

Euro-obligations et standardisation

Le marché des euro-obligations, de quelque 8.000 milliards d'euro, présente aujourd'hui une tendance de complexité croissante d'un point de vue opérationnel. Il est intéressant d'en observer les conséquences et principaux enjeux.

La complexité opérationnelle des euro-obligations

Même si les euro-obligations sont souvent cotées en bourse (notamment à Dublin et à Luxembourg), une grande majorité des transactions est traitée entre professionnels (i.e. OTC, "over the counter"), et cela essentiellement pour des raisons de liquidité.

La complexité opérationnelle des euro-obligations s'est développée au fil des années. Si ces instruments se veulent potentiellement plus attrayants pour les investisseurs, il n'en demeure pas moins que leur émission ainsi que les aspects gestion d'actifs en deviennent de plus en plus compliqués d'un point de vue purement administratif. Et ceci dans un environnement actuel fragmenté ; en effet, le marché des euro-obligations implique un grand nombre d'intervenants : plus de 8000 émetteurs localisés dans plus de 70 pays, émettant des titres dans plus de 40 devises différentes et uti-



lisant un important réseau d'agents. Par ailleurs, les interventions manuelles prédominent encore fortement, notamment en raison de la diversité des types d'opérations affectant les titres (options, offres, restructuration de titres en défaut, ...), du nombre d'agents impliqués (agents de calcul, agents de paiement, ...) ainsi que du manque de standardisation et d'harmonisation des procédures opérationnelles.

La nécessaire harmonisation des pratiques

Il est certes important d'innover. Il est cependant nécessaire de standardiser et d'harmoniser les émissions de titres de dette internationaux. Une certaine standardisation dans l'émission et la gestion des euro-obligations, d'autant plus qu'elles ciblent des investisseurs internationaux, permet de réduire les coûts et les risques opérationnels pour les investisseurs et pour les intervenants dans la chaîne de détention.

Le groupe ISMAG ("International Securities Market Advisory Group") a précisément été créé dans cette optique. Le groupe comprend, entre autres, des représentants d'émetteurs privés, de représentants d'agents des émetteurs et les ICSDs (dépositaires centraux inter-

nationaux de titres) eux-mêmes, qui visent à mettre en place les actions nécessaires afin de diminuer les risques tout en améliorant l'efficacité opérationnelle. Selon ISMAG, les informations relatives à une euro-obligation peuvent en effet impliquer jusqu'à dix acteurs différents dans la chaîne d'une transaction avant d'arriver à l'investisseur final. Dans la mesure où il n'existe aucun langage opérationnel commun pour définir le contenu de l'information, des problèmes d'interprétation et des erreurs coûteuses sont donc susceptibles de se produire.

Initiatives et recommandations

ISMAG a émis des recommandations et un document central (the "Market Practice Book") contenant les meilleures pratiques, ainsi que les rôles et responsabilités de l'ensemble des intervenants impliqués dans le traitement des informations liées à une euro-obligation. Le groupe a identifié et décrit l'ensemble des flux entre parties actives dans l'émission de titres de dette internationaux et dans la gestion de ces derniers dans le marché secondaire.

ISMAG vise ainsi à adresser trois aspects essentiels en termes d'efficacité pour les euro-obligations. Tout d'abord, les informations essentielles pour l'acceptation d'un titre et l'allocation électronique d'identifiants uniques pour les titres émis, qui est considérée comme indispensable au processus de distribution dans le marché primaire et à la négociation dans le marché secondaire. Deuxièmement, une documentation appropriée des opérations sur titres (par type d'opérations) avec des standards acceptés par l'industrie concernant l'information indispensable et le timing de

transmission de cette information. Cela permettra de diminuer les risques de confusion et d'interprétation en matière de traitement de ces opérations. Troisièmement, il est important de développer davantage l'automatisation des opérations sur titre, afin de réduire les risques d'erreurs notamment en recommandant l'automatisation des flux de communication à travers la chaîne d'intervenants.

Edwin De Pauw, Directeur, division Produit chez Euroclear

Euroclear Bank, dépositaire central international de titres, dispose d'une expertise importante dans le domaine des euro-obligations. Plus de 60% des euro-obligations sont traitées par Euroclear Bank, dans quelque 52 devises.

Euroclear fournit des services de règlement-livraison domestique et transfrontière pour les transactions sur obligations, actions, produits dérivés et fonds d'investissement. Détenu par le marché et gouverné par ses utilisateurs, le groupe Euroclear comprend Euroclear Bank, basée à Bruxelles, et les dépositaires centraux de titres Euroclear Belgium, Euroclear Finland, Euroclear France, Euroclear Nederland, Euroclear Sweden et Euroclear UK & Ireland. Euroclear détient également EMXCo, un prestataire important au Royaume-Uni de services de routage d'ordres pour les transactions sur fonds d'investissement, et le fournisseur de systèmes électroniques Xtrakter, propriétaire du système TRAX d'appariement des transactions et de reporting.

La valeur totale des transactions sur titres dénouées par le groupe Euroclear, en 2009, dépassait les 514.000 milliards d'euros par an, soit 180 millions de transactions domestiques et transfrontières. La valeur des titres détenus pour le compte des clients dépassait, quant à elle, les 20.000 milliards d'euros. Euroclear Bank est notée AA+ par Standard & Poor's et Fitch Ratings.

Pour plus d'informations: www.euroclear.com.

Fund managers, don't get overwhelmed : Surf the AIFM wave by migrating to Luxembourg

Part 1: Migration of the management company of a foreign UCI, a feasible but imperfect solution

With 3.520 undertakings for collective investment (UCIs) owning 1.898 billion Euros of assets under management as of April 15, 2010⁽¹⁾, Luxembourg remains the first-choice location in Europe to establish a fund, notably for its ability to balance investors' protection and management's flexibility, based on both an attractive regulatory framework and the tax environment.

Although the harshly debated draft Alternative Investment Fund Managers ("AIFM") Directive has been delayed in its adoption, it makes little doubt that it will be implemented at some point by the end of 2010 – as it seems today⁽²⁾. Then the questions are no longer "if" and "when", but "what" and "how" this Directive will finally impose on AIF managers, and to some extent on the AIFs themselves. Though this article does not purport to summarize the likely regulatory changes that the AIFM Directive will trigger, time has come to anticipate the most likely future shifts regarding management, distribution, organization, custody, disclosure, and delegation matters. The draft AIFM Directive seems an appealing incentive to be "in the place" to get acquainted with these matters, on the dark side of a forced-move.

On the bright side, Luxembourg's regulatory and tax attractiveness remains – onshoring your fund there is a relevant, business-efficient option to mitigate the impact of the Directive on your business in the European Union. For this purpose, you can either elect to migrate your funds' management company, or to relocate your funds themselves. Here is how to migrate a management company, and for which benefits.

1. Feasibility and constraints on a transfer of a foreign UCI's management company to Luxembourg

The ability to transfer a management company from a jurisdiction to another should not be taken as granted, and even when possible, such transfer, in certain circumstances, may lead to the application of two different systems of law on the company's matters.

1.1 Luxembourg welcomes foreign companies

According to the Luxembourg law on commercial companies (the Law), a company which has its central administration located in Luxembourg will be subject to the Luxembourg legislation and will have the Luxembourg nationality⁽³⁾. In addition, under the Law, the place of central administration is assumed to be the registered office⁽⁴⁾. Luxembourg accepts cross-border transfers of registered offices of companies, provided that they have been properly incorporated pursuant to their home state legislation and that the home state legislation also authorizes cross-border transfers of registered offices. In practice, a transfer of registered office requires restating the bylaws of the company, while the home state must authorize and recognize such transfer.

The re-location of a management company which has no legal personality cannot be envisaged under the Law, which recognizes only "commercial companies with legal personality (...)"⁽⁵⁾. A contrario, companies without legal personality will not be governed by the Law and therefore not recognized as Luxembourg

commercial companies. Practically, the decision to transfer a foreign company to Luxembourg should be taken by its shareholders or directors pursuant to the legislations of the home state. The same decision is taken by the shareholders in Luxembourg and evidenced in a notary deed⁽⁶⁾; by waiving the registered seat there, the company becomes subject to Luxembourg law, and its bylaws are restated accordingly. However, depending on the originating state's legislation, Luxembourg law might sometimes not be the only one to apply, then injecting some complexity in the handling of the management company's business and regulatory obligations.

1.2 Luxembourg law will apply, but sometimes not alone...

The law(s) that applies to the transferred company depend(s) mainly on the "linking-up" theory of the home jurisdiction. Jurisdictions which adhere to the "incorporation theory" do not pay attention to the location of the registered office, and then will recognize the existence of a company as long as it was validly formed under the legislation of the state of incorporation, and such jurisdictions will then consider that the company is governed by the legislation of its jurisdiction of incorporation for its whole life. Subject to local subtleties, this is the case of the UK and the Netherlands⁽⁷⁾. Jurisdictions which apply the "real seat theory" consider the effective seat (i.e. head office, registered office or principal place of business) of a company as the connecting factor. For instance, Luxembourg, Spain, Italy, and France belong to these jurisdictions which expect the application of the legislation of the state in which the companies' real seat is located⁽⁸⁾. In practice, a company incorporated in a state applying the incorporation theory which transfers its registered office to Luxembourg will be governed by both the home state legislation (for substantive matters)⁽⁹⁾ and the Luxembourg legislation⁽¹⁰⁾. If the company comes from a country that applies the real seat theory, then only Luxembourg law will apply⁽¹¹⁾.

1.3 License to manage

Once migrated to Luxembourg, a management company needs to be authorized to practice its activity. Management companies of undertakings for collective investment (UCIs) are supervised by the Luxembourg regulation authority, namely the Commission de Surveillance du Secteur Financier (CSSF). Such process should be initiated well in advance of the expected date of transfer to allow the CSSF to perform its due diligence and complete the approval procedure. Generally speaking, the management company must have a share capital of at least EUR 125.000,00 held by shareholders to be fully disclosed (for those who own a qualified holding), and the persons who effectively conduct its business must evidence sufficiently good repute and be sufficiently experienced in relation to the type of UCI managed. A program of activity setting out the organizational structure of the management company must be provided. Finally, the authorization is subject to the condition that the audit of its annual accounting documents is entrusted to one or more external auditors who can justify having adequate professional experience.⁽¹²⁾

UCIs other than those having a registered office in Luxembourg and those authorized under the UCITS III directive (e.g. Cayman Islands LP hedge funds), should qualify as non-coordinated UCIs⁽¹³⁾. Once approved, the management company of a UCITS shall limit its activities to the management of UCITS, which includes the investment management, the marketing of units and the administrative functions (corporate secretary, accounting, portfolio evaluation and calculation of the

net asset value per share)⁽¹⁴⁾. An approved management company, with respect to other UCIS which are not covered by the UCITS III Directive and for which the management company is subject to prudential supervision but the units of which cannot be marketed in other Member States of the European Union under such Directive, can engage in the management of such other UCIs (and only in their management).

2. Tax aspects in connection with the migration of the management company of a foreign UCI to Luxembourg

In addition to a special legal and regulatory environment, the transfer of a management company to Luxembourg could also trigger tax consequences, not only in Luxembourg but also in the departed country.

2.1. Migration: a lethal move from a tax perspective

Even if from a legal and regulatory perspective the management company can survive to its migration to Luxembourg, it is unlikely that it can survive tax wise. Actually, the transfer of a company from a jurisdiction to another is often considered as a liquidation from a tax perspective, with the consequence that all latent capital gains have to be disclosed and taxed accordingly. Nevertheless, in practice, the risk of taxation should remain limited if we consider that a management company of a UCI is not dedicated to the holding of any assets, its object being limited to the management of the UCI. The tax consequences deriving from this "liquidation" will obviously depend on the applicable domestic tax regime and should be analyzed on a case by case basis.

2.2. Welcome to Luxembourg

2.2.1. Application of the Luxembourg standard taxation rules

The management company will be considered as Luxembourg tax resident as soon as its registered office or its central administration is located in Luxembourg⁽¹⁵⁾. At the date of the migration of the management company of a foreign UCI, all assets and liabilities have to be evaluated at their fair market value⁽¹⁶⁾. These values will be reflected in the opening balance sheet of the management company. This ensures that only gains attributable to Luxembourg will be taxed in Luxembourg. Besides, the migration is only subject to a EUR 75 fixed registration duty⁽¹⁷⁾. As a Luxembourg resident, the migrated management company should be subject to tax in Luxembourg. Though management companies of Luxembourg UCIs might benefit from specific tax exemptions⁽¹⁸⁾, it is questionable whether the Luxembourg management company of a non Luxembourg UCI may embrace a similar tax regime. The migrated management company should therefore be subject to Corporate Income Tax⁽¹⁹⁾, Municipal Business Tax⁽²⁰⁾ and Net worth Tax⁽²¹⁾ in Luxembourg, as any fully taxable Company, and potentially to withholding tax on distributions⁽²²⁾ (except if specific exemptions / reductions apply based on the Parent-Subsidiary directive or the application of the extensive Luxembourg double tax treaty network⁽²³⁾).

2.2.2. Is a partial transfer viable?

Notwithstanding the above, there might be situations where the migrated company does not only become subject to Luxembourg tax but remains subject to tax in a foreign jurisdiction at the same time. Indeed, in case the company has legally migrated to Luxembourg but kept its central administration in the initial jurisdiction, there might be a risk that the management company be

taxed in both jurisdictions. Again double tax treaties should help determining where the management company has to be taxed and avoid double taxation situations. However, if the central administration remains located in a country with which Luxembourg has not signed any double tax treaty, the risk of double taxation remains.

2.2.3. Could the migration of the management company impact the tax regime of the Fund?

In order to avoid the risk of double taxation, it is essential to ensure that the central administration is effectively transferred to Luxembourg. However, in case the central administration of the UCI is completely moved to Luxembourg, the UCI could also become subject to tax in Luxembourg. Actually, the Luxembourg tax regime of the UCI will depend on different facts and circumstances, amongst which the legal form of the UCI, e.g. partnership, and the jurisdiction in which it was established. The Luxembourg tax consequences for the UCI will have to be analyzed on a case by case basis.

Conclusion

The migration of the management company of a foreign UCI to Luxembourg is technically possible, even if such migration requires an in depth legal, regulatory and tax analysis. Having in mind some of the main provisions of the AIFM directive and notably conditions similar to those applying to Luxembourg UCIs, it is advisable to consider a second option which, although not easier to implement, can offer significant tax benefits: migrating the UCI to Luxembourg... Stay tuned on Agefi and ATOZ, as we will explain why in a while – "to be continued!".

ATOZ - AIFM working group

Leaders: Jean-Michel Chamonard – jean-michel.chamonard@atoz.lu - +352 26 940 233
Nicolas Cuisset – nicolas.cuisset@atoz.lu - +352.26.640 305

- 1) CSSF Newsletter, vol. 111, April 2010, http://www.cssf.lu/uploads/media/newsletter111_01.pdf
- 2) European Parliament, Procedure File for AIFM Directive, <http://www.europarl.europa.eu/ocil/file.jsp?id=5774032>, visited April 29, 2010
- 3) Article 159 of the law of 10th August 1915 on commercial companies, as amended
- 4) Article 2 of the law of 10th August 1915 on commercial companies, as amended
- 5) Idem note 4 supra
- 6) Article 67-1 of the law of 10th August 1915 on commercial companies, as amended
- 7) Dicey & Morris on "The Conflict of Laws", Sweet and Maxwell, 2000, vol. 2, rule 29
- 8) Article 158 of the law of 10th August 1915 on commercial companies, as amended
- 9) Batifol (L.), "Transfert du siège social d'une société à l'étranger", BCF, March 2003
- 10) Idem note 3 supra
- 11) Idem note 3 supra
- 12) Articles 77 et seq., articles 91 et seq. of the law of December 20, 2002 relating to the undertakings for collective investment, as amended
- 13) Article 28-8 of the law of 5th April 1993 on the financial sector, as amended
- 14) Idem note 14 supra
- 15) Article 159-LITL
- 16) Articles 23 and 27 LITL
- 17) Law dated December 19, 2008.
- 18) Article 105-1 of 1988 Act.
- 19) Article 174 LITL, 21,84% (including the contribution for employment fund)
- 20) GewStG 6,75% (for a company having its registered office in Luxembourg)
- 21) §8 VSIG, 0,5%
- 22) Article 146 LITL, 15%
- 23) 57 double tax treaties in force and others under negotiation.
- 24) See above 2.2.2