ELVINGER, HOSS & PRUSSEN

AVOCATS À LA COUR

NEWSLETTER
September 2009

1. Law of 20 April 2009 relating to the electronic filing with the Register of Commerce and Companies – Grand-Ducal Regulation of 22 April 2009 amending the Grand-Ducal regulation of 23 January 2009 (as amended) relating to the execution of the law of 19 December 2002 relating to the RCS and to the accounting and annual accounts of enterprises – Circulars 09/001 and 09/002 of the RCS
Read more on page 2

2. Law of 29 April 2009 relating to unfair competition practices
Read more on page 3

3. Convention on Choice of Court Agreements
Read more on page 3

4. Law of 29 May 2009 abolishing the obligation to provide a certified copy of an original document
Read more on page 4

5. Amendment of the law of 1915 on commercial companies
Read more on page 4

6. Lugano Convention – Alignment of the rules of the Lugano Convention with the rules of Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
Read more on page 5

7. UCITS IV Directive
Read more on page 5

8. New tax developments
Read more on page 6

1. Law of 20 April 2009 relating to the electronic filing with the Register of Commerce and Companies – Grand-Ducal Regulation of 22 April 2009 amending the Grand-Ducal regulation of 23 January 2009 (as amended) relating to the execution of the law of 19 December 2002 relating to the RCS and to the accounting and annual accounts of enterprises – Circulars 09/001 and 09/002 of the RCS

The law of 20 April 2009 relating to the electronic filing with the register of commerce and companies (the "Law of 2009") amended the law of 19 December 2002 relating to the register of commerce and companies and to the accounting and annual accounts of enterprises (the "Law of 2002") and the law of 10 August 1915 on commercial companies (as amended).

The purpose of the Law of 2009 is to simplify the administrative burden linked to the registration, filing and publication of documents, to extend the scope of the inscriptions to be made with the Register of Commerce and Companies in Luxembourg ("RCS"), to specify the documents that need to be filed and the procedure to be used for the filings, to provide for a new control procedure and to allow electronic filing.

The new provisions came into force on 1 May 2009 except for the provisions relating to the electronic filing of documents which will come into force on 1 October 2009.

One of the consequences of the new provisions is that, as from 1 June 2009, the RCS has changed its filing system. Indeed all documents filed as from 1 June 2009 may only be consulted electronically, i.e. on the website of the RCS. Hence a paper copy of those documents will no longer be available in the files of the relevant companies. The file of any person or entity that needs to be registered with the RCS will only comprise a paper copy of documents that were filed before 29 May 2009.

The main changes to the Law of 2002 resulting from the Law of 2009 may be summarised as follows:

- Any document under private seal (i.e. other than a notarial deed) may be registered (i.e. enregistré) either with the Administration de l'Enregistrement et des Domaines (as was the case until the Law of 2009) or directly with the RCS. If a document under private seal is registered directly with the RCS, the latter will collect the registration tax on behalf of the State.

- Documents under private seal are exempt from any stamp duty.

- Costs for publication in the Mémorial C, Recueil des Sociétés et Associations (the "Mémorial") will be collected directly by the RCS on behalf of the State.

- The scope of the entities and the nature of the information that need to be registered with the RCS have been clarified. For instance the Law of 2009 has amended the Law of 2002 so as to provide that decisions relating to bankruptcy or similar proceedings and taken by foreign courts against a Luxembourg company in accordance with the EU Council Regulation No 1346/20000 of 29 May 2000 relating to insolvency procedures need to be filed with the RCS.

- The documents that need to be filed with the RCS as well as the filing procedure and the form that those documents must take have been clarified. The Law of 2002 now provides that any document that must be filed or published must be drafted in French, German or Luxembourgish (without prejudice to specific provisions regarding certain matters). It further provides that those documents, translated into an official language of the European Union, may be filed on a voluntary basis. Such a voluntary filing must be made at the same time as the mandatory filing and publication. In case of divergences between the documents published in one of the official languages of the RCS and the voluntary translation, the latter will not be enforceable vis-à-vis third parties. Third parties may, however, rely upon the voluntary translation unless the company proves that they had knowledge of the mandatory version.

- Authorised signatory lists may be filed with the RCS; publication thereof in the Mémorial is optional.

- The Law of 2002 contains a new procedure for the verification of the documents that are filed and their rectification.

- The RCS also has the power to impose the payment of certain costs to those persons having adopted bad habits in filing matters and not respecting the instructions of the RCS.

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- The Law of 2002 also contains provisions relating to the electronic signature of the manager of the RCS.

- As from 1 October 2009 it will be possible to proceed to electronic filings. There are no details yet as to how this type of filing will work.

2. Law of 29 April 2009 relating to unfair competition practices

On 29 April 2009, the Luxembourg legislator adopted a law on unfair commercial practices (hereafter the “Law”) which implements the Directive 2005/29 of the European Parliament and the Council of 11 May 2005 concerning unfair commercial practices (hereafter "the Directive 2005/29”).

The Law shall apply to unfair business-to-consumer commercial practices, towards consumers affecting their economic interests before, during and after the offer for sale and sale of products.

According to the definition of unfair practice laid down in Article 5 of the Directive 2005/29, the Law specifies that “a commercial practice shall be unfair if it is contrary to the requirements of professional diligence and it materially distorts or is likely to materially distort the economic behaviour with regard to product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers”.

The Law states that commercial practices which are misleading or aggressive constitute unfair practices.

Articles 4 to 6 of the Law define misleading practices. Article 7 treats aggressive practices, which use *“harassment, coercion, including the use of physical force, or undue influence”*. Article 8 lists the elements to be taken into consideration in order to determine whether a commercial practice is aggressive.

The Member States have to determine the penalties which shall be *“effective, proportionate and dissuasive”* (Article 13 of the Directive 2005/29). According to the Law, unfair, misleading and aggressive commercial practices are punishable by a fine of between 251 to 120.000 euro.

The Law also provides for some minimal amendments of the law of 30 July 2002 concerning commercial practices, unfair competition, comparative advertising and of the law of 18 December 2006 relating to distance financial services.

3. Convention on Choice of Court Agreements

The Convention of Choice of Court Agreements concluded at The Hague on 30 June 2005 was approved on behalf of the European Community by a Council Decision dated 26 February 2009 (OJ L 133, 29 May 2009), subject to the conclusion of the Convention at a later date.

The Convention on Choice of Court Agreements concluded under the Hague Conference on Private International Law aims to make a valuable contribution to promoting party autonomy in international commercial transactions and increasing the predictability of judicial solutions in such transactions.

Conclusion of the Convention by the Community should complement realisation of the aims underlying existing Community rules on recognition and enforcement of judgments, in particular Regulation (EC) 44/2001 of 22 December 2000 on the jurisdiction and recognition and enforcement of judgments in civil and commercial matters, by creating a harmonised set of rules within the Community in respect of third countries which will become Contracting Parties to the Convention.

The European Community has declared, in accordance with Article 30 of the Convention on Choice of Court Agreements that it exercises competence over all the matters governed by this Convention. Its Member States will not sign, ratify, accept or approve the Convention, but shall be bound by the Convention by virtue of its conclusion by the European Community.

For the purpose of this declaration, the term "European Community" does not include Denmark by virtue of Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community.

This Convention shall enter into force after the deposit of the second instrument of ratification, acceptance, approval or accession. At the present time, the European Community and the United States have only signed the Convention, and only Mexico has accessed it.

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4. Law of 29 May 2009 abolishing the obligation to provide a certified copy of an original document

In the context of the measures indicated by the Luxembourg government in order to alleviate the economic and financial crisis, *inter alia* several measures have been decided by the Parliament in order to ease administrative procedures.

In this context, on 29 May 2009, Parliament voted on a law abolishing the obligation to provide a certified copy of an original document. Indeed a certified copy of an original document delivered by a Luxembourg administrative authority or an administrative authority from another Member State of the European Union to be submitted in an administrative procedure of the State, municipalities or any other public person of public law, can no longer be requested. In case of doubt on the validity of the produced copy, the authorities may request the presentation of the original provided such a request indicates the reasons therefor.

This law came into force on 8 June 2009.

5. Amendment of the law of 1915 on commercial companies

The law of 10 June 2009 concerning cross-border mergers of limited liability companies, the simplification of the rules regarding the formation of *sociétés anonymes* and the maintenance and alteration of their capital, and implementing Directives 2005/56/EC, 2006/68/EC and 2007/63/EC was published in the Luxembourg legal gazette on 29 June 2009.

This law brings about certain important modifications to the law of 10 August 1915 on commercial companies (the "law of 1915"):

The law now allows increases of capital by contributions in kind without the need for an auditors' report. This exemption from the requirement to draw up an auditors' report applies in the case of contributions of transferable securities and money market instruments which are traded on a regulated market. Contributions of any other assets which have already been the subject of a valuation by an auditor carried out not earlier than six months prior to the contributions are also exempt from the requirement of an auditors' report.

The rules concerning the repurchase of own shares are now more flexible:

- the authorisation of the general shareholders' meeting for the purchase of own shares may now be given for a maximum of five years (as compared to eighteen months currently); and

- the maximum percentage of shares that can be repurchased (currently 10%) is abolished.

All other requirements set out in article 49-2 of the law of 1915 remain unchanged.

The rules concerning the financial assistance which a company can provide in the context of the acquisition of its own shares are relaxed. A *société anonyme* may now provide financial assistance on the following conditions:

- the transaction must be made at fair market conditions;

- the transaction requires the prior approval of the general meeting which must be held with the quorum and majority rules required for amendment of the articles and on the basis of a report of the management body of the company. If the members of the management body are interested in the transaction, the general meeting must be provided with a report from the statutory auditor or réviseur d'entreprises;

- the transaction may not result in the reduction of the net assets of the company below the amounts available for distribution; and

- the acquisition of treasury shares from the company or the subscription of new shares by the third party benefitting from the financial assistance must be made at a fair price.

The law furthermore introduces the possibility of a partial division (French: *scission partielle*) which is the transaction in which the company being divided is not dissolved (which occurs in a demerger) and where the shares issued by the recipient companies are directly allocated to the shareholders of the company. Until now, the law of 1915 only allowed transfers by a *société anonyme* of certain assets or of a branch of activity where the transferring entity receives shares from the company to which the assets/ branch of activity are/is transferred (as opposed to its shareholders in a partial division).

The law finally implements the not yet implemented provisions of Directive 2005/56/EC on cross-border mergers. The law of 23 March 2007 had for the first time introduced specific rules on cross-border mergers into Luxembourg law. These rules were further

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specified by a second law of 23 March 2007. The law of 1915 is now completed by a certain number of provisions taken from the Directive and which, *inter alia*, concern the required formalities and now fully conforms to the current EU rules on cross-border mergers.

The transitory provisions of the law of 10 June 2009 provide that it applies to all company mergers for which the draft terms of merger have been published on or later than 1 August 2009. All other provisions of the law entered into force on 3 July 2009.

An up-to-date version of our non-official consolidation of the law of 10 August 1915 on commercial companies is available in English and in French on our website www.ehp.lu or via the links below.

Law of 10 August, 1915 on commercial companies (update 26 August, 2009)

Loi du 10 août 1915 concernant les sociétés commerciales (mise à jour au 26 août 2009)

6. Lugano Convention – Alignment of the rules of the Lugano Convention with the rules of Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

The conclusion of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which will replace the Lugano Convention of 16 September 1988, was approved on behalf of the Community by a Council Decision dated 27 November 2008, published in the European Official Journal dated 16 June 2009.

Council Regulation (EC) No 44/2001 of December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, modernised the rules of the Brussels Convention and made the system of recognition and enforcement swifter and more efficient.

In the light of the parallelism between the Brussels and the Lugano Convention regimes on jurisdiction and on recognition and enforcement of judgments in civil and commercial matters, the rules of the Lugano Convention should be aligned with the rules of Regulation (EC) No 44/2001 in order to achieve the same level of circulation of judgments between the EU Member States and the EFTA States concerned (Iceland, Norway and Switzerland).

The Commission negotiated the convention, on behalf of the Community, with Iceland, Norway, Switzerland and Denmark. This Convention was signed, on behalf of the Community, on 30 October 2007 in accordance with Council Decision 2007/712/EC, subject to its conclusion at a later date.

The Council Decision dated 27 November 2008 includes a declaration of the European Community according to which, when amending Council Regulation (EC) No 44/2001, it intends to clarify the scope of Article 22(4) of the said Regulation with a view to taking into account the relevant case law of the Court of Justice of the European Communities with respect to proceedings concerned with the registration or validity of intellectual property rights, thereby ensuring its parallelism with Article 22(4) of the Convention.

7. UCITS IV Directive

The European directive on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (the “UCITS IV Directive”) was adopted by the Council of the European Union on 22 June 2009 without any debate. The UCITS IV Directive will now be published in the Official Journal (OJ) which usually takes between 4 and 12 weeks from the date of its adoption by the Council and on the twentieth day following its publication in the OJ, the UCITS IV Directive will enter into force.

The main pillars of the UCITS IV Directive are the following:

- to improve investor information by creating a standardised summary information document;
- to create a genuine European passport for UCITS management companies;
- to facilitate cross-border marketing of UCITS by implementing a regulator-to-regulator notification procedure;
- to facilitate cross border mergers of UCITS;
- to facilitate asset-pooling by creating a framework for the system of "master-feeder" arrangements whereby a fund invests more than 85 % of its assets in another fund;

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- to strengthen the supervision of UCITS and of the companies that manage them, by means of enhanced cooperation between supervisors.

CESR, the Committee of European Securities Regulators, has issued a number of consultation papers over the summer to provide guidance with regard to the implementation and application of a number of the UCITS IV Directive's provisions: (i) a consultation paper on CESR's technical advice at level 2 on the format and content of Key Information Document disclosures for UCITS and (ii) a consultation paper on CESR's technical advice to the European Commission on the level 2 measures related to the UCITS management company passport (regarding the organisational requirements and conflicts of interest, rules of conduct, risk management process, measures to be taken by depositories, cooperation between supervisory authorities). An open hearing on these consultations took place in Paris on 1 September 2009. CESR's advice is requested by 30 October 2009. The end of the transitional period for the implementation of the UCITS IV Directive (level 1 and level 2 measures) is 1 July 2011.

8. New tax developments

Implementation of OECD standards for exchange of information

On 31 March 2009 the G20 London summit announced that the age of banking secrecy was over and has put further pressure on countries that allegedly do not sufficiently cooperate in cross-border exchange of tax relevant information.

The Luxembourg government had in the meantime already announced that full OECD standards will be applied to exchange of information under Luxembourg tax treaties, thus also including exchange of information in matters that had previously been covered by banking secrecy.

Following this announcement, fifteen double tax treaties are about to be amended (or newly concluded) to include a paragraph identical or similar to article 26-5 of the OECD-Model Tax Convention stating that: *"in no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person"*.

The double tax treaties concerned are those concluded between Luxembourg and the U.S.A. (amendment dated 20 May 2009), France (amendment dated 3 June 2009), United Kingdom (amendment dated 2 July 2009), Austria (amendment dated 7 July 2009), Finland (amendment dated 1 July), Norway (amendment dated 7 July 2009), Denmark (amendment dated 4 June 2009), the Netherlands (amendment dated 28 May 2009), Belgium (amendment dated 16 July 2009), Switzerland (amendment dated 25 August 2009) as well as the newly concluded double tax treaties with Bahrain, Armenia, India, Qatar and Liechtenstein.

Full OECD standards for exchange of information will in principle apply for tax years beginning on or after 1 January of the calendar year next following the year of the entry into force of the protocol respectively convention, except with the US and France where application is respectively as from 2009 and 2010.

More importantly, the exchange of information implying that matters previously covered by banking secrecy will only be for the future and therefore do not apply for previous years, even if the Contracting State that makes the query acts within the statute of limitations provided by its domestic tax legislation.

On 7 July 2009, the OECD announced that Luxembourg now complies with OECD standards on exchange of information and shifted it from the *"grey-list"* to the *"white list"* of jurisdictions that have *"substantially implemented the internationally agreed tax standards"*. The conclusion of new treaties and the amendment of existing treaties illustrate Luxembourg's will and ability to act swiftly in the international tax environment.

New double tax treaties

The double tax treaties between Luxembourg and Azerbaijan on the one hand and between Luxembourg and the United Arab Emirates on the other hand have been approved by the Luxembourg Parliament through a law dated 29 May 2009.

Through a law dated 5 June 2009 the Luxembourg parliament also approved the Luxembourg/India double tax treaty.

Each of the treaties will enter into force once the relevant ratification process has been accomplished.

Further, Luxembourg has signed double tax treaties with Bahrain (signed on 6 May 2009), Armenia (signed on 23 June 2009), Qatar (signed on 3 July 2009) and Liechtenstein (signed on 26 August 2009).

A forthcoming double tax treaty between Luxembourg and Liechtenstein, combined with the current ongoing changes to introduce a corporate tax into Liechtenstein domestic tax legislation, will permit attractive

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structuring opportunities for the future.

European Court of Justice – Case law

- **Decision - Case C-303/07.** On 18 June 2009, the European Court of Justice ("ECJ") ruled in the case C-303/07 Aberdeen Property Fininvest Alpha Oy that a provision of an EU Member State that subjects dividend payments made by a resident entity to a non-resident investment fund resident in another EU Member State (in this case, a Luxembourg SICAV), while exempting such dividends from withholding tax when paid to a resident investment fund is incompatible with EU law.

  The ECJ argued that the non-discrimination principle set out in Articles 43 of the EC Treaty prevails over the risk of tax avoidance, even if the non-resident beneficiary of the dividends is not listed in article 2(a) of the amended Parent Subsidiary directive 90/435/CEE.

  The Aberdeen decision opens the opportunity for EU/ECC investment funds, even if not qualifying as UCITS, to claim refunds of withholding tax applied by a Member State on dividend payments made to them if resident investment funds would have benefited from an exemption on the same dividend payments.

- **Decision - Case C-572/07.** The ECJ decided that the letting of immovable property and the cleaning services relating to the common parts which are separately invoiced must be regarded as independent, mutually divisible operations, so that the cleaning services do not follow the VAT treatment of the letting of the property. In practice, cleaning services rendered in the framework of a VAT-exempt letting of immovable property but separately invoiced should therefore be subject to the VAT, which implies a right to deduction of the input VAT incurred by the landlord in relation to the cleaning services (and the avoidance of the invoicing of a hidden VAT part), and a possible supplementary VAT expense for the tenant if that tenant has no right to VAT deduction. This decision also confirms that the separate invoicing of services is one of the criteria to be taken into account in order to determine whether services rendered in the same framework among the same parties are distinct services or form one single supply for VAT purposes.

- **Opinion of the Advocate General Mengozzi - Case C-242/08.**

  The advocate general Mengozzi rendered an opinion according to which the transfer of reinsurance contracts constitutes a supply of services falling within the scope of the VAT, but cannot be considered an insurance (or reinsurance) service within the meaning of the Sixth Directive 77/388/EEC and can not therefore benefit from the VAT exemption applying to insurance (or reinsurance) services. This opinion clearly states that the transfer of a contract is not to be treated, for VAT purposes, as the service which is the object of the transferred contract (the underlying service) and should therefore not benefit from the potential VAT exemption applying to that underlying service. The decision of the ECJ following this opinion is highly awaited.

Value Added Tax

- **New VAT formalities as from 1 January 2010**

  In the framework of the implementation within the Luxembourg VAT legislation of the "VAT package" adopted at the European level, the Luxembourg VAT Administration has published, for information purposes, a new standard VAT return, a new standard recapitulative statement for intracommunity supplies of goods and a standard recapitulative statement for supplies of services to VAT payers established in another EU Member State. The new standard VAT forms should in principle be used as from 1 January 2010 provided the draft legislation implementing the "VAT package" is approved by the Luxembourg Parliament.

- **VAT Circular 742 of 8 April 2009**

  The VAT Circular details measures aiming at making audits carried out by the VAT Administration more efficient in terms of control and recovery, pursuant to the law of 19 December 2008 regarding the cooperation between tax authorities. Among other things, the VAT circular lists the accounting documents that may be requested by the VAT Administration and provides for penalties proportional to the passing of time if the VAT payer does not submit the documents requested in due time and for a 10% penalty if the VAT payer attempts to fraudulously avoid the payment of VAT or obtain a reimbursement of VAT.

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