In our publication “Legal Criteria for European Structured Finance Transactions” (the “EU Legal Criteria”), DBRS considers the application of the legal criteria and related methodologies for structured finance transactions in Europe. The criteria and methodologies set out in the EU Legal Criteria should be regarded as applying generally to a structured finance transaction in the Kingdom of Belgium (“Belgium”). This commentary sets out certain specific considerations arising in the context of structured finance transactions documented under the laws of Belgium (“Belgian law”). Unless otherwise defined, words and expressions used in this commentary shall have the meanings given to them in the EU Legal Criteria.

Belgian law provides for a specific legal framework designed to facilitate securitisation transactions. These rules are set out in the Belgian Act of 20 July 2004 on certain forms of collective management of investment portfolios (Wet betreffende bepaalde vormen van collectief beheer van beleggingsportefeuilles/Loi relative à certaines formes de gestion collective de portefeuilles d'investissement) (the “UCITs Act”) and the Royal Decree of 15 September 2006 relating to certain measures on institutional companies for collective investment in receivables (Koninklijk besluit houdende bepaalde uitvoeringsmaatregelen voor de institutionele instellingen voor collectieve belegging in schuldvorderingen/Arrêté royal portant certaines mesures d'exécution relatives aux organismes de placement collectif en créances institutionnels). This legislation provides for a dedicated category of collective investment undertakings, which are designed for making investments in receivables, the vennootschap voor belegging in schuldvorderingen or “VBS” / société d'investissement en créances or “SIC”.

The securitisation of (i) regulated debt receivables (i.e. mortgage credit and consumer credit) in Belgium must and (ii) any other debt receivables may, involve the use of a VBS/SIC as the purchasing and issuing vehicle. One of the major benefits of using a VBS/SIC is the tax treatment of that entity under Belgian law (see below).

Traditionally there was a distinction between a VBS/SIC offering securities to the general public and a VBS/SIC offering securities to specific categories of institutional or professional investors: whereas a public VBS/SIC is subject to the regulatory supervision of the Belgian National Bank and the Financial Services and Markets Authority (“FSMA”) and its establishment requires their approval, its institutional counterpart is subject only to minimal regulatory requirements. Given that since 2006 most securitisations in Belgium have been structured as an institutional VBS/SIC, this commentary focuses mainly on these types of vehicles.

This commentary is not exhaustive and does not address every legal and tax issue that may arise in connection with a Belgian ABS transaction, nor does it purport to set out a full analysis of the legal principles that are discussed, and as such it is not to be considered as legal or tax advice.
structured finance group

commentary 2

asset transfer

form of the transfer and true sale
Belgian ABS transactions tend to be based on “true sale” structures. Typical ABS transactions governed by Belgian law involve the transfer, by means of the sale of property title, of receivables, both existing and future, against the payment of a purchase price.

The transfer of the receivables by the Originator to the VBS/SIC is typically effected through a receivables transfer agreement. DBRS expects the sale to the VBS/SIC to be a true sale of the receivables, and requests a legal opinion confirming that the transfer is enforceable against the Originator, its creditors, its insolvency receiver and the underlying obligors (subject to what is set out below in connection with perfection of the transfer), that it vests full legal title to the receivables in the VBS/SIC, and is effective to separate the credit risk of the receivables from that of the Originator.

Certain transactions have been structured to temporarily transfer a pool of eligible receivables to a particular compartment of a VBS/SIC which is financed by means of a secured financing provided through a conduit vehicle (so-called “warehousing”). The receivables would typically subsequently be retransferred to the Originator, before being transferred to another compartment of the same VBS/SIC to be financed on a longer term basis through a bond issue.

conflict of law rules relating to receivables assignment
Whereas the law chosen by the parties will govern the validity and binding nature of the transfer, the requirements for the effectiveness of the transfer of receivables vis-à-vis third parties are determined from a Belgian conflict of laws view by the law of the habitual residence of the transferring party (or for corporations their COMI or “establishment”, as applicable) at the moment of the transfer of such receivables. Other sets of rules may need to be respected in parallel to ensure that the transfer is duly effective against all other parties (including the bankruptcy trustee of the transferor at the time of an insolvency event). DBRS expects issues as to conflicts of laws to be addressed in the transaction legal opinions.

perfection of the transfer (including with respect to the security)
The receivables transfer agreement shall be effective vis-à-vis all third parties (including other creditors of the Originator and a bankruptcy trustee) as from the date of the transfer by assignment to the VBS/SIC of the ownership of the rights (verkoop/vente) in respect of the receivables, the security interests and the other rights set out in the receivables transfer agreement (the “Sale”), provided however, that the effectiveness of the Sale vis-à-vis the underlying obligor of the assigned rights will be subject to the following limitations as long as notice of the Sale is not given to the debtors of the assigned rights (so-called “silent” assignment):

1. Future receivables may be transferred to the extent that they are identified or identifiable, which, in the case of a plurality of receivables, means identifiable as a pool.
2. Which is often paid partly upfront and partly on a deferred basis.
the obligor may validly discharge its obligations by payment to the Originator;

- the obligor may invoke any defence, including set-off, that it has against the Originator;

- if the Originator on or after the execution of the receivables transfer agreement assigns, pledges or otherwise encumbers the same rights to an assignee or pledgee other than the VBS/SIC, which assignee or pledgee in good faith gives notice of such assignment, pledge or encumbrance to the relevant obligor before notice of the Sale has been given, then the rights of the other assignee or pledgee will rank prior to those of the VBS/SIC; although there is no reported case law on this issue, in the event of such assignment by the Originator, the VBS/SIC would be deemed not to have an interest in any such assigned rights but would be entitled to hold the Originator liable; and

- the Sale will not be effective as against a third party creditor of the Originator (such as, typically, a creditor having proceeded with an attachment on the relevant receivable) who has in good faith received from the relevant obligor, also acting in good faith, payment of the latter’s obligations.

Notice of the Sale is given to the obligors upon the occurrence of certain events which are defined in the transaction documentation (“Notification Events”) which usually consist of events relating to the Originator which are severe enough in nature to warrant such notification, such as material breach of the Originator’s obligations, or any representations or warranties given by it pursuant to the transaction documents, the institution of insolvency proceedings in relation to the Originator or an attempt by a third party to attach an underlying receivable. Notification Events may also include a downgrade of the Originator to below rating thresholds specified in the transaction documentation.

The enforceability of the Sale (and likewise any pledge – see ‘Security and Bond Documentation’ below) of receivables which consist of mortgage loans, against third parties, including the creditors, a liquidator and receiver in bankruptcy of the Originator, is subject to Article 5 of the Mortgage Credit Act of 4 August 1992 (the “Mortgage Credit Act”) which prescribes a notarial deed and marginal notation of the transfer (or as the case may be, the pledge) in the local mortgage register. Articles 50 and following of the Mortgage Credit Act grant an exemption from Article 5 of the Mortgage Credit Act in relation to a transfer and pledge of mortgage receivables by or to a (public or institutional) VBS/SIC, so that a transfer or pledge of the loans to or by a VBS/SIC is enforceable against third parties (tegenwerpelijk aan derden/opposable aux tiers) without marginal notation.

The enforceability of the Sale (and likewise any pledge) of receivables which consist of consumer loans, against third parties, including the creditors, a liquidator and receiver in bankruptcy of the Originator, is subject to the Consumer Credit Act of 1991 (as amended by the Act of 2010) pursuant to which (a) consumer credit debts may only be assigned if they contain a provision expressly permitting this; (b) the assignment is only effective against the debtor if the debtor is notified of the assignment by registered mail, unless the assignee is a VBS/SIC in which case any form of written notice will suffice; and (c) for the sale (and the pledge) to be validly and effectively completed the assignee must qualify as an institution licensed under the Consumer Credit Act, a credit insurance company, a collective investment institution (including a VBS/SIC), or otherwise be explicitly authorised by royal decree. Legal opinions issued by counsel are expected to confirm the completion of these conditions.

3. The Consumer Credit Act defines consumer loans as loans to consumers with a purpose that is not commercial, professional or artisanal.
PROHIBITION ON ASSIGNMENT

As mentioned above, the enforceability of the Sale (or pledge) of consumer loan receivables requires an express provision permitting such Sale (or pledge). For other receivables, the agreement governing the receivable must not prohibit the assignment of or the creation of security over the receivable. Bank loans to corporate borrowers require particular due diligence of the general banking terms and conditions, which may explicitly or implicitly prohibit the transfer of those loans.

Special Purpose Vehicles

LEGAL STATUS

Belgian SPVs are established as a commercial company under Belgian law in the form of a limited liability company (naamloze vennootschap/société anonyme) or in the form of a limited liability partnership (commanditaire vennootschap op aandelen/société en commandite par actions). For the securitisation of regulated (mortgage and consumer) receivables, the SPV must be established so as to have and maintain the status of a VBS/SIC. The operations of a VBS/SIC are governed by the UCITS Act, its by-laws (statuten/statuts) and, except to the extent provided in the UCITS Act, the Belgian Company Code. In respect of non-regulated receivables (e.g. trade receivables), SPVs may be structured outside the realm of the VBS/SIC regulatory framework and may also be non-Belgian organised vehicles.

Institutional VBS/SICs, which are de facto the only structures applied in Belgium, must at all times retain their institutional status. The status of institutional VBS/SIC is in particular a requirement for the true sale of the loans\(^4\), for the absence of corporate tax on the revenues of the VBS/SIC and for an exemption from VAT on certain expenses of the VBS/SIC. The loss of such institutional VBS/SIC status would impact adversely on the VBS/SIC’s ability to satisfy its payment obligations.

Under the UCITS Act, the regulatory status of an institutional VBS/SIC depends inter alia on the securities it issues being acquired and held at all times by institutional or professional investors only.

Article 103 of the UCITS Act provides expressly that a listing on a regulated market accessible to the public (such as Euronext Brussels) and/or the acquisition of securities (including shares) of an institutional VBS/SIC by investors that are not institutional investors (and which are outside the control of the VBS/SIC), would not adversely affect the status of an institutional VBS/SIC, provided that:

- the VBS/SIC has taken “adequate measures” to guarantee that the investors of the VBS/SIC are institutional investors acting for their own account; and

- the VBS/SIC does not contribute to the holding of its securities by investors that are not institutional investors acting for their own account and does not promote in any way the

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4. As mentioned above, Articles 50 and following of the Mortgage Credit Act grant an exemption from Article 5 of the Mortgage Credit Act in relation to a transfer and pledge of mortgage receivables to or by an institutional VBS/SIC, so that such transfer or pledge is enforceable against third parties (tegenwerpelijk aan derden/opposable aux tiers) without the marginal notation that would otherwise be required.
holding of its securities by investors that are not institutional investors acting for their own account.

The Royal Decree of 15 September 2006 relating to certain measures on institutional companies for collective investment in receivables (Koninklijk besluit houdende bepaalde uitvoeringsmaatregelen voor de institutionele instellingen voor collectieve belegging in schuldvorderingen/Arrêté royal portant certaines mesures d’exécution relatives aux organismes de placement collectif en créances institutionnelles), sets out the circumstances and conditions in which a VBS/SIC will be deemed to have taken such “adequate measures”. In order to ensure that the securities issued by the VBS/SIC are held only by institutional investors acting for their own account, a VBS/SIC should take the following measures:

(i) the terms and conditions of the securities issued by the VBS/SIC, its articles of association and management regulation, as well as any other document relating to the issuance, the subscription or the trading of such securities must explicitly provide that the securities may only be subscribed, acquired or held by institutional investors;

(ii) the bearer securities or in case of registered securities, the register of such securities and the certificates confirming the inscription in said register must indicate that the securities may only be subscribed, acquired or held by institutional investors;

(iii) the listing prospectus should confirm the same;

(iv) any communication made by the VBS/SIC in any form should confirm the same;

(v) the securities should be in registered form; or the subscription value of a single note (or other security) issued by the VBS/SIC should be at least EUR 250,000; or each investor subscribing to or acquiring any such security confirms formally in writing to the VBS/SIC that it qualifies as an institutional investor within the meaning of the Act of 16 June 2006 on public offerings of investment instruments and the admission of investment instruments to trading on a regulated market (Wet van 16 juni 2006 op de openbare aanbieding van beleggingsinstrumenten en de toelating van beleggingsinstrumenten tot de verhandeling op een gereglementeerde markt/Loi du 16 juin 2006 relative aux offres publiques d’instruments de placement et aux admissions d’instruments de placement à la négociation sur des marchés réglementés) (the “Prospectus Act”) and that it undertakes not to transfer security(ies) issued by the VBS/SIC to an entity other than one that has likewise made this double confirmation to the VBS/SIC;

(vi) the VBS/SIC must not pay any dividend or interest relating to any securities discovered not to be held by an institutional investor;

(vii) with regard to registered securities, the VBS/SIC shall refuse to inscribe an investor in the relevant security registry if it finds out that such an investor does not qualify as an institutional investor; and

(viii) the conditions listed in paragraphs (vi) and (vii) above must be mentioned in the issuance conditions, management regulations or articles of association and listing prospectus as well as...
in any other document relating to the issuance, trading or listing of securities issued by the VBS/SIC.

These conditions are typically included in the by-laws of the VBS/SIC, the terms and conditions of the bonds being issued by the VBS/SIC and the subscription terms in respect of the transaction. DBRS expects an opinion from counsel confirming that these conditions have adequately been reflected in the transaction documents and the status of the VBS/SIC as an institutional VBS/SIC.

BANKRUPTCY REMOTENESS
The UCITS Act does not expressly exempt the VBS/SIC from Belgian insolvency laws. Theoretically, a VBS/SIC could be subject to formal insolvency procedures, which could entail delays both in incoming and outgoing cashflows, as the parties involved await clarification of the VBS/SIC’s situation. However, the UCITS Act confirms the ring-fencing of the other Compartments of a VBS/SIC in case of insolvency of one Compartment. In addition, “non-petition” clauses included in the transaction documentation are generally effective under Belgian law. In order to further mitigate the risk of the VBS/SIC’s bankruptcy, a number of covenants are commonly contained in the transaction documents:

CORPORATE SCOPE
In the contractual documents to which both the VBS/SIC and the ABS holders or their representative are parties, the VBS/SIC should covenant to limit its activities to those required for the purposes of the transaction, namely, the issuance of financial instruments for the purpose of acquiring receivables. Outside the framework of these activities, the VBS/SIC is not allowed to hold any assets, enter into any agreements or carry out any other activities. The VBS/SIC may carry out commercial and financial transactions and may grant security to secure its own obligations or to secure obligations under the securities being issued or the other relevant documents, to the extent only that those activities are necessary to realise the corporate purposes as described above. The VBS/SIC is not allowed to have employees. Similar limitations on the corporate purpose of the VBS/SIC are also included in the articles of association. In addition, the shareholders of the VBS/SIC should covenant that the by-laws cannot be amended until repayment in full of the ABS.

OWNERSHIP
The shareholders of the VBS/SIC should undertake not to agree to any liquidation, merger, or asset sale in respect of or by the VBS/SIC (other than as provided for in the relevant transaction documents), until repayment in full of the ABS.

SEPARATENESS
Belgian law does not provide for “substantive consolidation”, nor does, under Belgian law, the fact that one or more companies of a group are subject to insolvency proceedings necessarily cause the insolvency of the other companies of such group. The application of bankruptcy proceedings to a group company requires all conditions for such bankruptcy to be satisfied in respect of such company.

SHAREHOLDERS
Under Belgian bankruptcy laws, the undertakings of a bankrupt company in connection with shareholdings in other companies are not necessarily enforceable against the receivership. Therefore, if the shareholder of the VBS/SIC is a Belgian company, the undertakings of such shareholder as to the transfer of the VBS/SIC’s shares and the management of the VBS/SIC may not be enforceable against the insolvency receivership, who could freely dispose of the shares in the VBS/SIC in favour of a third party that is not bound by undertakings in relation to the management of the VBS/SIC. DBRS therefore
expects that the transaction should be structured so that the controlling or sole shareholder of the VBS/SIC is a bankruptcy-remote entity (such as, for example, a Dutch stichting).

The transaction documents should also contain a covenant by the controlling shareholder that it acknowledges the VBS/SIC’s obligations deriving from the securitisation and would not impose any actions on the VBS/SIC that would constitute a breach of such obligations.

**INDEPENDENT DIRECTOR**

At least one of the directors of the VBS/SIC should be independent from the parties to the transaction, and the VBS/SIC’s by-laws should provide that the independent director’s vote is required for any resolution of the board of directors that might adversely impact the transaction.

**COMPARTMENTS**

The by-laws of a VBS/SIC may provide for the power of the general meeting of shareholders and the board of directors to create separate sub-divisions, each a compartment (“Compartment”) in accordance with the UCITS Act. All obligations and liabilities owed to parties dealing with the VBS/SIC will be allocated specifically to one or more existing Compartments or to such new Compartments as may be created in the future. Creating Compartments means that the VBS/SIC is internally divided into different sub-divisions that are legally each considered to be a separate group of assets corresponding to a separate group of liabilities. The creation of a series of Compartments is standard practice when establishing a VBS/SIC, even if it is not determined upfront if and how many Compartments will be effectively used.

In case of bankruptcy of a Compartment, segregation of the assets continues to apply, so that the holders of ABS supported by assets from a particular Compartment would retain the right to have their claims met exclusively from their respective segregated assets; creditors of other Compartments would only have recourse against the assets of the Compartment to which their rights or claims have been allocated or relate. General creditors of liabilities that may not be exclusively allocated to a particular Compartment (e.g. certain overall costs and expenses) will be allocated proportionally to the different Compartments in accordance with what is set out in the articles of association of the VBS/SIC.

The Belgian rules on insolvency proceedings and bankruptcy are applied separately for each Compartment and a judicial reorganisation or bankruptcy of a Compartment does not as a matter of law entail the judicial reorganisation or the bankruptcy of the other Compartments or of the VBS/SIC itself. Only the liquidation of the last Compartment will entail the liquidation of the VBS/SIC.

In case of the dissolution and liquidation of a Compartment the rules on the dissolution and liquidation of companies would be applied mutatis mutandis.

Where relevant, DBRS expects the transaction legal opinion to confirm the position in relation to the segregation of assets and liabilities between Compartments of the VBS/SIC.
Security and bond documentation

SECURITY STRUCTURE
The VBS/SIC typically grants security interests over its assets, specifically allocated to the relevant Compartment, its rights deriving from the transaction documents and over the amounts standing to the credit of the transaction accounts, each of these to the extent related to the relevant Compartment, under the form of a pledge governed by Belgian law, in favour of the noteholders and the other secured parties.

As the common law concept of a trust is not recognised under the Belgian legal system (though Belgian courts recognise foreign trusts to the extent duly established under such foreign law), the equivalent of the “security trustee” in Belgian securitisations is the security agent (the “Security Agent”).

Under Belgian law, save in certain cases expressly provided for on a statutory basis, no security interest can in principle be validly created in favour of a party which is not the creditor of the claim which the security interest purports to secure. Consequently, in order to secure the valid creation of the security in favour of the Security Agent and the other secured parties, the VBS/SIC typically undertakes in a pledge agreement, as a separate and independent obligation, by way of parallel debt to pay to the Security Agent amounts equal to the amounts due from it to all the secured parties as a result of which the direct debt of the other secured parties is reduced with an equivalent amount to the parallel debt amount (“Parallel Debt”).

Any payments in respect of the Parallel Debt and any proceeds received by the Security Agent may in the case of an insolvency of the Security Agent not be separated from the Security Agent’s other assets. The transaction documents therefore usually contain triggers relating to the insolvency of the Security Agent, material breach of its obligations, the Security Agent no longer meeting the conditions set out in the UCITS Act and any implementing royal decrees containing the requirements for the appointment of an agent for Noteholders, upon the occurrence of which the Security Agent will be replaced. In addition, the Security Agent should be designated (i) as representative (vertegenwoordiger/représentant) of the security holders pursuant to Articles 27 and 106 of the UCITS Act and (ii) as agent (mandataris/mandataire) of the other secured parties. In each case its powers should include the acceptance of the pledges and the enforcement of the rights of the secured parties.

CONFLICT OF LAW RULES RELATING TO THE CREATION OF PLEDGES/CHARGES
The requirements for the effectiveness of the granting of rights in rem, such as pledges over such receivables vis-à-vis third parties are determined from a Belgian conflict of laws view by the law of the habitual residence of the granting party (or for corporations their COMI or “establishment”) at the moment of the granting of the rights thereon. Whereas the law chosen by the parties will govern the

5. Securitisation transactions may also involve security over financial instruments and cash held in accounts with Euroclear Bank SA/NV. As Euroclear is located in Belgium, these security interests are typically created by way of a Belgian law pledge of the relevant assets. The assets are typically held in a pledge account in the name of a participant in the Euroclear system. Following an event of default the pledgee is entitled to sell or appropriate the assets without prior notice or court approval.
validity and binding nature of the pledge, another set of rules may need to be respected in parallel to ensure that the pledge is duly effective against all other parties (including the bankruptcy trustee of the pledgor at the time of an insolvency event). As bank accounts and credit thereon are commonly considered to be receivables, the granting, for example, by a UK bank of a Belgian law pledge on an account held in Belgium would need to comply with UK perfection requirements. DBRS expects issues as to conflicts of laws to be addressed in the transaction legal opinions.

Insolvency Issues

CLAWBACK OF THE TRANSFER
A necessary condition for a bankruptcy order (faillietverklaring/déclaration de faillite) is that the company must be in a situation of cessation of payments (staking van betaling/cessation de paiements). Cessation of payments is generally accepted to mean that the company is not able to pay its main debts. Such situation must be persistent and not merely temporary. In principle, the cessation of payments is deemed to have occurred as from the date of the bankruptcy order. The court issuing the bankruptcy order may determine that the cessation of payments occurred on an earlier date if there are serious and objective indications that such was the case (such period being referred to as the “suspect period”). Such earlier date may not be earlier than six months before the date of the bankruptcy order, save in the case where the bankruptcy order relates to a company that was dissolved (ontbonden/dissolu) more than six (6) months before the date of the bankruptcy order in circumstances suggesting an intent to defraud its creditors, in which case the date of cessation of payments may be determined as being the date of such decision to dissolve the company.

The general clawback rules under Belgian insolvency law may be summarised as follows:

(i) under the Belgian bankruptcy procedure, any transaction entered into by a Belgian company during the so-called “suspect period” is ineffective against the creditors of the company if the value given by that party significantly exceeded the value it received in consideration;

(ii) any transaction entered into by a company during the “suspect period” may be ruled to be ineffective against the creditors of the company upon the subsequent bankruptcy of such party if the counterparty under the transaction was aware of the cessation of payments;

(iii) security granted during the “suspect period” may be declared ineffective if it is intended to secure a debt which existed prior to the date on which the security was granted;

(iv) any payments (in whatever form, i.e. money or in kind or by way of set-off) during the “suspect period” of any debt which was not yet due as well as all payments other than with money or equivalent instruments (such as cheques or promissory notes) can be set aside;

(v) any transaction or payment effected with fraudulent intent can be set aside irrespective of its date.

There is established case law that only the bankruptcy trustee may apply to have transactions set aside.
DBRS expects the securitisation transaction documentation to be prepared on terms that address these concerns such that the true sale of the portfolio would be upheld notwithstanding the insolvency of the Originator, it being understood that fraud may not be excluded. Transaction legal opinions should also address the risks associated with the application of Belgian insolvency laws to the transaction. In particular, DBRS expects certificates executed by the directors of the Originator confirming that it is able to pay its debts and is not is a situation of cessation of payments as well as certificates delivered by the Commercial Court confirming that the Originator is not subject to any insolvency proceedings or attachments.

**ENFORCEMENT OF SECURITY**

Under Belgian law, upon enforcement of the security for the ABS, the Security Agent will be permitted to collect any moneys payable in respect of the receivables, any moneys payable under the transaction documents pledged to it and any moneys standing to the credit of the accounts of the VBS/SIC and to apply such moneys in satisfaction of obligations of the VBS/SIC which are secured by the pledge agreement.

The Security Agent will also be permitted to apply to the president of the commercial court (rechtbank van koophandeltribunal de commerce) for authorisation to sell the pledged assets. The secured parties will have a first ranking claim over the proceeds of any such sale. Other than claims brought pursuant to the transaction documentation (such as under the receivables transfer agreement in relation to a material breach of a warranty and a right to be indemnified for all damages, losses and costs caused by such breach and a right of action for damages in relation to a breach of the servicing agreement), the VBS/SIC and the Security Agent will have no other recourse to the Originator in respect of the non-performance of the securitised receivables.

The enforcement rights of creditors are stayed during bankruptcy proceedings. The secured parties will be entitled to enforce their security, but only after the verification of claims submitted in the bankrupt estate has been completed and the liquidator (curator/curateur) and the supervising judge have drawn up a record of all liabilities. This normally implies a stay of enforcement of about two (2) months, but the liquidator may ask the court to suspend individual enforcement for a maximum period of 12 months from the date of the bankruptcy judgement, during which he can sell the secured asset himself if this is in the interest of the bankrupt estate and if this is not detrimental to the secured creditors (for example if individual enforcement by a secured creditor would prejudice the ability of the bankruptcy trustee to transfer the business to a third party). This extension would however not be granted if the secured creditors (such as the Security Agent) are able to demonstrate that the delayed realisation of their security interest would jeopardise their position.

The question whether or not a notification to the debtors of the pledged receivables (the obligors), the account banks or the insurance companies upon a certain event (stating that any amounts due under the pledged receivables or standing to the credit of the pledged accounts should only be paid to the Security Agent) is an enforcement measure is not settled under Belgian law. To the extent that such notification is not considered to be an enforcement measure then the pledge created pursuant to the pledge agreement will be able to be enforced at any time after the declaration of bankruptcy of the VBS/SIC. As a result of this uncertainty, DBRS expects the notification events defined in the pledge agreement to include events that would be expected to occur prior to the declaration of bankruptcy.

**JUDICIAL REORGANISATION**

A judicial reorganisation (réorganisation judiciairegerechtelijke reorganisatie) is different from a bankruptcy procedure as it aims to preserve the continuity of all or part of the debtor’s enterprise. This procedure requires the debtor to demonstrate that the continuity of his business is threatened, and that
there are reasonable prospects for its recovery. If the debtor is a legal entity, the business continuity is presumed to be threatened when losses have reduced the company’s net assets to less than half of its share capital6.

Upon the court’s decision granting the judicial reorganisation, a moratorium of at least 6 months (which can be extended to a maximum period of 18 months) is imposed, during which the debtor cannot be declared bankrupt (nor be wound up by a Court order if it is a legal entity) and no enforcement measures can be taken. The Commercial Court appoints amongst its members a “delegated judge” (juge délégué/gedelegeerde rechter), who will assist the debtor and supervise the procedure.

There are 3 types of judicial reorganisation measures: (1) the amicable agreement, (2) the collective agreement and (3) the transfer under judicial supervision.

- Amicable agreement: the debtor negotiates an individual agreement with its creditors (of whom there must be at least two). The parties are free to determine the content of such amicable agreement (more flexible payment deadlines, debt reduction that might enable an improvement in financial circumstances (retour à meilleure fortune/wedergoedkoming), conversion of debt into capital, etc.). If such amicable agreement is deposited with the clerk of the Commercial Court, the content of the agreement and any payments made by the debtor are enforceable against the bankrupt estate notwithstanding the debtor’s subsequent bankruptcy and will thus not be subject to clawback.

- Collective agreement: the debtor seeks the approval of its creditors for a reorganisation plan. The reorganisation plan cannot exceed a duration of 5 years and must be approved by the majority of the creditors representing at least half of the total sum of all claims. If approved, the reorganisation plan needs to be ratified by the Commercial Court.

- Transfer under judicial supervision: the Commercial Court orders (or at least supervises) the transfer of all or part of the debtor’s business. Such transfer may be requested by the debtor itself but can also be ordered by the Court at the request of the prosecutor or a creditor or an interested buyer (such as a competitor).

DBRS notes that provisions in the transaction documents providing for an event of default, an acceleration or early termination by reason of the VBS/SIC or other relevant transaction party being subject to proceedings for a judicial reorganisation may not be enforceable. Where relevant, DBRS expects transaction documentation to include events of default, acceleration or termination events that would become effective prior to a judicial reorganisation, which may include events based on the downgrade of a servicer below particular rating thresholds. DBRS requests transaction legal opinions to address the issue of enforceability of any such provisions.

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6. DBRS requests relevant transaction parties to report sufficient information to enable DBRS to determine compliance with this test on a periodic basis. DBRS notes that purchases by a company of its own shares may also contribute to a situation where a failure of the test might occur, and therefore also requests that information in relation to any such activity be provided at the earliest possible opportunity, to enable the impact of any reduction in assets and/or share capital to be determined.
Servicing, Collection and Commingling

SERVICER
Pursuant to a servicing agreement, the VBS/SIC and the Security Agent appoint a servicer as their agent (lasthebber/mandataire) to provide certain services, including, but not limited to, the administration of the receivables, the related security and the exercise of their respective rights, powers, discretions and to perform their duties, in respect of such assets and any related rights. The receivables are commonly serviced by the Originator, thereby in practice avoiding having to notify the underlying debtors of the sale and transfer of the receivables upfront.

Upon the occurrence of certain events, the actual collection activities may also be delegated to a subservicer that is not a bank or a financial intermediary pursuant to the terms of the servicing agreement.

DBRS reviews the servicing agreement to determine whether its provisions, and in particular any servicer termination events, are consistent with the ratings contemplated. As mentioned above, DBRS expects the servicing agreement to include termination events that would become effective prior to a judicial reorganisation, which may include termination events based on the downgrade of a servicer below particular rating thresholds, and requests transaction legal opinions to address the issue of enforceability of the provision of the servicing agreement, including any termination provisions.

COMMINGLING
Where assets of the VBS/SIC relating to a certain transaction are mixed with assets of third parties or with assets relating to other transactions those assets may be lost in the case of insolvency of the party with whose assets they have been commingled. For the purposes of avoiding commingling, the Originator should set up a separate account into which obligors should be directed to pay amounts due or procure that any amounts paid into the Originator’s general collection account should be swept to a separate account of the VBS/SIC.

Tax

What follows is a summary discussion of those tax issues that often arise in the context of Belgian securitisations. Where a Belgian securitisation involves other jurisdictions, DBRS also considers whether the impact of the tax laws of those other jurisdictions need to be addressed. DBRS expects comfort in the form of a tax opinion that either there are no taxes payable by the issuing SPV (and, if relevant, any intermediate SPV) or that any such taxes have been calculated and that the liability is accounted for and can be paid out of the available cash flows while still leaving sufficient amounts to meet principal and interest payments on the ABS.
BELGIAN CORPORATE TAX

A VBS/SIC is subject to corporate income tax at the default corporate tax rate of 33.99 per cent. However, as opposed to the general regime whereby companies are taxed on their worldwide income, the tax base of an SPV is limited to the sum of (i) all abnormal or gratuitous advantages received (i.e., benefits that result from non-arm's length transactions), and (ii) all expenses and costs that are not deductible as business expenses (so-called “disallowed expenses”, other than depreciations and capital losses on shares (Article 185bis of the Belgian Income Tax Code). In practice, a VBS/SIC’s tax base is nil and, therefore, does not pay any Belgian corporate tax. DBRS expects this to be confirmed in a tax opinion delivered by transaction counsel.

VAT

All services required to manage the VBS/SIC and its assets are exempt from VAT, with the exception of the forced collection of receivables (Article 44 § 3, 11° of the Belgian VAT Code). The Belgian tax authorities issued a circular letter (n° 3/2007 dated 15 February 2007) confirming that this exemption covers only management services that are specific for collective investment institutions and that relate to the management of such institutions or their assets. Nevertheless, pursuant to the official list of exempt transactions, this exemption has been interpreted very broadly. In practice, aside from the forced collection of receivables, only marketing and advertising costs (such as prospectus printing costs) should not be covered by the exemption and, therefore, should be subject to VAT.

Most trade receivables have a VAT component. The transfer of the receivables should normally be organised in such a way that it transfers to the vehicle the right to recover from the tax authorities the VAT already paid in the event that the debtor of the invoice subsequently defaults on its obligations.

As with other potential tax liabilities, DBRS expects tax and legal counsel to opine as to whether Belgian VAT may apply to any of the cash flows or payments being made to or from counterparties. If any Belgian VAT liability is identified, DBRS expects the VAT liability to have been quantified and accounted for in the structure.

WITHHOLDING TAX ON PAYMENTS: BENEFICIAL OWNERSHIP ISSUES

Interest payments by a VBS/SIC to securities holders are subject to the general withholding tax regime in respect of interest income. The VBS/SIC is required to apply a 21 per cent. withholding tax, except if the beneficiary of the interest income is entitled to an exemption. Such exemption may result from Belgian domestic tax law, EU legislation or bilateral tax treaties and may be subject to certain conditions.

Multi-jurisdictional and multi-tier securitisation structures could in certain cases raise some concerns regarding the beneficial ownership of the proceeds paid to the ABS holder, and the consequent right to benefit from a withholding tax exemption. If the VBS/SIC unlawfully applied an exemption, the Belgian tax authorities are entitled to recover the withholding tax and any tax increase or penalty from the VBS/SIC as it is the debtor of such withholding tax, which could have an impact on the transaction’s cash flows. DBRS expects comfort to be provided in the form of a legal opinion addressing the tax treatment of payments made by the SPV, and the actual applicability of withholding tax exemptions.

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7. A separate tax rate applies to so-called “secret commissions”, i.e. payments to undisclosed beneficiaries. Such undisclosed payments are subject to a 309 per cent. tax rate (Article 219 of the Belgian Income Tax Code).
Other Specific Local Issues

RESIDENTIAL MORTGAGE BACKED SECURITIES
Additional specific rules must be taken into account for the securitisation of mortgage loans:

Mortgage Registry. Mortgages are recorded at the mortgage registry and a registration duty of 1% of the secured amount will be due. The assignment of a mortgage claim must normally be recorded as well for such assignment to be enforceable against third parties. An assignment to a VBS/SIC, however, is exempt from this cumbersome formality. Mortgage loan securitisations will therefore in practice need to be structured around a Belgian regulated vehicle, as offshore structures will not be practicable.

Registration duties. The dispensation from inscription at the mortgage registry has the consequence that the 1% registration duty which is normally payable on the transfer of mortgage loans will not be due.

FSMA supervision. The securitisation vehicle, in addition to being subject to the supervision of the Financial Services and Markets Authority, must also be licensed by the Financial Services and Markets Authority in the same way as mortgage lenders. The Mortgage Credit Act does not provide for any substantive requirements in order to obtain a license as a mortgage lender. The review by the FSMA is therefore merely administrative and does not entail the exercise of any discretionary power. Belgian securitisation vehicles are accepted based on: (i) the Originator’s documentation in relation to the transferred portfolio, (ii) information on the structure, the transaction parties and (iii) the proposed issue of securities. In practice, the supervision exercised by the FSMA is mainly focused on the contractual documents used by the mortgage lenders. Any proposed change to these documents has to be reported immediately to the FSMA prior to its implementation.

The license granted by the FSMA may be revoked if the securitisation vehicle fails to comply with its legal and regulatory obligations and will automatically be revoked in case of bankruptcy or dissolution of the securitisation vehicle, in which case the securitisation vehicle will be prohibited from pursuing its mortgage credit activities.

DBRS expects transaction documentation to reflect the requirements of FSMA in relation to obtaining and maintenance of the licence. Transaction legal opinions should confirm that the licence has been obtained.

Mortgage Mandate. To reduce the costs involved in taking mortgages, it is standard Belgian banking practice to grant a mortgage for only a portion (and not for the total amount) of the secured claim and a mortgage mandate (hypothecair mandaat/mandat hypothécaire) for the remaining portion of the secured claim.

A mortgage mandate is an irrevocable mandate to create and register a mortgage and must be granted by notarial deed. A mortgage mandate does not in itself create security establishing a priority right to payment in respect of the proceeds of sale of the mortgaged assets, but instead allows the attorney appointed under the mortgage mandate to create and register a mortgage at any time or upon the occurrence of certain events without any further involvement of the grantor of the mortgage mandate. The mortgage created upon the exercise of the mandate will only be effective in relation to third parties...
as from the date it is recorded in the mortgage registry. When a mortgage mandate is converted into a mortgage, registration duties will be payable.

The following limitations exist in relation to mortgage mandates and their conversion process:

(a) where a third party registers a mortgage before the registration of the mortgage resulting from the conversion of a pre-existing mortgage mandate, the third party mortgage will rank ahead of the mortgage granted to the mandate holder resulting from such conversion;
(b) if a conservatory or an executory seizure is made in respect of the relevant property by a third party creditor, a mortgage registered pursuant to the exercise of the mortgage mandate after the writ of seizure is recorded at the mortgage registry, will not be enforceable against the seizing creditor;
(c) the mortgage mandate can no longer be converted following the bankruptcy of the relevant borrower and any mortgage registered at the mortgage registry after the bankruptcy judgment is void;
(d) the effect of a judicial reorganisation (gerechtelijke reorganisatie/réorganisation judiciaire) and the dissolution (ontbinding/dissolution) of the relevant borrower on the mortgage mandate is uncertain;
(e) mortgages created as a result of the conversion of mortgage mandates after the date of cessation of payment of debts (tijdstip van staking van betaling/date de la cessation de paiements) by the relevant borrower are not enforceable against the bankrupt estate, as such mortgages constitute new security for a pre-existing debt. The bankruptcy court can fix the date of cessation of payments at a date up to six months before the bankruptcy order. However, under certain circumstances, the claw-back rules are not limited in time, for example where a mortgage has been granted pursuant to a mortgage mandate in order to fraudulently prejudice creditors;
(f) mortgages registered after the day of cessation of payments of debt can be declared void by the bankruptcy court, if the registration was made more than fifteen days after the creation of the mortgage; and
(g) besides the possibility that the relevant obligors may grant a mortgage to a third party (as set out above), the mortgage resulting from a conversion of the mortgage mandate may also rank after certain mortgages arising as a matter of law (for example, a legal mortgage arising in favour of the tax authorities) to the extent these mortgages are registered before the registration of the mortgage resulting from the exercise of the mortgage mandate. In this respect, it should be noted that a notary will need to notify the tax administration before passing the notarial deed for the mortgage mandate.

Since the adoption of the Act of 3 August 2012 relating to various measures to facilitate the mobilisation of receivables in the financial sector (the “Mobilisation Act”), it has been clarified that a mortgage mandate is to be considered as an accessory of the secured receivable, and hence benefits to the transferee of the receivable which is in a position to convert such mandate in an actual mortgage inscription, unless the contrary is explicitly stated in the mortgage mandate deed.

For details of how DBRS treats mortgage mandates in Belgian RMBS transactions see the Belgian addendum to the Master European Residential Mortgage-Backed Securities Rating Methodology.

All sums mortgages. Receivables which came into existence after the transfer of the receivables to the VBS/SIC which are covered by the same all sums mortgage (future receivables) shall rank in priority behind the transferred receivables. Receivables existing at the time of the transfer of the receivables to the VBS/SIC which were not transferred but covered by the same all sums mortgage (existing
receivables) shall rank pari passu with the transferred receivables. The receivables transfer agreement typically provides a subordination of the existing receivables vis-à-vis the transferred receivables. Such subordination is considered to be a waiver of ranking which, in accordance with Belgian law, must normally be registered with the relevant mortgage registry in order to be enforceable against third parties. Such registration is subject to a registration duty of 1%. However, the Mobilisation Act has exempted VBS/SICs of such registration duty, provided that no third parties are affected by such subordination. An affected third party could be, for instance, the third-party transferee of an existing receivable, if the transfer of such existing receivable has occurred before the subordination arrangement.

**CONSUMER PROTECTION**

**Mortgages**

Mortgage lending in Belgium is primarily regulated by the Mortgage Credit Act. This law is applicable to all mortgage loans that are predominantly private.

Loans with a non-professional purpose are also subject to the Law of 6 April 2010 on market practices and the protection of the consumer as coordinated in 2010 (the “Consumer Protection Act”). The origination of such loans should therefore in addition to the mortgage loan regulations comply with the Consumer Protection Act, which lays down a wide range of publicity, information and other protection rules.

In some cases discrepancies may appear between the Consumer Protection Act and the Mortgage Credit Act. When such conflict arises the Mortgage Credit Act prevails.

(a) **Mortgage Credit Act**

The Mortgage Credit Act provides certain mandatory rules with which mortgage loans should comply with:

(A) Rules in relation to interest rates

Under the Mortgage Credit Act, the interest rate of a mortgage loan may be fixed or floating (adjustable), or mixed fixed/floating. Fixed interest rates are most common in Belgium and do not raise any specific issues. The rate may be determined either for the complete term or for a defined period after which the rate will be reset for another period. Mortgage loans are typically originated with terms up to 20 years, although longer terms are available under special circumstances.

Floating rates are subject to various limitations and requirements, among others:

- the variation must always be provided both upwards and downwards;
- a variation may only occur after a contractually determined period, which must be longer than one year; variations are subject to a legal cap during the first three year period;
- the variation of the rate must be based on the fluctuation of a reference rate which has been selected in the loan agreement;
- the reference rate must be chosen among the five legally authorised reference rates set out in the Royal Decree of 11 January 1993, which are all based on government bonds with different maturities; and
• the contract should always provide for a cap and a floor; the margin between the original interest rate and each of the cap and the floor must be identical (e.g. +3% cap and -3% floor).

Where relevant, DBRS reflects these limitations and requirements in its analysis of transaction cash flows.

(B) Rules in relation to the type of mortgage loans

There are two different types of mortgage loans with repayment of capital under the Mortgage Credit Act:

• with redemption of the capital and

• with reconstitution of the capital.

Redemption of the capital means that the periodical payments of the borrower (relating to principal) are automatically and entirely set off against the loan’s principal balance, the interest being calculated on the remaining principal balance.

Reconstitution of the capital means that the payments made by the borrower are only set off against the principal periodically, on certain occasions and subject to specific provisions of the law and the loan agreement. The borrower enters into a separate agreement (contrat adjoin/toegevoegd contract) of a certain type (life insurance, capitalisation agreement or savings instrument). The aggregated payments made pursuant to the separate agreement will ultimately be used to pay the outstanding principal. Until that point the interest paid by the borrower is calculated on the outstanding principal, without giving effect to the aggregate payments collected pursuant to the related insurance, capitalisation agreement or savings instrument.

If there is no redemption or reconstitution of the capital, then the mortgage loan agreement should explicitly provide the timing and the conditions of the interest payments.

(C) Rules in relation to the costs charged to the clients

According to article 11 of the Mortgage Credit Act, the only costs which may be charged to the borrower are:

• the legal and regulatory costs relating to the mortgage (the taxes, costs and fees of the notary, the costs and fees of the land registrar, and the tarified procedural costs);

• the costs for the valuation of the property offered as security;

• the costs linked to the opening of the file, provided that the lender has made a prior written offer to the borrower pursuant to article 14 of the Mortgage Credit Act.

Therefore, the management and administrative costs (copying, correspondence, communications, etc.) are to be borne exclusively by the lender. The costs linked to the setting up of security may be charged to the borrower.
(D) Rules in relation to prepayments

Under article 26 of the Mortgage Credit Act, a borrower may at any time prepay the entire outstanding amount of principal. Partial prepayment is in principle also allowed at any time under the Mortgage Credit Act, provided however that the loan documentation may contain certain restrictions in this respect.

Prepayment may be contractually restricted by inserting a penalty for prepayment in the loan agreement. This indemnity is to be calculated at the rate which applies to the loan and must be based on the outstanding principal; it may not exceed an amount of 3 months of interest. No prepayment penalty is due in the event of death of the borrower to the extent that the prepayment occurs with funds paid pursuant to an insurance policy which covers the repayment of the loan (i.e. life insurance or credit insurance).

Furthermore, a mortgage lender may not refuse (i) a partial prepayment provided that only one prepayment occurs in each year, irrespective of the amount involved, or (ii) a prepayment of an amount of not less than 10% of the principal amount (irrespective of how many such prepayments are made in any single year).

Under article 28 of the Mortgage Credit Act, the borrower may prepay the entirety of the loan without penalty if the mortgage lender is found to have deviated from or breached any of the mandatory provisions of the Mortgage Credit Act.

DBRS reflects the rules in relation to prepayments in its analysis of transaction cash flows.

(E) Default

In the event of a default, the Mortgage Credit Act contains a protective provision in favour of the borrower, obliging the mortgage lender to send a registered warning letter to the delinquent borrower within three months of the borrower’s failure to make a required payment under the mortgage loan.

Failure to send the mandatory letter will trigger two sanctions for the mortgage lender: (i) any penalty clauses increasing the interest rate will not operate, and (ii) the borrower will automatically benefit from a 6-month grace period starting from the date of the default and during which no penalty for late payment may be incurred.

A system of information pooling on defaulting borrowers has been created within the National Bank of Belgium. Mortgage lenders have to report delinquent debtors and may access the database for information on loan applicants.

(F) Other

The Mortgage Credit Act contains further mandatory rules in respect of advertising and marketing and judicial enforcement.

(b) Consumer Protection Act

In respect of mortgage loan origination the following provisions of the Consumer Protection Act are of primary relevance:

(A) the prohibition of abusive provisions which include certain specific clauses listed in the Consumer Protection Act (the “black clauses) as well as a catch-all general prohibition of clauses that create an
apparent imbalance between the rights and obligations of the parties. The black clauses are far-reaching and pertain to the performance of the contract as well as to the price, the termination, the warranties, the liability, the right to set-off, evidentiary requirements or the proper jurisdiction in case of dispute. Abusive clauses are void.

(B) the rules on the joint offer of services (gezamenlijk aanbod/offre conjointe). The Consumer Protection Act contains a general ban on joint offers (which are defined as the offer of products or services for free or against payment in conjunction with the offer of other products or services) in the field of financial services. There are several exceptions to the general prohibition, the most important one being the offering, for a single price, of two different financial services considered to form a whole.8

DBRS expects representations from the Originator, supported by appropriate due diligence, as to compliance with relevant provisions of Belgian consumer protection law. DBRS may also request an analysis of the issues in the transaction legal opinion.

Consumer loans
Loans with a non-professional purpose are subject to the law of 12 June 1991 as amended by the law of 13 June 2010 (the “Consumer Credit Act”). The Consumer Credit Act imposes certain obligations on the credit offerors, including:

- Advertisement: All advertisements for consumer credit agreements have to include the wording “Watch out: borrowing money costs money”. The Consumer Credit Act also states that any advertisement for a credit agreement which mentions an interest rate or any figures in relation to costs, should mention the interest rate, the annual percentage rate, the total credit amount, the total costs and the maturity of the credit agreement;

- Mandatory provision of pre-contractual information: The Consumer Credit Act outlines in detail the information which must be provided in a standard format to consumers prior to entering into a credit agreement. This document should contain all essential information (such as the type of credit, total credit amount, conditions for drawdown, etc) in relation to the credit agreement, in order to allow consumers to study and compare different credit offers;

- Content of the credit agreement: The Consumer Credit Act also contains a detailed list of information which needs to be incorporated in the credit agreement, and further provides a number of ongoing obligations applicable to lenders (e.g. the consumer needs to be informed of any changes to the interest rate before they enter into force); and

- Right of withdrawal: The Consumer Credit Act provides a right to the consumer to withdraw from a credit agreement up to 14 days after the later of (a) the date of entering into of the credit agreement or; (b) the date on which the consumer receives the contractual terms and conditions.

8. Breaches of the Consumer Protection Act may give rise to criminal liability and are subject to criminal sanctions (fines and imprisonment). As the consumer protection rules laid down in the Mortgage Credit Act can be considered to be the specific application of the general rules laid down in the Consumer Protection Act in the specific field of mortgage credit, compliance with the Mortgage Credit Act significantly reduces the risk that claims can successfully be brought on the basis of a breach of the abusive clause provisions in the Consumer Protection Act.
• Set-off: The Consumer Credit Act prohibits any clause which limits the rights of set-off of the borrower on the Originator, including after the transfer of the receivable.

• Transfer: Receivables subject to the Consumer Credit Act may only be transferred to a limited number of institutions, including amongst others credit insurers, consumer credit institutions (including credit institutions), and VBS/SICs.

GOVERNMENT RECEIVABLES
Receivables owing from the government and most types of public authorities or agencies are subject to specific procurement laws which complicate their transfer or securitisation. Certain creditors of the original supplier (i.e. the Originator) will retain a preferred right on the receivables despite their assignment to a securitisation vehicle; the vehicle therefore remains at risk on the creditworthiness of the Originator.

SET-OFF
Under Belgian law, a debtor may under certain circumstances set off any amount owed by him towards its creditor against any amount owed to him by the same creditor to the extent both debts are due and payable.

Consumer Loans
Section 27 of the Consumer Credit Act provides that, in case of transfer of the loan, the borrower shall retain any rights of set off or any other exception against the Originator irrespective of any contrary clause or notification, including in case of insolvency of the Originator.

As set-off following the insolvency of the Originator would result in a loss of collections for the VBS/SIC and could therefore adversely affect the VBS/SIC’s ability to make full payments of principal and interest to the Noteholders, DBRS reviews the transaction and any structural features designed to mitigate the risk to determine whether the risks are consistent with the ratings contemplated.

Other Loans
Rights of set-off can no longer arise as from:

(i) the moment of the notification to the debtor that the receivable has been assigned to a third-party (Article 1295 of the Belgian Civil Code); or

(ii) the insolvency of either party.

The sale of the loans to the VBS/SIC and the pledge of the loans granted in favour of the Security Agent and the other secured parties will typically not be notified to the borrowers or to third party providers of loan security, except in certain circumstances.

Set-off rights may therefore continue to arise in respect of reciprocal claims between a borrower (or a third party provider of loan security, such as a guarantor) and the Originator, potentially reducing the amount of the receivable by the VBS/SIC and the beneficiaries of the pledge (the noteholders and the other secured parties). The Originator typically agrees to indemnify the VBS/SIC if a borrower, insurance company or provider of loan security, claims to set-off certain amounts against the amounts owed to the VBS/SIC, and the rights to payment of such indemnity are also pledged in favour of the secured parties.
Since the adoption of the Mobilisation Act, a borrower can no longer invoke set-off or the exception of non-performance (irrespective of any close connection between the debts) in the following circumstances:

- after notification of the transfer to the borrower; or
- after the insolvency of the Originator;

provided that:

- the conditions of applicability of such set-off/non-performance exception were not met up until such notification/insolvency;
- the receivable has been transferred to or by a credit institution, a financial institution or a “mobilisation institution”, such institutions including amongst others VBS/SICs; or
- when the receivable falls within the scope of application of article 14 of the Act of 15 December 2005 on Financial Collateral (which is the act implementing the Collateral Directive 2002/47/CE), there is no contractual arrangement allowing set-off after insolvency or notification.

9. It should be noted however, that since the amendment of the Financial Collateral Act of 21 November 2011, it is not possible for physical persons (unless acting as merchants) to benefit from the carve-out of article 14.