

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

EXECUTIVE SUMMARY

- *Proposal for uniform Union conflict on law rules on the law governing third-party effects of the assignment of claims*
- *Law of the assignor's habitual residence is chosen as a general rule*
- *Exceptions in case of (I) assignment of cash credited to an account in a credit institution and (II) the assignment of claims arising from financial instruments, in which case the law of the assigned claim shall prevail*
- *Option is left to the parties in case of securitisation transactions: either the law of the assignor's habitual residence or the law of the assigned claim can be chosen*

Introduction and background

The Proposal of 12 March 2018 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 “**Proposed Regulation**”) ([English version](#) | [Dutch version](#) | [French version](#)) is part of the 2015 Action Plan on Capital Markets Union (CMU), which has the objective of removing barriers to cross-border investments and lowering the costs of funding.

The assignment of claims is a mechanism used by companies to obtain liquidity and have access to credit, such as factoring and collateralisation for example, and by banks and companies to optimize the use of their capital, such as securitisation for instance.

In case of cross-border assignments of claims, the law applicable to the third party effects of such assignments is determined by national conflict of law rules. Member States’ conflict of law rules are however inconsistent as they are based on different connecting factors to determine the applicable law. This means that Member States may designate the law of different countries as the law that should govern the third-party effects of the assignment of claims, which can lead to unexpected losses, as well as possible knock-on effects, increased transaction costs, missed business opportunities and reduced market integration.

The rules set out in the Proposed Regulation have the purpose to provide for clarity and predictability and are designed to foster cross-border investments in the EU, thereby facilitating access to financing for different kinds of firms, including SMEs.

Scope

The proposed regulation shall apply in situations involving a conflict of laws, to the third-party effects of assignments of claims in civil and commercial matters.

The Proposed Regulation defines claims as “the right to claim a debt of whatever nature, whether monetary or non-monetary, and whether arising from a contractual or a non-contractual obligation” and covers the three following categories of claims: (I) *Traditional claims*, or receivables, such as money to be received for unsettled transactions; (II) *Financial claims*, or claims arising from financial instruments; and (III) *Cash credited to an account opened with a credit institution*.

Third-party effects are defined as proprietary effects, that is, the right of the assignee to assert his legal title over a claim assigned to him towards other assignees or beneficiaries of the same or functionally equivalent claim, towards creditors of the assignor and towards other third parties.

Notably, the Proposed Regulation would have an universal character, for the reason that the national law designated as applicable can be the law of a Member State or the law of a third country.

Applicable law

Assigned claim	Law of the assignor's habitual residence	Law of the assigned claim	Optionality
Traditional claim	✓		No
Cash credited to an account opened with a credit institution		✓	No
Claim arising from a financial instrument		✓	No
Claims assigned in view of a securitisation	✓	✓	Yes

The Proposed Regulation is based on a mixed approach combining the law of the assignor's habitual residence and the law of the assigned claim.

1. General rule

The law of the assignor's habitual residence is chosen as a general rule, based on the following elements:

- it is the only law that can be predicted and easily found by third parties concerned by the assignment, such as the creditors of the assignor;
- it is the only law that makes possible the determination of the applicable law when future claims are assigned, a common practice in factoring;
- it is the only law consistent with the Union acquis on insolvency (Insolvency Regulation). The application of the same law to the third-party effects of assignments of claims and to insolvency facilitates the resolution of the assignor's insolvency;

- it is the only law consistent with the international solution enshrined in the 2001 United Nations Convention on the Assignment of Receivables in International Trade. For market participants who operate on a global basis, this benefit can bring synergies and save legal due diligence and litigation costs.

2. Two exceptions

The Proposed Regulation provides for an exception based on the law of the assigned claim to apply to certain specific assignments, namely the assignment of cash credited to an account in a credit institution and the assignment of claims arising from financial instruments, which accommodates the needs of market participants in these specific areas.

3. Options left to the parties in case of securitisation transactions

The Proposed Regulation offers flexibility to the assignor and the assignee in the context of a securitisation transaction. They can choose between the law of the assignor and the law of the assigned claim, thereby enabling both large and smaller operators to easily engage in cross-border securitisations.

The law of the assigned claim corresponds to the current market practice in securitisation transactions involving large banks by applying the law of the assigned claim to the third-party effects of assignments where the assigned claims are all subject to the same country's law but the assignors (originators) are located in various Member States. This means that the assignee (the special purpose vehicle) will need to comply with the requirements laid down in the law that governs the assigned claims (that is, the contract between the original creditor/assignor and the debtor) to ensure that it acquires legal title over the assigned claims. This reduces costs for operators that are able to structure their securitisations such that all claims included in the package to be assigned to the special purpose vehicle are subject to the law of a single country. The special purpose vehicle must then comply with the requirements laid down in the law of said country to ensure that it acquires legal title over the bundle of assigned claims

On the other hand, the law of the assignor is considered as being the only law that responds to the needs of factors and smaller operators of securitisation, who are not always equipped to check ownership requirements under the various countries' laws which govern the various claims assigned in the bundle.

Review, perspective and conclusion

The Proposed Regulation purports to fill the gap left open by the Rome I Regulations. The latter determines the law applicable to the contractual relationships between the parties to an assignment of claims (law governing the assignment agreement) and between the assignee and the debtor (law governing the receivables).

Notably, the Proposed Regulation does not overlap with the Financial Collateral Directive, the Settlement Finality Directive or the Winding Up directive, which determine the law applicable to book-entry securities or instruments being recorded in a register, an account, or a centralised deposit system.

There is no doubt that uniform conflict of law rules covering the third party effects of the assignment of claims should be welcomed as these should offer an increased legal certainty.

From a Belgian law perspective, it is obviously good news that the law of the assignor's habitual residence was retained, which is in line with current Belgian conflict of law rules.

Moreover, the choice made by the EU legislator to opt for the law of the assigned claim as the law governing the third party effects of the assignment/pledge of cash credited to accounts opened with credit institutions is to be underlined. The solution brought by the Proposed Regulation will overcome difficulties parties may have encountered in the past when vesting security rights or assigning such claims, especially in case of cash credited to accounts opened with Euroclear by Euroclear participants.

However, the Proposed Regulation is not immune from criticism. A number of inconsistencies should be addressed, and some clarifications are needed. For example, it may not seem desirable to opt for the 'habitual residence' as a determining criterion, while the concept of COMI (Center Of Main Interest) was opted for in the Insolvency Regulation (Recast).

In addition, it seems beneficial to extend the option left to the parties in the case of securitisation transactions (which is not a defined term in the Proposed Regulation) to other financing transactions in which the receivables are all subject to the same governing law and the assignors are located in different jurisdictions. Secondary trading in syndicated loans, for instance, also generally rely on the law governing the assigned receivables.

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