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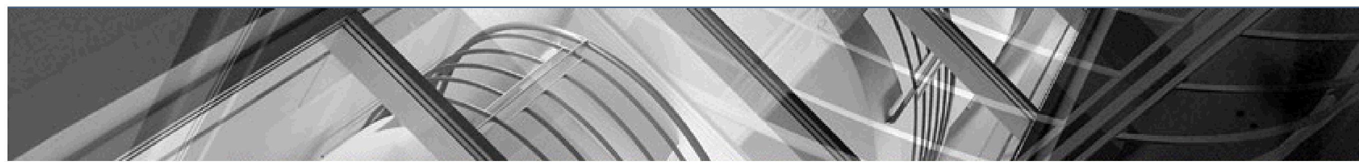

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July 2012

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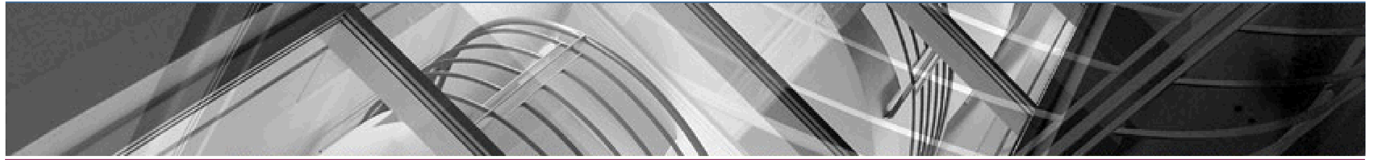

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BANKING & FINANCE

1.Changes to the Prospectus Law and the Transparency Law

The Luxembourg Law of 10 July 2005 implementing the Prospectus Directive (the "**Prospectus Law**") as well as the Law of 11 January 2008 implementing the Transparency Directive (the "**Transparency Law**") are about to be amended upon implementation of Directive 2010/73/EC[1] (the "**Amendment Directive**"). On 26 June 2012 the Luxembourg Parliament adopted the bill of law implementing the Amendment Directive which has been published in the Official Gazette on 5 July 2012.

The main changes concern the Prospectus Law and comprise the following:

- the inclusion of the concept of "Key Information" which shall be inserted in the summary of the Prospectus. "Key Information" is defined as "*essential and appropriately structured information which is to be provided to investors with a view to enabling them to understand the nature and the risks of the issuer, the guarantor and the securities that are being offered to them or admitted to trading on a regulated market*". "Key Information" shall include the following elements: (i) short description of the risks associated with and essential characteristics of (x) the issuer and any guarantor, including the assets, liabilities and financial position and (y) the investment in the relevant security, including any rights attaching to the securities,(ii) general terms of the offer including estimate and expenses charged to the investor by the issuer or the offeror or (iii) details of the admission to trading and (iv) reasons for the offer and use of proceeds;

- introduction of a requirement for standardisation of the format and the content of the summary and the prospectus generally. In this respect it should be noted that the European Commission has already issued the Commission Delegated Regulation n°486/2012 of 30 March 2012 amending regulation 809/2004/EC on content requirements which has become applicable on 1 July 2012;

- amendment of the definition of "qualified investors". The new definition refers to the terms used in Directive 2004/39/EC on markets and financial instruments ("**MIFID Directive**") by making a cross reference to those persons or entities which are described in points (1) to (4) of Annexe II of the MIFID Directive as well as the persons or entities who are, on request, treated as professional clients in accordance with Annexe II of the MIFID Directive or recognised as eligible counterparties in accordance with Article 24 of the MIFID Directive unless they have requested that they be treated as non-professional clients;

- amendment of certain thresholds determining whether an offer will be in scope or out of scope of the Prospectus Directive and thus of Part II of the Prospectus Law which implements the provisions of the Prospectus Directive. It should be noted that an offer which may be out of scope of Part II of the Prospectus Law may nevertheless still be in scope of Part III (regulating among others, certain offers which are out of scope of the Prospectus Directive) and thus requiring the preparation of a simplified prospectus. Pursuant to these amendments, Part II of the Prospectus Law will not apply to (i) securities included in an offer where the total consideration for the offer in the European Union is less than EUR 5 000 000, which shall be calculated over a period of 12 months or (ii) to non-equity securities issued in a continuous or repeated manner by credit institutions where the total consideration for the offer in the Union is less than EUR 75 000 000, which shall be calculated over a period of 12 months, provided that those securities (x) are not subordinated, convertible or exchangeable and (y) do not give a right to subscribe to or acquire other types of securities and that they are not linked to a derivative instrument;

- amendment of various thresholds in relation to the available exemptions to establish a prospectus. One may note in particular the following modifications of thresholds for available exemptions in the context of offers to the public : (i) the exemption to publish a prospectus in case an offer is made to less than 100 investors other than qualified investors per Member State is modified to give the possibility to make an offer on an exempted basis to 150 investors (other than qualified investors) per Member State; (ii) the exemption pursuant to which it is not required to publish a prospectus for securities having a nominal amount of at least EUR 50,000 is amended to increase the threshold to EUR 100,000 (the "nominal amount exemption");

- the use by financial intermediaries of the prospectus established by the issuer is clarified;

- clarification of the validity period of a prospectus by stating that a prospectus shall be valid for 12 months after its approval for offers to the public or admission to trading on a regulated market, provided that the prospectus is completed by any supplements required. Prior to this amendment the starting point was the publication date of the prospectus which was not necessarily the approval date which gave rise to some uncertainties;

- the requirement to prepare the annual document pursuant to Article 14.1 of the Prospectus Law summarising all publications made over the preceding year is abolished, and

[1] Directive 2010/73/EC amends Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading (the « **Prospectus Directive** ») and 2004/109/EC on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (the "**Transparency Directive**").

- it will now be necessary to have an electronic publication of the approved prospectus.

The Transparency Law will also be amended by increasing the "nominal amount exemption" threshold from EUR 50,000 to EUR 100,000 to align such an exemption with the threshold set out in the Prospectus Law mentioned above. The Amendment Directive, however, provides for a grandfathering clause for any securities having a denomination of EUR 50,000 and issued prior to 31 December 2010.

2.Rules and regulations of the Luxembourg Stock Exchange (Editions 2012/05 and 2012/07)

New versions of the rules and regulations of the Luxembourg Stock Exchange (*Règlement d'ordre intérieur de la Bourse de Luxembourg*) (the "**Rules and Regulations**") entered into force on 9 May 2012 (replacing those dated 08/09 that entered into force on 1 August 2009) and on 1 July 2012 (replacing those of May 2012).

The 2012/05 edition of the Rules and Regulations comprised additions to Part 3, Chapters 1 and 3 in order to implement the sponsored access to the securities markets of the Luxembourg Stock Exchange (i.e. any regulated market for securities and MTF operated by the Luxembourg Stock Exchange) (the "**Luxembourg Securities Markets**").

Any member of the Luxembourg Securities Markets (a "**Member**") may submit an application to the Luxembourg Stock Exchange to provide sponsored access to a Luxembourg Securities Market for one or more of his clients (i.e. any person who employs the services of a Member in relation to one or more orders for the purchase or sale of one or more admitted financial instruments, a "Client") whereby the Client can make use of direct connectivity solutions subject to the consent and under the responsibility of a Member and subject to the conditions set forth in the new rule 3.3. (Sponsored Access) of the Rules and Regulations.

The sponsoring Member shall have appropriate arrangements in place with the sponsored Client to enable it, *inter alia*, (i) to have control over its risk control systems and (ii) to be able to take any appropriate measures in relation to the trading activities of the sponsored Client.

The Luxembourg Stock Exchange will only consider applications in respect of a sponsored Client located in jurisdictions with satisfactory regulatory arrangements including those in respect of (i) the supervision of investment activity and (ii) information sharing and co-operation between the competent supervisory authorities.

The 2012/07 edition includes in Part 1, Chapter 10 (dealing with the publication and disclosure of information for issuers whose securities are admitted to trading on the Euro MTF market) an increase in the threshold of the denomination per unit of the bonds from EUR 50,000 to EUR 100,000.

Furthermore the European Stability Mechanism (ESM) has been added in Appendix VII to the list of supranational institutions and organisations exempted from the obligation to publish a prospectus for the admission to trading on a market regulated by the Luxembourg Stock Exchange.

The latest edition of the Rules and Regulations can be found on the website of the Luxembourg Stock Exchange:
http://www.bourse.lu/application?_flowId=PageStatiqueFlow&content=societe/Manuel.jsp

3.CSSF Annual Report : Guidelines on the assessment by the CSSF of the condition of professional standing

The CSSF recalled in its 2011 annual report that the law of 5 April 1993 on the financial sector, as amended (the "**LFS**") and some sectoral laws submit the obtaining of an authorisation to the condition that the members of the corporate bodies performing administrative, management and supervisory functions as well as the shareholders or partners holding a qualified participation, shall provide evidence of their professional standing. According to the LFS, this standing shall be assessed on the basis of police records and of any evidence tending to show that the persons concerned are of good repute and offering every guarantee of irreproachable conduct.

The CSSF indicated that, even in the financial sector, those officers who have a criminal record or have incurred a conviction should not ipso facto be excluded on the grounds that they do not have the good repute required by law, such as the LFS.

Just as convictions noted on an extract from a criminal record cannot ipso facto exclude a person, the absence of a conviction does not mean that a person is irrefutably presumed to be of good repute. An assessment of professional integrity is thus made by the CSSF, on a case-by-case, following three principal guidelines laid down by doctrine and in case law as follows.

The facts underlying convictions older than ten years must not be the only factors on which to base a decision denying someone the status of professional standing.

To enable the CSSF to assess whether or not to take certain convictions into consideration, the person concerned must however inform the CSSF of any

convictions incurred, even if older than 10 years and even if the conviction does not form or has ceased to form part of his police record which he has submitted to the CSSF.

The facts which may affect the professional standing must have a direct link to the type of activity for which an authorisation is required.

The assessment of professional reputation consists equally of determining whether the charges against the person whose good standing is being investigated are linked to the activities pursued by the entity for which an authorisation is sought.

This analysis is part of the end goal that the condition of professional standing pursues. Indeed, this condition essentially aims to ensure the integrity of the profession and the protection of future contracting parties and clients.

The reasons for refusal given by the authority must be based on accurately established facts which can be checked against the documents in the file.

The facts must be accurately established and the reasons given must have been checked against the documents in the file.

To enable the CSSF to assess the good standing of the persons concerned, the party seeking the authorisation must provide all the information and documents necessary and reply fully to the questions asked by the representatives of the CSSF.

The annual report can be found on the CSSF's website : http://www.cssf.lu/fileadmin/files/Publications/Rapports_annuels/Rapport_2011/RA2011_chap15.pdf

4.CSSF Press release12-21 about the use of credit ratings

The CSSF published a press release on 10 May 2012 which reminds all concerned entities under CSSF supervision, i.e. banks, investments funds and UCITs, that they are allowed to use, for regulatory purposes (for instance for calculating solvency ratios), only such credit ratings issued or confirmed by rating agencies registered or certified within the European Union. Reference is made to the ESMA website for an up-to-date list of relevant registered or certified agencies.

It should also be noted that a rating agency registered in the EU may only sign off on a credit rating issued in a third country if all the conditions provided in Article 4(3) of EC Regulation N°1060/2009 on credit rating agencies are satisfied (the "**CRA Regulation**").

The press release furthermore refers to the list of jurisdictions whose regulatory framework has been considered satisfactory by the ESMA as being equivalent to the EU framework within the meaning of Article 4(3)b) of the CRA Regulation. This list comprised Japan, Australia, Argentina, Brazil, Canada, the United Stated of America, Hong Kong, Mexico and Singapore as at the date of the press release.

The press release also restates the obligation of issuers in the context of prospectuses published in accordance with Prospectus Directive 2003/71/EC and EC regulation N°809/2004 which contain references to one or more credit ratings, to specify whether the referenced credit ratings have or have not been issued by a credit rating agency established in the European Union and registered in accordance with the CRA Regulation.

The press release ends with a reference to the ESMA FAQ document, question 76 for issuers of prospectuses.

The CSSF Press release is available on the following link: http://www.cssf.lu/fileadmin/files/Publications/Communiques/Communiques_2012/PR_1221_use_credit_ratings_100512_EN.pdf

5.CSSF Circular 12/536 : Guidelines on systems and controls in an automated trading environment

CSSF Circular 12/536 transposes the guidelines developed by the European Securities Market Authority (ESMA) in February 2012 on systems and controls in an automated trading environment.

The objective of these guidelines[2] is to ensure a common, uniform and consistent application of MiFID[3] and MAD[4] directives as regards systems and controls required at the level of trading platforms, credit institutions and investment firms in an automated trading environment, and at the level of trading platforms, credit institutions and investment firms which provide direct or sponsored access to the market.

The guidelines provide useful details on organisational requirements applicable to:

- the regulated markets, multilateral trading facilities, credit institutions and investment firms in order to:

[2] Guidelines on systems and controls in an automated trading environment for trading platforms, investment firms and competent authorities, published by ESMA on 24 February 2012, under n°2012/122.

[3] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments.

[4] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation.

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- promote fair and orderly trading in an automated trading environment;
- prevent market abuse (in particular market manipulation) in an automated trading environment;

- the electronic trading systems used by regulated markets, multilateral trading facilities, credit institutions and investment firms (including trading algorithms).

They contain rules on governance, capacity, resilience, business continuity, testing, monitoring, security, staffing, record-keeping and cooperation.

They also specify the points which should be taken into account by regulated markets, multilateral trading facilities, investment firms and credit institutions, in relation to their automated trading activities, i.e. risk management, blocking systems, reporting obligations, need for employee training, scrutiny by compliance staff.

The CSSF Circular 12/536 applies to the Luxembourg Stock Exchange, the Euro MTF, the Luxembourg credit institutions and the Luxembourg investment firms as well as to the branches of non European entities located in Luxembourg when executing orders on behalf of clients and/or dealing on their own account in an automated trading environment.

It also applies to management companies authorised under Chapter 15 of the Law of 17 December 2010 relating to undertakings for collective investment, which carry out the management of investment portfolios on a discretionary client-by-client basis.

The CSSF Circular is available on the following link:
http://www.cssf.lu/fileadmin/files/Lois_reglements/Circulaires/Hors_blanchiment_terrorisme/cssf12_536eng.pdf

ESMA's guidelines are available on the following link:
http://www.esma.europa.eu/content/Guidelines-Systems-and-controls-automated-trading-environment-trading-platforms-investment-f

6. CSSF Circulars 12/533 and 12/534 : Exemption regime applicable to payment institutions and electronic money institutions

Articles 48 and 48-1 of the Law of 10 November 2009 on payment services (the "**Law**") (cf. EHP Newsletter June 2010, p.10) establish exemption regimes according to which legal or natural persons wishing to provide one or several payment services or legal persons wishing to issue electronic money can do so under a less restrictive procedure and in compliance with less restrictive conditions.

The CSSF Circulars 12/533 and 12/534 both dated 2 March 2012 aim to lay down the terms and conditions of the respective exemption regimes.

The two substantive conditions to be fulfilled by the institutions are set out in letters a) and b) of Articles 48(1) and 48-1 (1) of the Law, respectively. They relate to the business volume and probity of the persons responsible for the management and operation of business. Once the two substantive conditions are met, the respective institutions must ensure, in particular, that:

- the activity must actually be carried out in Luxembourg and the central administration must be situated in Luxembourg,

- the respective institutions benefiting from an exemption are not authorised to set up branches in another EU Member State or in a third country, or to use agents or to exercise the freedom to provide services in those countries, so that the services may only be provided to Luxembourg customers, and

- an annual report on the activities, on the average total amount of the payment transactions executed, must be provided to the CSSF.

The registration in the register of payment institution or in the register of electronic money institutions as laid down in Article 36 of the Law will only take place after the requested exemption has been granted by the competent Minister.

The CSSF Circular 12/533 is available on the following link:
http://www.cssf.lu/fileadmin/files/Lois_reglements/Circulaires/Hors_blanchiment_terrorisme/cssf12_533eng.pdf

The CSSF Circular 12/534 is available on the following link:
http://www.cssf.lu/fileadmin/files/Lois_reglements/Circulaires/Hors_blanchiment_terrorisme/cssf12_534eng.pdf

7. Money Laundering : Revised FATF Recommendations

On February 2012, the Financial Action Task Force (the "**FATF**") revised its framework on combating money laundering and terrorist financing, known as "40+9 Recommendations". The FATF standards have been revised with inputs from governments, the private sector, and civil society, to strengthen global safeguards and provide governments with stronger tools to take action against criminals and address new threats to the international financial system.

The revised FATF Recommendations now fully integrate counter-terrorist financing measures with anti-money

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laundering controls and comprises henceforth only 40 recommendations.

The main changes are:

- Introduction of new measures to counter the *financing of the proliferation of weapons of mass destruction* through the consistent implementation of targeted financial sanctions when these are called for by the UN Security Council.
- *Improvement of the transparency* to avoid criminals and terrorists concealing their identities or hiding their assets behind legal persons and arrangements.
- Stronger requirements when dealing with *politically exposed persons (PEPs)*, in order to better address the laundering of the proceeds of corruption.
- Expansion of the scope of money laundering predicate offences by including tax crimes.
- *An enhanced risk-based approach* which enables countries and the private sector to apply their resources more efficiently by focusing on higher risk areas.
- *More effective international cooperation* including exchange of information between relevant authorities, conduct of joint investigations, and tracing, freezing and confiscation of illegal assets.
- *Better operational tools* and a wider range of techniques and powers, both for the financial intelligence units, and for law enforcement to investigate and prosecute money laundering and terrorist financing.

The FATF calls upon all countries to effectively implement these measures in their national systems and will also, at the global level, monitor and take action to promote implementation of the standards

8.CSSF Circular 11/529 : Risk analysis regarding the fight against money laundering and terrorist financing

CSSF Circular 11/529 of 22 December 2011 specifies the CSSF's requirements relating to the application of Article 3(3) of the Law of 12 November 2004 on the fight against money laundering and terrorist financing according to which professionals are required to perform an analysis of the risks inherent in their business activities, and to set down in writing the findings of this analysis.

The Circular distinguishes two different steps in the application of these provisions.

First, the professional shall identify the risks of money laundering or terrorist financing (the "**ML/TF risks**") and set up a methodology in order to categorise these risks. In this respect, the professional shall observe the parameters provided by the legal and regulatory texts.

The Circular points out some characteristics that may reveal important information for the identification and assessment of the ML/TF risks, related to the country or geographical area, to the nature of customers and to the nature of products offered or services provided.

In a second step, the management of the professional shall define and implement measures to mitigate the identified risks. The Circular indicates that the risk analysis shall show the number of customers to whom enhanced and limited due diligence measures are applied, respectively, and the manner in which these measures are effectively executed.

The CCSF Circular is available on the following link: http://www.cssf.lu/fileadmin/files/Lois_reglements/Circulaires/Blanchiment_terrorisme/cssf11_529eng.pdf

9.CSSF Circular 11/528: Abolition of the transmission of suspicious transaction reports

The financial intelligence unit (*Cellule de Renseignement Financier* (the "**CRF**")) within the public prosecutor's office (*Luxembourg Parquet*), created by the Law of 27 October 2010 enhancing the anti-money laundering and counter terrorist financing legal framework, is the national authority in charge of receiving suspicious transaction reports (the "**STR**") and other information regarding facts likely to be linked to money laundering or terrorist financing ("**ML/TF**").

Pursuant to Article 9-1 of the Law of 12 November 2004 on the fight against ML/TF (the "**Law**"), and in accordance with the Financial Action Task Force requirements, the CRF works in close cooperation with the CSSF. They are henceforth authorised to exchange all information necessary for the accomplishment of their respective duties, including, among other things, information contained in the STRs.

According to CSSF Circular 11/528, professionals of the financial sector are no longer required to systematically transmit to the CSSF the information they communicate to the CRF based on Article 5(1) of the Law. This repeals point 137 of CSSF Circular 08/387 on the fight against ML/TF.

Nevertheless, the professionals shall continue communicating in parallel to the CSSF any information transmitted to the CRF based on Article 5(1) of the Law regarding a suspect who is a professional subject to the CSSF's supervision, or who is, according to their knowledge, a member of the personnel or internal bodies of such a professional or where this information is likely to have a material impact on the financial sector.

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The CSSF Circular is available on the following link http://www.cssf.lu/fileadmin/files/Lois_reglements/Circulaires/Blanchiment_terrorisme/cssf11_528eng.pdf

INVESTMENT VEHICLES

10.Key Investor Information Document (KIID)

Final Q&A on KIID issued by ALFI (issue 13)

ALFI published on its website the thirteenth issue of its questions and answers document (**Q&A**) dated 11 April 2012 relating to the Key Investor Information Document (**KIID**) to be issued by UCITS by 1 July 2012 at the latest.

The Q&A can be viewed under : http://www.alfi.lu/sites/alfi.lu/files/files/Publications_Statements/Statements/ALFI-KIID-QA-Issue-13-clean-version-20120411.pdf

This Q&A aims at addressing questions raised when implementing the measures adopted by the European Commission by Regulation n°583/2010 of 1 July 2010, as well as related regulatory guidelines and, in particular, questions relating to the content of the KIID but also about using KIID in distribution networks. This document represents the view of a group of participants. This thirteenth issue is announced as the final document of the group which has now been dissolved.

CSSF Q&A concerning the KIID, published on 15 May 2012

In view of the implementation of the KIID, the CSSF has also published a series of questions and answers (**Q&A**) in relation thereto, mainly clarifying when a KIID is needed, the CSSF approval process and filing procedures.

The Q&A, currently available only in English, can be viewed under: http://www.cssf.lu/fileadmin/files/Prospectus_OPC/FAQs_KIID_final.pdf

11.CSSF website update : Procedure for the establishment of management companies of Luxembourg UCIs

The CSSF recently published on its website a description of the authorisation procedure to be followed by applicants intending to establish in Luxembourg either (i) a UCITS management company, subject to Chapter 15 of the amended Law dated 17 December 2010 relating to undertakings for collective investment (the "**2010 Law**") (ii) or a management company subject to Chapter 16 of the 2010 Law (those management companies not being allowed to manage UCITS).

The explanations concerning the authorisation procedure for UCITS management companies subject to Chapter 15 of the 2010 Law (**UCITS management companies**) may be downloaded from the CSSF website under: http://www.cssf.lu/fileadmin/files/societes_de_gestion/Authorisation_procedure_MC15.pdf

The explanations concerning the authorisation procedure for other management companies subject to Chapter 16 of the 2010 Law (**non-UCITS management companies**) may be downloaded from the CSSF website under: http://www.cssf.lu/en/investment-funds/establishing-a-management-company-chapter-16-of-the-law-of-17-december-2010-relating-to-undertakings-for-collective-investment/

The CSSF further published on its website instructions concerning the periodic reporting (quarterly and annual reporting) to be transmitted to the CSSF by management companies: http://www.cssf.lu/en/legal-reporting/periodic-reporting/management-companies/instructions/

12.CSSF Annual Report : UCITS Risk Management Process and Level of Leverage

On 4 May 2012, the CSSF published its 2011 annual report which contains useful regulatory information. This annual report is currently only available in French.

Attention should be paid to Chapter V "Supervision of undertakings for collective investment" and notably to its Section 4. "Prudential supervisory practice" in which the CSSF provides clarification on topics with particular relevance for Luxembourg undertakings for collective investment ("**UCIs**").

In its latest annual report, the CSSF particularly emphasises the risk management arrangements to be implemented by UCITS management companies subject to the 2010 Law and self-managed SICAVs ("**SIAG**").

The clarification provided by the CSSF on said risk management arrangements may be summarised as follows:

Regular reports to be drawn up by the risk management function ("RMF"):

A copy of the reports communicated by the RMF to the senior management, board of directors and, where it exists, the supervisory function of the UCITS management companies or SIAG shall be attached to the risk management process to be filed with the CSSF by

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the UCITS management companies or SIAG (Section 1.6 of the Appendix to CSSF Circular 11/512).

Arrangements with third parties relating to the exercise of risk management activities:

The due diligence process which shall be carried out on the competence and capabilities of third parties shall cover both organisational aspects (e.g. organisation, procedures, controls) and technical aspects (e.g. methods, systems), such that the level of detail of these analyses shall be high and appropriate measures taken to ensure the continuous monitoring of the quality of the delegated service. Accordingly, section 1.9 of the risk management procedure, in relation to these agreements, shall be especially detailed.

Transparency on the level of leverage:

Regarding the methodology used to calculate the expected level of leverage to be disclosed in UCITS prospectuses, the CSSF announced that, the faculty to use the commitment approach (the "**Commitment Approach**") allowed by CSSF Circular 11/512 may be abandoned shortly as it is challenged at European level.

The provisions allowing the use of the Commitment Approach is a specific provision of Luxembourg regulations and was not contemplated as such by the ESMA guidelines on risk measurement and the calculation of global exposure and counterparty risk for UCITS (ref. CESR 10/788) (the "**ESMA Guidelines**") which provides for the disclosure of the expected level of leverage being defined only as the "sum of the notionals of all the financial derivative instruments" (the "**Sum of Notionals Methodology**"). The Sum of Notionals Methodology (as opposed to the Commitment Approach) does not allow the possibility to take into account either netting or hedging transactions.

When the Commitment Approach is no longer allowed as the sole method of calculating the level of leverage, the CSSF takes the view that UCITS may still decide to disclose in their prospectus, as an illustration, the level of leverage resulting from the Commitment Approach in addition to the level of leverage expressed as the Sum of Notionals Methodology.

The CSSF recognises that a certain number of UCITS have very high levels of leverage and that these levels may result from specific investment strategies which do not necessarily involve levels of risks corresponding to the level of leverage. It is worth recalling that the ESMA Guidelines do not provide any maximum level of leverage.

In that case, increased transparency should be ensured in the prospectuses of the UCITS explaining the rationale for having such a high level of leverage, in particular its context, the instruments generating this leverage, its impact for the UCITS or its sub-fund(s) (mainly in terms of risk profile), and for its investors.

Global exposure and NAV calculation:

Notwithstanding the frequency of the publication of the NAV, the CSSF considers that a daily calculation of the NAV must also be ensured in the following cases:

- for UCITS which resort to the commitment approach if there is any doubt as to a possible overrun of the limit of the global exposure referred to in Article 42(3) of the 2010 Law, and

- for all UCITS which resort to a VaR approach with a view to calculating the global exposure, knowing that the daily calculation of the global exposure implies in any event a reassessment of the risk factors associated with the portfolio positions of the sub-fund.

The annual report can be found on the CSSF's website: http://www.cssf.lu/fileadmin/files/Publications/Rapports_annuels/Rapport_2011/RA2011_chap05.pdf

13.Money Market Funds

An updated version of the ESMA Q&A on Money Market Fund was published by ESMA on 21 February 2012. This update consists of the addition of two new questions (Q15 and Q 16) addressing, respectively, (i) the use by management companies of credit ratings provided by credit rating agencies and (ii) the corrective actions to be taken by management companies when an instrument in which a short-term money market fund or a money market fund is invested no longer complies with the guidelines on a Common Definition of European Money Market Funds published by the CESR (ESMA's predecessor) on 19 May 2010.

This document is available on the ESMA's website: http://www.cssf.lu/fileadmin/files/Prospectus_OPC/ESMA_2012_113.pdf

14.Inadmissibility of the claim of an investor against the depositary bank of a SICAV

Investors in a SICAV do not have a direct claim against the depositary bank (and other service providers) in respect of the loss they suffer indirectly as a result of the loss suffered by the SICAV as such.

On 30 November 2011, the Court of Appeal, confirming earlier decisions of the Luxembourg District Court rendered on 4 March 2010, declared inadmissible a claim filed by an investor against the depositary bank of an investment fund incorporated in the form of a SICAV

who claimed compensation from the depository bank for the damage allegedly suffered by him as a result of the loss of part of it.

According to the Court, which by this decision sticks to long-standing Luxembourg case law in respect of actions for liability filed by shareholders (rather than by the company itself) against company directors or third parties (such as service providers), only the company itself has standing to claim compensation for the loss it may have suffered and as a result of which its shareholders are affected only indirectly.

The Court found that Article 36 of the Law of 20 December 2002 relating to undertakings for collective investments (the "**2002 Law**") (now Article 35 of the 2010) according to which "*The depositary shall be liable in accordance with Luxembourg law to the shareholders for any loss suffered by them as a result of its wrongful failure to perform its obligations or its wrongful improper performance thereof*" does not derogate from the traditional principles of company law in this respect, being noted that Article 26 of the 2002 Law (and Article 26 of the 2010 Law) expressly provides that " *SICAVs shall be subject to the provisions applicable in general to public limited companies, insofar as the present law does not derogate therefrom*".

The Court has also found that this interpretation of the relevant Luxembourg legal provisions was not incompatible with the requirements arising from Article 16 of Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) and that the latter left it to the Member States to decide whether or not investors should have a direct action against the depositary and to define the rules according to which a depositary may be held liable towards the investors and the fund. In this respect the Court of Appeal found that there was no need to refer the matter to the European Court of Justice in order for the latter to say whether Article 16 required the Member States to provide for a direct action in favour of the investors.

No recourse has been filed against this decision before the Supreme Court.

It should be noted, for the sake of good order, that the solution adopted by the Court of Appeal applies in case the compensation claimed by the investors individually is a loss actually and originally suffered by the SICAV. It does not apply in circumstances where an investor has suffered a loss which is different from and not a consequence of the loss suffered by the SICAV.

TAX

15.Proposed changes should render the Luxembourg SPF tax regime even more attractive

The Luxembourg Law of 11 May 2007 introduced the *société de gestion de patrimoine familial* (the "**SPF**") as a tax planning tool for individuals. An SPF is exempt from Luxembourg direct taxation and may merely be subject to an annual subscription tax (capped at 125k€), if certain debt/equity thresholds are not satisfied. The SPF may, however, lose such preferential tax treatment, if it receives in a given year at least 5% of its dividends from certain unlisted foreign companies which are not subject to taxation comparable to Luxembourg corporate income tax (the "**Bad Dividend Rule**"). Since the Bad Dividend Rule, among other things,does not apply to dividends received from Luxembourg resident companies, regardless of their tax status, it was therefore found to be discriminatory by the European Commission. For this reason, a recent law abolished the Bad Dividend Rule with effect from 1 January 2012. This change will without doubt render the SPF regime even more attractive because an SPF is now allowed to receive dividends from any company, regardless of the tax status of the distributing company, without risking losing its preferential tax status. This may open attractive planning opportunities with respect to assets that before could not have been held in or by an SPF.

16.New condemnation of withholding taxes on outbound dividends by the CJEU

In the past, the CJEU had already ruled that treating outgoing dividends less favourably for tax purposes than dividends to domestic recipients constitutes a restriction prohibited by Community law (Denkavit, C-170/05; and Amurta, C-379/05).

The recent decision of the CJEU of 10 May 2012 (Santander, C-338/11 to 347/11) therefore comes as no surprise.

The French tax legislation provides for a difference in tax treatment to the detriment of non-resident undertakings for collective investments in transferable securities ("**UCITS"**), in that dividends originating in France received by non-resident UCITS are subject to withholding tax, whereas dividends having the same origin paid to resident UCITS are not subject to tax.

According to the CJEU that difference in the tax treatment of dividends according to the UCITS place of residence may discourage non-resident UCITS from investing in companies established in France and,

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investors resident in France from acquiring shares in non-resident UCITS. Accordingly, such legislation constitutes a restriction on the free movement of capital in principle prohibited by Community law.

Since the French tax legislation establishes a distinguishing criterion based on the UCITS' place of residence, the situations must be compared only at the level of the investment vehicle in order to determine whether that legislation is discriminatory and not, as suggested by the French government, taking into account the situation of the shareholders of the UCITS. In addition, since the French legislation prevents dividends distributed by resident companies being subject to a series of tax charges, the CJEU found that the situation of a resident recipient UCITS is comparable to that of a non-resident recipient UCITS. As a consequence the different treatment of resident UCITS, which are exempt from tax on nationally sourced dividends and non-resident UCITS, which are subject to withholding tax, cannot be justified by a relevant difference in their situations. The CJEU also found that none of the arguments put forward by the French government could be accepted as an overriding reason in the public interest to justify the less favourable tax treatment of non-resident UCITS.

Luxembourg UCITS and more largely Luxembourg tax payers should carefully assess whether they have suffered in the past French withholding tax and, even more largely, a tax charge on dividends that, similar to the Santander case described above, had been subject to withholding tax in another Member State of the European Union or a State, party to the Agreement on the European Economic Area; whereas in a purely domestic context such State would not have levied such withholding tax.

17.New double tax treaty signed with Germany

Germany and Luxembourg signed a new double tax treaty and protocol on 23 April 2012. The new provisions will replace the existing treaty dating back to 1958. The treaty still has to be ratified by both countries and will apply as of January 1st of the following calendar year, i.e. at the earliest as from 1 January 2013.

The following is a summary of the most important changes in the new tax treaty:

New withholding tax rate for dividends

The new tax treaty reduces the withholding tax rate on dividends from 10% to 5% if the beneficial owner holds at least 10% (formerly 25%) of the capital of the dividend distributing company. Partnerships but also the aforementioned investment companies are excluded from the benefit of the reduced withholding tax rate of 5%. The ordinary withholding tax rate remains at 15%. Another specific exclusion from the reduced withholding tax rate regards real estate investment companies, in cases where these companies can benefit from a total or partial profit tax exemption or if distributions by such companies are deductible for profit computing. Since from a Luxembourg perspective domestic law already reduces to nil the withholding tax if a fully taxable German corporation holds for at least 12 months a participation of at least 10% in the share capital of the Luxembourg dividend distributing company, the new reduced withholding tax rates are not really breaking news for German investors but may be beneficial for Luxembourg investors.

Clarification of treaty entitlement for investment companies and investment funds

Under the new protocol, an Investment Company in Risk Capital (**SICAR**), an incorporated undertakings for collective investments with variable capital (**SICAV**) or with fixed capital (**SICAF**), as so-called investment companies, can claim reduced withholding tax rates of 15% for dividends. The super reduced 5% rate is not available, however. Given that the new protocol states that Council Directive 2011/96/EU of 18 January 2012 also applies in the case of dividend distributions between entities of both Contracting States, denial of the super reduced 5% rate for dividend distributions to a SICAR seems contradictory because from a Luxembourg perspective a SICAR falls into the scope of said Directive.

Finally, contractual investment funds are also entitled to claim reduced withholding tax rates for dividends of 15% (but not of 5%), subject, however, to the condition that their units are held by persons resident in the jurisdiction where the contractual investment fund is established.

New capital gains taxation for real estate companies and non-resident individuals

The new tax treaty introduces a specific provision regarding taxation of capital gains realised upon the disposal of shares or similar rights in a land-rich company that derives its value for more than 50% directly or indirectly from real estate / immovable property situated in the other Contracting State. Unlike under the current treaty, with the new provisions, these capital gains may be taxed in the Contracting State where the real estate is situated. This may be perceived as the major change to the existing treaty should however for the time being not yet directly impact German real estate investments held through Luxembourg property companies. However, one may take the view that substance in such Luxembourg property companies may have to be strengthened.

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Extended capital gains taxation after change of tax residence for individuals

The new treaty also introduces a special provision with respect to individuals who resided for more than 5 years in one contracting state before transferring their residence to the other Contracting State. These provisions aim at safeguarding, in accordance with its domestic tax law provisions, the right of the prior state of residence to levy taxes on the accrued capital gains on shares in a company situated in prior state and which relate to the time period before the transfer of residence. According to the European Court of Justice, EC law does not prevent a Member State from assessing the amount of income on which it wishes to preserve taxation; an immediate taxation of such latent capital gains would, however, infringe the principle of freedom of establishment. For the time being no rules exist under Luxembourg domestic tax law to assess such accrued capital gains at the time of changing tax residence.

LITIGATION

18.Loi du 24 février 2012 relative à la médiation en matière civile et commerciale

La loi du 24 février 2012 portant introduction de la médiation en matière civile et commerciale dans le Nouveau Code de procédure civile (ci-après «**NCPC**») et transposition de la directive 2008/52/CE du Parlement européen et du Conseil du 21 mai 2008 sur certains aspects de la médiation en matière civile et commerciale, (la « **Loi** ») du 24 février 2012, entrée en vigueur le 9 mars 2012, introduit la médiation dans le Nouveau Code de procédure civile (« **NCPC** ») (articles 1251-1 à 1251-24 NCPC). La nouvelle loi institutionnalise donc la médiation.

La médiation est un « *processus structuré dans lequel deux ou plusieurs parties à un litige tentent volontairement par elles-mêmes, de parvenir à un accord sur la résolution de leur litige avec l'aide d'un médiateur indépendant, impartial et compétent.* »
Le médiateur est défini comme étant « *tout tiers sollicité pour mener une médiation avec efficacité, impartialité et compétence. Le médiateur a pour mission d'entendre les parties ensemble, le cas échéant séparément afin que les parties arrivent à une solution du différend qui les oppose.*» Le médiateur n'a pas de pouvoirs d'instruction, mais il peut, avec l'accord des parties, interroger des tiers qui y consentent.

Tout différend peut faire l'objet d'une médiation soit conventionnelle, soit judiciaire, « *à l'exception (i) des droits et obligations dont les parties ne peuvent disposer, (ii) des dispositions qui sont d'ordre public et (iii) de la matière relative à la responsabilité de l'Etat pour des actes et des omissions commis dans l'exercice de la puissance publique* ».
En cas de médiation conventionnelle, le médiateur désigné peut être agréé ou non agréé. En cas de médiation judiciaire, le médiateur doit être agréé sauf en cas de litige transfrontalier. Est dispensé de l'agrément le prestataire de services de médiation qui remplit des exigences équivalentes ou essentiellement comparables aux conditions requises par la Loi, dans un autre Etat membre de l'Union européenne.

On peut recourir à la médiation judiciaire tant que l'affaire n'a pas été prise en délibéré. La médiation judiciaire est exclue devant la Cour de cassation et en référé.

La médiation est en principe confidentielle et le médiateur est lié par le secret professionnel.

L'accord de médiation peut être homologué et donc revêtir force exécutoire. Pour obtenir l'homologation, il faut déposer une requête d'homologation dont la procédure est similaire à celle pour obtenir l'homologation d'un jugement étranger. Cette homologation peut être refusée par le juge si l'accord de médiation est contraire à l'ordre public ou si l'accord ne peut être rendu exécutoire en vertu d'une disposition spécifique ou si le litige ne peut être réglé par voie de médiation. Le juge peut également refuser « *l'homologation de l'accord de médiation conclu en matière fiscale, douanière ou administrative, de la responsabilité de l'Etat pour des actes et des omissions commis dans l'exercice de la puissance publique ainsi que de l'accord de médiation conclu en matière de droit de la famille si cet accord de médiation n'est pas exécutoire dans l'Etat dans lequel il a été conclu et la demande visant à le rendre exécutoire est formulée ».*

Abstract :
The Law of 24 February 2012 implements Directive 2008/52/EU of the European Parliament and of the Council of 28 May 2008 on certain aspects of mediation in civil and commercial matters by inserting the mediation in the Code of Civil Proceedings .

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