



## EUROPEAN COMMISSION

Directorate General Financial Stability, Financial Services and Capital Markets Union

Directorate General Justice and Consumers

### **CONSULTATION DOCUMENT**

#### **on conflict of laws rules for third party effects of transactions in securities and claims**

#### **Disclaimer**

This document is a working document of the Commission services for consultation and does not prejudice the final decision that the European Commission may take.

The views reflected on this consultation paper provide an identification on the approach the Commission services may take but do not constitute a final policy position or a formal proposal by the European Commission.

Interested parties are invited to reply between 7 April and 30 June 2017 at the latest to the online questionnaire available here:

[http://ec.europa.eu/info/finance-consultations-2017-securities-and-claims\\_en](http://ec.europa.eu/info/finance-consultations-2017-securities-and-claims_en)

The Commission is seeking input from all concerned stakeholders, and in particular those who engage in or are affected by the practice of factoring, securitisation, collateralisation, as well as legal counsels and experts familiar with conflict of laws on third party effects of transactions in securities and claims. Member States and supervisory authorities are also invited to provide their input to this questionnaire.

Respondents are invited to provide evidence-based feedback and specific operational suggestions. Please note that in order to ensure a fair and transparent consultation process only responses received through the online questionnaire will be taken into account and included in the report summarising the responses.

This consultation follows the normal rules of the European Commission for public consultations. Responses will be published unless respondents indicate otherwise in the online questionnaire.

Responses authorised for publication will be published on the following webpage:

[http://ec.europa.eu/info/finance-consultations-2017-securities-and-claims\\_en#contributions](http://ec.europa.eu/info/finance-consultations-2017-securities-and-claims_en#contributions)

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## 1. INTRODUCTION

Capital Markets Union ('CMU') is a core component of the Commission's Investment Plan for Europe to boost jobs, including youth employment, and growth. It encompasses the reforms of our financial system needed to enable the flow of private capital to fund the EU's pressing investment challenges – in the domains of infrastructure, energy transition and particularly in financing growing businesses.

In the CMU Action Plan<sup>1</sup>, the Commission noted that despite significant progress in recent decades to develop a single market for capital, there are still many long-standing and deep-rooted obstacles that stand in the way of cross-border investment. One of the obstacles identified is legal uncertainty surrounding securities ownership in cases when the securities issuer and the investor are located in different Member States and/or securities are held by financial institutions in different Member States. Another barrier results from differences in the national treatment of third party effects of assignment of debt claims that complicates their use as cross-border collateral, in particular as underlying in securitisations, and makes it difficult for investors to price the risk of debt investments. To facilitate cross-border investing the CMU Action Plan envisages action on securities and third party effects of assignment of claims<sup>2</sup>. The CMU Communication<sup>3</sup> further specifies that the Commission will propose a legislative initiative to determine with legal certainty which national law shall apply to securities ownership and to third party effects of the assignment of claims.

This is a complex topic which the Commission has been reviewing with stakeholders for several years<sup>4</sup>. In 2001, the First Giovannini Report identified the “*uneven application of national conflict of laws rules*” as one of the 15 barriers to efficient cross-border clearing and settlement<sup>5</sup>. In 2010, a public consultation included questions on the law applicable to securities ownership<sup>6</sup>. Stakeholders were also consulted when the Rome Convention was transformed into the Rome I Regulation<sup>7</sup> and a proposal on the law applicable to third party effects of assignment of claims was made, but not included in the final text<sup>8</sup>.

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<sup>1</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Action Plan on Building a Capital Markets Union' ('CMU Action Plan'), [COM\(2015\) 468 final](#), p. 23.

<sup>2</sup> See [CMU Action Plan](#), Annex 1: List of actions and indicative timeline, p. 30.

<sup>3</sup> Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions 'Capital Markets Union – Accelerating Reform', [COM\(2016\) 601 final](#), p. 6.

<sup>4</sup> For a record of this work see the Commission's website at: [https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-markets/post-trade-services/securities-ownership\\_en](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-markets/post-trade-services/securities-ownership_en)

<sup>5</sup> The Giovannini Group, Cross-border clearing and settlement arrangements in the European Union, 2001 ('[First Giovannini Report](#)'), Barrier 15, p. 57–59.

<sup>6</sup> Questions 27–29 of the Consultation document on legislation on legal certainty of securities holding and dispositions, 2010, p. 23–26, and the Summary of responses, 2011, p. 85–92, available at: [https://ec.europa.eu/info/publications/consultations-harmonisation-securities-law-2009-2011\\_en](https://ec.europa.eu/info/publications/consultations-harmonisation-securities-law-2009-2011_en)

<sup>7</sup> Question 18 of the Green paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, [COM\(2002\) 654 final](#), p. 39–41.

<sup>8</sup> See Article 13(3) of Proposal for a Regulation of the European Parliament and of Council on the law applicable to contractual obligations, [COM\(2005\) 650 final](#), and Articles 14 and 27(2) of Regulation (EC) No 593/2008 on the law applicable to contractual obligations ('[Rome I Regulation](#)').

Since then, an external study was conducted on this subject<sup>9</sup> and a Commission Report was adopted in 2016<sup>10</sup>.

The purpose of this public consultation is to gather stakeholders' views on the practical problems and types of risks caused by the current state of harmonisation of the conflict of laws rules on third party effects of transactions in securities and claims and to gather views on possibilities for improving such rules.

Stakeholders' responses will feed into the Commission's assessment of legal risks, the problem's scale and possible EU action.

This consultation document and the accompanying questionnaire are structured as follows: problem description (Section 2); book-entry securities and certificated securities (Sections 3 and 4 – both sections being mainly relevant for the securities industry, issuers and investors); claims (Section 5 – primarily relevant for the factoring and banking industry and SMEs); and a specific subset of claims that might need different solutions (Section 6 – primarily relevant for securitisation, banking and the derivative market industry). Section 7 indicates the follow-up steps to this public consultation.

## **2. WHAT IS THE ISSUE AND HOW DO MARKETS DEAL WITH IT?**

There are challenges in relation to the law applicable to transactions in securities and claims, particularly as regards the acquisition or disposal of such assets. Whether such transactions are effective vis-à-vis third parties is significant not only for the parties to the transaction in question, but also for other market participants who interact with any of the parties. For example, the effectiveness of proprietary rights to securities or claims may be disputed by others not party to the transaction. Matters can get more complicated where several subsequent transactions take place and certain actors call previous transactions into question (e.g. registration requirements were not complied with, securities were not acquired in good faith, or bulk assignments of future claims were not effective in the assignor's insolvency). Questions of priorities may also arise where competing transfers occur since the same assets were wrongfully assigned multiple times to different recipients. If a transaction takes place domestically, there is usually no problem in answering these questions based on national substantive law. However, if there is a cross-border situation, e.g. when the issuer and the investor are located in different Member States and/or securities are held through intermediaries based in different countries<sup>11</sup>, it is frequently unclear which national substantive law applies.

In order to determine which country's substantive law applies, courts (and sometimes also authorities assessing private law issues) follow 'conflict of laws rules' that designate

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<sup>9</sup> British Institute of International and Comparative Law (BIICL), Study on the question of effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person, 2011 ('[BIICL Study](#)').

<sup>10</sup> Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over the right of another person, [COM\(2016\) 626 final](#) ('[Commission Report](#)').

<sup>11</sup> This has been observed by some respondents to the CMU public consultation. See Responses to Questions 28 and 29 available at: [http://ec.europa.eu/finance/consultations/2015/capital-markets-union/index\\_en.htm](http://ec.europa.eu/finance/consultations/2015/capital-markets-union/index_en.htm) See also Feedback Statement on the Green Paper 'Building a Capital Markets Union', Commission Staff Working Document accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Action Plan on Building a Capital Markets Union', [SEC\(2015\) 184 final](#), p. 56–59.

the applicable substantive law based on certain criteria (so-called ‘connecting factors’). If there are uniform conflict of laws rules between countries, the question of which substantive law to apply gets answered in the same manner no matter where a lawsuit is started. However, conflict of laws rules are, traditionally, national and thus can be different in each country.

Within the EU, where there is automatic recognition of judgements in civil and commercial matters and insolvency proceedings, the lack of uniform conflict of laws rules gives room for forum shopping which might lead to potentially different substantive results for the parties depending on which Member State’s courts are seised and which conflict of laws rules applied. The Rome I Regulation covers contractual aspects of transactions in securities and claims but does not designate the applicable law to the effects of such transactions against third parties. As a result, parties to a cross-border transaction have to do their due diligence based on a set of potentially applicable laws. This inflates the costs of legal opinions required for due diligence, regulatory and capital adequacy purposes and the workarounds needed.

### **Question 1**

Do you observe in practice that legal opinions on cross-border transactions in securities and claims contain an analysis of which law is applicable (conflict of laws)? Please elaborate on your reply if you have further information.

- Yes, always where relevant
- In general yes, but not in all relevant situations
- In rare cases yes, but often not
- No, in general legal opinions do not include an analysis of which law applies
- I don't know / I am not familiar with legal opinions

As a result, cross-border transactions in securities and claims bear significant risk that legal defects emerge and result in financial loss (‘legal risk’). Given the persistent differences between substantive laws governing securities and claims transactions, the validity of acquisitions depends on which national substantive law is applicable. If investors, credit providers or factoring companies are unable to determine in advance which national substantive law governs their rights, they risk not having validly acquired securities or claims. These issues materialize if legal disputes arise.

It is difficult though to assess legal risk applying the existing case law, as financial institutions tend to avoid litigation and bad publicity associated with it, wherever possible. It is therefore usually in the insolvency or resolution context that questions on the law applicable to property rights to securities or claims arise, e.g. to establish which assets form part of the debtor's estate or whether third party rights to the debtor's assets exist. These are so-called ‘preliminary questions’ which are not governed by the Insolvency Regulation Recast<sup>12</sup> or the Winding-up Directive<sup>13</sup>, but by the general conflict of laws rules of Member States.

In extreme situations, legal risks can have a ‘domino’ effect in the market and create systemic risk. This can happen either because the financial failure of one major institution may trigger failures in other institutions that have assets at risk with it or because the market as a whole has misunderstood the legal risks associated with

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<sup>12</sup> Regulation (EU) 2015/848 on insolvency proceedings (‘[Insolvency Regulation Recast](#)’).

<sup>13</sup> Directive 2001/24/EC on the reorganisation and winding up of credit institutions (‘[Winding-up Directive](#)’).

recoverability of assets thought to be safely invested. It seems therefore that a default by a large participant in the financial market could potentially trigger very difficult conflict of laws questions.

## Question 2

Do you think that default of a large participant in the financial market who holds assets in various Member States could possibly create difficult conflict of laws questions, putting in doubt who owns (or has entitlement to) which assets?

-Yes

-No

-I don't know

If no, please explain why.

If yes, please provide concrete examples or specify in which legal context this problem might arise, pointing also to relevant national provisions where possible.

If yes, please give an estimate of the magnitude of the issue (e.g. number or value of transactions that might be concerned).

If yes, please explain how market participants deal with such legal uncertainty.

Given that the state of harmonisation of conflict of laws rules in the EU varies when it comes to different assets within the notion of ‘securities and claims’, this consultation will consider, in turn, the following three categories of assets: (1) book-entry securities (Section 3); (2) certificated securities (Section 4); (3) claims (Section 5 and 6). The various asset classes are illustrated by Annex 1.

### 3. BOOK-ENTRY SECURITIES (*PRIMARILY RELEVANT FOR THE SECURITIES INDUSTRY, ISSUERS AND INVESTORS*)

#### 3.1. Shortcomings of the current situation

Over the past decades securities (e.g. shares, bonds) have changed significantly: paper certificates became intangible ‘book-entry securities’<sup>14</sup> which are in market practice acquired through credits and debits in accounts maintained by intermediaries. Such securities are represented in book-entry form either by way of an immobilisation of securities issued in paper form in a Central Securities Depository (‘CSD’) or by way of a direct issuance in dematerialised form<sup>15</sup>. Book-entry securities form the large majority of financial instruments traded on capital markets.

Harmonised conflict of laws rules can be found in a number EU instruments, i.e. in the Settlement Finality Directive in relation to book-entry securities provided as collateral to participants of settlement systems and the European Central Bank or central bank of a Member State<sup>16</sup>, in the Financial Collateral Directive in relation to book-entry securities provided under financial collateral arrangements<sup>17</sup> and in the Winding-up Directive

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<sup>14</sup> The notion of ‘book-entry securities’ is legally defined in point (ii) of Article 2(9) of [Insolvency Regulation Recast](#) as meaning “*financial instruments, the title to which is evidenced by entries in a register or account maintained by or on behalf of an intermediary*”.

<sup>15</sup> Article 3(1) of Regulation (EU) No 909/2014 on improving securities settlement in the European Union and on central securities depositories (‘[Central Securities Depositories Regulation](#)’).

<sup>16</sup> Article 9(2) of Directive 98/26/EC on settlement finality in payment and securities settlement systems (‘[Settlement Finality Directive](#)’).

<sup>17</sup> Article 9 and point (h) of Article 2(1) of Directive 2002/47/EC on financial collateral arrangements (‘[Financial Collateral Directive](#)’).

concerning the enforcement of proprietary rights in book-entry securities in insolvency proceedings of credit institutions and investment firms<sup>18</sup>. All three conflict of laws rules are based on a similar approach, notably they use the location of the book-entry securities as a connecting factor (so-called ‘Place of the Relevant Intermediary Approach’, or ‘PRIMA’).

### 3.1.1. *Unclear location of securities accounts*

Despite the fact that the three directives referred to above use the Place of the Relevant Intermediary Approach, the connecting factors in all three directives differ however in detail. They are defined as follows:

- “register, account or centralised deposit system located in a Member State” (Settlement Finality Directive);
- “country in which the relevant account is maintained”, where the term ‘relevant account’ is defined as “the register or account – which may be maintained by the collateral taker – in which the entries are made by which that book entry securities collateral is provided to the collateral taker” (Financial Collateral Directive);
- “register, an account or a centralised deposit system held or located in a Member State” (Winding-up Directive).

These conflict of laws rules do not specify where the register/account/centralised deposit system is ‘located’ or ‘maintained’. Moreover, it is not self-explanatory, since new technologies mean that the data may be stored in one country, the client relationship managed from another and electronic records accessible through multiple locations.

### **Question 3**

Are you aware of actual or theoretical situations where it is not clear how to apply EU conflict of laws rules, or their application leads to outcomes that are inconsistent?

- Yes

- No

- I don't know.

- If yes, which rules, what is their interpretation and in which Member State(s)? What is the impact of such ambiguity? How does the market deal with this ambiguity?

- If no, please explain how you interpret and apply the Place of the Relevant Intermediary Approach (PRIMA), in which types of transactions and in which Member State(s)?

### 3.1.2. *Unclear which assets are credited to a ‘securities account’*

It should be also noted that conflict of laws rules in the aforementioned directives could potentially cover a different range of assets. While the conflict of laws rule in the Financial Collateral Directive relies on the notion of ‘book-entry securities collateral’ which is based on a self-standing definition of ‘financial instruments’<sup>19</sup>, the Settlement Finality Directive and the Winding-up Directive rely on the list of ‘financial instruments’ annexed to the Markets in Financial Instruments Directive II<sup>20</sup>. For example, there might

<sup>18</sup> Article 24 of the [Winding-up Directive](#).

<sup>19</sup> Point (e) and (g) of Article 2(1) of the [Financial Collateral Directive](#).

<sup>20</sup> Article 9(2) in conjunction with point (h) of Article 2 of the [Settlement Finality Directive](#); Article 24 in conjunction with indent 11 of Article 2 of the [Winding-up Directive](#). These dynamic references have now to be read as references to section C of Annex I to Directive 2014/65/EU on markets in financial instruments ([‘Markets in Financial Instruments Directive II’](#)).

be varying views as to whether ‘registered shares’ (i.e. shares which exist in book-entry form but the transfer of which takes place by registration in the issuer's shareholder registry) are covered by the notion of ‘book-entry securities’<sup>21</sup>. In addition, market practice differs in respect of which financial instruments are being credited to a ‘securities account’, depending on national legal and regulatory requirements. For example, in some Member States exchange-traded derivatives are credited to ‘securities accounts’, in others they are rather being evidenced in ‘other records’ of an intermediary. As a result, the scope of conflict of laws rules may vary across the Union.

#### Question 4

a) In your Member State, which financial instruments are considered to be covered by the EU conflict of laws rules? Please provide references to relevant statutory rules, case law and/or legal doctrine.

b) In particular, are registered shares considered to be covered by the EU conflict of laws rules in your Member State?

- Yes

- No

- I don't know

- If no, what could be the appropriate conflict of laws solution for those assets in your opinion?

c) In particular, are exchange-traded derivatives considered to be covered by the EU conflict of laws rules in your Member State?

- Yes

- No

- I don't know

- If no, what could be the appropriate conflict of laws solution for those assets in your opinion?

#### 3.1.3. Unclear which is the relevant account

Moreover, the wording of two directives (Settlement Finality Directive and Winding-up Directive) does not give a clear answer which ‘record’ is relevant, in case a book-entry security is recorded simultaneously in a “*register, account or centralised deposit system*”. Given that in indirect holding chains such records are duplicated or even multiplied<sup>22</sup>, the wording seems to be understood differently across Member States, depending on the legal relevance of records under their substantive law.

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<sup>21</sup> For example, it seems that registered shares represented in book-entry form might be considered ‘non-intermediated equity securities’ under Article 100(1) of UNCITRAL Model Law on Secured Transactions, adopted on 1 July 2016 ([‘UNCITRAL Model Law’](#)) with the result that proprietary rights to such securities would be governed by the law under which the issuer is constituted. This reading is based on the definition of ‘non-intermediated securities’ in point (w) of Article 2 UNCITRAL Model Law according to which they “*mean securities other than securities credited to a securities account and rights in securities resulting from the credit of securities to a securities account*”. The definition is explained by the Draft Guide to Enactment of the UNCITRAL Model Law on Secured Transactions, [Document A/CN.9/WG.VI/WP.73 of 21 December 2016](#), p. 15–16, as follows: “*It should be noted that, if securities are held by an intermediary directly with the issuer (e.g. the intermediary is registered in the books of the issuer as the holder of the securities), these securities in the hands of the intermediary are non-intermediated, even though equivalent securities credited by the intermediary to a securities account in the name of a customer are intermediated securities in the hands of the customer*”.

<sup>22</sup> For an illustration of indirect holding chains see Unidroit Legislative Guide on Intermediated Securities, [Revised Draft of 27 January 2017](#), paragraphs 25–35.

On the face of it, the Financial Collateral Directive provides more guidance on this issue, since it defines the ‘relevant account’ as being “*the register or account - which may be maintained by the collateral taker - in which the entries are made by which that book entry securities collateral is provided to the collateral taker*”. Nevertheless, the Financial Collateral Directive is silent as to in which account the entry of the collateral provision has to be made. For example, there can be potentially two answers to the question which is the ‘relevant account’ in the common two-party scenario where financial collateral arrangements are entered into between a client/collateral provider and its intermediary/collateral taker<sup>23</sup>. On the one hand, this intermediary will have some records which show that the securities in the client's account constitute the intermediary's collateral, so that the account maintained by the intermediary/collateral taker might be seen as the ‘relevant account’. On the other hand, an account further up the holding chain where the collateral taker's/intermediary's entitlement to the securities is recorded (e.g. at sub-custodian or CSD level) might be deemed the ‘relevant account’. It is quite likely, that the answer to this question depends on the way of holding securities along the chain of intermediaries and/or the methods of collateral provision employed in the different markets and thus varies between Member States.

### Question 5

In your Member State, how do statutory rules, case law and/or legal doctrine answer the question which is the relevant ‘record’ for conflict of laws purposes? Please provide references.

#### 3.1.4. Unclear how many laws apply in a holding chain and how they interact

It is also disputed whether there is only one *single* ‘relevant account’ or whether *more* than one account can be relevant. In a multi-tier structure this translates into the question whether there is a *single* legal system applicable or whether *more* governing laws could apply to a given legal issue.

Some argue that applying more than one law to a legal issue at stake would not work, because different laws may provide different answers<sup>24</sup>. For example, if securities had been fraudulently transferred through records in different accounts and with the understanding that *more* than one account was relevant, a series of different – and possibly contradicting – substantive laws would answer the question which person's title overrode the other person's title. As a result, different persons may be considered as owners under different laws. When it comes to shares, this might cause problems for investors (if they are not able to exercise their corporate rights) and issuers (if additional securities are ‘created’ and the integrity of the issue is violated).

The opposing view holds that it is the essence of the Place of the Relevant Intermediary Approach that the applicable law is determined separately for each tier of the chain of intermediaries<sup>25</sup>. Therefore, it is natural that in a multi-tier structure there may be two or more layers of governing laws.

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<sup>23</sup> See response of Clifford Chance and Loan Market Association to Q27 of the CMU consultation and response of British Bankers Association and CITI to Q26, available at: [http://ec.europa.eu/finance/consultations/2015/capital-markets-union/index\\_en.htm](http://ec.europa.eu/finance/consultations/2015/capital-markets-union/index_en.htm)

<sup>24</sup> Judgement of the High Court of 7.12.2010 *Habib Bank AG Zurich vs Citibank*, [2010] EWHC 3596 (Ch), paragraphs 15 and 17.

<sup>25</sup> For example, the conflict of laws rules of the [Hague Securities Convention](#) apply separately with respect to each securities account, i.e. to each relationship between an account holder and its relevant intermediary. See [Unidroit Legislative Guide on Intermediated Securities, Revised Draft of 27 January](#)

### Question 6

- a) Please describe how exactly you define and apply in practice the Place of the Relevant Intermediary Approach (PRIMA) in your Member State? If appropriate, please provide references to relevant case law and/or legal doctrine that corroborate your interpretation.
- b) In your experience, do different substantive laws in one cross-border holding chain interact smoothly or do they create problems in practice? Please provide examples.

#### 3.1.5. *Fragmented legal framework*

Furthermore, the personal, material and geographical scope of the conflict of laws rules in the directives is limited. As a result, the framework of Member States' conflict of laws rules are composed of (i) a harmonised area implementing the Financial Collateral Directive, the Settlement Finality Directive and the Winding-up Directive; and (ii) a non-harmonised area, outside the scope of EU law.

When it comes to the non-harmonised area, few Member States have extended the scope of their national transposition to cover also other transactions and persons<sup>26</sup> or provided for conflict of laws rules dealing specifically with book-entry securities<sup>27</sup>.

In the absence of such tailored rules, traditional conflict of laws rules of a given Member State apply<sup>28</sup>. Their application to book-entry securities can give rise to difficulties, as those rules might not address the practicalities raised when securities in book-entry form are held. In addition, there is no uniform view on whether certain intangible assets, most importantly 'rights in securities' are to be legally defined as 'securities' or as 'claims', if they fall outside the Union conflict of laws rules on book-entry securities. Such problems with definitions may impede finding the appropriate traditional conflict of laws rule in the non-harmonised area, which, in turn, may affect the legal certainty for the parties involved. This legal uncertainty is further amplified by different approaches taken by traditional conflict of laws rules as to whether they only consider the designated country's substantive legal rules, or also its conflict of laws rules. The latter might indeed designate another country's law to be applicable, or refer back to the law of the original jurisdiction (so-called *renvoi*). This inevitably increases the uncertainty as to which legislation will be applied to a given case<sup>29</sup>.

### Question 7

In your experience, what is the scale of difficulties encountered because of dispersal of conflict of laws rules in EU directives and national laws? Please provide examples.

## 3.2. Possible ways forward

### 3.2.1. *Status quo*

It may be appropriate to keep the *status quo* and not introduce any legislative change at EU level. It could be argued that the problems identified are not sufficiently serious or do not occur sufficiently frequently to warrant Union action.

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[2017](#), paragraph 305 and R. Goode, H. Kanda, K. Kreuzer, Explanatory Report on the Hague Securities Convention, 2005, paragraphs 4-11 and 4-43.

<sup>26</sup> E.g. Finland, Germany.

<sup>27</sup> E.g. Austria, Belgium, Poland.

<sup>28</sup> E.g. Estonia, France, Latvia, Slovenia and United Kingdom.

<sup>29</sup> For an overview of Member States' attitude to *renvoi* see T2S Advisory Group, '[Conflict of Laws Issues in T2S Markets. A Fact Finding Exercise](#)', 8 December 2015, p. 8, Answers to Q2 point c.

### **Question 8**

Do you see added value in Union action to address issues identified in Section 3.1. of this public consultation?

-Yes

-No

-I don't know

-If no, what would be the appropriate action in your view?

### **3.2.2. Targeted amendments to EU rules**

The conflict of laws rules in the Directives mentioned in Section 3.1. could be amended in a targeted way to address the identified issues. The proposed amendments could be limited to introducing a test to determine where an account is 'maintained/located'. In addition, the amendments could clarify which record, and whether it is only one record, that is relevant for the conflict of laws purposes.

### **Question 9**

Do you think that targeted amendments to the relevant EU legislation containing conflict of laws rules would solve the identified problems?

- Yes

- No

- I don't know

-If yes, do you have specific proposals as to which issues should be addressed and how? What would be the order of priority for addressing these issues?

### **Question 10**

If there was a targeted solution clarifying which record is relevant for determining the applicable law, do you expect problems if within one Member State the legal relevance of record(s) for conflict of laws purposes does not coincide with the legal relevance of record(s) under substantive law?

- Yes

- No

- I don't know

-If yes, please explain your opinion and indicate the relevant national provisions that could generate problems.

- If no, please explain your opinion.

### **3.2.3. Overarching reform of EU rules**

Another option would be to go further and develop a conflict of laws framework at Union level which would comprehensively designate the law applicable to third party effects of transactions in securities and claims, including financial instruments held in a securities account. To achieve this, possibly a combination of conflict of laws rules could be enacted in a separate legal act. These rules could have a universal scope of application, i.e. they could apply to intra-EU cases as well as to situations involving securities issued in third countries and/or parties being domiciled outside the EU, as soon as the legal dispute is brought before the courts of one of the Member States or is assessed by EU or Member States' authorities<sup>30</sup>.

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<sup>30</sup> For example, this approach is followed by the [Rome I Regulation](#) (Article 2).

This option should ideally address all elements relevant to conflict of laws analysis, in particular whether to use one connecting factor or multiple connecting factors, and whether different rules tailored to different categories of securities and claims and/or to different securities holding and settlement patterns are deemed necessary. In particular, it could distinguish between static and dynamic scenarios (i.e. whether the case relates to mere holding or to a transaction in securities) and whether the transaction is anonymous or non-anonymous (i.e. whether it is concluded on an exchange where the counterparties know each other or over the counter).

Concerning connecting factors, the following solutions could be considered:

(1) the law of the Place of the Relevant Intermediary Approach (PRIMA)

- determined separately at each level of the holding chain; or
- determined globally for the whole holding chain (Super-PRIMA) in which case the account that is *solely* relevant for conflict of laws purposes would need to be specified.

For any of the two above sub-options, the place of the relevant intermediary could be specified as being determined, e.g. by (a) the intermediary's registered office, (b) the intermediary's central administration, (c) the intermediary's branch through which the account agreement is handled, determined either (i) by an account number, bank code or other specific means that identifies the relevant branch in an objective manner<sup>31</sup>, or (ii) as contractually stipulated in the account agreement;

(2) the law governing the contract

- chosen by the parties to the account agreement provided that the intermediary has a 'qualifying office' in the country whose law has been chosen, and in the absence of such a choice, objective rules based on the PRIMA connecting factor (the approach of the Hague Securities Convention<sup>32</sup>);
- chosen by the participants of the securities settlement system designated under the Settlement Finality Directive (i.e. law governing the system<sup>33</sup>);
- chosen by the parties to the transaction, and in the absence of such choice, objective rules in accordance with the Rome I Regulation (the mechanism of 'secondary connection'<sup>34</sup>).

(3) the law under which the security is constituted<sup>35</sup>. This option could rely on a code that allows all market participants to identify the law under which the relevant security is

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<sup>31</sup> For example, the [Legal Entity Identifier \(LEI\)](#), a 20-character, alpha-numeric code to uniquely identify entities that engage in financial transactions, could be used. The LEI constitutes a global standard endorsed by the Financial Stability Board and is already used for regulatory purposes at EU level.

<sup>32</sup> Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary ('[Hague Securities Convention](#)') entered into force for Switzerland, Mauritius and the United States on 1 April 2017. Record of the debate within the EU on the signing of the Hague Securities Convention is available at: <https://ec.europa.eu/info/node/43884>

<sup>33</sup> Second indent of Article 2(a) and Article 8 of the [Settlement Finality Directive](#).

<sup>34</sup> Secondary connection is a technique employed in conflict of laws analysis whereby an existing relationship (e.g. a contract) is regarded as being a significant connection for other type of relationship (e.g. tort or delict). Such a secondary connection mechanism is used in Article 4(3) of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations ('[Rome II Regulation](#)').

<sup>35</sup> This wording is used in Article 49(1) and explained in Recital 56 of [Central Securities Depositories Regulation](#) as follows: "Such national corporate and similar law under which the securities are constituted govern the relationship between their issuer and holders or any third parties, and their

constituted<sup>36</sup>. The option could also entail harmonising the conflict of laws rules on the law applicable to the issuance of shares, bonds and other book-entry securities.

The possible solutions could also consider potential future technological changes in respect of transactions in book-entry securities, e.g. use of specifically designed distributed ledger technology or the storage of data in the cloud.

Finally, the possible legislative framework could also cover some common rules assisting conflict of laws analysis, such as rules listing the matters governed by the law applicable determined in accordance with its conflict of laws rules, clarify its standing towards overriding mandatory provisions and exclude *renvoi*, i.e. disregard the conflict of laws rules of the designated country. The existing sectoral conflict of laws rules could then be adjusted to align them with the new rules or abolished, if appropriate.

### **Question 11**

Do you think that an overarching reform of conflict of laws rules on third party effects of transactions in book-entry securities is needed to provide for legal certainty?

- Yes
- No
- I don't know

### **Question 12**

If you prefer an overarching reform, what would be the appropriate connecting factor in your view?

- (1) the law of the Place of the Relevant Intermediary Approach (PRIMA);
- (2) the law governing the contract (please select among the following options)
  - (i) the applicable law is chosen by the parties to the account agreement provided that the intermediary has a 'qualifying office' in the country whose law has been chosen, and in the absence of such a choice, determined by objective rules based on the PRIMA connecting factor (the approach of the Hague Securities Convention);
  - (ii) the applicable law is chosen by the participants of the securities settlement system designated under the Settlement Finality Directive;
  - (iii) the applicable law is chosen by the parties to the transaction, and in the absence of such choice, determined by objective rules in accordance with the Rome I Regulation;
- (3) the law under which the security is constituted;
- (4) other solution(s) – please specify.

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respective rights and duties attached to the securities such as voting rights, dividends and corporate action".

<sup>36</sup> For example, the International Securities Identification Number (ISIN) uniquely identifies a security and its structure is defined in ISO 6166. The use of this international standard for financial instruments in a trading venue or by systematic internalisers is mandated by Article 3 of [Commission Delegated Regulation \(EU\) 2017/585 supplementing Regulation \(EU\) No 600/2014 on data standards and formats for financial instrument reference data](#). ISO 6166 contains information on the law under which the security is constituted.

You can select more than one option in response to Question 12. When making your choice please also explain:

- a) the reasons for your preference,
- b) which classes of book-entry securities you think each selected option should cover,
- c) in which scenario the selected option should apply in your view.

***Sub-question to Question 12 answer (1)***

- a) Please select how should PRIMA be determined:
  - (1) separately at each level of the holding chain, or
  - (2) globally for the whole holding chain (Super-PRIMA). If you prefer Super-PRIMA, please specify which account should be solely relevant for conflict of laws purposes in your view.
- b) Please select how should the place of the relevant intermediary be determined:
  - (1) the intermediary's registered office; or
  - (2) the intermediary's central administration; or
  - (3) the intermediary's branch through which the account agreement is handled:
    - (i) identified by an account number, code or other objective means of identification (Please specify which means should be used to identify the branch) or
    - (ii) as contractually stipulated in the account agreement; or
  - (4) other – please specify.

***Sub-question to Question 12 answer (2)(i)***

a) If you support option (2)(i), do you think the best way is for the Union to become party to the Hague Securities Convention?

-Yes

-No

-I don't know

- If yes, do you have data that could help assessing the benefits of a global solution for the EU?

- If no, do you have data that could help assessing the drawbacks of the Hague Securities Convention for the EU?

b) Do you consider the Hague Securities Convention should be supplemented by the adoption of a regulatory framework to address potential problems identified so far in discussions on its signature by the Union?

-Yes (please explain how)

-No (please explain why)

-I don't know.

**Question 13**

For each of the options (1)-(4) in Question 12 above, as you defined these in your answers, please indicate the scale of advantages – disadvantages in terms of:

- a) an estimated increase / decrease of the number or value of transactions which you are able to undertake in your business (please quantify if possible)
- b) an estimated increase / decrease of your legal due diligence costs (please quantify if possible)
- c) an estimated increase / decrease of the profitability of your business (please quantify if possible)
- d) a change in your business model and the way in which you operate your business
- e) any other advantages (please specify and provide relevant data if possible)
- f) any other disadvantages (please specify and provide relevant data if possible)

**Question 14**

In your view, on which of the following issues would options (1)-(4) in Question 12 above have any positive or negative impact:

a) taxation (please specify and quantify if possible)

b) transfer of risks between central depositories, banks and depositors (please specify and quantify if possible)

- c) the effectiveness of clearing and settlement systems (please specify and quantify if possible)
- d) the identification of credit institutions' insolvency risks (please specify and quantify if possible)
- e) the exercise of voting rights attached to securities (please specify and quantify if possible)
- f) the remuneration of the ultimate owners of securities (please specify and quantify if possible)
- g) combating market abuse (please specify and quantify if possible)
- h) combating money laundering and terrorist financing (please specify and quantify if possible)

### **Question 15**

Which issues should be covered by the scope of the applicable law determined by such conflict of laws rules on third party effects of transactions in book-entry securities:

- the steps necessary to render rights in book-entry securities effective against third parties
- priority issues
- other (please specify)

### **Question 16**

Do you have other suggestions for conflict of laws rules for third party effects of transactions in book-entry securities or opinions on this topic that you have not expressed yet above?

## **4. CERTIFICATED SECURITIES (PRIMARYLY RELEVANT FOR THE SECURITIES INDUSTRY, ISSUERS AND INVESTORS)**

For the purpose of this consultation document, the concept of ‘certificated securities’ should cover only traditional paper securities which are not represented in book-entry securities form. For example, this includes securities held physically by an investor. Given that such securities are embodied in certificates, they are in many respects assimilated to tangible property. Consequently, securities which are issued in paper form but immobilised in a CSD are not covered by this Section, but by Section 3 on book-entry securities. In international context, ‘certificated securities’ are called ‘certificated non-intermediated securities’<sup>37</sup>.

### **4.1. Shortcomings of the current situation**

Although certificated securities are included in the scope of the Financial Collateral Directive<sup>38</sup>, the conflict of laws rule of the directive does not cover them.

In the context of commercial secured lending transactions, especially those involving loans to small and medium-size enterprises, it is quite common for the lender to request, in addition to security rights in various assets of the borrower, security rights in the shares of the borrower and its direct and indirect subsidiaries. In certain Member States,

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<sup>37</sup> They are defined in point (d) of Article 2 of [UNCITRAL Model Law](#) in the following way: “*Certificated non-intermediated securities*’ means non-intermediated securities represented by a certificate that: (i) Provides that the person entitled to the securities is the person in possession of the certificate; or (ii) Identifies the person entitled to the securities”.

<sup>38</sup> See last sentence of recital 10 of the [Financial Collateral Directive](#).

‘certificated shares’ are used for this purpose more frequently than in others. Given that substantive laws differ significantly with respect to the manner in which a security right in certificated securities may be made effective against third parties, it is important for the lender who considers extending credit in cross-border situations to identify the applicable law.

Unlike in the case of book-entry securities, there are currently no specific conflict of laws rules regarding certificated securities at EU level. In effect, it may be often difficult for the lender to predict which national law would apply to his/her security rights in such assets, should s/he wish to extend credit to a company in another Member State.

### **Question 17**

a) Do transactions in certificated securities still play an important role in your Member State?

- Yes, very important (please estimate the number or value of transactions concerned per year)
- Yes, important (please estimate the number or value of transactions concerned per year)
- Neutral (please estimate the number or value of transactions concerned per year)
- No
- I don’t know

b) How often are certificated securities being used as collateral in practice?

- Very frequently (please estimate the number or value of transactions concerned per year)
- Frequently (please estimate the number or value of transactions concerned per year)
- Sometimes (please estimate the number or value of transactions concerned per year)
- Rarely (please estimate the number or value of transactions concerned per year)
- Never
- I don’t know

### **Question 18**

Are conflict of laws rules on third party effects of transactions in certificated securities easily identified in your Member State?

- Yes, there are statutory rules (please provide reference and indicate the connecting factor)
- Yes, there is case law (please provide reference and indicate the connecting factor)
- Yes, there is legal doctrine (please provide reference and indicate the connecting factor)
- No
- I don't know

## **4.2. Possible ways forward**

### **4.2.1. Status quo**

It might be appropriate to keep the status quo and not introduce any legislative change. It could be argued that the problems identified are not sufficiently serious or do not occur sufficiently frequently to warrant Union action.

### **Question 19**

Do you see added value in Union action to address the identified issues with regard to certificated securities?

- Yes (please explain your answer)

- No
- I don't know
- If no, what would be the appropriate action in your view?

#### 4.2.2. *Harmonising of conflict of laws rules*

Another option would be to harmonise the conflict of laws rules on third party effects of transactions in certificated securities at EU level.

In this context, it should be noted that the Insolvency Regulation Recast modernised its rules on the location of certain assets. These ‘location rules’ are relevant, when territorial proceedings are opened, to delimitate the assets of the insolvency estate that are allocated to the main proceedings and the assets that are allocated to the territorial proceedings. Furthermore, when a third party is entitled to a right *in rem* over an asset belonging to the debtor, the location rules determine the application of Articles 8 and 10 of the Insolvency Regulation Recast.

Given that there are different location rules depending on the type of the certificated securities (i.e. depending on whether they are registered shares or bearer securities), the possible solutions for conflict of laws rules could also be considered based on this very distinction.

##### 4.2.2.1.           Certificated registered shares

For the purpose of this consultation document, the concept of ‘certificated registered shares’ should cover shares which are represented by a certificate issued to a named holder and the transfer of which takes place by delivery and endorsement of the certificate in combination with registration in the issuer's shareholder registry, irrespective of whether the registration has also proprietary effects or not<sup>39</sup>.

In case of ‘registered shares’ in companies, the location rule of point (i) of Article 2 (9) of the Insolvency Regulation Recast specifies that they are situated in the Member State within the territory of which the company having issued the shares has its registered office.

The argument of consistency might advocate in favour of applying the same connecting factor (i.e. the location of the issuer's registered office) in a conflict of laws situation. For example, if a company in Member State A has pledged registered shares issued by an issuer having its registered office in Member State B in favour of a third party, the law of Member State B could then determine whether the pledge is effective against third parties.

A similar solution has been also adopted in the Model Law on Secured Transactions adopted recently by the United Nations Commission for International Trade Law (UNCITRAL)<sup>40</sup>. However, UNCITRAL Model Law provides for an exception concerning the specific question of third party effectiveness. If the law of the country in which a collateral provider is located recognises registration of a notice as a method for

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<sup>39</sup> This understanding has been suggested by F. Garcimartín, *The situs of shares, financial instruments and claims in the Insolvency Regulation Recast: seeds of a future EU instrument on rights in rem?*, *Praxis des Internationalen Privat- und Verfahrensrechts*, 2015, issue 6, p. 489–495, p. 492.

<sup>40</sup> Article 100(1) of [UNCITRAL Model Law](#) specifies “*the law under which the issuer is constituted*” as the law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in ‘non-intermediated equity securities’. The notion of ‘non-intermediated equity securities’ is not defined in the UNCITRAL Model Law, but the concept of ‘non-intermediated securities’ is (see footnote 21).

achieving effectiveness against third parties of a security right in a certificated registered share, this law is also applicable to third party effectiveness of the security right in that asset by registration<sup>41</sup>. Therefore, a secured creditor may rely on the law of the location of the collateral provider to make its security right effective against third parties by registration, even if the generally applicable issuer's law is a different law<sup>42</sup>.

#### 4.2.2.2. Certificated bearer securities

For the purpose of this consultation document, the concept of 'certificated bearer securities' should cover securities which are embodied in certificated instruments and transferred by mere delivery.

Given that 'certificated bearer securities' qualify as tangible property, the location rule of point (vii) of Article 2 (9) of the Insolvency Regulation Recast applies. Under this rule, 'certificated bearer securities' are located in the Member State where the physical certificate is situated.

The argument of consistency with this location rule speaks in favour of applying the same connecting factor (i.e. the location of the physical certificate) in a conflict of laws situation. For example, if a company in Member State A has pledged bearer securities issued under the laws of Member State B and delivered the certificates to the collateral taker in Member State C, the law of C could then determine whether the pledge is effective against third parties.

A similar solution has been also suggested by UNCITRAL Model Law<sup>43</sup>. However, for debt securities (e.g. bonds) UNCITRAL recommends the law governing the securities (i.e. the law stipulated in the terms of issuance)<sup>44</sup>. In addition, the above mentioned UNCITRAL exception for the specific issue of third party effectiveness by registration applies also for certificated bearer securities<sup>45</sup>.

#### **Question 20**

Do you consider that conflict of laws rules on third party effects of transactions in certificated securities should be harmonised at EU level?

- Yes (please explain)
- No (please explain)
- I don't know

#### **Question 21**

<sup>41</sup> Article 98 of [UNCITRAL Model Law](#).

<sup>42</sup> See Draft Guide to Enactment of the UNCITRAL Model Law, [Document A/CN.9/WG.VI/ WP.71/Add.6 of 15 September 2016](#), p. 12.

<sup>43</sup> Article 85(1) of [UNCITRAL Model Law](#) specifies "*the law of the State in which the asset is located*" as the law applicable to the creation, effectiveness against third parties and priority of a security right in a 'tangible asset'. As clarified by point (II) of Article 2, the term 'tangible asset' includes also 'certificated non-intermediated securities'. This notion is defined in point (d) of Article 2 as meaning "*non-intermediated securities represented by a certificate that: (i) provides that the person entitled to the securities is the person in possession of the certificate; or (ii) identifies the person entitled to the securities*".

<sup>44</sup> Article 100(2) of [UNCITRAL Model Law](#) specifies "*the law governing the securities*" as the law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in 'non-intermediated debt securities', as well as to its effectiveness against the issuer. The notion of 'non-intermediated debt securities' is not defined in the UNCITRAL Model Law, but the concept of 'non-intermediated securities' is (see footnote 21).

<sup>45</sup> Article 98 of [UNCITRAL Model Law](#).

If you consider that harmonising conflict of laws rules on third party effects of transactions in certificated securities is the appropriate option:

- a) What connecting factor do you recommend for certificated registered shares?
- b) What connecting factor do you recommend for certificated bearer securities?
- c) Which issues should be covered by the scope of the applicable law determined by such harmonised conflict of laws rules:
  - the steps necessary to render rights in certificated securities effective against third parties
  - priority issues
  - other (please specify)

### **Question 22**

For each of the options (a)-(b) in Question 21 above, as you defined these in your answers, please indicate the scale of advantages – disadvantages in terms of:

- a) an estimated increase / decrease of the number or value of transactions which you are able to undertake in your business (please quantify if possible)
- b) an estimated increase / decrease of your legal due diligence costs (please quantify if possible)
- c) an estimated increase / decrease of the profitability of your business (please quantify if possible)
- d) a change in your business model or the way in which you operate your business
- e) any other advantages (please specify and provide relevant data if possible)
- f) any other disadvantages (please specify and provide relevant data if possible)

## **5. CLAIMS (PRIMARYLY RELEVANT FOR THE FACTORING, BANKING INDUSTRY AND SMES)**

For the purpose of this consultation document, the concept of ‘claims’ includes any right to payment of a sum of money (e.g. receivables) or to performance of an obligation (e.g. delivery obligation of the underlying assets under derivatives contracts), irrespective of its nature, e.g. contractual or non-contractual. However, claims which are evidenced by entries in a register or account maintained by or on behalf of an intermediary (Section 3) or embodied in securities certificates (Section 4) are excluded from this Section.

‘Assignment’ is a legal mechanism which enables both simple transfers of claims from one person to another and complex secured transactions used to finance the business activity of firms, such as financial collateral arrangements, factoring and securitisation. At its basis, it involves the transfer by a creditor (‘assignor’) of his claim against a debtor to another person (‘assignee’). The concept of assignment includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims<sup>46</sup>.

Claims can be typically assigned as follows:

- (1) a single claim is transferred directly by the assignor (creditor A) to the assignee (new creditor B);
- (2) a bulk of claims (receivables) is assigned by the assignor (e.g., an SME) to the assignee (e.g., a bank);
- (3) in certain specific ways as discussed in Section 6.

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<sup>46</sup> This is clarified by Article 14(3) of the [Rome I Regulation](#). The same approach is adopted by point (a) of Article 2 of the United Nations Convention on the Assignment of Receivables in International Trade, adopted 12 December 2001 (‘[UN Convention](#)’). So far, the UN Convention has been signed by Luxembourg, Madagascar and the US and ratified by Liberia, but has not yet entered into force.

Statistical data reflecting the volumes of transactions show that one of the main business sectors, apart from financial markets, that rely on the legal mechanism of assignment of claims is the factoring industry<sup>47</sup>. Factoring involves the assignment of receivables by the assignor (e.g., an SME) to the assignee (the ‘factor’) at a discount price as a means for the assignor to obtain immediate cash for the receivables it generates. A factoring agreement is fundamentally a financing arrangement. In addition, the factor may also perform various other services for the business relating to the receivables (e.g. evaluating the creditworthiness of the debtors of the receivables, performing bookkeeping duties and engaging in collection efforts). These services can provide a useful benefit to SMEs that do not have their own credit and collection departments.

Factors deal quite often with bulk assignments of future claims. Often, an individual investigation of the laws applicable to the underlying claims, especially in cases of small value receivables created by SMEs, would be impractical. Thus, it seems to be normal practice in this sector that the assignee does not undertake legal due diligence with regard to questions concerning its relationship with the debtor<sup>48</sup>.

### 5.1. Shortcomings of the current situation

With the increasing integration of national markets, assignment of claims often involves a cross-border element, where one or more of the parties involved have connections to different Member States. This can lead to a conflict of the laws applicable to an assignment within the Union, given that the substantive rules applicable to the assignment of claims in the Member States differ significantly<sup>49</sup>.

Currently, uniform conflict of laws rules exist at EU level in relation to the effects of an assignment with respect to the parties to the assignment contract (the assignor and the assignee)<sup>50</sup> and with respect to the relationship between the assignee and the debtor<sup>51</sup>, but not in respect of the effects of the assignment of the claim on third parties. As observed by the Commission Report, this is an important element missing in the existing EU framework<sup>52</sup>. The current diversity of conflict of laws approaches in the Member States as to the question of which law governs the effectiveness of an assignment against third parties as well as questions of priority between competing assignees or between assignees and other right holders undermines legal certainty, creates practical problems and increases legal costs<sup>53</sup>. Thus, the Commission Report concluded that a broad public consultation would be launched on the issues identified and that the problems would be quantified adequately.

#### Question 23

In the past 5 years, have you encountered problems in practice in securing the effectiveness of assignments against persons other than the assignee and the debtor (e.g. a

<sup>47</sup> According to the [BIICL Study](#), p. 14, the total of international factoring and invoice discounting business within the EU (in terms of claims assigned) has been estimated at over EUR 140 billion during 2010.

<sup>48</sup> [BIICL Study](#), p. 391 and p. 396.

<sup>49</sup> For example, depending on the substantive law there are different notice requirements for the effectiveness of assignments, different priority rules applicable to competing assignees or between assignees and other right holders, different rules applying to the assignment of future claims, as well as different limitations on the assignability of claims.

<sup>50</sup> Article 14(1) of the [Rome I Regulation](#).

<sup>51</sup> Article 14(2) of the [Rome I Regulation](#).

<sup>52</sup> [Commission Report](#), p. 3.

<sup>53</sup> [Commission Report](#), p. 12.

second assignee, a creditor of the assignor or of the assignee) in transactions with a cross-border element?

- Yes

- No

- I don't know

- If yes, please specify:

a) How frequently do these difficulties arise in practice?

- several times per week

- several times per month

- several times per year

b) Which category or categories of third parties (e.g. creditors of the assignor, a second assignee) most commonly give rise to difficulties?

c) Please describe shortly as many situations as possible in which these problems have arisen. Please explain whether you were able to overcome the problems and, if so, how.

d) Approximately what percentage of the total transaction costs (legal and other) would be allocated to the legal due diligence required in connection with the above situations?

#### **Question 24**

In a typical transaction with a cross-border element involving an assignment of claims, do you undertake legal due diligence with respect to the underlying claim under the law governing the assigned claim?

- Yes

- No

- I don't know

- If yes, please specify:

a) Which elements do you verify under the law governing the assigned claim (e.g., assignability of the claim, effectiveness of the assignment against the debtor, other)?

b) How much of the legal costs of a transaction involving an assignment of claims would be allocated to legal due diligence regarding e.g. the assignability of the underlying claim, the perfection of the assignment, or the enforceability of the claim by the assignee against the debtor?

c) Approximately what percentage of the total transaction costs (legal and other) would be allocated to the legal due diligence required in connection with the above situations?

- If no (i.e. if you do not undertake due diligence with respect to the underlying claims but accept the legal risks relating, e.g., to the assignability of the claim or its enforceability against the debtor), please explain the reasons for this:

- costs of due diligence

- impossibility to undertake individual verification of the law applicable to each claim assigned

- other (please explain)

#### **5.2. Possible ways forward**

The Capital Markets Union Action Plan acknowledges that a review of the provisions related to assignment of claims and the order of priority of such transfers could contribute to the creation of a genuine single market for capital in the EU. A harmonised conflict of laws rule governing the third party aspects of assignment could improve legal

certainty and also support cross-border transactions, in particular by reducing legal costs and due diligence, and facilitating the availability of capital and credit at affordable costs for companies and in particular SMEs.

### 5.2.1. *Status quo*

One option would be to keep the status quo and not introduce any legislative change. It could be argued that the problems identified are not sufficiently serious or do not occur sufficiently frequently to warrant Union action.

#### **Question 25**

Do you see added value in Union action to address the identified issues in the area of assignment of claims involving a cross-border element?

- Yes (please explain your answer)
- No
- I don't know
- If no, what would be the appropriate action in your view?

### 5.2.2. *Harmonising of conflict of laws rules*

Another option would be to harmonise at EU level the conflict of laws rules on third party effectiveness of an assignment of a claim against third parties and the priority of the assigned claim over a right of another person.

In its Report, the Commission presented three possible conflict of laws solutions and discussed their advantages and disadvantages:

- (1) the law of the contract between assignor and assignee<sup>54</sup>;
- (2) the law of the assignor's habitual residence<sup>55</sup>;
- (3) the law governing the assigned claim<sup>56</sup>.

Arguments in favour of and against each of the three approaches are summarised in the BCCIL Study<sup>57</sup>. In order to back up the Study with empirical data a questionnaire was addressed by the contractor to various stakeholders. However, only a limited number of responses were received<sup>58</sup>. Whereas 80% of the respondents clearly expressed the need to introduce a rule on third party effects of an assignment of claims<sup>59</sup>, views remained divided as to the solutions: 44% of all responding stakeholders prefer the law of the assignor's habitual residence, 30% suggest the law governing the assigned claim and 11% favour the law of the contract between assignor and assignee<sup>60</sup>. This public consultation aims at updating the views expressed by the stakeholders.

#### **Question 26**

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<sup>54</sup> [Commission Report](#), p. 10.

<sup>55</sup> [Commission Report](#), p. 10–11.

<sup>56</sup> [Commission Report](#), p. 11–12.

<sup>57</sup> See [BIICL Study](#), p. 41–45.

<sup>58</sup> [BIICL Study](#), p. 23 (out of 2000-3000 distributed questionnaires only 36 responses have been received). For the questionnaire and the summary of responses see p. 26–29 and p. 99–147.

<sup>59</sup> [BIICL Study](#), p. 46.

<sup>60</sup> [BIICL Study](#), p. 25.

What conflict of laws rule on third party effects of assignment of claims would you favour? Please indicate your order of preference among the below options ranging from 1 (best solution) to 4 (least preferred solution):

- (1) the law applicable to the contract between assignor and assignee
- (2) the law of the assignor's habitual residence
- (3) the law governing the assigned claim
- (4) other solution(s) (please specify and give reasons for your choice)

### **Question 27**

For each of the above options (1)-(4) please indicate the scale of advantages or disadvantages in terms of:

- a) an estimated increase / decrease of the number or value of transactions which you are able to undertake in your business (please quantify if possible)
- b) an estimated increase / decrease of your legal due diligence costs (please quantify if possible)
- c) an estimated increase / decrease of the profitability of your business (please quantify if possible)
- d) a change in your business model or the way in which you operate your business
- e) any other advantages (please specify and provide relevant data if possible)
- f) any other disadvantages (please specify and provide relevant data if possible)

### **Question 28**

Which issues should be covered by the scope of the applicable law determined by the conflict of laws rule:

- the steps necessary to render rights in claims effective against third parties
- priority issues
- other (please specify)

## **6. CERTAIN SPECIFIC SITUATIONS IN WHICH CLAIMS MIGHT NEED DIFFERENT TREATMENT (PRIMARYLY RELEVANT FOR SECURITISATION, BANKING AND DERIVATIVE MARKET INDUSTRY)**

The solutions discussed above for claims in general might not be suitable for certain financial market transactions. The specificities of certain claims and of the operations with those claims may require a different connecting factor regarding the third party effects of their assignment. This is the view taken by the UN Convention<sup>61</sup>, the UNCITRAL Legislative Guide<sup>62</sup> and the UNCITRAL Model Law<sup>63</sup> which, to a different extent, exclude certain financial markets transactions from their scope.

First, certain specific types of claims might be recorded as positions by financial intermediaries:

- (1) Claims constituting financial instruments other than book-entry securities and other claims traded on financial markets: these claims can be traded directly, either on trading facilities or over the counter. For example, trade in claims resulting from derivative contracts such as swaps, forward or futures contracts.

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<sup>61</sup> Article 4(2) of [UN Convention](#).

<sup>62</sup> Recommendation 4 of UNCITRAL Legislative Guide on Secured Transactions, adopted on 14 December 2007 ('[UNCITRAL Legislative Guide](#)').

<sup>63</sup> Article 1(3) of [UNCITRAL Model Law](#).

(2) Cash credited to a bank account, which is not a financial instrument, is, legally speaking, a debt owed by a bank to its client.

Second, specific types of transactions in claims, whether ordinary or specific types of claims, are heavily employed in financial markets:

(3) Collateralisation: cash, credit claims (i.e. bank loans) or financial instruments can be used as financial collateral to secure a loan agreement.

(4) Securitisation: in order to facilitate the trading of debt claims (i.e. make them liquid), claims can be bundled and used as underlying assets to create securities which are then sold on financial markets.

This Section and the following questions try to assess to which extent these specificities should or should not warrant a specific connecting factor in respect of these peculiar types of claims and transactions with these claims.

### **6.1. Claims constituting financial instruments other than book-entry securities and other claims traded on financial markets**

Certain claims, such as derivative contracts, might constitute ‘financial instruments’<sup>64</sup>. For example, an out-of-the-money swaps position may legally be characterised as a debt owed by a financial institution to its derivative counterparty. If one of the counterparties wants to extinguish its obligations under the derivatives contract or realise the value of the derivative, it usually concludes a reverse contract. However, certain derivatives may be also assigned to other parties, if this is allowed by the terms of the contract. For example, assignment of derivatives contracts could also be envisaged where a clearing member of a central counterparty (CCP) defaults and the derivatives positions are ported to another clearing member<sup>65</sup>.

When such claims are credited to securities accounts (e.g. exchange-traded derivatives in some Member States), they fall into the category of ‘book-entry securities’. As a result, they are covered by conflict of laws rules discussed above (Section 3).

Other claims which are not credited to securities accounts (e.g. interest rate swaps), but might be recorded as positions in the records of an intermediary, seem to fall outside the category of ‘book-entry securities’. In such a case, they are covered by the general conflict of laws rule on third party effects of assignment of claims (Section 5), unless they become subjected to a specific conflict of laws rule.

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<sup>64</sup> Currently, two different lists of ‘financial instruments’ exist in Union law which are relevant for conflict of laws purposes. First, Article 9(2) of the [Settlement Finality Directive](#), Article 24 of the [Winding-up Directive](#) as well as Articles 4(1)(h) and 6(4)(d) of the [Rome I Regulation](#) cover financial instruments listed in Section C of Annex I to [Markets in Financial Instruments Directive II](#). Second, Article 9 of the [Financial Collateral Directive](#) covers ‘financial instruments’ which are specifically defined in its point (e) of Article 2(1) as meaning “*shares in companies and other securities equivalent to shares in companies and bonds and other forms of debt instruments if these are negotiable on the capital market, and any other securities which are normally dealt in and which give the right to acquire any such shares, bonds or other securities by subscription, purchase or exchange or which give rise to a cash settlement (excluding instruments of payment), including units in collective investment undertakings, money market instruments and claims relating to or rights in or in respect of any of the foregoing*”.

<sup>65</sup> See paragraphs 4, 5 and 6 of Article 48 of Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories ([‘European Market Infrastructure Regulation’](#)). This Regulation requires CCPs to have procedures in place ensuring that they have the legal powers to transfer the derivatives positions of the defaulting clearing member.

The BIICL Study reports that consulted stakeholders questioned the suitability of two of the possible general solutions for ‘financial claims’<sup>66</sup>. A solution based on the law applicable to the assigned claim was reportedly favoured by the representatives of financial markets and derivatives/collateralised transactions<sup>67</sup>. Against this background, the BIICL Study provides for an optional sector-specific solution for ‘financial claims’<sup>68</sup>. Nevertheless, the Study observes that the reasons for preferences and objections concerning ‘financial claims’ remain rather unclear<sup>69</sup>. It also reports concerns voiced by stakeholders that sector-specific rules might add complexity and encourage characterisation problems<sup>70</sup>. The mere difficulty to find a precise wording for naming the ‘financial claims’ covered by this exception seems to illustrate the possible delimitation problems between the potential sectoral rule and the general rule<sup>71</sup>.

The UN/UNCITRAL framework excludes from its scope, to a different extent, the assignment of (1) claims arising under or from transactions on a regulated exchange<sup>72</sup>; (2) claims arising under or from inter-bank payment systems, inter-bank payment agreements or clearance and settlement systems relating to securities or other financial assets or instruments<sup>73</sup>; (3) payment rights arising under or from ‘financial contracts’<sup>74</sup> governed by ‘netting agreements’<sup>75</sup>, except a receivable owed on the termination of all

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<sup>66</sup> [BIICL Study](#), p. 44 and p. 398 (as for unsuitability of the law of the assignor's habitual residence) and p. 389 (as for unsuitability of the law applicable to the contract between the assignor and assignee). The notion of ‘financial claims’ is not further explained in the Study.

<sup>67</sup> [BIICL Study](#), p. 400.

<sup>68</sup> [BIICL Study](#), p. 414: Paragraph 2 of Proposal C – Law of the assignor's location [with optional exception for assignments of claims under financial contracts]: *“In the case of an assignment of a claim [under an existing contract concluded within the type of system falling within the scope of Article 4(1)(h) or within a multilateral system for the settlement of payments or other transactions between banks and financial institutions or a claim under a financial instrument], the law governing the assigned or subrogated claim at the relevant date shall also govern the assignment or subrogation”*.

<sup>69</sup> [BIICL Study](#), p. 388 and p. 389.

<sup>70</sup> [BIICL Study](#), p. 45, p. 46, p. 386, p. 399.

<sup>71</sup> Throughout the [BIICL Study](#), the notion ‘financial claims’ has been used interchangeably with the expression “claims related to contracts concluded at a financial market” (p. 152) or “claims deriving from financial contracts and instruments” (p. 398). However, the drafting suggested in Proposal C of the [BIICL Study](#) (reproduced in footnote 67 above) relates to “a claim under an existing contract concluded within the type of system falling within the scope of Article 4(1)(h) of the [Rome I Regulation](#) or within a multilateral system for the settlement of payments or other transactions between banks and financial institutions or a claim under a financial instrument”.

<sup>72</sup> Point (a) of Article 4(2) of the [UN Convention](#).

<sup>73</sup> Point (d) of Article 4(2) of the [UN Convention](#).

<sup>74</sup> Financial contracts’ are defined in point (m) of Article 2 of the [UNCITRAL Model Law](#) as meaning “any spot, forward, future, option or swap transaction involving interest rates, commodities, currencies, equities, bonds, indices or any other financial instrument, any securities repurchase or lending transaction, and any other transaction similar to those transactions entered into in financial markets and any combination of those transactions”.

<sup>75</sup> ‘Netting agreements’ are defined in point (v) of Article 2 of the [UNCITRAL Model Law](#) as meaning “an agreement between two or more parties that provides for one or more of the following: (i) The net settlement of payments due in the same currency on the same date whether by novation or otherwise; (ii) Upon the insolvency or other default by a party, the termination of all outstanding transactions at their replacement or fair market values, conversion of such sums into a single currency and netting into a single payment by one party to the other; or (iii) The set-off of amounts calculated as set out in subparagraph (ii) under two or more netting agreements”.

outstanding transactions<sup>76</sup>; (4) payment rights arising under or from foreign exchange transactions<sup>77</sup>.

Although the UN/UNCITRAL framework does not provide for specific conflict of laws rule in relation to the above mentioned claims, the UNCITRAL Legislative Guide observes that a rule based on the law governing the assigned claim would work well for a security right in a claim arising from a financial contract or a foreign exchange transaction, in which it is customary to conduct due diligence on each claim to be assigned<sup>78</sup>.

### **Question 29**

In your experience, how frequently are claims constituting financial instruments other than book-entry securities or other claims traded on financial markets being assigned?

- Very frequently (please estimate the number or value of transactions concerned per year)
- Frequently (please estimate the number or value of transactions concerned per year)
- Sometimes (please estimate the number or value of transactions concerned per year)
- Rarely (please estimate the number or value of transactions concerned per year)
- Never
- I don't know

### **Question 30**

Are conflict of laws rules on third party effects of assignment of claims constituting financial instruments other than book-entry securities and other claims traded on financial markets easily identified in your Member State?

- Yes, there are statutory rules (please provide reference and indicate connecting factor)
- Yes, there is case law (please provide reference and indicate connecting factor)
- Yes, there is legal doctrine (please provide reference and indicate connecting factor)
- No
- I don't know

### **Question 31**

Would it be useful to provide for a *specific* conflict of laws rule on third party effects of assignment of claims constituting financial instruments other than book-entry securities and/or other claims traded on financial markets which is different from your preferred solution for claims *in general*?

- Yes
- No
- I don't know
  - If yes, please:
    - a) indicate precisely which claims should be covered by such a specific rule

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<sup>76</sup> Point (b) of Article 4(2) of the [UN Convention](#); Point (d) of Recommendation 4 of the [UNCITRAL Legislative Guide](#); Point (d) of Article 1(3) of [UNCITRAL Model Law](#).

<sup>77</sup> Point (c) of Article 4(2) of the [UN Convention](#); Point (e) of Recommendation 4 of the [UNCITRAL Legislative Guide](#).

<sup>78</sup> [UNCITRAL Legislative Guide](#), p. 394, paragraph 45.

- b) provide arguments that would justify the departure from the general solution. Would such a solution have any impact on the market, business models, risks, etc?
- c) specify what conflict of laws solution you recommend
- d) specify which issues should be covered by the scope of the applicable law determined by such a conflict of laws rule:
  - the steps necessary to render rights in claims effective against third parties
  - priority issues
  - other (please explain)

## 6.2. Cash in accounts

Businesses in need of credit may obtain loans from financial institutions by giving them security rights in cash they hold in accounts (e.g. through a pledge of their bank account). Cash used as collateral is also the preferred way to mitigate counterparty risk in the financial markets. For example, the EU rules on over-the-counter derivatives enumerate ‘cash’ up-front in the lists of eligible collateral<sup>79</sup>. In addition, fixed-term deposits, placed by institutions with national central banks of the Member States whose currency is the euro, are eligible as collateral for Eurosystem credit operations<sup>80</sup>.

Although cash collateral is protected by the Settlement Finality Directive and the Financial Collateral Directive<sup>81</sup>, neither of the conflict of laws rules on collateral cover cash<sup>82</sup>. Different views seem to exist as to whether Article 8 of the Settlement Finality Directive covers also cash provided as collateral security, and if so, whether the law governing the system applies only to rights and obligations of a participant in its insolvency or also when the participant remains solvent. In insolvency of an indirect participant (other than a credit institution or an investment firm), Articles 8 and 12 of the Insolvency Regulation Recast might apply. Absent any special provision, Article 14 of Rome I Regulation might apply to proprietary aspects as between the parties and in relation to the bank<sup>83</sup>. In terms of third party effects and priority issues, national conflict of laws rule would apply. As a result of these interrelations, it may be difficult to determine which substantive law applies to the creation and enforcement of security rights in cash when such collateral is provided on a cross-border basis.

Both the UNCITRAL Legislative Guide and the UNCITRAL Model Law recommend conflict of laws rules on security rights in *“rights to payment of funds credited to a bank*

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<sup>79</sup> Point (a) of Article 46(3) of the [European Market Infrastructure Regulation](#); Article 38 of [Commission Delegated Regulation \(EU\) No 153/2013 on requirements for central counterparties](#), point (a) of Article 4(1) of [Commission Delegated Regulation \(EU\) 2016/2251 on risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty](#).

<sup>80</sup> Article 106 of the Guideline (EU) 2015/510 of the European Central Bank on the implementation of the Eurosystem monetary policy framework ([“General Documentation Guideline”](#)).

<sup>81</sup> ‘Collateral security’, as defined in point (m) of Article 2 of the [Settlement Finality Directive](#), means all realisable assets, including money. ‘Financial collateral’, as specified by point (a) of Article 1(4) of the [Financial Collateral Directive](#), consist i.a. of cash. ‘Cash’ is defined in point (d) of Article 2(1) of the Financial Collateral Directive as meaning *“money credited to an account in any currency, or similar claims for the repayment of money, such as money market deposits”*.

<sup>82</sup> Article 9(2) of the [Settlement Finality Directive](#) covers only *“securities including rights in securities”* and Article 9 of the [Financial Collateral Directive](#) is limited to *“book entry securities collateral”*.

<sup>83</sup> See [BIICL Study](#), p. 244–245.

*account*”<sup>84</sup>. Two alternative options are suggested by UNCITRAL to determine the law applicable to the creation, effectiveness against third parties, priority and enforcement of cash collateral:

Under Option A, the connecting factor is the bank's ‘place of business’, or, if the bank has places of business in more than one country, the place of the branch maintaining the account. As explained by UNCITRAL, this approach would enhance certainty and transparency as to the applicable law, reflect expectations of parties to banking transactions and result in the law governing a security right in cash being the same as the law applicable to regulatory matters<sup>85</sup>. It seems, however, that in the Union Option A would not result in the law governing cash collateral being the same as that applicable to the bank’s regulatory matters, as under the EU single passport, a branch is subjected, as a rule, to the regulatory requirements of its home Member State<sup>86</sup>.

In the Union, for the sake of coherence within EU law<sup>87</sup>, the location of a bank account could be developed by reference to the International Bank Account Number (IBAN) that identifies a particular branch. Nevertheless, if cash is held in accounts with a bank that does not have an IBAN, there is no single solution within Union law. Whereas the Regulation on the European Account Preservation Order relies on the ‘head office’ of the bank, the Insolvency Regulation Recast refers to its place of ‘central administration’. Alternatively, the Legal Entity Identifier could be used<sup>88</sup>.

Option B relies on a choice of the applicable law to the account agreement, provided that the bank has an office in the country whose law has been chosen and that office is engaged in the regular activity of maintaining bank accounts. If no choice of law is made, UNCITRAL recommends the fall-back rules of the Hague Securities Convention. According to UNCITRAL, this approach would meet the expectations of the parties to the account agreement and third parties would be able to ascertain the applicable law, because the collateral provider would be required to supply information on the account agreement to obtain credit from a lender relying on the funds credited to the account<sup>89</sup>.

In addition, UNCITRAL recommends a specific rule for the question whether third party effectiveness has been achieved by registration of cash collateral. This question could be answered by the law of the country where the collateral provider is located, if such a registration can be achieved under his law<sup>90</sup>. Other issues, such as the creation and priority of a security right, should be governed by the general conflict of laws rule, i.e. either Option A or Option B<sup>91</sup>.

The solutions suggested by UNCITRAL might sit well with the debtor (i.e. the bank maintaining the account). For the debtor it is important to know whom to pay the

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<sup>84</sup> Although the wording between Article 97 of [UNCITRAL Model Law](#) and Recommendation 210 of [UNCITRAL Legislative Guide](#) slightly differs, the solutions are the same. In contrast, the [UN Convention](#) excludes also ‘bank deposits’ from its scope.

<sup>85</sup> [UNCITRAL Legislative Guide](#), p. 395, paragraph 49.

<sup>86</sup> Article 49, Recitals 21–22 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (‘[Capital Requirements Directive IV](#)’).

<sup>87</sup> See the location rule in point (iii) of Article 2(9) of the [Insolvency Regulation Recast](#) and in Article 4(4) of the Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters (‘[Regulation on the European Account Preservation Order](#)’).

<sup>88</sup> See footnote 31.

<sup>89</sup> See [UNCITRAL Legislative Guide](#), p. 395, paragraph 50.

<sup>90</sup> Article 98 of [UNCITRAL Model Law](#) and Recommendation 211 of [UNCITRAL Legislative Guide](#).

<sup>91</sup> [UNCITRAL Legislative Guide](#), p. 395, paragraph 51 and p. 391, paragraph 34.

required sum in order to discharge the debt. For that to happen, the bank needs to be capable of answering the question of the priority of competing assignments of the cash and for that, in turn, the bank needs to be capable of identifying the law governing that question. Nevertheless, cash provided as collateral in connection with systems designated under the Settlement Finality Directive or provided to central banks of Member States or to the European Central Bank might need different solutions.

### **Question 32**

In your experience, does cash collateral play an important role?

- Very important (please estimate the number or value of transactions concerned per year)
- Important (please estimate the number or value of transactions concerned per year)
- Neutral (please estimate the number or value of transactions concerned per year)
- Not important
- I don't know

### **Question 33**

Are conflict of laws rules on third party effects of assignment of cash held in accounts easily identified in your Member State?

- Yes, there are statutory rules (please provide reference and indicate connecting factor)
- Yes, there is case law (please provide reference and indicate connecting factor)
- Yes, there is legal doctrine (please provide reference and indicate connecting factor)
- No
- I don't know

### **Question 34**

Would it be useful to provide for a *specific* conflict of laws rule on third party effects of assignment of cash held in accounts which is different from your preferred solution for claims *in general*?

- Yes
- No
- I don't know
  - If yes, please:
    - a) provide arguments that would justify the departure from the general solution. Would such a solution have any impact on the market, business models, risks, etc.?
    - b) specify what conflict of laws solution you recommend
    - c) specify which issues should be covered by the scope of the applicable law determined by such a conflict of laws rule:
      - the steps necessary to render rights in claims effective against third parties
      - priority issues
      - other: please explain

### **Question 35**

Do you consider that a specific rule, *different from the above*, is needed for cash collateral being provided:

- a) for the purpose of securing rights and obligations potentially arising in connection with a system designated under the Settlement Finality Directive?
  - Yes
  - No

- I don't know
- b) to central banks of Member States or to the European Central Bank?
- Yes
- No
- I don't know
  - If yes, please:
    - a) provide arguments that would justify the departure from the general solution for claims and/or the specific solution for cash held in accounts. Would such a solution have any impact on the market, business models, risks, etc.?
    - b) specify what conflict of laws rule you recommend

### 6.3. Credit claims used as financial collateral

‘Credit claims’<sup>92</sup> are bank loans that are provided as financial collateral. The Eurosystem accepts credit claims as collateral for credit operations in the category of non-marketable assets<sup>93</sup>. In 2016, credit claims amounted to approximately 20% of total collateral accepted by the Eurosystem<sup>94</sup>.

Since 2009, credit claims are protected by the Financial Collateral Directive, but the conflict of laws rule of the Financial Collateral Directive does not cover them. A recent Commission Report on the Financial Collateral Directive found that nearly half of the Member States continue to require formal acts relating to credit claims used as financial collateral for the purposes of perfection, priority, enforceability or admissibility in evidence against the debtor or third parties<sup>95</sup>. However, the question of which formal acts are required to ensure enforceability against other claimants and the order of priority between multiple transfers of the same credit claim is determined by national conflict of laws rules. As a result, the collateral taker may assume that he has priority because formal requirements of Member State A have been complied with, while a third party relies on formal requirements of Member State B and also believes that it has priority over the rights of the other<sup>96</sup>. Consequently, the lack of harmonised conflict of laws rules makes it more difficult to fulfil the eligibility criteria of the Eurosystem, as it increases the number of substantive laws potentially applicable to credit claims being used as collateral<sup>97</sup>.

Credit claims differ from other financial collateral (i.e. cash and book-entry securities) in that they are generally not recorded in electronic accounts, but evidenced by a credit

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<sup>92</sup> ‘Credit claims’ are defined in point (o) of Article 2(1) of the [Financial Collateral Directive](#) as meaning “*pecuniary claims arising out of an agreement whereby a credit institution, as defined in Article 4(1) of Directive 2006/48/EC, including the institutions listed in Article 2 of that Directive, grants credit in the form of a loan*”.

<sup>93</sup> The eligibility criteria for credit claims are listed in Article 89–105 of the [General Documentation Guideline](#).

<sup>94</sup> [European Central Bank data on use of collateral](#).

<sup>95</sup> This is allowed by Article 3(1) subparagraph 2 sentence 2 of the [Financial Collateral Directive](#). See Report from the Commission to the Council and the European Parliament on the appropriateness of Article 3(1) of Directive 2002/47/EC on financial collateral arrangements, [COM\(2016\) 430 final](#) (‘Commission Report on the Financial Collateral Directive’), p. 6.

<sup>96</sup> [Commission Report on the Financial Collateral Directive](#), p. 9.

<sup>97</sup> [Commission Report on the Financial Collateral Directive](#), p. 10. This is because Article 97 of the [General Documentation Guideline](#) requires no more than 2 governing laws applicable to (a) the counterparty; (b) the creditor; (c) the debtor; (d) the guarantor (if relevant); (e) the credit claim agreement; (f) the mobilisation agreement.

agreement only. However, there are specific procedures in place within the Eurosystem when credit claims are used on a cross-border basis by means of the correspondent central banking model<sup>98</sup>. Against this background, a specific solution might need to be found for the law applicable to the effectiveness of the provision of a credit claim as financial collateral.

### **Question 36**

In your experience, are credit claims used as financial collateral outside the Eurosystem credit operations?

- Very frequently (please estimate the number or value of transactions concerned per year)
- Frequently (please estimate the number or value of transactions concerned per year)
- Sometimes (please estimate the number or value of transactions concerned per year)
- Rarely (please estimate the number or value of transactions concerned per year)
- Never
- I don't know

### **Question 37**

Are conflict of laws rules on third party effects of assignment of credit claims easily identified in your Member State?

- Yes, there are statutory rules (please provide reference and indicate connecting factor)
- Yes, there is case law (please provide reference and indicate connecting factor)
- Yes, there is legal doctrine (please provide reference and indicate connecting factor)
- No
- I don't know

### **Question 38**

Would it be useful to provide for a *specific* conflict of laws rule on third party effects of assignment of credit claims which is different from your preferred solution for claims *in general*?

- Yes
- No
- I don't know
  - If yes, please:
    - a) provide arguments that would justify the departure from the general solution. Would such a solution have any impact on the market, business models, risks, etc.?
    - b) specify what conflict of laws solution you recommend
    - c) specify which issues should be covered by the scope of the applicable law determined by such a conflict of laws rule:
      - the steps necessary to render rights in claims effective against third parties
      - priority issues
      - other: please explain

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<sup>98</sup> Point (b) of Article 148(2), Article 149 and Annex VI, Point I, Paragraph 4 of the [General Documentation Guideline](#).

#### 6.4. Claims used as underlying assets in securitisation

Securitisation enables the assignor, called ‘originator’ (e.g. a business or a bank) to refinance a set of its claims (e.g. motor vehicle rents, credit card receivables, mortgage loan payments) by assigning them to a ‘special purpose vehicle’. The special purpose vehicle (assignee) then issues debt securities in the capital markets reflecting the proceeds from these claims. In some Member States, this issuance can happen also on the basis of an assignment and, if this is the case, the special purpose vehicle in addition becomes the assignor of a security interest over the claims to the holders of the securities it issues. As payments are made under the underlying claims, the special purpose vehicle uses the proceeds it receives to make payments on the securities to the investors.

Securitisation can lower the cost of financing because the special purpose vehicle is structured in such a way as to make it insolvency-remote. For corporates, securitisation can provide access to credit at lower cost than bank loans. For banks, securitisation is a way to put some of their assets to better use and free up their balance sheets to allow for further lending to the economy. Under the CMU, the Commission has issued a proposal aiming at reviving a sustainable EU market for simple, transparent and standardised securitisation<sup>99</sup>.

Securitisation transactions are legally complex as they depend upon both a country's securities laws and its property laws. Complexity is added if a multinational portfolio of underlying claims is to be included within a single securitisation structure, as the effectiveness of an assignment must be assured for every legally-different type of claim to be included. This situation is exacerbated by the fact that different Member States have different conflict of laws approaches. As a result, securitisations seem to be structured rather along national lines.

According to the BIICL Study, representatives of the securitisation sector expressed different views as to which would be the desirable conflict of laws rule for claims used as underlying assets in securitisations<sup>100</sup>.

One possible solution would be to rely upon the law governing the claim. This would ensure consistency with Article 14(2) of the Rome I Regulation and simplify the legal analysis and costs involved in due diligence which is necessary when an originator assigns claims to a special purpose vehicle. In order to obtain an appropriate rating for the issued securities, it is necessary to carry out detailed due diligence on the assigned claims to establish the validity and assignability of each claim underlying the securitisation. This due diligence must be carried out under the law governing the assigned claim because the question whether or not the claim is assignable is governed by that law (Article 14(2) of the Rome I Regulation). Thus, any other solution than the law governing the assigned claim would require further due diligence under a different substantive law and add further costs to the process.

Another option would be the law of the assignor's habitual residence. This is the solution adopted by UN Convention (which includes within its scope assignment of claims used in securitisations) and implemented by one Member State specifically for securitisations<sup>101</sup>. The proponents of this solution say that the law of the assignor's

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<sup>99</sup> Proposal for a Regulation of the European Parliament and of the Council laying down common rules on securitisation and creating a European framework for simple, transparent and standardised securitisation, [COM\(2015\) 472 final](#).

<sup>100</sup> [BIICL Study](#), p. 154 and p. 400.

<sup>101</sup> As observed by the [Commission Report](#), p. 7, it is Luxembourg. See [BIICL Study](#), p. 258.

residence is often part of the due diligence anyway, given that the process of obtaining a rating requires that the special purpose vehicle is insolvency-remote. Moreover, a solution based on the assignor's residence might help to remove the confinement of securitisations into national silos, as due diligence on third party effectiveness of claims would be reduced to one substantive law for all claims involved. However, disadvantages would arise for those Member States where the technique of assignment is also employed to issue securities. First, a solution based on the assignor's residence would further complicate the due diligence process in those Member States, as the originator and the special purpose vehicle are both assignors and both of their locations would be relevant. Second, it is apparently not uncommon for special purpose vehicles to change their place of residence. If such a change happens, the place of the assignor's residence may provide no solution as it may lead to the application of two mutually inconsistent laws.

### **Question 39**

In your experience, how frequently are claims used as underlying assets in securitisations?

- Very frequently (please estimate the number or value of transactions concerned per year)
- Frequently (please estimate the number or value of transactions concerned per year)
- Sometimes (please estimate the number or value of transactions concerned per year)
- Rarely (please estimate the number or value of transactions concerned per year)
- Never
- I don't know

### **Question 40**

Are conflict of laws rules on third party effects of assignment of claims used as underlying assets in securitisations easily identified in your Member State?

- Yes, there are statutory rules (please provide reference and indicate connecting factor)
- Yes, there is case law (please provide reference and indicate connecting factor)
- Yes, there is legal doctrine (please provide reference and indicate connecting factor)
- No
- I don't know

### **Question 41**

Would it be useful to provide for a *specific* conflict of laws rule on third party effects of assignment of claims used as underlying assets in securitisations which is different from your preferred solution for claims *in general*?

- Yes
- No
- I don't know
  - If yes, please:
    - a) provide arguments that would justify the departure from the general solution. Would such a solution have any impact on the market, business models, risks, etc.?
    - b) specify what conflict of laws solution you recommend
    - c) specify which issues should be covered by the scope of the applicable law determined by such a conflict of laws rule:
      - the steps necessary to render rights in claims effective against third parties
      - priority issues
      - other (please specify)

**Question 42**

Do you have any other comments on the topic of this public consultation?

**7. NEXT STEPS**

The Commission services will carefully evaluate the responses to this consultation and produce a summary feedback statement. In parallel to the consultation, the Commission services have set up a high level group of experts to assist the Commission with its work on conflict of laws rules on third party effects of transactions in securities and claims<sup>102</sup>.

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<sup>102</sup> For information on the work of the Expert Group on conflict of laws regarding securities and claims (E03506) please consult the [webpage of the Register of Commission Expert Groups](#).

# ANNEX 1

## Categories of ‘securities’ and ‘claims’ discussed in this consultation document

