A NEW LAW FOR COMPANIES INTRODUCING THE USE OF DIGITAL TOOLS AND PROCESSES

A new law of 7 July 2023 amending notably the law of 10 August 1915 concerning commercial companies, with a view to transposing Directive (EU) 2019/1151 of European Parliament and of the Council of 20 June 2019 regarding the use of digital tools and processes in company law, has been published on 18 July 2023 in Memorial A. Nevertheless, a question mark as to its practical effectiveness remains so far.

The aims of Directive (EU) 2019/1151 is to establish rules relating to:

- the online incorporation of public limited companies (*sociétés anonymes* - SA), partnerships limited by shares (*sociétés en commandite par actions* - SCA), and private limited liability companies *(sociétés à responsabilité limitée* - SARL);
- the online registration of branches;
- the online filing of deeds and information by companies and branches;
- improved exchange of information via the system of Business Registers Interconnection System (BRIS); and
- and better access to information on companies and branches.

Directive 2019/1151 (amending Directive 2017/1132) not only requires that authentic instruments for the incorporation of companies falling within its scope can be drawn up in electronic format, but also that they can be drawn up remotely. The Directive only allows for the possibility of requiring physical presence of a party to the deed of incorporation of the company in specific cases, such as suspicion of falsification of identity or the existence of reasons giving rise to suspicion of non-respect of rules aimed at guaranteeing that parties to the deed have the necessary legal capacity and the power to represent the company, as well as in the event that the payment of the share capital includes a contribution in kind.

The Directive also aims to strengthen the flow of information exchange between business registers of the Member States via the BRIS and to guarantee better access to information on branches of companies to citizens.

I. Use of electronic format

Deeds and authentic instruments, as well as copies thereof, may eventually be drawn up in electronic format under the conditions and in the forms laid down by laws and regulations, provided that:

1. the person having received or established them can be duly identified;

2. the technical process used to create them guarantees the integrity of their content from the moment they are created in their final form; and

3. the technical process used to establish them allows them to be represented in a way that is intelligible to humans.

They are valid as originals when they meet these requirements. All electronically signed deeds are deemed to have been signed at the office and in front of the instrumental notary and on the date indicated in the deed. The date indicated by the notary in the deed is authentic.

The notaries' association has to make available simple standard articles of association, free of charge, for the purpose of online incorporation.

Contributions in cash may be made online to an account opened in the name of the company to be incorporated with a credit institution within the meaning of article 4(1)(1) of Regulation (EU) nr. 575/2013 established in a Member State by means of a widely available online payment service which can be used for cross-border payments, which allows for identification of the person who made the payment, and which is provided by a financial institution or payment service provider established in a Member State. In addition, proof of payment may also be provided online.

A notary may refuse to draw up a deed in remote electronic format only when the company's share capital includes a contribution in kind or when the notary has grounds to suspect falsification or usurpation of identity or non-compliance with the rules relating to a party's legal capacity or a party's power of representation of a company in the deed.

II. The notaries' electronic exchange platform

This law sets up the requirement for an electronic exchange platform for use by notarial professionals, which is a computer system enabling notaries to, among other things:

- draw up authentic instruments in electronic format;
- collect the parties' electronic signatures;
- obtain data from public bodies and authorities; and
- transmit data to public bodies and authorities.

The notaries' association must keep an electronic file containing the electronic signature certificates and electronic stamps used by notaries. The notaries' association must forward a copy of this electronic file to the business registers of Member States and must forward a consolidated version to them each time there is a change in a notary's electronic signature certificates or electronic seals.

III. Entry into force

This law comes into force on the first day of the month following that of its publication in the Official Journal of the Grand Duchy of Luxembourg, i.e. on 1 August 2023. However, that date is uncertain to bring real effectivity to the law, as the notaries' electronic exchange platform is currently not ready to become operational.

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