Newsletter 2006/01

1. Arrêt de la Cour de Justice des Communautés Européennes du 12 janvier 2006

Droit d'apport – Soumission facultative au droit d'apport des opérations autres que les augmentation de capital proprement dites – Suppression du droit d'apport dans un Etat membre ne permettant pas à un autre Etat membre d'imposer le droit d'apport

Cet arrêt, qui a été rendu quant à l'applicabilité du droit d'apport néerlandais à propos d'une contribution faite par la société-mère anglaise d'une société néerlandaise à une société allemande, filiale de la société néerlandaise et petite-fille de la société anglaise, présente un intérêt certain pour le Luxembourg qui, contrairement à la plupart des autres Etats membres, n'a pas encore supprimé le droit d'apport.

La Cour a jugé, sur question préjudicielle de la Cour de cassation néerlandaise, que le droit d'apport néerlandais ne devait pas s'appliquer à la contribution faite par la société grand-mère anglaise à sa petite-fille allemande. Elle s'est fondée sur le fait que cette opération était en principe susceptible d'être soumise au droit d'apport allemand, et cela bien que l'Allemagne ait, depuis 1992, supprimé purement et simplement tout droit d'apport.

La Cour s'exprime à cet égard comme suit:

"*Les Etats membres sont … conformément à l'article 7, paragraphe 2 de la Directive 69/335, libres d'exonérer du droit d'apport les apports en sociétés, sans que cette exonération ait pour conséquence de permettre à un autre Etat membre de les imposer*".

La Cour ajoute:

"*…, la Directive 69/335 favorise et encourage tant les exonérations ponctuelles au droit d'apport … que sa suppression complète….*"

et encore:

"(La) *Directive ne saurait donc être interprétée de manière à permettre à un Etat membre de profiter, pour augmenter ses recettes fiscales, de la tempérance fiscale d'un autre Etat membre*".

Ce principe doit trouver application au Luxembourg, en dehors de la problématique soumise à la Cour, tout d'abord à la situation visée à l'article 3, paragraphe 2 de la loi sur les rassemblements de capitaux, qui soumet au droit d'apport le transfert au Luxembourg du siège de direction effective ou du siège statutaire d'une société civile ou commerciale qui n'a pas été soumise au droit d'apport du chef d'un Etat membre des Communautés Européennes. Lorsqu'il s'agit du transfert vers le Luxembourg d'une société d'un Etat membre, il

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doit y avoir exonération selon les termes de l'arrêt même si "*l'Etat membre d'origine n'a en réalité pas imposé cette société parce que le droit d'apport y est supprimé depuis le 1er janvier 1992*."

On doit donc s'interroger également sur la pertinence de l'exemple cité lors des travaux préparatoires, dans l'avis du Conseil d'Etat (document parlementaire 1557, page 43) cité en note sous l'article 3 au Code fiscal, du transfert du siège d'une société allemande en nom collectif vers le Grand-Duché de Luxembourg, opération qui, selon le Conseil d'Etat, donnerait ouverture au droit d'apport "*parce que ces sociétés ne sont pas assujetties au droit d'apport allemand*". En effet le critère est, d'après la Cour, la soumission au droit d'apport selon les règles de la Directive 69/335, et non pas l'applicabilité effective sur le plan national du droit d'apport. Or, l'article 3, paragraphe 2 de la loi prévoit l'assujettissement des sociétés de personnes à but lucratif tout en le rendant facultatif pour les Etats membres.

En outre, cet arrêt confirme que l'exonération prévue à l'article 4-1 de la loi sur les rassemblements de capitaux lors de l'apport de la totalité du patrimoine d'une société d'un autre Etat membre à une société luxembourgeoise doit s'appliquer lorsque la société dont le patrimoine est apporté n'a pas été effectivement soumise au droit d'apport dans cet autre Etat membre. De même, l'exonération prévue par l'article 4-2 de la loi sur les rassemblements de capitaux doit trouver application même si la société d'un autre Etat membre dont au moins 65 % des actions sont apportés à une société luxembourgeoise, n'a pas été soumise au droit d'apport dans cet Etat d'origine.

L'arrêt est encore intéressant en ce qui concerne le Luxembourg en ce que, dans ses motifs, il énumère certaines opérations constituant des augmentations de l'avoir social qui tombent sous l'assujettissement facultatif par l'article 4, paragraphe 2 sous b) de la Directive, s'agissant entre autres des prêts sans intérêts, des reprises de pertes ou encore de la renonciation à une créance. La Cour (considérant no 34) rappelle ses décisions qui se sont prononcées sur chacune de ces opérations. Or, on sait que lors de la transposition de la Directive 69/335, le Luxembourg a opté de ne pas soumettre au droit d'apport les opérations visées par l'article 4 paragraphe 2 sous b) de la Directive (document parlementaire 1557, p.2) dont des exemples sont utilement rappelés par l'arrêt de la Cour dans le considérant précité.

2. Loi du 16 mars 2006 relative à l'introduction des normes comptables internationales pour les établissements de crédit

La loi du 16 mars 2006 relative à l'introduction des normes comptables internationales pour les établissements de crédit (la "Loi") apporte à plusieurs modifications à la loi modifiée du 17 juin 1992 relative aux comptes des établissements de crédit en procédant à la transposition de certaines directives (notamment la directive 2001/65/CE et la directive 2003/51/CE), ainsi que des articles 5 et 9 du règlement (CE) n° 1606/2002 sur l'application des normes comptables internationales (le "Règlement").

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

Toutefois, par dérogation à l'article 4 du Règlement IAS, l'application directe et dérogatoire du régime obligatoire du Règlement IAS est retardée jusqu'à l'exercice social commençant le 1er janvier 2007 ou après cette date pour les établissements de crédit :

a) dont seules les obligations sont admises sur le marché réglementé par un Etat membre au sens de la directive 2004/39/CE, ou

b) dont les titres sont admis à la vente directe au public dans un pays tiers et qui utilisent à cet effet des normes acceptées sur le point international depuis un exercice ayant commencé avant le 11 septembre 2002.

La loi entend ainsi laisser aux banques concernées plus de temps pour assurer la transition vers le référentiel IAS.

Néanmoins, les banques concernées qui le souhaitent pourront appliquer, avec l'accord préalable de la CSSF, le référentiel IAS pour la publication de leurs comptes consolidés sur une base volontaire, conformément à la nouvelle partie 3bis de la loi.

3. European commission's investigation into 1929 Holdings

On 31st March 2006, the Commission published in the Official Journal of the European Union an invitation to submit comments pursuant to Article 88 (2) of the EC treaty, including the full text in French of the Commission's letter of 8th February 2006 to the Luxembourg Government regarding the Commission's decision to initiate a procedure under Article 88 (2) of the EC treaty regarding "*exempt 1929 Holding companies and milliardaire holding companies*" The publication contains a summary describing the alleged State aid measure and the Commission's assessment.

We understand that the Luxembourg Government is presently preparing its response to the Commission's letter.

The formal investigation comes after questions raised by letters of the Commission and responses by Luxembourg since February 1999. Also, the Primarolo working group previously classified 1929 Holdings as a harmful tax measure as defined by the 1997 Ecofin conclusions, as a result of which the 1929 law was amended by the law of 21st June 2005 so as to, in substance, preclude 1929 holdings companies from receiving dividends from companies not being subject to an income tax comparable to Luxembourg income tax. This law contains a grand-fathering provision allowing existing 1929 Holdings to defer compliance with the requirements of the amendment to 1st January 2011.

Despite, and perhaps because of these precedents, the investigation somehow comes as a surprise. A press release issued on 8th February 2006 on behalf of the Commission says - rightly to some extent - "*that the globalization of financial markets and the modern regulatory framework for financial services have rendered the 1929 legislation obsolete*". If this is so, was it worthwhile to launch an investigation in 2006 after Luxembourg has just amended the law so as to avoid the criticism of a harmful measure? And the basis of the investigation, Article 87 (2) of the treaty is, despite change of numbering (previously Article 92), as old as the treaty itself!

What is less surprising is that, as stated in the last paragraph of the press release, Luxembourg and interested parties are invited to submit their comments not only as to the preliminary qualification of the regime as incompatible aid, but also regarding "*the possible existence of legitimate expectations as to the future duration of such a long lasting regime*". The press release also stated that the inquiry "*does not prejudge the Commission's final decision*".

The letter to the Luxembourg Government is, by the details it contains, an impressing document. However, the summary which precedes the letter in the publication would seem, at face, to show certain weaknesses in the Commission's position.

For instance, when the summary, under the heading "*Assessment of the measure*" refers to economic advantages which are "*exclusively reserved to business entities in Luxembourg*", the fact is that the use of 1929 holding companies is available for any business entities outside Luxembourg within the European Union and abroad. It is also slightly surprising, in another respect, to read that the scheme is regarded as "*selective*" - a condition for qualification as a State aid - because it would be "*restricted to intra-group activities as the beneficiaries have to operate within a group structure in order to benefit from the regime*". This is not generally true for 1929 companies although such a restriction applies to so-called finance holding companies, a feature which served European groups' bond issuing activities well for some time, but is hardly used anymore.

As regards the appraisal of this regime, it should be remembered that, when it was introduced, it was, as evidenced by the Parliamentary working documents, conceived as a measure against double taxation at a time when domestic legislations ignored the cross border parent-subsidiary exemption and when there were hardly any treaties available for the avoidance of double taxation. It should be remembered that the EC introduced its parent subsidiary exemption Directive only in 1990.

To some extent, it could be said that the 1929 regime and the 1938 so-called milliardaire regime were pioneering in the field of the avoidance of double taxation.

Since then, the effectiveness of the tax exemption granted to 1929 Holdings has been gradually reduced. While these companies are exempt from corporate tax, they are excluded from the benefit of all double taxation treaties entered into by Luxembourg as well as from the EC parent subsidiary exemption. Accordingly, their investments suffer foreign tax in full by way of withholding tax on dividends received, and while dividends distributed by 1929 Holding companies are not subject to Luxembourg withholding tax, they incur full taxation without reduction or credit in the residence countries of their shareholders. At best, the regime affords a certain neutralization. In addition, the amendment introduced by the law of 21st June 2005 would appear to exclude any benefit which would go beyond such neutralization by precluding 1929 holding companies from receiving dividends from untaxed sources.

Although the Commission is right in saying that the exemption also applies to interest income of 1929 Holding companies, this benefit is limited by the fact that loans are only to be granted to subsidiaries or group companies. Furthermore, this benefit is largely set off by the exclusion from double taxation treaties, so that interest received suffers the full withholding tax applied by the payor.

Therefore, it can be said in substance that the tax exemption of 1929 Holding companies has become largely ineffective and that, at least in the corporate and business field, there is little of real tax advantages left. To some extent this confirms the statement in the press release about obsoleteness of the regime.

It is therefore hoped hat the Luxembourg Government can successfully deny the existence of a State aid or at least defend its compatibility with the treaty.

4. Law of 9 May 2006 on market abuse

1. General

The law on market abuse dated 9 May 2006 (the "Law") implementing several European Directives and in particular Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) has come into force on 19 May 2006. The purpose of the implemented Directives is to fight against market abuse (consisting of insider dealing and market manipulation) and to ensure the integrity of financial markets, increase investor confidence and create a level playing field for all economic operators in the European Union. The Law replaces and abolishes the law of 3 May 1991 on insider trading.

2. Scope of the Law

The Law introduces a legal framework covering both, insider trading and market manipulation. It shall apply to any natural or legal person who has access to the market, as well as to any financial instrument admitted to trading, or for which a request for admission to trading has been made, on a regulated market or on an alternative market (MTF). Besides, the Law shall also apply to any financial instrument not admitted to trading on a regulated market or a MTF, but whose value depends on a financial instrument admitted to trading on one of these markets.

3. Definitions

Inside information

The Law sets out a broader definition than the Insider Directive (89/592/EEC) which confines itself to preventing the misuse of privileged information. According to the Law inside information shall mean information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.

Insider Trading

The Law does not provide a definition of insider trading, but prohibits any person who possesses inside information:

(a) by virtue of his membership of the administrative, management or supervisory bodies of the issuer; or
(b) by virtue of his holding in the capital of the issuer; or
(c) by virtue of his having access to the information through the exercise of his employment, profession or duties; or
(d) by virtue of his criminal activities; from:

- acquiring or disposing of, or by trying to acquire or dispose of, for his own account or for the account of a third party, either directly or indirectly, financial instruments to which that information relates;
- disclosing inside information to any other person unless such disclosure is made in the normal course of the exercise of his employment, profession or duties;
- recommending another person, on the basis of inside information, to acquire or dispose of financial instruments to which that information relates.

Market manipulation

The Law generally prohibits market manipulation and defines as such:
- transactions or orders to trade which give false or misleading signals as to the supply of, demand for or price of financial instruments or

which secure by a person, or persons acting in collaboration, the price of one or several financial instruments at an abnormal or artificial level;
- transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance;
- dissemination of information through the media , or by any other means, which gives, or is likely to give, false or misleading signals as to financial instruments, including the dissemination of rumours and false or misleading news, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading.

However, the prohibitions provided for in the Law shall not apply to accepted market practices.

4. Administration of information

In order to prevent the use of any inside information the Law requires that issuers of financial instruments on a regulated market shall, as soon as possible, publicly disclose inside information which directly concern them and post it on their Internet sites for a three month period. Still, an issuer may under his own responsibility delay the public disclosure of inside information such as not to prejudice his legitimate interests provided that such omission would not be likely to mislead the public and provided that the issuer is able to ensure the confidentiality of that information.

In addition, whenever an issuer, or a person acting on his behalf or for his account, discloses any inside information to any third party in the normal exercise of his employment, profession or duties, he must make complete and effective public disclosure of that information, simultaneously in the case of an intentional disclosure and promptly in the case of a non – intentional disclosure.

The provisions above shall not apply if the person receiving the information owes a duty of confidentiality, regardless of whether such duty is based on a law, on regulations, on articles of association or on a contract.

Furthermore, the Law imposes several information obligations towards the CSSF:

–issuers or persons acting on their behalf or for their account, shall draw up a list of those persons working for them, under a contract of employment or otherwise, who have access to inside information. Issuers and persons acting on their behalf or for their account shall regularly update this list and transmit it to the competent authority whenever the latter requests it;
–persons discharging managerial responsibilities within an issuer of financial instruments and, where applicable, persons closely associated with them, shall, notify to the CSSF the existence of transactions conducted on their own account relating to shares of the said issuer, or to derivatives or other financial instruments linked to them. The declaration shall be made within five business days of the transaction;
-any person professionally arranging transactions in financial instruments who reasonably suspects that a transaction might constitute insider dealing or market manipulation shall notify the CSSF without delay.

Also, the Law requires that persons who produce or disseminate within Luxembourg information recommending investment strategy intended for distribution channels or for the public, take reasonable care to ensure that such information is fairly presented and disclose their interests or indicate conflicts of interest concerning the financial instruments to which that information relates.

5. Exceptions - *„safe harbours“*

The Law shall not apply to three sets of financial transactions:

- transactions carried out in pursuit of monetary, exchange-rate or public debt-management policy by a Member State, by the European System of Central Banks, by a national central bank or by any other officially designated body, or by any person acting on their behalf;
- trading in own shares in "buy-back" programmes, or
- stabilisation of a financial instrument, to the extent, for the two latter, to comply with EC Regulation 2273/2003.

6. Competent authority

Without prejudice to the competences of the judicial authorities, the Law designates the CSSF as the regulatory and supervisory authority to ensure that the provisions adopted pursuant to the Law are applied. The CSSF has the duty to cooperate with the competent foreign authorities whenever necessary for the purpose of carrying out their missions. The CSSF is in particular given extensive supervisory and investigatory powers necessary for the exercise of its functions pursuant to the Law.

7. Sanctions

The Law provides for administrative and criminal sanctions respectively in case of violations of the provisions of the Law.

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