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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
- Progress report

I. INTRODUCTION

1. 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 claims¹ was presented by the Commission as part of the Capital Markets Union Action Plan on 12 March 2018. The proposal is based on Article 81(2) (Judicial cooperation in civil matters) of the Treaty on the Functioning of the European Union and is subject to the ordinary legislative procedure. Upon presentation, it was accompanied by a Communication from the Commission on the applicable law to the proprietary effects of transactions in securities² and an Impact Assessment³.
2. The objective of the proposal is to help to increase cross-border transactions in claims and thereby facilitate access to finance by establishing, at EU level, common conflict-of-law rules designating which national law applies to the third-party effects of assignments of claims.

¹ 7222/18 - COM(2018) 96 final.

² 7358/18 - COM(2018) 89 final.

³ 7222/18 ADD1 REV 1 + ADD2 REV 1.

3. The declared purpose of the proposal is to lay down uniform rules in order to designate which national law should determine the ownership of a claim after it has been assigned on a cross-border basis and thereby eliminate legal risk and potential systemic consequences on financial markets. Therefore, the effect of the proposal will be to provide legal certainty which will promote cross-border investment, access to cheaper credit and market integration. The proposal should also be consistent with existing Union instruments on applicable law in civil and commercial matters, in particular with the Rome I Regulation, the Insolvency Regulation, the Financial Collateral Directive, the Settlement Finality Directive and the Winding-Up Directive.

4. In this context, the Commission proposed, as a general rule, that in situations of conflict-of-law, the law of the assignor's habitual residence should govern the third-party effects of the assignment of a claim. According to the Commission's assessment, this rule would make it easier to predict the applicable law, since the location of the assignor can be ascertained in advance by third parties. In order to adapt to the needs of market participants for specific types of claims (cash credited to a bank account and claims arising from financial instruments) the Commission proposed two exceptions from the general rule in which the law of the assigned claim will apply. Also, regarding the law applicable to the third-party effects of assignments of claims pursuant to a securitisation, the Commission proposed a choice between the law of the habitual residence of the assignor and the law of the assigned claim, in order to enable both large and smaller operators to engage in cross-border securitisations.

5. The European Parliament adopted its first-reading position⁴, with 24 amendments to the Commission proposal, on 13 February 2019 by 546 votes to 35, with 62 abstentions. The EP followed the Commission proposal that the third-party effects of an assignment should be governed by the law of the country where the assignor has its habitual residence. Members deleted the provisions of the proposal which provided that the assignor and the assignee could 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.
6. The European Economic and Social Committee adopted its opinion⁵ on this proposal on 11 July 2018 and the European Central Bank delivered its own-initiative opinion⁶ on 18 July 2018.
7. Neither the UK nor Ireland have made use of the possibility, set out in Article 3 of Protocol (No 21) to the Treaties on the Position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, to take part in the adoption and application of the proposed measure. In application of Protocol (No 22) to the Treaties on the Position of Denmark, Denmark does not take part in the adoption of the proposed measure.

⁴ 6217/19.

⁵ 11427/18.

⁶ CON/2018/33. There is not any obligation under the Treaties for the ECB to be consulted.

II. WORK IN THE COUNCIL

8. The Council noted the progress⁷ made on this file by previous Presidencies at its meeting on 6 and 7 December 2018. Building on the work carried out in 2018, the Presidency prepared two revised texts of the proposal which were examined by the Working Party on Civil Law Matters (Assignments of Claims), herein-after 'the Working Party'. Four Working Party meetings were dedicated to the examination of the Presidency texts⁸, the last one on 15 May 2019.

9. Over the last months, the Working Party has also focused on obtaining clarifications from the Commission on the financial aspects of the proposal and, in particular, its connection with EU financial services legislation and other international and national legislation potentially relevant to the aspects of the proposal concerning capital markets, such as the transactions on securities. It has been assisted in this task by delegates from the Working Party on Financial Services. Moreover, the Working Party has also considered, together with the Commission, a series of legal issues raised in relation to the proposal, some of which have led to amendments presented by the Presidency in its revised texts.

⁷ 14498/18.

⁸ The latest version can be found in document ST 7889/19.

10. The main provisions discussed during the first semester of 2019 were:

- a) **Scope (Article 1):** the Working Party welcomed the inclusion of 'contractual subrogation' into the scope of the Regulation in order to ensure coherence with the Rome I Regulation⁹. Regarding the exclusions from the scope, further negotiations are required on the possible additional exclusions, bearing in mind that further exclusions should not undermine the full achievement of the envisaged objective of the proposal, namely the elimination of the legal uncertainty that now exists in relation to the law applicable to third-party effects in cases of cross-border transactions involving claims.
- b) **Definitions (Article 2):** while the Presidency text retained some definitions as originally proposed by the Commission (e.g. 'assignor', 'assignee', 'habitual residence', 'financial instrument'), it has amended others (e.g. 'assignment', 'claim', 'third-party effects', 'credit institution', 'cash') in order to make them clearer. Furthermore, the Presidency text included new additional definitions (e.g. 'securitisation', 'securities'). The definitions are still under scrutiny by the delegations.

⁹ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJ L 177, 4.7.2008, p. 6–16*.

- c) **Applicable law (Article 4):** the Working Party has continued the examination of the general rule proposed by the Commission (i.e. the law of the assignor's habitual residence) and its exceptions (e.g. cash) in the light of its advantages (e.g. predictability) and disadvantages (e.g. possible need for several exceptions, such as, for instance, claims arising from financial instruments). A number of additional exceptions have been proposed by some delegations but still require further assessment as to their necessity and justification. In that respect, a number of delegations are in favour of reversing the general rule (the law of the assigned claim) with a need for some exceptions (e.g. factoring) which will fall under the law of the assignor's habitual residence, so, in this context, the advantages (e.g. identity of the law applicable to the third-party effects and to the debtor under the Rome I regime) and disadvantages (e.g. less predictability) of such alternative general rule will be under scrutiny in the Working Party. So far this examination has shown that the discussions on which general rule to adopt and on the scope of the proposal can be linked. Therefore, a substantial analysis of both elements of the proposal should continue in parallel in order to prepare the position of the Council.

The Presidency text also considered the comments made by some delegations as regards the necessity of a different connecting factor in cases where a registered security right over immovable (mortgages) or moveable (pledges) property is used as collateral in secured lending. The discussions on this matter showed that while there is a need for either a different connecting factor or, depending on the results of the discussions, for a provision clarifying that national law on these arrangements will not be affected, this need may only exist in situations in which the collateral (registered security right) is accessory to the claim. The examination of these issues will be continued.

d) **Application in time (Article 14):** the discussions in the Working Party are converging towards the applicability of the new instrument only to assignments of claims where the assignment contract has been concluded on or after the date of application of the Regulation.

11. The Working Party has also examined the remaining provisions¹⁰ of the proposal which the Presidency has not, or only slightly, modified in comparison with the original Commission proposal. For some of these provisions, clarifications in the corresponding recitals have been envisaged.

¹⁰ Universal application (Article 3), Scope of the applicable law (Article 5), Overriding mandatory provisions (Article 6), Public policy (Article 7), Exclusion of renvoi (Article 8), States with more than one legal system (Article 9), Relationship with other provisions of Union law (Article 10), Relationship with existing international conventions (Article 11), List of Conventions (Article 12), Review clause (Article 13) and Entry into force and date of application (Article 15).

III. CONCLUSION

12. While important progress has been achieved during the Romanian Presidency, delegations continue to analyse in-depth the content of the proposal and to examine the Presidency text. Therefore, taking into account the complexity of the proposal, its possible impact on financial markets and its interrelation with other pieces of Union law, further work at technical level is required before the Council can take any political decision. To that end, the Council is expecting additional technical input from the Commission, mainly on the financial issues referred to in paragraph 9.
 13. Against this backdrop, the Permanent Representatives Committee is invited to submit this progress report to the Council in order that it takes note of it at its meeting on 6 and 7 June 2019.
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