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Increased risk of cross border litigation and application of foreign laws for Luxembourg professionals marketing their goods and/or services notably via a website after recent judgments of the Court of Justice of the EU

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Two recent decisions of the Court of Justice of the EU (CJEU) (Judgments of 6 September 2012 in Case C-190/11, *Mühlleitner* and of 7 December 2010 in Joined Cases C-585/08 and C-144/09, *Pammer e.a*) increase the risk run by professionals established in Luxembourg and offering their products and services via internet that they will have to defend themselves in proceedings initiated by consumers in other EU Member States or in Norway, Switzerland or Iceland and that they will see their agreements with consumers partly governed by the laws of such foreign States.

Under the EU rules on jurisdiction (Brussels I Regulation and the parallel Lugano Convention), consumers, i.e. natural persons having entered into a given contractual relation for a purpose which may be regarded as being outside their trade or profession, are given the possibility of suing a professional with whom they have entered into contractual relations in the courts of their Member State of residence, even if the professional is established in another Member State. This faculty is, however, subject to two conditions:

- 1) the professional must pursue commercial or professional activities in the Member State in which the consumer resides or, by any means (e.g. via internet), direct such activities to that Member State or to several States including that Member State before the conclusion of any contract with the consumer; and
- 2) the relevant contract must fall within the scope of such activities.

1. The direction of professional activities to other Member States via a simple website

In a Judgment of 7 December 2010, *Pammer*, the CJEU decided in relation to the first condition that the use of a website by a professional to offer his products or services implies that his activity is "directed to" other Member States

provided that the professional's website has clearly expressed the latter's intention to establish commercial relations with consumers in other Member States, before the conclusion of any contract with such consumers.

According to the CJEU, various elements, as the case may be in combination with one another, and the list of which is not exhaustive, may indicate the professional's intention, such as:

- reference to telephone numbers with the international code;
- the use of a top-level domain name other than that of the professional's Member State, e.g. example '.de', or the use of neutral top-level domain names such as '.com.' or '.eu';
- the opportunity extended to consumers on the website to use a language or a currency other than that generally used in the professional's Member State.

2. No matter if the contract was actually concluded in the professional's Member State

In its Decision of 6 September 2012, the CJEU took position mainly in relation to the second condition.

It stated that a professional established in another Member State may be sued before the courts of the consumer's Member State of residence even if the contract was actually signed at the premises of the professional. Put in other words, the relevant contract is not required to be concluded at a distance, as long as it may be considered the result of the professional directing his activities to at least the Member State of the consumer's residence (e.g. via a website meeting one of the conditions set out above).

3. Implications of the recent CJEU case law for professionals established in Luxembourg

1. Increased risk of litigations abroad

Given Luxembourg's nature as a "hub" for all kinds of cross-border activities (especially as regards the financial sector), professionals established in Luxembourg must be aware that insofar as they use a website in order to promote their goods or services they incur the great risk that they will end up having to defend themselves before foreign courts in case of litigation with clients that have their residence in another EU Member State, in Norway, Switzerland or Iceland and may qualify as consumers.

2. Increased risk of application of foreign laws

On the basis of the EU rules on the law applicable to contractual relations (Regulation (EC) No 593/2008, better known under the appellation "Regulation Rome I"), once the conditions for suing the professional in the consumer's Member State of residence are met, this also has also implications as regards the law applicable to contractual relations. Notably, the consumer may not be deprived of the protection afforded to him by mandatory provisions of the law of his Member State of residence.

General recommendation

Luxembourg professionals will thus have to carefully review

the way they do business with clients established abroad so as to be able to determine whether they should adapt their practices (the way they communicate via their website, the way they enter into contractual relations) and their GTC in order to mitigate the risk of litigation before the courts of another Member State, Norway, Switzerland or Iceland and application of foreign laws whose content they are no not acquainted with.

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