

## Editorial



Dear ALCO Members, dear Readers,

The ALCO newsletter represents the ideal platform to examine in greater depth major themes relating to our profession. That is certainly the case for Guillaume Bègue's article, which addresses a subject which is important for Luxembourg's reputation as a financial centre. It is targeted at an audience composed chiefly of French lawyers in a country where anything that concerns the legal provisions of their small neighbour in the north tends to be somewhat controversial. It was therefore necessary to avoid any moralising to remain convincing. G. Bègue's article accordingly adopts a purely legal approach and in this regard is highly informative.

Another theme which is becoming increasingly important for some of us is the issue of data protection. Banking secrecy is not the only regulation which governs our client data. The concept of nominative, personal data targeted by the secrecy rule covers partially, but not totally, that of personal data. The article by Gary Cywie and Charles-Henri Laevens, legal specialists in this field, provides additional insight into the use of personal data not only in-house but also internationally, in particular within the same banking group.

The newsletter also provides, in addition to specific consultation of the association's private website, an opportunity to share with a broader audience the results of working groups when the subject covered is particularly important. That is the case, for example, of the roundtable organised in September by WG 34 on the compliance implications of FATCA. Luxembourg has not yet decided the exact content of the agreement that the country plans to sign with the United States and is closely monitoring the negotiations conducted by Switzerland in this regard. However, it is not too early to turn our attention to this subject and to anticipate the impact of FATCA on our activities as Compliance Officers.

WG 33, to which you can address any questions relating directly to the compliance function, has examined an issue which may concern many of you, not just management companies. The obligation to draw up an AML/CFT risk analysis concerns not only all credit institutions (CSSF

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11/519) but also all professionals subject to CSSF supervision to and the amended law of 2004 (CSSF 11/529). This has created a certain amount of controversy around the need to produce such an analysis for each investment fund meeting these conditions. The response of WG 33 should be seen as normal practice in Luxembourg.

This Newsletter therefore covers numerous subjects and is very technical. I am confident that it will be useful and assist you in the performance of your duties.

Happy reading.

Jean Noël Lequeue  
President of ALCO

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Article

## THE CRIMINAL PROSECUTION OF MONEY-LAUNDERING IN THE GRAND-DUCHY OF LUXEMBOURG

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*Study carried out in the framework of the international conference entitled “The criminal prosecution of money laundering – the lessons of comparative law”, organised by the Groupe de Recherches Actions sur la criminalité Organisée (GRASCO), the Centre du droit de l’entreprise (CDE, Strasbourg University) and the Cercle des comparatistes droit et finance (Paris), which was held on 27 May 2011 in Strasbourg. The conference proceedings have been published in the GRASCO journal.*

### Introduction

Luxembourg has become, in the space of thirty years, a leading financial centre<sup>3</sup>. Based on its two flagship activities, namely asset management and its investment funds industry, Luxembourg is today recognised worldwide as a major financial centre<sup>4</sup>. This does not mean that it does not have other more traditional economic activities, but the inescapable fact is that such activities are eclipsed by the relative weight of the financial sector. This reputation is the result of a forward-thinking policy implemented over many years to promote and develop banking and financial activities<sup>5</sup>.

Unfortunately, this vitality also has its drawbacks, since it attracts not just lawful financial operators but also criminals wanting to launder the proceeds of their criminal activities. This inevitable phenomenon has already affected Luxembourg, earning it an unwanted high-profile label<sup>6</sup>. However, in response to frequent criticism from numerous countries and notably its close

<sup>1</sup> The views expressed in this study are strictly personal and are the sole responsibility of the author

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<sup>3</sup> For an overview of the weight of financial services in the Luxembourg economy and how they have evolved since the 1980s, visit the STATEC website: [http://www.portrait.public.lu/fr/structures\\_economiques/structure/coups\\_de\\_projecteur/secteur\\_financier/developpement/index.html](http://www.portrait.public.lu/fr/structures_economiques/structure/coups_de_projecteur/secteur_financier/developpement/index.html)

<sup>4</sup> Ranked 2<sup>nd</sup> in the world behind the United States for investment funds, see <http://www.lff.lu/fr/faits-marquants/la-place-financiere-luxembourgeoise/>; 21<sup>st</sup> in the world as a specialised transnational financial centre, see [http://actu.efinancialcareers.lu/newsandviews\\_item/newsItemId-31635](http://actu.efinancialcareers.lu/newsandviews_item/newsItemId-31635)

<sup>5</sup> Although there has recently been an increase in interest in other sectors such as telecommunications (satellites) and services to multinationals (see Luxembourg Chamber of Commerce website: <http://www.cc.lu/docdownload.php?id=83>), financial services represent almost a quarter of gross domestic product

<sup>6</sup> The name of the country is regularly linked in the press to major financial scandals and cases involving the laundering of the proceeds of corruption and drug trafficking

neighbours<sup>7</sup>, Luxembourg has made a huge effort, over the past decade, to restore its somewhat tarnished image. Numerous laws and regulations have therefore been adopted to bolster the *corpus juris*, enshrining in particular penal sanctions for money laundering as a legal weapon in the global fight against money laundering.

However, these efforts seemed still to be perceived as inadequate in 2010 if we are to believe the Financial Action Task Force (hereinafter FATF) mutual evaluation report on Luxembourg<sup>8</sup>. The report suggested a financial centre that continued to be open to all forms of abuse and indifferent to the threat posed by the money of all kinds of criminals. However, this was a simplistic and sometimes unfair vision of the Member State of the European Communities which was the first to transpose in advance of the scheduled date a large part of the 3<sup>rd</sup> Money Laundering Directive<sup>9</sup>. If shortcomings existed or persisted in this area, in particular in the criminalisation of the offence, it is important to understand the reasons (II) in the light of the relatively traditional theoretical path of the said offence (I).

## **I A relatively traditional theoretical path**

### **1) Legislative development of criminalisation**

#### **i. Slow and gradual development**

Like many countries, Luxembourg confined itself for a long time to a specific offence of laundering the proceeds of drug trafficking<sup>10</sup>.

Its legislator inserted, for the first time, the offence of money laundering in the country's range of criminal sanctions by a law enacted in 1989<sup>11</sup>, the year of the creation of the FATF. This law added to article 8 of the law of 19 February 1973 on the sale of medicinal substances and the fight against drug use<sup>12</sup>, two additional articles expressly criminalising but not literally the laundering of the proceeds of drug trafficking<sup>13</sup>. After having transposed the Vienna Convention adopted by the United Nations on 20 December 1988 by a law of 17 March 1992<sup>14</sup>, the legislator adopted a coordinated text a few months later in order to seal the question of drugs and that of the laundering of their proceeds<sup>15</sup>.

<sup>7</sup> Even recently with the economic crisis which began in 2008 and the subjects of international tax cooperation and banking secrecy

<sup>8</sup> Financial Action Task Force mutual evaluation report on Luxembourg, dated 19 February 2010, see the FATF website: [http://www.fatf-gafi.org/document/20/0,3746,fr\\_32250379\\_32236963\\_44660308\\_1\\_1\\_1\\_1,00.html](http://www.fatf-gafi.org/document/20/0,3746,fr_32250379_32236963_44660308_1_1_1_1,00.html)

<sup>9</sup> Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJ L 309 of 25.11.2005. See on this subject G. Bègue, *Le droit luxembourgeois, nouveau référent dans la lutte contre le blanchiment de capitaux et le financement du terrorisme?*, RD Banc. Fin., January-February 2006, p.50

<sup>10</sup> V. A. Jonckheere, and M. Capus-Leclerc, V. Willems, D. Spielmann, *Le blanchiment du produit des infractions en Belgique et au Grand-Duché du Luxembourg*, Les dossiers du Journal des tribunaux, éd. Larcier, p. 105 et seq.

<sup>11</sup> Law of 7 July 1989 amending the amended law of 19 February 1973 on the sale of drugs and the fight against drug addiction, RECUEIL DE LEGISLATION A – Mem. N° 50, 19 July 1989, which followed quickly on the heels of the law of 16 June 1989 amending the first book of the Code of Criminal Investigation and certain other legal provisions, RECUEIL DE LEGISLATION A – Mem. N° 41, 26 June 1989. See M.-L. Casenave-Decheix, *Le blanchiment de la drogue (Journées d'étude de la Section luxembourgeoise de l'IDEF Institut international de droit d'Expression et d'Inspiration Française, 28-29 May 1992)*, Revue Internationale de Droit Comparé, vol. 46 n°1, January 1994, p.155

<sup>12</sup> Law of 19 February 1973 on the sale of drugs and the fight against drug addiction, RECUEIL DE LEGISLATION A – Mem. N° 12, 3 March 1973

<sup>13</sup> “Art.8 -1. Anyone who has knowingly facilitated or attempted to facilitate the misleading justification of the origin of the resources or assets of the perpetrator of one of the offences referred to in article 8 under a) and b) or anyone who has knowingly or in disregard of their professional obligations assisted with any investment, concealment or conversion of the proceeds of such an offence shall be liable to a term of imprisonment of between one and five years and a fine of between 5,000 francs and 50,000,000 francs, or only one of these sanctions.

Art. 8-2. In the cases provided for in article 8 under a) and b), the court may in addition, without prejudice to article 42 of the Criminal Code, order the confiscation of the movable and immovable property, owned individually or jointly, of convicted persons where such assets have been acquired with the proceeds of the offence”

<sup>14</sup> Law of 17 March 1992 approving the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, signed in Vienna, on 20 December 1988, amending and supplementing the law of 19 February 1973 on the sale of drugs and the fight against drug addiction; amending and supplementing certain provisions of the Code of Criminal Investigation, RECUEIL DE LEGISLATION A – Mem. N° 15, 26 March 1992

<sup>15</sup> Coordinated text of 29 October 1992 of the law of 19 February 1973 on the sale of drugs and the fight against drug addiction, as amended

Apart from a show of force of the Luxembourg courts which made full use of the specific offence of money laundering in the famous Jurado<sup>16</sup> case, the aforementioned provisions have not had the expected effect of increasing the number of indictments based on the laundering of the proceeds of drug trafficking. The specific nature of the criminal offence combined with a limited *rationae materiae* scope of application of the obligation of active cooperation provided for in the law of 5 April 1993<sup>17</sup>, as it was worded at the time, even supplemented by circulars issued by the competent supervisory authority<sup>18</sup>, afforded little satisfaction.

Therefore, the range of predicate offences giving rise to the offence of money laundering was enlarged with a law of 11 August 1998<sup>19</sup> criminalising criminal organisations and the offence of money laundering. The new article 506-1 et seq. inserted in the Luxembourg Criminal Code thus gave a legal definition of the offence of money laundering while listing the facts constituting this offence and specifying the categories of predicate offences giving rise to the offence of money laundering.

This range of offences included the following predicate offences:

- crimes or offences committed within the framework of or related to an association of criminals or another criminal organisation within the meaning of articles 324a to 324b of the Criminal Code;
- the kidnapping of minors (articles 368 to 370 of the Criminal Code);
- the offence of living off immoral earnings (articles 379 and 379a of the Criminal Code);
- the offence of corruption;
- an infringement of the law on firearms and munitions.

At the same time, the text of article 38 (3) of the amended law of 5 April 1993 on the financial sector was supplemented by a reference to the new article 506-1 of the Criminal Code so as to ensure that the concept of money laundering covers, in addition to all the acts defined in article 8-1 of the law of 1973, any act defined in the said article 506-1.

## ii. Maturity

The law of 14 June 2001<sup>20</sup> enlarged this scope slightly further by criminalising the “*pecuniary advantage obtained from one or more of these offences*” (which we will revisit later<sup>21</sup>), while the proceeds of the predicate offence of terrorism or terrorist financing was covered by a law of 12 August 2003 on the repression of terrorism and its financing<sup>22</sup>. As the law of 12 November 2004<sup>23</sup>

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<sup>16</sup> In the late 1990s, Franklin Jurado Rodriguez, a Colombian economist and graduate of Harvard and Columbia, laundered more than 90 million US dollars from drug trafficking organised by the Cali cartel. He was sentenced by a Luxembourg court in April 1992 to fifty-four months in prison and a fine of 5 million francs. He was finally extradited to the United States in 1994.

<sup>17</sup> Law of 5 April 1993 on the financial sector, RECUEIL DE LEGISLATION A – Mem. N° 27, 10 April 1993. Its article 38.3 which has now been repealed stipulated that “*Money laundering, within the meaning of this part, is understood to refer to any act, in particular concealing, disguising, acquiring, holding, using, investing, conserving, transferring, to which the law expressly confers with regard to the crimes or offences specified therein, the character of specific criminal offence and which relates to the proceeds, that is to say any pecuniary advantage, derived from another criminal offence.*” This was the first time that the term “money laundering” appeared, but was still limited to the fight against drug addiction. The government bill of the time contained the following marginal reference: “That is why we propose to give to this paragraph (3) a wording which offers financial professionals legal certainty while at the same time avoiding the need to amend the law on the financial sector whenever criminal law in this regard is amended. The legal certainty of financial professionals is ensured by the clear provision that “money laundering” within the meaning of this law can only be an act recognised as a specific criminal offence under the laws of Luxembourg, so that it will always be possible to refer for the definition of money laundering to a precise, restrictive legal provision, even if criminal law is changed at a future date to include acts of money laundering other than those currently referred to in the 1989 law against drug addiction. For this purpose, the description of the type of act targeted is inspired by the wording used not only by the Vienna and Strasbourg Conventions, but also by the FATT and the EEC directive.” See government bill n°3600, p.6

<sup>18</sup> Circ. IML 89/57 and IML 94/112

<sup>19</sup> RECUEIL DE LEGISLATION A – Mem. N° 73, 10 September 1998

<sup>20</sup> RECUEIL DE LEGISLATION A – Mem. N° 81, 17 July 2001

<sup>21</sup> This law is in reality the transposition into domestic law of the Convention of the Council of Europe on laundering, search, seizure and confiscation of the proceeds of crime of 8 November 1990 – otherwise known as the Strasbourg Convention – and which above all had an impact as regards confiscation

<sup>22</sup> RECUEIL DE LEGISLATION A – Mem. N° 137, 15 September 2003

was more focused on preventative considerations than on the purely punitive aspects, it did not really innovate as regards the latter, satisfying itself with adding to the abovementioned list of predicate offences that of defrauding public subsidies provided for in articles 496-1 to 496-4 of the Criminal Code.

We had to wait until a law of 17 July 2008<sup>24</sup> for the scope of application of the offence of money laundering to be significantly enlarged in accordance with the provisions of the 3<sup>rd</sup> European directive and the FATF recommendations revised in 2003<sup>25</sup>. Twelve years after France had inserted in its Criminal Code articles 324-1 et seq., the Luxembourg Parliament validated the creation of the so-called general offence of money laundering. A little too late according to its detractors. But if this very large coverage of predicate offences was only developed gradually, it remained focused on offences of sufficient seriousness and therefore more likely to give rise to large-scale money laundering transactions at a later date. In addition it provided, throughout this time, welcome legal certainty for professionals subject to the AML/CFT obligations<sup>26</sup> by leaving the scope of criminal application of money laundering aligned with that of the duty of active cooperation. Unfortunately this was not the case in France, where professionals suffered, from 1996<sup>27</sup> to 2009, from the consequences of the non-alignment of the scope of application of reporting obligations with that of the offence of money laundering<sup>28</sup>.

### iii. Detailed description of the offence of money laundering

Like France, which still maintains today several special money laundering offences, the Luxembourg legislator has not made a clean sweep of its original predicate offence by a system of legislative stacking. The new predicate offences have been consolidated in articles 506-1 and following as and when they have been adopted, without however repealing article 8-1 of the 1973 law<sup>29</sup>. This special criminalisation is the only one that exists over and above the general criminalisation (Luxembourg does not recognize customs fraud).

The list of predicate offences now includes, on the one hand, the offences listed by the FATF and specifically named (e.g. involvement in an organised criminal group; terrorism including its financing; trafficking in human beings and the smuggling of migrants; kidnapping of minors; trafficking in arms; illicit traffic in narcotic drugs and psychotropic substances; corruption; theft; smuggling, etc.) and, on the other hand, an open list of offences punishable by a term of imprisonment of not less than six months (e.g. misuse of company assets; false accounting; extortion; piracy; murder and grievous bodily harm; crimes against State security; kidnapping, restraint and hostage taking, etc.).

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<sup>23</sup> Law of 12 November 2004 on the fight against money laundering and terrorist financing transposing Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering, RECUEIL DE LEGISLATION A – Mem. N° 183, 19 November 2004

<sup>24</sup> Law of 17 July 2008 transposing Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, RECUEIL DE LEGISLATION A – Mem. N° 106, 23 July 2008

<sup>25</sup> For comments on this directive, see in particular: C. Cutajar, *Prévention et répression du blanchiment d'argent : bilan et préconisations à l'aube de la troisième directive*, Bull. Joly Bourse, September-October 2004, p. 567; E. Gastebled, *Etat du dispositif juridique de lutte contre le blanchiment au lendemain de l'adoption de la troisième directive européenne*, Banque et droit n°105 – January–February 2006, p.3

<sup>26</sup> Commonly used abbreviation of Anti-Money Laundering/Combating the Financing of Terrorism

<sup>27</sup> In France, law n° 96-392 of 13 May 1996 created the general offence of laundering the proceeds of “any crime or offence”

<sup>28</sup> G. Bègue, *Lutte contre le blanchiment de capitaux et secret professionnel I: extension des obligations de contrôle et de déclaration de soupçon*, Revue Lamy Droit des Affaires, April 2006, N°4, p. 56

<sup>29</sup> Article 8-1 was last amended by the law of 11 August 1998. It provides that: “The following persons are liable to a term of imprisonment of between one and five years and a fine of between 1,250 euros and 1,250,000 euros, or only one of these penalties:

1) anyone who has knowingly facilitated, by any means, the false justification of the origin of the assets or income derived from one of the offences referred to in art. 8 under a) and b);

2) anyone who has knowingly assisted in the investment, concealment or conversion of the direct or indirect object or proceeds of one of the offences referred to in art. 8 under a) and b);

3) anyone who has acquired, held or used the direct or indirect object or proceeds derived from one of the offences referred to in art. 8 under a) and b) knowing at the time they received it, that it was derived from one or more of these offences or from the involvement in one or more of these offences.

4) An attempt to commit the offences specified in points 1 to 3 above is subject to the same penalties.”



This list of offences includes part of article 506-1 of the Criminal Code currently in force and worded as follows:

*"The following persons are liable to a term of imprisonment of between one and five years and a fine of between 1,250 euros and 1,250,000 euros, or only one of these penalties:*

*1) anyone who has knowingly facilitated, by any means, the false justification of the origin of the assets referred to in (the law of 17 July 2008) "article 31, first indent, under 1)," constituting directly or indirectly the object or proceeds,*

- [... of the offence specified in the above mentioned non-exhaustive list]*
- of any other offence punishable by a term of imprisonment of not less than 6 months;"*
- or constituting any pecuniary advantage whatsoever derived from one or more of these offences;*

*2) anyone who has knowingly assisted in the investment, concealment or conversion of the object or proceeds of the assets referred to in article 32-1, first indent, under 1), constituting directly or indirectly the object or proceeds of the offences listed under point 1) of this article or constitute any pecuniary advantage whatsoever derived from one or more of these offences;*

*3) anyone who has acquired, held or used the assets referred to in article 32-1, first indent, under 1), constituting directly or indirectly the object or proceeds of the offences listed in point 1) of this article or constituting any pecuniary advantage whatsoever derived from one or more of these offences, knowing at the time they received it that it was derived from one or more of the offences referred to in point 1) or from the involvement in one or more of these offences;*

*4) An attempt to commit the offences specified in points 1 to 3 above is subject to the same penalties."*

Articles 506-2 to 506-7 have existed since 1998 and have not been amended since then. Article 506-2 refers to the possibility to disqualify a person or prohibit a person from exercising his rights as provided for in article 24 of the said code, while heavier penalties are authorised by articles 506-5<sup>30</sup> and 506-7<sup>31</sup>. The equivalent treatment of attempted offences<sup>32</sup> and the requirements of dual criminality<sup>33</sup> are also addressed very clearly.

As regards the *ne bis in idem* principle, this falls with article 506-4 which specifies that "*the offences referred to in article 506-1 are also punishable when the perpetrator is also the perpetrator or accomplice to the predicate offence*". This possibility to indict the perpetrator of the predicate offence not only for the said offence but also for the offence of money laundering is explicitly stipulated. The French legislator, less expansive, has left it to French case-law to decide via court rulings<sup>34</sup> which have ended the doctrinal controversy between authors who interpreted the silence of the law in different ways.

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<sup>30</sup> Art. 506-5. *The offences referred to in art. 506-1 are punishable by a term of imprisonment of between fifteen and twenty years and a fine of between 1,250.00 and 1,250,000.00 euros or only one of these penalties, if they constitute acts of participation in the main or secondary activity of an association or organisation*

<sup>31</sup> Art. 506-7. *In the event of a repeat offence within five years after a conviction for an offence provided for in art. 506-1, the penalties may be doubled. Final convictions pronounced abroad are taken into consideration for establishing a repeat offence provided that the offences having resulted in these convictions are also punishable in accordance with art. 506-1*

<sup>32</sup> Art. 506-6. *Association or the intent to commit offences specified in art. 506-1 carries the same penalty as the offence committed*

<sup>33</sup> Art. 506-3. *The offences specified in art. 506-1 are also punishable when the predicate offence has been committed abroad. However, except for the offences for which the law also provides for prosecution even where they are not punishable in the State where they were committed, this offence must be punishable in the State where it was committed*

<sup>34</sup> Cass. Crim., 25 June 2003, n°02.86-182, Sediki case and others; and Cass. Crim., 14 January 2004, Recueil Dalloz 2004 n°19, Note Chantal Cutajar (the Criminal Chamber of the Court of Cassation refers to article 324-1 indent 2 of the Criminal code which is "*applicable to the perpetrator of the laundering of the proceeds of an offence which he has himself committed*")

In terms of regulations, the Luxembourg provisions therefore comply with international standards. As regards the completeness of the material elements of money laundering, the FATF itself recognises that the expression “*facilitates, by any means, the false justification of the origin of the assets or income*” theoretically covers a wide range of acts intended to conceal the illegal/criminal origin of the assets or income. The concept of “*assistance*” covers aid and involvement in an act or event, but seems more specific in that it refers to the “*investment, concealment or conversion of the direct or indirect object or proceeds of one of the offences*”<sup>35</sup>. The interpretation of the scope of application of the provisions of article 506-1 et seq. as regards “concealment”<sup>36</sup> is less obvious. Finally, as regards the concept of “assets”, the definition seems to comply with that used in international conventions, while the subject of the non-existence of corporate criminal liability is now covered<sup>37</sup>.

## 2) Autonomy of the offence – Interaction with receiving stolen goods

### i. Degree of autonomy

In Luxembourg, no legal provision requires a person to have been convicted beforehand of the predicate offence from which the laundered assets are derived. Even if it is a consequential or secondary offence, the offence of money laundering nevertheless remains autonomous with regard to the need for the predicate offence to have the force of *res judicata*; in other words, it is not necessary to obtain a prior or concomitant conviction for the predicate offence in order to be able to prosecute and obtain a conviction on the grounds of money laundering.

However, the FATF experts have recently taken the view that in practice, proof of the predicate offence and not only that of the illicit origin of the capital is necessary to secure a money laundering conviction. The requirement of such a level of proof as regards the predicate offence is likely to cause practical difficulties in establishing whether an asset represents the proceeds of a crime or an offence, making it difficult to prosecute and convict someone on the grounds of money laundering<sup>38</sup>.

However, a judgment of the Luxembourg Court of Appeal dated 3 June 2009 confirms that the proof of the predicate offence is free and does not depend on a prior conviction: “*The court can base its conviction on a set of precise and corroborating presumptions, basing their conviction on any direct or indirect element of proof, provided that it is tendered into evidence and can be freely debated by the parties.*”<sup>39</sup> The court has also ruled on the status of the perpetrator of the predicate offence, ruling that “*it is not, however, necessary for the perpetrator of the predicate offence to have been prosecuted or convicted of the crime or offence from which the pecuniary advantage has been obtained and the crime or offence identified*”<sup>40</sup>. It added that it is sufficient, but the existence of the elements constituting the predicate offence must be established, which means that even implicitly but with certainty, this offence must be identified specifically in order to specify the illicit origin of the laundered funds.

<sup>35</sup> FATF mutual evaluation report on Luxembourg, 19 February 2010, p. 41.

<sup>36</sup> The concept of disguising within the meaning of the Vienna and Palermo Conventions (art. 3.1 b of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, signed in Vienna, on 20 December 1988; art. 6.1 of the United Nations Convention, the Palermo Convention against Transnational Organized Crime of 2004, ratified by Luxembourg on 12 May 2008) is not expressly included in the body of legislation, case-law not having as yet dissipated doubts existing in this area.

<sup>37</sup> See the law of 3 March 2010 introducing corporate criminal liability into the Criminal Code and the Code of Criminal Investigation, RECUEIL DE LEGISLATION A – Mem. N° 36, 11 March 2010. Article 37 of this law provides that the maximum amount of the fine imposed in accordance with the provisions of article 36 (750,000,000 euros) is increased fivefold when a legal entity is held criminally liable for, among other offences, money laundering and receiving stolen goods. In addition, its article 40 introduces the principle of special confiscation (defined in article 31) pronounced as the principal penalty against the legal entity when the offence punished provides for a term of imprisonment for natural persons.

<sup>38</sup> FATF mutual evaluation report on Luxembourg, 19 February 2010, p. 42. Its authors note that the “Luxembourg authorities admitted that “*the predicate offence is an element of the money laundering offence*” and that it is for the courts to “*decide whether there is sufficient evidence to establish the elements constituting this predicate offence in order to be able to convict the defendant of money laundering*”

<sup>39</sup> CSJ corr., 279/09 X, 3 June 2009

<sup>40</sup> *Ibid.*



These elements seem to be detrimental to the effective and practical criminalisation of the offence of money laundering and hamper, according to the FATF assessor, the effectiveness of the anti-money laundering system in Luxembourg, even in the absence, strictly speaking, of a legal obligation to obtain a prior conviction for the predicate offence<sup>41</sup>.

## ii. The relationship between receiving stolen goods and money laundering

The relationship between the offence of receiving stolen goods and that of money laundering could be described as parallel without having become completely collateral. The general criminalisation of receiving stolen goods, provided for in article 505 of the Criminal Code<sup>42</sup>, historically precedes the offence of money laundering by several decades since it was included in the Criminal Code of 1879. The concept of receiving stolen goods is today present on an ancillary basis in numerous other provisions of the Criminal Code<sup>43</sup>. Because it has existed for a far longer period of time, it is therefore natural that it is invoked far more frequently than the offence of money laundering. In 1904, case-law had enshrined the specific nature of the offence of receiving stolen goods<sup>44</sup>, while its autonomy was confirmed several years later in a 1919 ruling<sup>45</sup>. Moreover, contemporary rulings have confirmed its current legal force.

Sometimes as an immediate offence, as soon as the person receiving stolen goods takes possession of an object knowing that it comes from an illicit source, irrespective of the length of time during which the person in question retains possession of the object<sup>46</sup>, sometimes as a continuing offence<sup>47</sup>, the handling of stolen goods always requires the co-existence of two elements. A material element (the possession of an object from an illicit source) and a mental element (also called psychological: ordinary fraud) which implies knowledge of the criminal or illicit origin of the goods handled but also the deliberate intention to commit the criminal act<sup>48</sup>.

As regards the first condition of the second element, it is noteworthy that numerous rulings have confirmed that it is not necessary for the receiver of stolen goods to have been aware of the precise nature, the time and place, execution, the name of the victim or that of the perpetrator of the original offence<sup>49</sup>, but the public prosecutor must provide proof of intent<sup>50</sup>. In addition, unlike the offence of money laundering, the offence of receiving stolen goods necessarily supposes that the primary offence must have been committed by a third party and not by the accused person<sup>51</sup>. We note in this regard a judgment which convicted two financial professionals of negligence for having failed to check the activity of a client (despite being included on a watch list) and the origin

<sup>41</sup> FATF mutual evaluation report on Luxembourg, 19 February 2010, p. 43

<sup>42</sup> Art. 505. (L. 14 August 2000): "Anyone who has received all or part of assets or intangible property, embezzled or obtained as a result of a crime or an offence, shall be liable to a term of imprisonment of between fifteen days and five years and a fine of between 251 euros and 5,000 euros. In addition, they may be deprived of their rights, in accordance with article 24. Receiving is the fact of knowingly benefiting from the proceeds of a crime or an offence

<sup>43</sup> For example, as regards bankruptcy with article 490 ("[...] Those who, in the interest of the bankrupt, have concealed, hidden or received all or part of the said person's personal or real property [...]"); fraudulent handling with article 508 ("Fraud also applies and the perpetrator is liable when possession of goods has been obtained purely by chance or when this possession is the result of an error by a third party"), Court 23 March 1895, p.4, 99

<sup>44</sup> "The offence specified in article 505 of the Criminal Code constitutes a specific offence which is sanctioned with the aim of preventing third parties, by receiving subsequently the proceeds of a crime or an offence, from assisting the perpetrators of these crimes or offences intended to frustrate criminal proceedings. Given this intent of the receiver of such property, according to which the possession of the objects received appears "in itself" as the continuous execution of criminal intent, the offence specified in article 505 of the Criminal Code constitutes a continuous offence, which is executed only when the said objects are no longer in the possession of the offender. A foreigner who has taken possession of objects concealed by him abroad may be liable when it emerges from the investigation that he has continued to keep the goods in his possession in the Grand-Duchy with fraudulent intent." Court, 20 February 1904, p.6, 434

<sup>45</sup> "Under the regime of the Criminal Code of 1879, the offences of theft and receiving constitute legally autonomous offences, i.e. separate from each other; the theft which always precedes the receiving, and always has a different perpetrator, constitutes a separate offence from that of receiving the stolen goods; it follows that if an offender is prosecuted for receiving stolen property, the court cannot, without the defendant's consent, convict him of theft." Cass. 7 February 1919, p.10, 414

<sup>46</sup> CSJ corr., 109/08 X, 27 February 2008

<sup>47</sup> CSJ corr., 250/10 V, 2 June 2010

<sup>48</sup> CSJ corr., 18/07 V, 9 January 2007; CSJ corr., 443/01 V, 11 December 2001

<sup>49</sup> CSJ corr., 77/06 V, 14 February 2006 ; CSJ corr., 468/01 V, 18 December 2001

<sup>50</sup> CSJ corr., 142/08 X, 5 March 2008

<sup>51</sup> CSJ corr., 226/10 X, 19 May 2010; CSJ corr., 301/05 V, 21 June 2005

of the funds received on the client's account; the court considered that they should necessarily have realised the fraudulent origin of the funds of which they took "possession" and that, accordingly, their bad faith was established<sup>52</sup>.

In general, if the offence of receiving stolen goods is covered by a combination of article 506-1 (3) of the Criminal Code and the "theft" category (art. 463 to 479 of the Criminal Code), it cannot be said to have lessened in intensity, nor has the number of prosecutions for receiving stolen goods fallen in line with an increase in the number of money laundering prosecutions. We will probably have to wait several more years for the offence of money laundering to be implemented more systematically and supersede the offence of receiving stolen goods.

## **II Practical implementation difficulties**

The recurring use of receiving contrasts with the subdued use of money laundering as a legal weapon to combat financial crime. This weapon has nevertheless been deployed, with criminal prosecutions on the grounds of money laundering being chiefly initiated in the Grand-Duchy on the basis of articles 8-1, indent 1, 2) of the law of 1993 and 506 indent 1 2) of the Criminal Code<sup>53</sup>. During the period 2003–2008, around sixty preliminary investigations or judicial inquiries were launched for money laundering<sup>54</sup> and 18 of them were ultimately entrusted to an examining magistrate. In total, out of 16 judicial decisions pronounced, only 8 convictions were handed down<sup>55</sup>.

This low number of decisions before 2010 provoked the anger of the FATF assessors, who felt that the lack of significant money laundering convictions was not a deterrent for criminals. Although the fines imposed were undeniably small (between 1,200.00 euros and 25,000.00 euros) it must be emphasised that the terms of imprisonment pronounced were in some cases severe (up to 7 years)<sup>56</sup>. Moreover, it would seem that examining magistrates now investigate cases in a dual role: in addition to the predicate offence, the offence of money laundering is apparently invoked far more systematically<sup>57</sup>. Over and above these figures<sup>58</sup> and the limited volume of case-law, the grounds of judgments pronounced in this regard have been criticised, which the FATF experts have not failed to point out. These observations can be explained in particular by the legal difficulties faced in implementing the criminalisation of money laundering, as explained below.

### **1) Shortcomings in the money laundering offence**

#### **i. The difficulty of proof (material and mental element)**

As with the offence of receiving, the offence of money laundering requires, in addition to the legal element, the co-existence of material and mental elements. The material element must be established by proof of the existence of a crime or an offence having generated for its perpetrator a direct or indirect profit. The mental element lies in the intention of the perpetrator to launder the

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<sup>52</sup> Aforementioned CSJ corr., 250/10 V

<sup>53</sup> That is to say "*having assisted in an operation consisting in investing, concealing or converting the direct or indirect object or proceeds of the offences*", criminalisation which is broader than that of "*facilitating by any means the false justification of the origin of the property*" which does not apply to the perpetrators of the offence but rather to the co-perpetrators and accomplices, see previous report, p.41

<sup>54</sup> Principally

<sup>55</sup> Data obtained from tables of statistics kept by the Public Prosecutor's Office and reproduced in the aforementioned FATF report

<sup>56</sup> *Ibid.*

<sup>57</sup> The proof of this is the rise in the latest money laundering convictions pronounced in 2011 and 2012. Moreover, one of these judgments received significant coverage, since a local lawyer received a severe punishment in November 2010 for an offence dating back to 1996.

<sup>58</sup> They consider that the number of convictions is low in comparison with the number of cases which is also low, that the amount of fines imposed is particularly low, although the maximum legal fine is 1,250,000 euros and that confiscation, when pronounced, covers minor property, see the aforementioned report p.50

proceeds of the assets which he knows are the result of a crime or an offence that has been committed. It is the co-existence of these elements which will enable the court to convict a person prosecuted on the basis of the special offence or the general offence of money laundering.

However, we note from the few judgments pronounced in Luxembourg that proof of the material element, which is the responsibility of the prosecution<sup>59</sup>, is difficult to provide, despite the fact that the criminal origin of the funds may be established by all possible means<sup>60</sup>. The FATF experts have thus highlighted the difficulty of proving that a given asset represents proceeds of a predicate offence. Relying on an analysis of case-law<sup>61</sup>, they indicate that prosecutions on the grounds of money laundering require “*evidence of the predicate offence and the link between that offence and the assets targeted*”. The absence of a requirement for a prior or concomitant conviction does not, however, exempt the courts from the need to verify the nature of the underlying offence. However, it is this verification condition needed to establish the money laundering offence which, in their opinion, undermines the effective scope of application of the money laundering offence.

To sum up, the criminalisation of money laundering seems to rely excessively on proving the predicate offence, its material elements and the link between this and the assets which are the proceeds of the said offence. The level of proof required seems, again in their opinion, to make it virtually impossible to prove money laundering in the absence of a conviction for the predicate offence. This level of proof requirement is seen as having a direct impact on the effectiveness of the anti-money laundering system and also explains (according to the Luxembourg authorities themselves) the small number of convictions<sup>62</sup>.

It is important to emphasise that the mental element is often the element that is the most difficult to prove in cases of financial crime; at least this is the element which has been the most fiercely debated. To criminalise money laundering, the fraudulent act, that is to say the offender’s intent to commit the offence, is required. The suspected money launderer must have, with full knowledge of the facts, committed one of the acts specified in the provisions on money laundering, that is to say he must be aware of the illicit origin of the goods or funds when he receives them.

Despite the procedural flexibility available in criminal law in Luxembourg (all types of evidence are admissible and the possibility to deduce the offender’s intent from objective facts and circumstances), it is sometimes difficult to produce sufficiently strong evidence of the existence of this element<sup>63</sup>. In this case, even a slight doubt as to the defendant’s knowledge regarding the criminal origin of the property or the funds must be interpreted in his favour. On the other hand, as soon as a defendant is in possession of “solid information”, this is enough for the said defendant to be considered as being aware of the illegal origin<sup>64</sup>. Without an exact definition of these terms, we deduce that they depend on the court’s intimate convictions established on the basis of objective elements or a body of sufficiently strong and consistent evidence to establish intent.

### ii. Place of the underlying offence: fatalistic pragmatism vs. formalistic application?

Irrespective of the type of laundering involved, the place where the underlying offence is committed has little bearing on whether or not it is possible to pursue a prosecution in

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<sup>59</sup> CSJ corr., 235/00 V, 7 July 2000

<sup>60</sup> CSJ corr., 279/09 X, 3 June 2009. In this judgment, the Court considered that the Public Prosecutor’s Office had failed to provide proof of the existence of the predicate offence of living off immoral earnings (not established in Germany, where the offence was alleged to have been committed) based on the elements of the German prosecution’s case file

<sup>61</sup> Aforementioned CSJ corr., 250/10 V

<sup>62</sup> See aforementioned report p.43

<sup>63</sup> Aforementioned CSJ corr., 235/00 V. Any doubts as to whether the defendant had sufficiently solid information as to the exact origin of the amounts deposited on accounts must be interpreted in the defendant’s favour.

<sup>64</sup> *Ibid.* “Thus, it is not necessary for the defendants to know all the circumstances and acts of D., to be absolutely certain about them, even to know that D. has received a final conviction, but it is sufficient for them to have solid information to recognise that the funds had been acquired as a result of drug-trafficking activities”

Luxembourg for money laundering<sup>65</sup>. Several judgments have confirmed this legislative principle, in particular a ruling of 7 July 2000<sup>66</sup> concerning the predicate offence of living off immoral earnings and drug trafficking committed in the United States<sup>67</sup>. However, we note that in such cases the Luxembourg authorities seem to favour, for reason of efficiency according to them, reporting the offence to the foreign country where the underlying offence was committed, rather than instituting proceedings in Luxembourg on the grounds of money laundering.

Why not prosecute these offences locally when the necessary legal instrument exists to allow proceedings to be instituted? Quite simply because of a form of fatalistic pragmatism: the rationality of the procedure apparently justifies reporting the facts in the country where the authorities are prosecuting the predicate offence as a single useful action<sup>68</sup>. In addition, there is the probability that the perpetrator of the money laundering offence (a non-resident) might not be physically present in Luxembourg<sup>69</sup>. The Luxembourg authorities therefore defend their practice of reporting acts of money laundering as valid from the point of view of the effectiveness of the proceedings and assert that they prosecute at national level if the country contacted refuses to act<sup>70</sup>.

The FTAF experts do not approve of this position and consider that “the principle of grouping together, even if it is decided on a case by case basis, proceedings in the State where the predicate offence was committed does not seem to send out the right signal to criminals”<sup>71</sup>. Moreover, the FATF adds: “The fact that money laundering constitutes in principle cross-border crime in Luxembourg cannot justify the recurring practice of not prosecuting cases of money laundering in Luxembourg on the grounds of having reported the facts to the competent foreign authority. Money laundering is a specific offence which calls for a specific penalty to be imposed when a material case of money laundering is detected in order to ensure targeted global action against money laundering.”<sup>72</sup> Although this argument is admissible, the one which consists in explaining the large number of cases of reporting offences to foreign authorities by the absence of real autonomy of money laundering has not been objectively explained or demonstrated.

### iii. The impact of statutory positive law on the tax issue

As described previously, the Luxembourg list of predicate offences whose proceeds may be part of a money laundering transaction is very wide-ranging and is in line with international benchmarks. There is, however, a specific Luxembourg characteristic: the fact that the general offence of fraud provided for under article 496 of the Criminal Code does not include tax fraud; unlike Belgium and France which have explicitly inserted in their preventive and punitive money laundering systems this tax aspect about which much has been written in the past<sup>73</sup>.

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<sup>65</sup> Article 8-1(4) of the law of 1993 stipulates that offences are also punishable “when the predicate offence has been committed abroad”. This concerns offences under Luxembourg law. The criminal nature of the act under foreign law does not seem to be a requirement, which extends the scope of the acts that can be prosecuted by the Luxembourg authorities. Article 506-3 of the Criminal Code contains a different provision from that of the law of 1993 since it stipulates, subject to exceptions, that the underlying offence is punishable in the State where it was committed, since indent 2 provides that: “However, except for the offences for which the law authorises proceedings to be instituted even if they are not punishable in the State where they were committed, this offence must be punishable in the State where it was committed.” See the aforementioned report, p.45

<sup>66</sup> CSJ corr., 270/01 V, 10 July 2001: we note “[...] notwithstanding the fact that the original offence was committed outside Luxembourg [...]”

<sup>67</sup> Aforementioned CSJ corr., 235/00 V

<sup>68</sup> See aforementioned report, p.46

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.* Money laundering therefore constitutes a cross-border crime, which is difficult to prove since it requires in principle, according to the Luxembourg authorities, evidence of the predicate offence

<sup>71</sup> *Ibid.* In addition, it has not been established that Luxembourg effectively prosecutes the offence of money laundering, when this offence is not prosecuted abroad

<sup>72</sup> *Ibid.*

<sup>73</sup> For the French point of view: P. Michaud, *Tracfin, blanchiment et fraude fiscale : les déclarations de soupçon, de nouvelles obligations pour les juristes*, J.C.P. éd. Ent. N°42, 15 October 2009. For the Belgian point of view: A. Risopoulos, *Blanchiment et fraude fiscale : on change les règles*, *Analyse de la loi du 10 mai 2007*, *Revue Générale du Contentieux Fiscal*, 2007/4, p.239



By way of illustration, professionals subject to French law are required to report any suspicions of tax fraud as defined by article 1741 of the CGI<sup>74</sup>, subject to the eligibility criteria determined by decree<sup>75</sup>. When this measure was adopted there were fears that it would result in a huge increase in suspicious activity reports. The solutions proposed in numerous studies prior to the drafting of the texts transposing the 3<sup>rd</sup> directive in France, namely amending article 1741 by creating alongside ordinary tax fraud – or “small tax fraud” – a serious tax fraud offence (which on its own would be liable to a term of imprisonment of not less than one year, which would have had the effect of reducing significantly the potential number of suspicious activity reports, as it would have concerned only frauds in excess of 100,000,00 euros), or alternatively drawing up a code of best practice between the centre’s various stakeholders (e.g. the TRACFIN service, the Directorate-General for Taxation, the Banking Commission<sup>76</sup>, representatives of the regulated professions, etc.), were ultimately rejected<sup>77</sup>.

In Luxembourg, these deliberations did not take place since tax fraud<sup>78</sup>, punishable by a fine, is not included among the predicate offences that may give rise to an offence of laundering the “proceeds” or at least the pecuniary advantage or financial benefits derived from it. The same applies as regards qualified tax fraud<sup>79</sup>, more serious but punishable by a minimum term of imprisonment of between one month and five years: it cannot be a predicate offence which, within the meaning of anti-laundering laws, is necessarily a serious offence, that is to say punishable by a term of imprisonment of at least six months<sup>80</sup>.

Aside from the legal aspect of potential prosecution strictly on the grounds of the laundering of the proceeds or the pecuniary advantage derived from the offence of qualified tax fraud – whose impact is inevitably drastically reduced – this means that professionals subject to the obligation of active cooperation do not in theory have to worry about whether any doubts or suspicions they may entertain regarding a client or a transaction involve a tax issue (moreover, they do not normally have to classify the offence, which incidentally seems totally illusory when the aim is, if not to classify an offence, at least for professionals to objectify their suspicions or doubts). If, in practice, numerous professionals in the banking-financial sector enlist the services of tax lawyers to satisfy themselves of the legality from a tax perspective of financial structures and transactions, the fact that neither tax fraud nor qualified tax fraud fall within the *rationae materiae* scope of

<sup>74</sup> Article of the General Tax Code, worded as follows: “Without prejudice to the special provisions set out in this code, anyone who has fraudulently avoided or fraudulently attempted to avoid the establishment or payment in part or full of the taxes referred to in this code, either by intentionally failing to file a tax return within the allotted time, or has intentionally concealed part of the amounts subject to tax, or has organised his insolvency, or has hampered by other manoeuvres the recovery of the taxes due, or by acting in any other fraudulent way, is liable, irrespective of the applicable tax penalties, to a fine of 37,500 euros and a term of imprisonment of five years. When the offences have been carried out or facilitated via purchase or sales without an invoice, or via invoices not relating to real transactions, or whether their aim is to obtain unjustified refunds from the State, their perpetrator is liable to a fine of 75,000 euros and a term of imprisonment of five years.”

<sup>75</sup> Article L. 561-15-II of the Monetary and Financial Code stipulates that “Notwithstanding I, the persons referred to in article L. 561-2 shall report to the service referred to in I the amounts of the transactions where they are aware, suspect or have good reason to suspect that they are derived from tax fraud on the basis of at least one of the criteria determined by decree.” See decree n° 2009-874 of 16 July 2009 implementing article L. 561-15-II of the COMOFI, published in the JORF n°0164 of 18 July 2009 p. 11978, text n° 6. The legislator sought, in this way, to avoid the situation explained above, which would have triggered sudden and exponential growth in the number of reports.

<sup>76</sup> It has since become the Autorité de Contrôle Prudentiel (ACP)

<sup>77</sup> In particular in the report of the preparatory work for the transposition of Directive n° 2005/60 EC on money laundering and terrorist financing, drawn up in June 2007 by Jean-Louis Fort and Yves Charpenel

<sup>78</sup> “Anyone who obtains for themselves or for others unjustified tax benefits or who intentionally acts in such a way that tax revenues are reduced” will be convicted of tax fraud, as provided for in article 396, indent 1 of the general tax law of 21 May 1931 (the *Abgabenordnung*, AO). Only a fine is imposed but it can be as high as four times the amount of tax avoided. There are also the criminal tax offences of unintentionally reducing tax revenues; these target persons who, by negligence, cause the reduction of tax revenues or the granting or maintaining of tax benefits, or undermine the tax system, which refers to the intent or negligence infringing tax law or a ruling pronounced during the tax procedure

<sup>79</sup> That is to say the offence which is the closest, although very relatively, to French tax fraud. Article 396 indent 5, introduced by the law of 22 December 1993 on tax fraud, provides that: “If the fraud involves significant tax amounts and has been committed by the systematic use of fraudulent manoeuvres intended to conceal relevant information from the tax authorities or to justify inaccurate information, it shall be sanctioned as tax fraud by a term of imprisonment of between one month and five years and a fine of fifty thousand euros, plus a fine representing ten times the amount of tax avoided.” This is the most serious case of tax fraud, but its nature is mixed, since the law does not specify whether it is of an administrative or criminal nature

<sup>80</sup> This particular aspect may seem shocking on first sight. It must, however, be considered in the historic context of the time when it was adopted. Luxembourg has been influenced by numerous laws, above all French and German regulations. The *Abgabenordnung* (AO), a kind of German ordinary tax law, was introduced into Luxembourg’s legislative system in the 1940s, on top of existing Luxembourg tax law. Its article 396 still provides for an alternative regime to general criminal law and the offence of fraud in particular. For a study on this subject see: F. Entringer, *Une infraction nouvelle : l’escroquerie fiscale*, éd. d’Letzeburger Land, 1992

application of predicate offences, as specified in the 3<sup>rd</sup> directive<sup>81</sup> discharges them to some extent from a very heavy burden and responsibility<sup>82</sup>.

Finally, the generalisation of the scope of application of the offence of money laundering to other predicate offences, that is to say to a very large proportion of the offences included in the Criminal Code, will not have got the better (again?) of the tax exception. Some authorities on the subject therefore raise a question: is it really an obstacle to the prosecution of persons liable to tax in Luxembourg?<sup>83</sup> It must be borne in mind that a case of qualified tax fraud generally presupposes that other offences have been committed, in particular false accounting or forgery, offences which carry a minimum term of imprisonment of at least six months and which therefore fall within the scope of the provisions of the aforementioned law of 2008 which lists the predicate offences<sup>84</sup>. The capacity to prosecute offenders for money laundering in cases having a tax dimension, either as a primary or secondary offence, therefore exists and cannot be ignored. Even if it is unsatisfactory from the point of view of judicial dogmatism, it would not be the first time that a form of “*offences shopping*” has been used in a fatalistic way.

## 2) Confiscatory measures – General constraints

### i. Confiscation, freezing and garnishment of the proceeds of money laundering

Articles 31 et seq. of the Luxembourg Criminal Code govern special confiscation<sup>85</sup> while article 32-1 refers specifically to the offence of money laundering. The scope of application of confiscation is therefore wide and covers, via general provisions, a large part of assets.

However, the FATF experts have pointed out in their report that the confiscation of property which has been used or was intended to be used to commit the offence applies only to property belonging to the convicted offender. The same applies as regards the confiscation of assets of an equivalent value. The restrictions of article 31 seem “to be worded too generally since they exclude in principle any possibility of confiscating property held/owned by third parties”. Whereas the Luxembourg authorities interpret this restriction as a means of protecting the rights of third parties, the FATF does not accept this explanation, as the protection of the rights of third parties is explicitly provided for elsewhere. In addition, according to the FATF criteria, provisional confiscation must be the rule, subject to the reservation of third parties acting in good faith, whereas the Luxembourg wording is reversed so that the protection of third parties is the rule.

Similarly, the confiscation of assets of an equivalent value concerns the assets referred to under 1) of the 1<sup>st</sup> indent of article 31, that is to say “*property constituting directly or indirectly the object or proceeds of an offence*” and not the property which was used or intended to be used to commit the offence<sup>86</sup>. Consequently, only the combined application of article 31, 1) and 3) would seem to

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<sup>81</sup> Here is a reminder of the offences of fraud and embezzlement falling within the scope of application of reports of suspicious transactions: article 489 to 490 of the Criminal Code (bankruptcy), articles 491 to 495 of the Criminal Code (fraud) and article 496 of the criminal Code (embezzlement)

<sup>82</sup> Moreover, it is possible to consider that the difficulty of understanding the notion of pecuniary advantage, now enshrined in the aforementioned law of 2008, combined with the extension of the scope of application of predicate offences, will result in factual and legal incongruities

<sup>83</sup> Including some who consider that it can be described as excessive, see C. Bourin, *La course à la législation anti-blanchiment ou “qui peut montrer patte blanche?”*, Journal des Tribunaux, n°3, 12 June 2009, p.75

<sup>84</sup> C. Bourin, *op. cit.*

<sup>85</sup> Article 31 of the Criminal Code specifies that special confiscation applies:

“1) to property including property of all nature, whether tangible or intangible, movable or immovable, as well as all legal acts and documents constituting title or a right to property, property constituting the direct or indirect object or proceeds of an offence or constituting any pecuniary advantage whatsoever derived from the offence, including the income derived from the said property;

2) to the property which was used or was intended to be used to commit the offence, when it is owned by the convicted person;

3) to the property which has been substituted for that referred to in 1) of this indent, including the income derived from the substituted property;

4) to the property which is owned by the convicted person and whose monetary value corresponds to that of the property referred to under 1) of this indent, if the latter cannot be found for the purpose of confiscation.” See the aforementioned report, p.59 et seq.

<sup>86</sup> According to the FATF, case-law interprets the expression “*property which has been used or was intended to be used to commit the offence*” very broadly, so that it concerns the property used for the offence, that is to say useful for its perpetration, which includes property having been used for



authorise the confiscation of assets derived directly or indirectly from the proceeds of a crime, including the income, profit and other advantages derived from the proceeds of the crime.

Article 32 stipulates that “*special confiscation is always ordered for a crime*” and that it may also be applied for an offence. Article 32-1 specifically provides that in the event of money laundering, where the offence is referred to in articles 506-1 to 506-7 of the Criminal Code, the general provisions relative to the special confiscation referred to in article 31 apply. Moreover, this article specifies that: “*The confiscation of the assets referred to in points 1 and 3 of the 1<sup>st</sup> indent of article 31 shall be ordered, even in the event of acquittal, exemption from penalty, lapse or expiry of the time limit after which prosecution may not be brought, and even if such substances or property are not the property of the perpetrator of the offence.*”<sup>87</sup>

If the *corpus juris* complies with international standards, it appears in practice that confiscation is only ordered in very exceptional circumstances and that most of the time this concerns assets of low value or of little use which have been used to commit the offence, such as a mobile phone. The links to be established between the property to be confiscated and the underlying offence committed reflect the difficulties in issuing a confiscatory order.

As regards temporary freezing measures, the Financial Intelligence Unit (FIU) of the Public Prosecutor’s Office may pronounce such measures, but limited to three months, which is relatively short<sup>88</sup>. Such a measure must be related to a transaction or client subject to a suspicious transaction report. In theory non-renewable, such a measure is relatively informal since the order can be made based on verbal instructions<sup>89</sup>. In 2008, 13 orders were issued to freeze assets, while the total frozen in 2007 amounted to 3,893,670,000 euros and 17,486,959,000 US dollars<sup>90</sup>. These amounts continued to increase subsequently and involved around thirty asset-freezing operations in 2009; since then they have fallen slightly<sup>91</sup>. It is to be noted that the Public Prosecutor’s Office itself did not have the power at the time, outside its FIU, to freeze assets, including funds resulting from a transaction subject to confiscation<sup>92</sup>. This situation was rectified in 2010<sup>93</sup>.

Finally, pursuant to articles 66 and 66-1 of the Code of Criminal Investigation, the examining magistrate can seize all the assets referred to in article 31(3) of the Code of Criminal

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acts relating to preparations for the offence and for acts subsequent to the offence, enabling the perpetrator to enjoy the expected rewards, see aforementioned report, p. 60

<sup>87</sup> It is important to note that the law of 1993 has a similar provision

<sup>88</sup> Including the preliminary investigations to be carried out following the analysis of the FIU since it involves two stages involving the same authority, which, in the opinion of national judges themselves, sometimes requires them to manage this time limit so as to ensure that the three-month period during which assets may be frozen does not cause any problems of timing. It seems however that this period does not give rise to any practical difficulties, see the aforementioned report, p. 61

<sup>89</sup> In this case, it must be confirmed in writing subsequently

<sup>90</sup> Figures taken from the aforementioned report, p.62

<sup>91</sup> By way of illustration, the amount of the assets frozen by the FIU of the Luxembourg Public Prosecutor’s Office in 2011 was almost 70M euros, see 2011 report of the FIU of the Luxembourg Public Prosecutor’s Office, p.23.

<sup>92</sup> In this regard it is important to note that the power to freeze transactions originates from article 5(3) of the law of 12 November 2004 on the fight against money laundering and terrorist financing and not the Code of Criminal Investigation, which provides for this competence to be exercised solely by the examining magistrate, as will be noted below

<sup>93</sup> The law of 27 October 2010, strengthening the legal framework in the fight against money laundering and terrorist financing (RECUEIL DE LEGISLATION A – Mem. N° 193, 3 November 2010), amended article 24-1 (1) of the Code of Criminal Investigation which now reads as follows: “*For any offence, the State Public Prosecutor may require the examining magistrate to order a search, a seizure, the hearing of a witness or an expert evaluation without a preparatory investigation having been opened*”. The law thus extends the power of the State Public Prosecutor by enabling him to use a simplified investigation procedure. Consequently, it meets the concerns of the FATF, but is inconsistent with the reasons which at that time had led the legislator to introduce the simplified investigation procedure into the Luxembourg criminal procedure in order to reduce the workload of examining magistrates by avoiding a situation where the State Public Prosecutor must systematically open a preparatory investigation for minor offences, see opinion of Luxembourg Chamber of Commerce of 16 September 2010, following a referral of the Minister of Justice (30 July 2010). This can be consulted by clicking on the following web link: [http://www.cc.lu/uploads/tx\\_userccavis/3651\\_3714ZCH\\_Blanchiment.pdf](http://www.cc.lu/uploads/tx_userccavis/3651_3714ZCH_Blanchiment.pdf).

Investigation<sup>94</sup>. Article 67 (2) of the Code of Criminal Investigation authorises an examining magistrate, when “*the seizure concerns assets which do not need to be conserved in kind to establish the truth or to protect the rights of the parties*”, to order them to be deposited with the Caisse de Consignation in the case of assets for which deposit accounts are normally opened, such as amounts in local or foreign currencies, securities or precious metals. It is above all important to note that only an examining magistrate can issue a seizure order for an unlimited period<sup>95</sup>.

## ii. Constraints and peculiarities with regard to statistical data

The crime rate in Luxembourg is around 6000 offences for 100,000 inhabitants. These largely involve general criminal offences, such as theft, extortion, fraud, unlawful appropriation of property, misappropriation of corporate assets, simple or fraudulent bankruptcy and drug trafficking<sup>96</sup>. In total, in 2008, the police recorded around 30,000 offences classified as criminal.

When these gross figures are compared with the abovementioned results of the number of investigations and convictions, the outcome is not on the face of it satisfactory. However, this poor result needs to be adjusted to take account of Luxembourg’s very unique situation in comparison with its fellow FATF members and members of the European Communities. As indicated previously, the country has two major drawbacks in terms of its effectiveness in detecting offences and prosecuting them: its very small size and its very pronounced international dimension. It is effectively first of all a small country, which hosts a multitude of professionals, and therefore trade and financial flows.

In addition, the large number of overlapping and often complex business dealings does not facilitate the detection of money laundering transactions<sup>97</sup>. Thus, money laundering activities are mainly located at the layering stage, that is to say the intermediate stage of the process of money laundering, commonly recognised as consisting of a first stage of placement and a third and final stage of integration. In practice, this results in the near non-existence of money laundering transactions involving a predicate offence committed in Luxembourg. On the other hand, cases of money laundering reveal that the predicate offence is committed almost systematically outside the country. Available statistics show that the number of suspicious transaction reports submitted to the FIU of the Public Prosecutor’s Office concern funds which are the proceeds of a suspected offence committed abroad<sup>98</sup>.

The unusual provisions of articles 506-2 to 506-7, detailed above, are a perfect illustration of the unique situation of Luxembourg, as a simple transit and layering area, located at the crossroads of the activities of white collar criminals and targeting in reality an external enemy rather than an internal danger. This original situation is unknown or less common in the majority of our European neighbours. They are therefore not particularly bothered by the procedure for the criminalisation of the offence of money laundering in the framework of a case having international elements, at least outside judicial creations obtained from case-law.

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<sup>94</sup> Namely, “*the property, documents and belongings which were used to commit the crime or which were intended to be used to commit it and those which constituted the object of the crime, as well as everything which appears to correspond to the proceeds of the crime, as well as in general, everything which appears useful for establishing the truth or the use of which might be detrimental to the proper functioning of the investigation and everything which is liable to confiscation or return*”, including real estate, see aforementioned report, p.61

<sup>95</sup> The FATF notes in this regard: “As a reminder, as the Public Prosecutor’s Office is not competent in this area, the Luxembourg system does not seem to make adequate provision, by appropriate provisional measures and by granting the necessary prerogatives to the judicial authorities, to prevent any transaction, transfer or disposal of the assets subject to confiscation. It is important to note in this regard that the majority of cases of money laundering in Luxembourg are dealt with in Luxembourg by the Public Prosecutor’s Office without the involvement of an examining magistrate. It is to be noted, however, that in cases of flagrante delicto, including in cases of flagrante delicto involving money laundering, the Public Prosecutor’s Office has special competence as regards searches and seizure of property. This flagrante delicto procedure and the relevant powers have been used twice by the Public Prosecutor’s Office in cases of money laundering.” *Ibid.*

<sup>96</sup> See aforementioned report, p. 21 et seq.

<sup>97</sup> In this regard, the fact remains that professionals liable to the AML/CFT obligations are the best source of information jointly with exchanges of information between FIUs in the framework of international cooperation

<sup>98</sup> The techniques used are mainly inter-account transfers or somewhat complex bank transactions. In addition, it is estimated that in 2007, almost 85% of the persons suspected of having committed a predicate offence were non-residents, see aforementioned report p.34 and p.50

They must, on the other hand, focus not only on external criminal influences and their probable internal connecting factors<sup>99</sup> but also on “to hand” internal phenomena. More than their crime rate in itself, it is among other factors the number of local offences and crimes and the volume of geographically limited cases to be handled, the situation of judicial bottlenecks or their large territorial area which lead countries such as France to adopt an offence of “local” money laundering. For example, the non-justification of resources<sup>100</sup> is not an offence in the Grand-Duchy.

The differences between the detailed provisions of the two offences of national money laundering – integrated nevertheless in the legal system of neighbouring countries, both of which are members of the European Communities – are systematic of the noticeable gulf in terms of needs, issues and constraints. This impacts on the criminalisation procedures and the objectives (insofar as they are disclosed) of national policies to combat the laundering of the proceeds of illegal activities.

## Concluding remarks

Finally, on the involvement of financial sector professionals in efforts to combat financial crime, obviously there is still room for improvement, but their contribution is now irrefutable. Credit institutions and other financial sector professionals provide large volumes of information that is useful in solving cases and in facilitating prosecutions within the framework of international trafficking, and they are now an essential cog in the supply of unprocessed information on which the authorities can base a prosecution. The data published in the latest reports of the FIU of the Public Prosecutor’s Office show that there has been a steady increase in the number of reports since 2000<sup>101</sup>. Awareness of reporting needs and situations has increased in line with the rise in training and information sessions organised by the supervisory bodies, the authorities and professional associations in Luxembourg.

Initially, the twofold “stick and carrot” approach was above all driven by the “stick” aspect. Making the infringement of professional obligations a separate infringement in the aforementioned law of 1998, irrespective of any money laundering context, was a good illustration of this. This is less true now, since protecting their good reputation has become one of the chief concerns of professionals who wish to remain operational in an increasingly competitive crisis environment. Professionals now seem to be more driven by a need to operate free from suspicions of complicity than by fears of sanctions. This growing awareness could favour a lasting trend towards an increase in suspicious transaction reports – thus maximising the probability of detecting the layering of funds or assets from an illicit source and prosecuting offenders – and ultimately enhance the effectiveness of the anti-money laundering system put in place in Luxembourg.

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<sup>99</sup> Obviously often difficult to master and not easy to apprehend

<sup>100</sup> Article 24 of law n° 2006-64 of 23 January 2006 on the fight against terrorism and introducing various provisions on border security and controls introduces a generic offence of non-justification of resources. The intended twofold aim is the possibility of prosecuting an individual for possessing property when he is not in a position to justify its source, and to avoid long, painstaking investigations in order to identify fully all aspects of the person’s lifestyle to compare them with his legal income. See on this subject A. Bollé, *Commentaire de l’article 24 de la loi du 23 janvier 2006 créant un délit générique de non justification de ressources*, La Lettre de Sentinel, n°35, March 2006, p.12 ; D.G. Hotte, *Le délit de non justification de ressources*, Journal des Sociétés, n°37, November 2006, p.60

<sup>101</sup> V. *Annual reports for 2009, 2010 and 2011*, Financial Intelligence Unit FIU-LUX, Luxembourg Public Prosecutor’s Office

## Article

### **The protection of personal data in Luxembourg**

The aim of this article is to provide a succinct overview of the system applying to the protection of personal data in Luxembourg, by presenting briefly the local legislation governing this subject and the authority entrusted with ensuring compliance with the relevant legal provisions.

“With the growing importance of personal data in companies, compliance officers could find themselves in the front line as protection officers and thus become the main contacts of the CNPD.”

Applicable texts - The freedoms and fundamental rights of natural persons, in particular their privacy, with regard to the processing of their personal data are covered by the law of 2 August 2002 on the protection of persons in relation to the processing of their personal data (hereinafter the “Data Protection Act” or the “Act”), which entered into force on 1<sup>st</sup> December 2002 and amended by the law of 27 July 2007. The Data Protection Act transposes into Luxembourg law the provisions of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

The law of 30 May 2005 laying down specific provisions for the protection of persons with regard to the processing of personal data in the electronic communications sector also applies. This law takes account of recent developments in the area of electronic communication services and technologies.

What is the processing of personal data? The Data Protection Act defines “personal data” as any information relating to an identified or identifiable person. A natural person is considered to be identifiable if they can be identified directly or indirectly by reference to one or more elements. The processing of such data is any operation carried out, whether or not by automated means, and applied to such data. The law gives as examples of processing: the collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure or otherwise making available, as well as the destruction of data.

CNPD, duties and powers – The Data Protection Act created the National Data Protection Commission (hereinafter the “CNPD”), an independent authority with responsibility for controlling and checking whether data being processed are processed in accordance with the provisions of the Act. The duties and powers of the CNPD are specified in articles 32 et seq. of the Data Protection Act. This body is responsible for monitoring and checking the legality of the collection and use of processed data and for informing data controllers of their obligations. It ensures, inter alia, respect of the freedoms and fundamental rights of individuals, in particular with regard to their privacy, and informs the public about the rights of data subjects. Its main duty is to receive and examine complaints and requests to verify the lawfulness of processing operations. It also advises the government on data protection policy.

When infringements of the law are brought to its attention, the CNPD can impose sanctions against the data controller that has committed the infringement.

In accordance with our objective of presenting the range of legislative instruments covering the protection of personal data in Luxembourg, we will examine the conditions of validity of data processing operations (I), the obligations of the parties involved (II), the transfer of data abroad (III) and the notification formalities for processing operations (IV).

## **I- The conditions governing whether a processing operation is permitted**

Quality of the data and legitimacy of the processing operation – To be permitted, any processing of personal data must satisfy a certain number of substantive and procedural requirements. The Data Protection Act defines in this regard certain criteria which all data processing operations and files must satisfy. An initial set of requirements concerns the quality of the data, which must among other things be collected for specific purposes, be proportionate to these purposes and be accurate and up-to-date. The period for which data may be stored must be limited to the period needed to achieve the purposes defined before processing commences.

Moreover, the Act defines four aspects which must be taken into account by the data processing controller in order to ensure that the privacy of data subjects is adequately protected. The legitimacy of the processing operation is obviously guaranteed by the lawfulness of the processing, to which is added the core principle of the need for processing. The processing controller must moreover adhere to a principle of fairness vis-à-vis data subjects. The Act also requires measures relative to the security and confidentiality of the processed data to be respected. In general, before a data processing operation can be implemented, it must be notified to the CNPD (notification or prior authorisation, as the case may be, unless an exemption exists).

Non-compliance with the above conditions is liable to criminal penalties.

The processing of specific data categories – The Act authorises certain data processing operations, considered as particularly sensitive, subject to compliance with special, more restrictive conditions governing legitimacy.

The processing of sensitive data is in principle prohibited. “Sensitive data” are understood to be data relating in particular to the data subject’s racial origin, political or religious views, trade union membership, and data concerning their health or sex life, including genetic data. Such processing may be legitimised provided that the data subject has given their express consent, or if the processing is necessary for the purpose of fulfilling obligations in the field of employment law, or processing is necessary to protect the vital interests of the data subject or on grounds of public interest.

There are also specific procedures governing the processing of genetic data by health services, the processing of legal data, processing operations carried out in the framework of the freedom of expression, and finally processing for monitoring purposes. The latter form of processing, i.e. for monitoring purposes, requires some clarification. “Monitoring” is defined by the Act as “any activity which, carried out using technical instruments, consists of observing, collecting or recording in a non-occasional manner the personal data of one or more persons, concerning behaviour, movements, communications or the use of electronic computerised instruments”. Consequently, this may involve video surveillance, badge-controlled access or monitoring the use of computer systems, the Internet or email. Such processing must be submitted to the CNPD for its prior authorisation. Provisions on workplace surveillance by the employer are now included in the Labour Code. Employee surveillance is legitimate, in particular for the temporary monitoring of a worker’s production or performance in order to determine his salary, and to control production processes relating solely to machinery. To legitimise such processing, the employee’s consent is neither sufficient nor necessary. It is enough to obtain the agreement of a joint works council and inform employees and representative bodies.



## **II- Obligations and rights relating to the processing of data**

**Obligations of the processing controller** – The processing controller is required to implement all the necessary technical and organisational measures in order to protect the data being processed against destruction, loss, alteration or unauthorised access. These security measures must depend on the risks of a threat to privacy. If the processing is sub-contracted, for the same security reasons, the sub-contractor must act under the authority of the processing controller and may therefore only process data in accordance with the latter's instructions. The processing controller also has an obligation to inform the data subject, as described in more detail in the following paragraph.

**The data subject's rights** – Any natural person whose personal data are being processed must be informed accordingly by the processing controller. This information concerns the identity of the controller, the purpose(s) of the processing operation as well as any additional information required to ensure fair processing. This information obligation must be discharged at the latest when the data are collected, where the data are collected directly from the data subject, and at the time the data are recorded or when the data are first communicated where such data are not collected directly from the data subject. This information may be communicated by any means (mail, email, notice board, internal rules of procedure, etc.), it being understood that the burden of proof as regards the information obligation lies with the data controller. Data subjects also have the right to access and amend their personal data free of charge and without excessive waiting periods. In addition, data subjects have the right to oppose a processing operation at any time on compelling, legitimate grounds relating to their specific situation.

## **III- The transfer of data to third countries**

**Principle** – The transfer of data to countries outside the European Union is in principle prohibited. It is, however, possible to make such a transfer to a third party provided that it provides an "adequate" level of protection. The European Commission provides a list of these countries which includes, for example, Argentina, Israel, New Zealand, as well as the United States and Canada, under certain conditions.

**Waivers** – Data may be transferred to a third country that does not offer an adequate level of protection provided that the data subject has given his consent or the CNPD has authorised processing when the controller offers sufficient guarantees, based for example on contractual clauses.

## **IV- CNPD and administrative formalities**

**Prior notification to the CNPD** – The rule is that before a data processing operation can begin, it must be notified to the CNPD. This enables the CNPD to have an overview of actual processing operations and enables the public to consult the list of notified processing operations on the public register kept by the CNPD in the interests of transparency. The CNPD receives the notification and publishes its content in its public register after having checked the form.

There are two exceptions expressly and exhaustively specified by the Act when it is not necessary to notify processing to the CNPD. First, processing considered as commonplace and generally implemented as part of a company's day-to-day business, such as for accounting needs and staff management. The second case concerns particularly sensitive processing operations which require additional guarantees and which are therefore subject to the prior approval of the CNPD (see below) or need to be authorised by a Grand-Duchy regulation.



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Moreover, when a processing operation is stopped definitively, the data controller must complete an end-of-processing notice to inform the CNPD accordingly.

The CNPD's prior authorisation – The authorisation procedure is an exception to the principle of prior notification. The Personal Data Act contains an exhaustive list of the processing operations which require prior authorisation. These include notably monitoring and workplace supervision, the processing of biometric and genetic data (checking personal identity), the interconnection of data, the processing of data relative to the credit status and solvency of data subjects, as well as the specific case of data transfers to a non-EU country not offering an adequate level of protection.

In such cases, the CNPD carries out a prior examination of the application and decides on the merits of the case whether or not to authorise the proposed processing.

There is also a simplified form of authorisation in the form of a formal undertaking of compliance concerning processing operations for which the CNPD issues a single authorisation.

Personal data, an increasingly important issue – There can be no doubt that personal data are increasingly processed in the various areas of economic and social activity, and the advances of information technology have considerably facilitated the processing and exchange of such data. The growing body of regulations on the protection of personal data at European and national levels requires companies to review constantly their compliance procedures in this regard, which involves monitoring legal developments.

Proposed review of the European directive on the protection of personal data – On 25 January 2012, the European Commission published its proposals for a reform of European data protection law in order to modernise the European framework put in place by the 1995 directive. According to the recently published schedule, the proposed regulation is due to be submitted to the trilogue of the Parliament-Council-Commission in the summer of 2013. The choice of a regulation is not insignificant, since the Member States will have to apply the text without prior transposition. The proposed regulation aims to reinforce the data controller's security obligations. It also enshrines a right to oblivion. It is important to point out that one provision in particular has been the subject of much debate: the text provides that the competent authority should henceforth be the one where the company's main establishment is located. This change has caused an outcry, especially from the CNIL in France, which has objected to this criterion on the grounds that it will drive a wedge between European citizens and their national authorities.

Data protection officer – The data protection officer, the equivalent of the "IT and Freedoms Correspondent" (CIL) in France, has a key role in the company and is a special contact person for the CNPD, in order to enable the company to be kept apprised of legislative policy and to update its formalities. The data protection officer's status is regulated by the Act and by a Grand-Duchy regulation.

With the growing importance attached to the protection of personal data in companies, compliance officers could find themselves in the front line to assume the duties of data protection officers and thus become the main contacts for the CNPD.

January 2013

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## Roundtable summary

### FATCA & its implications on Compliance

Summary of the RT discussions of 24 September 2012

#### INTRODUCTION

This 15<sup>th</sup> ALCO round table has welcomed 20 participants around **Mrs Kerstin Thinnes**, Tax Partner of PWC Luxembourg. Frederic Batardy, Tax & FATCA expert has also participated to the discussions.

Mrs Renata Hoes has prepared an overview of the 33 answers to the questionnaire (available through the ALCO website: Members Documents/Publications). These answers show us that some participants already have a good knowledge about the implication of the FATCA rules. Others have only started recently to be informed about it.

The present summary can be read together with Mrs Thinnes' PowerPoint presentation, available through the ALCO website.

#### **FATCA - The Foreign Account Tax Compliance Act (FATCA) & Foreign Financial Institutions (FFI)**

Since 2001, the Qualified Intermediary (QI) regime, which is a US withholding tax system, has entered into force. FATCA adds a new dimension to the QI regime. It will operate as an additional system to the existing QI.

FATCA refers to Chapter 4 of the US Internal Revenue Code, which was enacted through the "Hiring incentives to Restore Employment (HIRE) Act" on March 18, 2010. The legislation is a direct result of combating off-shore tax evasion and recouping tax revenues. The purpose of the act is to detect, deter and discourage offshore tax evasion through increased transparency, enhanced reporting and strong sanctions, whether US tax evaders are holding assets on offshore accounts or through a foreign entity.

Some of the participating Compliance Officers already have contributed to the implementation of the QI regime within their institution. When FATCA arrived in 2010<sup>102</sup>, they were naturally involved in examining the new (draft) regulation and its impact on their financial institution.

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<sup>102</sup> The IRS released the final **FATCA** regulations on 17 January 2013. (<http://www.irs.gov>)

## Who's concerned?

All non US foreign financial institutions (FFIs) and even (non US) 'Non-Financial Foreign Entities' (NFFEs) are impacted by this new legislation.

FFIs and NFFEs that are affected by FATCA will have to make a simple choice as to whether they agree to comply with FATCA or not. FFIs and NFFEs that would like to continue to invest on their own behalf or on behalf of clients in the US capital markets will have to comply with the FATCA provisions by entering into an agreement with the US Internal Revenue Services (IRS). Those that do not agree to comply with the said provisions will suffer a 30% withholding tax and thus be unable to compete with the FFIs and NFFEs that are compliant.

## Who are FFIs?

The term FFI is broadly defined and includes four categories of non-US entities<sup>103</sup>:

- Entities that accept deposits in the ordinary course of a banking or similar business – e.g. Banks;
- Entities that as a substantial portion of their business hold financial assets for the account of others e.g. Broker Dealers, Trust Companies;
- Entities that are engaged or hold themselves out as being primarily engaged in the business of investing, reinvesting or trading securities e.g. Funds;
- Certain insurance companies.

If the FFI's decide to enter into agreement with the IRS, they will need to comply with the IRS verification and due diligence procedures with respect to the identification of US accounts and meet the reporting and withholding requirements of the IRS.

A FFI that does not serve any US person will nevertheless need to certify this and it ought to have procedures in place to identify any US indicia and ensure that an existing client does not become a US person (E.g. if one changes of residence).

## When will it be effective?

At the time of the meeting, entry into force was targeted to start in July 2013. In October, we were informed of further delays. Anyway, quite some countries are envisaging entering into bilateral agreements with the American authorities.

## Can FFI's be obliged to enter into an agreement with the IRS?

Not formally. But, if they don't, they will suffer from withholdings on US income. This might discourage registered FFI to maintain business with them. The 30% withholding will also result in a loss of revenues and, consequently, of competitiveness.

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<sup>103</sup> N.B. A fifth category had been added meanwhile by the final regulations

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In IGA Model 1 countries FFIs are deemed compliant but will have to register. In IGA Model 2 countries they will have to sign an agreement with IRS. In both cases there might be FFIs that will chose not to become participating FFIs.

## How do FFI enter into an agreement with the IRS?

Online forms enable to get the agreement on a group basis. It's burdensome. Questions are very detailed, especially regarding holdings and close links with (group) companies. Groups need to be careful: subsidiaries in certain non-partner jurisdictions might impact status of the whole group negatively. N.B. Some large financial groups have thousand or even tens of thousands of entities for which FATCA status will have to be determined.

## Intergovernmental Agreements (IGA's): different models

France, Germany, Italy, Spain & UK have opted for a Model 1 agreement:

Japan & Switzerland have opted for a Model 2 agreement.

Luxembourg has entered into discussions with IRS but has not yet decided on the model. It is presently more likely that Luxembourg goes for a Model 2 agreement. An agreement is expected to be reached by the summer 2013.

IGA's can be seen as attempts to neutralise unacceptable extraterritorial aspects of FATCA.

	<b>No IGA</b>	<b>IGA Model 1</b>	<b>IGA Model 2</b>
Countries	Non FATCA partner countries	France, Germany, Italy, Spain & UK (partners)	Japan & Switzerland, Luxembourg? (partners)
Reporting duties	FFI reports directly to IRS	FFI reports to local Gvt which forwards to US Gvt'	FFI reports directly to IRS (as requested by local laws)
Reciprocal exchange of information?	No	Depending from one IGA to another; purpose: transparent reporting. => legitimacy for non US Gvt to impose a US centric law	Depending from one IGA to another Japan: Yes Switzerland.: No
Certification	By responsible officer	Not required – presumption (it is unclear)	Not yet known. Probably by responsible officer
Withholding on 'recalcitrants'	yes	no	no
Implementation in local law	No	required	Required (it is more an enabling law, than an implementation law)

## **Who will catch the hot potato? To whom is the implementation to be allocated?**

In some organisations special interdisciplinary task forces are set up, at group level or at local level. They might be sponsored by specific departments such as Tax or Compliance.

At the end, organisations need to set up a framework that will give comfort to the “Responsible Officer” to certify personally the results of the due diligence process.

In some organisations the Head of Compliance is expected to become the Responsible Officer, because of his independency, in some others it will be the Head of Tax, because of his knowledge of (US) Tax regulations and implications thereof. It might also be the Head of (Private) Banking, the CEO...

Anyway, Compliance Officers need to be involved at some stage, at least for the KYC/CDD aspects. Compliance Officers can help private bankers to determine ultimate beneficial ownership of (family) trusts and off-shore companies. They can monitor the correct application of US indicia. Compliance also knows how to screen the client data base in order to identify ‘recalcitrant account holders’. , Compliance should make sure the different levels of controls are in place and take care of 3<sup>rd</sup> level controls.

## **Retroactive certification that no US person has been encouraged by FFIs to hide accounts or assets ?**

FFIs need to make sure that since May 2011, it didn’t engage in any activity, or have any formal or informal policies and procedures in place, directing, encouraging, or assisting account holders with respect to strategies for avoiding identification of their accounts as U.S. accounts under the FATCA procedures.

## **Conclusion**

Thanks to the brilliant presentation of Mrs Thinnes and her capacity to give answers to the various questions<sup>104</sup>, participants were briefed on the challenges of FATCA and the position of Luxembourg regarding these American rules.

FATCA certainly is not only a Compliance issue, but any Compliance Officer will have to contribute in some way to the process, at least for the CDD aspects and to ensure sufficient awareness concerning the FATCA issues.

We have to expect a significant workload and costs for developing the necessary tools enabling awareness, screening, monitoring, reporting etc.

The question whether Luxembourg will opt for an intergovernmental agreement under Model 1 or under Model 2 will be answered in 2013, probably in the summer.

ALCO WG34 “Roundtables”<sup>105</sup>

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<sup>104</sup> Thanks also to Frederic Batardy for his kind and precious contribution to the discussions and to the redaction of the summary

<sup>105</sup> Charles van Doorslaer, Hema Ramsohok Jewootah, Sylvain Aubry, Xavier Leydier, Jean-Michel Righi, Nathalie Doyle, Eric Kerschen.

## Members' questions

### Question 12/09,

*In light of the CSSF circular 11/529 relating to the AML/CFT risk analysis to be performed by all professionals subject to (i) CSSF supervision and (ii) the AML/CFT Luxembourg law dated November 12, 2004 (as amended), it may be assumed that such circular applies to all type of investment funds (e.g. UCITS, UCI and SIF for instance) and management companies as defined under Luxembourg UCITS laws and regulations. Please confirm?*

*Considering that the answer to this first statement is yes, how would you recommend investment funds to apply and comply with such circular? In your view, do funds actually need to perform a risk analysis, i.e. draft a methodology to categorize AML/CFT risks and then implement process and measures to mitigate identified risks, while keeping such analysis and methodology available to CSSF upon request. Or can they actually rely on the risks analysis and procedures in place at the level of their Luxembourg service providers (e.g. registrar and transfer agents for instance), which are subject to the same circular. Alternatively, in a situation where the Luxembourg fund would have appointed a local management company regulated by CSSF, can the fund be discharged of its duties in this respect and fully rely on the risks analysis and procedures in place at the management company.*

### GT 33 Answer

CSSF circular 11/529 (the “Circular”) concerning the risk analysis to be performed in the context of the fight against money laundering and terrorist financing (“AML/CFT”) applies, as provided under such Circular, to all professionals (other than credit institutions) subject to CSSF supervision and the AML/CFT law dated November 12, 2004 (the “Law”).

As prescribed under article 2 of the Law, investment funds (i.e. UCITS, UCI or SIF), private equity investment companies and management companies fall within the scope of the Law in the situation where these entities would market their shares or units, or the shares or units of investment funds products in the case of a management company.

Thus, it is the criteria of distribution and marketing of investment funds shares or units, which should be considered to assess whether the Circular applies or not to investment funds and management companies.

1. In Practice, this assessment should not be a problem in relation with any investment fund having appointed a management company and in particular a management company regulated under Chapter 15 of the law relating to UCI, since it is assumed in that case the latter is acting as principal distributor of the shares or units of the funds under its management. Consequently, in that situation, the funds considered are out of scope of the Circular. On the other hand, the management company being in charge of the marketing of the UCIs should perform an AML/CFT risk analysis as prescribed under the Circular for all the funds it is responsible for. Furthermore, such analysis should be adjusted to cover for the various and specific AML/CFT risks associated with the funds under management.

In this context, it is considered that the management company, while performing the risk assessment as prescribed under the Circular, may rely on the AML/CFT controls and risk



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methodology of its service providers to whom it has delegated certain functions, like distribution or transfer agency, while remaining primary responsible in this respect.

2. On the other hand, for all the funds not having appointed a Chapter 15 management company, like Part II UCIs, SIFs or SICARs for instance, the Circular in principle applies to these products. It is the board of representatives of these funds that should undertake the performance of the AML/CFT risk analysis and ensure that the Circular is fully complied with. Here again, the funds may rely on their service providers to perform such assessment. It has to be noted however that, if a distributor (which is not a management company) has been appointed by the board of these products, while such distributor is subject to the Circular or equivalent requirements in another jurisdiction, the funds considered might be exempted.

In a nutshell, the Circular has to be complied with on a per fund basis, except where management companies (Chapter 15) or distributors subject to similar requirements have been appointed. Meanwhile, such management companies or distributors should perform an AML/CFT risk analysis covering for all the products under their management. Finally, if questions remain on how the Circular applies and whether it is indeed applicable, it is recommended to liaise with the external auditors of the fund to seek for advice and clarification.

## **Disclaimer**

It should be noted that the information obtained in answers provided by the GT 33 is of general nature and is not necessarily comprehensive. Besides, any answer released by the GT 33 should not be interpreted as providing legal advice or legal opinion whatever its nature. ALCO accepts no responsibility for any loss or damage, whether direct or indirect that you may suffer as a result of your use of or reliance on any information contained in answers from the GT 33 or accessed via the ALCO website.

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Les informations fournies dans le cadre des réponses du GT 33 ne sont pas nécessairement exhaustives. Par ailleurs, une réponse formulée par le GT 33 ne saurait en aucun cas constituer un avis, une consultation ou une opinion juridique de quelque nature qu'il soit. L'ALCO décline dès lors toute responsabilité en cas de pertes ou de dommages directs ou indirects subis par les utilisateurs des informations contenues dans les réponses données par le GT 33 ou accessibles sur le site internet de l'ALCO ainsi que pour toute action ou omission fondée sur ces informations.

## The association's activities

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[guillaume.begue@bnpparibas.com](mailto:guillaume.begue@bnpparibas.com)

##### Groupe de travail 21

###### Interprétation pratique des restrictions d'investissements de fonds

Responsable            Tim WINFIELD  
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##### Groupe de travail 27

###### Formations IFBL

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##### Groupe de travail 30

###### Domiciliation de société

Responsable            Sophie RASE  
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[sophie.rase@maitlandgroup.com](mailto:sophie.rase@maitlandgroup.com)

### Association Activities

#### Current working groups

##### WORKING GROUP 11

###### WEBSITE

Owner                    Olivier GILSON  
Phone                    +352 2778 1016  
[o.gilson@lombardodier.com](mailto:o.gilson@lombardodier.com)

##### WORKING GROUP 16

###### LEGAL AND PUBLIC RELATIONS

Owner                    Claudine FRUTSAERT  
Phone                    +352 44 24 24 43 15  
[claudine.frutsaert@axa.lu](mailto:claudine.frutsaert@axa.lu)

##### Working group 20

###### FUNDS PRACTICES AND RECOMMENDATIONS AML

Owner                    Guillaume BEGUE  
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[guillaume.begue@bnpparibas.com](mailto:guillaume.begue@bnpparibas.com)

##### Working group 21

###### PRACTICAL INTERPRETATION OF FUND INVESTMENT RESTRICTIONS

Owner                    Tim WINFIELD  
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##### WORKING GROUP 27

###### TRAINING IFBL

Coordinator            Sundhevy GOÏOT  
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##### WORKING GROUP 30

###### DOMICILIARY AGENT

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# Le Bulletin

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## Groupe de travail 33

### Réponses aux questions des membres

Responsable Christophe BECUE  
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## WORKING GROUP 33

### ANSWERS TO QUESTIONS OF MEMBERS

Coordinator Christophe BECUE  
Phone +352  
[cfbecue@hotmail.com](mailto:cfbecue@hotmail.com)

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## Groupe de travail 34

### Tables rondes

Responsable Charles VAN  
DOORSLAER  
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[charles.van-doorslaer@kbl-bank.com](mailto:charles.van-doorslaer@kbl-bank.com)

## WORKING GROUP 34

### ROUND TABLES

Coordinator Charles VAN DOORSLAER  
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## Groupe de travail 35

### Doctrine

Responsable Guillaume BEGUE  
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## WORKING GROUP 35

### DOCTRINE

Coordinator Guillaume BEGUE  
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## Groupe de travail 38

### Assurance

Coordinateur  
Téléphone

## WORKING GROUP 38

### INSURANCE

Coordinator  
Phone

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## Groupe de travail 39

### Problématique de l'outsourcing

Coordinateur David RENAUD  
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## WORKING GROUP 39

### OUTSOURCING'S ISSUES

Coordinator David RENAUD  
Phone +352 26 05 21 81  
[david.renaud@rbcdexia-is.net](mailto:david.renaud@rbcdexia-is.net)

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## Groupe de travail 40

### Responsabilité du CO dans les sociétés de gestion

Coordinateur Bernard PONS

## WORKING GROUP 40

### CO RESPONSIBILITIES FOR A MAN CO

Coordinator Bernard PONS

# Le Bulletin

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## **Groupe de travail 41**

### **Gouvernance**

Coordinateur Jean Noël Lequeue  
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## **Groupe de travail 42**

### **Charte ICMA**

Coordinateur Vincent Salzinger  
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Coordinateur Patrick Chillet  
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## **WORKING GROUP 41**

### **GOVERNANCE**

Coordinator Jean Noël Lequeue  
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## **Working group 42**

### **ICMA Charter**

Coordinator Vincent Salzinger  
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Coordinator Patrick Chillet  
Phone +352 44 99 5840  
[patrick.chillet@ing.lu](mailto:patrick.chillet@ing.lu)

## **MEMBRES ET VIE ASSOCIATIVE**

## **Members and Association activities**

### **Nombre de membres (au 31/01/2013):**

Banques	251
Fonds	148
Fonds / Banques	22
Assurances	51
Consultants / Réviseurs	51
Admin. et domiciliation de sociétés	20
Avocats	15
PSF	52
Gestion de fortune	34
Autres	21
<b>Effectif total:</b>	<b>665</b>
Membres effectifs	513
Membres d'honneur	141
Membres de courtoisie	11
<b>Effectif total:</b>	<b>665</b>

### **Number of members (as per 31/01/2013):**

Banking sector	251
Funds sector	148
Funds / Banking sector	22
Insurance sector	51
Consultants / Auditors	51
Admin. and company domiciliation	20
Law firms	15
SFP	52
Asset management	34
Other	21
<b>Total number:</b>	<b>665</b>
Active members	513
Honorary members	141
Courtesy members	11
<b>Total number:</b>	<b>665</b>

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## Réunions et activités:

Mensuellement	Réunions du conseil d'administration
1 / 2 x par an	Réunions plénières
2 / 3 x par an	Rencontres informelles autour d'un thème

## Meetings and activities:

Monthly	Board meetings
1 / 2 x per year	Plenary assemblies
2 / 3 x per year	Informal meetings on a subject

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– **Board of Directors:**

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Jean-Noël LEQUEUE	President
Claudine FRUTSAERT	Vice-President, insurance section
Patrick WATELET	Vice-President, fund section
Vincent SALZINGER	Vice-President, bank section
Marie-Hélène CLAUDE	Treasurer
Guillaume BEGUE	Director
Patrick CHILLET	Director
Rolland DILLIEN	Director
Olivier GILSON	Director
SUNDHEVY GOÏOT	Director
Thierry GROSJEAN	Director
Emmanuelle HENNIAUX	Advisor
Bernard PONS	Advisor
Patrick SCHOTT	Advisor
David RENAUD	Advisor
Tim WINFIELD	Advisor

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– **ALCO secretariat:**

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L-1449 Luxembourg  
Tél: 26-63-86-25

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– **Newsletter secretariat:**

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Emilie Schmitt  
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**VISIT OUR WEBSITE:** [www.alco.lu](http://www.alco.lu)

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