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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 on 12 March 2018 based on Article 81(2) of the Treaty on the Functioning of the European Union and subject to the ordinary legislative procedure. The proposal was accompanied by a Communication from the Commission on the applicable law to the proprietary effects of transactions in securities.²

¹ 7222/18 – COM(2018) 96 final.

² 7358/18 – COM(2018) 89 final.

2. As part of the Capital Markets Union (CMU) Action Plan and in line with its objectives, the general objective of this proposal is to foster cross-border transactions in claims in the EU and, thereby, to facilitate access to finance for firms, including SMEs, and consumers.
3. The adoption of uniform conflict-of-laws rules at Union level designating which national law should determine the ownership of a claim after an assignment on a cross-border basis³ aims to provide legal certainty for market participants, thereby promoting cross-border investment and market integration, while eliminating legal risks and potential systemic consequences. The proposal should 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 conflict-of-law situations the law of the assignor's habitual residence should apply. In order to adapt to the needs of market participants for specific types of claims, the Commission proposed two exceptions (cash credited to a bank account and claims arising from financial instruments); in these cases, the law of the assigned claim should apply. In addition, for securitisation transactions, the Commission proposed a choice between the law of the habitual residence of the assignor and the law of the assigned claim.
5. The European Parliament adopted its first-reading position,⁴ with 24 amendments to the Commission proposal, on 13 February 2019.
6. The European Economic and Social Committee adopted its opinion⁵ on this proposal on 11 July 2018 and the European Central Bank delivered its opinion⁶ on 18 July 2018.

³ In its judgment of 9 October 2019 in Case C-548/18, BGL BNP Paribas SA v TeamBank AG Nürnberg, ECLI:EU:C:2019:848, the Court of Justice confirmed that this matter is currently not regulated by 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 2008 L 177, p. 6, 'the Rome I Regulation').

⁴ 6217/19.

⁵ 11427/18.

⁶ CON/2018/33.

7. Ireland has not 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.

II. WORK IN THE COUNCIL

8. The Working Party on Civil Law Matters (Assignments of claims) held an initial general exchange of views on the proposal during the Bulgarian Presidency and both the Austrian and Romanian Presidencies presented progress reports at Council meetings.⁷ After the Commission had provided additional information regarding certain key questions concerning the relationship between the proposal and the financial markets which the Working Party felt necessary to assess, deliberations under the Croatian Presidency were severely impeded by the Covid-19-pandemic. Nevertheless, a discussion took place at the informal video-conference of Ministers of Justice on 4 June 2020,⁸ providing valuable political guidance as to the retention of the principle of universality and to the exclusion of priority conflicts involving novation as well as the retroactive application of the proposed measure.
9. Due to the pandemic situation, discussions of the Working Party under the German Presidency of the Council could only take place via informal video-conferences. The deliberations, which were based on the Presidency redrafted text including the Recitals, helped to resolve certain issues, such as
- the exclusion from the scope of the transfer of transferable securities, money-market instruments and units in collective investment undertakings, and of assignments of claims arising out of those financial instruments when these claims are assigned attached to the financial instrument from which they arise,

⁷ 14498/18, 9562/19.

⁸ WK 5285/20.

- the exclusion from the scope of assignments of claims incorporated in a certificate (such as coupons) or represented by a book-entry,
- the definition of third-party effects of assignments of claims, which are without prejudice to the position of the debtor under the law applicable under Article 14(2) of the Rome I Regulation, and
- the treatment of States with more than one legal system.

10. However, several issues remain for further discussion, in particular the following points.

11. Following a proposal by the Italian delegation, the Working Party discussed the merits of using the law of the assigned claim for the main rule on the applicable law and using the law of the habitual residence of the assignor as the connecting factor for assignments of future claims, assignments of multiple claims governed by different laws (so called, bulk assignments), and factoring. While there was support for this proposal by several delegations, others voiced objections and a number of delegations expressed flexibility. It emerged at this stage that the general rule as proposed by the Commission, the law of the habitual residence of the assignor, was considered the appropriate connecting factor in general. It was also acknowledged that appropriate exceptions (as contained in the Presidency text⁹) were crucial to the smooth functioning of financial markets.

⁹ 11343/20.

12. The Working Party considered on several occasions whether the assignment of claims arising out of transferable securities, money-market instruments and units in collective investment undertakings, when assigned unattached to the security from which they arise and neither incorporated in a certificate nor represented by a book-entry, should be included in the scope of the proposal. Such assignments may happen, for example, when a company assigns a claim for dividends as collateral to a bank to obtain a loan. Some Member States' delegations asked for excluding these assignments from the scope, as they consider these claims indivisible from the securities or that these assignments do not occur in practice in their legal systems and that including them could lead to frictions with assignments of these claims attached to the securities from which they arise. Other delegations, however, considered that the claims can be assigned separately from the securities, that such assignments do happen and that they should stay in the scope in order not to leave a gap in the proposed instrument and to provide legal certainty.
13. The Working Party also continued to examine how assignments of claims secured by immovable property or registered assets (for instance a mortgage) should be treated. There is agreement that the Regulation does not apply to the transfer of the security right, e.g. the mortgage. However, there is a connection between the assignment of the secured claim and the security right: In many legal systems, the security right is accessory to the claim it secures, meaning that the transfer of the security right is an *ex lege* consequence of the assignment of the claim, and in those cases the effectiveness of the transfer of the security right depends on the effectiveness of the assignment of the secured claim against third parties. Simultaneously, some Member States' laws require registration of the assignment of the secured claim in a register (e.g. the land register in cases of mortgages) not only for the third-party effects of the transfer of the security right but also for the third-party effects of the assignment of the claim. Therefore, some delegations worried that the application of this Regulation could, among other consequences, impact these registration requirements and the accuracy of registers.

14. Taking the above into account, several options were assessed regarding the third-party effects of the assignment of claims secured by immovable property or registered assets. One of such options would be to subject the third-party effects of assignments of these claims to the law of the State in which the immovable property is situated or under the authority of which the register is kept. Another option would be to clarify that the Regulation does not apply to the transfer of such security rights and should therefore be without prejudice to any requirements as to form or registration under the law of the State where the immovable property is situated or under the authority of which the register is maintained. The Working Party also took in consideration a rule under which the law of the State in which the immovable property is situated or under the authority of which the register is kept would only apply to priority conflicts between different assignees. However, no solution found unanimous support and further assessment is necessary at technical level.

III. CONCLUSION

15. While important progress has been achieved during the German Presidency, delegations continue to analyse in-depth the content of the proposal. Therefore, taking into account the complexity of the proposal, its possible impact on financial markets and its interrelation with other instruments of Union law, further work at technical level is required before the Council can take a political decision.
16. The Permanent Representatives Committee is invited to take note of the present progress report from the Presidency.