



Council of the
European Union

Brussels, 26 July 2016
(OR. en)

11537/16

EF 250
ECOFIN 735

COVER NOTE

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	29 June 2016
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2016) 430 final
Subject:	REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT on the appropriateness of Article 3(1) of Directive 2002/47/EC on financial collateral arrangements

Delegations will find attached document COM(2016) 430 final.

Encl.: COM(2016) 430 final



Brussels, 29.6.2016
COM(2016) 430 final

**REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN
PARLIAMENT**

**on the appropriateness of Article 3(1) of Directive 2002/47/EC
on financial collateral arrangements**

1. INTRODUCTION

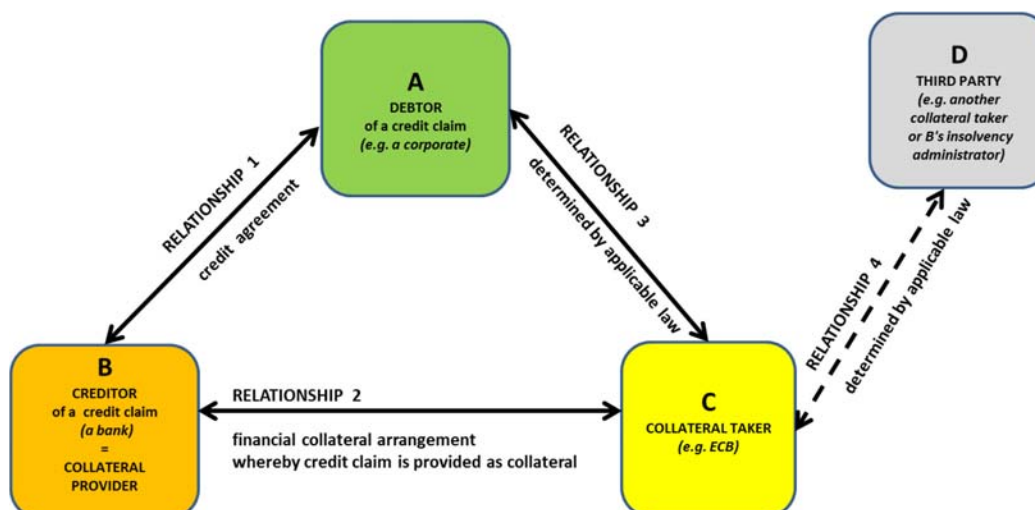
Collateral is given by a borrower to a lender to minimise the risk of financial loss to the lender if the borrower defaults on its obligations. Since the financial crisis, collateral has become increasingly important, driven by a market need for more secured funding and regulatory requirements.

Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements as amended by Directive 2009/44/EC (FCD) creates a harmonised EU legal framework for the creation and enforcement of collateral, i.e. *'title transfer financial collateral arrangements'* (where the full title to the collateral is transferred to the collateral taker) or *'security financial collateral arrangements'* (where the collateral taker receives a security right, e.g. a pledge or a charge).

The FCD originally covered only cash and financial instruments used as collateral. It abolished formal requirements imposed by Member States on financial collateral arrangements or the provision of collateral, e.g. requirements on the form of the relevant contractual documentation, registration or other notification. Given that the consequence of failing to comply with such requirements was often the invalidity or unenforceability of the collateral against third parties, the removal of those obstacles facilitated the movement of cash and financial instruments across the EU. In 2009, the FCD was amended to introduce *'credit claims'* as collateral.

A *'credit claim'* is defined in the FCD as a pecuniary claim arising from an agreement where a credit institution grants credit in the form of a loan. *Figure 1* shows the mobilisation of a credit claim as collateral where the collateral provider (B) transfers his credit claim against its debtor (A) to the collateral taker (C). More complex scenarios involving a third party (D) arise when the same credit claim is mobilised multiple times (e.g. if C transfers the claim onwards) or when the insolvency administrator questions whether the claim has been validly transferred out of B's estate.

Figure 1: Legal relationships in the mobilisation of credit claims as collateral



The 2009 revision of the FCD¹ prevents Member States from requiring that the creation or validity of financial collateral arrangements relating to credit claims be dependent on

¹ Article 3(1) subparagraph 2 sentence 1, FCD.

the performance of a formal act, e.g. registration or the notification of the debtor. This aims to ensure that the financial collateral arrangement relating to a credit claim (relationship 2 in *Figure 1*) is not invalidated because the arrangement was not registered with a public authority or the debtor was not notified about the collateral arrangement. It also grants Member States an option² to require formal acts, e.g. registration or notification, relating to credit claims used as collateral for purposes of perfection, priority, enforceability or admissibility in evidence against the debtor (relationship 3 in *Figure 1*) or third parties (relationship 4 in *Figure 1*).

Under the 2009 revision, the Commission was asked to report to the European Parliament and the Council on the continuing appropriateness of the Member State option³. This report assesses how Article 3(1) of the FCD was implemented, its results and whether amendments to the Directive are needed.

2. OBJECTIVES AND METHODOLOGY

The report focuses on the implementation of Article 3(1) of the revised FCD. Its scope is whether the Directive works effectively and efficiently as regards formal acts required to provide credit claims as collateral.

To prepare this report, the Commission sent Member States, the ECB and European Economic Area States (EEA) a questionnaire on the implementation of Article 3(1) of the FCD. 25 Member States replied⁴. This evaluation draws mainly from that material. The report also takes into account replies received to the public consultation on Building a Capital Markets Union⁵.

Some background information on Member States' law is derived from an external study carried out for the European Commission on the effectiveness of an assignment of a claim against third parties and the priority of the assigned claim over a right of another person⁶.

3. IMPLEMENTATION AND RESULTS

3.1. Economic relevance of credit claims

Figure 2 shows the rise in the use of credit claims in Eurosystem credit operations. In 2004, they represented 4% of total collateral. By the end of 2015, this had grown to 21%. The sharpest rise was between 2006 and 2007 which may be attributed to the Eurosystem decision to include credit claims in the list of collateral accepted for credit operations in the category of non-marketable assets from 1 January 2007⁷. This created uniform conditions, including criteria determining the eligibility of credit claims being used as

² Article 3(1) subparagraph 2 sentence 2, FCD.

³ Article 3(1) subparagraph 3, FCD.

⁴ No reply was received from EL, PL, SK or EEA States. Replies to the questionnaire of those respondents that have agreed to their publication are at: http://ec.europa.eu/finance/financial-markets/collateral/index_en.htm

⁵ http://ec.europa.eu/finance/consultations/2015/capital-markets-union/index_en.htm

⁶ Study by the British Institute of International and Comparative Law [hereafter, 'BIICL']: http://ec.europa.eu/justice/civil/files/report_assignment_en.pdf

⁷ *The use of credit claims as collateral for Eurosystem credit operations*, K. Tamura, E. Tabakis, ECB Occasional Paper Series No 148, June 2013 [hereafter, 'Tamura/Tabakis'].

collateral, for such operations⁸. The replies of Eurozone Member States confirm that credit claims are broadly accepted by their central banks⁹ or commonly used as collateral¹⁰.

Figure 2: ECB data on credit claims in Eurosystem credit operations

EUR bn, after valuation and haircuts, averages of end of month data over each time period			
Year	Use of Credit Claims:	Total Collateral:	Credit Claims as % of total Collateral Used:
2004	33.5	817	4%
2005	35.4	900	4%
2006	36.3	959	4%
2007	109.3	1 148	10%
2008	190.1	1 579	12%
2009	294.8	2 035	14%
2010	358.5	2 010	18%
2011	418.7	1 824	23%
2012	633.4	2 457	26%
2013	439.4	2 348	19%
2014	372.8	1 949	19%
2015	368.2	1 737	21%

Source: <https://www.ecb.europa.eu/paym/coll/charts/html/index.en.html>

Note: Credit claims figures from 2004-2011 are the aggregate data for ‘non-marketable assets’ (prior to 2012, credit claims were not recorded separately. They show the bulk of assets under the non-marketable assets category, the rest is fixed-term and cash deposits).

Outside the euro area, the situation differs and data is scarce. The acceptance of credit claims as collateral outside the euro area seems low. The Czech Republic and Lithuania confirmed that they are used as collateral in their markets. Bulgaria and Hungary stated that they are not widely used. Only Denmark reported that their central bank accepts credit claims as collateral. Other reports suggest that the Bank of England also accepts them but in a limited way¹¹.

Market conditions and global regulatory changes mean credit institutions are facing many demands for collateral¹². The EU has traditionally relied on bank financing¹³. End-2013 data shows that non-financial corporations rely on bank loans for about 15% of their total

⁸ Article 89–105, *Guideline (EU) 2015/510 of the European Central Bank of 19 December 2014 on the implementation of the Eurosystem monetary policy framework (ECB/2014/60)* [hereafter, ‘ECB General Documentation’].

⁹ BE, DE, FI, IT, IR, MT, NL, PT.

¹⁰ AT, FR.

¹¹ Tamura/Tabakis, p. 17-21, 25.

¹² *Collateral eligibility and availability. Follow-up to the report on »Collateral eligibility requirements – a comparative study across specific frameworks« dated July 2013* by the ECB contact group on euro securities infrastructures (COGESI), July 2014 [hereafter, ‘ECB COGESI’], p. 18.

¹³ *Commission Staff Working Document accompanying the document Green Paper Building a Capital Markets Union*, SWD(2015) 13 final, p. 11.

financing needs (compared to 10% in the US¹⁴). As such, EU credit institutions hold credit claims which, if appropriate, could be used as collateral. Estimates put credit claims in the euro area at almost EUR 4.4 trillion, i.e. one third of the total value of eligible marketable assets for the Eurosystem¹⁵.

This shows the relevance of the FCD in enhancing legal certainty where necessary and appropriate for credit claims to be used as collateral.

3.2. Implementation of Directive 2009/44/EC

Directive 2009/44/EC revising the FCD was adopted on 6 May 2009. It was implemented in most Member States in 2011 and all had transposed it by 2012. The FCD is also subject to the EEA Agreement¹⁶ with Lichtenstein, Norway and Iceland all implementing it.

3.2.1. Implementation of the option in Article 3(1)

To reduce administrative burden and increase market efficiency, Article 3(1) of the FCD, prevents Member States from imposing ‘*formal requirements*’ on collateral arrangements¹⁷ and making the provision of collateral dependant on the performance of a ‘*formal act*’. These notions are not defined but examples are given in recitals¹⁸. Article 1(5) clarifies that the inclusion in a list of claims submitted to the collateral taker should be considered as evidence of the provision of collateral and not as a formal act.

The replies of Member States to the questionnaire reveal four issues.

First, as allowed by Article 1(5), some Member States¹⁹ require that the use of credit claims as collateral is evidenced by the inclusion in a list of claims submitted to the collateral taker.

Second, Member States appear to have divergent interpretations on what is a ‘*formal act*’. Most seem to view physical acts required outside the book-entry system related to the provision of collateral as formal acts, but some exclude certain acts²⁰. It is difficult to conclude therefore which Member States have actually used the option to require formal acts for purposes of perfection, priority, enforceability or admissibility in evidence against the debtor (relationship 3 in *Figure 1*) or third parties (relationship 4 in *Figure 1*).

Third, based on their own assessment, half of the Member States²¹ have not used the option. In these Member States there may be no formal requirement to notify the debtor,

¹⁴ 2014 Q2 Financial Accounts of the US (Federal Reserve). The data relied upon by Tamura/Tabakis, p. 10, chart 1, shows the importance of credit claims as a stable funding source for the euro area economy even more: 40% in the euro area compared to 10% in the US.

¹⁵ ECB COGESI, p. 9.

¹⁶ Directive 2009/44/EC was incorporated into the EEA Agreement by the Joint Committee Decision 50/2010.

¹⁷ Article 1(5) subparagraph 1 and 4, FCD.

¹⁸ C.f. Recital 10.

¹⁹ BG, CZ, DK, EE, LV, PT (if credit claims are provided as collateral to the central bank), ES, RO, SI.

²⁰ E.g. the notification of the debtor in case of security financial collateral arrangements or the transfer of the credit claim supporting documentation to the collateral taker.

²¹ CZ, DK, FR, IR, LV, RO, SI and SE. EE and DE, who did not answer Question 4, seem to belong to this group as well.

but debtor protection rules continue to apply. If the debtor is not aware of the financial collateral arrangement and pays off the credit claim, the debtor will be discharged²². As such, those payments may be deducted from the value of the claim given as collateral posing a risk to the collateral taker that the collateral may disappear. Notification of the debtor may, thus, be seen as being required for the purpose of enforceability and/or evidence against the debtor, unless the debtor protection can be waived in the credit agreement²³.

Fourth, half of the Member States²⁴ used the option. All but one Member State require the notification of the debtor²⁵. But national laws differ on the nature of this condition. Bulgaria, Belgium²⁶, Estonia, Finland and Portugal require notification of the debtor as a single mandatory formal act. Hungary also requires the transfer of the supporting documentation to the collateral taker. Other Member States leave the choice between the notification of the debtor and another formal act to the counterparties. Austria requires the notification of the debtor or an entry in the books of the collateral provider. Lithuania and Malta require the notification of the debtor or a public notice in a newspaper. The Netherlands requires the notification of the debtor or registration in a non-public register held by tax authorities²⁷.

There are also differences in the purpose of the notification requirement. In most Member States, the notification makes the collateral arrangement enforceable against the debtor of the credit claim (relationship 3 in *Figure 1*). In Austria, Bulgaria, Finland, Lithuania²⁸, Malta and the Netherlands the notification of the debtor makes the collateral arrangement enforceable against third parties (relationship 4 in *Figure 1*). Those Member States view the requirement as an act of publicity²⁹ that ensures legal certainty, the protection of the rights of all parties³⁰ and helps to combat fraud (i.e. collateral arrangements created after the opening of insolvency proceedings but are backdated to defraud other creditors)³¹. In some jurisdictions notification of the debtor is a factor determining which of a number of collateral takers may have priority. Under English³², Dutch³³, Italian³⁴ and Portuguese³⁵ law, priority would be given to the title transfer collateral arrangement first notified to the debtor.

²² E.g. this is expressly stated in the CZ (§ 1882 of Czech Civil Code), DE (§ 407 German Civil Code), EE (§ 317 Estonian Law of Property Act), ES (Article 1526 Spanish Civil Code), LU (Article 14.2 of Luxembourg Law on Financial Collateral Arrangements), SE (Sections 10 and 29 of the Swedish Promissory Notes Act) and PL (Article 512 Polish Civil Code).

²³ BIICL, p. 221, § 404 *et seq.* of the German Civil Code do not constitute mandatory law, i.e. these rules may be waived by a contractual agreement. In other jurisdictions, the issue is subject to interpretation. *Directive 2008/48/EC of 23 April 2008 on credit agreements for consumers* allows not informing the debtor (consumer) but the lack of notification cannot put the consumer in a less favourable position (Article 17, Recital 41).

²⁴ AT, BE, BG, FI, HU, IT, LT, MT, NL, PT, UK.

²⁵ AT, BE, BG, HR, FI, HU, IT, LT, MT, NL, PT. CY requires registration by the companies registrar.

²⁶ For collateral takers other than the National Bank of Belgium.

²⁷ NL reply and BIICL, p. 270.

²⁸ Article 6.109 of the Lithuanian Civil Code.

²⁹ AT reply.

³⁰ BG reply.

³¹ FI reply.

³² UK reply and BIICL, p. 337, 344–345.

³³ BIICL, p. 272.

3.2.2. Other implementation issues

Member States identified two situations where different formal acts may be required.

Five Member States stated there are special rules on formal acts when credit claims are used as collateral to their central banks. In Belgium, registration instead of notification of the debtor is required if the collateral taker is the central bank. This enforces the claim towards third parties and gives the central bank priority. In Lithuania, when credit claims are used as collateral to EU central banks, a public notice on the website of the Bank of Lithuania is needed. Slovenia requires the notification of the debtor to restrict the debtor's set-off rights if credit claims are given to EU central banks. In contrast, in Portugal and (temporarily) in Italy no registration or debtor notification is required if credit claims are given to the central bank. In both cases, the central bank's rights prevail over any other rights over the same claims, even if they are notified to the debtor after the collateral arrangement.

Four Member States reported that special formal acts are required when credit claims secured by a mortgage are used as collateral. In Germany, in addition to a title transfer financial collateral arrangement relating to a credit claim secured by mortgage, the mortgage certificate needs to be given or the transfer of the claim registered in the land register. In Lithuania, the transfer of a claim secured by mortgage must be registered to be enforceable against third parties. In Portugal, pledges over mortgage credit claims need to be registered. With regard to credit claims in the form of residential mortgages backing (special) mortgage-backed promissory notes, the Irish central bank requires collateral arrangements to be the form of a deed and the details to be registered.

3.3. Effectiveness

Directive 2009/44/EC aimed to facilitate the use of credit claims as collateral³⁶. This section examines if this objective was achieved and whether the option in Article 3(1) influenced the outcome.

Any quantitative assessment of the impact of Directive 2009/44/EC on the mobilisation of credit claims is challenging³⁷. Eurosystem data (*Figure 2*) shows that between 2011–2012, i.e. when Directive 2009/44/EC was implemented in all Member States, the use of credit claims as collateral rose from 23% to 26% of total collateral used. However, it declined between 2012–2013 from 26% to 19%.

A number of factors could have affected the use of credit claims as collateral in Eurosystem credit operations. The implementation of Directive 2009/44/EC coincided with the financial crisis and changes in the Eurosystem collateral framework. The increased use of credit claims as collateral with the Eurosystem may thus be explained by an increased demand for central bank credit and market participants' incentives to submit relatively illiquid assets, e.g. credit claims, while keeping more liquid assets for other transactions³⁸. There were also technical and operational adaptations at individual central banks, e.g. Deutsche Bundesbank and Banque de France (both with counterparties with

³⁴ IT reply.

³⁵ Article 584 of Portuguese Civil Code.

³⁶ Recital 6 of Directive 2009/44/EC.

³⁷ Tamura/Tabakis, p. 27, footnote 41.

³⁸ Tamura/Tabakis, p. 13.

large outstanding amount of credit claims) implemented automated communication interfaces, which enable the efficient mobilisation of credit claims³⁹.

Five Member States⁴⁰ indicated that the FCD aided the use of credit claims as collateral. Assessment differs though on whether the Article 3(1) option reduced or increased legal risk. One view is that the option is indispensable for legal certainty as the lack of any formal act made it costly and not always possible to ascertain if the credit claim was posted as collateral or not⁴¹. A second view argues that the removal of divergent formal requirements between Member States would enhance legal certainty⁴².

The Green Paper on Building a Capital Markets Union⁴³ asked what measures could improve the cross-border flow of collateral. Replying to the consultation one stakeholder argued that the removal of all formal requirements, e.g. notification and registration obligations, is needed to facilitate the use of credit claims as collateral⁴⁴. Two replies backed harmonisation of conflict of laws rules to enhance the protection of collateral takers by the ability to determine the law governing the formal requirements that need to be complied with to render the mobilisation of credit claims collateral effective against third parties⁴⁵. The ECB suggested excluding the debtor's right to set-off with respect to credit claims mobilised as collateral with central banks, but this is beyond the scope of this report.

Overall, the objective of the FCD to facilitate the use of credit claims has been achieved. There is evidence that the inclusion of credit claims within the harmonised framework for collateral has facilitated their use in certain jurisdictions. For example, a title transfer financial collateral arrangement for credit claims used to be forbidden under Dutch law⁴⁶ but the implementation of the FCD changed this, with the use of credit claims in the Netherlands growing. The FCD also removed formal requirements for the creation or validity of collateral arrangements. In effect, the risk of invalidation of such arrangements has been eliminated, aiding the mobilisation of credit claims.

As the overview of implementation showed, differences in the formalities and techniques available to collateralise credit claims still persist between Member States. Nevertheless, even when credit claim collateral remains subjected to national formal requirements, once they are complied with, the collateral benefits from the ease of enforcement introduced by the FCD (e.g. credit claims collateral can be realised by sale or appropriation and set-off and no formalities as to prior notice or prescribed manner of realisation or the elapsing of a period of time will apply).

In terms of the extent to which the objective has been achieved, it cannot be concluded that all legal obstacles to the use of credit claims as collateral within the EU have been removed. In particular, the cross-border use of credit claims collateral is still subject to legal uncertainty due to the effect of different national requirements and the incomplete

³⁹ Tamura/Tabakis, p. 22.

⁴⁰ DK, NL, PT and the UK.

⁴¹ Replies from LT, BE, BG, NL and the UK.

⁴² DE reply.

⁴³ COM(2015) 63 final, p. 26, Question 27.

⁴⁴ BNP Paribas reply to Question 27.

⁴⁵ ECB reply p. 24; Reply of the Treasury and Financial Policy General Secretariat (Spain) to Question 27.

⁴⁶ BIICL, p. 281.

harmonisation of conflict of laws rules at EU level. Although harmonised conflict of laws rules exist for the law applicable to the relationship between the debtor and the creditor of a credit claim (relationship 1 in *Figure 1*), the collateral provider and the collateral taker (relationship 2 in *Figure 1*) and the collateral taker and the debtor (relationship 3 in *Figure 1*)⁴⁷, the law applicable to the effectiveness of the provision of a credit claim as collateral against third parties, e.g. which formal acts are required to ensure enforceability against other claimants and the order of priority between multiple transfers of the same credit claim (relationship 4 in *Figure 1*), is still determined by national conflict of laws rules in the Member States⁴⁸. As such, the collateral taker may assume he has priority because formal requirements of Member State *A* have been complied with, while the third party relies on formal requirements of Member State *B* and also believes that it has priority over the rights of the other.

3.4. Efficiency

Balancing the challenges in using credit claims as collateral with the importance of bank loans in the real economy, the Commission considers that the objective of the FCD has been achieved at the least expense to all the parties involved.

Persistent formal requirements place additional costs on the collateral provider. Even if compliance with the requirement to notify the debtor is not costly, from a credit institution's perspective, the requirement could indirectly adversely affect client relations. Some evidence suggests that the notification requirement may pose an obstacle to mobilising bank loans⁴⁹. This may affect the amount of capital on banks' balance sheets that is not put to more efficient use in the economy. It should, however, be born in mind that there are alternative legal means that allow banks to put their dormant assets to better use, e.g. issuing securities backed by credit claims, and thus to obtain funds to use to create additional loans.

From the collateral taker's perspective, the observance of formal requirements may help reducing costs arising out of legal risk involved in accepting credit claims as collateral. Unlike marketable securities, credit claims are normally tailored to the debtor's needs. Thus, in case the collateral needs to be realised, credit claims are usually not convertible into cash quickly but rather the debtor needs to be first addressed. A crucial factor determining the value of the collateral is therefore the enforceability of the credit claim against the debtor (relationship 3 in *Figure 1*). In order to ensure that the credit claim can be swiftly realised in the event of a counterparty default, the eligibility criteria of the Eurosystem require the notification of the debtor in any case⁵⁰.

In addition to their limited liquidity, credit claims differ from marketable securities as they are not generally recorded in electronic accounts, but evidenced only by a credit agreement. As such, there is higher risk that the same credit claim may be posted as collateral to a third party. The idea behind the notification requirement is that if the

⁴⁷ Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (*Rome I*). The concept of 'assignment' in Article 14 Rome I applies to all 'financial collateral arrangements' under the FCD including outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims.

⁴⁸ BIICL, p. 12-13 *et seq.* shows that Member States' conflict of laws rules have different solutions for the law applicable to relationship 4 in *Figure 1*.

⁴⁹ DE reply.

⁵⁰ Point (b) of Article 99(1) and Article 103, *ECB General Documentation*.

debtor is required to know about the collateral arrangement, they can function as a possible information source regarding the existence of the credit claim collateral⁵¹. As shown by stricter rules on formal requirements in some jurisdictions, if the central bank takes credit claims as collateral⁵², formal acts protect the collateral taker from exposure to potential disputes with third parties on the enforceability and priority (relationship 4 in *Figure 1*). Thus, the option in the FCD that allowed Member States to keep formal requirements can be beneficial for collateral takers in the jurisdictions concerned.

As far as the debtor is concerned, it is normally irrelevant whether they repay the loan to the bank or the collateral taker, so in principle his position is not adversely effected by a collateral arrangement. It is necessary though to protect the debtor against the risk of paying twice (to the original creditor and to the collateral taker as the new claim owner). There are various ways to do this, e.g. formal requirements for the creation or validity of the collateral agreement, or for the perfection, priority, enforceability or admissibility in evidence against the debtor or third parties. The options available are framed by the FCD. Given that bank loans are the most important source of financing for non-financial corporations in the EU⁵³, it has a positive social impact that the FCD has not affected the rules to discharge the debtor, if he pays off the loan to the original creditor not being aware of the collateral arrangement.

In terms of Member States, the option reduced the implementation costs of the FCD. There are also no signs that Member States faced any costs arising from legal difficulties as no evidence was given, e.g. court decisions rendered in application of national legislation transposing Article 3(1)⁵⁴.

To conclude, the FCD works efficiently for formal acts required to mobilise credit claims as collateral in a domestic environment. There seem to be valid reasons for certain formal requirements. Where all the elements relevant to the situation are located in one jurisdiction, compliance is not difficult. In cross-border settings, the problem is not so much the existence of different formal requirements, but the difficulty in establishing which national requirement applies. The costs of finding the law applicable to formal acts required for ensuring enforceability or priority against third parties (relationship 4 in *Figure 1*) and due diligence may be high⁵⁵. The lack of harmonised conflict of laws rules also increases the number of substantive laws potentially applicable to the mobilisation of credit claims as collateral which may make it more difficult to fulfil the eligibility criteria of the Eurosystem⁵⁶.

4. APPROPRIATENESS OF ARTICLE 3(1)

In relation to Article 3(1) of the FCD, several policy choices could be considered.

⁵¹ Tamura/Tabakis, p. 20.

⁵² Section 3.2.2.

⁵³ *ECB/EC Survey on the access to finance of enterprises in the euro area*, November 2014, p. 8, chart 6.

⁵⁴ Replies to Question 2.

⁵⁵ BIICL, p. 57-58. Legal costs for cross-border transactions involving assignments can amount to several hundreds of thousands of Pounds/Euros.

⁵⁶ Article 97 of the *ECB General Documentation* requires no more than 2 governing laws applicable to (a) the counterparty; (b) the creditor; (c) the debtor; (d) the guarantor (if relevant); (e) the credit claim agreement; (f) the mobilisation agreement.

First, the status quo could be kept. This is explicitly favoured by twelve Member States⁵⁷ that argue the opt-out provision allows for a reasonable balance of the interests. They believe that national publicity requirements are needed to protect the debtor and third parties, to combat fraud, at least as long as there is no EU harmonisation of third party effect and priority. In their view, this option offers the chance to address, at national level, the legal risk that the market faces with verification of credit claims. It was understandable that one encourages the absence of any formal requirements to foster the mobilisation of credit claims. However, if the formal requirements are not weighty, it would be legally preferable to provide for them to ensure priority of the collateral taker. This may continue to create legal uncertainty where transfers of claims have a cross-border element. This could be mitigated by uniform conflict of laws rules on the effectiveness of a credit claim against third parties and the order of priority between multiple transfers of the same claim.

Second, the Article 3(1) option could be removed. This would oblige Member States to remove all national provisions for credit claims used as collateral that require the performance of formal acts, e.g. registration or notification of the debtor. This is advocated by four Member States⁵⁸ arguing that a deletion of the option would create an EU level playing field and enhance legal certainty, fostering the cross-border use of credit claims. Opposing views hold that deleting the option would expose debtors and collateral takers to risks that are currently addressed by national requirements.

Third, a review of the FCD could be considered. This could reflect on the harmonisation of substantive law issues, e.g. formal acts required for the perfection, priority, enforceability or admissibility in evidence against the debtor or third parties, when credit claims are used as collateral as well as on the appropriateness of ensuring that set-off is fully excluded with respect to credit claims mobilised as collateral with central banks. The review could also examine the shortcomings of the FCD relating to other types of collateral identified by respondents to the public consultation on Capital Markets Union⁵⁹.

5. CONCLUSION

Action at the EU level must respect the principle of proportionality. Formal requirements can fulfil a useful purpose and requiring their complete removal would therefore not be appropriate. Leaving the choice of such requirements to Member States creates difficulties in cross-border situations, but harmonising them may interfere with other interrelated provisions of national law. The costs and benefits of any harmonisation would need to be balanced very carefully and should only be considered as part of a broader reform after a thorough evaluation of the FCD. In this context, Article 3(1) of the FCD seems to continue to be appropriate.

As announced in the ‘Action Plan on Building a Capital Markets Union’, the Commission has launched a broad review on the progress in removing barriers to cross-border clearing and settlement with a view, amongst other things, to improving legal certainty in the cross-border exchange of collateral. To this end, the Commission has established an expert group, the European Post-Trade Forum, to identify the remaining

⁵⁷ AT, BE, BG, EE, FI, HR, LT, NL, PT, SE, SI and UK.

⁵⁸ DE, FR, LV, RO.

⁵⁹ SEC(2015) 184 final, p. 57.

barriers. Furthermore, by 2017 the Commission will take forward early targeted work with view to reducing the uncertainty surrounding securities ownership as well as propose uniform rules to determine with legal certainty which national law shall apply to third party effects of the assignment of claims⁶⁰. This will contribute to achieving greater legal certainty also in cases of cross-border mobilisation of credit claims as collateral and correct the drawbacks of the existing situation.

⁶⁰ COM(2015) 468 final, p. 23.