

Towards a new, more flexible legal framework for secured lending in Belgium

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Authors: [Hadrien Servais](#), [Willem Van de Wiele](#)

Upon entering into force, the law of 11 July 2013 on security interests *in rem* on movable assets will provide Belgium with a modern legal framework that will greatly facilitate secured lending. Although not as all-encompassing as the US blanket lien or the English floating charge, the new Belgian register pledge will provide an efficient means to take security on most of the assets of a collateral provider.

A law amending the law of 11 July 2013 was passed by Parliament on 15 December 2016 (the **Amending Law**) in order to settle a number of matters left unaddressed in 2013 and provide for the entry into force of the law on 1 January 2018 at the latest. This client alert will summarize the key points of the law of 11 July 2013 and provide an overview of the main changes contained in the Amending Law.

Some highlights of the Law

A new method of perfection

For an effective pledge on specific assets to be created under Belgian law, it was traditionally required that the collateral provider be dispossessed of the collateral, a sometimes cumbersome and unpractical requirement to satisfy. While perfection by way of dispossession is maintained, the law of 11 July 2013 offers a new, more flexible, method of perfection: perfection by way of recording in a national central register, in which pledgees will be able to record their security interest. The register will contain key information such as the name of the pledgor and the pledgee, the type of collateral, the type of secured liabilities and the amount up to which such liabilities are secured.

Nature of collateral

As a general rule, any movable assets, whether tangible or intangible, current or future, may be pledged by way of a register pledge. There are, however, a few exceptions including the following:

- **financial instruments**, which are subject to the Belgian law of 15 December 2004 on financial collateral arrangements (the **Financial Collateral Law**, the Belgian implementation of the directive on financial collateral arrangements 2002/47/EC);

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- **fungible financial instruments held through an account in a clearing system**, which are subject to Royal Decree No. 62 on the deposit and clearing of fungible financial instruments and the Financial Collateral Law;
 - **receivables**, unless they fall within the scope of a universality pledged by way of a register pledge (e.g., a register pledge over the business of the pledgor);
 - **immovable assets by nature or by incorporation**¹, which may be mortgaged but not pledged (however, to the extent the incorporation occurs after the creation of the pledge, the asset immobilized by incorporation will remain covered by the pledge even after incorporation); and
 - **property excluded from commerce**, which may not be pledged at all.

Both specific assets and universalities may be the subject of a register pledge. A universality may, for instance, be a business or even all current and future movable assets of the pledgor.

Pledgee

There are no specific eligibility requirements applicable to pledgees in the context of a register pledge. Considering that traditional business pledges (which will be abrogated when the law of 11 July 2013 will come into force) could only be granted to a Belgian or EU-based credit institution, this is a welcome development for non-EU based and alternative lenders.

Security agent

Currently the Financial Collateral Law already contains a mechanism whereby a “security agent” can hold a security interest over financial instruments in its own name, but for the benefit of a pool of secured creditors. This mechanism is now extended to pledges over collateral that falls within the scope of the law of 11 July 2013. The pool of secured creditors can change over time (such as in the context of a syndicate of lenders or group of bondholders) without affecting the continuity of the security interest. In addition, the secured creditors are protected against the insolvency of the security agent.

Duty of preservation

Contrary to what is the case with traditional pledges involving dispossession, in the context of a register pledge the pledgor remains in possession of the collateral, may use the pledged assets in accordance with their purpose and may even dispose of them in the ordinary course of trading. The pledgee has a right to inspect the collateral at any time.

Enforcement

The pledgee may seize the pledged assets immediately in the event of a default. Upon 10 days' prior notice, the pledged assets may be sold, leased or appropriated by the pledgee (in the latter case, provided that the pledge agreement provides for a valuation mechanism). Enforcement must take place in a reasonable and economically justified manner and the pledgee may not limit its liability in that respect. Any interested party (including the pledgor) may file a petition for an *a posteriori* judicial review of the enforcement process. Special rules apply to consumers.

¹ Immovable assets by incorporation are movable assets that are permanently attached to, or incorporated into, an immovable asset (for instance, an air-conditioning system).

Key amendments

Entry into force

Due to delays in the implementation of the central register, the entry into force of the law of 11 July 2013 has repeatedly been postponed. The Amending Law makes clear that the law of 11 July 2013 will enter into force no later than 1 January 2018.

Exclusion of receivables

It was initially intended that receivables be eligible to be pledged by way of register pledge. This was a topic of controversy, as a pledge on receivables is perfected against all third parties other than the debtor merely by entering into the pledge agreement and having to then record such pledge would have added an unnecessary extra layer of formalities. The Amending Law addresses this issue by excluding receivables from the scope of the law of 11 July 2013. As mentioned above, it is worth noting that receivables may still be included in a register pledge where the collateral is a universality of assets including receivables (such as, e.g., a business).

Immovable assets by destination

Generally speaking, movable assets are immobilized by destination when they are permanently used for the purpose of exploiting a business (to the extent that the pledgor owns the business premises). Although it has always been clear that movable assets would not cease to be pledged when immobilized by destination, the fate of assets immobilized by destination at the time of entry into the pledge agreement was not clear. This issue has material implications as it relates to whether a potentially substantial portion of the equipment used in a business may be pledged. The Amending Law clarifies that assets that are immovable by destination may be pledged by way of a register pledge, irrespective of when the immobilization occurs.

Access to register

In an attempt to address privacy concerns, the law of 11 July 2013 provided that only interested parties would be allowed access to the central register. This would have been a major departure from legal systems that inspired the reform of security interests on movable assets in Belgium (such as the UCC filing system in the US). The Amending Law sensibly provides that the register will be accessible to everyone.

A posteriori judicial review

With a view to increasing legal certainty, the Amending Law shortens from one year to one month the period during which an interested party may file a petition for an *a posteriori* judicial review of the enforcement process.

White & Case LLP
Wetstraat 62 rue de la Loi
1040 Brussels
Belgium
T +32 2 239 26 20

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