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1. Publication by CESR[1] of guidelines to simplify the notification procedure of UCITS

On 29 June 2006, CESR has published its guidelines to simplify the notification procedure of UCITS (ref.: CESR/06-120b)[2] (the "CESR Guidelines"). The purpose of the document is to present guidelines for a common approach for the administration, by host state authorities, of the notification procedures to be undertaken by UCITS under the UCITS directive in host states before marketing their shares to the public in such host states. The CESR Guidelines seek to bring greater simplicity, transparency and certainty to the notification process.

The CESR Guidelines differentiate between the procedures to be followed for (A) the initial notification of registration of a UCITS and (B) the amendment or update of documentation of

[1] Committee of European Securities Regulators

[2] Published on www.cesr.eu.org

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UCITS already registered in the relevant host state(s).

A. The notification procedure

1. For the purpose of the notification procedure, UCITS must use the model notification letter attached as Annex II to the CESR Guidelines.

2. UCITS must attach to the notification letter the documents specifically mentioned in the aforesaid Annex II in the original language and translated into at least one of the official languages of the host state or such other language as permitted by the relevant host state.

3. The CESR Guidelines provide that host states may not require for the aforementioned documents to be certified by the authorities of the home state. Hence, host states would have to accept for the documents to be "self-certified" by agents of the UCITS or a third party appointed by the UCITS to that effect.

4. One of the documents to be attached to the notification letter is the attestation issued by the authorities of the home country (sometimes called "*UCITS certificate*") in the form of the model attestation constituting Annex I to the CESR Guidelines. For the notification procedure, a certified copy of such attestation, rather than the original, can be used, self-certified as described under 3. above.

If the aforesaid procedures recommended by the CESR Guidelines are accepted and applied by all host countries, it would no longer be necessary for Luxembourg UCITS, for the purpose of the notification procedures in host countries, to request the CSSF to issue the various documents (attestation (*UCITS certificate*), prospectus, articles, etc.) in as many originals as countries in which the UCITS intends to seek registration. Also, it would avoid the requirement for the CSSF to issue certified documents in different formats for different host countries (as is presently frequently the case).

B. Procedures for amendments or update of documents of UCITS which are already registered in the relevant host country

1. The CESR Guidelines provide that a new attestation of the kind referred to in A.4. above has to be applied for by the UCITS with its home state authority only if there have been changes in the information comprised in the original attestation issued by the home state authority. Examples of such changes are the change of management company or the creation of a new sub-fund.

2. The CESR guidelines confirm that any documents implementing changes (including changes upon the creation of new classes of shares) have to be sent by the UCITS to the authorities of the host countries. The same requirement is applicable in relation to the annual and semi-annual reports upon their publication. These documents can be self-certified as described above and their filing with the authorities of the host countries does not require the issuing of a new attestation (referred to in A.4. above) by the home state authority, unless the documents imply changes of the kind described in B.1. above.

We understand that the CSSF intends to publish shortly a Circular in relation to the foregoing.

2. No impact on UCITS and UCIs of the decision of the EU Commission of 19 July 2006 qualifying as State Aid the tax regime of Luxembourg 1929 Holding companies

By a decision of 19 July 2006 (the "Decision"), the EU Commission has concluded that the tax regime granted by the amended Luxembourg law of 31 July 1929 to holding companies (the "1929 Tax Regime") is constitutive of "State Aid" under the EU treaty. The Decision implies that no new companies having the benefit of the 1929 Tax Regime can be created since the date of the Decision. The Decision provides however for temporary provisions pursuant to which existing companies which have the benefit of the 1929 Tax Regime can, under certain conditions, continue to benefit from the 1929 Tax Regime until 31 December 2010. For more details on this subject, see also 11. below.

The Decision has no impact on Luxembourg investment funds governed by the laws of 30 March 1988 and 20 December 2002 regarding undertakings for collective investment.

The decision has however an impact on certain Luxembourg "advisory companies" the activity of which is limited to the providing of investment advice to a single UCITS or UCI. Indeed, pursuant to a decision of the Ministry or Treasury of 17 October 1968, such companies have the benefit of the 1929 Tax Regime. The aforementioned transitory provisions should also apply to such advisory companies and the Luxembourg government has started to initiate the necessary procedures for implementing into Luxembourg law the Decision, including the implementation of transitory provisions of the kind discussed above.

3. CSSF Circular 06/241 on the definition of the concept of "risk capital" within the meaning of the law of 15 June 2004 relating to the investment company in risk capital ("Sicar")

On 5 April 2006 the CSSF has issued a Circular comprising a general description of the concept of "risk capital" as used in the context of the Sicar Law.

The Sicar Law as well as the preparatory documents of such law comprised information on the concept of risk capital. This concept having given rise to ongoing discussions in the context of the creation of Sicar vehicles, the CSSF has felt appropriate to clarify, beyond the information comprised in the Sicar Law, this concept.

The Circular clarifies that "risk capital" implies the simultaneous existence of (i) high *risk* and (ii) an aim of *development*. The Circular describes these two criteria in detail providing also practical examples.

In the light of the numerous Sicar projects implying investments in real estate, the CSSF has felt appropriate to clarify in the Circular its position on the possibility for Sicars to undertake real estate investments. The Circular confirms that, also for real estate investments, the two aforesaid criteria must be met, namely high risk and an aim of development. Both criteria have to be analysed on a case-by-case basis by taking into consideration the various elements of each case.

The Circular also confirms that indirect investments in private equity can be undertaken by Sicars, thereby validating the possibility for fund of private equity funds to be created in the form of a Sicar.

On the other hand, the Circular confirms that hedge fund type investment policies are not compatible with the Sicar Law. This does not prevent a Sicar, as an ancillary measure to its private equity investments, to use derivative financial instruments for hedging purposes.

An English translation of the Circular will be published shortly on our website www.ehp.lu. Also, our Memo on Sicars published on our website will be updated shortly to reflect, inter alia, the content of Circular 06/241.

4. Selected topics from the CSSF 2005 Activity Report

In its annual Activity Report, the CSSF generally publishes positions which they have taken in specific cases on specific issues. The following constitutes a summary of some selected topics concerning UCITS dealt with in the 2005 Activity Report:

1. The CSSF has confirmed that the Russian Trading System stock exchange (RTS stock exchange) and the Moscow Interbank Currency Exchange (MICEX) constitute regulated markets for the purpose of article 41 (1) of the law of 20 December 2002 regarding undertakings for collective investment. Especially in relation to the aforementioned Russian markets, this implies that UCITS are no longer limited to investing not more than 10% of their net assets in securities dealt in on such markets. The CSSF mentions however in their report that the possibility for UCITS to invest in securities dealt in on such Russian markets should be specifically mentioned in its prospectus.

   The CSSF has also confirmed that the Euro MTF operated by the Luxembourg Stock Exchange qualifies as a regulated market under article 41 (1).

   Other markets which have recently been recognised by the CSSF as regulated markets are the "GovPx Inc." and the "Australian OTC Fixed Income" markets.

2. The CSSF has clarified in its activity report the extent to which a UCITS can invest in securities of the type "*Rule 144 A*".

3. The CSSF has confirmed that a UCITS may invest in *volatility futures* in accordance with the rules set forth in article 41 (1) g) of the law of 20 December 2002 if the risk management process used by the UCITS concerned covers this type of investments and the use of this kind of derivatives is specifically mentioned in the UCITS prospectus.

4. The CSSF has confirmed that UCITS may invest, on the basis of article 41 (2) a) of the law of 20 December 2002, up to 10% of its net assets in *open-ended hedge funds* which are subject to supervision in their home country provided however they meet, in addition, the conditions set forth in the CESR advice on eligible assets (CESR 06/005, January 2006, mentioned in our previous legal update).

5. VAT implications on UCITS and UCIs of the ECJ decision in the Abbey National case

Upon the decision of the European Court of Justice (ECJ) in the case of Banque Bruxelles Lambert (BBL) v Belgian State C-08/03 confirming the submission of Sicavs to VAT, the Luxembourg Fund Industry generally had concluded that the impact of this decision is

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positive or neutral as long as the concept of exempt "management services" is interpreted in a broad manner so as to comprise investment management and administration services. In its recent decision of 4 May 2006 in the case Abbey National plc and Inscape Investment Fund v Commissioners of Customs and Excise C-169/04, the ECJ has taken a position on the interpretation of the concept of "management services" exempt from VAT under the relevant EU VAT Directive. The ECJ has confirmed that (i) investment management services and (ii) administration services (accounting, NAV calculation, registrar and transfer agency, record-keeping, etc.) fall within the definition of "management services" and are therefore exempt from VAT. However, the ECJ has concluded that custodian services and, more specifically, the supervisory functions to be performed by the custodian under article 7 (1) and (3) and 14 (1) and (3) of Directive 85/611/EEC (the equivalent provisions in the Luxembourg law of 20 December 2002 regarding undertakings for collective investment are article 17 (1), article 18 (2), article 34 (1) and (3)) are not exempt from VAT. Until the ECJ decision, the Luxembourg tax authorities had taken the view that custodian services are, in the same manner as administration services, exempt from VAT.

The Luxembourg fund association has started discussions with the Luxembourg tax authorities on the interpretation and consequences of the aforesaid ECJ decision. The tax authorities have unofficially confirmed that they intend to issue for the end of the year a new circular leaving sufficient time to the fund industry to adapt to any possible change and that there will be no retroactive effect.

6. Replacement of the Law of 19 July 1991 regarding Institutional Investor Funds: Proposal for a new law on Specialised Funds [3]

When it entered into force, the purpose of the law of 19 July 1991 concerning undertakings for collective investment ("UCIs") the securities of which are not intended to be placed with the public ("Law of 1991") was to allow the establishment in Luxembourg of UCIs the securities of which are reserved for one or several institutional investors ("Institutional UCIs"), like similar vehicles in other countries, in particular the *Spezialfonds* under German law. The Law of 1991 thus differs from the law of 20 December 2002 relating to UCIs ("Law of 2002"), which governs UCIs the securities of which are intended to be placed with the public by means of a public or private offer.

In all other respects, notably as regards the rules applicable to the operation and monitoring of Institutional UCIs, the Law of 1991 refers to the provisions of the law of 30 March 1988 relating to UCIs ("Law of 1988"), which governed UCIs subject to part II of that law (i.e. non-UCITS). The regime applicable to Institutional UCIs is therefore similar to the one applicable to UCIs created under part II of the Law of 1988 – apart from the possibility to have a single investor. On the other hand, there is an obligation to restrict shares or units to Institutional Investor. Further, in light of the fact that Institutional Investors do not need a similar protection as the one that need to be assured

[3] This note has been prepared on the basis of the draft bill of law discussed between industry representatives and the CSSF. The bill of law has been adopted by the Luxembourg Government on 13 September 2006. There may be changes to the text by the time it will become law.

for retail or private investors, the Luxembourg regulator ("*Commission de Surveillance du Secteur Financier*" or "CSSF") is, in practice, more flexible in certain respects, notably regarding diversification rules.

The Law of 1991 has notably allowed the creation of vehicles reserved for insurance companies or designated for institutional investors wishing to invest in a vehicle dedicated to them. Recently, especially in 2005, growing interest appeared in the creation, under the Law of 1991, of UCIs investing in real estate.

The Law of 1991, which refers to the Law of 1988, is not a self-contained law. It will therefore have to be amended or redrafted by 13 February 2007, after which the Law of 1988 will be repealed as a result of the transitional provisions included in the Law of 2002 which implements the UCITS Directive 85/611/EC, as amended, (the so-called "UCITS III regime") into Luxembourg law.

Having this deadline in mind, the industry and the Luxembourg regulator have begun to discuss the drafting of a new law on special funds that would replace the Law of 1991. The items discussed to date may be summarised as follows:

1. Creating a self-contained law

The Law of 1991 was drafted for the purpose of "supplementing" the Law of 1988. Consequently, rather than being a complete text including all the rules applicable to Institutional UCIs, this law refers to the provisions of the Law of 1988. For the new regime, a full, self-contained law should be created so as to further distinguish the vehicles created under this regime from UCIs, the securities of which are intended to be placed with the public, that are governed by the Law of 2002.

2. Insuring flexibility with respect to eligible assets

Like UCIs created under part II of the Law of 2002, and in contrast to the law of 15 June 2004 relating to the investment company in risk capital (SICAR), it is anticipated that the law will allow significant flexibility with respect to the assets in which the vehicles to be created under its regime may invest. Accordingly, vehicles investing in any types of assets could be created under this new law. It could therefore be used, inter alia, for the creation of transferable securities funds, money market funds, real estate funds, hedge funds, private equity funds, microfinance funds, or funds investing in claims.

3. Maintaining the principle of risk spreading

Like UCIs governed by the Law of 2002 (and UCIs currently governed by the Law of 1991), the vehicles created under the new law would be subject to the principle of risk spreading. The CSSF could however allow a lower level of diversification, as such vehicles should be reserved for sophisticated investors (as was also the case to a certain extent for UCIs created under the Law of 1991).

4. Extending the concept of eligible investors to professional investors and well-informed investors

Under the new law, the concept of eligible investors would be extended so as to comprise, besides institutional investors, professional investors and other well-informed investors who invest a minimum of 125,000€ or having an assessment made by a credit institution or another financial sector professional certifying their capability to appraise the contemplated investment and the risk thereof. This means that sophisticated retail or private investors would be allowed to benefit from the new regime.

5. No requirement for a promoter

In contrast to UCIs, the securities of which are intended to be placed with the public, that are governed by the Law of 2002, it would not be required that vehicles governed by the new law be set up by an institutional promoter with significant financial resources and subject to prior approval by the CSSF. Besides, the CSSF would no longer check the financial standing or status of the investment managers for this type of vehicle. The CSSF would focus on the repute and the expertise of the directors or managers of the vehicle in light of its investment policy.

6. Allowing the start of activities prior to regulatory approval

Vehicles governed by the new law could be created and start their activities without having received regulatory approval, provided that an application for authorisation is filed with the CSSF within the month following their creation.

7. Flexible share capital structure

Like UCIs governed by the Law of 2002 and those currently governed by the Law of 1991, the minimum capitalisation for a vehicle subject to the new law would be 1,250,000€. However, the time period within which this minimum must be reached would be extended to 12 months after the authorisation of the vehicle, rather than 6 months. Except for the *fonds commun de placement* ("FCP"), the reference would be the subscribed capital rather than the net assets, but the issue premium could be included.

Furthermore, under the new regime, the possibility to issue partly paid shares should be extended to SICAVs.

8. Other lighter requirements

Although vehicles created under the new law would remain subject to the supervision of the Luxembourg regulator, as it is the case for UCIs created under the Law of 2002 (and UCIs currently governed by the Law of 1991), the new law would provide for a somewhat less strict regulatory regime. For instance, there would be no requirement to publish a semi-annual financial report and the law would not provide for a specific schedule with respect to the minimum contents of the prospectus or other offering documents.

9. Additional flexibility

Under the new law, an investment company with variable capital (*société d'investissement à capital variable* or "SICAV") would not be required to be a limited liability company (*société anonyme*) as is the case for SICAVs subject to the Law of 2002 or the Law of 1991. Under the new regime, a SICAV could also be established in the form of a partnership limited by shares (*société en commandite par actions*), a private limited company (*société à responsabilité limitée*) or a corporate company set up as a public limited company (*société coopérative organisée sous la forme d'une société anonyme*).

In addition, the conditions and procedures for the issue and redemption of shares or units would be relaxed compared to the rules applicable to UCIs governed by the Law of 2002 or those currently subject to the rules of the Law of 1991. In this regard, the new law would provide that the conditions and procedures applicable to the issue and, if applicable, the redemption of shares or units would be determined in the constitutive documents. As a result, for example, there would be no requirement that the issue price be based on the net asset value as it is the case for a SICAV governed by the Law of 2002 or the Law of 1991.

10. Ensuring continuity for UCIs currently existing under the Law of 1991

Given that there are currently 193 UCIs governed by the Law of 1991 (source: CSSF, 7 September 2006), it must be ensured that these

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entities may continue their investments with no impact other than formal amendments to their documentation to bring them into compliance with the new regime. To this end, the new law should include appropriate transitional provisions.

7. Qualification of Luxembourg UCITS and UCIs under double tax treaties (update)

On 21 February 2006, the Luxembourg tax authorities have published an updated list as to the double tax treaties ("DTT") entered into by Luxembourg and which are applicable or not applicable, as indicated below, to Luxembourg UCITS and UCIs:

1. The DTT concluded with the following countries are applicable to Luxembourg UCITS and UCIs created as investment companies: Austria, China, Denmark, Finland, Germany, Indonesia, Ireland, Malaysia, Malta, Morocco, Poland, Portugal, Romania, Singapore, Slovakia, Slovenia, South Korea, Spain (UCITS only), Thailand, Trinity and Tobago, Tunisia, Turkey, Uzbekistan and Vietnam. The Luxembourg tax authorities accept to issue tax residence certificates for the authorities in such countries.

2. In respect of DTTs concluded with Bulgaria, Greece, Italy, the Russian Federation and Switzerland, there is no clear understanding between the Luxembourg tax authorities and the tax authorities of such countries and therefore the Luxembourg tax authorities do not accept to issue tax residence certificates for the authorities in such countries.

3. The DTT concluded with the following countries are not applicable to Luxembourg UCITS and UCIs: Belgium, Brazil, Canada, Czech Republic, France, Hungary, Iceland, Japan, Latvia, Lithuania, Mauritius, Mexico, Netherlands (with some exceptions), Norway, South Africa, Sweden, United Kingdom and United States. The Luxembourg tax authorities do not accept to issue tax residence certificates for the authorities in such countries.

4. DTTs are generally not applicable to UCITS and UCIs which have been created in the form of FCPs (common funds).

8. The ten principles of corporate governance of the Luxembourg Stock Exchange

The Luxembourg Stock Exchange published a paper comprising ten principles of corporate governance in April 2006. This paper was drafted by a working group set up by the *Société de la Bourse de Luxembourg* (the "Luxembourg Stock Exchange") and which was composed of representatives of the Luxembourg Stock Exchange and representatives of listed companies.

The preamble to the principles defines the concept of corporate governance and sets out a framework for the interpretation and application of the principles. The preamble also discusses the monitoring of and compliance with the principles as well as their scope and entry into force. With regard to disclosure of information, it is worthwhile noting that the paper recommends disclosure of information through a corporate governance charter to be posted on a listed company's website and a corporate governance chapter in the annual report.

Special attention is also drawn to the recommendation by the Luxembourg Stock

Exchange that listed companies should disclose significant information about their corporate governance rules and practices in compliance with the principles.

As regards the scope of the principles, the preamble notes that they are intended to apply to listed companies but that nothing should prevent non-listed companies to adhere to such principles Multi-listed Luxembourg companies should also follow the principles.

The Luxembourg Stock Exchange has confirmed that the principles do not apply to UCITS, UCIs and SICARs, even if listed on the Luxembourg Stock Exchange.

The principles will be applicable as from 1st January 2007 but the paper recommends that corporate governance should be an item for consideration on the agenda of the 2006 AGM.

The remainder of the paper is structured into ten principles with a number of recommendations in relation to each principle.

The principles are the following:

Principle 1 – Corporate governance framework - The company will adopt a clear and transparent corporate governance framework for which it will provide adequate disclosure.

Principle 2 - Duties of the board - The board will be responsible for the management of the company. It will act in the best interests of the company and protect the general interests of the shareholders by ensuring the sustainable development of the company. It will function in a well-informed manner as a collective body.

Principle 3 - Composition of the board and the special committees - The composition of the board will be balanced so as to enable it to take well-informed decisions. It will ensure that any special committees necessary for it to properly fulfil its duties are set up.

Principle 4 - Appointment of directors and executive managers - The company will establish a formal procedure for the appointment of directors and executive managers.

Principle 5 - Conflicts of interest - The directors will take decisions in the interests of the company and will refrain from taking part in any deliberation or decision that creates a conflict between their personal interests and those of the company or any subsidiary controlled by the company.

Principle 6 - Evaluation of the performance of the board - The board will regularly evaluate its performance and its relationship with the executive management.

Principle 7 - Management structure - The board will set up an effective structure of executive management. It will clearly define the duties of executive management and delegate to it the necessary powers for the proper discharge of those duties.

Principle 8 - Remuneration policy - The company will secure the services of good quality directors and executive managers by means of a suitable remuneration policy that is compatible with the long-term interests of the company.

Principle 9 - Financial reporting, internal control and risk management - The board will establish strict rules, designed to protect the company's interests, in the areas of financial reporting, internal control and risk management.

Principle 10 – Shareholders - The company will respect the rights of its shareholders and ensure they receive equitable treatment. The company will establish a policy of active communication with the shareholders.

Furthermore, the paper contains four appendixes (A-D) addressing the definition of control (appendix A), transparency requirements (appendixes B and C) and independence criteria (appendix D, with reference to the European

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Commission recommendation of 15th February 2005 on the role of non-executive directors of listed companies).

The paper can be downloaded on the website of the Luxembourg Stock Exchange www.bourse.lu.

9. Loi du 27 avril 2006 sur l'application des normes comptables internationales dans le secteur des assurances[4]

La loi du 27 avril 2006 sur l'application des normes comptables internationales dans le secteur des assurances (la "Loi") introduit dans la législation nationale, notamment les mesures suivantes, prévues par le dispositif de réglementation communautaire :

- les articles 5 et 9 du règlement CE n° 1606/2002 ("Règlement IAS") ;
- la directive 2003/51/CE ("Directive modernisation des directives comptables") ;
- l'article 50 de la proposition de directive concernant le contrôle légal des comptes annuels et des comptes consolidés et modifiant les directives 78/660/CEE et 83/349/CEE (proposition sur laquelle un accord politique est intervenu au Conseil en date du 11 octobre 2005) ;
- la directive 2001/65/CE en ce qui concerne les règles d'évaluation applicables aux comptes annuels et aux comptes consolidés de certaines formes de sociétés ainsi qu'à ceux des banques et autres établissements financiers ("Directive Juste Valeur"), rendue applicable aux comptes des entreprises d'assurances et de réassurances par la Directive modernisation des directives comptables.

La Loi transpose toutes les options prévues à l'article 5 du Règlement IAS. Ainsi, il est permis aux entreprises d'assurances et de réassurances de publier leurs comptes consolidés et/ou leurs comptes annuels sous le référentiel IAS. Contrairement à la loi pour les établissements de crédit, cette faculté ne saurait cependant dispenser les entreprises concernées d'établir à des fins prudentielles un second jeu de comptes suivant les normes comptables actuelles de la loi sur les comptes des entreprises d'assurances, étant donné qu'en l'absence de normes IAS pour les passifs d'assurances, des comptes IAS d'entreprises d'assurances seront difficilement interprétables et peu utilisables à des fins de surveillance.

La Loi transpose également toutes les dispositions transitoires prévues aux points (a) et (b) de l'article 9 du Règlement IAS permettant aux compagnies concernées, notamment à celles dont seules les obligations sont cotées, de différer jusqu'à 2007 l'obligation de publier des comptes consolidés conformes aux normes IAS.

La Loi transpose par ailleurs dans la loi sur les comptes des entreprises d'assurances, les dispositions communautaires relatives au contenu du rapport de gestion et celles relatives au rapport du contrôleur légal des comptes (en application de la Directive modernisation des directives comptables) et par anticipation de l'entrée en vigueur de la directive sur le contrôle légal des comptes, la publication d'informations sur les honoraires des contrôleurs légaux des comptes.

La Loi est applicable pour chaque exercice commençant le 1er janvier 2005 ou après cette date.

[4] Law of 27 April 2006 on the application of international accounting standards in the insurance sector. An English translation of this contribution can be obtained upon request.

Alors que les modifications, y compris l'application optionnelle du référentiel IAS et des différentes options IAS, sont applicables aux exercices commençant le 1er janvier 2005 ou après cette date, l'application du régime obligatoire du Règlement IAS (article 4) est retardée jusqu'à l'exercice social 2007 pour les entreprises d'assurances et de réassurances dont :

a) uniquement les obligations sont négociées sur un marché réglementé de l'Union européenne, ou dont
b) des titres sont admis à la vente directe au public dans un pays tiers et qui utilisent à cet effet des normes acceptées sur le plan international depuis un exercice ayant commencé avant le 11 septembre 2002.

10. Eurofood IFSC Ltd – ECJ 2 May 2006 – C-341/04 – Council Regulation (EC) No 1346/2000 of 29 May 2000 – Group of companies – Insolvency proceedings – Decision to open the proceedings – Centre of the debtor's main interests – Recognition of insolvency proceedings – Public policy

Two insolvency proceedings had been opened in two different Member States against two different companies belonging to the same group, i.e. the Parmalat group, and the European Court of Justice (the "ECJ") was asked to determine, according to Council Regulation (EC) n° 1346/2000 on insolvency proceedings (the "Regulation"), whether and which one of those proceedings could outdo the other one.

The case concerned in particular the question whether the Regulation, which does not contain any provision for groups of companies, required that an Irish subsidiary of the Italian holding company should be wound up in Ireland or in Italy.

The facts were the following: on 27 January 2004, Bank of America, alleging that Eurofood, a subsidiary of Parmalat incorporated and registered in Ireland, was insolvent, presented to High Court of Ireland a petition for the winding up of Eurofood. On the same day, the High Court appointed Mr Farrell as the provisional liquidator, with powers to take possession of all the company's assets, manage its affairs, open a bank account in its name and instruct lawyers on its behalf.

On 9 February 2004, the Italian Minister for Production Activities admitted Eurofood to the extraordinary administration procedure and appointed Mr Bondi as the extraordinary administrator.

On 10 February 2004, an application was lodged before the District Court in Parma (Italy) for a declaration that Eurofood was insolvent. The hearing was fixed for 17 February 2004, Mr Farrell being informed of that date on 13 February. On 20 February 2004, the District Court in Parma, taking the view that Eurofood's centre of main interests was in Italy, held that it had international jurisdiction to determine whether Eurofood was in a state of insolvency.

On 23 March 2004 the High Court decided that, according to Irish law, the insolvency proceedings in respect of Eurofood had been opened in Ireland on the date on which the application was submitted by the Bank of America NA, namely 27 January 2004. Taking the view that the centre of main interests of Eurofood was in Ireland, it held that the proceedings opened in Ireland were the main proceedings. It also held that the circumstances in which the proceedings were conducted before

the District Court in Parma were such as to justify, pursuant to Article 26 of the Regulation, the refusal of the Irish courts to recognise the decision of that court. Finding that Eurofood was insolvent, the High Court made an order for winding up and appointed Mr Farrell as the liquidator.

Mr Bondi having appealed against that judgment, the Supreme Court considered it necessary, before ruling on the dispute before it, to stay the proceedings and to refer some questions to the ECJ for a preliminary ruling.

The first one aimed at the ECJ giving a definition of a judgment opening insolvency proceedings for the purposes of Article 16, interpreted in the light of Articles 1 and 2, of the Regulation.

The response was the following:

> "On a proper interpretation of the first subparagraph of Article 16(1) of the Regulation, a decision to open insolvency proceedings for the purposes of that provision is a decision handed down by a court of a Member State to which application for such a decision has been made, based on the debtor's insolvency and seeking the opening of proceedings referred to in Annex A to the Regulation, where that decision involves the divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation. Such divestment implies that the debtor loses the powers of management that he has over his assets."

The Irish Court also wanted to clarify a definition of "centre of main interests" and put the following question to the ECJ:

> "Where,
>
> (a) the registered offices of a parent company and its subsidiary are in two different Member States,
>
> (b) the subsidiary conducts the administration of its interests on a regular basis in a manner ascertainable by third parties and in complete and regular respect for its own corporate identity in the Member State where its registered office is situated and
>
> (c) the parent company is in a position, by virtue of its shareholding and power to determining the "centre of main interests",
>
> are the governing factors those referred to at (b) above or on the other hand those referred to at (c) above?

Not willing to recognize groups of companies unless the control of the subsidiary by the parent satisfies the requirements of transparency and ascertainability, the ECJ ruled as follows:

> "Where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated,

the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by that Regulation."

Finally, to the following question of the Irish Supreme Court:

> "Where it is manifestly contrary to the public policy of a Member State to permit a judicial or administrative decision to have legal effect in relation [to] persons or bodies whose right to fair procedures and a fair hearing has not been respected in reaching such a decision, is that Member State bound, by virtue of Article 17 of the said regulation, to give recognition to a decision of the courts of another Member State purporting to open insolvency proceedings in respect of a company, in a situation where the court of the first Member State is satisfied that the decision in question has been made in disregard of those principles and, in particular, where the applicant in the second Member State has refused, in spite of requests and contrary to the order of the court of the second Member State, to provide the provisional liquidator of the company, duly appointed in accordance with the law of the first Member State, with any copy of the essential papers grounding the application?",

the ECJ responded that:

> "On a proper interpretation of the first subparagraph of Article 16(1) of Regulation No 1346/2000, the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State",

and that:

> "On a proper interpretation of Article 26 of the Regulation, a Member State may refuse to recognise insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys."

11. European Commission's decision to impose the Luxembourg State to cancel or modify the status of 1929 holding companies

On 19th July, 2006 the European Commission decided to impose on the Luxembourg State to cancel or modify the status of 1929 holding companies for 31st December, 2006 at the latest, allowing however for a transitional period until 31st December, 2010 for companies which benefited from the regime at the date of the Commission's decision.

According to the declarations made by the Luxembourg Government, which has not recognised as such that the tax regime of the Holding 29 qualifies as a State aid, the decision of the European Commission is the result of negotiations with the Luxembourg Government and constitutes a compromise securing the existing holding 29 companies for a transitional period. As a result of the relatively long transitional period and by putting into place in the near future alternative investment vehicles, the Luxembourg Government expects to procure a safe and stable legal environment to the Luxembourg financial sector.

As mentioned above, the decision of the European Commission allows the extension of the present regime for existing holding

companies until 31st December, 2010. However, Article 2, last paragraph of the decision provides that companies benefiting of such grand-fathering clause must not be "the subject of any total or partial transfer of their capital during the whole period of this transitory regime".

Preamble n. 113 of the decision explains this restriction by saying that "*companies continuing to benefit from the exemption regime until 31st December, 2010 may not become the subject of a total or partial disposal of their capital during the whole of the period of the transition regime, because considering their status as participation companies they cannot, if their parties (sic) are transmitted, prevail themselves of the legitimate confidence in the tax exemption regime …*".

Preamble n. 113 and article 2 paragraph 3 of the actual decision are unclear and leave room for interpretation.

A strictly literal interpretation could lead to the conclusion that no transfer of "capital" i.e. shares may occur at all. This would constitute for any holding company listed on the Luxembourg Stock Exchange or on any other Stock Exchange an impossible condition. Obviously, shares in listed companies are capable of being negotiated on the Stock Exchange on any dealing day. Even for a non listed company, this interpretation would result in a major limitation of ownership rights.

A reasonable interpretation would be to consider the Commission's restriction as to transfer as an anti abuse provision aiming to avoid a "market" in "shelf" structures set up prior to the decision.

This seems to be the position expressed by the Minister of Finance in an interview given to the press on 19th August, 2006.

The Luxembourg Government will shortly submit a bill of law abolishing the existing tax regime of the Luxembourg 1929 holding companies with effect on 1st January, 2007. Such bill of law will provide for the specific rules applicable during the transitional period running until 31st December 2010, transitional rules which will only apply for those holding companies having been incorporated before 1st August 2006, being the day after the date on which the decision of the European Commission was published in the Luxembourg Official Gazette.

The condition of non transferability of capital had not been a subject of the discussions with the Commission. This is definitely an anti abuse provision. The restrictions to transfer of shares do not jeopardize the transferability of shares and the trading of shares of listed companies.

The bill of law which is currently being worked out by the Luxembourg Government, with the assistance of a working group set up by the Luxembourg Bankers Association (ABBL), is expected to clarify the implementation of the decision of the European Commission, bill of law which is expected to be submitted and approved by the Parliament before the end of the year 2006.

Elvinger, Hoss & Prussen have been actively involved in this matter by making representations and proposals to the Minister of Finance. Partners of the firm are members of the working group set up by the ABBL and participated in preparing specifically the provisions of the bill of law dealing with the transitory period.

12. European Company

Two laws of 25th August, 2006 deal with the European Company – also known by its Latin name "Societas Europaea". The first law enacts the EC Regulation 2157/2001 establishing the

company law rules of the European Company and the second implements the EC Directive 2001/86 on the involvement of workers in the European Company. Both the Regulation and the Directive had to be implemented by 8th October 2004.

The statute of the European Company will "permit the creation and management of companies with a European dimension, free from the obstacles arising from the disparity and the limited territorial application of national company law "(Regulation 2157/2001, recital (7)). As the internal market commissioner Mr Bolkestein has put it "adoption of the European Company Statute will give companies the option of using this efficient structure for their pan – European operations. The European Company will enable companies to expand and restructure their cross-border operations without the costly and time-consuming red tape of having to set up a network of subsidiaries. This is a practical step to encourage more companies to exploit cross-border opportunities and so to boost Europe's competitiveness in accordance with the objective at the Lisbon Summit".

Indeed, one of the major characteristic of the European Company is its intra-community mobility: a European Company registered in one Member State may move its registered office to another Member State without having to be wound up in the first Member State and re-incorporated in the second Member State.

The law of 25th August, 2006 based on the bill of law 5352 copies the procedural steps provided in the Regulation for the transfer of the registered office of a European Company. However, contrary to initial version of the bill of law, the Parliament has not taken over the right granted to the Minister of Justice to oppose to a transfer of the registered office of a European Company on grounds of public interest (whatever that may mean).

The European Company is a new type of commercial company. It will be governed by the rules set forth in the Regulation and the law of 25th August, 2006. For those aspects which are not set out in the Regulation and hence the bill of law, the rules applicable to the "société anonyme" will apply.

That explains why the provisions of the Regulation have not been implemented in a specific text, but have been included in the law of the 10th August, 1915 on commercial companies, and more specifically in the section dealing with the "société anonyme".

The European Company is a public limited liability company with a minimum issued share capital of 120,000 Euro, without prejudice to any law requiring a greater subscribed capital for companies carrying out certain types of activities (such as, for example, banks and other professionals of the financial sector or insurance and re-insurance companies). A European Company may have only 1 shareholder.

The European Company has a legal personality, not as the other types of Luxembourg commercial companies since the day of its incorporation, but since the day of its entry into the Luxembourg Register of Trade and Companies.

The registered office of a European Company needs to be located in the Member State where it has its administrative head office. The criteria used to determine the location of the registered office of a Luxembourg commercial company will also apply to the European Company. By 8th October, 2009 the European Commission shall forward to the Council and the European Parliament a report on the application of the Regulation and said report will, among other, address the issue whether to allow the location of a European Company's head office and registered office in different Member States.

A European Company may be set up in four different ways:

- by the merger of two or more public limited liability companies ("sociétés anonymes" or equivalent) from at least 2 different Member States; or

- by the incorporation of a holding company promoted by public limited liability companies ("sociétés anonymes" or equivalent) or private limited liability companies ("sociétés à responsabilité limitée" or equivalent) from at least 2 different Member States or which have for at least 2 years a subsidiary governed by the law of another Member State or a branch located in another Member State;
- by the incorporation of a subsidiary of companies or other legal bodies governed by public or private law from at least 2 different Member States or which have for at least 2 years a subsidiary governed by the law of another Member State or a branch located in another Member State;

- by the transformation of a public limited liability company (société anonyme) if for at least 2 years it has had a subsidiary governed by the law of another Member State.

The law also provides for the transformation of a European Company into a "société anonyme".

As regards the management of a European Company, the articles of incorporation may provide either for a one – tier system represented by the board of directors or for a two-tier system, being a supervisory board ("conseil de surveillance") and the management board ("directoire").

The European Company may switch from one management system to the other even during a given financial year. There is no priority or preference granted to any one of such management structures.

The one – tier management structure of a European Company, consisting in the board of directors, does note substantially differ from the system currently used by the "société anonyme".

The two - tier system encompasses a management board responsible for the actual management of the European Company and a supervisory board that supervises the management board without itself exercising the power to manage the European Company.

The members of the supervisory board are appointed and removed by the shareholder(s). The members of the management board are appointed and removed by the supervisory board unless the articles of incorporation provide that the members of the management board shall be appointed and removed by the shareholder(s).

The law also provides for rules on corporate governance. The main such rules may be summarised as follows:

- the board of directors or the management board of a European Company has to meet at lease every third month according to a periodicity set forth in the articles of incorporation;

- board meetings as well as shareholders' or bondholders' meetings may be held by way of videoconference or by any other telecommunication means;

- the confidentiality obligation of board members, whether in the one-tier or two-tier system, is now set forth in the law;

- a legal person may be appointed member of the board of directors, supervisory board or management board

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of a European Company. It shall appoint a physical person as permanent representative and the law provides for the rules governing the liability of such permanent representative.

The Parliament has not changed the majorities required for the amendment of the articles of incorporation. Indeed the Government had suggested that under certain conditions, the articles of incorporation could be amended by a majority of the shareholders present or represented.

The law reduces the percentage of the issued share capital which triggers the obligation for the board of directors or management board, as the case may be, to convene a shareholders' meeting. Shareholders representing 10% of the issued share capital – instead of currently 20% - may ask the board to convene such shareholders' meeting. The same percentage applies if shareholders want to add additional items on the agenda of a shareholders' meeting, but the board is not compelled to accede to such request.

The law not only provides for the company law aspects of the European Company, but also applies some of the characteristics of the European Company to the "société anonyme".

These are threefold:

- a "société anonyme" may have only 1 shareholder;
- the management of a "société anonyme" may be structured though a one – tier or a two – tier system; and
- the rules on corporate governance, also apply to a "société anonyme", with the exception of the periodicity of the meetings of the board of directors or the management board.

It should be finally noted that the law of 10th August, 1915 on commercial companies will further be amended at the end of 2006 / beginning of 2007. The bill of law 4992 will extend the possibilities of merger and division to other types of commercial companies and will permit cross-board mergers. It will also provide for the possibility of contributions in kind of a line of business or all of the assets and of the professional property of a legal or physical person to a company. Such extension of the contribution in kind mechanism has however be strongly criticized by the Council of State, thus triggering – should the parliamentary committee on Justice keep the bill of law 4992 despite the opposition of the Council of State – two votes in Parliament at three months interval.

13. Loi du 31 juillet 2006 portant introduction d'un Code du Travail : entrée en vigueur le 1er septembre 2006[5]

Par la loi du 31 juillet 2006 portant introduction d'un Code du Travail publié dans le Mémorial n° 149 du 29 août 2006, le législateur a abrogé toutes les lois existantes en matière de droit du travail telles que plus amplement reprises dans la loi précitée pour reprendre les mêmes dispositions de façon codifiée dans une même loi. Cette codification permet une présentation des règles applicables en matière de droit du travail sous la forme d'un ensemble organisé construit selon un plan d'ensemble systématique.

En effet à ce jour les différentes lois applicables en matière de droit du travail étaient difficilement retraçables, à moins de disposer

[5] The law of 31 July 2006 introduces with effect on 1 September 2006 a new labour code. An English translation of this contribution can be obtained upon request.

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d'une compilation officieuse des différents textes en vigueur en la matière, compilation qui présentait toujours l'inconvénient de ne pas être à jour. Par l'adoption du Code du Travail il sera dorénavant possible de retracer facilement les différentes modifications aux dispositions applicables en matière de droit du travail.

Quant à la technique de la codification, le législateur luxembourgeois s'est inspiré du législateur français en suivant le modèle de numérotation préconisé par la législation française.

Le Code du Travail regroupe les dispositions actuellement applicables en matière de droit du travail sous les sujets suivants:

Livre I Relations individuelles et collectives du travail
Livre II Réglementation et conditions de travail
Livre III Protection, sécurité et santé des travailleurs
Livre IV Représentation du personnel
Livre V Emploi et chômage
Livre VI Administrations et organes

La codification n'englobe que les lois actuellement en vigueur et non les règlements d'exécution pour lesquelles les références aux dispositions abrogées sont remplacées par les références aux dispositions correspondantes du Code du Travail, étant entendu qu'il est prévu de codifier la partie réglementaire dans un proche futur. Pour autant que le législateur ait omis d'abroger certaines lois en matière de droit du travail et de les insérer dans le Code du Travail, le législateur est autorisé à procéder à l'abrogation de ces lois et à leur insertion dans le Code du Travail par voie de règlement grand-ducal.

La présente loi ne change pas la réglementation en matière de droit de travail et ne requiert dès lors pas de commentaire à ce sujet. Néanmoins cette loi nécessitera une revue générale des références légales afin de les adapter aux dispositions reprises dans le Code du Travail.

For any further information please contact us or visit our website at www.ehp.lu.

The information contained herein is not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific legal advice concerning particular situations. We undertake no responsibility to notify any change in law or practice after the date of this document.

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