

Belgium: regulatory perspectives

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Since 1992, various securitisations have taken place in Belgium though the securitisation market is not as developed as for example the United Kingdom or the United States. Assets typically used for securitisation in the Belgian market are classes of loans; such as mortgages, credit card advances, car loans or trade receivables. The management company TBE NV was involved in many of these transactions. It has recently refocused its activities towards the so-called master servicing of a transaction which is aimed at mitigating operational risk. A couple of Belgian banks have also practised complex synthetic securitisation techniques involving credit derivatives in the last few years.

Save for the Credibe securitisation at the end of 2003 where a Dutch financial institution issued securities backed by a residential mortgage portfolio of EUR 2.2 billion, which it had bought from the Belgian state owned credit institution Credibe (the former CBHK), 2003-2004 has seen extremely low market activity in Belgium.

Existing Belgian legal framework

The first Belgian legislative initiative in the field of securitisation was the Act of 5 August 1992 (the Act), modifying the Act of 4 December 1990 on financial transactions and financial markets, creating a general framework for securitisation transactions under Belgian law. This Act was completed by a Royal Decree of 29 November 1993 on all necessary aspects of securitisation, which was subsequently modified several times, notably in 1996 (the Decree).

This has allowed the creation of a receivables investment organisation (the RIO). The RIO's exclusive corporate purpose permits the investment in receivables assigned to it by a third party. The assets of a RIO are usually constituted by a portfolio of assigned receivables. Therefore, each securitisation operation covering a set of receivables will in principle entail the creation of a specific bankruptcy remote RIO (or the set up of a compartment thereof), that is both in legal and accounting terms distinct from the originator of the securitisation.

Only after the explicit approval of the Banking, Finance and Insurance Commission (the CBFA), can a single asset securitisation be effected. The concern of the CBFA is always whether the credit risk regarding the securitised assets is sufficiently spread or otherwise, in case of a single asset securitisation, guaranteed by a solvent party.

For the purpose of financing, the RIO may issue different categories of securities (ie shares or debt instruments) based on the characteristics of the receivables, forming part of the securitised portfolio, on the basis of allocation rules to be provided for under its articles of association. The RIO can itself be of two categories – a contractual type or a corporate one; also referred to as a Receivables Investment Company (the RIC) – both of which have to be managed, from an administrative and accounting point of view, by a management company in the exclusive interests of the participants. Such a management company needs to obtain a licence from the CBFA. Typical requirements to obtain such licence are that there is fit and proper management, minimum capital requirement, infrastructure and systems and bona fide shareholders etc. The mandatory intervention of a depository is also provided for under the Decree. The depository will receive a fixed or floating fee that needs to be contractually negotiated with the RIO. Moreover, the depository cannot contractually exclude or otherwise limit its liability towards the RIO.

In the case of a RIC, the capital ties with the originator need to be very limited. An equity link between the assignor and the securitisation vehicle is considered contrary to the requirement that the transfer must be complete and definitive. Sufficient separation is deemed to exist according to the CBFA when the vehicle is of a public character, when the capital link is lower than 20% (the remaining portion being held by one or more effective third parties) and when the assignor is only represented by one person on the board of directors.

The management company may contractually entrust the assignor of the receivables (or another third party) with the task of recovering them, the so-called servicing of the receivables. This has two important advantages;

- (i) the assignor is very familiar with the receivables, which has its effect on the efficiency and operational cost and
- (ii) this working method allows the RIO not to have to notify the debtors in relation to the assignment of the receivables so that they can continue to deal with the assignor.

It is crucial however for the assignee to always ring-fence the cash flow and separate it sufficiently from that of the assignor.

In this respect it is useful to stress the importance of the legislative modification in 1994, whereby the Belgian legislators decided to modify, notably with the aim of facilitating securitisation operations, the legal rules surrounding the transfer of receivables, as these rules were set forth in Article 1690 of the Belgian Civil Code. Pursuant to this modified provision, the assignment of a receivable is effective between the assignor and the assignee upon the mere reaching of an agreement between them, and this will then also be effective vis-à-vis third parties with the exception of the debtor. A specific protection is put in place for the debtor, as the assignment is only effective towards him if he has been notified of the assignment or if he has acknowledged it.

Belgian securitisation legislation was further adapted in 1996, to organise a specific legal regime for RIOs, that do not receive their financial means from the general public (ie private receivables, investment companies and private receivable investment funds). The private RIOs are not subject to the control of the CBFA but must be registered with the Ministry of Finance.

Another innovation, introduced in 1996, has been to create legal status for the representatives of the holders of the debt instruments issued by the RIO, either public or private. These representatives must be approved by the CBFA (or endorsed under other permitted categories already operating in the regulatory scope, such as the assignor or the management company) and may be dismissed at any time by a general meeting of the holders of the debt instruments. Their powers are determined either in the issuing conditions of the (asset-backed) securities or by the general meeting of the holders thereof. These representatives should exercise their powers in the exclusive interest of the holders of the securities.

Further, a public RIO must appoint a rating agency that is responsible for the delivery of an extended report relating to each securitisation transaction. The report must cover topics such as the sustainability of the underlying receivables, the quality of the financial plan, the fit and proper character of the legal structure, the administrative organisation and the value of the guarantees given to the investors. In practice, these rating agencies have proven to be very important in public securitisation transactions.

Finally, the CBFA is the regulatory authority which oversees all securitisation transactions initiated through a RIO in Belgium. In addition, the CBFA also oversees transactions of Belgian credit institutions effected through

a foreign special purpose vehicle, further to their general supervisory authority over Belgian credit institutions.

New regulatory initiative

On 1 April 2004, the House of Representatives in Belgium, further to the implementation of the European Directives numbers 2001/107/EG and 2001/108/EG on collective investment schemes, approved a new bill on certain forms of collective management of investment schemes (the Bill on Management of Collective Investment Schemes). This draft text is currently under review by the Senate. Although this proposal is not yet formally approved in its final form by the Belgian Parliament, it is worthwhile referring to some of the provisions as it is expected that the bill will most likely be approved substantially in its current form.

According to the explanatory memorandum of the House of Representatives, in addition for the (urgent) need for implementation of the two European directives (which should have happened before 13 February 2004), this proposal is also adapted to attempt to modernise the legislative framework with respect to collective investment schemes in Belgium and to maintain the Belgian market as a competitive one in Europe.

The Bill on Management of Collective Investment Schemes is divided into two main parts;

- (i) the status and the regulatory supervision on collective investment schemes and
- (ii) the status and the regulatory supervision for the management companies of collective investment schemes.

With respect to the first part on the collective investments schemes themselves, the parts of regulation pertaining to RIOs do not substantially modify previous legislation but puts into context the entire legislation on collective investment schemes. A modification worth mentioning is the explicit application of the dissolution, liquidation, restructuring and insolvency provisions of the Belgian Companies Law on the different individual compartments of a RIO. Each compartment of a RIO will be liquidated or filed in bankruptcy separately, without the liquidation or bankruptcy of one compartment influencing or triggering the liquidation of the other compartments of the RIO. The intention of the legislator is to segregate the different compartments in case of discontinuation of one of them.

The second part of the Bill on Management of Collective Investment Schemes on the management companies of collective investment schemes also sums up all existing provisions with respect to their status and supervision. The main difference in practice will be that all management companies will need to comply with more detailed requirements before they will be able to obtain a licence from the CBFA. The fact that all management companies will in the future need to obtain such licence causes great concerns amongst management companies that have no such license to date.

Some of the initial major securitisation transactions are currently still being managed by companies that indeed do not come under the regulatory supervision by the CBFA, such as the securitisation of a mortgages portfolio of local social housing companies managed by the Flemish housing company (Vlaamse Huisvestingsmaatschappij). These management companies are currently negotiating with the Belgian government to provide for some exemptions under the new regulation. The transformation of the existing facilities to a CBFA regulated management company would, in their opinion, result in an enormous increase in costs that was not budgeted for at the outset of the securitisation. It creates problems for both existing and future securitisations. For existing securitisation vehicles, it is problematic for them to incubate new money into the system to pay for these increased costs. Moreover, it would burden future securitisation transaction as costs would increase further and hit cost-effectiveness.

Even though the new requirements to obtain a licence as a management company of a collective investment scheme are substantially along the lines of the existing requirements of the Decree, such as corporate form, minimum capital requirements, fit and proper management etc, the new Bill on Management of Collective Investment Schemes is much more detailed. It also provides an update on other recent important legislative initiatives (ie recent laws such as the Law of 2 August 2002 on the supervision on the financial sector and financial services) and focuses more on current issues such as risk management, analysis systems and valuation methods for, amongst others, (OTC) derivative products.

The supervision of these management companies by the CBFA will also be organised more thoroughly. The RIOs will need to provide the CBFA with periodic information, the exact contents of which will need to be further specified by the CBFA. The CBFA will also have more investigating powers in order to enforce compliance with these new provisions and to prevent any abuses.

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