The meeting was non-public.

1. **Approval of the agenda**

2. **Procedural points discussed**
   a. Discussion on the draft minutes from the past meeting, amendments to the draft minutes circulated by the Commission proposed
   b. Explanation on how to use the shared virtual space for the purposes of communication with other members of the group and the Commission staff
   c. Creation of three subgroups of experts:
      - Subgroup of experts elaborating solutions for securities based on an objective connecting factor (‘Objective Approach Subgroup’);
      - Subgroup of experts elaborating solutions for securities based on a subjective connecting factor (‘Subjective Approach Subgroup’);
      - Subgroup of experts elaborating solutions for claims (‘Claims Subgroup’).

3. **Substantive points discussed**
   a. **Presentation on the French approach to digital ledger technology (‘DLT’) and discussion on the implications of DLT for the conflict of laws issues:**

   Hubert de Vauplane gave an overview of how DLT works and of current legislative developments in France. First, he presented the Ordinance No. 2016-520 of 28 April 2016 which addresses intermediation of mini-bonds (i.e. promissory notes) on regulated investment-based internet crowdfunding platforms. A decree is planned soon to provide for the exact conditions of issuance and transmission of mini-bonds using Blockchain technology. Second, the Act 2016-1691 of 9 December 2016 on Transparency, Anti-Corruption and Economic Modernisation grants the French government temporary powers to reform securities laws so that securities which are not traded via a central securities depository and a securities settlement system can be represented and transmitted using DLT. The French Trésor has launched a public consultation on whether such a reform is desirable which will end on 19th May.

   The subsequent discussion focused on whether this initiative should cover also the law applicable to proprietary aspects of crypto-securities (i.e. securities which could be moved from the book-entry system to the blockchain environment or securities issued directly into the blockchain system).

   It was pointed out that existing EU conflict of laws rules based on the Place of the Relevant Intermediary Approach (‘PRIMA’) would not work in the DLT environment given that there are no securities accounts maintained by intermediaries and no book-entries being made to such accounts. On one hand, some experts felt that if this initiative did not address issues emerging from new technologies, legislation would become
outdated fast, as things develop forward. On the other hand, some experts stressed that blockchain raises a lot of legal problems which the expert group might not have the time to analyse as well as technological problems (time which is needed to validate a transaction, high energy consumption, hardware problems due to huge amount of data being transferred) which might lead to moving beyond DLT soon (e.g. to distributed consensus technology). The group agreed that it was difficult to predict how the future would evolve and to regulate issues which existed only on a test basis.

The challenge would be to identify a single jurisdiction to which there is sufficient connection to make the law of this jurisdiction governing an entire portfolio of crypto-securities recoded on a ledger. This wouldn’t be achieved if the law of the issuer was used as connecting factor, as this could lead to multiple applicable laws in case there is an international portfolio in an electronic vault. It was pointed out that the location of an entry point to the vault was not an appropriate connecting factor either, given that there were as many entry points as participants in the blockchain. In any case, a technology neutral formulation of the connecting factor would be desirable.

Another connecting factor could be the law of the jurisdiction where the system is authorised, however, this would work only for private blockchain. Leaving out public/permissionless ledger was, according to some experts, not a problem, since permissionless systems are problematic from a policy perspective as they can be easily used for money laundering and terrorism purposes and users would use them at own risk. For restricted distributed ledger technology, the location of the operator of the centralised ledger could be envisaged as the connecting factor.


The Commission services presented an overview of how the conflict of laws rules in the directives have been transposed based as well as which MiFID financial instruments are creditable to securities accounts in the respective jurisdiction. The overview revealed significant differences of transpositions in terms of their scope and national ways of reading ‘PRIMA’, in particular the notion of the ‘relevant account’.

The subsequent discussion revealed disagreement on the extent to which there were differences and on the question whether conflict of laws rules in the directives – and their diverging transpositions – should be kept, amended or repealed in case a uniform solution is found.

Some experts stressed that differences in implementations across the EU are a lot less harmful than a potential change of the existing ‘PRIMA’ rule. It was also mentioned that these conflict of laws rules serve well their purpose, as they enabled market participants taking collateral from other Member States which was very difficult before their were enacted. Any EU action must not deteriorate this achievement.

Other experts pointed out the problem with keeping the conflict of laws rules in the directives: given that property rights are effective against third parties having different conflict of laws rules for different situations would mean that the rules would not be able to fulfil their objective of introducing legal clarity. For example, if priority issues arose between collateral takers covered by different conflict of laws rules entailed in different legal instruments, different laws might become applicable and the conflict of laws problem is not solved.

Some experts stressed the added value of legal certainty that a uniform conflict of laws regime would bring in comparison to the current fragmented approach. In particular, if
the conflict of laws rules in the different directives would be replaced by conflict of laws rules in a regulation and the gaps due to the limited scope of the different directives would be filled.

One observer questioned whether conflict of laws rules in the field of securities could be fully unified given the differences in national property laws. This argument was countered with the reference to other uniform regulations on conflict of laws in fields where there are also major differences in terms of substantive laws (family law, succession law).

c. **Presentation by the experts and discussion on the existing national conflict of laws rules in the area of securities outside the harmonised field and on claims for the following Member States: Finland, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Spain, Sweden, United Kingdom.**

The presentations covered the following issues:


2. National conflict of laws rules on third party effects of transactions in certificated securities;

3. National conflict of laws rules on the creation and/or issuance of securities;


In respect of each of the above-mentioned four points the experts explained (i) whether the rules are based on statute, case law or doctrine; (ii) their personal, material and geographical scope; (iii) the connecting factor(s) used by these rules; (iv) the matters covered by the law applicable designated by these rules; (v) whether they have come across the existence of any overriding mandatory provisions of national law which may affect the application of the law designated by the conflict of laws rules.

In addition, national conflict of laws rules applicable in Belgium, Poland and the Czech Republic were mentioned.

4. **Conclusions/recommendations/opinions**

With respect to book-entry securities, the Commission representative concluded that even outside the harmonised field some sort of PRIMA seems to be the common denominator of all national solutions. In terms of which is the ‘relevant account’ and where is it located, the presentations outside the harmonised field confirmed the findings on the national transpositions of the EU conflict of laws rules, namely that there are diverging national solutions, but they are not clear as they are based on doctrine or market practice and not specifically set out in legislation. The following example was given: where a French investor accessed the Spanish CSD through a French custodian, under Spanish law any security right needed to be registered in the Spanish CSD which was the relevant account for conflict of laws purposes, if an individual client account was used. Under French conflict of laws the relevant account was at custodian level and any security right was to be registered there. In many countries there seems to be a dual system of connecting factors depending on the account structure: one level of account is deemed relevant for securities held in individual accounts at CSD level, and potentially multiple accounts are deemed relevant if omnibus accounts are being employed. It was also revealed that certain provisions of the law of the forum were sometimes applied on the basis that they have the status of ‘overriding mandatory
provisions’ irrespectively of the law otherwise applicable. Based on the presentations, the Commission representative concluded that conflicting judgments in cross-border securities cases are quite likely to happen due to these different approaches. The outcome of a case could vary depending on which Member State’s court is seized first. Given the fact that we have quasi automatic recognition of judgments within the EU, this clearly posed a problem that called for action at Union level.

When it comes to certificated and registered securities, there seemed to be largely agreement between the national solutions. For bearer certificates, it was the *lex rei sitae* which applied, whereas for registered shares it was either the *lex societatis* or the place of the issuer’s register.

With respect to third party effects of assignments of claims, the Commission representative summarised the existing situation resulting from the application of national conflict of laws rules in the laws of Member States. The different national conflict of laws rules in the area of third party effects of assignment of claims lead to a number of practical problems. First, the existing national conflicts of laws rules in the area of third party effects of assignment of claims were often not certain enough to provide the desired legal predictability. The resulting uncertainty could put economic operators in certain Member States in a situation that they did not know how to structure transactions involving assignment of claims since they cannot determine clearly in advance which law would be applicable to the third party effects and, and consequently, whether they acquired a clean and enforceable title to the transferred claims. Nevertheless, even in such situation transactions involving cross-border assignment of claims were realised either due to the ignorance of the underlying risk or in the knowledge of the underlying risk based on wilful decision to accept the risk of possible invalidity of the transaction due to the determination of the incorrect law.

Second, another source of legal uncertainty resulted from the incompatibility or divergence of possibly applicable national conflict of laws rules. This incompatibility or divergence resulted in a possibility of application of more than one law to the assignment to be performed. In such a situation economic operators – in order to avoid the risk of unenforceability of the transaction because it was made subject to a law wrongly considered as applicable – fulfilled conditions of all possible applicable laws to the transaction. This doubled, tripled etc. the costs of transaction in assignment of claims.

5. **Next steps**

The subgroups were requested to produce discussion papers regarding pros and cons of the different connecting factors discussed and the implications of such connecting factors. Each subgroup will prepare the work to be presented and discussed in the following meeting.

6. **Next meeting**

Next meeting will be held on 8 and 9 June 2017.

7. **List of participants**

Members: Lars AFRELL, Thiebald CREMERS, Gilles CUNIBERTI, Louis D’AVOUT, Hubert DE VAUPLANE, Francisco GARCIMARTÍN, Matthias HAENTJENS, Eva-Maria KIENINGER, Janne LAUHA, Matthias LEHMANN, Joanna PERKINS, Christina TARNANIDOU, Maria Aránzazu, ULLÍVARI ROYUELA, Christine VAN GALLEBAERT, Francesca VILLATA, Peter WERNER;

Observers: ECB, ESMA
Commission staff: Maria VILAR BADIA, Ondrej VONDRAČEK (JUST A1); Miriam PARMENTIER (FISMA C1); Barbara GABOR, Olga TYTON, Krista ZARINA (FISMA C2); Nadia DE SOUZA (CLIMA B1)