Luxembourg court decision on interest-free loans:

Key role of economic substance

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On 17 April 2025, the Luxembourg Administrative Court ("the Court") issued a notable decision in case number 50602C, addressing the key question of whether an interest-free loan granted by an indirect shareholder should be treated as debt or equity for tax purposes. While the Luxembourg courts have examined interest-free loans in prior cases, this judgment brings new clarity and depth, particularly in its application of the economic substance principle.

Summary of the case

In 2015, a Luxembourg company ("the Company"), part of an international group, received two interest-free loans from its indirect shareholder to finance the acquisition of participations in foreign companies involved in a gas pipeline project. The participations were allocated to a Malaysian branch of the Company.

The tax authorities requalified the loans as disguised capital, citing the economic aspects of the loans and the absence of terms that would be expected at arm's length. They also rejected the allocation of the participations to a foreign branch (or permanent establishment), finding it artificial. The Court upheld the position of the tax authorities.

The Court's reasoning

At the heart of the case was whether the interest-free loans granted by the indirect shareholder should be recognized as genuine or whether they should be requalified as disguised capital. The Court upheld the principle of substance over form in Luxembourg tax law, and examined the contractual features of the loans, as well as their economic context and purpose. The Court stated that there is no rigid formula in establishing whether a financing qualifies as debt or equity, but that the assessment should be made on a holistic basis, evaluating a number of legal and economic elements that may have different significance in each individual case.

Among the decisive elements were:
- Absence of interest: The Court considered this economically implausible in an arm's-length setting.
- Repayment terms: The Court found that the 10-year maturity assigned to the loans did not correspond to economic reality given the long-term investment horizon of the underlying gas pipeline project financed with the loans.
- Allocation of funds: The borrowed amounts were allocated to funding long-term participations in companies developing infrastructure assets. The Court considered that, in economic reality, such investments would be more likely to be financed with equity capital than debt.
- Absence of guarantees or collateral: No security was provided to support the repayment obligation despite the borrower's highly leveraged position.
- Extreme debt-to-equity ratio: The Company was almost entirely debt financed, with a debt-to-equity ratio of 99.998%, far exceeding what the Court considered acceptable at arm's length.

While these were the central factors driving its conclusion, the Court also referred to a broader set of additional indicators that may be relevant in similar cases, including: subordination to other creditors, participation in profits or liquidation proceeds, convertibility into shares, and voting or information rights attached to the instrument. The Court did not find it necessary to evaluate all of these in detail as, in its view, the key criteria already pointed clearly toward equity.

Allocation of funds

One of the pivotal factors in the Court's analysis was the use of the loan proceeds—specifically, their allocation to long-term participations in entities involved in the development of energy infrastructure. This is an asset class that typically involves high up-front capital costs, delayed revenue generation, and significant operational and regulatory risk. Such characteristics, the Court noted, are more consistent with equity financing, where investors accept higher risk in exchange for potential long-term returns, rather than with debt, where repayment obligations are typically fixed, requiring a degree of certainty to support regular and predictable servicing of the debt.

In the market, there are plenty of examples of debt-financed long-term assets or investments where the use of debt can present a number of advantages to investors. However, where taxpayers invest in projects with highly uncertain, irregular or volatile expected cash flows, it is important to convincingly demonstrate the economic rationale of using intragroup debt both from the perspective of the lending and the borrowing entity.

Absence of guarantees

The absence of guarantees (or collateral) was another important element in the Court's judgment. It emphasized that, under arm's-length conditions, a lender—particularly in the context of a borrower with almost no equity and with high financial risk—would typically require some form of protection to ensure repayment. The complete lack of any contractual security in this case was viewed as inconsistent with what an independent creditor would have accepted.

That said, the Court did not suggest that the absence of guarantees was, on its own, determinative. Instead, it treated this factor as one among several in a holistic analysis of the instrument's economic substance. This is an important nuance, particularly in the context of intragroup lending, where the necessity of resorting to guarantees is not always obvious given the lender's existing control or influence over the borrower and its assets. Furthermore, as intragroup loans are often subordinated to debt taken externally that is already heavily secured over the entire assets of the borrower, the provision of separate securities or guarantees embedded in the junior intragroup loan may lack economic or practical significance for the related party lender.

Excessive debt leverage

Another central consideration in the Court's analysis was the debt-to-equity ratio of the borrower and, more specifically, the extreme level of debt leverage. The Company had a debt-to-equity ratio of approximately 99.99%. The Court viewed this financial structure as a strong indicator that the loans did not reflect the economic characteristics of debt. In the Court's view, excessive leverage undermines the commercial plausibility of a loan transaction. A lender acting at arm's length would not reasonably accept such disproportionate exposure to a borrower that lacked meaningful equity and carried no apparent capacity to absorb losses. In the Court's view, in such a scenario the lender assumes a level of risk that resembles that of a shareholder, not a creditor.

Importantly, the Court dismissed the taxpayer's argument that its capital structure reflected market practice. While the taxpayer invoked a transfer pricing benchmark, this was rejected by the Court, which highlighted the limited number and low quality of comparable data points per the benchmark, as well as the lack of meaningful analysis of realistically available alternative options of the parties. The Court also rejected the taxpayer's claim that only the portion of the loans exceeding 85% of the borrower's assets may be reclassified into equity. The taxpayer had referred to a general practice in Luxembourg of maintaining an 85:15 debt leverage ratio for financing participations anterior to article 56bis of the Luxembourg Income Tax Law. The Court, however, stated that such a ratio was not legally binding and that only a proper economic analysis could determine whether an instrument qualified as debt. The Court made it clear that the question at hand was not about the tax treatment of excessive debt or interest but about the qualification of the instrument itself as debt or equity.

The notion of debt capacity plays a critical role at the intersection of transfer pricing and tax treatment of debt financing. On the one hand, debt capacity is a core component of transfer pricing analysis: It helps determine the maximum amount of debt that a borrower could sustain on arm's-length terms. Any debt exceeding the debt capacity of the borrower could be requalified into equity (partial requalification). On the other hand, as the Court's decision shows, the mere fact that a borrower is excessively leveraged may suggest—in combination with other pertinent elements, as noted above—that the entire instrument could lose its debt character for tax purposes (full requalification).

Conclusion

The fact that the examined loans were interest-free played a key role in the Court's decision. While not decisive on its own, this led the Court to review the transactions more closely and apply a broader set of criteria to assess whether the loans were, in substance, equity. The Court's analysis emphasized that there is no single criterion or mechanical formula based on which the tax treatment of a financing instrument should be established. Instead, qualification requires a careful, fact-driven assessment of multiple criteria.

The Court's decision reinforces the importance of debt-capacity analysis of the borrower in intragroup loan transactions. Firstly, debt capacity—in combination with other criteria, as discussed—informs on whether a borrower is excessively leveraged and thus plays a key role in making a holistic, binary assessment of whether a financing instrument qualifies as debt or equity. Secondly, where a financing instrument is correctly qualified as debt, the debt-capacity analysis—this time applied on its own—informs on the quantum of that instrument to be respected as debt under the arm's length principle.

When it comes to intragroup financing, taxpayers should not only ensure their intragroup loans carry arm's-length interest but also be ready to demonstrate the debt capacity of the borrower and the commercial viability of the adopted terms and conditions, taking into account the overall economic context and the business purpose of the loans.

Repenser l'allocation patrimoniale : combien investir en Private Equity ?

Par Frédéric STOLAR, Managing Partner d'Altaroc

Il existe des questions qui se posent aussi bien les clients privés que les investisseurs institutionnels les plus aguerris. Celle de la part à allouer au Private Equity dans une allocation d'actifs en fait partie. Elle n'est ni anecdotique, ni purement technique. Elle est stratégique. Car la vérité, parfois oubliée, est que la répartition par classe d'actifs reste l'un des premiers déterminants de la performance d'un portefeuille à long terme.

Trop souvent, l'attention se focalise sur le choix du fonds ou de l'entreprise en portefeuille. Mais ce que montre l'histoire des grands investisseurs, c'est que le moteur principal de la création de valeur durable n'est pas la sélection, c'est l'allocation. Les grands fonds de dotation américains l'ont compris depuis longtemps. Ces endowments, qui gèrent le capital des universités les plus prestigieuses du monde, ont pour seul objectif de capitaliser efficacement dans la durée. Leurs portefeuilles affichent, en moyenne, plus de 50 % de Private Equity.

Harvard, avec ses 54 milliards de dollars d'actifs, y consacre 52 % de son allocation, comme le montrent l'étude NACUBO-TIAA Study of Endowments (2023-2024) et le rapport annuel 2023 Harvard. La donnée est issue de PitchBook, la base de référence du secteur. Elle parle d'elle-même. Les fonds de pension, dont la mission est d'assurer le versement des retraites sur plusieurs décennies, ont eux aussi intégré le Private Equity comme composante essentielle de leur stratégie. Leur niveau moyen d'allocation avoisine les 21 %, selon le rapport S&P Global (2025). Il s'agit là d'acteurs dotés de capacités d'analyse sophistiquées, agissant avec une forte exigence de prudence.

Les fonds souverains, qu'ils soient au service de monarchies pétrolières, de pays producteurs de ressources minières ou d'États budgétairement excédentaires, y consacrent en moyenne 22 %, selon le rapport Preqin / Global SWF (2023). Leurs investissements visent à préparer le futur : l'après-rente pétrolière, l'après-rente démographique, l'après-rente industrielle.

Même les compagnies d'assurance, malgré des contraintes réglementaires strictes et des exigences fortes en matière de liquidité, investissent en moyenne 8 % de leurs fonds propres en Private Equity, d'après le rapport de 2004–2010 de la GAO aux États-Unis. Cette proportion, bien qu'inférieure à celle des autres institutionnels, démontre une conviction partagée, même dans des environnements très encadrés.

Côté investisseurs privés, les grandes fortunes américaines sont aujourd'hui investies à plus de 30 % en Private Equity. En Europe, la moyenne tourne autour de 20 %, comme le montrent les études Private Wealth, FT, P&I et Trend HNW. Ce rattrapage progressif s'explique en partie par une différence d'ancienneté : les États-Unis ont vu naître le Private Equity institutionnel il y a plus de 60 ans, contre environ 35 ans pour l'Europe. Mais tout converge vers un alignement progressif des pratiques. Dès lors, faut-il recommander aux clients privés d'investir eux aussi 20 % de leur patrimoine en Private Equity ? La réponse est plus complexe qu'un simple chiffre. Avant toute chose, il est impératif d'analyser sa situation patrimoniale. Le Private Equity est un actif de long terme. Il exige une immobilisation de capital pendant une durée de sept à dix ans. La première question à se poser est donc celle de la disponibilité réelle du capital sur cette période. Il s'agit de déterminer, seul ou avec l'aide de son conseiller, la part de son patrimoine dont on n'aura pas besoin à court ou moyen terme. Cette poche longue constitue le socle sur lequel une allocation en Private Equity peut être bâtie.

La seconde question, plus subjective, porte sur l'acceptation de l'illiquidité. Le Private Equity n'est pas un actif qu'on arbitre comme une action ou une obligation. Même si les premières distributions commencent souvent dès la quatrième année, la pleine valorisation d'un portefeuille n'intervient qu'au bout de dix ans. Si cette contrainte de temps est incompatible avec les attentes de l'investisseur, alors la classe d'actifs ne sera pas adaptée. En revanche, si cette temporalité est bien comprise et acceptée, elle peut être source de performance (non garantie).

Il est utile ici de faire un détour par l'immobilier. Longtemps, les clients privés ont investi leur capital de long terme dans des actifs immobiliers. Cette stratégie avait du sens, à une époque où les autres classes d'actifs n'étaient pas accessibles. Mais l'immobilier n'est pas aussi liquide qu'on le pense. Vendre un bien immobilier prend souvent plusieurs mois et occasionne des frais élevés. La gestion locative est chronophage. Et surtout, maintenir un parc immobilier demande des investissements constants, qu'il s'agisse d'entretien, de conformité ou de modernisation.

À l'inverse, un portefeuille de Private Equity, bien structuré, bien diversifié, ne requiert ni gestion active ni arbitrages fréquents. Il permet d'être exposé à des entreprises de croissance, souvent leaders dans leur segment, et d'en capter la valeur sur le long terme, sans les contraintes de gestion immobilière. Les grandes banques privées internationales ont d'ailleurs revu leurs recommandations. Là où l'on prônait historiquement une répartition 60 % actions / 40 % obligations, la plupart des institutions intègrent désormais le Private Equity comme un pilier de l'allocation stratégique. Les recommandations actuelles des plus grandes institutions tournent autour de 20 % du patrimoine global pour un investisseur fortuné, comme le montre le rapport réalisé par UBS / O'Connor & Stonehage Fleming.

Il est donc temps de revoir la répartition du patrimoine. Trop souvent, le Private Equity est abordé comme une classe d'actifs opportuniste, marginale. On investit « un peu », avec l'argent disponible, sans remettre en question la structure globale. Le résultat, c'est un portefeuille où le Private Equity reste sous-représenté, à hauteur de 1 % ou moins. Or ce n'est pas ainsi que cette classe d'actifs peut réellement jouer son rôle. Pour ceux qui disposent d'un horizon de placement long, qui ont défini leur poche illiquide et qui souhaitent faire évoluer leur patrimoine, le moment est venu de repenser l'allocation. L'émergence de véhicules comme ceux proposés par Altaroc a réduit les freins techniques. Il ne reste plus qu'à agir.

Faut-il investir 10 % de son patrimoine dès demain ? Bien sûr que non. La bonne question n'est pas celle du montant, mais celle de la méthode. Il s'agit de bâtir progressivement une allocation de long terme, cohérente, adaptée à ses besoins et à ses contraintes. Il ne s'agit pas de prendre un virage brutal, mais de changer de perspective.