



Council of the
European Union

Brussels, 16 March 2022
(OR. en)

7272/22

LIMITE

JUSTCIV 30
ECOFIN 235
EJUSTICE 39
COMPET 157
CODEC 308
IA 25

Interinstitutional File:
2018/0044(COD)

NOTE

From:	Presidency
To:	Delegations
Subject:	Proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims - Report on the sixth technical meeting with the European Parliament and compromise proposals

DOCUMENT PARTIALLY ACCESSIBLE TO THE PUBLIC 12.09.2023

Delegations will find in Annex a courtesy translation of doc. ST 7272/22.

1. The sixth technical meeting with the Parliament on the proposed regulation on the law applicable to the third-party effects of assignments of claims took place on 8 March 2022.

As the previous discussions had been slow and had not led to substantial progress, the agenda was designed differently. Instead of a linear reading of the 4-columns table, the discussions focused on seven previously identified topics.

2. The dates of the next technical meetings have not yet been set. They could take place at the end of March and beginning of April. A report will be made at a working party meeting which is preliminarily set for 12 April.
3. In preparation for these forthcoming technical meetings, the Presidency wishes to report on the discussions held with the Parliament and to gather the Council's comments and opinions on several compromise proposals.

I. NEW AGREED OR POSSIBLE POINTS OF AGREEMENT BETWEEN COUNCIL AND PARLIAMENT

A. Topics discussed during the 6th technical meeting

4. Among the topics on the agenda, a compromise has been found or seems possible on the following four topics. The first one concerns **consumer rights**.

In Article 1 (line 51a), the Parliament added the following §1a: "*This regulation is without prejudice to EU and national law on consumer protection*". This addition is in line with its general objective to protect third parties. Despite the explanations given by the Presidency and the Commission, the Parliament maintained its position.

In view of the apparent political importance of the issue for the Parliament, the Presidency proposed to the Parliament, as part of an overall compromise, to introduce the following provision in Article 6: "*In particular, this Regulation shall be without prejudice to the application of Union law or national law on consumer protection.*" (see doc. 5547/1/22 REV1, point 14).

DELETED

5. The second issue concerns **the exclusion of claims incorporated in a certificate or represented by a book-entry** (Article 1 §2, (g); rows 25c, 25h and 58d).

DELETED

As explained in recital 16b of the general approach (row 25h), the exclusion is justified by the fact that these claims are governed by special rules. The specificity of these rules stems from the particular modes of transmission of these claims : physical delivery of the certificate or book-entry.

DELETED

6. Agreement was reached on a third issue, **the definition of the concept of assignment** (Article 2(1)(c); rows 17, 26, 40, 63, 88).

For the record, Article 2 (c) of the general approach amends the notion of assignment in order to expressly exclude the transfer and the novation of contract: “*‘assignment’ means a voluntary transfer of a right to claim a debt against a debtor. ~~It;~~ it includes outright transfers of claims, contractual subrogation, transfers of claims by way of security and pledges or other security rights over claims, **but does not cover transfers of contracts, in which both rights and obligations are included, or the novation of contracts including such rights and obligations***”.

DELETED

An agreement has therefore been reached on the definition of assignment (row 63). As a consequence, in recital 17 (row 26), the Parliament should agree to abandon its amendment to the text, the consequence of which would be to include the transfer of contracts in the scope of the regulation. However, recital 17 was not discussed during the technical meeting. The position of the Parliament is therefore still ambiguous on this point.

7. The fourth issue on which a compromise is emerging is **the situation of the debtor and the relationship with Rome I** (Article 2, §1, (e); rows 23, 23a and 65).

During a previous technical meeting, the Presidency had informed the Parliament that the working group agreed to move the clarification that the Regulation would apply "*without prejudice to the debtor's rights and obligations under the applicable law in accordance with Article 14(2) of the Rome I Regulation*" from the definition of third-party effects (Article 2(e); row 65) to a new paragraph inserted after the first paragraph of Article 1.

DELETED

The Presidency explained that the reference made here to the Rome I and Rome II regulations might be too restrictive. Indeed, it cannot be excluded that there is a specific conflict of laws rule in another legislative act of the Union. By way of illustration, the Presidency referred to the definition of the concept of system in Article 2(a) of the SFD (Directive 98/26 on settlement finality in payment and securities settlement systems). This definition specifies that a system is governed by the law chosen by the participants in the system but they must choose the law of a Member State in which at least one of them has its head office. It therefore places a restriction on the principle of choice of law set out in Rome I.

The Presidency therefore proposed two solutions to the Parliament, favouring the first.

The first solution would be to retain the wording of the general approach, which refers to Article 14(2) of the Rome I Regulation, while specifying in recital 14, in its wording resulting from the general approach, which law governs the debtor's situation by making a reference the Rome I and Rome II Regulations : *"A claim gives a creditor a right to the payment of a sum of money or the performance of a non-monetary obligation by the debtor. The assignment of a claim enables the creditor (assignor) to transfer its right to claim the debt against a debtor to another person (assignee). The laws that govern the contractual relationship between the creditor and the debtor, between the assignor and the assignee and between the assignee and the debtor are designated by the conflict of laws rules laid down in the Rome I Regulation. The conflict of laws rules laid down in Article 14(1) of the Rome I Regulation govern the contractual relationship between the assignor and the assignee, ~~and the conflict of laws rules laid down in Article 14(2) of the Rome I Regulation govern the contractual relationship between the assignee and the debtor.~~ Pursuant to Article 14 (2), the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and whether the debtor's obligations have been discharged are regulated by the law governing the assigned claim. Unless a special conflict of laws rule provides otherwise, the law is designated, depending on the case, by the Rome I or Rome II regulations."*

The second option would be to retain the following wording in Article 1, previously accepted by the working party as a fallback solution: *"without prejudice to the rights and obligations of the debtor under the law ~~applicable pursuant to Article 14(2) of the Rome I Regulation~~ governing the assigned claim"*. Recital 14 would be completed as in the first option.

Given that the Presidency will assume that silence is consent, do delegations have any objections to any of the solutions ?

B. Other topics

8. Recital 34 (row 43), relating to **the respect of fundamental rights**, was completed by the Parliament with a reference to Article 16 of the Charter of Fundamental Rights of the European Union concerning the freedom to conduct a business: "(34) *This Regulation respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union. In particular, this Regulation seeks to promote the application of Articles 17 and 47 concerning, respectively, the right to property and the right to an effective remedy and to a fair trial, as well as Article 16 concerning the freedom to conduct a business.*"

DELETED

9. DELETED

In the previous working document (doc. 6282/22), the Presidency indicated that it was of the opinion that the alternative wording was not appropriate and that the wording of the general approach better expresses the idea that there are indeed claims for which certain elements, such as the conditions of their creation or their assignability, were governed by company law.

DELETED

II. POINTS OF DIVERGENCE BETWEEN THE COUNCIL AND THE PARLIAMENT TEXTS

10. Among the issues raised at the 6th technical meeting, disagreements between Parliament and Council persisted on the following three topics.

The first one is related to **the relationship with insolvency law** (Article 1(2)(f)(1) in the Parliament's text, row 58a; recital 22a in the general approach, row 31a). The Parliament's text excludes from the scope of the regulation assignments of claims concluded in the course of collective proceedings within the meaning of Regulation 2015/848. The general approach does not exclude them and sets out in recital 22a how the two regulations interact with each other.

The Presidency, supported by the Commission, again defended the general approach.

DELETED

11. The second point of disagreement concerns **the introduction of a special conflict-of-laws rule in Article 4(4), designed to resolve cases where two assignments of the same claim subject to two different laws become effective simultaneously** (Article 4(4); row 81).

The Parliament had proposed an alternative wording, which was rejected by the working group as was the previous one.

The Presidency therefore opposed the Parliament's request, invoking two main reasons. The first is that it is not appropriate to seek to legislate on a theoretical case. The second is that the rule as drafted does not in any way address the problem identified by Parliament. The Presidency gave the example of two successive assignments concluded on the same day, one governed by the law of the assignor's habitual residence, the other by the law of the assigned claim, both laws providing that the assignment is effective at the time of the conclusion of the contract. In this case, giving precedence to the law of the assignor's habitual residence would not solve the difficulty.

DELETED

12. Finally, the third point of disagreement concerns **the introduction in Article 6 of a provision on the overriding mandatory provisions of the State of performance of the contract** (row 91a). In its report, the Parliament added the following §3: "*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.*" This provision is taken directly from Article 9(3) of the Rome I Regulation. However, whereas this provision is optional in the Rome I Regulation, the Parliament makes it mandatory.

DELETED

The Presidency again objected, arguing inter alia that it was not feasible to amend the Rome I Regulation. **DELETED**

DELETED

PUBLIC

III. PERSPECTIVES

DELETED



DELETED

PUBLIC