Luxembourg

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The simplified private limited liability company

In order to promote entrepreneurship and stimulate growth, the Luxembourg Government has introduced the draft law dated 2 February 2015 for the purpose of creating a new type of private limited liability company ("*Société à responsabilité limitée simplifiée*" or "*S.à r.l.-S*") that can be incorporated pursuant to a private deed with a corporate capital of EUR 1.- only.

Apart from the special provisions applicable to the S.à r.l.-S., the S.à r.l.-S will be governed by the same set of rules as the S.à r.l.

1. A draft law targeted at entrepreneurs

The S.à r.l.-S is dedicated to private individuals only and the draft law expressly prohibits legal persons to either hold corporate units of an S.à r.l.-S or to manage them.

In addition, private individuals are not entitled to own shares in more than one S.à r.l.-S.

These limitations have been introduced by the Government in order to prevent the misuse of the S.à r.l.-S for any purpose that is contrary to the spirit of the draft law.

Non-compliance with any of these two prohibitions would result either in (i) the invalidity of the deed pursuant to which any legal person has become a member or a manager of an S.à r.l.-S or (ii) the joint and several liability for all obligations and liabilities of any additional S.à r.l.-S of which an individual would become a member of.

2. Purpose

The S.à r.l.-S is dedicated to commercial, craft and industrial activities and certain liberal professions that require a business authorization from the Ministry of Middle Classes.

To ensure that S.à r.l.-S are not employed for any means other than those foreseen by the draft law, the corporate object of an S.à r.l.-S must be an activity that requires a business authorization, such as commercial activities (*e.g.* trade, restaurants, catering, transportation, industrial activities, etc.), craft activities (*e.g.* construction, engineering, audiovisual, art, etc.) and a certain number of liberal professions.

Given the fact that the corporate purpose of any S.à r.l.-S requires such S.à r.l.-S to hold a business authorization, the draft law subjects the registration of an S.à r.l.-S with the Luxembourg Trade and Companies Register ("RCS") to filing such business authorization with the RCS.

3. Formalities

The S.à r.l.-S may have one or several members and can be incorporated pursuant to a private deed.

After its incorporation, the newly incorporated S.à r.l.-S will be required to file the names and surnames of its members, their addresses, the number of corporate units held by each of them and its business authorization with the RCS.

The corporate capital of an S.à r.l.-S may consist of a symbolic Euro only but must be subscribed and fully paid up at the time of incorporation, whether by contributions in cash or in kind.

The maximum corporate capital of the S.à r.l.-S is set to EUR 12,394.68; a capital increase beyond that limit is permitted but requires the transformation of the S.à r.l. into another type of company pursuant to a notarial deed.

Finally, it is worthwhile noting that the Luxembourg Government has introducing a provision pursuant to which each year at least one-twentieth of the net profits of the S.à r.l.-S shall be allocated to the creation of a reserve, in order to protect the S.à r.l.-S' creditors.

This allocation shall cease to be compulsory when the amount of the corporate capital plus the reserve has reached the amount of EUR 12,394.68.

As a conclusion, it can be stated that the introduction of the S.à r.l.-S into Luxembourg's comprehensive and efficient legal framework would provide entrepreneurs with a convenient tool to operate the separation between their private assets and business assets.

In a Nutshell
Minimum corporate capital: EUR 1.-
Possibility of incorporation under a private deed
Dedicated to private individuals only
Joint and several responsibility of any individual that holds corporate units in more than one S.à r.l.-S
Business authorization is required for registration purposes with the RCS
Compulsory payment of an annual reserve of 5 % of the annual benefits

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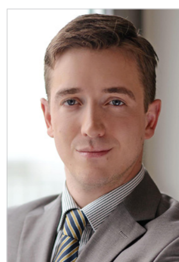

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CSSF Circular 14/598 implementing ESMA's Opinion on the Review of the CESR's guidelines on a common definition of European money market funds

1. Review process

Following the publication of the CESR's Guidelines on a common definition of European money market funds (Ref. CESR/10-049) (the "**MMF Guidelines**") on 19 May 2010, the European Securities and Markets Authority ("**ESMA**") has issued an opinion (Ref. ESMA/2014/1103) (the "**Opinion**") dated 22 August 2014 introducing a certain number of amendments to the MMF Guidelines (the "**Revised MMF Guidelines**").

The rationale for the Opinion is based on the requirements imposed by Regulation (EU) No 462/2013 dated 21 May 2013 (the "**Regulation**") amending Regulation (EC) No 1060/2009 on credit rating agencies. In this respect, the Regulation introduces a new Article 5c stating that supervisory authorities in Europe shall review and delete, as the case may be, all references to credit ratings in regulatory texts, where such references have the potential to trigger sole or mechanic reliance on said credit ratings.

In accordance with these requirements, ESMA has conducted a review of the MMF Guidelines leading to the conclusion that references to credit ratings contained therein had the potential to trigger sole or mechanic reliance on external credit ratings relating to the assessment of the credit quality of the money market instruments in which a European money-market fund ("MMF") could invest.

2. New provisions

Consequently, ESMA amended the MMF Guidelines by most notably requiring the management company of an MMF (or the MMF itself in case it is self-managed) to put in

place an internal documented assessment for money market instruments in order to determine their high credit quality.

The specific amendments pursuant to the Opinion may be summarised as follows:

- Short-term MMFs shall consider ratings made by external credit rating agencies (registered and approved by ESMA) but further undertake their own internal documented assessment of the credit quality of such instruments in order to ensure investment in high quality money market instruments. While there should be no mechanical reliance on such external ratings, a downgrade below investment grade or any other equivalent rating grade by a credit rating agency of a money market instrument should lead to a new internal assessment of the credit quality of such instrument in order to ensure it continues to be of appropriate quality (see Point 4 of Box 2 of the Revised MMF Guidelines);

- MMFs may further, as an exception to the above provision, hold sovereign issuance (i.e. money market instruments issued or guaranteed by a central, regional or local authority or central bank of a Member State, the European Central Bank, the European Union or the European Investment Bank) of a lower internally-assigned credit quality based on the internal assessment made by the relevant MMF's manager (see Point 2 of Box 3 of the Revised MMF Guidelines).

3. Implementation in Luxembourg

In Luxembourg, the Revised MMF Guidelines have been implemented through CSSF Circular 14/598 dated 2 December 2014 (the "CSSF Circular"). In accordance to Box 1, the requirements imposed by the Revised MMF Guidelines shall apply to all Luxembourg-based undertakings for collective investment and specialised investment funds labelling or marketing themselves as MMFs.

The CSSF Circular came into force with immediate effect as of the date of its publication.

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The European redefinition of the prudential supervision and reporting and its impact on the Luxembourg supervisory and prudential reporting scheme

The European impulse to redefine the prudential supervision and reporting applicable to credit institutions results in, among other, (I.) the implementation in Luxembourg of the European Single Supervisory Mechanism and related harmonization of the European supervisory framework as well as (II.) the introduction of a more complete risk monitoring and management framework in the Luxembourg supervisory and prudential reporting scheme.

1. The implementation in Luxembourg of the European Single Supervisory Mechanism and related harmonization of the European supervisory framework

As you may know the European Central Bank is since 4 November 2014 the single supervisor of all the banking sector in the Euro zone in the framework of the Single Supervisory Mechanism (more details here).

With the aim to create an harmonized European supervisory framework, the European Commission adopted on 16 April 2014 the Commission Implementing Regulation EU n°680/2014 laying down implementing technical standards with regard to supervisory reporting of institutions according to Regulation (EU) N°575/2013 of the European Parliament and of the Council (the “Regulation CRR”).

Considering the above European redefined supervisory framework and to clarify the impact of its implementation and application in Luxembourg, the Supervisory Commission of the Financial Sector (Commission de Surveillance du Secteur Financier, the “CSSF”) has published the following Circulars:

- CSSF Circular 14/593[1] on supervisory reporting requirements applicable to credit institutions as from 2014: such Circular sets forth all recent modification of the reporting requirements as a result among other of the application of the Regulation CRR. As a result the tables B 1.2, B 1.4, B 2.3 and B 6.3 of the former prudential reporting relating to foreign currency positions, prudential reporting scheme regarding capital adequacy and information on large exposure are not applicable as of 1 January 2014 and the tables relating to the prudential reporting scheme on financial information on a consolidated basis (i.e. B 6.1, B 6.6, B 6.2 and B 6.7) are not applicable as of 1 July 2014;

- CSSF Circular 14/599[2] on the treatment of the lump sum provision and the AGDL (deposit guarantee scheme) provision in the prudential reporting: such Circular mainly sets forth the technical alignment in the financial reporting as a result of the Regulation CRR, the alignment of the treatment of the lump sum provision with regard to own funds as well as the clarification of the transition from a deposit guarantee scheme supplied with provisions to a deposit guarantee scheme supplied ex ante with payments in a fund;

- CSSF Circular 14/596[3] concerning the communication regime under the Single Supervisory Mechanism for significant entities and the repeal of the VISA procedure for published annual account.

2. A more complete risk monitoring and management framework in the Luxembourg supervision and prudential reporting scheme

To reduce the credit institutions’ reliance on public sector funding sources, the European Systemic Risk Board (ESRB) on funding credit institutions published on 20 December 2012 a range of recommendations[4] to enhance the monitoring and assessment of credit institutions’ funding risks and funding

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[1] http://www.cssf.lu/fileadmin/files/Lois_reglements/Circulaires/Hors_blanchiment_terrorisme/cssf14_593eng.pdf

[2] http://www.cssf.lu/fileadmin/files/Lois_reglements/Circulaires/Hors_blanchiment_terrorisme/cssf14_599eng.pdf

[3] http://www.cssf.lu/fileadmin/files/Lois_reglements/Circulaires/Hors_blanchiment_terrorisme/cssf14_596.pdf

[4] https://www.esrb.europa.eu/pub/pdf/recommendations/2012/ESRB_2012_2.en.pdf?b6bca4cc7f0e4df5d6fa53702f0abd12

risks management by the national supervisory authorities including the CSSF.

One recommendation encourages the introduction of risk management policies on asset encumbrance. Such risk management policies would allow the credit institutions to follow their own encumbrance levels and better cope with possible stress situations.

To transpose such recommendation, the CSSF has published the CSSF Circular 14/597[5] adding a new Chapter 6 to the Part III of the CSSF Circular 12/552 on the central administration, internal governance and risk management.

This new Chapter shall only apply to credit institutions and provides for credit institutions to:

- put in place risk management policies to define their approach to asset encumbrance as well as procedures and controls that ensure that the risks associated with collateral management and asset encumbrance are adequately identified, monitored and managed;

- have in place a general monitoring framework that provided timely information, at least once a year, to the authorised management and the board of directors on, among other, (i) the level, evolution and types of assets encumbrance; (ii) the amount, evolution and credit quality of unencumbered but encumberable assets and (iii) the amount, evolution and types of additional encumbrance resulting from stress scenarios (contingent encumbrance); and

- include in their business continuity plan actions to address the contingent encumbrance resulting from relevant stress events.

Such risk encumbrance shall be monitored through additional tables to the prudential reporting scheme aiming at reporting encumbered assets, which will supplement the Regulation CRR. The final draft of technical standards on asset encumbrance was published by the European Banking Authority on 24 July 2014[6].

To receive more information on the aforementioned evolutions of the Luxembourg prudential reporting framework, please contact:

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5 http://www.cssf.lu/fileadmin/files/Lois_reglements/Circulaires/Hors_blanchiment_terrorisme/cssf14_597eng.pdf

6 http://www.eba.europa.eu/documents/10180/466544/EBA+ITS+2013+04+Final+draft+ITS+on+Asset+Encumbrance.pdf

The concept of "Economic and Social Entity"

A recent case law (C.A. 06/11/2014, No. 39980) clarifies the definition of "economic and social entity" (the "Economic and Social Entity") as mentioned in Article L. 161-2 of the Labour Code. In such case, the judges of the Court of Appeal have specified that a group of different entities having a distinct legal personality may form together an Economic and Social Entity.

The Economic and Social Entity consists in a certain number of entities being legally independent and distinct, which do not appear to be independent or autonomous, but fulfilling, as detailed in the pre-mentioned case law, the following cumulative conditions:

- economic condition: a concentration of management power and common, complementary or coordinated activities; and
- social condition: a community of employees bounded by common or complementary interests or linked by a similar social status.

In order to assess whether entities form together an Economic and Social Entity, the Labour Code has taken up, among other things, the following criteria:

- the entities must have common or complementary infrastructures;
- the entities have to implement a common, complementary or coordinated strategy;
- the entities must have economic beneficiaries who are fully or partly identical or linked;
- the entities must have common, complementary or coordinated shareholders who are partly composed of the same persons or persons representing the same entity; and
- the entities must have a community of employees bounded by common or complementary interests or linked by a similar social status.

These criteria may nevertheless vary as explained in the following case. In fact, the Superior Court of Justice (C.S.J. 17/03/2011, No 36198) has extended this concept in considering that the email addresses, which were the same for the Luxembourg company and other companies in Europe, are a proof that the Luxembourg company, which has less than 150 employees, is to be considered as an Economic and Social Entity and was required to hold a pre-dismissal interview.

The concept of Economic and Social Entity is a crucial point in Labour Law and should be taken into consideration, among other things, in the case of a dismissal. In fact, any employer who regularly employs (i) 150 or more employees[7] or (ii) not less than 100 employees in the bank sector[8] and who contemplates to dismiss an employee (with notice period or with immediate effect) must, before reaching any decision or proceeding with the dismissal, convoke, by registered letter or by hand delivery with acknowledged receipt, the concerned employee for a pre-dismissal interview. Whatever the size of the Entity, the pre-dismissal interview, which aims to prevent any sudden or rash dismissals, is not required for a termination of an employment agreement during the trial period.

In order to calculate the threshold of 150 employees (or 100 employees for the banks), it is necessary, for the employer, to take into account the total number of individuals employed (i) at the date of the convening to the pre-dismissal interview and (ii) in the different entities which form together an Economic and Social Entity.

The employer must respect the form, the content and the deadlines of the pre-dismissal interview describe under the article L. 124-2 of the Labour Code or, if applicable, under the article 5 (4) of the Collective bargaining agreement for bank employees. Should this requirement not be met, the dismissal is considered irregular (but not abusive) by the Labour Court and the employer may be ordered to pay the employee an indemnity of up to one month's salary[9].

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7 Art. L. 124-2 of the Labour Code
8 Collective bargaining agreement for bank employees 2014-2016
9 Art. L. 124-12 (3) of the Labour Code

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