EuSEF and that the fund manager has established and maintained adequate records and controls in respect of the use of any mandate or control over the money and assets of the EuVECA/EuSEF and its investors. However, both regulations provide that the EU Commission will review by July 2017 the appropriateness of complementing the EuVECA/EuSEF legal framework with a depositary regime.

Connection with the AIFM Directive

The EuVECA and EuSEF regulations are, in certain respects, complementary to the AIFM Directive as they offer an EU marketing passport to small AIFMs (i.e. the managers of unleveraged closed-ended AIFs with assets under management up to a total value not exceeding EUR 500 million). These managers are in principle exempted from the "full" AIFM Directive and only subject to some registration and reporting requirements. Even if they may voluntary opt-in for the application of the AIFM Directive, and consequently acquire an EU marketing passport on the basis of that directive, acquiring an EuVECA or EuSEF status and passport seems substantially less burdensome for them as they will not have to comply with the full set of the AIFM Directive rules. Nevertheless, an EuVECA or EuSEF manager that begins to exceed the AIFM Directive EUR 500 million threshold may continue to make use of the EuVECA or EuSEF label, provided that it also complies with the full AIFM Directive requirements.

Connection with the UCITS Directive

Where EuVECA/EuSEF managers are external managers and are registered in accordance with the EuVECA regulation, respectively EuSEF regulation, they may additionally manage UCITS, subject to authorisation under the UCITS Directive.

Clifford Chance has prepared a client briefing outlining the key benefits and obligations that result from the new EuVECA status.

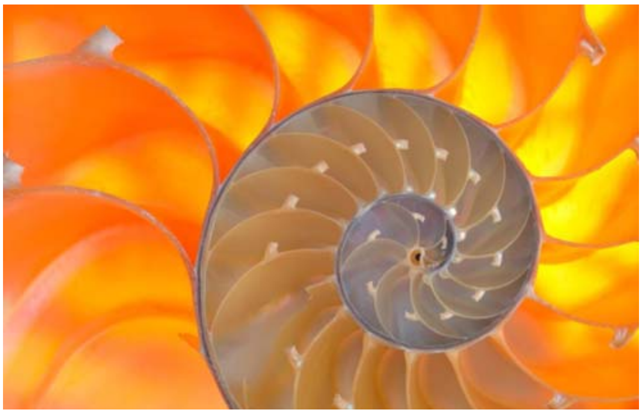
ETFs and other UCITS Issues

ESMA Guidelines 2012/832

ESMA's consolidated guidelines on ETFs and other UCITS issues entered into force on 18 February 2013. On the same day, the CSSF published its Circular 13/559 incorporating the ESMA guidelines into its supervisory practice. In addition, ESMA published a Q&A on 15 March 2013 on the practical application of these guidelines, which is intended to be continually edited and updated by ESMA as and when new questions are received.

ESMA guidelines on ETFs and other UCITS issues introduce disclosure and documentation requirements as well as a number of new substantive requirements applicable to UCITS ETFs, index-tracking by UCITS, the use of efficient portfolio management (EPM) techniques and over-the-counter (OTC) derivatives by UCITS, the management of collateral received by UCITS in this context, and the eligibility of financial indices for investments by UCITS.

UCITS established prior to the entry into force of the Guidelines are given until 18 February 2014 to comply with some of the Guidelines' requirements, whilst others apply with immediate effect.



Clifford Chance has prepared a client briefing providing an overview of the changes to the relevant Luxembourg regulatory environment brought about by these guidelines and focusing on the actions to be taken by Luxembourg UCITS, in particular as regards the new substantive requirements and the amendments to the various fund documents required by ESMA guidelines.

Legislation

Dematerialisation of Securities – Law of 6 April 2013

According to the Luxembourg law of 6 April 2013 on the dematerialisation of securities, SICAVs/SICAFs and FCPs governed by the UCI Law or the SIF Law will be allowed to issue dematerialised shares/units in addition to registered or bearer shares/units provided that this is foreseen by their articles of incorporation/management regulations. A UCI/SIF may exclusively issue dematerialised shares/units. It shall however also be possible to combine, within one and the same fund, sub-fund or class of shares or units, dematerialised, bearer and registered securities. Bonds subject to Luxembourg law may also be issued in dematerialised form.

For the avoidance of doubt, shares of management companies governed by Chapter 15 or 16 of the UCI Law can only be issued in registered form.

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, the 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 law of 6 April 2013).

For detailed description please refer to the Corporate, M&A section of this Luxembourg Legal Update.

Regulatory Developments

CSSF Circular 13/564 and BCL Circular 2013/231

Statistical Data Collection for Money Market and Non-Money Market UCIs

This Circular, published on 28 March 2013 by the CSSF together with the BCL, aims at modifying the statistical data collection for money market UCIs and non-money market UCIs.

In comparison with the current statistical data collection, the modification aims to repeal the existing exemptions, namely:

- repealing the derogations currently granted to sub-funds of non-money market UCIs of modest size for the reports S 1.6 "Information on valuation effects on the balance sheet of non-money market UCIs", S 2.13 "Quarterly statistical balance sheet for UCIs", as well as for the security by security report (SBS)
- repealing the derogations currently granted to sub-funds of money market UCIs of modest size for the report S 1.3 "Monthly statistical balance sheet for money market UCIs", as well as for the security by security report (SBS).

Therefore, the exemptions foreseen by previous BCL Circulars 2007/211 and 2009/227, which had been confirmed by various BCL letters and according to which some sub-funds of UCIs were provided with an exemption for the remittance of statistical reports are repealed with effect from the reference period of June 2013.

Consequently:

- All sub-funds of money market UCIs are invited to submit reports S 1.3 and SBS for the reference period of June 2013 at the latest on 12 July 2013.
- All sub-funds of non-money market UCIs are invited to submit reports S 2.13 and SBS for the reference period of June 2013 at the latest on 26 July 2013 and report S 1.6 as from the reference period of July 2013. In this context, it should be reminded that submitting report S 1.6 is not mandatory if the amounts for items fixed assets or financial derivatives represents less than 5% of total assets.

CSSF Application Form

Specific Sub-Fund Investment Policy Questionnaire

The CSSF has recently published a new separate questionnaire (Specific Sub-Fund Investment Policy Questionnaire) on its website to be filled out each time an application for a new UCI or new additional sub-fund(s) is submitted to the CSSF in order to inform about the sub-fund's investment policy.

CSSF Activity Report 2012

The CSSF published its Annual Report for 2012 in May 2013. In addition to statistical information concerning the Luxembourg financial sector, the report contains some information on the exercise by the CSSF of its regulatory powers over Luxembourg UCIs, SIFs, SICARs and management companies.

ALFI Guidelines for UCITS Liquidity Risk Management

The purpose of these guidelines, which were published on ALFI's website on 7 March 2013, is to provide guidance to the Luxembourg fund industry, with regard to liquidity risk management for UCITS. Particularities related to non-

UCITS or ETF structures are not addressed in this document. These practical guidelines aim to explore the different aspects of liquidity risk and to provide guidance on how to capture and manage it.

ALFI Guidelines for Sound Stress Testing Practices

On 17 April 2013, ALFI published guidelines for sound stress testing practices, which have become an important risk management tool that is required by supervisory authorities and is used by UCITS as part of their risk management process. In brief, such practices aim to provide an early warning signal so that the risk management procedures can operate accordingly and informed management decisions can be made.

ALFI's new guidelines are aimed at providing insights into current market practices and how a management company could translate different regulatory rules into sound stress testing practice for UCITS.

Case Law

Inadmissibility of an Individual Shareholder's Claim for a Loss Suffered due to the Depreciation of a Stock's Value (SICAV)

Court of Appeal, 30 November 2011

Please refer to the Litigation section of this Luxembourg Legal Update.

Litigation

Banking, Finance & Capital Markets

The Banker's Liability with respect to a Transfer Order (*ordre de virement*)

Supreme Court, 28 February 2013

In two rulings issued the same day, the Supreme Court examined the banker's liability with respect to the execution of a transfer order.

In the first ruling[5], the banker had executed a transfer order containing a forged signature. The client whose account had been debited pursuant to this transfer order challenged the debit and sued the banker in order to obtain a refund of the sums unduly transferred.

The Court of Appeal gave him satisfaction by considering that in its capacity as custodian of the client's assets, the bank was not validly released from its obligation of restitution towards the client. The court reasoned that when bankers execute a forged transfer order, i.e. given by a person that is not allowed to operate the account, they do not act in their capacity of agent of the client, as no valid mandate has been given by the client. Therefore, it is solely in their capacity as custodians that the bankers' liability will be appreciated. In their capacity as irregular custodians (*dépositaire irrégulier*), who have become owners and thus debtors of the funds deposited, the bankers can only validly be released provided they hand over the funds to their client or to the person appointed by the client. As the custodian bankers' obligation to reimburse the funds is an obligation of result (*obligation de résultat*), they can only avoid liability by showing that the payment resulted from the client's fault or from an extraneous cause not attributable to them.

The Supreme Court considered that the Court of Appeal had not violated article 1937 of the Civil Code. It therefore endorsed the lower court's conclusion that, in its capacity of custodian of the client's assets, the bank was not validly released from its obligation to reimburse the client.

The bank had also claimed before the Court of Appeal that pursuant to the contract the bank could not be held liable for the misuse or the fraudulent use of confidential data, either by the client or a third party, and that therefore, the parties had contractually put on the client the burden resulting from the misuse or the fraudulent use of the client's confidential data. The Court of Appeal had reasoned that this clause solely aimed at exonerating the bank from its contractual liability and did not prevent the client from making a claim in restitution following the execution of a forged payment on the grounds of payment law and of the principle that "who pays wrongly pays twice" ("*qui paie mal paie deux fois*").

The Supreme Court considered that the Court of Appeal, after construing in its sole discretion the clauses of a contract and applying them to the facts at hand, had not altered the convention, nor questioned the validity of the act, thereby endorsing the reading of the Court of Appeal.

In the second case[6], the claimant had ordered her bank to transfer a sum of money into the Luxembourg account of a

[5] Supreme Court, 28 February 2013, N°16/13, registry N°3012.

[6] Supreme Court, 28 February 2013, N°15/13, registry N°3137.

Belgian company held in another bank in order to purchase a vehicle. The bank of the order's beneficiary had noticed discrepancies between the account number and the name of the beneficiary. The bank of the order's beneficiary had informed the bank of the claimant, and after a discussion with the payer, had been instructed to transfer the money on the account specified. The funds then disappeared and the claimant sued the beneficiary's bank for crediting the account despite the discrepancies spotted. The Court of Appeal had rejected the claimant's appeal based on the scope of the banker obligation (limited to a check and spot potential discrepancies between the beneficiary's account number and his name). In the present case, the bank had met this requirement by duly informing the payer's bank. The beneficiary's bank was under no obligation to achieve a result to prevent the claimant from being defrauded, nor was it under any obligation of result with respect to the outcome of the discussion between its employee and the claimant.

The Supreme Court, confirming the Court of Appeal's decision, considered that the Court of Appeal had examined the bank's obligation to achieve a result on sufficient grounds and had reached a valid legal conclusion on the basis of the facts at hand.

Bankruptcy – Enforceable Title (*titre exécutoire*) and Grace Period

District Court Luxembourg, 19 April 2013

A banker had brought a bankruptcy claim against his debtor, for an unpaid debt of more than EUR 100,000,000.

The debtor objected to the claim and argued that the creditor did not have an enforceable title against him. The court[7] rejected this defence and reconfirmed that a merchant is bankrupt when he has ceased his payments and his commercial creditworthiness is undermined. The cessation of payment is the physical fact of the merchant who, unable to pay his debts, has stopped his cash flow. The cessation of payment assumes that certain, liquid and due debts (*dettes certaines, liquides et exigibles*) remain unpaid. The creditor is therefore not required to hold an enforceable title, nor to be in possession of an act of bailiff establishing the insolvency of the debtor (*acte de carence*).

The debtor also requested that the court grant him a grace period, to allow him to reimburse his debt in instalments.

[7] District Court Luxembourg (Comm.), 19 April 2013, N°151758 and 152344.

The court reconfirmed that measures of grace are measures granted by the judge to a debtor, whose debt is due and whom the creditor sues, in order to obtain payment. However, in the case at hand, as the claim was not for payment, but for a declaration of bankruptcy of the debtor, and as grace periods are not applicable to the latter, the court rejected this request.

The debtor also asked the court to stay the proceedings, insofar as he had filed for controlled management (*gestion contrôlée*), pending the outcome of such request. The court also rejected this exception, on the grounds that it was within its discretion, guided by the care for a sound administration of justice, to determine whether staying the proceedings was appropriate; in the case at hand it decided that a stay was not appropriate. The debtor was therefore declared bankrupt.

Fraud and Orders of Payment

Conciliation committee, CSSF Activity Report 2012

A claimant settled a constructor's invoice paying on the IBAN personal account of an employee of the constructor (the invoice did not mention the company's IBAN account). The client claimed that the bank should have checked the consistency of the names of account holder and the beneficiary of the bank order.

The bank claimed that article 100 of the Law dated 10 November 2009 relating to services of payment provides that "an order of payment executed in conformity with the unique identifier (*identifiant unique*) is deemed duly executed with respect to the beneficiary identified by the unique identifier". From the bank's point of view, this article implies that the banker can validly execute an order of payment onto the specified IBAN account without any obligation to check the payment's beneficiary. The CSSF endorsed the bank's stance.

Fee changes and duty to inform the client

Conciliation committee, CSSF Activity Report 2012

In various cases[8], clients challenged banking fees or interest rate changes implemented by banks.

In one specific case, the bank claimed that:

- clients tacitly accepted the fee increase by not challenging the bank statement in which the fee increase was mentioned within a said period

[8] CSSF, Activity Report 2012, p. 233-234.

- the fee schedules provided to the clients allow to modify the fees provided the client was informed beforehand.

The CSSF examined the client's bank statements and noted that the bank had withheld various amounts for fees and commissions in accordance with fee schedules subject to change over time. Those changes affected both the amount of the fees and the presentation of those fees under various headings intended to reflect the bank's activities. The CSSF then held that the claimant had not been properly informed by the bank of the fee conditions as their application had not been straightforward.

In a second case, the client asserted that the bank had not informed him properly of a change in the interest rate and that this change was therefore not enforceable against him. The bank argued that the claimant had tacitly accepted the interest rate change as he had not challenged the bank statement within the contractual period during which challenges could be made. The CSSF noted that the bank had informed its client of the interest rate change simply by mentioning it on the bank statement along with two other pieces of information. The bank statement read "CHGT", standing for "change" (*changement*), without any other explanation, along with "1,25000 →1,05000%", followed by a date. The CSSF concluded that the client had not been duly informed of the rate change as this information had not been conveyed in a readily understandable manner. Therefore, the bank was not entitled to conclude from the absence of challenge brought before the deadline that the client had tacitly accepted this change.

Corporate and M&A

Dismissal of Claims – Specialty of Legal Personality – Limitation of the Corporate Object – Failure to Register

Supreme Court, 22 December 2011

The claimant[9] was a company hired to execute the installation of sanitary, heating, and air conditioning facilities. In order to execute this mission, it subcontracted to additional companies for the assembly and installation of suspended ceilings. However, due to the sub-contractor's failure to properly execute this task, the claimant was forced to have the work redone at its own expense. It therefore brought an action for compensation against the sub-contractor, who brought a similar action against its own subcontractor. This second subcontractor raised, as a defence, the non-registration of this activity of installing suspended ceilings by the claimant with the Luxembourg LRoCC. It argued that the action for compensation by the claimant should be rejected, as according to Luxembourg law only actions related to activities for which a company is registered with the LRoCC are admissible. Indeed while the claimant itself was registered, it was not, according to its registered corporate object, allowed to engage in the assembly and installation of suspended ceilings.

The District Court rejected the argument of the second sub-contractor and considered that no legal provision prohibited the claimant from sub-contracting certain tasks within its global engagement to other companies. The District Court further found that in such a sub-contracting situation, the claimant did not need to be registered with the LRoCC for such sub-contracted tasks.

The Court of Appeal, however, overturned the judgment of the District Court and accepted the request of the sub-contractor considering that the sub-contracted activity was distinct from the activities for which the claimant was registered with the LRoCC. As it was not the case, the action of the claimant in relation to such activity was not admissible.

The Supreme Court confirmed the position of the Court of Appeal and rejected all of the arguments of the claimant. It firstly considered that the principle of the non-admissibility of actions related to activities for which a company is not registered with the LRoCC is a general principle of Luxembourg procedural law, which may be invoked by any interested person and not only by the direct sub-contractor of the claimant.

It secondly rejected the argument of the claimant that Luxembourg law does not require companies to provide an exhaustive listing of their commercial activities in the description of their corporate object filed with the LRoCC, but only required an "indication of the corporate object". It confirmed the position of the Court of Appeal pursuant to which the principle of specialty which applies to Luxembourg companies requires the Luxembourg companies to file with the LRoCC all of the activities they initially performed, as well as all of the activities they performed during their existence and which were not initially filed with the LRoCC.

The Supreme Court rejected the argument of the claimant that the non-admissibility of actions related to activities for which a company is not registered with the LRoCC applied solely to legal or natural persons engaging in commercial activities without any kind of registration, unlike the claimant

[9] Supreme Court, 22 December 2011, N°72/11.

which only failed to register an additional activity. The Supreme Court pointed out that this reading of the law was erroneous, and that not just the registration itself was mandatory. The Supreme Court found that not registering an activity may cause a company's claims to be dismissed, thereby effectively barring it from obtaining redress. Every change relative to a company's corporate object must be filed with the LRoCC, otherwise the company may be barred from bringing claims relative to such non-registered activities because the company's scope of action is limited to those activities mentioned in its corporate object.

The Transfer of a Branch of Activity and the Transfer of Claims

Supreme Court, 14 March 2013

A company filed a suit for payment against another company. The claim was based on the grounds that it had acquired the commercial branch of a third company, including the claim against the defendant company. The defendant company argued that said transfer of claim had not been notified. It could therefore act as if the transfer had not occurred and refuse to pay the receivable debt held by the transferee.

The Court of Appeal had rejected that exception as the transfer of the commercial branch has to be understood as the transfer of a universality covering all the assets and liabilities (including the transfer of agreements that were part of the company's former commercial activity). Such transfer of a universality does not have to be notified to the debtors of the former company.

The Supreme Court quashed the decision[10]. In its appeal, the defendant company put forward that there are only five situations allowing the transfer *ipso jure* of the entirety of assets and liabilities ("*patrimoine*") of a limited liability company governed by Luxembourg law, i.e.:

- the merger by absorption and incorporation of a new company
- the demerger ("*scission*")
- the contribution by a limited liability company of a part of its assets to another company, when both companies opt to submit said contribution to the law applicable to demerger matters
- the contribution of a branch of activity, when both companies opt to submit said contribution to the law applicable to demerger matters
- the contribution of a universality of assets and liabilities, when both companies opt to submit said contribution to the law applicable to demerger matters.

However, in the case at hand, the deed of incorporation of the claimant company did not mention that the transferor and transferee companies had submitted the contribution of the commercial branch to the law applicable to demerger matters.

The Supreme Court followed this reasoning. It thus ruled that the Court of Appeal had erred in considering that the transfer of claim resulting from the transfer of the commercial branch did not need to be notified to be enforceable against the transferred debtor.

Liability of the Liquidator for not including in its Liquidation Accounts a Certain Claim of which he was aware – No Legal Prohibition to Close the Liquidation of the Company before the Expiration of a Legal Warranty Period

Court of Appeal, 1 December 2011

In 1998, a Luxembourg company performed construction works for the benefit of two individuals. The construction of the house was completed in 1999, and the constructor who performed the work was put into liquidation in April 2003 – the liquidation was completed in December 2003. In 2007, some construction defaults appeared in the house, and the clients brought a case against the liquidated constructor on the basis of the legal warranty period for construction which is ten years. They also made a claim for damages against the liquidator of the liquidated company, considering that the liquidator committed some faults in the liquidation process:

- by closing the liquidation before the expiry of the legal warranty period, thus preventing them to have an effective recourse against the liquidated company
- by not setting aside sufficient funds in the liquidation accounts to cover any amounts which the liquidated company may have to pay arising during the legal warranty period.

Both the District Court and the Court of Appeal[11] rejected the arguments of the plaintiffs and refused to hold liable the

[10] Supreme Court, 14 March 2013, N°18/13, registry N°3136.

[11] Court of Appeal, 1 December 2011, N°35296.

liquidator for fault. The Court of Appeal considered that no legal provision prevents a company's liquidator from closing the liquidation before the expiry of a legal warranty period, and therefore there is no obligation for the liquidator to wait until the expiration of such legal warranty period before closing the liquidation operation. Moreover, according to the Court of Appeal, a liquidator could be held liable for fault in the event that he forgets to include in the liquidation accounts sufficient provisions to cover those claims he was aware of. In the present case, considering that the claim only appeared in 2007, i.e. after the closing of the liquidation, the liquidator was not at fault for not setting aside an amount in the liquidation accounts in order to cover this claim.

Non-Publication of Annual Accounts by a French Company having a Branch in Luxembourg – Judicial Liquidation for Serious Contravention to the Provisions of the Companies Law – Proportionality of the Sanction

Court of Appeal, 14 December 2011

This case involved a French company which had established a branch in Luxembourg. Since the establishment of the branch in 1997, the French company had neither filed with the Luxembourg Register of Commerce and Companies nor published in the Mémorial any of its annual accounts, in contravention of the Companies Law, which obliges a foreign company having a branch in Luxembourg to file and publish its own annual accounts (as they are filed and published in its country) with the LRoCC and Mémorial.

The public prosecutor ordered the closing of the Luxembourg branch for violation of the provisions of the Companies Law, and the District Court of Luxembourg decided to close the branch in July 2010. However, in June 2010, the French company finally published and filed its annual accounts in the Mémorial and with the LRoCC, and contested the decision of the District Court on this basis.

The decision of the District Court was overturned by the Court of Appeal[12]. Indeed, as the French company had complied with all the other obligations imposed by the Companies Law on it and its branch (except the filing and publication of its annual accounts), the Court of Appeal considered that the decision to close the branch was disproportionate.

Opening of Bankruptcy Proceedings after the Closing of Liquidation Proceedings – Prescription for the Opening of Bankruptcy Proceedings

Court of Appeal, 18 January 2012

On 16 October 2008, a Luxembourg SA was put into liquidation and dissolved through a simplified liquidation procedure before a Luxembourg notary public. The notarial deed enacting the dissolution was published in the Mémorial on 3 December 2008 and the company was deregistered from the Luxembourg Register of Commerce and Companies on 27 November 2008. On 15 April 2010, the State of the Grand Duchy of Luxembourg requested the opening of bankruptcy proceedings against the liquidated company for non-payment of tax invoices.

The District Court rejected the request of the State of the Grand Duchy of Luxembourg, on the grounds that the liquidation of the company was closed and that, with the closing of the liquidation, the liquidated company had ceased its commercial activity. The District Court, interpreting the provisions of the Luxembourg law on bankruptcy proceedings, further found that bankruptcy proceedings could only be requested against a dissolved company within six months of the closing of its liquidation.

The State of the Grand Duchy of Luxembourg however lodged an appeal against this decision. It considered that according to article 157 of the Companies Law, in its capacity as third party, the State was authorised to lodge any action against a dissolved company during a period of 5 years from the publication of the closing of the liquidation, and could request the opening of bankruptcy proceedings against such a dissolved company.

The Court of Appeal[13] rejected the arguments of the State of the Grand Duchy of Luxembourg considering that article 157 was not applicable to actions requesting the opening of bankruptcy proceedings against the dissolved company. The Court of Appeal upheld the previous judgment, confirming that bankruptcy proceedings could only be opened against a liquidated company within 6 months of the closing of its liquidation. It however admitted that the liquidation of a company could be reopened by a creditor of the liquidated company in case of the fraudulent closing of the liquidation.

[12] Court of Appeal, 14 December 2011, N°36785.

[13] Court of Appeal, 18 January 2012.

Conditions for a Judicial Appointment of a Provisional Director or an Expert in case of a Conflict between Shareholders

Court of Appeal, 29 February 2012

The appellant sought the nomination of a provisional director or an expert in light of a serious danger that the company would face due to the actions of a manager not correctly defending the interests of the company.

On the nomination of a provisional director

The designation of a provisional director is usually an exceptional measure which may occur when there is evidence of circumstances

- preventing the normal functioning of the company
- threatening it of an imminent damage/loss.

In practice, courts are quite prudent when the nomination of a provisional director is sought in a situation involving a conflict between shareholders and tend to make sure that two conditions are met before authorising the nomination of a provisional director: the abnormal functioning of the company and the corporate interest of the company is seriously jeopardised.

In the present case, the Court of Appeal[14] therefore held that the disagreement with the policy followed by the manager was not sufficient to justify the appointment of a provisional director. The appellant did not produce evidence that the corporate interest of the company was jeopardised and, as a result, the required conditions for the appointment of a provisional director were not fulfilled. Thus the request was rejected.

On the nomination of an expert

The conditions for the nomination of an expert are

- the urgency of the matter
- the legal necessity to prevent the fading of elements of proof.

In the present case, the court held that the appellant did not establish the presence of a matter of urgency. Furthermore, it is not the role of the *juge des référés* to assign to an expert when the purpose of such an expert would be to appreciate the economic or financial opportunity of a transaction. This request was therefore also rejected.

[14] Court of Appeal, 29 February 2012, N°37603.

Appointment of Directors – Interpretation of the Provisions of the Articles of Association regarding Appointment from a List of Candidates – Conditions for Appointment of a Provisional Director

District Court, 31 March 2011

Two minority shareholders of a Luxembourg SA brought a claim against the company and its majority shareholder for the annulment of a decision taken by the shareholders' meeting of the company appointing a new director. The two minority shareholders challenged this shareholders' decision on the basis that such appointment was in contravention of the articles of association of the company.

The share capital of the company was divided between ordinary and preferred shares, with the majority of the ordinary shares being held by the minority shareholders and the majority shareholder holding the majority of the preferred shares. According to the articles of association of the company, the holders of ordinary shares and the holders of preferred shares are respectively entitled to propose candidates for appointment as directors by the shareholders' meeting. The articles of association specify that the list of candidates proposed for appointment must be established by the shareholders of the relevant category acting together.

During the shareholders' meeting, candidates proposed by the holders of preferred shares were elected. However, the candidates proposed by the majority holders of the ordinary shares (i.e. the two minority shareholders) were not elected, and the majority shareholder decided to elect another candidate it had proposed, in its capacity as a minority holder of the ordinary shares.

The two minority shareholders therefore brought a claim for the appointment to be nullified, arguing that the new director who was appointed was not selected for nomination by the holders of ordinary shares acting as a whole. They requested the convening of a new shareholders' meeting to appoint a new director, and for the appointment of a provisional director replacing the existing board of directors until the holding of the reconvened shareholders' meeting.

The majority shareholder argued that the appointment was valid on the basis that the candidate was proposed by a holder of ordinary shares and that the articles of association of the company, as well as the past practice of the company regarding appointment of directors, actually authorised each holder of ordinary shares to propose candidates for appointment.

After analysing the provisions of the articles of association of the company, the District Court[15] confirmed the validity of the provision reserving to a certain category of shareholders the right to propose candidates for appointment as directors. The District Court further considered that despite the past practice of the company in this respect, the current provisions of the articles of association regarding the proposal of candidates clearly stated that the list of candidates must be determined by the shareholders of the relevant category acting together, i.e. by a majority vote of the shareholders of the relevant category, and that there is no individual right for a holder of ordinary shares to propose candidates for appointment.

Therefore, the District Court held that the nomination of the director in question was not in conformity with the articles of association of the company. As a result, the resolution of the general shareholders' meeting of the company nominating the director in question was annulled and a new assembly had to be called to appoint a new director.

However, the District Court found that it was not necessary to appoint a provisional director in the present situation, considering that there was no imminent and important damage to the company in not having a valid board of directors until the reconvened shareholders' meeting.

Bankruptcy of a Luxembourg SA – Sale of all the Assets of a Bankrupt Company by a Director to another Luxembourg Company in which he is also Director for an Insignificant Price – Clear and Serious Wrongdoing

District Court, 8 July 2011

According to article 495-1 of the Luxembourg Commercial Code, in the event that the assets of a bankrupt company appear inadequate to meet its liabilities, the court may decide upon request of the bankruptcy receiver, to require that some or all of its debts are paid jointly or severally by those directors whose clear and serious wrongdoing have contributed to the company's bankruptcy.

Moreover, according to article 444-1 of the Luxembourg Commercial Code, the court may also impose a professional ban on the directors of a bankrupt company whose clear and serious wrongdoing contributed to its bankruptcy from serving as directors of other companies.

In the present situation, one of the directors of the bankrupt company sold, prior to the bankruptcy of the company, all the assets of the company for an insignificant price to another company performing the same business for which he was also director. He did not inform the other directors of the bankrupt company of the sale and did not mention that he may have a conflict of interest in this operation. Further to such sale, the company was no longer able to perform its activities and meet its liabilities, thus leading to its bankruptcy.

The bankruptcy receiver therefore requested that such director be held liable to pay some of the debts of the bankrupt company and that a professional ban be imposed on him.

The District Court[16] accepted the requests from the bankruptcy receiver. It held that the director committed a clear and serious wrongdoing having contributed to the bankruptcy by selling all of the assets of the company for an insignificant price, thus stopping the activity of the company, without informing the other directors and without making them aware of his conflict of interest, and by giving all the necessary elements for the exploitation of the company's activity to a competitor. Considering this behaviour, the District Court also pronounced a professional ban against such director for a period of 5 years.

Nullity of Shareholders Resolutions – Introduction of the Nullity Action against both a Company and the People who wish to rely upon the Resolutions

District Court, 26 April 2012

In April 2010, shareholders of an existing Luxembourg SCA took resolutions to increase the share capital of the company by issuing additional class C shares in the company and suppressed the preferential subscription rights of the existing class C shareholders. New class C shares were subscribed by four shareholders. Further to such resolutions and the capital increase, other general meetings were held, where it was decided, among other things, to approve the annual accounts of the company and to put the company into liquidation.

An existing holder of class C shares, however, requested the annulment of the resolutions taken during the extraordinary general assembly held in April 2010, claiming that an abuse of majority was committed and that the resolutions taken resulted in the dilution of the holder's financial rights. The class C shareholder's action in nullity

[15] District Court, 31 March 2011, N°133571.

[16] District Court, 8 July 2011, N°35204.

was introduced against the company only.

The defendants asserted that this claim for nullity was inadmissible, as the other shareholders (in particular the four who had subscribed for the new class C shares) were not implicated in the judicial proceedings. Indeed, a possible annulment of the resolutions taken in April 2010 could prejudice the rights of these shareholders.

According to case law and doctrine, when a legal action aims at obtaining the invalidity of a deliberation, the company as well as all of the people who wish to rely upon the resolutions need to be implicated. This should be done through a "*demande en déclaration de jugement commun*" which renders the judgment pronouncing the invalidity of a deliberation enforceable against all of the people who wish to rely upon the invalid deliberation.

In the present case, the District Court[17] held that all of the shareholders concerned by the subscription were identified and none of them were implicated in the proceedings. Therefore, as the nullity of the resolutions could cause prejudice to the interests of these shareholders, they must be party to the proceedings. As the requesting shareholder only introduced its claim of nullity against the company, the District Court considered that the demand was inadmissible.

Erroneous Filing of Information with the Luxembourg Register of Commerce and Companies and the Possibility of Modification or Return of Documents Filed

District Court, 8 March 2013

A limited partnership (*société en commandite simple*) had electronically submitted its consolidated 2011 annual accounts to the LRoCC, erroneously checking the publication box (*publication par mention*). Such publication would have given public access to their accounts, whereas limited partnerships are under no obligation to publicly disclose their annual accounts.

As claimant, the partnership filed injunctions against the LRoCC, the District Court prosecutor as well as the State of the Grand-Duchy of Luxembourg, in order to have the record of the filing erased, to have all of the documents in paper form returned to it and additionally to instruct the LRoCC to classify the 2011 consolidated annual accounts in a separate and officially sealed folder and not to proceed to the publication of the filing notice in the Mémorial.

The LRoCC explained that it was under no obligation to point out filing errors to the partnership, as the filing company is liable for the information it submits to the LRoCC. As the documents had been filed electronically, the LRoCC claimed it could not return them to the partnership in paper form. However, it was not opposed to cancelling the filing.

Under Luxembourg law, restitution or modification of documents filed with the LRoCC is solely possible if a judicial injunction is brought against the LRoCC to that effect.

In this instance, the District Court[18] issued the necessary injunction in favour of the claimant but not without confirming that the filing company was liable for the information filed with the LRoCC. According to the decision at hand, the LRoCC should proceed with a cancellation of the erroneous filing, while the claimant should resubmit the consolidated annual accounts.

In addition even though the District Court rejected the claim against the State seeking to prevent the publication of the accounts in the Mémorial (as the claimant failed to provide a legal basis in this respect), the District Court conceded that the non-publication of the filing was a logical consequence of its cancellation.

The judgment stressed the filing company's liability with respect to the documents filed, and had it bear the costs of the procedure. Further, the District Court confirmed that the sole means for obtaining a correction of an erroneous filing is by obtaining an injunction to that effect.

[17] District Court, 26 April 2012, N°135431.

[18] District Court, 8 March 2013, N°151117.

Funds & Investment Management

Inadmissibility of an Individual Shareholder's Claim for a Loss Suffered due to the Depreciation of a Stock's Value

Court of Appeal, 30 November 2011

Following the discovery of a complete loss of the value of the stock held in an investment company with variable capital (SICAV) undergoing liquidation, a shareholder brought a claim against the SICAV's depository. It attributed this loss of value to mismanagement and the depository's failure to comply with its obligations. An initial decision of the District Court ruled that the claims were inadmissible on grounds that Luxembourg Companies Law bans shareholders of companies with separate legal personalities from bringing individual claims on their own behalf. The District Court ruled that as the shareholder brought claims solely for the loss of value of its shares, its claims were inadmissible because a loss in share value is a damage suffered by the company itself, and is not an individual, separate damage experienced by the shareholder.

The shareholder lodged an appeal against this first instance judgment arguing that a shareholder is solely prohibited from bringing claims against the company in which it holds shares, but not against the depositary. The shareholder argued that accordingly it should be allowed to bring such claims, especially given that the possibility of bringing individual claims against a depository is foreseen by the directive 85/611/EEC of the Council of 20 December 1985, which was transposed into Luxembourg law by the 1988 law on undertakings for collective investment.

These arguments however were rejected by the Court of Appeal[19]. It maintained the decision of the court of first instance, since the Companies Law clearly applies also to SICAVs and consequently the same rules apply to them as to the public limited liability companies. An SA and by extension a SICAV is a distinct legal entity, separate from its shareholders. Therefore, it suffers damage independently of its shareholders and it may bring its own claims for indemnification. In order to bring a claim, a shareholder must have suffered a damage separate from the loss of capital of the company, which is a damage suffered primarily by the company. In the case at hand, the Court found this not to be the case, because the shareholder's claim was only based on the loss of the value of the SICAV's shares.

Under the 1988 law, the SICAV's shareholder does not have an individual right of action because the SICAV is governed by Luxembourg Companies Law, which does not allow for the individual action of shareholders with regards to companies having their own legal personality.

The Court of Appeal found that this is in accordance with the abovementioned 1985 directive, given that its text clearly refers to national law in order to determine the extent of the liability of the depository. As Luxembourg law foresees only claims by the company, the depository's liability is only to the company, not to an individual shareholder who is barred from bringing such claims.

The claimant also argued that once a company (here, the SICAV) is in liquidation, the individual shareholder regains the right to bring individual claims. The Court of Appeals rejected this argument and explained that during the judicial liquidation of a company only the liquidator is in charge of exercising the rights and actions of the relevant company and not the individual creditor. As a public limited company, and by extension a SICAV, is a distinct legal person, independent from its shareholders, it is only the company that may bring indemnification claims for a loss suffered by it (i.e. all of its shareholders jointly) and this exclusive right persists even if the company is being liquidated.

A loss of value of the company's shares, which causes a loss of social capital is a damage suffered by the company itself. Unless a shareholder has suffered a separate, individual damage distinct from that of the company, its claim is not admissible.

Employment

Annulment of an Employment Contract for Misrepresentation by the Employee

Court of Appeal, 24 January 2013

An employee filed a court action against his employer for unjustified dismissal claiming for damage payment. The employer opposed this demand by asking the court to declare the employment contract null and void, for the reason that the employee had deliberately omitted to inform him that he was a manager (*gérant statutaire*) of a competitor.

By a first instance judgment, the Labour Court accepted to annul the employment contract, but nevertheless decided that the employee had been dismissed without valid reasons and condemned the employer to pay damages. In its decision dated 24 January 2013, the Court of Appeal

[19] Court of Appeal, 30 November 2011, N°36253.

overruled this judgment. The Court of Appeal held indeed that the employment contract had to be declared null and void for misrepresentation by the employee as the employee had the duty to inform his employer before being hired that he was a manager of a competitor.

The Court of Appeal was indeed of the opinion that this was a material element which had to be brought to the attention of the employer, in particular as the employment contract provided that the employee was not entitled to be active for any other company, without the prior consent of the employer, and that the non-compliance with this prohibition would entitle the employer to terminate the employment contract for gross misconduct.

The Court of Appeal deducted from this contractual provision that by omitting to inform the employer before the signature of the employment contract of his corporate mandate in a competitor, the employee committed a misrepresentation (*dol*), and that hence the employment contract was to be declared null and void. The employment contract being null and void, the employer could not be considered as having dismissed the employee, and hence the claim for damages of the latter was rejected.

The Court of Appeal however held, that although the employment contract was retroactively null and void, the employee was nevertheless entitled to his remuneration, for the time he had worked for the employer.

Tax

Abuse of Law – Deemed Debt Waiver

Administrative Court of Appeal, 7 February 2013

On 12 July 2012, the Luxembourg Administrative Court[20] considered that a transfer of a receivable for CHF 1 (together with the transfer of shares in the debtor for the same amount) should be treated as a deemed waiver granted to the debtor based on the abuse of law concept. The details of the case are very specific (and not fully disclosed in the decision from the court) so that it is difficult to anticipate whether this decision would be isolated or is an example of a new trend from the Luxembourg Tax Authorities who may challenge similar transactions.

In any case, this decision had been upheld by the Administrative Court of Appeal[21]. It is interesting to note that the justifications used by the Court of Appeal are totally different from those used by the Administrative Court even if the end result is the same. Even if we believe that the new arguments may still be discussed from an academic perspective, this decision has to be taken into account dealing with reorganisation or similar transactions.

Hidden Capital Contribution – Debt Waiver with a better Fortune Clause

Administrative Court of Appeal, 7 February 2013

On 12 July 2012, the Luxembourg Administrative Court[22] considered that a debt waiver did not meet the conditions to be classified as a hidden capital contribution and as such being considered as a non-taxable item in the hands of the debtor.

The Administrative Court of Appeal[23] rejected the arguments from the lower court and confirmed the current practice and tax literature on hidden capital contribution. A debt waiver granted by a shareholder of the debtor could indeed be considered as a hidden capital contribution. As a result, the waived amount may not be taxable in the hands of the debtor. This is however subject to valuation of this hidden capital contribution. This important point has unfortunately not been discussed in front of the court, the Head of the Tax Authorities having the valuation responsibility. The question would then be to determine whether the hidden capital contribution should be valued at an amount corresponding to the nominal value of the debt (which could somehow be considered as the operating value of the debt for the debtor) or at any market value from the creditor perspective. We believe that based on the law there are arguments to sustain that the hidden capital contribution should be valued at the operating value (being the nominal value of the debt) but there is still an uncertainty in this respect as the court did not decide on this technical question.

[20] Administrative Court, 12 July 2012, N°28815.
[21] Administrative Court of Appeal, 7 February 2013, N°31320C.
[22] Administrative Court, 12 July 2012, N°26409a.
[23] Administrative Court of Appeal, 7 February, N°31339C.

Data Protection

Legislation

Electronic Archiving – Bill N°6543

With the image of a paperless office in mind, the main objectives of this bill are to modernise the rules regarding the dematerialisation of paper documents and the storage thereof in digital form and to introduce or modify accordingly rules on the recognition of the legal value of dematerialised documents and presuming, subject to certain conditions, the conformity thereof to the originals.

Besides a modernisation of the rules regarding the dematerialisation of certain documents and the storage of these documents in digital form, the bill aims to:

- define the conditions in relation to the dematerialisation of original documents and the conditions of storing copies of original documents and digital originals
- specify the conditions under which the copies referred to in the preceding paragraph may benefit from a presumption of conformity to the original
- set the rules for the business of providing dematerialisation or storage services.

The Luxembourg legislator further organises the activity of providers of dematerialisation or storage services (*Prestataire de Services de Dématérialisation ou de Conservation* – PSDC) and distinguishes between three categories of service providers:

- providers of dematerialisation services (PSDC-D)
- providers of storage services (PSDC-C)
- providers of dematerialisation and storage services (PSDC-DC).

"Storage" is defined as an activity which consists in keeping a digital copy or an original document, guaranteeing its integrity. "Dematerialisation" means the process of creating a copy of an original document placed on an analogue medium. A "dematerialisation or storage services provider" is a legal entity that is certified on the basis of the regulation on technical requirements and measures for the PSDC certification by a certifier accredited by the Luxembourg Office for Accreditation and Surveillance (OLAS) or by any other accrediting body recognised by OLAS within the European or international mutual recognition agreements with the Luxembourg Institute for Standardisation, Accreditation, Security and Quality of Products and Services (*Institut Luxembourgeois de la Normalisation, de l'Accréditation, de la Sécurité et qualité des produits et services* – ILNAS). Such certified entities are authorised to use the term PSDC in their company name and are registered on a list of PSDCs published on the ILNAS website.

In order to become a PSDC, companies have to apply for an authorisation issued by ILNAS. PSDCs must have adequate financial and material resources, as well as technical and human resources to ensure the safety, reliability and sustainability of the provided dematerialisation and storage services. Furthermore, PSDCs must demonstrate a good management and administrative organisation and implement appropriate procedures and technical and organisational methods. Legal persons that carry out an activity of dematerialisation or storage limited to their own needs, along with legal persons that provide dematerialisation or storage services solely to one or several companies that belong to the same group, may also obtain the status of PSDC.

Members of administrative and supervisory authorities, officers, employees and other persons working with a PSDC are obliged to keep strictly secret all information, original documents and copies entrusted to them in the context of their professional activity. These persons are not bound by their obligation to secrecy when the holder has agreed or requested the disclosure of the documents.

The bill also provides that a copy made by its holder has the same probative force as the original if the copy was made in accordance with a method that is regularly monitored and that respects the conditions laid down by a future Grand-Ducal regulation set to replace the Grand-Ducal regulation of 22 December 1986 currently in force. The copy is presumed to meet these requirements and to be conform to the original document when it was made by a PSDC-D or PSDC-DC. More importantly, the bill expressly provides that article 1333 of the Luxembourg Civil Code (which provides that where the original instrument is still extant, copies are evidence only of what is contained in the instrument, the production of which may always be required) is not applicable to the copies in electronic form. Said article is currently an obstacle to electronic archiving.

It should however be noted that a judge may not reject a copy for the sole reason that it is in electronic form or that it was not made by a PSDC-D.

The aforementioned Grand-Ducal regulation on the dematerialisation and storage of documents will give clear and precise guidelines for service providers that would like to carry out the business of dematerialisation or storage of documents in digital form. Its objective is to preserve the legal value of electronic documents in time, guarantee their availability in a readable form and ensure their enforceability against third parties, in particular in case of a dispute.

Although the bill on electronic archiving constitutes a watershed for the Luxembourg digital landscape, it still leaves some grey areas such as the outcome of a cessation of activities of a PSDC-C and the transfer of its activities to another PSDC-C.

Employment

Legislation

Recruitment Process – Request of Excerpt of Criminal Record

Following its publication in the Mémorial on 6 May 2013, the Law dated 29 March 2013 regarding the organisation of the criminal record and the exchange of information included in the criminal record between Member States of the European Union will enter into force on 1 August 2013.

The law introduces a favourable change to employers setting forth the possibility for the employer to require the candidate/employee to provide an excerpt of his/her criminal record for recruitment or staff management purposes. The storing of the information relating to the criminal record is however limited to 24 months after the report (Bulletin) is issued.

Until the enactment of the law, only few employers were allowed to process this kind of data due to the very stringent provisions of the Law dated 2 August 2002 on the protection of persons with regard to the processing of personal data.

Regulatory Development

New Circular Letter on Tax Aspects of International Hiring of Employees

On 21 May 2013, the Luxembourg Tax Authorities issued a new Circular letter N°95/2 replacing the previous one issued on 31 December 2010 on international hiring of employees (effective as from 1 January 2013).

The rationale of the new Circular Letter is similar to the previous one, i.e. granting tax deductions to employers and tax exemptions to employees on certain payments/advantages made within the framework of international hiring of employees. The main consequence for so-called impatriates (new wording used instead of highly skilled employees) is a broader scope of application regarding eligible employees:

- no specific diploma required
- new threshold regarding the minimum annual gross salary of EUR 50,000
- employees benefiting from this specific regime could represent up to 30% of the total salaried people instead of 10% before
- removal of the need for the transfer to be temporary
- removal of the need to file a request to the Luxembourg Tax Authorities in order to apply the tax regime foreseen in the Circular.

However, based on an in-depth reading of the Circular Letter, it appears that the relaxed conditions are mitigated by other provisions:

- The temporary nature of the transfer could still be induced from the right of return that the employee must have in case of transfer from another entity within an international group of companies. This temporary nature is however not required in case of direct hiring abroad.
- The definition of international group of companies has been removed but this condition still exists (even if a different definition may now be allowed).
- There is no longer a need to introduce any request to apply the regime which is on one hand beneficial to the companies and employees but on the other hand there may be some uncertainty on the application of the regime. The company only has a reporting obligation on 31 January each year and should disclose at that time the list of employees benefiting from the "impatriates" tax regime. We do not know if the Luxembourg Tax Authorities would analyse any formal request as from now.
- Few conditions have been amended in a detrimental way, e.g. people having lived within 150km from the Luxembourg border at some point in time during the 5 years prior to claiming for the benefits of this specific regime are excluded from the regime.

Case Law

Annulment of an Employment contract for Misrepresentation by the Employee

Court of Appeal, 24 January 2013

Please refer to the Litigation section of this Luxembourg Legal Update.

Tax

EU Developments

Financial Transaction Tax – Update

On 14 February 2013, the European Commission published its detailed proposal for an EU Financial Transaction Tax to be implemented under the "enhanced cooperation procedure" across France, Germany and nine other EU Member States. If adopted, most equity, debt and derivative transactions in these jurisdictions will be subject to the tax – from as early as 2014. For details, please see our client briefing.

As predicted in our January client briefing, the tax has wide extra-territorial effect. Pension funds, insurance companies, unit trusts, banks and businesses in the UK, Ireland, Luxembourg and worldwide will be subject to the tax on many of their transactions. The "cascading" design of the tax means that its effective rate will be considerably higher than the headline rates.

The real impact on the financial sector and the outcome of the technical discussions between participating Member States are difficult to predict. The final scope of the tax may still significantly change compared to the current draft proposal. Significant criticism has emerged regarding the legal grounds on which the proposal is made and the United Kingdom announced that it will introduce a legal challenge in front of the ECJ. The Luxembourg government supports this action but no details on the exact form of this support has been released yet.

So far, the Luxembourg government has announced that it will not participate in any financial transaction tax except if implemented globally (i.e. not only at EU level).

EU Savings Directive – Luxembourg Announcement

On 10 April 2013, the Luxembourg government officially announced that it will no longer apply the withholding tax system as from 1 January 2015 and would instead exchange information on interest and similar income under the EU Savings Directive as from this date. A press statement has been released as well as Frequently Asked Questions.

This change is linked to the current discussions regarding FATCA and the entry into force of the EU Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, the implementation of which has been voted on 29 March 2013.

This change does not mean per se that banking secrecy has been repealed in Luxembourg but only that relevant information under the EU Savings Directive will be exchanged with other Member States in order for interest and similar income to be properly taxed in the Member State of residence of the individuals which has received an interest income within the meaning of the EU Savings Directive.

Luxembourg wishes to see the same conditions apply to all competing financial centres and to see the automatic exchange of information accepted as the international standard. It has therefore agreed on 14 May 2013 to grant the European Commission a mandate to negotiate with Switzerland, Liechtenstein, Andorra, Monaco and San Marino.

International Development

FATCA

In the context of its FATCA negotiations with the United States, Luxembourg has chosen Model I which will provide automatic exchange of information between the Luxembourg and US fiscal authorities on bank accounts held in Luxembourg by citizens and residents of the United States. This information has been released on 21 May 2013.

OECD – Base Erosion and Profit Shifting

On 12 February 2013, the OECD has released a report on base erosion and profit shifting and has committed to develop an action plan in a short term period.

This report has received support from the G20 and some individual states. It is part of a general trend leading to increased scrutiny of tax avoidance schemes or simply lawful transfers of taxable base from one country to another.

In this respect, the ECOFIN Council made some recommendations inviting Member States to analyse the efficiency of their General Anti Abuse Rules and/or implement them in accordance with current EU tax law (see Council conclusions of 14 May 2013 on tax evasion and tax fraud).

OECD – Mutual Administrative Assistance Convention

On 29 May 2013, Luxembourg signed the OECD convention on Mutual Administrative Assistance in Tax Matters. According to the Minister of Finance statement, "*the signature of the convention on Mutual Administrative Assistance in Tax Matters is an important step for Luxembourg. It shows* (Luxembourg) *commitment to implement the principle of automatic exchange of information which is however only efficient if it is implemented on a global level*".

Legislation

State of the Nation Speech

The main point disclosed during the State of the Nation speech, apart from the change of position of Luxembourg regarding the EU Savings Directive (see below), is a likely increase of the VAT rate as from 2015 to partly compensate for loss of tax revenues deriving from the change of taxation rules for e-commerce.

It has however been confirmed that Luxembourg would keep one of the lowest VAT rates within Europe being around 17% (vs presently 15%).

Administrative Cooperation in the Field of Taxation – Law of 29 March 2013

The law implements the EU Directive 2011/16/EU of 15 February 2011 repealing the Directive 77/799/EEC and the corresponding law of 15 March 1979. The main changes are the following:

- broader scope of administrative cooperation
- banking information included in the scope of exchange of information upon request
- automatic exchange for certain available information
- administrative cooperation no longer restricted to direct taxes but still not applicable to VAT, custom and excise duties or social security contributions.

Exit Taxation Rules – Bill N°6556

The proposed amendments are mainly the result of several EU infringement procedures (see N°2012/4014, 4015 and 4016 of 27 September 2012) further to decisions from the EU Court of Justice in the field of exit taxation regarding individuals and companies (see ECJ C-9/02 Lasteyrie du Saillant, C-470/04 N and C-371/10 National Grid Indus and decision E-15/11 Arcade from the European Free Trade Association Court).

So far, taxation of latent gains is triggered immediately upon outbound transfer by a non-resident taxpayer of a Luxembourg business or permanent establishment. The Bill confirms that such transfer is still a triggering event and broadens its scope to encompass the transfer of business or permanent establishment abroad by a Luxembourg resident taxpayer.

It also introduces the possibility for the Luxembourg business or permanent establishment of taxpayers resident in a State of the European Economic Area (i.e. the European Union, Norway, Iceland and Liechtenstein) to take into account future decreases in value of the assets/debts on which latent gains were recognised to the extent that:

- the business/permanent establishment is transferred to another EEA State and
- such State does not take into account such decreases in value/capital losses realised post transfer.

The new tax deferral regime will be granted upon request but without further guarantee or prior analysis by the Luxembourg Tax Authorities of the position of the taxpayer regarding its ability to pay the tax immediately. It will apply:

- as long as there is no change in the ownership as the transferred assets
- to the extent that the business or permanent establishment or the seat of the company are transferred to an EEA State.

The tax deferral applies unless the taxpayer elects otherwise and provided that continuous ownership by the taxpayer is properly documented with the Luxembourg Tax Authorities each year. No interest will be charged as a consequence of the tax deferral.

The Bill does not deal at all with practical questions regarding effective recovery of taxes further to a transfer outside Luxembourg, e.g. conflict of application of domestic rules and allocation of taxing rights under relevant double taxation agreements.

The Luxembourg government has taken the opportunity of this Bill to proceed with other changes:

- Abrogation of the provisions of Article 44 LITL which currently provide for a tax free transfer of assets from a Luxembourg business to another Luxembourg business of the same taxpayer. This change was required in order to not discriminate against domestic and outbound transfers of business/permanent establishment. Such amendment should however have limited impact in practice.
- According to Article 54 LITL, Luxembourg taxpayers may currently benefit from a roll-over relief of the capital gains realised upon disposal of certain Luxembourg qualifying assets to the extent that the sale proceeds are used within a certain period of time to acquire other assets linked to a Luxembourg business. The requirement for acquired assets to be linked to a Luxembourg business may be considered as a breach of EU Law as it favours investments made in domestic assets. The roll-over relief will now apply to acquired assets linked to any EEA located business/permanent establishment. Specific rules are added to secure the effective Luxembourg recovery of the tax on the initial capital gain, which is due at the latest upon disposal of the acquired assets.
- The Luxembourg government has not taken the opportunity of this Bill to amend the provision of the law dealing with the investment tax credit further to the ECJ decision of 22 December 2010 Tankreederei (C-287/10) according to which the Luxembourg investment tax credit rules (regarding territorial scope) are in breach of EU Law (even if they have already acknowledged the ECJ decision in a Circular Letter N°152bis/3 on 31 March 2011).
- Tax losses are currently linked to the legal person of the taxpayer according to Article 114 LITL. However, if a business is transferred further to the death of a taxpayer, tax losses linked to the business were also transferred to the heirs provided they were taxed together with the transferor. As this provision would necessarily be detrimental to heirs who are tax residents outside Luxembourg, the conditions of joint taxation with the transferor is abolished. Such provision is further restricted to beneficiaries being individuals. This will clearly stop academic discussions on whether the transfer of tax losses could also be applied to companies which may be considered as heirs further to a restructuring.

Double Taxation Agreements

Taiwan – Bill N°6552

On 7 March 2013, Bill N°6552 has been proposed to the Luxembourg Parliament in order to enforce the double taxation agreement signed with Taiwan on 19 December 2011.

The double taxation agreement generally follows the OECD Model Tax Convention. Some adjustments have however been made to take into account the international tax status of Taiwan. The double taxation agreement provides for a reduced rate of withholding tax on dividend, interest and royalties under certain conditions. There is no real estate tainted provisions regarding the disposal of shares in a company holding real estate, meaning that such capital gain would only be taxable in the State/territory or residence of the shareholder.

The double taxation agreement is compliant with international standards regarding exchange of information.

Double taxation agreements to enter into force – Bill N°6501

On 16 May 2013, the Luxembourg Parliament approved several double taxation agreements (DTA) and protocols concluded with the following countries:

- New German DTA replacing the old one
- Kazakhstan DTA
- Laos DTA
- Macedonia DTA
- Seychelles DTA
- Tajikistan DTA
- Canada Protocol
- Italy Protocol
- Korea Protocol
- Malta Protocol
- Poland Protocol
- Romania Protocol
- Russia Protocol
- Switzerland Protocol.

Please note that these DTAs and Protocols will enter into force on 1 January of the year following the confirmation by both countries of the implementation of the DTA in domestic law. Some of the Protocols will however enter into force sooner for certain taxes (see for instance Poland and South Korea).

The Protocols are mainly dealing with the update of the exchange of information provisions to fully comply with the

OECD Model Tax Convention. Some Protocols like those with Poland and Russia also include more important provisions regarding real estate companies or withholding tax rate (see our client briefings relating to Germany, Poland and Russia).

Czech Republic

On 5 March 2013, a new double taxation agreement has been signed with the Czech Republic. For further details, please refer to our client briefing.

Saudi Arabia

On 7 May 2013, the Luxembourg government has announced that a double taxation agreement has been signed with Saudi Arabia. With this agreement, Luxembourg has now one of the largest treaty networks with Middle East countries.

VAT Amendments – Law and Grand-Ducal Decree of 29 March 2013

The law implements Article 4 of the EU Directive 2008/8/EC on the place supply of services and the EU Directive 2010/45/EU on the invoicing rules. The Law applies as from 1 January 2013 whereas the Grand Ducal decree applies as from 8 April 2013. The VAT Authorities also issued a Circular letter N°762 of 4 April 2013 to further explain the changes. The law mainly brings the following changes:

- change of the rules of the place of supply, as part of the VAT package, for long term rental services of transport means
- deeper harmonisation of invoicing rules and simplification with specific rules regarding e-invoicing.

The Grand-Ducal decree mainly aims at providing details about implementation of VAT measures included in the law of 29 March 2013 as well as providing some details about the Law of 21 December 2012 which amended the threshold of exempt turnover for small businesses for VAT purposes.

Regulatory Developments

New Circular Letter on Tax Aspects of International Hiring of Employees

On 21 May 2013, the Luxembourg Tax Authorities issued a new Circular letter N°95/2 replacing the previous one issued on 31 December 2010 on international hiring of employees (effective as from 1 January 2013).

Please refer to the Employment section of this Luxembourg Legal Update.

New Circular Letter on VAT Deduction Prorate

On 15 May 2013, the Luxembourg Tax Authorities issued a new Circular letter N°765 regarding the computation of the VAT prorate.

This Circular details the criteria determining the VAT prorate of a VAT taxable entity:

- The method used to compute the VAT prorate must be evidenced by analytical accounting. The taxpayer should be in a position to demonstrate this upon request from the VAT Authorities.
- This actual allocation should be the preferred method. In this respect, the following criteria could be used: allocation key determined based on the number of employees used or the portion of offices used for a certain activity for instance.
- The general prorate should only be used for the allocation of the VAT to overhead expenses which cannot be otherwise allocated.

The real impact of this Circular is difficult to predict as practitioners on the market place have different views on its scope being indicative or compulsory for specific entities (e.g. holding companies).

Case law

Abuse of Law – Deemed Debt Waiver

Administrative Court of Appeal, 7 February 2013

Hidden Capital Contribution – Debt Waiver with a better Fortune Clause

Administrative Court of Appeal, 7 February 2013

Please refer to the Litigation section of this Luxembourg Legal Update for details of the above.

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