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Luther News, April 2012

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# Luxembourg

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Dear Reader:

Welcome to the very first edition of Luther Luxembourg' Newsletter. It is designed to provide you with technical and industry updates related to the Luxembourg market on a quarterly basis. We hope that you will find it of value. We welcome your feedback as well as specific questions and comments to our expert writers.

Lastly, a note of appreciation to our clients and colleagues who have been instrumental in the Luther Luxembourg's development and the most recent Legal 500 recognition. Thank you for your support!

Enjoy your reading,

Eric Sublon  
Managing Partner  
Luther Luxembourg



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## An Introduction to the Grand Duchy of Luxembourg and Luther Luxembourg

Choosing the right country to structure your investment or establish your headquarters is a standard but decisive question for international transactions and international groups. The following note outlines the reasons for selecting the Grand Duchy of Luxembourg (“Luxembourg”) and how Luther Luxembourg can help you take advantage of the best Luxembourg can offer.

### Luxembourg – A European member state at the heart of Europe

- **A European member state**

Luxembourg is one of the founding member states of the European Union. European investors will therefore be familiar with Luxembourg business laws, which have been harmonised based on EU Laws. In addition, Luxembourg is part of the Eurozone and therefore investors will benefit from reduced transaction costs.

- **At the heart of Europe**

Luxembourg is conveniently located in Europe and is served by an international airport, connecting the country to all major European business centers.

London: 1 hour / Paris: 40 min / Brussels: 35 min / Frankfurt: 40 min / Milan: 1 hour / Geneva: 1 hour

### A well-known jurisdiction for structuring investments and establishing headquarters

- **Luxembourg is the second largest global leader for domiciled funds behind the US**

As at 31 December 2011, with a total of assets under management at more than EUR 2,059 billion, Luxembourg is the second largest global leader for funds.

- **Luxembourg is a well-known and favoured jurisdiction by private equity firms**

Most of the major private equity and buy-out firms have a presence in Luxembourg and channel international deals through Luxembourg. Out of the 10 largest Private Equity Houses worldwide, 9 are using Luxembourg to structure their investments (Source: Luxembourg Private Equity & Venture Capital Association).

- **Luxembourg is a recognised place for establishing or relocating headquarters**

More and more of the international and European leading companies are (re)locating their headquarters or their European headquarters in Luxembourg. Among global companies and international leaders with headquarters in Luxembourg are: ArcelorMittal, SES, Intelsat, Ferrero, RTL Group, Skype, Guardian Industries, Amazon.com, PayPal (Source: Luxembourg For Business).

- **Why should we come to Luxembourg?**

International investors and group of companies enjoy its favourable and stable tax regime, the flexibility and stability of its laws, the expertise of third party providers, the presence of highly skilled multi-lingual workforce and the fact that Luxembourg is a well-known place for investors and banks.

### Luther Luxembourg – How can we assist you to benefit from the advantages of Luxembourg?

Luther Luxembourg is a business law firm, which is ideally positioned to satisfy the needs of multinational corporations, private equity and investments funds, and financial institutions at every stage of the life cycle of an investment at a local and international level.

The Luther Luxembourg team, composed of 20 lawyers and paralegals, has a strong expertise and a proven track record in all areas of business law (M&A and corporate law, Investment funds, Banking, finance and capital markets, Real estate, Insurance and reinsurance, HNWI, IP&IT, Litigation and Tax). In order to provide its clients with the most suitable advice, Luther Luxembourg has adopted an innovative position in the Luxembourg legal market:

- **A fully integrated Luxembourg – German structure:** The firm, fully integrated with the German leading law firm Luther (11 offices in Germany) has a unique combination of expertise in both markets.

- **High level tax advice:** The firm with its privileged collaboration with ATOZ, a Luxembourg leading tax firm member of Taxand, provides to its clients high level tax advice in Luxembourg.
- **An independent law firm:** The firm as an independent law firm is able to choose among the best law firms most suitable for the needs of our clients for each country and in each area of the law.

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## **Legal update: Banking, Finance & Capital Markets**

### **1. Dematerialization of securities**

At the moment, the Parliament is examining a bill on dematerialized securities (the “Bill”). The Bill aims at modernizing Luxembourg securities law by introducing the possibility for companies incorporated under Luxembourg law to issue dematerialized debt and equity securities and for any other issuer to issue dematerialized debt securities, governed by Luxembourg law. The dematerialization of securities is considered as a supplementary option, in addition to the existing issuance of securities in registered or bearer form under the law dated 10 August 1915 on commercial companies, as amended (the “Companies Law”).

Whereas the ownership of shares issued in bearer or registered form and their transfer will continue to fall under the scope of the Companies Law, ownership and transfer of dematerialized shares will be governed by the law dated 1 August 2001 on the circulation of securities as amended by the Bill. The Bill offers a complete legal framework applicable to securities issued in dematerialized form and

introduces, in addition to the clearing institution (organisme de liquidation) as account holder, the central securities depository (teneur de compte central), a new category of professional of the financial sector into the law dated 5 April 1993 on the financial sector, as amended. Luxembourg credit institutions or investment firms, or Luxembourg branches of EU/EEA credit institutions or investment firms, are only eligible to apply for a central securities depository license as a special license in addition to their current license.

The dematerialization of securities is not compulsory, but the Bill rather limits itself to provide certain procedural rules for conversion if an issuer decides to dematerialize its securities. Please note that the possibility and the modalities for the conversion of company’s shares or units of investment fund in bearer or registered form into securities in dematerialized form has to be foreseen in the articles of association or in the management regulations of the issuer.

The Bill will not affect the de facto dematerialization practice currently used in Luxembourg. Through this mechanism, temporary global certificates representing the securities are issued and physically held by a depository. The transfer of the represented securities is then achieved via book entries.

The European Central Bank (the "ECB") welcomes the possibility for dematerializing securities in Luxembourg as it will contribute to the elimination of the operational complexities and risks relating to handling physical securities and it will reduce the settlement and custody costs. The ECB recommends monitoring by the Luxembourg authorities of the European Union developments as regards the ongoing harmonization of securities law, including the potential introduction of mandatory book entry form for transferable securities .

## 2. Prospectus – Transparency

The Parliament is also examining a bill (the "PT Bill") which will amend the law dated 10 July 2005 on prospectuses for securities (the "Prospectus Law") which implemented Directive 2003/71/EC (the "Prospectus Directive") and the law dated 11 January 2008 on transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (the "Transparency Law") by implementing into domestic law Directive 2010/73/EU.

The main amendments to the Prospectus Law can be summarised as follows:

- standardization of the format and content of the summary of the prospectus which will allow comparison of summaries for similar products;
- harmonization of the definition of "qualified investor" as mentioned in the Prospectus Directive with the concepts of "professional client" and "eligible counterparty" with Directive

2004/39/EC of the European parliament and of the Council of 21 April 2004 on markets in financial instruments;

- reduction of information to be provided in case of public offer or admission to trading on a regulated market of securities by small and mid-sized companies or in case where securities benefit from the guarantee of an EU member;
- clarification of exemptions from the obligation to publish a prospectus in case where intermediaries are used to sell the issued securities or where shares are allocated to employees;
- the obligation of an issuer of securities to provide an annual document containing the information they have published during the last twelve months has been abolished;
- adjustment of certain thresholds which are no longer in line with the market reality. For instance, the threshold between retail and professional investors has been increased from EUR 50,000 to EUR 100,000.

The contemplated changes also apply to offers of securities which fall outside the scope of the Prospectus Directive and as a consequence Part III of the Prospectus Law is also amended in order to reflect the above-mentioned amendments made to Part II of the Prospectus Law.

The amendments to the Transparency Law similarly include an increase of the threshold from EUR 50,000 to EUR 100,000 for the distinction between retail and professional investors.

It is planned that the PT Bill should enter into force on 1 July 2012. However, a couple of provisions are anticipated to come into force on the day of publication of the law in the Mémorial in order to

allow the relevant persons to use certain provisions of Directive 2010/73/EC as soon as possible. These provisions will apply with immediate effect. For instance, the abolition of the issuer's obligation to file the annual document or the benefit of an exempted offer when the offer is addressed to less than 150 persons (instead of currently 100 persons) other than qualified investors per member state.

For additional details, please contact Laurent Massinon at [laurent.massinon@luther-lawfirm.com](mailto:laurent.massinon@luther-lawfirm.com) or +352 27 48 46 58.

#### **About the Author**

Laurent Massinon has recently joined Luther Luxembourg as a counsel. His role will be to develop further the firm's Banking, Finance and Capital Markets practice as well as the insurance and reinsurance capabilities in Luxembourg.

Laurent specializes in legal and regulatory aspects related to banking, finance, capital markets, insurance and reinsurance. He has considerable expertise in capital markets transactions, including issuing of debt and equity securities, structured finance, securitization and repackaging. He is also accomplished in cross-border banking transactions, insolvency, debt restructuring, insurance and reinsurance.

He is a graduate of the "Université Libre de Bruxelles" and holds a Master's degree from the same university in Economic Law. He was admitted to the Luxembourg bar in 2005. Prior to joining

Luther Luxembourg, he practiced at Clifford Chance in Luxembourg, with a secondment in their London office in 2011.

#### **About the Practice**

Banking, Finance and Capital Markets:

- Lending
- restructuring and Insolvency
- structured finance
- financing of debt portfolio acquisitions
- listings & public offers
- EMTN programmes
- fiduciary issuances
- high yield
- securitisation (including repackagings)
- regulatory aspects

Insurance and reinsurance:

- license application
- insurance and reinsurance groups' restructurings (such as incorporation of reinsurance, companies, acquisitions of reinsurances companies, etc.)
- insurance products
- portfolio and business transfers
- deposit agreements and related activities
- regulatory aspects

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## **ESMA - Key concepts of the AIFMD and types of AIFM - a discussion paper**

On 23 February, the European Securities and Markets Authority (**ESMA**) issued a discussion paper of certain key concepts of the Alternative Investment

Fund Managers Directive (**AIFMD**) and types of Alternative Investment Fund Managers (**AIFM**).

The most salient features of this discussion paper can be summarized as follows:

### 1. Definition of AIFM

AIFMs are defined as any legal person, whose regular business is to manage one or more Alternative Investment Fund(s) (AIF). Investment management functions are at least the portfolio management and the risk management.

The discussion paper clarifies the discrepancy between two AIFMD articles, whether an AIFM has to perform both or just one of these functions, and considers that performing either of these two functions suffices to be considered as an AIFM and therefore needs to request the relevant authorization.

Either of these two functions may be carried out under a delegation arrangement.

However, the delegate must be either authorized or registered for asset management and be subject to supervision, or, at least, shall obtain the prior approval for the delegation arrangement by the competent authority of the AIFM Member State.

The discussion paper states further that an AIFM may not delegate both functions in their entirety at the same time. We wonder whether this does not go beyond the AIFMD, as it seems to provide that the delegation of both functions should be subject only to the "empty letter-box entity" test.

According to the discussion paper it is not necessary for the AIFM to perform additional function such as administration, marketing and other activities related to the Alternative Investment Fund (AIF) assets, set out in Annex I of AIFMD. ESMA states that if such functions are not assumed by the AIFM itself, they would be considered to have been delegated to a third party.

Any delegation does not affect the liability of the AIFM.

### 2. Definition of AIF

The scope of the AIFMD is very broad. In the context of the recitals of the AIFMD, AIF types may be open or closed-ended, take any legal form and be admitted to trading on a regulated market. ESMA points out that focusing on the asset classes of AIFs or the investment strategies applied to those assets does not seem to be the correct approach.

ESMA proposes the following criteria, with regard to a harmonized AIFMD application:

- (i) raising of capital is made for commercial purposes, with the intention to deliver an investment return or profit and the involvement of some kind of business communication between the entity seeking capital and the potential investor. However, the absence of raising capital alone would not constitute that an entity is not an AIF;
- (ii) a definition of collective investment is still not provided;
- (iii) the concept of a number of investors is scheduled to be assessed on the basis of the underlying beneficial owners test. In case the AIF's rules or instruments of incorporation do not contain provisions, restricting the sale of units/shares to only one investor, this condition would be met;
- (iv) the defined investment policy, given the listed criteria, we wonder whether a global opportunistic fund would be out of the scope of the AIFMD;
- (v) the ownership of underlying assets; and

(vi) the control of underlying assets, meaning that investors may not have day-to-day discretion or control over these assets.

### 3. Appointment of AIFM

Each AIF shall have a single AIFM, even if an AIF may, depending on its structure, have more than one potential AIFM.

The AIFMD doesn't outline conditions for the selection of the AIFM; thus, any legal person may be appointed as AIFM, provided it is authorized under the AIFMD.

However, a distinction must be made between a legal person, carrying out investment management functions for an AIF under a delegation arrangement, and a legal entity, which is appointed as the AIFM for the AIF.

### 4. Treatment of UCITS management companies

Before AIFMD's entry into force, the UCITS Directive allowed UCITS management companies to manage non-UCITS funds. After the entry, a UCITS management company will no longer be subject to the UCITS Directive for that activity. Hence, an additional authorization under the AIFMD will be required.

It will therefore be possible to hold both a UCITS and an AIFMD authorization.

Further, both Directives allow a supplementary authorization for discretionary portfolio management (including investment advice, safe-keeping and administration of units in UCIs).

Moreover, the AIFMD allows AIFMs to be authorized for receipt and transmission orders and ESMA takes the view that AIFM, being UCITS

management companies, should also be able to perform this additional task under their AIFMD authorization, provided that conflict of interest issues are considered. No external AIFM may engage in activities other than those indicated in Annex I of the AIFMD and the additional management of UCITS.

### 5. Treatment of MiFID firms and credit institutions

Entities under the Markets in Financial Instruments Directive (MiFID) may provide investment services, such as individual portfolio management services, to AIFs without the requirement to obtain an authorization under the AIFMD, which allows them to provide these services under delegation arrangements pursuant to article 20.

MiFID entities may not be appointed AIFM, nor obtain authorization under the AIFMD.

The thresholds provided for in article 3(2) are hence not relevant.

ESMA invites comments by 23 March 2012 and expects to develop a consultation paper in Q2 2012, which will be helpful for establishing the draft regulatory technical standards required by the AIFMD. The consultation paper will be lodged by ESMA to the European Commission for endorsement by end of 2012.

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## Real Estate-Investment turnover in Germany increases in 2011

Commercial property in Germany remains highly regarded by investors. According to the market figures published by BNP Paribas Real Estate, the transaction volume in commercial property in 2011 increased by 20 percent and totaled to nearly 23.5 billion € (prior-year total of nearly 19.6 billion €). Defying the financial and currency crisis, the fourth quarter produced the best performance of the year, with investment amounting to about 6.18 billion €. The result achieved last year was comparable with that in 2005; only in the two boom years of 2006 and 2007 the total was significantly higher.

More than one third (34 %) of the aggregate turnover was generated by foreign investors, the other two thirds by German investors (66 %), where retail properties account for 46 % of all turnover. So, German property as an asset class currently represents an indispensable investment. In particular, Core properties continue to be very much in favour. 84 % (19.8 bn €) of the transaction volume correspond to single deals, portfolios attracting only 16 % (3.67 bn €) which might be another indication that investors prefer assured and predictable assets.

The major city locations (Berlin, Cologne, Düsseldorf, Frankfurt, Hamburg and Munich) posted a transaction volume of over 12.1 billion € in 2011,

thus exceeding the prior-year performance by almost 10 %. Yields stabilized at the end of 2011. In the field of office buildings, Düsseldorf (5 %) and Cologne (5.3 %) show the highest prime yield, then Berlin (4.95 %), Frankfurt (4.90 %), Hamburg (4.80 %) and Munich (4.75 %).

Though the economic growth in Germany, as elsewhere, might slow down in 2012, the framework conditions for the German investment markets, especially where core properties are concerned, will most probably stay favourable overall in 2012. So, another strong transaction volume of at least 20 billion € seems feasible. The interest of investors being unfettered, the development of the financial market will decide if it will be possible to match or perhaps even exceed the 2011 result. Besides core property– becoming probably more expensive – the request for value-add investments might increase in the course of 2012, depending of course on the transaction volume, its risks and the financing possibilities.

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Luther Rechtsanwaltsgesellschaft mbH advises in all areas of business law. Our clients include medium-sized companies and large corporations, as well as the public sector. Luther is the German member of Taxand, a worldwide organisation of independent tax advisory firms.

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