



Council of the
European Union

015354/EU XXVI. GP
Eingelangt am 19/03/18

Brussels, 16 March 2018
(OR. en)

Interinstitutional File:
2018/0044 (COD)

7222/18
ADD 3

JUSTCIV 63
ECOFIN 256
EJUSTICE 16
COMPET 165
CODEC 403
IA 71

COVER NOTE

From: Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 12 March 2018

To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

No. Cion doc.: SEC(2018) 128 final

Subject: Regulatory Scrutiny Board Opinion
COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS on the applicable law to the proprietary effects of transactions in securities
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

Delegations will find attached document SEC(2018) 128 final.

Encl.: SEC(2018) 128 final



EUROPEAN COMMISSION

Brussels 12.3.2018
SEC(2018)128 final

REGULATORY SCRUTINY BOARD OPINION

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL,
THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS
on the applicable law to the proprietary effects of transactions in securities

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

{COM(2018)89final}
{COM(2018)96final}
{SWD(2018)52final}
{SWD(2018)53final}



EUROPEAN COMMISSION
Regulatory Scrutiny Board

Brussels,
Ares(2018)

Opinion

Title: Impact Assessment / Conflict of law in Claims and Securities

(resubmitted version of 19 January 2018)*

Overall 2nd opinion: POSITIVE WITH RESERVATIONS

(A) Context

In some cross-border financial transactions, there may be an issue of what law applies. There is no globally agreed-upon method to decide this. Within the EU, three EU Directives address conflict of laws questions for many securities transactions. No EU legislation addresses conflict of laws questions with regard to financial claims.

The Commission has explored ways to address this problem of legal uncertainty since 2001. In the meantime, global financial markets have grown. Cross-border transactions in securities were reportedly €440 trillion in 2015. Relevant claims volume was an additional several hundred billion euros.

Internationally, the Hague Securities Convention offers a set of conflict of laws rules for securities. The convention recently entered into force in the United States and Switzerland. The UK reportedly also plans to ratify this convention after Brexit. The Commission proposed to ratify this convention already in 2003, but withdrew the proposal in 2009.

This impact assessment explores ways to clarify which national law governs cross-border transactions in various categories of securities and claims, respectively. Doing so could facilitate cross-border investment and access to credit.

(B) Main considerations

The Board acknowledges that the report has been significantly reworked to reflect the Board's recommendations. The Board welcomes the additional assessment of the options covering financial claims.

However, the report still contains significant shortcomings that need to be addressed. As a result, the Board expresses reservations and gives a positive opinion only on the understanding that the report shall be further adjusted in order to integrate the Board's recommendations on the following key aspects.

- (1) The report does not sufficiently justify the preferred option on securities in relation to the findings of the evaluation. It is not sufficiently clear whether costs linked to 'conflicts of law' will continue for international securities transactions.
- (2) The report does not address the consistency between the two solutions found for claims and securities.

* Note that this opinion concerns a draft impact assessment report which may differ from the one adopted.

(C) Further considerations and adjustment requirements

(1) The preferred option for securities (clarifying EU legislation by issuing a communication) should be analysed on a par with other policy options. The discussion on the preferred option in Chapter 8 (and possibly elsewhere) should be put into perspective of the findings of the evaluation.

(2) The baseline scenario should take into account envisaged developments of global rules and technology and any UK plans to ratify the Hague Securities Convention after Brexit.

(3) The report should consider the consistency between the two solutions found for claims and securities, given limited evidence to support the assessments that the scale of the problem is residual for securities and significant for claims. The report should better consider possible solutions for securities, which would combine the approaches of EU law and the Hague Securities Convention, for instance by specifying choice of law for international transactions and EU law applying to intra-EU transactions.

(4) The report lacks clarity on the magnitude of costs and benefits and should at least identify the factors influencing such costs and benefits. The report should also present cost implications of the 'choice of law' option in a more consistent and structured way. The cost analysis is not fully consistent between section 7.3.2 and section 7.4.3 and the option comparison table (on page 66). Annex 3 should also include the one-off costs incurred by the preferred option on claims, including for businesses. The report is still not sufficiently clear about the consequences of maintaining EU rules, which are inconsistent with international law. Section 8 should clarify that the costs relating to conflict of law, i.e. risk of unexpected losses, transaction costs and fees for legal opinions for international transactions will continue to burden international securities transactions.

(5) Simpler language and numbering of all figures, tables and boxes would make the report more reader-friendly.

(6) The Board notes that, owing to lack of quantitative data, only qualitative assessments of the various costs and benefits associated with the preferred options are provided in the impact assessment.

[Some more technical comments have been transmitted directly to the author DG.]

(D) RSB scrutiny process

The lead DG shall ensure that the report is adjusted in accordance with the recommendations of the Board prior to launching the interservice consultation.

Full title	Proposal for a Regulation on the law applicable to the third party effects of the assignment of claims and Communication clarifying the interpretation of EU conflict of law rules on the proprietary effects of transactions in securities.
Reference number	PLAN/2016/227
Date of RSB meeting	13/12/2017



EUROPEAN COMMISSION
Regulatory Scrutiny Board

Brussels,
Ares(2017)

Opinion

Title: Impact Assessment /Conflict of law in securities and claims

Overall opinion: NEGATIVE

(A) Context

In some cross-border financial transactions, there may be an issue of what law applies. There is no globally agreed-upon method to decide this. Within the EU, three EU Directives address conflict of laws questions for many securities transactions. No EU legislation addresses conflict of laws questions with regard to financial claims.

The Commission has explored ways to address this problem of legal uncertainty since 2001. In the meantime, global financial markets have grown. Cross-border transactions in securities were reportedly €440 trillion in 2015. Relevant claims volume was an additional several hundred billion euros.

Internationally, the Hague Securities Convention offers a set of conflict of laws rules for securities. The convention recently entered into force in the United States and Switzerland. The UK reportedly also plans to ratify this convention after Brexit. The Commission proposed to ratify this convention already in 2003, but withdrew the proposal in 2009.

This impact assessment explores ways to clarify which national law governs cross-border transactions in various categories of securities and claims, respectively. Doing so could facilitate cross-border investment and access to credit.

(B) Main considerations

The Board acknowledges good efforts to present and analyse stakeholder concerns and expert views about conflict of laws. However, the Board gives a negative opinion, because the report contains important shortcomings that need to be addressed, particularly with respect to the following key aspects:

- (1) The report does not adequately reflect how markets have responded to perceived risks in securities. It should indicate whether this reduces concerns about securities.
- (2) The report does not show how the preferred option would solve the problems as they are described. This applies both to conflicts between EU rules and global rules for securities, and needs for rule derogations for claims.

Commission européenne, B-1049 Bruxelles - Belgium. Office: BERL 6/29. E-mail: regulatory-scrutiny-board@ec.europa.eu

(3) The report is not reader friendly. It does not address the problems for securities and claims in a balanced way.

(C) Further considerations and adjustment requirements

(1) Risk related to securities: Section 1.2.5 suggests high risks for securities markets. The report should better reflect how markets have adapted so far and whether the nature of the problem in securities is less important than suggested.

It should be checked whether these modifications will require reviewing the intervention logic (consistency of problems, objectives, assessment criteria for the options and monitoring framework). It will also require rebalancing the presentation between securities and claims.

(2) Policy context and baseline: The history and policy context of The Hague Convention and the 'choice of law' option need to be better explained. The positions of the European Parliament, the Member States and the ECB should be made clear. The report should explain why the Commission's position on the Hague Convention has changed between 2006 and 2009, and why EU chose not to ratify the Convention.

(3) Problem description: The distinction between securities and claims should be made clear. If the problem of conflict of law is less pronounced for securities because markets have adapted, then the problem description should make this clear. The problem section should also explain why the problem is not diminished for claims.

The problem description should separate intra-EU consistency from global consistency, as the report later addresses these issues separately. The baseline should more clearly consider the prospects for the Hague Convention, and assess the likelihood that in the future it may set the international norm for resolving conflicts of law in global securities markets.

(4) Options: The 'choice of law' option was discarded with the 2009 withdrawal of the Commission's ratification proposal of the Hague Convention. Unless the Commission has changed its assessment since then, the report should discard this option upfront based on a clear justification. If the option would entail significant costs for market operators, as claimed, this should be made clear in the report, notably in the comparison of options (including the summary table on page 69). The current comparison table does not suggest any cost issue for that option. The report should consider whether it would be possible to construct a policy option which would both serve the intra-EU consistency (as reflected in the three directives) and global consistency by adhering to the Hague Convention.

For the claims, the report has to explain how options would treat different submarkets, including factoring. It should explain global rules and how the options align with these global rules.

(5) Preferred options: The report should better describe the coherence of the proposed option regarding claims. It should clarify how the preferred option would treat various submarkets for claims in different ways. The report should explain the extent to which diverging stakeholder reviews seem to be a result of differences in submarkets, and how the preferred option would strike an appropriate balance.

2

The report should better explain how the preferred option found for securities is consistent with the conclusions of the evaluation. The report should also present its best judgment of the consequences of maintaining a globally inconsistent solution (including concerning the risks for securities), and the extent to which the preferred option will achieve its objectives.

(6) The report should explain whether the different solutions for claims and securities are consistent.

(7) Presentation: The report should be shorter and more accessible to non-expert readers. The report should be rebalanced by shortening the part on securities (in particular parts 2.5 and 2.6). A revised executive summary should also be reader-friendly and reflect the above revisions to the full report. The report should have a glossary of technical terms and acronyms.

Some more technical comments have been transmitted directly to the author DG.

(D) RSB scrutiny process

The lead DG shall ensure that the report is revised in accordance with the above-mentioned requirements and resubmitted to the Board for its final opinion.

Full title	Conflict of law in securities and claims
Reference number	PLAN/2016/227
Date of RSB meeting	13/12-2017