Luxembourg Legal Update

November 2014

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Contents

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

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

Banking, Finance and Capital Markets

EU Developments

CRD IV/CRR: New Delegated and Implementing Regulations

Over the last few months, the following new Commission Delegated and Commission Implementing Regulations have been published in the Official Journal of the EU:

- N°926/2014 of 27 August 2014 supplementing the CRD IV with regard to passporting notifications which lays down Implementing Technical Standards (ITS) in respect of standard forms, templates and procedures for notifications relating to the exercise of the right of establishment and the freedom to provide services according to the CRD IV. The Regulation entered into force on 17 September 2014.
- N°945/2014 of 4 September 2014 supplementing the CRD IV and laying down ITS with regard to relevant appropriately diversified indices under the CRR. The Regulation specifies a list of stock indices for the purposes of Article 344 of the CRR. The Regulation entered into force on 25 September 2014.
- N°1030/2014 specifying ITS with regard to uniform formats, date and locations for the disclosure of values used to identify global systemically important institutions (G-SIIs) according to the CRR. The Implementing Regulation entered into force on 20 October 2014.

CRR/CRD IV: ECB Decision on Submission of Data Reported to National Competent Authorities by Supervised Entities

A European Central Bank (ECB) decision on submission of data reported to national competent authorities by supervised entities (ECB/2014/29) has been published on 19 July 2014 in the Official Journal. The Decision lays down procedures concerning the submission to the ECB of data reported to the national competent authorities by supervised entities on the basis of Implementing Regulation (EU) N°680/2014, which sets out ITS with regard to supervisory reporting of institutions according to the CRR.

Supervisory Reporting: New EBA Q&As

On 1 August 2014, the EBA has published a new set of final Q&As on supervisory reporting. This follows the publication in the Official Journal of Commission Delegated Regulation (EU) N°680/2014 on ITS on supervisory reporting of institutions.

Single Supervisory Mechanism (SSM): ECB Guide to Banking Supervision under SSM

On 30 September 2014, the ECB has published its guideline to banking supervision under the Single Supervisory Mechanism (SSM). The SSM is the new system of financial supervision, composed of the ECB and the national competent authorities (NCAs) of participating Member States, that begins operation in November 2014. The ECB bears responsibility for, and will oversee the functioning of, the SSM as well as direct supervision of those credit institutions classified as significant. Less significant institutions will be supervised by the relevant NCA and the guide sets out, among other things, the criteria for assessing whether a credit institution should be categorised as significant or less significant.

The guide is intended to be a practical tool to assist stakeholders with their preparation for the SSM and sets out:

- the supervisory principles of the SSM
- the functioning of the SSM, including the distribution of tasks between the ECB and NCAs, and the decision-making process and operating structures within the SSM

- the conduct of supervision, including authorisations and overall quality and planning control.

The ECB anticipates that the guide will be regularly updated once the SSM is fully operational.

Single Supervisory Mechanism (SSM): Final List of Significant Credit Institutions

On 4 September 2014, the ECB has published the final list of the 120 significant credit institutions, direct supervision of which it will assume on 4 November 2014. The ECB will directly supervise credit institutions, financial holding companies or mixed financial holding companies that are deemed significant at the highest level of consolidation within participating Member States.

The significance assessment has been based on banks' year-end 2013 figures, the total value of their assets, the importance for the economy of the country in which they are located or the EU as a whole, the scale of their cross-border activities and whether they have requested or received public financial assistance from the European Stability Mechanism (ESM) or the European Financial Stability Facility (EFSF).

The significance of banks will be assessed regarding their status on a regular basis and at least once a year after the publication of their full-year results. In the case of mergers, ad hoc assessments will take place. A change of status from less significant to significant can occur at any time. A change of status from significant to less significant requires that significance criteria have not been met for three consecutive years.

The ECB has also published a list of less significant institutions, as required by the SSM Framework Regulation. These banks will continue to be supervised by national competent authorities. However, the ECB can decide at any time to exercise direct supervision in order to ensure consistent application of supervisory standards.

Single Resolution Mechanism (SRM): SRM Regulation

The Regulation (EU) N°806/2014 of the European Parliament and the Council of 15 July 2014 establishing uniform rules and a procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism (SRM)/Single Resolution Fund (SRF) has been published on 3 July 2014 in the Official Journal. The Regulation is intended to ensure orderly resolution without recourse to public funds. The regulation establishes:

- the SRF, which will be built up over eight years to reach a target level equal to at least 1% of covered deposits of all credit institutions authorised in all Member States participating in the SRM, estimated at around EUR 55 billion
- a central decision-making resolution board to determine the application of resolution tools and the use of the SRF.

The Regulation entered into force on 19 August 2014. Provisions relating to the cooperation between the Single Resolution Board and the national resolution authorities for the preparation of the banks' resolution plans will apply from 1 January 2015 and the SRM should be fully operational by 1 January 2016.

Single Rulebook: Update of EBA Q&A

The EBA has updated its set of Q&As on the Single Rulebook several times over the last few months. Among other things, the newly published answers relate to the meaning of accounting scope of consolidation, operational risk and highly leveraged obligors, shareholder approval for a firm to increase the permitted ratio of fixed to variable remuneration, eligible collateral for the purpose of credit risk mitigation, liquidity cash flows, and the valuation of liquid assets and repo conducted with a non-financial customer.

Funding Plans of Credit Institutions: EBA Guidelines on Templates for Funding Plans of Credit Institutions

The EBA has published on 30 June 2014 its final guidelines on harmonised definitions and templates for funding plans of credit institutions, which are intended to harmonise reporting of funding plans across the EU. The common templates and definitions provide a tool for competent authorities to assess the feasibility, viability and soundness of funding plans, as well as their impact on the supply of credit to the real economy. They are also intended to enable the EBA to fulfil its mandate of coordinating the assessment of funding plans and assessing their viability across the EU banking system.

Securitisation Transactions: EBA Guidelines on Significant Risk Transfer for Securitisation Transactions

On 7 July 2014, the EBA has published a final set of guidelines intended to support both originator institutions and competent authorities in the assessment of significant risk transfer (SRT) for securitisation transactions and ensure harmonised assessment and treatment of SRT across all EU Member States. The guidelines include:

- requirements for originator institutions when engaging in securitisation transactions for SRT
- requirements for competent authorities to assess transactions that claim SRT
- requirements for competent authorities when assessing whether commensurate credit risk has been transferred to independent third parties
- a standard template on how competent authorities should provide information to the EBA for approved transactions claiming SRT.

The EBA will provide advice to the EU Commission by 31 December 2017 on whether a binding technical standard is required on SRT.

EBA and ESMA Joint Guidelines for Complaints-Handling for Securities and Banking

On 25 August 2014, the EBA and ESMA published translations of their joint guidelines for consumer complaints-handlings in the securities and banking sector as established on 27 May 2014.

These guidelines are part of the efforts of the EU Supervising Authorities (ESAs) to bring further supervisory convergence across the securities and banking sectors and have been developed on the basis of the existing complaints-handling guidelines established by EIOPA. ESMA and the EBA consider that these guidelines will ensure a consistent approach to complaints-handling across the EU for all 28 EU Member States and across all financial services sectors. Consumers can purchase financial services and products in the investment, banking and insurance sectors across the entire EU Single Market and these guidelines will allow them to refer to a single set of complaints-handling arrangements. EU consumers will therefore be able to rely on the same approach irrespective of what type of product they have purchased and where they have purchased it.

The joint guidelines specifically seek to:

- clarify expectations relating to firms' organisation relating to complaints handling
- provide guidance on the provision of information to complainants
- provide guidance on procedures for responding to complaints
- harmonise the arrangements of firms for the handling of all complaints they receive
- ensure that firms' arrangements for complaints-handling are subject to a minimum level of supervisory convergence across the EU.

In addition to strengthening consumer protection – a key statutory objective for ESMA and for the EBA –, the guidelines will also allow firms, some of which sell products from more than one sector across the EU, to streamline and standardise their own complaints-handling arrangements. NCAs will be able to supervise the same harmonised requirements across all sectors of financial services in their own jurisdictions.

The guidelines became applicable ("comply or explain" principle) two months after the date of publication of their translations on ESMA's website, i.e. on 25 October 2014.

Banking Recovery and Resolution Directive (BRRD): EBA Guidelines on Tests That May Lead to Extraordinary Public Support Measures

The EBA has published on 22 September 2014 its final guidelines setting out features of the tests, reviews or exercises that may lead to extraordinary public support measures for institutions under the Banking Recovery and Resolution Directive (BRRD).

The BRRD sets out a regulatory framework under which resolution should be primarily and almost exclusively financed by private resources and article 32 specifies that the need for extraordinary public financial support should be considered as an indicator that the institution is failing or likely to fail. However, the BRRD also acknowledges that in certain exceptional circumstances, extraordinary financial support will not necessarily trigger a resolution, for example the BRRD specifically refers to a public injection of own funds or the acquisition of capital instruments addressing a capital shortfall resulting from a stress test, asset quality review or other equivalent exercises.

The new EBA guidelines specify the conditions of these tests, reviews or exercises, which should include:

- a specific timeline and scope
- inclusion of time horizons and reference dates
- a quality review process
- where relevant, macro-economic scenarios, hurdle rates and a timeframe to address the shortfall.

Payment Systems: ECB Regulation on Oversight Requirements for Systemically Important Payment Systems

On 23 July 2014, the ECB Regulation on oversight requirements for systemically important payment systems (ECB/2014/28) has been published in the Official Journal. The Regulation implements the Committee on Payment and Settlement Systems (CPSS) and the Technical Committee of the International Organization of Securities Commissions' (IOSCO) principles for financial market infrastructures (the CPSS-IOSCO principles). This Regulation specifies oversight requirements for systemically important payment systems (SIPS), both large-value payment systems and retail payment systems of systemic importance, and will apply to systems operated by central banks and private operators.

The Regulation entered into force on 15 August 2014. SIPS operators will have one year following the decision of the Governing Council identifying the payment systems that are subject to these requirements, which shall be listed on the ECB's website, to comply with the Regulation.

Payment Accounts Directive

The Payment Accounts Directive (PAD) 2014/92/EU of the European Parliament and of the Council of 23 July 2014 has been published in the Official Journal on 28 August 2014.

The PAD establishes rules on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, in particular:

- the right for all consumers legally residing in the EU to open a payment account that allows them to perform essential operations, such as receiving their salary, pensions and allowances or payment of utility bills etc.
- easier comparison of fees charged for payment accounts by payment service providers in the EU through standardised documentation and guaranteed access to fee comparison websites
- a new procedure for switching payment accounts to another service provider within the same Member State, and which facilitates the process of closing a bank account in one Member State and opening it in another to remove discrimination based on residency.

The Directive entered into force on 17 September 2014 and Member States have to transpose and apply measures under the Directive by 18 September 2016.

Single Euro Payments Area (SEPA): EU Commission FAQ

The EU Commission has published on 13 August 2014 a set of frequently asked questions (FAQs) on the Single Euro Payments Area (SEPA). SEPA became fully operational in all eurozone countries on 1 August 2014. It will also apply to euro-denominated transactions in non-eurozone countries from 31 October 2016.

European Account Preservation Order (EAPO) Regulation

Regulation (EU) N°655/2014 of the European Parliament and the Council of 15 May 2014 establishing a European Account Preservation Order (EAPO) procedure to facilitate cross-border debt recovery in civil and commercial matters has been published in the Official Journal on 27 June 2014.

The EAPO Regulation will allow a court in one member state to freeze bank accounts in another. These orders will, however, be significantly less readily available, less easily obtainable and less uniform in application than under the Commission's original proposal. The claimant will have to show that there is a real risk that the defendant will dissipate its assets through unusual action outside the normal course of business. The claimant will also usually need to provide security unless it has already obtained judgment. The scope of bank accounts covered by the Regulation is restricted to cash accounts, and only claimants who already have judgment will be able to search across Europe for bank accounts held by the defendant. The effect, including the ranking, of these orders will not be the same in each EU member state since it will depend upon national law.

The EAPO Regulation has entered into force and will apply from 18 January 2017, with the exception of Article 50, which will apply from 18 July 2016.

Clifford Chance has prepared a briefing paper discussing the new EAPO Regulation, as well as commenting on the new EAPO Regulation, to which we kindly refer. We also kindly refer in this respect to the July 2014 edition of our Luxembourg Legal Update.

Central Securities Depositories Regulation

Regulation (EU) N°909/2014 of the European Parliament and the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories (CSD) and amending the Settlement Finality Directive, the Markets in Financial Instruments Directive 2 and the Short Selling Regulation has been published in the Official Journal on 28 August 2014.

The CSD Regulation aims to:

- introduce an obligation to represent all transferable securities in book entry form and to record them in CSDs before trading them on regulated venues
- harmonise settlement periods and settlement discipline regimes across the EU
- introduce a common set of rules addressing the risks of CSD operations and services
- enable the ECB's "Target2-Securities" initiative for the settlement of securities transactions in Euros to begin operating as planned in 2015.

The CSD Regulation entered into force on 17 September 2014.

The EU Commission has published on 3 October 2014 a set of FAQs on the CSD Regulation. The FAQs relate to the timing of implementation, the scope of the requirements and the position of third country CSDs.

Clifford Chance has prepared a client briefing on the new regulation, to which we kindly refer.

EMIR: Update of EU Commission Q&As

On 10 July 2014, the EU Commission has published an updated set of FAQs on EMIR. The FAQs relate to the timing of implementation, the scope of the requirements and the position of third country CCPs.

A new section has been added for EU CCPs, discussing whether non-EU clearing members of EU CCPs providing services to clients are subject to the segregation requirements in article 39 of EMIR.

EMIR: ESMA Guidelines on Implementation of CPSS-IOSCO Principles for Market Infrastructures in Respect of CCPs

ESMA has issued on 10 July 2014 guidelines and recommendations regarding the implementation of the CPSS-IOSCO Principles for Financial Market Infrastructures by competent authorities as part of the exercise of their duties resulting from the European Market Infrastructure Regulation (EMIR) for the authorisation and supervision of central counterparties (CCPs) under Article 22(1).

Solvency II: Corrigendum

On 25 July 2014, a Corrigendum to the Solvency II Directive 2009/138/EC has been published in the Official Journal. The Corrigendum sets out amendments in relation to errors in the correlation table set out in Annex VII of Solvency II in 23 language versions, including the English language version.

Legislation

Law of 28 July 2014 on Immobilisation of Bearer Shares and Units

The Luxembourg parliament has adopted a new law dated 28 July 2014 on the mandatory immobilisation of bearer shares and units, which entered into force on 18 August 2014.

We kindly refer for further explanations to the Corporate and M&A section of this Luxembourg Legal Update.

Regulatory Developments

CRD IV – Reporting Requirements

CSSF Technical Details of Reporting Requirements for Credit Institutions

On 10 July 2014, the CSSF has issued the final version of its document "Reporting requirements for credit institutions" providing further guidance on the technical details of the reporting requirements as applicable to credit institutions under the CRD IV/CRR framework, in particular under Commission Implementing Regulation (EU) N°680/2014 of 16 April 2014 laying down implementing technical standards with regard to supervisory reporting of institutions according to the CRR.

The document aims to provide an overview of the periodical reporting requirements applicable to credit institutions in Luxembourg from January 2014 onwards (chapters 1-4) as

well as the reporting formats and technical specifications (chapter 5).

ECB Guideline on the Statistical Reporting Requirements of the ECB in the Field of External Statistics

BCL Regulation 2014/N°17 dated 21 July 2014

The Luxembourg Central Bank (BCL) has issued a new regulation 2014/N°17 dated 21 July 2014 on the collection of statistical data from financial companies and amending the Regulation of the BCL 2011/8 of 29 April 2011 on the collection of statistics from companies which grant loans or issue debt securities or derivative instruments to affiliates, which has been published in the official Luxembourg gazette. The BCL thereby updates Regulation BCL 2011/N°8 to bring it in line with the ECB Guideline ECB/2011/23 of 9 December 2011, which entered into force on 1 June 2014.

The new BCL regulation extends the scope of companies that are subject to statistical reporting under Regulation BCL/2011/8 to financial companies crossing a certain balance sheet threshold. While, in the past, companies issuing debt or derivatives instruments or granting loans to affiliates were within the scope of the regulation, it will in future cover any company whose object includes at least one of the following elements:

- the investment in any company for any kind of investment
- the acquisition in any way of financial instruments
- the investment in the acquisition and management of a real estate portfolio or of intellectual property rights
- borrowing in any form
- lending funds.

Regulated companies that are already subject to equivalent statistical reporting obligations are exempted from the scope of the new regulation.

The new regulation entered into force on 1 December 2014. Companies newly subject to the regulation will benefit from a transitional period of six months to submit first monthly reports for December 2014 to May 2015 to the BCL.

ECB Guideline on Temporary Additional Measures for Refinancing Operations of the Eurosystem and Eligibility of Collateral

BCL Regulation 2014/N°18 dated 21 August 2014

The BCL has issued a new regulation 2014/18 dated 21 August 2014 which implements the ECB Guideline of 9 July 2014 on temporary additional measures in relation to refinancing operations of the Eurosystem and the eligibility of collateral and amending ECB Guideline ECB/2007/9 (recast).

The new regulation compiles the different amendments made at ECB level and provides for some additional measures being temporarily applicable including, in particular, the possibility for the BCL to accept state-backed bank bonds as collateral under certain strict conditions. The new regulation repeals and replaces the regulations BCL/2013/15 and BCL/2014/16.

The new regulation is applicable since 21 August 2014 with article 6 on accepting state-backed bank bonds being applicable until 28 February 2015.

New Publications Concerning the Insurance Sector

The CAA has issued on its website a document indicating the EIOPA Guidelines applied by the CAA in different areas. These include the EIOPA Guidelines on:

- system of governance
- the submission of information to national competent authorities
- complaint handling by insurance undertakings
- forward – looking assessment of own risks (based on the ORSA model)
- pre-application of internal models.

The CAA has also published a FAQs document on insurance brokers. The new FAQs document deals, among others things, with the data and document storage obligations of insurance brokers, and the use of private investigation companies by a broker for carrying out "know your customer" checks.

New Circulars on AML/CTF of the Luxembourg Land Registration and Estates Department

The Luxembourg Land Registration and Estates Department (*Administration de l'Enregistrement et des* Domaines – AED) has published new circulars on anti-money laundering (AML) and counter-terrorism financing (CTF).

The AED is competent under Luxembourg AML/CTF legislation for the supervision of certain types of professionals subject to AML/CTF legislation that are not subject to a sector specific regulator's supervision, such as real estate agents. The new circulars deal with the Financial Action Task Force (FATF) publications of June 2014 in relation to jurisdictions with AML/CTF deficiencies,

as well as AML/CTF obligations of estate agents (*marchands de biens*), professionals providing accounting services (excluding chartered accountants), fiscal and economic advisory services and service providers for companies and fiduciaries.

Case Law

AML/CTF Legislation – Limitation Period

Court of Appeal, 18 June 2014

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

Corporate and M&A

Legislation

Law of 28 July 2014 on the Immobilisation of Bearer Shares and Units

The Luxembourg parliament adopted on 28 July 2014 the law on the immobilisation of bearer shares. This law has been published in the *Mémorial* on 14 August 2014 and amends the Luxembourg law of 10 August 1915 on commercial companies by inserting new provisions regarding shares of Luxembourg companies issued in bearer form.

The law establishes new formalities regarding shares issued by Luxembourg companies in bearer form, in order to ensure a better identification of their holders. It mainly concerns Luxembourg SAs and SCAs that are issuing bearer shares.

Bearer shares must now be deposited with a custodian (*dépositaire*) who cannot be a shareholder of the issuing company. It is appointed by the board of directors or the management board of the issuing company, as applicable, and must maintain a register of the bearer shares.

Particularities related to the custodian

The law specifically mentions that only the following persons can act as custodian:

- credit institutions
- asset managers
- distributors of OPC shares
- certain specialised professionals in the financial sector (notably domiciliary agents and Family Office)
- Luxembourg lawyers or European lawyers admitted to practise in Luxembourg
- Luxembourg notaries
- Auditors (*réviseurs d'entreprises agréés* and *réviseurs d'entreprises*)
- chartered accountants.

The name of the custodian appointed by the issuing company must be filed with the RCSL and published in the *Mémorial*.

Liability of the custodian for the exercise of its functions shall be governed by the same rules as the ones applicable to directors or members of the management board.

Creation of a Register of Bearer Shares

Such custodian will maintain a register in Luxembourg detailing:

- the precise designation of each shareholder and the number of bearer shares held by each shareholders
- the date of the deposit of the bearer shares by each relevant shareholder
- the date of the transfers of bearer shares or the date of the conversion of the bearer shares into registered shares.

Each holder of bearer shares will be authorised to have knowledge of the content of this register, but only with respect to registrations relating to itself.

The custodian will hold the bearer shares on behalf of the shareholder (which remains the owner of the shares). Ownership of bearer shares shall be established by an entry in the register. Upon written request from the shareholder, the custodian shall deliver a certificate noting all the registrations made in the register with respect to such shareholder.

Any transfer of bearer shares shall only be enforceable towards the issuing company by registration of such transfer in the register of the bearer shares by the depository. The custodian may accept and enter in the register a transfer on the basis of correspondence or other documents recording the agreement between the transferor and the transferee.

The rights attached to the bearer shares of a respective holder can only be exercised if:

- such shares are registered in the bearer share register
- all the information related to their holder are duly filled-in in the register.

Finally, according to the Financial Collateral Law, evidence of a pledge over bearer shares can now be established by a specific registration made in this respect in the register of the bearer shares.

Liability Considerations

Liability of the custodian for the exercise of its functions shall be governed by the same rules as the ones applicable to directors or members of the management board.

Moreover, a new criminal liability for managers or directors has been introduced in the Companies Law.

Any manager or director, who, knowingly:

- has not maintained a register of registered shares in compliance with Companies Law
- has not appointed a custodian for the bearer shares
- has recognised shareholders' rights to holders of bearer shares not having registered such bearer shares with the custodian

shall be subject to a fine of between EUR 5,000 and EUR 125,000.

The custodian shall also be subject to a fine of between EUR 500 and EUR 25,000, for knowingly contravening to the provisions of the Law.

Transitory Provisions

The Law has entered into force on 17 August 2014. Pursuant to the transitory measures, all Luxembourg SAs and Luxembourg SCAs which have issued bearer shares prior to the entry into force of the Law, must designate a custodian within six months of the entry into force of the Law.

Bearer shares issued by Luxembourg SAs and Luxembourg SCAs must be registered with the custodian so appointed within 18 months as from the entry into force of the Law.

Voting rights and dividend rights attached to bearer shares which have not been registered with the depositary within six months of the entry into force of the law shall be automatically suspended at the end of such period, until the bearer shares are registered with the custodian.

Shares on which voting rights are suspended shall not be taken into account for determining quorum and majority rules in shareholders' meetings and their holders will not be entitled to participate at such shareholders' meetings.

Bearer shares which have not been registered with the depository within 18 months as from the entry into force of the law, shall be cancelled and the share capital of the company which issued such shares shall be reduced accordingly. The cancellation price of these shares shall be obtained by dividing the net asset value (*capitaux propres*) of the company by the number of shares in issue, such price being, however, reduced by the amount of the fees to be paid by the company in connection with the capital decrease.

The cancellation price shall be paid to the holder of the bearer shares so cancelled or deposited with the *Caisse de consignation* in case the holder of the shares so cancelled is unidentified at the time of the capital reduction.

Managers and directors of companies who, knowingly, have not proceeded with the cancellation of the un-deposited bearer shares and the subsequent capital reduction shall be subject to a fine of between EUR 5,000 and EUR 125,000.

Circular/regulation

RCS Information Circular of 8 September 2014

On 8 September 2014, the RCSL issued an information circular pointing out that, as from 1 November 2014, all filings to be made with the RCSL can only be made electronically through its website (www.rcsl.lu). Any filings in paper version will no longer be accepted by the RCSL.

Case Law

Judicial Liquidation of a Luxembourg Company for Contravening the Provisions of the Companies Law – Replacement of the Judicial Liquidator by a Liquidator Appointed by the Shareholders of the Liquidated Company

Court of Appeal, 5 March 2014

Commercial Prescription – 10 years Statute of Limitations of Article 189 of the Luxembourg Commercial Code is Applicable to all Commercial and Civil Claims against a Merchant

Supreme Court, 19 December 2013

Concurrent Insolvency Proceedings and Judicial Liquidation Proceedings over the Same Company – Closure of the Liquidation Proceedings only after the Closure of the Insolvency Proceedings

Court of Appeal, 25 January 2012

Judicial Liquidation for Breach of the Companies Law – Power of the Court to Declare or not the Judicial Liquidation

Luxembourg District Court, 22 June 2011

Conditions for Appointment of a Provisional Manager

Court of Appeal, 29 February 2012

Bearer Shares and Liquidation

Administrative Court, 5 June 2014

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

Funds and Investment Management

EU Developments

UCITS V Directive

The so-called UCITS V Directive, which amends the current UCITS regime to address perceived discrepancies across the EU on the duties and liability of depositaries, remuneration policy and sanctions, has been officially published in the Official Journal on 28 August 2014 and entered into force on 17 September 2014. The EU Member States will now have 18 months, i.e. until 18 March 2016, to transpose the new directive into national law; and depositories will be given a 42-month transitional period from the date on which UCITS V comes into force, i.e. until 18 March 2018, to comply with the new UCITS V "depositary eligibility criteria".

In the meantime, the EU Commission should adopt a Level 2-delegated regulation to clarify the depositary regime and ESMA should also issue Level 3 guidelines, in particular to clarify the remuneration requirements. In this respect, ESMA has launched, on 26 September 2014, a consultation (ESMA/2014/1183) on its draft technical advice to the EU Commission on possible delegated acts in relation to the depositary role of UCITS funds under the UCITS V Directive. The proposed rules prescribe the types of entity that may act as a depositary and ESMA is seeking views on its proposals in the following two areas related to the depositary function:

- insolvency protection requirements under UCITS V that require third parties to take all necessary steps to ensure that, in the event of insolvency, assets held in custody are unavailable for insolvency distribution. ESMA's proposals include steps to be taken by the third party including, but not limited to, the following:
  - verify that the applicable legal system recognises the segregation of the UCITS' assets from those of the third party (which is not located in the EU) and those of the depositary
  - recognise that the UCITS' segregated assets do not form part of the third party's estate in the event of insolvency and are unavailable for distribution among, or realisation for the benefit of, creditors of the third party (if the latter is not located in the EU)
  - always maintain accurate and up-to-date records and accounts of UCITS' assets that readily

establish the precise nature, amount, location and ownership status of those assets
  - maintain appropriate arrangements to safeguard the UCITS' rights in its assets and minimise the risk of loss and misuse
- independence requirements relating to provisions in UCITS V specifying that both the UCITS' management company and its depositary need to act independently and solely in the interest of the fund and its investors. In order to fulfil the independence requirement, ESMA proposes a combination of measures based on the management/governance and structural links.

Comments on ESMA's proposals were due on 24 October 2014 and ESMA is expected to finalise and submit its technical advice to the EU Commission by the end of November 2014.

Clifford Chance has prepared a briefing paper focusing on some of the key issues arising from the new depositary regime, comparing it to the current regime under UCITS IV and to the recently introduced depositary regime for alternative investment funds under the AIFMD.

For further details on other UCITS V topics, please refer to the July 2014 edition of our Luxembourg Legal Update.

ESMA Officially Published Revised Guidelines on ETFs and other UCITS Issues

On 1 August 2014, ESMA published an updated version of its guidelines on ETFs and other UCITS issues (ESMA/2014/937), which had originally been published in 2012. The revised guidelines, which apply as from 1 October 2014, introduce new rules concerning the diversification of collateral received by UCITS in the context of EPM techniques and OTC transactions.

For further details on ESMA's Revised Guidelines on ETFs and other UCITS issues, please refer to the July 2014 edition of our Luxembourg Legal Update.

AIFMD

ESMA Updated Q&As on Application of the AIFMD

On 30 September 2014, ESMA published a new version of its Q&As on the application of the AIFM Directive (ESMA/2014/1194). The latest updated questions concern the reporting obligations to national competent authorities as well as the delegation of portfolio and/or risk management.

ESMA Officially Published Guidelines on Reporting Obligations under AIFMD

On 8 August 2014, ESMA officially published on its website the translation in all EU languages of its guidelines on reporting obligations under articles 3(3)(d) and 24(1), (2) and (4) of the AIFM Directive (ESMA/2014/869).

The aim of these guidelines, which were adopted by ESMA on 15 November 2013, is to clarify the reporting obligations of EU AIFMs and non-EU AIFMs towards 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 publication of the translations in all EU official languages triggers a period of two months within which Member State competent authorities subject to these guidelines have to notify ESMA of their compliance position. As regards Luxembourg, the CSSF has already indicated, in CSSF Circular 14/581 of 14 January 2014, that it intended to comply with these ESMA guidelines and further clarified earlier this year, in its FAQ document on the AIFM Law (version 7 as of 18 July 2014), some technical details

and criteria that AIFMs need in order to fulfil their reporting obligations under the AIFM Directive.

For further details on ESMA reporting guidelines and CSSF Circular 14/581, please refer to the July 2014 and February 2014 editions of our Luxembourg Legal Update.

European Market Infrastructure Regulation (EMIR)

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

European Money Market Funds

On 22 August 2014, ESMA published its opinion (ESMA/2014/1113) on how NCAs should apply the modifications to CESR guidelines on money market funds (CESR Guidelines – CESR/10-049) as set out in the report on "Mechanistic Reference to Credit Ratings" issued on 6 February 2014 by the Joint Committee of the three ESAs composed of ESMA, the EBA and EIOPA.

This Joint Committee's report sets out the manner in which CESR Guidelines were to be amended, in particular with respect to the assessment of credit quality of money market instruments by managers of Short-Term Money Market Funds (ST MMFs) and Money Market Funds (MMFs) as such terms are defined in CESR Guidelines. The purpose of ESMA's opinion is now to explain how NCAs should apply the modifications set out in that report when monitoring the application of CESR Guidelines by the relevant financial market participants.

Background

CESR Guidelines were adopted in May 2010 and entered into force on 1 July 2011 at the same time as the deadline for transposition of the UCITS IV Directive. These guidelines distinguish between ST MMFs and MMFs on the basis of certain key characteristics, such as weighted average maturity and weighted average life. CESR Guidelines also set out criteria that money market instruments should respect in order to be considered as eligible investments for ST MMFs and MMFs. In particular, ST MMFs and MMFs should only invest in high – quality money market instruments. According to CESR Guidelines, a money market instrument should not be considered to be of high quality by managers of ST MMFs and MMFs unless it has been awarded one of the two highest available short-term credit ratings by each recognised credit rating agency that has rated the instrument.

After having reviewed CESR Guidelines, ESMA – which is the legal successor of CESR – concluded that the rules had the potential to trigger a sole or mechanistic reliance on credit ratings when considering "high quality". As a consequence, ESMA, EIOPA and EBA decided to publish on 6 February 2014 their joint final report on Mechanistic Reference to Credit Ratings contained in the ESA's Guidelines and Recommendations (JC 2014 004). ESMA's opinion now aims at explaining how NCAs should, when fulfilling their supervisory functions in relation to MMFs, apply the modifications set out in that report.

Modification of the Provisions on the Assessment of Credit Quality of Money Market Instruments

In its opinion, ESMA is of the view that the original CESR Guidelines should be amended in order to ensure that a management company implements its own internal assessment process to evaluate the credit quality of a money market instrument and to document adequately its outcome. However, where provided, external credit ratings issued by one or more recognised rating agencies shall also be taken into account. While there should be no mechanistic reliance on such external rating(s), a downgrade below the two highest short-term credit ratings by the rating agency should be reflected in the internal process and lead the manager to re-assess the credit quality of the money market instrument.

As an exception, ESMA considers that MMFs not qualifying as ST MMFs may also invest in sovereign issuances of a lower internally assigned credit rating. Apart from that, however, sovereign issuances are nonetheless subject to the same rules as outlined above.

ESMA has indicated that it does not intend to re-issue CESR Guidelines. This means that NCAs will not have to notify ESMA whether or not they comply or intend to comply with the amended version of CESR Guidelines. However, ESMA will monitor the application of this opinion by NCAs.

A consolidated version of CESR guidelines is annexed to ESMA's opinion.

Benchmarks Regulation Compromise Proposal

On 9 September 2014, the EU Council Presidency has published a compromise text for the proposed regulation on indices used as benchmarks in financial instruments and financial contracts, which regulation was initially deposited by the EU Commission on 18 September 2013. The draft regulation has to be adopted by the EU Parliament and the

Council in the ordinary legislative procedure before becoming law. This process is expected to be completed in the course of 2014 and the rules should then come into effect one year later, i.e. in 2015.

In brief, the proposed regulation aims at enhancing the robustness and reliability of benchmarks, facilitating the prevention and detection of their manipulation and clarifying responsibility for, and the supervision of, benchmarks by the authorities. Indeed, the new rules will complement other EU directives and regulations, such as the UCITS Directive, MiFID, Prospectus Directive and PRIIP KID Regulation which already cover certain aspects of certain benchmarks but do not address all the vulnerabilities in the process of producing all benchmarks and do not cover all uses of financial benchmarks in the financial industry.

The proposed regulation is in line with the principles agreed at international level by IOSCO and covers a broad variety of benchmarks, not just interest rate benchmarks such as LIBOR, but also commodity benchmarks, for example. In particular, the proposed regulation should cover all benchmarks that are used to reference financial instruments admitted to trading or traded on a regulated venue, such as energy and currency derivatives, those that are used in financial contracts, such as mortgages, and those that are used to measure the performance of investment funds. It seeks to address possible shortcomings at every stage in the production and use of benchmarks.

Social Entrepreneurship and Venture Capital Funds

On 26 September, ESMA published a consultation (ESMA/2014/1182) on the technical advice it should provide to the EU Commission on implementing measures relating to the European Social Entrepreneurship Funds Regulation (EuSEF) (Regulation 346/2013) and the European Venture Capital Funds Regulation (EuVECA – Regulation 345/2013).

As a reminder, Regulation 346/2013 and Regulation 345/2013 provide for optional new EuVECA and EuSEF designations or "labels", together with an EU passport in order to allow small EU AIFMs of unleveraged closed-ended EU AIFs, which have total assets under management below the EUR 500 million threshold laid down in the AIFM Directive, to market these AIFs across the EU and grow while using a single set of rules, provided that they comply with certain "qualifying requirements" in respect of the manager, the fund and the fund's investment policy and eligible investors.

The consultation launched by ESMA is divided into five sections and considers advice on:

- the types of goods and services, methods of production for goods and services and financial support embodying a social objective
- conflicts of interest of EuSEF managers
- conflicts of interest of EuVECA managers
- the methods for measuring social impact
- the information that EuSEF managers should provide to investors.

Comments are due by 10 December 2014 and ESMA will consider the feedback it receives when preparing its technical advice, with a view to submitting that advice to the EU Commission before the end of April 2015.

For further details on EuSEFs and EuVECAs, please refer to the July 2014 and June 2013 editions of our Luxembourg Legal Update.

Calculation of Counterparty Risk by UCITS for Derivative Transactions subject to Clearing Obligations

On 22 July 2014, ESMA launched a consultation (ESMA/2014/876) on the calculation of counterparty risk by UCITS for OTC financial derivative transactions subject to clearing obligations.

Under the UCITS Directive, UCITS are allowed to invest in exchange-traded derivatives (ETDs) and OTC derivatives; but only investments in OTC derivatives are subject to counterparty risk exposure limits. In its consultation paper, ESMA seeks views on how UCITS should calculate the limits on counterparty risk in OTC derivative transactions that are centrally cleared under EMIR and whether the same rules for both OTC transactions and ETDs should be applied by UCITS. This consultation paper distinguishes between direct and indirect clearing arrangements and

analyses the impact of a default of a clearing member or of other clients of that member for the calculation of the counterparty risk by UCITS.

The consultation is open until 22 October 2014 and ESMA will use the feedback received to determine its final views on the appropriate way forward, including a possible recommendation to the European Commission on a modification of the UCITS Directive.

EBA and ESMA Joint Guidelines for Complaints-Handling for Securities and Banking

On 25 August 2014, the EBA and ESMA published translations of their joint guidelines for consumer complaints-handlings in the securities and banking sector as established on 27 May 2014. The guidelines will become applicable ("comply or explain" principle) two months after the date of publication of their translations on ESMA's website, i.e. on 25 October 2014.

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

Luxembourg Legal and Regulatory Developments

Law of 28 July 2014 on Immobilisation of Bearer Shares and Units

The Luxembourg Law of 28 July 2014, which introduces a new regime for the compulsory deposit and immobilisation of bearer shares and units has been published in the *Mémorial* and has entered into force on 18 August 2014.

For further details on the new Luxembourg regime for compulsory deposit and immobilisation of bearer shares and units, please refer to the presentation made in this respect in the Corporate and M&A section of this Luxembourg Legal Update.

CSSF Circular 14/587
Clarifications of Luxembourg UCITS Depositary Regime

In anticipation of the implementation of the UCITS V Directive, the CSSF issued Circular 14/587 of 11 July 2014 concerning the provisions applicable to credit institutions acting as a UCITS depositary subject to Part I of the UCI Law and to all UCITS, where appropriate, represented by their management company. Credit institutions acting as a depositary of Luxembourg UCITS and all Luxembourg UCITS, where appropriate, represented by their management company, must comply with the provisions of Circular 14/587 by 31 December 2015 at the latest, subject, however, to the transitional provisions of the UCITS V Directive, where applicable.

In brief, the purpose of the new circular is to clarify the depositary regime of Luxembourg UCITS by defining new standard organisational rules concerning the duties and rights attached to the depositary function of Luxembourg UCITS. These rules have to be put in place at the level of both the depositaries of Luxembourg UCITS and the Luxembourg UCITS themselves. Of particular interest are the new rules and clarifications concerning the segregation of assets, the due diligence for the appointment and ongoing monitoring of sub-custodians/delegates, the prevention and management of conflicts of interests and the cash monitoring duties.

Most of the new organisational rules introduced by CSSF Circular 14/587 are aligned with the AIFM Directive depositary regime and anticipate the changes to be introduced to the UCITS depositary regime under the UCITS V Directive. The current liability regime of depositaries of Luxembourg UCITS is, however, neither addressed nor amended by Circular 14/587 and remains subject, for the time being, to the provisions of the UCI Law.

CSSF Circular 14/591
Protection of Investors in Case of a Material Change to an Open-Ended UCI

On 22 July 2014, the CSSF has published Circular 14/591 concerning the protection of investors in case of a material change to an open-ended UCI governed by the UCI Law.

The circular provides some clarifications on the existing well-established supervisory practice according to which the CSSF requires, for a material change to investors' interests in an open-ended UCI governed by the UCI Law, that sufficient time be provided to these investors in order for them to make an informed decision on the envisaged change and, in the event that they disagree, that they are given the possibility to present their holding for redemption or conversion free of redemption or conversion charges.

According to the CSSF's current administrative practice, the minimum notification period to notify investors of a significant change to the UCI they are invested in should be one month. The CSSF may agree not to impose such a notification period with the ability for investors to redeem or convert their holdings free of charge (for example, in cases where all the investors in the relevant UCI agree with the contemplated change). Similarly, the CSSF may agree only

impose to a notification period to duly inform the investors of the relevant change before it becomes effective, but without the ability for investors to redeem or convert their holdings free of charge.

Circular 14/591 provides that the above one-month notification period is without prejudice to:

- the other notice period(s) required by law for investors to pre-approve such events
- the specific requirements of other competent authorities in jurisdictions (within and outside the European Union) where the UCI is registered for distribution.

CSSF Circular 14/592 ETFs and other UCITS Issues

Further to the official publication by ESMA of its revised guidelines on ETFs and other UCITS issues (ESMA/2014/937) on 1 August 2014, the CSSF issued Circular 14/592 on 30 September 2014 in order to incorporate the new ESMA guidelines into its supervisory practice.

This circular has entered into force on 1 October 2014, which is the date as from which ESMA revised guidelines on ETFs and other UCITS issues are applicable, subject to the transitional provisions applicable to existing UCITS concerning the prospectus and annual accounts and reports transparency requirements.

For further details on ESMA's revised guidelines on ETFs and other UCITS issues, please refer to the July 2014 edition of our Luxembourg Legal Update.

CSSF Press Release 14/47 New Application Questionnaire to Set Up a UCITS

On 1 September 2014, the CSSF has informed that the current form "Application questionnaire for the set up of an undertaking for collective investment" which is available on its website is now replaced for UCITS only as from 1 September 2014 by a new "Application questionnaire to set up an UCITS", which new form has to be used for submitting to the CSSF an application for approval to set up a UCITS.

Similarly to the previous one, this application form aims at collecting the full information required by the CSSF to open and examine the file for approval of a new Luxembourg law UCITS. For all UCIs other than UCITS, the current forms and procedures remain the same.

The procedure for submitting application files by electronic means (e-file or e-mail at the setup.uci@cssf.lu address) is still the same, except for applications filed via e-mail for which a nomenclature specified in the "Documents" tab of the application file has to be followed to name the e-mail and documents in attachment.

The use of the new application form is mandatory for approval of any new Luxembourg law UCITS as from 30 September 2014.

CSSF Information Form and Updated FAQs on Marketing of AIFs by Non-EU AIFMs to Professional Investors in Luxembourg

On 18 July 2014, the CSSF published on its website an information form to be completed by every non-EU AIFM that intends to market to professional investors in Luxembourg as of 22 July 2014 shares or units of the AIF(s) it manages without a passport under article 45 of the AIFM Law (which implements article 42 of the AIFM Directive).

The information form must be completed irrespective of the nationality of the relevant AIF(s) (Luxembourg, EU or non-EU) or whether the AIF(s) is/are regulated or not in the country where it is/they are established. Once the form is properly filled out, a paper version shall be dated and signed by the applicant and sent to the CSSF electronically. Marketing by the applicant non-EU AIFM may, in principle, start from the date the information form is sent to the CSSF, provided that the specified form and its appendices (if any) are complete and that requirements imposed by article 45 of the AIFM Law are complied with.

Additional guidance on the use of the information form and updated questions and answers relating to article 45 of the AIFM Law has also been published by the CSSF.

According to these documents, the information to be communicated to the CSSF by every non-EU AIFM that intends to market to professional investors in Luxembourg shares or units of the AIF(s) it manages pursuant to article 45 of the AIFM Law are as follows:

- General information on the AIFM such as the name, address, country and supervisory authority of the AIFM.
- General information on each AIF in relation to which the marketing in Luxembourg is notified, such as the name, domicile, national competent supervisory authority of the AIF (if applicable) and ISIN code of the AIF (if applicable). For the avoidance of doubt, not more than four AIFs per information form should be declared. As a result, one or more additional

information forms will have to be filled out and sent to the CSSF when the number of AIFs to be declared exceeds four.

- Specific information on each AIF to be marketed in Luxembourg:
  - the name of the AIFs required to publish a prospectus in accordance with the Prospectus Directive and/or in accordance with the laws and regulations of their home state
  - the name of the AIFs required to make public an annual financial report in accordance with the Transparency Directive
  - a "yes or no" confirmation as to whether the non-EU AIFM, at the date of the present information, is required to proceed with a notification in accordance with articles 27 and 28 of the AIFM Directive (relating to the acquisition of major holdings and control of non-listed companies) in relation to one or more of the AIF(s). If yes, the AIFM should be required to complete also a separate specific form in relation to the notification of the acquisition of major holdings and control of non-listed companies and to submit it simultaneously as an appendix to the information form for marketing under article 45 of the AIFM Law.
- The information form can be signed and filed with the CSSF by the AIFM itself, or by another company acting in the name and on behalf of the AIFM, and will in any case contain the contact details of the person filing the information form with the CSSF (i.e. first name, last name and professional title, postal address, phone number, e-mail address and facsimile number).
- Moreover, the person submitting information to the CSSF in the context of the information of marketing in accordance with article 45 of the AIFM Law (respectively article 42 of the AIFM Directive) is required to confirm explicitly on the last page of the information form that:
  - it has the authority to submit the relevant information in the name and on behalf of the AIFM
  - the information submitted is, to the best of its knowledge, true, accurate and complete
  - the AIFM will comply with article 22 of the AIFM Directive (annual report), article 23 of the AIFM Directive (disclosure to investors) and article 24 of AIFM Directive (reporting obligations to the CSSF)
  - the AIFM will notify the CSSF in respect of major holdings and control of non-listed companies and issuers acquired after the date of their marketing notification in accordance with articles 26 to 30 of the AIFM Directive
  - the AIFM will comply with Section XIII (Guidelines on disclosure) of ESMA Guidelines on sound remuneration policies under the AIFM Directive.
- The non-EU AIFMs have to inform the CSSF if they stop marketing AIFs in Luxembourg on the basis of article 45 of the AIFM Law. When informing the CSSF, the non-EU AIFM must indicate the date from which it will stop marketing activities in Luxembourg.

According to the information form and the Grand-ducal Regulation of 28 October 2013 relating to the fees to be levied by the CSSF, the following fees will be levied by the CSSF:

- As regards the information for marketing of foreign AIFs in Luxembourg under article 45 of the AIFM Law:
  - a single lump sum of EUR 2,650 in the case of a foreign traditional AIF and EUR 5,000 in the case of a foreign umbrella AIF
  - an annual lump sum of EUR 2,650 in the case of a foreign traditional AIF and EUR 5,000 in the case of a foreign umbrella AIF.
- As regards the marketing of Luxembourg AIFs under article 45 of the AIFM Law, it should be noted that the information form may be introduced at the same time as the approval process of the AIF by the CSSF in the case of a regulated UCI. In particular, in the case of Luxembourg AIFs qualifying as SICAV-SIFs with a non-EU AIFM, the following fees will be levied by the CSSF:
  - initial fees in connection with the application to the CSSF for the approval of the relevant SICAV-SIF-AIF: a single lump sum of EUR 3,500 in the case of a traditional stand-alone SICAV-SIF and EUR 7,000 in the case of an umbrella SICAV-SIF
  - annual fees in connection with the maintenance of the files of the relevant SICAV-SIF-AIF by the CSSF: an annual lump sum of EUR 3,000 in the case of a stand-alone SICAV-SIF and EUR 6,000 to EUR 30,000 in the case of an umbrella SICAV-SIF, depending on the number of sub-funds.

ALFI Q&A and Guidance on AIFMD Reporting and Annual Report

On 3 October 2014, ALFI issued the following two documents prepared by its AIFMD reporting working group:

- a Q&A document, which proposes answers to technical questions on reporting under the AIFM Directive, complementing both ESMA's Q&A document on application of the AIFM Directive and the CSSF FAQ document on AIFM Law
- guidance for the preparation of Luxembourg annual reports of regulated AIFs (Part II UCIs and SIFs) under the AIFM Directive. It focuses on the annual report to investors pursuant to article 20 of the AIFM Law as well as on periodic disclosure to investors.

Both documents, which are not necessarily definitive, are not meant to be an industry standard or a guide to best practice but represent the view of a group of market participants.

Litigation

Legislation

Regulation (EU) N°655/2014 of the European Parliament and of the Council of 15 May 2014 Establishing a European Account Preservation Order Procedure to Facilitate Cross-Border Debt Recovery in Civil and Commercial Matters

Regulation (EU) N°655/2014 of 15 May 2014 was published in the Official Journal on 27 June 2014. This Regulation introduces an EU procedure enabling a creditor to obtain a so-called European account preservation order with a view to facilitating cross-border debt recovery in civil and commercial matters.

The Regulation provides for two situations where a creditor may apply for a preservation order:

- before initiating proceedings in a Member State against the debtor on the substance of the matter or in the course of the proceedings until a judgment is rendered or a court settlement is made
- after obtaining, in a Member State, a judgment, court settlement or authentic instrument obliging the debtor to pay the claim.

The competent court for issuing the preservation order varies according to the situation. In the first situation above, the preservation order is to be applied before the courts of the Member State which have jurisdiction on the substance of the matter and the creditor has to submit sufficient evidence to satisfy the court that he is likely to succeed on the substance of the claim against the debtor. In the second situation, the preservation order is to be applied before the courts of the Member State in which the judgment was rendered, the settlement approved or the authentic instrument drawn up.

The competent court will grant the preservation order if the applicant has provided sufficient evidence that there is an urgent need for a protective measure. In other words, the applicant has to evidence that the enforcement of his claim will be impeded or substantially more difficult in the absence of such a preservation order.

The creditor may be asked by the court, before the issuance of the preservation order, to provide security for an amount sufficient to prevent abuse and to ensure compensation for any damage that may be suffered by the debtor.

The debtor is not informed about the creditor's application and is not heard by the court before the preservation order has been issued, which aims at ensuring a surprise effect for the preservation order.

If not already done, the creditor must initiate proceedings on the substance of the matter within 30 days from the application for the preservation order or within 14 days of the date of the issue of the order, whichever date is the later.

Depending on whether the creditor is already in possession of an enforceable title or not, the preservation order is to be issued within five working days or within 10 working days, respectively.

The bank to which the preservation order has been addressed is under an obligation to execute it without delay by freezing funds in the debtor's accounts and has to make a declaration accordingly.

An appeal (*recours*) against the preservation order may be lodged by the debtor before the court that has issued the preservation order. The debtor and/or the creditor may appeal the decision rendered on the debtor's appeal.

It should be noted that this Regulation will be applicable from 18 January 2017.

Banking, Finance and Capital Markets

AML/CTF Legislation – Limitation Period

Court of Appeal, 18 June 2014

In the case at hand, a notary was accused of not applying ML/TF due diligence procedures with regard to his clients. In particular, he had not identified the beneficial owners of a company.

The District Court sentenced the notary to a fine of EUR 5,000. However, the notary formed an appeal against the decision in which the question was mainly one regarding the time limit for bringing a case against the notary.

It is necessary to determine the applicable limitation period and its starting point. With regard to offences constituted by the omission to act, the offence is realised as from the moment when action is required and omitted.

It follows that, in the case at hand, the omission exists from the day when the notary would have had to identify the beneficial owner of the company and no later than the date of the agreement entered into in front of a notary (*acte notarié*). In this case, this had happened more than three years before the first act of prosecution had taken place.

For this reason the Court of Appeal decided that the action had become time-barred.

Please note that since legislative reform applicable to facts that have taken place since 1 January 2010, the applicable time limit is five years.

Corporate and M&A

Judicial Liquidation of a Luxembourg Company for Contravening the Provisions of the Companies Law – Replacement of the Judicial Liquidator by a Liquidator Appointed by the Shareholders of the Liquidated Company

Court of Appeal, 5 March 2014

On 16 June 2011, the Luxembourg District Court pronounced the judicial dissolution and liquidation of a Luxembourg SA for seriously contravening the provisions of the Companies Law. Indeed, the Court found that, since 2009, the Luxembourg SA had no headquarters/registered office, all the managers and auditors of the Luxembourg SA having resigned at the same time. Moreover, the last annual accounts of the company filed with the RCS in 2008 related to the financial year 2006.

On 16 May 2013, an appeal was lodged against this decision. The appellant argued that the Luxembourg SA had, in the meantime, regularised its situation, thus rendering the dissolution and liquidation of the SA unnecessary. Indeed, the annual accounts for financial years 2007, 2009 and 2010 were finally filed with the RCS in April 2013, and the company was in the process of approving the annual accounts for financial year 2008, and finding a new registered office. The appellant also requested that, in case the Court of Appeal confirmed the decision of the District Court, the judicial liquidator already appointed by the court be replaced by a liquidator to be appointed by the shareholders of the company and the liquidation of the company be conducted in accordance with the rules governing voluntary liquidation rather than by the rules governing liquidation of an insolvent company (which were the rules applied in the present context). Indeed, considering the particular activities of the Luxembourg SA and the specific nature of its assets (i.e. the holding of a participation in a Belgian company selling railway construction materials in Africa), the appellant pointed out that the sale of the assets in accordance with the rules applicable to liquidation of an insolvent company would be arbitrary due to the difficulty of finding a buyer willing to pay the right price for the assets, and thus could be harmful to the shareholders.

The Court of Appeal[1] rejected most of the appeal and confirmed the judicial dissolution and liquidation of the Luxembourg SA, considering that the company continues to have neither a registered office nor duly appointed directors. However, it did not reject the request of the appellant to apply the rules governing voluntary liquidation, and allowed the appointment of a liquidator by the shareholders instead of the judicial liquidator, considering the particular activities of the company. Such new liquidator so appointed should, however, carry out the liquidation operation under the supervision of a supervisory judge (*juge-commissaire*).

Commercial Prescription – 10 Years Statute of Limitations of Article 189 of the Luxembourg Commercial Code is Applicable to all Commercial and Civil Claims against a Merchant

Supreme Court, 19 December 2013

On 17 January 2013, the Court of Appeal declared that the civil claim brought by a former employee of a Luxembourg SA requesting damages from such SA could no longer be validly filed because the period specified by the statute of limitations of article 189 of the *Code de Commerce* ("Article 1989") for a breach of duty had passed.

The former employee contested such decision, arguing that the 10-year statute of limitations of Article 189 applied only to claims arising from the business of the merchant and not to civil claims for breach of duty, as the claim in the present case.

However, the Supreme Court[2] rejected this argument and reconfirmed that Article 189 does not distinguish between civil and commercial obligations; thus its statute of limitations of 10 years applies to both sorts of claims, civil and commercial.

Concurrent Insolvency Proceedings and Judicial Liquidation Proceedings over the Same Company – Closure of the Liquidation Proceedings only after the Closure of the Insolvency Proceedings

Court of Appeal, 25 January 2012

On 29 January 2010, the judicial dissolution and liquidation of a Luxembourg SA was ordered due to disagreement between its shareholders, each holding 50% of the shares of the SA. In the course of the liquidation proceedings, insolvency proceedings were also opened against the SA, allowing the creditors of the SA to appoint a person of confidence, the bankruptcy receiver, to sell the assets of the SA and proceed to an equal distribution. On 25 November 2011, due to insufficient assets, the insolvency proceedings were ended, and the liquidation proceedings re-started.

The Court of Appeal[3] confirmed that once the insolvency proceedings are closed, the liquidator is authorised to close the liquidation proceedings, the company only being dissolved at the end of the liquidation proceedings. Moreover, the court held that the event of a judicial liquidation of a Luxembourg company due to a disagreement between its shareholders, the liquidation expenses should be borne by both parties.

Judicial Liquidation for Breach of the Companies Law – Power of the Court to Declare or not the Judicial Liquidation

Luxembourg District Court, 22 June 2011

Pursuant to article 203 of the Companies Law, a Luxembourg court has the unfettered discretion to declare the dissolution and liquidation of a Luxembourg company if this company does not respect Luxembourg laws and if the violation of the laws justifies it.

On 22 June 2011, the District Court of Luxembourg[4] considered that, although a company had had no registered office since 2006 and the last annual accounts filed with the RCS related to financial year 2002, its sole shareholder had been trying to regularise the situation of the company since 2007, all the annual accounts for the period between 2003 and 2010 being ready to be approved at a shareholder's meeting to be held in April 2011.

Therefore, considering that the company has a real commercial activity in Luxembourg and took all necessary steps to regularise its situation before receiving, in February 2011, the petition for liquidation from the public prosecutor, the court held that the company does not need to be dissolved and liquidated.

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[1] Court of Appeal, 5 March 2014, N°40253
[2] Supreme Court, 19 December 2013, N°78/13
[3] Court of Appeal, 25 January 2012, N°36133
[4] District Court Luxembourg, 22 June 2011, N°137198

Conditions for Appointment of a Provisional Manager

Court of Appeal, 29 February 2012

Concerning the appointment of a provisional manager (*administrateur provisoire*) by the court, there are two conditions precedent that must be fulfilled in order to enable a court to appoint such a manager. The company must be:

- functioning abnormally, and
- its interest must be gravely compromised.

When such an appointment is solicited in a situation where the shareholders are in disagreement, the Court of Appeal[5] reminded that the courts are very careful in analysing whether or not these conditions are actually met. The Court of Appeal also confirmed that the company's interest should not be confused with the minority shareholder's interest; thus the court cannot appoint a provisional manager only because the minority shareholders are unhappy with the way things are run. However, it could be different in the case of gross irregularities.

In the present case, the Court of Appeal considered that the operations that the plaintiff claimed were not against the best interest of the company, and were adequately explained and justified, thus not giving rise to such an appointment of a provisional manager by the court.

Subsequently and as a second resort, the plaintiff asked the court to appoint an expert in order to describe and analyse the operations entered into by the management. The Court of Appeal first reminded that article 154 of the Companies Law providing for the appointment of an expert to verify the books and accounts of a company is only applicable to Luxembourg SAs (to the exclusion of Luxembourg SARL). However, the court found that the appointment of an expert to describe and analyse the operations entered into by the management would be admissible, even for SARL, through *droit commun,* although there are no explicit rules for SARL. However, articles 932 and 933 of the *Nouveau Code de procedure civile* apply to the appointment of such an expert and both of these articles condition these appointments upon the urgency of the matter. In the present case, no such urgency being able to be established, the court decided not to appoint an expert.

Bearer Shares and Liquidation

Administrative Court, 5 June 2014

On 11 June 1982, the Luxembourg District Court declared a Luxembourg SA dissolved and ordered its liquidation. On 16 November 1989, the District Court held that the liquidation proceeds of said SA were to be paid to the State Treasury-Fund Deposit (*Caisse de Consignation*) because the liquidator could not identify the shareholders of the company, all shares in the company being in bearer form.

On 16 February 2011, an alleged shareholder of the liquidated company sent a letter to the State Treasury-Fund Deposit demanding a refund of a portion of the full amount of the liquidation proceeds. The director of the State Treasury-Fund Deposit refused to refund any of the liquidation proceeds due to a lack of proof that the plaintiff was indeed a shareholder of the liquidated SA, as it was not able to produce the physical papers representing the bearer shares.

On 11 December 2011, the alleged shareholder of the liquidated SA brought a claim before the Administrative Court against the decision of the director of the State Treasury-Fund Deposit. However, the Administrative Court[6] rejected this claim because the plaintiff did not establish that it was in fact a shareholder of the company at the time of its demand of restitution of the liquidation proceeds, nor did it establish the exact number of shares it allegedly held. Because the shares of the company were bearer shares, there was no track record showing who the shareholders were in fact.

[5] Court of Appeal, 29 February 2012

[6] Administrative Court, 5 June 2014, N°31802

Although the plaintiff produced its balance sheet showing the purchase of the shares, the court found that this was a unilateral document, which could not prove that the plaintiff was really the shareholder. Thus, the claim was rejected by the court, and the money was not refunded to the alleged shareholder of the liquidated SA.

Litigation and Dispute Resolution

The Limitation Period of a Civil Action Arising from a Criminal Offence Committed by a Company Manager

Court of Appeal, 5 November 2013

An individual incorporated a company, being its director, and misappropriated funds by pretending to be an asset manager. He was prosecuted by the Public Prosecutor and the victims being *parties civiles* within the criminal proceedings.

The defendant challenged the demands of the *parties civiles* by relying mainly on the five-year limitation period foreseen by article 157 of the Luxembourg company law, and arguing that the punishable acts occurred more than five years ago.

The Court decided that the five-year limitation period of civil claims brought against directors of public limited liability companies (s*ociétés anonymes*) could apply to civil claims made against a director where such claims arise out of a criminal offence, but could do so only under the condition that the act giving rise to the damage is an "act of their function" (*fait de leur fonction*). The term "act of their function" is to be understood as any act of the directors and the statutory auditors that is related to the administration and the supervision of the company. This concept aims at wrongful acts committed in the framework of the management (while remaining within the scope of their powers) or to acts beyond their powers (as long as they are not guilty of wilful misconduct or fraud).

However, in the present case, the company had no real and serious activity, and only served to collect the funds of the victims and to make them believe that their money would be invested with a high return. Thus, the fraud had been committed independently from the functioning – in the proper sense – of the company, as the latter was only a cover for committing a criminal offence. The accused had therefore acted under the cover of his capacity as director of the company but for a purely personal purpose. The result therefore was that the statute of limitation was the 30-year period of general civil law and not the five-year period foreseen by company law.

Bankruptcy – Wrongful Act of a Manager of the Company – Action for Making Up the Debts (*Comblement de Passif*)

Court of Appeal, 29 January 2014

In the case at hand, a company had been declared bankrupt. The bankruptcy receiver found out that the manager had not kept regular accounting records, had not published the company's balance sheet for six years and had not paid VAT or income tax for five years. The bankruptcy receiver considered that this constituted serious wrongful acts (*fautes graves et caractérisées*) that had a relation of causation with the filing for bankruptcy of the company. On this basis, the insolvency receiver brought an action for making up the debts of the company against the manager.

The Court of Appeal considered that some of the alleged wrongful acts, namely the failure to keep accounting records and to regularly publish the company's balance sheets, did not contribute to the bankruptcy of the company.

The Court then took note of the fact that more than 99% of the debt of the bankrupt estate was towards the VAT and Tax Authorities (the total debt exceeded EUR 500,000).

The Court restated that, in principle, the non-payment of tax and social contributions does not in itself constitute a serious wrongful act (*faute grave et caractérisée*) if it is unintentional and if it results from the unfavourable development of the business of the company. However, it becomes a serious fault if it is a deliberately chosen financing method. In this case it must be considered as a misappropriation of funds for the benefit of the employer and a means used to provide credit unduly to the company through funds that have been misappropriated. By proceeding in such a way, the manager had committed a serious wrongful act within the meaning of article 495-1 of the Commercial Code. In the case at hand, the Court considered, in addition, that the failure for the manager to introduce a recourse against the tax assessment made by the authorities, which was issued *ex officio* and was based on an assumed turnover that was much higher than the one made in reality by the company, was also a serious wrongful act.

Regarding the height of the condemnation, the Court stated that the bankruptcy receiver does not need to establish a link between the wrongful act and the shortfall in assets. In fact, the manager is presumed – provided his or her gross negligence contributed to the bankruptcy – to be liable for the entire shortfall in assets, but the judge has a

discretionary power of moderation that will be used to reduce the obligation of the manager.

In the case at hand, the Court held that the amounts claimed by the VAT office and the tax authority in relation to the last two years during which the company was in business, which the manager had allowed to accumulate and which he had knowingly not paid while deliberately preferring to pay debts towards suppliers, service providers, banks and other creditors, would have to be borne fully by the manager himself. The manager also had to bear an additional sum of EUR 50,000, set as a lump sum by the Court, corresponding to the increase of the tax debt that resulted from the fact that the manager did not introduce any recourse against the *ex officio* tax assessment which the company had to pay.

Securitisation Undertaking – Registration Refusal – English Law Winding Up Procedure – Liquidation of the Undertaking – Jurisdiction

District Court Luxembourg, 26 June 2014

In the case at hand, a securitisation entity issuing securities to the public had its licence denied by the CSSF. Such denial was confirmed by the administrative courts. A month and a half later, the High Court of Justice of London launched winding up proceedings against the said undertaking. Five months later, the Luxembourg Public Prosecutor brought a request before the District Court of Luxembourg for the company to be "liquidated" (*liquidation judiciaire*) by the court. The company opposed this request and put forward in the first place that, pursuant to the European regulation on insolvency proceedings, the Luxembourg courts had no jurisdiction to hear this request due to the fact that insolvency proceedings were pending in England. The District Court rejected this argument by stating that the Luxembourg liquidation proceedings were not insolvency proceedings within the meaning of the regulation on insolvency proceedings. The Court also stated that only a Luxembourg judge could decide on whether or not a Luxembourg company should be removed from the Luxembourg Trade and Companies Registry, and that the European regulation on insolvency proceedings did not give such a power to a foreign judge, even if insolvency proceedings against a company registered in Luxembourg had been validly referred to such foreign judge. The Luxembourg court therefore considered it had jurisdiction to decide on the request for liquidation made by the Public Prosecutor.

The Court nevertheless stated that the English decision opening the winding up proceedings – which are insolvency proceedings within the meaning of the European regulation on insolvency proceedings – must be recognised in Luxembourg, as must be the powers of the joint provisional liquidators that had been appointed to act in the best interest of the company and the creditors. In order to avoid that a Luxembourg decision would impede its powers, the Court therefore decided to delay its decision on the request for liquidation until the end of the winding up operations.

Employment

No Reimbursement for Meal Allowances during the Notice Period

Labour Court, 17 March 2014[7]

In the event of a dismissal, the employer can exempt the employee from work during the notice period (*période de préavis*). Until the expiry of the notice period and according to article 124-9 (1), paragraph 2 of the Labour Code, the exemption from work cannot have as a result for the employee a diminution of the salary, of the indemnities or of other advantages which he would have received if he had continued to work. However, the employee cannot claim to receive the benefits which represent the reimbursement of costs caused by working, in particular meal allowances or travelling expenses.

In the case at hand, an employee had been dismissed and exempted from work during her two-month notice period. The employee claimed meal vouchers for this period (which she had received in the past from the employer). The Labour Court has, however, decided that, in application of article 124-9 (1), paragraph 2, the employee has no right to claim meal vouchers during the notice period.

Tax

VAT – Supplies of Services – VAT Group

European Court of Justice, 17 September 2014, Case C-7/13

On 17 September 2014, the European Court of Justice (ECJ) decided that once an establishment of a legal entity is part of a VAT group then any supplies made to it are received by the VAT group.

[7] Labour Court, 17 March 2014, N°1235/2014

Skandia America Corporation (Skandia) was the global purchasing company established in the US and was responsible for procuring IT services for the wider Skandia group. Skandia performed its activities in Sweden through a local branch called Skandia Sverige. Skandia Sverige has been registered for VAT purposes in Sweden since 2007 as the member of a group. Skandia Sverige was responsible for producing an IT platform and then supplying the platform to various companies in the Skandia corporate group some of which were in the Swedish VAT group.

The ECJ decided that where a branch is a taxable person in its own right and that services are provided from a Head Office to a branch those services are disregarded for VAT purposes where the branch is registered for VAT in its own name. However, it is important to note that in the present case the ECJ ruled that once a branch joins a VAT group then for VAT any services provided by a third party to a member of the VAT group must be considered as being made not to the member but the VAT group.

Therefore, for VAT purposes, the services are no longer provided to the branch with the effect that they can no longer be disregarded.

IP Tax Regime – Commercialisation of Products

Administrative Court, 30 July 2014, Case N°33148

In order to benefit from the IP tax regime under article 50bis (1) of the Luxembourg Income Tax Law (LITL) a company must have created or acquired a brand after 31 December 2007. It is important to note that there is no definition of brand creation.

In the case at hand, the Court stated that royalties must be paid in connection with the IP and only putting a name on zinc materials it produced without any further commercial activity in relation to the brand do not qualify as royalties. It is worth noting that the company previously produced exactly the same zinc products without any name or licence agreement.

The Court decided in this case that the IP tax regime should not apply as the company benefiting from the IP tax regime was not commercialising the zinc products itself. The Court took the position that the company benefiting from the IP tax regime was not using its licence contract and as such the IP tax regime should not apply.

IP Tax Regime – Designs and Models

Administrative Court, 30 July 2014, Case N°33772

The Luxembourg IP tax regime applies to royalties and capital gains derived from software copyrights, patents, industrial and commercial trademarks, designs and models or domain names.

In the case at hand, a company claimed for the benefit of the IP tax regime in respect of animated characters for the audiovisual sector. The company considered that its production should be considered as designs and models and should therefore benefit from the IP tax regime.

The Court decided that the production of this company could not be considered as designs and models within the definition of article 50bis of the LITL as there would be no industrial or craft characteristics. Further, the Court explained that animation works would not constitute industrial property but, rather, artistic property, this type of intellectual property being excluded from the IP tax regime of article 50bis of the LITL.

Tax

International Legislation

Adoption of the 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 Council – Amendment to the Parent Subsidiary Directive for Hybrid Financing Arrangements

On 8 July 2014, the European Union's Council of Economic and Finance Ministers adopted the text amending the Parent Subsidiary Directive (2011/96/EU) to prevent double non-taxation via the use of hybrid financing arrangements.

Following article 4(1) of the amended Parent Subsidiary Directive, the Member State where the parent company is established shall tax profits distributed by a subsidiary in another Member State, to the extent that such profits are deductible by the subsidiary. The Member State where the parent company is established shall refrain from taxing such distributed profits to the extent that such profits are not deductible for the subsidiary.

For further information, see the February 2014 edition of our Luxembourg Legal Update.

Base Erosion and Profit Shifting Action Plan – OECD

Publication of Seven Action Points Relating to the OECD/G20 Base Erosion and Profit Shifting Project

The Base Erosion and Profit Shifting (BEPS) action plan was first published by the Organisation for Economic Co-operation and Development (OECD) in July 2013. This plan contained 15 action points. The current publication contains a set of recommendations as follows:

- Action 1: Taxation of the digital economy
- Action 2: Neutralisation of hybrid mismatch arrangements
  - The OECD recommends:
    to nullify the effects of hybrid financial instruments under national law
  - to amend the OECD Model Convention in order to make sure that hybrid financial entities cannot obtain treaty benefits.
- Action 5: Counter harmful tax practices

There is still no complete consensus on this matter. This action focused on two key elements, being the definition of substantial activity requirement in the context of intangible regimes and the spontaneous exchange on tax rulings.

- Action 6: Prevent treaty abuse

It is proposed to introduce a Limitation on Benefits clause (LOB) based on the existing LOB clause contained in the tax treaties concluded by the US. A second proposal is to introduce a general anti-abuse rule based on the principal purposes of the transactions in order to address other forms of treaty abuse that are not covered by the LOB clause.

- Action 8: Ensure that transfer pricing outcomes are in line with value creation
- Action 13: Re-examine transfer pricing documentation. This action requires multinational companies to:
  - report annually for each country in which they do business
  - provide tax authorities with information regarding their global business in a so-called "master file"
  - provide local disclosure for each country.
- Action 15: Development of a multilateral instrument

National Legislation

Net Wealth Tax

Bill N°6706

The Luxembourg Parliament Bill N°6706 dated 17 July 2014 deals with net wealth tax aspects.

It amends paragraph 8 of the law of 16 October 1934. The timeline procedures and fixation of advances will be reviewed and updated.

VAT Free Zone

Bill N°6713

On 1 September 2014, the Minister of Finance submitted to the Luxembourg Parliament Bill N°6713 that aims to amend the amended law of 12 February 1979 on the value added tax (VATL) and the amended law of 17 December 2010 on excise duties applicable to certain categories of goods.

In this article we will only focus on the creation of the VAT free zone. The law dated 28 July 2011 created the VAT free zone in Luxembourg. The purpose of this law was to develop Luxembourg as a logistics centre.

The Bill aims at developing this attractiveness of Luxembourg. It does so by:

- reducing the VAT rate for certain goods
- extending the profit margin regime for public auctions that take place in the VAT free zone
- exempting certain goods and services from VAT.

Reduction of the VAT rate for certain goods

In principle, acquisitions and supply of works of art, antiques and collectors' items are currently subject to the normal VAT rate of 15%. However, the Bill reduces VAT for these acquisitions and supplies to a rate of 6%.

Extension of the profit margin regime

The Bill offers the option for organisers of sales by public auction to choose the application of the profit margin VAT regime. This regime is similar to the regime in place for second-hand goods dealers. VAT will only be due on the gain that is realised on the sale of goods.

Exemption of certain goods and services from VAT

The Bill further exempts certain supply of goods and services that are related to certain transactions such as goods intended to be presented to customs and placed in temporary storage or goods intended to be placed in a free zone or in a free warehouse.

Further, the import of certain goods which are intended to be placed in a free zone, in a free warehouse or to be placed under customs warehousing arrangements are VAT exempt.

Double Tax Treaties

On 29 September 2014, Luxembourg has signed a total of 75 Double Tax Treaties (DTT) of which 47 are in line with the OECD exchange of information standard. In addition, negotiations with other states are under way either to amend the existing DTT or to adopt a new DTT.

Double Tax Treaty between Luxembourg and Jersey – Entered Into Force

On 5 August 2014, the DTT between Luxembourg and Jersey signed on 17 April 2013 entered into force further to the reciprocal implementation by both countries of the DTT within their domestic laws. The DTT, which is in line with the OECD exchange of information standard, shall, in principle, have effect on 1 January 2015.

Double Tax Treaty between Luxembourg and Saudi Arabia – Entered Into Force

On 1 September 2014, the DTT between Luxembourg and Saudi Arabia signed on 7 May 2013 entered into force further to the reciprocal implementation by both countries of the DTT within their domestic laws. The DTT shall, in principle, have effect on 1 January 2015. For further information, see the October 2013 edition of our Luxembourg Legal Update.

Double Tax Treaty between Luxembourg and Isle of Man – Entered Into Force

On 5 August 2014, the DTT between Luxembourg and Isle of Man signed on 8 April 2013 entered into force further to the reciprocal implementation by both countries of the DTT within their domestic laws. The DTT shall, in principle, have effect on 1 January 2015.

Double Tax Treaty between Luxembourg and the Czech Republic – Entered Into Force

On 31 July 2014, the DTT between Luxembourg and the Czech Republic signed on 5 March 2013 entered into force further to the reciprocal implementation by both countries of the DTT within their domestic laws. The DTT shall, in principle, have effect on 1 January 2015.

Double Tax Treaty between Luxembourg and Guernsey – Entered Into Force

On 8 August 2014, the DTT between Luxembourg and Guernsey signed on 10 May 2013 entered into force further to the reciprocal implementation by both countries of the DTT within their domestic laws. The DTT, which is in line with the OECD exchange of information standard, shall, in principle, have effect on 1 January 2015.

Protocol to Double Tax Treaty between Luxembourg and Denmark – Approved by Luxembourg

On 1 July 2014, the Luxembourg parliament ratified the Protocol, signed on 9 July 2013, amending the DTT between Luxembourg and Denmark. Further to national implementations in both countries, the Protocol shall, in principle, enter into force on the date of receipt of the last notification of implementation given by one of the two states.

Protocol to Double Tax Treaty between Luxembourg and Slovenia – Entered Into Force

On 22 August 2014, the Protocol signed on 20 June 2013, amending the DTT between Luxembourg and Slovenia entered into force further to the reciprocal implementation by both countries of the Protocol within their domestic laws.

The Protocol, which amends the exchange of information provisions (article 27) pursuant to the OECD exchange of information standard, shall have effect on 1 January 2015.

For additional information on the above DTTs and protocols, please refer to the February 2013, June 2013, October 2013 and February 2014 editions of the Luxembourg Legal Update.

Double Tax Treaty between Luxembourg and Taiwan – Entered Into Force

On 25 July 2014, the DTT between Luxembourg and Taiwan signed on 19 December 2011 entered into force further to the reciprocal implementation by both countries of the DTT within their domestic laws. The DTT shall, in principle, have effect on 1 January 2015.

Double Tax Treaty between Luxembourg and Estonia – Signed

On 7 July 2014, Luxembourg and Estonia signed a new DTT replacing, once in force and effective, the DTT signed on 23 May 2006. Further to national implementations in both countries, the DTT shall, in principle, enter into force on the date of receipt of the last notification of implementation given by one of the two states. While the DTT is based on both the OECD and the UN Models Conventions, the exchange of information clause is in line with the applicable international OECD standard for the exchange of information upon request.

Protocol to Double Tax Treaty between Luxembourg and Lithuania – Signed

On 20 June 2014, Luxembourg and Lithuania signed a Protocol amending the existing DTT in order to have the exchange of information clause (article 27) in line with the applicable international OECD standard for the exchange of information upon request. Further to national implementations in both countries, the Protocol shall, in principle, enter into force on the date of receipt of the last notification of implementation given by one of the two states.

Protocol to Double Tax Treaty between Luxembourg and Tunisia – Signed

On 8 July 2014, Luxembourg and Tunisia signed a Protocol amending the existing DTT in order to have the exchange of information clause (article 26) in line with the applicable international OECD standard for the exchange of information upon request. Further to national implementations in both countries, the Protocol shall, in principle, enter into force on the date of receipt of the last notification of implementation given by one of the two states.

Protocol to Double Tax Treaty between Luxembourg and France – Signed

On 5 September 2014, Luxembourg and France signed the fourth Protocol amending the existing DTT, as amended by the 1970 exchange of letters, and by the 1970, 2006 and 2009 protocols. This fourth Protocol attributes to France the right to tax capital gains realised upon the sale of shares in French real estate companies. The Protocol shall, in principle, enter into force on the first day of the month following the day when the later notification of ratification by each state is received.

Clifford Chance has prepared a client briefing on this DTT, to which we kindly refer.

Circulars/Regulatory Developments

Functional Currency for Tax Purposes

Circular L.G.-A N°60 of 16 June 2014

On 16 June 2014, the Luxembourg Tax Authorities issued a new Circular L.G.-A N°60 clarifying the use of a non-Euro functional currency for tax purposes.

In order to be able to benefit from the Circular, taxpayers must fulfil the following requirements:

- the exchange rate which is used must be determined and published by the European Central Bank (ECB)
- the capital as well as the accounts prepared by the relevant taxpayer must be denominated in that functional currency
- a request, in order to benefit from the Circular, must be filed with the Luxembourg Tax Authorities. This request needs to be filed at least three months before the end of the first financial year for which the functional currency will be applied

- in the case of companies benefiting from the fiscal unity regime, all the companies must use the functional currency.

In order to calculate the corporate income tax due, the taxable amount will be determined through the functional currency and then converted into Euro by using the exchange rate determined by the ECB. The relevant taxpayer has the option to choose either the year end exchange rate or the year average exchange rate. It is important to note that the taxpayer will be bound by its choice for future years.

For net wealth tax purposes the exchange rate used will be the exchange rate of 31 December. Except for taxpayers who have a financial year which differs from the calendar year these taxpayers may use either the exchange rate of 31 December or the exchange rate of the last day of their financial year.

Transfer and Deferral of Real Estate Related Gains

Circular L.I.R. N°102/1 of 25 July 2014

On 25 July 2014, the Luxembourg Tax Authorities issued a new Circular L.I.R. N°102/1 dealing with the transfer and deferral of real estate related gains. This regime allows a relevant taxpayer to defer any taxation due to an exchange of immovable property where the exchange is due to a legal reason. This Circular was issued after case N°34385C of the Administrative Court on 10 July 2014.

VAT transitional period

Circular N° 771 of 24 October 2014

Following the presentation of the project of Law of the Budget for 2015 the Luxembourg VAT Administration issued a new Circular.
The Project of Law of the Budget for 2015 provides that works in order to produce immovable property for rent purposes will not benefit from the super-reduced VAT rate but the standard VAT rate of 17% will apply as from 1 January 2017. In this context, the Circular states that taxpayer that want to benefit from the super-reduced VAT rate have to apply for this regime at the latest on 31 December 2014, in order to benefit from the super-reduced VAT rate for a transitional period ending on 31 December 2016.

Case Law

VAT – Supplies of Services – VAT Group

European Court of Justice, 17 September 2014, Case C-7/13

IP Tax regime – Commercialisation of Products

Administrative Court, 30 July 2014, Case N°33148

IP Tax regime – Designs and Models

Administrative Court, 30 July 2014, Case N°33772

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

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