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BELGIAN LAW ON SME FINANCING

Belgium has implemented a new law on SME financing. Whilst the law is primarily aimed at protecting "true" SMEs, the provisions of the law may impact syndicated loans, and financing arrangements made with SPVs, newly established companies or the local subsidiary of a large group of companies.

What is an SME?

In order to qualify as an SME for the purposes of the new law, a company must satisfy not more than one of the following criteria:

(a) average of 50 employees;

(b) annual turnover (not including VAT) of EUR 7,300,000;

(c) total balance sheet of EUR 3,650,000 on a "solo" basis (see below).

If the relevant company has more than 100 employees it will no longer qualify as an SME.

The testing date for determining whether a company is an SME is the date on which the relevant company requests the credit facility. This may cause project companies, securitisation SPVs, or SPVs that are about to acquire real estate or shares, to qualify as SMEs for the purposes of the new law, even if those companies will no longer satisfy the above mentioned test on the day the loan agreement is entered into. Similarly, the local subsidiary of a large group of companies may qualify as an SME.

Code of Conduct

The new law provides that the relevant trade organisations must draft a Code of Conduct for SME lending, detailing certain information requirements for lenders, and the calculations of prepayment indemnities for loans in excess of EUR 1,000,000 (see below). A royal decree was published in the *Moniteur Belge* on 4 March 2014 endorsing this Code of Conduct.

Limitations on prepayment indemnities

The law provides that SMEs must be entitled to prepay the loan made to them at any time, subject only to a prepayment indemnity (or break costs). Contractual provisions restricting the borrower's ability to prepay a loan will be null and void.

The prepayment indemnity may not exceed the equivalent of six months of interest if the principal amount of the loan is lower than EUR 1,000,000. If the principal amount of the loan exceeds EUR 1,000,000, then the loan agreement must determine what prepayment indemnity will be due and such contractual provisions must be in line with the recommendations made in the Code of Conduct referred to above (and in line with article 1907*bis* of the Belgian Civil Code which also provides that prepayment indemnities may not exceed the equivalent of six months of interest for certain types of credit agreements).

In addition, the borrower may not be required to pay a fee, charge or indemnity for a minor amendment to the credit agreement, or in circumstances where several credit facilities are "grouped" with the same lender.

Unauthorised provisions

The law provides that certain clauses will be considered to be "abusive", and will therefore be held to be null and void. These clauses can be summarised as follows:

(a) provisions pursuant to which the obligations of the borrower are irrevocable, with the obligations of the lender being conditional upon circumstances which are within the control of the lender;

(b) provisions pursuant to which, in the absence of a default by the borrower, the lender is entitled to terminate a credit facility for a limited duration without reasonable compensation for the borrower;

(c) provisions pursuant to which the lender is entitled to terminate a credit facility for an unlimited duration without a reasonable notice period, unless such termination is the consequence of a borrower default.

Lenders will, of course, be able to terminate a credit facility in case of a payment default by the borrower, but there are doubts as to whether lenders will be entitled to invoke events of default other than payment defaults for the purposes of the above mentioned unauthorised provisions.

Information obligations

The new law provides for the following obligations for lenders and credit intermediaries:

(a) they must select the type of credit that is best suited to the needs of the borrower;

(b) at the time the borrower requests a credit facility to be made to it, they must provide the borrower with a note summarising all types of credit that could be suitable for that borrower;

(c) upon request by the borrower, they must provide the borrower with a draft credit agreement, and an information document containing information about the proposed credit agreement.

The Code of Conduct for SME lending describes the scope and content of the information which must be made available to the borrower.

Position of the government

The government seems to be aware of the difficulties that the law may cause on certain financing arrangements (such as syndicated loans and project finance transactions) and the Minister of Finance has made statements in Parliament seeking to restrict the scope of the law. The Minister for instance declared that where a credit facility is granted to several borrowers, and one of these borrowers is not an SME, then the law will not apply to the credit facility. Similarly, the Minister declared that where an SME borrower is part of a group of companies, and the group (on a consolidated basis) does not qualify as an SME, then the relevant SME borrower will not be considered as an SME for the purposes of the new law. These statements are not in line with a (literal) interpretation of the provisions of the law, and the legal force of these statements is therefore not entirely clear.

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