



Chambre de commerce Belgo-Luxembourgeoise en France *La chambre qui nous rassemble*

12 rue Pernelle - 75004 Paris Tél.: 00/33/1.40.26.97.62 Fax: 00/33/1.40.26.54.23 mail: af.nothomb@ccbelgo-lux.fr



Luxembourg domiciliation sector adapts today's legal and economical challenges

Strictly connected with the destiny of the banking and financial industry, the domiciliation sector is forced today to rapidly adapt a tough economical background and a fast changing corporate legal environment characterized by a substantial increase in the amount of compliance and disclosure obligations that companies must cope with.

In this context of an increasingly important international pressure, regularly fuelled with politico-financial scandals (the recent highly mediatized Jérôme Cahuzac case being just one among many recent incidents implicating several banking institutions such as Geneva's HSBC, Cayman Islands' Julius Baer or Lichtenstein's LGT Bank) one can hardly be surprised by the development of an "offshore witch hunt" tendency, rising the possibility of an even more extensive up-to-come legislation.

Already characterized by a not so client-friendly environment and a constant legal complexity increase, the role of the domiciliation agent becomes more and more important and valuable and its activity more and more complex. Several factors have contributed throughout history and continue to contribute to Luxembourg's present success, among which one might emphasize: a strong political will in the diversification of the economy, a pragmatic legal approach, a rapid reaction time and a pro-active attitude of the legislator and other governmental authorities in assuring a dynamic but coherent juridical frame by constantly adapting its legislation to specific market demands, a highly qualified, multi-lingual and multicultural labor force, or its vast network of bilateral double taxation agreements (DTTs).

In addition to the above, its tax efficient regime and internationally reputated know-how are reasons for the confidence that big investors and world wide players in the financial sector (and not only) show towards Luxembourg (such as banks, insurance companies, management and consultancy groups, law firms, fund managers, a.s.f.). Their increasing presence and intense activity, directly or indirectly attracts more and more participants, including small and medium sized companies, which also wish to use Luxembourg's legal and business oriented environment and its extensive network of DTTs in today's highly competitive international background.

SUPPLY CREATES ITS OWN (HALF BILLION Euro) DEMAND

These dynamics, and the important share that the financial sector holds in the national GDP, provoked in time a spill-over effect on its domestic fast growing, service oriented economy, and thus more financial service providers have been needed. It is in this context that domiciliation agents, trust and/or fiduciary companies and more generally the so called corporate service providers developed and have subsequently known a significant boost in the past years, becoming one of the main driving forces of the financial sector with double digits annual growth rate and amounting for an annual turnover of half billion Euro. Thus, it is one of today's undisputed reality that corporate service providers by offering adapted management and administrative services to the clients become to play an active and significant role in the growth of Luxembourg's economy.

The domiciliation agents are required by law to perform the necessary services to the best of their ability and in the best interest of the company the domiciliation is provided for (and in practice most domiciliation agents are usually asked to provide several additional services). This performance must be fulfilled in complete respect of all applicable laws and regulations, in compliance with the provisions stipulated in the chart of the company⁽¹⁾, the resolutions of the managing body⁽²⁾, the general meeting of shareholders and as a more general principle in respect of good business practice.

WHY WOULD ANYONE NEED A DOMICILIATION AGENT?

In addition to the obvious fact that the domiciliation agent must supply the registered office of the domiciled company, a large spectrum of duties are assumed by the domiciliation agent in the name of its client, and an increasingly wide range of services which will in practice be needed during both the incorporation phase



of the company, and during its post incorporation life time are provided.

From a formal conditions perspective, the law imposes that a written agreement must be concluded between the company and the domiciliation agent. Prior to incorporation, a certain number of details must be taken care of. The domiciliation agent, as part of the know your customer rule, must identify the ultimate beneficial owner(s) of the company to be created as well as the members of the corporate bodies, ensure complete confidentiality with this regard and keep the relevant documentation for a certain period of time⁽³⁾.

Depending on the written agreement concluded between the company and the domiciliation agent, during the incorporation phase, the domiciliation agent can be in charge of banking arrangements (such as open a bank account in the name of the company), or if authorized by the company, fulfill after incorporation other various operations in the name of the company: sign cheques, transfer funds, make deposits in the company's bank accounts, and so on⁽⁴⁾. If the domiciliation agent is not a law office⁽⁵⁾ it may (in practice after notifying the company) require the services of a lawyer, in order to ensure the legal compliance on various issues or the drafting of various agreements.

In order to adapt to an increasingly diversified spectrum of client's needs, the domiciliation agents are in practice requested to provide additional services such as: renting of physical space and / or supply employees to the domiciled company, arrange for telephone and fax lines as well as the set up of an e-mail address.

In the current international context and the last years trend of multiplication of legal and administrative obligations imposed on corporate entities, the domiciliation agent will also ensure tasks deriving from the obligation imposed on any corporate entity in keeping a certain number of corporate documents up to date. The corporate documentation relevant for this category includes: the constitutional chart of the company, minutes of the shareholders' meetings, governing body resolutions, certificate holders' meetings, registrations, various licenses or permits, copies of annual accounts, shareholders' and certificate holders, or share register and to issue share certificates or certificates in physical form⁽⁶⁾.

Going further, the domiciliation agent will liaise with a specialized tax expert in order to provide the relevant accounting services needed by the client and thus supplying a complete and integrated service. In practice this can include: the preparation of annual accounts and / or assisting the duly registered auditor(s) in auditing the annual account (if a duly registered auditor is required by law⁽⁷⁾), prepare semi-annual or quarterly reporting (if applicable) and other relevant disclosure obligations (such as: filing of applications, declarations, periodic reports of any nature to be submitted to the appropriate administration or governmental authorities, stock exchange, banks or any other entity)⁽⁸⁾, take care of the tax returns⁽⁹⁾ and their filing with the relevant tax authority and even maintain the books of account and financial records of the domiciled company.

To summarize at glance the important amount of technical data expressed here above, the domiciliation agent must accomplish today an extensive list of tasks, from (or even before) the incorporation moment on, ensure that the company stays in good standing, arrange compliance / disclosure requirements and even payment obligations by the company of any amounts due for taxes, duties or expenses required under Luxembourg law, making it's mission important until the eventual liquidation of the company. This explains the past years important development of this sector in today's market context, characterized in this respect by a significant increase of the legal and administrative obligations a company must comply with.

DOMICILIATION SECTOR, CRASHED OR ENHANCED IN THE FORESEEABLE FUTURE?

With respect to future projections regarding the domiciliation sector in Luxembourg, one can not help to notice the contrast between two opposing concepts regarding the short and medium term expectations. The skeptics would base their arguments on both global and European concerns, among which: the persist-

tent fear generated by the recent banking crisis, the European sovereign debt turmoil, the budget deficits, the unemployment concerns, the fiscal harmonization and the contemplated legislation at European level with respect to reporting duties and information exchange⁽¹⁰⁾.

Nevertheless, in accordance with a contrary opinion, more transparency can only benefit Luxembourg and it's financially oriented economy can only profit from these transparency measures, as this would mainly be considered as a sign of strength and solidity of the Luxembourg financial center regarding the future. Moreover, the current consensus anticipates an increase of the domiciliation activity for the months to come based on a visible trend of regain of confidence and optimism by investors⁽¹¹⁾, the highly expected implementation of the Alternative Investment Fund Managers Directive (AIFMD)⁽¹²⁾, or an imminent intervention by the European Central Bank anticipated to soon take place during the month of May.

In this context and in today's extensive competitive environment, investors must take several factors into account before making the appropriate domiciliation agent's choice. In addition to details such as its size or its reputation, eventual past collaboration, employers' qualification or the applicable fees of the domiciliation agent, the investor must seriously consider the variety of tasks and the range of specializations such domiciliation agent is able to offer, due to the fact that this choice might have mid or even long term implications.

Last but not least, this pre-choice analysis must also take into account future developments and the impact regarding subsequent transactions, in which possible conflict of interest might occur between the activities of the domiciliation agent and other participants in the planned transactions. If, depending on the circumstances, for some investors, the choice of a big-size multi-specialized corporate service provider is recommended, in some other cases, the choice of a smaller structure specialized in domiciliation, management and administration (but not offering accounting services), might be preferable and could allow the avoidance of potential future conflict of economical interests between several service providers to the same company and therefore be better suitable for the long term and future contemplated transactions.

POCHON LAWYERS & ASSOCIATES EXPANDS TO A FURTHER DIVERSIFIED PANNEL OF SERVICES

POCHON LAWYERS & ASSOCIATES is an ambitious, fast growing Luxembourg multidisciplinary Law Firm, active in various legal fields such as Corporate Business Law, Investment and Funds, Intellectual Property Law, Labor and Employment Law, Business and Commercial Litigation. The full service Law Firm stands strongly committed to the highest standard quality of service it provides in both legal advisory and domiciliation services. Thus POCHON LAWYERS & ASSOCIATES acquired a solid experience in the field of corporate domiciliation and related corporate reliable services through a large variety of local and worldwide clients, a diversified range of transactions but most of all through a complete dedication and commitment to outstanding results, in a greatly competitive environment and a market assessing more and more legal challenges.

1) Document also referred to as the Articles of Association , Articles of Incorporation or Deed of Incorporation of a company.

2) The managing body will have to be organised function of the legal form of incorporation of the company. In accordance with the market practice, the most used corporate forms are by far the private limited company (la société à responsabilité limitée) or the public limited company (la société anonyme) and this distinction can also have a certain number of repercussion on the form of the managing body of the company. In contrast with a private limited company, which can be managed by one or more managers who may or may not receive a salary, may or may not be shareholders and are appointed for a limited or an unlimited period of time, the public limited company must be managed by a board of directors (with the exception of a public limited company having only one shareholder, in which case it can be managed by a single director). Unlike the private limited company, the board of directors of a public limited company must have three directors, who may be elected for a maximum of six years (although unless the company's chart of incorporation states otherwise, the directors can be re-elected). It must be stated that in addition to these rules, the law provides for the possibility of the public limited company to have a so called two-tier management structure. If such is the shareholders' choice, a supervisory board will be appointed and although it can not directly interfere with the management of the company, it will have in principle an unlimited right to scrutinize all activities of the management board and therefore of the company. Further technical details regarding the above, are outside the scope of this article.

3) In order to comply with the current applicable legislation i.e. law of May 31, 1999 on the domiciliation of companies, as amended, and the law of November 12, 2004 on the fight against money-laundering and financing of terrorism, as further amended.

4) On a case by case basis, and function of the client's needs, the domiciliation agent can even be requested to proceed with even more technical actions such as: to pay redemption proceeds to the shareholders upon instructions of the company's relevant managing body or to make payment of dividends and/or distributions on shares and/or redemption proceeds in relation to the shares and / or certificates of the company, or to prepare and dispatch of necessary documents to the eventual registered shareholders and / or certificate holders after being notified by the governing body of the

Head of the Corporate Department, Mrs. Cristina Andrei, has found an ideal opportunity to combine her analytical skills as an economist with the legal environment of POCHON LAWYERS & ASSOCIATES and her extensive professional experience gained as a Team Leader of the Corporate Department of a well-known Luxembourg tax and audit firm, specialising in the management and administration of local and international holding companies : "The substantial economic and social changes of the 21st century have brought our firm to define and to develop new strategies connected to the liberalisation of the legal market together with the approach to a large diversity of non-market activities through the creation of a All-in-One multilingual professional - service law firm bringing together lawyers, management consultants, tax, financial advisors and accountants".

POCHON LAWYERS & ASSOCIATES is also active in the litigation branch with a dynamic department under the supervision of Maître Sophie Pierini: "the litigation department offers its panel of services in real time and distinguishes itself from similar law firms by its reactivity, availability and the trust relationship established with the clients". Thus, as a consequence of the carefully constant customer focused approach and thanks to a highly skilled professional team, basing their high standard know-how on multiple years of outstanding practice in their relevant legal field, POCHON LAWYERS & ASSOCIATES not surprisingly developed a respected and solid reputation, allowing it to continue its expansion with an enhanced Investment Funds department.

Darius Bitu, Senior Associate in charge of the Investment Funds division, commented: "...together with the securitization structures and corporate finance transactions, the fund business has certainly been seriously touched by the liquidity crisis during the past 5 years' financial turmoil, but to a noticeably lesser extent. Corroborating Luxembourg's today worldwide leading position in the investment funds sector with recently published data indicating a regain of optimism from institutional investors and an overall better than expected recently published Q1 2013 listed companies results, one can explain the good numbers Luxembourg fund industry shows for the first months of 2013. In spite of persistent uncertainties in particular with respect to the European recovery the current trend is expected to continue".

With a strongly innovative, highly pro-active team, good responsiveness and professionalism, POCHON LAWYERS & ASSOCIATES sustained a constant and firm growth in the recent years and is currently appreciated by a large portfolio of local and international clients. Through a sound combination of skills in business legal advisory, commercial litigation, domiciliation and administrative support, POCHON LAWYERS & ASSOCIATES provides reliable services based on its deep knowledge and solid expertise to a variety of domestic and international clients and successfully assists them in all types of transactions, with local or worldwide implications.

Brigitte Louise POCHON

Partner

POCHON LAWYERS & ASSOCIATES

brigitte.pochon@pla.lu

www.pla.lu

company.

5) The law of May 31, 1999 on the domiciliation of companies allows this activity to be made by a certain number of regulated professions: banks, insurance companies, professionals of the financial sector, qualified auditors, qualified accountant and duly authorized lawyers.

6) Other related duties may include : to maintain various registrations and/or permits and/or licenses as required by law or be able to provide a full record of all transactions undertaken by the company; to prepare and/or proceed with all relevant registrations and filings and/or publication with the appropriate governmental authorities such as: Luxembourg trade and companies register, Mémorial C, and generally keep the company's file up-to-date to convene shareholders' meetings, draft and record the necessary documents related thereto, prepare and/or execute limited powers of attorney for use in jurisdictions other than Luxembourg, a.s.f.

7) Luxembourg legislation provides that an audit by a qualified auditor is compulsory for any company which on the balance sheet date after two consecutive financial years, exceed two out of the following three criteria: a) a balance sheet total of at least EUR 3.125 million; b) a net turnover of at least EUR 6.25 million and c) average staff figure of 50 people.

8) Compliance and disclosure obligations field has been very dynamic in the last decade, facing an important boost in the light of the legislation on anti money laundering, anti terrorism financing, pursuant to nine eleven events, and other compliance/disclosure obligations put in to place pursuant to various incidents occurred during the recent banking crisis.

9)

In practice, usually prepared by an external tax consultant.

10) Recent declarations of high Luxembourg governmental figures, that the Grand Duchy is ready to abandon the banking secrecy in the next years, corroborated with recent similar Swiss officials statements seem to indicate that United States' Foreign Account Tax Compliance Act (FATCA) is seriously considered.

11) As indicated by historical high levels of the main stock exchange indices, and recently published, overall better than expected listed companies results for Q1 2013 and in the same time, most banks currently giving back the received funds from US or EU governmental bodies via increasing liquidity programs such as : Twist, Quantitative Easing(s), LTRO.

12) Already implemented by the Netherlands.