# NEWSLETTER

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ELVINGER, HOSS & PRUSSEN
LUXEMBOURG LAW FIRM

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## CAPITAL MARKETS

### 1. SQUEEZE-OUT/SELL-OUT RIGHT: ENTRY INTO FORCE OF THE LAW ON 1 OCTOBER 2012

The purpose of the Law dated 21 July 2012 on the mandatory squeeze-out and sell-out (the "**Law**") is to introduce within Luxembourg law the provisions of (i) a squeeze-out right in favour of Majority Shareholders (as defined below in paragraph 1.1 (i)), (ii) a sell-out right in favour of minority shareholders and (iii) some obligations in terms of notification and information for companies having their registered office in Luxembourg where some or all of their Securities[1]:

(i) are admitted to trading on a regulated market in one or more Member States; or

(ii) have been, but are no longer, admitted to trading on a regulated market in one or more Member States, provided that the date on which the withdrawal from such a regulated market became effective does not go back more than five years, it being understood that Article 10 of the Law (Transitory provisions) provides that the squeeze-out/sell-out rights may, for a period of three years, be exercised for Securities on which the withdrawal from the regulated market goes back to 1 January 1991; or

(iii) have been the subject of a public offering which gave rise to the obligation to publish a prospectus in accordance with Article 3 of Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 or for which the obligation to publish such a prospectus has not been applied in accordance with Article 4, first paragraph of this Directive, and that the beginning of the offer does not go back more than five years.

Are excluded from the scope of the Law:

(i) companies whose object is the collective investment of retail deposits, submitted to the risk-spreading principle and whose shares are, upon holders' request, redeemed directly or indirectly, against these companies' assets (such as redemption at a value equal to or close to the net asset value); and

(ii) takeover bids made in conformity with Directive 2004/25/EC of the European Parliament and Council of 21 April 2004 on takeover bids, until the expiry of any delay stipulated for the exercise of post rights to such an offer, i.e. under this Directive and Law three months and during a period of six months from the expiry of this delay.

#### 1. Obligations of notification and information

##### 1.1. Any holder of Securities must notify the company and the *Commission de Surveillance du Secteur Financier* (the "CSSF") in the event that:

(i) it becomes a "Majority Shareholder" which is defined as any natural or legal person holding alone, or with persons acting together (*agissant de concert*), directly or indirectly, 95% of the capital carrying voting rights and 95% of the voting rights in a company ; or

(ii) it is a Majority Shareholder and falls below one of the thresholds qualifying as a Majority Shareholder; or

[1] "Securities" means securities (*valeurs mobilières*) carrying voting rights in a company, included depositary receipts representing shares carrying right to give voting instruction.

(iii) it is a Majority Shareholder and acquires additional Securities of the company concerned.

The notification[2] shall be made as soon as possible but not later than four trading days, the first of which shall be the day after the date on which the holder learns of the acquisition or the effective disposal, or of the possibility of exercising or no longer exercising the voting rights, or on which, having regard to the circumstances, it should have learned of it, regardless of the date on which the acquisition, disposal or possibility to exercise the voting rights takes effect.

The Law mentions the specific information which shall at least be inserted in the notification notwithstanding the fact that the CSSF may also request the Majority Shareholder to provide any relevant additional information.

### 1.2. Publication

Upon receipt of the notification but not later than three business days after such notification, the company shall publish the whole information included in the notification.

The CSSF shall publish on its website, and for a minimum period of twelve months, a list of companies for which information has been validly notified.

### 1.3. Transitory provisions

The notification requirements (unless specifically excluded by the Law) also apply to shareholders which were existing Majority Shareholders when the Law entered into force. Such notification shall be made within the two months following the entry into force of the Law, i.e. by 1 December 2012 at the latest.

## 2. Right to squeeze-out (“*retrait obligatoire*”)

### 2.1. Principle

A Majority Shareholder may require the holders of the remaining Securities to sell those Securities following a bid.

When the company has issued several classes of Securities, the right to squeeze-out can only be exercised with respect to the class of instrument where the threshold of 95% has been reached, provided however that the two thresholds laid down by the Law are also reached for the entire issued Securities, regardless of the class concerned.

### 2.2. Procedure

The Majority Shareholder shall first inform the CSSF of its intention to exercise its right to squeeze-out and shall commit to performing the transaction until completion. The Majority Shareholder wishing to exercise its right to squeeze-out shall ensure that it is in a position to provide the entire consideration in cash.

The Majority Shareholder shall forthwith inform the company and publish without delay its decision to squeeze-out. The CSSF shall determine the form and content of the information to be provided but this shall include at least:

(i) the identity and details of the Majority Shareholder;

(ii) the name of the independent expert for the determination of the fair price;

(iii) the methods of payment; and

(iv) any other conditions the squeeze-out procedure is subject to.

[2] Circular CSSF 12/545 includes the application form required for such notification.

### 2.3. Price

The right to squeeze-out must be exercised at a fair price (“*juste prix*”) on the basis of objectives and appropriate methods as used in the case of transfer of assets.

The valuation report shall be drawn up by an independent expert appointed at the Majority Shareholder’s discretion and paid by the Majority Shareholder. The expert must be independent of all the parties involved and have no conflicts of interest. He must have experience in valuing Securities and must carry out his report in accordance with objective and adequate methods.

Within the month following the notification, the Majority Shareholder shall communicate the proposed price as well as the valuation report of the Securities to the CSSF. The Majority Shareholder shall then communicate the proposed price to the company and publish it.

If there is no opposition against the proposed price by the other holders, the CSSF will accept this price as the fair price, which will be duly published on its website.

### 2.4. Opposition right

Within the month following the publication of the proposed price, each holder of the remaining Securities may oppose the squeeze-out project.

Such opposition must be notified to the CSSF which may decide upon proposal by the company among five candidate experts to appoint a new independent expert to establish a new valuation report and proposed fair price. The price will ultimately be determined by the CSSF.

### 2.5. Delivery of Securities

Securities covered by such a right to squeeze-out and which are not delivered at the final payment date at the latest shall be considered as being transferred *ipso iure* to the Majority Shareholder. The price shall then be deposited on the first business day following that date.

### 2.6. Exclusivity

Once a squeeze-out procedure has been launched, no sell-out procedure can be launched until the squeeze-out procedure has been completed.

## 3. Right to sell-out (“*rachat obligatoire*”)

### 3.1. Principle

Minority shareholders have the right to force the Majority Shareholder to purchase their shares provided that the notification to be addressed to the CSSF with respect to the exercise of the sell-out right occurs at the date on which:

(i) the conditions stipulated above for the exercise of the sell-out right are fulfilled;

(ii) the acquisition of the Securities by the Majority Shareholder has been published within the past three months; and

(iii) the latest sell-out procedure was launched at least two years before the publication of the CSSF’s decision with respect to the fair price.

### 3.2. Procedure

The holder of Securities shall notify the Majority Shareholder of its intention to exercise the sell-out right by registered letter. A copy of the letter shall be addressed to the CSSF and to the company.

### 3.3. Price

The determination of the proposed fair price is similar to that described above for the squeeze-out process. It should be noted that the fees of the expert shall also be supported here by the Majority Shareholder.

### 3.4. Opposition right

The opposition procedure is similar to that described above for the squeeze-out.

It should be noted that all holders of remaining Securities who challenge the proposed price shall be obliged to participate in the sell-out procedure.

### 3.5. Concomitant exercise of the squeeze-out right

A Majority Shareholder may exercise its squeeze-out right until the date at which the fair price is published by the CSSF. In the latter case, the sell-out right and its procedure shall become void.

## 4. Role and powers of the CSSF and penalties

The Law grants to the CSSF the authority and powers to ensure that the provisions of the Law are complied with. In particular, the CSSF may apply fines of up to 125,000 euros to persons who fail to comply with the notification and information requirements or who fail to provide the information requested by the CSSF.

Imprisonment and criminal penalties may also be triggered if inaccurate and incomplete information is deliberately communicated.

# 2. SHORT SELLING: ENTRY INTO FORCE OF NEW EU REGULATION ON 1 NOVEMBER 2012

In September 2008, at the height of the financial crisis, the Member States of the European Union (as well as some third countries like the United States and Japan) saw a risk of collapse in share prices in short selling practices, particularly within the financial institutions, which could cause systemic risks.

In Luxembourg, the CSSF reacted by publishing two press releases in September 2008[3] prohibiting naked short sales where their underlying consisted of shares in a credit establishment or insurance undertaking traded on a regulated market of the Luxembourg Stock Exchange (excluding those securities admitted to trading on the Euro MTF).

Given the lack of cohesion within the Member States, the European Union responded by adopting Regulation (EU) No. 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps (the "**SSR**")[4]. Although certain indirect provisions have applied since March 2012, the SSR took effect on 1 November 2012 and the positions adopted in 2008 by the CSSF are repealed as from this date.

[3] The CSSF press release dated 19 September 2008 relating to the ban on naked short selling and the CSSF press release dated 29 September 2008 providing details concerning the ban on naked short selling.

[4] For consistent application of the SSR, the Commission has adopted a package of four implementing measures specifying technical aspects of certain key issues of the SSR: (i) Commission Delegated Regulation (EU) No 826/2012 of 29 June 2012 supplementing Regulation (EU) No 236/2012 of the European Parliament and of the Council with regard to regulatory technical standards on notification and disclosure requirements with regard to net short positions, the details of the information to be provided to the European Securities and Markets Authority in relation to net short positions and the method for calculating turnover to determine exempted shares; (ii) Commission Implementing Regulation (EU) No 827/2012 of 29 June 2012 laying down implementing technical standards with regard to the means for public disclosure of net position in shares, the format of the information to be provided to the European Securities and Markets Authority in relation to net short positions, the types of agreements, arrangements and measures to adequately ensure that shares or sovereign debt instruments are available for settlement and the dates and period for the determination of the principal venue for a share according to Regulation (EU) No 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps; (iii) Commission Delegated Regulation (EU) No 918/2012 of 5 July 2012 supplementing Regulation (EU) No 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps with regard to definitions, the calculation of net short positions, covered sovereign credit default swaps, notification thresholds, liquidity thresholds for suspending restrictions, significant falls in the value of financial instruments and adverse events; and (iv) Commission Delegated Regulation (EU) No 919/2012 of 5 July 2012 supplementing Regulation (EU) No 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps with regard to regulatory technical standards for the method of calculation of the fall in value for liquid shares and other financial instruments.

As the European framework takes the legislative form of a regulation, this ensures that provisions directly imposing obligations on private parties to notify and disclose net short positions relating to certain instruments and restricting uncovered short selling are applied in a uniform manner throughout the European Union. Moreover, the SSR confers powers on the European Securities and Markets Authority ("**ESMA**")[5] to coordinate measures taken by the competent authorities or to take measures itself.

The scope of the SSR is as broad as possible to provide for a preventive regulatory framework to be used in exceptional circumstances with a proportionate response to the risks that short selling of different instruments could represent. It is therefore only in the case of exceptional circumstances that competent authorities and ESMA will be entitled to take measures concerning all types of financial instruments (see the scope of the SSR under paragraph 2 below), going beyond the permanent measures that only apply to particular types of instruments (see the transparency regime under paragraph 3 below) where there are clearly identified risks that need to be addressed.

## 1. What is the definition of short selling in the SSR?

The SSR provides a standard definition of short selling.

According to Article 2.1.b) of the SSR, a "short sale" in relation to a share or debt instrument means any sale of the share or debt instrument which the seller does not own at the time of entering into the agreement to sell including such a sale where at the time of entering into the agreement to sell the seller has borrowed or agreed to borrow the share or debt instrument for delivery at settlement.

The following transactions are not considered as short sales within the meaning of the SSR:

(i) a sale by either party under a repurchase agreement where one party has agreed to sell the other a security at a specified price with a commitment from the other party to sell the security back at a later date at another specified price;

(ii) a transfer of securities under a securities lending agreement; or

(iii) entry into a futures contract or other derivative contract where it is agreed to sell securities at a specified price at a future date.

## 2. What is the scope of application of the SSR?

Article 1.1 of the SSR states that this regulation applies (i) to all financial instruments that are admitted to trading on a trading venue in the Union, including such instruments when trading outside a trading venue, (ii) to derivatives that relate to these financial instruments or to an issuer of such a financial instrument, and (iii) to debt instruments issued by a Member State or the Union and derivatives that relate or are referenced to debt instruments issued by a Member State or the Union[6].

The key point is therefore the place of trading which must be within the European Union. Indeed neither the location of the short sale transaction nor of the person effecting it is relevant.

However, the transparency requirements detailed below do not apply to all the financial instruments referred to above but only to shares which are admitted to trading on a regulated market or on a multilateral trading system[7] (except if the main venue is in a third country). For sovereign debts and sovereign

[5] ESMA has been established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council.

[6] The financial instruments and derivative instruments as referred to in the SSR are listed in the Appendix to the 2004/39/EC MiFID Directive.

[7] The material scope of transparency obligations is therefore broader than that initially adopted by the CSSF in 2008 because it is no longer confined to shares of credit institutions or insurance undertakings whose securities are admitted to the negotiation on a regulated market of the Luxembourg Stock Exchange but concern all the shares admitted to the regulated and non-regulated markets of the Luxembourg Stock Exchange.

credit default swaps the notification and publication requirements provided under the SSR apply if they are issued by a Member State or by the Union.

## 3. Transparency of net short positions

The SSR introduces a system of transparency of significant net short positions in shares which are admitted to trading on a regulated market or a multilateral trading system (except if the main trading venue is in a third country) or of significant net short position in relation to sovereign debt issued by a Member State or the Union where certain thresholds of net short positions are exceeded or not reached.

The transparency regime on shares is a two-tier model of private and public reporting.

Any net short position in shares which exceeds or falls below the threshold of 0.2% of the share capital issued by an entity concerned, and each 0.1% above that threshold, must be notified to the competent authority which, for Luxembourg, is the CSSF.

The notification requirement becomes a publication requirement when the threshold of 0.5% of capital issued by the entity concerned is exceeded, and each 0.1% above that.

A notification system is also implemented for significant net short positions on sovereign debt and for uncovered positions in sovereign credit default swaps (“**CDS**”) when certain thresholds are reached. ESMA shall publish on its website the notification thresholds applicable to each Member State.

The SSR provides that the above transparency obligations shall not apply to shares of a company admitted to trading on a trading venue in the Union where the principal venue for the trading of the shares is located in a third country (Article 16 of the SSR). Commission Delegated Regulation No. 826/2012 (mentioned under footnote 4) provides for a method of calculation of turnover to determine the principal trading venue for a share.

The methods of notification and publication are provided in Commission Delegated Regulation No. 826/2012 and Commission Implementing Regulation No. 827/2012 (mentioned under footnote 4) and must be adopted and detailed by each competent authority.

On 30 October 2012, the CSSF published the Circular 12/548 on the entry into force of the SSR. This circular aims at providing practical details and guidance as regards certain aspects in relation to the notification or disclosure of significant net short positions to the CSSF in accordance with Articles 5 to 9 of the SSR, the exemption for market making activities and primary market operations under Article 17 of the SSR and the publication, by ESMA and by the CSSF, of relevant information in relation to the application of the SSR.

## 4. Restrictions on uncovered short sales

The SSR prohibits any uncovered short sales in shares unless one of the following conditions is met:

(i) the natural or legal person has borrowed the share or has made alternative provisions resulting in a similar legal effect;

(ii) the natural or legal person has entered into an agreement to borrow the share or has another absolutely enforceable claim under contract or property law to be transferred ownership of a corresponding number of securities of the same class so that settlement can be effected when it is due;

(iii) the natural or legal person has an arrangement with a third party under which that third party has confirmed that the share has been located and has taken measures vis-à-vis third parties necessary for the natural or legal person to have a reasonable expectation that settlement can be effected when it is due.

The same restrictions are applicable to uncovered short sales in sovereign debt. There also exist restrictions on uncovered CDS.

Commission Implementing Regulation No. 827/2012 (mentioned under footnote 4) specifies in particular which are the agreements, arrangements and measures to ensure adequately that the instruments are available for settlement.

## 5. Exemptions for market making activities and for authorised primary dealer activities

The transparency mechanisms of significant net short positions and of restrictions on uncovered short sales do not apply to transactions carried out on financial instruments (which include derivatives) due to market making activities and authorised primary dealer activities.

According to Article 2(1)(k) of the SSR, "market making activities" means the activities of an investment firm, a credit institution, a third-country entity, or a firm as referred to in point (1) of Article 2(1) of Directive 2004/39/EC, which is a member of a trading venue or of a market in a third country, the legal and supervisory framework of which has been declared equivalent by the Commission pursuant to Article 17(2) where it deals as principal in a financial instrument, whether traded on or outside a trading venue, in any of the following capacities:

(i) by posting firm, simultaneous two-way quotes of comparable size and at competitive prices, with the result of providing liquidity on a regular and ongoing basis to the market;

(ii) as part of its usual business, by fulfilling order initiated by clients or in response to clients' request to trade;

(iii) by hedging positions arising from the fulfilment of tasks under points (i) and (ii).

According to the above definitions, the CSSF shall be the competent authority in Luxembourg for investment firms and credit institutions as defined in the Luxembourg Law of 5 April 1993 on the financial sector, as amended, and for firms as referred to in point (l) of Article 2(1) of Directive 2004/39/EC where they have their registered office, their head office or their domicile in Luxembourg.

Article 2(1)(n) defined "authorised primary dealer" as a natural or legal person who has signed an agreement with a sovereign issuer or who has been formally recognised as a primary dealer by or on behalf of a sovereign issuer and who, in accordance with that agreement or recognition, has committed to dealing as principal in connection with primary and secondary market operations relating to debt issued by that issuer. In Luxembourg, the CSSF shall then be the competent authority in relation to the sovereign debt issued by the Grand-Duchy of Luxembourg, the European Investment Bank, the European Financial Stability Facility and the European Stability Mechanism.

The relevant concerned authorities shall then notify their request of exemption directly to the CSSF in accordance with the procedure set forth by the CSSF in the Circular 12/548.

### 6. Powers of competent authorities and of ESMA in exceptional circumstances

The SSR also provides that the competent authorities and ESMA may, in exceptional circumstances, adopt specific notification and publication procedures. Such specific measures may apply to all financial instruments as opposed to the transparency regime which apply to only certain financial instruments.

## 3. DISPUTE RESOLUTION: INSIDE INFORMATION - NOTION OF "PRECISE INFORMATION" (ECJ 28 JUNE 2012 C-19/11 MARKUS GELTL VS DAIMLER AG)

In its judgment delivered on 28 June 2012, the Court of Justice of the European Union ("**ECJ**") gave useful clarifications on the notion of "inside information" within the meaning of Directive 2003/6/EC and Directive 2003/124/EC.

For information to qualify as inside information, such information must be, amongst other things, of "a precise nature". Pursuant to Directive 2003/124/EC, the information must refer to a "set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to occur and is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments".

When questioned by the German Federal Court of Justice on the notion of "precise information", in the case where the chairman of a board had discussed internally his early departure from the board before the actual decision had been made and disclosed to the public, the ECJ replied that in the case of a continuing process which is intended to bring about a particular circumstance or generate a particular event, the intermediate steps of that process (whether actual or future) may in themselves constitute a set of circumstances or an event within the meaning of Directive 2003/124/EC and not only the actual circumstance or event that is the result of that continuing process.

These intermediate steps may *per se* constitute information of a precise nature, and therefore qualify as inside information.

## 4. NEW PROSPECTUS AND TRANSPARENCY REQUIREMENTS: CSSF CIRCULARS 12/542 AND 12/539

Following the implementation into Luxembourg law of Directive 2010/73/EC amending 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 harmonisation of the transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (the "**Transparency Directive**") by a Law of 26 June 2012 (see our newsletter of July 2012), the CSSF has issued Circulars 12/539 and 12/542.

### 1. CSSF Circular 12/542

This circular amends the existing CSSF Circular 08/337 which had been issued in the context of the entry into force of the Law of 11 January 2008 implementing the Transparency Directive.

CSSF Circular 12/542 thus amends Circular 08/337 on the following items:

(i) the reference to the annual document referred to therein by reference to Article 14 of the Law of 10 July 2005 implementing the Prospectus Directive which has been abolished, is deleted;

(ii) the references to the thresholds applying to the "nominal amount exemptions" which have been increased from 50,000 euros to 100,000 euros are amended; and

(iii) a "grand-fathering" provision regarding securities issued before 31 December 2010 and in accordance with the previously applicable "nominal amount exemption" and having the denomination of 50,000 euros (instead of the new higher threshold of 100,000 euros) is inserted in Circular 08/337.

### 2. CSSF Circular 12/539

This circular abolishes and replaces CSSF Circular 05/226 on (i) the general presentation and (ii) the technical procedures regarding submission to the CSSF of documents for approval, notification, filing or communication regarding offers of securities to the public and admissions of securities to trading on a regulated market. The latter part set out in Part II of the circular is now described in more detail and describes the new procedures such as the preparation of an "Entry Form" document required in the context of each submission for approval of documents. Similarly new procedures are also put into place in the context of requests for passporting and filings.

## 5. UPDATED CSSF Q&A ON PROSPECTUS

On 11 October 2012, the CSSF published an updated version of the Q&A on Prospectus. This document currently available only in French can be viewed under: http://www.cssf.lu/fileadmin/files/MAF/FAQ_prospectus/FAQ_prospectus_121012.pdf

# SECURITISATION

## NEW SECURITISATION FAQ ISSUED BY CSSF ON 19 JULY 2012

On 19 July 2012, the CSSF published an FAQ on securitisation. This FAQ is addressed to regulated securitisation vehicles as contemplated by Article 19 of the Law of 21 March 2004 on securitisation (the "**Law of 2004**"). This FAQ replaces the explanations given by the CSSF on the supervisory review of regulated securitisation vehicles set out in its 2007 annual report and presents such previously existing guidelines in a more structured manner.

The CSSF has also added some new topics, notably:

**(i) Regarding the various forms of securitisations of receivables**

In its FAQ No. 7, the CSSF considers the various forms of securitisations of receivables among which is the more traditional true sale of a receivable to the securitisation vehicle as well as synthetic securitisations. Furthermore, the relevant FAQ discusses the conditions where the securitisations vehicle grants itself loans instead of acquiring a receivable on the secondary market.

The CSSF stresses that for the latter case, such conditions will be appreciated on a case-by-case basis and that in light of the ongoing discussions on "shadow-banking" on an international level, the legal and regulatory environment may change in the future.

**(ii) Which assets may be securitised?**

The CSSF discusses in its FAQ No. 8 which other types of assets and risks may be securitised. The CSSF points out that the indication of the various underlying assets listed in that FAQ is not limitative and that such FAQ shall only give elements of information on the approach on the basis of which the CSSF will review any submissions. The securitisation of commodities is also envisaged.

**(iii) Financing possibilities for securitisation vehicles**

The FAQ document also discusses the possibility and the conditions pursuant to which securitisation vehicles may borrow funds either from external or intra-group financings in order to pre-finance the acquisition of the risks to be securitised.

**(iv) Which securities may be issued?**

The FAQ discusses which securities may be issued by a securitisation vehicle in the context of a securitisation transaction. The CSSF confirms that will be considered "securities" within the meaning of the Law of 2004, any securities which are governed by foreign law and to which the characteristic of "security" is recognised by its governing law or which constitute "securities" within the meaning of the directive of market and financial instruments.

**(v) AIFMD and management of portfolio of assets**

The CSSF points out that the Alternative Investment Fund Managers Directive of 8 June 2011, which is to be implemented into Luxembourg law by 22 July 2013, will have an impact on regulations applicable to the collective management of portfolios, so that the principles relating to the management of financial assets shall be reviewed/adapted, and/or the applicable supervisory review shall be completed.

**(vi) Contact address in case of further securitisation questions**

Lastly, the CSSF has created a specific email address, where parties concerned may contact the CSSF in case they have further questions on securitisation that have not been treated in the FAQ: securitisation.questions@cssf.lu

# INVESTMENT VEHICLES

## 1. UCITS MANAGEMENT COMPANIES AND SELF-MANAGED SICAVs & UCI PROMOTERSHIP: CSSF CIRCULAR 12/546

On 26 October 2012, the CSSF published the Circular 12/546 on the authorisation and organisation of the Luxembourg management companies subject to Chapter 15 of the Law of 17 December 2010 relating to undertakings for collective investment as well as to investment companies which have not designated a management company within the meaning of Article 27 of the Law of 17 December 2010 relating to undertakings for collective investment. An English translation of this document is available on our website (see our Newsflash of 31 October 2012).

On 31 October 2012, the CSSF also published a Press Release 12/45 on UCI and Promoter. An English translation of this document is available on our website (see our Newsflash of 6 November 2012).

For a detailed regulatory overview on these matters, see our Memorandum of 9 November 2012.

## 2. ETF AND OTHER UCITS ISSUES: NEW ESMA GUIDELINES ON 25 JULY 2012

On 25 July 2012, ESMA published a Report and Consultation Paper (ref. ESMA/2012/474) containing (i) guidelines on ETFs and other UCITS issues as well as (ii) a consultation paper on repo and reverse repo arrangements.

These guidelines will become effective two months after the publication of the final guidelines which comprise (i) guidelines on ETFs and other UCITS issues and (ii) the forthcoming guidelines on repo and reverse repo arrangements. The final guidelines are not yet published.

The Report and Consultation Paper (ref. ESMA/2012/474) is available on the ESMA's website: http://www.esma.europa.eu/content/Report-and-consultation-paper-guidelines-ETFs-and-other-UCITS-issue

## 3. SICAR: NEW Q&A ISSUED BY CSSF ON 30 AUGUST 2012

On 30 August 2012, the CSSF published a Q&A on SICAR.

This document currently available only in French can be viewed under: http://www.cssf.lu/fileadmin/files/SICAR/SICAR_FAQ_31082012.pdf

## 4. AIFMD: LUXEMBOURG BILL OF LAW IMPLEMENTING AIFMD NOW DEPOSITED

On 24 August 2012, the bill of law (the "**Bill**") transposing the alternative investment fund managers directive ("**AIFMD**") was submitted to the Luxembourg Parliament for approval. Besides transposition, the Bill aims to introduce a number of innovations that are designed to facilitate and improve the development of the alternative investment fund industry (for more information on the innovations introduced by the Bill, see our Newsflash of 31 August 2012 and for more information on the professional depositary of assets other than financial instruments, see our Newsflash of 12 September 2012).

## 5. SIF: RISK MANAGEMENT AND CONFLICTS OF INTEREST - CSSF REGULATION 12-01

On 13 August 2012, the CSSF published Regulation No. 12-01 which lays down detailed rules for the application of Article 42a of the Law of 13 February 2007 relating to specialised investment funds concerning the requirements regarding risk management and conflicts of interest. An English translation of this document is available on our website (see our Newsflash of 14 August 2012).

## 6. KIID: ESMA Q&A ISSUED ON 25 SEPTEMBER 2012 AND UPDATED ALFI Q&A ON 20 NOVEMBER 2012

On 25 September 2012, ESMA published a Q&A on the key investor information document ("**KIID**") for UCITS. This document is available under: http://www.esma.europa.eu/content/Questions-and-Answers-Key-Investor-Information-Document-UCITS. Further to this publication, the Association of the Luxembourg Fund Industry ("**ALFI**") issued on 20 November 2012 an updated version of its Q&A Document with questions and proposed answers about the KIID implementation. The updated ALFI Q&A is available under: http://www.alfi.lu/publications-statements/publications/alfi-ucits-iv-implementation-project-%E2%80%93-kid-qa-document

## 7. CSSF TAXES INCREASE: GRAND-DUCAL REGULATION OF 29 SEPTEMBER 2012

The Grand-Ducal Regulation of 29 September 2012 (the "**Regulation**") relating to the taxes to be levied by the CSSF which repeals the Grand-Ducal Regulation of 18 December 2009, as amended, was published in the *Mémorial* (the Luxembourg official gazette) on 3 October 2012.

The Regulation, which will enter into force on 1 January 2013, increases the taxes currently payable to the CSSF. The Regulation applies to all legal entities and natural persons subject to the CSSF's supervision which include, amongst others, credit institutions and other professional of the financial sector, trade matching and reporting systems, issuers requesting approval of a prospectus within the meaning of the Law dated 10 July 2005 relating to prospectuses for transferable securities, securitisation undertakings, pension funds, SICARs, investment funds and their management companies.

As an illustration, you will find below the changes applicable to undertakings for collective investment ("**UCIs**") subject to the Law of 17 December 2010 (the "**2010 Law**"), specialised investment funds ("**SIFs**") and management companies subject to Chapters 15 and 16 of the 2010 Law ("**ManCos**").

As from 1 January 2013, both the taxes to be levied by the CSSF in the context of the submission of an application for approval by a UCI, a SIF or a ManCo ("**Examination Taxes**") and the annual maintenance tax ("**Maintenance Taxes**") will increase.

Please find below a sample of the increase of the Examination Taxes and Maintenance Taxes.

(i) Increase of Examination Taxes for UCIs and SIFs:

| Examination Tax | Current tax | Applicable tax as from 1 January 2013 |
|---|---|---|
| Stand alone UCI | 2,650 euros | 3,500 euros |
| UCI with multiple compartments | 5,000 euros | 7,000 euros |
| Self-managed investment company | 5,000 euros | 10,000 euros |
| Stand alone SIF | 2,650 euros | 3,500 euros |
| SIF with multiple compartments | 5,000 euros | 7,000 euros |

(ii) Increase of Maintenance Taxes for UCIs and SIFs:

| Maintenance Tax | Current tax | Applicable tax as from 1 January 2013 |
|---|---|---|
| Stand alone UCI or SIF | 2,650 euros | 3,000 euros |
| UCI or SIF with multiple compartments | | |
| 1 to 5 compartments | 5,000 euros | 6,000 euros |
| 6 to 20 compartments | 5,000 euros | 12,000 euros |
| 21 to 50 compartments | 5,000 euros | 20,000 euros |
| Over 50 compartments | 5,000 euros | 30,000 euros |

(iii) Increase of Examination Taxes for ManCos:

| Examination Tax | Current tax | Applicable tax as from 1 January 2013 |
|---|---|---|
| Chapter 15 ManCo | 2,650 euros | 10,000 euros |
| Chapter 16 ManCo | 2,650 euros | 5,000 euros |

(iv) Increase of Maintenance Taxes for ManCos:

| Maintenance Tax | Current tax | Applicable tax as from 1 January 2013 |
|---|---|---|
| Chapter 15 ManCo | 5,000 euros | 20,000 euros |
| Chapter 16 ManCo | 5,000 euros | 15,000 euros |

The Regulation is currently available only in French on the CSSF's website. An English translation of the Regulation will be available shortly on our website.

# TAX

## 1. LUXEMBOURG TAX-RELATED MEASURES FOR 2013

On 7 November 2012, the government deposited a bill of law with the Luxembourg Parliament introducing the tax-related measures formerly announced. Subject to amendments which may be made during the legislative procedure, the proposed amendments will in principle apply as from 1 January 2013. An updated newsletter will be published when the law is adopted.

### 1. Increase of the minimum tax for Soparfis

At the same time the minimum tax to be paid by Soparfis shall be increased from 1,500 euros to 3,000 euros (plus the solidarity surcharge of 7%). The overall tax shall henceforth be 3,210 euros.

The minimum taxation will be due by each entity regardless of whether it is part of a fiscal unity or not and certain domestic tax credits will no longer be deductible from the minimum taxation.

### 2. Introduction of a minimum taxation for all other Luxembourg companies and non-resident corporates holding assets in Luxembourg

Whereas previously, a lump-sum tax was only imposed on unregulated Luxembourg resident entities with a collective character ("*organismes à caractère collectif*") holding certain financial assets (so-called Soparfis), it is now contemplated to introduce a minimum corporate income tax on all Luxembourg-resident entities with a collective character or non-Luxembourg resident entities holding Luxembourg assets via a Luxembourg permanent establishment or with no such permanent establishment (e.g. real estate).

The bill of law introduces a minimum taxation the amount of which will depend on the total closing statutory balance sheet of the relevant taxpayer and will range between 500 euros and 20,000 euros (plus a solidarity surcharge of 7%). As such, for taxpayers with a total closing balance sheet of maximum 50,000 euros, the minimum tax will amount to 500 euros and it will be capped at 20,000 euros for entities whose total closing commercial balance sheet amounts to at least 20 million euros.

### 3. Reduction of the tax credit for investments (*bonification d'impôts pour investissement*)

After having been increased last year, the tax credit for investments will be reduced as from 1 January 2013 by 1%.

### 4. Increase of the marginal tax rate for Luxembourg-resident individual taxpayers

It is proposed to increase the marginal tax rate for Luxembourg-resident individual taxpayers with taxable income exceeding 100,000 euros to 40%.

### 5. Increase of the so-called "solidarity surcharge"

The solidarity surcharge will be increased for both Luxembourg-resident individual and corporate taxpayers.

#### 5.1. Luxembourg-resident corporate taxpayers

The solidarity surcharge will rise from currently 5% to 7% for Luxembourg-resident entities with a collective character which are liable to corporate income tax. Accordingly, the aggregate 2013 tax rate applicable to Luxembourg corporate taxpayers established in Luxembourg-city will increase from currently 28.80% to 29.22% (i.e. 21% corporate income tax, plus 7% solidarity surcharge, plus 6.75% municipal business tax when the taxpayer is established in Luxembourg City).

#### 5.2. Luxembourg-resident individual taxpayers

The solidarity surcharge will rise from currently 4% to 7% for Luxembourg-resident individual taxpayers and even to 9% for taxable income exceeding 150,000 euros (Tax Class 1 and 1a, singles) or 300,000 euros (Tax Class 2, spouses assessed jointly).

### 6. Other cuts into expenses deduction for individual taxpayers

It is intended that the annual interest deduction allowance will be reduced by 50% and be limited to 336 euros per taxpayer (672 euros in Tax Class 2).

It is further intended that the first 4 units for home-to-work lump-sum deduction travel expenses will be abolished, equalling a tax deduction of 396 euros *per annum*.

## 2. NEW PROTOCOL TO THE INCOME TAX TREATY BETWEEN LUXEMBOURG AND POLAND (THE "TREATY")

Besides introducing an OECD-compliant full exchange of tax information procedure (still excluding "fishing expeditions"), the major changes to the Treaty concern the introduction of an anti-abuse/limitation on benefits provision which is new ground in Luxembourg tax treaty policy and the possibility for the *situs* state to tax the sale of shares in a "land-rich" entity (provided however that domestic tax law permits such taxation, which, depending on the structuring scenario, does not necessarily seem to be the case under currently existing Polish tax law and regulations).

One could add more words on the newly introduced anti-abuse provision permitting the tax authorities of both Contracting States to deny treaty protection to what the Treaty calls - without defining it - "artificial arrangements", which brings to mind the 1998 Imperial Chemical Industries (C-264/96) and the 2006 Cadbury Schweppes (C-196/04) ECJ cases. However, even though this is quite an innovative concept, its application should, at least from a Luxembourg perspective, be of limited importance, given that in a large number of cases, tax structuring is based on interpretation of domestic tax law provisions not relying on any treaty application.

The worst news though, and this not only from a Polish tax but also from a Luxembourg business perspective, is the switch from the exemption method to the credit method for Luxembourg source dividends received by Polish tax residents because this brings to an end a certain number of existing tax-efficient Luxembourg-Polish structures.

# FINANCIAL INSTITUTIONS

## 1. NEW CSSF CIRCULARS

### 1. US dollar denominated Funding of Credit Institutions: CSSF Circular 12/537

On 29 June 2012, the CSSF published the Circular 12/537 on US dollar denominated funding of credit institutions. This document can be viewed under: http://www.cssf.lu/fileadmin/files/Lois_reglements/Circulaires/Hors_blanchiment_terrorisme/cssf12_537eng.pdf

### 2. Lending in Foreign Currencies: CSSF Circular 12/538

On 29 June 2012, the CSSF published the Circular 12/538 on lending in foreign currencies. This document can be viewed under: http://www.cssf.lu/fileadmin/files/Lois_reglements/Circulaires/Hors_blanchiment_terrorisme/cssf12_538eng.pdf

### 3. Entry into force of Regulation (EU) No 260/2012 establishing Technical and Business Requirements for Credit Transfers and Direct Debits in Euro: CSSF Circular 12/543

On 17 July 2012, the CSSF published the Circular 12/543 on the entry into force of Regulation (EU) No 260/2012 of the European Parliament and of the Council of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation (EC) No 924/2009. This document can be viewed under: http://www.cssf.lu/fileadmin/files/Lois_reglements/Circulaires/Hors_blanchiment_terrorisme/cssf12_543eng.pdf

## 2. BCL REGULATION ON ADDITIONAL TEMPORARY MEASURES RELATING TO EUROSYSTEM REFINANCING OPERATIONS AND ELIGIBILITY OF COLLATERAL

On 12 September 2012, the *Banque Centrale du Luxembourg* (“**BCL**”) published the Regulation 2012/No 12 implementing the Guideline of the European Central Bank of 2 August 2012 on additional temporary measures relating to Eurosystem refinancing operations and eligibility of collateral and amending Guideline ECB/2007/9. This document can be viewed under: http://www.bcl.lu/fr/publications/Reglements_de_la_BCL/Reglement_BCL_2012_12_EN_BCL_website.pdf

## 3. MIFID: ESMA GUIDELINES

On 6 July 2012, ESMA published two sets of MiFID guidelines:

(i) guidelines on certain aspects of the MiFID suitability requirements (ESMA/2012/387); and

(ii) guidelines on certain aspects of the MiFID compliance function requirements (ESMA/2012/388).

## LITIGATION

### JUDGMENT OF 26 SEPTEMBER 2012: "THE FRENCH SUPREME COURT STRIKES DOWN ONE WAY JURISDICTION CLAUSE"

A client of the Luxembourg-based bank Banque Privée Edmond de Rothschild Europe introduced a claim against the bank and its affiliate, Société Compagnie Financière Edmond de Rothschild, having its registered office in Paris, in relation to significant losses in the value of its portfolio. The client claimed for damages against the bank and its affiliate before a court in Paris. The defendants argued that the French Court should deny jurisdiction based on a clause in the agreement with the client attributing exclusive jurisdiction for all claims against the bank to the courts of Luxembourg, while allowing the bank to claim against the client in any appropriate jurisdiction.

The French *Cour de cassation* rejected this defence against the claim from the French client based on two considerations:

(i) Firstly, the French *Cour de cassation*, based on the consideration that the jurisdiction clause imposed on the client to call exclusively on the Luxemburgish courts, while the bank reserved the right to act in the domicile of the client or before "any other competent court", concluded that the clause was only binding on the client and was thus of a discretionary nature in regard to the bank (*caractère potestatif*), which is contrary to the object and purpose of the jurisdiction clause exception of Article 23 of EC Regulation 44/2001 of 22 December 2000 ( the "**Brussels 1 Regulation**").

(ii) In a second argument, the court responded to the bank's criticism, based on Article 6 paragraph 1 of the Brussels 1 Regulation, that the Court of Appeal had not explained why it had agreed to hear together two cases which did not have the same object and were subject to different governing laws (Luxembourg and French). The *Cour de cassation* judged that, by adopting the position of the first judges that the cases had an identical object and raised the same question, the Court of Appeal had justified its decision to hear the two cases together in order to avoid irreconcilable solutions (on the basis of Article 6-1 of the Brussels 1 Regulation), regardless of whether the requests were based on different laws.

This decision, although issued by the French *Cour de cassation*, received considerable attention among legal practitioners in Luxembourg, because Luxembourg courts sometimes follow French court precedents, in particular in matters of civil procedure and in the interpretation of European regulations.

However, the reactions to this case are widely critical, based on the obviously erroneous reference to the concept of the "*potestativité*" (i.e. full discretion) in relation to the exercise of a right (a right being always, and by essence, discretionary, and being limited only by the test of abusiveness). Another reason for criticism is that the French *Cour de cassation* decided not to call on the European Court of Justice in the context of this case to seek clarification on the interpretation of the provisions of the Brussels 1 Regulation on which it based its decision.

For any further information please contact us or visit our website at www.ehp.lu. The information contained herein is not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific legal advice concerning particular situations. We undertake no responsibility to notify any change in law or practice after the date of this document.