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Non-performing loans and the harmonisation of extrajudicial collateral enforcement across Europe

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Abstract

The European Union plans on partially harmonising the extrajudicial enforcement of collateral in order to reduce the stocks of nonperforming loans. This article discusses the proposed regime and its background. After examining its impact on the national secured transactions law of Austria, Belgium, France, Germany and The Netherlands, the authors comment on the appropriateness of the proposed harmonisation.

1 | INTRODUCTION[1]

The European Union intends to partially harmonise the extrajudicial enforcement of collateral. These plans are part of the "Proposal for a directive of the European Parliament and of the council on credit servicers, credit purchasers and the recovery of collateral" ("Directive Proposal").[2] The main objective of the proposed harmonisation is to tackle the so-called non-performing loans (NPLs).

The financial crisis of the last decade has led to an increase of debtors who are unable to make the scheduled payments to cover interest or capital reimbursements to their bank, in particular in

[1]This article builds on Ben Schuijling, Vincent van Hoof, and Tom Hutten, "Collateral Recovery and Non-Performing Loans: Impact, Appropriateness and Necessity of Harmonisation," Chapter 5 in Jennifer Gant (ed.), *Party Autonomy and Third Party Protection in Insolvency Law* (INSOL Europe 2019) (79–96); "Non-performing loans en de harmonisatie van het zekerhedenrecht" (2018) 8 *Tijdschrift Financiering*, *Zekerheden en Insolventierechtpraktijk* 42; and a presentation given at the INSOL Europe Athens Conference on 3 October 2018.

[2]Proposal for a Directive of the European Parliament and of the Council on credit servicers, credit purchasers, and the recovery of collateral COM/2018/0135 final—2018/063 (COD) ("Directive Proposal").

southern Europe.[3] A large amount of NPLs is considered to hamper credit provision in general and to threaten the stability of the financial system as a whole. The European Union aims to reduce the current stocks of NPLs and to prevent any excessive build-up in the future. One of the proposed measures is a common framework for accelerated and extrajudicial enforcement of collateral.[4] The harmonisation of the conditions under which banks can enforce their collateral should improve the bank's ability to deal with NPLs. Furthermore, the accelerated enforcement and the increased proceeds that are to be expected should increase the value of NPLs in the secondary market.[5]

In this article, we analyse the current legislative proposal in light of its purpose. In this analysis, we consider the expected impact of the proposal on the laws of Austria, Belgium, France, Germany, and the Netherlands, and the appropriateness and necessity of harmonisation. In the next section, we start with a brief description of the of NPLs and the European dimension of the problems related to them. Subsequently, we analyse the Directive Proposal and discuss the proposed regime for extrajudicial collateral enforcement through public auction, private sale, or appropriation (Section 3). In Section 4, we examine the impact of the proposal on the national secured transactions law of Austria, Belgium, France, Germany, and the Netherlands. After that, we comment on the appropriateness of harmonisation (Section 5). Section 6 contains our concluding remarks.

2 | BACKGROUND

2.1 | Non-performing loans and their effects

The last financial crisis and the following recessions left a number of European banks with high levels of NPLs. NPLs are (bank) loans for which the debtor is unable to make the scheduled payments to cover interest or capital reimbursements. The Directive Proposal classifies a loan as an NPL when payments are more than 90 days past due or the loan is assessed as unlikely to be repaid by the debtor.[6] In 2015, a total of EUR 1,066 billion in nominal value of non-performing loans was listed on the balance sheets of banks in the Eurozone.[7] A large quantity of NPLs on the balance sheet of a bank is undesirable. NPLs reduce a bank's profitability because they require higher levels of provisioning. As a result, banks cannot use this regulatory capital to issue new (profitable) loans to businesses and consumers. Furthermore, management and active recovery of NPLs tie up significant amounts of a bank's human

[3]See ECB, Supervisory Banking Statistics (Q1 2019) (July 2019), available at https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.supervisorybankingstatistics_first_quarter_2019_201907~62c4b59f7c.en.pdf?ef17a51aac533582f8ecb6fdf2645e6a. Because of the economic recovery after the crisis, the amount of NPLs on the balance sheet of European banks is decreasing, see SWD/2018/075–2018/063 (COD) (Impact assessment), 5.

[4]Other policy action areas are bank supervision and regulation, developing secondary markets for distressed assets and fostering restructuring of the banking system. Furthermore, the European Commission issued a (non-binding) blueprint for how national Asset Management Companies or other measures can be set-up in compliance with existing EU banking and State aid rules. These AMCs can be set-up to buy NPLs. For an overview of the policy measures, see COM (2018) 766: Third Progress Report on the Reduction of Non-performing Loans and Further Risk Reduction in the Banking Union.

[5]See COM (2018) 766, above note 4, Preamble Recitals 6 and 7.

[6]See Directive Proposal, above note 2, 1. This is in line with the EBA Draft Guidelines on Management of Non-performing and Forborne Exposures, which refers to Annex V of Regulation (EU) 680/2014, available at https://eba.europa.eu/documents/10180/2150622/Consultation+Paper+on+Guidelines+on+management+of+non-performing+and+forborne+exposures+%28EBA-CP-2018-01%29.pdf.

[7]See Supervisory Banking Statistics, available at https://www.bankingsupervision.europa.eu/.

and financial resources. Altogether, NPLs hurt the bank's solvency and reduce its capacity to lend and have a negative effect on economic growth and the stability of the financial system.[8]

2.2 | European dimension

The ratio of NPLs to performing loans varies greatly between Member States.[9] In some Member States, the NPL ratio is only 2%, whereas in other Member States, almost half of the outstanding loans and advances classify as NPLs. A decrease in the overall amount of NPLs has been apparent across the European Union since 2015, but some banks are still grappling with high levels of NPLs.[10] Apparently, these banks have been unable to significantly reduce the level of NPLs on their balance sheet.[11]

The European Commission launched a European strategy for NPLs in May 2017.[12] Subsequently, the ECOFIN Council agreed on an *Action plan to tackle non-performing loans in Europe* in July 2017.[13] The plan calls upon various institutions, among which the Commission, to take measures addressing the risks related to a high NPL ratio in Europe. The plan emphasises that banks are primarily responsible for tackling high NPL ratios. However, because of the economic spill-over effects caused by the interconnection of national banking and financial systems—both in terms of economic growth and financial stability—the Commission called for Europe-wide action.

In line with the Council's (ECOFIN) plan, the Commission presented a mix of complementary policy actions in March 2018 to facilitate the management of NPLs by banks and to avoid the accumulation of new NPLs in the future.[14] The Commission presented

i a proposal for a regulation amending the Capital Requirement Regulation and introducing common minimum coverage levels for newly originated loans that become non-performing,[15]
ii a proposal for a directive on credit servicers, credit purchasers, and the recovery of collateral,[16] and
iii a Commission services' staff working document containing a blueprint on the set-up of national asset management companies (AMCs).[17]

[8]For further reading, see IMF Staff Discussion Note, "A Strategy for Resolving Europe's Problem Loans" (September 2015), available at https://www.imf.org/external/pubs/ft/sdn/2015/sdn1519.pdf.

[9]See ECB Statistics, above note 3, T04.02.2 Asset quality: non-performing loans and advances by country, 60.

[10]In 2015, the total of NPLs on the balance sheets of European Banks represented EUR 1,066 billion; in the third quarter of 2018, this had decreased to EUR 627 billion. Member States that have been struggling with high NPL rates are Greece (43.36%), Cyprus (20.68%), and Portugal (14.54%). For a brief explanation, see https://www.bloomberg.com/news/articles/2018-02-14/get-a-grip-on-europe-s-bad-loan-problem-with-these-five-charts.

[11]See in this context: ECB, Guidance to Banks on Non-performing Loans (March 2017), available at https://www.bankingsupervision.europa.eu/ecb/pub/pdf/guidance_on_npl.en.pdf.

[12]Reflection Paper on the Deepening of the Economic and Monetary Union (31 May 2017), available at https://ec.europa.eu/commission/publications/reflection-paper-deepening-economic-and-monetary-union_en.

[13]See www.consilium.europa.eu/nl/press/press-releases/2017/07/11/conclusions-non-performing-loans/.

[14]See COM (2018) 133—SWD (2018) 72: Second Progress Report on the Reduction of Non-Performing Loans in Europe, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0133&from=EN. See also COM (2018) 37—SWD (2018) 33: First Progress Report on the Reduction of Non-Performing Loans in Europe, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018SC0033R(01)&from=EN.

[15]See Proposal for a Regulation of the European Parliament and of the Council on amending Regulation (EU) No 575/2013 as regards minimum loss coverage for non-performing exposures COM/2018/0134 final—2018/060 (COD).

[16]See Directive Proposal, above note 2.

[17]See COM (2018) 133 Commission staff working document AMC Blueprint.

The Commission believes that debt restructuring, insolvency, and debt recovery processes are too slow and unpredictable in some Member States. This sentiment is supported by a 2017 report of the Council's Financial Services Committee subgroup on NPLs.[18] The Commission wishes to facilitate debt recovery by enabling accelerated out-of-court enforcement of loans secured by collateral.[19] This would help secured creditors to recover value from collateral without going to court.[20]

3 | ACCELERATED EXTRAJUDICIAL COLLATERAL ENFORCEMENT FRAMEWORK

3.1 | Introduction

Title V of the Directive Proposal contains measures regarding *Accelerated Extrajudicial Collateral Enforcement* (AECE).[21] Member States have to ensure that creditors and debtors can agree in advance on an accelerated mechanism to recover the value from loans that are guaranteed with collateral. Member States would need to have a legal framework in place for extrajudicial enforcement through at least public auction, private sale, or appropriation.[22] The Directive Proposal sets specific requirements for each type of enforcement.

The scope of the Directive Proposal is firstly limited to movable and immovable—and thus tangible—collateral. In this sense, the proposal complements the Financial Collateral Directive,[23] which harmonises out-of-court enforcement for financial collateral such as cash, financial instruments, or credit claims.[24]

The scope of the Directive Proposal is secondly limited to loans granted to businesses. Consumer loans (including mortgage-backed loans) are excluded, because of the potential social impact of an accelerated extrajudicial collateral enforcement. The Directive Proposal's limited scope has its basis in the public consultation launched in July 2017 and is consistent with the action plan as presented by the ECOFIN Council.[25]

3.2 | The proposal in general

In short, the AECE method must be agreed upon up-front between the creditor and the debtor in writing or in a notarised form.[26] The agreement comprises a directly enforceable title, so that the creditor can enforce its rights without first applying to a court.[27] When the debtor defaults on the loan, the

[18]Report dated 31 May 2017 of the FSC Subgroup on Non-Performing Loans, section 4.2.4, paragraph 152, available at https://data.consilium.europa.eu/doc/document/ST-9854-2017-INIT/en/pdf.

[19]NPL ratios tend to be lower in Member States where collateral foreclosure periods are shorter. Another benefit of facilitating debt recovery is that tax payers will be spared from bearing the costs of reducing NPLs.

[20]The Commission also wishes to foster the transparency on NPLs in Europe by improving the data availability and comparability as regards NPLs and potentially supporting the development by market participants of NPL information platforms or credit registers. These policy objectives are in line with section 7.1 of the Report, above note 18.

[21]See Directive Proposal, above note 2, Articles 23–33.

[22]Ibid., Articles 24(2) and (3).

[23]Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, PbEG 2002, L 168/48 ("Collateral Directive").

[24]Article 1(4)(a), Collateral Directive.

[25]See "Action Plan on the Reduction of Non-Performing Loans in Europe", available at https://www.consilium.europa.eu/en/press/press-releases/2017/07/11/conclusions-non-performing-loans/pdf.

[26]See Directive Proposal, above note 2, Article 23(1).

[27]Ibid., Article 23(1); Preamble Recital 46.

creditor has to grant the debtor a reasonable remedy period to avert enforcement.[28] The creditor who (then) proceeds with enforcement has to value the collateral prior to its realisation. Furthermore, the creditor is obliged to notify the debtor 4 weeks prior to the enforcement of its intention to realise the collateral, the type of enforcement, the time period for the execution, and the outstanding debt.[29] After the sale, the creditor only gets to keep the proceeds to the extent necessary to cover the outstanding amounts on the loan. Excess proceeds are paid out to the creditor.[30]

The mandatory valuation of the collateral must comply with specific rules. First, an independent valuer must conduct the valuation. Second, the debtor and the creditor have to agree on the appointment of a valuer. If the creditor and the debtor cannot agree upon the appointment of a specific valuer, a valuer shall be appointed by the court.[31] Third, the valuation has to be conducted specifically for the purpose of the realisation of the collateral. Fourth, the valuation has to be fair and realistic. The debtor must have the right to challenge the valuation before a court.[32] If one of the aforementioned rules is not complied with, the debtor must have the right to challenge the use of the AECE mechanism before a court.[33]

3.3 | Public auction, private sale, or appropriation

The Directive Proposal obliges the Member States to have a mechanism in place for enforcement through either public auction, private sale, or appropriation. If a Member State wishes to provide for AECE by way of *public auction*, it should ensure that[34]

a the creditor has to publicly communicate the time and place of the public auction at least 10 days prior to that auction;
b the creditor is obliged to make reasonable efforts to attract the highest number of potential buyers;
c the creditor has to notify the debtor and any third party with an interest in or right to the asset, of the public auction, including its time and place, at least 10 days prior to that auction;
d a valuation of the asset has to be conducted prior to the public auction;
e the reserve price of the asset has to be at least equal to the valuation amount determined prior to the public auction;
f the asset can only be sold at a reduction of no more than 20% of the valuation amount where both of the following apply:

i no buyer has made an offer in line with the requirements referred to in points (e) and (f) at the public auction;
ii there is a threat of imminent deterioration of the asset.

If the Member State wishes to provide for AECE by way of *private sale*, it should ensure that[35]

[28]Ibid., Article 23(3). The Directive Proposal does not define how long this period (approximately) is. In the preamble, the only reference made to this period can be found in Recital 45.
[29]Ibid., Article 23(1), where it is stated that the creditor and the debtor can agree on a longer notification period.
[30]Ibid., Article 29.
[31]Ibid., Article 24(5).
[32]Ibid., Article 24(4).
[33]Ibid., Article 28.
[34]Ibid., Article 25.
[35]Ibid., Article 26.

a the creditor is obliged to make reasonable efforts, including adequate public advertising, to attract potential buyers;
b the creditor has to notify the debtor, and any relevant third party with an interest in or right to the asset, of its intention to sell the asset at least 10 days prior to offering the asset for sale;
c a valuation of the asset has been conducted prior to the private sale and/or a correctly notified public auction;
d the guide price of the asset has to be at least equal to the amount established in the valuation, at the time of offering the asset for private sale;
e the asset can only be sold at a reduction of no more than 20% of value where both of the following apply:

i no buyer has made an offer in line with the aforementioned requirements within 30 days;
ii there is a threat of imminent deterioration of the asset.

AECE by way of appropriation is a third method of collateral enforcement Member States can choose to facilitate.[36] This method of enforcement is unfortunately not immediately apparent from the text of the Directive Proposal. Therefore, at first glance, one can doubt whether appropriation is an independent method of collateral enforcement. After all, Article 24, section 2, states that Member States shall provide for "one or both" of the following means and then lists public auction and private sale. The fact that appropriation is a third way of enforcement, follows from the third section of Article 24, read in conjunction with the preamble. Appropriation is clearly summed up in point 47 of the preamble as an admissible way of AECE under the Directive Proposal.[37] In case of AECE by way of appropriation, Member States have to ensure that the creditor is obliged to pay the debtor the positive difference between the secured outstanding debt and the (previous) valuation of the asset, if present.[38]

In conclusion, each of the proposed AECE regimes requires a valuation of the assets by an independent valuer. The person of the valuer can be agreed on by the parties or, if parties cannot agree, appointed by the court.[39] In each case, the creditor has to notify the debtor, and any relevant third party with an interest in or right to the asset, of its intention to sell the asset at least 10 days prior to offering the asset for public auction or private sale.[40] The creditor has to publicly advertise the sale, strangely enough even if it is a private sale.[41] The asset cannot be sold below the reserve price, which is 80% of the valuation price.[42] The AECE by means of appropriation obliges the creditor to repay the debtor the difference between the outstanding sum of the secured credit agreement and the valuation of the asset.[43]

[36]Compare Article 4(1)(a), Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, PbEG 2002, L 168/48.
[37]The example in Preamble Recital 48 confirms this view. It also follows from Article 33(2)(b), Directive Proposal, and the detailed explanation of the specific provisions of the proposal at 16.
[38]See Directive Proposal, above note 2, Article 24(3).
[39]Ibid., Articles 24(4) and (5).
[40]Ibid., Article 25(1)(a).
[41]Ibid., Articles 25(1)(a) and 26(1)(a).
[42]Ibid., Article 25(1)(f) and 26(1)(e).
[43]Ibid., Article 24(3).

4 | IMPACT ON NATIONAL SECURED TRANSACTIONS LAW

4.1 | Impact assessment and benchmarking exercises

Both before and after the publication of the Directive Proposal, the Commission undertook benchmarking exercises of loan enforcement regimes to establish a reliable picture of the delays and value-recovery that banks experience in collateral enforcement. It invited close cooperation between Member States and supervisors to develop a sound and significant benchmarking methodology.[44] These exercises covered various types of enforcement procedures available under national law, including both individual and collective procedures, and available to both secured and unsecured creditors.

In line with these benchmarking exercises, the impact of Title V of the Directive Proposal is assessed in the next section. We analysed the potential impact of the Directive Proposal on the national laws of Austria, Belgium, France, Germany, and the Netherlands. This selection of jurisdictions is based on the availability and accessibility of reliable legal sources on the secured transactions laws of these Member States in languages we sufficiently master. We recognise that this selection leaves out some of the (southern) European jurisdictions most affected by NPLs. It is worth noting that banks in the Member States we did select seem to experience relatively low levels of NPLs. One could assume that these jurisdictions apparently succeed in facilitating expedient recovery processes. The compatibility of the Directive Proposal with these national laws and the reflections on its possible consequences are therefore interesting from the perspective of harmonising this part of the law.

4.2 | Country analyses

4.2.1 | Austria

Austria recognises both pledge (*Pfandrecht*) and title transfer for security of movables, but both security devices require publicity. The debtor must transfer control over the movable to the creditor.[45] Movables that are not easily moved, like big industrial machines, may be marked as pledged or transferred, instead of transferring control over them. With regard to immovables, Austria recognises the creation of a mortgage (*Pfandrecht*) that requires registration of the mortgage deed in a public register.[46]

The Austrian Civil Code allows for an accelerated extrajudicial collateral enforcement regarding the pledge of movables and the mortgage of immovables.[47] The secured creditor has the right to sell the movable or immovable without prior court approval if the debtor is in default. For mortgage, parties need to agree on the method of sale in the mortgage contract.[48] For pledge, the Austrian Civil Code contains a detailed set of rules.[49] The sale is in principle a public sale.[50] The creditor must give

[44]Progress on the benchmarking exercise was presented to and discussed with experts from each Member State at the September and December 2017 meetings of the expert group on NPLs, including the issue of lack of access to meaningful data. See https://data.consilium.europa.eu/doc/document/ST-9854-2017-INIT/en/pdf. Also note that Article 29, Directive (EU) 2019/1023 on restructuring and insolvency, lays down obligations on Member States to collect comparable data on insolvency and restructuring proceedings and communicate this to the Commission.

[45]§ 451(1), ABGB; ECLI:AT:OGH0002:1954:RS0010394.

[46]Ibid., § 451(1).

[47]The default option is judicial sale based on § 461, ABGB.

[48]§ 1371, ABGB. See: ECLI:AT:OGH0002:1950:RS0032402. Cf. Ulfried Terlitza, "Sicherungsrechte an Immobilien in Europa: Länderbericht Österreich," in Monika Hinteregger and Tomislav Borić (eds), *Sicherungsrechte an Immobilien in Europa* (Lit Verlag, 2009), 247.

[49]Ibid., § 466a.

[50]Ibid., § 466b(2) and (3).

notice to the debtor at least 1 month prior to the sale and mention the amount of the outstanding secured claim.[51] He also has to notify other creditors with security interests in the pledged asset. The creditor needs to notify the debtor after the sale of the value of the proceeds.[52]

4.2.2 | Belgium

Belgian law recognises pledge (*pand*) as a security right in movables. In 2018, the so-called Pledge Act (*Pandwet*) updated the Belgian civil code with regard to pledges. A distinction is made between a possessory pledge, which requires the pledgee to gain control over the movables, and a non-possessory pledge, which requires a public registration in a newly created Pledge Register. With regard to immovables, Belgium recognises the creation of a mortgage (*hypotheek*), which requires registration of the mortgage deed in a public register.[53] The Belgian mortgage is enforced through a court-supervised sale of the mortgaged property.[54] There is no extrajudicial enforcement of immovables.[55]

The updated Belgian Civil Code already allows for various types of accelerated extrajudicial collateral enforcement regarding movables.[56] If the debtor is in default, the secured creditor has the right to sell or rent out part of or all the pledged assets, without prior court approval.[57] The sale can be a public sale or a private sale.[58] The secured creditor can order a bailiff to carry out the sale of the pledged assets.[59] The secured creditor and debtor can agree on the specifics of the execution at the time of the conclusion of the pledge contract or afterwards. The creditor must give the debtor notice at least 10 days prior to the execution by registered mail.[60] The creditor also has to give notice to other creditors with security interests in the asset. The notice needs to contain a description of the secured claims, the pledged assets, the specifics of the sale, and the needs to mention the right of the debtor to redeem the assets by satisfying the secured claim.

The secured creditor and debtor can also agree on a forfeiture clause at the time of the conclusion of the pledge contract or afterwards, even after the debtor has defaulted.[61] If the debtor defaults, the secured creditor will become the owner of the pledged assets. The asset must be valued by an expert on the day of the transfer of ownership. The debtor, creditor, or any interested party can apply for judicial review of the execution at any stage of the execution.[62]

[51]Ibid., § 466b(1).
[52]Ibid., § 466c(2).
[53]Article 76, Hypotheekwet (or Book III, Title XVIII, Belgian Civil Code).
[54]Articles 1563 and 1626, Ger.W.
[55]Idem. The mortgagee can start the sale without prior court approval if the secured claim is established by the mortgage deed. See: Cass. (1ste Kamer) 17 November 1988, Pas. 1988, I, 303. Cf. Hamida Reghif, "De tenuitvoerlegging van zakelijke zekerheidsrechten," in Anon, *Voorrechten en hypotheken*, *Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, *Capita selecta* (Volume I), paragraphs 1–59 (April 2006).
[56]*Voorrechten en hypotheken OVH*, *Commentaar bij art. 46 Pandwet*, Volume 54, 47 (April 2015).
[57]Article 47, Pandwet (or Book III, Title XVII, Belgian Civil Code).
[58]OVH—Afl. 54 (23 April 2015), 66.
[59]Art. 51, Pandwet (or Book III, Title XVII, Belgian Civil Code).
[60]Ibid., Article 48.
[61]Ibid., Article 53.
[62]Ibid., Articles 54 and 56.

4.2.3 | France

French law recognises pledge as a security right in movables. A distinction is made between a possessory pledge, which requires the pledgee to gain control over the movables, and a non-possessory pledge (*gage*), which requires a public registration in a Pledge Register.[63] Apart from common pledges regulated by the Civil Code, the French Commercial Code allows for the creation of the so-called commercial pledges. Commercial parties can create these non-possessory or possessory pledges on assets such as agricultural equipment or stock. With regard to immovables, France recognises the creation of a mortgage (*hypothèque*), which requires the registration of the mortgage deed in a public register.[64]

The French Civil Code does not allow for accelerated extrajudicial collateral enforcement through public or private sale. Articles 2346 and 2347 of the Civil Code state:

> "If the debt secured is not paid, the creditor may seek a judicial order for the sale of the pledged object. This sale takes place according to the rules of civil procedure on measures of enforcement from which a contract of pledge cannot derogate. The creditor may also obtain a judicial order to the effect that the object will remain with him as payment. When the value of the object exceeds the amount of the secured debt, the difference is paid to the debtor or, if there are other pledgee creditors, is held in consignment."

Articles 2458 and 2459 of the Civil Code have a similar content with regard to (the) mortgage. Furthermore, the French Civil Code also allows for accelerated extrajudicial collateral enforcement though appropriation. Articles 2348 and 2459 recognise the use of a forfeiture clause. The secured creditor and debtor can agree on a forfeiture clause at the time of the conclusion of the pledge contract or afterwards. If the debtor defaults, the secured creditor will become the owner of the pledged assets. The asset must be valued by an expert, designated by amicable agreement or judicially, on the day of the transfer of ownership.[65] Any clause to the contrary is deemed unwritten.

The enforcement of some of the commercial pledges deviates from the execution regime in the Civil Code.[66] Article L.521-3 of the Commercial Code states that if payment is not made on or before the due date, the creditor may, 8 days after a simple notice served on the debtor and any third party holding a landlord's lien for rent, sell the articles held as security at public auction.[67] Articles L.322-9 to L.322-13 of the Commercial Code on public auctions are applicable. Furthermore, two methods of recourse as regulated by the Civil Code are available too. First, the parties can agree upon a forfeiture clause in the contract. Second, the creditor can ask for judicial attribution of the pledged asset.

[63]Article 2337, Civil Code. Cf. *Répertoire Dalloz de droit commercial*, vol. *Gage commercial* (January 2017).
[64]Ibid., Articles 2416 and 2426.
[65]Ibid., Article 2460.
[66]Article L.527-8, Commercial Code, states that enforcement of the pledge of stock must be realised according to the enforcement regime of the Civil Code.
[67]The notice should be served by a bailiff. See: Civ. 3 févr. 1937, DH 1937. 165. Cf. (Le gage commercial, Rep. Com. Dalloz—Dimitri Houtcieff—janvier 2017, nr. 58 e.v.)

4.2.4 | Germany

German law recognises the security transfer of ownership (*Sicherungsübereignung*) of a movable. The transfer of control over the movable is not required.[68] The security transfer is not regulated in the German Civil Code (*Bürgerliches Gesetzbuch*; *BGB*). Security over immovables can be granted in the form of a mortgage (either a *Hypothek* or a *Sicherungsgrundschuld*). However, there is no option to realise the immovable collateral out-of-court. The mortgagee has to enforce its collateral through a court-supervised proceeding (*Zwangvollstreckung*).[69]

A general demarcation of the secured creditor's enforcement rights after a security transfer is lacking. It follows from case law that the enforcement of the collateral takes place primarily in accordance with the security agreement between the secured creditor and the debtor.[70] In the absence of any specific stipulation, the secured creditor can choose to sell the movable either privately or publicly. The secured creditor must strive to achieve the best possible recovery result.[71] Unless agreed otherwise, there is no waiting period or mandatory valuation prescribed for enforcing the collateral. Enforcement through appropriation is only possible if agreed upon by the parties.[72]

German law also recognises a pledge over movables (*Pfandrecht an beweglichen Sachen*), although in practice, the significance of this instrument is limited. This has to do with the requirement that the pledgor has to transfer control over the movable to the secured creditor.[73] The secured creditor can sell the movable if the debtor is in default.[74] Unless this is unfeasible, the secured creditor has to give notice to the debtor at least 1 month in advance of the sale of the movable.[75] However, parties can agree on a different waiting period.[76] The sale can be a public sale (§ 1235 BGB). The time and place of the auction have to be announced publicly.[77] The secured creditor also has to inform the debtor (and others with rights in the movable) of the public sale.[78] However, the secured creditor and the debtor can agree otherwise on both the manner of sale and the communication thereof.[79]

German law does not allow for execution through a pre-agreed appropriation clause. However, the secured creditor and the debtor can agree that the secured creditor shall retain ownership of the movable as a (partial) satisfaction of the secured claim if the debtor is in default.[80]

4.2.5 | The Netherlands

Dutch law recognises pledge (*pandrecht*) as a security right over movables. A distinction is made between a possessory pledge, which requires the pledgee to gain control over the movable, and a non-possessory pledge, which does not require a transfer of control. Security over immovables is granted in the form of a mortgage (*hypotheek*).

[68]Cf. § 929 and 930, BGB.
[69]Ibid., § 1147 and § 1192. See also MüKoBGB/Lieder § 1147, Rn. 1 and § 1192, Rn. 2 (2017).
[70]BGH 24.10.1979, NJW 1980, 226. See also MüKoBGB/Oechsler, Anh. § 929–936, Rn. 49 (2017).
[71]BGH 05.10.1999, NJW 2000, 352. See also MüKoBGB/Oechsler, Anh. § 929–936, Rn. 51 (2017).
[72]BGH 24.10.1979, NJW 1980, 226.
[73]§ 1205, BGB.
[74]Ibid., § 1228.
[75]Ibid., § 1234.
[76]Ibid., § 1245(1).
[77]Ibid., § 1237(1).
[78]Ibid., § 1237(2).
[79]Ibid., § 1245(1). See also MüKoBGB/Damrau § 1245, Rn. 1–7 (2017).
[80]Ibid., § 1229. See also MüKoBGB/Damrau § 1229, Rn. 1–6 (2017).

The Dutch Civil Code (*Burgerlijk Wetboek*; *BW*) allows for an accelerated extrajudicial collateral enforcement with regard to a right of pledge. If the debtor is in default (*verzuim*) the secured creditor has the right to sell the movable, without prior court approval.[81] The sale is in principle a public sale.[82] The sale must be organised by a notary public or a bailiff.[83] If the pledge is non-possessory, the secured creditor can demand the surrender of the movable as soon as the pledgor or the debtor fails to meet its obligations or the secured creditor has good reason to believe they will fail to do so.[84] If the debtor refuses to surrender the movable, the pledgee can seize the movable with the assistance of a bailiff. This seizure requires prior approval of the court, unless the deed of pledge was executed in a notarised form.[85] However, the secured creditor can request the court for permission to sell the movable privately.[86] The secured creditor and debtor can also agree on a different way of execution of the movable, like a private sale.[87] However, such an agreement can only be made when the debtor is in default.

The pledgee who wishes to enforce its security right has to communicate, to the extent possible, the place and time of the sale to the pledgor and the debtor (and any other third party with an interest in the asset) at least 3 days before the sale, unless agreed otherwise.[88] The pledgor must communicate this in writing.[89] In practice, the application of this rule is excluded in an agreement between the parties. Moreover, it is not required that the pledgor publicly communicates its intent to sell the movable.

The pledgee is not required to conduct a valuation prior to the sale of the movable. From this, it follows that there are no rules on reserve or guide prices for the sale of the movable. The pledgor or the debtor can challenge the enforcement of the pledge in a summary proceeding before the court of the district in which the defendant resides or the court that they agreed upon.

Dutch law does not allow for execution through an appropriation clause in the pledge contract.[90] However, if the debtor is in default, the creditor can request for judicial attribution of the pledged assets for a price to be specified by the court.[91] It is not possible to agree on an enforcement mechanism through appropriation before the debtor is in default.

A mortgage (*hypotheek*) over immovables can be enforced extrajudicially by way of a public (internet) sale in the presence of a notary if the debtor is in default.[92] A private sale is only possible with the approval of the court (after a public sale has been publicly announced and up to a week before the set date for auction).[93] There are no other ways of realising the collateral, such as through a pre-agreed appropriation of the immovable.[94]

The public sale of the immovable has to be notified to the debtor (and other parties with a registered interest in the immovable) by means of a writ.[95] Within 14 days, the notary will set a time and

[81]Article 3:248, BW.
[82]Ibid., Article 3:250.
[83]Article 1, Wet ambtelijk toezicht bij openbare verkopingen.
[84]Article 3:237(3), BW.
[85]Article 496, Wetboek van Burgerlijke Rechtsvordering (Code of Civil Procedure).
[86]Article 3:251(1), BW.
[87]Ibid., Article 3:251(2).
[88]Ibid., Article 3:249(1).
[89]Article 1 Besluit ex artikel 249 Boek 3 Burgerlijk Wetboek, *Stb.* 1991, 433.
[90]Article 3:235, BW.
[91]Ibid., Article 3:251(2).
[92]Ibid., Article 3:268(1).
[93]Ibid., Article 3:268(2); Article 548, Code of Civil Procedure.
[94]Ibid., Article 3:268(5).
[95]Ibid., Article 3:268(4) BW; Article 544, Code of Civil Procedure.

place for the sale and he shall communicate this to, *inter alios*, the debtor and the mortgagee.[96] The public sale can be carried out 30 days after it has been announced on one or more publicly accessible websites.[97] The mortgagee is, however, not required to conduct a valuation prior to the sale.

4.3 | Conclusion on impact

Of the researched countries, only France does not need to change its laws when implementing the directive regarding AECE regimes. The French AECE by means of appropriation is already in compliance with the Directive Proposal. The other countries will need to change their laws, even though they already have AECE regimes in place. The Dutch, Austrian, Belgian, and German AECE regimes, for example, do not comply with the Directive Proposal's requirements of a valuation by an independent valuer prior to the enforcement and a fixed reserve price. Furthermore, Belgian and German law would need to introduce an extrajudicial enforcement of collateral over immovables, because mortgaged property is presently enforced in these jurisdictions by a court-supervised sale. With the exception of France, the analysed jurisdictions would have to amend their available security interests or introduce a new compliant AECE mechanism.

5 | APPROPRIATENESS OF HARMONISATION

One can have doubts as to the appropriateness of the proposed framework for accelerated extrajudicial enforcement of collateral. The harmonisation ought to contribute to the tackling of existing NPLs,[98] but that goal will not be achieved with this part of the Directive Proposal. After all, the proposed AECE options will not automatically be applicable to existing NPLs. The proposed AECE options have to be agreed upon by the creditor and the debtor in advance. That means that for the Directive to have an impact on the current quantity of NPLs in the European Union, parties would have to successfully agree upon the proposed AECE method when the loan in question is already non-performing. In these situations, it is clear that a debtor is likely to refuse such an amendment of the security agreement. The debtor's acceptance of the AECE method would after all expedite the enforcement of the collateral.[99] When the debtor is unwilling to agree upon the new AECE method, the collateral has to be enforced in accordance with the already existing national enforcement regimes.[100] Moreover, it is not even that likely for creditors to propose the applicability of the framework. In the case of collateral that can be enforced under Dutch, Austrian, Belgian, and German law, the national laws on enforcement of collateral are more flexible in various aspects. For example, Austrian, Belgian, Dutch, and German law do not have the mandatory intervention of a valuer, the waiting periods for execution are often shorter, and there are no rules regarding a minimum yield.[101]

The preamble of the proposal states that the existing enforcement procedures within the European Union sometimes result in a lack of a level playing field with regard to the access to credit.[102] However, the potential harmonising effect of the Directive Proposal should not be overstated. This is

[96]Article 515, Code of Civil Procedure.

[97]Ibid., Article 516.

[98]See Directive Proposal, above note 2, 1–2.

[99]See also Sander Timmerman and Frits-Joost Beekhoven van den Boezem, "De ontwerprichtlijn voor de aanpak van Non-Performing Loans" (2018) *Tijdschrift voor Insolventierecht* 184.

[100]Existing enforcement mechanisms will not be replaced by the proposed AECE options, see Preamble Recital 40.

[101]However, the possibility to agree upon (the method of) appropriation before the occurrence of a default could be an attractive element in comparison with regular enforcement under Dutch law.

[102]See Directive Proposal, above note 2, Preamble Recital 42.

partly due to the limited scope of the Directive Proposal. For consumer loans, the proposed ways of extrajudicial execution cannot be agreed upon. The Directive Proposal's scope is limited to loans to business debtors.[103] Moreover, the Directive Proposal does not harmonise enforcement regimes in (pre-)insolvency proceedings, which will still be governed by national law.[104] The position of a secured creditor during such proceedings would still be subject to various regimes throughout the European Union.

From a substantive point of view, and as far as the investigated jurisdictions are concerned, the harmonised framework will probably not create an *accelerated* recovery of collateral over movables due to the strict requirements in the proposal in comparison with the existing enforcement instruments. For other jurisdictions, the proposal may indeed be a means to achieve faster and more predictable enforcement proceedings. However, a lot will come down to the application of the harmonised framework. For example, the Directive Proposal grants a debtor the right to go to court for an alleged violation of the enforcement rules.[105] The courts of one (more debtor-friendly) Member State may be more inclined to order a suspension of the execution than the courts of another (more creditor-friendly) Member State. In this respect, the differences between Member States may continue to exist and will affect the processing time for the enforcement. A harmonised extrajudicial execution mechanism will therefore not be a panacea for one of the problems that the Directive Proposal is supposed to address: the differences in the duration (and reliability) of enforcement procedures within Europe.

On the other hand, the proposed harmonisation can be seen as a meaningful step in the right direction. The aforementioned directive on financial collateral arrangements is a first example of a partial harmonisation of secured transaction law, which could be supplemented with other partial harmonisations. With the "ever closer union" in mind and in particular the unification of the European capital markets, it is understandable and justifiable to further harmonise the national laws on secured transactions. But the aforementioned circumstances do however raise questions about the timing and method.

The main advantage of the proposal seems to be the possibility for banks to agree on a more uniform and predictable enforcement method for foreign (European) security rights. In addition, the Directive Proposal gives Member States the chance to add new types of AECE mechanisms by transposing the directive.[106] However, the proposed out-of-court enforcement framework leaves room for improvement. As the proposed AECE mechanisms will contribute little to the tackling of existing NPLs, there seems to be ample time for further benchmarking and fine-tuning of the framework.

6 | CONCLUDING REMARKS

The harmonisation of secured transactions law will, without a doubt, contribute in a positive way to the European business climate and is probably inevitable in the long run of completing the European Union's internal market. Out-of-court enforcement of movable and immovable collateral forms an important building block of secured transactions law and as such deserves a harmonisation that is well-considered. Although the problems with NPLs created momentum for such harmonisation, we question whether they justify the (hasty) introduction of the proposed rules, taking into account the

[103]Ibid., Article 2(2).

[104]Ibid., Article 32.

[105]Ibid., Article 28. See further Article 24(4)(e) for the challenge of the valuation of the collateral.

[106]For example, AECE by way of appropriation insofar as this was impossible.

limited effects for existing NPLs.[107] As for the momentum, recent data show that the amount of NPLs can decrease significantly even without harmonisation of collateral enforcement. At the start of 2015, European banks had more than EUR 1 trillion in nominal value of NPLs on their balances. In the first quarter of 2019, that amount had decreased by almost 45% to EUR 586 billion (3.67% of the total outstanding loans).[108] These positive developments give reason to reconsider the manner, timing, and scope of the harmonisation of extrajudicial collateral enforcement in Europe.[109]

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[107] We nonetheless expect that the tightening up of prudential supervision and the further development of a European secondary market have more potential to tackle NPLs.

[108] See ECB Statistics, above note 3, T04.02.2 Asset quality: non-performing loans and advances by country, 60.

[109] At the moment of finalising this article, the Council has adopted its position on the Directive Proposal. Negotiations on the Directive have been split into two work streams: (a) issues related to credit servicers and credit purchasers and (b) issues related to the recovery of collateral. Title V on AECE has not progressed so far, and no changes have been made. The current draft of the Directive Proposal, which does not contain the original Title V, is available at https://data.consilium.europa.eu/doc/document/ST-7344-2019-ADD-1/en/pdf.