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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	COMMISSION STAFF WORKING DOCUMENT EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT Accompanying the document 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 Communication on the law applicable to the proprietary effects of transactions in securities

Delegations will find attached document SWD(2018) 53 final.

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COMMISSION STAFF WORKING DOCUMENT
EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT

Accompanying the document

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

Communication on the law applicable to the proprietary effects of transactions in securities

{COM(2018) 96 final} - {SWD(2018) 52 final}

Executive Summary

Impact assessment on a

Proposal for a Regulation on the law applicable to the third-party effects of assignments of claims

and a

Communication on the law applicable to the proprietary effects of transactions in securities

A. Need for action

Why? What is the problem being addressed?

The problem addressed by this initiative is the lack of legal certainty as to which national law determines the proprietary effects of cross-border assignments of claims and transactions in securities. Given that, in a cross-border scenario, several national laws can potentially apply, market participants need clarity as to which of such laws they must observe in order to ensure that they acquire legal title over the claim or the security.

Currently, there are no EU conflict of laws rules on the proprietary effects of assignments of claims and the Member States' conflict of laws rules are inconsistent and unclear. On securities, conflict of laws rules on the proprietary effects of transactions in securities are laid down in the Financial Collateral Directive, the Settlement Finality Directive and the Winding-Up Directive. These provisions are similar in that they all designate an applicable law based on the place of the relevant register or securities account. However, they differ in detail and the rules are not worded in an identical manner and are implemented differently across the EU.

The current lack of legal certainty creates a legal risk in cross-border transactions. If market participants are not aware of the risk or choose to ignore it, they may end up facing unexpected losses; if they decide to mitigate the risk by seeking specific legal advice, they will incur higher transaction costs; if they are deterred by the legal risk and choose to avoid it, they may forego businesses opportunities and reduce market integration.

The assignment of claims is a legal mechanism used by companies to have access to finance. Claims are assigned in factoring and securitisation and as collateral in order to obtain credit. The factoring market was estimated at EUR 1,557 billion in 2015; about 25% of all financial market transactions financed by the Eurosystem are secured by credit claims as collateral, amounting to some EUR 520 billion; and the market volume of securitisation issuance was EUR 237.6 billion within the EU in 2016. An estimated 440 trillion of cross-border transactions in securities took place in 2015.

The stakeholders directly affected by the legal risk in cross-border transactions in claims and securities are financial institutions (such as banks engaged in lending, factoring, collateralisation and securitisation), financial intermediaries that transact in securities and claims, end investors (funds, retail investors) and borrowers (retail customers and firms, including SMEs).

What is this initiative expected to achieve?

The policy objective of this initiative is to provide legal certainty for cross-border transactions in claims and securities by clarifying which national law should govern the proprietary effects of such transactions and, thereby, foster cross-border investment and facilitate access to credit. This initiative aims to adopt common conflict of laws rules applicable to the proprietary effects of assignments of claims and to clarify the Commission's views with regard to the existing EU conflict of laws rules on the proprietary effects of transactions in securities so that these rules are applied consistently throughout the EU.

What is the value added of action at the EU level?

There is clear added value in addressing the problems described at EU level. On claims, the current legal uncertainty and the legal risk it creates are caused by inconsistent and unclear national conflict of laws rules. In respect of claims, 80% of the stakeholders consulted in the study contracted by the Commission and 70% of the stakeholders which expressed an opinion in the public consultation considered that EU action would have added value. On securities, the Communication on securities will deliver on the objective of introducing more clarity, improving transparency of the existing rules across the EU without unsettling the existing EU acquis that stakeholders warn against.

B. Solutions

What legislative and non-legislative policy options have been considered? Is there a preferred choice or not? Why?

The current legal uncertainty and ensuing legal risk in cross-border assignments of claims results from the absence of conflict of laws rules on the proprietary effects of assignments of claims at EU level and from the co-existence of Member State conflict of laws rules which are inconsistent and unclear. In order to provide legal

certainty for cross-border assignments of claims and thereby facilitate access to cheaper finance for companies, including SMEs, and consumers, the preferred option is the adoption of an EU legislative initiative harmonising conflict of laws rules on the effects on third parties of assignments of claims. By designating in a uniform manner which national law should apply to determine ownership rights over the claims assigned, any dispute concerning such ownership rights would be resolved in accordance with the same national law regardless of which Member State authority examined the case.

In the area of conflict of laws rules on the proprietary effects of transactions in securities, both legislative and non-legislative options were assessed. The preferred policy option is non-legislative, namely the issuing of a Communication clarifying the Commission's views with regard to certain aspects of the three existing Directives. The reasons for this choice are the following: (1) there is little tangible evidence of materialised risks; (2) the Directives already address the main legal issues within the EU, although not at international level; (3) stakeholder preferences are extremely divided; and (4) legislative action might not be able to take into account future international and technological developments. The preferred option of issuing a Communication clarifying the Commission's views of the existing conflict of laws provisions can provide more clarity without any negative consequences on any stakeholder groups or lock-in effects for future policy developments in this field.

Who supports which option?

With regard to claims, stakeholders were asked about their preferences as to the law that should apply to the proprietary effects of cross-border assignments of claims in the study contracted by the Commission and in the public consultation. In the study contracted by the Commission, 44% of the stakeholders consulted favoured the law of the assignor's habitual residence and 30% favoured the law of the assigned claim. In the public consultation, out of the stakeholders which expressed an opinion, 57% favoured the law of the assignor's habitual residence and 43% favoured the law of the assigned claim. At a meeting of Member State experts on conflict of laws held in September 2017, Member States were divided as to their preferred applicable law. Regarding securities, in the public consultation no legislative action was the preferred option of Central Securities Depositories (CSDs) as well as other stakeholders. A review of the three Directives is supported by different stakeholder groups, and proposing a new initiative is supported by a number of other stakeholders. However, stakeholders calling for legislative action are strongly divided on the preferred policy option (that is, whether designating the applicable law by reference to the place of the relevant intermediary or granting freedom of choice of law). At a meeting of Member State experts on conflict of laws held in November 2017, the vast majority of Member States voiced support for a Communication clarifying the Commission's views with regards to the existing EU conflict of laws rules.

C. Impacts of the preferred option

What are the benefits of the preferred option (if any, otherwise main ones)?

Both the preferred options of adopting a legislative instrument on claims and issuing a Communication clarifying the Commission's views with regard to the existing EU conflict of laws rules on securities are expected to have a positive impact (albeit to a different extent given the legal nature of each option) on the economy, both on financial markets and the real economy. Adopting EU rules on the law applicable to the third-party effects of cross-border assignments of claims and clarifying the Commission's views on the existing EU conflict of laws rules on the law applicable to the proprietary effects of cross-border transactions in securities would provide legal certainty and thereby lessen or eliminate the legal risk linked to cross-border transactions. Legal certainty would decrease the risk of financial losses, do away with the increased transaction costs resulting from legal due diligence costs and promote cross-border investment and thus market integration. Legal certainty would also facilitate access to cheaper finance by companies, in particular SMEs, and consumers, as the assignment of claims is a mechanism frequently used to have access to cheaper credit (for example, through factoring and collateralisation). Increased cross-border investment and access by companies to cheaper credit may also have an indirect positive social impact. No significant direct environmental benefit is expected.

A quantification of benefits is difficult given that legal risks are not quantified. In the area of claims, information on the value of the claims assigned, the number of assignments or on whether the assignments were cross-border is either kept confidential by the industry or is not recorded. In the public consultation, both the authorities of Member States and stakeholder associations confirmed that a great deal of data on assignments of claims, for example on collateralisation or securitisation, is not collected either by public authorities, stakeholders or stakeholder associations.

What are the costs of the preferred option (if any, otherwise main ones)?

Neither the legislative initiative on claims nor the non-legislative initiative on securities is expected to cause any negative economic, social or environmental effects. To the contrary, these initiatives will have a positive economic and social impact through the provision of legal certainty. The adoption of uniform provisions on the third-party effects of cross-border assignments of claims and the adoption of a Communication clarifying the Commission's views on the existing conflict of laws provisions on the proprietary effects of cross-border transactions in securities would eliminate legal risk and, therefore, the risk of financial losses, the increased transaction costs aimed at mitigating the legal risk, and would promote cross-border investment and market integration. The legislative initiative on claims may impose one-off adaptation costs on market participants (for example, if they need to change their legal documentation). The non-legislative initiative on securities should not lead to compliance costs.

How will businesses, SMEs and micro-enterprises be affected?

The provision of legal certainty through the legislative initiative on claims and the non-legislative initiative on securities will have a direct positive impact on businesses. In particular, the legislative initiative on claims will benefit SMEs and micro companies as, in designating clearly and in advance which national law will apply to the ownership effects of assignments of claims, these businesses will have more opportunities to choose mechanisms that enable them to have access to cheaper finance through cross-border factoring and collateralisation. Increased cross-border investment and access by businesses to cheaper finance may also have an indirect positive impact on employment. On securities, the Communication will provide clarity for market participants without imposing compliance costs that could be disruptive for the market. These benefits would accrue with financial intermediaries and might be passed on to end investors. Improving clarity of the existing applicable rules will also help to decrease any cross-border risks related to legal uncertainty as well as transaction costs related to discovering the applicable law.

Will there be significant impacts on national budgets and administrations?

Neither the legislative initiative on claims nor the non-legislative initiative on securities will impose any significant costs on national administrations. Given that the proposed measures will bring legal certainty, they are expected to alleviate the work of courts.

Will there be other significant impacts?

Both the legislative initiative on claims and the non-legislative initiative on securities will have a positive effect on legal certainty concerning the ownership aspects of transactions in claims and securities, which is related to the fundamental right to property. Neither the legislative initiative on claims nor the non-legislative initiative on securities will affect third-country aspects or competition.

Given that the preferred option in the legislative initiative on claims would be based on the law of the assignor's habitual residence, synergies would be created with the EU Insolvency Regulation, based on a compatible conflict of laws rule. Synergies would also be achieved at international level as the law of the assignor's habitual residence is also the law chosen by the 2001 UN Convention on the Assignment of Receivables in International Trade.

On securities, the Communication will allow some convergence across the EU and possibly avoid, in some specific cases, the applicable of multiple laws internationally.

D. Follow up**When will the policy be reviewed?**

The Commission will monitor the impacts and effectiveness of the proposed initiatives on claims and securities by way of a questionnaire sent to key stakeholders. This questionnaire may be part of a more comprehensive study which will examine developments in the areas of cross-border transactions in claims and securities. The impact of the proposed initiative on claims will be evaluated in a report prepared by the Commission five years after the entry into force of the proposed instrument.