

BELGIUM

# Investment rules of the world

## About

At DLA Piper, we have one of the largest finance and projects teams in the world with more than 600 dedicated lawyers and an established local law firm network. We share knowledge and skills in debt instruments, debt securities, funds, derivatives and portfolios, as well as energy, infrastructure and other projects, across Europe, the Middle East, Africa, Asia Pacific and the Americas.

When and wherever we work for you on finance and investment deals and projects, you can rely on our international platform; we are backed by the network and resources of one the largest and most-connected business law firms in the world.

We enjoy being part of your team, bringing experience across sectors, borders and financial products, supporting you on first-of-a-kind deals, in new markets and to grow.

With global perspective, we can help you to realize your financial strategy in whichever markets you do business.

## Investment Rules of the World

With input from across our global network, this guide covers key legal topics for different financial activities and projects and gives you an overview of the points you may consider when initially looking at financing or investing in particular jurisdictions. Please [contact us](#) if you would like to discuss any legal issues or solutions for your business. We also welcome your feedback about this guide via [investmentrules@dlapiper.com](mailto:investmentrules@dlapiper.com).



# Belgium

*Last modified 18 December 2019*

## Capital markets and structured investments

### Issuing and investing in debt securities

#### *Are there any restrictions on issuing debt securities?*

Both Belgian and EU law contain restrictions on offering and selling debt securities.

Unless certain exclusions or exemptions apply, the public offer of debt securities in Belgium and the admission of such securities to trading on a Belgian regulated market requires the publication of a prospectus in compliance with the Prospectus Regulation/Prospectus Law.

A prospectus shall, in particular, not be required for public offers of securities or other investment instruments that are either:

- For a total consideration of less than, or equal to, EUR5,000,000.
- For a total consideration of more than EUR5,000,000 and less than, or equal to, EUR8,000,000,000 which will be admitted to trading on Euronext Growth Brussels or Euronext Access Brussels.

However, any prospectus drawn up in respect of investment instruments (other than securities) will not benefit from the EEA passporting regime.

The Prospectus Law also requires issuers to prepare an "information note" in the following circumstances (in each case, subject to certain exemptions):

- An offer to the public of securities or other investment instruments for a total consideration of less than EUR5,000,000.
- An offer to the public of securities or other investment instruments for a total consideration of less than EUR8,000,000 to the extent these instruments will be listed on Euronext Growth Brussels or Euronext Access Brussels.
- An admission to trading of securities or other investment instruments on Euronext Growth Brussels or Euronext Access Brussels.

This obligation does not apply to the following offers (the so called 'safe harbor provisions'):

- an offer for a total consideration of less than, or equal to, € 5,000,000;
- an offer for a total consideration of more than € 5,000,000 and less than, or equal to, € 8,000,000,000 which will be admitted to trading on Euronext Growth Brussels or Euronext Access Brussels.

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#### *What are common issuing methods and types of debt securities?*

The most common types of debt securities issued in Belgium are bonds or notes issued on a standalone basis or under a program.

Many different types of debt securities are offered in Belgium. Some common forms include:

- debt securities characterized by the type of interest or payment such as fixed rate securities, floating rate securities, variable rate securities, and high yield bonds;
- guaranteed securities, subordinated securities, perpetual debt securities (ie debt securities that have no specified redemption date);
- asset backed securities;
- derivative securities such as securities linked to the value of one or more reference asset including shares, commodities, interest rate, currency rate or index, and credit linked notes;
- equity linked securities such as convertible bonds (debt securities convertible into the equity of the issuer);
- depositary receipts (a security issued by a depositary conferring on the holders beneficial ownership of certain underlying assets held by the depositary for the holders); and
- warrants (securities giving the holders the option to purchase the equity of the issuer or a related company).

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### ***What are the differences between offering debt securities to institutional / professional or other investors?***

If the debt securities are offered solely to professional investors and no admission to trading on a regulated market of the debt securities is sought, no prospectus would be required, in line with the Prospectus Regulation/Law.

The issuer prepares an offering circular with certain information on the issuer and the securities offered, without FSMA approval.

The Belgian Prospectus Law however requires issuers in certain circumstances to prepare and publish a short-form information note which complies with the minimum information requirement set out in the Prospectus Law.

An offer to the public (retail issue) of debt securities is made under a placement agreement entered into before the offering period starts. In principle, a prospectus must be prepared, and it must be approved by the FSMA.

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### ***When is it necessary to prepare a prospectus?***

Offers to professional investors requires issuers in certain circumstances to prepare and publish a short-form information note which complies with the minimum information requirement set out in the Prospectus Law. A prospectus must be prepared in case of admission to trading on a regulated market.

An offer to the public of debt securities requires in principle a prospectus.

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### ***What are the main exchanges available?***

Euronext Brussels is a regulated market for the purposes of the [Markets in Financial Instruments Directive](#), so issuers are subject to the requirements of a number of EU Directives, including the Market Abuse Directive and the Transparency Directive.

Euronext Growth is the main multilateral trading facility (MTF) in Belgium.

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### ***Is there a private placement market?***

Belgium has a private placement market.

There is no dominant standard for documentation but the standard private placement documentation developed by the [Loan Market Association](#) and [International Capital Markets Association](#) are often used.

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## ***Are there any other notable risks or issues around issuing or investing in debt securities?***

### **Issuing debt securities**

Issuers are required to take responsibility for prospectuses for debt securities. Misleading statements in, or omissions from, any applicable offering document can give rise to both civil and criminal liability under Belgian law. Belgium provides investor protection through legal and regulatory provisions relevant to liability for an inaccurate offering memorandum.

There are also general fraud laws and regulations and liability may also arise through a civil action for deceit, negligent misstatement or misrepresentation.

### **Investing in debt securities**

Debt security terms and conditions typically provide for meetings of investors to consider matters affecting the investors interests. These provisions typically permit defined majorities to bind all investors including investors who did not attend and vote at the relevant meeting and investors who voted against the majority.

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## **Establishing and investing in debt / hedge funds**

### ***Are there any restrictions on establishing a fund?***

The [AIFM Law](#) provides a regulatory framework for alternative investment fund managers (AIFM) governed by either Belgian law or the laws of an EEA or non-EEA member state that are managing alternative investment funds (AIF) governed by Belgian law or marketing EEA or non-EEA AIFs in Belgium.

The Alternative Investment Fund Managers Directive (AIFMD) only applies to the (external or internal) AIFMs but it provides each member state with the option to also regulate on a national level the AIFs established in such member state. The Belgian legislator opted to keep the existing legislation with respect to public and specific non-public AIFs (including their managers) and to restate this legislation (with certain modifications) into the AIFM Law. The AIFM Law's scope is therefore broader than the AIFMD.

In line with the AIFMD, certain types of funds are excluded from the AIFM Law's scope of application. These include Undertakings for Collective Investment in Transferable Securities (UCITS), holding companies, institutions for occupational retirement provision and securitization special purpose entities.

The AIFM Law lays down a broad set of rules regarding, among other things, authorization, operating conditions (for example, rules on remuneration, conflicts of interest, risk management, liquidity management, valuation, delegation and acting as a depositary), transparency requirements for AIFMs (annual report, disclosure to investors, and reporting obligation to competent authorities) and special obligations for AIFMs managing specific types of AIFs, such as leveraged AIFs or AIFs which acquire control of non-listed companies and issuers (notification, disclosure, annual report, asset stripping). Furthermore, the AIFM Law contains a passport mechanism for management and/or marketing for EEA AIFMs managing or marketing EEA AIFs. The AIFM Law provides for a 'light regime' whereby certain smaller AIFMs (eg Belgian private equity fund managers) will not have to comply with the requirements under the AIFM Law unless they choose to opt in.

The [UCITS Law](#) provides a regulatory framework and introduces a simplified notification procedure for UCITS that wish to market their units in member states other than those in which they are established.

The UCITS Law provides certain obligations that must be taken into account, such as the publication of a prospectus and the prior approval of advertising materials and a key investor information document by the Financial Services and Markets Authority (*Autorité des services et marchés financier/Autoriteit voor Financiële Diensten en Markten*) (FSMA). The public offering of a UCITS also triggers an obligation to register the UCITS with the FSMA.

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## ***What are common fund structures?***

They can (irrespective of legal form) take a closed ended or open ended form, so there may be four basic forms (either UCITS or AIFs):

- contractual funds with variable capital;
- contractual funds with fixed capital;
- companies with variable capital (SICAVs); and
- companies with fixed capital (SICAFs).

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## ***What are the differences between offering fund securities to professional / institutional or other investors?***

EU based alternative investment fund managers (AIFMs) authorized under the [AIFM Law](#) will be granted a passport to either manage alternative investment funds (AIFs) in other EU member states or to market the units or shares of AIFs in other EU member states to professional investors. In order to exercise such activities in other EU member states, the EU based AIFM is required to notify the supervisory authority of the relevant member state.

The passport regime will not apply to the marketing of AIF units or shares to retail investors, as the Alternative Investment Fund Managers Directive (AIFMD) permits the member states to impose stricter requirements for marketing to such investors. As is the case in most EU member states, Belgium has elected to make use of this option, and the AIFM Law imposes more stringent conditions for AIFMs marketing units or shares in AIFs to retail investors.

For the purposes of the AIFMD, the term 'professional investors' is defined as any investor that is considered as, or may be treated as, a professional client under the Markets in Financial Instruments Directive (MiFID). Professional clients include, among other things, credit institutions, investment firms and collective investment schemes, as well as 'opted up' retail clients.

The [UCITS Law](#) contains rules applicable to Belgian Undertakings for Collective Investment in Transferable Securities (UCITS) and foreign UCITS complying with the conditions of the Undertakings for Collective Investment in Transferable Securities Directive, whose shares are offered to the public in Belgium.

The UCITS Law is not applicable to foreign UCITS whose shares are offered within the context of a private placement. In derogation from the UCITS Directive, the UCITS Law further distinguishes between Belgian UCITS whose shares are offered within the framework of a public offering and Belgian UCITS whose shares are offered within the framework of a private placement. There is no public offer if the shares are exclusively offered to professional investors.

Publicly offered UCITS are subject to a list of additional requirements, such as a registration with the FSMA. Moreover, all communications, advertisements and other documents that are related to a public offering of the shares in a UCITS must be pre-approved by the FSMA and must be complete, accurate and consistent with the prospectus.

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## ***Are there any other notable risks or issues around establishing and investing in funds?***

N/A

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## Managing and marketing debt / hedge funds

### *Are there any restrictions on marketing a fund?*

The marketing of funds is generally covered under the [Undertakings for Collective Investment in Transferable Securities](#) (UCITS) or under the [Alternative Investment Funds Managers Directive](#) (AIFMD) regime.

UCITS, including those established in Belgium, have an EU passport which enables fund promoters to create a single product for marketing in all EU member states and on the completion of the appropriate notification procedure, a UCITS established in one member state can be sold in any other.

A UCITS intending to market in another member state must complete and submit to its home regulator a notification including certain specified information, including copies of key investor information documents. The home regulator then completes a notification file which is sent in a regulator to regulator transmission, following which the UCITS can be sold in the other member state.

Under AIFMD, marketing is defined as a direct or indirect offering or placement at the initiative of AIFM or on behalf of the AIFM of units or shares in an AIF it manages to or with investors domiciled or with a registered office in the EU.

An AIFM may only market an AIF to EU investors if it is authorized by a relevant EU regulator – registration with one EU regulator opens access, subject to certain further limited conditions, to marketing to professional investors across the EU under a EU passport or if it complies with national private placement regimes (where available).

As the AIFMD's passport regime for the marketing of non-EU AIFs by EU AIFMs and the marketing of AIFs by non-EU AIFMs, is not yet available, Articles 36 and 42 of the AIFMD allow the member states to permit such marketing if certain conditions are met. The Belgian legislator has decided to implement Articles 36 and 42 of the AIFMD. The private placement regime is therefore still available in case a passport is not yet available.

In accordance with Article 68 of the AIFMD, these grandfathering rules and the private placement regime in Belgium will be abolished on a date to be determined by the European Commission. It is expected that this abolition will not take place before the end of 2018.

In addition to these two laws, a number of other regulations have impacted the way that funds can be distributed in Belgium. These include the:

- [Belgian moratorium on the marketing of particularly complex products to non-professional clients](#) (which prohibits or limits the marketing of certain funds by distributors that have acceded to the moratorium);
- [Royal Decree of 25 April 2014](#) on certain information requirements when marketing financial products to non-professional clients (which adopts a 'transversal' approach towards financial products); and
- [Royal Decree of 24 April 2014](#) approving the regulation of the FSMA on the ban on the distribution of certain financial products to retail clients.

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### *Are there any restrictions on managing a fund?*

Alternative Investment Fund Managers (AIFM)/Undertakings for Collective Investment in Transferable Securities (UCITS) management companies are subject to prior authorization to be granted by the competent authorities of the management company's home member state. Authorization granted to a management company shall be valid for all member states. A management company that does not benefit from an exemption pursuant to the [AIFM/UCITS](#) Law will need to obtain authorization from its home regulator (the Financial Services and Markets Authority (*Autorité des services et marchés financier/Autoriteit voor Financiële Diensten en Markten*) (FSMA) in Belgium) in order to manage AIFs/UCITS. As part of the application procedure, the management company will need to provide certain information to the regulator.

Before granting an authorization to a management company, the FSMA may be required to consult with other member state regulators (for example, if the management company in question is associated with an entity regulated in another member state, such as an investment firm, a credit institution or an insurance undertaking).

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## Entering into derivatives contracts

### *Are there any restrictions on entering into derivatives contracts?*

Unless an exemption or exclusion applies, a person entering into a derivatives contract by way of business in Belgium (such as investment firms) will in principle have to be authorized.

The distribution of certain financial derivatives among Belgian retail clients is restricted as from 18 August 2016. Certain derivatives such as binary options or contracts for difference (CFDs) with leverage, may not be distributed, and certain distribution practices are also prohibited. The Regulation drawn up by the Financial Services and Markets Authority (*Autorité des services et marchés financier/Autoriteit voor Financiële Diensten en Markten*) (FSMA) on this matter was approved by [Royal Decree of 21 July 2016](#) that approves the FSMA's Regulation on the distribution of over-the-counter (OTC) derivatives (Regulation). The Regulation applies to derivative contracts distributed to consumers in Belgium, usually from abroad, via electronic trading platforms.

The Regulation consists of two elements which apply cumulatively:

- The first element is a ban on distribution of a few specific types of derivative contracts to consumers via electronic trading platforms. These are binary options, derivative contracts with a maturity of less than 1 hour, derivative contracts with leverage, such as CFDs and rolling spot forex contracts. The Regulation applies to unlisted or OTC derivatives. It does not apply to derivatives that are admitted to trading on a regulated market or on a multilateral trading facility. The Regulation supplements the distribution ban that was already in force for certain products, such as life settlements (traded life policies) and financial products with a virtual currency as their underlying.
- The second element is a ban on a number of aggressive or inappropriate distribution techniques (cold calling via external call centers, inappropriate forms of remuneration, fictitious gifts or bonuses etc) used when distributing OTC derivatives to consumers.

In addition, the European Market Infrastructure Regulation (EMIR) imposes obligations on EU derivatives market participants. EMIR applies to financial counterparties (banks, investment firms, insurance companies, registered funds (UCITS), pension funds and private funds) and non financial counterparties (any other undertaking established in the EU) that enter into derivatives, whether they do so for trading purposes, to hedge themselves against interest rate or foreign exchange risk or to gain exposure to certain assets as part of their investment strategy.

Certain EMIR obligations (clearing and risk mitigation) may also affect non EU entities in two sets of circumstances: EMIR can apply directly to those companies or indirectly impact them when they enter into derivatives with EU participants.

EMIR does not impose any new authorization or registration requirements for parties to derivatives contracts. EU dealers in OTC derivatives are already required to be authorized as investment firms under MiFID, unless an exemption applies.

EMIR imposes three main obligations on market participants:

- **Clearing** – Certain OTC derivatives entered into between certain market participants will have to be cleared via a central counterparty (CCP).
- **Reporting** – All derivatives (OTC and exchange traded, including derivatives entered into since, or that were outstanding on, 16 August 2012) will have to be reported to a trade repository.
- **Risk mitigation techniques** – OTC derivatives entered into between certain market participants and which are not cleared via a CCP are subject to risk mitigation obligations.

EU non financial counterparties that have 'systemically important' positions in 'non hedging' derivatives (whether at entity or group level) on any given day also have a notification obligation to their national competent authority and the European Securities and Markets Authority (ESMA).

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### *What are common types of derivatives?*



The definition of 'derivative' is not set out in full in the European Market Infrastructure Regulation (EMIR) but cross refers to a sub set of financial instruments listed in the Markets in Financial Instruments Directive (MiFID).

Broadly speaking, a 'derivative' includes any option, future, swap, forward and other derivative contract relating to securities, currencies, interest rates, financial indices, commodities, financial contract for differences and credit default swap. This definition is, however, limited to bilateral derivative contracts, such as exchange traded derivatives (ETDs) and over-the-counter (OTC) contracts and does not, as a rule, include derivatives embedded in other contracts, such as securities or loans.

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## *Are there any other notable risks or issues around entering into derivatives contracts?*

Since the global financial crisis in 2007 to 2008, derivatives, and particularly over the counter derivatives, have attracted significant regulatory attention. The European Commission has sought in particular, to:

- enhance transparency by requiring the provision of comprehensive information on over the counter derivative positions;
- reduce counterparty risk by increasing the use of central counterparty clearing; and
- improve the management of operational risk by increasing the standardization of derivatives contracts.

As a result, the derivatives market has seen, and continues to see, the introduction of a significant amount of new regulation and this has led to substantial compliance costs for market participants.

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## Debt finance

### Lending and borrowing

#### *Are there any restrictions on lending and borrowing?*

##### Lending

Lending is a regulated activity in relation to mortgage credit and consumer credit (Book VII of the Code of Economic Law).

Assuming none of the available exemptions apply, mortgage and consumer credit providers need to be authorized by the FSMA to conduct such business.

Mortgage and consumer loans are subject to a range of regulatory requirements that do not apply to unregulated loans. For example, for regulated mortgage and consumer contracts, specific obligations apply with respect to:

- conduct of business rules;
- provision of information;
- knowledge of the client/borrower; and
- assessment of the creditworthiness of the client/borrower.

There are no additional restrictions that apply to foreign lenders making loans to Belgian borrowers.

Providing financing to a company (excluding providing consumer credit and mortgage credit to individuals for residential purposes) ("commercial lending") on a stand-alone basis does not require a licence nor any filing and/or registration.

However, specific rules of conduct apply for lending to SMEs, pursuant to the Act of 21 December 2013 on the Financing of SMEs. These rules of conduct include a duty of rigour, a duty of information, restrictions on a number of contractual terms, and a right of prepayment

for the enterprise. SMEs are individuals or legal entities pursuing an economic purpose in a sustainable manner or liberal professions (eg, lawyers, notaries, etc) that have no more than one of the following criteria in their last and penultimate closed financial year: (i) 50 employees on an annual basis; (ii) annual turnover of EUR9 million; and (iii) a total balance sheet of EUR4.5 million.

Commercial lending sometimes activity requires a licence – ie, if it is undertaken in combination with deposit taking (which requires a licence as a credit institution) or if it is funded with crowdfunding (which may require a licence as a crowdfunding platform).

## Borrowing

While borrowers are generally not regulated, it is advisable for borrowers to consider whether either the mortgage or consumer lending regimes apply to their activities, in which case they will benefit from the protections mentioned above.

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## What are common lending structures?

Lending in Belgium can be structured in a number of different ways to include a variety of features depending on the commercial needs of the parties.

A loan can either be provided on a bilateral basis (a single lender providing the entire facility) or syndicated basis (multiple lenders each providing parts of the overall facility).

Syndicated facilities by their nature involve more parties (such as agents which fulfil certain roles for the finance parties), are more highly structured and involve more complex documentation. Larger financings will typically be done on a syndicated basis with one of the syndicate taking the lead in coordinating and arranging the financing.

Loans will be structured to achieve specific objectives, eg term loans, working capital loans, equity bridge facilities, project facilities or letter of credit facilities.

## Loan durations

The duration of a loan can also vary between:

- a term loan, provided for an agreed period of time but with a short availability period;
- a revolving loan, provided for an agreed period of time with an availability period that extends nearer to maturity of the loan and which may be redrawn if repaid;
- an overdraft, provided on a short term basis to solve short term cash flow issues; or
- a standby or a bridging loan, intended to be used in exceptional circumstances when other forms of finance are unavailable and often attracting a higher margin.

## Loan security

A loan can either be secured, unsecured or guaranteed. For more information, see [Giving and taking guarantees and security](#).

## Loan repayment

A loan can also be repayable on demand, on an amortizing basis (in instalments over the life of the loan) or scheduled (usually meaning the loan is repayable in full at maturity).

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## What are the differences between lending to institutional / professional or other borrowers?

There are no differences except for mortgage credit and consumer credit, which are regulated activities.

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## *Do the laws recognize the principles of agency and trusts?*

The principle of agency is recognized as a matter of Belgian law. It is possible to appoint an agent, who would act in the name and for the account of a single regulated undertaking (as opposed to a broker).

It also explicitly recognises the concept of a collateral agent/security agent, but only in relation to security taken over financial collateral and movable assets. This allows for the creation of security over such assets for the benefit of the agent (acting as representative of the secured parties), provided that the secured parties are determinable on the basis of the security agreement.

However, Belgian law does not recognise the concept of a security agent with respect to security over real estate. Therefore, when a mortgage is being granted to a security agent on behalf of a consortium of lenders, or in a situation where there is only one lender but the intention is to subsequently syndicate the facilities, a parallel debt structure can be considered. Although Belgian law does not recognise the concept of parallel debt as such, the use thereof has been common practice, and the concept and validity thereof has been supported by Belgian legal authors.

Belgian law does not recognize the principle of trusts. Belgian Courts would, however, recognize foreign trusts validly incorporated to the extent that they are not manifestly incompatible with Belgian mandatory laws.

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## *Are there any other notable risks or issues around lending?*

### Generally

Loan agreements and other finance documents are subject to general contractual principles. For example, Belgian courts may decide not to enforce a penalty or may decide to reduce the agreed amount. Lenders hence have to be careful about the rate of default interest charged on a loan.

### Specific types of lending

Specific to the area of mortgage lending is the issue of whether a lender falls within the new Belgian mortgage regime. The Mortgage Credit Directive, implemented in Belgium through the [law of 22 April 2016](#) amending the provisions on consumer credit and mortgage credit in the Code of Economic Law, aims to prevent the irresponsible lending and borrowing practices that were exposed during the global financial crisis. The Law imposes a number of requirements on lenders including the need to:

- assess the creditworthiness of the consumer;
- provide the consumer with the personalized information needed to compare the credits available on the market; and
- ensure that the relevant staff of creditors, credit intermediaries and appointed representatives possess an adequate level of knowledge and competence, in order to achieve a high level of professionalism.

Consumer credit is regulated in the Code of Economic Law. The [Consumer Credit Directive \(2008/48/EC\)](#) was implemented in Belgian law by the Act of 13 June 2010 and amended by the law of 22 April 2016 amending the provisions on consumer credit and mortgage credit in the Code of Economic Law. The Law also imposes a number of requirements on credit providers.

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## *Are there any other notable risks or issues around borrowing?*

Borrowers should be aware of the potential implications of the EU's [Bank Recovery and Resolution Directive \(BRRD\)](#), which outlines certain measures for dealing with failing financial institutions.

The BRRD applies to financial institutions incorporated in the European Economic Area (EEA), but does not apply to EEA branches of non-EEA incorporated entities.

Article 55 of the BRRD gives authorities the power to 'bail in' obligations of failed EEA financial institutions and also postpone the enforcement of early termination rights against the affected institution. 'Bail in' describes a variety of write-down and conversion powers, such as the power to convert certain liabilities into shares or cancel debt instruments. In the case of Belgian or other EEA law contracts, such powers override what the contracts says. In the case of non-EEA law contracts, there are requirements to incorporate such provisions into the contract.

Furthermore, when a borrower, security provider or guarantor becomes insolvent, the related claims and security rights of lenders might lose value, because the lenders need to compete with other privileged creditors or the collateral is insufficient to cover the total debt. In addition, enforcement might be delayed or no longer possible.

In the case of bankruptcy, any payments or security granted to lenders might also become subject to claw-back actions, upon the opening of insolvency proceedings.

Certain transactions may be declared ineffective vis-à-vis third parties if they are concluded or performed by the debtor during the hardening period (a period of up to a maximum of six months prior to the date of the bankruptcy judgment). There is an exhaustive list of automatic and non-discretionary claw-back events, as follows:

- gifts and undervalued contracts;
- payments made for amounts that are not due at the date of payment;
- new security granted for existing debt; and
- all other payments made to creditors.

These can be challenged by the bankruptcy receiver if the creditor that accepted payment was aware of the financial distress of the company at the time of the event.

In addition, at the request of the bankruptcy receiver, the court can declare other transactions that have been entered into or performed during the hardening period ineffective, provided the counterparty was aware of the fact that the debtor was virtually bankrupt and the court determines that this declaration would benefit the bankruptcy estate (ie, the challenged transaction was detrimental to the rights of the creditors).

Moreover, "fraudulent transactions" (ie, abnormal transactions that are detrimental to the rights of the creditors and where there is fraud on the part of both the debtor and the other party) can be declared ineffective, regardless of whether they occurred during or before the hardening period.

If the lender acts as a credit institution, it has an obligation to inquire about its client's ability to repay his debt, and must evaluate the validity of the securities granted to him. If the institution does not comply with that provision, it may be ordered to reimburse the sums resulting from the call on the guarantee or the enforcement of the securities.

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## Giving and taking guarantees and security

### *Are there any restrictions on giving and taking guarantees and security?*

The main issues involved in a company granting any downstream, upstream or cross-stream guarantee/security in respect of any obligation of a company belonging to the same group concern the existence of a valid and direct corporate benefit for that subsidiary. Under Belgian law there is no legal concept of group interest and only showing that the security would be in the interest of the group is not sufficient.

The granting of an intra-group guarantee/security must also fall within the corporate purpose of that company. The corporate purpose of a Belgian company is set out in its articles of association and Belgian companies can only act within the boundaries of this corporate purpose.

In the context of a target being acquired, the target is restricted from granting guarantees or security (financial assistance) for the acquisition of its own shares. However, this can be permitted following the adoption of a particular procedure. Given the cumbersome nature of such procedure, it is not common that companies choose to comply with the procedure and they will usually structure a transaction avoiding financial assistance.

Other conditions and/or restrictions depend on the type of guarantees/security.

All security interests under Belgian law can be created by means of a private agreement, except mortgages and mortgage mandates that must be created by means of a notarial deed and, in case of a mortgage, registered at the competent mortgage registry.

## General validity requirements that are applicable to all agreements

- Consent of the parties
- Capacity of the parties
- Determination of the object of the security taking (a determined or determinable asset)
- Legitimate cause (the cause of the agreement must not be prohibited by law or contrary to morals and public order)
- In the case that security is granted by an individual – restrictions on security granted without consideration and limitations resulting from the marital status (which may require spousal consent)
- In the case that security is granted by a legal entity – authorization by the competent bodies, conformity with corporate interest, no violation of specific restrictions (eg financial assistance rules or prohibition on ‘misuse’ of corporate assets)

## Specific validity requirements

- **Mortgages** – formal notarial deed, secures a specific amount, must accurately define the mortgaged real estate
- **Register pledge** – all moveable assets, tangible and intangible, in whole or in part, can be pledged by private agreement (a register pledge will be valid between the parties to it from the date it is concluded but, in order to be valid and enforceable against third parties, the pledge should be registered in the yet to be established National Pledge Register)
- **Pledge over receivables** – effected by private agreement (under Belgian law, a pledge over receivables is valid between parties and enforceable against third parties (other than the debtor of the receivables) as from the date of its conclusion; in order to be valid and enforceable against the debtors of the receivables the debtors must be notified of the pledge)
- **Pledge over bank account** – an acknowledgement by the bank holding the pledged accounts is required in order to protect the pledgee against risks arising out of rights afforded to the bank pursuant to its standard account terms and conditions or otherwise
- **Pledge over shares** – articles of association must be reviewed, may contain restrictions to the granting of a pledge over shares; pledge needs to be registered in the shareholders register of the company

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## What are common types of guarantees and security?

The most common forms of guarantees and security are:

- security interest *in rem*:
  - pledge over tangible assets
  - pledge over receivables, bank accounts, securities or business);
  - title transfer as security interest;
  - mortgage over real estate;
  - mortgage mandate (however, the mortgage mandate does not provide for an actual security right on the assets but only gives the right to establish a mortgage at a later point in time);

- security interest over ships and planes; and
- personal security interest – a third party (such as a guarantor) will secure the claim of the creditor on the debtor, by committing its estate or by granting one of the security interests listed above.

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## *Are there any other notable risks or issues around giving and taking guarantees and security?*

### All sums security interests

A security interest on conditional or future debts is valid under Belgian law as long as the future debt is sufficiently determined or determinable which is the case if the agreement creating the security interest allows to define and identify the debt, and it results from the elements of the cause that the (future) debt was part of what the parties intended to secure.

### Mortgages

Mortgage requires registration of the mortgage with the appropriate local mortgage register for it to be effective *vis-à-vis* third parties.

### Other

Other security interests may require specific perfection requirements.

*Last modified 18 Dec 2019*

## Financial regulation

### Law and regulation

#### *What are the main laws and regulations that apply to entities that are involved in finance and investments generally?*

### Relevant EU legislation

#### **BANKING SUPERVISION**

[Directive 2013/36/EU](#) of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms

[Regulation \(EU\) No 575/2013](#) of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation 648/2012.

#### **FINANCIAL MARKETS AND INVESTMENT SERVICES**

The Markets in Financial Instruments Directive (Directive 2014/65/EU; "MiFID II")

Commission Delegated Directive (EU) 2017/593 of 7 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits; and Regulation on markets in financial instruments (Regulation n° 600/2014; "MiFIR")

[Regulation \(EU\) No 596/2014](#) of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC

[Directive 2014/57/EU](#) of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive)

[Regulation \(EU\) 2016/1011](#) of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014

Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC

#### **INSURANCES**

The Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution

[Directive 2009/138/EC](#) of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance (Solvency II)

#### **REGULATED CREDIT AND CONSUMER PROTECTION**

[Directive 2014/17/EU](#) of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010

[Directive 2014/92/EU](#) of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features

[Regulation \(EU\) No 1286/2014](#) of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs)

#### **PAYMENT SERVICES**

[Directive 2015/2366/EU](#) of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC

[Regulation \(EU\) No 260/2012](#) of the European Parliament and of the Council of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation (EC) No 924/2009

#### **INVESTMENT FUNDS**

[Directive 2009/65/EC](#) of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)

[Directive 2011/61/EU](#) of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010

#### **POST TRADE**

[Regulation \(EU\) No 648/2012](#) of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories

[Regulation 2015/2365](#) of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse (SFTR)

[Regulation \(EU\) No 909/2014](#) of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012

[Directive 98/26/EC](#) of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems

[Directive 2002/47/EC](#) of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements

## Relevant Belgian legislation

### **BANKING SUPERVISION**

[Law of 25 April 2014 on the legal status and supervision of credit institutions and stockbroking firms](#)

### **FINANCIAL MARKETS AND INVESTMENT SERVICES**

Law of 21 November 2017 on infrastructure for markets in financial instruments and on the implementation of Directive 2014/65/EU

Law of 2 August 2002 on the supervision of the financial sector and on financial services

Law of 11 July 2018 on public offers of investment instruments and the admission to trading of investment instruments on regulated markets

### **INSURANCE AND REINSURANCE**

Law of 13 March 2016 on the legal status and supervision of insurance or reinsurance undertakings

Law of 4 April 2014 on insurance

### **REGULATED CREDIT AND CONSUMER PROTECTION**

Book VI (Market Practices and consumer protection) of the Code Economic Law

Book VII (Payment Services and Credit) of the Code Economic Law

Royal Decree of 25 April 2014 on certain information requirements in relation to marketing of financial products with non-professional client

### **PAYMENT SERVICES**

The Law of 11 March 2018 on the statute and supervision of payment institutions and electronic money institutions, access to the business of payment service provider and to the activity of issuing electronic money, and access to payment systems.

Book VII (Payment Services and Credit) of the Code Economic Law

### **INVESTMENT FUNDS**

Law of 3 August 2012 on certain forms of collective management of investment portfolios (the UCITS Law)

Law of 19 April 2014 on alternative investment funds and their managers (the AIFM Law)

### **POST TRADE**

Law of 28 April 1999 transposing Directive 98/26/EC of 19 May 1998 on settlement finality in payment and securities settlement systems

Law of 15 December 2004 on financial collateral and containing various tax provisions in respect of collateral security agreements and loans of financial instruments

### **OTHER KEY LEGISLATIONS**

The Law of 18 September 2017 on the prevention of money laundering and terrorist financing and on the restriction of the use of cash.

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## Regulatory authorization

### Who are the regulators?

Supervision is organized according to the 'Twin Peaks' model, with two autonomous supervisors, namely the National Bank of Belgium (*Banque Nationale de Belgique/Nationale Bank van België*) (NBB) and the Financial Services and Markets Authority (*Autorité des services et marchés financiers/Autoriteit voor Financiële Diensten en Markten*) (FSMA), each of which has a specific set of objectives.

The NBB performs macro prudential supervision of 'system relevant' financial institutions and is also responsible for the individual prudential supervision (including compliance with anti-money laundering legislation) of financial institutions authorized to hold funds on behalf of their clients.

The FSMA is the supervisor with respect to financial markets, investment products and the rules of conduct that apply to financial institutions. It is also responsible for contributing to the financial education of savers and investors.

Beside the national authorities, the European Central Bank (ECB) is the competent authority in Belgium for carrying out its micro-prudential tasks within the single supervisory mechanism (SSM) under [Regulation \(EU\) No 1024/2013](#) in respect of Belgian credit institutions and (mixed) financial holding companies that are classified as significant. The ECB is also the competent authority to authorize these institutions and to withdraw their authorizations subject to the relevant provisions laid down in Regulation No 1024/2013.

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### What are the authorization requirements and process?

A financial institution is required to obtain an authorization before commencing any regulated activities, unless certain exclusions or exemptions apply. Depending on the type of firm, a firm must apply to the National Bank of Belgium (*Banque Nationale de Belgique /Nationale Bank van België*), European Central Bank or the Financial Services and Markets Authority (*Autorité des services et marchés financier/Autoriteit voor Financiële Diensten en Markten*) for authorization.

- Credit institutions/stockbroking firms: NBB
- Insurance and reinsurance undertakings: NBB
- Payment institutions and electronic money institutions: NBB
- Settlement and clearing institutions: NBB
- Consumer/mortgage credit' lenders: FSMA
- Portfolio management and investment advice companies: FSMA
- Intermediaries in banking and investment services: FSMA
- Platform of crowdfunding: FSMA
- Management companies of UCIT/AIF/ FSMA
- Independent financial planner: FSMA

The authorization requirements and process depend on the institution concerned.

The competent authority must assess whether the application meets the required threshold conditions. Generally, in order to obtain an authorization, the institution needs to submit an application file which includes among other information:

- a program of operations;
- a business plan including a forecast budget calculation which demonstrates that the applicant is able to employ the appropriate and proportionate systems, resources and procedures to operate soundly;
- a description of the applicant's governance arrangements and internal control mechanisms;
- a description of the applicant's structural organization;

- the identity of persons holding in the applicant, directly or indirectly, qualifying holdings;
- the applicant's legal status and articles of association; and
- the address of the applicant's head office.

The applicant can only obtain a license if it is financially sound and meets the minimum initial capital and own funds requirements. These requirements are set out in the legislations outlined above.

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## *What are the main ongoing compliance requirements?*

Financial institutions must at all times comply with the authorization requirements. Threshold conditions (such as having adequate financial resources and structural and compliance arrangements in place) are an ongoing compliance requirement for authorized firms.

Failure to comply with the threshold conditions and with the applicable laws and regulations can result in sanctions for the institutions concerned and can even lead to the revocation of the authorization.

Investment firms, management companies of undertakings for collective investment, undertakings for collective investment which have not designated a management company, credit institutions and insurance companies governed by Belgian law and the branches of such institutions established in Belgium governed by the laws of third countries, shall appoint compliance officers of good repute and with the requisite knowledge and experience with a view to ensuring compliance with the rules referred to in the laws.

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## *What are the penalties for failure to be authorized?*

Failure to be authorized may result in payment penalties, administrative or criminal sanctions.

*Last modified 18 Dec 2019*

## Regulated activities

### *What finance and investment activities require authorization?*

A person must not perform any regulated activities in Belgium unless authorized or exempt.

The following businesses would usually be deemed to be carrying on regulated activities and require authorization under Belgian law:

- credit institutions;
- investment firms: stockbroking firms, portfolio management or investment advice companies;
- insurance or reinsurance undertakings;
- payment institutions and electronic money institutions;
- settlement institutions and institutions equivalent to settlement institutions;
- consumer credit providers;
- intermediaries in banking and investment services;
- intermediaries in consumer credit and mortgage credit;
- intermediaries in insurance and reinsurance;
- Undertakings for Collective Investment in Transferable Securities (UCITS) and their management company; and
- Alternative Investment Funds (AIFs) and their management company.

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## *Are there any possible exemptions?*

For each type of regulated activity there are a number of specific exemptions that could also apply, such as the provision of investment services on an ancillary basis.

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## *Do any exchange controls or other restrictions on payments apply?*

Belgian law does not impose specific restrictions on exchange controls, except in exceptional situations (e.g., as with UN sanctions). Article 63 Treaty on the Functioning of the European Union (TFEU) expressly prohibits restrictions between EU member states and between member states and third countries.

Therefore, there are no exchange control rules for foreign investors and no restrictions on the repatriation of profits either. However, withholding tax (roerende voorheffing/précompte mobilier) may apply under certain circumstances.

Belgian residents which fall within one of the following categories should inform the National Bank of Belgium (*Banque Nationale de Belgique/Nationale Bank van België*) (NBB) of their professional foreign transactions:

- the 1,050 biggest companies;
- coordination centers; or
- the financial sector.

In addition, Belgian residents outside those categories should provide the NBB (if requested to do so) with information with respect to their transactions with countries abroad.

There are also anti money laundering, cash control and tax considerations to take into account.

*Last modified 18 Dec 2019*

## *What are the rules around financial promotions?*

Financial promotions are not generally defined in Belgian law.

A financial promotion refers to a communication of an invitation or inducement to engage in investment activity made by a person in the course of business. Since such communications can influence consumers, a person is restricted from communicating such promotions unless they are an authorized person, or the content of the communication has been approved by a competent authority, or the promotion falls within one of the exemptions.

### **Rules**

Different laws and regulations regulate financial promotions, such as the Belgian Code of Economic Law, the Law of [2 August 2002](#), the [Prospectus Law](#), the [UCITS Law](#), the [AIF Law](#), the [Royal Decree of 25 April 2014 on certain information requirements in relation to marketing of financial products with non-professional clients](#) and circular letters from the Financial Services and Markets Authority (*Autorité des services et marchés financier/Autoriteit voor Financiële Diensten en Markten*) in this respect.

Below an overview of the rules governing the distribution of financial instruments in force in Belgium:

- Belgian prospectus law

Under the Belgian prospectus law, marketing is defined very broadly as the presentation of a financial product, in any manner, to encourage the client or potential client to buy or subscribe the relevant financial product (article 11).

Pursuant to article 60 of the Belgian prospectus law, ex ante/a priori supervision by the FSMA of advertising is required for investments instruments offered to the public that are subject to the requirement of a prospectus.

The advertising or marketing materials shall observe the following principles:

- they shall state that a prospectus has been or will be published and indicate where investors are or will be able to obtain it;
- they shall be clearly recognizable as such.
- the information contained in advertising or marketing materials shall not be inaccurate, or misleading. This information shall also be consistent with the information contained in the prospectus;
- Marketing Royal Decree

The Royal Decree of 25 April 2014 regarding certain information obligations for the marketing of financial products to retail clients (the “Marketing Royal Decree”) also provides rules on marketing documents for financial products marketed to retail clients in Belgium.

The rules apply to the retail marketing of any financial product in Belgium. Accordingly, foreign entities conducting activities in Belgium on a cross-border basis (or through a branch) also fall under the rules. It should be noted that they only apply to marketing addressed to MiFID retail clients.

Marketing is again defined very broadly as the presentation of a financial product, in any manner, to encourage the client or potential client to buy, subscribe, adhere, accept, sign or open the relevant financial product. This covers both public offers and private placements. The new regime creates an obligation regarding the content and presentation of marketing documents.

The Marketing Royal Decree sets forth a series of rules on the content and presentation of marketing materials including general principles such as fair and not misleading content, minimum criteria with regard to the content of marketing materials), the presentation of future and past performance information, disclosures on award and rating and comparisons between financial products.

All marketing materials must be approved beforehand by the FSMA.

- Book VI of the Code of Economic Law

Book VI of the Code of Economic Law on “Market practices and consumer protection” sets forth general rules applicable to advertising. Book VI regulates abusive advertising, misleading advertising and comparative advertising.

- Ban on the marketing of certain financial products

In Belgium, the marketing of certain financial products to retail clients in Belgium is banned by a Royal Decree of 24 April 2014 that applies to financial products that are based on so-called non-mainstream or non-standard assets.

The Regulation bans the marketing of several classes of products:

- financial products that depend on a life settlement, in other words, traded life assurance policies;
- products that consist essentially of derivatives based on virtual currencies such as Bitcoin.
- notes and class 23 insurance contracts where the return depends on an alternative investment fund that invests in non-standard assets and to class 23 insurance contracts whose return depends on an internal fund invested in such non-standard assets (such as commodities, artworks, and consumer products like wine or whisky).

Depending on the financial product concerned, non-authorized financial promotions can be sanctioned by criminal, administrative and civil penalties.

## Exemptions

Exemptions include certain promotions when certain safe harbor conditions are met, such as the offer of investment instruments to qualified investors.

*Last modified 18 Dec 2019*

## Entity establishment

## *What types of legal entity are generally used to undertake financial or investment activity?*

### Generally

The most common types of legal entities are limited companies, which are body corporates with separate legal personality and limit the liability of their members.

Limited companies can either be private (private limited liability company, *société à responsabilité limitée/besloten vennootschap*) or public (public limited company, *société anonyme/naamloze vennootschap*), depending on whether their shares are offered to the public.

Usually, regulated entities are incorporated as public limited companies which is the legal entity favored by large enterprises.

### Funds

Investment funds mostly take the form of public limited companies, partnerships limited by shares or contractual schemes.

Fund managers should be public limited companies.

*Last modified 18 Dec 2019*

## *Is it possible to conduct lending or investment business through a branch or establishment?*

Yes.

To the extent that it concerns activities subject to mutual recognition, European Economic Area (EEA) credit institutions and other financial institutions authorized to offer such activities in their home member state, can start these activities in Belgium, either under the freedom to provide services or via the establishment of a branch.

Non EEA entities need to be authorized to conduct regulated lending or investment business through a branch or establishment.

Foreign companies carrying on a trade in Belgium through a 'permanent establishment' or 'Belgian establishment' will be subject to Belgian corporation tax.

*Last modified 18 Dec 2019*

## FinTech

### FinTech products and uses

#### *What are the most common technology products and FinTech applications used or being developed in the finance and investment marketplace?*

##### Peer-to-peer funding platforms and marketplace lending

Peer-to-peer lending as such is forbidden by law in Belgium. On one hand, the Prospectus Law prevent individuals to raise funds publicly, even through an intermediary platform. This means that a borrower candidate cannot invite other people publicly to lend him money. On the other hand, one needs to be a regulated lender to grant loans and to get access to the Central Individual Credit Register.

Crowdfunding is regulated by the Law of 18 December 2016, which introduced a bespoke crowdfunding regime for platforms in Belgium. This regime applies only to crowdfunding entailing a financial return for investors. This specific form of crowdfunding can itself be broken down into two types: debt-based and equity-based crowdfunding.

## Blockchain, smart contracts and cryptocurrencies

### WHAT IS BLOCKCHAIN?

Blockchain provides a new approach to holding and authenticating data. It is a database operating through distributed ledger technology in which data is recorded on computers, by way of a P2P mechanism, based on pre-agreed consensus algorithms in the applicable participating network. It is a form of database where data is stored in the chain in either fixed structures called 'blocks' or algorithm functions called 'hashes'.

Each block includes unique features such as its unique block reference number, the time the block was created and a link back to the previous block. Each block is reviewed by a number of nodes and the block is only added to the database if the node reaches consensus that the block only contains valid transactions. Content includes digital assets and instructions which reflect the transactions and parties to those transactions. The ability to track previous blocks in the chain makes it possible to identify transactions back to the first ever transaction completed, enabling parties to verify and establish the authenticity of the assets in the latest block. This makes blockchain exceptionally accurate and secure.

Specialist users on the system apply advanced computing software to identify time stamped blocks, verify the accuracy of the block using sophisticated algorithms and add the verified block to the chain. As the number of participants increases, the replication of the data over a wider base makes it harder for any person to alter the data in the chain. Any attempted addition or modification to the information on a block needs to be approved by all users in the network and verification of any block can only happen through a 'proof of work' process. The process requires vast amounts of computing power, making it practically impossible to insert fake transactions into a block.

As a result, the data is identified and authenticated in near real-time, providing a permanent and incorruptible database sufficiently robust to operate as a store of value (eg in the case of cryptocurrencies such as Bitcoin) or providing an indisputable record for example relating to securities transfer.

Blockchain is a decentralized system, created and maintained by users of the network rather than being dependent on any central or third party intermediary. It may be public and open ('permissionless' or 'unpermissioned') or structured within a private group ('permissioned').

Permissionless blockchains include bitcoin and ethereum, in which anyone can set up a node that once authorized can validate, observe and submit transactions. The identities of the participants are not known (other than the unique and random identities known as an 'address'). Permissioned ledgers restrict participation in the network and only the specific participants are given access and are known within the network. The network is private, and only organizations that have been authorized can participate and view transactions.

### WHAT ARE SMART CONTRACTS AND DECENTRALIZED AUTONOMOUS ORGANIZATIONS (DAOS)?

Developments in blockchain are also providing an ability to transfer and rely on instructions verified within the electronic system in the form of so called 'smart contracts'. These contracts have been converted into code and are then executed and enforced by the blockchain network on the occurrence of an event. This reduces the need for intermediaries to collect, store and act on communicated information.

Smart contracts are essentially pre-written computer codes which are stored and replicated on distributed ledger platforms such as blockchain. Execution takes place over the network, eliminating the need for intermediary parties to confirm the transaction, leading to self-executing contractual provisions. These contracts can be as simple as moving a balance from one account to another or advanced, more complex interactions with the outside world using so called 'Oracles'. With Oracles the contract code consults with a service outside of the blockchain network to make a decision. This may entail receiving a confirmation that an event has occurred, such as payment, which automatically executes a further step in the contract, such as the transfer of an asset, which might be in digital form or by delivering instructions to a person or warehouse to release the asset for delivery.

DAOs are essentially online, digital entities that operate through the implementation of pre-coded rules. These entities often need minimal to zero input into their operation and they are used to execute smart contracts, recording activity on the blockchain. DAOs can be particularly challenging to regulate, depending on their software engine, the nature of transactions they are completing or other unique features. Questions of ownership and responsibility for resulting acts of DAOs can also be brought to question if any technical issues arise with their operation.

### WHAT IS A CRYPTOCURRENCY?

The European Central Bank definition of a cryptocurrency is that it is a digital representation of value that is neither issued by a central bank or public authority nor necessarily attached to a fiat currency, but is issued by natural or legal persons as a means of exchange and

can be transferred, shared or traded economically. The oldest and best-known cryptocurrency is bitcoin (itself based on the bitcoin platform) although many other cryptocurrencies now exist. For example, the most widely-known alternatives to bitcoin include ether based on the ethereum platform and litecoin (these cryptocurrencies are now actively traded with a large developing infrastructure for holding, pricing and exchanging currency).

## Initial coin offerings and token-based products

### WHAT IS AN INITIAL COIN OFFERING (ICO)?

ICOs are a form of digital currency or token using blockchain technology. ICOs are often a means by which funds are raised for a new blockchain or cryptocurrency venture (the market for ICOs is currently booming). ICOs come in a wide variety of forms and may be used for a wide range of purposes. Some forms of ICOs may be directed at customers or suppliers as a form of loyalty program or a form of access or purchasing power (preferential or otherwise) in respect of assets of the issuer's business. Other forms may be more focused on raising initial funding. It is essential to examine the legal and regulatory basis for any ICO, as an unauthorized offering of securities is illegal and may result in criminal sanctions in a number of jurisdictions. Legal analysis of the underlying token will determine if it should be treated as a specified investment or form of regulated security or is more appropriately a form of asset that is not itself subject to the regulatory regime.

Typical attributes provided by tokens will include:

- access to the assets or features of a particular project;
- the ability to earn rewards for various forms of participation on the platform; and
- prospective return on the investment.

Key aspects to consider will include the:

- availability and limitations on the total amount of the tokens;
- decision-making process in relation to the rules or ability to change the rules of the scheme;
- nature of the project to which the tokens relate;
- technical milestones applicable to the project;
- basis and security of underlying technology;
- amount of coin or token that is reserved or available to the issuer and its sponsors and the basis of existing rights;
- quality and experience of management; and
- compliance with law and all regulatory requirements.

The nature of the business and the purpose and structure of the token offering will typically be set out in a white paper available to potential purchasers.

## Artificial intelligence and robo advisory systems

Automated financial advice tools, also known as 'robo advisors,' are software tools driven by artificial intelligence (AI) that provide a variety of investment advice services, from portfolio selection to personal finance planning. The systems are generally operated on a platform /personal dashboard basis; a user can input a set of personalized data to be processed by the AI algorithms, which produce optimized outcomes around specified parameters. Although generally of application in the asset management sector, AI and automated advice tools also impact in the banking and private wealth advisor sectors; the implications include decreased human involvement, although recent trends have included a growth in popularity of hybrid structures which combine AI and human inputs.

## Data analysis and cloud computing

Cloud computing enables delivery of IT services through internet-based tools and applications, rather than direct connection to a physical server. Cloud-based storage makes it possible to save masses of data to remote servers, accessible through the internet rather than by

way of a physical connection. With the vast data processing and storage capabilities offered by cloud computing technology and virtually no infrastructure barriers to entry, there are a number of applications in building and running FinTech businesses and the technology has had a significant impact in recent years.

*Last modified 18 Dec 2019*

## *Are there any restrictions, specific laws, regulations or procedures that apply to FinTech products?*

### Regulation of payments services

Businesses that aim to provide payment services require prior authorization from the NBB under the Law of Law of 11 March 2018 transposing the Second European Union Payment Services Directive (PSD II). In order to become authorized, payment service providers need to meet certain criteria, including in relation to the business plan, initial capital, processes and procedures in place for safeguarding relevant funds, sensitive payment data and money laundering and other financial crime controls.

### Application of data protection and consumer laws

The European General Data Protection Regulation (GDPR) entered into force with direct effect on 25 May 2018. The GDPR offers citizens a wider control around the use of their personal data.

### Money laundering regulations

The Law of 18 September 2017 on the prevention of money laundering and terrorist financing and on the restriction of the use of cash implements the Fourth Anti Money Laundering Directive (4AMLD). Suspicious transactions have to be reported to the Belgian Financial Intelligence Processing Unit. As mentioned above, the Belgian Minister of Justice intends to bring virtual currency exchanges into the scope of the Belgian Anti-Money Laundering Act in the future.

*Last modified 18 Dec 2019*

## *What type of funding arrangements and incentives are available to FinTech businesses?*

### Early stage

#### SEED INVESTMENT

Initial investment in FinTech businesses may be provided by family and friends of the founders and other high-net-worth individuals, (often known as business angels) in return for an equity stake. Such seed investment is often used to fund the establishment and early growth of the business before larger investment is available. The investing individuals may also provide know-how and expertise to assist in the company's development. The seed investors would typically not require the same controls over the business as, for example, venture capital providers.

#### CROWDFUNDING

The crowdfunding sector is well established, and may be appropriate for a FinTech business in the early stages. It involves members of the public investing in a business by pooling their resources through an intermediary platform (the so-called 'alternative financing platforms'). The FSMA website currently shows 6 registered alternative financing platforms.

There are three main types of crowdfunding: equity-based, debt-based and reward-based.

- Equity crowdfunding involves company shares being given in exchange for investment in the business.
- Debt-based crowdfunding (also known as crowdlending): funders lend money to a company and look for interest payments as well as the full repayment of the principal.
- Reward-based crowdfunding provides investors with a tangible benefit, such as early access to a platform or application that the business is developing.



Crowdfunding offers a large number of private investors an opportunity to make small-scale investments in early-stage businesses to which they may otherwise not have had access.

#### ACCELERATORS

There are various incubators or accelerators in the Belgian market, which offer support and facilities for startups. Several competitions are being organized by financial market players in order to attract ideas, which may in turn be rewarded with initial financing.

Banks are equally keen to keep an eye on promising projects in the Belgian market. ING Belgium in 2017 offered a full FinTech incubator experience to startups in search of professional guidance and early stage advisory. The ING FinTech Village was a four-month scheme to which startups or scale-ups could apply in order to develop FinTech applications, while being provided with appropriate accommodation, support and advice offered by board level professionals from across the financial sector.

### Venture capital and debt

Venture capital funding is a type of equity investment usually targeted at early stage FinTech companies with an established business and some trading history. Venture capital provides a viable alternative to traditional lending given that the business is unlikely to have the tangible asset base or long track record needed to attract traditional debt funding from financial institutions.

Corporate venture capital (CVC) is a type of venture capital and involves an equity investment by a corporate fund, a Belgian example of which is the FinTech platform B-Hive. The benefit of having a CVC as an investor for a FinTech startup is that the fund is able to share its knowledge and expertise of the FinTech sector with the company and act as an advisor. In Belgium, FPIM (Federal Holding and Investment Company), a government investment body, made considerable contributions to B-Hive's fundraising, thus stressing the state's intentions to stimulate the sector's early development. More government capital funding initiatives are expected to be launched in the near future.

An additional funding option is venture debt, which is typically structured as a three-year term loan (or series of loans), secured against a company's assets and including an equity element allowing the debt provider to purchase shares in the company. However, venture debt providers will usually only invest into companies that have already received investment through venture capital.

### Warehouse and platform funding

Warehouse financing may be suitable for (typically larger scale) FinTech companies which own a portfolio of assets. Funding is often provided by way of a loan from a small number of lenders to a special purpose vehicle (SPV). The loan is secured on the assets acquired by the SPV from the originator. The lenders will only fund a portion of the assets, with the remainder being financed by way of subordinated lending from the originator.

Another internationally available alternative form of funding is by way of peer-to-peer (P2P) lending platforms, which bring individual borrowers and lenders together without the involvement of traditional banks. P2P lending does not involve equity investments, and instead, interest is paid on the money borrowed. However, as mentioned above, this type of lending is currently not available in the Belgian market, given the hostile regulatory environment.

### Senior bank debt and capital markets funding

#### SENIOR BANK DEBT

Once a FinTech company is established and has a track record, bank debt becomes a more viable source of funding, either on a secured or unsecured basis, depending on the creditworthiness and asset base of the business. In contrast to capital markets funding which is often covenant-lite, bank funding will generally involve the imposition of financial covenants and controls that will apply over the life of the facility. Bank finance may be particularly important for working capital, overdraft, accounts management and general liquidity purposes.

#### CAPITAL MARKETS FUNDING

Belgium has both debt and equity capital markets which are accessible to businesses (usually of a certain size). The Belgian capital market, however, is not readily available to companies in startup or scale-up stages. In recent years, IPOs and especially securitizations have been scarce. There is a tendency for successful Belgian startups to move abroad in their early stages.

#### CONVERTIBLE BONDS/LOAN NOTES

Another funding tool for fast-growing FinTech businesses, is to issue convertible bonds or loan notes which are essentially a hybrid between debt and equity. Convertible instruments begin as a loan accruing interest and are convertible into shares in the issuing company at prescribed prices in certain circumstances.

## Incentives and reliefs

Under Belgian law, a tax shelter is available for investors in startup companies including FinTech initiatives. Depending on the size of the company receiving funding, the Belgian taxpayer-investor is entitled to a 30% or 45% tax reduction. Companies are therefore being divided into micro-enterprises and SMEs, with the number of employees being one of the decisive factors (less than 10 for the former and less than 50 for the latter).

Private equity funds are more open to companies envisaging a steep growth trajectory. Both private and public debt is available in every region of Belgium. Often government subsidies can be obtained for innovative initiatives with a solid business prospect.

In early 2017 a new FinTech focused investment fund was set up to provide funding to FinTech initiatives in the Belgian market. Such funds often benefit from government contributions. More similar initiatives have been announced for the near future.

*Last modified 18 Dec 2019*

## Portfolio sales

### Loan transfers and portfolio sales

#### *What are common ways of buying and selling loans?*

Buying and selling loans is not very common.

A loan can be sold on an individual basis or packaged up with other loans and sold as a portfolio pursuant to overarching terms.

The most common ways of selling loans are:

- **Novation** – A novation is a full legal transfer of the party's rights and obligations. It is a tripartite arrangement between the existing parties and the transferee and results in a fresh contract being formed between the continuing party and the transferee and the transferor being released from its obligations.
- **Cession** – A cession is a full legal transfer of the party's rights. It is an arrangement whereby the existing lender transfers his rights to a transferee. The latter thus takes over the rights under the existing contract which is to be continued.
- **Sub-participation** – The original lender will remain the only creditor of the borrower, and the only beneficiary of the security package. Based on the sub-participation agreement, the sub-participant has a contractual right to amounts received by the principal lender, but no direct in rem right against the borrower, nor over the security assets.
- **Belgian law LMA standard documentation** – In case of large syndicated loans, it is market practice to use the LMA standard contracts, with the necessary amendments so that it can be governed by Belgian law. For the transfer of rights created thereby the transfer mechanisms provided in this documentation can be used.

Loan transfers are commonly documented using standard form contracts made available by the Loan Market Association. For more complex transactions, a more bespoke form of sale and purchase agreement would tend to be used. The form and content of the transfer documentation will depend on the nature of the loan assets being sold.

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#### *What are the main considerations when transferring a loan and related security?*

There are a number of issues to consider before transferring a loan or portfolio of loans. These issues are often covered as part of a due diligence exercise by the seller's legal advisors. Key considerations include the following.

## Notification

A transfer via cession is valid and enforceable against third parties following the agreement between the lender and the transferee. However, the borrower needs to be notified or has to acknowledge the cession.

## Transfer security interest - novation

In case of a transfer by way of novation, all security rights relating to the initial debt are extinguished, unless explicitly preserved. A clause containing this preservation can be included in the original facility agreement.

## Transfer security interest – cession

In principle, all security rights that have been put in place in connection with the transferred debt are automatically transferred. However, for each transfer of (part of) a loan secured by a mortgage, a marginal note (kantmelding/inscription marginale) in the Mortgage Registry must be made, which will involve the payment of a 1% registration tax (calculated against the secured amount) unless the transfer is made between certain categories of lenders (such as an EEA-licensed credit institution or mobilisation institutions).

## Confidentiality

Consider whether the seller of the loan is allowed to disclose information relating to the loan to a potential purchaser.

## Data protection

Consider whether there is any personal data or other restricted information in the loan that should not be disclosed to a potential purchaser.

## Lender eligibility

Consider whether there are any restrictions around the type of entity to which the loan can be transferred.

## Undrawn commitments

Consider whether there are any continuing obligations for further funding or other material obligations on the part of the lender that may fall on the transferee or reduce claims made by the transferee.

## Transfer mechanics

Consider whether there are any steps that need to be taken to transfer the loan in accordance with its terms.

## Consent

Consider whether a transfer requires the consent or notification of any other parties.

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# Projects

## Financing / investing in energy / infrastructure

*To what extent are energy and infrastructure assets publicly or privately owned?*

## Generally

The ownership of energy and infrastructure assets in Belgium varies according to the asset class. The main asset classes are usually considered to be:

- economic infrastructure (energy, aviation, rail, telecommunications, water, roads and waste); and
- social infrastructure (education, health and justice/prisons, housing).

Key sectors are considered below.

The gas and electricity industries in Belgium are privatized, with generation, transmission, distribution and supply services provided by a number of private sector companies. The relevant private sector companies own the generation, transmission and distribution assets. Notably two listed public companies (albeit heavily regulated) play major roles:

- Elia, the transmission network manager, owns all of the electricity transmission lines.
- Fluxys, the transport network manager, owns all of the gas transmission lines.

Transmission and transport networks are thus owned by these two companies.

For the distribution of energy however, Belgium relies on distribution network managers, each of whom owns its respective distribution network. Most of these distribution network managers leave the exploitation of their networks to be handled by one of the three recognized working companies (Fluvius and ORES).

The private sector finances and delivers most of the required infrastructure but there are a number of government policy mechanisms (adopted through legislation) which are used to incentivize investment in eligible energy generation technologies. In certain instances, including on major energy infrastructure, projects may be procured by the public sector and depending on the terms of the procurement, the asset may either be publicly or privately owned.

The pricing and tariffs of transmission and transport network managers are monitored by the the Commission de Régulation de l'Électricité et du Gaz/*Commissie voor de Regulering van de Elektriciteit en het Gas* (CREG). This federal agency equally controls the technical functioning of these networks.

## Telecoms infrastructure

The telecommunications networks (fixed and mobile) in Belgium are privately owned by three service providers: BASE, Orange and Proximus. However, Proximus (responsible for most of Belgium's broadband infrastructure) may be distinguished from BASE and Orange, because (unlike BASE and Orange) its majority shareholder is the Belgian government.

The Institut belge des services postaux et des télécommunications (IBPT)/*Belgisch Instituut voor Postdiensten en Telecommunicatie* (BIPT) is the regulator of Belgium's telecommunications sector. It also has responsibility for radio and television broadcast services and postal or wireless communications services.

## Transport infrastructure

### HEAVY RAIL

The rail market in Belgium is semi privatized but its composition (which is complex) involves both 'autonomous public' and private entities. The principal elements to the rail sector in Belgium are as follows.

The main player in Belgian railway infrastructure is the Société nationale des chemins de fer (SNCB)/*Nationale Maatschappij van Belgische Spoorwegen* (NMBS). This is a 100% state owned company which is set up to operate independently from governmental instructions, as an 'autonomous governmental company'. Therefore, it is led by an autonomous board, to resemble a private sector participant.

Infrabel, another autonomous governmental company, manages the Belgian railway infrastructure. The SNCB/NMBS is Infrabel's most important customer. It is equally responsible for the maintenance, renovation or renewal and development of the Belgian railway network.

All railway operators in Belgium need an Infrabel license to use their infrastructure. At the end of 2019 Infrabel has granted access to 15 railway companies involved in transport of passengers or goods.

### LIGHT RAIL

Tram networks in Belgium are owned by regionally owned public transportation companies:

- De Lijn (in Flanders);
- MIVB (in Brussels); and
- TEC (in Wallonia).

Since their revenues are consistently too low to cover their operating costs, the respective regional governments annually provide subsidies in respect of these deficits.

#### **PROJECT FINANCE**

In most construction deals the project will be procured through a project finance model.

An example of a recent railway PPP is the Antigoon tunnel, the construction of which was completed in 2014. This has been built through a Design Build Finance Maintain (DBFM) construction by a private consortium receiving public financing from Infrabel and the Flemish government. The remainder of funds were provided by the European Investment Bank and a small syndicate of credit institutions. After the 38 year maintenance period the ownership will be transferred to Infrabel.

Since 2010 it has become common practice for tramway or bus construction projects as well to be conducted as PPPs.

The rail sector is regulated by the Regulatory Body for Railway Transport and for Brussels Airport Operations. Its objectives and responsibilities are to supervise the market, to guard the interests of the users and the general public and to advise participants on certain sector related topics.

#### **ROADS, BRIDGES AND TUNNELS**

In Belgium the regional authorities (through their main agencies AWV and DG1) are responsible for constructing and maintaining roads, bridges and tunnels.

Regional government entities are in charge of operating, maintaining and improving the major highways and all secondary roads in Belgium. Some local roads are the responsibility of local authorities or municipalities. The public sector may outsource the construction, operation and maintenance (sometimes on a project financed basis) of such assets to the private sector. Belgium has no privately owned or exploited toll roads.

#### **AVIATION**

Aviation in Belgium is mostly privatized, although government financing remains substantial. As regards airport infrastructure, there are a number of ownership structures in the Belgian market, including private ownership, local government ownership and public private ownership. Belgium's main airports are Ostend, Antwerp, Brussels (Zaventem), Charleroi and Liège.

#### **PORTS**

The Belgian ports sector comprises a number of companies and regional ports, all operating on commercial principles, all to a certain extent benefiting from public subsidy.

Belgium's largest port is the Port of Antwerp, which is operated by the Antwerps Havenbedrijf, a public state owned company. Other large and heavily industrialized ports include Zeebrugge, Ostend, Ghent, Brussels and Liège.

### **Other infrastructure**

#### **SOCIAL INFRASTRUCTURE (SCHOOLS, HOSPITALS, EMERGENCY SERVICES CENTERS/PRISONS)**

Typically, these are owned by the public sector, with private sector operators responsible for aspects such as the design, build, financing, operation and maintenance of the infrastructure. The majority of social infrastructure assets in Belgium are directly financed by the government. Subject to value for money considerations, private finance may also be used in the procurement of social infrastructure assets. In relation to some of these specific sectors:

##### ***Education***

The ownership of a school's infrastructure depends upon which category of school it belongs to. For example, in the case of a local authority maintained school, the school and playing fields will be owned by the local authority. The program for new schools currently being implemented is called *Scholen voor Morgen*. This is a large scale DBFM based infrastructure program of the Flemish government in order to improve educational infrastructure region wide based on private sector financing.

### **Hospitals**

Ownership of hospitals is vested in various public sector bodies. The Belgian regions have competency in respect of the provision of healthcare services in their respective jurisdictions, so the majority of hospitals in Belgium operate under their supervision. However, most hospital funding is provided at a federal level, with additional regional government subsidies, often complemented by private financial sector loans. In general, hospitals equally contribute to the repayment of such loans through their own funds.

### **Social housing**

This is a diverse sector involving many different organizations and individuals including housing developers, building contractors, mortgage lenders, local authorities, housing associations, landlords, owner occupiers, private renters and those in the social rented sector. Typically, on a social housing project, government led social care institutions own and exploit the relevant housing stock. Where similar projects are run by private sector participants, their activities tend to be constrained by public sector regulation.

### **DEFENSE**

Typically, defense assets are owned by the public sector.

### **WASTE**

Waste collection is typically coordinated and provided at a public sector level, whereas waste processing is handled primarily by private sector players. Waste processing facilities developed and operated by private sector entities typically serve both public sector and private sector customers and various waste processing initiatives such as car wreck, waste oil and waste medication reclamation can be subsidized with either federal or regional government budgets, depending on the intergovernmental competences.

### **WATER**

In Belgium drinking water, industrial water and wastewater services are provided by state-owned companies. These are regionally organized but can also have a subdivision at local levels. All are typically funded through public means.

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## ***Are there special rules for investing in energy and infrastructure?***

### **Generally**

There is no specific regime governing or restricting investment in energy or infrastructure projects in Belgium over and above existing regulation for investors and funders more generally but a particular proposed investment may be subject to legislative or regulatory control (eg merger control rules). As regards the planning and implementation of the underlying energy or infrastructure project (in which the investment is to be made), the legal/regulatory position relevant to that project must be considered. For example, a project involving development on land will require planning permission or a development consent order; and a project may require environmental authorizations/permits and/or sector specific regulatory consents or licenses. If a public body (eg a government department, a local authority or an autonomous government company) is procuring a project using private finance, and the public body is to benefit from central government funding towards the cost, the project will be subject to central government approval. Key sector specific issues are flagged in the sections below.

Whether an investor can invest will depend on the terms of the procurement of that project if it is a public sector project and, in respect of an existing/operational project, that will depend on whether there are any contractual restrictions on 'Change of Control'. This is less of a concern on private sector infrastructure although investors would need to consider whether any licenses/consents/permits would be affected by their acquisition of an interest.

### **Energy**

The energy markets in Belgium have a complex system of arrangements between suppliers, generators, transmission and distribution network managers which are heavily regulated. In particular, there are complex arrangements in respect of licensing, subsidies and demand/charging mechanisms with suppliers, customer and the layered energy operator system. These are subject to change/regular updates meaning that investors will need to have a good understanding of the current framework and the potential directions in which the market may move. Both market participants and investors regularly point out the lack of stable regulatory framework which hampers large-scale investments in the Belgian energy market. In particular, uncertainty surrounding the longevity of nuclear plants and fiscal regulations continues. Mild political instability has proven to be an additional cost in this equation.

## Telecoms infrastructure

Given the dispersed nature of this sector, various pieces of legislation need to be read jointly to get a sufficient understanding of the applicable regulations. The interplay of competences is not to be underestimated, since the main legislation is to be found at both regional and national levels, in decrees and laws combined. Different permits/licenses may need to be obtained for the performance of various activities in the separate regions.

The industry is largely privatized, therefore investors should consider if any permits/consents/licenses will be affected by their interest.

## Transport infrastructure

### RAIL

There is an extensive and complex regulatory framework to consider in respect of a practical and operational involvement in this sector. Key areas include understanding the regulatory regime for certification for train use and acceptance. As stated above, every service provider needs an Infrabel license in order to operate on the Belgian tracks.

The difficulty of investing in an existing rail project depends upon the nature of the investment and the specific type of entity or asset the investor wishes to invest in/acquire.

### ROADS

A procuring public sector authority (a federal, regional or local authority) may delegate certain of its statutory duties in respect of certain types of road projects to private sector partners. In assuming these duties, private sector partners will, therefore, need to understand those duties and whether they are able to subcontract those duties to an appropriate person. There is usually a restriction on the change of control of the private sector partner during the construction period. Following the construction period, the private sector may be allowed a change of control provided that they do not fall within a definition of an 'Unsuitable Third Party' (which may include concerns about national security or tax avoidance). The precise scope of the restrictions will depend on the contractual terms.

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## What is the applicable procurement process?

Public procurement in Belgium is, for the time being, in most instances governed by the Law, which is based on EU Directives. There are some sector specific regulations such as the [Royal Decree of 10 January 1996](#) on the public procurement of commissions of works, deliveries and services in the sectors of water, energy, transport and postal services.

The key principles are that contracts procured by the public sector are awarded fairly, transparently and without discrimination on the grounds of nationality and that all potential bidders are treated equally.

## Investing in energy and infrastructure

Public procurement is relevant where one of the Belgian governments (whether national or regional), or a branch of them, is seeking to outsource delivery of a new project. On an infrastructure project, a potential investor would have to bid in its own capacity or as part of a consortium to deliver the overall deal which could include design, build, operation, maintenance and financing of the relevant energy or infrastructure asset. The relevant procurement legislation applies to certain public bodies including central government departments, local authorities, police and fire authorities, various non governmental bodies and autonomous governmental companies. A regulated procurement is required where certain financial thresholds are met and on most major infrastructure projects (where limited exclusions do not apply), it is likely that those thresholds will be met, so a regulated procurement would need to take place.

In most cases, the public sector will need to publish a contract notice in the [Official Journal of the European Union](#) (OJEU) and typically run one of the following procedures:

- **Open procedure** – This is suitable for easy to evaluate projects and tenderers simply submit a tender in response to the OJEU notice. Change and negotiations to the tender are not permitted. This is the most common procedure for relatively small-scale projects.
- **Restricted procedure** – There is a shortlisting of at least five tenderers following an expression-of-interest stage and tenderers submit a bid. Again, no negotiation is permitted other than clarification and finalization of the contract terms.
- **Competitive dialogue** – This is often the most common procedure for complex infrastructure projects and involves a shortlisting of at least three bidders who are invited to dialogue with the public sector to develop detailed solutions which are capable of being accepted by the public sector. Clarification and further negotiations are allowed following final tender but only on the basis of confirming the financial and other commitments in a tenderer's bid.
- **Competitive procedure with negotiation** – This is sometimes described as a hybrid procedure as it allows dialogue with bidders but also allows the public sector to award a contract on the basis of an initial tender (or further stages) but clarification and negotiation is not allowed following final tender.

An investor may choose, however, to seek to invest in a project (by acquiring an interest in a private sector partner) that has already been procured and is operational. Typically, such investments are controlled by contractual mechanisms (particularly on publicly procured projects) within the original awarded contract rather than procurement regulations themselves.

Depending on the structure of the deal, any acquisition of an interest or variation to the existing project may have procurement related considerations that need to be borne in mind.

## Financing energy and infrastructure

On a publicly procured contract, the public sector may have prescribed requirements on the funding arrangements. Following entry into the contract, the main tool for controlling the financing is that, typically, on project finance deals, a refinancing of the senior debt will require the consent of the public sector.

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## What are the most common forms of funding / investing in energy and infrastructure?

The principal forms of private sector funding/investment in energy and infrastructure in Belgium (including in relation to public private partnerships) are:

### Funding

Common forms of funding in energy and infrastructure include:

- loans made on a corporate finance basis (balance sheet debt);
- loans made on a project finance basis (to a special purpose project company) on medium to long term bases – such loans may later be syndicated to other funders.
- mezzanine debt (in some sectors);
- refinancing of the debt in operational projects; and
- asset financing.

Most commonly a small syndicate of national and/or international banks, and since recently, institutionalized investors (eg insurance companies), will be gathered to finance larger scale projects.

Funding is also, sometimes, provided by the European Investment Bank and export credit agencies.

### Investing

Common forms of investing in energy and infrastructure include:



- 'equity' investment in special purpose vehicles or entities that may have a portfolio of interests, ie share capital and subordinated sponsor loans; and
- secondary market investment in operational projects (acquisition of 'equity').

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## Restructuring

### Enforcement and sanctions

#### *When can there be regulatory investigations?*

When the Financial Services and Markets Authority (*Autorité des services et marchés financier/Autoriteit voor Financiële Diensten en Markten*) (FSMA) or the National Bank of Belgium (*Banque Nationale de Belgique/Nationale Bank van België*) (NBB) considers that an authorized firm or regulated individual may have breached the ongoing compliance requirements, it will launch a formal investigation. This may result in administrative sanctions.

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#### *What regulatory penalties may apply?*

When a legal or regulation provision is breached, the Financial Services and Markets Authority (*Autorité des services et marchés financier /Autoriteit voor Financiële Diensten en Markten*) (FSMA) or the National Bank of Belgium (*Banque Nationale de Belgique/Nationale Bank van België*) (NBB) may impose a financial penalty or withdraw the entity's authorization. The regulator will publicize these penalties.

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#### *What criminal penalties may apply?*

Following formal investigation, the regulators have powers to impose criminal penalties in certain cases, including:

- insider dealing and misleading statements and practices;
- breaches under the Money Laundering Regulations; and
- engaging in regulated activities without proper authorization.

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## Tax

### Tax issues

#### *Are stamp, registration, transfer or other similar taxes applicable?*

#### *Are there stamp, registration, transfer or other similar taxes payable on the advance, transfer or assignment of a loan?*

##### **ADVANCE OF A LOAN**

No stamp, registration, transfer or other similar taxes are payable on the advance of a loan.

The granting of a loan attracts a notional documentary tax of €0.15 per original document executed in Belgium if the loan is granted by a bank or by a (natural or legal) person who usually holds money on deposit.

#### **TRANSFER OR ASSIGNMENT OF A DEBT UNDER A LOAN**

No stamp, registration, transfer or other similar taxes are payable on the transfer or assignment of a debt under a loan. Additional taxes may, however, apply depending on whether security was taken or not.

### **Are there stamp, registration, transfer or other similar taxes payable on the taking, transfer or assignment of a mortgage, debenture or other security?**

#### **TAKING OF A MORTGAGE, DEBENTURE OR OTHER SECURITY**

Documents evidencing a mortgage over Belgian real estate attract (apart from notional documentary taxes) a 1% registration duty and a mortgage duty of approximately 0.3%.

Depending on the value of the secured debt, a retribution of € 20 – € 500 is due upon the registration or renewal of a pledge. Such retribution will also be due in case the pledge is modified (€ 12 - € 300) or in case the pledge deregistered.

#### **TRANSFER OR ASSIGNMENT OF MORTGAGE, DEBENTURE OR OTHER SECURITY**

The transfer of a mortgage is subject to a 1% or 0.5% registration duty if the mortgage or the pledge concerns Belgian real estate. The transfer of a pledge is subject to a retribution of €10.

### **Are there stamp, registration, transfer or other similar taxes payable on the issue, transfer or assignment of a debt security (eg a bond)?**

#### **ISSUE OF A DEBT SECURITY**

No stamp, registration, transfer or other similar taxes are payable on the issue of a debt security.

#### **TRANSFER OF DEBT SECURITY**

The transfer or assignment of a debt security will give rise to a 0.12% tax if it is performed with the intervention of a professional intermediary established inside or outside of Belgium. This tax is capped at €1,300.

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### ***Do tax authorities take priority on enforcement?***

### **On the enforcement of security, do tax authorities take priority over secured lenders or secured debt security holders (eg secured bond holders)?**

Secured lenders and secured debt security holders take priority over the tax authorities on enforcement of security.

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### ***Is withholding tax on interest payments applicable?***

### **Is there withholding tax on interest payments under a loan?**

Yes, Belgium levies withholding tax on interest payments under a loan.

**If so:**

### **What is the rate of withholding?**

The current rate of Belgian withholding tax (ie the basic rate) is 30%.

## What are the key exemptions?

Belgian domestic law provides for numerous withholding tax exemptions regarding interest payments. The following exemptions may be considered as key exemptions:

- the exemption for interest payments made between Belgian companies;
- the exemption for interest paid by Belgian resident professional investors to credit institutions established in the European Economic Area or in a country with which Belgium has concluded a double tax treaty; and
- reliance on the EU Interest and Royalties Directive as implemented by Belgian law.

A withholding tax exemption may also be obtained, in whole or in part, by virtue of double tax treaties concluded by Belgium.

## Would the same analysis apply to interest payments under a debt security (eg a bond)?

Yes, the analysis described above is applicable to both interest payments under a loan or other form of debt security.

There are also withholding tax exemptions that specifically apply to interest payments under a debt security. For example, there is an exemption for interest paid by the issuer of Belgian registered bonds to 'non-resident savers' and interest paid on registered non-capitalization bonds and on securities cleared through the X/N clearing system (managed by the National Bank of Belgium).

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## Are foreign lenders and debt security holders subject to tax on interest payments?

**Will the lender be taxed on interest payments under a loan in the jurisdiction of the borrower (other than by way of the application of withholding taxes (if any)), assuming the lender is not otherwise resident in that jurisdiction for tax purposes (eg by virtue of incorporation, residence or local branch)?**

No.

## Would the same analysis apply to interest payments under a debt security (eg a bond)?

Yes.

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