

Client Alert

Belgium adopts a new law facilitating the mobilisation of credit receivables

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Summary

Various measures were adopted in Belgium to facilitate the mobilisation of receivables in the financial sector by a law initially enacted on 3 August 2012 and then further amended on 11 July 2013 (the “**Mobilisation Law**”).ⁱ

The aim of the Mobilisation Law is to facilitate the assignment or pledge of credit receivables in the financial sector. However, the scope of the Mobilisation Law is broader as it applies to the transfer and protection of credit receivables in general. The Mobilisation law aims to facilitate and provide for more certainty in respect of (partial) transfers of credit facilities by removing certain obstructive legal requirements and by regulating the ranking of the transferred receivables and the security interests relating thereto. The Mobilisation Law will thereby foster asset-based funding and the liquidity of loan portfolios generally.

In the *first section*, we will discuss the scope of application of the Mobilisation Law. In the *second section*, we will lay out the changes in the transfer formalities of public receivables. In the *third section*, we will discuss the transfer formalities of mortgage-backed receivables as well as the changes to the ranking of receivables arising from advance payments under a same credit facility, and the benefit of mortgage mandates and promises. In the *fourth section*, we will discuss the transfer and ranking of credit facilities receivables which are not secured by a mortgage as well as the benefit of a same security interest (other than a mortgage) securing future receivables or “all amounts”. Finally, in the *fifth and last section*, we will analyse certain claw-back concerns pertaining to the underlying debtor to the transferred credit receivables that are removed by the Mobilisation Law.

Section I. Scope of Application

Object

The Mobilisation Law is (with certain exceptions) applicable to the *assignment or pledge (a “Mobilisation”)* of bank receivables and mortgage-backed receivables.

- ▶ **Bank receivables** are receivables resulting from any agreement whereby a (i) credit institution, (ii) a mortgage firm, (iii) a consumer credit provider or (iv) a foreign company which in its country of origin belongs to one of the aforementioned categories, provides a loan or a credit facility.
- ▶ **Mortgage-backed receivables** include receivables secured by (i) a mortgage, (ii) a lien on real estate property, (iii) a mortgage mandateⁱⁱ or (iv) a mortgage promiseⁱⁱⁱ. A bank receivable can therefore also be a mortgage-backed receivable at the same time.

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Persons

The Mobilisation Law is applicable to the Mobilisation of bank receivables and mortgage-backed receivables by or to credit institutions, financial establishments or mobilisation undertakings (each a “**Mobilisation Person**”).

- ▶ A **credit institution** is a Belgian or foreign company the activities of which consist of receiving cash deposits or other repayable funds and granting credits for its own account. However, strangely enough, the provisions of the Mobilisation law amending the law of 4 August 1992 on mortgage-backed credits (*Loi relative au crédit hypothécaire/Wet op het hypothecair krediet*) (the “**Mortgage-Backed Credit Law**”) are only applicable to Belgian (and not foreign) credit institutions, although such distinction is not made as regards the mobilisation undertakings and financial establishments (see hereafter).
- ▶ A **financial establishment** is an undertaking which is not a credit institution but the main activity of which consists of the acquisition of participations or the providing of certain financial services listed in the law of 22 March 1993 on the status and supervision of credit institutions.
- ▶ **Mobilisation undertakings** include (i) undertakings for collective investment in receivables and (ii) Belgian or foreign institutions that autonomously conduct securitization or assimilated operations.

Time

The Mobilisation Law is applicable to the Mobilisation of bank receivables and mortgage-backed receivables by or to a Mobilisation Person in relation to all agreements that were concluded after but also before 3 September 2012 (except for certain provisions of the Mobilisation Law that only apply after 3 September 2012, as listed in Articles 10 and 20 of the Mobilisation Law).

Section II. Mobilisation of Public Receivables

Under the Belgian laws on public procurement^{iv}, the receivables of the contractors owed upon the performance of a public procurement for works, supplies or services by the contracting authority could not be attached, assigned or pledged before the “provisional acceptance” (*réception provisoire/voorlopige oplevering*)^v of such works, supplies or services by the contracting authority. Pursuant to the Mobilisation Law, the Mobilisation of public receivables by or to a Mobilisation Person is no longer subject to such requirement of prior provisional acceptance by the contracting authority of the work or service. However, for perfection purposes, the Mobilisation must still be notified no later than at the time the request for payment is made to the contracting authority.

Section III. Mobilisation of Mortgage-Backed Receivables

Ranking of Credit Facilities Receivables Secured by a Mortgage (or Mortgage Mandate or Promise)

The rule under Belgian law is that security interests are automatically transferred along with the receivable that they secure. This is an application of the general principle that ancillary rights follow the principal rights. Different creditors may thereby, following (partial) Mobilisation of such credit receivables, benefit from the same security interest. In that case, each creditor had equal rights in the proceeds of such security interest, unless otherwise agreed between them.

The Mortgage-Backed Credit Law (as amended by the Mobilisation Law) now provides that the transferred receivable arising from an advance payment under a credit facility will take precedence in respect to the proceeds of a mortgage over the receivables arising from an advance payment under such credit facility originating after the date of Mobilisation and will have equal rank with the receivables arising from an advance payment under such credit facility originating before or on the date of Mobilisation, unless otherwise agreed between the parties to the Mobilisation.

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If the parties agree otherwise, their agreement on the ranking and subordination of receivables secured by the same mortgage will be by virtue of law enforceable towards third parties other than the underlying debtors or personal guarantors. As for the latter, such agreement would be enforceable against them as from the moment they have been notified thereof.

Transfer Formalities and Perfection Requirements

Under the Mortgage-Backed Credit Law, the assignment of mortgage-backed receivables is subject to the requirement of recordation in the mortgage registry (which triggers a 1 per cent. registration duty on the secured amount) and the requirement of notarization. The same requirements are applied to the pledge of such mortgage-backed receivables. However, the Mobilisation Law amends the Mortgage-Backed Credit Law so that the Mobilisation of mortgage-backed receivables by or to a Mobilisation Person is no longer subject to such requirements.

Benefit of Mortgage Mandate and Mortgage Promise

A mortgage mandate or promise is not a security interest. It will only provide a security interest once a mortgage has been registered in performance of the mortgage mandate or promise. However, the mortgage mandate or promise itself does not trigger any registration costs (which, for a mortgage, amount to 1 per cent. of the secured amount). Such registration duty will only be due upon transformation of the mortgage mandate or promise into a mortgage.

Given their economic importance, the Mobilisation Law provides for more certainty in respect to mortgage mandates and promises. Pursuant to the Mortgage-Backed Credit Law (as amended by the Mobilisation Law), the mortgage mandates and mortgage promises are, unless otherwise agreed therein, deemed to benefit the successors and assignees of (part of) the credit or loan receivables. In addition, the transferee of such (part of) credit or loan receivables will have the right to enforce such mortgage mandate or mortgage promise, unless otherwise agreed.

This means that when (part of) a credit receivable which benefits from a mortgage mandate or mortgage promise is transferred to a Mobilisation Person, the transferee will have the right to enforce such mortgage mandate or promise and to have such mortgage recorded in its name (or the name of the transferor or both names) in the mortgage registry. The advantage of having the mortgage registered in the name of the transferor lies in the fact that the underlying debtor will then not need to be notified of the Mobilisation.

Section IV. Mobilisation of Receivables Unsecured by a Mortgage

Mobilisation and Ranking of Credit Facilities Receivables Unsecured by a Mortgage

Before the Mobilisation Law, the transfer of a receivable arising from a credit facility which was not secured by a mortgage, a real estate lien, a mortgage promise or mandate was not covered by the transfer-facilitating rules of the Mortgage-Backed Credit Law. The Mobilisation Law now fills this gap by establishing the following rules facilitating the Mobilisation of such receivables:

- ▶ A receivable arising from an advance payment under a credit facility may be transferred;
- ▶ The transferee benefits from all liens and security interests pertaining to the credit facility, up to the transferred amount;
- ▶ Unless otherwise agreed between the transferor and the transferee, the transferred bank receivable will take precedence over the bank receivable arising from advance payments under the same credit facility originating after the date of transfer; and
- ▶ The right to draw from the credit facility is stayed up to the transferred amount.

It should be noted that the above rules have a general scope and are not limited to transactions involving a Mobilisation Person.

Benefit of a Same Security Interest (Other Than a Mortgage) Securing Future Receivables or “All Amounts”

Before the Mobilisation Law, the benefit of a same security interest other than a mortgage, a real estate lien, a mortgage promise or mandate securing future receivables or “all amounts”^{vi} was also not covered by the rules of the Mortgage-Backed Credit Law. The Mobilisation Law now fills this gap too by providing that, unless otherwise agreed, when the same lien, pledge, pledge on business or personal surety secures several bank receivables, each such secured bank receivable can be transferred and each transferee will benefit from the security interests (other than mortgages) securing such transferred receivable up to the amount of such transferred receivable.

Furthermore, the agreement on the ranking and subordination of receivables secured by the same security interest (other than a mortgage) is by virtue of law enforceable towards third parties other than the underlying debtors or personal guarantors. As for the latter, such agreement would be enforceable against them as from the moment they have been notified thereof.

Section V. Claw-Back Concerns Pertaining to Underlying Debtor

The Mobilisation Law also removes certain claw-back concerns for the transferee by providing that the underlying debtor to a mobilised credit receivable may no longer rely on the rules on statutory or contractual set-off of receivables and the exception of non-performance of the contract (*exceptio non adimpleti contractus*)^{vii} (i) as from the time such debtor is notified of the Mobilisation, if the conditions for set-off or the exception of non-performance are met after the notification date (subject to certain conditions) or (ii) even in the absence of a Mobilisation notification, if the conditions for set-off or the exception of non-performance are met after the opening date of the insolvency proceedings against the transferor (subject to certain conditions).

ⁱ The Law of 3 August 2012 on various measures to facilitate the Mobilisation of receivables in the financial sector (*Loi du 3 août 2012 relative à des mesures diverses pour faciliter la mobilisation de créances dans le secteur financier/Wet van 3 augustus 2012 betreffende diverse maatregelen ter vergemakkelijking van de mobilisering van schuldvorderingen in de financiële sector*).

ⁱⁱ A mortgage mandate is an agreement between the grantor and a proxy whereby the grantor gives the proxy an irrevocable and unconditional power of attorney to create a mortgage on a certain real property in favour of the beneficiary up to a certain predefined amount. A mortgage mandate is not a security interest. It will only provide a security interest once the mandate has been exercised and a mortgage has been registered.

ⁱⁱⁱ A mortgage promise is an undertaking from the grantor to create a mortgage on a certain real property in favour of and at the demand of the beneficiary up to a certain predefined amount. A mortgage promise is not a security interest. It will only provide a security interest once a mortgage has been registered.

^{iv} Article 23 of the Law of 24 December 1993 on public procurements and certain works, supplies or services contracts (*Loi du 24 décembre 1993 relative aux marchés publics et à certains marchés de capitaux, de fournitures ou de services/Wet van 24 december 1993 betreffende de overheidsopdrachten en sommige opdrachten voor aanneming van werken, leveringen en diensten*) and Article 43 of the Law of 15 June 2006 on public procurements and certain works, supplies or services contracts (*Loi du 15 juin 2006 relative aux marchés publics et à certains marchés de capitaux, de fournitures ou de services/Wet van 15 juni 2006 betreffende de overheidsopdrachten en bepaalde opdrachten voor werken, leveringen en diensten*).

^v The “provisional acceptance” is the legal act by which the project owner acknowledges that the works, supplies or services have been duly performed, thereby discharging the performer of its liability pertaining to the apparent aspects of such works, supplies or services.

^{vi} All-amounts security interests (*sûretés pour toutes sommes/alle-sommen-zekerheden*) are security interests granted as security for all present and future obligations owed to a certain creditor.

^{vii} The *exceptio non adimpleti contractus* is the right for a party to a contract to refuse to perform its obligations under such contract if the other party to that contract does not perform its own obligations under such contract.