ELVINGER, HOSS & PRUSSEN

AVOCATS À LA COUR

Newsletter March 2007

1. Law of 13th February 2007 on Specialised Investment Funds (SIF), related Grand-Ducal Decrees and CSSF Circular 07/238 on the entering into force of the law of 13th February 2007 on SIFs

This new legislation replaces the institutional investment fund law of 1991. The SIF offers greater flexibility in terms of corporate structure and investment rules as well as lighter prudential supervision notably by the fact that no promoter is required to be approved by the CSSF. Eligible investors are not only institutional investors and professional investors but also sophisticated private investors.

In connection with the SIF law, the following Grand-Ducal Decrees have been published on 27th February 2007:

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- Grand-Ducal Decree relating to the levy of the subscription tax[1] (i) defining, in its article 1, the term "money market instruments" for the purpose of the provisions of article 68(2) of the SIF law exempting certain type of money market funds[2] entirely from the subscription tax and (ii) requiring, in its article 2, SIFs to separately declare investments in other Luxembourg UCIs subject to the subscription tax to achieve exemption of such investments from the tax and thus avoid double taxation.

- Grand-Ducal Decree fixing, in application of Article 67 of the SIF law, the once and for all capital duty payable at the constitution of the SIF at 1,250 Euro.

- Grand-Ducal Decree fixing the CSSF initial registration fee for SIFs at 1,500 Euro (2,650 Euro for Umbrella SIFs) and the annual CSSF maintenance fee at the same amounts.

On 28th February 2007, the CSSF has issued Circular 07/283 informing about the entry into force of the SIF law and summarising its main features.

On 20th February 2007, the Luxembourg tax authorities have published a Newsletter confirming that Circular RIUE n° 1[3] describing, inter alia, the impact of the Luxembourg law of 21st June 2005 which has implemented the provisions of the EU Savings Directive is also applicable to SIFs. This implies that income and distributions from SIFs having adopted the legal form of a corporation (such as SICAVs) are outside of the scope of the EU Savings Directive.

A memo on the new SIF, an English translation of the law and an English translation of CSSF Circular 07/283 are published in the Legal Topics section of our website www.ehp.lu .

2. Clarification by CSSF Circular 07/280 of the practical implications of the law of 9th May 2006 on market abuse in general and on UCIs in particular

2.1 General

CSSF published in its circular CSSF 07/280 (the "Circular") some precisions and guiding principles as to the law of 9 May 2006 on market abuse (the "Law") and its implementation in various areas.

Elements of market manipulation

As to the elements that might constitute a market manipulation, the Circular refers to the CESR document "Market Abuse Directive Level 3 – first set of CESR guidance and information on the common operation of the Directive Ref: CESR/04 – 505b" which specifies more concrete examples of what can be considered to be an element of a market manipulation.

Notification of suspicious transactions

Regarding the notification requirements relating to transactions being suspected to constitute

[1] Such tax (*taxe d'abonnement*) is levied at a rate of 0.01% p.a. of the NAV pursuant to article 68 of the SIF law.

[2] Article 68(2)b) imposes the following requirements for the exemption: (i) exclusive object to invest in money market instruments and deposits, (ii) the portfolio must have a weighted residual maturity not exceeding 90 days and (iii) highest possible rating from a rating agency.

[3] Circular RIUE n°1 issued by the Director of Direct Taxes on 29th June 2005

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insider dealing or market manipulation (article 12 of the Law), the CSSF specifies that credit institutions or other finance sector professionals ("FSPs") are required to take the necessary measures in order to be able to proceed to a specific analysis of the suspicious transaction. The CSSF emphasised that credit institutions or other FSPs are not required to perform a systematic analysis of all prior transactions by the same persons. In case of notification of a suspicious transaction to the CSSF, the form annexed to the Circular should be used.

List of insiders

The following persons shall be on the list of those persons who have regular or occasional access to inside information (article 10 of the Law) in particular:

- persons having access at inside information due to their position at managerial level;
- persons working regularly on sensitive subjects (e.g. annual accounts);
- persons working occasionally on matters giving rise to inside information.

Persons who could potentially by accident come across inside information are excluded from this requirement.

Notification of transactions in shares of a listed company by persons discharging managerial responsibilities shall be made to the CSSF by those persons, in case of Luxembourg companies, or by the relevant company in case of non-EEA companies, by using the form annexed to the CSSF Circular. The CSSF has indicated that the notification requirement does not apply to acquisitions as result of inheritance or donation or to acquisitions in application of labour contracts or as part of a remuneration.

Buy-back and stabilisation transactions

The Circular also contains some indications on buy-back and stabilisation transactions falling under the scope of the safe harbour exemption provided by Regulation (EC) no 2273/2003 of the Commission of 22 December 2003.

The notification and publication of details of buy-back transactions in accordance with article 4 of the Regulation and the notification of details of stabilisation transactions in accordance with article 9 of the Regulation shall be done by using the form annexed to the Circular.

As to article 8 of the Regulation setting out the time-related conditions for stabilisation, CSSF specifies that Luxembourg permits trading prior to the commencement of trading on a regulated market.

Abrogation

Circular CAB 91/2 of 1 July 1991 concerning the law of 3 May 1991 on insider transactions is abrogated.

2.2 UCIs

The general interdiction on insider dealing and market manipulation apply to all Luxembourg undertakings for collective investment ("UCIs") the shares of which are listed on the Luxembourg Stock Exchange ("LSE"). They do not apply to UCIs admitted to trading on the Euro MTF.

The Circular clarifies that the Law has only a limited impact (if any) on UCIs the portfolio of which is broadly diversified and which calculate their Net Asset Value on a frequent basis.

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a) Obligation to make public privileged information

The obligation to make public any privileged information is in practice unlikely to have implications or cause obligations on UCIs (such as Part I UCITS) which calculate an NAV daily, which are broadly diversified and for which the Stock Exchange price is equivalent or extremely close to the net asset value. Indeed, it is in that case highly unlikely that there is information that could in any way influence the Stock Exchange price.

For such UCIs, the correction of an already published NAV could constitute privileged information that would need to be published but the obligation to publish any calculated NAV is already covered by the regulations on UCIs.

The obligation to make public this type of information should in practice only be relevant for UCIs which are not diversified in the same manner as UCITS funds or which do not calculate their NAV at regular and short intervals.

b) Obligation to establish a list of insiders

The obligation to establish a list of insiders is normally not relevant for UCIs (such as Part I UCITS) that are broadly diversified and publish their NAV daily.

A list will need to be drawn up for UCIs which are not investing in a broadly diversified manner or do not calculate their NAV at regular and short intervals and for which the Stock Exchange price of their shares is likely to diverge notably from its calculated NAV. This list would typically comprise the persons responsible for the preparation of the annual accounts and those implicated in the determination of the NAV.

c) Obligation to declare transactions by directors

CSSF Circular 07/280 confirms that obligation to declare operations on listed shares effected by "dirigeants" is not applicable to UCIs.

d) Obligation to notify suspicious transactions

The CSSF Circular clarifies that UCIs and their management companies are not subject to the obligation to notify suspicious transactions under article 12 of the law. This obligation does however apply to the Luxembourg banks and other professionals of the financial sector which act as the UCIs custodian, transfer agent or administrative agent.

3. CSSF Circular 07/277 on the simplification of the notification procedure for UCITS in application of the CESR guidelines

By reference to the CESR document CESR/06-120 b) (see our Newsletter of August 2006), the CSSF has introduced a simplified notification procedure and changed the rules for the issuing of documentation for registration in foreign countries.

For countries outside of the European Economic Area (EEA) the situation remains unchanged and the CSSF will continue to issue the number of original prospectuses and certificates as required by the local authorities concerned.

For the member states of the EEA, the CSSF will issue only one document (in three languages: French, German and English) certifying UCITS compliance. Such document

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must be used duly certified by a person authorised by the UCITS. A new attestation under the new format is only issued by the CSSF in case the information contained in the previous attestation is amended.

In terms of prospectuses, the CSSF will only deliver one original prospectus with the visa and, in the same way as for the provision of certified copies of the attestation to the relevant authorities, the CSSF considers that the UCITS has to submit certified copies of the visaed prospectus to the relevant local authorities. The same is true for the simplified prospectus. In case some EEA authorities refuse to apply the CESR guidelines, the CSSF will be flexible and upon duly motivated request issue "old style" original certificates as requested by those authorities. It appears that, at present[4] the regulators in the following countries accept self-certified documents: Austria, Denmark, Estonia, France, Iceland, Ireland, The Netherlands, Poland, Portugal, Slovenia, Spain, Sweden and the United Kingdom.

The self-certification procedure referred to above implies that the board of directors of UCITS or their management companies should specifically appoint representatives authorised to certify copies of the relevant originals issued or stamped by the CSSF.

Finally, the submission of the documents to the relevant authorities should be made by way of the new standard notification letter also available on the CSSF website in French, German and English.

4. The Luxembourg VAT regime for UCIs: Circular 723/06

The Luxembourg VAT authorities (*Administration de l'Enregistrement et des Domaines*) issued on 29th December 2006 a circular n°723 (hereafter referred to as the "Circular") clarifying the VAT status of investment funds.

4.1 Following the decision of the European Court of Justice in the Abbey National case (see our Newsletter dated August 2006), the Circular clarifies that the "supervision and control" functions performed by the custodian of a UCI do not fall under the VAT exemption of investment management services and are therefore subject to VAT with effect from 1 April 2007. The VAT treatment of other "custodian" services (such as safekeeping fees) remains unchanged. It will be up to the custodian to establish the VAT taxable part of the fees on the basis of objective criteria and the custodian must be in a position to justify to the VAT authorities the criteria retained.

4.2 Following the decision of the European Court of Justice in the BBL case, the Circular clarifies that Luxembourg based investment vehicles, whose management is VAT exempt under article 44-1 d) of the Luxembourg VAT Law, have the status of taxable persons for VAT purposes.

[4] Source: CSSF on 16.3.2007

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Therefore, as from 1 April 2007, SICAVs (*société d'investissement à capital variable*) have in principle to register with the Luxembourg VAT authorities and will receive a VAT identification number. For FCPs, as divided pool of assets, without own legal personality, the VAT authorities consider that the management company carries out the investments and thus must register for VAT purposes. Umbrella funds with multiple compartments will be considered as one single entity for VAT purposes (and receive one single VAT identification number). Due to the fully VAT-exempt status of investment funds, the administrative burden is however lightened.

From a practical perspective, it is possible to distinguish the following two cases:

1. Where an investment fund (or the management company on behalf of the FCP) does not receive goods or intangible services from abroad (from within or outside the EU), the investment fund is released from the obligation to register for VAT purposes.

2. Where an investment fund (or the management company on behalf of the FCP) receives goods or more likely intangible services from abroad, the investment fund will be required to register with the Luxembourg VAT authorities. It will have to self-assess Luxembourg VAT on the goods and/or services received, and file a simplified annual VAT return. However, *prima facie* the investment fund will not be able to deduct this input VAT, given its fully VAT-exempt status. As from VAT registration, the intangible services received from abroad are in the scope of Luxembourg VAT and thus potentially may benefit from the Luxembourg VAT exemption for management services under article 44-1 d) of the Luxembourg VAT Law which – despite the impact of the Abbey National case - is perceived to be larger than in other jurisdictions. If the intangible services are not in the scope of the above exemption, the investment fund will be liable to account for Luxembourg VAT under the so-called reverse-charge mechanism, applying therefore the Luxembourg VAT rate instead of being charged at generally higher foreign VAT rates. The difference in applicable VAT rates and the application of the larger management services exemption may after all result in VAT savings for the investment funds. Finally, there may also be cash-flow advantages in case of receipt of intangible services. The investment fund self accounts for Luxembourg VAT in the frame of the simplified annual VAT return rather than paying immediately VAT upon invoicing from the foreign supplier of the service. On the other hand, the status as VAT taxpayer of Luxembourg investments funds might result in a VAT liability for certain services rendered by suppliers established outside the EU which previously were outside the scope of VAT.

Finally, regarding the issue of invoices, investment, vehicles, as taxable persons whose activities are fully VAT-exempt without the right to deduct input VAT, are relieved from the invoicing obligation, even if they registered for VAT purposes.

To conclude, whether it makes sense for a UCI to register for VAT depends on whether the UCI (or the

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management company on behalf of the FCP) receives goods or intangible services from within or outside the EU (foreign lawyer fees; printing expenses from abroad).

5. CSSF Circular 06/267 on technical specifications regarding communications to the CSSF of documents for the approval or for filing and of notices for offers to the public and admissions to trading on a regulated market of units or shares issued by Luxembourg closed-ended UCIs

Since 1 January 2006, the CSSF is the only party involved in the approval process of prospectuses in relation to offers to the public and admissions to a regulated market of securities in accordance with the law of 10th July 2005 (the "Prospectus Law").

In this context, the CSSF issued in December 2005 the CSSF Circular 05/226, the second part of which describes the technical procedure for communications to the CSSF, pursuant to the Prospectus Law, of documents for the approval or for filing and of notices for offers of securities to the public and admission of securities to trading on a regulated market. Prospectuses drawn up for offers to the public and admission to trading on a regulated market of units or shares issued by Luxembourg closed-ended undertakings for collective investment ("UCIs") were expressly excluded from the scope of this Circular, which indicated that communications to the CSSF in the context of such UCIs should be made by using the existing means of communication regarding applications for authorisation of UCIs.

On 22 November 2006, the CSSF issued a further circular, CSSF Circular 06/267, which specifies the technical procedure in relation to the communications to the CSSF, in accordance with the Prospectus Law, of documents for the approval or for filing or of notices for offer to the public and admission to trading on a regulated market of units or shares of Luxembourg closed-ended UCIs. This Circular specifies the practical aspects of the technical procedure in relation to such communications. This procedure is *mutatis mutandis* the same as the one described in Circular CSSF 05/226. The Circular notably specifies that before proceeding to an official filing for approval of a prospectus under the Prospectus Law, a Luxembourg closed-ended UCI must be approved by the CSSF.

The Circular exclusively applies to UCIs of the closed-ended type. It is reminded that, in this context, closed-ended UCIs are UCIs, which offer no right to their investors to request redemption of their units or shares in these UCIs. In any other case, whatever the number or frequency of redemptions contemplated, the UCI is of the open-ended type and then not covered by the Prospectus Law or by this Circular.

6. EU Commission implementing Directive and CESR guidelines concerning eligible assets for investment by UCITS

The EU Commission has adopted on 19 March 2007 an implementing Directive aiming at clarifying certain definitions used in the UCITS Directive[5]. The implementing Directive largely reflects CESR's advice on

[5] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:079:0011:0019:EN:PDF

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the subject to the EU Commission[6]. The aim of the CESR guidelines on the same subject (CESR/07-044) is to cover the text of its previous advice which was not included in full in the implementing Directive[7].

The implementing Directive and the CESR guidelines aim at clarifying the following terms and concepts:

- transferable securities (including units of closed-end funds);
- money market instruments;
- liquid financial assets with respect to financial derivative instruments;
- financial indices (including certain indices based on financial derivatives on non-eligible assets such as commodities and indices on property). The classification of hedge fund indices as eligible assets is not covered by the implementing Directive and these CESR guidelines (for hedge fund indices, see 7. below);
- transferable securities and money market instruments embedding derivatives;
- techniques and instruments for the purpose of efficient portfolio management (comprising collateral arrangements, repurchase agreements, guarantees received, securities lending and securities borrowing);
- index replicating UCITS;
- other UCIs (concepts of equivalent supervision and equivalent protection of unitholders).

Member States have to publish by 23 March 2008 the laws, regulations and administrative provisions necessary to comply with the implementing Directive and such provisions shall become applicable from 23 July 2008.

7. CESR Consultation Paper of February 2007 on the classification of hedge fund indices as eligible financial indices for the purpose of UCITS (CESR 07-045)

This Consultation Paper[8] describes CESR's preliminary conclusions and proposed draft measures to be taken on the basis of the feedback received from market participants on questions concerning the ability of hedge fund indices ("HFIs") to fall within the definition of "financial indices" contained in the UCITS Directive raised in CESR's initial Consultation Paper on the subject published in October 2006[9].

[6] CESR/06-005

[7] http://www.cesr.eu/index.php?page=document_details&id=4421

[8] http://www.cesr-eu.org/index.php?page=consultation_details&id=88

[9] http://www.cesr-eu.org/index.php?page=consultation_details&id=79

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8. Practices and Recommendations aimed at reducing the risk of money laundering and terrorist financing in the Luxembourg UCI Industry

The Association of the Luxembourg Fund Industry, the Luxembourg Bankers' Association and the Association of Luxembourg Compliance Officers have issued in December 2006 a document giving a practitioners view on the implementation of the law of 12th November 2004 on the fight against money laundering and terrorist financing and the subsequent CSSF Circular 05/211 on the same subject.[10]

The document has not been officially approved by the CSSF but the regulator has not raised objections and the aim is clearly that the document should become guidance on best practice for the Luxembourg UCIs.

The document aims to capture the practical responses to the challenges faced by the UCIs while at the same time already incorporating most of the recommendations of the European Directive 2005/60/EC ("3rd anti-money laundering directive") which has not yet been implemented into Luxembourg law.

The document takes a practice oriented view on the main challenges faced by Luxembourg professionals, mainly transfer agents, in their daily KYC operations and tries to provide clear guidance to avoid divergent interpretation of the regulations.

- The document defines from a UCI perspective the exemption from and delegation of KYC duties and outlines the principles of the proposed risk based approach for assessment of equivalence of identification requirements in different jurisdictions.
- It also provides useful guidance on the due diligence to be performed on distributors of UCI units / shares.
- The document comprises in its annexes a list of documentation required for the purpose of identifying trusts, investment funds, pension schemes, nominees and foundations when they invest into Luxembourg UCIs.

9. Amendments to the law dated 10 August 1915 relating to commercial companies made by the law dated 25 August 2006 that have a potential impact on the articles of incorporation of UCIs incorporated as société anonyme (with a board of directors), including UCIs having adopted the legal form of a SICAV or SICAF

The law of 25 August 2006 on the *société européenne*, the *société anynome* with a management board and a supervisory board and the single-shareholder *société anonyme* (*société anonyme unipersonnelle*) has come into force on 4 September 2006 and has amended certain provisions of the law dated 10 August 1915 (the "Law").

10 http://www.alfi.lu/fileadmin/files/Statements%20%26%20Publications/Recommendations/AML_ALFI-ABBL-ALCO_2006-12-20.pdf

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Certain of these amendments may have an impact on the articles of incorporation (the "Articles") of UCIs incorporated in the form of a *société anonyme*:

- Article 26 of the Law provides that a *société anonyme* may be incorporated with only one shareholder and may become a single shareholder company as a result of the holding of all the share capital by a single shareholder.

- Article 57 of the Law has been amended to provide that the conflict of interest rules and formalities do not apply to transactions with a director which relate to current operations entered into under normal conditions.

- Article 64 of the Law has been amended to provide that the board of directors shall elect a chairman from among its members. Previously, this was not mandatory.

- Article 64bis of the Law has been inserted to provide that, unless otherwise provided for in the Articles, the following rules are applicable to the board meetings.

  (i) at least half of the members of the board of directors must be present or represented,
  (ii) resolutions must be carried by at least the majority of the members present or represented,
  (iii) the chairman of the board of directors shall have a casting vote in the event of tie,
  (iv) if provided for in the Articles, possibility for the members of the board of directors to attend the board meetings by way of videoconference or telecommunication means permitting their identification. Such means must satisfy technical characteristics which ensure an effective participation at the meeting whose deliberations shall be on-line without interruption.

- Article 67 of the Law has been amended to provide for the possibility for the shareholders to attend a general meeting by way of videoconference or telecommunication means permitting for their identification, if provided for in the Articles.

- Article 67-3 of the Law has been amended to provide for the possibility for the shareholders to vote by correspondence by means of a voting form the content of which shall be laid down in the Articles.

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

- Article 70 of the Law has been amended to specify that one or more shareholders holding at least 10% of the subscribed share capital may request that one or more additional items be put on the agenda of any general meeting.

- Article 70 of the Law has been amended to specify that one or more shareholders holding at least 10% (instead of previously 20%) of the subscribed share capital may request the convening of a general meeting of shareholders.

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The further changes made to the Law by the laws of 23rd March, 2007 (see 15. below) has further interesting bearings on the possibility for cross-border mergers of corporate UCITS on which we will report in our next newsletter.

10.Law of 5 November 2006 on supervision of financial conglomerates

The law on supervision of financial conglomerates dated 5 November 2006 (the "Law") implements the European Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate (the "Directive") by introducing the relevant provisions in the law of 5 April 1993 on the financial sector and in the law of 6 December 1991 on the insurance sector.

The purpose of the implemented Directive is to introduce a prudential supervision on a group wide basis of credit institutions, insurance undertakings and investment firms which are part of such a conglomerate, in particular with regard to the solvency position and risk concentration at the level of the conglomerate, the intra group transactions, the internal risk management processes at the conglomerate level, and the fit and proper character of the management. We will in the following outline only the main principles of the Law. The CSSF specified in its Circular CSSF 06/268 certain essential elements of the Law in a more detailed way.

Scope of the Law

The Law applies to financial conglomerates meaning a group which meets all of the following conditions:

(1) A regulated entity (a credit institution, an insurance undertaking or an investment firm) having its registered office in a Member State is at the head of the group or at least one of the subsidiaries in the group is a regulated entity;

(2) Where there is a regulated entity having its registered office in a Member State at the head of the group, it is either a parent undertaking of an entity in the financial sector, an entity which holds a participation in any entity in the financial sector, or an entity linked with an entity in the financial sector by being placed under a sole management by virtue of a contract or statutory clauses or by having administrative, managing or supervision organs composed in majority of the same persons;

(3) Where there is no regulated entity having its registered office in a Member State at the head of the group, the group's activities mainly occur in the financial sector, which is deemed to be the case when the ratio between the balance sheet total of the regulated and non-regulated financial sector entities in the group and the balance sheet total of the group as a whole exceeds 40%;

(4) At least one of the entities in the group is within the insurance sector and at least one is within the banking or investment service sector;

(5) The consolidated and/or aggregated activities of the entities in the group within the insurance sector and the consolidated and/or aggregated activities of the entities within the banking and investment services sector are both significant. Activities are significant if for each financial sector the average of the ratio between the balance sheet total of that financial sector to the balance sheet total of the financial sector entities in the group, and the ratio between the solvency requirements of the same financial sector and the total solvency requirements of the financial sector entities in the group exceed 10%. Cross-sectoral activities shall also be presumed to be significant if the balance sheet

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total of the smallest financial sector in the group exceeds EUR 6 billion.

Group-wide supervision

The competent authorities will be able to assess at a group wide level the financial situation of credit institutions, insurance undertakings and investment firms which are part of financial conglomerates, in particular as regards solvency, risk concentration and intra group transactions.

They therefore are given the means of obtaining from the entities within a financial conglomerate or from other competent authorities, on top of the information already provided by the regulated entities under the individual and consolidated supervision, the information necessary for the performance of the supplementary supervision.

Coordinator

All financial conglomerates subject to supplementary supervision have a coordinator appointed from among the competent authorities involved. His tasks are the coordination of the gathering and dissemination of relevant or essential information, supervisory overview and assessment of the financial situation of the financial conglomerate, assessment of compliance with the rules set out by the law as well as the planning and coordination of supervisory activities in cooperation with the relevant competent authorities involved. Those tasks do not affect the tasks and responsibilities of the competent authorities as provided for by the sectoral rules.

Management requirements

The Law also provides for new requirements on the management that has to be of sufficiently good repute and sufficient experience to perform its duties according to the Directive.

11. Regulation (EC) No 1781/2006 of 15 November 2006 on information on the payer accompanying transfers of funds

On 1 January 2007 the regulation (EC) No 1781/2006 ("the Regulation") on information on the payer accompanying transfers of funds, published in the Official Journal of the European Union No L 345 of 8 December 2006, entered into force.

The Regulation shall ensure that Special Recommendation VII on wire transfers (SR VII) of the Financial Action Task Force (FATF) is transposed uniformly throughout the European Community. Its purpose is to facilitate the prevention, the investigation and the detection of money laundering and financing of terrorism.

The CSSF outlined in its Circular CSSF 06/274 published on 22 December 2006 the most important changes introduced by the Regulation.

In the following article we would like to give a more detailed overview of this new Regulation, particularly in comparison with article 39 of the Law of 5 April 1993 on the financial sector as amended ("Law of 5 April 1993").

Due to the principle of the priority of the European law the provisions of the Regulation prevail over those established by article 39 of the Law of 5 April 1993 where their scope matches.

Article 39 of the Law of 5 April 1993 relative to the financial sector, provides in its final paragraph that *" […] credit institutions and FSPs (financial sector professionals) shall be required to include in remittances and transfers of funds, and in any messages relating thereto, the name or account number of the originator"*.

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I. Scope

1. The regulation applies to" payment service providers" of the payer and the payee

The regulation providing obligations for all kinds of payment service providers, defined as *"natural or legal person whose business includes the provision of transfer of funds services"* (article 2 of the Regulation) ("Payment service providers"), its scope is much larger than the scope of Article 39 of the Law of 5 April 1993 applying only to credit institutions and FSPs.

In addition, to the contrary of article 39 of the Law of 5 April 1993 setting out requirements only for the credit institutions or FSP's working for the *payer* the Regulation provides obligations for the payment service providers of the payer *and* the payee.

2. The regulation applies to "transfers of funds"

The Regulation applies generally to "*all transfers of funds, in any currency which are sent or received by a payment service provider established in the Community*" (article 3 (1) of the Regulation). However, it excludes under certain circumstances certain transfers from its scope, as there are:

- Transfers of funds using a credit or debit card (article 3 (2));
- Pre-paid transfers of funds carried out by means of a mobile telephone or any other digital or Information Technology (IT) device, that do not exceed EUR 150 (article 3 (4));
- Post-paid transfers of funds carried out by means of a mobile telephone or any other digital or Information Technology (IT) device (article 3 (5));
- Withdraws of cash by the payer from its own account (article 3 (7));
- Direct debits, provided that a unique identifier accompanies the transfer of funds, permitting to trace back the legal or natural person (article 3 (7));
- Where truncated cheques are used (article 3 (7));
- Payment of taxes, fines or other levies within a member state (article 3 (7));
- Transfers of funds where both the payer and the payee are payment service providers acting on their own behalf (article 3 (7)).

Please note that this list is not exhaustive regarding the conditions that must be fulfilled for the application of those exceptions.

In addition, the Member States can, under certain circumstances, decide not to apply the obligations set out by the Regulation to transfers permitting payment for the provisions of goods or services of an amount of 1.000 EUR or less (article 3 (6)). As the CSSF did not comment this possibility in its circular 06/274 we assume that Luxembourg will not apply this particular exception.

According to article 3 (3) of the Regulation it shall not apply either to transfers of funds using electronic money, provided that Luxembourg will chose to apply the derogation set out in article 11(5)(d) of Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. This Directive has not been transposed into Luxembourg law yet.

II. Obligations

As mentioned above, the Regulation provides obligations for the payment service providers of the payer as well as for the payment service providers of the payee. In addition, it sets out regulations for payment service providers acting as intermediaries. Furthermore, the Regulation distinguishes between transfers of funds within the Community and between the Community and third countries.

The main provisions of the Regulation may be summarized as follows:

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1. Obligations on the payment service provider of the payer

(a) Transfers of funds from the Community to outside must contain "complete information" of the payer

Transfers of funds effected from the Community to outside have to be accompanied by the name, address and account number ("complete information") of the payer except under certain circumstances for batch file transfers. The address may be substituted with the date and place of birth of the payer, his customer identification number or national identity number. If an account number does not exist, it shall be substituted by a unique identifier which allows the transaction to be traced back to the payer.

(b) Less requirements for transfers of funds within the Community

Transfers of funds within the Community shall be accompanied only by the account number of the payer or a unique identifier allowing the transaction to be tracked back to the payer. However, if so requested by the payment service provider of the payee, the payment service provider of the payer shall make available to the payment service provider of the payee complete information on the payer, within three working days of receiving that request.

Member States may under certain circumstances exempt payment service providers from those obligations as regards transfers of funds to non-profit organisations limited to a maximum amount of EUR 150. As the CSSF did not comment this possibility in its circular 06/274 we assume that Luxembourg will not apply this particular exception.

(c) Obligation of the payment service provider to verify and to keep record of the complete information

The payment service provider has the obligation to verify the complete information on the payer. This verification may be deemed to have taken place if the payer's identity has been verified in connection with the opening of the account and this information has been stored in accordance with Article 8 (2) and 30 (a) of Directive 2005/60 EC or the payer falls within the scope of Article 9 (6) of Directive 2005/60 EC (article 5 (3) of the Regulation). Where transfers of funds are not made from an account, verification has to be made only if the account is in excess of EUR 1 000,-.

In addition, it shall keep records of complete information on the payer for five years.

2. Obligations on the payment service provider of the payee

(a) Procedures in order to detect missing information

The payment service provider of the payee shall have effective procedures in place in order to detect whether the required information on the payer, as described above, is missing, whereby in case of transfers of funds coming from a payment service provider situated outside the Community the required information is the same as described under 1 (a) (= complete information).

(b) Obligation to ask for complete information or to reject the transfer

If the payment service provider becomes aware that information on the payer is missing or incomplete, it shall either reject the transfer or ask for complete information on the payer. If the same payment service provider regularly fails to supply the provided information it shall – after warnings and setting of deadlines – terminate its business relationship with this payment service provider.

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The payment service provider of the payee shall report that fact to the authorities responsible for combating money laundering or terrorist financing.

(c) Record keeping

The payment service provider of the payee shall for five years keep records of any information received on the payer.

3. Obligations on the intermediary payment service provider

Intermediary payment service provider which means "*a payment service provider, neither of the payer nor of the payee, that participates in the execution of transfers of funds*", shall ensure that all information received on the payer that accompanies a transfer of funds is kept with the transfer. It shall for five years keep records of any information received on the payer.

Nevertheless, if it receives a transfer of funds from payment service providers situated outside the Community, it may use a payment system with technical limitations preventing information on the payer from accompanying the transfer of funds, unless it becomes aware, when receiving a transfer of funds, that information on the payer required under the regulation is missing or incomplete. In this case, it shall only use a payment system with technical limitations if it is able to inform the payment service provider of the payee thereof.

III. Cooperation obligations and penalties

Payment service providers shall respond fully and without delay, in accordance with the procedural requirements established in the national law, to enquiries from the authorities responsible for combating money laundering concerning the information on the payer accompanying transfers of funds and corresponding records.

The Regulation requires that the Member States lay down rules on penalties applicable to infringements of the provisions of this Regulation and applying from 15 December 2007.

12. Law of 18 December 2006 concerning the distance marketing of consumer financial services

On 21 December 2006, the law of 18 December 2006 (the "Law") on distance marketing of consumer financial services implementing Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending the law of 27 July 1997 on the insurance contract, the law of 14 August 2000 on electronic commerce and the law of 5 April 1993 relating to the financial sector, entered into force.

The CSSF outlined in its circular CSSF 07/281 published on 27 February 2007 the essential elements of the Law.

Scope

The Law applies to all distance contracts concerning financial services concluded between a supplier and a consumer, except the services relating to insurances and personal pensions in the form of an insurance contract. Distance contract means any contract under an organised distance sales or service-provision scheme run by the supplier who makes exclusive use of one or more means of distance communication. As exclusive use is a condition, the Law is not applicable where at any stage of the precontractual process, including the signing of the contract itself, the parties are physically present.

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If the contract is concluded by electronic means, the law of 14 August 2000 on e-commerce applies in addition.

Information to be provided to the consumer

In good time before the consumer is bound by any distance contract or offer, he shall be provided by detailed information including in particular precise information on the supplier himself, the financial service offered by the supplier, the terms on the distance contract as well as further information, i.e. the existence of an out-of-court complaint and redress mechanism for the consumer.

In case of voice telephoning communications initiated by the supplier, he shall make explicitly clear his identity and the commercial purpose of his call at the beginning of any conversation with the consumer and, subject to the explicit consent of the consumer, give restricted information on the main characteristics on the financial service, the total price to be paid by the consumer, the existence or absence of a right of withdrawal and inform the consumer that further information is available on request and of what nature this information is.

Communication of the contractual terms and conditions

The supplier shall communicate to the consumer all the contractual terms and conditions and all the information mentioned above on paper or on another durable medium available and accessible to the consumer in good time before the consumer is bound by any distance contract or offer.

Right of withdrawal

The consumer has a period of 14 calendar days to withdraw from the contract without penalty and without giving any reason. This period is extended to 30 calendar days in distance contracts relating to personal pension operations. The period for the withdrawal shall begin either at the day of the conclusion of the distance contract or at the day on which the consumer receives the contractual terms and conditions and the information mentioned above, if that is later than the date of conclusion of the contract.

The right of withdrawal does not apply to certain financial services whose price depends on fluctuations in the financial market outside of the supplier's control, as there are – among others – services related to foreign exchange, money market instruments, transferable securities, units in collective investment undertakings and contracts whose performance has been fully completed by both parties at the consumers express request.

Unsolicited communications

All kinds of communications destined for direct or indirect promotion of goods, services or the image of a supplier by email, an automated calling system without human intervention, telephone or fax machines shall require the consumer's prior consent. Other means of distance communication may only be used if the consumer has not expressed his manifest objection.

Burden of proof

Any contractual term or condition providing that the burden of proof of the respect by the supplier of all or part of the obligations incumbent on him should lie with the consumer shall be an unfair term within the meaning of the legislation on consumer protection.

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13. Loi du 22 décembre 2006 promouvant le maintien dans l'emploi et définissant des mesures spéciales en matière de sécurité sociale et de politique de l'environnement transposant l'accord "Tripartite" du 28 avril 2006 (ci-après la "Loi Tripartite") et réformant la loi modifiée sur le congé parental du 12 février 1999 ("Loi réformant le congé parental")[11]

I. La Loi Tripartite

La Loi Tripartite comporte des mesures en faveur de l'emploi modifiant ainsi toute une série de lois existantes, les modifications essentielles sans être exhaustives étant reprises ci-après et peuvent être résumées comme suit:

a) Mesures promouvant le maintien de l'emploi

- Obligations pour l'employeur occupant au moins quinze salariés de notifier au secrétariat du Comité de conjoncture tout licenciement pour des raisons non inhérentes à la personne du salarié au plus tard au moment de la notification du préavis de licenciement.

- En cas de constat par le Comité de conjoncture de cinq licenciements pour des raisons non inhérentes à la personne du salarié pendant une période de référence de trois mois ou de huit licenciements pendant une période de six mois par un même employeur, celui-ci peut inviter les partenaires sociaux à entamer des discussions en vue de l'établissement d'un plan de maintien dans l'emploi.

- Les discussions concernant le plan de maintien de l'emploi doit nécessairement porter sur les règles suivantes:

  - application de la législation sur le chômage partiel;
  - aménagements possibles de la durée de travail dont application d'une période de référence plus longue ou plus courte;
  - travail volontaire à temps partiel;
  - recours à des comptes épargne-temps;
  - réduction de la durée de travail ne tombant pas sous le champ d'application de la législation sur le chômage partiel, prévoyant le cas échéant la participation à des formations continues et/ou des reconversions pendant les heures de travail libérées;
  - possibilités de formation voire de reconversion permettant une réaffectation de salariés dans une autre entreprise, appartenant le cas échéant au même secteur d'activités;
  - application de la législation sur le prêt temporaire de main-d'œuvre;
  - accompagnement personnel des transitions de carrière, le cas échéant en prenant recours sur des experts externes;
  - application de la législation sur la préretraite-ajustement;
  - période d'application du plan de maintien dans l'emploi;
  - principes et procédures régissant la mise en œuvre et le suivi du plan de maintien dans l'emploi.

Les partenaires sociaux négocient ce plan et informent le Comité de Conjoncture sur le résultat des discussions en lui soumettant le plan négocié ou en lui transmettant un rapport signé par les partenaires sociaux retraçant le contenu et les conclusions des discussions menées.

[11] Law of 22 December 2006 promoting the maintenance of employment and defining special measures in the field of social security implementing the "tripartite" of 28 April 2006 and amending the amended law of 12 February 1999 on parent leave.

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- Exonération d'impôt pour l'indemnité de départ prévue par le Code du travail ou celle convenue par la convention collective de travail.

- Limitation de l'exonération d'impôt à un montant de douze fois le salaire social mensuel minimum par travailleur non qualifié, c'est-à-dire à concurrence d'un montant de 18.843,36 € pour l'année d'imposition 2007 de l'indemnité pour résiliation abusive fixée par la juridiction du travail par une transaction ou l'indemnité bénévole de licenciement allouée en cas de résiliation du contrat de travail par le travailleur ou par accord bilatéral des parties. En cas de fractionnement du paiement de cette indemnité, il y a lieu de prendre comme référence le salaire social minimum au 1er janvier de l'année d'imposition du premier versement de l'indemnité.

Les mêmes seuils valent pour l'indemnité bénévole de licenciement en cas de fermeture totale ou partielle de l'entreprise et de l'indemnité de départ convenue dans un plan social qui dépasse l'indemnité de départ prévue par le Code du travail ou une convention collective.

- Les négociations d'un plan social dans le cadre d'un licenciement collectif tel que prévu à l'article 166-1 et suivants du Code du travail devront porter à peine de nullité sur le même sujet que ceux à reprendre dans le plan de maintien de l'emploi énumérés ci-avant, à l'exception du volet "travail volontaire à temps partiel et recours à des comptes épargne temps à moins qu'un plan de maintien de l'emploi ait déjà été négocié et homologuer par le ministre ayant l'emploi dans ses attributions au cours de six mois précédant le début des négociations.

Ce n'est qu'après avoir abordé les négociations sur les points repris ci-avant que celles-ci pourraient ensuite porter sur la mise en place d'éventuelles mesures de compensation financière.

Ces modifications sont effectives à partir du 1er janvier 2007.

b) Modification de législation sur le chômage et le Fonds pour l'Emploi et sur les mesures en faveur de l'emploi des jeunes

La Loi Tripartite prévoit essentiellement des modifications au niveau de la durée d'indemnisation de chômeurs et des règles concernant le chômage des travailleurs indépendants et de l'introduction d'une convention d'activation individualisée. Pour ce qui est des mesures en faveur de l'emploi de jeunes, la Loi Tripartite introduit le contrat d'appui à l'emploi et le contrat d'initiation à l'emploi.

Les modifications essentielles mentionnées ci-avant n'entreront en vigueur que le 1er juillet 2007.

c) Modification de la législation sur les prestations pour travail supplémentaire et de jours fériés légaux

Le recours à des heures supplémentaires demeure limité aux cas exceptionnels par la loi, c'est-à-dire:

1. pour prévenir la perte de matières périssables ou éviter de compromettre le résultat technique du travail;
2. pour permettre des travaux spéciaux tels que l'établissement d'inventaires ou de bilans, les échéances, les liquidations et les arrêtés de compte;
3. dans des cas exceptionnels qui s'imposeraient dans l'intérêt public et en cas d'événements présentant un danger national.

La prestation d'heures supplémentaires ou de travail de jours fériés légal n'est plus subordonnée à une autorisation préalable de l'Inspection du Travail et des Mines. Il suffit d'une notification ou le cas échéant d'une requête d'autorisation avisée favorablement par

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la délégation s'il en existe ou à défaut par les salariés concernés, la notification préalable de cette requête vaut autorisation.

Suivant circulaire informative de l'Inspection du Travail et des Mines, cette demande est à adresser par voie de formulaire préparé par celle-ci à adresser par fax.

II. Loi réformant le congé parental (ci-après la "Loi")

Les modifications essentielles de la Loi qui réforme le régime du congé parental instaurés par la loi du 12 février 1999 peuvent être résumées comme suit:

a) Distinction entre congé parental indemnisé et non indemnisé

La Loi introduit un congé parental non indemnisé entre 3 et 6 mois pour les parents dont les enfants n'ayant pas atteint l'âge de 5 ans au 1er janvier 1999 et qui n'ont pas encore pris de congé parental. La demande doit être introduite dans un délai de 6 mois à partir de l'entrée en vigueur de la Loi c'est-à-dire à partir du 1er janvier 2007 et doit être entamée avant l'expiration de l'année qui suit l'entrée en vigueur de la Loi. La Loi prévoit encore un congé parental non indemnisé de 3 mois pour le 1er congé parental dans le cas où le congé parental n'aurait pas été pris consécutivement au congé de maternité, congé d'accueil.

b) Délais de notification

La Loi prévoit que les délais pour le 2ième parent sollicitant un congé parental indemnisé est de 6 mois, le délai pour le 1er congé parental suivant immédiatement le congé de maternité étant toujours de 2 mois. La Loi ne prévoit pas de délais pour le congé parental non indemnisé de 3 mois.

c) Conditions d'attribution du congé parental

La condition d'affiliation à l'assurance pension est remplacée par l'affiliation à l'assurance maladie. L'occupation de 12 mois précédant immédiatement le début du congé parental auprès d'un employeur peut être interrompue pour autant que cette interruption ne dépasse pas les 7 jours. Pour ce qui est du 2ième congé parental lié à la condition que l'enfant pour lequel le congé est demandé n'a pas atteint l'âge de 5 ans accompli, le congé doit être pris au moins à raison de la moitié des mois avant que l'enfant n'ait atteint l'âge de 5 ans accompli.

d) Remplacement du salarié absent

En cas de remplacement du salarié bénéficiant du congé parental, par un salarié lié par un contrat à durée déterminée ce remplacement ne doit pas nécessairement être pour le poste occupé par le bénéficiaire du congé parental mais peut être conclu pour un autre poste libéré suite à une réorganisation liée à l'octroi du congé parental.

Il est possible de remplacer le salarié bénéficiant du congé parental par un contrat de durée déterminée pouvant débuter 3 mois avant la date du début du congé parental et pouvant prendre fin 3 mois après la fin du congé parental.

e) Formalités et délais de démission

Le salarié bénéficiant du congé parental et ne retournant plus à son poste de travail après la fin du congé parental a l'obligation de notifier sa démission à l'employeur, cette notification ne pouvant avoir lieu qu'au plus tôt le premier jour suivant le dernier jour du congé parental.

f) Période d'essai

Le congé parental ne peut être demandé qu'après expiration de la période d'essai.

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g) Cession et saisie

La Loi prévoit des cas précis pour lesquels l'indemnité peut être cédée, saisie ou mise en gage notamment dans le cadre de la souscription d'un prêt hypothécaire consenti pour la construction ou l'acquisition d'un logement familial.

h) Effets sur le contrat en cours

Le contrat est toujours suspendu. Néanmoins le salarié et l'employeur peuvent convenir que le salarié assiste à certaines manifestations comme des mesures de formation continue et les réunions de services.

i) Fixation d'une indemnité forfaitaire

Le salarié touchera une indemnité non indexée de 1.787,31 € par mois pour le congé à plein temps et de 889,15 € pour le congé parental à temps partiel.

14. EU and CESR developments on the prospectus directive

Frequently asked questions regarding Prospectuses: Common positions agreed by CESR Members (CESR/07-110)

The Committee of European Securities Regulators (CESR) has published on 16 February 2007 an updated version of the joint responses of all EU securities supervisors to commonly asked questions on the day-to day application of the Prospectus Directive (2003/71/EC) and the Commission's regulation on prospectuses (EC 809/2004) to provide marked participants with clarification and greater certainty to their most common questions.

Commission Regulation (EC) No 211/ 2007 of 27th February 2007 amending Regulation (EC) No 809/2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards financial information in prospectuses where the issuer has a complex financial history or has made a significant financial commitment

Commission Regulation (EC) No 211/ 2007 was published on 28th February 2007 in the Official Journal of the European Union and entered into force the day after its publication. Regulation (EC) No 809/2004 has been amended to allow for the competent authority of the home Member State, in cases where the issuer of a security has a complex financial history, or has made a significant financial commitment, and in consequence the inclusion in the registration document of certain items of financial information relating to an entity other than the issuer is necessary to enable the investor to make an informed assessment of the issuer's financial position and prospects, to request that the issuer, the offeror or the person asking for admission to trading include those items of information in the registration document.

15. Laws of 23rd March, 2007 amending the law of 10th August, 1915 on commercial companies

The law of 10th August, 1915 on commercial companies has been amended by two laws of 23rd March 2007.

The first law of 23rd March 2007 (resulting from bill of law 4992) essentially introduces provisions regarding:

(i) mergers and divisions involving all types of Luxembourg law legal entities (including economic interest groupings);
(ii) cross border mergers and divisions;
(iii) transfers of assets, transfers of branches and all assets and liabilities transfers;
(iv) transfers of professional assets and liabilities; and

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(v) the removal of certain timing constraints regarding the payment of interim dividends in *sociétés anonymes* and *sociétés en commandite par actions*.

The second law of 23rd March 2007 (resulting from bill of law 5658) contains certain additional rules concerning cross-border mergers.

You will find on our web site under the following links a memorandum containing a summary of these new provisions, as well as an unofficial up to date consolidation in French of the law of 1915 on commercial companies and an English translation of such law:

- Memorandum on the amendments to the law of 1915 on commercial companies by the two laws of 23rd March, 2007
- Loi du 10 août 1915 concernant les sociétés commerciales (mise à jour officieuse au 2 avril 2007)
- Consolidated Version of the Law of 10th August, 1915 on commercial companies and of the amending laws in force as at 2nd April, 2007

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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