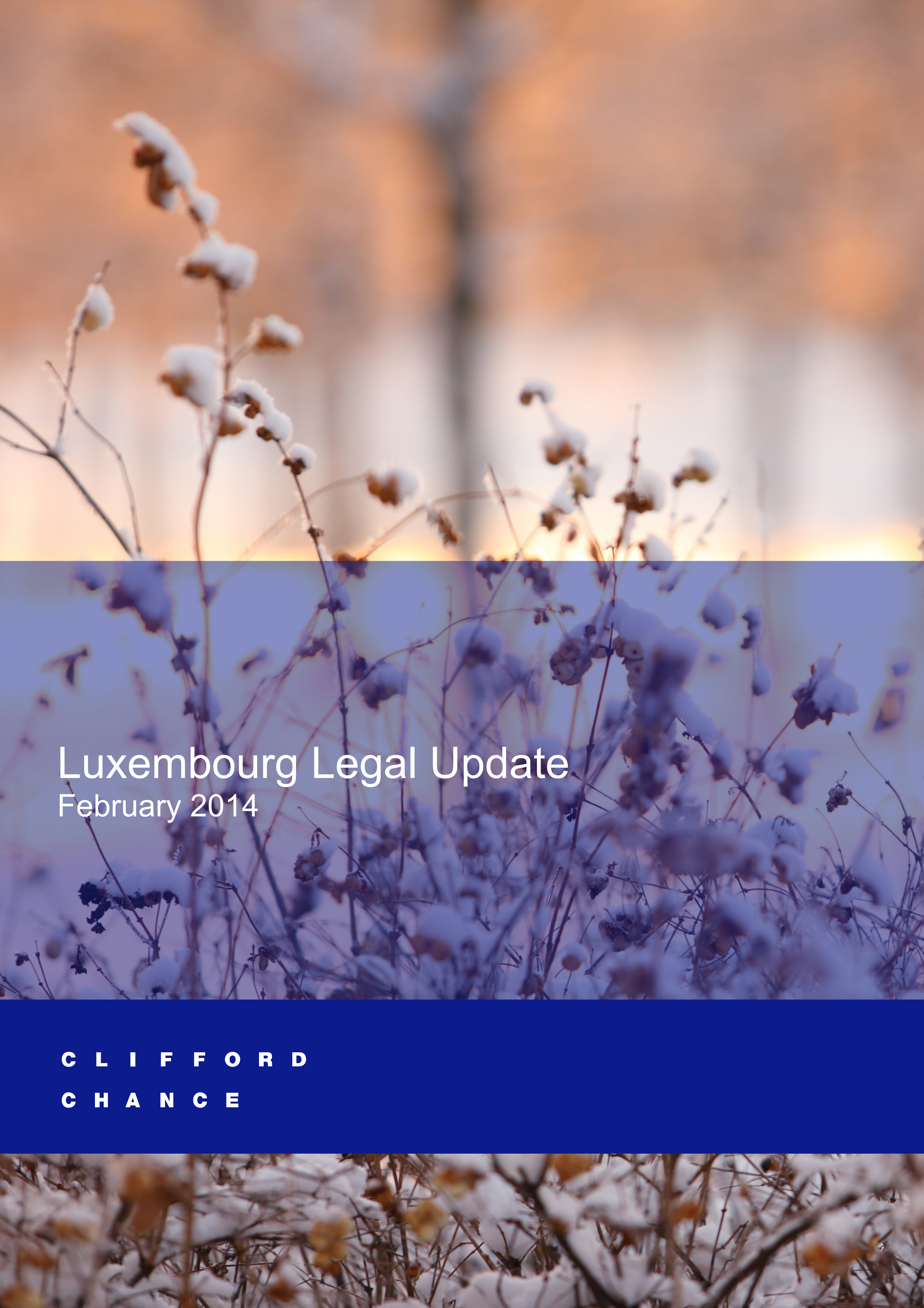

Luxembourg Legal Update

February 2014

CLIFFORD CHANCE

Contents

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

This newsletter provides a compact summary of, 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 and Capital Markets

EU Developments

Single Rulebook: Update of Q&A

The European Banking Authority (EBA) has updated its set of questions and answers (Q&A) on the Single Rulebook (CRD IV etc.).

Capital Requirements Regulation: Corrigendum

A corrigendum to Regulation (EU) N°575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) N°648/2012 (Capital Requirements Regulation, CRR) has been published in the Official Journal. The corrigendum is intended to correct a number of obvious errors in the text of the CRR.

Capital Requirements Regulation: Commission Implementing Regulation on Disclosure of Own Funds Requirements

The Commission Implementing Regulation (EU) N°1423/2013 of 20 December 2013 laying down implementing technical standards with regard to disclosure of own funds requirements for institutions according to the Capital Requirements Regulation (CRR) has been published in the Official Journal on 31 December 2013. The Implementing Regulation specifies uniform templates for the purposes of disclosure pursuant to points (a), (b), (d) and (e) of paragraph 1 of Article 437 and pursuant to paragraph 3 of Article 492 of the CRR.

The Implementing Regulation entered into force on 20 January and will apply from 31 March 2014.

Capital Requirements Regulation: EBA Guidelines on Retail Deposits for the Purpose of Liquidity Reporting

The EBA has published its final Guidelines setting out the criteria for identifying retail deposits subject to different outflows for the purpose of liquidity reporting under the CRR. The Guidelines have been developed on the basis of Article 421(3) of the CRR.

National competent authorities should implement these Guidelines by incorporating them in their supervisory procedures within three months of publication and ensure that institutions comply with them effectively (see CSSF implementing circular 14/582 below).

EMIR: New Commission Delegated Regulation – Exempted Entities and Fees Charged to Trade Repositories

The following delegated regulations under the regulation on over-the-counter (OTC) derivative transactions, central counterparties and trade repositories (EMIR) have been published in the Official Journal:

- Commission Delegated Regulation (EU) N°1002/2013 amending EMIR with regard to the list of exempted entities (this delegated regulation entered into force on 8 November 2013)
- Commission Delegated Regulation (EU) N°1003/2013 supplementing EMIR with regard to fees charged by ESMA to trade repositories (this delegated regulation entered into force on 22 October 2013).

EMIR: Update of Q&A Document

In the last few months, ESMA has published several updates of its Q&A document on EMIR, the last one on 11 February 2014. The new Q&A clarifies issues related to reporting on trade repositories (TRs) such as the use of

Legal Entity Identifiers (LEI), the Unique Trade Identifiers (UTI), the reporting on empty/not available fields and the UPI taxonomy.

Amendment of Prospectus Directive and Transparency Directive

Directive 2013/50/EU of 22 October 2013

Directive 2013/50/EU of 22 October 2013, amending the Transparency Directive (including its implementing directive, the Prospectus Directive), has been published in the Official Journal.

The Directive entered into force on 26 November 2013 and Member States have to transpose the Directive within two years.

Prospectus Directive: Update of Q&A Paper

ESMA has published an updated version of its Q&A document (Ref. 2013/1537) on the Prospectus Directive and its implementing measures.

In particular, the Q&A includes revisions of the pro forma financial information and the level of disclosure concerning price information for share offerings. As these revised questions set out changes to current market practices, ESMA has provided a phase-in period to provide market participants with sufficient time to adjust to the new approaches. The changes are applicable as from 28 January 2014.

The updated Q&A also addresses a number of new issues, including:

- the agreement of the auditor (in relation to profit estimates)
- the proportionate disclosure regime for prospectuses for rights issues
- the proportionate disclosure regime for rights issues and admission to trading.

Shadow Banking

On 29 January 2014, the EU Commission adopted a proposal for a regulation on structural measures to improve the resilience of EU credit institutions. The proposed regulation would give banking supervisors power to require certain complex banks to ring-fence certain trading activities from their deposit taking business if the pursuit of such activities compromises financial stability.

In addition, the EU Commission has adopted an accompanying proposed regulation on reporting and transparency of securities financing transactions (SFTs), mainly securities lending, repo or reverse repurchase transactions and buy-sell back or sell-buy back transactions. This aims to prevent banks from attempting to circumvent the ring-fencing rules by shifting activities to the so-called "shadow banking" sector.

Please refer to the Funds and Investment Management section of this Luxembourg Legal Update for details of the above.

Solvency II: Extension of Deadline for Implementation until 31 March 2015

On 21 November 2013, the EU Parliament has adopted the proposed directive amending Directive 2009/138/EC on the taking-up and pursuit of the business of insurance and reinsurance (Solvency II) as regards the dates of implementation and application and the date of repeal of certain directives. The proposed directive delays the date of implementation of Solvency II until 31 March 2015. Solvency II will apply as from 1 January 2016.

New ECB Regulations

The following revised versions of European Central Bank (ECB) regulations have been published in the Official Journal:

- Regulation (EU) N°1071/2013 of the ECB of 24 September 2013 concerning the balance sheet of the monetary financial institutions sector (recast) (ECB/2013/33)

- Regulation (EU) N°1072/2013 of the ECB of 24 September 2013 concerning statistics on interest rates applied by monetary financial institutions (recast) (ECB/2013/34)
- Regulation (EU) N°1073/2013 of the ECB of 18 October 2013 concerning statistics on the assets and liabilities of investment funds (recast) (ECB/2013/38)
- Regulation (EU) N°1074/2013 of the ECB of 18 October 2013 on statistical reporting requirements for post office giro institutions that receive deposits from non-monetary financial institution euro area residents (recast) (ECB/2013/39)
- Regulation (EU) N°1075/2013 of the ECB of 18 October 2013 concerning statistics on the assets and liabilities of financial vehicle corporations engaged in securitisation transactions (recast) (ECB/2013/40).

Regulations (EU) N°1071/2013, 1073/2013, 1074/2013 and 1075/2013 have been rectified by a publication in the Official Journal dated 29 November 2013.

Legislation

Fees Charged by the CSSF

Grand-Ducal Regulation of 28 October 2013

A new Grand-Ducal Regulation on fees charged by the CSSF dated 28 October 2013 has been published in the Official Journal on 31 October 2013 and entered into force on 1 November 2013. It repeals and replaces the Grand-Ducal Regulation of 29 September 2012 on fees charged by the CSSF.

The main change is to introduce fees to be charged to new types of professionals that have been introduced into Luxembourg legislation over the last year, in particular:

- AIF managers
- professional depositaries of assets other than financial instruments, in particular for AIFs
- family offices
- holders of central accounts for issuances of dematerialised securities.

The provisions for fees charged to management companies in general have also been revised.

Please refer to the Funds and Investment Management section of this Luxembourg Legal Update for details of the above.

Regulatory Developments

Out-Of-Court Resolution of Customer Complaints

CSSF Regulation 13-02

A new CSSF Regulation 13-02 on out-of-court resolution of customer complaints has been published in the Official Journal. The Regulation updates and details the framework in which customer complaints are processed. The related provisions entered into force on 1 January 2014.

The Regulation further specifies the obligations arising for professionals in respect of their internal handling of customer complaints. The related provisions entered into force on 1 July 2014 in order to allow professionals to adapt their internal procedures to the new requirements.

The IML Circular 95/118 on the handling of customer complaints has been repealed following the entering into force of the new Regulation. The CSSF has announced that it will shortly prepare a Q&A document in order to provide further guidance on the new regulatory framework for customer complaints.

Please refer to the Funds and Investment Management section of this Luxembourg Legal Update for details of the above.

Update of Reporting Tables on Regulated Functions within Credit Institutions and Investment Firms

CSSF Circulars 13/576 and 13/577

The CSSF has issued two new circulars, namely N°13/576 for credit institutions and 13/577 for investment firms, both being dated 4 December 2013. The new circular letters update existing CSSF reporting tables on persons responsible for regulated functions and activities within credit institutions or investment firms and bring them in line with the revised central administration, internal governance and risk management requirements under circular 12/552 (which entered into force on 1 July 2013).

Supervisory Reporting Requirements Applicable to Investment Firms as of 2014

CSSF Circular 13/575

The CSSF has issued a new circular 13/575 dated 18 November 2013 on supervisory reporting requirements applicable to investment firms as from 2014.

The CSSF circular draws attention to the draft Implementing Technical Standards on Supervisory Reporting (ITS) published by the EBA, which will be directly applicable to investment firms throughout the European

Union as from 1 January 2014 once they have been adopted by the European Commission and published. The ITS will cover the new COREP reporting (as from 1 January 2014) as well as the new FINREP reporting (as from 1 July 2014) and the CSSF provides further details on the new reporting requirements.

The ITS will apply to all investment firms falling within the scope of the Capital Requirements Regulation (EU) 575/2013 (CRR). The CSSF specifies which Luxembourg investment firm types will be subject to (or exempt from) the CRR and ITS. Some types of exempted firms will continue to be subject to the currently applicable own fund requirements under CSSF Circular 07/290.

Management of Concentration Risk

CSSF Circular 13/574

The CSSF has issued a new circular 13/574 dated 28 October 2013 on the management of concentration risk for credit institutions and investment firms.

Credit institutions and investment firms in Luxembourg have to implement robust processes for detecting, measuring, declaring, managing and mitigating concentration risk. The new circular specifies that robustness of such procedures is to be assessed in light of the guidelines on the management of concentration risk under the supervisory review process issued by the EBA on 2 September 2010 which are annexed to the new circular.

The circular entered into force with immediate effect.

Treatment of Retail Client Deposits for the Purpose of new Liquidity Reporting

CSSF Circular 14/582

The CSSF has issued a new circular 14/582 dated 31 January 2014 on the treatment of retail client deposits for the purpose of the new liquidity reporting obligations. Article 421 of the CRR defines treasury outflows of retail client deposits for credit institutions and investment firms. In this respect, the EBA has issued final guidelines setting out the criteria for identifying retail deposits subject to different outflows for the purpose of liquidity reporting under the CRR (please see above). Pursuant to these guidelines, institutions need to allocate eligible client deposits to three categories, depending on the number, and the degree of risk, of a series of predefined criteria.

The CSSF notes that, as a first step, these provisions serve monitoring purposes only (i.e. gather sufficient reliable empirical data to determine appropriate outflow ratios in the prudential requirements to be set out in a delegated act of the Commission, as required by Article 460 of the CRR). Such delegated act entering into force at the latest on 31 December 2014, but being applicable as of 1 January 2015 only. Institutions are required to comply with the guidelines. The circular entered into force with immediate effect (see new Q&A 19).

CSSF: Update of Q&A on Securitisation

The CSSF has updated its Q&A paper on securitisation. The updated Q&A paper addresses, in particular the impact of the recent implementation of the Alternative Investment Fund Managers Directive 2011/61/EU (AIFMD) in Luxembourg law.

The new Q&A specifies, among other things, the definition of the "securitisation special purpose entity" exemption from the scope of the Luxembourg law implementing the AIFMD. It also provides clarifications regarding the extent to which securitisation entities do not constitute alternative investment funds and regarding the definition of alternative investment funds generally.

CSSF: Update of Q&A on Statuses of Professionals of the Financial Sector

The CSSF has updated Part II of its Q&A paper on the statuses of professionals of the financial sector (PFS).

The update contains clarifications on the scope of the category of underwriter of financial instruments (*preneur d'instruments financiers*) as set out in the Financial Sector Law. The update also takes into account the recently introduced new categories of PFSs, namely:

- professional depositaries of assets other than financial instruments, in particular for alternative investment funds
- family offices
- holders of central accounts for issuances of dematerialised securities.

Review of 2013 Half-yearly Financial Statements of Securities Issuers subject to the Transparency Law

CSSF Press Release 13/51

On 29 November 2013, the CSSF published its press release 13/51 on its review of 2013 half-yearly financial statements of securities issuers subject to the Transparency Law.

The CSSF has assessed the compliance of their half-yearly financial statements with the main disclosure requirements of applicable IFRS standards, among others IAS 34 "Interim Financial Reporting", focusing particularly on the impacts in 2013 of the newly applicable standards and amendments to the existing standards.

Among all the breaches noted by the CSSF, some are directly related to the new requirements applicable in 2013 to the half-yearly financial statements prepared in accordance with IFRS standards. In that respect, the CSSF has noted that:

- changes to accounting policies have often not been sufficiently described, in particular when these amendments were material for the issuer
- the disclosures on the fair value of financial instruments were sometimes missing or incomplete
- separate disclosure of the items that comprise the "other comprehensive income" was not always made.

The CSSF has also noted some recurring infringements, in particular related to comparative figures (*cf*. paragraph 20 of IAS 34). As a result, the CSSF has requested eight issuers to issue amended 2013 half-yearly financial statements.

Reminder on EMIR – Start of Reporting Obligation on 12 February 2014

CSSF Press Release 14/11

On 12 February 2014 the CSSF has published its press release 14/11 reminding all concerned counterparties that, as from 12 February 2014, they need to report details of any derivative contract (OTC or exchange traded) they have concluded, or which they have modified or terminated, to a registered or recognised Trade Repository (TR). The press release lists currently available TRs and provides further practical guidance on the content of the reporting, on reporting of TX derivatives and the use of the Legal Entity Identifiers for the purpose of the reporting obligation. The press release reminds in summary of other obligations under EMIR (clearing obligation, exchange of collateral, risk management and mitigation techniques).

Modification of Statistical Reporting from Credit Institutions

BCL Circular Letter N°2014/235

The Luxembourg Central Bank (BCL) has issued a new circular letter N°2014/235 dated 20 January 2014 on the modification of statistical reporting from credit institutions.

On the basis of Regulation ECB/2013/33 concerning the consolidated balance sheet of the monetary financial institutions sector (recast) and Regulation ECB/2013/34 concerning statistics on interest rates applied by monetary financial institutions (recast), adopted by the Governing Council of the European Central Bank (ECB), the BCL has developed a data collection system for credit institutions that is detailed in its new circular letter. Compared to the current statistical data collection system, the changes relate to the following areas:

- updating or changing the nomenclature of codes used in statistical reporting
- introduction of new statistical reports
- modification of existing statistical reports
- update of the nomenclature of statistical reports.

The transmission of information under the modified regime is mandatory as of reference period December 2014 and the first reports are therefore those pertaining to end-December 2014. Credit institutions that wish to do so may participate in a test phase which will begin in September 2014.

CAA: FAQ Paper on Insurance Brokerage

The *Commissariat aux Assurances* (CAA), the Luxembourg insurance sector regulator, has published a Frequently Asked Questions (FAQ) document on insurance brokerage on 12 November 2013.

The FAQ address issues such as document and data retention and storage, use of private investigation companies (e.g. providing KYC assistance or genealogical research services), the relationship between the regulatory categories of insurance intermediaries and the newly introduced regulatory categories of professionals of the insurance sector as well as the requirement for small insurance brokerage companies to appoint an external auditor (*commissaire aux comptes*).

CAA: Regulation N°13/01 dated 23 December 2013 on AML/CTF

The CAA has issued Regulation N°13/01 on countering money laundering and terrorist financing (AML/CTF). The Regulation is mandatory and clarifies and completes the Luxembourg AML/CTF provisions set out in the AML/CTF Law of 12 November 2004 with respect to professionals subject to the supervision of the CAA, such as insurance and reinsurance undertakings.

The Regulation specifies the obligations of such professionals as regards customer due diligence, the risk-based approach, adequate internal organisation, cooperation with authorities and control by the external auditor. Issuing a new circular 13/14 dated 23 December 2013 (please see below), the CAA has repealed the CAA's circular letters 09/6 and 10/7 which dealt with such issues in the past.

New Circular Letters Concerning the Insurance Sector

The CAA has issued the following circulars:

- Circular Letter 13/12 dated 23 December 2013 and modifying CAA Circular 08/1 on investment rules for insurance life products linked to investment funds
- Circular Letter 13/13 dated 23 December 2013 and modifying and complementing the amended CAA Circular 98/1 on technical interest rates
- Circular Letter 13/14 dated 23 December 2013 on the entering into force of the CAA Regulation N° 13/01 dated 23 December 2013 on AML/CTF and the abrogation of Circular Letters 09/6 and 10/7
- Circular Letter 14/1 dated 7 January 2013 on the EIOPA Guidelines on complaints processing by direct insurance companies
- Circular Letter 14/2 dated 7 January 2013 on the introduction of a new version of quarterly statements of assets representing technical provisions.

Case Law

Loan – Real Contract (*contrat réel*) – Loan Commitment – Specific Performance (no)

District Court, 1 December 2011

Placing Orders – Bankers' Obligation to Provide Information and Advice

District Court, 8 December 2011

AML Obligations

District Court, 25 April 2012

Enforcement of Pledge – Contractual Limitation to Enforce Pledge (no)

District Court, 29 January 2014

Validity of One-sided Jurisdiction Clauses

District Court, 29 January 2014

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

Corporate and M&A

Legislation

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

Reform of the Companies and Associations Legal Publication Rules

Bill N°6624 of 4 October 2013

The Luxembourg Parliament is currently examining draft bill N°6624 relating to the reform of the rules of legal publication in respect of companies and associations.

The aim of the bill will be:

- to set up an official electronic platform of central publication in respect of companies and associations (called *Recueil Electronique des Sociétés et Associations* or RESA), such platform being inserted in the website of the Luxembourg trade and companies register (RCS) and
- to rationalise and simplify the publication procedure to reduce costs and red-tape.

As a consequence of the implementation of the RESA, the *Mémorial C, Recueil des Sociétés et Associations* will disappear, the documents previously published in the *Mémorial C* remaining accessible on the Legilux website.

In the context of the reform, the procedure of publication will be revised. The RCS manager will be in charge of gathering/drafting the information to be published from the information filed with the RCS. As a result, the document which is currently used for publication will no longer be useful.

The main points of the reform are:

- Any document which the law required to be published in the RESA shall be filed with the RCS.
- The filing with the RCS shall be done within a month following the date on which the law required the document to be published.
- Publication in the RESA shall be made within 15 days following the filing with the RCS. Such period of time does not apply to the convocation to general meetings of shareholders for which the period of 15 days is not sufficient given the requirements of the law. In practice, the person in charge of publication will file the convocation with the RCS and provide two dates of publication.
- Documents or extracts of documents bind third parties as from their publication in the RESA, unless the company proves that the relevant third parties had prior knowledge thereof. Third parties may, however, rely upon such documents or extracts of documents which have not yet been published.

  With regard to transactions taking place before the sixteenth day following the date of publication, these documents or extracts of documents will not be valid vis-à-vis third parties who prove that it was impossible for them to have had knowledge thereof.

  In the event of any discrepancy between the document filed with the RCS and the document published in the RESA, the latter is not binding vis-à-vis third parties. Third parties may, however, rely upon the same unless the company proves that they had knowledge of the text of the document filed with the RCS.
- Bill N°6624 clarifies certain information to be filed with the RCS, such as the period during which managers hold office, and specifies competences in terms of filing with the RCS. For example, a resignation shall be filed with the RCS by the person who resigned or its attorney.

Lock-up Mechanisms for Bearer Shares and Units

Bill N°6625 of 4 October 2013

The Bill deposited with the Luxembourg Parliament on 4 October 2013 will put the Company Law provisions in line with the requirements of the FATF and the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) regarding the identification of the holders of bearer shares/units.

Among the options envisaged by the FATF and the Global Forum, Bill N°6625 proposes to introduce in article 42 of the Company Law a lock-up (*immobilisation*) mechanism applicable to bearer shares/units issued by:

- public limited liability companies (SA) and corporate partnerships limited by shares (SCA)
- SICAVs, SICAFs and SICARs incorporated in the form of SA or SCA
- FCPs.

The new lock-up mechanism should facilitate access to information, at any time, by judicial and tax authorities while preserving data confidentiality towards third parties and other shareholders/unitholders of the issuing company or investment fund. Its main characteristics are the following:

- The bearer shares/units shall be locked up (*immobilisées*) with a professional custodian established in Luxembourg (e.g. credit institutions and other specialised professionals of the financial sector, *avocats à la cour*, notaries, statutory auditors and approved statutory auditors, etc.) which/who will be appointed by the management body of the relevant commercial company or investment fund.
- The custodian shall keep a register of bearer shares/units for the relevant commercial company or investment fund containing all the information necessary to identify the bearer shareholders/unitholders (e.g. the appointment of each owner of bearer shares/units, the number of bearer shares/units held by it, the date of deposit of bearer shares/units, transfer of bearer shares/units and the dates of such transfer or conversion into registered shares/units.
- The ownership of bearer shares/units shall be established by an entry in the register (i.e. no longer by the possession of the bearer shares/units).
- Any transfer of bearer shares/units shall be done by a declaration of transfer, inscribed on the register, dated and signed by the transferor and the transferee, or by their proxies, as well as in accordance with the rules governing the transfer of receivables established by article 1690 of the Civil Code.

It should be noted that the lock-up mechanism should apply not only to bearer shares/units to be issued after the entry into force of the new legal provisions contained in the Bill but also to those already issued. As a result, the Bill provides for specific transitional provisions for the appointment of the custodian and deposit of the bearer shares/units. Various sanctions, including suspension of voting rights and criminal penalties, are also envisaged in the event of non-compliance with the new Company Law provisions.

For the avoidance of doubt, the lock-up mechanism with a professional custodian should not apply to bearer shares/units admitted to trading on a regulated market.

Case Law

Article 100 of Companies Law – Conditions for Assessing that Losses Exceed the Amount of the Capital of a Luxembourg Company

District Court Luxembourg – 8 December 2011

Nullity of Bondholders' Meeting for Violation of Convening Formalities – No Possibility for the Company to Request the Nullity of such Meeting

Court of Appeal – 1 February 2012

No Right for Shareholder to Obtain Copy of Minutes of Shareholders' Meeting

Court of Appeal – 16 January 2013

A Share Capital Reduction to nil Followed by a Capital Increase is Valid only if it is in the Corporate Interest of the Company and such Company is Insolvent but Viable

District Court – 22 December 2011

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

Employment

Case Law

Acceptance of Concept of Co-Employment

Court of Appeal, 6 June 2013

For the first time, the Court of Appeal has accepted the concept of co-employment in its decision dated June 2013.

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

Funds and Investment Management

EU Developments

AIFMD Package

EU Commission Delegated Regulation on Types of AIFMs

On 17 December 2013, the EU Commission adopted a delegated regulation supplementing the AIFM Directive with regard to regulatory technical standards determining types of alternative investment fund managers (AIFMs).

The purpose of this regulation is to determine whether an AIFM manages AIF(s) of the open-ended and/or closed-ended type. The difference between an AIFM of open-ended or closed-ended AIFs is relevant for the application of some provisions of the AIFM Directive, in particular those relating to liquidity management and the valuation of assets. This difference is also important in relation to certain transitional provisions of the AIFM Directive that only apply to AIFMs of closed-ended AIFs.

The new delegated regulation still has to be published in the Official Journal of the EU and will enter into force as from the date following this publication.

ESMA Revised Guidelines on Reporting Obligations

On 15 November 2013, ESMA published a revised version of its guidelines on reporting obligations under articles 3(3)(d) and 24(1), (2) and (4) of the AIFM Directive.

The aim of these guidelines is to clarify the reporting obligations of EU AIFMs and non-EU AIFMs towards national competent authorities (NCAs) under the AIFM Directive, regardless of whether the relevant AIFM is below or above the EUR 100/500 million thresholds laid down in the AIFM Directive. In particular, the guidelines provide clarification on the content of the information that these AIFMs should report to NCAs, the timing and frequency (quarterly, semi-annually or annually) as well as the format to be used for such reporting, together with the procedures to be followed when AIFMs move from one reporting obligation to another. The guidelines also set out a diagram which summarises the reporting obligations of AIFMs, as determined by the total value of assets under management and the nature of the AIFs managed or marketed, tables of enumerated reporting fields' values and contents of geographical areas to be used for filing of reports.

The ESMA guidelines will now be translated into the official EU languages. The publication of the translations will trigger a two-month period during which NCAs must notify ESMA whether they comply, or intend to comply, with the guidelines.

ESMA Opinion on the Collection of Information for the Effective Monitoring of Systemic Risk

In addition to its reporting guidelines, ESMA also published an opinion on 1 October 2013 on the collection of information for the effective monitoring of systemic risk under article 24(5), first sub-paragraph, of the AIFM Directive. In this opinion, ESMA provides details on a set of additional information that, in its view, NCAs could require AIFMs to report on a periodic basis pursuant to article 24(5), first sub-paragraph, of the AIFM Directive.

In the updated version of its FAQ on AIFMs (see Regulatory Developments section below), the CSSF has indicated that the information referred to in the ESMA opinion must be provided as part of the reporting obligation of AIFMs.

ESMA Q&A on the Application of the AIFM Directive

On 17 February 2014, ESMA published a Q&A on the AIFM Directive (mostly on remuneration, cross-border marketing and reporting) the purpose of which is to promote common supervisory approaches and practices in the application of the AIFM Directive and its implementing measures. ESMA does this by providing responses to questions posed by the general public and competent authorities in relation to the practical application of the AIFM Directive.

As regards remuneration, ESMA has clarified that once an entity becomes authorised as AIFM under the AIFM Directive, it becomes subject to the AIFM Directive remuneration rules and ESMA remuneration guidelines.

Therefore, the relevant remuneration rules and guidelines should start applying as of the date of authorisation of the AIFM, except for the rules on variable remuneration that should apply for the first time only to the accounting periods following that in which:

- The AIFM submits an application for authorisation in case the AIFM was not performing activities under the AIFM Directive before 22 July 2013.
- The AIFM becomes authorised as AIFM in case the AIFM was already performing activities under the AIFM Directive before 22 July 2013 and is therefore required to submit an application for authorisation between 22 July 2013 and 22 July 2014. In that case, however, ESMA has indicated that these AIFMs will nevertheless have to apply the rules on variable remuneration to the calculation of payments relating to the 2015 accounting period at the latest even if their authorisation as AIFM is obtained after 31 December 2014.

The ESMA Q&A further indicates that in case of delegation of portfolio management or risk management activities by an AIFM to an entity with "identified staff" (within the meaning of ESMA remuneration guidelines) subject to the remuneration requirements of the so-called Capital Requirements Directive ("CRD"), that entity will be viewed as subject to regulatory requirements on remuneration "equally effective" as the requirements under the ESMA guidelines on remuneration (which is not surprising as the CRD rules are virtually identical).

UCITS Related Issues

UCITS V

On 3 July 2013, the EU Parliament voted on the text of the draft UCITS V Directive[1] as deposited by the EU Commission on 3 July 2012. Since then, a compromise text was issued by the EU Council Presidency on 27 November 2013 and COREPER agreed on 4 December 2013 on the legislative position on UCITS V. Ahead of the so-called "trialogue" negotiations, a final agreement has been reached on 25 February 2014 between the EU Parliament and Council representatives confirming rules on remuneration, depositaries and sanctions that must be followed by UCITS from 2015/2016 (precise implementation period is yet to be announced) .

As a reminder, the UCITS V Directive contains provisions amending the UCITS Directive[2] in relation to UCITS depositary duties and liability regimes and introduces new provisions in relation to the remuneration policies of UCITS managers (please refer to the October 2013 edition of our Luxembourg Legal Update).

As concerns remuneration, the proposed UCITS V Directive introduces a requirement for the UCITS management company to implement a policy that is consistent with sound risk management and complies with minimum principles. According to the agreement reached on 25 February 2014 between the EU Parliament and Council, new remuneration rules will not apply to third parties, such as fund administrators and outsourcing providers, to which some UCITS managers can delegate functions. The agreement also provides that UCITS fund managers would be required not to take investment risks beyond what is accepted by their UCITS investors. At least half of the variable part of their remuneration would be paid in the assets of their UCITS, unless the management of UCITS accounts for less than half of the total portfolio. Payment of at least a further 40% of this variable remuneration would be deferred for at least three years, to encourage managers to take a long-run view.

UCITS VI

On 26 July 2012, the EU Commission launched a consultation on further modifications and changes to the UCITS framework (UCITS VI) looking at product rules including the use of derivatives and leverage, liquidity management and depositary rules and long-term investment funds including improvements to UCITS IV.

The EU Commission has tackled the issue of long-term investments in a proposal published on 26 June 2013 (please refer to the October 2013 edition of our

[1] Proposal of the EU Commission of 3 July 2012 for a directive of the EU Parliament and of the Council amending directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions.

[2] Directive 2009/65/EC of 13 July 2009 of the European Parliament and of the Council on the coordination of laws, regulations and administrative provisions relating to UCITS (recast).

Luxembourg Legal Update). It is anticipated that the other UCITS VI issues could be dealt with in proposals in 2014.

ESMA Updated Q&A on UCITS Risk Measurement

On 19 December 2013, ESMA published a new version of its Q&A on risk measurement and calculation of global exposure and counterparty risk for UCITS.

The revised Q&A includes five new questions on the calculation of counterparty risk for exchange-traded derivatives and centrally-cleared OTC transactions. According to the revised Q&A, UCITS should consider the clearing model used to determine the existence and, if any, the location of counterparty risk and should also review the existence of segregation arrangements of the assets and the treatment of claims on these assets in case of bankruptcy of the clearing member or central counterparty.

ESMA indicated that it envisages publishing more detailed guidance on these issues in the course of 2014.

ESMA Updated Q&A and New Consultation Paper on its Guidelines on ETFs and other UCITS Issues

As a first general remark, it should be noted that the ESMA guidelines on ETFs and other UCITS issues (ESMA 2012/823) entered into force on 18 February 2013 and that the last deadline for compliance of Luxembourg UCITS is 18 February 2014. Please refer to the Clifford Chance 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 and applicable timing.

On 27 November 2013, ESMA published an updated version of its Q&A (initially published on 15 March 2013) on the practical application of its guidelines on ETFs and other UCITS issues, which had already been updated on 11 July 2013.

The only changes introduced in the November 2013 version of the Q&A are the addition of two new questions and answers confirming that:

- When UCITS reinvest cash collateral, the reinvested cash collateral should be taken into account for the calculation of the 20% issuer concentration limits as laid down in article 52(1)(b) of the UCITS Directive. In addition, the reinvested cash collateral has to comply with the diversification requirement laid down in paragraph 44 of the ESMA guidelines.
- The calculation mistakes are not covered by paragraph 59 of the ESMA guidelines according to which UCITS should not invest in financial indices whose methodologies permit retrospective changes to previously published index values ("backfilling").

In addition, ESMA also issued on 20 December 2013 a consultation paper on a proposed revision of the provisions of its guidelines on ETFs and other UCITS issues concerning the diversification of collateral received by UCITS in the context of efficient portfolio management techniques and OTC transactions. This proposal follows a request formulated by stakeholders who have asked ESMA to reconsider its position given the adverse impact of its guidelines on UCITS collateral management policies, in particular money market funds (MMFs) which place their money in reverse repurchases (repos).

In its consultation paper, ESMA considers different options and proposes to amend paragraph 43(e) of its guidelines by increasing the 20% single issuer exposure limit to 100% for UCITS qualifying as MMFs and short-term MMFs (as both concepts are defined in the ESMA guidelines on a common definition of European money market funds). This proposal is however subject to the fact that the securities and money market instruments received as collateral are issued or guaranteed by a Member State, one or more of its local authorities, a third country, or a public international body to which one or more Member States belong. Such UCITS should receive securities from at least six different issues, but securities from any single issue should not account for more than 30% of the collateral received. For the avoidance of doubt, ESMA indicates that this derogation does not affect the other criteria for collateral management as set out in paragraphs 41 to 47 of its guidelines on ETFs and other UCITS issues.

On 31 January 2014, ALFI responded to ESMA's consultation paper on the review of its guidelines on ETFs and other UCITS issues. Even if ALFI agrees on the suggestions made with regard to paragraph 43(e) of the ESMA guidelines, it does not see any reason why the proposed derogation would be granted only to UCITS that meet the criteria of money market funds. ALFI therefore recommends that ESMA allows all UCITS funds to use the exemption because UCITS should be given unrestricted access to the safest and most liquid form of collateral available. ALFI also underlines that in the original UCITS Directive, the condition for receiving securities from at least six different issues aimed at ensuring that a UCITS portfolio invested in government bonds meets the definition of a UCI (i.e. diversification test). According to ALFI, since the collateral is not included in the portfolio of the UCITS, it would not be necessary to impose a diversification requirement at the level of the collateral.

EMIR

Please see the presentation made in this respect in the Banking, Finance and Capital Markets section of this Luxembourg Legal Update.

Shadow Banking

On 29 January 2014, the EU Commission adopted a proposal for a regulation on structural measures to improve the resilience of EU credit institutions. The proposed regulation would give banking supervisors power to require certain complex banks to ring-fence certain trading activities from their deposit taking business if the pursuit of such activities compromises financial stability.

In addition, the EU Commission has adopted an accompanying proposed regulation on reporting and transparency of securities financing transactions (SFTs), mainly securities lending, repo or reverse repurchase transactions and buy-sell back or sell-buy back transactions. This aims to prevent banks from attempting to circumvent the ring-fencing rules by shifting activities to the so-called "shadow banking" sector.

In brief, the proposed regulation on reporting and transparency of SFTs aims to improve the transparency of SFTs mainly in the following three ways:

- ***Reporting to trade repositories***: according to the proposed regulation, any EU financial entity (including banks, brokers, UCITS, AIFs, pension funds, insurance companies, etc.) and non-financial companies would be required to report all transactions to a central trade repository. This reporting, which would be based on the existing reporting framework for derivative contracts established under EMIR, would allow supervisors to better identify the links between banks and shadow banking entities and would shed more light on some of their funding operations. As a consequence, supervisors would be able to monitor the exposures to, and risks associated with, SFTs and, if necessary, take better-targeted and timelier actions.
- ***Additional disclosure for investment funds***: the proposed regulation would improve transparency towards investors on the practices of investment funds engaged in SFTs and other equivalent financing structures by imposing additional detailed transparency requirements on these operations over and above the current requirements laid down in the UCITS and AIFM Directives. In particular, appropriate disclosure to investors would be ensured both in the annual/semi-annual reports of UCITS and AIFs as well as in the prospectus or other pre-investment documents. This would lead to better-informed investment decisions by investors.
- ***Rehypothecation***: finally, the proposed regulation would improve the transparency of the rehypothecation (any pre-default use of collateral by the collateral taker for its own purposes) of financial instruments by setting minimum conditions to be met by the parties involved, including written agreement and prior consent. This would ensure that clients or counterparties have to give their consent before rehypothecation can take place and that they make that decision based on clear information on the risks that it might entail.

Crowd-funding

IOSCO has published a paper giving a global overview of the crowd-funding industry. The paper seeks to identify investor protection issues and to determine whether crowd-funding poses a systemic risk to the global financial sector.

The paper specifically analyses financial return crowd-funding, which refers to peer-to-peer lending and equity crowd-funding. The financial return crowd-funding market was worth an estimated USD 6.4 billion in 2013, driven by an annual growth of 90% in peer-to-peer lending.

The paper says that regulators should strike a balance between encouraging crowd-funding, which could help stimulate economic recovery by providing capital to small and medium-sized enterprises, and mitigating the risks associated with its growth. It concludes that the financial return crowd-funding market currently does not present a systemic risk to the global financial sector, but this may change if it is allowed to grow without proper management.

Legislation

Fees to be Levied by the CSSF

Grand-Ducal Regulation of 28 October 2013

The Grand-Ducal Regulation of 28 October 2013 relating to the fees to be levied by the CSSF has been published in the *Mémorial A* on 31 October 2013. The new regulation applies with effect as of 1 November 2013 and repeals the Grand-Ducal Regulation of 29 September 2012 (as amended).

Most of the existing (fixed and annual) fees levied by the CSSF in relation to the instruction and maintenance of the files of UCIs, SIFs, SICARs and their management companies have been amended to take into account the impact of the AIFM Law on these regulated vehicles to the extent that they are authorised as (internal/external) AIFMs under Chapter 2 of the AIFM Law in addition to their authorisation as UCI, SIF, SICAR or management company under the relevant "Product Laws" (i.e. UCI Law, SIF Law and SICAR Law). For the avoidance of doubt, the Grand-Ducal Regulation of 28 October 2013 has no impact on Luxembourg UCITS funds and UCITS management companies which do not apply for the AIFM licence.

New fixed fees will also be levied by the CSSF for the restructuring of existing UCIs, SIFs, SICARs and management companies pursuant to the AIFM Law (e.g. extension of the initial authorisation to authorisation as internally-managed AIF or external AIFM, as the case may be).

Please also see the presentation made in this respect in the Banking, Finance and Capital Markets section of this Luxembourg Legal Update.

Reform of the Companies and Associations Legal Publication rules

Bill N°6624 of 4 October 2013

The Luxembourg Parliament is currently examining a new bill (Bill N°6624) deposited on 4 October 2013 with the aim of reforming the rules of legal publication in respect of companies and associations.

In brief, Bill N°6624 provides for the replacement of the *Mémorial C* by a new official electronic platform of central publication, the *Recueil Electronique des Sociétés et Associations*, to be managed by the Luxembourg RCS and available from its website. In the context of the reform, the procedure of publication in respect of companies and associations is expected to be simplified and rationalised in comparison with the current formalities applicable to publication in the *Mémorial C*.

It should be noted that the new publication rules and procedures will apply to all Luxembourg companies, including, for the avoidance of doubt, SICAVs, SICAFs, SICARs and management companies. In addition, Bill N°6624 also envisages requiring the registration of Luxembourg FCPs with the RCS.

Please see the presentation made in this respect in the Corporate and M&A section of this Luxembourg Legal Update.

Lock-up Mechanisms for Bearer Shares and Units

Bill N°6625 of 4 October 2013

The Bill deposited with the Luxembourg Parliament on 4 October 2013 will put the Company Law provisions in line with the requirements of the FATF and the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) regarding the identification of the holders of bearer shares/units.

It should be noted that the lock-up (*immobilisation*) mechanism to be introduced by Bill N°6625 will also be applicable to bearer shares/units issued by SICAVs, SICAFs and SICARs incorporated in the form of SAs or SCAs as well as to bearer shares/units issued by FCPs.

Please see the presentation made in this respect in the Corporate and M&A section of this Luxembourg Legal Update.

Regulatory Developments

Resolution of Extrajudicial Claims

CSSF Regulation 13-02

CSSF Regulation 13-02 of 15 October 2013 relating to the resolution of extrajudicial claims was published in the *Memorial A* on 28 October 2013. It repeals IML Circular 95/118 and provides details on the process and timeline for the resolution of extrajudicial claims introduced by clients of entities supervised by the CSSF, including consumer disputes concerning the activities of UCIs subject to the UCI Law.

In brief, CSSF regulation is divided into three sections:

- The first section, which entered into force on 1 January 2014, describes the procedure to be followed before the CSSF for the extrajudicial settlement of disputes.
- The second section, which is applicable to all professionals (being defined as any physical or legal person falling under the supervision of the CSSF), will enter into force on 1 July 2014 and requires that professionals establish a procedure for handling complaints and clarifies the specific obligations and disclosure requirements in relation to such a complaints-handling procedure. In this respect, it is likely that UCITS funds and UCITS management companies will probably have to adapt the existing complaints-handling procedures that they have implemented in accordance with the provisions of the UCITS Directive and its implementing legislation.
- The third section specifies the date of entry into force of the previous sections.

The CSSF has indicated that it will prepare a Q&A document in order to provide further guidance on the new regulatory framework.

Please refer to the Banking, Finance and Capital Market section of this Luxembourg Legal Update for details of the above.

Reporting Obligations for AIFMs

CSSF Circular 14/581

Further to the publication by ESMA of its guidelines on reporting obligations under articles 3(3)(d) and 24(1), (2) and (4) of the AIFM Directive, the CSSF published on 13 January 2014 Circular 14/581 concerning the new reporting obligations for Luxembourg AIFMs.

This circular aims to clarify technical details that AIFMs need in order to fulfil their reporting obligations under the AIFM Directive.

CSSF Updated FAQs on AIFM Law

On 10 January and 20 February 2014, the CSSF updated its FAQs on AIFMs, by adding new questions and answers (11 to 16) in relation to the EU marketing passport and reporting obligations under the AIFM Directive as well as in relation to the valuation of AIFs' assets and transaction costs.

In addition, question 1) of the FAQs relating to the scope of the AIFM Law has been amended to clarify the CSSF's position on the determination of the AIFM of AIFs organised as FCPs or limited partnerships:

- As regards FCPs, the CSSF considers that their legal form does not permit an internal management and that an AIF structured as an FCP in all instances has to appoint an external AIFM, which can be the FCP's own management company or another external AIFM appointed by that management company.
- As regards limited partnerships, the CSSF operates a distinction between the different types of limited partnerships under the provisions of the Company Law. As is the case for FCPs, the CSSF considers, in particular, that an AIF structured as a special limited partnership (SCSp) cannot qualify as an internal AIFM but necessarily has to appoint an external AIFM, which can be the general partner (*associé commandité*) or the manager (*gérant*) or another external AIFM appointed by the manager of the SCSp.
- As regards the deadlines for compliance with the AIFM Law requirements, the answer to question 8) now confirms that Luxembourg AIFMs, which benefit from the one-year transition period, are invited to submit an AIFM application file to the CSSF by 1 April 2014 at the latest. Luxembourg AIFs are also invited to submit to the CSSF, by 1 April 2014 at the latest, a file containing information as regards their compliance by 22 July 2014 with the AIFM Directive product rules (e.g. annual report, valuation rules, disclosure to investors, depositary rules).

Finally, the list of the cooperation arrangements required under the AIFM Directive as signed by the CSSF has also been updated.

Please refer to the updated Clifford Chance client briefing on the key changes to the current legal framework of Luxembourg regulated investment vehicles and Luxembourg management companies introduced by the AIFM Law.

Open-Ended UCI's Units/Shares no Longer Allowed as UCITS Eligible Assets under the Trash Ratio

CSSF Press Release 12/46 Reminder

Following the publication on 20 November 2012 of ESMA's opinion concerning article 50(2)(a) of the UCITS Directive, the CSSF confirmed in its Press Release 12/46 of 23 November 2012 that it would follow ESMA's opinion and that Luxembourg UCITS would no longer be allowed to invest in units or shares of UCIs which do not fulfil all of the conditions listed in article 50(1)(e) of the UCITS Directive as these units/shares do not constitute eligible investments for UCITS under article 50(2)(a) of the UCITS Directive (i.e. the so-called "trash ratio").

In its press release, the CSSF also indicated that any existing position in such investments would need to be realised by UCITS, taking into account the best interests of the investors, at the latest by **31 December 2013**.

Please refer to the February 2013 edition of our Luxembourg Legal Update.

First RQFII UCITS Authorised by the CSSF

In November 2013, the CSSF has authorised the first Renminbi Qualified Foreign Institutional Investor (RQFII) UCITS fund, by approving a UCITS investing 100% (vs. 35% only in the past) of its net assets in China A-shares (i.e. shares in mainland China-based companies that are traded on a Chinese stock exchange) provided that some conditions are complied with.

Exoneration of VAT Regarding Risk Management Services Provided to AIFs

AED Circular 723*ter*

On 7 November 2013, the Luxembourg *Administration de l'Enregistrement et des Domaines* issued Circular 723*ter* confirming that risk management services for AIFs could be VAT exempt under certain conditions.

Please see the presentation made in this respect in the Tax section of this Luxembourg Legal Update.

Real Estate

Case Law

No Additional Parking Spaces

Administrative Court, 8 April 2013

Non-Conformity of Easement with Article 16 of the Constitution

Constitutional Court, 4 October 2013

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

Tax

International Legislation

Proposal for a Council Directive Amending Directive 2011/96/EU of 25 November 2013 on the Common System of Taxation applicable in the Case of Parent Companies and Subsidiaries of different Member States

European Commission – Amendment to the Parent Subsidiary Directive

On 25 November 2013 the European Commission released a proposal[3] for amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States. This amendment comes as an additional step towards the fight against tax fraud and tax evasion introduced by the European Commission in its Action Plan adopted on 6 December 2012.

The proposal forecasts that Member States will have until 31 December 2014 to amend their domestic laws if this proposal is adopted.

Anti-hybrid clause

In order to avoid double non-taxation deriving from hybrid financial arrangements, the proposal amends Article 4(1) of the Parent Subsidiary Directive. Such amendment shall read as follows: the Member States where the recipient is resident should "refrain from taxing such profit to the extent that such profits are not deductible by the subsidiary of the parent company". In other words, tax exemption should be denied to payments which are deductible in the source Member State. No withholding tax would be imposed on the profits distributed by the subsidiary as the payments of the subsidiary will be treated as an interest payment under the Interest and Royalties directives.

In this respect, the European Commission hopes to "ensure a consistent treatment across EU" and to reduce the use of hybrid financing instruments aiming at avoiding taxation.

[3] Proposal for a Council directive amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

Anti-abuse clause

The proposal contemplates the update of the current anti-abuse law provisions of the Directive to be in line with the general anti-abuse rules proposed in the recommendation on aggressive tax planning of December 2012. The idea would be to make it mandatory for all Member States to adopt the common anti-abuse rule.

The amendment would modify the article of the Directive as follows: "a transaction, scheme, action, operation, agreement, understanding, promise, or undertaking is an artificial arrangement or a part of an artificial series of arrangements where it does not reflect economic reality.

In determining whether an arrangement or series of arrangements is artificial, Member States shall ascertain, in particular, whether they involve one or more of the following situations:

- the legal characterisation of the individual steps which an arrangement consists of is inconsistent with the legal substance of the arrangement as a whole
- the arrangement is carried out in a manner which would not ordinarily be used in reasonable business conduct
- the arrangement includes elements which have the effect of offsetting or cancelling each other
- the transactions concluded are circular in nature
- the arrangement results in a significant tax benefit which is not reflected in the business risks undertaken by the taxpayer or its cash flows."

Taxation of the Digital Economy – European Commission

Commission of Expert Group Taxation of the Digital Economy – Working Paper on VAT Issues – Meeting on 14-15 January 2014

On 14-15 January 2014, an expert group on taxation of the digital economy designated by the European Commission met to address the VAT issues linked to the digital economy.

Digital economy covers a large definition, in this respect a distinction between the supply of electronic services and the supply of goods ordered on line should be kept in mind as the VAT treatment depends on the type of supply.

Supply of electronic services

In 2008, a first step focusing on the supply of electronic services was taken to discourage the implementation of businesses specialising in electronic services in lower VAT rate countries. The "VAT Package" adopted by the EU Member States provides that as from January 2015 the place of supply of all services of telecommunication broadcasting and electronic services to private individuals will be the Member State in which the customer is located instead of the State of the provider. This treatment will put intra-EU transactions and transactions with third countries on an equal footing (cf. Bill N°6642).

Alongside the VAT package, the concept of Mini One Stop Shop (MOSS) has been introduced so that the supplier does not need to register in each Member State in which it has a customer. Each supplier will be able to declare and pay VAT via a web portal in his country and will only need to make a single declaration. The Commission is also adopting regulation and drafting a guide to help the implementation of those changes, especially to deal with issues such as the determination of the customer's location.

Supply of goods

Regarding the supply of goods ordered online, the principle of taxation at destination is already the rule (subject to some turnover threshold). However, the system is complicated and is, up to now, forcing suppliers to register for VAT in each Member State. Despite the failure to implement a system comparable to MOSS, the Commission is planning to propose again a facilitation for the online distance selling of goods.

Goods ordered in a third country can benefit from VAT exemption under certain conditions (threshold on the value of imported goods). However, this exemption is now detrimental for EU suppliers which are at a disadvantage compared to third party suppliers. In this respect, this exemption could be removed if the implementation of a simplified collection mechanism could be put in place.

Legislation

Mandatory Automatic Exchange of Information

Bill N°6632

On 17 December 2013, the new Luxembourg government submitted Bill N°6632 to the Parliament regarding the automatic exchange of information.

This law essentially implements into Luxembourg law Article 8 of the 2011/16/EU Directive which provides that Member States shall, by automatic exchange, communicate the information concerning residents of other Member States to the competent authority of the other Member States.

This draft law only introduces the automatic exchange of information for three types of revenue (income from employment, director's fees and pensions) out of the five provided by the directive. Information regarding life insurance products or ownership/income from immovable property will not be considered in this law as the Luxembourg Tax Authorities do not have any information on those revenues in their tax files.

The automatic exchange of information has been active since 1 January 2014. The communication of information will take place on a regular basis, at least once a year. Luxembourg Tax Authorities are committed to provide the information before 30 June following the year in which the information became available.

Double Tax Treaties

Bill N°6633

On 17 December 2013, Bill N°6633 has been proposed to the Luxembourg Parliament for the approval of several Double Tax Treaties (DTT) including the provisions on the exchange of information and Protocols signed by Luxembourg with the following countries:

- Guernsey DTT
- Isle of Man DTT
- Jersey DTT
- Czech Republic DTT
- Saudi Arabia DTT
- Denmark Protocol
- Slovenia Protocol.

These DTTs should enter into force on 1 January of the year following confirmation by both countries of the implementation of the DTT in domestic law.

For additional information on the new DTTs, please refer to the February 2013, June 2013 and October 2013 editions of the Luxembourg Legal Update.

The Protocol between Luxembourg and Slovenia deals with the update of the exchange of information to comply fully with the Organisation for Economic Co-operation and Development (OECD) Model Tax Convention.

The Protocol with Denmark introduces a new Article 18 dealing with pensions, payments of social security and similar payments. Once this Protocol will have entered into force, the State making the pension payments will be able to tax pensions and similar income instead of the State of residency of the taxpayer.

Double Tax Treaty and Protocol between Luxembourg and Kazakhstan entered into Force

As all the conditions for the entry into force of both the DDT signed on 26 June 2008 and the Protocol signed on 3 May 2012 between Luxembourg and Kazakhstan have been met on 11 December 2013 and they have entered into force on 1 January 2014.

Protocol between Luxembourg and the Republic of Mauritius

On 28 January 2014, Luxembourg and the Republic of Mauritius signed a Protocol amending the existing DDT between Luxembourg and the Republic of Mauritius. The amendment modifies several provisions and includes the provision on the exchange of information of the OECD Model Tax Convention.

Implementation of Article 5 of the Directive 2008/8/EC on the Place of Supply of Telecommunications, Broadcasting and Electronic Services to a Non-taxable Person

Bill N°6642

On 21 January 2014, Bill N°6642 was submitted to the Luxembourg Parliament for the transposition of article 5 of Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC on the place of supply of services.

Place of supply is the Place of the Service Recipient

Article 5 of the Directive amends the rules which currently still determine the place of supply of telecommunications services, radio and television broadcasting services as well as electronic services supplied by taxable persons established in the EU to non-taxable persons established in the EU. So far, these services were taxable at the place of establishment of the service provider. They will, as from 1 January 2015, be taxable at the place of the non-taxable recipient. This major change is provided by Article 1§1 of the Bill.

Implementation of Member State of Identification

Concurrently, the law implements the concept of "Member State of identification". In order to avoid that taxable persons delivering such services in several Member States be submitted to several administrative formalities, taxable persons have the possibility to choose a Member State of identification as a single point of electronic contact for VAT identification and declaration.

Convention for Administrative Assistance

Bill N°6643

On January 6 2014, Bill N°6643 regarding the approval of the Convention on Mutual Administrative Assistance in Tax Matters and its Protocol of Amendment signed in Paris on 29 May 2013 amends the general tax law.

The Bill approves the Convention on Mutual Administrative Assistance signed by Luxembourg in May 2013 together with Austria, Belize, Estonia, Latvia, Nigeria, Saudi Arabia, Singapore and the Slovak Republic. More than 60 countries have ratified the Convention.

The Bill recalls in its Article 2 reserves and statements that Luxembourg made in accordance with Article 30 of the Convention. In this respect, Luxembourg will not provide any form of assistance:

- in relation to the taxes of other Parties in any of the categories listed in sub-paragraph b. of paragraph 1 of Article 2 of the Convention on Mutual Administrative Assistance (e.g. social security cotisation, real estate tax, excise duty or inheritance duty)
- in the recovery of any tax claim, or in the recovery of an administrative fine, for all taxes or only for taxes in one or more of the categories listed in paragraph 1-a of Article 2 of the Convention on Mutual Administrative Assistance (e.g. income tax and corporate income tax)
- in respect of any tax claim, which is in existence at the date of entry into force of the Convention on Mutual Administrative Assistance
- in the service of documents for all taxes or only for taxes in one or more of the categories listed in paragraph 1-a of Article 2 of the Convention on Mutual Administrative Assistance (e.g. income tax and corporate income tax).

Business Preservation and Modernisation of Bankruptcy Law

Bill N°6539/05

As mentioned in the October 2013 edition of our Luxembourg Legal Update, Bill N°6539 modernises bankruptcy law and prevents bankruptcies through various reorganisation measures for businesses in difficulty.

It is proposed to amend the §109 of the *Abgabenordnung* of 22 May 1931 (the Fundamental Tax Law) by deleting the concept of culpable breach (*schuldhafte Verletzung*). Until now, the director of a company could be held liable for the bankruptcy of the company by the Luxembourg Tax Authorities if he failed to uphold his tax obligations and if the Tax Authorities could prove its culpable breach.

On 2 December 2013, the Luxembourg Chamber of Commerce rendered its opinion towards the Bill. According to the Chamber of Commerce, by deleting the notion of culpability no distinction can be made between a director acting in good faith and one acting dishonestly. In this respect, the Chamber of Commerce advises not to delete the concept of culpable breach in order to preserve Luxembourg's entrepreneurial mindset.

Circulars/Regulatory Developments

VAT Exemption for Risk Management Services

Circular L.I.R. N°723 ter of 7 November 2013

On 7 November 2013, the Luxembourg VAT Authorities issued Circular L.I.R. N°723 ter regarding VAT exemption for risk management services for investment funds. According to Circular L.I.R. N°723 ter, risk management services for investment funds may be considered as management services exempt from VAT under Article 44§1d of the Luxembourg VAT Law.

Services rendered by a third party acting as management company should also benefit from the exemption as long as the conditions set out in Circular L.I.R. N°723 bis of 30 April 2010 are met. In other words, the exemption should be available if those services form a distinct whole and are specific and essential for the management of the investment fund. The circular also reminds that Alternative Investment Funds can also benefit from VAT exemption according to Article 14 of the Law of 12 July 2013 on alternative investment fund managers.

Net Wealth Tax Reduction

Circular I. Fort N°47 of 14 November 2013

On 14 November 2013, the Luxembourg Tax Authorities issued Circular I. Fort N°47 clarifying the conditions of application of the net wealth tax reduction. The introduction of a new minimum corporate income tax for all taxpayers as from 1 January 2013 has triggered a new limitation to net wealth tax reduction.

According to §8 a of the Luxembourg net wealth tax law, companies subject to net wealth tax may ask for a reduction provided that they maintain in a reserve account an amount equivalent to five times the reduction requested.

The amount of the reduction is, however, subject to two limitations:

- The amount of the reduction cannot exceed the amount of corporate income tax (including the employment fund contribution and prior to any tax credit).
- As from 1 January 2013, the reduction of net wealth tax is reduced by the theoretical amount of minimum tax (including the employment fund contribution and prior to any tax credit) that could be applicable to the company.

In this respect, regardless of whether or not the company effectively paid corporate income tax, no company will be granted a reduction amounting to the minimum income tax (including the employment fund contribution and prior to any tax credit) which could be due.

This principle also applies to group taxation. The net wealth tax law does not allow a group computation of the net wealth tax: in the case of group taxation, net wealth tax is computed on a stand-alone basis. The limit set by the amount of corporate income tax is the corporate income tax due by the whole tax group. As from 2013, the reduction cannot exceed the cumulative minimum tax amount (including the employment fund contribution and prior to any tax credit) due by each company of the group.

It should be noted that in the event of merger, demerger or acquisition the reduction granted is not cancelled if the five-year reserve period has not ended as long as the reserve is taken over by another company of the group.

Procedure of Exchange of Information on Request

Circular ECHA – N°1 of 31 December 2013

On 31 December 2013, the Luxembourg Tax Authorities issued Circular ECHA - N°1 regarding the procedure of exchange of information on request. This circular clarifies the international standard of the World Forum regarding transparency and exchange of information for tax purposes.

Firstly, the standard provides that exchange of information should only occur when the requested information is "foreseeably relevant" and it rules out the so-called "fishing expeditions". At the time of the request, there should be a reasonable possibility that the requested information is relevant. When the relevance of the requests is unclear for the Luxembourg Tax Authorities, the latter can ask for further clarifications. Upon the other State clarification, the Luxembourg Tax Authorities can no longer refuse a request or refuse to communicate the requested information.

Secondly, the circular highlights the application of the principle of non-retroactivity of the Double Tax Treaty in the context of the exchange of information. The principle of non-retroactivity applicable to DTTs does not preclude the communication of information related to years prior to the entry into force of the new DTT. The holder of the information will have to communicate all information and documents requested (as long as the "foreseeable relevance" is respected) by the Luxembourg Tax Authorities under the application of the DTT. A refusal to disclose the requested information could lead to a fine of EUR 250,000 imposed by the Luxembourg Tax Authorities' Director.

Moreover, the competent division of the Luxembourg Tax Authorities will ensure that the holder of the information will communicate fully, accurately and without any alteration the requested information. Any deviation will result in an EUR 250,000 fine.

Finally, the person who is the subject of a request of a foreign authority is informed by the Luxembourg Tax Authority. Concurrently, if the foreign authority advises the Luxembourg Tax Authorities not to inform the person, the Luxembourg Tax Authorities should send the request directly to the information holder. Moreover, if the person who is the subject of the request is a non-resident or is resident, but cannot be reached, the information holder is contacted directly.

Case Law

Income of Branches Cannot be Taken into Account for the Computation of the Proportion of Deductible VAT

European Court of Justice – 12 September 2013 – Case C-388/11

Argenta Spaarbank NV – Notional Interest Deduction

ECJ-Case – 4 July 2013 – C-350/11

Taxpayer Facing the Exchange of Information between Member States in Course of a Tax Audit

ECJ – Case C-276/12 – 22 October 2013

Repurchase of Company Cars is a Taxable Benefit in Kind

Administrative Court – Case N°31272 – 14 October 2013

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

Litigation

Banking, Finance and Capital Markets

Loan – Real Contract (*contrat réel*) – Loan Commitment – Specific Performance (no)

District Court, 1 December 2011[4]

A contract had been signed between two parties, one of them comitting to lend EUR 1 million to the other party. The funds have never been transferred and the borrower demands specific execution of the contract.

The District Court held that a loan is an *in rem* contract (*contrat réel*) which only becomes valid and binding once the funds have been transferred to the borrower. As long as there has been no such transfer there is only a loan commitment, a promise to enter into a loan. The person who is acting in violation of this commitment has to pay damages. However, there can be no specific execution of its obligations.

Placing Orders – Bankers' Obligation to Provide Information and Advice

District Court, 8 December 2011[5]

In respect of orders on the financial markets, banks are held by an obligation to provide information and advice even though there is no management contract (ref. article 37 of the Financial Sector Law).

In such a case, banks are held to provide information only regarding the general risks of placing orders on the financial markets and is not held to provide information regarding specific transactions or regarding the opportunity to act.

However, if a bank gives recommendations to buy, it is liable for damages if it later appears that the recommendations were based on an erroneous appreciation of the information that it had or that it should have taken into consideration. The quality of the recommendation is judged with regard to the date it was given. The client has to prove that the bank has been wrongful or negligent.

[4] District Court, 1 December 2011, N°129255 (this decision is subject to appeal).
[5] District Court, 8 December 2011, N°127479.

According to the District Court, the client has to establish that, with regard to the chosen investment policy, the advice given did not correspond to that which a normally cautious and careful investment adviser would have provided in the same circumstances. The sole fact that the client incurred losses, even if they have been substantial, is not sufficient to establish the adviser's liability. More specifically, the client has to show that the bank had not correctly analysed the known information or the information that it should have known had it taken into account all the information that had been accessible to it.

AML Obligations

District Court, 25 April 2012[6]

The District Court held that vigilance obligations are not fulfilled sufficiently if the person held by the obligations simply holds a copy of the articles of association and a copy of the ID card of the people concerned.

In respect of the obligation to keep adequate records, it is held that it is not sufficient to keep documentation; in order to be useful, the documentation also has to be kept in good order so that it can be used in an AML enquiry. The person subject to AML legislation has to have an adequate internal organisation, and it therefore has to show an interest in the effective beneficiaries of the companies that are its clients and into their activities.

Finally, the person subject to AML legislation has to organise adequate training of its employees and, if it does not, it knowingly commits a wrongdoing punishable under AML legislation.

Enforcement of Pledge – Contractual Limitation to Enforce Pledge (no)

District Court, 29 January 2014[7]

In circumstances in which one of the parties to a pledge agreement argued that the 2005 law on financial collateral arrangements enables the parties to limit contractually the circumstances in which a pledge may be enforced, the District Court held that the right to enforce a pledge in case the debtor does not pay its debt at maturity is of the essence of the pledge and any contractual clause limiting this right is to be considered null and void.

In fact, the 2005 law on financial collateral arrangements does not depart from this general principle as its aim is to reinforce the creditors' rights permitting them to enforce the pledge in circumstances not foreseen with regard to pledges not falling within its scope.

Under the 2005 law on financial collateral arrangements, the pledgor may not only enforce the pledge in the event of the debtor's failure to pay at maturity but also in different circumstances determined by contract.

Validity of One-sided Jurisdiction Clauses

District Court, 29 January 2014[8]

In a decision dated 26 September 2012, the French Supreme Court (please refer to the February 2013 edition of our Luxembourg Legal Update) decided that a one-sided jurisdiction clause did not comply with article 23 of the Brussels I Regulation, and was, therefore, ineffective.

The reasoning of the Court of Appeal approved by the French Supreme Court was that the clause was in fact only binding upon the client, who could only sue in Luxembourg, but left a choice to the bank on where to sue the client. Therefore, in the eyes of the Court, the clause was *potestative*, meaning a clause where performance depends wholly on the will of one single party.

This decision has been widely commented on in French and Luxembourg legal writing as it was causing some uncertainty.

For the first time, a Luxembourg court has taken a position with regard to a similar jurisdiction clause. In particular, the District Court notes that far from prohibiting one-sided jurisdiction clauses, the Brussels I Regulation expressly admits such clauses in its article 23. In particular, it is clear that if there are no weaker parties involved in the contract, expressly protected by the Regulation, the party autonomy has to be respected as long as no exclusive forum designated by the Regulation is concerned. In the case at hand both parties were sophisticated and had an equivalent bargaining power and so the jurisdiction clause had to be considered valid.

[6] District Court, 25 April 2012, N°1565/2012.
[7] District Court, 29 January 2014, N°153636, 155943, 156026 and 157028.

[8] District Court, 29 January 2014, N°153636, 155943, 156026 and 157028.

Corporate

Article 100 of Companies Law – Conditions for Assessing that Losses Exceed the Amount of the Capital of a Luxembourg Company

District Court Luxembourg, 8 December 2011

According to article 100 of the Companies Law, in the event of a loss of half of the corporate capital of a Luxembourg SA, the board of directors of the company shall convene a general meeting of the shareholders to be held within a period not exceeding two months from the time at which the loss was or should have been ascertained by them and such meeting shall resolve in accordance with the conditions for amending the articles of the company on the possible dissolution of the company.

The same rules shall be observed where the loss equals at least three quarters of the corporate capital provided that, in such case, dissolution shall take place if approved by one fourth of the votes cast at the meeting of the shareholders. In the event of any infringement of the foregoing provisions, the directors may be declared personally and jointly and severally liable vis-à-vis the company for all or part of the increase of the loss.

In the case at hand, a company suffered a loss exceeding 100% of its share capital, and in accordance with article 100 of the Companies Law, the question of the dissolution of the company was therefore submitted to the shareholders of the company. The claimant sustained, however, that, considering that the value of the real estate asset held by the company clearly exceeded the amount of the losses suffered by the company, article 100 of the Companies Law did not apply to the present situation and that the question on the dissolution of the company should not be submitted to the shareholders. Moreover, it argued that the losses could only be ascertained on the basis of a balance sheet of the company duly approved by the shareholders of the company.

The District Court[9] first confirmed that, for the purpose of article 100 of the Companies Law, only the amount of the share capital of the company is to be taken into consideration when compared to the losses of the company, irrespective of the value of any (real estate) asset held by the company, even if such asset has a value higher than the loss. The District Court finally confirmed that article 100 of the Companies Law does not require that the loss be recognised by way of a balance sheet duly approved by the general meeting of shareholders, and that the board of directors of the company may ascertain the loss on the basis of any financial document, without waiting for the approval of the annual accounts by the general meeting of shareholders.

Nullity of Bondholders' Meeting for Violation of Convening Formalities – No Possibility for the Company to Request the Nullity of such Meeting

Court of Appeal, 1 February 2012[10]

The Luxembourg Courts have power to declare whether a general meeting of bondholders is not valid, null and void. A general meeting of bondholders will be declared not valid, null and void if the breach of the legal and statutory provisions impairs the resolutions passed. In accordance with precedent, a general meeting of bondholders may be declared null and void at the request of either the company, the bondholders, creditors subrogated in the rights of the company or a third party having an interest to claim.

In the case at hand, the company requested that the general meeting of bondholders be declared null and void as the second general meeting of bondholders had been convened before the holding of the first one and the result of the first general meeting was not inserted in the agenda of the second general meeting, thus violating the convening formalities set forth by the provisions of the Companies Law.

The Court of Appeal confirmed that convening formalities for bondholders' meetings are protective measures for the

---

[9] District Court, 8 December 2011, N°133408 and 134926, BIJ 7/2013.
[10] Court of Appeal, 1 February 2012, N°37724, BIJ 8/2013.

bondholders and the violation of such formalities can only be invoked by the bondholders. The Court also confirmed that the company which issued bonds has no power to invoke non-compliance with the convening formalities of the general meeting of bondholders set forth by the Companies Law.

No Right for Shareholder to Obtain Copy of Minutes of Shareholders' Meeting

Court of Appeal, 16 January 2013[11]

The article 73 of the Companies Law lists the documents which are at the disposal of the shareholders at the registered office of a *société anonyme* 15 days before the general meeting of shareholders.

In the case at hand, a limited partner in a Luxembourg SCA requested from the management of the company to obtain a copy of the minutes of the annual general meeting of the partners of the company held in 2011 and the management of the company rejected such request.

Both the District Court and the Court of Appeal also rejected the request from the limited partner. Considering that the minutes of any general meeting of partners are not listed in the article 73 of the Companies Law (which contains the restrictive list of the documents to which partners are entitled to have access), the Court denied such request as it cannot grant to partners more rights than they have by virtue of the law.

A Share Capital Reduction to nil Followed by a Capital Increase is Valid only if it is in the Corporate Interest of the Company and such Company is Insolvent but Viable

District Court, 22 December 2011[12]

The share capital of a Luxembourg company was reduced to nil by way of shareholders' resolutions, and then immediately increased by new contributions in cash made by certain existing shareholders of the company. As a result of such operations, certain minority shareholders of the company were excluded from the company, as they did not subscribe to the proposed capital increase and did not participate in the recapitalisation operation.

[11] Court of Appeal, 16 January 2013, N°38716.
[12] District Court, 22 December 2011, N°121778, BIJ 7/2013.

The District Court expressly admits the validity of this kind of recapitalisation operation provided that certain conditions are fulfilled:

- these operations must be in the corporate interest of the company, such interest being the continuity of its activity and
- the company must be insolvent and no longer viable.

If the company is insolvent but viable, this kind of recapitalisation operation is not valid as it leads to the exclusion of the shareholders who do not participate in the subsequent capital increase.

Employment

Acceptance of Concept of Co-Employment

Court of Appeal, 6 June 2013[13]

For the first time, the Court of Appeal has accepted the concept of co-employment in its decision dated June 2013. An employee of company A claimed that not only company A should be considered as his employer but also company B as his co-employer. The employee argued that (a) Company A was not managed in an independent way but by Company B, (b) the assets of the two companies were used in common, and (c) the management of company A was *de facto* under the authority of the managers of company B.

He deducted from these factual elements that he had companies A and B as co-employers, and that hence employment conditions that were granted to the employees of company B (in particular rights deriving from a collective bargaining agreement) should also be granted to him.

The Court of Appeal rejected the claim on the merits, but nevertheless accepted to consider that, in the absence of any autonomy of company A, A and B may be considered as co-employers of the employee, with the consequence that the employee can bring any claim against both companies.

[13] Court of Appeal, 6 June 2013, N°38105.

Real Estate

No Additional Parking Spaces

Administrative Court, 8 April 2013[14]

In the case at hand, a request for authorisation for the construction of 600 additional parking spaces in an administrative building had been rejected by the mayor on the basis of article 17.1 of the building regulation (*règlement sur les bâtisses*) of the concerned municipality. This article limited the number of parking spaces for certain areas and certain buildings, except in the case of inadequate public transport connections.

The applicant filed an action for annulment of this decision with the Administrative Court, arguing in particular that article 17.1 of the building regulation infringed article 16 of the Constitution which protects the right to property and article 11(6) of the Constitution protecting the freedom of trade and industry.

The court recalled that the planning laws and regulations (in the case at hand, the above-mentioned provisions of the building regulation) may be in contradiction with article 16 of the Constitution only in cases where these laws and regulations operate to bring about substantial changes in the attributes of the right to property.

The court also analysed the conformity of article 17.1 of the building regulation with article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol number 11. In this respect the court held that the objective of general interest pursued by the municipality (i.e. control of the traffic flow and promotion of public transport) was not unreasonable. The court also ruled that restrictions imposed on the ownership rights consisting of limiting the number of parking spaces was not disproportionate in relation to the above objective of general interest pursued by the municipality.

The court then ruled that the mayor's refusal to grant the authorisation for construction of parking spaces was not an infringement of article 16 of the Constitution or of article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol number 11. The court specified that the mayor did not deprive the owner of its ownership rights but only regulated the use of these rights by imposing some restrictions. The court also rejected, for the same reasons as above, the applicant's argumentation based on violation of article 11(6) of the Constitution.

Regarding the applicant's request to benefit from the exception foreseen in article 17.1 of the building regulation, the court held that the applicant had not proved inadequacy of public transport connections in the area concerned, taking account of its real needs.

Non-Conformity of Easement with Article 16 of the Constitution

Constitutional Court, 4 October 2013[15]

Article 22 of the law of 19 July 2004 on municipal land management and urban development as amended (*loi modifiée du 19 juillet 2004 concernant l'aménagement communal et le développement urbain*) provides that easements resulting from a general development plan (*plan d'aménagement general*) do not confer any right to compensation, except in some cases (such as infringement of accrued rights or material alteration of the prior state of conditions of a site causing a direct, material and certain loss).

In the case at hand, the Constitutional Court had been asked to give a preliminary ruling on the conformity of the law (insofar as it allows requalification of constructible land into non-constructible land without compensation) with article 16 of the Constitution relating to the property right.

The court recalled that article 16 of the Constitution protects the property right and prohibits expropriation except in the public interest and subject to fair compensation. The court also recalled that substantial changes to the attributes of the right to property may be considered as an expropriation.

The court then ruled that article 22, in combination with articles 2, 5, 6 and 8, of the law was not in conformity with article 16 of the Constitution. The court based its decision on the grounds that article 22 of the law sets a principle according to which easements resulting from a general development plan do not confer any right to compensation

[14] Administrative Court, 8 April 2013, N°28956.

[15] Constitutional Court, 4 October 2013, N°101/13.

and foresees a limited number of exceptions to this principle.

In an answer given to a parliamentary question that was raised following this decision, the Minister of the Interior stated that a working group had been put in place in order to prepare a proposal for an amendment of the law.

Tax

Income of Branches Cannot be Taken into Account for the Computation of the Proportion of Deductible VAT

European Court of Justice, 12 September 2013, Case C-388/11[16]

On 12 September 2013, the European Court of Justice ruled whether a company established in a Member State could take into account the income of its branches established in another Member State to compute the proportion of deductible VAT. This case may impact Luxembourg banks having foreign branches.

In the case at hand, after a tax audit, a bank claimed for the reimbursement of VAT which it considered it had overpaid arguing that income from branches established in other Member States should be taken into account to compute the deductible proportion of VAT on expenses incurred by its head office. The bank's main argument was that its foreign branches should be considered together with the principal establishment as a single taxable person in so far as concerns the relationship between them (see Case C-210/04 FCE Bank).

In this respect, the French Administrative Supreme Court decided to submit the questions to the ECJ for a preliminary ruling. The ECJ ruled that a company with a principal establishment in a Member State and branches established in other Member States cannot take into account the turnover of its branches to compute the deductible proportion of VAT. The ECJ extended this answer to the turnover of branches located in third states outside the EU. The Court also added that a Member State is not allowed to implement a rule for the calculation of the deductible proportion per sector of business of a company which, by allowing the company to take into account the turnover of a branch established in another Member State or a third party, would be contradictory to its first two answers.

Argenta Spaarbank NV – Notional Interest Deduction

European Court of Justice, 4 July 2013, C-350/11[17]

On 4 July 2013, the European Court of Justice ruled on whether a Member State could, based on its domestic legislation, prevent a fully taxable company from taking into account, for the calculation of a deduction, the net asset value of the assets of a permanent establishment situated in another Member State (if the PE is not taxable in the first Member State), while the assets attributed to a permanent establishment located in this Member State could be taken into account for the computation.

In the case at hand, Argenta Spaarbank, a company resident in Belgium, is subject to corporate tax in Belgium. Argenta Spaarbank had a permanent establishment in the Netherlands, whose income was exempted from Belgian taxation under the Belgium–Netherlands Double Tax Treaty (DTT). The Belgian tax law provides for a possible deduction for risk capital (also called "deduction of notional interest") which consists in deducting a percentage of the equity capital. In this respect, when computing its taxable basis, Argenta Spaarkbank requested the deduction of the notional interest linked to the net value of the assets of its Dutch permanent establishment but was disallowed by the Belgian tax authority.

In this respect, Argenta Spaarbank argued that the deduction of notional interest provided by Belgian tax law constituted an obstacle to the freedom of establishment provided by article 49 of the Treaty on the Functioning of the European Union (TFEU). As claimed by the Advocate General in his Opinion, taking into account the assets of a permanent establishment in order to calculate the deduction of notional interest constitutes a tax advantage as it reduces the tax basis. However, this tax advantage is denied when the PE is located outside Belgium and is exempt from corporate income tax under a DTT. In this respect, the impossibility for a company to benefit from this tax advantage because its permanent establishment is located in another Member State, which has signed a DTT with Belgium and which exempts the PE's revenues from Belgian taxation, is disadvantageous for that company. This disadvantageous treatment deters Belgian companies from carrying out businesses in other Member States and as

[16] ECJ – Case C-388/11 – 12 September 2013.

[17] ECJ – Case C-350/11 – 4 July 2013.

such infringes the freedom of establishment promoted by article 49 of the TFEU.

The ECJ ruled that "*Article 49 TFEU must be interpreted as precluding national legislation under which, for calculation of a deduction granted to a company subject to full tax liability in a Member State, the net value of the assets of a permanent establishment situated in another Member State is not taken into account when the profits of that permanent establishment are not taxable in the first Member State by virtue of a double taxation convention, whereas the assets attributed to a permanent establishment situated in the territory of the first Member State are taken into account for that purpose*."

Exchange of Information between Member States

European Court of Justice, C-276/12, 22 October 2013[18]

The Czech Tax Authorities have asked the ECJ to rule on various questions regarding the extent of the rights of the taxpayer in the context of an exchange of information between Member States.

In the case at hand, Mr Sabou, a professional footballer, has reduced his taxable basis by deducting expenses linked to his possible transfer to another football club in another Member State. The Czech Tax Authorities requested information from the other Member States' Tax Authorities to check the accuracy and veracity of those expenses. Following the tax audit, the Czech Tax Authorities reassessed Mr Sabou on his income tax. Mr Sabou claimed that the information was illegally collected by the Tax Authorities as he was not aware of the information requests and had no possibility to assist in the witnesses' examinations.

Member States agree that the respect of the right of defence of the taxpayer does not require that the taxpayer takes part in the request for information. Requests of information occur at the investigation stage but not during the contentious stage where the taxpayer is given the opportunity to answer to a tax reassessment notice.

In its judgment of 22 October 2013, the ECJ ruled that European law, as it results in particular from Council Directive 77/799/EEC of 19 December 1977 amended by Directive 2006/98/EC on mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums, does not confer on a taxpayer of a Member State the right to:

- be informed of a request for assistance from his Member State to another Member State
- take part in formulating the request addressed to the requested Member State
- take part in examinations of witnesses organised by the requested Member State
- contest the accuracy of the information conveyed.

[18] ECJ – Case 276/12 – 22 October 2013.

Repurchase of Company Cars is a Taxable Benefit in Kind

Administrative Court, 14 October 2013, Case N°31272 [19]

On 14 October 2013, the Administrative Court ruled in favour of the Luxembourg Tax Authorities regarding the tax reassessment of a company which failed to withhold taxes on the benefit in kind allocated to some of its employees, through the repurchase of their company cars.

In the case at hand, a company had sold to one of its employees a 24 month old car worth EUR 36,735 new for EUR 54.53 and to another one a 27 month old car worth EUR 34,199 new for EUR 29.1. The Luxembourg Tax Authorities decided that the company should withhold the tax on all the revenue of its employees, including this benefit in kind, and therefore reassessed the company. For the purpose the Luxembourg Tax Authorities estimated the amount of benefit in kind by using another valuation method than the company's. They computed a 35% devaluation of the value of the car for the first year and a 10% devaluation for subsequent years.

The Luxembourg Tax Authorities rejected the argument of the company regarding the lack of legal basis of the reassessment. In this respect they argued that the absence of treatment of the specific case of the purchase of company car in a circular does not prevent the taxation of this repurchase on a legal basis. The same goes for the standard computation method used to evaluate the value of the benefit in kind.

The Court confirmed the Luxembourg Tax Authorities' view and ruled that the option to repurchase a car at a lower price than the market price is a benefit in kind falling under article 104 (1) of the Luxembourg Income Tax Law.

The company also argued that the accounting method used by the company was in accordance with the Luxembourg Tax Authorities' constant practice and as such could not be questioned in respect of the non-retroactivity principle.

Concurrently, the Court highlights in its judgment that the Luxembourg Tax Authorities have never provided any insurance that this practice will be maintained and have never given any personal answer or affirmation on this point.

[19] Administrative Court, 14 October 2013, N°31272.

CLIFFORD
CHANCE

Luxembourg Contacts

Banking, Finance & Capital Markets


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


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


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


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


Audrey Mucciante
Counsel
T : +352 48 50 50 409
E : audrey.mucciante@
cliffordchance.com


Udo Prinz
Counsel
T : +352 48 50 50 232
E : udo.prinz@
cliffordchance.com


Victor Regnard
Counsel
T : +352 48 50 50 207
E : victor.regnard@
cliffordchance.com

Corporate/M&A/ Private Equity


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


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


Pierre Gromnicki
Partner
T : +352 48 50 50 260
E : pierre.gromnicki@
cliffordchance.com


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


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

Investment Funds


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


Pierre Gromnicki
Partner
T : +352 48 50 50 260
E : pierre.gromnicki@
cliffordchance.com


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


Alfred Sawires
Counsel
T : +352 48 50 50 276
E : alfred.sawires@
cliffordchance.com


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


Paul Van den Abeele
Counsel
T : +352 48 50 50 478
E : paul.vandenabeele@
cliffordchance.com

Litigation, Employment


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


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


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


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


Sébastien Schmitz
Counsel
T : +352 48 50 50 455
E : sebastien.schmitz@
cliffordchance.com

Tax


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

Worldwide contact information
36* offices in 26 countries

Abu Dhabi
Clifford Chance
9th Floor, Al Sila Tower
Sowwah Square
PO Box 26492
Abu Dhabi
United Arab Emirates
T +971 2 613 2300
F +971 2 613 2400

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

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

Barcelona
Clifford Chance
Av. Diagonal 682
08034 Barcelona
Spain
T +34 93 344 22 00
F +34 93 344 22 22

Beijing
Clifford Chance
33/F, China World Office Building 1
No. 1 Jianguomenwai Dajie
Beijing 100004
China
T +86 10 6505 9018
F +86 10 6505 9028

Brussels
Clifford Chance
Avenue Louise 65
Box 2, 1050 Brussels
Belgium
T +32 2 533 5911
F +32 2 533 5959

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

Casablanca
Clifford Chance
169 boulevard Hassan 1er
20000 Casablanca
Morroco
T +212 520 132 080
F +212 520 132 079

Doha
Clifford Chance
Suite B
30th floor
Tornado Tower
Al Funduq Street
West Bay
P.O. Box 32110
Doha, Qatar
T +974 4 491 7040
F +974 4 491 7050

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

Düsseldorf
Clifford Chance
Königsallee 59
40215 Düsseldorf
Germany
T +49 211 43 55-0
F +49 211 43 55-5600

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

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

Istanbul
Clifford Chance
Kanyon Ofis Binasi Kat. 10
Büyükdere Cad. No. 185
34394 Levent, Istanbul
Turkey
T +90 212 339 0000
F +90 212 339 0099

Jakarta**
Linda Widyati & Partners
DBS Bank Tower
Ciputra World One 28th Floor
Jl. Prof. Dr. Satrio Kav 3-5
Jakarta 12940
T +62 21 2988 8300
F +62 21 2988 8310

Kyiv
Clifford Chance
75 Zhylyanska Street
01032 Kyiv,
Ukraine
T +38 (044) 390 5885
F +38 (044) 390 5886

London
Clifford Chance
10 Upper Bank Street
London
E14 5JJ
United Kingdom
T +44 20 7006 1000
F +44 20 7006 5555

Luxembourg
Clifford Chance
10 boulevard G.D. Charlotte
B.P. 1147
L-1011 Luxembourg
T +352 48 50 50 1
F +352 48 13 85

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

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

Moscow
Clifford Chance
Ul. Gasheka 6
125047 Moscow
Russia
T +7 495 258 5050
F +7 495 258 5051

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

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

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

Perth
Clifford Chance
Level 7
190 St Georges Terrace
Perth WA 6000
Australia
T +618 9262 5555
F +618 9262 5522

Prague
Clifford Chance
Jungamannova Plaza
Jungamannova 24
110 00 Prague 1
Czech Republic
T +420 222 555 222
F +420 222 555 000

Riyadh
Clifford Chance
Building 15, The Business Gate
King Khaled International Airport Road
Cordoba District, Riyadh
P.O. BOX: 90239
Riyadh 11613
Kingdom of Saudi Arabia
T +966 11 481 9700
F +966 11 481 9701

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

São Paulo
Clifford Chance
Rua Funchal 418 15ºandar
04551-060 São Paulo-SP
Brazil
T +55 11 3019 6000
F +55 11 3019 6001

Seoul
Clifford Chance
21st Floor, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 100-210
Korea
T +82 2 6353 8100
F +82 2 6353 8101

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

Singapore
Clifford Chance
Marina Bay Financial Centre
25th Floor, Tower 3
12 Marina Boulevard
Singapore 018982
T +65 6410 2200
F +65 6410 2288

Sydney
Clifford Chance
Level 16, No. 1 O'Connell Street
Sydney NSW 2000
Australia
T +612 8922 8000
F +612 8922 8088

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

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

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

*Clifford Chance's offices include a second office in London at 4 Coleman Street, London EC2R 5JJ. **Linda Widyati and Partners in association with Clifford Chance.

CLIFFORD

CHANCE