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10 questions about the new Belgian security interests regime

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The new Belgian security interests regime

The reform of the legal framework of security interests over movable assets was seen as long overdue. The transition from the previous system, based on the dispossession of the pledged assets, to a new dispossession-free system based on online registration will give Belgium a system just as modern as the ones in neighbouring countries.

This reform was adopted in July 2013. The new Act will enter into force on **1 January 2018** and will turn the established practices upside down and will oblige lenders to overhaul their credit documentation. Moreover, banks will quickly have to review all their pledges over business assets. In fact, the latter pledges will only retain their rank if the necessary actions are taken within 12 months following the entry into force of the new Act.

The new rules will apply without prejudice to specific provisions of other legislation, such as the law on financial collaterals.

Set out below, in the form of Q&As, is a summary of the core parts of the reform.

1. What are the security interests covered by the new Act?

The Act covers security interests over movable assets. This primarily relates to the pledge on tangible or intangible movable assets: inventories, shares, receivables, bank accounts, financial instruments, trademarks and patents, etc. The pledge over business assets (“floating charge”) has also been significantly revamped.

Personal security interests (surety, first demand guarantee) are outside the Act’s scope. The regime for security interests over immovable assets (mortgages, mortgage mandates) has not been changed.

2. What is the major innovation of the new Act?

Historically, the creation as well as the perfection of a pledge was conditional on the “dispossession” of the pledged asset. The pledgor therefore had to place it under the control of the pledgee or a third party pledge holder. This principle has been significantly softened over time, notably when dealing with intangible assets (dematerialized securities, receivables). However, dispossession always applied to tangible movable assets. This presented major practical downsides for, among other things, the pledging of inventories or other specific assets needed for the pledgor’s business activities.

Under the new Act, dispossession will no longer be a requirement for the validity of the pledge. The pledgor will be able to retain the pledged assets and continue to exploit or commercialize them. The perfection of the pledge is ensured through its registration in a National Pledge Registry, held at the Mortgage Registry (Ministry of Finance): the pledge will now be enforceable against third parties as from its registration in this registry. The registration of the pledge, which is the responsibility of the pledgee, permits any third party to rapidly identify, on a quick search in the registry, whether the debtor's assets are already pledged or not. The registration of the pledge must be renewed after 10 years (for a subsequent period of 10 years), otherwise the security will no longer be enforceable against third parties.

The parties will, however, still have the opportunity to opt for a dispossession pledge as it now exists and therefore not proceed with registration of the pledge in the new National Pledge Registry. Both regimes will co-exist. It remains to be seen whether this will cause problems in the event of a conflict of security interests.

The pledge over receivables is, however, excluded from the registration system; the current regime will remain applicable.

3. Will the new Act impact existing security interests?

The new Act will apply to all security interests over movable assets created after its entry into force. The existing ones will *a priori* still be governed by the old rules.

An exception to this rule will be pledges over business assets. These will retain their rank only on the condition that they have been registered with the National Pledge Registry within 12 months of the Act's entry into force. Moreover, the law of 25

October 1919 governing this type of pledge will be repealed. It will nonetheless still be possible to create a pledge over business assets, but this time under the regime established by the new Act. The “new” pledge over business assets is, inter alia, no longer reserved for financial/credit institutions; it can now be for the benefit of any sort of creditor. Furthermore, while the pledge over business assets could not include more than 50% of the total inventory, this limitation has now been removed.

4. Will the new Act facilitate the creation of security interests over movable assets?

The new legal regime will facilitate the creation of pledges over tangible assets, such as inventories. To date, to meet the dispossession requirement, inventories have often been deposited to a third party pledge holder (typically a warehouse keeper). This has frequently given rise to lengthy discussions between parties over the rules of availability of the inventory and their respective duties and responsibilities as to the goods stored.

The pledging of those assets can now take place without any dispossession. This way, the pledgor will be able to use them freely, transform them, substitute them and (unless expressly agreed otherwise) even sell them “in the normal course of its business activities”. These rights will be offset by the right of the pledgee to inspect the pledged assets at any time and by the obligation on the pledgor to look after the pledged assets as a “prudent trustee”. Lastly, in the event of fraud committed by the debtor, the pledgee will have a “right of pursuit” over the pledged asset that would have been sold or assigned to a third party in breach of a legal or contractual provision.

5. Will the new Act facilitate the enforcement of security assets over movable assets?

Currently, the enforcement of the pledge requires, in most cases, the prior permission of the court, with the notable exception of the pledge over financial instruments and, in practice, over receivables.

This authorization prerequisite will no longer be necessary when the pledgor is not a consumer. The pledgee will immediately be able to move forward with the selling of the pledged assets, acting in good faith and *"in an economically justifiable manner"*. The pledgee will nonetheless have to notify the pledgor of its intention to enforce the pledge at least 10 days in advance (three days if the assets are perishable).

Where the parties agree, the pledgee can also appropriate the pledged assets on the basis of an expert-set price or the market price (where the asset is traded on a market). Courts will have the right to monitor the process when there are difficulties while enforcing or after having enforced the pledge.

6. Will the appointment of a security trustee be admissible?

The new Act permits the appointment of a security trustee with regard to all security interests over movable assets. It is, therefore, no longer necessary for each creditor to be a party to the pledge agreement; a trustee acting on behalf of all of them may be appointed in that respect.

This new provision will greatly facilitate the creation of security interests by banking syndicates. These will no longer have to use the so-called “parallel debt” mechanism, except for security interests over immovable assets.

7. Will the new Act increase associated costs?

The pledge registration with the National Pledge Registry, as well as any further action such as consultation, modification, renewal and deregistration, will entail a fee amounting to between 5 and 500 euros (depending on the amount secured by the pledge).

This suggests extra charges (save for pledges over all business assets that already required payment for registration fees), but with very limited impact.

8. Will current template agreements have to be adapted?

The template agreements presently in use will need to be adapted in the light of the provisions of the new Act.

Besides mandatory mentions, new agreements must address the registration step (and related responsibilities in this regard), the monitoring of the free disposal of pledged assets by the pledgor, the new measures for the pledge enforcement and the appropriation of pledged assets.

In addition, while existing pledges over business assets could not include more than 50% of the inventories, the new type of pledge can now include all of them. This greater scope will have to be reflected in the new agreements.

9. Does the new regime present specific provisions depending on the nature of the debtor?

The new system contains specific provisions where the pledgor is a “consumer”. The value of the pledged asset cannot be more than twice the amount of the secured receivable together with accessories. The accessories (interest, penalty clause, enforcement fees, etc.) are furthermore capped at 50% of the secured receivable. The court’s control when enforcing the security interest is reinforced.

10. What about reservation of title clauses and rights of retention?

The current regime places reservation of title clauses and rights of retention in the hands of the court. Its effectiveness is sometimes limited. The new Act now provides a statutory basis for those “quasi-security interests”, with enhanced protection for the creditor.

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