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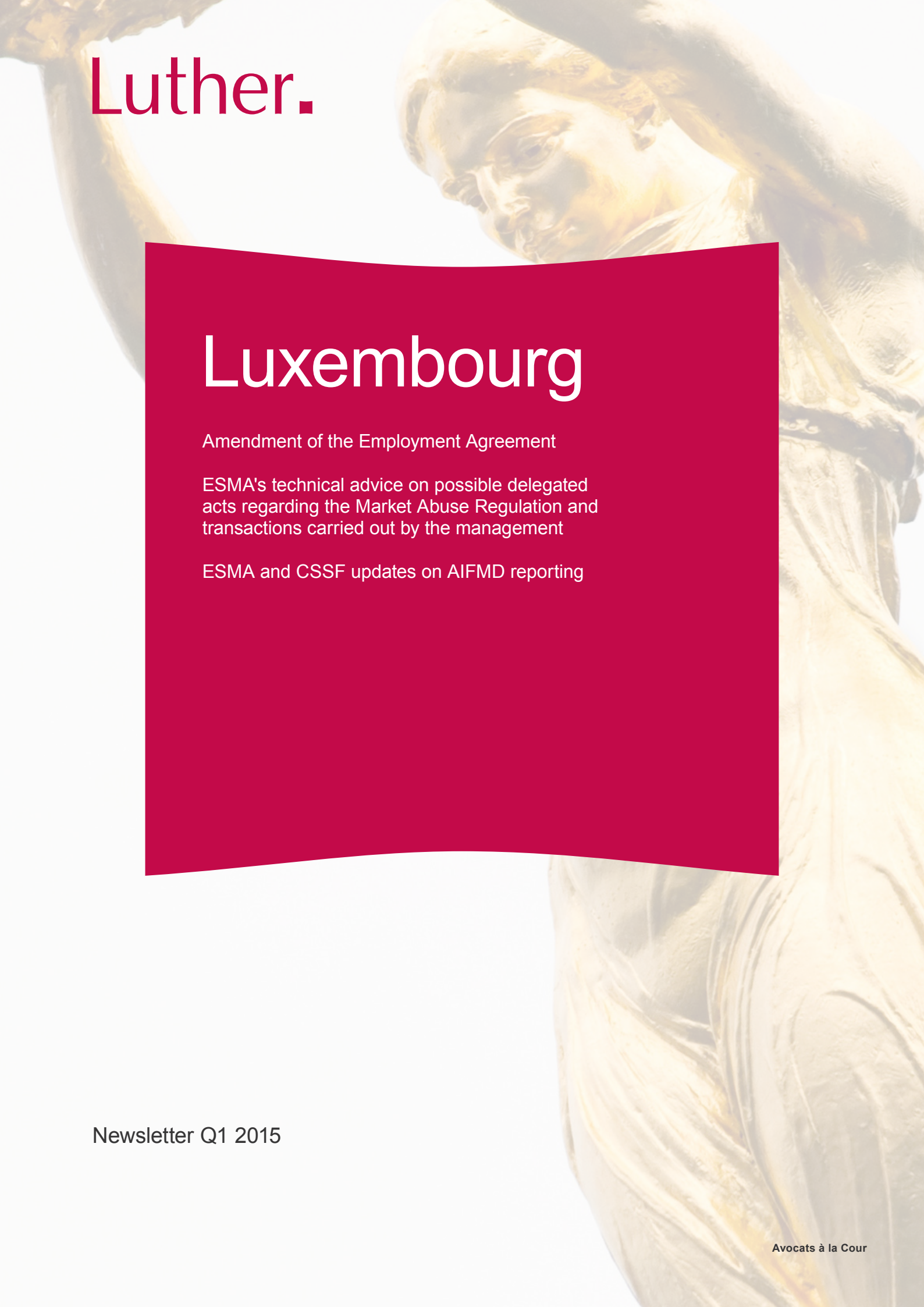

Luxembourg

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Newsletter Q1 2015

Avocats à la Cour

Amendment of the Employment Agreement

A recent case law (C.A. 05/12/2014, No. 38929) clarifies the definition of "Unfavourable amendment of an essential clause of the employment agreement" as mentioned in Article L. 121-7 of the Labour Code. In such case, the judges of the Court of Appeal have specified that if the employer, who wanted to amend unilaterally the remuneration (i.e. an essential clause of the first amendment of the employment agreement) of the employee, should have notified this amendment in the form and within the notice period describe under the Article L. 121-7 of the Labour Code of the Labour Code. Therefore, the Court of Appeal considered the amendment as null and void.

This case law is a good opportunity to remind some essential rules about the amendment of an employment agreement.

I. How does the amendment of an employment agreement work?

The employer may unilaterally amend the employment agreement (the "**Agreement**") provided that such amendment complies with a number of formalities which depend on the substantially of the modification (essential or accessory provision, favorable, neutral or unfavorable amendment, etc.).

To be qualified as accessory, the amendment should relates to an element to which the parties (i.e. the employer and the employee) clearly consider it as non-material or have foreseen the possibility of a subsequent amendment in the Agreement. This is, for example, the duration of work (if there is in the Agreement a flexibility clause regarding the duration of work), and the workplace (if there is in the Agreement a flexibility clause regarding geographical mobility). To be qualified as essential, the amendment should relate to an element that could determine the parties to sign (or not) the Agreement. This relates particularly to the remuneration, the function, the working time, the duration of work or the workplace (if the above clauses are not included in the Agreement).

II. How is it possible to amend unilaterally an employment agreement?

Generally speaking, any amendment to an Agreement must be set out in a written agreement, drawn up in duplicate and concluded at the latest on the date the amendment enters into force. However, (i) the amendment with immediate effect and (ii) the amendment with a notice period should be differentiated. In case of amendment with immediate effect, the notification letter should contain the serious reason(s) that justify this amendment. Without serious reason, the amendment will come into force after a notice period (i.e. 2, 4, or 6 months) which depends on the employee's length of service in the company[1]. In this case, the employee may request the reason of such amendment in the forms and within the deadlines provided by law[2]. It must be noted that any notification of the amendment should be sent by registered letter with acknowledgement of receipt or by hand delivery with acknowledged receipt by counter-signing a copy of the letter. Any employer who regularly employs (i) 150 or more employees[3] or (ii) not less than 100 employees in the bank sector[4] and who contemplates to amend (with notice period or with immediate effect) an Agreement must, before reaching any decision or proceeding with the amendment, convoke, by registered letter or by hand delivery with acknowledged receipt, the concerned employee for an interview.

III. May an employee refuse the amendment done in due form?

If the employee refuses an unfavourable amendment of an essential clause of his/her Agreement which has be notified in due form, he/she must resign before the amendment enters into force and the Agreement will finish on the same date. This resignation will be considered as a dismissal with notice and subject to appeal.

Nevertheless, it is important to note that a presumption of acceptance of the new work conditions exists when the employee continues working after such conditions take effects.

IV. What are the consequences for the employer in case of non-respect of the process?

In case of violation by the employer of the formalities and the notification process, the amendment of an essential clause is considered as null and void. Within 15 days, the employee may request, by a simple request to the President of the Labour Court, to acknowledge that the amendment

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1 Art. L. 124-3 of the Labour Code

2 Art. L. 124-5 of the Labour Code

3 Art. L. 124-2 of the Labour Code

4 Collective bargaining agreement for bank employees 2014-2016

is null and void, and to order the maintaining of his/her initial employment agreement.

If the judge deems that the reasons of the amendment are not justified or if the employer has not notified these reasons in the forms and within the deadlines provided by law, the employer will support the consequences of an abusive dismissal and may have to pay damages to the employee.

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ESMA's technical advice on possible delegated acts regarding the Market Abuse Regulation and transactions carried out by the management

On 3 February 2015 the European Securities and Markets Authority (the "**ESMA**") has published its final report with technical advice on possible delegated acts under the Market Abuse Regulation (EU) No 596/2014 (the "**MAR**")[5].

The following overview concentrates on the main changes with regard to managers' transactions pointing out the type of transactions to report and trading during a closed period.

As you may know the general approach of MAR is to define activities, behaviours and indicators constituting market abuses, e.g. insider dealing or market manipulation. MAR is extending the scope of market manipulation of the current regime to cover new trading tactics and market realities as well as providing non-exhaustive lists of indicators for market manipulation. It also defines the framework within which inside information has to be publicly disclosed. However, the clarifications of the European Commission are necessary as regards the types of transactions triggering the notification and disclosure duties as well as the circumstances under which trading during a closed period may be permitted by the issuer including circumstances that would be considered as exceptional and the types of transaction that would justify the permission for trading.

I. Transactions carried out by the management

1. Extended scope of the notification obligation

Article 19 of MAR sets out a transactions notification requirement for (i) persons discharging managerial responsibilities (the "**PDMRs**") within an issuer of a financial instrument, (ii) closely associated persons (the "**CAPs**") or

[5] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014R0596&from=EN

(iii) emission allowance[6] market participants (the "**EAMPs**")[7] to improve the financial markets' transparency. Therefore PDMRs and CAPs should notify the issuer or the EAMP and the competent authority of every transaction conducted on their own account in relation to the shares or debt instruments of that issuer. The issuer itself is responsible to ensure that the information is made public, unless national law provides that the competent authority itself makes the information public.

MAR has expanded the scope of the notification obligation by extending the scope of the financial instruments covered to financial instruments admitted to trading or for which a request has been made to trade on a regulated market or the Euro MTF market and those traded on an OTF[8] or OTC[9]. Furthermore, the scope of instruments falling under the obligation covers both shares and debt instruments, derivatives or other financial instruments linked to them as well as emission allowances, related auction products or related derivatives. Transactions where the PDMR or CAP do not play an active role in the investment decision, such as gifts, inheritances and donations received by a PDMR or a CAP shall also be included.

After transactions have been executed by a PDMR or a CAP within a calendar year cumulatively amounting up to € 5,000, every subsequent transaction should be notified regardless of its amount. If a competent authority has decided to increase this threshold in accordance with Article 19(9) the amount is € 20,000. The respective threshold should be calculated by adding the amounts of all transactions effected without netting. A notification to the relevant competent authority, issuer, EAMP or auction entity about transactions that are executed before the threshold is reached is not necessary.

2. Transactions carried out during a closed period

In principle, a PDMR shall not conduct any transactions on its own account or for the account of a third party during a closed period of 30 days before the announcement of an interim financial report or a year-end report which the issuer is obliged to make public.

Under certain circumstances an issuer may allow a PDMR to trade during a closed period. This is a new rule on the European level.

In general, circumstances are exceptional when they are extremely urgent, unforeseen and compelling and where their cause is external to the PDMR who has no control over them. An issuer may allow a PDMR to proceed with immediate sales of shares of that issuer during a closed period only when the issuer is satisfied that the circumstances for such transactions are exceptional and has informed accordingly the PDMR. Furthermore, the issuer should base the case-by-case assessment it has to conduct prior to any trading being permitted on a reasoned and motivated written request for permission provided by the PDMR.

The issuer should take into account non-exhaustive indicators in order to examine exceptional characteristics of the circumstances, such as the extent to which the PDMR (i) is facing a financial commitment that person has to fulfil and (ii) is in a situation entered into before the beginning of the closed period and requiring the payment of sum to a third party.

II. Opinion of the Securities and Markets Stakeholder Group

In the opinion of the Securities and Markets Stakeholder Group (the "**SMSG**")[10] the disclosure approach will be weakened by the exception for trading during a closed period, contributing at the same time to the purpose of the prohibition on insider dealing as well as ensuring equal information of investors.

Within the scope of application of the rules on a closed period only PDMRs are prohibited from trading during a closed period whilst CAPs are not subject to this. The regulatory approach of entitling an issuer to allow a PDMR to trade during a closed period fits very well for a PDMR but not for a CAP who

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6 *Emission allowance* is an allowance to emit a specific volume of greenhouse gases/carbon dioxide equivalent during a specific period (further details in Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003).

7 *EAMP* is any person who enters into transactions, including the placing of orders to trade, in emission allowances, auctioned products based thereon, or derivatives thereof, provided it does not benefit from an exemption (i.e. relating to the threshold) as defined in Article 3 (20) of MAR.

8 *OTC* ("over the counter") is a decentralised market where geographically dispersed dealers are linked by telephones and computers. The market is for securities not listed on a stock or derivatives exchange.

9 *OTF* ("organised trading facility") is a non-regulated multilateral system for the trading of securities.

10 *SMSG* helps facilitating consultation by ESMA with stakeholders in areas relevant to ESMA's tasks such as the development of technical standards and guidelines.

does not have any contractual relationships with the issuer. Nevertheless, it should be mentioned that the issuer has no information as to whether the respective person falls under the category of CAPs with a PDMR, as a PDMR is not obliged to disclose such information to the issuer.

Although the disclosure of managers' transactions provides a better informational basis for investment decisions, the SMSG stresses the point that a donor who does not give relevant signals to the market by making a gift/donation to a third party, there should be no grounds for fearing that he will take advantage of insider knowledge especially in the case of inheritance. For these reasons gifts, inheritance and donations are currently not considered as transactions triggering the duty to disclose in some Member States. Therefore the SMSG recommends interpreting the MAR in the same way according to it, concluding that transactions by gifts or inheritance should not be subject to notification requirements under Art. 19(1) MAR. Due to this SMSG is concerned about a potential circumvention of the provisions on a closed period and encourages ESMA and the national competent authorities to examine potential cases in the future.

The SMSG agrees with ESMA's interpretation that any interim report will trigger the closed period; this should be laid down in the recitals of the respective delegated act by the European Commission. On the other side it does not agree with ESMA's position that the closed period would follow a transparency purpose. SMSG explains that the closed period is a complementary instrument aimed at preventing the abuse of inside information. But it even goes further and restricts the possibility for PDMRs to profit from any other information which is not price relevant as defined by Art. 7(4) MAR.

III. Next steps

As a next step the second part of ESMA's technical advice, namely ESMA's regulatory technical standards regarding other aspects of MAR, such as insider lists and wall-crossing is expected to be published separately in July 2015. The delegated acts should be adopted by the European Commission entering into force 24 months after the entry into force of the MAR, in July 2016.

ESMA's Final Report ESMA/2015/224 is available on its website.[11, 12]

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11 http://www.esma.europa.eu/system/files/2015-224.pdf

12 If you would like to read more about managers' transactions, please consider the article "*The Luxembourg regime on ongoing disclosure obligations for listed companies as regards major shareholdings and transactions carried out by the management*" written by Laurent Massinon and Fabienne Schauber that is going to be published soon in *Revue luxembourgeoise de Bancassurfinance.*

ESMA and CSSF updates on AIFMD reporting

I. ESMA updated Q&As

On 9 January 2015, the European Securities and Markets Authority ("**ESMA**") published an updated version of its Questions and Answers (ESMA/2015/11) (the "**Q&As**") with regards to the application of the Directive 2011/61/EU of the European Parliament and of the Council (the "**AIFMD**"), as supplemented by the Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 (the "**Level 2**") and transposed in Luxembourg by the Law of 12 July 2013 on alternative investment fund managers (the "**AIFM Law**").

The updated version of the Q&As aims at providing clarifications concerning the reporting requirements under AIFMD. Such reporting obligations have been further detailed in Level 2, as well as in previous versions of the Q&As. Four questions and answers have now been added concerning reporting to supervisory authorities and calculations of the net asset value (the "**NAV**") as follows:

1. Subscriptions and redemptions over the reporting period

It is clarified that alternative investment fund managers ("**AIFMs**") should report the value of subscription and redemption orders and not the number of such orders. Should the month of the cash-flows and the month of the subscription and redemption orders not be the same, the relevant information should be reported for the month of the cash-flows only.

2. Reporting of the change in the NAV per month

For the purpose of reporting, the change in the NAV which shall be done each month of the reporting period, the net effect on the fund's NAV over the given reporting period after all inflows, outflows and performance, are taken into account. The NAV shall be estimated by the AIFM in case no official NAV is available for the calculation. For an alternative investment fund ("**AIF**") investing in illiquid assets, the previous NAV may be the best estimate.

3. Report of the percentage of gross and net investment returns

Similarly to the reporting of the change in the NAV above, (i) AIFMs should report the information on the percentage of gross and net investment returns for each month of the reporting period, (ii) in case no official NAV is available for the calculation, AIFMs should use estimates of the NAV, and (iii) in some instances, the previous NAV may be the best estimate.

4. Aggregated reporting at the level of the AIFM (managing both funds and funds of funds)

An AIFM managing both funds and funds of funds should report aggregated information at the level of the AIFM and on funds of funds within 45 days after the end of the reporting period, respectively 1 month after the end of the reporting period of the funds which are not funds of funds, as provided for in Article 110 of the Level 2.

The latest version of the Q&As is available on the ESMA's website[13].

II. CSSF FAQs and press release

1. CSSF Press Release 15/11

On 10 February 2015, the *Commission de Surveillance du Secteur Financier* (the "**CSSF**") published a press release (CSSF Press Release 15/11) linking to a detailed document describing the different feedback files that the senders of AIFM reporting are receiving (the "**Document**"). The Document also describes the controls that the CSSF performs on the reporting files required to be submitted by AIFMs pursuant to AIFMD Articles 3 (3)(d), 24 (1), (2) and (4), and Level 2 respectively.

Every AIFM and technical agent shall receive at least 3 positive feedback files from the CSSF upon submission of the reporting, until all control checks are adequately performed. Furthermore, the CSSF reserves the right to contact the AIFM subsequently in relation with the content of the reporting file(s).

Since 10 February 2015, the Document has been updated (most recently on 11 March 2015) and will be updated continuously on the basis of exchanges on any problems encountered.

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[13] http://www.esma.europa.eu/system/files/2015-11_qa_aifmd_january_update.pdf

This press release including the link to the Document is available on the CSSF's website[14].

2. CSSF FAQs in relation to AIFMD

With regard to AIFMD reporting obligations, the CSSF has not published an updated version of its Frequently Asked Questions (the "**FAQs**") on the AIFM Law, following the publication of the updated version of the ESMA Q&As. However, the latest FAQs, updated as of 29 December 2014, clarified *inter alia* that AIFMs established before 22 July 2014 and authorised between 1 October 2014 and 31 December 2014 were required to submit their first reporting covering the period from 1 October 2014 to 31 December 2014, no later than 31 January 2015 (and no later than 15 February 2015 where the AIF is a fund of funds). This reporting timeline has also been confirmed in CSSF Press Release 15/04 (issued on 13 January 2015 as an urgent reminder on reporting obligations for AIFMs).

The latest version of the FAQs is available on the CSSF's website[15].

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14 http://www.cssf.lu/fileadmin/files/Publications/Communiques/Communiques_2015/PR1511_AIFMD_reporting_100215.pdf

15 http://www.cssf.lu/fileadmin/files/AIFM/FAQ_AIFMD.pdf

Imprint

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