



Association
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DRAFT EUROPEAN BUSINESS CODE

BOOK 8

BANKING LAW

Draft

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Draft

BOOK 8: BANKING LAW

INTRODUCTORY COMMENT:

The purpose of Title 1 is to provide a general overview of professionals working in the banking sector. It does not prejudge the requirements under European and national law to carry out the operations whose legal regime is set out in Title 2. The latter provides for an optional regime that the parties may choose in lieu of the law of one of the Member States.

TITLE 1: SERVICE PROVIDERS

Article 8.1.1. - General principles

The supervision of professionals in the banking sector is governed by European and national law.

Comment: This is a reference provision. Texts concerning banking supervision cannot be subject to any contractual arrangement.

Article 8.1.2 - Authorisation

Some of the operations governed by Title 2 may need prior authorisation in accordance with current European and national legislation.

Comment: The purpose of this article is to provide clarification. Under applicable national and European law, service providers may be required to obtain an authorisation prior to the provision of the European banking services referred to in Title 2 of this Book. In the absence of an authorisation, European banking service providers are liable to sanctions for infringement of said regulations.

TITLE 2 : OPERATIONS

Preliminary comment: This book breaks new ground by introducing several new optional instruments.

CHAPTER 1 : FINANCING OPERATIONS

SECTION 1: THE EUROPEAN LOAN

§ 1: Concept, scope of application, general principles

Article 8.2.1.1.1.1 - Concept

A European loan is a contract by which a professional makes funds available to another professional.

The loan may bear interests or be interest-free.

Comment: The definition of a European loan is based on an economic criterion. It covers both promises to lend and the loans themselves. Characterisations under national law do not apply.

Article 8.2.1.1.1.2 - Selection

- 1. The regime on the European loan only applies if the parties have chosen it. The choice must be express. It is not subject to any particular form.*
- 2. The choice can be made at any time. The rights of third parties are not affected by a change of regime.*
- 3. A partial choice of the European loan regime is excluded.*

Comment: The European loan regime is optional. The rules of national law remain applicable unless the parties have expressly opted for it. The second paragraph is inspired by the Rome I Regulation (article 3 para. 2). The European loan regime is a whole. It is not possible to apply the European and national rules in part and selectively. This does not exclude the possibility to deviate from certain provisions by exercising contractual freedom (see article 8.2.1.1.1.5).

Article 8.2.1.1.1.3 - Relationship with national law

- 1. The provisions of this section take precedence over all provisions of national law, including mandatory rules.*
- 2. National rules of supervisory law, tax law and accounting remain applicable.*

Comment: The rules on the European loan are part of the supranational law of the EU. As such, they supersede any provisions of the Member States that fall within their scope. This applies both to matters expressly covered by the rules and to those not expressly addressed but falling within the ordinary scope of the rules on loan contracts, such as usury, control of unfair terms and the percentage rate of charge. At the same time, rules outside contractual law remain unaffected.

Article 8.2.1.1.1.4 - Gap filling

- 1. Questions relating to capacity are governed by the applicable national law.*
- 2. All other matters not governed by the following provisions are governed by the common principles of European Union contract law.*

Comment: The regime does not include any provisions on the capacity of parties to enter into a contract. This issue is governed by the relevant rules of national law. Conflicts of law relating to incapacity are partially resolved by the Rome I Regulation (article 13). For general rules of contract law, such as those relating to the conclusion of the contract or the consequences of non-performance, reference is made to the common principles of European Union contract law, to be elaborated by the courts when interpreting the present Code (the Principles of European Contract Law drawn up by the "Lando Commission" may provide a model/source of inspiration).

Article 8.2.1.1.1.5 - Contractual freedom

The parties may adapt the European loan regime, subject to the conditions set out in this section.

Comment: The choice of the European loan regime leads to the applicability of its provisions. The parties are free to adapt the rules on the European loan to their needs.

Article 8.2.1.1.1.6 - Independence of the European loan from the financed operation

The validity and execution of the European loan are independent from the financed operation, unless otherwise stipulated.

Comment: The independence of the financing contract from the contract being financed is a classic principle of banking law. It is retained here as such. The provision does not preclude exceptions, for example in the case of fraud affecting both contracts simultaneously.

§ 2: Conclusion of the contract

Article 8.2.1.1.2.1 - Pre-contractual information

- 1. The lender must inform the borrower of the terms and conditions of the loan contract within good time prior to entering into the contract.*
- 2. As a lending professional, the lender must draw the borrower's attention to the suitability or unsuitability of the loan in light of the borrower's financial situation.*

Comment: The purpose of paragraph 1 is to inform the customer of the general and essential terms and conditions of the contract.

The purpose of paragraph 2 is to draw the customer's attention to the specific risks involved. It does not imply any obligation of the lender to refuse the loan.

Article 8.2.1.1.2.2 - Consensual contract

The European loan is formed as soon as the parties consent to it.

Comment: The provision of funds is not a condition of contract formation. Forced execution of the contract is possible.

Article 8.2.1.1.2.3 - Evidence

The European loan can be issued on any durable medium.

Article 8.2.1.1.2.4 - Total cost of the European loan

- 1. Before concluding the agreement, the borrower must be informed of the total cost of the loan.*
- 2. The total cost of the European loan must take into account all the elements which the borrower is required to pay in connection with the loan.*
- 3. A lack of information or inaccurate information provided to the borrower does not render the clause null and void. The lender may be held liable.*

Comment: The cost of a European loan is not limited to interests. Other costs charged by the lender to the borrower also need to be taken into account, such as administration fees or insurance premiums.

The damages possibly owed as compensation for a violation of paragraph 3 is the difference between the rate displayed and the rate including all cost factors omitted or displayed inaccurately in said calculation.

§ 3: Obligations of the parties

Article 8.2.1.1.3.1 - Provision of funds

- 1. The lender makes the funds available to the borrower on the date and under the conditions agreed by the parties.*
- 2. The funds are released in one or more instalments in accordance with the agreement of the parties.*

Article 8.2.1.1.3.2 - Currency

- 1. Only a currency constituting legal tender may be chosen by the parties for the provision and repayment of funds.*
- 2. The currency chosen for reimbursement may be different from that chosen for the provision of funds.*
- 3. The borrower must be informed, prior to the conclusion of the contract, of the foreign exchange risk resulting from the use of a currency other than that which constitutes legal tender in the territory in which the contract is concluded, or resulting from the use of different currencies for the provision and repayment of funds. Numerical examples shall illustrate the foreign exchange risk borne by the borrower.*

Comment: Foreign currency clauses are accepted whereas crypto-currencies that are not legal tender are excluded.

Article 8.2.1.1.3.3 - Destination of funds

- 1. The European loan can be designated for a specific purpose.*
- 2. In the case of a designated loan, the parties may agree that the lender will be responsible for ensuring that the funds are used for their intended purpose. Failure to do so may result in termination of the European loan. The lender violating the obligation under the first sentence may be held liable.*

Comment: This provision is without prejudice to article 8.2.1.1.1.6 concerning the independence of contracts.

Article 8.2.1.1.3.4 - Remuneration

- 1. The borrower pays the lender a remuneration as per the terms agreed in the loan contract.*
- 2. This remuneration consists of the payment of any interest and commission agreed in the said contract.*

Article 8.2.1.1.3.5 - Contractual interest rate

- 1. The rate can be fixed or variable.*

2. *Unless otherwise stipulated, a clause providing for a variable interest rate cannot obligate the lender to pay interest to the borrower.*
3. *Proof of the contractual interest rate can be provided by any means.*

Comment: This clause excludes negative interest rates and thereby makes the law more secure. It also dispenses with formal requirements for the clause stipulating the interest rate. As for the effects of the abolishment of a reference index, see Art. 6:107 Principles of European Contract Law.

Article 8.2.1.1.3.6 - Interest calculation

1. *If the agreement on the European loan does not provide otherwise, the reference year used to calculate interest is the calendar year.*
2. *Unless otherwise agreed, interest accrues from the date the funds are made available.*

Comment: To calculate the amount of interest *pro rata temporis*, it is necessary to determine the number of days in the year. Hence the choice of the calendar year (365 or 366). This avoids the banking practice of using the number 360.

Article 8.2.1.1.3.7 - Compound interest

Unless explicitly agreed in the contract, the interest claim resulting from a European loan does not accrue interest.

Comment: This solution diverges from French law (conditional authorisation of compound interest) and German law (prohibition of compound interest).

Article 8.2.1.1.3.8 - Repayment

1. *The borrower repays the funds according to the agreed terms and conditions.*
2. *If the contract is silent, the lender can demand repayment after informing the borrower and granting him a reasonable time to fulfil his obligations.*

Comment: The second paragraph gives the lender an option, but only where he meets two mandatory conditions: (1) information of the borrower and (2) granting a reasonable time for fulfilment.

Article 8.2.1.1.3.9 - Early repayment

1. *The contract may authorise early repayment.*
2. *The right to early repayment may be made subject to a penalty.*

Comment: The judge does not have the power to reduce the amount of the a penalty that the parties have agreed to.

§ 4 : Non-performance

Article 8.2.1.1.4 - Information about non-performance

Before exercising its right to suspend performance of the European loan, the lender must first inform the borrower of its intention and the reasons for it.

Comment: The solution diverges from Article 9:201 of the Principles of European Contract Law, which does not require prior information by the debtor.

§ 5: Duration and termination of the European loan

Article 8.2.1.1.5.1 - Duration

- 1. The European loan can be concluded for a fixed or open-ended period.*
- 2. If the European loan is concluded for an open-ended period, either party may terminate it by registered letter with acknowledgement of receipt, respecting the contractually agreed notice period or, failing such agreement, a reasonable period.*
- 3. Unless otherwise stipulated, a European loan concluded for a fixed term must be performed until the end of the term.*

Comment: A judge's power of reviewing the duration of the contract under national law does not apply.

Article 8.2.1.1.5.2 - Extensions

A fixed-term European loan may be extended before the end of the term if the contracting parties so agree. The extension does not entail novation unless otherwise stipulated. It cannot affect the rights of third parties.

Comment: Modification of the duration is likely to aggravate the situation of the guarantor or any third party. Hence the need for a balanced solution as set out in this provision.

Article 8.2.1.1.5.3 - Termination

- 1. The European loan terminates with repayment of the nominal amount and payment of interest in accordance with the contractual stipulations.*

2. Neither the dissolution of the lender as a legal entity, nor any modification entailing a universal transfer of its assets, nor the death of the lender as a natural person terminates the contract, unless otherwise stipulated.

3. The lender may terminate the contract in the event of a significant deterioration in the borrower's financial situation.

Comment: On paragraph 3: Given that the contract is not automatically terminated by the disappearance of the borrower, the lender must have the option of terminating the contractual relationship when faced with the borrower's successor, who may be less creditworthy.

SECTION 2: EUROPEAN LEASING

Comment: This section reproduces the UNIDROIT Convention on International Financial Leasing concluded in Ottawa on May 28, 1988, with the necessary modifications.

§ 1: Concept, scope of application, general principles

Article 8.2.1.2.1.1 - Notion

1. European leasing is a transaction described in paragraph 2, in which a lessor

a) on the specifications of another party, the lessee, enters into a supply contract with a third party, the supplier, under which it acquires movable property for professional use, the goods, on terms approved by the lessee insofar as they concern its interests, and

b) enters into a leasing contract with the lessee, granting the latter the right to use the goods in return for the payment of rentals.

2. The leasing transaction referred to in the previous paragraph is a transaction with the following characteristics:

a) the lessee specifies the goods and selects the supplier without relying primarily on the skill and expertise of the lessor;

b) the goods are acquired by the lessor in connection with a leasing agreement which, to the knowledge of the supplier, either has been made or is to be made between the lessor and the lessee; and

c) the rentals payable under the leasing agreement are calculated so as to take into account in particular the amortisation of the whole or a substantial part of the cost of the goods.

3. This section applies whether or not the lessee has acquired, or subsequently acquires, the option of buying the property, or of leasing it back, even for a symbolic price or rent.

Article 8.2.1.2.1.2 - Selection

- 1. The European leasing system only applies if the parties have chosen it. The choice must be express. It is not subject to any particular form.*
- 2. The choice can be made at any time. The rights of third parties are not affected by a change of regime.*
- 3. A partial choice of the European leasing contract provisions is excluded.*

Article 8.2.1.2.1.3 - Relationship with national law

- 1. The provisions of this section take precedence over all provisions of national law, including mandatory rules.*
- 2. National rules of supervisory law, tax law and accounting remain applicable.*

Article 8.2.1.2.1.4 - Gap filling

- 1. Questions relating to capacity are governed by the applicable national law.*
- 2. All other matters not governed by the following provisions are governed by the common principles of European Union contract law.*

Article 8.2.1.2.1.5 - Contractual freedom

The parties may, in their relations with each other, derogate from or vary the effect of any of the provisions of the present section, except as stated in paragraph 3 of Article 8.2.1.2.1.10.

Article 8.2.1.2.1.6 - Plurality of operations

In the case of one or more sub-leasing or subrenting transactions involving the same goods, this section applies to each transaction which constitutes a leasing transaction and is otherwise subject to this section as if the person from whom the first lessor acquired the goods were the supplier and as if the contract under which the goods was so acquired were the supply contract.

Article 8.2.1.2.1.7 - Fixing the goods to an immovable.

- 1. The provisions of this section shall not cease to apply merely because of the incorporation or fixture of the goods to an immovable.*
- 2. Questions relating to the incorporation or fixture of the goods to an immovable, and the respective rights of the lessor and the holders of rights in rem in the immovable arising therefrom, are governed by the law of the State where the immovable is situated.*

§ 2: Rights and obligations of the parties

Article 8.2.1.2.1.8 - Enforceability of rights in rem

The lessor's rights in rem in respect of the goods are enforceable against third parties from the time the leasing contract is registered in a European register established for that purpose.

Comment: Until a European public register has been set up, the register referred to in this article consists of the interconnected national registers.

Article 8.2.1.2.1.9 - Exercise of rights and actions against the supplier

- 1. Rights and actions against the supplier of the goods are exercised by the lessor or the lessee.*
- 2. The leasing contract determines the extent and manner in which the lessee may exercise the rights referred to in paragraph 1.*
- 3. If the contract is silent, rights relating to the warranty for hidden defects and the warranty for conformity are exercised by the lessee.*
- 4. The lessee may not terminate or cancel the supply contract nor take any action to that end without the consent of the lessor.*

Comment: The main actions are those relating to eviction, warranty of hidden defects and conformity. The lessee may be authorised to request termination of the contract. The lessor's consent referred to in paragraph 4 may be given in the leasing contract.

Article 8.2.1.2.1.10 - Liability

- 1. The lessor is exempt from any liability to the lessee in respect of the goods if the lessee can take action against the supplier of the asset under article 8.2.1.2.1.9.*
- 2. In any event, the lessor warrants that the lessee will be protected against eviction or any disturbance of the lessee's quiet possession by a person who has a right of ownership or a superior title or right, or who asserts such a right in legal proceedings, when this title or right is not derived from an act or omission of the lessee.*
- 3. The parties may not derogate from the provisions of the previous paragraph or modify their effects in so far as the superior title, right or claim is derived from an intentional or grossly negligent act or omission of the lessor.*

Comment: Paragraph 1 was added.

Article 8.2.1.2.1.11 - Acceptance, use and return of goods

- 1. The lessee receives the goods, checks their conformity and informs the supplier of any non-conformity within a reasonable time.*
- 2. The lessee shall take care of the goods, use them in a reasonable manner and keep them in the condition in which they were delivered, subject to wear and tear resulting from normal use and to any modification of the goods agreed by the parties.*
- 3. When the leasing agreement comes to an end, the lessee, unless exercising a right to buy the goods or to hold the goods on lease for a further period, shall return the goods to the lessor in the condition specified in the previous paragraph.*

Comment: Paragraph 1 was added.

Article 8.2.1.2.1.12 - Variation of rights

The lessee's rights under the supply contract shall not be affected by a variation of any term of the supply agreement previously approved by the lessee, unless the lessee has consented to that variation.

Article 8.2.1.2.1.13 - Non-performance of contract or late delivery

- 1. Where the equipment is not delivered or is delivered late or fails to conform to the supply agreement:*
 - a) the lessee has the right as against the lessor to reject the goods, to withhold rental payments or to terminate the leasing contract; and*
 - b) the lessor has the right to remedy the non-performance of its obligation by delivering goods that conform with the contract.*
- 2. Where the lessee has exercised a right to terminate the leasing contract, the lessee shall be entitled to recover any rentals and other sums paid in advance, less a reasonable sum for any benefit he may have derived from the goods.*
- 2. This article is without prejudice to the rights of the lessee against the supplier under article 8.2.1.2.1.9.*

Comment: The provisions in articles 13 and 14 of the Ottawa Convention have been omitted as they already follow from the general rules of law.

CHAPTER 2: FINANCING THROUGH MOBILISATION OF CLAIMS

SECTION 1: EUROPEAN ASSIGNMENT OF CLAIMS

§ 1: Definitions, scope of application, general principles

Article 8.2.2.1.1.1 - Concept

- 1. The European assignment of a claim is a contract by which a professional creditor assigns all or part of his claim against a professional debtor to a third party ("assignee").*
- 2. The assignment may relate to one or more present or future claims, whether determined or determinable.*
- 3. It may be made in return for payment or free of charge.*
- 4. It extends to all accessories to the claim.*

Comment: This article essentially reproduces article 1321 of the French Civil Code as well as sections 308, 401 of the German Civil Code and the case law of the German Federal Court. The assignment must have arisen in the course of a professional activity.

Article 8.2.2.1.1.2 - Selection

- 1. The European assignment of claims regime only applies if the parties have chosen it. The choice must be express. It is not subject to any particular form.*
- 2. The choice can be made at any time. The rights of third parties are not affected by a change of regime.*
- 3. A partial choice of the provisions on the European assignment of claims is excluded.*

Article 8.2.2.1.1.3 - Relationship with national law

- 1. The provisions of this section take precedence over all provisions of national law, including mandatory rules.*
- 2. National rules of supervisory law, tax law and accounting remain applicable.*

Article 8.2.2.1.1.4 - Gap filling

- 1. Questions relating to capacity are governed by the applicable national law.*
- 2. All other matters not governed by the following provisions are governed by the common principles of European Union contract law.*

Article 8.2.2.1.1.5 - Contractual freedom

The parties may adapt the European regime for the assignment of claims, subject to the conditions set out in this section.

§ 2: Rights and obligations of the parties

Article 8.2.2.1.2.1 - Validity of the assignment

- 1. The assignment of claims is established by written agreement on any durable medium.*
- 2. The assignment is valid notwithstanding any clause stipulating the non-transferability of the claim. However, the non-transferability of the claim remains enforceable against the assignee who was aware or could not reasonably have been unaware of the non-transferability stipulation at the time of the assignment.*

Comment: The first paragraph of this article is inspired by article 1322 of the French Civil Code, which requires a written document for the assignment of claims. The provision consciously diverges from section 398 of the German Civil Code, which does not require any form for the assignment, because this solution risks inviting fraud and undermining legal certainty. Paragraph 2 of the present article enshrines a preferential regime for assignments by invalidating any restrictive clause preventing the mobilisation of claims. This provision is justified in particular by the fact that the European assignment of claims regime can only be chosen by professionals. The invalidation of non-transferability clauses also helps to redress the contractual balance by encouraging the financing of small and medium-sized businesses, while still protecting the assignee who acts in good faith. However, the debtor of the assigned claim is not deprived of all protection, as paragraph 2 allows him to invoke the non-transferability clause against any assignee who was aware, or who could not reasonably have been unaware, of the existence of such clause at the time the assignment contract was concluded.

Article 8.2.2.1.2.2 - Transfer date

- 1. The transfer of the claim takes place between the parties and is enforceable against third parties from the date of the assignment contract.*
- 2. In the event of a dispute, proof of the date of transfer lies with the assignee, who may provide it by any means.*
- 3. In the case of successive assignments, the priority conflict is solved in favour of the first assignee in time, who has a right of recourse against the person to whom the debtor has paid.*

Comment: This article reproduces the provision of article 1323 of the French Civil Code. It is also in line with German law.

Article 8.2.2.1.2.3 - Enforceability of the assignment against the debtor

- 1. The assigned claim is fully enforceable against the debtor.*
- 2. Payment made to the assignor discharges the debt as long as the debtor is unaware of the assignment.*

3. *The debtor may raise any defences inherent in the debt, such as nullity, non-performance, rescission or set-off with related claims against the assignee, irrespective of when such defence has arisen. He may also raise defences that are not inherent in the debt, such as the deferral or waiver of payment or the set-off against unrelated claims, provided they have arisen before the assignment.*

Comment: Paragraphs 1 and 2 are based on provisions currently in force in France and Germany. Paragraph 3 of this article reproduces article 1324(2) of the French Civil Code and section 404 of the German Civil Code.

Article 8.2.2.1.2.3 - Warranties of the assignor

1. *A person who assigns a claim for payment guarantees the existence of the claim and its accessories, unless the assignee acquired the claim at his own risk or knew of its uncertain nature.*
2. *Unless otherwise agreed, the assignor is not liable for the debtor's solvency.*
3. *Where the assignor guarantees the debtor's solvency, this guarantee refers only to solvency at the date of the assignment, unless otherwise agreed.*

Comment: This article reproduces article 1326 of the French Civil Code. It is also in line with German law.

SECTION 2: EUROPEAN FACTORING

Comment:

This section reproduces the UNIDROIT Convention on International Factoring concluded in Ottawa on May 28, 1988, with the necessary modifications.

§ 1: Definitions, scope of application, general principles

Article 8.2.2.2.1.1 - Concept

1. *The European factoring contract is a contract by which one party, the supplier, transfers, by whatever means, to another party, the factor, claims arising in the course of its business activity.*
2. *The factor is to perform at least two of the following functions:*
 - *finance for the supplier;*
 - *maintenance of accounts relating to the claims;*
 - *collection of claims;*
 - *protection against default in payment by debtors.*

Comment: Claims may be transferred to the factor notably via assignment or subrogation. The scope has been extended from claims arising out of the sale of goods to all claims arising in the course of a professional activity.

Article 8.2.2.2.1.2 - Selection

- 1. The European factoring regime only applies if the parties have chosen it. The choice must be express. It is not subject to any particular form.*
- 2. The choice can be made at any time. The rights of third parties are not affected by a change of regime.*
- 3. A partial choice of the European factoring regime is excluded.*

Article 8.2.2.2.1.3 - Relationship with national law

- 1. The provisions of this section take precedence over all provisions of national law, including mandatory rules.*
- 2. National rules of supervisory law, tax law and accounting remain applicable.*

Article 8.2.2.2.1.4 - Gap filling

- 1. Questions relating to capacity are governed by the applicable national law.*
- 2. All other matters not governed by the following provisions are governed by the common principles of European Union contract law.*

Article 8.2.2.2.1.5 - Contractual freedom

The parties may adapt the European factoring regime, subject to the conditions set out in this section.

§ 2: Rights and duties of the parties

Article 8.2.2.2.2.1 - Validity of the transfer

- 1. The European factoring contract covers existing or future claims, even if they are not individually designated, provided that they are determinable at the time of conclusion of the contract or when they come into existence. If future claims are transferred by way of assignment, such transfer takes effect as soon as they come into existence, without the need for a new act of transfer.*
- 2. The assignment of a claim by the supplier to the factor shall be effective notwithstanding any agreement prohibiting such transfer, provided the factor is acting in good faith, and without prejudice to any liability of the supplier to the debtor.*
- 3. A factoring contract may validly provide as between the parties thereto for the transfer, with or without a new act of transfer, of all or any of the supplier's rights deriving from a sales contract from which the claim arises, including the benefit of any provision in the contract of sale of goods reserving to the supplier title to the goods or creating any security interest.*

Article 8.2.2.2.2 – Possibility to raise defences

- 1. The debtor of the transferred claims may raise against the factor any defence arising from his relationship with the supplier.*
- 2. The defence of non-performance may be invoked regardless of when it arose.*
- 3. The set-off defence may only be invoked if it arose prior to the transfer, except in the case of set-off of related claims.*

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