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ELVINGER HOSS LUXEMBOURG LAW

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Soparfi : The Luxembourg holding and finance company - Update September 2016

This new edition includes an updated comparative table of eligible companies as a result of the substantial reform of the Luxembourg company act by the law of 10 August 2016.

Paroles d'experts : rétrospective et déontologie

Interview of André Elvinger and Jacques Loesch.

This article was first published in Laws - Le magazine de la Conférence du Jeune Barreau, n°1, 2013, pp. 26-31.

First Luxembourg UCITS authorised by CSSF to invest 100% in China A shares under RQFII quota

Elvinger, Hoss & Prussen advised a major global fund manager in obtaining the first approval from the CSSF (" Luxembourg Commission for the Supervision of the Financial Sector") for a UCITS investing up to 100% of its net assets directly in the People's Republic of China ("PRC") equity markets through the use of a RQFII quota. The CSSF approval has been granted under a number of conditions and subject to full compliance with the requirements of the UCITS directive. The allocation of the quota is still subject to PRC regulatory approval.
The CSSF had previously authorised Luxembourg UCITS to invest directly in the PRC equity markets through the use of a QFII quota. However, due to restrictions on repatriation of funds out of the PRC under the QFII Regime (e.g. lock-up period, monthly repatriation cap), these investments were limited to 35% of the net assets of such UCITS. These rules applicable to investments using a QFII quota remain currently unchanged.

For any information in relation to the above, please contact:

- at our Luxembourg Office : Jacques Elvinger or Gast Juncker;
- at our Hong Kong Office : Katia Panichi or Emmanuel Gutton.

Le régime des titres et instruments fongibles

Article by Yves Prussen published in Droit bancaire et financier au Luxembourg, Larcier, 2004, vol. 3, pp. 1287-1318.

Tax

Company Law: Bill of Law 5730 adopted

Luxembourg parliament adopted on 13 July Bill of Law 5730 modernising the law on commercial companies of 10 August 1915 and amending*inter alia* relevant articles of the Civil Code. The new regime entered into force on 23 August 2016. An updated version of the company law is available on our website.

Although the new company law brings a lot of significant changes in our legislation, the contractual freedom for the shareholders remains the key feature of Luxembourg company law. The new company law mainly purports to integrate some innovations also existing in foreign countries, to offer new legal instruments to investors, to harmonise rules applicable to the different forms of companies and to formally recognise the validity of legal solutions previously developed by Luxembourg practice.

The new company law contains new opportunities but also additional constraints. As a result, the impact of such legislation should be carefully analysed not only for new entities but also for existing structures.

For any new entity incorporated after the entry into force, the new company law shall automatically apply in its entirety. For any existing entity, the shareholders have 24 months to adapt the articles of association. During this period (or at least until the articles are amended so as to comply with the new company law), the current legislation remains applicable to all provisions of the articles of association contrary to the new company law while the new company law applies to all matters not mentioned in the articles.

You will find below some of the key changes resulting from the new company law in summarised form. Some of them may require specific actions, including appropriate provisions to be inserted in the articles or shareholders' agreement but this will need to be analysed on a case-by-case basis.

KEY CHANGES

(a) Key changes applying to SA, SCA and Sàrl:

- All types of companies (including Sàrls) will be allowed to issue bonds to the public.
- Agreements governing voting rights are now formally recognised save in certain circumstances.
- The new company law lists cases where a decision of shareholders or bondholders may be declared void.
- A shareholder of a SA, a Sàrl or a SCA may voluntarily give up all or part of his voting rights either temporarily or permanently.
- Management may, if provided by the articles of association, suspend the voting rights of a shareholder who is in default of its obligations under the articles of association or under agreements among shareholders.
- The legal recognition of the practice of issuing tracking shares.
- The right of shareholders and/or holders of 10% of the capital or voting rights to request information on management decisions with respect to the company and group subsidiaries.
- The change of nationality will no longer require an unanimous decision by the shareholders (and bondholders).

(b) Key changes pertaining to Sàrl :

- Amendments of the articles of association will be subject to a vote by the shareholders holding 3/4 of the capital (i.e. abolition of the additional mandatory headcount majority).
- An Sàrl may issue non-convertible bonds to the public, beneficiary units (*parts bénéficiaires*) with or without voting rights and redeemable shares.
- The managers may decide distributions out of interim profit under the same conditions as for an SA.
- The majority requirement applicable to the transfer of shares in an Sàrl to a non-shareholder may be reduced to 50% of the share capital in the articles of association; if the proposed transfer of shares is not approved, the remaining shareholders may propose alternatives within 3 months of this refusal to the leaving shareholder allowing it to transfer its share and if no solution has been found, the leaving shareholder is authorised to transfer its shares to the third party initially identified.
- The possibility is introduced to provide for an 'authorised share capital' with the authorisation to the managers to issue new shares under certain conditions.
- The possibility to delegate day-to-day management to one of the managers.
- The maximum number of shareholders in an Sàrl is increased from 40 to 100.

(c) Key changes pertaining to SA and SCA :

- The validity of lock up clauses in the articles of association is formally recognised with the consequence that any transfer made in breach of such clause is expressly null and void.
- A prior consent clause or a pre-emption clause relating to a transfer of shares and provided for in the articles of association is formally declared as being valid as long as it does not prevent the leaving shareholder from transferring its shares for more than 12 months; any equivalent clause possibly contained in a shareholders agreement is not impacted by the new company law.
- Shareholders or holders of beneficiary units with voting rights representing at least 10% of all voting rights may, on behalf of the company, bring an action against the board of directors, management board or supervisory board for mismanagement, breach of law or articles.
- The issuance of non-voting shares in the capital will no longer be limited to 50% of the corporate capital and non-voting shares do not necessarily need to receive a preferred dividend.
- The possibility to issue bonus shares (*actions gratuites*) and shares below par value under certain conditions.
- Convening notice to registered shareholders may be sent by means other than by registered letters (such as email or courier service) provided that such alternatives are mentioned in the articles and have been approved by the relevant shareholders.
- The legal recognition to provide for a *comité de direction* or, alternatively, a *directeur général*.
- The creation of committees at the level of the board of directors or the management board and the supervisory board, a practice already implemented for the board of directors in many companies, is now specifically provided.
- An auditor's report is no longer required for contributions consisting in a receivable (under certain conditions).

The new company law also introduces a new form of company, the *Société par actions simplifiées* ("SAS") which is subject to the same rules as the SA but is characterised by a greater contractual freedom (for instance the corporate governance rules can be freely determined by the shareholders).

Our teams are at your disposal to discuss the amendments in more detail and any specific impact that the new company law may have on your company.

Please address any questions you may have to your main contact lawyer at the firm or to **newcompanylaw@elvingerhoss.lu**

Amendments to the law of 1915 on commercial companies by the two laws of 23rd March, 2007

Hoss Philippe

ICT, IP and data protection

The Ryanair Judgment of the Court of Justice of the European Union: A useful clarification on the use of unprotected databases

Article by ***Linda Funck*** *and* ***Emmanuèle de Dampierre****.*

At the beginning of 2015, the Court of Justice of the European Union (**The Court**") rendered a judgment (**CJUE, aff. C-30/14**) which should serve to reassure database owners irrespective of the nature of these databases. In response to a preliminary ruling posed by the Supreme Court of the Netherlands, the Court has indeed confirmed that the owners of databases which do not fall under the legal protection regime may limit their use by third parties through the adoption of general terms and conditions.

Context

We must attribute this useful clarification to Ryanair. Noticing that an Internet flight search engine had used data (flight times and ticket prices) reproduced from the Ryanair website, even allowing users to reserve a Ryanair flight through this search engine, Ryanair referred the matter to the Dutch courts.

Ryanair pleaded both an infringement of its rights on the collection of data in relation to its flights and a breach of its general terms and conditions. Indeed, the terms and conditions published on the Ryanair website could not be clearer as to the impossibility for any third party to use Ryanair flight data for commercial purposes.

Following the dismissal of its claims by the first courts, Ryanair filed an appeal before the Supreme Court of the Netherlands which considered it necessary to request the Court to rule on the scope of application of the **European Directive on the legal protection of databases** (the "**Directive**").

Double legal protection of databases

The Directive, which was to be transposed into the national law of each Member State, has in fact established a double legal protection regime for databases. In Luxembourg, this transposition was made through the Law of 18 April 2001 on copyright, related rights and databases, as amended by the Law of 18 April 2004.

In short, a database may benefit from protection under copyright law when, by the selection or arrangement of the elements it contains, it can be seen as the author's own intellectual creation. Copyright applies here to the lay-out, to the structure of the database and not to its content.

The protection of the content of a database is provided by a new right (entitled *sui generis* right) when the obtaining, verification or presentation of the contents of the database demonstrates a substantial qualitative or quantitative investment by the producer of the database. The investment may take different forms (financial, technical or human). Where applicable, the copyright and the *sui generis* right may of course be applied cumulatively to the same database.

When a database is protected, both its author and producer benefit from exclusive rights which they may exploit themselves or grant to third parties through a licence (such as reproduction and translation rights, the right to distribute the database to the public, or the right to extract or re-use all or a substantial part of the contents of the database).

In consideration for these exclusive rights, the author and producer cannot object to a legitimate user (namely an authorised third party or a third party with access to a publicly available database decided at the initiative of the producer or author) performing certain actions in relation to the database. Thus, the producer of a database which will be made available to the public may not prevent a legitimate user from extracting and/or re-using insubstantial parts of the contents of the database, regardless of the purpose of this action.

In order to maintain the balance between the authors' and producers' exclusive rights and the rights of legitimate users, the European legislator ensured that the provisions on the rights of legitimate users were mandatory and that any contractual provision to the contrary would be considered null and void. This provision is at the heart of the judgment rendered by the Court on 15 January 2015.

The lesson and impact of the Ryanair judgment

In the Ryanair judgment, the Court intelligibly states that the legal regime implemented by the Directive only applies to those databases which benefit from copyright and/or *sui generis* right protections and that consequently the mandatory provisions in relation to the rights of legitimate users of databases do not apply to "simple" databases, i.e. unprotected. The owner of such an unprotected database is entitled to limit the rights of third parties by way of imposing general terms and conditions, provided that these terms and conditions comply with the applicable national law. This solution should be welcomed.

Indeed, when the owner of a simple database does not have exclusive rights conferred by law, there is no need to guarantee a balance with potential third party rights. On the contrary, the only means available to the owner of the database to restrict its use by third parties is by way of a contract. A contract may also be used to govern the use of databases whose legal protection has expired.

In practice, however, contractual limitations governing the use of unprotected databases may only be binding on third parties who were already aware of these limitations and who had accepted them, which the plaintiff must prove in the event of a dispute and which may be subject to interpretation by the courts.

In the Ryanair matter, the Court was careful to point out that the company that had copied Ryanair's flight data without authorisation had previously agreed to Ryanair's general terms and conditions by ticking the relevant box. If a third party had taken Ryanair data, not from the airline's website but from the price comparison website, Ryanair's general terms and conditions would not have applied. In principle, contracts are only effective between the contracting parties and are not binding on third parties who have not agreed to the contractual provisions.

Ultimately, the judgment rendered by the Court opens up new prospects for owners of databases not protected by the law (particularly those accessible online) and they cannot be advised strongly enough to define the use of their databases by way of general terms and conditions clearly presented to internet users. However, if data are copied in chain by third parties, the contractual freedom granted to owners of simple databases will not be as effective as the exclusive rights enforceable against all third parties that are granted to the author of an original database or to the producer of a database having benefited from a substantial investment.

For more information, please contact **Linda Funck** or any of your usual contacts of the Elvinger Hoss Prussen ICT, IP and Data Protection team.

Asset management and investment funds

Second edition of the compendium of investment fund laws and regulations

Elvinger Hoss Prussen published today the second edition of the compendium of Luxembourg investment fund laws and regulations that has been produced in cooperation with the Luxembourg Stock Exchange and the Association of the Luxembourg Fund Industry (ALFI).

This compendium is made up of two separate publications, which are available in French, English and German.

The **first publication** is dedicated to undertakings for collective investment in transferable securities (UCITS) established under Luxembourg law and contains the amended Law of 17 December 2010 on undertakings for collective investment as well as the main regulatory texts relating thereto.

The **second publication** is dedicated to alternative investment funds (AIFs) established under Luxembourg law and other investment vehicles which are neither UCITS nor AIFs. It contains the amended Law of 12 July 2013 on alternative investment fund managers (AIFM), the amended Law of 17 December 2010 on undertakings for collective investment, the new Law of 23 July 2016 on reserved alternative investment funds (RAIF), the amended Law of 13 February 2007 on specialised investment funds (SIF), the amended Law of 15 June 2004 on the investment company in risk capital as well as the main regulatory texts relating thereto.

Alternative investment funds and other investment vehicles - Update March 2017

This compilation is dedicated to alternative investment funds (AIFs) established under Luxembourg law and other investment vehicles which are neither UCITS nor AIFs. It contains the amended Law of 12 July 2013 on alternative investment fund managers (AIFM), the amended Law of 17 December 2010 on undertakings for collective investment, the new Law of 23 July 2016 on reserved alternative investment funds (RAIF), the amended Law of 13 February 2007 on specialised investment funds (SIF), the amended Law of 15 June 2004 on the investment company in risk capital as well as the main regulatory texts relating thereto.

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