



EUROPEAN CENTRAL BANK  
EUROSYSTEM

## OPINION OF THE EUROPEAN CENTRAL BANK

of 5 November 2010

**on amendments to the legislation on financial collateral arrangements as regards credit claims  
(CON/2010/78)**

### **Introduction and legal basis**

On 23 September 2010 the European Central Bank (ECB) received a request from the Luxembourg Ministry of Finance for an opinion on a draft law transposing Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and EC/2006/48/EC and repealing Directive 2000/46/EC<sup>1</sup> and Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims<sup>2</sup> (hereinafter referred to as ‘the draft law’) which amends (a) the Law of 10 November 2009 relating to payment services, the business of electronic money and settlement finality in payment and securities settlement systems, (b) the Law of 5 August 2005 on financial collateral arrangements, (c) the Law of 12 November 2004 relating to the fight against money laundering and financing of terrorism, (d) the Law of 5 April 1993 relating to the financial sector and (e) the Law of 23 December 1998 establishing a commission for the supervision of the financial sector.

The ECB’s competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union and the second, fifth and sixth indents of Article 2(1) of Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions<sup>3</sup>, as the draft law contains provisions on means of payment, payment and settlement systems as well as rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets. The scope of the draft law goes beyond the transposition of Union directives into national law, so the exception contained in Article 1(2) of Decision 98/415/EC does not apply. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

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<sup>1</sup> OJ L 267, 10.10.2009, p. 7.

<sup>2</sup> OJ L 146, 10.6.2009, p. 37.

<sup>3</sup> OJ L 189, 3.7.1998, p. 42.

## 1. Purpose of the draft law

In addition to transposing Directives 2009/110/EC and 2009/44/EC, the draft law amends as follows Article 5(2)(a) of the Law of 5 August 2005 relating to financial collateral arrangements: ‘Financial instruments that may be transferred by entering into an account may be validly dispossessed:

- (i) by entering into the pledge contract if the depositor of these financial instruments is the pledge creditor;
- (ii) by an agreement between the pledgor, the pledge creditor and the depositor or by an agreement between the pledgor and the pledge creditor notified to the depositor according to which the depositor will act in accordance with instructions from the pledge creditor concerning these financial instruments and without any other agreement by the pledgor;
- (iii) by entering these financial instruments into an account of the pledge creditor;
- (iv) by entering these financial instruments, without indicating the number, onto an account opened for a depositor in the name of the pledgor or a person to be agreed acting as a third party holder, the financial instruments having been designated in the depositor’s accounts individually or collectively by reference to the relevant account in which they have been entered as pledged.<sup>4</sup>

Article 2(2)(a) *in fine* of the draft law provides that the ‘dispossession [mechanisms] as provided under points (ii), (iii) and (iv) shall be considered as a waiver by the depositor of their pledge’s ranking over the same financial instruments unless agreed otherwise or merely notified to the depositor in accordance with point (ii).’

## 2. The financial collateral arrangements as regards credit claims

2.1 The draft law amends and simplifies the regime for the creation of collateral arrangements as regards credit claims. Under Article 5(3) of the Law of 5 August 2005 on financial collateral arrangements, the creation of a pledge over a credit claim is only valid and effective against third parties upon notification or acceptance by the debtor of the pledged credit claim. Under the draft law, a financial collateral arrangement regarding credit claims is to be valid and enforceable vis-à-vis all third parties, provided that (a) a pledge agreement has been entered into between the collateral taker and the collateral giver<sup>5</sup> and (b) the said claims have been included in a list of claims submitted in writing to the collateral taker or by any other legally equivalent manner<sup>6</sup>. The debtor of the pledged credit claims may also waive the right of set-off as well as of any other exceptions in relation to the creditor of the claim provided as collateral and in relation to persons to whom the creditor has granted an assignment, pledge or any other mobilisation of the claim. Such waiver will be valid between the parties and against third parties<sup>7</sup>.

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4 Article 2(2)(a).

5 Article 2(2)(c).

6 Article 2(1)(a).

7 Article 2(1)(c).

- 2.2 In order to avoid the abovementioned notification or acceptance conditions provided under Article 5(3) of the Law of 5 August 2005 on financial collateral arrangements, the Law of 13 July 2007 had introduced, in Article 22(1) of the Organic Statute of the Banque centrale du Luxembourg (BCL), a regime for the creation and enforceability of financial collateral arrangements as regards claims in favour of the BCL, either acting on its own behalf or on behalf of the ECB or other central banks forming an integral part of the European System of Central Banks, within the context of the credit operations of monetary policy. Under that regime, which was subject to a previous ECB opinion<sup>8</sup>, pledges of claims were enforceable vis-à-vis third parties as soon as they were entered in a BCL register and made accessible to third parties for this purpose.
- 2.3 The draft law would significantly simplify the rules on the creation, enforcement and enforceability of financial collateral arrangements as regards credit claims and would strengthen the overall legal soundness of the relevant mechanism, especially by allowing the debtor to waive its right of set-off and any other exceptions. However, the ECB recommends that the Luxembourg legislator address the interaction between the proposed new regime and the regime governing the pledging of claims in favour of the BCL. The ECB understands that, in the absence of any specific provisions to the contrary, the two regimes would simply co-exist. In the interests of transparency and legal certainty, the draft law should instead extend the possible contractual waiver by the debtor of the pledged claim of its right of set-off or any other exception also to any pledge of claims registered on the BCL register.

### **3. Waiver by the depositor of the ranking of its pledge over the underlying financial instruments subject to financial collateral arrangements in favour of third parties**

- 3.1 The draft law also simplifies the possible conflict of rank between, on the one hand, a depositor<sup>9</sup> and, on the other hand, the pledge creditor in respect of financial instruments that have either been entered into an account of the pledge creditor, or an account opened with a depositor in the name of the pledgor, or that are governed by an agreement between the pledgor, the depositor and the pledge creditor. In these cases the depositor would act in accordance with the pledge creditor's instructions in respect of such instruments. Unless agreed otherwise, if the depositor registers the underlying financial instruments on a separate account or accepts or notifies the agreement entered into between the pledgor and the pledge creditor as regards the management of the account in accordance with the pledge creditor's instructions, this implies the waiver by the depositor of its pledge's ranking over such financial instruments. In this case, the Luxembourg legislator would simplify the rules enabling the creation of higher ranking pledges

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<sup>8</sup> ECB Opinion CON/2006/56. All ECB opinions are available on the ECB's website at [www.europa.eu](http://www.europa.eu).

<sup>9</sup> The concept of depositor, under the draft law, is to be understood, in the light of Article 2 of the Law of 1 August 2001 on the circulation of securities and other fungible instruments as encompassing the credit institutions, to be investment firms, professional depositories of securities as well as national and international public bodies established in Luxembourg and acting in the financial sector.

over such financial instruments<sup>10</sup>, as the depositor's consent would now no longer be required in this respect.

- 3.2 Under Article 18 of the Statute of the European System of Central Banks and of the European Central Bank, credit operations conducted by the national central banks (NCBs) must be based on adequate collateral. Moreover, pursuant to Standard 1 of the 'Standards for the use of EU Securities Settlement Systems in ESCB Credit Operations' the NCBs' rights in respect of securities held in their accounts in securities settlement systems must be adequately protected<sup>11</sup>. In this context, the financial instruments serving as collateral for monetary policy purposes are transferred by the BCL's counterparties either to the account opened in the name of the BCL with the domestic central securities depository (CSD) or, as regards new collateral management products offered by the BCL to counterparties, to the account opened in the counterparties' names with such CSD. The ECB understands that, without prejudice to the earmarking operations that take place on the BCL's books in the first scenario, such transfer will give effect to the dispossession mechanism described in Article 2(2)(a)(iii) of the draft law and will imply the waiver, by the CSD as depositor, of its pledge's ranking over such financial instruments. The ECB therefore considers that the BCL's rights as first-rank collateral taker will be reinforced by the introduction of such provision into Luxembourg law.

This opinion will be published on the ECB's website.

Done at Frankfurt am Main, 5 November 2010.

[signed]

*The President of the ECB*

Jean-Claude TRICHET

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<sup>10</sup> See Article 2(3)(b).

<sup>11</sup> See in this sense paragraph 8 of ECB Opinion CON/2005/12 and paragraph 1 of ECB Opinion CON/2006/40.