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Luxembourg

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Newsletter Q4 2017

Luther S.A.

The issuance of bonds to the public by a private limited liability company (*société à responsabilité limitée*)

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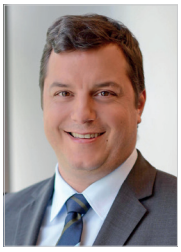

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The legislator through the adoption of the law of 10 August 2016 which modernized the law of 10 August 1915 on commercial companies (the "**Law**") has expressed its willingness to extend the sources of financing for the private limited liability companies ("**SARL**").

If the Luxembourg practice, on the basis of an a *contrario* interpretation of the former Article 188, admitted the validity of the private issuance of debt securities or bonds by a SARL (in particular under the form of preferred equity certificates), the inclusion in the Law of a new Article 11*ter* now allows any company of any form to issue bonds. The rewording of the Article 188 of the Law also confirms this intention by abolishing the prohibition for an SARL to take out loans by way of public bonds issuance but the public issue of shares or profits units remains however prohibited for a SARL.

Consequently a SARL may issue bonds to be listed and traded on the Luxembourg stock exchange. However in case of an issuance of convertible bonds by a SARL, the subscribers that are not already shareholders of the company must obtain the approval of its current shareholders given in accordance with the article 189 of the Law. The approval may thus be given in advance to non-shareholders who are identified in the approval decision or upon issuance of the bonds or instruments or subsequently. Such approval will also be required prior to any transfer of convertible bonds to a third party, whether inter vivos or by cause of death. The public limited liability companies (*sociétés anonymes*) are not subject to such a constraint.

The revamped MiFID and EUVECA frameworks

I. A more transparent procedure for the prudential assessment of the acquisition of a qualifying holding in an investment firm

Completing the MiFID framework, the Commission Delegated Regulation (EU) 2017/1946 supplementing Directives 2004/39/EC and 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards for an exhaustive list of information to be included by proposed acquirers in the notification of a proposed acquisition of a qualifying holding in an investment firm was published on 26 October 2017 (the "**Delegated Regulation**").

The Delegated Regulation complements the CSSF circular n°17/669 issued on 28 September 2017 (the "**Circular**") adopting the ESMA, EBA and EIOPA joint guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector dated 20 December 2016 (the "**Guidelines**").

The Circular, the Guidelines and the Delegated Regulation (the "**New Regulations**") set new rules for the prudential assessment of a direct or indirect holding in a financial institution which represents 10% or more of the capital or of the voting rights or which makes it possible to exercise a significant influence over the management of that undertaking.

The New Regulations define a clear and transparent procedure for the prudential assessment by the competent financial authorities and harmonise the conditions under which the proposed acquirer is required to notify its decision.

The Delegated Regulation entered into force on 15 November 2017.

II. A new boost for the venture capital market

On 10 November 2017, the Regulation (EU) 2017/1991 of the European Parliament and of the Council of 25 October 2017 amending Regulation (EU) No 345/2013 on European venture capital funds and Regulation (EU) No 346/2013 on European social entrepreneurship funds was published (the "**Regulation**").

The EU had created both investment structures, the EU venture capital and social impact investment funds (the "**EuVECA**" and the "**EuSEF**"), in order to foster private investment in SMEs.

As the use of both EuVECA and EuSEF labels has been deemed insufficient, the Regulation aims at a broader fund market acceptance of them.

The main changes can be summarized as follows:

- An alternative investment fund manager ("**AIFM**") should now be allowed to directly manage EuVECA and EuSEF with its AIFM authorisation.
- The range of eligible undertakings in which EuVECA can invest should be expanded (the definition of qualifying portfolio undertakings should therefore include companies with up to 499 employees not admitted to trading on a regulated market or on a multilateral trading facility, and SMEs listed on SME growth markets).
- Appropriate and proportionate own funds requirements for EuVECA and EuSEF should be set and based on harmonised criteria:
  - initial capital of EUR 50,000;
  - own funds shall, at all times amount to at least one eighth of the fixed overheads incurred by the manager in the preceding year;
  - where the value of the EuVECA or the EuSEF managed by the manager exceeds EUR 250,000,000, the manager shall provide an additional amount of own funds. That additional amount shall be equal to 0.02 % of the amount by which the total value of the qualifying venture capital funds exceeds EUR 250,000,000.

The Regulation shall apply from 1 March 2018.

By increasing the attractiveness of these structures, the EU could stimulate the venture capital market across Europe and investors in Luxembourg, as a prime investment location, could take advantage of this new opportunity.

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Amendment of the Luxembourg law on the exchange of tax information on request in sight

In our newsletters Q1 and Q2 2017, we announced a paradigm shift in Luxembourg concerning the exchange of tax information on request by another EU member state since the Luxembourg law of 25 November 2014 laying down the procedure applicable to the exchange of information on request in tax matters (the "Law of 25 November 2014") had been fundamentally challenged by a judgment of the Court of Justice of the European Union ("CJEU") of 16 May 2017.

As a reminder, the CJUE held in its decision that the requested tax authority shall verify, not only the procedural regularity of the request of another member state, but also that the information sought is not deprived of any foreseeable relevance to the tax affairs of a given taxpayer. Likewise, the Luxembourg administrative court should have jurisdiction to review the foreseeable relevance of the requested information.

Well, the repercussions of this CJEU decision in Luxembourg quickly became tangible.

First, the Luxembourg administrative Court of Appeal, which had referred the question to the CJEU for a preliminary ruling, and by consequent raised the above mentioned decision, delivered its decision on 26 October 2017 taking up the conclusions of the CJEU and excluding the application of the challenged provisions of the Law of 25 November 2014. In the present case, the administrative Court of Appeal sanctioned the Luxembourg tax authorities for failure to verify the foreseeable relevance of the request and annulled the administrative fine which had been imposed on the requested third party.

Moreover, the Ministry of Finance has included in the bill regarding the budget of 2018 an article 11 setting out the changes in cooperation with foreign tax authorities and proposed to amend two articles of the Law of 25 November 2014, as follows:

(i) The proposed amended article 3 of the Law of 25 November 2014 now provides that the competent tax authorities shall ensure that the requested information is foreseeably relevant to the typologies of taxpayer and of holder of the information and with respect to the needs of the tax investigation in question.

(ii) The proposed amended article 6 now authorizes to any person covered by the administrative decision of the Luxembourg tax authority and to any third party concerned to apply for annulment of the administrative decision... For the purpose of this application for annulment, the claimant and the court shall have access to a minimum amount of information permitting to verify the foreseeable relevance of the request for information. The action shall have suspensive effect.

However, the Ministry of Finance wanted to accelerate the procedure in comparison with standard procedures. Thus, the application must be brought within one month of the notification of the decision to the holder of the requested information. Moreover and by way of derogation from the legislation on proceedings before the administrative court, there may be no more than one written submission by party, including the motion initiating proceedings and the court shall take its decision within one month from the filing of the last written submission.

It remains possible to lodge an appeal before the administrative Court of appeal within a period of 15 days from the notification of the decision.

As of today, any taxpayer or requested third party may rightly object to an injunction from the tax authorities if he/she has good reason to believe that the request is not relevant.

Please feel free to contact us for further information.

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