ELVINGER, HOSS & PRUSSEN
AVOCATS À LA COUR

NEWSLETTER
June 2010

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1. Abolishment of subscription tax (taxe d'abonnement) on ETFs

The Luxembourg Prime Minister announced on 5 May 2010 in his annual speech on the State of the Nation (*Déclaration sur l'Etat de la Nation*) that the subscription tax (*taxe d'abonnement*) on Exchange Traded Funds (ETFs) will be abolished. The tax is presently levied generally at the rate of 0,01%. We expect that the change will be implemented at the latest by the end of this year when the investment fund law will be amended to implement UCITS IV.

2. New law of 11 April 2010 regarding the posting of employees

The law of 11 April 2010 modifying articles L.010-1, L.141-1, L.142-2, L.142-3 and L.142-4 of the Labour law Code was published in the *Memorial* on 16 April 2010 (the "Law").

The modification of abovementioned articles of the Labour law Code was required following the judgement of 19 June 2008 of the European Court of Justice ("ECJ"), which ruled that Luxembourg had failed to fulfil its obligations under the directive 96/71/EC of 16 December 1996 concerning the posting of employees within the framework of the provision of services (the "Directive").

The Law deals with the following subjects:

I. Notion of "public policy"

The Directive, which applies to employers established in a Member State who are posting employees to another Member State to perform temporary work, sets out an exhaustive list of basic minimum measures to be observed by these employers in the host country. The Directive expressly states, however, that it is open to Member States to apply provisions to employees posted to their territory other than those referred to in this list in the case of national public policy provisions, i.e. provisions which are deemed to be crucial for the protection of the political, social or economic order of the Member State concerned ("public policy exception").

When implementing the Directive in 2002, Luxembourg opted for a broad definition of the public policy provisions by adding to the list provided by the Directive (i) the requirement to have a written contract of employment, (ii) the obligation to comply with rules on part-time and fixed-term employment, (iii) the obligation to comply with the provisions on collective bargaining agreements and (iv) the indexing of salaries. After recalling that the "public policy exception" is a derogation of the principle of freedom of services and must be strictly construed, the ECJ ruled that the above 4 provisions cannot be considered as public policy provisions applicable to employees posted to Luxembourg.

In the new article L.141-1 (1) of the Labour law Code, the provisions under (i) to (iii) above have thus been deleted from the list of rules applicable to employees posted to Luxembourg, as well as for point (iv) the indexing of salaries exceeding the minimum salary provided for by the law or by a generally binding collective bargaining agreement (the "minimum salary"). The indexing of the minimum salary was indeed accepted by the ECJ.

In this respect, it should be noted that the Law does not provide for the indexing of the foreign salary of the employee posted to Luxembourg. The indexing is only applicable to the Luxembourg minimum salary. If, after the indexing, the foreign salary is lower than the newly indexed Luxembourg minimum salary, the foreign salary is increased up to the amount of the newly indexed Luxembourg minimum salary. For instance, if the employee has a foreign salary of 101 and the Luxembourg minimum salary is 100, the employee will continue to receive 101; however, if during the posting the Luxembourg minimum salary is increased up to 102,50 as a result of the indexing, the foreign salary will be increased by 1,50 in order to reach 102,50.

II. Monitoring

The ECJ also criticised the monitoring by the authorities of employers who post employees to Luxembourg.

The ECJ held that article L.142-2 of the Labour law Code - which states that a company that posts employees in temporary employment in Luxembourg shall, before beginning work, make available to the *Inspection du Travail et des Mines* all the basic information necessary for control - is contrary to the principle of freedom of services and is likely to discourage companies wishing to post employees in Luxembourg from exercising their freedom to provide services. The same applies to article L.142-3 of the Labour law Code which requires any company established abroad to file all legal documents necessary for monitoring with an "agent ad hoc".

The new articles L.142-2 and L.142-3 of the Labour law Code now state that the information must be provided to the *Inspection du Travail et des Mines* at the beginning of the posting and that the documents necessary for monitoring purposes may be kept with any person present in Luxembourg.

III. Definition of posting

Although this was not addressed by the decision of the ECJ, the Law further defines the concept of posting of employees.

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The new article L.141-1 (2) of the Labour law Code limits the posting to one taking place in the framework of a provision of service concerning an object or specific activity limited in duration and ending with the completion of the contract. According to the new article L.141-1 (3) of the Labour law Code, "limited duration" must be understood according to the criteria developed by the ECJ (namely, the duration, frequency, periodicity and the continuity of the provision of service as well as the nature of the activity which is the object of the posting).

3. Law of 3 March 2010 on the criminal liability of legal entities

Traditionally legal entities could not be held criminally liable under Luxembourg law (Supreme Court 29 March, 1962, Pas. 18, p.450). Criminal liability of legal entities has been introduced in Luxembourg legislation by a law of 3 March 2010 (the "Law").

I. Conditions under which legal entities may be held criminally liable

Which categories of legal entities fall within the scope of the Law?

Article 34 of the Criminal Code (*Code penal*) introduced by the Law only refers to "legal entities" ("*personnes morales*"). These comprise:

- the commercial companies to whom the law of 10 August 1915 on commercial companies as amended grants the legal personality (art. 2): *société anoyme*, *société à responsabilité limitée*, *société cooperative*, *société en nom collectif*, *société en commandite par actions*, *société en commandite simple* and the *societas europaea*,
- non profit associations (*association sans but lucratif*) and foundations,
- civil companies (*société civile*),
- economic interest grouping, european economic interest grouping, and
- farmers' associations (*associations agricoles*).

Legal entities incorporated or existing under foreign law also fall within the scope of the Law, as long as they have a legal personality.

The following are excluded:

- the State (including any foreign State),
- the municipalities (*communes*) of Luxembourg (although there may be issues regarding the total and unconditional exclusion of those municipalities at least with respect to activities, which are also carried out by the private sector), and
- any entity which has no legal personality: e.g. group of companies, *de facto* groupings.

Legal entities from the public sector such as syndicates of municipalities (*syndicats de communes*) or public-sector establishments (*établissements publics*) (e.g. Central Bank, CSSF, National Data Protection Commission) have not been expressly excluded from the scope of the Law.

Which categories of criminal offences fall within the scope of the Law?

The criminal liability of a legal entity can only be recognised if the offence committed is qualified as a *délit* (misdemeanour) or a crime. Minor offences (*contraventions*) do not fall within the scope of the Law.

These misdemeanours or crimes are those listed in the Criminal Code or in specific legislation.

By whom does the criminal offence need to have been committed?

A legal entity exists and acts only through its corporate bodies. Therefore article 34 of the Criminal Code provides that the misdemeanour or crime must have been committed by one of its corporate bodies (managers, directors, shareholders' meeting, statutory auditor (*commissaire aux comptes*) or the *de facto* managers acting in the name and in the interest of the legal entity.

A representative does not act in his own name: he has to act in the name of the legal entity and in the interests of the legal entity. The *de jure* or *de facto* representative of the legal entity has committed a criminal offence in view of either having the legal entity make a gain or a financial profit or avoiding that the legal entity suffers a loss. If the representative has acted to the detriment of the legal entity, the legal entity may not be held criminally liable.

The criminal liability of the legal entity does not exclude the criminal liability of the physical persons who are the authors or accomplices of such an infringement.

Thus, the physical person and the legal entity can both be condemned for the same offence. According to the preparatory documents of the Law, the Luxembourg legislator has opted for the French system pursuant to which it is not required to prove that the legal entity has infringed a criminal legal provision: no criminal misbehaviour of the legal entity which is distinct from a criminal misbehaviour of its legal or *de facto* bodies has to be proven. In other words, a legal entity may be held criminally liable even though the legal or *de facto* representatives have not been prosecuted or condemned or are unknown.

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What matters is that the infringement has been committed by a legal body or *de facto* representative acting in the name and for the benefit of said legal entity. However the fact that the legal body or *de facto* representative acted in the name and for the benefit of the legal entity does not constitute a cause for him not to be prosecuted.

What is the criminal intention that will need to be proven?

The criminal intention lies with the legal entity. Some French authors speak of a "criminal policy" pursued by the legal entity. The intentions of the legal body or *de facto* representative are not relevant to establish the criminal liability of the legal entity.

II. Penalties

There are four applicable penalties to legal entities, two principals, being the fine and the dissolution, and two accessories, being the special seizure and the exclusion from public offerings (article 35 of the Criminal Code). When an imprisonment is provided by criminal law, the special seizure of the objects used to commit the criminal offence can be ordered even if it is not provided for such a specific offence.

The provisions of the Criminal Code on the possibility to suspend the judgement (*suspension du prononcé*) or to have the payment sentence suspended (*sursis*) are applicable to legal entities. This also applies to the rehabilitation.

The fine

Pursuant to article 36 of the Criminal Code, the minimum fine for legal entities is 500€.

For crimes, the maximum fine is 750,000€.

For *délits* (misdemeanours) the maximum fine is set at double the maximum fine applicable to physical persons. If legislation only provides for a prison penalty, the prison penalty will have to be converted into a fine according to the following mechanism:

- the prison penalty (usually expressed in months or years) is converted into days (e.g. 10 years become 3,650 days. Practice will show if the courts will tend to a 360-day year or 365-day year),

- then this amount is multiplied by 50€ (which is the current amount of a fine, which if not paid will result in the offender having to be jailed for 1 day),

- then the resulting amount will be multiplied by 2.

The fine is multiplied by 5 if the legal entity is condemned for certain categories of criminal offences: e.g. terrorism, conspiracy, drug trafficking, money laundering.

In addition the fine is multiplied by 4 (even if it has already been multiplied by 5 beforehand) in the following situations:

- the legal entity has been condemned for a crime and is again condemned for a new crime;

- the legal entity has already been condemned for a crime and is again condemned for a *délit* (misdemeanour); or

- the legal entity was sentenced for a *délit* (misdemeanour) to a fine of at least 36,000€ and is condemned again for a misdemeanour within 5 years from the date of payment of fine or on which the fine became time-barred.

The dissolution of the legal entity (article 38 of the Criminal Code)

The legal person can be dissolved by court order if:

- if it has been intentionally set up for the purpose of committing criminal offences; or

- in case of a crime or misdemeanour sentences as regards physical persons to a jail term of at least 3 years, if it has been diverted from its (legal) purpose to commit criminal offences.

When the dissolution has been ordered, the criminal judge shall refer the case to the court sitting in commercial matters which will then be in charge of the liquidation of the legal entity.

III. The end of the prosecution

The Law draws a distinction between the execution of the penalty and the prosecution.

According to article 86 of the Criminal Code, the loss of the legal personality, e.g. by way of liquidation or merger with another entity, does not extinguish the obligation to execute the penalty. For example, if a legal entity has been condemned to a fine of a given amount and thereafter is absorbed by another company, the fine will have to be paid by the absorbing entity.

On the contrary, the criminal prosecution (meaning the proceedings before a non-appealable judgement is being rendered) stops if an entity has lost its legal personality. For example, if a company has committed a criminal offence and – before it is condemned – is absorbed by another company, the absorbing company cannot be held criminally liable in place of the absorbed company.

However, the prosecution may continue if (i) the goal of the operation (merger, liquidation) which resulted in the

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entity losing its legal personality was to avoid criminal prosecution or (ii) the legal entity had already been officially charged (*inculpé*) with a criminal offence by an investigating judge (*juge d'instruction*).

The possibility to restore the legal personality of the liquidated or absorbed entity will certainly raise practical issues, especially, in case of a merger, if the absorbing entity was unaware of the criminal charges brought against the absorbed entity or in case of transborder mergers.

According to the new article 89 in the Code of criminal proceedings, the investigating judge (*juge d'instruction*), if he has sufficient elements of proof which lead to assert the criminal liability of a legal entity, may order that:

- proceedings entailing the liquidation or the dissolution of the legal entity (including a merger) be suspended,
- prohibit any specific patrimonial transaction that could lead to its insolvency; or
- request the deposit of a warrant.

The purpose of these provisions is to offer means to the investigating judge so that he can prevent the legal entity or its assets from "disappearing" during the criminal proceedings and prevent the occurrence of an offence left unpunished.

The legal entity or any interested party may lodge an action before the courts to have the decision of the investigating judge be declared void (due to the absence of the legal conditions for such an order) or to have the suspension or prohibition waived (due to the change of factual circumstances).

4. Draft law on VAT rules applicable to « carbon certificates »

In March 2010, the Minister of Finance filed a draft law regarding the VAT rules applying to the trading of greenhouse gas emission allowances (which we refer to as « carbon certificates »). This draft law was introduced as a consequence of the increase of « carousel-type » fraud schemes relating to the trading of carbon certificates during the summer of 2009 and the filing of a draft council directive (now adopted under number 2010/23/UE) regarding an optional and temporary application of the reverse charge mechanism in relation to supplies of certain goods and services susceptible to fraud.

According to Article 1 of the draft law, the (Luxembourg) VAT applicable to the supply of carbon certificates will be due by the recipient (i.e. the purchaser of the carbon certificates) in all situations, i.e. even if both the supplier and the recipient are located within the territory of Luxembourg (under the current regime, the recipient of the supply is only liable for payment of the Luxembourg VAT if the supplier is located outside Luxembourg). The purpose of the draft law is to avoid situations where recipients of carbon certificates are able to get a refund of the VAT invoiced to them, although the suppliers of the same carbon certificates have not paid the VAT to the Treasury and disappear before any such payment. As opposed to Directive 2010/23/UE), the draft law does not envisage to limit in time the application of such a general reverse charge mechanism to the trading of carbon certificates.

5. CSSF circular 10/437 concerning the guidelines on remuneration policies in the financial sector

The purpose of the CSSF circular 10/437 of 1 February 2010 is to implement the recommendation 2009/384/CE of the European Commission on remuneration policies in the financial services sector.

It is applicable to all entities under the supervision of the CSSF, including their branches abroad, as well as to the branches of similar non-EU entities established in Luxembourg.

Pursuant to the circular, the professionals of the financial sector subject to the oversight of the CSSF shall have to implement and maintain a remuneration policy consistent with the strategy of the company and the risk management. It shall cover the categories of staff whose professional activities have a material impact on the risk profile of the financial undertaking (for example : members of the board, financial directors, traders, etc.) and whose remuneration includes a variable component.

The remuneration policy shall ensure that the fixed component and the variable component are in appropriate balance. The variable component has to be limited to a certain level. Where the variable component depends on performance, it shall be assessed in combining the evolution of the performance of the relevant person and operational department with the evaluation of the actual performances.

The entity shall be entitled to retain bonuses in case of non fulfilment of performance criteria or deterioration of the financial situation of the entity.

Furthermore, the circular provides that the Board of Directors has to determine the remuneration of its members, eventually seconded by a remuneration committee which shall be independent from the executive management. The Executive Management shall implement the remuneration policy. The remuneration policy shall be controlled by the CSSF.

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Finally, the circular provides that the remuneration policy and any modification thereto shall be disclosed in the yearly financial statements.

The remuneration policies shall be set up for 30 June 2010 and implemented as of 2011. The contracts shall be renegotiated as soon as possible, although the CSSF recognises that this may not be completed before 31 December 2010.

6. Law of 18 December 2009 on the audit profession

The law on the audit profession of 18 December 2009 (the "Law"), which implements Directive 2006/43/CE of the European Parliament and the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, as well as the three Grand Ducal regulations of 18 December 2009 and 15 February 2010 implementing the Law, were published in the Official Gazette (*Mémorial* A n°22) on 19 February 2010 and came into force on 23 February 2010.

The Law repeals the law of 28 June 1984 organising the profession of independent auditors (*réviseur d'entreprises*) and amends several laws (including in particular the law of 10 August 1915 on commercial companies[1]) referring to auditors and their missions.

The Law introduced in particular the distinction between *réviseur d'entreprises* and *réviseur d'entreprises agréé* (and between *cabinet de révision* and *cabinet de revision agréé* for legal entities).

The statutory audits and certain other tasks (e.g. reports required on contributions other than cash, in case of mergers/divisions or liquidations (to the extent required pursuant to the applicable legal provisions)) are conferred by law on an exclusive basis to the *réviseurs d'entreprises agréés.* Furthermore, only the *réviseurs d'entreprises agréés* are authorised to carry out an audit of accounts while referring to international auditing standards.

[1] An updated version of our non-official consolidation of the law of 10 August 1915 on commercial companies is available in English and in French on our website www.ehp.lu or via the links below:

Consolidated Version of the Law of 10th August, 1915 on commercial companies and of the amending laws in force as at 23 February, 2010

Loi du 10 août 1915 concernant les sociétés commerciales (mise à jour officieuse au 23 février 2010)

The CSSF Circular 10/439 published on 24 February 2010 provides additional details as to the implementation of the Law and the Grand Ducal regulations mentioned above.

The CSSF is in charge of the public oversight of statutory auditors and audit firms and is granted specific supervisory, investigatory and injunction powers as well as the power to impose sanctions.

Pursuant to the Law the CSSF shall keep a public register in which the approved statutory auditors and audit firms are entered.

Furthermore, the CSSF shall register every third-country auditor and audit entity that provides an audit report concerning the annual or consolidated accounts of a company incorporated outside the European Community whose transferable securities are admitted to trading on a regulated market in Luxembourg, except when the company is an issuer exclusively of debt securities admitted to trading on a regulated market in a Member State the denomination per unit of which is at least EUR 50,000 or in the case of debt securities denominated in another currency equivalent at the date of issue to at least EUR 50,000.

Finally, the Law introduces special provisions for the statutory audits of public-interest entities, i.e. Luxembourg entities whose transferable securities are admitted to trading on a regulated market of any Member State, credit institutions (as defined in the law on the financial sector of 5 April 1993, as amended), and Luxembourg insurance and reinsurance companies.

Among the specific provisions applying to public-interest entities are the requirements for a transparency report to be established by the statutory auditors and audit firms that carry out the statutory audits, for each public-interest entity to have an audit committee, and the application of additional independence and quality assurance requirements imposed on the statutory auditors and audit firms carrying out statutory audits of public-interest entities.

Public-interest entities which have not issued transferable securities admitted to trading on a regulated market and their statutory auditors or audit firms are exempt by the Law from some of the specific provisions referred to above.

7. Law applicable to contractual obligations – Rome I Regulation

The Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) shall apply to contracts concluded as from 17 December 2009.

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8. Grand-Ducal regulation of 15 December 2009 on moral harassment at work

Until recently, only sexual harassment at work and "discriminatory harassment" (i.e. harassment linked to reasons based on age, religion or belief, disability, sexual orientation, race or ethnic group) were provided for by law (articles L.245-1 and L.251-1 of the Labour law Code). From a criminal point of view, "obsessional harassment" was moreover sanctioned by article 442-2 of the Criminal Code.

Moral harassment at work was not, however, governed by any regulations, but only defined by case-law.

This legal vacuum has been partly remedied by the implementation of the European Framework Agreement on Harassment and Violence at Work of 26 April 2007 through the Agreement relating to Harassment and Violence at Work concluded between the UEL, the OGB-L and the LCGB on 25 June 2009 (the "Agreement"). The Agreement has been declared generally binding for all employers in Luxembourg by Grand-Ducal regulation dated 15 December 2009.

The Agreement defines moral harassment and violence at work and confirms the prohibition to commit any acts of harassment. The Agreement also deals with the awareness of employees and managers, the prevention (employer's obligation to take the necessary preventive measures) and the development of a management procedure against moral harassment and violence at work (the obligation to intervene in such cases, the protection of the victims and witnesses to acts of harassment). Consultation with staff representatives is provided at all stages of the procedure. The Agreement provides that the procedure can be detailed by an internal or sector agreement.

The Agreement, however, contrary to sexual harassment or "discriminatory harassment", does not offer to victims of moral harassment and violence at work the same legal means of action as those legally provided for victims.

Firstly, the Agreement does not provide for a reversal of the burden of proof in favour of the victim. The victim of moral harassment must therefore prove the reality of all the facts that he/she has stated whereas the victim of sexual harassment or "discriminatory harassment" only needs to establish the facts which *presume* the existence of the harassment (the intention to harass being itself presumed) and it is then up to the defendant to prove that there was no harassment.

Secondly, the Agreement does not provide for sanctions in case of retaliatory measures towards the victims or witnesses to acts of moral harassment. An employee having been dismissed in these circumstances can therefore only bring an action for abusive dismissal whereas it is expressly provided that an employee who has been dismissed following his/her rejection of an act of sexual harassment or "discriminatory harassment" may request the President of the Labour Court to declare the dismissal null and void.

Thirdly, in matters of sexual harassment, an employee pretending to have been sexually harassed may, moreover, refuse to continue to work and terminate the employment contract on serious grounds with payment of damages by the employer. This is not provided for in the case of moral harassment.

The shortcomings identified above could soon be remedied, however, since Parliament has put back on the agenda of legislative work a 2002 bill regarding moral harassment at work.

9. UCITS IV Directive

On 17 November 2009, the UCITS IV level 1 Directive, Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (the “UCITS IV Directive”) was published in the Official Journal of the European Union (EU), and came into force on 7 December 2009.

As a reminder, the main pillars of the UCITS IV Directive are the following:

- to improve investor information by creating a standardised summary information document which will replace the simplified prospectus;
- to create a European passport for UCITS management companies by allowing a management company set up in one EU Member State to act as management company for UCITS set up in other EU Member State(s);
- to facilitate cross-border registration by implementing a regulator-to-regulator notification procedure;
- to permit cross-border mergers of UCITS;
- to permit "master/feeder" arrangements;
- to strengthen the supervision of UCITS by means of enhanced cooperation between supervisors.

EU Member States have to implement those provisions into their national law by 1 July 2011 at the latest. A specific deadline has been provided for the simplified prospectus, which must be replaced by the key

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information document no later than 1 July 2012. On 19 April 2010, CESR published 3 feedback statements concerning the responses received to its technical advice to the European Commission on the level 2 measures regarding (i) The management company passport (ii) mergers, master/feeder structures and (iii) cross-border notification of UCITS.

The Commission will have to adopt the implementing details (level 2) by 1 July 2010 for which it has already issued some draft directives. They, in turn, have to be implemented in the Member States' national law one year later at the latest.

Luxembourg is already working on the implementation of the level 2 measures and their implementation into national legislation is intended by the end of the year.

On 19 April 2010, CESR also published a consultation paper relating to "CESR Guidelines on risk Measurement and the Calculation of Global Exposure and Counterparty Risk for UCITS" aiming at issuing level 3 guidelines that will accompany the level 2 implementing measures of the UCITS IV Directive.

10. Loi du 11 novembre 2009 concernant certaines mesures temporaires visant à atténuer les effets de la crise économique sur l'emploi des jeunes et modifiant certaines dispositions du Code du travail

En date du 11 novembre 2009, la Chambre des Députés a voté la loi sur les mesures temporaires pour l'emploi des jeunes concernant certaines mesures temporaires visant à atténuer les effets de la crise économique sur l'emploi des jeunes et modifiant certaines dispositions du Code du travail.

Cette loi, d'application temporaire alors qu'elle restera en vigueur jusqu'au 31 décembre 2010, prévoit l'ouverture du contrat d'appui d'emploi (CAE) et du contrat d'initiation à l'emploi (CIE) aux jeunes diplômés, mesures qui furent introduites par la loi du 22 décembre 2006 dite loi tripartite et a créé le contrat d'initiation à l'emploi expérience pratique (CIE-EP).

Contrat d'appui d'emploi (CAE)

Le CAE s'adresse aux jeunes de moins de 30 ans et est destiné aux promoteurs étatiques ou communaux. Les jeunes demandeurs d'emploi doivent être inscrits pendant 1 mois au moins auprès de d'ADEM. Le CAE est axé sur une formation complémentaire théorique et pratique décrite dans un plan de formation et est suivie par un tuteur. La durée du CAE est de 12 mois avec possibilité de prolongation auprès de l'employeur ou auprès d'un autre employeur.

Contrat d'initiation à l'emploi (CIE)

Le CIE, qui a pour but d'assurer la formation pratique pendant les heures de travail, est réservé aux demandeurs d'emploi inscrits pendant 1 mois à l'ADEM. Il est axé sur une formation complémentaire décrite dans un plan de formation et suivie de manière continue par un tuteur. Le CIE est conclu pour une durée de 12 mois avec possibilité de prolongation pour une nouvelle durée de 12 mois. A la fin, en cas de recrutement, l'employeur est contraint d'embaucher par priorité le bénéficiaire d'un CIE qui est redevenu chômeur. Cette priorité d'embauchage est identique à la durée totale du CIE.

Contrat d'initiation à l'emploi expérience pratique (CIE-EP)

Le CIE-EP ("Praktikum") permet aux jeunes d'obtenir un stage auprès d'une entreprise, c'est-à-dire d'acquérir une expérience professionnelle. Dans un souci d'une simplification administrative, les jeunes qui s'inscrivent sur le site internet www.anelo.lu sont automatiquement inscrits à l'ADEM sans cependant qu'ils soient contraints à suivre l'obligation de présentation régulière et l'assignation contraignante à des postes vacants.

La durée d'un CIE-EP varie entre 6 mois au minimum et 24 mois au maximum y compris une éventuelle prolongation. Cette mesure permet notamment aux entreprises bénéficiant de mesures de maintien dans l'emploi, ce qui leur interdit de recruter de nouveaux employés, de former des jeunes.

En cas de recrutement de personnel l'employeur est obligé d'embaucher par priorité l'ancien bénéficiaire d'un CIE-EP qui est redevenu chômeur. La priorité d'embauchage est identique à la durée totale du temps passé en CIE-EP auprès de l'employeur.

Pour toutes les trois mesures, le jeune touche une indemnité qui varie en fonction de son degré de diplôme et ces instruments reposent sur le principe que le Fonds pour l'Emploi rembourse à l'employeur une partie de l'indemnité versée au jeune. L'employeur aura aussi droit à une prime en cas d'embauche du jeune moyennant un contrat à durée indéterminée et sans période d'essai à la fin de la mesure.

11. Law of 10 November 2009 and related regulations : the VAT package

The so-called VAT package was implemented in Luxembourg on 1 January 2010. The VAT package involves a set of new measures including (i) a change of the place of supply rules for services, (ii) the implementation of new administrative compliance obligations (an electronic listing of services provided by

Luxembourg suppliers to EU business recipients and for which the EU recipients are liable for payment of the VAT), (iii) the introduction of a simplified procedure of VAT refund for EU businesses.

According to the new general place of supply rule, services which do not fall within the scope of a derogation rule, are now located at the place where the recipient is established, provided that the recipient is a « VAT payer » within the meaning of the new Article 17, §1 , a) of the Luxembourg law on VAT. This article extends the notion of VAT payer (i) to legal persons [entities] which do not carry out an activity within the scope of the VAT (such as most Soparfi's) but are however registered for VAT purposes (as a consequence of intracommunity acquisitions for example) and (ii) to legal persons which have both an activity falling within the scope of the VAT and an activity falling outside the scope of the VAT (for example Soparfis supplying management services to some of their subsidiaries) and which are now considered VAT payers for all services supplied to them.

The amendment of Article 61 of the Luxembourg VAT law pursuant to the law of 10 November 2009 also clarifies the obligation of registration of VAT payers only carrying out exempt activities, who must register for VAT purposes if certain situations arise, such as their receiving taxable services from foreign suppliers for which they are liable for payment of the Luxembourg VAT.

12. Law of 10 November 2009 on payment services

On 10 November 2009, the Luxembourg Legislator adopted the law on payment services (the "Law") which entered into force on 1 November 2009. The purpose of this law is to implement the 2007/64/EC Directive on payment services in the internal market whose objective is to ease the payments within the EU so that these payments become as reliable and effective as national payments.

The Law introduces a new category of professional in the payment services area by creating the payment institution (*établissement de paiement*) as payment provider. The licence is conditional on minimum capital and own funds thresholds, organisational procedures, and other conditions comparable to those applicable to other professionals of the financial sector as specified by the Law.

For all payment services providers (including banks), the Law defines different mandatory information to be provided to the client before and during the transactions.

As far as payment transactions are concerned, the Law is limited for payments made in the EU in euro or another currency of a Member State (including currencies of European Economic Area Member States) and excludes transfers executed in bank notes, coins, paper cheques, or other paper-based instruments.

The Law further sets new rules about the value date of a payment, the responsibility of the payment service providers and the irrevocability of the payment order once received by the payment service provider.

13. CSSF circular 09/418 concerning cross-border payments in the Community and repealing the CSSF circular 02/63

The CSSF circular 09/418 announces the entry into force of the Regulation (EC) No 924/2009 of the European Parliament and of the Council of 16 September 2009 on cross-border payments in the Community (the "Regulation") and repeals the CSSF circular 02/63. The Regulation repeals the 2560/2001 Regulation on cross-border payments in euro and was taken in line with the directive 2007/64/CE on cross-border payments.

The Regulation provides that the charges levied by a payment service provider for cross-border payments between two member states amounting to a maximum of 50,000 euro (or the equivalent in the national currency of a member state which has made the Regulation applicable to its currency) must be the same as the charges levied for a national payment of the same value in the same currency. This provision is to be applied as of 1 November 2009.

The Regulation also provides for different measures in order to facilitate the automation of payments to be applied since the entry into force of the Regulation.

As of 1 November 2010, the payment service providers of a payer reachable for a direct debit transaction in euro on the national level shall make the payment account of their client reachable to a direct debit transaction initiated by a payer through a payment service provider located in another member state.

The Regulation further provides for rules on interchange fees for direct debit transactions and for obligations to the Member States to determine penalties and to remove certain reporting obligations.

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14. Revised version of the ten principles of corporate governance of the Luxembourg Stock Exchange

The Luxembourg Stock Exchange has revised its ten principles of corporate governance that were published in April 2006 (cf. our newsletter August 2006). The second edition of the ten principles, as revised and supplemented, came into force on 1 October 2009 and relates to annual reports for financial years closed after that date.

As regards the scope of the principles, they apply to companies whose shares are listed on a regulated market operated by the Luxembourg Stock Exchange, but nothing prevents non-listed companies or companies which have applied for listing on a foreign regulated market to adhere to such principles. When Luxembourg companies listed on various regulated markets are faced with several codes of conduct in relation to corporate governance, they are invited to follow the ten principles of corporate governance and their recommendations carefully, without preventing them from observing different provisions and codes of conduct applicable in other regulated markets.

The revised edition of the ten principles has kept the flexible approach based on the "comply or explain" system and consists of three sets of rules: the general principles ("comply"), the recommendations ("comply or explain") and the guidelines.

In the second edition four principles and sixty-two recommendations have been amended and numerous guidelines have been added, deleted or modified.

Transparency, achieved through the disclosure of information, is an essential ingredient of the principles of corporate governance. This disclosure of information is effected through two different documents: the corporate governance chapter posted on the company's website and the corporate governance chapter in the annual report.

The adjustments reflected in the second edition of the ten principles take into account particularly recent European and national legislative provisions, such as the transparency directive 2004/109/EC of 15 December 2004, directive 2007/36/EC of 11 July 2007 on the exercise of certain rights of shareholders and the law of 29 May 2009 that requires credit institutions to describe the governance code they follow.

The ten principles, as revised and supplemented, are as follows:

Principle 1 - Corporate governance framework

The company will adopt a clear and transparent corporate governance framework for which it will provide adequate disclosure.

Principle 2 - Duties of the board

The board will be responsible for the management of the company. As a collective body, it will act in the corporate interest and serve the common interests of the shareholders ensuring the sustainable development of the company.

Principle 3 - Composition of the board and the special committees

The board will be composed of competent, honest and qualified persons. Their choice will take account of the specific features of the company. The board will ensure that any special committees necessary for it to properly fulfil its duties are set up.

Principle 4 - Appointment of directors and executive managers

The company will establish a formal procedure for the appointment of directors and executive managers.

Principle 5 - Conflicts of interest

The directors will take decisions in the best interests of the company. They will warn the board of possible conflicts between the direct or indirect personal interests and those of the company or an entity controlled by it. They will refrain from taking part in any deliberation or decision involving such a conflict, unless they relate to current operations, concluded under normal conditions.

Principle 6 - Evaluation of the performance of the board

The board will regularly evaluate its performance and its relationship with the executive management.

Principle 7 - Management structure

The board will set up an effective structure of executive management. It will clearly define the duties of executive management and delegate to it the necessary powers for the proper discharge of these duties.

Principle 8 - Remuneration Policy

The company will secure the services of qualified and executive managers by means of a suitable remuneration policy that is compatible with the long-term interests of the company.

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Principle 9 - Financial reporting, internal control and risk management

The board will establish strict rules, designed to protect the company's interests, in the areas of financial reporting, internal control and risk management.

Principle 10 - Shareholders

The company will respect the rights of its shareholders and ensure they receive equitable treatment. The company will establish a policy of active communication with the shareholders.

Furthermore, the corporate governance paper of the Luxembourg Stock Exchange contains four appendices (A-D) addressing the definition of control (appendix A), transparency requirements (appendices B and C) and independence criteria (appendix D, with reference to the European Commission Recommendation of 15 February 2005 on the role of non-executive directors of listed companies).

The corporate governance paper can be downloaded on the website of the Luxembourg Stock Exchange www.bourse.lu.

15. ALFI Code of Conduct for Luxembourg Investment Funds

In September 2009, ALFI released its Code of Conduct for Luxembourg Investment Funds (the "ALFI Code").

The ALFI Code formalises existing best practices. It is divided into high-level principles and best practice recommendations. It does not establish binding rules.

The eight principles are:

I. The Board should ensure that high standards of corporate governance are applied at all times.

II. The Board should have good professional standing and appropriate experience and use its best efforts to ensure that it is collectively competent to fulfil its responsibilities.

III. The Board should act fairly and independently in the best interests of the investors.

IV. The Board should act with due care and diligence in the performance of its duties.

V. The Board should ensure compliance with all applicable laws, regulations and with the fund's constitutional documents.

VI. The Board should ensure that investors are properly informed, are fairly and equitably treated, and receive the benefits and services to which they are entitled.

VII. The Board should ensure that an effective risk management process and appropriate internal controls are in place.

VIII. The Board should identify and manage fairly and effectively, to the best of its ability, any actual, potential or apparent conflict of interest and ensure appropriate disclosure.

References to the "Board" are to the body responsible by law for managing, administering and supervising the relevant investment fund.

The ALFI Code is applicable to all types of investment funds. EU Directive 2006/46/CE requires that listed companies include a statement in their annual financial report confirming adherence to corporate governance principles. ALFI recommends that all funds (i.e. not only listed funds) confirm adherence to the ALFI Code in their annual financial report. It should be stressed that investment funds may decide to adhere to other codes of conduct and could even establish their own set of corporate governance principles.

It is recommended that Boards request an analysis of the differences between their standard practices and those set out in the ALFI Code

The ALFI Code of Conduct can be downloaded on the website of the Association of the Luxembourg Fund Industry www.alfi.lu .

16. Latest developments in relation to the duties and liabilities of investment funds' depositaries

The Luxembourg regulator has consistently taken the position that the general mission of the depositary of an investment fund must not be understood in the sense of "safekeeping", but in the sense of "supervision". A depositary must have knowledge at all times of how the fund's assets have been invested and how these assets are available which implies that the depositary must know at any time what is the exact composition of the fund's assets and with whom they are held and have effective access thereto. When assets are entrusted with third parties the depositary should be satisfied from the outset, and during the whole of the duration of the contract, that the third party is reputable and competent and has sufficient financial resources. Because a fund's assets are not necessarily safe-kept by the depositary, the latter does not necessarily have an obligation of restitution of such assets to the fund.

The Madoff fraud and the Lehman Brothers' default spurred the debate over the regime applicable to depositaries of investment funds throughout the European Union and somewhat questioned that applicable in Luxembourg. Although the depositary issue had been tackled at EU level before its occurrence, the Madoff case strikingly revealed how UCITS provisions relating to depositary had been transposed in diverging ways in the EU Member States and the need to harmonise and strengthen them. Much contention arose over the provisions contained in the initial drafts of the so-called AIFM Directive which aimed at applying a stricter regime to depositaries of so-called alternative investment funds than that applicable to UCITS (see below). On 3 July 2009, alongside discussions in relation to the AIFMD and the implementation of certain UCITS 4 provisions, the EU Commission launched a public consultation on the UCITS depositary function to identify and shape the European response to vulnerabilities emanating from the UCITS depositary sector, whilst in parallel to this public consultation, CESR carried out a mapping exercise to establish how the various rules on depositary obligations have been implemented at national level.

All these discussions aim at clarifying fundamental elements such as the depositary's role and duties (including possible different role and duties depending on the types of assets concerned), the delegation of such duties in general and the extent of the depositary's liability and possible exonerations thereof, if any. Where a consensus seems to have been reached on the strengthening of the duties of the depositary (e.g. segregation of assets, proper due diligence and monitoring), there seem to be many open questions regarding the scope of the liability of the depositary. In substance, there are currently two main schools of thought among the EU Member States. At one extreme, certain EU Member States advocate the view that the depositary is a safe keeper who must return the assets deposited in any circumstance. At the other end, in certain EU Member States – Luxembourg among them – the depositary has only a duty of surveillance and may escape liability in the absence of negligence.

The above issues are still under discussion at the EU Commission. It is expected that the new regime applicable to UCITS will be enshrined into the forthcoming UCITS V Directive. We should, however, have a flavour of its content via the AIFMD which is expected to be enacted before UCITS V. In the context of the discussions surrounding the AIFMD, it was initially envisaged that the liability of an AIF depositary would be engaged for any failure to perform or improper performance, that assets deposited should be returned in any circumstance and that liability would remain unaffected by delegation. Consideration is, however, now given to mitigate this regime by accepting limitations grounded on the absence of negligence as well as external, unforeseeable and unavoidable events, and allowing a transfer of liability, under certain conditions, via relevant contractual provisions in the context of delegation.

17. UCITS borrowing restrictions and interpretation of Article 50 (2) (a) of the law of 20 December 2002

Article 50 (2) (a) of the law of 20 December 2002 provides that a UCITS may borrow the equivalent of up to 10% of its assets provided that the borrowing is on a temporary basis.

The CSSF confirms in its 2009 Activity Report that debit and credit positions of a UCITS' current accounts with the same legal entity, denominated in the same or different currencies, may be netted for the purpose of calculating the 10% borrowing limit under the following conditions:

- the current accounts must be free of any legal charge or any lien, and
- the agreements governing such current accounts must permit such netting, and
- the law that governs such agreements must allow the netting.

The CSSF has recently further relaxed its position on the use of the borrowed monies. Temporary borrowings *for investment purposes* are now permitted within the 10% limit under the following conditions:

- the relevant borrowings shall be entered into for a reasonable period of time taking into consideration the context in which they were entered into; and
- temporary borrowings shall not be a permanent part of the investment policy of the relevant UCITS (i.e. borrowings for investment purposes may not be carried out on a recurrent basis).

18. Management by Luxembourg Management Companies of foreign UCIs not subject to supervision in their home country

For quite some time, the CSSF has accepted that management companies, authorised under chapter 13 or chapter 14 of the law of 2002, manage foreign investment funds (each a "Fund") which are not subject to supervision in their home country.

In its Activity Report 2009 the CSSF reiterated this possibility but also imposed some new requirements in this context. In particular, the CSSF now requires that prior approval must be obtained from them before a management company accepts a new management mandate for this type of Fund. The requirements set out in the CSSF Activity Report 2009 can be summarised as follows:

a) The sales documents and promotional materials relating to the Fund must comprise a specific indication highlighting that the Fund will not be subject to supervision by a Luxembourg authority.

b) The sales literature relating to the Fund must expressly mention that the Fund's shares or units cannot be offered to the public in or from Luxembourg.

c) The fact that the management company is party to a key contract, such as a *Trust Deed* or management regulation, does not undermine the nationality of the Fund.

d) In the case where the management company plans to sub-delegate tasks linked to the management of the Fund, it must at all times have the methods and control procedures in place to allow it to monitor the management of the Fund. A description of these methods and procedures must be submitted to the CSSF.

e) The management company must draw up a map of the operational risks associated with managing the Fund and set up appropriate methods to monitor these risks adequately.

f) Any new management mandate that the management company wishes to conclude with a Fund must be submitted for prior approval to the CSSF.

19. Loi du 25 juin 2009 sur les marchés publics

Par la loi du 25 juin 2009 sur les marchés publics et le règlement grand-ducal du 3 août 2009 portant exécution de la loi du 25 juin 2009 sur les marchés publics et portant modification du seuil prévu à l'article 106 point 10° de la loi communale modifiée du 13 décembre 1988, le législateur a procédé à l'élaboration d'un nouvel ensemble cohérent de textes légaux et réglementaires, et a transposé les directives 2004/17/CE et 2004/18/CE du Parlement européen et du Conseil du 31 mars 2004 relatives, respectivement, à la coordination des procédures de passation des marchés dans les secteurs de l'eau, de l'énergie, des transports et des services postaux, et à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services.

La structure en trois livres de la loi abrogée du 30 juin 2003 sur les marchés publics a été conservée.

Les principaux ajouts et modifications apportés par la loi du 25 juin 2009 seront succinctement signalés dans le cadre des livres auxquels ils sont intégrés.

Livre I – Dispositions générales

Affirmation de nouveaux principes directeurs en matière de marchés publics : l'égalité de traitement entre les opérateurs économiques, la transparence, la transmission rapide des décisions relatives aux offres, l'utilisation des moyens électroniques dans les procédures des marchés publics viennent s'ajouter à l'absence de discrimination et à la prise en compte des aspects et des problèmes liés à l'environnement et à la promotion du développement durable.

Changement de terminologie : le terme de « procédure » remplace celui de « soumission », ainsi la soumission publique devient la procédure ouverte.

Informatisation des procédures dans un souci d'élargir la concurrence et d'améliorer l'efficacité des procédures.

Pour les marchés et services complémentaires, le seuil en dessous duquel la dispense de procéder par procédure ouverte peut être accordée passe de 30 à 50 pour cent.

Les centrales d'achat apparaissent en tant que pouvoirs adjudicateurs susceptibles d'acquérir des fournitures ou des services ou de passer des marchés publics de travaux, de fournitures ou de services destinés à des pouvoirs adjudicateurs.

L'exclusion de la participation aux marchés publics est prévue par la loi qui précise la notion d'irrégularité conduisant à cette exclusion. La durée maximale d'exclusion est fixée à deux ans.

Les marchés par procédure ouverte ou restreinte sont attribués au soumissionnaire ayant présenté soit l'offre régulière économiquement la plus avantageuse, soit l'offre régulière au prix le plus bas.

L'offre économiquement la plus avantageuse ne doit plus être obligatoirement choisie parmi les trois offres régulières accusant les prix acceptables les plus bas, mais d'autres critères peuvent être pris en compte, notamment, la qualité, la valeur technique, le caractère esthétique et fonctionnel, les caractéristiques environnementales, l'aspect social….

Les critères d'adjudication doivent être pondérés selon un mode d'évaluation prédéterminé.

La loi prévoit la possibilité de réserver des marchés à des ateliers ou programmes employant majoritairement des personnes handicapées.

Livre II – Dispositions particulières relatives aux marchés d'une certaine ampleur

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Les seuils sont exprimés en euros et non plus en droits de tirages spéciaux. Ils sont principalement de 162 000 euros pour les marchés publics de fournitures et de services des autorités gouvernementales, de 249 000 euros notamment pour les autres marchés de fournitures et de services, et de 6 242 000 euros pour les marchés publics de travaux.

Apparition d'une nouvelle procédure de passation des marchés publics : le dialogue compétitif, réservé aux marchés particulièrement complexes dans lesquels les pouvoirs publics sont dans l'impossibilité objective de définir les moyens aptes à satisfaire leurs besoins ou d'évaluer ce que le marché peut offrir en termes de solutions techniques et/ou de solutions financières et juridiques. Il est à préciser que l'attribution du marché public par voie de dialogue compétitif peut uniquement se faire sur base du critère d'attribution de l'offre économiquement la plus avantageuse.

La possibilité de conclure un accord-cadre n'est plus limitée mais élargie à tous les secteurs. Il s'agit d'un accord conclu entre pouvoir(s) adjudicateur(s) et opérateur(s) économique(s) ayant pour objet d'établir les termes régissant les marchés à passer au cours d'une période donnée, notamment en ce qui concerne les prix et, le cas échéant, les quantités envisagés.

Livre III – Dispositions spécifiques relatives aux marchés publics dans les secteurs de l'eau, de l'énergie, des transports et des services postaux.

Le secteur des télécommunications a été retiré du champ d'application de ce livre en raison de l'adoption d'une réglementation communautaire autonome, permettant d'introduire une concurrence effective en droit et en fait.

Introduction des activités des secteurs postaux.

20. Grand-Ducal regulation of 10 June 2009 determining the content and presentation of the Luxembourg standard chart of accounts

In accordance with Article 12 of the Luxembourg Code of Commerce, the Grand-Ducal regulation of 10 June 2009 determines the content and presentation of the Luxembourg standard chart of accounts.

The standard chart of accounts shall apply to the first accounting year starting after 31 December 2010 for those undertakings as defined in Article 8 of the Luxembourg Code of Commerce (i.e. mainly Luxembourg commercial companies, economic interest groups as well as European economic interest groups having their registered office in Luxembourg).

The standard chart of accounts shall not apply to those undertakings excluded pursuant to Article 13 of the Luxembourg Code of Commerce (i.e. in particular unlimited companies and limited corporate partnerships with a turnover not exceeding 100,000 euro (VAT excluded) for the last financial year, credit institutions, insurance and reinsurance companies and holding companies) or to those undertakings exempted pursuant to Article 27 of the law of 19 December 2002 relating to the register of trade and companies and the accounting and annual accounts of undertakings, as amended, including in particular undertakings preparing their annual accounts in accordance with IFRS.

Finally, the Grand-Ducal regulation of 10 June 2009 allows for undertakings to deviate under certain conditions and with respect to certain items from the content and the presentation of the standard chart of accounts.

For any further information please contact us or visit our website at www.ehp.lu . The information contained herein is not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific legal advice concerning particular situations. We undertake no responsibility to notify any change in law or practice after the date of this document.

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