

CONCLUSION

The detailed rules governing the standard of care of the directors of an AG results from the jurisprudence of the courts and the writings of jurists. The German approach appears to work in practice, although sometimes the precise result of litigation involving the application of para. 93(1), No. 1 and 93(2), No. 2, is difficult to predict. This appears inevitable in the case of general clauses. It may be unfortunate that the exact scope of the rule governing the reversal of the burden of proof is not entirely clear. It may well be the case that different approaches are adopted by the courts, dependent on the facts of

the case, and that this situation may not merit undue concern. It appears that in the past the German courts have given insufficient attention to the need of directors faced with a difficult choice to exercise their business judgment, but their approach to this question now seems to be changing, as is apparent from the dicta in the decision of the High Court reported in *Die Atkiengesellschaft* 1997, at p. 377. 

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Planned legal framework for the changeover to the Euro

by Daniel M Tomasevic

On 20 February 1998, the Belgian Government approved a bill on the Euro ('the bill'). The bill purports to provide a legal framework with respect to the changeover to the Euro in Belgium. Accordingly it enshrines some of the principles and ideas found in the *National Changeover Plan*, issued in August 1996, which provides a general framework for the preparation of the Belgian economy for the successful introduction of the single currency.

This review of the bill will touch on the following issues:

- continuity of contracts;
- dual pricing;
- fiscal, social security and labour implications of EMU;
- conversion and rounding issues;
- substitution of reference interest rates;
- increase and rounding of capital;
- redenomination of securities; and
- continuity of contracts.

The bill does not contain any general provision on continuity of contracts after 1 January 1999. Such continuity will be sufficiently ensured in Belgium by EC regulation (Regulation 1103/97, OJ L162/1) – which has direct effect and primacy – in particular art. 3 thereof which reads as follows:

'The introduction of the Euro shall not have the effect of altering any term of a legal instrument or of discharging or excusing performance under any legal instrument, nor give a party the right unilaterally to alter or terminate such an instrument.'

However with respect to particular contracts, i.e. contracts governing relations between vendors and consumers – in as much as these agents have been defined in the *Law of 14 July 1991 on Business Practices and Consumer Information and Protection* – the bill intends to prohibit clauses whereby the vendor has the unilateral right to terminate or to amend the contract because of the introduction of the Euro (art. 57). These clauses will generally be regarded as abusive. They will only be regarded as licit if the vendor is able to show that the clause has really been negotiated between the parties and has not been imposed upon the consumer as is often the case in that kind of relationship.

This will somehow restrict the freedom given to the parties by art. 3 of Regulation 1103/97 which ends as follows: 'This

provision is subject to anything which parties may have agreed.' This concern has been underlined by the Council of State, an advisory body to the government, in its opinion issued in April 1998, where it said that the bill goes beyond what is provided by Regulation 11032/97. Accordingly, if passed by Parliament, this provision of the bill could well be challenged before the Belgian courts, and ultimately before the Court of Justice of the EC by way of preliminary reference under art. 177 of the EC Treaty.

DUAL PRICING

Pursuant to the *Law of 14 July 1991 on Business Practices and Consumer Information and Protection*, prices and rates in Belgium have to be indicated in BEF (Belgian francs). Compulsory pricing in BEF will remain for the period between 1 January 1999 and 31 December 2001.

IMPACT OF THE EURO

The introduction of the Euro will have an important impact on financial markets, especially in a country such as Belgium, where public debt and private savings are amongst the highest in the world.

The bill does not provide for compulsory double-pricing. However the government is granted the power to impose such compulsory double-pricing (art. 54). Accordingly the government, if necessary, will impose dual pricing either as a general measure or, with respect to trade, of specific services or goods for which such double pricing is particularly needed.

Furthermore the bill provides that for specific contracts, i.e. consumer credit contracts (governed by the *Law of 12 June 1991 on Consumer Credit*) and mortgage contracts (governed by the *Law of 4 August 1992 on Mortgages*) issued in Euros, the counter-value of the contract must also be shown to the borrower in BEF.

FISCAL, SOCIAL SECURITY AND LABOUR IMPLICATIONS

The bill (art. 9ff.) provides that, as from 1 January 1999, individuals and companies will be entitled to fill in their tax return (VAT, income tax, etc.) in Euros. Equally they will be able to submit documents in Euros to social security institutions (art. 58).

Opting for the Euro is irrevocable. In other words, for a given type of tax or with a given type of social security institution, any return or information to be submitted has to be issued in Euros only, once the company or individual has decided to make the switch.

With respect to the relationship between employers and employees, nothing has been included in the bill itself. However, on 17 December 1997, the National Labour Council and the Central Economic Council, both advisory bodies to the government, issued a joint opinion on the impact of the changeover to the Euro. Both Councils recommend the following:

- the employer will be able to choose, when issuing wage slips, between BEF and Euros; however gross and net salary amounts expressed in Euros will also have to be shown in BEF;
- amounts shown on the document given to the employee for filling in his tax return (the so-called '281.10 document') will be expressed in BEF;
- in general the conversion rates between the Euro and BEF will have to be shown on any welfare document given by the employer to the employee.

Moreover the councils are of the opinion that the changeover to the Euro is an event likely to have an important impact on businesses. Consequently it comes within the scope of the *Royal Decree of 27 November 1973 on Economic and Financial Information to be provided to the Works Council*. This implies that the Works Council has to be briefed as soon as possible (at the latest on 1 January 1999) about all the consequences for businesses of the changeover to the Euro.

CONVERSION AND ROUNDING ISSUES

Pursuant to art. 4 of Regulation 1103/97, which provides for conversion rates being adopted with six significant figures, the BEF/Euro conversion rate will have two figures before the point and four figures after it. As an illustration, one could assume that the conversion rate would be: 1 Euro = 40.2171 BEF.

The rounding problems arising from the changeover to the single currency must be dealt with differently depending on whether the issues at stake are related to either sums of money to be paid and to accounting operations, or to other kinds of amounts. Only the former (sums of money to be paid and accounting operations) attract rounding operations (see art. 5 of Regulation 1103/97). These amounts, when converted from BEF to Euros, will be rounded to two figures after the point as provided for in art. 5 of Regulation 1103/97. Example: BEF 1,250/40.2171 = Euro 31.0813 rounded to 31.08. Conversely amounts converted from Euros to BEF will be rounded to the Franc, i.e. they will be rounded from BEF 0.50 upwards. Example: Euro 31.08 x 40.2171 = BEF 1,249.95 rounded to 1,250.

With respect to conversion from BEF to Euros, the bill grants the government the power to take measures providing for more accurate rounding when necessary (art. 3). Such will be the case for low prices in Euros which are applied to a large number of transactions. This is particularly true for sale of goods and services requiring the fixing of a low unit reference value such as in gas and electricity bills.

The bill also provides for a system of quality control of instruments and systems for conversion and rounding. In that

respect the government has the responsibility to put in place a system of 'conformity labels' that can be granted to or withdrawn from such systems and instruments (art. 5).

Finally the bill provides that a loss of accuracy of no more than one cent, due to several conversions of a same amount of money to be paid, does not affect the validity of the payment of the original amount and does not give rise to any compensation for the creditor (art. 6).

SUBSTITUTION OF REFERENCE INTEREST RATES

Continuity of contracts implies that interest rates referred to in such contracts, in the event that they no longer exist after 1 January 1999, should be replaced by other rates.

Accordingly, art. 7 of the bill provides that references to the rates of the National Bank of Belgium (NBB) appearing in statutory or contractual provisions, should be replaced by references to the equivalent European Central Bank (ECB) rates. The government is responsible for implementing this provision.

On this basis, the leading rate of the NBB, its central rate, which is applied for weekly tenders for a period of one week open to financial institutions, will probably be replaced by the rate used by the ECB used for weekly refinancing operations with maturity of two weeks. Similarly the bill also provides that references to BIBOR ('Belgian Interbank Offered Rate') will be replaced by EURIBOR ('European Interbank Offered Rate') references.

IN BRIEF

If adopted by Parliament this bill will give Belgium a legal framework on the changeover to the Euro where:

- continuity of contracts will be sufficiently ensured by Community law;
- dual pricing will not generally be required; such dual pricing could however be imposed when consumer protection requires it;
- companies and individuals will have the choice to conduct their relationship with tax and social security administrations in BEF or Euros; opting for the latter will be irrevocable;
- conversion and rounding will not raise specific legal issues;
- existing reference interest rates will be substituted by future equivalent rates;
- companies will be able to increase and round their capital, once converted to the Euro, by a simplified procedure;
- securities, in particular those representing the dematerialised debt of the Belgian State, will be redenominated by a simplified procedure.

INCREASE AND ROUNDING OF SHARE CAPITAL

The changeover to the single currency means that the capital of companies incorporated under Belgian law will be converted from BEF to Euros. Given that the capital of a company is usually a round figure, companies will have to increase their capital if they want to keep it round after 1 January 1999. Capital increase, under Belgian law, is quite a heavy and costly process to go through. In particular it requires a shareholders' meeting to be called. The increase also has to be recorded in a public deed.

In order to allow companies to increase and round their capital without having to bear such proceedings, the bill provides for simplified proceedings specifically dedicated to capital increase between 1 January 1999 and 31 December 2002 by companies converting their capital from BEF to Euros. Companies will be able to increase their capital by a mere decision of the board of directors recorded in a private deed. The increase could be made by capitalisation of reserves, profits carried over, or share premiums (art. 46 of the bill). The increase should amount to no more than 1,000 Euros or 4% of the capital subscribed before the increase.

Where the capital shares of a company have a nominal value the board of directors, under the simplified proceedings for capital increase, has to either adapt the value of the shares or delete this value from the articles of association. A capital increase normally gives rise to collection of registration fees (0.5%). The private deed embodying the capital increase resolution will therefore have to be submitted to the tax authorities within four months.

REDENOMINATION OF SECURITIES

The introduction of the Euro will have an important impact on financial markets, especially in a country such as Belgium, where public debt and private savings are amongst the highest in the world.

Redenomination of dematerialised instruments

With respect to dematerialised instruments of the debt of the state, the bill provides that linear bonds, strips and treasury certificates will be redenominated in Euros on 2 January 1999 (art. 15). redenomination should be accurate to within two decimals places. Such redenomination purports to avoid simultaneous trading of bonds of the Belgian State in BEF (bonds issued before 1 January 1999) and in Euros (bonds issued after 1 January 1999). This will ensure that outstanding BEF denominated bonds do not become less attractive to investors, and so less liquid, than new bonds issued in Euros.

The bill provides for redenomination proceedings pursuant to which the borrower must inform the investors about the following points:

- the security that is going to be redenominated;
- the conversion rate applicable under art. 109 L4 of the EC Treaty;
- the date of redenomination coming into force (art. 20).

This information has to be provided to the investors at least one month before redenomination takes place.

Claims in connection to such redenomination proceedings can be lodged before the courts within one year after redenomination has occurred. Such claims can only be based on the following grounds:

- the bill does not apply to the redenominated security;
- redenomination was prohibited by the terms under which the security was issued;
- redenomination proceedings have not been correctly applied (art. 21).

Redenomination of other instruments

All the securities referred to above are part of the dematerialised debt of the state. Other instruments, representing the materialised debt of the state (mainly the so-

called *Philippe* loans) may be redenominated. It is unlikely, however, that the government will proceed with redenomination of materialised debt instruments, given the administrative and financial costs of such an operation.

on the internet

<http://amue.if.net>

For further discussion on the single currency try the web site of the Association for the Monetary Union of Europe.

Public bonds issued in a foreign currency participating in EMU may be converted into Euros once the participating member state has also taken measures regarding redenomination of its own debt. When the law applicable to such bonds is the law of the member state of the currency, redenomination of these bonds is also governed by the law of the latter state.

The bill provides for mandatory redenomination only with respect to securities issued by the Belgian State. As far as securities issued by other public authorities are concerned (regions, local authorities, social security institutions, etc.) the bill provides that such authorities are entitled to proceed in the same way with redenomination of their securities if they so wish.

Private issuers will similarly be entitled to redenominate their securities except if such redenomination is prohibited under the terms of the contract itself. Importantly, if these are dematerialised and governed by Belgian law, they can be redenominated in the same way as public bonds. This allows the issuer to refrain from calling a bondholders' meeting as might otherwise be required.

CONCLUSION

In short, if adopted by Parliament, this bill will give Belgium a legal framework on the changeover to the Euro where:

- continuity of contracts will be sufficiently ensured by community law;
- dual pricing will not generally be required; such dual pricing could however be imposed when consumer protection requires it;
- companies and individuals will have the choice to conduct their relationship with tax and social security administrations in BEF or Euros; opting for the latter will be irrevocable;
- conversion and rounding will not raise specific legal issues;
- existing reference interest rates will be substituted by future equivalent rates;
- companies will be able to increase and round their capital, once converted to the Euro, by a simplified procedure;
- securities, in particular those representing the dematerialised debt of the Belgian State, will be redenominated by a simplified procedure. ☺

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