The transfer of claims under credit agreements
M.H.P. Claassen and J.L Snijders[1]

This is a translation by order of FIZ advocaten of 'De overdracht van vorderingen uit hoofde van kredietovereenkomst' as published in the Journal of Financial Law ('Tijdschrift voor Financieel Recht' (TFR) 2020/04).

On 24 December 2019, the Dutch Minister of Finance submitted an amendment to the *Vrijstellingsregeling Wft* (Exemptions Regulation under the Financial Supervision Act – "Wft Exemptions Regulation") for consultation.[2] The consultation deadline was 16 February 2020.[3] One of the objectives of the amendment is to change the exemption regarding the licence requirement for providing credit in respect of parties that obtain credit claims. Although the amendment is presented as a relaxation and clarification, it has an entirely different effect. In this article we will address the supervisory-law aspects and context of the transfer of credit claims, make a number of critical comments on the proposed amendment and deal with a number of subjects that are relevant to the transfer of credit claims.

Exemption for companies taking over claims

Under Article 2:60 of the *Wet op het financieel toezicht* (Financial Supervision Act) it is prohibited to offer (mortgage and consumer) credit (as defined in Article 1:1 of the Financial Supervision Act) without a licence granted for that purpose by the AFM (the Netherlands Authority for the Financial Markets). The offering of credit is a broad concept. It includes not only making a sufficiently specific proposal, either directly or indirectly, in the pursuance of a professional practice or business to "act as the counterparty" in a contract with a consumer, but also to enter into, manage or administer such a contract in the pursuit of a professional practice or business.

When the *Wet financiële dienstverlening* (Financial Services Act), the predecessor of the Financial Supervision Act, entered into force, it was acknowledged that the broad definition of "offering" could have unintended consequences for the securitisation practice. In a securitisation, the lender of record assigns its claims under the credit agreement to a special purpose vehicle (SPV). The SPV finances the purchase of the claims by issuing (usually) bond loans. In the legislature's line of reasoning (which is incorrect under civil law), the SPV becomes the "counterparty" to the agreement as a result of the assignment: *"If the legal ownership of the claims does pass to the SPV, the SPV becomes the counterparty to the credit agreements in question. The legislative proposal then fully applies to the SPV as the administrating counterparty."*[4] The SPV would then require a licence under the Financial Services Act/Financial Supervision Act. But the legislature found that the SPV itself does not administer the credit agreement in practice. Another company, the "credit manager",[5] usually assists the SPV in the management and administration of the agreements. In that case that credit manager is legally regarded as a credit broker. The legislature therefore decided that the SPV is exempt from the licence requirement for offering credit, provided that the claims

[1] M.H.P. Claassen and J.L. Snijders are lawyers at FIZ advocaten in Rotterdam, the Netherlands.
[2] The proposal of 24 December 2019 of the Minister of Finance to amend the Wft Exemptions Regulation, submitted for consultation with a view to the amendment of the articles related to the transfer of claims under a credit agreement and the Wft Implementing Regulations with a view to changes to the amount of cover for professional liability insurance, which can be found at https://www.internetconsultatie.nl/vorderingenuitkredietovereenkomst.
[3] The Dutch Banking Association (*NVB*), the Dutch Securitisation Association (*DSA*), Loyens&Loeff and FIZ advocaten have responded. Their comments can be found at https://www.internetconsultatie.nl/vorderingenuitkredietovereenkomst.
[4] Dutch Lower House, Parliamentary year 2003-2004, 29 507, no. 3, p. 76. See also the explanation of Article 3 of the Wft Exemptions Regulation, Government Gazette 2006, 229.
[5] See the definition in Article 1 of the Wft Exemptions Regulation.

are managed and administered by a party that has a licence to provide credit or to act as a broker in that regard.[6,7]

The current Article 3 of the Wft Exemptions Regulation provides that companies that "acquire the legal ownership"[8] of claims under credit agreements that they themselves have not entered into as the counterparty are exempt from the licence requirement under Article 2:60(1) of the Financial Supervision Act insofar as:

(i) the management and administration of those agreements takes place on a contractual basis by a "credit manager" that is permitted by law to act as a credit broker or to offer credit; and
(ii) that credit manager provides the information within the meaning of Article 68 of the *Besluit gedragstoezicht financiële ondernemingen Wft* (Market Conduct Supervision (Financial Institutions) Decree) in the manner prescribed in that article.

Please note that the applicability of the Wft Exemptions Regulation is not limited to securitisation SPVs, but applies to all companies that acquire credit claims. And rightly so, because the transfer of credit claims is not limited to securitisation transactions.[9] Mortgage and other credit claims are transferred to SPVs also in whole loan sale transactions, warehouse transactions or covered bonds transaction, whereby the lender of record remains the counterparty under civil law and whereby the lender of record remains in charge of the management and administration. The exemption is furthermore relevant to certain crowdfunding structures in which the crowdfunding platform itself acts as the credit provider and then transfers the credit claims to the crowd. Provided that all the other criteria for "offering credit" are also met, including the requirement to act in the pursuance of a professional practice or business and to provide credit to consumers, Article 3 of the Wft Exemptions Regulation offers the acquiring company/crowd an exemption from the current licence requirement also in that regard.[10]

Under Article 43(4) of the Wft Exemptions Regulation, companies that comply with Article 3 of the Exemptions Regulation are also exempt from the market conduct supervision section of the Financial Supervision Act. As a result of that exemption, a company that meets the conditions of Article 3 of the Wft Exemptions Regulation therefore falls entirely outside the scope of the Financial Supervision Act.

6 Article 3 of the Wft Exemptions Regulation that was copied almost verbatim from Article 2 of the Wft Exemptions Regulation. See also the explanation of Article 2 of the Wft Exemptions Regulation (Government Gazette 2005, 247) and Article 3 of the Wft Exemptions Regulation (Government Gazette 2006, 229).

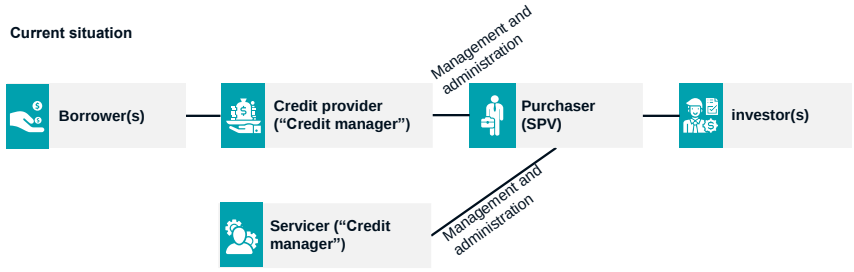
7 The question of principle could be raised to what extent a company that acquires claims under a credit agreement actually constitutes a credit provider, as the legislature believes. An SPV primarily serves as a bankruptcy remote entity and does not have any employees. The lender of record remains the contractual counterparty and is under supervision. Unlike the legislature believes, the acquiring company does not become a party to the credit agreement by taking over claims. Particularly in the case of undisclosed assignment, in which the consumer is entirely unaware of the acquiring company and in which the lender of record retains the debt collecting power, it is unclear how and why the acquiring company could be regarded as a credit provider. It also gives rise to the somewhat strange situation in which there are two credit providers, whereby it is also unclear on what ground the AFM could and should take enforcement measures against the acquiring company as a credit provider.

8 Better under the civil law: "that become entitled to the claims".

9 See for the definition of "securitisation" Article 2 of Regulation (EU) No 2017/2402 of 12 December 2017 to determine a general framework for securitisation and to set up a specific framework for uniform, transparent and standardised securitisation, OJ 2017, L347 (STS Regulation), J.C. Hintzen, *De securitisatie verordening: een nieuw regulatoir kader voor securitisaties,* TFR no. 8/9, 2019 and E.P.M. Joosen, *Rondom het nieuws: securitisation of the third kind*, TFR no. 4, 2019.

10 The exemption applies to the transfer of claims under credit agreements, as defined in Article 1:1 of the Financial Supervising Act. Briefly stated, the provision to consumers of a sum of money, but also postponement of payment. Similar transactions/structures may also relate to claims under other agreements, such as leases or money loan agreements that do not constitute credit within the meaning of the Financial Supervision Act (such as commercial buy-to-let loans). If the underlying agreement is not regulated, the same applies to the companies that acquire the claims under those agreements.

A credit manager is defined in Article 1(b) of the Wft Exemptions Regulation as a broker that assists the acquiring company with regard to the transfer of credit claims in the management and administration of those agreements. The above can be illustrated as follows:



The proposed amendment

The proposed amendment amends Article 3 of the Wft Exemptions Regulation. After the amendment, companies to which credit claims have been transferred are exempt from the licence requirement for offering credit under Article 2:60(1) of the Financial Supervision Act, insofar as the party that entered into the credit agreement as the counterparty continues to manage and administer the credit agreement. Along those lines, the definition of "credit manager" in Article 1(b) of the Wft Exemptions Regulation has also been omitted.

It is apparent from the brief explanation of the proposed amendment that the intention is first of all to facilitate *regiepartijen* (mortgage funds that originate mortgage loans on behalf of institutional investors) and investors (usually institutional investors), and to limit their administrative and other burdens. According to the Minister, it should be avoided that those parties are confronted with costs when applying for a licence to act as a broker or to offer credit. No further explanation has been provided of the term *regiepartijen*. We assume that the Minister is primarily referring to parties/mortgage labels such as Merius Hypotheken (Fenerantis B.V.), Munt Hypotheken B.V. and Tulp Hypotheken (Tulpenhuis 1 B.V.): parties that offer mortgage loans in the Netherlands that are financed[11] by (foreign) (institutional) investors. Those parties operate on the basis of an originate-to-distribute model. They raise the funds of (foreign) (institutional) investors and private house buyers, provide the loans and manage them for the benefit of the investors (and in that respect act as *regiepartijen*).[12]

It is noted in the explanation of the proposed amendment that the amendment of Article 3 of the Wft Exemptions Regulation first of all avoids a situation in which institutional investors that take over credit claims from the lender of record must apply for a licence in order to offer credit. Secondly, the proposed amendment clarifies that the lender of record may continue to manage and administer the credit agreement on the basis of its licence for offering credit and does not require a licence to act as a broker under Article 2:80(1) of the Financial Supervision Act. The clarification that the lender of record may continue to manage and administer the credit agreement on the basis of its licence as a credit provider and does not also need a licence as a broker is of course a welcome clarification, although we would organise this differently; more on which below.

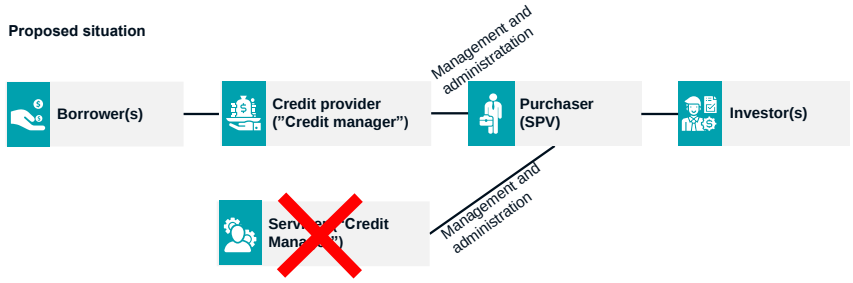
Although the intention is to ease the burden on *regiepartijen* and investors and to limit their administrative and other costs, the proposed amendment will have the opposite effect. As we will explain below, in our opinion the proposed amendment limits the possibilities of efficiently structuring transactions. The need for the amendment is also unclear: it adds

[11] The term "financed" is not entirely correct. The claims are purchased by the SPV, for which a purchase price is paid, which it usually finances by issuing bond loans.
[12] See e.g. *Revolutie op de hypotheekmarkt is kwestie van lange adem*, *Financieele Dagblad* 23 December 2019.

nothing to the current Article 3 of the Wft Exemptions Regulation. The current text already makes it clear that companies – which include institutional investors – that acquire those claims under credit agreements on the grounds of an assignment are exempt if the conditions in question are met, regardless of whether the assignment takes place in the context of securitisations, whole loan sales, warehouse transactions or in another manner.[13] The new proposed Article 3 expressly does not change this.

Consequences for use of the exemption

So what is the adverse effect (if any)? Under the current Article 3 of the Wft Exemptions Regulation, the exemption is subject to the condition that the claims are managed and administered by "a credit manager" that is authorised to act as a credit broker or to offer credit. The proposed amendment tightens this condition in the newly proposed Article 3. Under the new Article 3, a company is eligible for an exemption only if the claims are managed and administered by "the lender of record". Under the new Article 3, it is therefore no longer possible to have the claims managed and administered directly by a party other than the lender of record. This can be illustrated as follows:

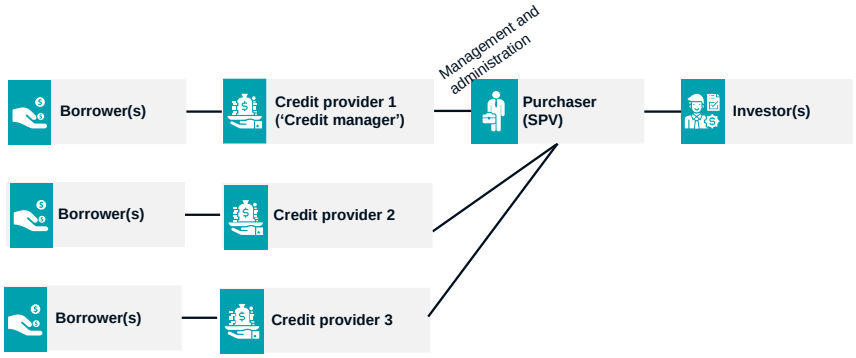


It is not explained why the exemption should be limited on this point. We fail to see the logic. The supervision is not impeded and the consumers' interest does not appear to be at risk, since also under the current regime the servicing (the management and administration) of the claims is performed by licensed parties, supervised by the *AFM*. The limitation may, however, create major obstacles on the market. The Minister appears to be unaware that, although in practice the lender of record usually remains responsible for the management and administration of the claims (possibly outsourced to third parties), it is entirely possible that at some point after the transfer the lender of record is not (or no longer) in charge of the servicing. That misconception may have a major impact. Three examples are provided below.

First, a situation may occur in which at some point after the transfer the lender of record goes into liquidation or must be replaced as the servicer for other reasons (such as the sale of its management activities). Under the current regime, such a situation need not be a problem, because a licensed third party may continue the servicing and the SPV may continue to use the exemption. That is no longer possible under the new regime. In that situation the acquiring company (the SPV/assignee) could keep the portfolio only if that company itself obtained a licence. That is impossible for an SPV in a securitisation or covered bond transaction. A securitisation SPV will not be able to meet the licence requirements without employees. In sum, the new regulations present a risk to the Dutch securitisation and covered bond market, with all the possibly negative effects that may entail.

[13] Insofar as it was unclear, the explanation of the proposed amendment clarifies that the exemption applies only to the assignment/transfer of the claims under credit agreements. In the case of contract takeover – which requires the borrowers' consent – the acquiring company will definitely require a licence to offer mortgage and other loans. The lender of record can no longer be regarded as a credit provider after a contract takeover.

A second example is lending by several credit providers within a group, whereby the credit claims are transferred to one company, within or outside the group. In that case all the claims are managed and administered by only one party after the transfer. That party may be one of the credit providers, but could also be another entity with the group. It applies also in this regard that the company that acquires the claims is exempt from the licence requirement in the current regime, but can no longer use the exemption under the newly proposed regime.



A third example of a possibly very harmful effect is that Dutch securitisations may no longer be eligible for the STS designation[14]. The STS Regulation stipulates as a condition for securitisations that wish to be eligible for the STS designation that the transaction documentation enables the replacement of the servicer to safeguard the continuity of the servicing.[15] The servicer is the "entity that manages a pool of purchased receivables or the underlying credit exposures on a day-to-day basis:[16] in other words, the "credit manager" referred to in the Wft Exemptions Regulation. Under the new Exemptions Regulation, safeguarding that continuity of the servicing by a third party will be problematic, as explained above: if the servicer is replaced, the exemption will be lost and the SPV itself will have to obtain a licence in order to offer credit.

We have demonstrated above that the proposed amendment/limitation may have very harmful effects. The parties that have responded to the consultation have indeed unanimously drawn attention to the limitations for the securitisation practice and have called the need for the amendment into question. We fail to see the reason for the limitation; no explanation whatsoever has been provided. We assume for the present that the harmful effects were not intended and hope that the amendment will not be implemented.

Clarification that the lender of record does not require a licence to act as a broker

A second objective of the amendment to the Wft Exemptions Regulation is to clarify that the lender of record may continue to manage and administer the credit agreement on the basis of its licence to provide credit, and therefore does not require a licence to provide brokerage services under Article 2:80(1) of the Financial Supervision Act. That is indeed a welcome clarification.

The current Article 3 of the Wft Exemptions Regulation and the definition of "credit manager" are inherently inconsistent. Article 3 of the Wft Exemptions Regulation stipulates as a

14 The STS Regulation sets out general rules that apply to all securitisations and furthermore introduces an STS designation. Securitisations that meet strict criteria may carry the STS designation. Securitisations with the STS designation enjoy a more favourable regime under the capital requirements for banks and investment companies.
15 See e.g. Article 21(7)(b) of the STS Regulation.
16 Article 2(13) of the STS Regulation.

condition for the exemption that the credit agreement is managed and administered by "a credit manager that is permitted by law to provide brokerage services or to offer credit", whereas a credit manager is defined in Article 1(b) of the Wft Exemptions Regulation only as a "broker" that assists in the management and administration of credit agreements.

The AFM's policy on this point is also not unequivocal. Whereas the AFM stated when asked that it is also permitted to provide brokerage services on the grounds of a permit for offering credit, the AFM in fact expressly requires of a credit manager in other securitisation (or securitisation-related) transactions that it has a licence to provide brokerage services in addition to the licence to offer credit.[17] Clarification on this point is therefore highly desirable.

In our opinion, the term "credit manager" in Article 1(b) of the Wft Exemptions Regulation could be omitted by way of clarification (as has already been proposed). In (the current) Article 3 of the Wft Exemptions Regulation, the term "credit manager" could be replaced with "company" or (possibly more precise) "financial service provider", since the term "financial service provider" includes both the provider of credit and the credit broker. Article 3 of the Wft Exemptions Regulation would then read as follows:

"Enterprises that acquire the legal ownership of claims under credit agreements not entered into by those enterprises themselves as the counterparty are exempt from Article 2:60(1) of the Financial Supervision Act insofar as those agreements are contractually managed and administered by a credit manager financial service provider that is authorised by law to provide brokerage series or to offer credit, and that credit manager financial service provider provides the information referred to in Article 68 of the decision in the manner prescribed in that article."

As Loyens&Loeff has also proposed in its response to the consultation, an alternative might be to keep the definition of "credit manager", but to add the "provider" of credit in addition to the "broker". The definition of "credit manager" would then read as follows:

"a provider or broker that assists the acquiring company in respect of the transfer of claims under credit agreements in the management and administration of those agreements."

Both of these changes clarify that the lender of record is permitted also on the grounds of its credit provider licence to continue to manage and administer the credit agreements whose claims have been transferred, because "management and administration" expressly form part of the definition of "offering credit". At the same time it is clear that the company (the SPV) that has taken over the claims is also exempt from the licence requirement if the claims are managed and administered by a broker, not being the lender of record.

Exemption from the ban on commission

We furthermore advocate a generic exemption from the ban on commission (for instance in a (new) Article 3(2) of the Wft Exemptions Regulation) for "credit managers" that act as brokers for parties that acquire claims under mortgage loan agreements and that meet the conditions of Article 3 of the Wft Exemptions Regulation.

The activities of a "credit manager" constitute brokerage one way or another. That also applies if no separate brokerage licence is required for that purpose and those activities may also be performed under a credit provider's licence, as the Minister has now clarified. Article 4:25a(2) of the Financial Supervision Act and Article 86c of the Market Conduct Supervision

[17] All of the mortgage funds named above, Fenerantis B.V, Munt Hypotheken B.V. and Tulpenhuis 1 B.V., also have a licence for offering both mortgage loans and the brokerage services in question, as apparent from the AFM licence register.

(Financial Institutions) Decree provide for a ban on commission in respect of mortgage loans. This means that the broker may not receive a fee for his or her services from the provider of mortgage loans but must be paid directly by the customer/consumer. But because the "credit manager" performs activities only for the company or the SPV that acquires the claims (of which the consumer is usually not even aware), and not for consumers, the costs involved can be charged only to the acquiring company. In practice, an exemption from the ban on commission is therefore usually applied for at the AFM in that case.[18, 19]

If the Minister's intension in amending Article 3 of the Wft Exemptions Regulation is to facilitate investment funds and investors (usually institutional investors), to limit their administrative and other costs, and to prevent those parties from being confronted with costs when applying for a licence for providing brokerage services or offering credit, a generic exemption from the ban on commission for *regiepartijen* would make sense. Otherwise those *regiepartijen* would be accommodated in the sense that they would no longer need to apply for a brokerage licence, but would, however, need to apply for an exemption from the ban on commission.

Information requirements

It is also noted in the explanation of Article I(D) of the amendment to the Wft Exemptions Regulation that, in order to be eligible for the exemption, the credit provider that manages and administers the credit agreement must meet information requirements and other rules of conduct under the Financial Supervision Act and the Market Conduct Supervision (Financial Institutions) Decree during the term of the credit agreement.

The information in question is set out in Article 68 of the Market Conduct Supervision (Financial Institutions) Decree. The current Article 3 of the Wft Exemptions Regulation also refers to that information. On the basis of that provision, a credit provider must (i) provide the consumer at his or her request with an itemisation of the outstanding balance during the term of a credit agreement; and (ii) until one year after settlement of credit agreement provide a consumer at his or her request free of charge with an itemised final settlement. That condition already forms part of the current Article 3 of the Wft Exemptions Regulation. It is remarkable that the explanation of the proposed amendment expressly refers to that requirement, but that condition is not included in the proposed Article 3. We therefore assume that this is a slip of the pen in the proposed amendment.

Transitional arrangement

The fact that the Minister does not appear to be entirely aware of the consequences of the proposed amendment to Article 3 of the Wft Exemptions Regulation is also apparent from the proposed effective date. The consultation period ended on 16 February 2020. The proposed effective date of the amendment is 1 April 2020. If the proposed amendment regarding the scope of the exemption were to go ahead, companies that have acquired credit claims and that are currently using a credit manager other than the lender of record will require a licence as from 1 April 2020.

[18] See also the *Interpretatie ontheffingsmogelijkheid serviceorganisaties* of the AFM of November 2012, in which the AFM states how it assesses exemption applications (https://www.afm.nl/nl-nl/professionals/doelgroepen/adviseurs-bemiddelaars/beloning/provisieverbod)

[19] For the record, the AFM keeps a list on its website of the exemptions granted. However, they are only the "generic" exemptions, meaning the exemptions of "service organisations" that apply to all the credit providers to which they provide brokerage services. With regard to transactions governed by Article 3 of the Wft Exemptions Regulation, the AFM usually grants a "specific" exemption for one or more credit providers/acquiring companies/SPVs to which the credit manager provides brokerage services. Those "specific" exemptions are not included in the AFM's list of exemptions granted.

Those companies must by that time either have transferred the management and administration to the lender of record or themselves have a licence for offering credit. That is virtually impossible in light of the AFM's decision period for a licence for offering credit alone. Should the amendment be implemented, it would be preferable to limit it to new transfers of claim. If the amendment were also declared applicable to existing transactions, a reasonable transitional arrangement must in any event be provided for.

This concludes our comments on the proposed amendment to the Wft Exemptions Regulation. We would also like to use this opportunity to briefly address two subjects that are relevant to the transfer of claims but that are not directly affected by the proposed amendment.

Interest rate determination

A first point for attention in practice on the transfer of credit claims that is unrelated to the proposed amendment to the Wft Exemptions Regulation is the question which party is authorised to determine the interest rate for the underlying credit agreements after transfer of the claims on the date of the interest rate review. Investors like to be able to influence the interest rate on an interest rate review. The AFM considers the influence of investors on the interest rate determination undesirable and requested the Minister in its 2016 legislative letter to investigate the possibilities of including safeguards for mortgages financed by investors.[20] The AFM fears that possible future developments, such as contracting margins on investments in mortgages, may cause investors to lose interest and, on an increase in an interest rate review, will attempt to discourage customers from staying at that provider. The AFM now includes regulations when granting licences to draw the parties' attention to their obligation to act with due care and to address the risk of such high interest rates.

The lender of record must furthermore take into account the single-track interest rate policy under Article 81a of the Market Conduct Supervision (Financial Institutions) Decree. In other words, it must apply the same debit interest rate to the same fixed- interest period for all consumers to which an offer is made at that time for the upcoming fixed-interest period if they have a similar risk profile. To avoid any misunderstanding, this applies to the consumer's risk profile, not that of the investor. The consumer's risk profile depends on the value of the dwelling or the income of the consumer in question in relation to the amount of the outstanding mortgage loan (loan to value and loan to income, respectively) and whether the mortgage is covered by the National Mortgage Guarantee; regional differences may be taken into account and discount campaigns are possible.[21] In an interest rate review, the lender of record (which in our opinion remains the applicant of the single-track interest rate policy under Article 81a of the Market Conduct Supervision (Financial Institutions) Decree)[22] may therefore not distinguish on the basis of the underlying investor.[23]

Agreements on management and administration

The exemption in Article 3 of the Wft Exemptions Regulation stipulates as a condition for the

[20] https://www.afm.nl/nl-nl/professionals/nieuws/2016/jul/wetgevingsbrief.
[21] Bulletin of Acts and Decrees 2012, 695, p. 85.
[22] Article 81a of the Market Conduct Supervision (Financial Institutions) Decree does not apply to the acquiring company under Article 43(4) of the Wft Exemptions Regulation. It is also not in keeping with the single-track interest rate policy for a distinction to be made in the interest rate fixing for borrowers depending on the investor to which the (undisclosed) claims have been transferred.
[23] From a civil-law perspective, it is generally assumed that the interest rate review right passes as an ancillary right to the acquiring party (the assignee) but that (unless otherwise clearly stated) the borrower may rely on it that it is bound only by the interest rates of the lender of record/assignor. See M.H.E. Rongen, *Cessie*, Kluwer, Deventer, 2012, pp. 1357 and 1360.

exemption that the claims are managed and administered (and “contractually” according to the current text of Article 3) by a credit manager or by the lender of record. This means that the acquiring companies will have to make agreements with the credit manager about the management and administration of the claims taken over. That is easily said but may be difficult to implement in practice – particularly bearing in mind our objections in principle to the legislature’s position that the company acquiring the claims must be regarded as a credit provider.[24]

In practice, a servicing agreement is usually entered into with an underlying service level agreement (SLA). The question is, however, on what “management and administration” exactly agreements must be made. What work will be performed for the company that acquired the claims under the credit agreements (the servicing activities)? The acquiring company is regarded by the legislature as a credit provider, but most of the work performed in respect of credit agreements will be related to the responsibilities of the lender of record (LoR activities): changes on the part of the borrower, complaints settlement, interest rate determination, etc. In actual fact only possible debt collection activities, including default management, are performed for the benefit of the party that took over the claims (the “new and second” credit provider), of which (particularly in the case of undisclosed assignment) the consumer is unaware and by which he or she is not affected. The discussion is particularly pertinent to the implementation of new legislation, such as the Mortgage Credit Directive (MCD),[25] but also the General Data Protection Regulation (GDPR)[26] and the question who pays the costs involved. It is advisable to take this into account when drawing up the servicing agreement.

On a final note

In light of the above, there is no reason in our opinion to amend Article 3 of the Wft Exemptions Regulation. Unlike the Minister probably assumes, the proposed amendment on the introduction of the obligation of servicing by the original credit provider does not offer regulatory relief, but in fact limits the current exemption, entailing the risk of harmful effects for the market. There is no justification for that limitation, or in any event no justification has been provided. A clarification that the lender of record may also manage and administer the transferred credit claims on the basis of its credit provider licence would be welcomed. That clarification would be even more comprehensive if the Wft Exemptions Regulation also included an exemption from the ban on commission for companies that acquire claims under mortgage loan agreements.

[24] See footnote 7.
[25] Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ 2014, l 60/34).
[26] Regulation 2016/679/EU of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.