III

(Preparatory acts)

EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 18 July 2018

on a proposal for a regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims

(CON/2018/33)

(2018/C 303/02)

Introduction and legal basis

On 12 March 2018, the European Commission adopted a proposal for a regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims (hereinafter the 'proposed regulation') ([1]). The European Central Bank (ECB) considers that the proposed regulation falls within its scope of competence, and it has therefore decided to exercise its right, as provided for in the second sentence of Article 127(4) and in Article 282(5) of the Treaty on the Functioning of the European Union (hereinafter the 'Treaty'), to submit its opinion.

The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty, since the proposed regulation contains provisions affecting (a) the basic task of the European System of Central Banks (ESCB) to implement the monetary policy of the Union pursuant to Article 127(2) of the Treaty, insofar as the proposed regulation affects the interests of ESCB central banks in connection with the collateralisation of Eurosystem credit operations; and (b) the ESCB's contribution to the smooth conduct of policies pursued by the competent authorities relating to the stability of the financial system pursuant to Article 127(5). 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.

1. General observations

1.1. The assignment of claims is one of the means through which financial market participants obtain liquidity and/or access credit necessary for the pursuit of their business activities. At present, the proprietary effects of the assignment of claims are governed by national laws, which are inconsistent across Member States. Specifically for claims that are bank loans, although certain material aspects have been harmonised through Directive 2002/47/EC of the European Parliament and of the Council ([2]), the validity of their assignment and the constitution of collateral rights over them remain subject to national law ([3]). Without harmonisation, economic agents in the European Union cannot know which requirements will apply for a valid assignment of or a collateral transaction over a claim in the context of a cross-border transaction ([4]). Besides, although some measure of harmonisation has been achieved under Article 14 of Regulation (EC) No 593/2008 of the European Parliament and of the Council ([5]), its provisions do not designate the law applicable to all *in rem* effects of the assignment of claims ([6]). Uncertainty in respect of the

([1]) COM(2018) 96 final.

([2]) Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (OJ L 168, 27.6.2002, p. 43).

([3]) Article 3(1) of Directive 2002/47/EC allows Member States to retain the national rules in respect of the creation, validity, perfection, enforceability or admissibility in evidence of a financial collateral arrangement or the provision of financial collateral under a financial collateral arrangement that existed prior to the adoption of Directive 2002/47/EC.

([4]) The explanatory memorandum to the proposed regulation aptly states that 'clarity as to who owns a claim further to its cross-border assignment is relevant for participants in financial markets and also for the real economy' (see p. 8).

([5]) Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008, p. 6).

([6]) This is despite the fact that recital 38 of Regulation (EC) No 593/2008 states that in the context of voluntary assignments Article 14(1) also applies to the property aspects of an assignment, as between assignor and assignee.

applicable law in the context of the cross-border assignment of claims raises both legal and financial risks for financial market participants, the mitigation of which entails added financial transaction costs as well as complexities in terms of the realisation of claims in assignor insolvency situations. Uncertainty in terms of which property law applies to the cross-border transfer of claims may discourage assignments, depriving financial market participants of access to credit for the pursuit of business opportunities.

1.2. The ECB takes note of the proposed regulation, which seeks to address the question of defining the law governing the effectiveness of the assignment of a claim against third parties, and the priority of the assigned claim over third party claims over the subject matter of the assignment. By supplementing Article 14 of Regulation (EC) No 593/2008, which does not address these specific points, the proposed regulation seeks to establish rules for determining the applicable jurisdiction in respect of the above matters. Thereby it also helps to promote cross-border investment, in line with one of the objectives pursued by the Union through the Capital Markets Union, as already communicated by the Eurosystem earlier on ([1]).

2. **Specific observations**

2.1. The general rule under the proposed regulation is that the third-party effects of assignments of claims are to be governed by the law of the country of the assignor's 'habitual residence'. The ECB notes that Article 14 of Regulation (EC) No 593/2008 refers, for certain aspects, to the law of the assignment agreement and, for others, to the law of the assigned claim. The general rule under the proposed regulation refers to a third jurisdiction, that of the assignor's habitual residence. Although legally feasible, the proposed rule has shortcomings, especially in scenarios where credit claims are used as financial collateral within the meaning of Article 1(4)(a) of Directive 2002/47/EC. This is because the reference to the law of a third jurisdiction increases the legal due diligence burden on collateral takers where credit claims, i.e., bank loans, are mobilised as collateral on a cross-border basis.

2.2. The explanatory memorandum to the proposed regulation states that about 22 % of Eurosystem refinancing operations are secured by credit claims as collateral, amounting to some EUR 380 billion at the end of the second quarter of 2017, of which around EUR 100 billion represented credit claims mobilised on a cross-border basis ([2]). As the proposed regulation affects the interests of central banks as collateral takers, i.e. as assignees of claims, the ECB invites the Council to consider the introduction, in Article 4(2) of the proposed regulation (which seeks to create a special regime in the field of finance by providing for the application of the law of the claim in certain situations), of a refinement, to the effect that the law applicable to the claim would also govern the third-party effects of assignments of credit claims, i.e. bank loans.

2.3. The ECB makes reference to the *acquis* in matters of conflict of laws under Article 9 of Directive 2002/47/EC, according to which, for book entry securities in cross-border constellations, the law of a single jurisdiction applies, namely, that of the account in which securities are held through a custodian. This rule, the aim of which is to facilitate cross-border financial collateral transactions in securities, mirrors the *acquis* under Article 9(2) of Directive 98/26/EC of the European Parliament and of the Council ([3]), Article 9(2) of which also provides that one law only — that of the relevant account — is applicable. The ECB wishes to recall, in this regard, that when Directive 2009/44/EC of the European Parliament and of the Council ([4]) was adopted to, inter alia, include credit claims (i.e., bank loans) within the scope of Directive 2002/47/EC, Article 9 thereof was not amended, since negotiations on the content of Article 14 of Regulation (EC) No 593/2008 were still underway. Taking into account the *acquis* and, in particular, Article 9 of Directive 2002/47/EC and Article 9(2) of Directive 98/26/EC, there is a strong case for defining a single applicable jurisdiction for credit claims as the Union legislator has done for book entry securities. Having regard to Article 14(1) of the Regulation (EC) No 593/2008 and Article 4(2) of the proposed regulation, the most efficient way of minimising the number of laws applicable to credit claims

([1]) See European Commission, *Green Paper — Building a Capital Markets Union* (COM(2015) 63 final, Brussels, 18.2.2015). Also see European Central Bank, *Building a Capital Markets Union – Eurosystem contribution to the European Commission's Green Paper*, 2015.

([2]) Page 2 and footnote 10 of the explanatory memorandum to the proposed regulation. It should be noted that, at the end of the second quarter of 2017, the amount of Eurosystem credit operations secured by credit claims as collateral and mobilised on a cross-border basis was significantly lower than the referenced amount.

([3]) Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166, 11.6.1998, p. 45).

([4]) 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 (OJ L 146, 10.6.2009, p. 37).

would be to refer, also in the case of bank loans, to the law of the assigned claim. This would achieve a similar degree of legal certainty and simplicity for bank loans mobilised as collateral as has been achieved in the case of collateral transactions in securities.

2.4. The explanatory memorandum to the proposed regulation notes that the conflict of laws rules in the proposed regulation, on the one hand, and the conflict of laws rules in Directive 2002/47/EC, Directive 98/26/EC and Directive 2001/24/EC of the European Parliament and of the Council ([1]), on the other, do not overlap, as the former applies to claims and the latter to book entry securities and instruments, the existence or transfer of which presupposes their recording in a register, an account or a centralised deposit system ([2]). The ECB nevertheless takes this opportunity to reiterate an issue in respect of Directive 2002/47/EC which is of major importance to the Eurosystem for the acceptance of credit claims as collateral for Eurosystem credit operations. The ECB recalls that Directive 2002/47/EC was amended by Directive 2009/44/EC with the specific aim of facilitating the use by central banks of credit claims as collateral. The ECB issued an opinion on these amendments ([3]) in which it addressed the issue of 'non-harmonised sets of rules on credit claims in the different EU jurisdictions' and flagged the 'great importance for the Eurosystem to be able to use credit claims as collateral under the regime established by Directive 2002/47/EC, thereby facilitating an informal and efficient operational handling of that kind of asset, in particular through electronic means and including in cross-border constellations.'

2.5. Whilst the proposed regulation only concerns conflict of law rather than substantive issues, the ECB wishes to reiterate its earlier remarks regarding one of the risks stemming from the mobilisation of credit claims as central bank collateral, both across euro area jurisdictions and at Union level, namely the risk of set-off rights being exercised by third party debtors (or guarantors) of such credit claims in respect of amounts owed to such third parties by the creditors of such claims. This risk can significantly reduce the value of the credit claim, and could compromise its 'adequacy' as collateral under Article 18.1 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'). If a central bank wishes to realise a credit claim, in the event of counterparty default, the possibility of set-off may entail the partial or total depletion of the credit claim's collateral value. Article 3(3)(i) of Directive 2002/47/EC, as introduced by Directive 2009/44/EC, only deals with the issue of set-off in a limited manner. A number of Member States have introduced legislation which addresses this risk, by excluding set-off rights in respect of credit claims mobilised as collateral in credit operations with ESCB central banks ([4]).

2.6. The ECB considers the aim of excluding set-off risks associated with the acceptance of credit claims as collateral in Eurosystem credit operations as legitimate and fully in line with the Statute of the ESCB. Protecting the Eurosystem against any potential loss arising from the acceptance of such collateral is closely linked to the requirement laid down in the second indent of Article 18.1 of the Statute of the ESCB, pursuant to which lending by the ESCB central banks must be based on adequate collateral. In addition, adequately addressing set-off risks also facilitates the continued eligibility of credit claims as collateral in Eurosystem credit operations, and thereby contributes to the efficiency of the transmission of monetary policy to the real economy ([5]). The ECB invites the Council to consider an amendment to Directive 2002/47/EC to exclude the possibility of the debtor (or guarantor) of a credit claim provided as collateral to a central bank in the context of Eurosystem credit operations exercising any right of set-off it may have against the original lender under such claim. To minimise the amount of potential losses in the case of realisation, this exclusion should also cover any third party to whom the credit claim is subsequently assigned by a Eurosystem central bank ([6]).

Where the ECB recommends that the proposed regulation is amended, a specific drafting proposal is set out in a separate technical working document accompanied by an explanatory text to this effect. The technical working document is available in English on the ECB's website.

([1]) Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions (OJ L 125, 5.5.2001, p. 15).
([2]) See page 11 of the explanatory memorandum to the proposed regulation.
([3]) See paragraph 9.1 of Opinion CON/2008/37.
([4]) See in particular, for instance, paragraph 2 of section I of Article L. 141-4 of the French Financial and Monetary Code, introduced by Article 53 of Law No 2016-1691 of 9 December 2016; Article 26 of the Italian Decree Law No 237 of 23 December 2016, converted into Law by the Law of 17 February 2017, No 15; Article 22-1(4) of the Law of 23 December 1998 concerning the monetary status and the Central Bank of Luxembourg; see also paragraphs 2.1-2.2 of Opinion CON/2006/56; paragraph 2.3 of Opinion CON/2016/37; paragraph 5.1 of Opinion CON/2017/1.
([5]) See paragraph 2.2 of Opinion CON/2016/37; paragraph 5.1 of Opinion CON/2017/1.
([6]) See paragraph 2.5 of Opinion CON/2016/37.

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

Done at Frankfurt am Main, 18 July 2018.

The President of the ECB

Mario DRAGHI