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Law of May 20, 2011 on Financial Collateral arrangements

On May 20, 2011, a new law implementing into Luxembourg legislation the Directive 2009/44/EC of May 6, 2009 amending the directive 98/26/EC on settlement finality in payment and securities settlement systems and the directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims was adopted, thus amending the Luxembourg law of August 5, 2005 on financial collateral arrangements (the "Law").

This Law strengthens the position of the collateral taker and clarifies several issues in the existing regulation. The most notable amendments are encompassed in the below note.

1. General provisions

The Law clarifies that receivables transmitted to the holder of financial collaterals may be identified by their mere registration on a list of receivables. In addition, such registration shall be sufficient to legally prove the existence of the financial collateral towards the debtors or other third parties.

It is further provided that any right of substitution or withdrawal of the excess of the collateralized assets, and the right for the collateral provider to receive an income out of the collateralized assets or to give instructions in respect of these assets, do not impair the rights of the collateral taker.

Moreover, the original debtor is now authorized to waive any right of set-off or other defences it might have against its original creditor or the collateral provider. Such waiver shall be valid and enforceable between the parties, but also towards third parties. This new provision is particularly important for collateral arrangements granted on receivables. The collateral taker should be able to rely on the value of the receivable granted as collateral and it is therefore essential that no right of compensation with the collateral maker be invoked against the collateral taker by the debtor.

The collateral provider can also irrevocably waive any right of recourse or subrogation it may have. The validity of such a waiver appears to be particularly important in case a financial collateral is granted on the shares of the debtor held by the collateral provider. The existence of such subrogation recourse could in fact substantially decrease the value and the efficiency of the collateral arrangement. In case the pledge is enforced and the collateral taker becomes the owner of the shares, the collateral provider would normally be subrogated into the rights of the collateral taker, and thus be able to claim the value of the pledged shares against the debtor.

2. Perfection of pledge

Collateral agreements, for financial instruments transferable by book entries, can now be perfected by the mere change of control over the pledged assets: the law makes it possible to conclude a financial collateral arrangement in the form of a "control agreement" as already existing under the common law system.

The change of control over the assets transferable by book entries in favour of the pledgee can thus be realized:

- (i) In case the pledgee is also the custodian, by the mere entry into the pledge agreement;
- (ii) In case the custodian is a third party, by a tripartite control agreement between the pledgor, the pledgee and the custodian or by a notification to the custodian of the agreement entered into between the pledgor and the pledgee, in case it is not a party thereto;
- (iii) By a book entry in an account held by the pledgee; and
- (iv) By a book entry in an account opened with a custodian in the name of the pledgor (or a third party holder), with the designation of the financial instruments in the books of the custodian.

The dispossession realized pursuant to (ii), (iii) and (iv) shall be construed as a waiver by the custodian of the prior ranking of its own pledge over the pledged asset, unless otherwise agreed.

As regards collateral arrangements over receivables, they can now be realized by the mere entry into a pledge agreement, without any further need for notification of the debtor. Furthermore, the pledgee is now authorized to exercise the rights attached to the receivables.

3. Rights attached to the pledged assets

The Law confirms that the exercise of the rights attached to the pledged assets is not limited to the voting rights, but also covers any other rights. For instance, in case of pledged shares, the collateral taker can now convene the shareholders' meeting.

4. Enforcement

The Law clarifies that the collateral taker can enforce the pledge before the valuation of the assets, provided that the valuation method has been agreed upon between the collateral taker and the collateral provider.

Moreover, it is confirmed that the collateral taker can appoint a nominee in order to receive the pledged assets.

5. Insolvency

The Law finally clarifies that the Luxembourg insolvency and pre-insolvency provisions do not apply to financial collateral arrangements made under Luxembourg law, but also to the collateral arrangements made under foreign laws, when the collateral provider is established in Luxembourg.

Law of August 3, 2011 regarding the obligations on reporting and documentation in case of merger or demerger

The law of August 3, 2011 implements the directive 2009/109/CE which modifies the directives 77/91/CEE, 78/855/CEE and 82/891/CEE. The purpose is to enhance the EU companies' competitiveness by reducing the administrative burdens and the costs relating to the publication and documentation obligations in case of merger or demerger.

The main amendments introduced by the law of August 3, 2011 are as follow:

- The new provisions introduce an obligation for the management bodies to inform the shareholders of any substantive modification of the assets and liabilities that have taken place between the date of the merger project and the date on which the general meeting shall approve the merger.
- In order to simplify the administrative burdens related to the merger, the shareholders now have the possibility to unanimously waive the establishment of a report by the management.
- Nevertheless, with a view to protect the creditors, when the shareholders have unanimously decided to waive the establishment of a report on the common merger project by an independent expert, it is now required to have a contribution report established by an independent auditor for the contributions other than cash, pursuant to the general provisions of the articles 26-1 and following of the law of August 10, 1915 on commercial companies (the "1915 Law").
- The same requirement now applies to the merger by the establishment of a new company: it will be necessary to have a contribution report established by an independent auditor for the contributions other than cash if the shareholders have unanimously resolved to waive the report on the merger by an independent expert.
- Still with a view to simplify the administrative burdens, in case of demerger, the parties are now authorized to waive the establishment of a contribution report by an independent auditor for the contributions other than cash, in case of establishment of report on the demerger project by an independent auditor.
- An accounting statement is no more required if the company publishes interim financial reports in accordance with article 4 of the law of January 11, 2008 relating to the transparency requirements in relation to information on issuers whose securities are admitted to trading on a regulated market, which are made available to the shareholders and the holders of other securities conferring voting rights of each company involved in the merger.
- A company, party to a merger, is no more required to make available to its shareholders the merging documentation as referred to in article 267 of the 1915 Law at its registered seat, if these documents are published on its website during a period of at least one month before the day fixed for the general meeting to approve the merger project. Similarly, the rights for the shareholders to obtain a copy of these documents can be replaced by the possibility to download and print these documents from the company's website.

Draft bill of August 12, 2011 amending the law of May 11, 2007 on Specialised investments funds

The purpose of this bill is to amend the existing provisions of the law of February 13, 2007 on specialised investment funds ("SIF").

The proposed draft law takes into consideration the European developments which lead to the adoption of the directive 2011/61/EU of the European Parliament and the Council of June 8, 2011 on alternative investment fund managers and amending the directives 2003/41/EC and 2009/65/EC and the regulations (EC) No. 1060/2009 and (EU) No. 1095/2010.

The proposed amendments are intended to supplement the existing legal framework by introducing new provisions defining notably the conditions under which a SIF, respectively its management company, may delegate its tasks and functions to third parties. The bill introduces the obligations for the SIFs to implement risk management methods and to set up clear rules regarding potential conflicts of interest.

The bill further proposes the revision of certain existing provisions of the law of February 13, 2007 in order to take into account the experience gained by the CSSF in the monitoring of such funds. Among the changes that emerge from the experience acquired by the CSSF, it appears a requirement for the SIFs, and the persons in charge of their management, to be authorized prior to the beginning of the activities.

Lastly, it is proposed to introduce into the law of February 13, 2007 certain provisions existing in the law of December 17, 2010 on undertakings for collective investments, in order to allow the SIFs to benefit from certain opportunities that are available to the UCIs. Among these opportunities, appears the right of SIFs with multiple compartments, to invest into other compartments of the same entity under certain conditions.

Draft bill of August 12, 2011 amending the law of July 10, 2005 on Prospectuses for Securities and the law of January 11, 2008 on the transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market

The bill implements the directive 2010/73/UE of the European Parliament and the Council of November 24, 2010 amending the directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and the directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.

The bill is divided into three chapters. The provisions of Chapter 1 concern the amendments to the law on prospectuses for securities, the Chapter 2 deals with the amendments to the law on transparency requirements and the Chapter 3 contains general provisions.

The directive 2003/71/EC has introduced into Luxembourg law a passport mechanism by which the prospectus for a public offer or admission to trading of a security approved by the authority of one member state is valid throughout the European Union. For this purpose, the directive proceeds with the harmonization of the rules regarding the prospectus which must be made available to the public in case of public offer or admission to trading of securities in a regulated market in the European Union. The purpose of the directive 2010/73/UE is to simplify and improve the implementation of the directive 2003/71/EC and increase the efficiency in order to enhance the competitiveness of the European Union.

The proposed amendments to the law of July 10, 2005 are as follows:

- Reducing of the disclosure requirements as part of public offers and admissions to trading on a regulated market of securities carried out by small and medium enterprises;
- Reducing of the disclosure requirements as part of public offers and admissions to trading on a regulated market of securities made under the guarantee of a member state;
- Adaptation and standardization of the format and content of the summary prospectus;
- Clarification of the exemptions from the requirement to publish a prospectus in cases where companies make sales by using intermediaries or allocate shares to their staff;
- Harmonization of the definition of "qualified investors" in directive 2003/71/EC with the notions of "professional client" and "eligible counterparty" in directive 2004/39/EC on markets in financial instruments;
- Abolition of the annual document;
- the adaptation of certain thresholds as it was found that certain requirements of the texts no longer reflect market realities (for example, the thresholds that form the basis for the distinction between "retail investor" and "professional investor" were increased from 50,000 euros to 100,000 euros, as it was found that retail investors are also making investments of more than 50,000 euros so that the current threshold are no longer reflecting reality.)

The Chapter 2 of the bill implements into Luxembourg law the amendments to the directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market. The thresholds that form the basis for the distinction between "retail investor" and "professional investor" have been increased from 50,000 euros to 100,000 euros.

Lastly, the Chapter 3 of the bill sets out the general and transitional provisions and fix the date of entry into force.

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