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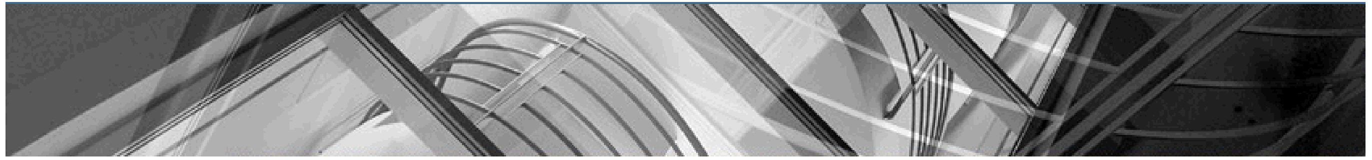

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**July 2011**

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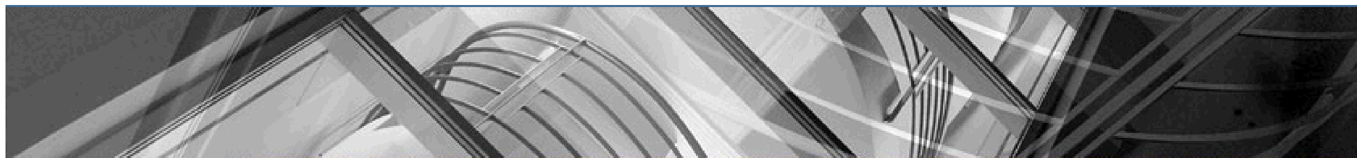

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# INVESTMENT FUNDS

## 1. Flashback on UCITS IV implementing measures

Since the beginning of the year, we have kept you informed, on a regular basis, about the 2010 Law, the CSSF Regulations, the CSSF Circulars and the CSSF Press Release which have been published in the context of the implementation of UCITS IV.

We are listing hereafter one more time the various texts, as published, with a link to the English translation, which we have prepared with either a full explanation on their content or a link to the informative Newsflash which we published previously in relation thereto.

We have also compiled the 2010 Law, the CSSF Regulations and the CSSF Circulars in a single document which comprises, on a side-by-side basis, the original French text and the English translation which we have prepared. You will find such compilation on our website, but if you would like us to send you a hardcopy of such compilation, please liaise with your usual contact at our firm.

- The law of 17 December 2010 on undertakings for collective investments (the "2010 Law")

The 2010 Law, which came into force on 1 January 2011, has implemented UCITS IV but has also introduced a number of non-UCITS IV related changes for UCITS, UCIs and their management companies (see our Special Newsletter of December 2010).

- CSSF Regulation N°10-4 of 22 December 2010 transposing Commission Directive 2010/43/EU of 1 July 2010 implementing Directive 2009/65/EC as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company.

CSSF Regulation N°10-4 substantially mirrors the content of the relevant Commission Directive.

- CSSF Regulation N°10-5 of 22 December 2010 transposing Commission Directive 2010/44/EU of 1 July 2010 implementing Directive 2009/65/EC as regards certain provisions concerning fund mergers, master-feeder structures and notification procedure.

CSSF Regulation N°10-5 substantially mirrors the content of the relevant Commission Directive.

- CSSF Circular 11/498 of 10 January 2011 relating to the entry into force of the 2010 Law and CSSF Regulations N°10-4 and N°10-5 laying down the implementing measures in relation thereto, Regulations (EU) No. 583/2010 and No. 584/2010 of the European Commission of 1 July 2010 implementing Directive 2009/65/EC and the Guidelines and other documents drawn up by the Committee of European Securities Regulators (CESR).

CSSF Circular 11/498 draws the attention to the entry into force of (i) the 2010 Law, (ii) the aforementioned CSSF Regulations, (iii) the EU Regulations regarding, principally, key investor information and content of standard notification letter and UCITS certificates, and (iv) applicable CESR Guidelines.

- CSSF Circular 11/508 of 15 April 2011 relating to new provisions applicable to Luxembourg management companies subject to Chapter 15 of the 2010 Law and to investment companies which have not designated a management company within the meaning of Article 27 of the 2010 Law.

Circular 11/508 provides details on the new requirements applicable under UCITS IV to UCITS management companies and self-managed investment companies (see our Memo of 13 May 2011 in relation to such Circular).

- CSSF Circular 11/509 of 15 April 2011 relating to new notification procedures to be followed by a UCITS governed by Luxembourg law wishing to market its units in another Member State of the European Union and by a UCITS of another Member State of the European Union wishing to market its units in Luxembourg.

Circular 11/509 provides details on the new notification procedure which applies in the case of UCITS marketing in other EU member countries. It thus applies to Luxembourg UCITS (and compartments thereof) which intend to market their shares in other EU member countries and to foreign UCITS which intend to market their shares in Luxembourg (see also our Memo of 13 May 2011 in relation to such Circular, as well as Section 2 below).

- CSSF Press Release of 17 May 2011 regarding the requirement and procedure for the update of the prospectuses of existing UCITS, for which the 2010 Law is applicable since 1 July 2011 (our Newsflash of 18 May 2011 in relation to such Press Release).

- CSSF Circular 11/512 concerning the main regulatory changes in risk management for UCITS.

Circular 11/512 applies, on the one hand, to UCITS management companies and self-managed SICAV ("SIAGs") as regards their organisational requirements and, in particular, their risk management processes and, on the other hand, to all Luxembourg UCITS as regards their rules of formation and operation.

The Circular details (i) the main changes of the regulatory framework regarding risk management following the publication of CSSF Regulation 10-4 and

the ESMA Guidelines (CESR 10-788), (ii) further clarification from the CSSF on risk management rules, and (iii) the content and format of the new risk management process to be communicated to the CSSF pursuant to Article 42 (1) of the 2010 Law and how this process shall be transmitted to the CSSF (see our Newsflash of 1 June 2011 in relation to such Circular).

## 2. Latest clarifications on new notification procedures applicable to UCITS.

CSSF Circular 11/509 (the "Circular") provides clarification on the new notification procedure applicable under the Law of 17 December 2010 on undertakings for collective investment (transposing the UCITS IV Directive into Luxembourg law), since 1 July 2011, for the cross-border marketing of UCITS within the European Union.

This Circular applies (i) to Luxembourg UCITS (and sub-funds thereof) which intend to market their shares in other EU Member States and (ii) to foreign UCITS which intend to market their shares in Luxembourg.

The notification procedure set out in the UCITS IV Directive aims at making the European passport for UCITS more effective, by reducing the administrative barriers, delays and costs that could previously arise under the UCITS III notification procedure. It introduces an “authority-to-authority” communication procedure for the cross-border marketing of new UCITS or sub-funds within the European Union. It must be noted that the UCITS IV Directive does not completely remove the notification introduced directly by the UCITS with the authority of the host Member State.

The Circular lays down the practical and technical procedures to be followed.

**1. Luxembourg UCITS which intend to market their units in another EU Member State**

**A. Notification procedures.**

(i) The new notification procedure introduced by the UCITS IV Directive relates to the marketing of shares of a new UCITS or a new sub-fund. It requires that a notification file be submitted to the CSSF by the UCITS which intend to market their units, or in the case of an umbrella UCITS, any or part of its units of one or several (additional) sub-funds in another Member State. Following the submission of this notification file, the CSSF must, within ten working days, perform a series of formal verification tests, as more fully described in the Circular. If the file is complete it is transmitted by the CSSF to the host Member State's competent authority.

The CSSF will then immediately notify the UCITS of the transmission, thus enabling the UCITS to market its units in the host Member State from the date of the notification.

The Circular lists the compulsory documents forming the notification file to be submitted to the CSSF:

- the notification letter based on the template set out in Annex 4 of the Circular;
- the attestation letter (new format) issued by the CSSF. In relation to this attestation letter, the CSSF has stated in their Press Release of 8 July 2011 that the attestations issued prior to 1 July 2001 are no longer valid and that new attestation letters should be applied for by existing UCITS;
- the latest version of the management regulations /articles of incorporation;
- the latest version of the prospectus visaed by the CSSF and of the key investor information document(s) (or the simplified prospectus(es), to the extent still applicable); and
- the latest audited annual or unaudited semi-annual report, if available.

The notification file might also have to be completed with a description of the marketing arrangements for each targeted jurisdiction in case the notification letter does not allow the contemplated methods of marketing to be completely reproduced.

In addition, UCITS or sub-funds to be notified must be on the CSSF's data base, available on its website.

As the CSSF must be in possession of the latest electronic versions of all documents referred to above in order to be able to perform the formal verification tests, promoters should in particular ensure that the CSSF have the current management regulations / articles of incorporation of the UCITS on their files, in an acceptable electronic format and not simply in paper format, as has generally been the case up to now.

A new notification file must be submitted by the UCITS if the initial file is incomplete, if it does not comply with the technical requirements set forth in the Circular or if the transmission to the authority of the host Member State has not been accepted by the latter.

(ii) The other notification procedure applies to any change of the marketing arrangements or of the share classes to be marketed. It also applies to any amendment to the legal documentation of the UCITS such as the update of the key investor information document or prospectus.



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In these cases, the notification shall be made directly by the UCITS to the competent authority of the relevant host Member State before implementation of the relevant change.

It is not necessary to send a copy of this notice to the CSSF. The CSSF must, however, have approved any amendment to the prospectus or constitutive documents of the UCITS before such notification is made to the foreign authority.

**B. Processing of the notification file.**

Both the submission of the notification file under A (i) above and its transmission to the authority of the target Member State has to be done electronically.

The submission of the notification file to the CSSF may be done, either by submitting the required documents directly on the CSSF website, or through a secured channel system (e.g. e-file system,…). Submission on the CSSF website will, however, only be permitted for filings of a small size.

The Circular provides that the UCITS must prepare the notification file as a "single package" and in respect of each host Member State, where it intends to market its units.

**2. UCITS established in another Member State which intend to market their units in Luxembourg**

In this situation, the procedures to follow are the same as described above but in reverse order.

(i) The CSSF, as the host Member State authority, will receive the notification file and the attestation letter from the competent authority of the UCITS' home Member State for any new UCITS or sub-fund to be marketed in Luxembourg.

Immediately upon receipt of the notification from its home Member State authority that the latter has transmitted the file to the CSSF, the UCITS is allowed to market its units.

The notification letter shall provide the following information regarding the marketing arrangements:

- details of the Luxembourg paying agent;
- place where investors may present orders relating to units of the UCITS;
- name of a local newspaper where necessary publication will be done.

Documents to be part of the notification file must be provided in French, German, English or Luxembourgish.

(ii) In the event of a change of the marketing arrangements set out in the initial notification letter or of the marketed share classes or an update of the Prospectus for example, the UCITS must notify the CSSF directly before implementing the change.

## 3. Entry into force of CESR's Guidelines 10-049 of 19 May 2010 on a common definition of European money market funds as of 1 July 2011

The aim of the Guidelines is to create a European "brand" for UCITS and non-UCITS (or their compartments), that label or market themselves as money market funds ("MMF") and from which an investor can expect the value of his capital to be preserved whilst benefiting from the possibility of withdrawing his capital on a daily basis.

The Guidelines introduce specific criteria that need to be fulfilled by these funds to qualify either as *Short Term MMF* or as *MMF*.

**A. Entry into force**

The Guidelines entered into force in line with the transposition deadline for Directive 2009/65/EC ("UCITS Directive") on 1 July 2011 (the "Deadline").

Investment funds which are created after the Deadline and wish to use the label or market themselves as MMF must comply with the Guidelines immediately.

Although investment funds (or their compartments) set up before the Deadline had to disclose in their prospectus (or KIID for UCITS) for the 1 of July, whether they qualify as Short Term MMF or as MMF, the Guidelines provide for a 6-month transitional period, until the 1 December 2011, to allow them to rebalance their portfolio to comply with the new criteria set out by the Guidelines. Any new investment made after the Deadline must however be eligible under the Guidelines.

Conversely, investment funds which do not intend to comply with the Guidelines should cease to call or market themselves as MMF as of the Deadline.

**B. Rules and requirements**

The Guidelines lay down specific criteria (Box 2 and 3) to be qualified as a Short Term MMF or MMF mainly regarding (i) the investment fund's objective, (ii) the eligible investments, (iii) the NAV and price calculation as well as (iv) the weighted average maturity ("WAM") and weighted average life ("WAL").

(i) Both Short Term MMF and MMF must have the primary objective of maintaining their principal and providing a return in line with money market rates;

(ii) Both Short Term MMF and MMF must limit their investments to:

a) deposits with credit institutions or money market instruments (MMI) as defined in Directive 2009/65/EC which have the following characteristics:

- the MMI must have a residual maturity of less than or equal to 397 days for Short Term MMF and a residual maturity of less than or equal to 2 years for MMF (provided that the time remaining until the next interest rate reset date is less than 397 days).

- the MMI must be of high quality, as determined by the management company (meaning also the self-managed SICAVs or the operators of non-UCITS, where appropriate). The Guidelines establish the criteria to be taken into account when assessing the quality of an MMI:

- its credit quality: a high quality MMI is an MMI which has been awarded one of the two highest available short-term credit ratings by all recognised credit rating agencies, if it is rated. The Guidelines specify, however, that the management company cannot only rely on the credit ratings, but should carry out its own assessment. If the security is not rated, the assessment has to be undertaken by the management company.

An exception to the high quality requirement has been granted for MMF, which may hold sovereign issue of, at least, investment grade quality;

Discussions have arisen from the fact that the Guidelines provide that a security is of high-quality if it has been awarded “one of the two highest available short-term credit ratings by all recognised credit rating agencies, if it is rated” (or if it is not rated, if deemed by the management company of being of equivalent quality) without any reference to “long-term ratings”. Only securities having a maturity of less than 397 may be awarded a short-term credit rating, whereas eligible MMI for Short Term MMF may have a residual maturity of less than 397 days and those for MMF may have an initial or residual maturity of less than 2 years. The CSSF has confirmed, for Short Term Money Market Funds, that money market instruments which have a residual maturity of 397 days or less and which do not benefit from a short-term credit rating would be considered as meeting the criteria of “high quality”, if they have been awarded one of the two highest available long-term ratings by all recognised credit rating agencies. Discussions are still open as to the interpretation to be given to the “two highest available long-term ratings” and whether equivalence should be recognised between short-term and long-term credit ratings. One may wonder whether the solution is not to consider MMI as not rated, if they do not have a short-term credit rating and leave the assessment of its high quality to the management company. The problematic is the same for MMF as Box 3 of the CESR Guidelines makes a cross reference for this requirement among others, to Box 2 applicable to Short Term MMF:

- the nature of the asset class represented by the MMI;

- for structured financial instruments, the inherent operational and counterparty risks;

- its liquidity profile.

b) other MMF and other Short Term MMF in case of a MMF (and only other Short Term MMF in case of a Short Term MMF).

c) the use of efficient portfolio management techniques and the use of financial derivative instruments for hedging purposes. In addition, both Short Term MMF and MMF are prohibited from having direct or indirect exposure to equities or commodities.

Nothing in the Guidelines seems to prevent an investment fund from taking advantage of the label if it invests synthetically in eligible investments by using financial derivative instruments, provided that all the conditions set out by the Guidelines are complied with.

(iii) NAV and Price Calculation

Both Short Term MMF and MMF must provide a daily NAV and price calculation and offer daily subscriptions and redemptions (with the exception, under certain conditions, of non-UCITS marketed solely through employee savings schemes).

Short Term MMF may have a constant NAV or a fluctuating NAV (in principle, mark-to-market) whereas an MMF must have a fluctuating NAV.

(iv) WAL and WAM

The WAM is used to measure the sensitivity of an MMF to changing money market interest rates and is restricted to 60 days for Short Term MMF and 6 months for MMF. The WAL is used to measure the credit risk and to limit the liquidity risk and is restricted to 120 days for Short Term MMF and 12 months for MMF.

The only reference to the Guidelines which can be found in Luxembourg law, is in CSSF Circular 11/498 regarding, among others, the entry into force of the Law dated 17 December 2010 implementing, *inter alia*, the UCITS IV provisions in Luxembourg In its Circular 11/498, the CSSF draws the attention of the fund promotors to the fact that, in 2010, CESR (the new ESMA) issued various guidelines, including those on a common definition of European money market funds (the "Guidelines") (CESR 10-049 of 19 May 2010). For the time being, it seems that the CSSF does not intent to take further steps to reflect the Guidelines in Luxembourg regulations or interpret their content.



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## 4. Dedicated UCI Section on the CSSF website comprising, among others, information regarding new CSSF approval procedures

On 28 February 2011, the CSSF launched a new section on their website www.cssf.lu which is entirely dedicated to undertakings for collective investment.

While reminding professionals of existing practices, the new section of the CSSF website also contains some innovations applicable to funds and management companies subject to the law of 17 December 2010 ("2010 Law") and the law of 13 February 2007 on SIFs.

While we are generally handling, for our clients, the approval procedures with the CSSF, we thought it would be useful to summarize the new approval process which is now applicable.

**1. Contact information**

The CSSF describes how to handle communication with the CSSF, whom to contact and how to escalate matters, if required.

**2. Procedures**

The CSSF distinguishes between (A) the set up of new UCIs and the set up of new sub-funds in an existing umbrella UCI and (B) amendments to existing UCIs (and amendments to existing sub-funds). These are outlined in separate sections on the CSSF website and another section is available for (C) the approval of management companies.

**A. New UCIs and new sub-funds**.

The procedure applies to UCITS, Part II UCIs and SIFs.

Applicants will have to choose either "e-file" or "e-mail" to submit the documentation and will have to communicate with the CSSF for the entire duration of the approval procedures through the media chosen at the beginning of the procedure.

The CSSF specifically recommends to submit only if and when the details/features of the project are reasonably certain and clear and submit all relevant documents in one submission package. Specific questionnaires are now available on the CSSF website. Provided that the detailed procedure is complied with, the CSSF commits to revert within certain deadlines such as: (i) confirmation of receipt of the application and information on the responsible officer within 2 working days; (ii) a first contact with comments on the application after 10 working days of the initial submission (iii) the return of the visa stamped prospectus 5 working days after the submission of the final approved version.

**B. Amendment to existing UCIs or existing sub-funds.**

This procedure applies to amendments to UCITS, Part II UCIs and SIFs (if not covered by A. above) and covers also amendments to existing Chapter 16 (non-UCITS) management companies.

Applicants will have to choose either "e-file" or "e-mail" to submit the documentation and will have to communicate with the CSSF for the entire duration of the approval procedure through the media chosen at the beginning of the procedure.

As to deadlines within which the CSSF intends to revert, the same as those indicated under A. above apply.

**C. Set up of UCITS management companies (Chapter 15 of the 2010 Law) and non-UCITS management companies (Chapter 16 of the 2010 Law).**

The CSSF has posted on its website guidance on the elements to be provided in the context of the request for authorisation of management companies.

In the context of the approval of new management companies the CSSF does not commit, in principle, to particular approval times.

## 5. AIFM Directive

On 8 June 2011, Directive 2011/61/EU on Alternative Investment Fund Managers was published in the Official Journal of the European Union. The Directive will enter into force on the 21 July 2011 and Member States shall adopt and publish by 22 July 2013 the laws, regulations and administrative provisions necessary to comply with the Directive.

The Directive aims at regulating Alternative Investment Fund Managers ("AIFM") but it also entails requirements that will apply to the Alternative Investment Funds ("AIF") managed by such AIFM.

The aforesaid implementation deadline will first apply to EU AIFM managing AIF established in EU Member States.

Existing EU AIFM managing EU AIF benefit from a grandfathering period of one year, i.e. until July 2014, after which they will have to comply with the legislation implemented at national level in accordance with the Directive.

The Directive provides for delayed transposition rules applicable to AIFM and AIF situated in non-EU member countries:

during an initial two-year period (from July 2013 until July 2015), non-EU managers will not be able to avail themselves from the European passport for distributing the AIF they manage to professional investors but may continue to undertake placements in the EU on the basis of private placement rules as may be applicable in each EU Member State.

after this two-year period, non-EU managers will be able to benefit from the European passport if they meet the requirements of the Directive and thereby become AIFM under the Directive. Alternatively, they can continue to market on the basis of the local private placement rules until 2018, at which time the EU Commission aims to eventually abolish local private placement rules. As regards the opportunities which we expect to emerge for Luxembourg from the AIFMD, please refer to our Memo "AIFMD: Opportunities for Luxembourg".

## BANKING & FINANCE

## 6. Law of May 20, 2011 amending existing provisions on issuance of electronic money and on financial collateral arrangements

The law of May 20, 2011 implements Directive 2009/110/EC on the taking up, pursuit and prudential supervision of the business of electronic money institutions and Directive 2009/44/EC modifying Directive 98/26/EC on Settlement Finality (SFD) and Directive 2002/47/EC on Financial Collateral Arrangements (FCD), thus modifying, among others, the Luxembourg laws of November 10, 2009 on payment services and of August 5, 2005 on financial collateral arrangements.

**Electronic money**

The purpose of Directive 2009/110/EC is to promote the use of electronic money in the European Union as a substitute for banknotes and coins. The repealed Directive 2000/46/EC intended to promote such use by facilitating the access of institutions other than credit institutions to the electronic money business, but in fact curbed the development by too strict prudential rules. The goal of the 2009 Directive and the transposition thereof in Luxembourg law is to establish a stable and modern legal framework for the issuance of electronic money, to promote the emergence of a single market for electronic payments in the EU and encourage the development of new, innovative and safe customer services.

There are several points of interest in the new provisions introduced in the 2009 law on payment services:

- Definition

A new, technologically neutral, definition of electronic money has been forged, so as to cover any situation in which an electronic money issuer issues an electronically or magnetically stored monetary value as represented by a claim on the issuer which is issued on a receipt of funds for the purpose of making payment transactions and that is accepted as a means of payment by third parties.

The definition of electronic money now covers electronic money that is held on a payment device in the electronic money holder's possession (such as pre-paid cards) as well as electronic money stored remotely at a server and managed by the electronic money holder through a specific account for electronic money (cyber money).

- Prudential rules

The new provisions apply the same prudential rules to electronic money issuers as are applied to payment institutions except a few minor points in which the law states otherwise. The electronic money issuers now represent a sui generis category of financial actors and do not need to have the status of credit institutions. However, the latter have the full right to issue electronic money without prior approval. Same applies to the Luxembourg Post and Telecommunications Company. Reversely, however, the electronic money issuers cannot act as credit institutions and receive deposits, issue credits or pay out interests on the deposited money.

As far as quality requirements, accreditation procedures and requirements are concerned, electronic money institutions are subject to the same rules as payment institutions.

Further, the required initial capital requirements have been lowered from 1 million Euro to 350,000 Euro in order to allow smaller entities to access the market.

- Abandonment of the exclusivity of activity

Henceforth, electronic money issuers will be allowed to pursue other activities than sole electronic money issuing. The abandonment of the exclusivity principle is expected to develop innovation and services and will be in use in businesses such as transportation, telecommunications and retail.

- Clarification of redemption rules

Consumers will be able to redeem issued electronic money at their will, at the nominal value and without any extra fees except in a number of exhaustively listed events.



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- New system of exemptions applicable to electronic money institutions

Electronic money institutions are now subject to the anti-money laundering and anti-terrorism financing regulations to the same degree as payment institutions. Entities issuing only small amounts of electronic money can, however, obtain an exemption of a part of such regulations. The criteria for such an exemption are stated in article 48-1 of the Law.

**Financial Collateral Arrangements**

The amendments to the 2005 law on financial collateral arrangements encompass the perfection and enforcement of pledges, the exercise of the rights deriving from pledged assets, a strengthening of the collateral takers' position as well as increased clarity on several aspects on the 2005 legislation.

- Perfection of pledge

For financial instruments transferable by book entry, the law now provides four sets of circumstances in which the pledge is perfected by change of control over the financial instruments, such change of control being deemed to realise the dispossession in favour of the pledgee:

- if the pledgee is also custodian of the financial instruments: the pledge is perfected by simple entering into the agreement;
- if the custodian is a third party: the transfer is accomplished by means of a tripartite control agreement or by the simple notification to the custodian of the agreement between the pledgor and the pledgee in case the latter is not a party thereto;
- by a book entry in an account held by the pledgee;
- by a book entry of the financial instruments in an account, without specification of their numbers, opened with a custodian in the name of the pledgor or a third party holder, the financial instruments being designated, in the books of the custodian, either individually or collectively with reference to the relevant account.

The dispossession realised according to the last three indents entails waiver by the custodian of the ranking of his pledge, if any.

As far as receivables are concerned, their dispossession operates through the mere conclusion of the pledge agreement. The registration on a list of receivables is sufficient for their identification.

As a consequence, the notification to the debtor is no longer required to perfect the pledge. The dispossession being occult, however, the debtor can make a valid payment into the hands of the pledgor as long as he is not aware of the agreement.

- Enforcement

The new financial collateral law clarifies two long discussed points: the assets may be appropriated before or after valuation, and the appropriation itself may be carried out either by the pledgee himself, or by a third party designated by him.

- Exercise of the attached rights

The possibility for the parties to determine the attribution of the exercise of rights attached to the financial instruments is maintained. The amended law now speaks of all rights attached to the financial instruments, and not only voting rights. As a consequence, the pledgee, if he has been vested with the rights by the agreement between parties, can for instance require a shareholder meeting to be convened.

- Protection of the collateral taker

\- Waiver of set-off:

In order to have certainty over the value of the pledged receivable, the collateral taker must ensure that the original debtor will not invoke its set-off right against the pledgor. The new legislation enables now an anticipatory waiver of such rights by the debtor.

\- Waiver of rights of subrogation and recourse

An anticipated waiver of any rights of subrogation and recourse that the pledgor may have against the debtor of the covered financial obligations is now possible. The validity of such a waiver is particularly important in the event that any collateral is constituted on shares or equity of the debtor.

\- Reservation of certain rights by the collateral provider

The amended law points out that even if the rights to receive income desired from the collateral or of giving instructions in relation to the collateral were to be reserved to the collateral provider, they do not in any way affect the validity of financial collateral.

\- Bankruptcy remoteness

The amendments increase the collateral taker's protection in case of bankruptcy. The bankruptcy remoteness is extended to the possibility of set-off and recourse waivers contained in new paragraphs (5) and (6) of article 2 of the law.

Finally, the law now clarifies that the Luxembourg bankruptcy provisions do not apply, where the provider



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of financial collateral under Luxembourg law or any similar collateral under foreign law (or the defaulting party under repurchase or set-off agreements) is established in Luxembourg.

## 7. Law of April 28, 2011 modifying provisions relating to the Financial Sector

The purpose of the Law of April 28, 2011is to implement Directive 2009/11/EC (Capital Requirement Directive) modifying Directives 2006/48/EC and 2006/49/EC as well as completing implementation of directive 2009/14/EC on deposit-guarantee schemes and payment delay.

- Provisions concerning the CSSF

Where the "Commission de Surveillance du Secteur Financier" was designated as "Commission" in the legislation, it will now be referred to as "CSSF".

The implementation of the Directives into the April 5, 1993 law on the financial sector adds to the Luxembourg Financial Supervisory Authority's obligations as a consolidating supervisory authority in the context of the creation of the European regulation system.

During the financial turmoil of the past, the importance of a rapid exchange of information and a solid crisis management has become increasingly clear.

The amended provisions have now been completed in order to allow the CSSF to exchange more information with the central banks of the European Central Bank System and other similar monetary authorities

Further, the law specifies the functions and missions of the CSSF as well as its cooperation with competent authorities of other Member States when in charge of the monitoring on a consolidated basis of a credit institution or investment firm licensed in Luxembourg that is either a parent company in the European Union (EU) or is controlled by a financial holding parent company in the EU.

- Deposit guarantee scheme and payment delay

Depositor confidence being a key in financial stability, credit institutions must provide their clients with adequate information. From now on, the institutions must explain to their clients in a comprehensive way when their deposits are completely or partially excluded from the deposit-guarantee scheme.

Also, the payout delay has been reduced from 3 months to 20 working days with only one possible extension of 10 working days.

- Simplified accreditation procedure for credit institutions and financial sector professionals (FSP)

The simplified procedure introduced by the law gives the CSSF competence for approvals delivered to credit institutions and FSPs to change their object of activity, company denomination or legal form. Before the modification, such approval had to be delivered by the Minister. Similarly, the CSSF's approval shall suffice in future for the set-up and acquisition of affiliates in Luxembourg or abroad. The creation of agencies and branches in Luxembourg does no longer require an accreditation.

- New status for financial sector professionals

FSPs are henceforth divided into 3 categories: investment firms, specialised FSPs and support FSPs.

Domiciliation agents and professionals providing company formation and management services are placed in the category of specialised FSPs.Also, accreditations for Client Communication Agents or Administrative Agents do now cover services provided to Specialised Investment Funds, SICARs and securitisation entities.

- Regulation of foreign financial institutions occasionally active in Luxembourg

The new provisions apply to credit institutions or other persons that are not established in an EU Member State and occasionally and temporarily raise funds or other deposits or have another activity relating to the financial sector on the Luxembourg territory.

The mere business development and marketing in Luxembourg do not fall under that definition.

If a person or entity concerned wants to have an actual activity on an occasional basis on the Luxembourg territory, it needs an accreditation to be delivered by the Minister on the advice of the CSSF. Such accreditation can only be delivered if the person or entity is subject to similar rules of accreditation and monitoring in its country of origin as the ones in force in Luxembourg. Entities whose countries of origin are represented in the Basel Committee are granted trusted status.

Like all other financial service providers in Luxembourg, the occasional provider must comply with national rules on money laundering and the financing of terrorism, as well as consumer protection rules.

- Professional Secrecy

The Law clarifies that the professional secrecy obligation extends beyond the end of the contractual relationship and also to other professionals that may have received confidential information after the withdrawal of accreditation and to persons appointed after such

withdrawal. For instance, the liquidator is explicitly targeted as well as the persons the latter may appoint.

- Exemption from consolidated accounts

Credit institution parent companies whose affiliates represent either individually or collectively a secondary interest are no longer obliged to establish consolidated accounts.

- Domiciliation

In case of a domiciliation agreement concluded with a person supervised by the CSSF, the agreement can only be validly terminated by a notification to the CSSF. The notification must occur at least one month before the taking of effect of the termination.

## 8. Islamic Finance : Rules applicable to « sukuk »

On 26 January 2011, the CSSF published a statement regarding the rules applicable to "sukuk" in the context of the EU Prospectus Regulation 809/04.

The CSSF acknowledges that the issuers of "sukuk" have recognised the attractiveness of the Luxembourg legal framework for Islamic finance. In order to reinforce the legal certainty for issuers of "sukuk" while at the same time ensuring the appropriate protection of investors, the CSSF specifies certain rules applicable to issues of Islamic bonds called "sukuk", including with regard to the Annexes of the Prospectus Regulation.

"sukuk" can be recognised as asset-backed securities on the basis of the provisions of Article 2.5 of the Prospectus Regulation or, under certain conditions, as guaranteed bonds following Article 23.2 and Annex VI of the Prospectus Regulation. Indeed, if the payment of principal and periodic revenue with regard to the securities is guaranteed on a contractual basis by one or more underlying entities, i.e. if principal and periodical distributions are paid independently from the performance of the underlying asset, the CSSF considers that the description of the underlying entities can be made pursuant to Annex VI of the Prospectus Regulation.

## 9. New framework for financial supervision in Europe

Since 1 January 2011, this new framework has comprised a new European Systemic Risk Board (ESRB) and three new European Supervisory Authorities (ESAs) for the financial services sector : European Banking Authority (EBA) based in London, European Insurance and Occupational Pensions Authority (EIOPA) in Frankfurt and European Securities and Markets Authority (ESMA – formerly CESR) in Paris.

All related Regulations are published in OJ L n° 331 dated 15 December 2010.

**Regulation (EU) No 1092/2010** of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (ESRB)

**Regulation (EU) No 1093/2010** of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority - EBA), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC

**Regulation (EU) No 1094/2010** of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority - EIOPA), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC

**Regulation (EU) No 1095/2010** of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority - ESMA), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC

Council **Regulation (EU) No 1096/2010** of 17 November 2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board

# CORPORATE

## 10. Law of 24 May 2011 on the exercise of certain rights of shareholders in general meetings of listed companies

This law implements Directive 2007/36/EC of 11 July 2007 on the exercise of certain rights of shareholders of listed companies. The purpose of this directive is to introduce certain minimum standards with a view to protecting investors and promoting the smooth and effective exercise of shareholder rights attaching to voting rights.

10.1 Scope

10.1.1 Luxembourg companies listed on a regulated market

The law applies to companies governed by Luxembourg law (the directive refers to the Member State in which the company's registered office is located) whose shares are admitted to trading on a regulated market in the European Union (EU).

10.1.2 Voluntary submission – opt-in

Companies whose securities are traded on a market in a third country may subject themselves to the law by inserting an explicit provision to that effect in their articles of incorporation.

10.1.3 Excluded entities

The law does not apply to undertakings for collective investment, other similar undertakings whose sole objective is the collective investment of capital and cooperative companies.

10.2 Notice periods

The law provides that convening notices must be published at least 30 days prior to a general meeting, in the *Mémorial,* in a Luxembourg newspaper and in media ensuring effective dissemination to the public throughout the European Economic Area. If all the shares are in registered form, the notice may be sent by registered letter only or, for those shareholders who have so accepted by e-mail.

The notice period for a second meeting convened following a lack of quorum at the first meeting, is reduced to at least 17 days. The law of 2011 therefore adopts the opposite solution in such a situation compared to that of the law of 1915 which provides for a longer notice period for such a second meeting.

The law requires a certain number of mandatory items to be included in the convening notices and the company must also make certain information available to shareholders on its website from the date of the convening notice. This will include, in particular, all the documents which are to be presented at the meeting as well as draft resolutions for each item on the agenda.

10.3 Right for shareholders to place items on the agenda and to table draft resolutions

Shareholders who together hold at least 5% of the share capital may place items on the agenda of the meeting and submit draft resolutions for all the items on the agenda. Any such request must reach the company no later than the 22nd day prior to the date of the meeting. In that case, the company publishes a revised agenda no later than the 15th day prior to the date of the meeting.

10.4 Waiver of share blocking – record date system

The law introduces a record date system under which the right to participate as well as the number of votes which can be exercised by a shareholder are determined by reference to the number of the shares held by that shareholder at midnight (Luxembourg time) on the 14th day prior to the general meeting.

10.5 Exercise of the right to vote by way of proxy

Shareholders have the right to appoint any person to take part in the general meeting on their behalf, and to vote in their name. The law contains a certain number of rules in case of potential conflicts of interest between a shareholder and his proxyholder and as to the procedures for appointing the proxyholder and for the notification of such appointment to the company.

10.6 Voting results

The company must establish and publish the voting results.

10.7 Equal treatment

Companies shall ensure equal treatment of all shareholders who are in the same position with respect to the participation in, and the exercise of voting rights at, the general meeting.

10.8 Optional provisions

The law allows companies concerned to introduce a certain number of optional provisions in their articles such as the participation in general meetings by electronic means, the right to ask questions in writing from the date of publication of the convening notice, and the possibility to vote by correspondence.

10.9 Coming into force

The law came into force on 1st July 2011 but does not apply to general meetings convened prior to this date. For this purpose only the date of the first convening notice or publication will be taken into account.

The law does also not apply to general meetings postponed by the board of directors while the meeting was in session, nor to meetings which have been reconvened due to a lack of quorum, provided that these first meetings were convened prior to the entry into force of the law.



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## 11. Law of 10th December 2010 on the introduction of international accounting standards

The law of 10th December 2010 on the introduction on international accounting standards for undertakings made a number of amendments to the law of 10th August 1915 concerning commercial companies and the law of 19 December 2002 concerning, amongst others, the accounting and annual accounts of companies, including inter alia the following:

- undertakings now have the option to prepare their annual accounts and, for those undertakings which are not listed on a regulated market, their consolidated accounts, in accordance with the international accounting standards as adopted by the European Union (EU) (it should be noted that undertakings listed on a regulated market already had to prepare their consolidated accounts in accordance with international accounting standards);

- undertakings preparing their annual or consolidated accounts in accordance with Lux GAAP may now value financial instruments and other asset classes at “fair value”. The law also provides that undertakings who decide not to value their financial instruments at fair value must provide a certain amount of information in the notes to their accounts;

- undertakings whose securities are admitted to trading on a regulated market are subject to certain increased transparency obligations, including a corporate governance statement and a description of the main features of their internal control and risk management systems;

- the thresholds defining small and medium-sized undertakings and small groups are increased. These thresholds determine the undertakings benefiting from certain exemptions including, for example, the absence of the obligation to appoint an approved statutory auditor *(réviseur d'entreprises agréé*) or the right to prepare an abridged balance sheet or, for small groups, not to prepare consolidated accounts;

- the law introduces more detailed requirements for the content of the management report and, where applicable, the consolidated management report and the approved statutory auditor’s reports on the annual accounts and, where applicable, consolidated accounts;

- the law makes certain amendments to the presentation of the balance sheet and the profit and loss account;

- a description of related parties' transactions is now required;

- there is now an explicit duty on the administrative, management and supervisory bodies of the relevant undertakings to ensure that the annual accounts, the management report and, where appropriate, the consolidated accounts and the consolidated management report are drawn up and published in accordance with the law of 2002 concerning, amongst others, the accounting and annual accounts of companies or the law of 1915 on commercial companies or the international accounting standards adopted by the EU, as applicable.

The law of 2010 contains a transitional provision pursuant to which companies whose then current financial year was not closed on the date of entry into force of the law, do not have to apply the new legal requirements to their then current financial year. For example, companies whose financial year ended on 31 December 2010 need not comply with the law of 2010 for their 2010 annual accounts but they must do so for their 2011 annual accounts.

# TAX

## 12. Tax update : Intra-group financing transactions – Investment tax credit – VAT – Income tax

### Tax Circulars on intra-group financing transactions

On 28 January 2011 and 8 April 2011 the Luxembourg tax authorities issued two circulars L.I.R.- n° 164/2 (the “First Circular”) and L.I.R.- n° 164/2/2bis (the “Second Circular”) which, based on OECD transfer pricing guidelines, introduce a more detailed tax framework for intra-group financing transactions.

The scope of application of the First Circular is large in that :

- the definition of associated group companies includes any participation, direct or indirect, by one company in the management, control or capital of another company; and

- the definition of (intra-group) financing transactions is equally large in that it concerns the granting of loans or advances refinanced by any financial means.

A taxpayer, within the scope of the First Circular, who wishes to receive confirmation from his tax office (in charge) of the Luxembourg tax treatment applicable to a given intra-group financing transaction, must satisfy the following conditions:

- provide a transfer pricing report in accordance with OECD transfer pricing guidelines;

- satisfy strengthened substance requirements in Luxembourg; and

- have a minimum equity at risk of € 2 million or 1% of financing volume, whichever is the lower

Whereas in the past, advance tax agreements were not limited in time, the First Circular clarifies that the validity of such confirmation for intra-group financing transactions is limited to a maximum period of 5 years, but may be renewed upon request.

A certain number of uncertainties remain with respect to the exact scope of application of the First Circular and to what the practical consequences will be in case of non-compliance by a taxpayer with the requirements set out above.

The Second Circular clarifies that the First Circular does not only apply to intra-group financing transactions entered into since 2011, but also for past and thus to existing structures. A grace period to regularise existing structures that do not fulfil the requirements set out above is granted until 31 December 2011.

For more detailed information, the two tax circulars can be accessed (in French) on the website of the Luxembourg tax authorities.

**Extension of the geographical scope of the Luxembourg investment tax credit**

Under the impact of recent ECJ case law in the Tankreederei I S.A. decision of 22.12.2010 (C-287/10), the Luxembourg tax authorities have issued on 31 March 2011 a new Tax Circular 152bis/3 whose purpose is to extend the geographical scope of the investment tax credit granted under article 152bis of the Luxembourg Income Tax Law to now also include eligible investments "put to use" on the territory of any of the Member States of the European Economic Area. Before the decision of the ECJ, only investments in Luxembourg enterprises were eligible for the investment tax credit. This was a clear infringement of fundamental EU law principles. Given that Luxembourg has become over the years a hub for logistics and transportation, this change may present attractive tax-planning opportunities, particularly for leasing and transport operations.

**Release of the VAT working group of ALFI in the field of investment funds and asset management**

In January 2011 the VAT working group of ALFI released a communication which summarises the outcome of recent discussions with the Luxembourg VAT authorities concerning the Luxembourg VAT treatment applicable in the field of investment funds and more largely asset management and advisory services.

Please find hereafter a summary of this communication in italics with some guiding comments:

1. Input-VAT deduction right of Luxembourg suppliers providing management services to foreign investment funds

"*It has been confirmed that the current position of the Luxembourg VAT administration is to refuse the right to deduct input VAT incurred in relation to the management of an investment fund subject to a prudential control by a regulatory authority in one of the EU Member States (e.g. the CSSF in Luxembourg). It is important to note that this question is currently addressed in a case pending in front the Luxembourg Tribunal. This matter may thus evolve.*"

Such position seems to be a clear change compared with the administrative practice over the last years which accepted that services rendered to entities not listed in the Luxembourg VAT law opened the right to recover Input-VAT when the foreign entity was eligible to receive exempt services in its home Member State. The reason for such a change in administrative practice may be found in the desire of the VAT authorities to put Luxembourg service providers in the same position, regardless whether they provide services in the field of investment management to Luxembourg or foreign beneficiaries.

2. Input VAT deduction right of Luxembourg investment funds

*"The Luxembourg VAT administration has confirmed the position expressed in its circular 723 of 29 December 2006 regarding the input VAT deduction right of Luxembourg investment funds. This means that a Luxembourg investment fund has no right to deduct input VAT. This position is unlikely to change except if new elements arising from a legislative change or court cases."*

The present position of the Luxembourg VAT authorities is based on a strict interpretation of the ECJ case law in the BBL case of 21 October 2004 (C-80/95) based on which regulated Luxembourg investment vehicles (and securitization vehicles) are not able to recover Input-VAT, because they provide only VAT exempt investment services to their investors. This puts Luxembourg at a disadvantageous edge compared to certain other EU Member States that allow such recovery, but is counterbalanced by the fact that Luxembourg's standard VAT rate is the lowest in the EU.

3. Exemption for sub-contracted fund administration services

*"Based on circular 723bis of 20 April 2010, the VAT exemption for the administrative management of the fund is not applicable to the supply of a single isolated type of service. In the event of subcontracted fund administration*



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*services, these services must form a distinct whole and be specific to and essential for the management of investment funds (as ruled by the European Court of Justice in its Abbey National Case (C-169/04). In this context, it has also been confirmed that services related to the management of the investments, such as investment advice and assistance in the establishment of the investment policy of a fund supplied by a third party to the management company of a Luxembourg investment fund or pension fund under the regulation of the CSSF or of the CAA continues to benefit from the VAT exemption of article 44.1.d) of the Luxembourg VAT law. In this respect, there is no change compared with the discussions and the documents exchanged between the Luxembourg VAT administration and the ABBL between October 1992 and May 1993*."

This last point may be considered for practitioners as the most relevant of the ALFI communication because when Tax Circular 723bis of 20 April 2010 had been issued it had created some uncertainty regarding the scope of application of the VAT exemption to out-sourced fund administration services. It reconfirms again the longstanding Luxembourg VAT practice that portfolio advisory services also fall into the scope of the VAT exemption for management services.

**Income tax allowances for highly skilled employees coming to Luxembourg**

The Luxembourg tax authorities have issued on 31 December 2010 Tax Circular L.I.R. – n° 95/2 whose purpose is to provide guidelines to the field officers (i) to permit personal income tax allowances for highly skilled employees starting working in or being seconded to Luxembourg and (ii) to grant corresponding corporate tax deductions for the Luxembourg employer.

Eligibility and availability of this favourable tax regime are linked to a certain number of conditions pertaining on the one hand to the skills and status of the employee and on the other hand to the scope and nature of the work carried out and the status of the employer. A more detailed description and a summary analysis of this regime can be assessed on the ABBL website.

Given the large number of conditions as well as the tax filing and compliance obligations imposed on the Luxembourg employer, it would seem that this new regime, limited in any event to a period of 6 years, should in practice rather be of limited importance to boost Luxembourg as a hub for the targeted highly skilled workforce.

# LABOUR

## 13. Landsbanki case : application of the rules on collective redundancies in case of bankruptcy or liquidation (CJCE 3 March 2011, C-235/10 to 239/10)

Landsbanki, a credit institution established in Luxembourg, whose suspension of payments was ordered by judgement of the Luxembourg District Court of 8 October 2008, was following a request submitted by the public prosecutor on 27 November 2008, which was supported by the financial supervisory authority, i.e. the "Commission de Surveillance du Secteur Financier" (hereafter the "CSSF"), put into liquidation by judgement of 12 December 2008. In this respect, two liquidators were appointed by the Court to carry out the winding up of Landsbanki.

Thereupon, the liquidators informed the employees that, in view of the dissolution and winding up of Landsbanki pursuant to the order of 12 December 2008, their employment contract was terminated with immediate effect following Article L.125-1 of the Luxembourg Labour Code.

A certain number of employees, who had the status of protected employees, i.e. whose contract may not be terminated insofar as the employees were either employees' representatives or pregnant, argued that the liquidation of Landsbanki does not qualify as a bankruptcy following which contracts are terminated with immediate effect and that the terms of Directive 98/59 of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (hereafter the "Directive") are violated as, in case of collective redundancies, a consultation process needs to be initiated as well as the negotiations of a social plan, notwithstanding Article L.125-1 of the Luxembourg Labour Code. Hence, they concluded that their contract cannot be considered as being terminated and submitted a request to the President of the Court sitting in labour matters to have the termination of their employment contract declared null and void so to be reinstated in their former position as of the day their contract was terminated. The President of the Labour Court rejected the request by order dated 10 February 2009, which was confirmed by the President of the Chamber of the Court of Appeal sitting in labour matters dated 4 June 2009 relying on Article L.125-1 of the Luxembourg Labour Code, which provides for a termination of employment contracts with immediate effect following a declaration of the employer's insolvency. Indeed, the President of the Court argued that the termination of the activity of Landsbanki was the result of a factual situation which was comparable to an insolvency as specifically referred to in Article L.125-1 of the Luxembourg Labour Code,

the banking activities being no longer continued because of the withdrawal of the banking license by the CSSF. No response was given to the issue of violation of the Directive the President of the Court focussing his analysis on Luxembourg labour law provisions.

The order of 4 June 2009 was appealed before the *Cour de Cassation*. By order dated 14 June 2010, the *Cour de Cassation* seized the European Court of Justice for the interpretation of Articles 1, 2 and 3 of the Directive, the questions raised are as follows:

1) To what extent is the Directive applicable to the termination of activities as a result of a declaration that the employer is insolvent or a judicial decision ordering the dissolution and winding up, on grounds of insolvencies, of a credit institution is applicable in respect of which termination the national legislation, i.e. Luxembourg law, provides for the termination of employment contract with immediate effect of the employment contract.

2) The second question raised is whether the administrator or liquidator appointed by the Court is deemed to be in the same position than an employer who is contemplating collective redundancies and is bound by the obligations set forth under Articles 2 and 3 of the Directive, i.e. consultation of the employees' representatives and negotiation of a social plan.

By judgement of the European Court of Justice dated 3 March 2011, it has been decided (i) that the Directive must be interpreted as applying to a termination of the activities of an employing establishment as a result of a judicial decision ordering its dissolution and winding up on grounds of insolvency, even though, in the event of such a termination, national legislation provides for the termination of employment contracts with immediate effect and (ii) that until the legal personality of an establishment whose dissolution and winding up have been ordered, has ceased to exist, the obligations under Articles 2 and 3 of the Directive must be fulfilled; the employer's obligations pursuant to those provisions must be carried out by the management of the establishment in question, where it is still in place, even with limited powers of management over that establishment, or by its liquidator, where that establishment's management has been taken over in its entirety by the liquidator.

Hence following the order of the European Court of Justice dated 3 March it is to be concluded that the liquidators should have followed, after the liquidation order issued by court order of 12 December 2008, the obligations set forth by the Directive which are reflected in Article L.166-1 of the Luxembourg Labour Code notwithstanding Article L.125-1 of the Luxembourg Labour Code providing for a termination of a contract with immediate effect. Thus, the liquidators should have negotiated a social plan, subject to compliance with the conditions of the law on collective redundancies, such obligation being maintained as long as the liquidator is still in place, i.e. the underlying obligations continuing to apply until the legal personality has seized to exist.

Following the order issued by the European Court of Justice dated 3 March the *Cour de Cassation* will, in case the matter is still pursued, i.e. liquidators not agreeing on a voluntary reinsertion of the employees or reaching of an agreement with those employees, order the "cassation" of the order issued by the President of the Court of Appeal dated 4 June 2009. The matter will thereupon be submitted to another president of the Chamber of the Court of Appeal sitting in labour matters. It should be expected that the relevant terminations of the employment contract of those employees having initiated litigations will be declared null and void.

The order should also have as a consequence that, in general, the liquidators, whether named in relation to a bankruptcy or a liquidation of a bank, will have, if applicable, to follow, in the future, the rules on collective redundancies, i.e. consultation process and negotiation of a social plan, it being understood that these rules had never been followed in the past as it was generally considered that by the issuance of the bankruptcy order contracts were terminated by virtue of law, despite the fact that Article L.125-1 only provides for a termination with immediate effect.

In this context, a working group has been initiated by the Luxembourg Bar Association in order to study how to amend Luxembourg legal provisions in this respect in order to reflect the difficulty for liquidators to organise consultation process and negotiate a social plan.

## 14. Bill of law n° 6234 introducing a time-saving account

A bill of law n° 6234 introducing a time-saving account for private sector employees was submitted on 22 December 2010. A similar bill of law was submitted for public sector employees, but this will not be the focus of this contribution.

A time-saving account provides a mechanism which enables the employee, if he/she so desires, to save up paid leave entitlements in return for leave not taken, rest periods not taken, or for part of his/her remuneration. This leave may be used for private reasons (sabbatical leave, care of the children, etc.) or vocational training.

The time-saving account was introduced into Luxembourg Labour Law by the Law of 18 May 2008 introducing a single status. Since then, a framework law is expected to establish the rules governing the implementation of a time-saving account, it being understood that it is the issue of the above-mentioned bill of law. The bill of law provides that certain rules, as laid

down therein, may be waived by a collective bargaining agreement.

The main principles of the bill of law are as follows:

- The time-saving account may be established by collective bargaining agreement or by internal rules (subject to the advice of the staff delegation or of the entire staff).

- The collective bargaining agreement or internal rules must provide a certain number of considerations, as laid down by the bill of law, i.e.: beneficiary of the account ; the means of feeding the time-saving account; the feeding, using and liquidation rules in respect of the account; the practical arrangements which are necessary to prove the feeding of the account and the accumulated savings; the management arrangements of the account; the rules governing the transferability of the account from one employer structure to another; the waiting period which must elapse between the first feeding of the account and the total liquidation or the first partial liquidation save that this period cannot be less than twelve calendar months and the guarantee of the payment of the entitlements in the event of the employer's bankruptcy.

- The beneficiaries of the time-saving account are employees bound by an employment contract, excluding those occupied on a temporary basis by the company (in particular employees hired under fixed-term contracts or for a trial period and agency employees or employees put at the disposal of the company by another company).

- The time-saving account may be fed, on the employee's initiative, by:

- the part of the paid leave exceeding 20 days and additional rest days;

- the part of the salary above the social minimum wage without exceeding 10% of the annual salary;

- overtime hours;

- extra pay and compensatory rest periods for Sunday work, night work and work on public holidays.

- The equivalent in currency of the employee's entitlements in the time-saving account must be recorded with an insurance company, with a view to protecting the claim of the employee in the event of the employer's bankruptcy.

Where the time-saving account is established by a collective bargaining agreement, it may however provide that these amounts will be managed by the employer itself, insofar as a mechanism is in place to guarantee the employee's rights in the event of the employer's bankruptcy.

- The principle is the use of the rights acquired in the time-saving account by way of taking paid leave. The bill of law provides for a waiting period of 12 months prior to the first use.

The leave is scheduled as desired by the employee, unless objection is raised by the business needs or justified desires of other employees of the company.

During his/her leave, the employee receives a daily allowance calculated in accordance with the rules applicable to annual paid leave. However, the employee may opt to receive only 75% of this allowance in order to benefit from a longer period of leave.

During his/her leave, the employee has the same status as an employee on annual paid leave.

- If the principle is the use of the rights acquired by taking paid leave, the bill of law provides for limited cases in which the acquired rights may be liquidated in cash. This is particularly so, in the event of an *ipso jure* termination of the employment contract or on the initiative of one or both parties.

- When the employer changes, the rights accumulated in the time-saving account may be transferred to the new employer insofar as it gives its approval.

- The rights accumulated in the time-saving account are subject to the taxes and social security contributions applicable to salary, which become due at the time of the use or liquidation of the account.

The bill of law provides that time-saving accounts already in effect must if necessary be amended following the provisions of the law within twelve months. Such is the case, in particular, where necessary, for the annexe regarding the time-saving account which is attached to the collective bargaining agreement of bank employees.

The bill of law raises many questions and has already been the subject of intense criticism from the *Chambre des Salariés* (Employees' Chamber) (opinion dated 28 February 2011).

The issue of the valuation of the amounts accumulated in the time-saving account is a key issue. In this respect, the comments on the articles of the bill of law provide that the acquired savings must be revalued through the mechanism of salary indexing.

The issue of the transfer of rights, in case of change of employer is also an issue, since the new employer shall assume responsibility for the payment of the taxes and



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social security contributions related to the accrued amounts.

The timetable for the vote of the bill of law is not yet determined, as the *Conseil d'État* (Council of State) has not yet issued its opinion and as the social actors are currently discussing the bill of law.

# LITIGATION

## 15. Loi du 8 avril 2011 portant introduction d'un Code de la consommation

La loi du 8 avril 2011 portant introduction d'un Code de la consommation (ci-après le "Code de la Consommation"[1]) est entrée en vigueur le 16 avril 2011.

Le Code de la Consommation est en principe une codification à droit constant de textes applicables en matière du droit de la consommation à l'exception, notamment, des dispositions relatives au crédit à la consommation et au *timesharing* alors que le législateur a profité de la codification pour transposer en droit luxembourgeois la directive 2008/48/CE concernant les contrats de crédit aux consommateurs ainsi que la directive 2008/122/CE relative à la protection des consommateurs en ce qui concerne certains aspects des contrats d'utilisation de biens à temps partagé, des contrats de produits de vacances à long terme et des contrats de revente et d'échange.

Le Code de la Consommation est divisé en quatre parties: (i) la partie préliminaire reprend les définitions à portée générale; (ii) le premier livre comprend d'une part un titre 1 relatif aux obligations générales d'information du consommateur ainsi que les règles applicables en matière d'indication des prix, le titre 2 reprenant la loi du 29 avril 2009 relative aux pratiques commerciales déloyales; (iii) le titre 1 du deuxième livre regroupe les dispositions générales applicables aux contrats conclus avec les consommateurs (clauses abusives, etc.) et le titre 2 régit certains contrats particuliers; (iv) le troisième livre regroupe les règles de procédure applicables en droit de la consommation.

Dans le cadre de la codification, le droit de rétractation au profit du consommateur a été uniformisé, il s'élève à 14 jours calendrier, à l'exception du droit de rétraction d'un consommateur partie à un contrat à distance où le délai de rétractation est resté à 7 jours ouvrables au motif que ce délai plus court est un atout pour attirer les entreprises actives dans le commerce électronique vers le Luxembourg.

[1] Mémorial A n° 69 du 12 avril 2011 (pages 1120 et suivantes)

Concernant les contrats "*timesharing*", le champ d'application a été élargi aux contrats de courte durée (plus d'un an), à certains biens mobiliers comme les hébergements en caravane ou en bateau de croisière ou en péniche, aux contrats de produits de vacances à long terme et aux contrats de revente et d'échange. Le consommateur ne peut pas être obligé à payer des avances.

Quant aux dispositions régissant les contrats de crédit à la consommation, les dispositions du Code de la Consommation prévoient une fiche standardisée pour les informations précontractuelles. En outre le consommateur doit communiquer au professionnel ses engagements financiers en cours ainsi que les revenus courants afin de permettre au professionnel de mieux analyser la solvabilité du consommateur.

Un prêteur établi au Luxembourg doit avoir obtenu au préalable une autorisation écrite du Ministre ayant dans ses attributions le secteur financier (si le prêteur est un professionnel du secteur financier), soit l'autorisation écrite du Ministre ayant dans ses attributions les autorités d'établissement (au cas où le requérant exerce à titre principal une activité visée par la loi sur le droit d'établissement).

Les intermédiaires de crédit établis au Luxembourg doivent s'inscrire sur une liste qui est établie par le Ministre ayant la protection des consommateurs dans ses attributions. Cette obligation d'inscription vaut également pour les intermédiaires de crédit agissant à titre accessoire dans le cadre de leurs activités professionnelles principales visées par la loi sur le droit d'établissement. Lors de cette inscription les intermédiaires de crédit doivent également indiquer l'identité du prêteur ainsi que l'adresse géographique de ce dernier (par exemple ceci concerne les garagistes qui accordent par des intermédiaires des crédits à la consommation). La liste des intermédiaires de crédit est aussi publiée sur le site du Ministère ayant la protection des consommateurs dans ses attributions. Un autre point important est que les conditions de remboursement anticipé du crédit par le consommateur, qui engendre normalement une indemnité pour le prêteur, sont précisées afin d'éviter des abus.

**Abstract :**
The law of 8th April 2011 in relation to the Code of Consumer Protection came into force on 16th April 2011 (the "Code").

The Code is basically a codification of existing laws in the field of consumer protection. Furthermore the law of 8th April 2011 has implemented the Directives 2008/48/EC of the European Parliament and of the Council of 23rd April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, and Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare,

long-term holiday product, resale and exchange contracts. The legislator has also harmonised the consumer's right of withdrawal. The consumer is now entitled to withdraw from a contract within 14 calendar days provided some conditions are met. The right of withdrawal in the e-commerce domain remains 7 business days.

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