BTG News

M&A transactions involving banks

The role of the National Bank of Belgium and the European Central Bank in obtaining regulatory clearance

INSIDE

The acquisition of a qualifying interest in credit institution requires clearance by the competent financial supervisory authorities. The successful completion of the ownership control procedure is one of the crucial steps in every M&A transaction or reorganization involving banks. While the statutory framework for the ownership control procedure has already been harmonized throughout the European Union on the basis of the Acquisitions Directive (2007/44/EC), the introduction of the Single Supervisory Mechanism (SSM) with the European Central Bank (ECB) taking on a key role in the supervision of banks in the Eurozone has brought important changes to the procedure and the authorities involved.

Who must obtain regulatory clearance?

Any legal or natural person that, assuming the consummation of the acquisition, would directly or indirectly hold 10% or more of the shares or voting rights in a credit institution or that is able to exercise a significant influence, has to obtain regulatory clearance from the competent financial authorities. A similar requirement applies if the acquirer reaches or exceeds the thresholds of 20%, 30% or 50% of the voting rights or capital or is otherwise obtaining control over a credit institution.

The requirement relates to all EU credit institutions, i.e., banks that are active both in deposit-taking and the extension of credit. In order to obtain regulatory clearance, each direct or indirect acquirer of a qualifying holding has to submit a comprehensive filing containing, among other things, information and documents describing the transaction, the acquirer and its business and management, the financing of the acquisition, and the future plans of the acquirer for the target bank, including a business plan and projected capital and liquidity ratios for the next three financial years following completion of the proposed acquisition.

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The competent authorities shall then proceed to the review of the filing and decide whether to oppose the transaction. The authority's objections may only be for limited grounds, as further detailed in the Capital Requirements Directive IV (CRD IV). These mainly include (i) the reputation of the proposed acquirer, (ii) the reputation and experience of any person who will direct the business of the credit institution as a result of the proposed acquisition, (iii) the financial soundness of the proposed acquirer, (iv) whether the credit institution will be able to comply with the prudential requirements and whether the group of which it will become a part has a structure that makes it possible to exercise effective supervision, and (v) whether the proposed acquisition may increase the risk of money laundering or terrorist financing.

Applicable procedure

In Belgium, the details of the ownership control procedure are set out in the Banking Law of 25 April 2014 (Banking Law) implementing the relevant EU framework set out in the CRD IV.

With the introduction of the SSM, the procedure for ownership control filings relating to credit institutions has been subject to significant changes. Most importantly, while in the past the National Bank of Belgium (NBB) was the competent supervisory authority for handling the ownership control procedure for Belgian banks, it is now the ECB in Frankfurt that ultimately decides on all ownership control filings and whether to approve or oppose a contemplated acquisition. Thus, the ECB is not only in charge of the acquisition of qualifying holdings in so-called significant credit institutions (i.e., the approx. 130 largest credit institutions[1] in the Eurozone and their banking subsidiaries), but also for acquisitions in all credit institutions based in the Eurozone.

However, as the national competent authority, the NBB continues to play a prominent role in the ownership control procedure and throughout the filing process. Indeed, any filing related to a Belgian credit institution must first be submitted to the NBB, which will inform the ECB of the receipt of the filing and will proceed to its assessment. Within two days following the receipt of a filing deemed as complete by the NBB, the authority will acknowledge receipt thereof. Such acknowledgement shall trigger a period of 60 business days for the assessment of the filing. While reviewing the acquisition file, the NBB may ask the candidate acquirer to provide the regulator with additional information, as a result of which the assessment period will be extended (up to a maximum of 20 business days). At the latest 15 business days prior to expiry of the assessment period, the NBB must propose a draft decision to the ECB, which then takes the ultimate decision to approve or oppose the contemplated acquisition.

In addition to the above procedure applicable to the acquisition of a qualifying interest in a credit institution, the Belgian legislator has taken the view, unlike some of its neighbors (e.g., France or Luxembourg), that other procedures should also be subject to the review and approval of the national and European regulators. Thus, Article 77 of the Banking Law requires a credit institution to obtain prior approval from the regulator(s) in certain particular, and presumably important, instances such as mergers or demergers, transfers between credit institutions or financial institutions of whole or part of their activities or network (e.g., contribution of a branch of activity, portfolio or division). Akin to the acquisition procedure set out above, the credit institution will have to submit a regulatory file to the NBB. As regards the procedural aspects of such a procedure, experience indicates that the process is similar to that of an acquisition: as at the moment the Belgian regulator deems the file to be complete, a two-month assessment period will start. Should the credit institution be under the supervision of the ECB, the NBB will then prepare a draft decision for the attention of the European regulator. Two months at the latest after said acknowledgment, the ECB shall decide to approve or oppose the contemplated transaction in light of the specific criteria set out by the Banking Law.

Impact on M&A transactions

The successful completion of the regulatory procedure is one of the key steps in every M&A transaction. For instance, in the framework of an acquisition, it is crucial, from the seller's perspective, to identify potential impediments to regulatory clearance when selecting a potential bidder. As a result of this new legal framework, it is now mandatory that successful financial regulatory clearance be made a condition precedent to the closing in the transaction documentation. From the seller's perspective, it may also be desirable to request additional covenants as to the acquirer's filing and its timing to increase deal certainty. In this respect, a seller will typically request the inclusion of several incentives in the transaction documentation for the acquirer to act promptly vis-à-vis the regulators, such as a long stop date (i.e., the reference to a specific date by which the satisfaction of regulatory clearance must be obtained and, if not, damages are due to the seller). Conversely, the purchaser may want to request additional covenants from the seller regarding the seller's and the target bank's cooperation in the preparation of the filing documentation and throughout its assessment by the regulators. While similar clauses are frequently used in merger control filings, such obligations are, surprisingly, still not as frequent in regulatory ownership control filings.

Key success factor: Early preparation of the filing documents

It is of paramount importance to start preparation of the documentation filing as early as possible, and ideally prior to the signing of the transaction documents. As part of the filing, a considerable amount of information and documents need to be collected.

On the acquirer side, it is important to ensure that all parties required to make a filing are aware of their obligation and willing to support the process. Minority shareholders or individuals may be especially hesitant or reluctant to disclose certain information to supervisory authorities (e.g., with respect to ultimate beneficial owners), which can endanger the whole clearance process. Likewise, private equity, hedge funds, sovereign wealth funds and other alternative investors may face issues when it comes to the disclosure of their structure and holdings. Frequently, it may not even be clear which parties on the acquirer side actually must submit a filing. In all these cases, it is important, at an early stage, to clarify the expectations of the supervisory authorities involved and whether the submission of certain information or documents can be waived.

As a result of the absence of a European legal framework regulating the restructuring process of credit institutions (merger, demerger, etc.), there are, for the moment, no

1 List available on: **https://www.bankingsupervision.europa.eu/ecb/pub/pdf/list_of_supervised_entities_20160101en.pdf**

official guidelines as to the documentation the regulators will request. In previous transactions including mergers between banks, the NBB asked for, among other things, (i) the merger agreement, (ii) a description of the impact on the activities/IT/control functions/governance of the merging entities further to the restructuring, (iii) an assessment of the risks, the monitoring and the management thereof, as well as (iv) a detailed overview of any supervisory cross-border impacts or procedures.

Recent transactions have also showed that the regulators increasingly apply a high level of scrutiny to the composition of the management (board of directors, special committees, compliance officer) of all credit institutions. Through a "fit and proper" process, candidate directors must now demonstrate, with detailed documentation, their honorability, their capabilities as part of the management of the credit institution, and their availability to perform director's duties.

In any event, the completion of the filing documentation can turn out to be challenging, and incomplete documentation may delay the clearance process, as the statutory review period will only be triggered once the regulator deems the filing complete. In our experience, and depending on the specifics of the parties involved and their shareholder structure, a time period of approx. four – nine months after signing of the legal documentation needs to be factored in as a realistic timeline for the preparation of the filings and the processing of the filings by the supervisory authorities.

Other frequent pitfalls

Other frequent pitfalls in ownership control procedures include the ability of the acquirer to convince supervisory authorities of its financial strength, particularly in situations where the buyer may not have the same financial strength as the seller, which may have a negative impact on the financial solidity and business of the target bank. Similar issues occur if the acquirer plans to rely on external financing, a debt push down, or tries to pursue an aggressive dividend policy.

Companies from outside the financial sector or that are not already part of a regulated entity in Belgium or in another EU jurisdiction often face the problem that they are not known to supervisory authorities, which may take a more restrictive approach compared to buyers already holding a banking license in the EU or having a regulated group company in Belgium or the EU.

The cross-border dimension of the acquisition or restructuring of a credit institution will also play a key role and be challenging in the process of the transaction. These aspects should be taken into account from the earliest stages. Indeed, it is not unusual for the target institution to have subsidiaries or branches in other EU or non-EU Member States, and that local law will also require regulatory filings. In this respect, experience has shown that regulators tend to coordinate with each other, and that the documentation and information they request do not significantly differ. In addition, in a cross-border restructuring, attention should also be paid to the fact that additional regulatory filings may have to be complied with (e.g., opening of a local branch) and the impact such additional formalities could have on the timing of the restructuring.

Conclusions

The need for obtaining financial regulatory clearance—in addition to merger control clearances, when necessary—is one of the key factors in the successful completion of M&A transactions involving banks. Since the introduction of the SSM, the ECB is the competent supervisory authority to clear such transactions. The need for obtaining financial regulatory clearance must be factored in throughout all stages of the M&A process, including the selection of bidders and the preparation of the transaction documentation. Early preparation of the filing documentation is crucial, as well as the identification of other potential impediments to successful clearance at an early stage..

Belgian Transactional Practice boosts capabilities

Belgian Transactional Practice boosts its banking capabilities and transatlantic development with new Local Partner Hadrien Servais

"I am delighted to see the ongoing growth of our Practice. Hadrien's arrival will provide us in Brussels with a unique command of American law and of its specific mechanisms, but more generally, it will add capabilities to our finance practice and bring it to a leading position," says Partner Thierry Bosly, head of the Belgian Practice.

Hadrien Servais started his career in Brussels. Prior to joining White & Case, he also worked in New York and in London for another international law firm, where he advised commercial and investment banks, as well as sponsors, on leveraged finance transactions including acquisition financings, dividend recaps and refinancing. He is qualified to practice in New York and Belgium.

"In the current financial environment, Hadrien's arrival is a major strategic asset for the development not only of the Belgian financial practice, which now offers one of the most complete range of capabilities in the Belgian market, but also of the whole banking practice within White & Case. His unique experience will broaden our banking expertise and bolster our transatlantic capabilities," explains Partner Lee Cullinane, Regional Section Head, EMEA Banking.

Lee Cullinane (left) and Hadrien Servais (right) at the London office

Belgian Class Actions now open to EU consumer protection organizations

Nathalie Colin (Partner, Brussels) and Alexandre Hublet (Associate, Brussels)

By decision of 17 March 2016, the Belgian Constitutional Court partially annulled the Belgian Class Action Law for being discriminatory vis-à-vis EU consumer protection organizations of other Member-States.

The Belgian legislator must now review the Class Action Law.

Nevertheless, in the meantime, the Constitutional Court decided that Belgian judges have to immediately take into consideration this ruling in order to assess the admissibility of a class representative in Belgium and, in any event, have to declare admissible any organization listed by the EU Commission under article 4(3) of EU Directive 2009/22/EU.

As a consequence, a large number of European actors can now act as class representatives in front of Belgian courts. The Belgian legislator should intervene to modify or clarify this solution provided by the Constitutional Court.

In the same ruling, the Constitutional Court dismissed all other grounds for annulment raised by the claimants, confirming the most important aspects of the Belgian Class Action Law: (i) class actions are only available for claims based on facts that occurred after 1st September 2014, (ii) class actions are limited to the protection of consumers, (iii) only consumer protection claimants can initiate a class action (and not attorneys) and (iv) Belgian class representatives still need a ministerial authorization to be admissible.

Read the full article

Belgian criminal settlement regime declared partially unconstitutional

Nathalie Colin (Partner, Brussels) and Alexandre Hublet (Associate, Brussels)

On 2 June 2016, the Belgian Constitutional Court ruled that a part of the Belgian criminal settlement regime is unconstitutional.

Currently, article 216bis of the Belgian Code of criminal procedure allows the Public Prosecutor to propose that the perpetrator pays a sum of money to stop the prosecution. The Public Prosecutor can, at his discretion, propose a criminal settlement at any stage of the proceedings, even when an investigating judge is in charge of the investigation or when the case has been referred to criminal court. In these last two cases, Belgian law only allows the court to verify if the formal obligations for a criminal settlement had been met, but cannot rule on the opportunity of the settlement or on the sum paid. The Constitutional Court decided that this lack of scrutiny was unconstitutional, and that oversight of the legality and the opportunity of the criminal settlement is required, either by the investigating courts or by the criminal court to which the case had been referred.

Read the full article

Latest News from the Inside

Our Belgian Transactional Team is growing

In addition to Hadrien Servais who will lead the expansion of our banking group, seven new mid-level and junior associates have bolstered our Practice since 2015: Alexandre Hublet and Morgane Van Ermengem (Commercial litigation), Marie Georgy and Thomas Glauden (M&A), Aurélie Terlinden and Laura Tielemans (Banking), and Thomas Flament (Capital Markets). Each of them has already proven being remarkable assets!

We won the Trends Legal Award for the Best Law firm in Litigation & Arbitration

White & Case Brussels was named "Best Law Firm in Litigation & Arbitration" at the 2016 Trends Legal Awards Gala on April 20.

We are extremely happy—and proud—of this prize, which demonstrates that our young Belgian team is capable of the best and highest achievements. Other nominees in this category were magic circle law firms.

The Trends Legal Awards are organized every year by *Trends Tendances* Magazine. The awards recognize law firms in Belgium for excellence in expertise, knowledge and innovation in a legal field. A panel of 34 independent judges from various industries selected the winners.

The jury praised "the high quality of the individual lawyers and the highly qualified staff" while also making reference to the firm's international network and special focus on arbitration "with a clear specialization in complex cases and subjects". Finally, the judges stated that in 2015, our litigation and arbitration department "was marked by strong, very diverse cases".

Partner Thierry Bosly, Head of the Belgian Transactional Group (right) and Associate Alexandre Hublet (left)

Partner Nathalie Colin Head of the Litigation & Arbitration Department

White & Case Brussels' Annual Women's Event strikes a chord

Our annual Women's Networking Event took place on 20 April at the "Queen Elisabeth Music Chapel", a very special concert space and residential complex for young classical musicians in the countryside outside Brussels. At this event, White & Case provides women clients and professional contacts from many backgrounds with an opportunity to meet and connect in an unusual and intimate environment.

After a private tour of the "Music Chapel", we had the privilege of listening to a wonderful concert by Nathanaël Gouin (piano – Queen Elisabeth candidate 2016) and Vladyslava Luchenko (violin – Queen Elisabeth semi-final 2015), followed by a walking dinner.

The evening was a resounding success, with about 100 attendees, and we are already looking forward to next year!

Discover the other's reality

For the first time, White & Case Brussels is happy to participate in DuoDay. This inspiring project offers people with a disability to dive in the reality of a professional environment, as in 2016, it is still a challenge for disabled people to convince (!) employers to give them a chance.

"I am so delighted to have White & Case participating to this program. This is truly a great opportunity for our lawyers and staff members to share skills and experience with the DuoDay interns," states Thierry Bosly, who introduced this programme to our Brussels office.

As a truly global law firm, connecting people from various horizons is part of our DNA. In DuoDay, we found an opportunity to break another—and artificial—boundary with an unwell-known world.

Our Brussels office warmly welcomed Gianluca Diana and Cédric Hocepied as legal interns for 2.5 months, and Galina Krysteva as a legal secretary and translator for one month.

We were truly amazed by how our three interns, with their constant motivation, eagerness and resourcefulness made their "difference" nearly inexistent. Impossible to tell which side of each duo learns the most from the other. But one thing is certain: this experience is full of surprises…

Exceptional women building exceptional careers

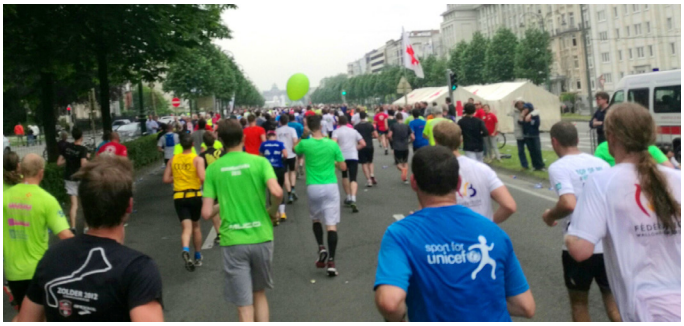
On 17 May 2016, White & Case Brussels hosted the final session of the Women in Law and Leadership (WILL) program. This is a cross-law firm project based in Brussels, designed to support talented women on their way to becoming leaders, providing them with the tools they need to succeed.

The program takes a positive, practical approach: identifying women's strengths and building on them; sharing experiences and ideas; developing skills; balancing private and professional life; and is aimed at equipping women leaders for successful careers as lawyers. Jacquelyn MacLennan, partner at White & Case, has been involved since the program began in 2008, and a number of White & Case women lawyers have taken part en route to promotion including Muriel Alhadeff, Genevra Forwood and Katarzyna Czapracka.

For this final session for this year, the participants were asked to present their Personal Development Plan in small groups, with "mentor partners" providing constructive feedback. A speed-dating session with partners giving personal advice on work-life balance was also included.

The completion of the program was celebrated with drinks and a walking dinner in the White & Case Brussels office. Partner Nathalie Colin made some warm welcoming remarks, and WILL participants from previous years and our male colleagues joined the group and enjoyed the opportunity to network.

Running for a good cause at the 20km through Brussels



For the 11th year in a row, White & Case participated in the 20km run through Brussels as part of the Legal Run team, in which 47 law firms based in Brussels join forces and run under one banner to support a local charity.

Our 2016 run raised funds for Les Enfants de Salus Sanguinis, a Belgian charity based at Saint Luke's University Hospital, helping children fighting cancer. The charity aims at easing the physical and emotional burdens on these children through various concrete projects, games and holiday camps.

Recent awards

White & Case has been named among the winners of the 10th Annual M&A Advisor Turnaround Awards – 28 January 2016.

Project Finance International (PFI) magazine has named White & Case "Law Firm of the Year" for 2015 in its annual PFI Awards – 3 February 2016.

White & Case was ranked number one in international arbitration in the world for the second year in a row by *Global Arbitration Review* – 2 March 2016.

White & Case was named "Cross-Border M&A Law Firm of the Year" at The M&A Advisor's 8th Annual International M&A Awards – 12 April 2016.

We've opened a new office in Boston!

As one of the country's most well-known corporate centers, Boston is a natural choice for the growth of our firm in the United States and it represents a significant step in our five-year growth strategy. The city is also home to many of the industries that focus on complex, cross-border work, which is part of our DNA.

We are happy to welcome Michael Kendall as Office Executive Partner and his team: Kevin Bolan and Lauren Papenhausen in the Boston office, and Andrew Tomback in New York. Their practice will focus on white collar and commercial litigation work.

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