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White & Case News

March 2014

Belgian Transactional Practice boosts its energy capabilities with new Counsel in Brussels

In April 2014, Jean-François Lerouge will join our Belgian Transactional Practice, working together with Thierry Bosly, Muriel Alhadeff, Nathalie Colin, Matthieu Duplat and Ferdinand Brughmans.

Jean-François Lerouge and Ferdinand Brughmans, in charge of the EIPAF (Energy, Infrastructure, Project & Asset Finance) Group in Brussels, together with Thierry Bosly, Head of the Belgian Practice.

Prior to joining White & Case, Jean-François worked as General Secretary of Tractebel Engineering – GDF Suez.

Building on 17 years' experience in cross-border transactions, Project Finance and M&A, Jean-François has specific expertise in the energy, engineering, construction and ICT sectors covering amongst others oil and gas, LNG, thermal power, renewable, nuclear, smart grids, energy efficiencies, water and waste, roads & bridges, licensing, software development, outsourcing and data protection.

He is particularly recognized for his pragmatism and his capacity to propose innovative solutions meeting clients' operational constraints and desires for new ways to adapt to the quickly-changing nature of the information technology industry, to optimize energy consumption, protect content and applications, and invest accordingly.

He was a lecturer both at the universities of Namur and Liège (HEC) from 1998 through the end of 2008, teaching IT law issues.

Seminar on Class Actions

Now in Belgium as well

Register here

On 13 March 2014, the Belgian Parliament enacted a law providing for the introduction of class actions into the Belgian judicial system ("*loi sur l'action en reparation collective*", "*wet over rechtsvordering tot collectief herstel*"). It will be inserted as a Title 2 in Book XVII of the Belgian Economic Code and will enter into force on a date to be determined by Royal Decree.

Although the law is restricted to violations of specific legislative acts and the Belgian legislator clearly tries to avoid what is viewed in Europe as the negative consequences of the US class actions system, the increased litigation risk for companies and financial institutions should not be neglected.

Across Europe as well, various countries have introduced, or are in the process of introducing, similar class action mechanisms.

Since it is high time for companies and financial institutions to look at potential implications of the new law and get organized, Nathalie Colin, partner in charge of the Belgian Dispute resolution practice, is organizing a seminar on this topic (Belgian situation, update of EU initiatives, US expertise).

Tuesday May 13, 2014

5:30 p.m. - 7:00 p.m.

Keynote speakers:

Alexia Bertrand, Advisor to the Minister of Foreign Affairs and Deputy-Prime Minister of Belgium

Bryan Merryman, Specialist in Class Actions, Partner, White & Case Los Angeles

Deposit guarantee schemes in the Banking Union

by Thierry Bosly and Diane Verhaegen, Brussels

The construction of a Banking Union has lately been in the headlines, with the projection that we are moving gradually in that direction. There is much talk of the first two pillars of the Banking Union (bank supervision and bank resolution), but the third pillar, which is focused on deposit protection, should not be forgotten. It establishes a common system of deposit-guarantee schemes which would have significant impact on each individual person in case of bank failures and financial crises.

I. Definition and objectives of deposit-guarantee schemes

Deposit-guarantee schemes may be defined as schemes funded by their members (credit institutions) which aim to guarantee, up to a certain level, the repayment of deposits from account holders in the event of a failure of one of their members.

One of the intrinsic characteristics of deposit-guarantee schemes is that membership is mandatory. This means that no credit institution is entitled to take deposits unless it is a member of a scheme existing in the jurisdiction where it wishes to operate.

The general view is that the implementation of a deposit-guarantee scheme achieves three objectives. It first enhances a depositor's level of protection, by reimbursing depositors up to a certain ceiling if, notwithstanding prudential supervision, a bank becomes insolvent. Secondly, it serves as a stabilising factor for the economy, by bringing the trust and confidence that any banking system requires to be efficient. And thirdly, deposit-guarantee schemes reduce or eliminate any taxpayer contribution in case of a bank failure.

II. Deposit-guarantee schemes during the financial crisis

The above-mentioned objectives are viewed as so important by governments and lawmakers that at least 106 countries across the globe have set forth deposit-guarantee schemes. Within the European Union, there are 40 different deposit-guarantee schemes and 3 additional deposit-guarantee schemes in the EEA member states.

In an effort to ensure that the rules applicable to those schemes do not vary too much between the various Member States, the European Parliament and the Council adopted, in 1994, a directive governing deposit-guarantee schemes (the "**1994 Directive**").[1]

As demonstrated by the bank run on Northern Rock, the 1994 Directive did not provide for an appropriate response to depositors during the financial crisis. This is mainly due to the fact that the 1994 Directive opted in favor of a minimum harmonisation approach, which has led to a situation in which the rules governing deposit-guarantee schemes within the European Union varied significantly among the Member States and where some schemes were insufficiently or ill-financed.

[1] Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes.

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Clearly, therefore, promoting convergence of deposit-guarantee schemes through a thorough revision of the 1994 Directive was one way to restore depositors' confidence in the banking system after the financial crisis. This was done in March 2009 through the adoption of a directive amending certain key elements of the 1994 Directive (the "**2009 Directive**").[2]

Drafted as an emergency measure, the 2009 Directive offers only a partial reform of the 1994 Directive, focusing on the following three elements which could be improved through swift negotiations:

- the deposits' coverage level, which has been tentatively increased and fixed at EUR 100,000;
- the pay-out delay of the deposit-guarantee in case of a bank failure, which has been reduced to 20 working days; and
- the co-insurance system (allowing deposit-guarantee schemes to limit their intervention to 90% of the amount of the deposits of each individual depositor), which has been suppressed.

"The option followed by the European Union is a reasonable and practical solution. Let's hope that it will be implemented sooner than later"
Thierry Bosly, Head of the Belgian Transactional Practice

The 2009 Directive further instructed the European Commission to conduct a more comprehensive review covering all aspects of deposit-guarantee schemes. This led, in July 2010, to a new proposal for a directive on deposit-guarantee schemes (the "**2010 Proposal**").[3]

III. The 2010 Proposal: towards maximum harmonisation

With the 2010 Proposal, the European Commission takes a great leap towards maximum harmonisation and chooses to regulate a wide range of aspects of deposit-guarantee schemes. The most important ones are summarised hereafter.

- *Confirmation of the single coverage level and extended coverage*

Following an impact assessment conducted by the European Commission, the 2010 Proposal confirms the uniform coverage level of EUR 100,000. In practice, this means that only 5% of the accounts in Europe lack total coverage by a deposit-guarantee scheme, which is 7% less than before the financial crisis.

- *Short pay-out delay*

The 2010 Proposal provides for a further reduction of the pay-out delay to 7 working days.

In addition, in order to facilitate pay-out processes in cross-border situations, the 2010 Proposal provides that the host country deposit-guarantee scheme would act as a single point of contact and manage, on behalf of the home country deposit-guarantee scheme, the claims of depositors of local branches of banks with headquarters situated in another Member State.[4]

- *Common, balanced and credible financing system*

For the first time since deposit-guarantee schemes have been regulated at European level, the 2010 Proposal sets out financing requirements for the schemes, which can be summarised in three steps.

The first step consists of an *ex ante* financing. Member banks are thereby required to make semestrial contributions to their deposit-guarantee schemes in order to ensure that the schemes have up to 1.5% of the covered deposits on hand, after a transitional period of 10 years.
Secondly, if the *ex ante* financing of a deposit-guarantee scheme is insufficient to repay depositors in case of a bank failure, additional contributions may be required from the member banks of the deposit-guarantee scheme, up to a maximum amount of 0.5% of the covered deposits.

Finally, should those extraordinary contributions not be sufficient, the scheme in need would have access to alternative funding arrangements (such as loans from public or private third parties) and would also have the right to borrow from all other deposit-guarantee schemes within the Union under certain conditions.

Last but not least, the 2010 Proposal creates a system whereby contributions of the member banks would be proportionate to their individual risk profile.

IV. Towards a pan-European scheme?

Theoretically, three options were available to the European Union to structure the new regime for deposit-guarantee schemes in the framework of the contemplated Banking Union.

The first option was to substitute all existing deposit-guarantee schemes with a single Pan-European deposit-guarantee scheme. Such a scenario would have many benefits. It would be more efficient than the current fragmented framework and would obviously ensure harmonisation and remove competitiveness distortions between the Member States. It would also enhance customer confidence and, according to

[2] Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009 amending Directive 94/19/EC on deposit-guarantee schemes as regards the coverage level and the pay-out delay.

[3] COM (2010) 368 final.

[4] Proposal for a directive of the European Parliament and of the Council on Deposit Guarantee Schemes, COM (2010) 368 final, Explanatory memorandum ("Context of the proposal"), p. 9.

some forecasts, allow savings of administrative costs up to an amount of EUR 40,000,000 every year. Finally, and in our view most significantly, it would clearly go in the direction of a deeper integration of the Banking Union. The opponents to such option argue, however, that it breaches the subsidiarity and proportionality principles and that there is no legal basis under the current Treaty for the creation of such Pan-European scheme. Those are indeed valid arguments but they are technical or legal comments that, in our view, do not undermine the statement that the creation of a Pan-European scheme would be the ideal scenario.

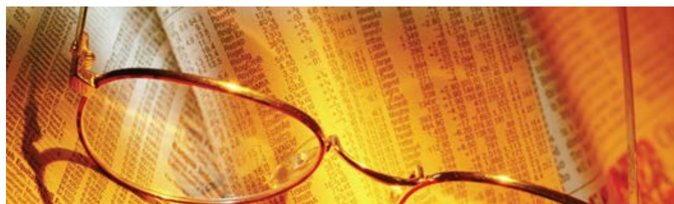
In practice however, the creation of such pan-European scheme is unlikely. The implementation of such scheme would face fierce resistance from the Non-Eurozone Member States that consider the risk of bank failure to be higher in the Eurozone than in the rest of Europe. It may also face resistance from Eurozone Member States which may view it as an additional loss of sovereign competence over an important financial matter. The second option was to create an additional deposit-guarantee scheme at European level. This would have probably been the less effective option. It does indeed not settle fragmentation problems, it leaves open competitiveness distortions, and would only lead to additional complexities. It is probably therefore, in our view, the worst-case scenario.

The third option was to create a network of existing deposit-guarantee schemes with a mutual borrowing facility. This is the scenario that has been proposed by the European Commission. It has the advantage of having a legal basis under the current Treaty and of complying with the subsidiarity and proportionality principles.

It is therefore a reasonable and practical solution which may also be viewed as an interim measure towards the creation of a Pan-European deposit-guarantee scheme in the framework of an effective Banking Union. We therefore hope that it will be implemented sooner rather than later and that it will effectively enhance stability on the financial market.

Clients and Matters

During the last semester, the White & Case Transactional Practice in Brussels has advised, among others, the following clients on their major transactions:



Advising **Cimenteries C.B.R.**, part of the HeidelbergCement group with respect to the acquisition of a majority stake in **Cimescaut SA**, one of the oldest companies listed on Euronext Brussels, and prominent player in the fields of cement, concrete and aggregates in Belgium, France, the Netherlands and Luxembourg.

Represented **Hamon SA**, a leading player in engineering and contracting of cooling systems, process heat exchangers, air pollution control (APC) systems, heat recovery steam generators (HRSG) and chimneys (listed on NYSE Euronext Brussels) in a transaction which involved both the restructuring of its €375 million senior facilities and a debut €55 million 5.5% bond due 2020, guaranteed by several of its subsidiaries in Belgium, France, Germany, the UK, the US and Hong Kong. The bonds are listed on NYSE Euronext Brussels. BNP Paribas Fortis and KBC Bank acted as Joint Bookrunners and Joint Lead Managers for the offering.

We represented **J.F. Hillebrand USA Holding, Inc.** in its acquisition of a majority of the outstanding equity interests of Satellite Logistics Group, a leading beverage supply chain logistics business in the United States.

We represented **UCB SA/NV**, a global biopharmaceutical company (listed on NYSE Euronext Brussels, part of the Bel20 index) with respect the issue of €350 million 4.125% notes due 2021 under their €3billion EMTN Programme.

We advised the shareholders of the **T.Palm group**, the first Belgian builder of turnkey homes specializing in energy-saving houses, regarding the sale of 100% of their shares.

We represented **UCB SA/NV** on an unconditional public exchange offer on maximum €250 million out of the €750 million 5.75% bonds maturing 27 November 2014 against newly issued 5.125% bonds maturing on 2 October 2023. This led to the second and largest 10-year bond issued in the Belgian retail bond market in recent years.

We represented **Jefferies International Limited, Petercam NV and KBC Bank NV** as joint book-running managers in the €285 million offering of senior secured notes by Univeg Holding B.V., a world leader in the sourcing and supply of fresh and fresh-cut fruit and vegetables headquartered in Belgium.

We represented **BNP Paribas Fortis SA/NV** and **ING Bank N.V.**, Belgian Branch, as bookrunners on the issue by **Apetra** SA/NV of €400 million 3.125% bonds due 25 September 2023, which were placed with qualified investors in the EU. The bonds are listed on the Euro MTF of the Luxembourg Stock Exchange.

We represented **ING BANK N.V.**, Belgian Branch, as sole lead manager on the issue by Société Publiques d'Administration des Bâtiments Scolaires of Brabant Wallon, Hainaut, Namur, Liège and Luxembourg of their debut €40 million 3.173% pooled bonds due 2024. The bonds are severally and jointly guaranteed by the Walloon Region and the French Community

of Belgium. The bonds are listed on the Frankfurt Open Market ("Freiverkher") of the Frankfurt Stock Exchange.

We represented **BNP Paribas Fortis, Société Générale Corporate & Investment Banking and Petercam** acting as managers in the €175 million offering of net share settled bonds convertible into new shares and/or exchangeable for existing shares (ORNANE) by **Econocom Group SA**, a European business-to-business digital service provider headquartered in Belgium and listed on NYSE Euronext Brussels. The transaction is the first time an ORNANE structure has been used by a Belgian corporate.

Advising Belgian investment company **Cobepa** on the acquisition of **Babilou**, the French leading operator of privately-owned nurseries for children, with a turnover of 130M€ in 2012 and a network of 238 nurseries in the country.

We represented **Bonatrans Group** in its acquisition of Gutehoffnungshütte Radsatz GmbH, a member of the GHH-Valdunes group and a leading manufacturer of wheel sets for the railway industry.

We represented **Clariant AG**, the Swiss specialty chemical group, on the closing preparations in Germany, France, Belgium and Turkey in connection with the sale of its Textile Chemicals, Paper Specialties and Emulsions businesses to SK Capital. The three former Clariant businesses are now operating under the name Archroma.

We represented **KBC Bank NV** in connection with their financing of the acquisition of **Mifratel**, a facility contact center organisation, by **KeBeK**.

We represented **R+V Lebensversicherung AG** in connection with their financing of the acquisition by **Hannover Leasing** of the **Government Administration Center (RAC)**, a real estate project which will serve as headquarter for Belgium's Federal Police.

We represented **KBC Bank NV** in connection with the financing of the acquisition by **Maranatha** of the **Solfitel Le Loise**, a five-star hotel in Brussels.

European Commission's Proposal on Banking Structural Reform: A Volcker Rule for Europe

On 29 January 2014, the European Commission published a legislative proposal for a Regulation on structural reforms to the EU banking sector (the "Proposed Regulation") (available here). The Proposed Regulation advances the recommendations set forth in a report published in October 2012 by the EU High-Level Group on reforming the structure of the EU banking sector chaired by the Governor of the Bank of Finland, Erkki Liikanen (the "Liikanen Report") (available here).

In summary, the Proposed Regulation aims at improving the resilience of the EU banking system by requiring banks, in particular banks that are deemed to be "too big to fail", to implement structural reforms. The key structural reforms proposed include: (i) a ban on speculative activities, i.e. proprietary trading; and (ii) a requirement to separate certain trading activities, such as market making, from a deposit taking entity if the trading activities of the bank exceed certain thresholds.

MORE INFORMATION: DOWNLOAD PDF

MiFID II and MiFIR One Step Closer

After an extended period of negotiations, the European Commission confirmed through a memorandum on 14 January 2014 that the European Parliament, the Council of the European Union and the European Commission have reached an agreement in principle on updated rules for markets in financial instruments.

MORE INFORMATION: DOWNLOAD PDF

White & Case Enhances EMEA Private Equity Capability with New Partners in London

The addition in October 2013 of partners Ian Bagshaw and Richard Youle in the London office strengthened its EMEA private equity practice considerably.

Bagshaw and Youle are recognized leaders in private equity, with extensive experience in all forms of leveraged M&A and portfolio assistance, including restructuring advice. They joined from Linklaters, where they co-headed the private equity group. The arrival of Bagshaw and Youle, combined with the recent addition of Ross Allardice, strengthens the Firm's London private equity team and rounds-out the private equity offering in EMEA

During the first six months of 2013, the global M&A team at White & Case advised on 102 deals with an aggregate value of US$95 billion, ranking fifth among all law firms. This work included advising private equity firm BC Partners on its substantial acquisition from Electra Partners of Allflex, a leader in animal identification.

"*English law is increasingly used to govern large cross-border private equity deals in most EMEA markets and it's clear that our clients will derive additional benefit from the combination of further strategic investment in our private equity English law capability and the existing breadth of our geographic coverage and strong related practices,"* said Budapest-based partner Rob Irving, who heads the White & Case private equity practice in Central and Eastern Europe and Turkey

White & Case Enhances Africa Practice with Johannesburg Expansion

Commitment to Sub-Saharan Region Underscored by Two New Partners and Two Partner Redeployments

White & Case LLP is strengthening its practice in Africa with two new partners in its Johannesburg office and the relocation of two partners from its London office.

White & Case's Johannesburg office, which was launched in 1995, will act as the Firm's hub for project finance and bank finance activity in sub-Saharan Africa, offering on the ground English and South African law finance advice. The Firm has been advising clients on complex, cross-border legal issues in the region for more than 30 years and was the first international law firm to establish an office in South Africa, post-apartheid.

"*A strong Johannesburg office is fundamental to our strategy in Africa*," said White & Case Chairman Hugh Verrier. "*The addition of these senior partners in Johannesburg underscores our commitment to our clients in South Africa, as well as the increasing number of multinationals and financial institutions doing business in the region*."

Recent Awards

White & Case Named "Large International Arbitration Practice" of 2013
February 14, 2014, *Global Arbitration Review*
Brussels, Budapest, Doha, Frankfurt, London, Mexico City, Miami, Moscow, New York, Paris, Prague, Singapore, Stockholm, Tokyo, United Arab Emirates, Warsaw, Washington, DC

White & Case Wins Law360 "Practice Group of the Year" Awards for its Class Action, Competition, Life Sciences and Project Finance Practices
January 2, 2014, *Law360* Los Angeles, Miami, New York, Silicon Valley, Washington, DC

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