INTERNATIONAL BANKING REVIEW
2022 / 23

Beaumont Capital Markets

Belgium

Access to credit in Belgium: what foreign investors need to know

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Els Van Poucke has extensive experience in advising and representing national and international clients in corporate, financial and commercial law. She focuses on banking and finance, M&A, private equity transactions, joint-ventures, the set-up of corporate structures in Europe and Asia, and international commercial contracts. As a Fellow of the SIArb (Singapore Institute of Arbitrators) and the AiADR (Asian Institute of Alternative Dispute Resolution) and a member of CEPANI, she also has broad experience in international arbitration and mediation in both Europe and Asia. As a former foreign registered lawyer in Singapore, she is well-versed in both common and civil law matters.

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Pierre-Alexandre Fassin is a senior associate in the banking and finance litigation practice of Buyle legal. Over the years, he has gained experience in several areas of banking and finance law, going from M&A debt and capital financing, distressed debt refinancing, insolvency and restructuring debt negotiations and litigation and the investment funds industry. His current practice combines all of these experiences in a comprehensive practice in which he advises clients or assists them in administrative, civil and eventually criminal litigation regarding a wide array of banking & finance matters.

Pierre-Alexandre is a member of the Brussels bar since 2014. He studied (international) company and finance law at the Universities of Ghent and Washington and earned his LL.M. at the University of Pennsylvania Law School.

1.Introduction

1.Over the last decades, credit regulation has significantly restrained the contractual freedom of parties regarding the negotiation and content of credit contracts. With the introduction of a European legal framework on consumer credit contract regulation in 1986[1], Belgian credit regulation has continuously been extended or modified by national and European legislation, thereby affecting the rules of conduct of credit institutions in both the pre-contractual and contractual phases of the credit granting, imposing restrictions to credit allocation and providing for mandatory contractual provisions.

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2. Since 2010, regulated credit law became even more rigid and formalistic. The Act of 13 June 2010 amending the Act of 12 June 1991 on Consumer Credit transposed the (second) Consumer Credit Directive[2] into Belgian law. With the Act of 21 December 2013 (the SME Finance Act), protection was also extended to small and medium-sized enterprises requesting credit. Subsequently, with the Act of April 19, 2014, Book VII was introduced into the Belgian Code of Economic Law, which coordinated the existing legislation on basic banking services, payment services and regulated credit law into one book.

Different types of credit regulation can be distinguished in Belgium: (i) EU based consumer credit contract regulation and (ii) EU based Small and Medium Enterprises (SME) credit contract regulation.

With regards to EU based large cap companies[3] or non-EU based enterprises[4] or consumer looking for financing in Belgium, common contract law applies as these companies remain outside the scope of the aforementioned Belgian credit regulations.

3. The scope of consumer credit regulation is delineated *ratione personae* by the concepts of “consumer”. The consumer concerns a natural persons acting for private purposes.

4. The SME Finance Act is applicable to credit contracts entered into between an SME having either its registered office or a branch in the European Economic Area. Furthermore, the act is only applicable if (i) the credit institution develops its commercial or professional activities in Belgium or (ii) the credit institution develops its commercial or professional activities in Belgium or in different countries including Belgium, and the credit contract falls under such activities in Belgium.

According to the SME Finance Act a company is considered a SME if it does not exceed one of the following criteria:

- The company’s workforce may not exceed an annual average workforce of 50;
- The company’s annual turnover may not exceed an annual turnover of EUR 9.000,000, excluding VAT;
- The company’s balance sheet may not exceed EUR 4.500,000;

These criteria are applied on a consolidated basis and the SME Financing Act does not apply as soon as one of the borrowers is not an SME, which is important for group financing. In addition, for new companies (e.g. SPVs or project companies) the annual turnover of the first financial year can be estimated in good faith.

In case the company does not meet any of the aforementioned criteria, its credit contract will be governed by Belgian common contract law, which offers greater flexibility and provides for less (administrative) obligations for the credit institution granting the credit.

[1] COUNCIL DIRECTIVE (87/102/EEC) of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit.

[2] DIRECTIVE 2008/48/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC

[3] Large cap companies are companies which do not qualify as SME’s under article 24 of the Belgian Company Code.

[4] The scope of application of Belgian credit regulation is limited to EU based borrowers and therefore not applicable to non-EU borrowers.

Furthermore, the SME Financing Act applies to any credit agreement concluded between a lender and an enterprise. The definition of the "credit agreement" is particularly broad. Therefore a credit contracted using interest rate swaps to absorb interest rate fluctuations on the market, falls within the scope of the SME Financing Act. The clear text of the law, which in principle takes precedence over parliamentary preparation, means that a mere deferral of payment, factoring agreements and (un)movable leasing agreements would also fall within the scope of the law.[5]

2. EXTENSIVE INFORMATION AND ADVICE OBLIGATIONS UNDER THE SME FINANCING ACT

5. The SME Financing Act introduces important and far-reaching pre-contractual information duties for credit institutions. A general duty of care, a pre-contractual information duty and even an advisory duty are introduced. The creditor, the credit intermediary and the borrower must act in good faith in their mutual legal relationships. Furthermore, the information provided by the credit institution must be correct, clear and not misleading. This general duty of care applies at the stage preceding the conclusion of the credit agreement and during the performance of the credit agreement.[6]

6. The application of the general duty of care of the creditor discussed in the previous paragraph is often referred to as the principle of responsible lending and groups together a number of obligations to be met by the creditor and the credit intermediary such as the active investigation duty of the creditor and the passive information duty of the borrower as well as their respective duties to provide information and advice.

7. The SME Financing Act therefore provides for the obligation of the creditor/credit intermediary to make inquiries regarding the company's financial situation and credit behaviour.

The creditor/ credit intermediary, must themselves request from the borrowing company the information they consider necessary.[7] This obligation must be carried out when the company submits a credit application and at least before the creditor makes a credit offer to the company.[8]

The credit institution/credit intermediary autonomously determine what information is requested from the prospective borrower and what weight they attach to it. Concrete guidelines for the application of this duty can be found in the Code of Conduct,[9] which provides for a set of information that should at least be requested before the granting of the credit becomes possible.

The active research duty as stated in Article 5 of the SME Financing Act implies that the creditor and the credit intermediary are expected to form an image of the financial competences and capacities of the company. In this way the legislator aims to protect businesses from overly frivolous decisions.

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The active research obligation of the lender and the credit intermediary must allow them to assess the feasibility of the envisaged project for which the credit is requested, the financial condition, the possibilities for repayment and the current financial commitments of the company.[10] It is up to them to determine what information they request and they consider necessary to assess the creditworthiness of the prospective borrower. However, this does not mean that the credit institution would be obliged to assess the appropriateness of the project to be financed.[11]

[6] Blommaert, D. en Vannerom, J., « Kroniek gereglementeerd kredietrecht 2010-2016 », D.B.F.-B.F.R., 2016/2, p. 97.

[7] Articlr 5 SME Financing Act – see also Gent 19 oktober 2011, onuitg.; Brussel 28 april 2008, RABG 2009, 1031; Bergen 12 juni 2006, JLMB 2007, 146; Kh. Brussel 12 september 2000, TBH 2001, 787; D. Blommaert, "De bescherming van de kredietnemer in het kredietrecht" in M. Tison, C. Van Acker en J. Cerfontaine (eds.), Financiële regulering: Op zoek naar nieuwe evenwichten. Volume I: privaat bankrecht – ondernemingsrecht – insolventierecht, Antwerpen-Gronin-gen-Oxford, Intersentia, 2003, 119-121.

[8] Bill of 24 October 2013 on various provisions on financing for small and medi-um-sized Companies, Parl.St. Chamber 2013-2014, no. 3088/001, 10.

[9] Code of Conduct under the Act of December 21, 2013 on various provisions relating to the financing of small and medium-sized enterprises, BS 4 March 2013 (abbreviated as "Code of Conduct").

[10] Art. 5, 1e zin Wet Kmo-Financiering.

[11] Wetsontwerp 24 oktober 2013 betreffende diverse bepalingen inzake de financiering voor kleine en middelgrote ondernemingen, Parl.St. Kamer 2013-2014, nr. 3088/001, 10-11.

The result of the search - as perceived by the creditor/ credit intermediary as professionals, is transmitted to the company in the framework of the information obligation to the company. If this information is partly negative, this should give the company pause for thought so that it does not take decisions that wouldn't necessarily be in its interests. If the professional creditor or intermediary does not (or not sufficiently) request necessary and pertinent information regarding the feasibility of the project to be financed, their liability may be compromised.

8. On the other side of the spectrum, the company has a passive information duty to inform. They must answer the questions asked by the lender/ credit intermediary correctly and completely. In addition, the company must also spontaneously communicate additional information which it knows or should know is useful and/or important for the creditworthiness.

However, in order to prevent the creditor from assessing the creditworthiness of the company incorrectly (i.e. too favourably), there is a duty of care on each party to cooperate loyally and in good faith in the conclusion of the credit agreement. In this regard, the Belgian Supreme Court also ruled that a 'circumstantial silence" can constitute fraud.[12] The passive information duty is therefore not as passive as the term might suggest, and an active disclosure from the side of the borrower is to be recommended.

9. The SME Financing Act also provides for an explanation duty. At the time of the credit application, the lender must provide a written explanation to enable the company to form a general idea of the forms of credit that are relevant to it. In this regard, article 7, § 1 - requires that the appropriate explanation covers at least the main characteristics to the relevant forms of credit and their specific implications for the company.

10. Finally, the SME Financing Act also introduces a duty of advice. The creditor must himself seek out and offer the company the type of credit that best meets the company's credit needs, among the credit agreements he usually offers and in case of a credit intermediary, the most appropriate credit institution for which he usually acts as an intermediary. In doing so, they must take into account the financial situation of the company at the time of the contract and the stated purpose of the credit agreement (the *'suitability'* test).

The duty to advise imposed by Article 6 of the SME Financing Act is of considerable importance, as the penalties for non-compliance or disregard are far-reaching. A judge may, without prejudice to the consequences under ordinary law, order the free conversion of the credit to a form of credit which, in terms of type, is better suited to the company's financial situation taking into account the financial situation of the company at the time of the conclusion of the credit agreement and the purpose of the credit or use any other type of sanction he sees fit.

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Conclusion

3. Before undertaking a search for credit in Belgium, foreign investors will need to take into account that they might be falling under the scope of Belgian credit regulations. Overall, the Belgian credit regulations are supposed to favour the foreign investor as it imposes far-going information, explanation and advisory duties to the credit institution granting the credit. However, the borrower when entering into a contractual relationship with a credit institution will also need to comply with imposed information duties and ensure that all relevant information regarding the enterprise is provided to the credit institution to avoid sanctions or damages claims.

[12] Cass. 8 juni 1978, Arr.Cass. 1978, 1189; Gent 30 mei 2012 (12e kamer), 2010/AR/217

The oversubscription to the Ukrenergo Eurobond backed up by a sovereign guarantee shows a huge interest in new financing instruments. Many foreign banks operating in Ukraine are required (either by law or their internal commitments) to maintain a green stack in their portfolios and actively seek for new sources to fill in the gap. Moreover, lack of any detailed qualification criteria for privately funded ecological projects allows more flexibility to the investors, who can structure green projects based on requirements applicable to such investors in the jurisdictions of their incorporation (e.g., EU Taxonomy). Investors into such instruments are also protected by additional obligations placed on not only project owners but also financiers to control use of funds attracted through green bonds to prevent greenwashing.

However, the green and sustainability linked bonds are just one of the examples of new instruments that local banks can also use to finance projects of their clients. The Capital Markets Law also provides, for example, for infrastructure bonds and special-purpose bonds allowing use of securities for financing virtually any type of project. It goes without saying that volumes of issues by Ukrainian companies are not yet there but with state owed companies paving the way, creation of a CCP and further development of the organised markets that is underway locally issued securities backed up by derivative hedging contracts will gradually gain popularity among financing instruments used by banks.

It may seem that Ukraine is only starting a way towards developing a proper capital markets infrastructure and it is premature to conclude what role will be played by the banks in this new infrastructure. On the one hand, this is true – the infrastructure is not yet there. On the other hand, Ukraine has been in a preparatory mode for a number of years already and now the speed of changes, most of which have been formalised during 2021, together with motivation of certain market participants demonstrate that the new reality will arrive sooner than may be expected. It is high time to prepare.

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