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THE INTRICACIES OF THE TRANSPARENCY DIRECTIVE AS TRANSPOSED INTO LUXEMBOURG LAW

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INTRODUCTION

Part of the European Commission's Financial Services Action Plan ("FSAP"), European Directive 2004/109 of December 15, 2004, known as the "Transparency Directive" (hereafter, "Directive"), was intended to bring greater investor protection and efficiency to the European capital markets by harmonising reporting requirements of issuing companies whose securities are listed on a regulated market. More specifically, regular disclosure of pertinent information about the relevant company should result in heightened "transparency" for investors and prospective investors in its listed securities. This should, in turn, bring about more efficient markets by removing barriers to listing securities on regulated markets within the European Union, thereby resulting in deeper and more liquid capital markets.

The mechanism for attaining these objectives is the reporting of information based on the "home Member State" principle. That is, only the issuer's "home Member State" can determine the relevant reporting requirements for admission of securities to trading on its exchanges, and "host Member States" may not impose more stringent disclosure requirements on issuers whose securities are listed on their exchanges than those set forth in the Directive.

LUXEMBOURG LAW OF JANUARY 11, 2008

The Directive was transposed into Luxembourg law by the law of January 11, 2008 (hereafter, the "Law") and the Grand-Ducal regulation of the same date (hereafter, the "Regulation"), both of which took effect on January 19, 2008. The Law

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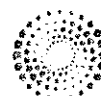
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closely follows the requirements set forth in the Directive, and Luxembourg chose not to impose more stringent reporting requirements (as permitted by art.3(1) of the Directive). The Regulation transposes Commission Directive 2007/14 of March 8, 2007, known as the "Implementing Directive", regarding the rules for implementing certain provisions of the Directive.

The Law essentially requires issuers of listed securities on "regulated markets" within the European Economic Area ("EEA") whose "home Member State" is Luxembourg to provide "regulated information" as defined therein, and which includes periodic information, ongoing information in respect of "major holdings", and more general reporting obligations, including "inside information". This information must be published by the issuer, made available to an "Officially Appointed Mechanism" ("OAM"), and filed with the Luxembourg regulator of the financial sector (*Commission de Surveillance du Secteur Financier* or "CSSF").

Before describing these reporting requirements, it is useful to make several comments.

Firstly, the Law applies only to issuers of securities on regulated markets, by which is meant markets falling within the scope of art.4(1) (14) of the Directive 2004/39 of April 21, 2004, known as "MiFID." While the definition is rather technical, it is up to the relevant authorities of each Member State (which includes EEA members that are not part of the European Union) to determine which exchanges are "regulated markets" for its respective territory. In Luxembourg, only the Luxembourg Stock Exchange (*la Bourse de Luxembourg*) is a "regulated market" for purposes of the Directive. Therefore, issuers whose securities are listed on Luxembourg's Euro MTF, the "alternative market," are not required to comply with the reporting obligations of the Directive.

Secondly, the Law refers to issuers whose "home Member State" is Luxembourg, makes an important distinction between "home" and "host" Member State, and

explains how that determination is made. If the issuer issues either (i) debt securities whose denomination per unit is less than €1,000 or (ii) equity, then the "home Member State" of such issuer is where it has its registered office (if incorporated in the European Economic Area). Hence, if such an issuer has its registered office in Luxembourg, then Luxembourg is the "home Member State". If, however, such an issuer has its registered office outside of the European Economic Area, then the "home Member State" is that Member State with whose competent authority it is required to file pursuant to the law of July 10, 2005 (the "Prospectus Law") (i.e. where the securities are intended to be offered to the public for the first time after December 31, 2003, or where the first application for admission to trading on a regulated market is made). If the foregoing is not applicable (typically, where the issuer issues debt securities whose denomination per unit is equal to or greater than €1,000 and the Member State where its registered office is located is not the same as where its securities are listed), the issuer has a choice as to its "home Member State", and may choose either (a) the Member State in which it has its registered office or (b) one of the Member States on whose regulated markets its securities are admitted, provided, however, that only one Member State may be chosen, and such choice remains valid for at least three years (unless the securities are no longer listed). For purposes of the Law, "host Member State" is the state (within the European Economic Area) in which the securities are admitted to trading on a regulated market.

Thirdly, the Law does not apply to (i) units issued by open-end investment funds, or (ii) units acquired or disposed of in such collective investment undertakings.

A final observation in this respect is that the issues regarding "home Member State" under the Prospectus Directive (and, by extrapolation, the Prospectus Law) and the Transparency Directive (and, by extrapolation, the Law) are not related. That is, the choice of "home Member State" by an

issuer (where the choice is available) under either the Prospectus Directive or Transparency Directive is independent of the choice made under the other Directive. Hence, an issuer could, in theory, have Luxembourg as its home Member State for purposes of the Transparency Directive, but not for purposes of the Prospectus Directive.

The analysis below describes the requirements imposed by Luxembourg law in respect of issuers of securities listed on a regulated market and whose home Member State is Luxembourg.

PERIODIC REPORTING REQUIREMENTS

The periodic or "regulated information" required of issuers whose home Member State is Luxembourg include the following:

- Annual financial reports comprising:
 - audited financial statements prepared in accordance with Luxembourg law (or in accordance with International Accounting Standards if the accounts are consolidated);
 - interim management reports prepared in accordance with Directive 78/660 of July 25, 1978; and
 - statements made by those responsible within the company that the financial statements present a true and fair view of the assets, liabilities, financial position and profit or loss of the issuer and that the management report includes a fair review of the development and performance of the business and the position of the issuer.
- The issuer must make the annual financial report available to the public within four months after the end of the financial year and it must remain available for five years thereafter.

- Semi-annual financial reports covering the first six months of the financial year and including:
 - a condensed set of financial statements (audited or unaudited);
 - an interim management report, including a description of important events during the first six months and their impact on the financial statements, as well as the principal risks and uncertainties for the remaining six months, and major related-party transactions (for issuers of shares); and
 - statements made by those responsible within the company as set forth above. These semi-annual financial reports must be published within two months after the relevant period and remain available for five years.
- Either (i) interim management reports for the two six-month periods of the financial year or (ii) quarterly financial reports (prepared in accordance with either the Regulation, the national legislation of the Issuer (if other than Luxembourg) or the rules governing the regulated market on which its shares are traded), as chosen by the Issuer. The interim management reports must explain material events and transactions that have taken place and their impact on the financial position of the Issuer and its subsidiaries, and must describe the financial position and performance of the company and its subsidiaries during the relevant period. The report must be published between 10 weeks after the beginning and 6 weeks before the end of the relevant six-month period. The quarterly reports must contain (i) financial information, including annual sales both overall and by business segment, overall earnings and earnings per share, as well as the relevant numbers for the previous year, and (ii) a description of important events that occurred during the relevant year

and their impact on the activity and financial situation of the issuer.

Quarterly reports must be published within 60 days after the end of the first and third quarter of the financial year.

There is an important exception to the foregoing reporting requirements. If the issuer issues only debt securities whose denomination per unit is at least €50,000 (or equivalent value if denominated in another currency), as of the date of issue, then there is no need to comply with the periodic reporting obligations. In addition, the periodic information requirements do not apply to Member States or their regional or local authorities, public international bodies of which at least one Member State is a member, national central banks or the European Central Bank. Nevertheless, as the CSSF has pointed out in its 2008 Annual Report, the foregoing issuers are exempt only from the preparation of the financial reports, and must publish information regarding:

- (for issuers of securities other than shares) changes in the rights of holders of securities, other than shares, including changes in the terms and conditions of the securities that could indirectly affect those rights, resulting, in particular, from a change in loan terms or interest rates;
- new loan issues and in particular any guaranty or security in respect thereof;
- the information necessary to enable holders of debt securities to exercise their rights; and
- inside information.

ONGOING DISCLOSURE REQUIREMENTS

Issuers are also required to make disclosures regarding changes in major shareholdings to which voting rights are attached. Shares include depositary receipts in respect of the shares.

A shareholder that acquires or disposes of shares that trade on a regulated market must notify the issuer and file with the CSSF the proportion of voting rights held upon

the acquisition or disposal of such shares when that proportion reaches, exceeds, or falls below the following thresholds: 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 33 1/3 per cent, 50 per cent, and 66 2/3 per cent. The voting rights are calculated on the basis of all shares to which voting rights are attached regardless of whether such voting rights have been suspended. The notification must also include the information by class of shares to which voting rights are attached. In Circular 08/349 dated April 21, 2008, the CSSF established the standard form to be used for shareholder notifications.

These notification requirements apply to individuals and entities if they are entitled to acquire, dispose of, or exercise voting rights in a number of cases, including, inter alia, voting rights held pursuant to an agreement with third parties, including an agreement over collateral. They also apply in the event that individuals or entities directly or indirectly hold financial instruments resulting in the entitlement to acquire pursuant to a formal agreement shares to which voting rights attach.

There are exceptions to the notification requirements, namely for: (i) shares acquired for the sole purpose of clearing and settling; (ii) shares held by custodians; (iii) the trading portfolio of credit institutions or investment firms; (iv) less than 10 per cent of the shares held by a market maker; and (v) shares held by the European System of Central Banks for monetary purposes.

When required, the shareholder's notifications to the issuer must take place as soon as possible, but, according to the CSSF, no later than six trading days following a transaction or four days following information of an event changing the breakdown of voting rights in the issuer. (The calendar of trading days is published on the CSSF's website.)

One final comment should be made regarding the attainment of 33.33 per cent of the shares of a company whose shares are listed on a regulated market and whose home Member State is Luxembourg. CSSF Circular 08/337 notes that the attaining of

such threshold does not necessarily result in the acquiring entity's gaining "control" of such company under the Luxembourg law on takeover bids. Therefore, the acquiring entity is not necessarily required to launch a mandatory takeover bid. For example, voting rights may be assigned to persons such that the law on takeover bids does not deem those persons to hold the voting rights in respect of the shares.

Regarding issuer disclosure to the public (and to the CSSF), the issuer is required to publish as soon as possible all information contained in the shareholder's notification. The publication is to be made public within three trading days of receipt of the notification. In order to calculate the thresholds, the issuer must disclose to the public the total number of voting rights and capital at the end of each calendar month during which an increase or decrease of the total number has occurred. Circular 08/349 sets out the standard form the issuer is to use for this. Moreover, the issuer must also disclose the proportion of its own shares, when that proportion reaches, exceeds, or falls below the thresholds of 5 per cent or 10 per cent following the acquisition or disposal of its own shares. The publication must be made as soon as possible, but not later than four trading days following such transaction. Finally, the issuer must publish any change in the rights attaching to various classes of shares, including changes in the rights attaching to certain classes of derivative instruments.

There are additional ongoing reporting obligations incumbent on issuers of shares and debt securities. Both types of issuers must ensure the equal treatment of all holders of shares and debt securities that are in the same position. The issuer must also ensure that all the facilities and information necessary to enable such securities holders to exercise their rights are available in the home Member State (i.e. Luxembourg) and that the integrity of the data is preserved. To this end, issuers must disclose various information regarding general meetings and the exercise of voting rights, which must be allowed by proxy.

GENERAL REPORTING OBLIGATIONS

Issuers have the additional obligation to disclose "regulated information" in a manner ensuring fast access to such information on a non-discriminatory basis, and, for these purposes, may use any medium for the effective dissemination of information to the public in all Member States. Such dissemination must involve the active distribution of information from the issuer to the media with a view to reaching investors. This applies equally to issuers whose securities are admitted to trading on the Luxembourg Stock Exchange, even if Luxembourg is the "host" Member State and not the "home" Member State.

It should be noted that these informational obligations of "regulated information" are intended to supplement those required under the law on market abuse, which include reporting requirements regarding inside information.

There is an obligation for the issuer to make its regulated information available to an OAM, appointed by Grand-Ducal Regulation, for central storage. The OAM indexes and classifies the regulated information and makes it available via electronic means on an internet site. In the Grand-Ducal Regulation of July 3, 2008, the Luxembourg Stock Exchange (*Société de la Bourse de Luxembourg S.A.*) was appointed OAM, and is overseen by the CSSF.

Finally, Issuers whose home Member State is Luxembourg must file all regulated information with the CSSF at the time that it is made available to the public. Such issuers must also notify the CSSF of any amendments to their articles of incorporation. Although the Directive foresaw the possibility for the national regulator to exempt an issuer from filing the foregoing information in respect of information disclosed in accordance with art.6 of Directive 2003/6, (the Market Abuse Directive) [2003] OJ L96/16, Luxembourg did not include such exemption in the Law.

It should also be mentioned that the CSSF may exempt certain issuers with registered

offices outside of the European Union, but whose home Member State is Luxembourg, from certain provisions, including the "periodic" reporting requirements set out above. However, the exemption will be given only if the given country has reporting requirements equivalent to Luxembourg. Nevertheless, such issuers must, in any event, file the required information and disclose such information. The difference is the "substance" of the information, rather than the obligation to file. In addition, all information that may be of importance for investors in the European Union and whose disclosure is required in the relevant country (but not under the Law) must be disclosed, even if it is not "regulated information" under the Law.

One final note is that the Law provides for the adoption of international accounting standards/international financial reporting standards for the consolidated accounts of publicly-traded companies based in Luxembourg if either that company's debt securities are admitted on a regulated market in any Member State or its securities are admitted to public trading in a non-EU Member State that has used internationally-accepted standards for a financial year that began prior to September 11, 2002.

CONCLUSION

The Directive constitutes part of FSAP, along with the Prospectus Directive and Market Abuse Directive, among others, which, collectively, are intended to create a single European capital market. The Law is itself a major piece of financial legislation in Luxembourg, and there are now well over 700 issuers whose home Member State is Luxembourg and must comply with its transparency requirements.