In case of discrepancies between the French and the English text, the French text shall prevail

Luxembourg, 16 December 2005

To all persons and undertakings under the supervision of the CSSF, as well as to all persons intending to make an offer of securities to the public in Luxembourg, within the scope of Part II and Chapter 1 of Part III of the law on prospectuses for securities

CIRCULAR CSSF 05/225

Re: The notion "offer to the public of securities" as defined in the law on prospectuses for securities and the "obligation to publish a prospectus" that may ensue.

Ladies and Gentlemen,

Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading (the **Prospectus Directive**) provides, at European level, for a harmonised definition of the notion "offer to the public" which was fully integrated into the Luxembourg law on prospectuses for securities (the **Prospectus Law**). The purpose of this circular is to clarify the different elements of the notion "offer to the public", as defined in article 2.1.1) of the Prospectus Law, and to specify the obligation to publish a prospectus that may ensue. The explanations given in the third part of this circular analyse certain frequent practices or various scenarios in this respect without however aiming to cover all the possible hypotheses.

The Prospectus Law introduces for the first time in Luxembourg a formal definition of the notion of an offer to the public. Nevertheless, this definition is limited in its effects to Part II of the Prospectus Law concerning offers to the public of securities that are subject to Community harmonisation and to Chapter 1 of Part III of the Prospectus Law laying down the Luxembourg rules governing offers to the public of securities and other comparable securities that do not fall into the scope of the Prospectus Directive. The definition does not apply to other areas, such as the marketing of units/shares of undertakings for collective investment (**UCIs**) of the open-end type; reference should be made to the relevant regulations in order to determine whether the distribution of these products should be considered as an offer to the public. Moreover, the definition of an

offer to the public introduced by the Prospectus Law does not modify the requirements determining the assessment of the need of an authorisation in accordance with the law of 5 April 1993 on the financial sector as amended and the law of 22 March 2004 on securitisation.

Part I. Definition of an "offer to the public of securities"

According to article 2.1(1) of the Prospectus Law, an "offer of securities to the public" means "*a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to these securities*". It should be noted that the definition also applies to the placement of securities through financial intermediaries, which, under circumstances that are further described under articles 5(2) and 30(2) of the Prospectus Law, may entail the obligation to publish a prospectus. Those situations are illustrated by way of examples in the third part of this circular.

1. The "securities" concerned

The scope of Part II is defined in article 4 of the Prospectus Law while article 29 defines the scope of Part III. As regards Part II, the financial instruments that are not covered by the rules applicable to the offer to the public under this Part II are listed in paragraph 2 of article 4 of the Prospectus Law. It is notably specified that Part II does not apply to units issued by UCIs other than the closed-end type. It should be noted in this context that the definition of a UCI of the closed-end type is to be understood, for the purpose of the Prospectus Law, as a UCI where the investor has no repurchase right relating to the units concerned. In all other cases, whatever the number and periodicity of the foreseen repurchases, the UCIs are of the open-end type not covered by Part II of the Prospectus Law. Part III (which refers to the same definition of offers to the public as Part II) applies to offers to the public, within the territory of Luxembourg, of securities and other comparable instruments not covered by Part II, i.e. those referred to under article 4(2) except however for the units issued by UCIs of the open-end type that are still governed by the sole provisions of the law of 30 March 1988 and 20 December 2002 concerning undertakings for collective investment.

The definition of "securities" delimits the scope of Parts II and III of the Prospectus Law. That definition derives from Directive 2004/39/EC concerning markets in financial instruments (**MiFID**). It is broader than the preceding Community definitions so as to cover more financial instruments and to take account of the innovation in the field of financial instruments in recent years. "Securities" are defined as "*those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as:*

i) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;

ii) *bonds or other forms of securitised debt, including depositary receipts in respect of such securities;*

iii) *any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures."*

It should also be borne in mind in this context that the comments contained in the Parliamentary documents relating to the Prospectus Law specify that the non-fungible "bons de caisse" are not considered as securities under the Prospectus Law. Non fungible "bons de caisse" do therefore not fall under the scope of the Prospectus Law, whatever their maturity, whereas fungible "bons de caisse" fall under Part II if their maturity is at least 12 months, and under Part III if this maturity is less than 12 months. However, the "bons de caisse" (whatever their nature) may constitute securities for the purpose of other laws.

The nature of the rights offered may determine whether the obligations ensuing from an "offer to the public" as provided by the Prospectus Law apply. For instance, in the context of "offers" to employees, granting "options" to employees of an issuer (or of the issuer's group) to subscribe to securities, is not, in principle, an offer to the public of "securities". The conditions to be met are that these options are not negotiable on the capital markets and exclusively linked to the employment contract (including, where applicable, besides current employees, former employees and "mandataires sociaux" (such as board members)). Indeed, the non-negotiability on the capital markets and the *intuitu personae* character of the granted right are key elements for this assessment.

The "security" concerned, the nature of the financial instrument, respectively the "option" or the "right" offered, must be analysed on a case-by-case basis.

2. "A communication to persons in any form and by any means"

The definition of an offer to the public does not allow anymore to distinguish between an "offer to the public" and a "private placement" according to the means of communication used or the persons concerned as was the case under the former legislation.

a. The "means" used to make an offer are to be understood in a broad sense, not excluding *a priori* any form of communication or media. Thus, not only offers made by public means, such as advertisements in Luxembourg newspapers or disseminated in Luxembourg, or any other media disseminated in Luxembourg, or through mailings to a large and indistinct number of addressees, or by making brochures available in a place accessible to the public, may be considered as constituting an offer to the public under the Prospectus Law, but also offers made by means that were previously considered as "private", such as mailings addressed to the sole clients of a credit institution or an investment firm, or the distribution of a brochure to a limited circle of potential investors, even if certain precautions are observed as

regards the dissemination mode of the documents, are now in principle considered as a "communication to persons in any form and by any means" as referred to in article 2.1(1) of the Prospectus Law.

b. The notion of "persons" as referred to in article 2.1(1) of the Prospectus Law is also to be understood in a broad sense, as it makes, *a priori,* no distinction between "institutional investors" and non-professional customers. Thus, neither the nature (save for the subsequent exemption as regards the obligation to publish a prospectus under article 5.2(a)), nor the number (save for the subsequent exemption as regards the obligation to publish a prospectus under article 5.2(b)) of the persons concerned, allow to rule out the application of the definition of an offer to the public.

3. "Sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to these securities"

An offer of securities must present sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide knowingly to purchase or subscribe to these securities. Three key elements must be combined:

(i) the offeror must have the intention to make an offer;

(ii) the description of the offered securities must be communicated; and

(iii) the conditions governing the offer (including, notably, the price of the offered securities) must be determined or determinable.

In order to be considered as an offer to the public, a communication shall thus necessarily contain sufficient information on the terms of the offer and the securities concerned, which means that at least summary information on the offered securities (such as the nature of the security and main characteristics) shall be communicated, that the selling price of the security shall be determined or determinable and that the mode of acceptance and the period during which the offer is open shall be known or explicitly or implicitly indicated. For a proposal to be considered as an offer under the Prospectus Law, it shall be sufficiently specific in order to be accepted by the addressee.

The comments contained in the Parliamentary documents relating to the draft Prospectus Law thus confirm that "*the simple communication of information on a security or an issuer without securities being offered for purchase or subscription cannot be considered as an offer to the public. It is necessary that the communication of information is made in relation to an offer of securities.*" Thus, the simple availability of information or advice to invest in certain securities does not, in principle, constitute an offer to the public (please also refer to the third part of this circular).

In another area, but in the same vein, the communication of documentation relating to a draft merger agreement (“projet de fusion") accompanying (or appended to) the convening notice for a general meeting deciding on the draft merger agreement (“projet de fusion"), does not, in principle, constitute an offer to the public of the securities of the absorbing company or of the newly incorporated company to the shareholders of the absorbed company, but should, in most cases, be considered as simply making information available in the context of the solicitation of votes.

Part II. Obligation to publish a prospectus and relating exemptions

Where a communication relating to securities fulfils the above criteria and can be considered as an offer to the public, it should be verified if this classification entails the obligation to publish a prospectus or if it may be exempted from this obligation.

1. Determination of the obligation to publish a prospectus

Article 5 (please also refer to article 30 for Part III) of the Prospectus Law sets out the rules to assess the obligation relating to “offers / offers to the public” of securities in three stages:

a. Article 5 paragraph 1 lays down the general principle that no offer to the public of securities shall be made within the territory of Luxembourg without prior publication of a prospectus and that whoever intends to make such an offer to the public of securities shall notify the CSSF beforehand.

b. In its second paragraph, article 5 provides that the obligation to publish a prospectus, and consequently the obligation to notify the CSSF, does not apply to certain types of offers, which are the following:

   a) an offer of securities addressed solely to qualified investors; and/or
   b) an offer of securities addressed to fewer than 100 natural or legal persons other than qualified investors, <u>per Member State</u>; and/or
   c) an offer of securities addressed to investors who acquire securities for a total consideration of at least EUR 50,000 per investor, for each separate offer; and/or
   d) an offer of securities whose denomination per unit amounts to at least EUR 50,000; and/or
   e) an offer of securities with a total consideration of less than EUR 100,000, which limit shall be calculated over a period of 12 months.

   In practice, where for instance an offer of securities to the public in Luxembourg is addressed to more than 99 natural or legal persons, other than qualified investors, the obligation to publish a prospectus is in fact only generated in Luxembourg and not necessarily and automatically in all Member States. The possible obligation to publish a prospectus shall be assessed separately in the light of the legislation of every country in which an offer will take place. Where an offer is made in another Member State, the

prospectus approved by the CSSF as competent authority of the home Member State can afterwards be used in this Member State under the European "passport".

c. Paragraph 3 of article 5 specifies that the obligation to publish a prospectus does not apply to offers to the public of certain types of securities[1].

For example, the obligation to publish a prospectus does not apply, under certain conditions, to securities offered in connection with a takeover by means of an exchange offer (in which case an equivalent document approved by the CSSF must be available) and to securities offered, allotted or to be allotted to existing or former directors or employees by their employer whose securities are already admitted to trading on a regulated market or by an affiliated undertaking (in which case an information document, which does not need to be approved by the CSSF, must be available).

As regards an offer of securities to employees, verification should be made as to whether, according to the steps mentioned above, the offer can possibly benefit from the exemption to publish a prospectus pursuant to article 5, paragraph 2 and then (if answered negatively), whether this offer to employees fulfils the criteria that may entail an exemption from the obligation to draw up or publish a prospectus in accordance with article 5.3(e).

2. Obligation of the financial intermediaries to publish a prospectus

As far as the secondary market is concerned, article 5 further specifies that "*any subsequent resale of securities which were previously the subject of one or more of the types of offer mentioned in this paragraph under (a) to (e) shall however be regarded as a separate offer and the definition set out in Article 2(1)(l) shall apply for the purpose of deciding whether that resale is an offer of securities to the public. The placement of securities through financial intermediaries shall be subject to publication of a prospectus if none of the conditions (a) to (e) are met for the final*

[1] These types of securities are the following : "a) shares issued in substitution for shares of the same class already issued, if the issuing of such new shares does not involve any increase in the issued capital;
(b) securities offered in connection with a takeover by means of an exchange offer, provided that a document is available containing information which is regarded by the Commission as being equivalent to that of the prospectus, taking into account the requirements of Community legislation on exchange offers;
(c) securities offered, allotted or to be allotted in connection with a merger, provided that a document is available containing information which is regarded by the Commission as being equivalent to that of the prospectus, taking into account the requirements of Community legislation on mergers;
(d) shares offered, allotted or to be allotted free of charge to existing shareholders, and dividends paid out in the form of shares of the same class as the shares in respect of which such dividends are paid, provided that a document is made available containing information on the number and nature of the shares and the reasons for and details of the offer;
(e) securities offered, allotted or to be allotted to existing or former directors or employees by their employer whose securities are already admitted to trading on a regulated market or by an affiliated undertaking, provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer".

placement." This point mainly purports to prevent abuses through distribution mechanisms built with the sole purpose to artificially circumvent the obligation to draw up a prospectus. Thus, the comments in the Parliamentary documents specify that "*any subsequent resale of securities which were originally exempted from the obligation to publish a prospectus* may *again fall within the scope of Part I when the conditions of the definition of an offer to the public are fulfilled. Likewise, every placement by financial intermediaries of securities falls under the scope of Part I* [Part II of the Prospectus Law]*, when none of the exemptions provided for by this article is fulfilled.*" Further details regarding the particular aspect of the possible obligation for an intermediary to publish a prospectus are set out in detail in the third part of this circular.

Part III. Practical application of the definition of an "offer to the public" and the different distribution modes of securities

The issue, distribution and circulation of securities give rise to certain situations that may constitute an offer to the public. A distinction should therefore be made between the offer in relation to the issue of securities (the primary market) and offers or placements by intermediaries allowing the circulation of securities (the secondary market).

1. The primary market

The role of the primary market (or market for issues of securities) is to allow issuers to cover their financing needs by directly meeting the supply of investments by capital holders. In practice, an issuer issuing shares or bonds for its financing needs may make an offer to the public by addressing a communication to persons in general which presents sufficient information on the terms of the offer and the securities to be offered, so as to enable investors to decide to purchase or subscribe to these securities. In case the offer is generally announced to an undefined number of investors, indicating the period during which the offer is open as well as the institutions and establishments allowing the public to accept the offer, this confers on an advertisement the undeniable character of an offer to the public.

On the other hand, the simple communication of information on a security or an issuer, without securities being offered for purchase or subscription, cannot be considered as an offer to the public. Similarly, a newspaper article written by a journalist or a report of an analyst on a security and/or an issuer does not fall under the relevant definition.

A communication in relation to trading on a regulated market (included in the list of regulated markets published by the European Commission) or a multilateral trading system (MTF) is in principle excluded from the definition of an offer to the public. Likewise, an admission to trading on a market (such as the regulated market of the Luxembourg Stock Exchange or the second market operated by the Luxembourg Stock Exchange, called "Euro MTF") does not constitute an offer to the public of securities, even if it entails in principle the same consequence, namely the obligation to draw up and to publish a prospectus. Similarly, the simple publication,

in accordance with stock exchange regulations, of price-sensitive information, is not considered as an offer to the public.

A "preliminary prospectus" that does not include the acquisition price of the relevant securities does not, in principle, contain sufficient information to constitute an offer to the public, except where the price is clearly determinable (notably where a narrow price margin is given) so that investors would in fact not need any additional information on the acquisition price. Thus, where the price (or a narrow price margin, respectively) is given during a public roadshow, the communications made at this event could be considered as an offer to the public and the issuer could possibly be required to draw up a prospectus.

In this context, it should be considered in what cases intermediaries may use a prospectus published by the issuer for the placement and resale of the securities concerned:

a. If the issuer submits a prospectus for approval to the CSSF with a view to offer securities to the public in Luxembourg, the placement and offer activities of the members of the banking syndicate on the primary market are covered by the approval of the prospectus initially drawn up by the issuer, and the members of the banking syndicate may use the published prospectus for the primary distribution of the securities. In the event where, following an offer (which was not an offer to the public) made by an issuer or a proxy of the issuer to one or several qualified investors (including financial intermediaries), such qualified investor offers in turn on its own behalf and for its own account, the securities to the public, the offer by the qualified investor does not entail as a consequence the application of the rules governing offers to the public by the issuer or its proxy. In other words, the obligations that ensue from such a "secondary" offer to the public (in case the issuer was exempted from the obligation to publish a prospectus) shall be fulfilled by the offeror itself (in this case, the qualified investor) and not by the issuer when the "secondary" offer to the public is made independently of the latter.

b. Where intermediaries place securities subsequently with their clients on the secondary market, reference should in principle be made to article 5, paragraph 2 of the Prospectus Law, which, as mentioned above, sets out that "*any subsequent resale of securities which were previously the subject of one or more of the types of offer mentioned in this paragraph under a) to e) shall however be regarded as a separate offer and the definition set out in Article 2(1)(l) shall apply for the purpose of deciding whether that resale is an offer of securities to the public. The placement of securities through financial intermediaries shall be subject to publication of a prospectus if none of the conditions (a) to (e) are met for the final placement*." If the issuer has obtained approval of a prospectus for the admission of securities to trading on a regulated market, the intermediaries may use this prospectus for placement purposes during its period of validity, subject to the prospectus still being compliant with the legislation, which may notably be ensured through the publication by the intermediary of a supplement and/or by making available,

in the form of an addendum to the prospectus, all information published by the issuer in relation to the securities admitted to trading on a regulated market.

2. The secondary market

Once the securities are issued and placed, the circulation cycle on the secondary market where the securities are traded, resold and placed begins. The intervention of a financial intermediary or a banking syndicate may contribute to the efficiency of the placements of the securities with clients of the different intervening parties. The comments on the Prospectus Law specify that the "*placement of securities by financial intermediaries for (…) their own account is likely to constitute an offer to the public if it fulfils the characteristics of the definition*". The various facts that, in this context, the price of the securities is communicated by the intermediary or becomes determinable by the client due to the information available, that the precise description of the nature and main conditions of the securities is provided and that the intention of the intermediary to offer these securities is obvious (notably if they are securities or financial products that the intermediary subscribed in large quantities in order to resell and place them, for example, following a underwriting), are elements that surely classify such alleged "placement" as an offer to the public.

As regards private management, the new definition of an offer to the public could have a considerable impact notably on "investment advice" and "discretionary management".

a. In case of "discretionary management", the client gives power of attorney to the professional to manage a portfolio for his account and at his own risk. Having conferred power of attorney to the professional, the client does in principle not interfere in its execution by accepting himself offers of the professional or by giving instructions in relation to particular transactions. The placement in a securities portfolio by professionals authorised to this effect, such as credit institutions or portfolio managers established in Luxembourg, does not constitute an offer to the public under the Prospectus Law.

b. As far "investment advice" is concerned, the client is given advice by the professional, but manages his portfolio on his own by giving instructions to the professional to this end. In principle, where a professional established in Luxembourg (and authorised to this end) advises its clients in respect of securities (be it actively and on its own initiative or at the customer's request) with the sole intention of providing them with information for their investment decisions, this advice may not be considered as an offer to the public. Likewise, where, for instance, the analysts of a professional identify securities that will subsequently and as a priority, or, where applicable exclusively, be recommended to the professional's customers by his account managers, this advice does not, in principle, constitute an offer to the public.

   Within the context of his advisory activities, the professional must however make sure in certain cases that the "advice" given to a large number of clients (notably when this advice is given on the professional's initiative) cannot be

considered as an offer to buy or subscribe to specific securities. From this point of view, the general principle described above will only be set aside if the professional, in order to sell the securities it holds in large quantities (or it committed to subscribing in large quantities) in the market, uses its advisory function *vis-à-vis* clients to actively encourages them to buy these securities. In other words, if the professional, by means of his "advice", aims in fact to place securities it holds or will hold in large numbers and if this "advice" is moreover given in Luxembourg to more than 99 natural and legal persons, other than qualified investors, the professional (subject to other relevant exemptions) must draw up and publish a prospectus for the securities concerned. On the other hand, if a professional recommends a security without holding them in its portfolio (or without having the intention of placing such securities it would have in his own portfolio or would have planned to acquire or issue in a large number), this advisory activity can, in principle, not be considered as constituting an offer to the public.

The simple fact that securities are already admitted on a regulated market does not necessarily allow an intermediary to offer them on the secondary market without publication of a prospectus, but could, as specified above, have an influence on the obligations relating to the publication of such a prospectus (respectively the publication by an intermediary of a supplement and/or by the provision, in the form of an addendum to the prospectus, of any information published by the issuer in relation to the securities concerned).

3. The specific case of cross-border offers

Article 5 (as well as article 30 for Part III) of the Prospectus Law solely concerns the offers to the public of securities "on the territory of Luxembourg". Although the principle of territoriality is applied both in relation to an offer to the public and within the context of the freedom to provide services within the single European market (**FPS**), the purpose of both regulations and the question of the competence of the relevant authorities should not be mixed up. FPS concerns the authorisation to carry on certain activities within the territory of a Member State, while the regulations concerning the prospectus for securities define the specific rules applicable to an offer to the public as regards the approval of a prospectus relating to the securities concerned.

The elements that should be taken into account to locate an offer to the public are manifold, but the place of the characteristic execution (i.e. the place of the offer), together with the place of the public's residence and consequently the location of the market targeted, seem to be the most appropriate to determine the territory on which an offer to the public is made. Obviously, this approach demands a case-by-case analysis. All offers made on the territory of Luxembourg, even *vis-à-vis* non-resident clients, are in principle deemed to be made in Luxembourg and thereby fall under the Luxembourg law as regards their assessment as offer to the public. The offers made by a Luxembourg professional on the territory of another country fall under the law of that country. The application, according to the principle of territoriality, of the competences and the provisions of the host country is not

incompatible with the principle of the home country within the context of FPS. Indeed, the latter applies to the sole provision of investment services referred to in relevant European Directives, including portfolio management or investment advice, except however for any offer of securities, which remains subject to the Prospectus Directive.

If a professional contacts actively and on its own initiative new clients in their country of residence with the aim of offering them securities, it may be making, subject to the definition of the law of the client's country of residence, an offer to the public on the territory of the country in which the (future) clients are domiciled (which still needs to be analysed according to the definition of an "offer to the public" that applies in the country of residence). Therefore, if an offer is made in Luxembourg and/or the offer addresses the Luxembourg public (even if it is made by a foreign issuer/offeror), Luxembourg law applies in that respect.

As regards, more particularly, advertisements published in a foreign newspaper available in Luxembourg, a certain link should, in principle, exist with Luxembourg so that the offer is considered to be made in Luxembourg. For instance, either the name of the country is mentioned (implicitly or explicitly) as targeted market or the issuer itself is incorporated in Luxembourg and widely known by the Luxembourg public and the offeror intends to offer the securities concerned in Luxembourg. If such intention to offer in Luxembourg does not exist and if Luxembourg residents, who learned about the offer, would want to participate in the offer on their own initiative, the offeror can accept these investors without having to comply with the requirements governing an offer to the public in Luxembourg. In this context, it would be useful to bear in mind that the mere intention of making an offer to the public in Luxembourg does not necessarily mean that the CSSF is the competent authority (for the issuer concerned) for the approval of the prospectus for this offer.

In order to determine whether an offer to the public of securities addresses the Luxembourg territory by means of the Internet, the CSSF refers to a certain number of specific elements, to be considered on a case-by-case basis, such as:

- information items allowing to conclude that Luxembourg is a/the market addressed by the offer;
- the possibility to register as "Luxembourg (non-professional) investor" and/through the setting-up of website access control procedures, such as interstitials that consist in the request for information on the nationality and the place of residence of the potential investor;
- references to the website address in Luxembourg's written press, radio or television or hyperlinks to websites of Luxembourg distributors or intermediaries;
- the clear indication, for instance by means of a pertinent disclaimer, of the countries in which securities are offered or the indication that the Internet website solely addresses investors for given countries; and
- the use of passwords to access the transactional website.

Yours faithfully,

COMMISSION DE SURVEILLANCE DU SECTEUR FINANCIER

Simone DELCOURT	Arthur PHILIPPE	Jean-Nicolas SCHAUS
Director	Director	Director general