Newsletter December 2006

1. CSSF Circular 06/257 relating to the entry into force of the Law of 9 May 2006 on market abuse

On 17 August 2006 the CSSF has issued a circular (the "Circular") in relation to the entry into force of the law of 9 May 2006 on market abuse (the "Law") comprising a general description of the context and purpose of the Law, the scope of the new regime relating to insider dealings and market manipulation, the obligations imposed on the different market participants, the powers and missions of the CSSF and the new information obligations aiming to prevent market abuse.

The Circular sets out the European context that has led to the implementation by the Law of several European Directives and in particular Directive 2003/6/EC on insider dealing and market manipulation.

The Circular furthermore stresses out that the prohibitions and obligations set out by the Law apply as well to actions committed in Luxembourg or in a foreign country in relation to financial instruments admitted to trading or for which a request for admission to trading has been made on a regulated market operating in Luxembourg, as to actions committed in Luxembourg relating to financial instruments admitted to trading or for which a request for admission to trading has been made on regulated marked in a foreign country. The prohibitions do however not apply for actions in relation to financial instruments admitted to trading or for which a request for admission to trading has been made on a foreign alternative market (MTF).

The Circular summarizes some of the new obligations imposed on market participants such as:

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- the obligation for credit institutions and other professionals of the financial sector established in Luxembourg to notify the CSSF of any transaction that they suspect to constitute insider dealing or market manipulation,

- the obligation for issuers of financial instruments to publicly disclose inside information which directly concerns them and to ensure with reasonable care, to the extent possible, simultaneous dissemination of the privileged information among all categories of investors in all countries where the financial instruments are admitted to trading on a regulated marked.

The CSSF is the competent authority to determine whether a practice is to be considered as an accepted market practice that, to the extent applied for legitimate reasons, shall not be considered as market manipulation. The CSSF shall make publicly available on its internet site such admitted market practices.

The CSSF is also competent to verify whether buyback programs and stabilisation operations realised by credit institutions fall within the definition of "safe harbours" as set out in EC Regulation 2273/2003.

Furthermore, the CSSF is also competent to verify the compliance by the operators with the information obligations imposed by the Law such as:

- the drawing up of the lists of persons working for issuers who have access to inside information;
- the notification to the CSSF of the transactions conducted on their own account by persons discharging manager responsibilities within an issuer of financial instruments and relating to shares of the issuer admitted to trading on a regulated Luxembourg or foreign market or relating to derivatives or other financial instruments linked to their shares.

Finally, the Circular indicates that the new legal provisions on market abuse may in the future be completed by:

(a) further explanations and guidelines relating to:

- the elements that may be considered as indications of market manipulation or insider dealing;
- the format of declarations of suspect operations;
- the list of persons having access to inside information;
- the declarations relating to operations carried out by persons discharging manager responsibilities within an issuer of financial instruments;

(b) the rules relating to accepted market practices and the rules to be followed in relation to buyback programs and stabilisation operations in order to comply with the "safe harbour" exemptions set out by Regulation CE n° 2273/2003.

2. Law of 25 August 2006 amending certain provisions of the Company Law

The law of 25 August 2006 on the *société européenne*, the *société anonyme* with a management board and supervisory board and the single-shareholder *société anonyme* (*société anonyme unipersonnelle*) (the "Law") has come into force on 4 September 2006.

The Law introduces a new legal framework for the *société européenne* (SE) and the *société anonyme* with a management board and supervisory board (ie the two tier société anonyme) and provides for the possibility to have a *société anonyme* with one shareholder only. The Law further amends various provisions of the law of 10 August 1915 on commercial companies (as amended) which apply not only to the SE in the new two tier société anonyme but also to the traditional non-european *société anonyme* (the "Law of 1915"). This contribution only sets out what we consider to be the most relevant changes for these companies. It is not an exhaustive list thereof and does not deal with amendments to other laws than the Law of 1915 in particular those made to the law of 20th December 2002 relating to undertakings for collective investment.

Single-shareholder société anonyme

According to the Law a *société anonyme* may be incorporated with only one shareholder or may become a single-shareholder company as a result of the holding of all the shares by a single person.

Where the *société anonyme* has been formed by a single shareholder or where it has been established at a general meeting that the company has a single member, the board of directors may be composed of one person only until the ordinary general meeting where it is established that there are more than one shareholder.

Sociétés anonymes with a two tier management

The Law has introduced the possibility for a *société anonyme* to adopt the two tier structure (management board plus supervisory board) as an alternative to the single tier structure (board of directors).

The introduction or removal from the articles of such possibility may be decided at incorporation or during the existence of the company.

Where such possibility is introduced, the *société anonyme* will be managed by the management board. The number of its members and the rules for its determination are set forth in the articles failing which by the supervisory board.

In single-shareholder *sociétés anonymes* or in *sociétés anonymes* whose share capital is less than €500,000, a single person may exercise the functions incumbent on the management board.

The members of the management board shall be appointed by the supervisory board unless the articles provide that the appointment shall be made by the general meeting, in which case the general meeting shall have sole authority. They shall be appointed for a term set forth in the articles not exceeding 6 years; they may be reappointed. They may be removed by the supervisory board and, where the articles so provide, by the general meeting.

Legal entities may be appointed as members of the management board. The same provisions as those applying to corporate directors as set out below will apply.

The management board shall

(i) have the power to take any action necessary or useful to realise the corporate object, with the exception of those powers reserved by law or

the articles to the supervisory board and to the general meeting;

(ii) represent the company vis-à-vis third parties and in legal proceedings, either as plaintiff or as defendant.

It may delegate the day-to-day management of the business of the company and the power to represent the company with respect thereto, except to members of the supervisory board.

No person may at the same time be a member of the management board and of the supervisory board. However, in the event of a vacancy at the level of the management board, the supervisory board may appoint one of its members to act as a member of the management board. During such period, the functions of the person concerned as member of the supervisory board shall be suspended.

As to conflicts of interest, the same rules as those applying to the board of directors apply.

The liability of the members of the management board is governed by the same rules as those governing the liability of directors.

The management board fulfils its duties under the supervision of a supervisory board which is not authorised to interfere with the management.

The supervisory board shall convene upon notice of its chairman. The chairman must convene it on the request of at least two of its members or by the management board. The board shall meet at intervals laid down by the articles. The supervisory board may invite the members of the management board to be present at the meetings of the board, in which case they shall have an advisory role only.

The supervisory board shall have an unlimited right to inspect all the transactions of the company; it may inspect, but not remove, the books, correspondence, minutes and in general all the records of the company. The management board shall, at least every three months, make a written report, to the supervisory board, on the progress and foreseeable development of the company's business. In addition, the management board shall promptly pass to the supervisory board any information on events likely to have an appreciable effect on the company's situation.

The supervisory board may require the management board to provide information of any kind which it needs to exercise its supervision. Furthermore, the supervisory board may undertake or arrange for any investigations necessary for the performance of its duties.

Finally, each year, the supervisory board shall receive from the management board the inventories, balance sheet and the management report and shall present to the general meeting, its observations on the report of the management board and on the annual accounts.

The supervisory board may, like the management board, convene general meetings of shareholders.

Corporate Entity Directors

The Law has introduced new articles 51bis and 60bis-4 to the law of 1915 which regulate the appointment of a legal entity as a director or a member of the management board (*directoire*). Any such legal entity must designate a physical

person to act as permanent representative to exercise that function in the name and for the account of the legal entity. The representative shall be subject to the same duties and shall incur the same civil liability as if he fulfilled such mission in his own name and for his own account, without prejudice to the joint and several liability of the legal entity which he represents. The revocation by the legal entity of its representative is conditional upon the simultaneous appointment of a successor. The appointment and termination of the position of the permanent representative are subject to the same publicity rules as if he would act in his own name and for his own account.

Conflict of interest

Article 57 of the Law of 1915 dealing with conflicts of interests between directors and the company has been amended to provide that

(i) in the case of a single-shareholder société anonyme, the transactions made between the company and its director having a conflicting interest is only mentioned in the minutes;

(ii) the rules on conflicts of interests do not apply where the decisions of the board of directors or the sole director relate to day-to-day operations entered into under normal conditions.

Delegation of day-to-day management

It is not necessary any more to seek the prior authorisation of the general meeting for the delegation of the day-to-day management to a member of the board of directors or the management board. However, as was the case before, a special report on the managing director's remuneration must be made to the annual general meeting.

Procedures of meetings of the board of directors, the management board and the supervisory board

The board of directors, the management board and the supervisory board shall elect a chairman from among their members.

Each member of the board of directors, of the management board and of the supervisory board shall be entitled to examine all information submitted to the relevant board.

Unless otherwise provided by the articles and without prejudice to specific legal provisions, the internal rules relating to quorums and majorities in the board of directors, the supervisory board and the management board shall be as follows:

(i) quorum : at least half of the members must be present or represented.

(ii) decision-taking : a majority of the members present or represented.

Where there is no relevant provision in the articles, the chairman of each corporate body shall have a casting vote in the event of tie.

Unless otherwise provided by the articles, the internal rules may provide that for the calculation of quorum and majority, the directors or members of the management board participating at the board or management board meeting by video conference or by telecommunication means permitting the identification may be deemed to be present. Such means shall satisfy technical characteristics which ensure an effective participation at the

meeting whose deliberations shall be on-line without interruption.

Confidentiality provisions

The Law has enshrined in law the confidentiality obligation for the directors and the members of the management board and of the supervisory board as well as for any person invited to attend the meetings of such corporate bodies. Indeed, these persons shall be under a duty, even after they have ceased to hold office, not to divulge any information which they have concerning the *société anonyme,* the disclosure of which might be prejudicial to the company's interests, except where such disclosure is required or permitted by a legal or regulatory provision applicable to *sociétés anonymes* or is in the public interest.

General Meetings of Shareholders

The Law has also amended certain provisions of the, and introduced new provisions in the, Law of 1915 dealing with general meetings.

First of all, the Law of 1915 has been amended to specify that where a *société anonyme* comprises a single shareholder, the latter shall exercise the powers reserved to the general meeting. His decisions shall be recorded in minutes.
The Law has amended article 67 of the Law of 1915 to introduce the possibility in the articles of association for shareholders to participate in a meeting by way of video conference or by way of telecommunication means permitting for their identification. Those shareholders shall be deemed to be present for the calculation of the quorum and the majority. Such means must satisfy technical characteristics which ensure an effective participation at the meeting whose deliberations shall be on-line without interruption.

Furthermore, the articles may authorise any shareholder to cast its vote by correspondence by means of a voting form the content of which shall be laid down in the articles. It should be noted that voting forms which indicate neither the direction of a vote nor an abstention will be void.

For the calculation of the quorum, only those voting forms shall be taken into account which have been received by the company prior to the general meeting of shareholders, within the period provided by the articles.

Article 67-1 of the Law of 1915 has been amended to provide that resolutions to amend the articles, in order to be adopted, must be carried by at least two-thirds of the votes cast (and not of the votes of the shareholders present or represented anymore). Votes cast shall not include votes attaching to shares in respect of which the shareholder has not taken part in the vote or has abstained or has returned a blank or invalid vote.

Article 70 of the Law of 1915 governing annual general meetings and the convening of general meetings in general has been amended and completed as follows:

(i) the annual general meeting shall be held within 6 months of the financial year end and the first general meeting may be held within 18 months after its formation;

(ii) general meetings must be convened by the board of directors or the management board, as applicable, and by the supervisory board as well as by the statutory auditors so as to be held

within a period of 1 month if shareholders representing 1/10 (and not 1/5 anymore) of the capital so require in writing with an indication of the agenda;

(iii) if, following a request made by the shareholders pursuant to (ii) above, the general meeting is not held within the prescribed period, the general meeting may be convened by an agent, appointed by the judge presiding the chamber of the *Tribunal d'Arrondissement* dealing with commercial matters and sitting as in urgency matters on the application of one or more shareholders who together hold the 1/10 of the capital; and

(iv) one or more shareholders who together hold at least 10% of the subscribed capital may request that one or more additional items be put on the agenda of any general meeting. Such request shall be sent to the registered office by registered mail, at last five days prior to holding of the meeting.

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Article VIII of the Law generally provides that any legal or regulatory provision concerning commercial companies and which contains a reference to the "board of directors" of a *société anonyme* must be understood, in the context of a *société anonyme* with a management board and supervisory board, to be a reference to the management board of that company, unless, in consideration of the authorised duties it must be understood as a reference to the supervisory board.

3. Lidl Belgium GmbH & Co. KG c/ Etablissementen Franz Colruyt NV – Case C-356/04 - 19 September 2006 - Directives 84/450/EEC and 97/55/EC – Misleading advertising – Comparative advertising

The European Court of Justice (the "ECJ") has defined conditions under which comparative advertising is permitted in case of comparison of the prices of a selection of products.

The ECJ first rules that the condition under which comparative advertising is permissible that is laid down by article 3a (1)(b) of Council Directive 84/450/EEC as modified ("the Directive") must be interpreted as not precluding comparative advertising from relating collectively to selections of basic consumables sold by two competing chains of stores in so far as those selections each consist of individual products which, when viewed in pairs, individually satisfy the requirement of comparability laid down by that provision.

The purpose was to see whether the condition under which comparison must relate on goods or services meeting the same needs or intended for the same purpose was fulfilled.

The requirement that the advertising "*objectively compares*" the features of the goods concerned does not signify, in the event of comparison of the prices of a selection of basic consumables sold by chains of stores or of the general level of the prices charged by them in respect of the range of comparable products which they sell, that all the products and prices compared, that is to say both those of the advertiser and those of all of his competitors involved in the comparison, must be expressly listed in the advertisement

The following constitute, for the purposes of article 3a (1)(c) of the Directive, "verifiable" features of goods sold by two competing chains of stores:

- the prices of those goods
- the general level of the respective prices charged by such chains of stores

in respect of their selection of comparable products and the amount liable to be saved by consumers who purchase such products from one rather than the other of those chains, in so far as the goods in question do in fact form part of the selection of comparable products on whose basis that general price level has been determined.

The ECJ pointed out that in order for the prices of the goods comprising a selection of products or the general level of the prices charged by a chain of stores in respect of its selection of comparable goods to be verifiable, it is a necessary precondition that, even though, the goods whose prices have been thus compared are not required to be expressly and exhaustively listed in the advertisement addressed to the consumers, they must nevertheless be capable of being individually and specifically identified on the basis of the information contained in that advertisement. The prices of goods can necessarily only ever be verified if it is possible to identify the goods.

A feature mentioned in comparative advertising satisfies the requirement of verifiability laid down by article 3a(1)(c) of the Directive, in cases where the details of the comparison which form the basis for the mention of that feature are not set out in the advertising, only if the advertiser indicates, in particular for the attention of the persons to whom the advertisement is addressed, where and how they may readily examine those details with a view to verifying, or, if they do not possess the skill required for that purpose, to having verified, the details and the feature in question as to their accuracy.

Comparative advertising claiming that the advertiser's general price level is lower than his main competitor's, where the comparison has related to a sample of products, may be misleading when the advertisement:

- does not reveal that the comparison related only to such a sample and not to all the advertiser's products,
- does not identify the details of the comparison made or inform the persons to whom it is addressed of the information source where such identification is possible,

or

- contains a collective reference to a range of amounts that may be saved by consumers who make their purchases from the advertiser rather than from its competitors without specifying individually the general level of the prices charged, respectively, by each of those competitors and the amount that consumers are liable to save by making their purchases from the advertiser rather than from each of the competitors.

4. Loi du 21 septembre 2006 sur le bail d'usage d'habitation[1]

La loi du 21 septembre 2006 sur le bail à usage d'habitation et modifiant certaines dispositions du Code Civil (ci-après la "Loi") a abrogé la loi modifiée du 14 février 1955 portant modification et coordination des dispositions légales et réglementaires en matière de baux à loyer de même que les dispositions y afférentes de la loi du 27 août 1987 portant réforme de la législation sur les baux à loyer pour entrer en vigueur le 1er novembre 2006.

[1] Law of 21 September 2006 on Housing Lease Contracts. An English translation of this contribution can be obtained upon request.

Les changements majeurs par rapport aux dispositions légales abrogées peuvent être résumés comme suit:

I. Bail d'habitation:

-> Abandon de la différenciation entre les immeubles construits avant et après le 10 septembre 1944, de sorte que la Loi prévoit un système unique de fixation des loyers pour les logements à l'exception des logements à confort moderne non-standard (ci-après "logements de luxe").

A ce sujet le loyer mensuel par logement non meublé ne peut dépasser 5 %, montant du capital investi. La Loi généralise le principe de la fixation des loyers à tous les immeubles, les critères relatifs au capital investi à pendre en considération restant inchangés par rapport à la loi abrogée.

-> Possibilité d'adaptation des loyers tous les deux ans.

-> Nouvelles règles applicables en matière de garantie locative.

Une garantie locative pourra être demandée pour un montant comprenant le loyer et les autres obligations du contrat, sous réserve qu'un état des lieux écrit et contradictoire des lieux soit signé.

-> Nouvelles règles en matière de logements à confort moderne, non standard dit les "logements de luxe".

Les critères pour définir un logement de luxe ont été modifiés. Ces logements sont définis par rapport au loyer mensuel fixé, soit par rapport au capital investi par m^2 de la surface d'habitation, étant entendu que c'est au bailleur de rapporter la preuve que ces critères fixées par la Loi sont remplis. Le loyer pour le logement de luxe peut être renégocié au terme du bail, les principes de l'adaptation de loyer tel que repris ci avant n'étant pas applicables.

-> Nouvelles règles de fonctionnement pour les commissions de loyers au jour de l'approbation d'un règlement grand-ducal pris en exécution de la Loi, règlement grand-ducal qui n'a pas encore été adopté à ce jour, de sorte que les dispositions actuelles en vigueur restent d'application.

-> Le délai de résiliation d'un contrat de bail d'habitation est de 3 mois à moins que les parties aient prévu un délai plus long, étant entendu que le principe selon lequel le contrat de bail qui vient à cesser pour n'importe quelle cause est prorogé de plein droit. Le principe de prorogation de plein droit du contrat de bail ne joue pas pour les "logements de luxe" en cas de besoin personnel, en cas de non exécution des obligations du locataire ou pour cause d'autres motifs grave et légitimes.

-> Différenciation entre la procédure de résiliation en cas de besoin personnel.

a) régime de droit commun:

Pour autant que le locataire n'a pas déguerpi les lieux après écoulement du délai de préavis donné par le bailleur qui est de 3 mois et qu'un jugement de déguerpissement a été pris, le locataire peut demander un sursis sous réserve que cette demande soit introduite avant l'expiration du délai de 12 mois après l'introduction par le bailleur de la procédure judiciaire devant le juge de paix.

b) besoin personnel:

Outre le fait que le délai de préavis prévu par la Loi est de 6 mois, la lettre de résiliation à envoyer par lettre recommandée avec accusé de réception doit être écrite, motivée, c'est-à-dire préciser en quoi le besoin personnel consiste, mentionnant sous peine de nullité le texte de l'article 12(3) de la Loi.

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Une demande de prolongation est à introduire par le locataire dans le délai de 3 mois après réception de la lettre mentionnée ci-avant pour autant que ce dernier peut justifier d'un motif sérieux, c'est-à-dire construction/ transformation d'un logement lui appartenant, prise en location d'un logement en construction/transformation, démarches utiles et étendues en vue de la recherche d'un logement.

Une prolongation de la date de résiliation pourra sur base des pièces versées être accordée sur une période maximum de 12 mois, cette décision n'étant pas susceptible d'appel ou d'opposition, le jugement en question valant titre exécutoire en vue du déguerpissement forcé après l'expiration des délais fixés dans le jugement. Des sursis au déguerpissement peuvent toujours être demandés par le locataire, l'expiration du délai de déguerpissement ne pouvant aller au-delà de 15 mois après la date d'envoi de la lettre de résiliation, la décision en question n'étant pas susceptible d'appel ou d'opposition.

Pour autant que le besoin personnel est invoqué par une personne venant d'acquérir le logement loué, ce dernier devra notifier la résiliation du contrat de bail dans un délai de 3 mois à partir de la signature de l'acte notarié en vertu duquel il est devenu le nouveau propriétaire, le délai de préavis de résiliation étant de 6 mois. Une demande de prolongation de délai de préavis peut être demandée si elle est basée sur un motif réel et sérieux, pour autant qu'elle est demandée dans le délai de 3 mois de la réception de la lettre de résiliation, prolongation qui peut aller jusqu'à 6 mois, aucun sursis ne pouvant plus être accordé. Si le locataire n'a pas introduit une telle demande de prolongation du délai de préavis, le propriétaire doit demander son déguerpissement après l'écoulement du délai de résiliation de 6 mois. Le locataire condamné à déguerpir peut encore demander des sursis qui ne peuvent aller au-delà du délai de 12 mois à compter de la demande de la lettre invoquent le besoin personnel.

-> Extension des personnes pouvant bénéficier du maintien du contrat de bail en cas d'abandon ou de décès du locataire.

II. Bail commercial:

Les règles en matière de bail commercial n'ont pas été changées, sauf à être reprises par les articles 1762-3 à 1762-8 du Code Civil et de prévoir dorénavant que le délai de préavis en matière commerciale est de 6 mois, sauf stipulation contraire.

III. Entrée en vigueur et mesure transitoire:

La Loi entre en vigueur le 1er novembre 2006

Les contrats de bail conclus avant l'entrée en vigueur de la Loi et portant sur des logements de luxe visés par l'article 5 de la loi modifiée du 14 février 1955 portant modification et coordination des dispositions légales et réglementaires en matière de baux à loyer continuent à courir jusqu'à l'expiration du bail.

Les loyers convenus avant l'entrée en vigueur de la Loi ne peuvent être adaptés au niveau résultant de l'application de la présente loi qu'après une notification écrite au locataire.

Le locataire occupant un logement en vertu d'un contrat de bail conclu avant l'entrée en vigueur de la Loi dispose d'un délai de réflexion de trois mois, à partir de la demande en augmentation du loyer du bailleur en application des dispositions introduites par la Loi, pour dénoncer le contrat de bail. S'il dénonce le contrat de bail, aucune adaptation du loyer ne peut lui être imposée.

Lorsque le locataire ne dénonce pas le contrat de bail et si l'augmentation du loyer

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demandée dépasse 10 %, la hausse s'applique par tiers annuels.

5. Publication of the Directive 2006/68/EC of 6 September 2006 amending Council Directive 77/91/EEC as regards the formation of public limited liability companies and maintenance and alteration of their capital

On 25 September 2006, the Directive of 6 September 2006 amending the "second corporate law" Directive of 13 December 1976 as regards the formation of public limited liability companies and the maintenance and alteration of their capital was published in the Official Journal of the European Union.

The purpose of Directive 2006/68/EC is to grant public limited liability companies more flexibility in adopting certain measures affecting the volume, the structure and the ownership of their capital.

Member states shall bring into force the required provisions necessary to comply with this Directive by 15 April 2008.

The main amendments made to Directive 77/91/EEC can be summarized as follows:

1. Allotment of shares for consideration other than in cash

   Member states should be able to permit public limited liability companies to allot shares for consideration other than in cash without requiring them to obtain a special expert valuation in cases in which there is a clear point of reference for the valuation of such consideration. Nonetheless, the right of minority shareholders to require such valuation should be guaranteed.

2. The acquisition by the company of its own shares

   Public limited liability companies should be allowed to acquire their own shares up to the limit of the company's distributable reserves and the period for which such an acquisition may be authorised by the general meeting should be increased so as to enhance flexibility and reduce the administrative burden for companies which have to react promptly to market developments affecting the price of their shares.

3. Granting of financial assistance with a view to the acquisition of the company's shares by a third party

   Member states should be able to permit public limited liability companies to grant financial assistance with a view to the acquisition of their shares by a third party up to the limit of the company's distributable reserves so as to increase flexibility with regard to changes in the ownership structure of the share capital of companies.

   This possibility should be subject to safeguards in order to protect both shareholders and third parties.

4. Creditor protection in case of reduction in the share capital

   Creditors should be able to resort, under certain conditions, to judicial or administrative proceedings where their claims are at stake as a consequence of a reduction in the capital of public limited liability company, in order to

enhance standardized creditor protection in all member states.

6. Bill of law 5627 implementing the Directive on markets in financial instruments 2004/39/EC ("MiFID")

The Luxembourg government has on 19th October, 2006 deposited a bill of law relating to the markets in financial instruments (the "MiFID Law") which implements Directive 2004/39/EC of 21st April, 2004 concerning the markets in financial instruments ("MiFID"). The law, which has 179 articles, is divided into two different parts addressing the different aspects of MiFID.

The first part relates to markets in financial instruments and replaces the law of 23rd December, 1998 relating to the supervision of the financial markets, which is repealed. This part of the MiFID Law deals with the recognition and regulation of regulated markets, MTFs and systematic internalisers and defines the regulatory framework for the exercise of such activities. This part of the law constitutes an implementation of the parts of MiFID which tend to organise an effective competition between all trading venues and which aims at organising their organisational and professional obligations. Chapter 4 of part I organises the transparency and reporting obligations of investment firms. Chapter 5 of part I appoints the CSSF as the competent authority for the purposes of MiFID in Luxembourg, defines its powers and addresses cooperation with foreign authorities.

The second part of the law substantially modifies the law of 5th April, 1993 relating to the financial sector, which is the general banking law in Luxembourg. This part introduces all relevant MiFID definitions to the law of 1993 and implements the new harmonised framework for the approval and the exercise of the activity of investment firms under the MiFID. It also organises the European passport in compliance with the provisions of MiFID and the supervision by the home member state authorities. All MiFID rules regarding investor protection and equal treatment are reflected in this part, which applies to both banks in their investment services activity and to investment firms. Rules of conduct, rules on conflict of interest, best execution and rules concerning the treatment of client orders are reflected in part II. This part of the law also amends the status of certain professionals of the financial sector ("PSF"), either as a result of MiFID requirements or as a result of the experience made by the CSSF in relation to these types of PSFs.

The law implementing MiFID is expected to be enacted into Luxembourg law before the deadline of 31st January, 2007. Level 2 Directive 2006/73/EC of 10th August, 2006 implementing MiFID's organisational requirements and operating conditions for investment firms and defined terms will be enacted through a grand-ducal regulation, for which the MiFID law creates the legal basis. Level 2 Regulation no. 1287/2006 of the Commission implementing MiFID's record-keeping obligations, transaction reporting, market transparency, admission to trading and defined terms will be applicable directly in Luxembourg and does not require any further implementation measures.

It is expected that once the MiFID law and the grand-ducal regulation are in force, certain obligations of banks and investment firms will be the object of interpretation by CSSF circulars.

7. Amendments required by Directive 2003/123/CE to the EU Parent Subsidiary Directive for dividends (Directive 90/435/CEE).

The Law of November 17, 2006 (the "Law") incorporated into Luxembourg tax law the amendments required by Directive 2003/123/CE to the EU Parent Subsidiary Directive for dividends (Directive 90/435/CEE).

The Luxembourg dividend/withholding tax, capital gains and net wealth tax exemption regime was already applied to Luxembourg permanent establishments of qualifying EU resident corporations and the threshold requirement for the size of the participation was already fixed at 10% in the share capital of the relevant company. Therefore, the Law merely enlarges the scope of qualifying entities for these exemption provisions. Since entities other than corporations ("sociétés de capitaux") can now also qualify for these exemption provisions, the Law introduced the concept of "collective undertakings" ("organismes à caractère collectif").

It is noteworthy to mention that the SE ("société européenne") will be treated for Luxembourg tax purposes as a joint-stock company ("société anonyme").

For tax practitioners probably the most important from a Luxembourg tax perspective is that the Law did not change the tax treatment applicable to pass-through entities that are not in the scope of the EU Parent Subsidiary Directive for dividends. This should permit further tax planning by using such entities.

8. Bill of law 5637 concerning the creation of a family estate management company (a "société de gestion de patrimoine familial", in abbreviation "SPF")

On 20 November 2006, the Luxembourg Government filed the bill of law with the Parliament. The law is aimed at providing a legal framework to the management of private estates by allowing natural persons to use a legal entity for the acquisition, holding, management and realisation of all kinds of financial assets in view of the organisation of their wealth management, as well as matrimonial and inheritance structuring. It is the answer in the field of private investments to the abolition of the tax status of holding 29 companies requested by the European Commission according to a decision of 19 July 2006 claiming that the holding 29 tax regime is a state aid incompatible with the European market. By restricting the use of an SPF to private wealth management, the law does not allow the SPF to be an undertaking ("*entreprise*") exercising an economic activity and thus places the SPF out of scope of the state aid rules.

1. Conditions for the existence of a SPF

(a) Formal conditions

(i) An SPF has to adopt the form of a *société à responsabilité limitée* (private limited company), a *société anonyme* (public limited company), a *société en commandite par actions* (corporate partnership limited by shares) or a *société cooperative organisée sous forme d'un société anonyme* (cooperative company organised in form of a public

limited company). Corporate partnerships (*société en nom collectif, société en commandite simple*) are not considered as taxable entities independent from their partners and are therefore not eligible.

(ii) The articles of association of the SPF have to state explicitly that the company is submitted to the provisions of the law.

(b) Eligible Investors

Three kinds of investors are eligible, being

(i) natural persons acting in the frame of their private wealth management, or

(ii) estate management entities (such as trusts, foundations or similar entities to the exclusion of commercial entities) acting exclusively in the interest of the private estate of natural persons, or

(iii) intermediaries acting on behalf of investors as mentioned under (i) and (ii) (e.g. on a fiduciary basis or as nominees).

The investors have to declare their respective capacity to the SPF or its domiciliary agent.

The private nature of the company is enhanced by the requirement for a limited number of investors, such as family members, investment club members or other defined investors willing to manage together their private savings. Securities issued by a SPF may not be publicly offered or listed on a stock exchange.

(c) Activities and investments of the SPF

The object of a SPF is restricted to the acquisition, holding, management and realisation of financial assets. No commercial activities, such as trading in financial instruments or financial services are allowed. The criteria used by article 14 of the income tax law defining commercial profits are applicable. A SPF is not allowed either to directly acquire real estate.

Eligible investments comprise financial instruments as defined under the law of 5 August 2005 governing financial collateral arrangements (being securities in the broadest sense), as well as cash or other assets of whatever other nature (e.g. precious metals) held in an account with a professional of the financial sector. The idea is to allow a SPF to invest as if it would be the natural person itself. Therefore eligible investments also encompass structured products, derivatives, options, indices or foreign currencies.

A SPF may also hold participations (even majority participations) in another company under the condition that it refrains from influencing the management of that company. Financing of companies held in its portfolio by remunerated credits is not allowed, whereas granting incidently and without consideration of advances or providing of guarantees remain eligible.

2. Tax Regime

The SPF is designed to be tax neutral in the sense that taxes are not levied on the company's profits, but, only on the income of the investors once they have taken advantage of distributions from the SPF. No withholding tax is applicable to distributions made to the investors under the form of dividends. However, distributions in the form of interests are

submitted to the national or European withholding taxation where relevant. Furthermore all distributions received by the investors will be taxable at normal rates under their personal tax regime.

The SPF is exempt from income tax, municipal trade tax and from wealth tax. However, such exemption will not apply if the SPF has received at least 5% of dividends from participations of non resident and non listed companies that are not underlying a tax equivalent to the Luxembourg corporate income tax (currently, a rate of 11% is accepted as being equivalent).

However, the SPF is subject to an annual subscription tax of 0, 25% with a cap of EUR 125,000 per year. The subscription tax is calculated on the paid-in capital increased by the issuance premium and the liabilities exceeding a ratio of eight times such capital plus premium.

Other direct or indirect taxes, such as withholding taxes on wages and on directors compensations as well as the capital duty ("*droit d'apport*") remain applicable. The SPF is not liable under VAT.

The SPF is not admitted to the benefit of double taxation treaties nor to the benefit of the European directive on a common tax regime applicable to parent companies and subsidiaries in different EU member countries.

3. Supervision and control

The tax regime of the SPF is under control of the administration for indirect taxes ("administration de l'enregistrement et des domaines").

An external party (domiciliary agent, external auditor or chartered accountant) has to certify annually that the conditions pertaining to the capacity of the investors, the eligibility of the dividend stream in favour of the SPF and its obligations as paying agent under the European taxation on interests are respected.

It is expected that the law comes into force beginning 2007, thus providing Luxembourg with an alternative vehicle to the holding 29 regime in the field of investments limited to the management of private estate.

9. Second amendment to the current in force French-Luxembourg double tax treaty

On November 25, 2006 the Luxembourg State Secretary of Foreign Affairs and the French ambassador signed the second amendment to the current in force French-Luxembourg double tax treaty. Such amendments will close the currently existing "loophole" whereby business profits (including gains realized upon sale of the real estate) of a Luxembourg enterprise holding directly French situs real estate are neither taxed in France nor in Luxembourg. Once the amendments will enter into force, France - in accordance with the provisions of the OECD Model Tax Convention - will have the right to tax the profits arising from the sale of French situs real estate by a Luxembourg enterprise (including gains realized upon sale of the real estate). The amendments also contain specific provisions concerning the holding of French situs real estate through French or Luxembourg partnerships.

10. Commission Regulation (EC) 1787/2006 of 4th December 2006 amending Commission Regulation (EC) 809/2004 implementing Directive 2003/71/EC as regards information contained in prospectuses

The Commission Regulation (EC) 1787/2006, that was published on 5th December 2006 in the Official Journal of the European Union and has entered into force on the third day following its publication, has amended Article 35 of Regulation (EC) No 809/2004.

Former Article 35 contained transitional provisions which in certain limited cases exempted third country issuers from the obligations to restate historical financial information which was not drawn up in accordance with either IFRS or accounting standards of a third country equivalent to IFRS. Under Regulation No 809/2004 those transitional exemptions would have expired in respect of prospectuses filed from 1st January 2007.

In light of the efforts of the accounting standards setters in Canada, Japan and the United States to converge with IFRS and of certain other countries that are converging national GAAP to IFRS over a period of time, Article 35 has been amended to exempt third country issuers from the obligation to restate their historical financial information or (as the case may be) from providing a narrative description of differences, for a further maximum two year period, provided that:

- the notes to the financial statements that form part of the historical financial information contain an explicit and unreserved statement that they comply with IFRS; or
- the historical financial information was drawn up in accordance with the accounting standards of Canada, Japan or the United States; or
- the historical financial information is prepared in accordance with the GAAP of a third country other than Canada, Japan or the United States of America and the national authority responsible has made a public commitment, before the start of the financial year in which the prospectus is filed, to converge those standards with IFRS and that authority has established a work programme which demonstrates the intention to progress towards conversion before 31 December 2008.

11. Law abolishing the law and regulations relating to 1929 Holdings

On 13th December 2006, Parliament has voted the bill of law (hereafter the "Law") cancelling the laws and regulations relating to the tax regime for companies introduced by the law of 31st July 1929, i.e. the 1929 Holdings.

Hence Luxembourg has followed the decision of the European Commission dated 19th July 2006 requesting the Luxembourg State to modify or to cancel the status of 1929 Holdings (see our newsletter August 2006). Existing 1929 Holdings may however continue to benefit from such tax regime during a transitional period until 31st December 2010 provided that during such period part or all its shares are not transferred.

The main provision of the Law may be summarised as follows:

a) Prohibition to incorporate 1929 Holdings from 20th July 2006 on:

The decision of the Commission taken on 19th July 2006 has no retroactive effect. As such decision was notified to the Luxembourg Government on 20th July 2006, new companies incorporated from 20th July 2006 on may no longer benefit from 1929 Holdings tax regime.

b) Transitional period from 1st January 2007 to 31st December 2010:

As well as the decision of the Commission dated 19th July, 2006 as well as the Law do recognise to economic actors having chosen in good faith to incorporate in the past 1929 Holdings the right to continue to benefit from the 1929 Holdings tax regime during a transitional period of four years. Such period should allow to adopt company structures chosen and to opt for other tax vehicles like Soparfi, Sicar or Sogepaf (see our comment in this newsletter on the bill of law filed on 20th November 2006).

However companies benefiting from such transitional period are prohibited to transfer part or all of their shares. Indeed such a transfer of 1929 Holdings shares to a third party would constitute in the opinion of the Commission a transfer of a State aid.

Nevertheless the Law provides certain exceptions recognised as such implicitly by the Commission in relation to such prohibition of transfer of shares which are as follows:

- companies listed on the stock exchange as such limitation of transfer would be contrary to the rules applicable in relation to the free transferability of shares for listed companies;

- transfer within shareholders of the 1929 Holdings or within group related companies as these group related companies can legitimately argue that they should benefit from such transitional period;

- transfers being the result of inheritance, gifts or matrimonial property rules for which it was not the intention of the relevant shareholders to take advantage of the 1929 Holdings regime do not either implied the loss for such advantage.

Finally in order to avoid that minority shareholders sell their shares against the will of other shareholders with the consequence to loose the status of 1929 Holdings tax regime, a transfer of their shares requires the agreement of 2/3 of the remaining shareholders.

The Law is expected to be published in the official gazette during the week 52 and will come into force on 1st January 2007.

For any further information please contact us or visit our website at www.ehp.lu.