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Banking, Finance and Capital Markets Update

- Amendments to the mortgage banks regime
- Preservation of companies and modernization of insolvency laws
- Fight against money laundering and terrorism financing

Adoption of the new EU Regulation on European Venture Capital Funds

Digital Age for Paper Documents Starts in Luxembourg

Newsletter Q1 2013

Greetings:

Dear Reader,

Thank you to your continuing support which has been recently evidenced in the recent legal directories recognition.

We hope that the current and relevant legal and regulatory updates that you will find below will help you in your daily activities.

Enjoy your reading,

Eric Sublon
Managing Partner
Luther Luxembourg

Table of contents

Banking, Finance and Capital Markets Update

You will find below a high-level overview of a couple of interesting changes which have occurred in the Banking, Finance and Capital Markets area.

1. Amendments to the mortgage banks regime

The Luxembourg Parliament is examining a new bill which aims to amend the provisions of the law dated 5 April 1993 on the financial sector (the "**LFS**") applicable to the banks issuing mortgage bonds (the "**Bill**"). Inspired by the German law dated 19 December 2010 on mortgage bonds, the so called *Pfandbriefsgesetz*, the Bill purports amongst other things to elaborate a new insolvency regime designed to preserve the activity related to the issuance of mortgage bonds by a bank in financial distress as well as to create a new type of covered bonds: the co-operative covered bonds.

1.1. The preservation of the activity related to the issuance of mortgage bonds

Banks issuing mortgage bonds (the "**Mortgage Banks**") have as their main principal activities which are the issuance of covered bonds as defined in Article 12-1 of the LFS and might also have incidental and ancillary activities as detailed in Article 12-2 of the LFS.

Pursuant to the Bill, where a Mortgage Bank is subject to a liquidation or a suspension of payments (*sursis de paiement*) procedure, the judiciary decision starting those procedures has as immediate result to divide the assets of the Mortgage Bank (the "**Assets**") in two different parts.

The first part of the Assets shall include for each category of covered bonds the related collaterals. This part is thus divided in as many compartments as there are collaterals related to each issued covered bond (the "**Compartments**"). The second part of the Assets represents the Assets that relate to the incidental or ancillary activities of the Mortgage Bank.

The liquidation or the suspension of payments procedure might impact either the first part or the second part or both parts of the Assets. Where the second part is subject to the common insolvency procedure, an agent (*administrateur*) will be judiciary appointed in order to manage, administrate and preserve the Compartments (the "**Collateral Agent**"). The second part's insolvency procedure may not impact the Compartments or prevent the full enforcement of each issued covered bond. In fact the Mortgage Bank may continue its

activity of issuing covered bonds while the incidental or ancillary activities shall not be carried on, such bank is defined "**Mortgage Bank with limited activity**". Despite the appointment of a Collateral Agent, the Supervision Commission of the Financial Sector (the "**CSSF**") will still supervise the Mortgage Bank.

Where the Compartments or one of the Compartments is subject to such financial distress that the full enforcement of the covered bonds at maturity or the performance of the Collateral Agents' mission will be compromised or that its liquidity will be impacted, the court may declare such Compartment in suspension of payments. The court may further determine the period, terms and conditions of the suspension of payments process. In such case, the provisions of the LFS governing the opening of proceedings for suspension of payments by establishments governed by the Luxembourg law (i.e. Articles 60-2 § 2 to 24 (except § 10), 60-3 and 60-4 of the LFS) are applicable. A Compartment might be declared in liquidation and be thus wind-up, when the previously opened suspension of payments procedure did not reverse the financial situation of the Compartment, its liquidity is irrevocably compromised and the commitments made under the covered bonds cannot be completed. In such case, the provisions of the LFS governing the judicial winding-up of establishments governed by Luxembourg law (Article 61 of the LFS) are applicable.

1.2. The co-operative covered bonds

The Bill introduces a new type of covered bonds known as co-operative covered bonds (the "**Co-operative Covered Bonds**"). Such Co-operative Covered Bonds consist in:

- debt instruments issued on the basis of loans granted by the Mortgage Bank to credit institutions, established in the European Union (EU), the European Economic Area (EEA) or the Organisation for Economic Cooperation and Development (OECD) and part of a co-operative guarantee system (the "**Credit Institutions**"), such debt instruments being secured by the debt entitlements resulting from those loans; or
- debt instruments issued on the basis of bonds issued by Credit Institutions or on the basis of any other commitment made by Credit Institutions, such debt instruments being secured by the debt entitlements resulting from those bonds or commitments.

The Bill specifies that the loan granted by the Mortgage Bank may be in any form including but not limited to the acquisition of bonds or debt instruments which shall comply with the first quality level defined by a registered notation agency.

Under the Bill, a co-operative guarantee system means amongst other things a system having as main purpose to prevent its members from any existing or future economic difficulties and which, as may be deemed necessary and with respect of its purpose, must maintain the liquidity and solvability of its members with any funds made available to the co-operative guarantee system (the "**System**"). Becoming part of a System arises some obligations such as the obligation to make available to the System the auditor report, to inform in the best delays the System of any financial or economic distress or of any intention to acquire a company or a credit institution which is not part of the System.

The Bill further intends to introduce an obligation for the Mortgage Banks to publish the information related to the collaterals' composition, the issuance and the issuer of the covered bonds. The terms and conditions of such obligation shall be determined by the CSSF. Finally, although the German legislation has inspired the Bill, the Luxembourg Parliament stays true to the specific license requirement to carry on the activity of Mortgage Bank, in other words, the so called specialization principle.

2. Preservation of companies and modernization of insolvency laws

The Parliament is currently examining a new bill regarding the preservation of companies and the modernization of the Luxembourg insolvency laws (the "**Bill 6539**"). The Bill 6539 is more than welcomed due to the fact that the existing insolvency regime was not adjusted to the current situation resulting from the crisis.

The Bill 6539 encompasses the topic through various angles and the prevention side is rather significant.

2.1. The prevention aspects

2.1.1. Collection of financial data

An administrative authority centralizing information regarding the financial situation of companies will be created. This authority should be able to identify companies having financial troubles. When it detects such difficulties, this authority will be authorized to suggest certain measures to companies which are not compulsory.

2.1.2. Conciliation (non-judicial procedure)

A company will be entitled to ask for a conciliator to be chosen by the above-mentioned administrative authority.

The conciliator will assist the company in the negotiations with its creditors and will support the company to identify the reasons of its financial difficulties.

2.1.3. Out of the court agreement (non-judicial procedure)

Another non-judicial procedure aiming at finding an agreement with creditors out of the court will be put in place. This procedure should ensure the survival of companies. The agreement between the company and the creditors will be then lodged with the administrative authority, but please note that this agreement will not be applicable to creditors who have not signed the agreement. The agreement and any payment made pursuant to the agreement are protected against any future insolvency scenario and cannot be voided even if they are made within the hardening period.

2.1.4. Reorganization measures (judicial procedure)

There will be judicial reorganization measures as well, which will imply the deferral of all payments during such a procedure. They will allow the achievements of three goals: (i) an agreement out of the court with several creditors, (ii) general agreement with all the creditors despite the fact that some of them can be against it, (iii) judicial reorganization of the company through a transfer of the activities (all or part) of the company to ensure its continuity.

2.2. Creation of an administrative dissolution procedure without liquidation

The Bill 6539 provides for an administrative dissolution procedure without liquidation. This simplified procedure does not require any intervention of the court. It will be used regarding companies having no assets, no employees and which might not even have had any activity for a long period of time.

2.3. Other changes

Several provisions of the code of commerce will be amended. For instance, at the moment, due to the potential risk of litigation generated by the bankruptcy, the curator appointed within the frame of a bankruptcy is a lawyer. However, with regard to small companies with a reduced risk of litigation, the approach of a pool of experts has now been taken.

The Bill 6539 will also simplify bankruptcy proceedings in order to facilitate criminal prosecution of directors of insolvent companies.

Please note that financial collateral arrangements will remain generally unaffected by the contemplated changes.

3. Fight against money laundering and terrorism financing

The CSSF published the circular letter 13/556 dated 16 January 2013 (the "**Circular 13/556**") regarding the entry into force of the CSSF Regulation 12-02 dated 14 December 2012 on the fight against money laundering and terrorism financing (the "**CSSF Regulation 12-02**").

This CSSF Regulation 12-02 applies to all professionals subject to the law of 12 November 2004 on the fight against money laundering and terrorism financing, as amended (the "**AML/TF**") which also fall under the supervision of the CSSF and including, amongst others, banks, professional of the financial sector, pension funds, UCITS and SICAR's (collectively, the "**Professionals**" and each, a "**Professional**"). Please note that the Circular 13/556 repeals and replaces the former CSSF circulars 08/387 and 10/476.

The following topics are covered by the CSSF Regulation 12-02:

I. Risk–Based Approach (RBA) (Chapter 3)

Professionals must evaluate the risks of money laundering and terrorism financing and classify their clients accordingly. The client's classification is made according to a combination of a) category of risks: type of client, country or territory and products, services and transactions and b) risks variables: purpose of a business relationship, level of assets, volume of transactions and regularity or duration of the business relationship. Monitoring measures must be based on the level of risks associated with each client at the stage of identification and updated during the business relationship.

II. Client due diligence (the "CDD)" measures (Chapter 4)

- **Client acceptation procedure (the "CAP")**

Pursuant to the CSSF Regulation 12-02 (Articles 8 to 11), the Professionals shall adopt a CAP which will place every new client under a risk assessment and define specific procedures according to the level of risk. The need to document any prospect not resulting in a client relationship is also stressed in this section.

- **Client Identification and identity verification**

The possibility of opening a bank account before achieving the identity verification is maintained but it is subject to strict conditions (no disposal of assets prior to completion of the verification, low risk situation and verification to be completed quickly). The opening a bank account for the incorporation of a company is also developed in this section.

- **Occasional transactions**

When carrying out occasional transactions amounting to EUR 15,000 or more, or when the transaction is performed through several transactions that are linked and reach the amount of EUR 15,000, identification and verification measures must be performed.

- **Identification and verification of a private individual (Article 16)**

The Professionals must determine if the person acts in his own account or on behalf of the beneficial owner and record minimum information during the identification as described in the CSSF Regulation 12-02.

Verification of the identity is achieved with the receipt of an officially valid document issued by a public authority and showing the signature and photo of the client, such as a passport, ID Card or a residence card (depending on risk profile the Professional may verify the address of the individual by obtaining a recent utility bill (not mobile phone), tax bill, or voter card for example.

- **Identification and verification of client's representatives (Article 20)**

The Professionals must identify and verify the client's representatives on the basis of documents, data or information obtained from a reliable and independent source.

This includes the following representatives:

- A legal representative for a physical incapacitated person;
- A private individual or legal entity authorized to act on behalf of a client by mandate; and
- An authorized person to represent its client, either a legal entity or a legal construction, in relation with his professional activities.

- **Identification and verification of the beneficial owner (the "BO")**

Articles 21 to 23 of the CSSF Regulation 12-02 describe the due diligence requirements concerning the BO. No essential changes have been made.

- **Purpose and the intended nature of the business relationship (Article 24)**

The CSSF Regulation 12-02 clarifies that "Knowing-your-Customer" also includes gathering information as to the origin of the funds injected, types of transaction, etc. which are to be used to monitor the client relationship.

- **Record keeping (Article 25)**

Information obtained during the CDD process, including all information regarding the business relationship and transactions, internal reports as well as the analysis of transactions and facts contained in those reports must be kept for a period of at least 5 years in a manner that they may be used as evidence in court.

- **Enhanced due diligence (Articles 26 to 29)**

The CSSF Regulation 12-02 describes general examples of enhanced due diligence including type of documentation to be collected and procedures to be applied (Article 26).

Articles 28 and 29 define the situation of a "Cross-border corresponding bank relationships".

The section relating to Politically Exposed Persons (each, a "**PEP**") specifies that procedures must be implemented to determine whether a PEP is involved in the structure.

Specific measures in relation to no cooperatives countries or territories or where the risks of money laundering and terrorism financing regimen is considered as insufficient are also developed in this section.

- **Ongoing due diligence (Articles 32 to 35)**

The ongoing monitoring shall allow the detection of complex transactions and unusual operations.

- **Client due diligence performed by a third party (Articles 36 and 37)**

The CSSF Regulation 12-02 describes the conditions under which the Professionals may outsource or benefit from a "Third Party Introducer".

The CSSF Regulation 12-02 states that prior to accepting a "Third Party Introducer", the Professionals must verify that such "Third Party Introducer" is suitable in accordance to the applicable chapter of the AML/TF, that results of this verification are kept. Furthermore, a written agreement between the Third Party Introducer and the Professional shall confirm the Third Party Introducer's obligation to comply with the applicable Law

III. Obligation of an adequate internal organization (Chapter 5)

AML/TF policies must be implemented, be validated and under the ongoing control of the person in charge of AML/TF.

Business relationship and transactions must be monitored (Article 39) by the development of procedures allowing the detection of unusual or suspect operations.

All searches must be properly documented and in written reports and transmitted to the person in charge of ML/TF.

Professionals must determine a member at the level of the management as responsible of AML/TF matters (Article 40), and the name must be communicated to the CSSF. In credit and financial institutions the function is performed by the Chief Compliance officer. The responsible of AML/TF matters is the privileged contact with the authorities competent for the fight against money laundering and terrorism financing.

Control of the AML/TF policies shall be integral part of the internal audit function (Article 44).

Recruiting procedures must ascertain a level of adequate professional standing and training and awareness-rising of the employees must be documented (Articles 45 to 46).

IV. Cooperation with authorities (Chapter 6)

Article 48 of the CSSF Regulation 12-02 states that Professionals must report any suspicious transaction or facts to the responsible of AML/TF matters who will then decide to report to the competent authority. Declarations of suspicion must also be conducted where no business relationship exists.

V. Control by the external auditor (Chapter 7)

The audit shall cover the compliance with AML/TF obligations and regulatory requirements (Article 49). This includes the Professionals ongoing monitoring procedures and internal trainings

The audit also covers subsidiaries and branches of the Professional.

To receive additional information and details, please contact:

Laurent Massinon, Counsel
Luther Avocats à la Cour, Luxembourg
Phone +352 27484 658
laurent.massinon@luther-lawfirm.com

Agathe Laissus, Associate (juriste)
Luther Avocats à la Cour, Luxembourg
Phone +352 27484 676
agathe.laissus@luther-lawfirm.com

Joanne Somma, Compliance Officer
Luther Avocats à la Cour, Luxembourg
Phone +352 27484 657
Joanne.somma@luther-lawfirm.com

Adoption of the new EU Regulation on European Venture Capital Fund

The final text of the Regulation on European Venture Capital Funds ("**EuVECA Regulation**") was adopted by the European Council on 21 March 2013 and, pending its publication in the Official Journal of the European Union, shall apply as from 22 July 2013, i.e. simultaneously with the end of the transposition period of the Alternative Investment Fund Managers Directive ("**AIFMD**").

A European regulation is directly applicable in all EU Member States and does hence not need a transposition into national law.

The objective of the EuVECA Regulation is to simplify the capital raising exercise across Europe by introducing a marketing passport ("**EU Marketing Passport**") for European Venture Capital Funds ("**EuVECA**") in order to foster the growth and innovation of small and medium-sized enterprises ("**SMEs**") in the European Union.

In this context, the European Commission deemed it necessary to create a common framework of rules regarding the use of the designation "EuVECA" for qualifying venture capital funds, in particular with respect to the:

1. Registration of EuVECA managers;
2. Conditions to qualify as EuVECA;
3. Conditions to qualify as eligible investor;
4. Obligations of EuVECA managers; and
5. Supervision and cross-border cooperation.

The most salient features of the EuVECA Regulation can hence be summarised as follows:

1. Registration of EuVECA managers

Managers that plan to obtain the designation of EuVECA and benefit from the EU Marketing Passport for all or some of their EuVECA must:

(i) be established in the EU;
(ii) be subject to the supervision of the competent authority in their home Member State according to point (a) of Article 3 (3) of the AIFMD;
(iii) in total not exceed the threshold referred to in point (b) of Article 3 (2) of the AIFMD, i.e. the assets under management ("**AuM**") do not exceed 500 million Euro (if they are unleveraged and without redemption rights in the first 5 years). Nevertheless, an EuVECA manager that begins to exceed this threshold may continue to make use of the EuVECA label, provided it also complies with the AIFMD requirements; and
(iv) comply with certain administrative and organisational requirements with respect to portfolio management, human resources, skill, care and diligence and prevention of malpractices.

2. Conditions to qualify as EuVECA

In order to qualify as a EuVECA, the fund must:

(i) qualify as an alternative investment fund ("**AIF**") as defined in point (a) of Article 4 (1) of the AIFMD, i.e. be a collective investment undertaking, including investment compartments thereof, which:

- raise capital from a number of investors with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and
- do not require authorisation pursuant to Article 5 of the UCITS Directive;

(ii) intend to invest at least 70% of its aggregate capital contribution and uncalled committed capital in assets that are "qualifying investments" (as set out below);

(iii) invest no more than 30% of its aggregate capital contributions and uncalled committed capital in assets other than "qualifying investments"; and

(iv) is established within the territory of a EU Member State.

"Qualifying investments" are investments in "qualifying portfolio undertakings" (as set out below) that are:

(i) equity or quasi-equity instruments issued by "qualifying portfolio undertakings" (as set out below) or companies of which the qualifying portfolio undertaking is a majority-owned subsidiary;

(ii) secured or unsecured loans granted by the EuVECA to a qualifying portfolio undertaking in which the EuVECA already holds qualifying investments, provided that no more than 30% of the aggregated capital contributions and uncalled committed capital in the EUVECA are used for such loans;
(iii) shares of a qualifying portfolio undertaking acquired from existing shareholders of that undertaking; or

(iv) units or shares of one or several other qualifying EuVECA, provided that those have not themselves invested more than 10% of their aggregate capital contributions and uncalled committed capital in EuVECA.

"Qualifying portfolio undertakings" are:

(i) established in a EU Member State or in a third country which is (i) not listed as a non-cooperative country by the Financial Action Task Force ("**FATF**") and (ii) with which a tax information exchange agreement exists in accordance with the OECD model;
(ii) not admitted to trading on the regulated market or on a multilateral trading facility ("**MTF**");
(iii) SMEs, i.e. employ fewer than 250 persons and either have an annual turnover not exceeding EUR 50 million, or an annual balance sheet total not exceeding EUR 43 million; and
(iv) not themselves a collective investment undertaking, a credit institution, an investment firm, an insurance undertaking, a financial holding company or a mixed-activity holding company (as defined in the EuVECA Regulation).

3. Conditions to qualify as eligible investor

In order to qualify as an investor in a EuVECA, managers shall market the units and shares of EuVECA exclusively to investors which are considered to be:

(i) professional clients pursuant to the Markets in Financial Instruments Directive ("**MiFiD**") or
(ii) other investors that:
- commit to investing a minimum of EUR 100,000; and
- state in writing that they are aware of the risks associated with the envisaged commitment/investment.

Executives, directors or employees involved in the management of a EuVECA manager qualify *ipso jure* as eligible investors.

4. Obligations of EuVECA managers

EuVECA managers must comply with certain obligations, which are lighter than the AIFMD requirements (e.g. no need to appoint a depositary), with respect to (list not exhaustive):

(i) skills, care and diligence;

(ii) prevention of malpractices;
(iii) conflicts of interest;
(iv) promotion of the interests of the EuVECA and its investors;
(v) portfolio management;
(vi) valuation;
(vii) own funds; and
(viii) human resources.

With reference to delegation, a EuVECA manager:

(i) may not delegate duties to third parties to an extent that, in essence, it can no longer be considered to be the manager of the EuVECA and to the extent that it becomes a letter-box entity;
(ii) shall not be affected by the delegation with respect to its liability towards the EuVECA and its investors; and
(iii) delegating functions to a third party may not undermine the effectiveness of supervision of the EuVECA manager, and in particular, may not prevent it from acting or the EuVECA from being managed in the best interests of its investors.

The EuVECA manager shall disclose certain pre-contractual information to potential investors, such as, *inter alia*:

(i) the investment strategy and objectives of the EuVECA;
(ii) the instruments to be invested in;
(iii) costs and related fees (including a cap);
(iv) the risk/reward profile of the investments; and
(v) the remuneration principles.

Further, it must for each EuVECA establish an audited annual report and make it available to the competent authority. The auditor shall confirm that money and assets are held in the name of the EuVECA and that the EuVECA manager has established and maintained adequate records and checks in respect of the use of any mandate or control over the money and assets of the EuVECA and its investors.

5. Supervision and cross-border cooperation

Further to the registration as manager of a EuVECA, the competent authority shall notify the host Member State(s) accordingly of each additional registration of new EuVECA and the addition of new Member States where marketing is intended.

The host Member State where only marketing activities are performed shall not (i) impose any additional requirements or administrative procedures in relation to the marketing of the EuVECA or (ii) require any approval of the marketing prior to its commencement.

However, the EuVECA Regulation entails no prohibition on further regulation of the management of the EuVECA.

The European Securities and Markets Authority ("**ESMA**") shall maintain a central database, publicly accessible on the internet, listing all EuVECA managers and registered EuVECA.

The competent authorities shall have all supervisory and investigatory powers that are necessary for the exercise of their functions, e.g. to request access to any document or to require the relevant EuVECA manager to provide information without delay.

To receive additional information and details, please contact:

Max Welbes, LL.M., Partner
Luther Avocats à la Cour, Luxembourg
Phone +352 27 484 674
max.welbes@luther-lawfirm.com

Marie-Astrid Willems, Associate
Luther Avocats à la Cour, Luxembourg
Phone +352 27 484 663
marie-astrid.willems@luther-lawfirm.com

Digital Age for Paper Documents Starts in Luxembourg

With the bill n°6543 on electronic archiving and modifying the law of 5 April 1993 on the financial sector (the "**Bill**") introduced on 13 February 2013 Luxembourg further strengthens its position on the global Information and Communication Technology (ICT) market.

Current framework - What about all that paper?
The legal value of electronic documents and digital signatures is recognised in Luxembourg since a dozen years and the current supervision of companies offering digital signatures is recognised at the highest level offered in Europe.

However the current legal framework for archived documents is based on a Law from 1986 imposing outdated technical restraints and giving limited probative value to such copies.

The Bill, which is highly expected to be voted within this year, proposes to create a presumption of conformity for digital copies and is expected to remove any remaining doubts and uncertainties about the legal consequences of swapping paper piles for data centres.

Future framework
The Bill proposes to create a new type of regulated service provider, the *Prestataire de services de dématérialisation ou de conservation* (**PSDC**, dematerialisation or archiving service provider) which will be supervised by the Luxembourg institute for normalisation, certification, security and product/service quality (ILNAS).

In addition, PSDCs that would like to provide services to the financial institutions in particular, will be considered as *prestataires du secteur financier* (financial sector service providers) and will need approval by the CSSF (*Commission de Surveillance du Secteur Financier*).

Two different certifications will be available. The first certifies PSDCs for dematerialisation of paper documents (certified **PSDC-D**). The electronic copy of documents digitised by such supervised PSDC will have the same probative value as the original paper version. The second certification is available to PSDCs that store and archive the digital copy for customers (certified **PSDC-C**).

Depending on their know-how and technical equipment, service providers will thus be able to provide either (certified **PSDC-D** or certified **PSDC-C**) or both of those services (certified **PSDC-DC**).

Apart from the technical aspects, the Bill establishes a number of additional procedural and legal guarantees maintaining a high level of protection of confidentiality and security of archived data. In order to protect the customer, PSDCs will be obliged to inform customers in advance about how their documents are handled and bound by professional secrecy subject to criminal liability. In addition, in case they are no longer able to fulfil their obligations, PSDCs must provide the customer with the option of recovering the stored data.

Taking the lead in Europe
With the Bill, Luxembourg anticipates a regulation proposed by the European Commission in July 2012 which is currently discussed by the Council and the Parliament of the EU. The text, scheduled to be finalised by the Parliament in July 2013, provides for cross-border acceptance of certified electronic documents and copies. It intends thereby to remedy the current situation in the internal market where digitised documents have a different legal status depending on the national legal traditions. Whereas in the more permissive countries electronic copies are equivalent to paper documents, in other jurisdictions, courts will be reluctant to accept such digital documents. Even in the most permissive jurisdictions such as Germany, companies risk that their digitally archived documents are not recognised if they have to be produced before a foreign court or administration.

By being the first European country to propose a clear legal framework for such documents Luxembourg is set for a head start once Europe requires cross-border acceptance.

To receive additional information and details, please contact:

Aurélien Latouche, Senior Associate
Luther Avocats à la Cour, Luxembourg
Phone +352 27484 680
aurelien.latouche@luther-lawfirm.com

Patrick Wildgen, Associate (juriste)
Luther Avocats à la Cour, Luxembourg
Phone +352 27484 672
patrick.wildgen@luther-lawfirm.com

If you do not want to receive this service in future, please send an e-mail with the subject "Newsletter Luxembourg" to luxembourg@luther-lawfirm.com.

Imprint
Luther Rechtsanwaltsgesellschaft mbH, Anna-Schneider-Steig 22, 50678 Cologne,
Phone +49 221 9937 0, Fax +49 221 9937 110, contact@luther-lawfirm.com

V.i.S.d.P.: Eric Sublon, Luther, Aerogolf Center, 1B, Heienhaff, L-1736 Senningerberg,
Phone +352 27484 1, Fax +352 27484 690, eric.sublon@luther-lawfirm.com

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