

Procedure file

Basic information	
COD - Ordinary legislative procedure (ex-codecision procedure) Regulation 2018/0044(COD)	Awaiting Council's 1st reading position
Law applicable to the third-party effects of assignments of claims	
Subject 2.50.03 Securities and financial markets, stock exchange, CIUTS, investments 2.50.08 Financial services, financial reporting and auditing 3.45.01 Company law	
Legislative priorities Joint Declaration 2023-24	

Key players			
European Parliament	Committee responsible	Rapporteur	Appointed
	 Legal Affairs	 POSPÍŠIL Jiří	11/01/2021
		Shadow rapporteur	
		 REPASI René	
		 VÁZQUEZ LÁZARA Adrián	
		 TOUSSAINT Marie	
		 BECK Gunnar	
		 STANCANELLI Raffaele	
		 MAUREL Emmanuel	
	Former committee responsible		
	 Legal Affairs		27/03/2018
		 SVOBODA Pavel	
	Former committee for opinion		
	 Economic and Monetary Affairs	The committee decided not to give an opinion.	

Key events

12/03/2018	Legislative proposal published	COM(2018)0096	Summary
16/04/2018	Committee referral announced in Parliament, 1st reading		
10/07/2018	Vote in committee, 1st reading		
10/07/2018	Committee decision to open interinstitutional negotiations with report adopted in committee		
17/07/2018	Committee report tabled for plenary, 1st reading	A8-0261/2018	Summary
10/09/2018	Committee decision to enter into interinstitutional negotiations announced in plenary (Rule 71)		
12/09/2018	Committee decision to enter into interinstitutional negotiations confirmed by plenary (Rule 71)		
13/02/2019	Results of vote in Parliament		
13/02/2019	Decision by Parliament, 1st reading	T8-0086/2019	Summary
15/11/2021	Committee decision to open interinstitutional negotiations after 1st reading in Parliament		
22/11/2021	Committee decision to enter into interinstitutional negotiations announced in plenary (Rule 72)		

Technical information

Procedure reference	2018/0044(COD)
Procedure type	COD - Ordinary legislative procedure (ex-codecision procedure)
Procedure subtype	Legislation
Legislative instrument	Regulation
Legal basis	Treaty on the Functioning of the EU TFEU 081-p2
Other legal basis	Rules of Procedure EP 159
Mandatory consultation of other institutions	European Economic and Social Committee
Stage reached in procedure	Awaiting Council's 1st reading position
Committee dossier	JURI/8/12508

Documentation gateway

Legislative proposal	COM(2018)0096	12/03/2018	EC	Summary
Document attached to the procedure	COM(2018)0089	12/03/2018	EC	Summary
Document attached to the procedure	SWD(2018)0052	12/03/2018	EC	

Document attached to the procedure	SWD(2018)0053	12/03/2018	EC	
Committee draft report	PE621.985	03/05/2018	EP	
Amendments tabled in committee	PE623.589	04/06/2018	EP	
Committee report tabled for plenary, 1st reading/single reading	A8-0261/2018	17/07/2018	EP	Summary
European Central Bank: opinion, guideline, report	CON/2018/0033 OJ C 303 29.08.2018, p. 0002	18/07/2018	ECB	Summary
Text adopted by Parliament, 1st reading/single reading	T8-0086/2019	13/02/2019	EP	Summary
Commission response to text adopted in plenary	SP(2019)354	16/04/2019	EC	

Additional information

Research document	Briefing	20/09/2022
-------------------	--------------------------	------------

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

PURPOSE: to outline the Commission's view on the current conflict of laws rules for securities transactions.

BACKGROUND: following on from the [action plan on Capital Markets Union](#) (CMU), and the [mid-term review](#), the Commission announced targeted action to reduce legal uncertainty on cross-border transactions of securities and claims. The purchase and sale of securities, as well as their use as collateral, take place daily across the EU in large volumes. A significant part of these transactions, amounting to around EUR 10 trillion per year, involve a cross-border element.

Cross-border transactions in securities are important components of CMU. In order to promote cross-border transactions, clarity and predictability about which country's law applies to determine who owns the underlying assets of the transaction is of the essence.

The conflict of laws provisions in the [Settlement Finality Directive](#), [Financial Collateral Directive](#) and [Winding-up Directive](#) designate the applicable law based on a common approach. They all designate an applicable law based on the place of the relevant register or account (and in the case of the Settlement Finality Directive and the Winding-up Directive, the centralised deposit system). Nevertheless, the provisions differ in detail and there appear to be some differences in how they are interpreted and applied across Member States. In particular, this concerns the definition and determination of where the account is 'located' or 'maintained'.

The lack of clarity created by different interpretations of the existing rules might make cross-border transactions more costly due to some residual legal uncertainty around which law is applicable.

Given the volume of transactions concerned, the Commission is of the view that a clarification of the rules is necessary to help markets reduce redundant costs and increase legal certainty around the applicable law.

CONTENT: the Communication clarifies the Commission's views on important aspects of the existing EU acquis with regard to the law applicable to proprietary effects of transactions in securities. It covers the third-party effects of the transfer of financial instruments and accompanies the legislative proposal on third-party effects of assignment of claims.

Two elements of transactions in securities are governed by conflict of laws rules:

- the proprietary element, which refers to the transfer of rights in property and which affects third parties; and
- the contractual element, which refers to the parties obligations towards each other under the transaction.

The Communication concerns the first aspect, proprietary effects of securities transactions. The [Rome I Regulation](#) already regulates the contractual element at EU level.

On the question of whether the terms 'maintained' and 'located' mean different things, the Commission is of the view that the difference in wording, referring to the place of the account or register, does not imply any difference in substance.

The Commission observes that under national implementation there are different ways to determine where a securities account is 'located' or 'maintained'. Without prejudice to potential future decisions of the Court of Justice of the European Union, these different ways of interpretation all appear to be valid under the Directives.

Member States should continue to observe if any legal discrepancies occur at the level of national interpretations that might cause market disruptions, and aim to converge in their interpretation and application of the existing EU rules.

The Commission will continue to monitor developments in this area. In consultation with stakeholders, it will assess how national interpretations and market practices evolve, in light of international and technological developments. Evidence from stakeholders on the impact of specific issues on the functioning of the internal market will be particularly assessed. Any possible future legislative initiative will be accompanied by an impact assessment.

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

PURPOSE: to establish common conflict of laws rules designating which national law applies to the third-party effects of assignments of claims, with a view to ensuring legal certainty.

PROPOSED ACT: Regulation of the European Parliament and of the Council.

ROLE OF THE EUROPEAN PARLIAMENT: the European Parliament decides in accordance with the ordinary legislative procedure and on an equal footing with the Council.

BACKGROUND: conflict of laws rules governing the third-party (or proprietary) effects of assignments of claims do not currently exist at Union level. These conflict of laws rules are laid down at Member State level, but they are inconsistent and often unclear. In cross border assignments of claims, the inconsistency of national conflict of laws rules leads to legal uncertainty as to which law applies to the third-party effects of the assignments.

The assignment of a claim is a legal mechanism whereby a creditor ("assignor") transfers his right to claim a debt to another person ("assignee"). A claim gives a creditor the right to receive a sum of money or to the performance of an obligation by the debtor. This mechanism is used by companies to obtain liquidity and have access to credit, so-called factoring and collateralisation respectively, and by companies (most often banks) to optimise the use of their capital, also called securitisation.

Factoring is a crucial source of liquidity for many firms. The majority of users of factoring are SMEs: Small represent 76%, Medium 11% and Large 13%. Europe as a region is the largest factoring market world-wide and represents 66% of the world market.

As part of the Action Plan on [Capital Markets Union](#) (CMU) and the [Mid-Term Review](#), the Commission announced targeted action on rules on the ownership of securities and the third-party effects of assignments of claims to reduce legal uncertainty for cross-border transactions in securities and claims. This proposal and the [Communication](#) on the law applicable to the proprietary effects of transactions in securities, presented in parallel, implement this commitment.

IMPACT ASSESSMENT: five options have been studied in the impact assessment. The proposal is based on the option that the law of the assignor's habitual residence is a general rule but with certain assignments subject, as an exception, to the law of the assigned claim and with a choice of law possibility for securitisation.

CONTENT: the proposal for a Regulation concerns the law applicable to cross-border transactions involving claims or securities. It does not cover the transfer of the contracts (for example derivative contracts), in which both rights (or claims) and obligations are included.

The proposal aims to:

- contribute to the objective of encouraging cross-border investment by reducing the legal uncertainty that may discourage cross-border assignments of claims or lead to additional costs for those transactions;
- protect investors by reducing losses that may occur when market participants are unaware of the legal risk arising from legal uncertainty;
- harmonise the conflict of law rules on the third-party effects of assignments of claims, the proposal will provide legal certainty to parties involved in factoring, collateralisation and securitisation and thereby facilitate access to cheaper finance for SMEs and consumers.

The solution which the Commission proposes is a general rule that in conflict situations the law of the assignor's habitual residence applies.

The law of the assignor's habitual residence is easy to determine and most likely to be the place in which the main insolvency proceedings with respect to the assignor will be opened. The proposal is also particularly suitable for bulk assignments and assignments of receivables under future contracts, which are an important source of finance for SMEs. It is the only law which is consistent with the Union acquis on insolvency, that is, the [Insolvency Regulation](#).

The Commission proposes, however, that the law of the assigned claim applies to two types of specific claims, which are therefore exempted from the general rule:

- cash on the account of a credit institution (for example a bank, where the consumer is the creditor and the credit institution is the debtor);
- claims derived from financial instruments, such as derivatives.

In addition, for securitisation transactions, the Commission proposes a choice between the law of the assignor and the law of the assigned claim.

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

The Committee on Legal Affairs adopted the report by Pavel SVOBODA (EPP, CZ) on the proposal for a regulation of the European Parliament and of the Council on the law applicable to the third party effects of assignments of claims.

The proposal for a Regulation concerns the law applicable to cross-border transactions involving claims or securities. It shall apply, in situations involving a conflict of laws, to the third-party effects of assignments of claims in civil and commercial matters other than third-party effects to the debtor of the claim assigned.

The committee responsible recommended that the European Parliaments position adopted at first reading under the ordinary legislative procedure should amend the Commission proposal as follows.

Scope of application: Members pointed out that matters governed by Directive 2002/47/EC of the European Parliament and of the Council (financial collateral arrangements), by Directive 98/26/EC of the European Parliament and of the Council (settlement finality), Directive

2001/24/EC of the European Parliament and of the Council (winding-up Directive) and Commission Regulation (EU) No 389/2013 on the register, should not be affected by this Regulation, since the scope of the conflict of laws rules contained in this Regulation and that of the conflict of laws rules contained in those three Directives do not therefore overlap.

Explicit exclusion of debtors: the conflict of laws rules laid down in this Regulation should govern the effects of assignments of claims in respect of third parties, for example, a creditor of the assignor, excluding the debtor.

Exclusion from insolvency proceedings: [Regulation \(EU\) 2015/848](#) of the European Parliament and of the Council on insolvency proceedings contains rules relating to applicable law. For that reason, assignments done in the course of a collective proceeding according to that regulation should be excluded from the scope of application of this Regulation.

Applicable law: the third-party effects of an assignment shall be governed by the law of the country in which the assignor has its habitual residence at the time of the conclusion of the assignment contract.

Members deleted the provisions of the proposal which provide that the assignor and the assignee may choose the law applicable to the assigned claim as the law applicable to the third-party effects of an assignment of claims in view of a securitisation.

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

Overriding mandatory provisions: effect shall be given to the overriding mandatory provisions of the law of the Member State where the assignment has to be or has been performed, insofar as those overriding mandatory provisions render the performance of the assignment contract unlawful.

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

OPINION OF THE EUROPEAN CENTRAL BANK on a proposal for a regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims.

The ECB takes note of the proposed regulation, which seeks to address the question of defining the law governing the effectiveness of the assignment of a claim against third parties, and the priority of the assigned claim over third party claims over the subject matter of the assignment. However, it recommends certain improvements to the proposal.

The general rule under the proposed regulation is that the third-party effects of assignments of claims are to be governed by the law of the country of the assignors habitual residence. The ECB notes that Article 14 of [Regulation \(EC\) No 593/2008](#) refers, for certain aspects, to the law of the assignment agreement and, for others, to the law of the assigned claim. The general rule under the proposed regulation refers to a third jurisdiction, that of the assignors habitual residence. The ECB considers that, although legally feasible, the proposed rule has shortcomings, especially in scenarios where credit claims are used as financial collateral within the meaning of Article 1(4)(a) of [Directive 2002/47/EC](#) on financial collateral arrangements.

Furthermore, since the proposed regulation affects the interests of central banks as collateral takers, i.e. as assignees of claims, the ECB invites the Council to consider the introduction of an amendment to the effect that the law applicable to the claim would also govern the third-party effects of assignments of credit claims, i.e. bank loans.

The ECB makes reference to the *acquis* in matters of conflict of laws under Article 9(2) of [Directive 98/26/EC](#) on settlement finality in payment and securities settlement systems and feels there is a strong case for defining a single applicable jurisdiction for credit claims as the Union legislator has done for book entry securities. The most efficient way of minimising the number of laws applicable to credit claims would be to refer, also in the case of bank loans, to the law of the assigned claim.

The ECB also invites the Council to consider an amendment to Directive 2002/47/EC to exclude the possibility of the debtor (or guarantor) of a credit claim provided as collateral to a central bank in the context of Eurosystem credit operations exercising any right of set-off it may have against the original lender under such claim. In order to minimise the amount of potential losses in the case of realisation, this exclusion should also cover any third party to whom the credit claim is subsequently assigned by a Eurosystem central bank.

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

The European Parliament adopted by 546 votes to 35, with 62 abstentions, a legislative resolution on the proposal for a regulation of the European Parliament and of the Council on the law applicable to the third party effects of assignments of claims.

The proposal for a Regulation concerns the law applicable to cross-border transactions involving claims or securities. It shall apply, in situations involving a conflict of laws, to the third-party effects of assignments of claims in civil and commercial matters other than third-party effects to the debtor of the claim assigned.

The European Parliament's position adopted at first reading under the ordinary legislative procedure amended the Commission proposal as follows.

Scope of application:

Parliament pointed out that matters governed by Directive 2002/47/EC of the European Parliament and of the Council (financial collateral arrangements), by Directive 98/26/EC of the European Parliament and of the Council (settlement finality), Directive 2001/24/EC of the European Parliament and of the Council (winding-up Directive) and Commission Regulation (EU) No 389/2013 on the register, should not be affected by this Regulation, since the scope of the conflict of laws rules contained in this Regulation and that of the conflict of laws rules contained in those three Directives do not therefore overlap.

By laying down common conflict of laws rules designating which national law applies to the third-party effects of assignments of claims, the Regulation shall increase cross-border claims transactions, so as to encourage cross-border investment in the Union and facilitate access to finance for firms - including small and medium-sized enterprises (SMEs) - and consumers.

Explicit exclusion of debtors

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

Exclusion from insolvency proceedings

[Regulation \(EU\) 2015/848](#) of the European Parliament and of the Council on insolvency proceedings contains rules relating to applicable law. For that reason, assignments done in the course of a collective proceeding according to that regulation should be excluded from the scope of application of this Regulation.

Applicable law

The third-party effects of an assignment shall be governed by the law of the country in which the assignor has its habitual residence at the time of the conclusion of the assignment contract.

Members deleted the provisions of the proposal which provide that the assignor and the assignee may choose the law applicable to the assigned claim as the law applicable to the third-party effects of an assignment of claims in view of a securitisation.

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

Overriding mandatory provisions

The overriding mandatory provisions shall apply to the law of the Member State where the assignment has to be or has been performed, insofar as those overriding mandatory provisions render the performance of the assignment contract unlawful.