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Luxembourg

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Newsletter Q1 2016

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Domiciliation of a Luxembourg company: Recent update further to a decision of the Court of Appeal of Luxembourg

The Court of Appeal of Luxembourg recently rendered, on 16th December 2015, a decision (the "**Court Decision**") pursuant to which it had to qualify from a legal standpoint a "services and premises provision agreement": was it a lease or a service agreement? A service or a domiciliation agreement?

This Court Decision is of particular interest as the Luxembourg Court decided that a business centre was illegally providing domiciliation services. However, the Court did not fully extend its reasoning: it considered that the agreement was in breach of the Domiciliation Law (as defined below), which is of public order. Thus it declared that the agreement was null and void for this reason, yet did not sentence the business centre for illegally carrying out this activity.

This decision is the perfect opportunity to remind ourselves of the various options available to a company or a group of companies wishing to establish its registered office in Luxembourg, and the pitfalls that need to be avoided.

1 How to establish its registered office in Luxembourg?

Different options are available for a company to establish its registered office in Luxembourg.

(a) Definition of registered office

The registered office (*siège statutaire*) of a Luxembourg company corresponds in principle to the place of its central administration (*administration centrale*). It is the place where the company may be found by third parties for the purpose of its legal existence, and where the corporate documents and the meetings of its corporate bodies are held.

The address of the registered office has to be included in the articles of association of a Luxembourg commercial company.

(b) Different options to establish its registered office in Luxembourg

Different options exist:

- Acquisition of property for its own offices;
- Conclusion of a lease agreement in order to rent premises to establish its registered office;
- Conclusion of a sublease agreement;
- Conclusion of a domiciliation agreement.

(c) Definition of domiciliation

Domiciliation is the activity consisting of offering to other companies a place to establish their registered office together with the provision of additional services related thereto.

It offers a much wider range of services than the other options, limited to the provision of premises. Indeed, domiciliation also offers all the required services to establish a company in Luxembourg.

The law of 31 May 1999 (as amended) (the "**Domiciliation Law**") regulates the activity of domiciliation and sets out specific requirements which have to be fulfilled.

(d) Assessment of the requirements of the Domiciliation Law

- The Court Decision is of particular interest with regards to the appreciation, in practice, of the existence of a domiciliation situation. Indeed,
  - It confirmed that the activity of domiciliation consists of the provision of premises plus certain additional services, such as account maintenance (*tenue des comptes sociaux*), preparation of annual accounts or consolidated annual accounts, preparation of tax returns, or provision of a mandate of manager, director or statutory auditor;
  - It took all elements of fact into consideration to requalify the "services and premises provision agreement" into an illegal domiciliation agreement rather than in a lease agreement, as it considered that the most significant characteristic of the agreement was not the simple provision of premises, but the provision of the additional services (provision of a phone receptionist, reception of clients, preparation of certain tax administrative

documents and payment of invoices, among others, were included);

- It then provides elements of assessment in order to draw a line between the domiciliation activity and business centres activities, which have to be strictly limited to the provision of offices, meeting rooms or work spaces and, as the case may be, with the necessary equipment (furniture) and resources (electricity, Wi-Fi, phone) to carry out the business.

- The size of the premises, the excessive number of companies established at the same address and the absence of private premises reserved for the exclusive use of each company (as time sharing practices) are also taken into account by Luxembourg courts and may lead to the requalification of lease agreements into domiciliation agreements.

(e) Companies entitled to be domiciled

Certain types of companies are not entitled to require domiciliation services to establish their registered office. This is the case for operational companies e.g. companies holding a business license and having any craft, commercial or liberal profession activities.

(f) Entities and persons entitled to act as a domiciliation agent

The Court Decision reiterated that a third party has to be a qualified domiciliation agent when its role exceeds the simple provision of premises.

Only a registered member of one of the authorized regulated professions may act as a qualified domiciliation agent: professional of the financial or the insurance sector, attorney-at-law (*avocat à la Cour)*, statutory auditor (*réviseur d'entreprises*), independent expert auditor (*réviseur d'entreprises agréé*), or an accountant (*expert-comptable*).

(g) Consequences of a potential breach of the Domiciliation Law

An illegal domiciliation situation may lead to the nullity of the prohibited domiciliation agreement. Even if the Court Decision did not take position on this matter, it may impact the domiciled company: The failure to have a registered office in compliance with Luxembourg laws is considered as a serious breach of law, and, in such a case, the Luxembourg Public Prosecutor may be entitled to introduce a dissolution proceeding against the domiciled company.

2 The particular case of the group of companies

Certain international groups of companies are currently looking for solutions to establish entities in Luxembourg while trying to save costs at the same time.

Even if the general rules set out above remain applicable, a specific exemption exists under the Domiciliation Law which may benefit to such groups of companies. This may facilitate their migration or establishment process in Luxembourg. Some practical questions may however be raised.

(a) Exemption to the Domiciliation Law for groups of companies

One of the exceptions provided for in the Domiciliation Law benefits specifically to groups of companies, as a company may allow other companies to establish their registered office at its own premises, without falling under the scope of the activity of domiciliation, if the said companies belong to the same group.

There is no legal definition of the concept of "group of companies" under Luxembourg law. However it is generally admitted that a group is composed of different and separate companies under significant influence (directly or indirectly) of a sole and same entity, with an economical dependence between them. The interpretation of "significant influence" may vary from one situation to another. A case law decision stated that such significant influence requires a minimum of control of at least 10% of the shareholding or voting rights.

(b) Establishment of a group of companies in the Grand-Duchy of Luxembourg

- **Benefit from the exemption**
  If the above conditions of the group exemption are met, the requirements applicable to the domiciliation activity under the Domiciliation Law do not apply, and the company is authorised to provide other companies of the group with premises and services without falling within the scope of the Domiciliation Law.

- **Alternative options**
  If the conditions of the group exemption are not met, alternative options are still available (e.g. the entry into a lease or a sublease agreement remains possible).

  In the case of provision of services in addition to the premises by one company to another, the situation would require particular attention in light of the Domiciliation Law and the Court Decision.

Should you have any queries in this respect, please feel free to contact us.

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Amendments to the Rules and Regulations of the Luxembourg Stock Exchange making disclosure more straight - forward (as of 1st January 2016)

The Luxembourg Stock Exchange ("**LuxSE**") has reviewed and updated its rules and regulations (the "**Rules & Regs**") in order to put them in line with, *inter alios*, the requirements of the new Transparency Directive 2013/50/EU (the "**New Transparency Directive**"), the Commission Regulation (EC) 809/2004 implementing Directive 2003/73/EC as regards information contained in prospectuses (the "**Regulation**") and the new practices of the market and its operators.

The updated version of the Rules & Regs has entered into force as of 1st January 2016.

1 An overview of the amendments to the Rules & Regs

The amendments aim to ensure the compliance of the Rules & Regs with the local and European regulations as stated above (including but not limited to) and such amendments only concern Parts 1 and 2 as well as the appendices of the Rules & Regs. Hence, the Parts 3 and 4 of the Rules & Regs remain unaltered.

The main changes which have been carried out by the LuxSE may be listed as follows:

(a) Certain obligations as laid down in the Rules & Regs have been clarified and/or lightened in accordance with the terms of the Regulation

Information to be contained in the prospectus regarding securities admitted to trading on Euro MTF have been updated in the relevant appendices of the Rules & Regs.

Hence, if the issuer prepares both consolidated and non-consolidated annual accounts, the issuer will only be required to provide the consolidated annual accounts and the latter is no longer required to attach both documents to the prospectus.

Another significant change is the fact that the issuer will need to provide information only with regard to its main subsidiaries. Consequently, the issuer does no longer have to provide individual details relating to the undertakings in which it holds at least 10% of the shares.

A number of other improvements have also been made regarding information to be provided about the issuer and its activity, for instance, the issuer does not need anymore to provide the amount of any convertible debt securities, exchangeable debt securities or debt securities with warrants attached as well as the net turnover during the past two financial years and the description of the principal investments made since the date of the last published financial statements has been lightened.

It may be noted that, by taking into consideration the aforementioned improvements, the information to be provided by the issuer in the prospectus have been considerably reduced.

(b) Implementation of special rules for securities with a denomination of at least EUR 100,000 (one hundred thousand euros)

The LuxSE has made changes to the Rules & Regs regarding securities with a denomination being equivalent to at least EUR 100,000 (one hundred thousand euro) and to be traded on the Euro MTF to bring them into line with the specific requirements under the Regulation. As a result, certain exceptions have been included in the Rules & Regs for such type of securities.

By way of illustration, the name and description of the natural or legal persons underwriting or guaranteeing the issue for the issuer, indication of the net proceeds of the issue and the purpose of the issue and intended application of its proceeds are no longer a part of information to be provided regarding the issue for securities with a denomination of at least EUR 100,000.

(c) Certain Rules & Regs have been adjusted according to the provisions of the New Transparency Directive and the market needs

Prior to the amendments, every issuer whose debt securities are admitted to trading on the Euro MTF had the duty to inform the investors of any new issuing of debt securities traded on another market to that operated by the LuxSE and including any related guarantee.

Following the publication of the New Transparency Directive, the LuxSE has made the decision to remove this obligation from the Rules & Regs in order to correspond with the New Transparency Directive's provisions.

Moreover, for every issuer whose securities are admitted to trading on the Euro MTF, Luxembourg was referenced as the place where documents shall be made available by the issuers to the investors.

As a result of developments of the market practices, such documents shall only be made available by electronic means from the issuer to the relevant investors.

(d) The list of supranational institutions and organisations has been updated

The list of supranational institutions and organisations at the regional level exempted from the obligation to publish a prospectus for the admission to trading on the Euro MTF has been renewed.

Indeed, the West African Development Bank (*Banque Ouest Africaine de Développement*) has been included to such list and therefore, the latter is now, among others, also exempted to publish a prospectus for trading on the Euro MTF.

(e) Other modifications to the Rules & Regs

The LuxSE has removed the references to laws and regulations which have become obsolete from the Rules & Regs and as a consequence, the Appendix VI of the Rules & Regs has been completely substituted by new provisions.

Therefore, information to be included in the prospectus for the admission to trading on the Euro MTF of the shares and units issued by undertakings for collective investment other than the closed-end type (whose securities are not publicly exposed, offered or sold in or from Luxembourg) according to the Appendix VI of the Rules & Regs may be quickly sum up as follows:

- General information about the issue;
- Information concerning those responsible for the prospectus;
- Information concerning the investment fund;
- Information concerning the management company;
- Information concerning the depositary;
- Information concerning the investment adviser(s);
- Other information; and
- Information concerning the fund's assets and liabilities, financial position and profit and losses.

In addition to the foregoing, the LuxSE has reviewed some inconsistencies related to the terms used in the Rules & Regs and has improved such terms so as to be in line with the terminology used in, among others, the Regulation.

2 The benefits of the update of the Rules & Regs

The LuxSE operates both a regulated market (*Bourse de Luxembourg*) and an exchange-regulated market (in the form of a multilateral trading facility), namely the Euro MTF. The LuxSE has succeeded in opening largely to diversified issuers and broad types of securities (such as CoCo bonds, dim sum bonds, indexed bonds and Islamic bonds (*sukuk*)).

It is worth saying that, to date, the LuxSE welcomes over 3,000 issuers from more than 100 jurisdictions. The LuxSE listing is a great opportunity to raise capital and undertake new projects as this provides more visibility and expands the scope of the potential investors.

The recent amendments are an evidence of improvement of the Rules & Regs governing the LuxSE which in turn contribute to the progress and attractiveness of the LuxSE.

This recent update of the Rules & Regs is a first step towards a continuous improvement of the LuxSE as the Rules & Regs are still being reviewed in order to meet the needs of the market and its operators.

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UCITS V Implementation in Luxembourg

1 Background

The Law of 10 May 2016 (the "**UCITS V Law**") implementing Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014, amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities ("**UCITS**") as regards depositary functions, remuneration policies and sanctions ("**UCITS V**") shall enter into force on 1 June 2016.

As clarified in Press Release 16/10 issued by the *Commission de Surveillance du Secteur Financier* (the "**CSSF**") on 2 March 2016, the implementation of UCITS V in Luxembourg is also based on the following instruments:

- The Commission Delegated Regulation (EU) 2016/438 with the level II measures regarding obligations of the depositary banks (the "**Delegated Act**"). The Delegated Act was published in the Official Journal of the European Union on 24 March 2016 and will apply from 13 October 2016;

- The European Securities and Markets Authority ("**ESMA**") Guidelines on sound remuneration policies which were published on 31 March 2016 and will enter into force as of 1 January 2017 (Ref. ESMA/2016/411);

- The ESMA Questions and Answers on the application of the UCITS Directive (the "**ESMA Q&As**"), as last updated on 1 February 2016 and 5 April 2016 (Ref. ESMA/2016/569).

Furthermore, the entry into force of UCITS V had been anticipated in Luxembourg with the issuance of CSSF Circular 14/587 (dated 11 July 2014), as amended by CSSF Circular 15/608 (dated 23 March 2015) (the "**Circular**").[1]

2 Regulatory Impact

(a) Documentation

The ESMA Q&As clarify with regard to the update and revision of the UCITS fund documentation that:

[1] Please refer to our Newsflash dated July 2014

- **Prospectus**
  While the essential elements of a prospectus must be kept up-to-date at all times, a UCITS may update its prospectus in order to include the relevant disclosure regarding remuneration at the next occasion when other updates are made to the prospectus, or in any event by 18 March 2017 at the latest;

- **KIID**
  Similarly, relevant updates to the KIID shall be made at the first occasion when the KIID is revised or replaced for another purpose, but no later than at the next annual update of the KIID after 18 March 2016;

- **Annual Report**
  For annual reports relating to periods that end on or after 18 March 2016, but before the UCITS management company (if any) has completed its first annual performance period, remuneration-related information should be included in the report on a best efforts basis and to the extent possible, along with an explanation regarding the basis for any omission;

- **Depositary Contract**
  UCITS depositary contracts should be revised promptly. In any case, all existing contractual provisions which would conflict with the UCITS V liability requirements are considered void with effect as from 18 March 2016.

(b) Part II Funds

The UCITS V Law introduces a single depositary regime by aligning the depositary regime applicable to all undertakings for collective investment established under Part II of the Law of 17 December 2010 relating to undertakings for collective investment, to the regime applicable to UCITS.

3 Next Steps

Considering that the Delegated Act shall apply from 13 October 2016, the CSSF will revise the Circular with an effective date identical to the date by which the Delegated Act applies. All aspects specifically covered by the UCITS V Law and/or the Delegated Act should be deleted from the revised Circular.

In the meantime, in the event of a conflict between the provisions of the Circular and the UCITS V Law, the provisions of the latter shall prevail.

As announced in Press Release 16/10, the CSSF shall (i) put in place a fast track procedure for the approval of prospectus changes relating only to the UCITS V remuneration and depositary aspects; and (ii) submit a questionnaire to UCITS management companies and self-managed UCITS regarding the key aspects of the revised remuneration policies.

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