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AVOCATS À LA COUR

NEWSLETTER

May 2009

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1. Commission Decision 2008/961/EC and Commission Regulation (EC) 1289/2008 of 12 December 2008 relating to IFRS equivalence in relation to third country GAAPs

The European Commission has adopted recent measures granting the GAAPs of certain third countries equivalence to IFRS under the relevant prospectus and transparency provisions.

US GAAP and Japanese GAAP are considered equivalent to adopted IFRS from 1 January 2009.

Furthermore, third country issuers listed on EU markets will continue to be able to prepare and file their financial statements in accordance with the GAAPs of China, Canada, South Korea or India for a transitional period of no more than 3 years ending no later than 31 December 2011.

Regulation (EC) 1289/2008 has amended Article 35 of Regulation (EC) 809/2004 (implementing Directive 2003/71/EC as regards elements related to prospectuses and advertisements) and Commission Decision 2008/961/EC has repealed Commission Decision 2006/891/EC (on the use by third country's issuers of securities of certain third countries' national accounting standards and International Financial Reporting Standards to prepare their consolidated financial statements), both in order to reflect the above with effect from 1 January 2009.

2. Regulation (EC) 24/2009 of the European Central Bank of 19 December 2008 concerning statistics on the assets and liabilities of financial vehicle corporations engaged in securitisation transactions

The European Central Bank ("ECB") adopted on 19 December 2008 the Regulation (EC) 24/2009 concerning statistics on the assets and liabilities of financial vehicle corporations engaged in securitisation transactions (the "Regulation") in order to provide the ECB with adequate statistics on the financial activities of the financial vehicle corporations ("FVC") subsector.

The Regulation is directly applicable to Luxembourg securitisation vehicles under the Luxembourg law of 22 March 2004 on securitisation (the "SV Law") as well as companies not falling under the SV Law *per se* but proceeding to securitisation transactions.

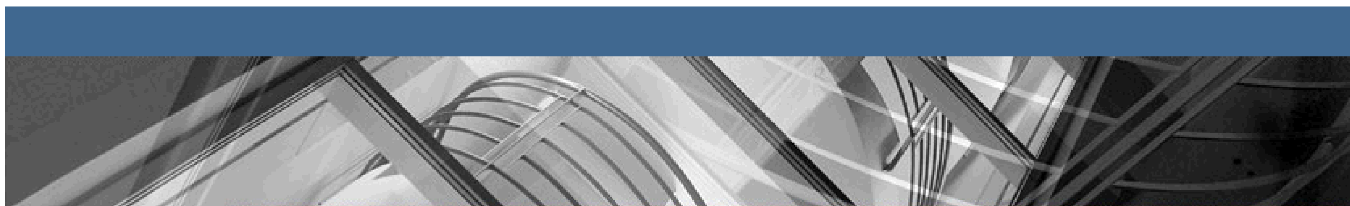
The ECB has estimated that given the close links between the securitisation activities of FVCs (see definition below) and monetary financial institutions ("MFI")[1] a complementary and integrated reporting of MFIs and FVCs is required.

The Regulation applies to FVCs.

FVC are defined as being an undertaking which is constituted pursuant to national or EU law under one of the following:

- contract law as a common fund managed by management companies;
- trust law;

[1] Monetary financial institution within the meaning of article 1 Regulation (EC)25/2009 (ECB/2008/32) concerning the balance sheet of monetary financial institutions



- company law as a public or private limited company;
- any other similar mechanism;

and whose principal activity meets both of the following criteria:

- it intends to carry out, or carries out, one or more securitisation transactions and is insulated from the risk of bankruptcy or any other default of the originator;
- it issues, or intends to issue, securities, securitisation fund units, other debt instruments and/or financial derivatives and/or legally or economically owns, or may own, assets underlying the issues of securities, securitisation fund unit, other debt instruments and/or financial derivatives that are offered for sale to the public or sold on the basis of private placements.

The relevant national central bank ("NCB"), in the case of the Grand Duchy of Luxembourg, the *Banque Centrale de Luxembourg,* ("BCL"), must establish and maintain a list of FVCs resident in its territory which are required to report under the Regulation and transmit this information to the ECB on a regular basis.

The FVCs shall therefore inform the relevant NBC (in the case of Luxembourg FVCs, the BCL) within one week from the date where the FVC has taken up business irrespective of whether it expects to be subject to regular reporting obligations under the Regulation.

FVCs shall provide to the BCL, data on end-of-quarter outstanding amounts, financial transactions and write-offs/write-downs on the assets and liabilities of FVCs on a quarterly basis, in accordance with Annexes I and II of the Regulation.

FVCs shall comply with the reporting requirements in accordance with the minimum standards specified in Annex III of the Regulation. The NCBs shall define and implement the arrangements to be actually followed in accordance with local characteristics.

The BCL may grant derogations to certain reporting requirements set out in the Regulation.

The first reporting pursuant to the Regulation shall begin with quarterly data from December 2009. When reporting data for the first time, only outstanding amounts shall be reported.

FVCs that take up business after 31 December 2009 shall, when reporting data for the first time, report data on a quarterly basis as far back as the original securitisation transaction.

The ECB's sanctions regime laid down in Regulation (EC) 2533/98 of 23 November 1998 is applicable to FVCs. According thereto the ECB may impose fines of up to € 200,000 for certain infringements.

3. United Kingdom accepts EC Regulation on the law applicable to contractual obligations (Rome I)

According to Commission Decision on 22 December 2008, Regulation (EC) n°593/2008, on the law applicable to contractual obligations (Rome I), shall apply to the United Kingdom. It shall apply from 17 December 2009, except for Article 26 which shall apply from 17 June 2009.

4. Call for evidence on possible implementing measures of the future UCITS IV directive

Further to the adoption by the European Parliament, on 13 January 2009, of the proposal for the new UCITS Directive (the "UCITS IV Directive"), containing amendments to the UCITS Directive (85/611 as amended), the European Commission (the "Commission") has requested the assistance of the Committee of European Securities Regulators ("CESR") on the content of the implementing measures to be taken pursuant to the UCITS IV Directive. As the UCITS IV Directive imposes a strict deadline (1 July 2010) for adoption of certain level 2 measures (according to the *Lamfalussy Process*), the Commission felt it was important for CESR to start its work as soon as possible. All contributions were to be submitted by 31 March 2009 to CESR and CESR published responses received to its call for evidence

on 8th April 2009. CESR's advice is requested by 30 October 2009.

Due to the significant number of articles of the UCITS IV Directive providing for implementing measures to be taken, the request for assistance is divided into three parts by order of priority:

Part I – Request for technical advice on the level 2 measures related to the **management company** passport which covers, amongst others, organisational requirements and conflicts of interest for management companies, rules of conduct and conflicts of interest for management companies, risk management, measures to be taken by depositaries, on-the-spot verification and investigation and exchange of information between competent authorities.

Part II – Request for technical advice on the level 2 measures related to **key investor information (or key information document)** – supplement to the Commission's April 2007 request for assistance on key investor disclosures for UCITS.

In parallel, CESR issued another "Consultation paper on technical issues relating to Key Information Document (KID) disclosures for UCITS" on March 16, 2009 (the "Consultation Paper"). Since the Commission requested CESR's assistance on developing KID disclosures in April 2007, CESR has been working intensively to prepare its response, in parallel with the finalisation of the revised UCITS IV Directive at Level 1. The Commission used CESR's advice as the basis for the investor testing exercise it has been carrying out since March 2008, the second (and final) phase of which is due for completion by end-May 2009. CESR has also been closely involved in both the design and roll-out of the consumer testing process. In the February 2008 advice, CESR identified a number of technical issues (risk and reward disclosure, past performances, charges, methodology of illustration of charges, calculation of ongoing charges figures and performance scenarios) arising from its work that merited further consideration. This Consultation Paper sets out CESR's proposed approach on the technical issues.

The Commission considers that it is essential that level 2 measures enter into force at the end of the expiry of the transposition period for level 1 provisions ending on 1 July 2011.

Part III – Request for technical advice on the level 2 measures related to **fund mergers, master-feeder structures** and the **notification procedure**. For this Part III, CESR's advice is requested by 30 October 2009 although CESR is invited to reflect on the best way to organise its work should this prove not to be achievable.

The European Council's final approval of the UCITS IV Directive is expected very shortly, in the course of May or June 2009.

5. Philanthropy and patronage

On 27 January 2009, the European Court of Justice rendered its decision in the *Persche* vs *Finanzamt Lüdenscheid* matter (case C-318-07) and this decision will have an important impact on the practicability of transborder donations to non-profit-organisations. The Court has indeed decided that "*article 56 EC precludes legislation of a Member State by virtue of which, as regard gifts made to bodies recognised as having charitable status, the benefit of a deduction for tax purposes is allowed only in respect of gifts made to bodies established in that Member State, without any possibility for the taxpayer to show that a gift made to a body established in another Member State satisfies the requirements imposed by that legislation for the grant of such a benefit.*"

This decisions comes as a very useful addition to the decision of the same Court in the Stauffer matter rendered in 2006 and in which the Court ruled that the free movement of capital applied to operations carried out by non-profit-making charitable foundations and that Member States were thus not allowed to exclude foreign charitable foundations from the benefit of certain tax exemptions on investment revenues available to national charitable foundations (case-386/04).

6. Reorganisation of professionals of the financial sector

Since our previous Newsletter in which we reported on a number of decisions rendered in the context of the reorganisation of certain professionals of the financial sector (Lehman Brothers (Luxembourg) S.A.; Glitnir S.A.; Landsbanki S.A. and Kaupthing

S.A.) further important decisions have been rendered in this context.

In particular, in a decision dated 28 January 2009, the Court of appeal, thereby overturning a decision of the District Court dated 24 December 2008, decided that in the context of the suspension of payment proceedings provided for by articles 60 ff of the financial sector law, the administrators of Kaupthing Bank could seek the approval, by a mere majority of creditors, of a reorganisation plan not only providing for certain claim reductions but further providing for a differentiated treatment of different categories of creditors.

Further, in a decision rendered on April 2, 2009, the District Court sitting in commercial matters decided that notwithstanding the wording of article 60-2 (10) of the financial sector law which provides that suspension of payment proceedings can be opened for a period not exceeding six months, the Court could, in circumstances where there was a good perspective that a reorganisation could succeed in the near future, extend the suspension of payment beyond this six month period.

7. Recognition and enforcement of foreign arbitral awards ECJ Case C185/07

In a judgment dated 10 February 2009 (Allianz SpA / West Tankers Inc.), the ECJ ruled that it is incompatible with Council Regulation (EC) n° 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State ("anti-suit injunctions") on the ground that such proceedings would be contrary to an arbitration agreement.

In its judgment in Turner (dated 27 April 2004), the Court had already held that the Brussels Convention precludes the imposition of an anti-suit injunction in connection with proceedings before the court of another Member State, even where the proceedings abroad are brought by a party in bad faith with a view to frustrating the existing proceedings.

On the grounds of that judgment, the Court relied, essentially, on the principle of mutual trust which underpins the system of Convention.

The ECJ considers that the fact that the basis of the judgment in Turner was the Brussels Convention, whereas Regulation n° 44/2001 is applicable, *ratione temporis*, to the Allianz case, is no hindrance to apply the principles set out in Turner. The regulation is intended to update the Convention, while adhering to its structure and basic principles and ensuring its continuity.

Because of the exclusion of arbitration from the scope of Regulation n° 44/2001, the House of Lords took the view that the Turner case-law could not be applied to the Allianz case. In Turner indeed, the Court expressly related the principle of mutual trust to proceedings *within the scope of the Convention*.

According to the ECJ, the decisive question is not whether the application for an anti-suit injunction – in this case, the proceedings before the English courts – falls within the scope of application of the Regulation, but whether the proceedings against which the anti-suit injunction is directed – the proceedings before the court in Syracuse – do so. It is more important whether the Regulation applies to the action against which the anti-suit injunction is directed.

The existence and applicability of the arbitration clause merely constitute a preliminary issue which the court seized must address when examining whether it has jurisdiction. Even if the view were taken that that issue fell within the ambit of arbitration, as a preliminary issue it could not change the classification of the proceedings, the subject-matter of which falls within the scope of the Regulation.

A legal relationship does not fall outside the scope of Regulation n° 44/2001 simply because the parties have entered into an arbitration agreement. Rather the Regulation becomes applicable if the substantive subject-matter is covered by it. The preliminary issue to be addressed by the court seized as to whether it lacks jurisdiction because of an arbitration clause and must refer the dispute to arbitration in application of the New York Convention is a separate issue. An anti-suit injunction which restrains a party in that situation from commencing or continuing proceedings before the national court of a Member State interferes with

proceedings which fall within the scope of the Regulation.

8. CSSF circular 09/393 concerning statistics on guaranteed deposits and instruments

CSSF circular 09/393 of 27 February 2009 confirms that, in accordance with the articles of association of the Luxembourg Deposit Guarantee Association (*l'Association pour la Garantie des Dépôts, Luxembourg* (the "**AGDL**")), as recently amended, the CSSF has accepted to compute on an annual basis as of 31 December the total amount of the deposits and instruments guaranteed as well as the respective percentage relating to each member of the AGDL in that respect.

The circular clarifies the information to be provided by the respective members of the AGDL to the CSSF for that purpose and requires the statistics to be provided to the CSSF by no later than 30 April 2009.

The circular furthermore refers to the recent change introduced by the law of 19 December 2008 on the State budget (amending article 62-2(2) of the law of 5 April 1993 on the financial sector), increasing the maximum amount covered by the Luxembourg deposit guarantee scheme for each depositor from € 20,000 to € 100,000 (as opposed to the amount of compensation to be paid to each investor that remains, regardless of the number of accounts, limited to a value equivalent to € 20,000 (article 62-12(2) of the law)).

The circular also refers to the recent amendments to the articles of association of the AGDL dated 18 February 2009 and in particular to the splitting of the deposit guarantee scheme and the investor compensation scheme (exempting *inter alia* investment firms to contribute in case of compensation payments to be made under the deposit guarantee scheme).

Further amendments to the Luxembourg legal framework on deposit guarantee schemes may be required in the future pursuant to Directive 2009/14/EC of 11 March 2009 amending Directive 94/19/EC on deposit guarantee schemes as regards the coverage level and the payout delay. Indeed, Directive 2009/14/EC, in addition to increasing the minimum coverage level to at least € 50,000 by 30 June 2009 and to € 100,000 by 31 December 2010, is reducing the payout delay to 20 working days (that may be extended in certain exceptional circumstances) and the period for the competent authorities to determine that a credit institution appears to be unable to repay deposits and to have no current prospect of being able to do so to 5 working days (after first becoming satisfied that it has failed to repay deposits).

9. CSSF approves fast-track procedures for side pockets

In March 2009, the CSSF approved a fast-track authorisation procedure (the "Procedure") for the implementation of side-pocketing in Luxembourg non UCITS undertakings for collective investment and specialized investment funds or any sub-funds thereof (collectively the "Funds") facing serious liquidity issue in relation to certain of their assets.

The Procedure is limited to two side pocketing options, namely spin-off via creation of (1) a new class of shares/units or (2) a new sub-fund, which class or sub-fund have both to receive the illiquid assets and which are both deemed to be in liquidation as soon as launched and hence closed to subscriptions and suspended to redemptions.

The Procedure consists of filing the following information with the CSSF: side-pocketing option chosen, description of the illiquid assets and fees to be charged to the side-pocket, communication to investors and other authorities, ongoing CSSF information and reporting. Clearance of the required side-pocketing may be expected within one week from filing such information.

The Procedure is being used, among others, by funds of hedge funds facing liquidity issues because of their underlying hedge funds themselves having implemented side-pocketing arrangements or gating provisions, or being in the process of liquidation.

It is important to note that the Procedure cannot be contrary to the Fund's articles / rules and cannot be used (i) if the assets concerned by the side-pocketing represent more than 20% of the relevant Fund's total net assets or (ii) to solve temporary valuation or

potential or presumed illiquidity of an asset. Once becoming liquid again, any asset part of a side-pocketing arrangement must be promptly realized and can hence no longer be held by the Fund.

Situations falling outside the Procedure's scope of application do not benefit from the fast-track treatment and will be considered by the CSSF on a case-by-case basis.

10. Loi du 13 mars 2009 relative aux procédures européennes d'injonction de payer et de règlement des petits litiges

This contribution sets out the adaptations introduced in the NCPC by a law of 23 March 2009 in order to ensure the application in Luxembourg of Regulation (EC) n° 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure and of Regulation (EC) n° 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.

Par une loi du 13 mars 2009, le législateur a procédé à une adaptation du droit procédural luxembourgeois afin de garantir l'application des règlements communautaires n°1896/2006 instituant une procédure européenne d'injonction de payer et n°861/2007 instituant une procédure européenne de règlement des petits litiges.

Ces règlements communautaires, qui s'appliquent exclusivement aux litiges transfrontaliers, ont pour but de simplifier, accélérer et réduire les coûts du recouvrement de certaines créances.

La procédure européenne d'injonction de payer vise le recouvrement de créances liquides et exigibles à la date à laquelle la demande d'injonction de payer est introduite. Compétence est attribuée à un juge unique pour traiter de ces demandes. Deux voies de recours sont prévues à l'encontre de l'injonction délivrée sur cette base: l'opposition, à former dans un délai de 30 jours à compter de la signification ou de la notification de l'injonction européenne de payer, et, à l'expiration de ce délai et pour des motifs exceptionnels, la demande de réexamen. L'opposition formée dans le délai imparti met un terme à la procédure européenne d'injonction de payer et entraîne le passage automatique du litige à la procédure civile ordinaire, telle que prévue par le droit luxembourgeois.

S'agissant de la procédure européenne de règlement des petits litiges, elle est utilisable pour les demandes ne dépassant pas la valeur de 2.000 euros au moment de l'introduction de la demande. Compétence a été attribuée au juge de paix qui statue en la matière en dernier ressort. Afin de garantir l'égalité de traitement entre litiges purement internes et litiges transfrontaliers, le taux de compétence de la justice de paix en premier et dernier ressort a été relevé pour passer de 1.250 à 2.000 euros.

Cette loi, en outre et pour l'essentiel, assouplit les règles applicables en matière de caution *judicatum solvi* (très rarement utilisée en pratique), ainsi que la procédure de vente de biens meubles dépendant d'une succession vacante qui pourra, dans certains cas, être effectuée de gré à gré au lieu de l'être aux enchères publiques.

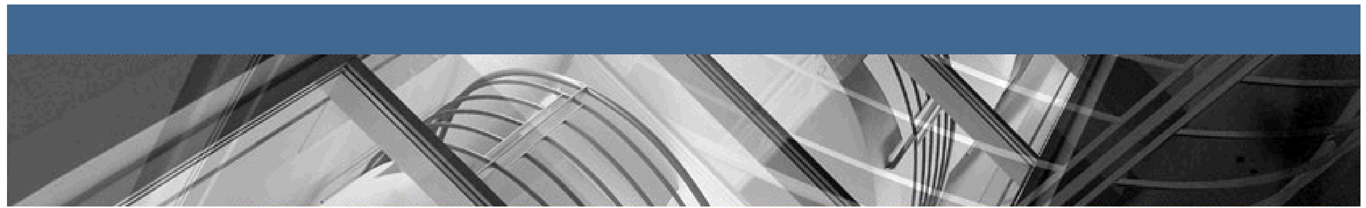
11. New tax developments

Circular on the IP tax regime. Circular on capital duty. Implementation of OECD standards for exchange of information. Circular on the evaluation of certain benefits in kind granted by the employer to its employees. Circular on withholding tax levied on savings income paid to Luxembourg residents. Tax returns in the English language. "VAT package" approved by the government. European Court of Justice VAT case law.

Circular on the IP tax regime

On 5 March 2009, the Luxembourg tax authorities issued a Circular n°50bis/1 on the partial exemption of income from qualifying intellectual property ("IP") rights. The IP tax regime was introduced into Article 50bis of the Luxembourg Income Tax Law by the law dated 21 December 2007 (please refer to our March 2008 Newsletter for further details).

The circular provides extensive information in particular on the type of IP assets and on the income that qualify for the IP regime. It further includes details on the conditions to be met to benefit from the



partial exemption, in particular regarding the date of constitution or acquisition of the IP right, the obligation to capitalise expenses, amortisations and deductions linked to the IP right, the definition of the affiliated companies from which the IP rights may not be acquired. The circular also details the valuation of the IP rights.

Circular on capital duty

On 31 December 2008, the Luxembourg tax authorities issued Circular n°739 which details the nominal registration fees implemented by the law of 19 December 2008 abolishing the 0.50% capital duty and the fixed capital duty due by certain investment vehicles (please refer to our December 2008 tax newsletter for further details).

The Circular clarifies that the 75.00 Euro registration fee is due exclusively in the cases mentioned by the law of 19 December 2008, i.e. upon incorporation of a Luxembourg company, modification of its statutes of incorporation or transfer of a foreign company to Luxembourg.

Further, it states that a contribution of real estate located in Luxembourg in exchange for shares is subject to the registration fee of 0.5% + 2/10th and to the transcription fee of 0.50%. A contribution in exchange for a consideration other than shares is subject to the registration fee of 5% + 2/10th and to the transcription fee of 1% (possibly increased by the 3% surtax, if the real estate is located in Luxembourg City) .

The Circular also expressly states that capital duty exemptions previously granted under Article 4-2 of the Luxembourg Capital Duty Law remain applicable even if the conditions for the exemption are no longer fulfilled because, e.g., the shares have been transferred within the 5 year period.

Circular on the valuation of certain benefits in kind granted by the employer to employees

On 18 February 2009, the Luxembourg tax authorities issued the Circular n°104/1 on the valuation of certain benefits in kind granted by the employer to employees. In particular, it covers the granting by the employer, for free or at a reduced price, of housing facilities and company cars that can be used for private purposes also. These benefits in kind are as a rule subject to income tax and salary withholding tax. The Circular sets out details for the valuation of these benefits for tax purposes. It also covers the case where benefits in kind are granted to partners and shareholders of capital companies, whether they are employees of the company or not.

Circular on withholding tax levied on savings income paid to Luxembourg residents

On 4 February 2009, the Luxembourg tax authorities issued a Circular that amends and replaces the Relibi Circular n°1 of 24 January 2006 on withholding tax on certain savings income paid to Luxembourg residents introduced by the law of 23 December 2005. The Circular covers the amendments introduced by the law of 17 July 2008 and article 5 of the law of 19 December 2008.

Implementation of OECD standards for exchange of information

On 13 March 2009, the Luxembourg government announced that OECD standards will be applied to exchange of information under Luxembourg double tax treaties.

This concerns in particular the introduction in certain Luxembourg double tax treaties of Article 26 (5) of the OECD Model Tax Convention on Income and on Capital and which provides that bank secrecy cannot be an obstacle to exchange of information for tax purposes.

In this respect, the Treasury Minister, Luc Frieden, announced on 28 April 2009 to the Council of the government that after intense negotiations in Washington from 24 to 26 April 2009, the first agreement was negotiated and finalised with the United States of America on a protocol modifying the agreement of 3 April 1996 on non-double taxation between Luxembourg and the United States. Such protocol will provide for the exchange of information on demand between tax authorities including in specific cases that previoulsy would have been covered by bank secrecy.

The agreement will be signed in the days to come as soon as certain American procedures have been carried out.

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Tax returns in English

In the context of the simplification of the formulas issued by the direct tax authorities, certain tax returns relating to corporate taxation and income taxation can be filed and returned in English for the fiscal year 2008 and onwards. This includes tax returns for corporate income tax, for trade tax and for withholding tax on dividends.

"VAT package" agreed by the government

The Luxembourg government council has recently agreed a number of projects relating to the "VAT package" as to the implementation of certain VAT directives. The amendments shall enter into force as from 1 January 2010.

The VAT package shall modify the determination of the place of supply of services. In principle, business-to-business services will be taxable in the country of establishment of the recipient instead of the supplier's country of establishment. Stronger cooperation and information exchange rules are foreseen in order to fight against EU VAT fraud and evasion. Additional filing requirements and new EC sales lists for intra-EU supplies of services as well as a new electronic procedure for claiming foreign VAT shall be introduced.

European Court of Justice - VAT case law

Case C-29/08 concerns the situation where a parent company disposes of all the shares held in a subsidiary or controlled company to which it has provided services subject to VAT. In his opinion rendered on 12 February 2009, the Advocate General states that such activity constitutes an economic activity, that the disposal of shares is an operation exempt from VAT and that input VAT on services rendered to the parent company which are directly and immediately linked to the disposal of the shares is not deductible. The fact that the disposal of the shares is part of the parent company's objective to restructure its industrial activities is not relevant.

Case C-515/07 concerns an association promoting the interest of the agricultural sector. Its activities were falling within the scope of the VAT for the services it provided to third parties; whereas the services rendered to its members were not considered an economic activity for VAT purposes. The association acquired goods and services which were used for both type of activities. On 12 February 2009, the European Court of Justice (ECJ) ruled that the non economic activities performed by the association could not be considered to be carried out for "purposes other than" those of the business within the meaning of Article 6(2)(a) of the Sixth VAT Directive (Article 26 (1)(a) of Directive 2006/112/EC). Referring directly to the Securenta case (C-437/06), the ECJ confirmed that where a taxable person simultaneously carries out economic activities, whether taxed or exempt, and non-economic activities outside the scope of the aforementioned directive, deduction of the input VAT relating to expenditure is allowed only to the extent to which that expenditure may be attributed as an output to the economic activity of the taxable person.

In Case C-407/07, the ECJ ruled that services supplied to their members by independent groups for VAT purposes are covered by the exemption provided for in Article 13 A (1)(f) of the Sixth VAT Directive (132 (1)(f) of Directive 2006/112/EC), even if those services are supplied only to one or several of those members. This interesting decision for groups of companies and banks established in Luxembourg should be read in the light of the "Frequently Asked Questions" published by the Luxembourg VAT authorities on their website in December 2008 and of the VAT Circular 707 of 29 January 2004 on the VAT exemption applying to independent groups. In apparent contradiction with the above judgment of the ECJ, the Luxembourg VAT authorities consider that the exemption should be disregarded in case of specific services rendered to one or several members of the independent group.

For any further information please contact us or visit our website at www.ehp.lu .

The information contained herein is not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific legal advice concerning particular situations. We undertake no responsibility to notify any change in law or practice after the date of this document.

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