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INFORMATION NOTE

From: General Secretariat of the Council
To: Permanent Representatives Committee/Council

Subject: 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
- Outcome of the European Parliament's first reading,
(Strasbourg, 11 to 14 February 2019)

I. INTRODUCTION

The rapporteur, Pavel SVOBODA (EPP, CZ), presented a report on the proposal for a Regulation on behalf of the Committee on Legal Affairs. The report contained 24 amendments (No 1-24) to the proposal. No other amendments were tabled.

II. VOTE

When it voted on 13 February 2019, the plenary adopted amendments No 1 to 24 to the proposal for a Regulation.

The Commission's proposal as thus amended constitutes the Parliament's first-reading position which is contained in its legislative resolution as set out in the Annex hereto¹.

¹ The version of the Parliament's position in the legislative resolution has been marked up to indicate the changes made by the amendments to the Commission's proposal. Additions to the Commission's text are highlighted in ***bold and italics***. The symbol "■" indicates deleted text.

Law applicable to the third-party effects of assignments of claims ***I

European Parliament legislative resolution of 13 February 2019 on the 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)0096 – C8-0109/2018 – 2018/0044(COD))

(Ordinary legislative procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to Parliament and the Council (COM(2018)0096),
 - having regard to Article 294(2) and Article 81(2) of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C8-0109/2018),
 - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
 - having regard to the opinion of the European Central Bank of 18 July 2018²,
 - having regard to the opinion of the European Economic and Social Committee of 11 July 2018³,
 - having regard to Rule 59 of its Rules of Procedure,
 - having regard to the report of the Committee on Legal Affairs (A8-0261/2018),
1. Adopts its position at first reading hereinafter set out;
 2. Calls on the Commission to refer the matter to Parliament again if it replaces, substantially amends or intends to substantially amend its proposal;
 3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

² OJ C 303, 29.8.2018, p. 2.

³ OJ C 367, 10.10.2018, p. 50.

Amendment 1

Proposal for a regulation

Recital 3

Text proposed by the Commission

(3) The proper functioning of the internal market requires, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict of law rules in the Member States to designate as the applicable law the same national law irrespective of the Member State of the court in which an action is brought.

Amendment

(3) The proper functioning of the internal market requires - in order to improve the predictability of the outcome of litigation, **legal** certainty as to the law applicable and the free movement **and recognition** of judgments - for the conflict of law rules in the Member States to designate as the applicable law the same national law irrespective of the Member State of the court in which an action is brought.

Amendment 2

Proposal for a regulation

Recital 11

Text proposed by the Commission

(11) **Conflict** of laws **rules** governing the third-party (or proprietary) effects of assignments of claims **do not** currently exist at Union level. These conflict of laws rules are laid down at Member State level, but they are inconsistent **and often** unclear. In cross-border assignments of claims, the inconsistency of national conflict of laws rules leads to legal uncertainty as to which law applies to the third-party effects of the assignments. The lack of legal certainty creates a legal risk in cross-border assignments of claims which does not exist in domestic assignments as different national substantive rules may be applied depending on the Member State whose courts or authorities assess a dispute as to

Amendment

(11) **No harmonised set of rules on the conflict** of laws governing the third-party effects of assignments of claims currently exist at Union level. These conflict of laws rules are laid down at Member State level, but they are inconsistent - **being based on different connecting factors to determine the applicable law - and therefore** unclear, **especially in those countries where such rules are not governed by separate legislative provisions**. In cross-border assignments of claims, the inconsistency of national conflict of laws rules leads to legal uncertainty as to which law applies to the third-party effects of the assignments. The lack of legal certainty creates a legal risk in cross-border assignments of claims which

the legal title over the claims.

does not exist in domestic assignments as different national substantive rules may be applied depending on the Member State whose courts or authorities assess a dispute as to the legal title over the claims; ***implicitly, the outcome of a priority conflict as to who owns a claim further to a cross-border assignment will vary, depending on the national law applied.***

Amendment 3

Proposal for a regulation Recital 12

Text proposed by the Commission

(12) If assignees are not aware of the legal risk or choose to ignore it, they may face unexpected financial losses. Uncertainty about who has legal title over the claims assigned on a cross-border basis can have knock-on effects and deepen and prolong the impact of a financial crisis. If assignees decide to mitigate the legal risk by seeking specific legal advice, they will incur higher transaction costs not required for domestic assignments. ***If assignees are deterred by the legal risk and choose to avoid it, they may forego business opportunities and market integration may be reduced.***

Amendment

(12) If assignees are not aware of the legal risk or choose to ignore it, they may face unexpected financial losses. Uncertainty about who has legal title over the claims assigned on a cross-border basis can have knock-on effects and deepen and prolong the impact of a financial crisis. If assignees decide to mitigate the legal risk by seeking specific legal advice, they will incur higher transaction costs not required for domestic assignments.

Amendment 4

Proposal for a regulation Recital 12 a (new)

Text proposed by the Commission

Amendment

(12a) This legal risk can also act as a deterrent. Assignees and assignors may choose to avoid it, thereby allowing business opportunities to pass. This lack

of clarity does not therefore appear to be in line with the objective of market integration and the principle of free movement of capital enshrined in Articles 63 to 66 Treaty on the Functioning of the European Union.

Amendment 5

Proposal for a regulation Recital 13

Text proposed by the Commission

(13) The objective of this Regulation is to provide legal certainty by laying down common conflict of laws rules designating which national law applies to the third-party effects of assignments of claims.

Amendment

(13) The objective of this Regulation is to provide legal certainty by laying down common conflict of laws rules designating which national law applies to the third-party effects of assignments of claims, ***increasing cross-border claims transactions, so as to encourage cross-border investment in the Union and facilitate access to finance for firms - including small and medium-sized enterprises (SMEs) - and consumers.***

Amendment 6

Proposal for a regulation Recital 14 a (new)

Text proposed by the Commission

Amendment

(14a) This Regulation is not intended to alter the provisions of Regulation (EC) No 593/2008 regarding the proprietary effect of a voluntary assignment as between assignor and assignee or as between assignee and debtor.

Amendment 7

Proposal for a regulation Recital 15

Text proposed by the Commission

(15) The conflict of laws rules laid down in this Regulation should govern the **proprietary** effects of assignments of claims **as between all parties involved in the assignment (that is, between the assignor and the assignee and between the assignee and the debtor) as well** as in respect of third parties (for example, a creditor of the assignor).

Amendment

(15) The conflict of laws rules laid down in this Regulation should govern the effects of assignments of claims in respect of third parties, for example, a creditor of the assignor, **excluding the debtor**.

Amendment 8

Proposal for a regulation Recital 16

Text proposed by the Commission

(16) The claims covered by this Regulation **are** trade receivables, claims arising from financial instruments as defined in Directive 2014/65/EU on markets in financial instruments⁴⁴ and cash credited to an account in a credit institution. Financial instruments as defined in Directive 2014/65/EU include securities and derivatives traded on financial markets. While securities are assets, derivatives are contracts which include both rights (or claims) and obligations for the parties to the contract.

Amendment

(16) The claims covered by this Regulation **include** trade receivables, claims arising from financial instruments as defined in Directive 2014/65/EU **of the European Parliament and of the Council**⁴⁴ and cash credited to an account in a credit institution. Financial instruments as defined in Directive 2014/65/EU include securities and derivatives traded on financial markets. While securities are assets, derivatives are contracts which include both rights (or claims) and obligations for the parties to the contract.

⁴⁴ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173, 12.6.2014, p. 349–496.

⁴⁴ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

Amendment 9

Proposal for a regulation

Recital 17

Text proposed by the Commission

(17) This Regulation concerns the third-party effects of the assignment of claims. ***It does not cover*** the transfer of the contracts (such as derivative contracts), in which both rights (or claims) and obligations are included, or the novation of contracts including such rights and obligations. ***As this Regulation does not cover the transfer or the novation of contracts, trading in financial instruments, as well as the clearing and the settlement of these instruments, will continue to be governed by the law applicable to contractual obligations as laid down in the Rome I Regulation. This law is normally chosen by the parties to the contract or is designated by non-discretionary rules applicable to financial markets.***

Amendment

(17) This Regulation concerns the third-party effects of the assignment of claims. ***In particular, it covers*** the transfer of the contracts (such as derivative contracts), in which both rights (or claims) and obligations are included, or the novation of contracts including such rights and obligations.

Amendment 10

Proposal for a regulation

Recital 18

Text proposed by the Commission

(18) Matters governed by the ***Financial Collateral Directive⁴⁴, the Settlement Finality Directive⁴⁵, the Winding-Up Directive⁴⁶ and the Registry Regulation⁴⁷*** should not be affected by this Regulation.

Amendment

(18) Matters governed by ***Directive 2002/47/EC of the European Parliament and of the Council⁴⁴, Directive 98/26/EC of the European Parliament and of the Council⁴⁵, Directive 2001/24/EC of the European Parliament and of the Council⁴⁶ and Commission Regulation (EU) No 389/2013⁴⁷*** should not be affected by this Regulation, ***since the scope of the conflict of laws rules contained in this***

Regulation and that of the conflict of laws rules contained in those three Directives do not therefore overlap.

⁴⁴ 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. 43–50.

⁴⁵ 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. 45–50.

⁴⁶ 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. 15–23.

⁴⁷ Commission Regulation (EU) No 389/2013 of 2 May 2013 establishing a Union Registry pursuant to Directive 2003/87/EC of the European Parliament and of the Council, Decisions No 280/2004/EC and No 406/2009/EC of the European Parliament and of the Council and repealing Commission Regulations (EU) No 920/2010 and No 1193/2011, OJ L 122, 3.5.2013, p. 1–59.

⁴⁴ 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).

⁴⁵ 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).

⁴⁶ 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).

⁴⁷ Commission Regulation (EU) No 389/2013 of 2 May 2013 establishing a Union Registry pursuant to Directive 2003/87/EC of the European Parliament and of the Council, Decisions No 280/2004/EC and No 406/2009/EC of the European Parliament and of the Council and repealing Commission Regulations (EU) No 920/2010 and No 1193/2011 (OJ L 122, 3.5.2013, p. 1).

Amendment 11

Proposal for a regulation

Recital 25

Text proposed by the Commission

(25) In accordance with market practice and the needs of market participants, the third-party effects of certain assignments of claims should, as an exception, be governed by the law of the assigned claim, that is, the law that governs the initial contract between the creditor and the debtor ***from which*** the claim ***arises***.

Amendment

(25) In accordance with market practice and the needs of market participants, the third-party effects of certain assignments of claims should, as an exception, be governed by the law of the assigned claim, that is, the law that governs the initial contract between the creditor and the debtor ***which gives rise to*** the claim.

Amendment 12

Proposal for a regulation

Recital 28

Text proposed by the Commission

Amendment

(28) Flexibility should be provided in the determination of the law applicable to the third-party effects of assignments of claims in the context of a securitisation in order to cater for the needs of all securitisers and facilitate the expansion of the cross-border securitisation market to smaller operators. Whilst the law of the assignor's habitual residence should apply as the default rule to the third-party effects of assignments of claims in the context of a securitisation, the assignor (originator) and the assignee (special purpose vehicle) should be able to choose that the law of the assigned claim should apply to the third-party effects of the assignment of claims. The assignor and the assignee should be able to decide that the third-party effects of the assignment of claims in the context of a securitisation should remain subject to the general rule of the assignor's habitual residence or to choose the law of the assigned claim in function of the structure and characteristics of the transaction, for example the number and location of the originators and the number of laws which govern the assigned claims.

deleted

Amendment 13

Proposal for a regulation

Recital 29

Text proposed by the Commission

Amendment

(29) Priority conflicts between assignees of the same claim may arise where the third-party effects of the assignment have been subject to the law of the assignor's habitual residence in one assignment and to the law of the assigned claim in another assignment. In such cases, the law applicable to resolve the priority conflict should be the law applicable to the third-party effects of the assignment of the claim which has first become effective against third parties under its applicable law.

(29) Priority conflicts between assignees of the same claim may arise where the third-party effects of the assignment have been subject to the law of the assignor's habitual residence in one assignment and to the law of the assigned claim in another assignment. In such cases, the law applicable to resolve the priority conflict should be the law applicable to the third-party effects of the assignment of the claim which has first become effective against third parties under its applicable law.

Where both assignments of claims become effective against third parties at the same time, the law of the assignor's habitual residence should prevail.

Amendment 14

Proposal for a regulation Recital 30

Text proposed by the Commission

(30) The scope of the national law designated by this Regulation as the law applicable to the third-party effects of an assignment of claims should be uniform. The national law designated as applicable should govern in particular (i) the effectiveness of the assignment against third parties, that is, the steps that need to be **taken** by the assignee in order to ensure that he acquires legal title over the assigned claim (for example, registering the assignment with a public authority or registry, or notifying the debtor in writing of the assignment); and (ii) priority issues, that is, conflicts between several claimants as to who has title over the claim (for example, between two assignees where the same claim has been assigned twice, or between an assignee and a creditor of the assignor).

Amendment

(30) The scope of the national law designated by this Regulation as the law applicable to the third-party effects of an assignment of claims should be uniform. The national law designated as applicable should govern in particular (i) the effectiveness of the assignment against third parties, that is, the steps **and procedures** that need to be **followed** by the assignee in order to ensure that he acquires legal title over the assigned claim (for example, registering the assignment with a public authority or registry, or notifying the debtor in writing of the assignment); and (ii) priority issues, that is, **the resolution of conflicts** between several claimants as to who has title over the claim **following a cross-border assignment** (for example, between two assignees where the same claim has been assigned twice, or between an assignee and a creditor of the assignor).

Amendment 15

Proposal for a regulation Recital 34

Text proposed by the Commission

(34) This Regulation respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union. In particular, this Regulation seeks to promote the application of Articles 17 and 47 concerning, respectively, the right to property and the right to an effective remedy and to a fair trial.

Amendment

(34) This Regulation respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union. In particular, this Regulation seeks to promote the application of Articles 17 and 47 concerning, respectively, the right to property and the right to an effective remedy and to a fair trial, ***as well as Article 16 concerning the freedom to conduct a business.***

Amendment 16

Proposal for a regulation Article 1 – paragraph 1 – subparagraph 1

Text proposed by the Commission

This Regulation shall apply, in situations involving a conflict of laws, to the third-party effects of assignments of claims in civil and commercial matters.

Amendment

This Regulation shall apply, in situations involving a conflict of laws, to the third-party effects of assignments of claims in civil and commercial matters ***other than third-party effects to the debtor of the claim assigned.***

Amendment 17

Proposal for a regulation Article 1 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. This Regulation is without prejudice to Union and national law on consumer protection.

Amendment 18

Proposal for a regulation

Article 1 – paragraph 2 – point b

Text proposed by the Commission

(b) assignment of claims arising from matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, **and** wills and succession;

Amendment

(b) assignment of claims arising from matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage **including registered partnerships**, wills and succession;

Amendment 19

Proposal for a regulation

Article 1 – paragraph 2 – point f a (new)

Text proposed by the Commission

Amendment

(fa) assignment of claims in the course of a collective proceeding under Regulation (EU) 2015/848.

Amendment 20

Proposal for a regulation

Article 2 – paragraph 1 – point e

Text proposed by the Commission

(e) 'third-party effects' means **proprietary effects, that is**, the right of the assignee to assert his legal title over a claim assigned to him towards other assignees or beneficiaries of the same or functionally equivalent claim, creditors of the assignor and other third parties;

Amendment

(e) 'third-party effects' means the right of the assignee to assert his legal title over a claim assigned to him towards other assignees or beneficiaries of the same or functionally equivalent claim, creditors of the assignor and other third parties, **excluding the debtor**;

Amendment 21

Proposal for a regulation

Article 2 – paragraph 1 – point h

Text proposed by the Commission

(h) ‘cash’ means money credited to an account in a credit institution in any currency;

Amendment

deleted

Amendment 22

Proposal for a regulation

Article 4

Text proposed by the Commission

Article 4

Applicable law

1. Unless otherwise provided for in this Article, the third-party effects of an assignment of claims shall be governed by the law of the country in which the assignor has its habitual residence at the **material** time.

Where the assignor has changed its habitual residence between two assignments of the same claim to different assignees, the priority of the right of an assignee over the right of another assignee shall be governed by the law of the habitual residence of the assignor at the time of the assignment which first became effective against third parties under the law designated as applicable pursuant to the first subparagraph.

2. **The** law applicable to the assigned claim shall govern the third-party effects of the assignment of:

- (a) **cash** credited to an account in a credit institution;
- (b) claims arising from **a** financial

Amendment

Article 4

Applicable law

1. Unless otherwise provided for in this Article, the third-party effects of an assignment of claims shall be governed by the law of the country in which the assignor has its habitual residence at the time **of the conclusion of the assignment contract**.

Where the assignor has changed its habitual residence between two assignments of the same claim to different assignees, the priority of the right of an assignee over the right of another assignee shall be governed by the law of the habitual residence of the assignor at the time of the assignment which first became effective against **other** third parties under the law designated as applicable pursuant to the first subparagraph.

2. **Notwithstanding paragraph 1 of this Article, the** law applicable to the assigned claim shall govern the third-party effects of the assignment of:

- (a) **money** credited to an account in a credit institution;
- (b) claims arising from financial

instrument.

3. The assignor and the assignee may choose the law applicable to the assigned claim as the law applicable to the third-party effects of an assignment of claims in view of a securitisation.

The choice of law shall be made expressly in the assignment contract or by a separate agreement. The substantive and formal validity of the act whereby the choice of law was made shall be governed by the chosen law.

4. A priority conflict between assignees of the same claim where the third-party effects of one of the assignments are governed by the law of the country in which the assignor has its habitual residence and the third-party effects of other assignments are governed by the law of the assigned claim shall be governed by the law applicable to the third-party effects of the assignment of the claim which first became effective against third parties under its applicable law.

instruments.

4. A priority conflict between assignees of the same claim where the third-party effects of one of the assignments are governed by the law of the country in which the assignor has its habitual residence and the third-party effects of other assignments are governed by the law of the assigned claim shall be governed by the law applicable to the third-party effects of the assignment of the claim which first became effective against third parties under its applicable law. ***Where both assignments become effective against third parties at the same time, the law of the country in which the assignor's habitual residence is situated shall prevail.***

Amendment 23

Proposal for a regulation

Article 6 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. Effect shall be given to the overriding mandatory provisions of the law of the Member State where the assignment has to be or has been performed, insofar as those overriding mandatory provisions render the

*performance of the assignment contract
unlawful.*

Amendment 24

Proposal for a regulation Article 14 – paragraph 2

Text proposed by the Commission

2. The law applicable pursuant to this Regulation shall determine whether the rights of a third party in respect of a claim assigned after the date of application of this Regulation have priority over the rights of another third person acquired before this Regulation becomes applicable.

Amendment

2. The law applicable pursuant to this Regulation shall determine whether the rights of a third party in respect of a claim assigned after the date of application of this Regulation have priority over the rights of another third person acquired before this Regulation becomes applicable. ***In the case of competing claims based on assignments, the law applicable pursuant to this Regulation shall determine the rights of the respective assignees, solely in respect of assignments concluded after ... [the date of application of this Regulation].***