

CLASSIFICATION SHEET

BUREAU D'IMPOSITION SOC. 6  
ENTRÉE

14 MAI 2009



This document relates to the following request:

13 May 2009

References: CEMR/FCVR/MADE/Q8509001M-TYBM

**PSP – Project Felicity**

PSPLUX S.à r.l.	(Tax Number: 2005 2438 668)
Germalux Investment I S.à r.l.	(Tax Number: 2007 2441 797)
Felicity Luxembourg I S.à r.l.	(Tax Number: 2007 2469 578)
Felicity Luxembourg II S.à r.l.	(Tax Number: 2007 2470 010)
Felicity Luxembourg III S.à r.l.	(Tax Number: 2007 2469 586)
JP Residential I S.A.	(Tax Number: 2004 2217 388)
JP Residential II S.A.	(Tax Number: 2004 2222 675)
JP Residential III S.à r.l.	(Tax Number: 2005 2410 356)
JP Residential V S.à r.l.	(Tax Number: 2005 2422 958)
JP Residential VI S.à r.l.	(Tax Number: 2005 2426 597)

**1. Key topics: back-to-back PPL and tax transparency of German KG**

PSPIB, together with Cedar Cove Holdings Limited, acquired a real estate portfolio located in Germany. This joint-venture investment is acquired through a Luxembourg platform owning German KGs and is financed with back-to-back PPLs.

**2. Name of the advisor : PwC**

**3. Corporate group's name, or fund sponsor: PSP**

**4. Name of the project: Felicity**

**5. Amount intended to be invested: EUR 72,000,000**

**6. Date of receipt:**

14 MAI 2009



For the attention of Mr Marius Kohl

Administration des Contributions Directes  
Bureau d'imposition Sociétés VI  
18, Rue du Fort Wedell  
L-2982 Luxembourg

13 May 2009

References: CEMR/FCVR/MADE/Q8509001M-TYBM



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**PSP – Felicity JV investment**

Dear Mr Kohl,

We are pleased to submit for your review and approval the description of the new transaction envisaged by the Public Sector Pension (hereafter the “PSP Group”). Reference is made to the previous advance tax agreements (hereafter “ATA”) submitted for your review dated 21 June 2006 (References: WPI/CEMR/ANBE/Q8506001M-TYBM) regarding the acquisition of French real estate property, as well as 16 January 2008 (References: CEMR/FCVR/MADE/Q8508002-TYMB) in respect of the acquisition of Spanish investment by PSP Group through a Luxembourg platform.

For your convenience, you will find enclosed to this letter a chart showing the general holding and financing structure of the Felicity joint venture investment in a diagrammatic form (**Appendix 1**).

## A. Background

The Public Sector Pension Investment Board ("PSPIB") is a Canadian crown corporation established by Parliament by the Public Sector Pension Investment Board Act. The mandate of PSPIB is to manage the net contributions made after 1 April 2000 by the federal Public Service, the Canadian Forces and the Royal Canadian Mounted Police pension funds.

### A.1 Shareholding structure

- 1 PSPIB is the sole shareholder of a Luxembourg company, namely PSPLUX S.à r.l. (hereafter "PSPLUX"), which is in turn the sole shareholder of another Luxembourg company, namely Germalux Investment I S.à r.l. (hereafter "Germalux").
- 2 PSPIB, through its Luxembourg platform described above, together with Cedar Cove Holdings Limited, a limited liability company incorporated under the laws of Gibraltar (hereafter "Cedar Cove"), acquired in April 2008 a real estate portfolio located in Germany via the holding and financing structure hereafter described.
- 3 Germalux and Cedar Cove acquired respectively 96,7% and 3,3% of the share capital of three Luxembourg companies, i.e. Felicity Luxembourg I S.à r.l. (hereafter "Felicity I"), Felicity Luxembourg II S.à r.l. (hereafter "Felicity II") and Felicity Luxembourg III S.à r.l. (hereafter "Felicity III"), together the "Felicities".
- 4 Each Felicity, together with Eurolinque II GP LLC (i.e. a limited liability company incorporated under the laws of the State of Delaware which is part of the Cedar Cove group), established in the ratio of 94,4% / 5,6% three German Kommanditgesellschaft, i.e. Erste Eurolinque Felicity GP GmbH & Co. KG ("KG1"), Zweite Eurolinque Felicity GP GmbH & Co. KG ("KG2") and Dritte Eurolinque Felicity GP GmbH & Co. KG ("KG3"), together the KGs.

The Felicities and the KGs then acquired shares in five Luxembourg companies (together referred to as the "JP Residential entities") as follows:

- Felicity I and KG1 acquired respectively 94,4% and 5,6% of the share capital of JP Residential III S.à r.l.
  - Felicity II and KG2 acquired respectively 94,9% and 5,1% of the share capital of JP Residential II S.A., as well as 94,4% and 5,6% of the share capital of JP Residential VI S.à r.l.
  - Felicity III and KG3 acquired 94,4% and 5,6% of the share capital of JP Residential I S.A. and JP Residential V S.à r.l.
- 5 The Felicities also purchased existing interest free shareholder loans in JP Residential I S.à r.l., JP Residential V S.à r.l. and JP Residential VI S.à r.l.



- 6 The JP Residential entities own a real estate portfolio comprising 69 buildings located in Berlin, Germany. On November 5, 2008,, the real estate portfolio was transferred from the JP Residential entities (save for JP Residential VI S.à r.l.) to twelve (12) German Kommanditgesellschafts (“German PropKGs”). The JP Residential entities (save for JP Residential VI S.à r.l.) have a limited partner’s interest into the PropKGs representing 100% of their share capital and Germalux Felicity GmbH (a fully taxable German company) acts as general partner without a capital interest in the share capital of the PropKGs. The related bank debt remains at the level of the JP Residential entities.

## A.2 Financing structure

- 7 In order to finance the investment, PSPIB granted PSPLUX with an Income Participating Loan (“Top IPL”) amounting to EUR 72,000,000, which in turn on-lent the above amount to Germalux through another IPL (“Middle IPL”).
- 8 Germalux used these funds to acquire shares in the Felicities and financed the Felicities with IPLs (“Bottom IPLs”) amounting to an aggregate of EUR 71,800,329 (i.e. respectively IPL of EUR 22,802,566 to Felicity I, IPL of EUR 18,383,185 to Felicity II and IPL of EUR 30,614,578 to Felicity III).
- 9 The Felicities used these funds to invest into the KGs and to acquire the JP Residential entities, as well as the existing shareholder loans granted to JP Residential I S.à r.l. amounting to EUR 2,285,984, JP Residential V S.à r.l. amounting to EUR 12,015,148 and JP Residential VI S.à r.l. amounting to EUR 6,246,980.
- 10 Financing of EUR 964,000 and other amounts required to pay the balance of the acquisition price was or will be granted to the Felicities by PSP Group following the same funding process.
- 11 The Felicities also received financing from Cedar Cove, the joint-venture partner, under the form of IPLs (“Bottom IPLs”) amounting to EUR 397 281 to Felicity I, EUR 397 281 to Felicity II and EUR 397 280 to Felicity III.





## **B Tax treatment**

### **B.1 Luxembourg tax residency**

12 All the Luxembourg companies that form the subject of this letter are Luxembourg tax residents. Consequently, Luxembourg tax residency certificates will be delivered upon request.

### **B.2 Income Participating Loans**

#### **B.2.1 Characteristics of the interest payments**

13 The IPLs flowing through the structure in order to finance the investments in the Felicities, will be qualified as debt for both income taxes and net wealth tax purposes, and interest thereon will in principle be fully tax deductible, subject to article 45 (2) of the Luxembourg Income Tax Law (hereafter "LITL") or article 166 (5) LITL (see the further analysis on the tax regime applicable to IPLs in **Appendix 2**).

14 Interest payment under the IPLs will not be subject to the withholding tax on distributions (neither on the ground of article 146 (1) 2 nor of article 146 (1) 3 LITL).

#### **B.2.2 Debt-to-equity ratio**

##### *At the level of PSPLUX*

15 Since the amounts lent by PSPIB to PSPLUX under the Top IPL are on-lent to Germalux under the same terms and conditions, the financing activity performed by PSPLUX will be regarded as performed within the frame of back-to-back loans up to 100% of the sums lent. As a consequence the Top IPL will fall outside the calculation of the 85:15 debt-to-equity ratio and none of the interest paid by PSPLUX will be reclassified as a deemed dividend. As a result, all the interest paid by PSPLUX will be fully deductible for corporate income tax and municipal business tax purposes and will not be subject to any dividend withholding tax.

##### *At the level of Germalux*

16 The overall group investments made by Germalux that are financed by the Middle IPL (i.e. acquisition of the share capital of the Felicities and the Bottom IPLs financing) are regarded as being connected with the overall financing granted by PSPLUX. This is economically speaking clearly the case: if the investments do well, the underlying companies pay out annually a very significant element of their income as shareholder debt interest, and if those underlying investments do badly, much less interest have to be paid on the shareholder debts. Germalux does not face a high financial risk, even if the investment performed badly. As a consequence, the Middle IPL will fall outside the calculation of the debt-to-equity ratio. As a result, all the interest paid by Germalux will be fully deductible for corporate income tax and municipal business tax purposes and will not be subject to any dividend withholding tax.

*At the level of the Felicities*

- 17 The overall group investments made by the Felicities that are financed by the Bottom IPLs (i.e. acquisition of the JP Residential entities, as well as of the existing interest free shareholder loans granted to JP Residential I S.à r.l., JP Residential V S.à r.l. and JP Residential VI S.à r.l. and the financing of the KGs) are regarded as being connected with the overall financing granted by Germalux. This is economically speaking clearly the case: if the investments do well, the underlying companies pay out annually a very significant element of their income as shareholder debt interest, and if those underlying investments do badly, much less interest have to be paid on the shareholder debts. The Felicities do not face a high financial risk, even if the investment performed badly. As a consequence, the Bottom IPLs will fall outside the calculation of the debt-to-equity ratio. As a result, all the interest paid by the Felicities will be fully deductible for corporate income tax and municipal business tax purposes and will not be subject to any dividend withholding tax.

**B.2.3 Margin subject to taxation**

- 18 Taking into account the fact that PSPLUX, Germalux and the Felicities do not bear any default risk, nor foreign exchange risks, and that the amounts borrowed and on-lent match, the taxable margin will be left at the level of Germalux.
- 19 Considering the amounts involved and the risk profile of Germalux, the taxable profit realised by Germalux in relation to its IPL back-to-back financing activity will be considered as appropriate and acceptable with respect to transfer pricing policy and articles 56 and 164 (3) LITL insofar as a margin of 0.125% per annum of the adjusted accounting profits as defined in the IPL will be subject to corporate income tax and municipal business tax.
- 20 For the context of the Felicity joint venture investment, no further taxable margin will be left at the level of PSPLUX and the Felicities.

**B.3 Luxembourg tax treatment of the German source income**

- 21 A German Kommanditgesellschaft is not considered as a “legal person” subject to taxation for the purpose of the application of a tax treaty.
- 22 As a consequence, the KGs held by the Felicities and the German PropKGs held by the JP Residential entities will be treated as tax transparent for Luxembourg tax purposes and thus will be disregarded for Luxembourg corporate income tax and net wealth tax purposes.

**B.3.1 German KGs investing in the JP Residential entities**

- 23 As the KGs held by the Felicities will be treated as tax transparent for Luxembourg tax purposes, the Felicities will be deemed to hold directly the relevant proportion of all assets and liabilities held by the KGs, i.e., notably participations in the Luxembourg JP Residential entities.

- 24 As a result, tax balance sheets shall be prepared and the Felicities should report in their tax balance sheets their share in the assets and liabilities of the KGs. Those tax balance sheets will be prepared based on the accounts of the KGs which will be prepared according to their own GAAP, without being converted into Luxembourg GAAP for this purpose.
- 25 Given the above, any dividend distributed by the JP Residential entities will be deemed to be directly distributed to the Felicities.

### **B.3.2 German PropKGs investing in German Real Estate**

- 26 As the German PropKGs held by the JP Residential entities will be treated as tax transparent for Luxembourg tax purposes, Article 4 of the Germany-Luxembourg double tax treaty applies and the tax exemption of the tax treaty is applicable at the level of the partners. The income received by the JP Residential entities will thus qualify as income from immovable property according to Article 4 of the Germany-Luxembourg tax treaty and will therefore be exempted from corporate and municipal business tax in Luxembourg.
- 27 As a result, tax balance sheets shall be prepared and the JP Residential entities should report in their tax balance sheets their share in the assets and liabilities of the PropKGs. Those tax balance sheets will be prepared based on the accounts of the PropKGs which will be prepared according to their own GAAP, without being converted into Luxembourg GAAP for this purpose.
- 28 Furthermore, in accordance with Article 19 of the above treaty, the German sourced real estate property will not be included in the computation basis of the annual net wealth tax due by the JP Residential entities.

### **B.3.3 JP Residential VI S.à r.l. investing in German Real Estate**

- 29 JP Residential VI S.à r.l. still owns directly the German real estate. According to Article 4 of the double tax treaty signed between Luxembourg and Germany (“the Treaty”), real estate sourced income (i.e. such as rental income or capital gains) will only be taxable in Germany.
- 30 Hence, any income generated on the real estate investment located in Germany will not be considered taxable income in Luxembourg for JP Residential VI S.à r.l.
- 31 Furthermore, in accordance with Article 19 of the above treaty, the German sourced real estate property will not be included in the computation basis of the annual net wealth tax due by JP Residential VI S.à r.l.

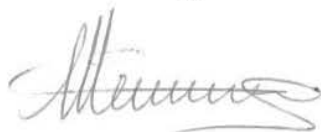




We respectfully request that you confirm the tax treatment of the situation described above or that you provide us with your remarks, if any.

We remain at your disposal should you need any additional information and would like to thank you for the attention that you will give to our request.

Yours sincerely,



Cécile Menner  
Partner



Thierry Bream  
Senior Manager

Appendices:

Appendix 1: Structure chart of the Felicity JV investment.

Appendix 2: Technical tax analysis on the tax regime applicable to IPLs.

**For approval**

*Le préposé du bureau d'imposition Sociétés 6  
Marius Kohl*

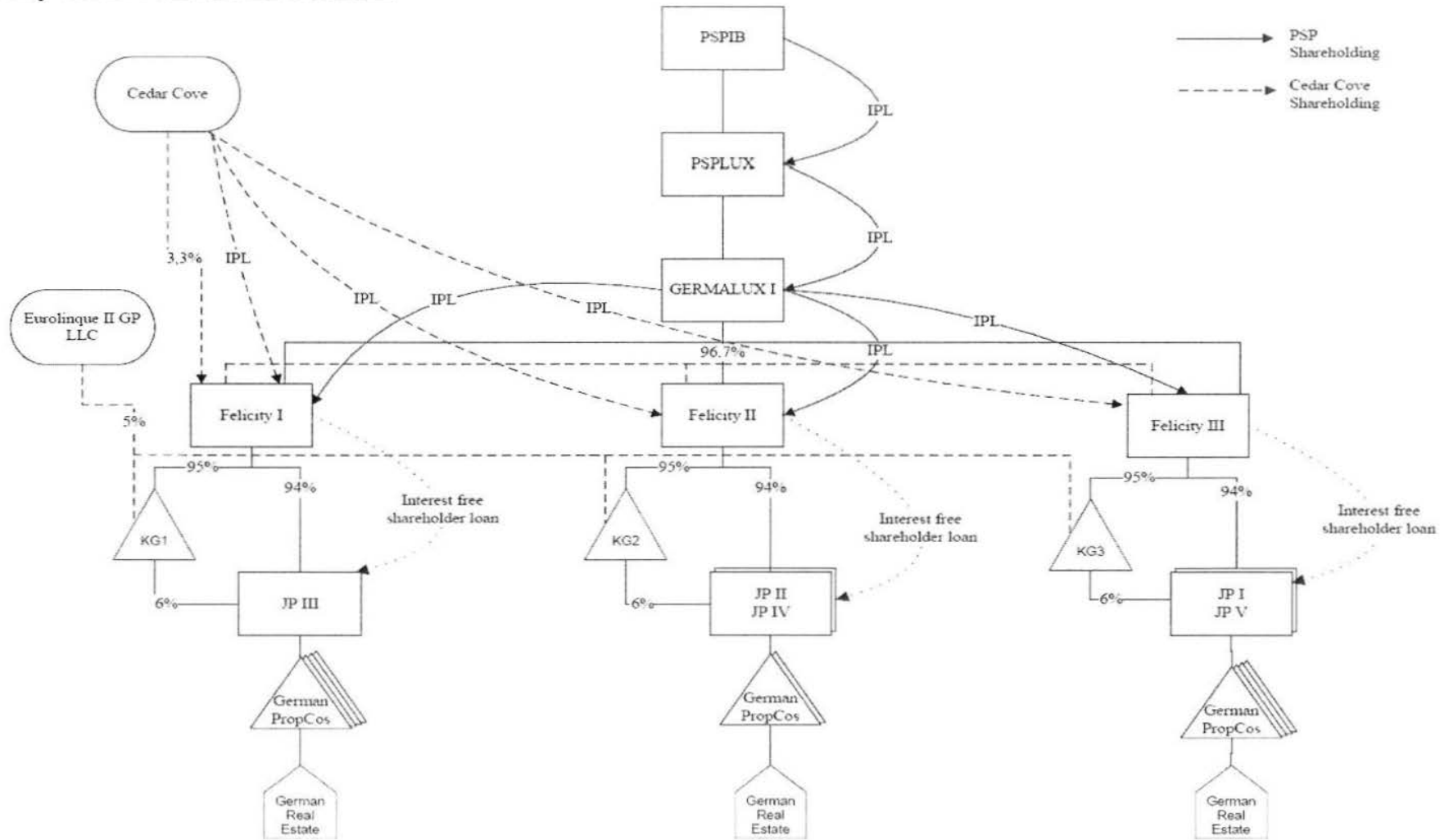
Luxembourg, le 14 MAI 2009



*This tax agreement is based on the facts as presented to PricewaterhouseCoopers Sàrl as at the date the advice was given. The agreement is dependent on specific facts and circumstances and may not be appropriate to any party other than the one for which it was prepared. This tax agreement was prepared with only the interests of PSPLUX S.à r.l. in mind, and was not planned or carried out in contemplation of any use by any other party. PricewaterhouseCoopers Sàrl, its partners, employees and or agents, neither owe nor accept any duty of care or any responsibility to any other party, whether in contract or in tort (including without limitation, negligence or breach of statutory duty) however arising, and shall not be liable in respect of any loss, damage or expense of whatever nature which is caused to any other party.*



Felicity Joint Venture Investment





## TECHNICAL TAX ANALYSIS

### A. Tax residency

- 1 PSPLUX, Germalux, the Felicities and the JP Residential entities will be Luxembourg tax residents in the sense of the double tax treaties concluded by Luxembourg and in the sense of article 159 of the Luxembourg Income Tax Law (hereafter “LITL”), as well as for purposes of Luxembourg domestic corporate income tax and municipal business tax, as their shareholders’ meetings and their managers’ meetings will take place in Luxembourg and as their accounting will be done in Luxembourg. Consequently, tax residency certificates will be issued upon request.

### B. Tax regime applicable to IPL and debt-to-equity ratio considerations

#### B.1 Tax classification as debt

- 2 According to the commentaries to the income tax law (commentaries included in “Projet de Loi N° 571 (1955)”) on the former article 114 LITL (now article 97 LITL) on income from participation, where an income participating loan bears a minimum fixed interest rate, payable even when the company is in a loss position, and provided the principal amount of the loan is repayable before the reimbursement of the company’s share capital, the income participating loan should continue to be treated as a debt for Luxembourg tax purposes.
- 3 Consequently, the IPLs granted to PSPLUX, Germalux and the Felicities will be qualified as debt for both net wealth tax purposes and corporate income tax purposes, and interest thereon will be deductible under the same conditions as apply to fixed interest debt.

#### B.2 Classification as interest rather than dividend

- 4 Authors have examined the question whether the definition of “dividends” given by the Luxembourg income tax law could include payments accounted for as interest<sup>1</sup>. The key criteria for characterizing a payment as dividend, rather than interest are:
  - Entitlement to ongoing profit (including profit reserves); and
  - Entitlement to the liquidation proceeds.
- 5 Under this interpretation, the payment of an amount neither directly relating to the entire profit of the borrower, nor to its liquidation proceeds, need not be considered as a dividend.

<sup>1</sup> A. Steichen, “Précis de droit fiscal de l’entreprise,” Editions Saint-Paul, 2004, Section 702 and following, p. 462.

- 6 In the case at hand, since the interest will be dependent on the income realised before Luxembourg taxes and variable interest, and not profit after tax, the loan interest may be qualified as interest rather than dividend.

**B.3 Payment of remuneration free of Luxembourg dividend withholding tax**

- 7 Article 146(1)-3 LITL provides for the application of a withholding tax upon payment of interest arising from participating bonds or other similar securities. Interest payments are only subject to a 15% dividend withholding tax on this ground if the following conditions apply:
- The loan is structured in the form of bonds or other similar securities; and
  - Aside from the fixed interest, a supplementary interest varying according to the amount of distributed profits is paid, unless the supplementary interest is linked to a corresponding decrease in the fixed interest.
- 8 On the contrary, interest payments related to participating loans are not subject to a specific dividend withholding tax.
- 9 In the present case, the debt instrument is structured as a participating loan (and not a profit participating bond), and the participating interest does not depend on distributed profit. Therefore, interest on the IPL paid by PSPLUX, Germalux and the Felicities will not be subject to any dividend withholding tax.
- 10 Furthermore, interest payment under the IPL will not be subject to withholding tax by virtue of articles 97(1)-2 and 146 (1)-2 LITL (i.e. “Stille Gesellschaft”, “bailleur de fonds” or “silent partnership”). Indeed, there is no intention to create such partnership in the case at hand as there is no “affectio societatis” by the IPL holder and no intention to establish a company in the sense of article 1832 of the civil Law Code.
- 11 Based on the above analysis, no dividend withholding tax on investment income will be due on interest paid under the IPL (neither on the grounds of article 146 (1) 3 LITL nor of article 146 (1) 2 LITL).

**B.4 Deductibility of the remuneration paid to IPL holders**

- 12 100% of all interest paid on the IPL will in principle be tax deductible in accordance with article 45 (1) LITL, unless article 45 (2) LITL or article 166 (5) LITL is applicable.

**C. Debt-to-equity ratio**

- 13 Generally, according to Luxembourg practice, a debt to equity ratio of 85:15 needs to be respected by a company investing in participations. Any interest paid in excess of the applicable ratio should be qualified as dividends and subject to a 15% withholding tax for the purposes of article 146 LITL.
- 14 PSPLUX will be in a true back-to-back position with respect to the back-to-back IPL granted to Germalux. The overall investments made by Germalux and the Felicities will be regarded as connected with the IPLs financing. This is economically speaking clearly the case: if the investments made by Germalux and the Felicities do well, Germalux and the Felicities pay out a very significant element of their income as interest on the IPLs, and if the investments do badly, only fixed interest have to be paid on the IPLs. Furthermore, the IPL granted will provide for limited recourse by PSPIB against the assets financed by the IPL. The principal amount of the IPL outstanding will also be (partially) reimbursed in case of (a partial) exit from or of the investments financed.
- 15 Consequently, these entire activities will fall outside the calculation of the 85:15 debt-to-equity ratio. Hence none of the interest paid on the IPL will be re-characterised as a deemed dividend. As a result, all the interest paid on IPL will in principle be fully deductible for corporate tax purposes and will not be subject to any dividend withholding tax.

