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Milano, 9 aprile 2018

OGGETTO: GRUPPO DI LAVORO "FINTECH"

Verbale riunione del 9 marzo 2018
Bozza di nota sui profili giuridici del Fintech

Si trasmette al Gruppo di lavoro in oggetto il verbale della riunione del 9 marzo 2018. Si prega di inviare eventuali commenti/osservazioni **entro lunedì 16 aprile p.v.**

In allegato al presente verbale si trasmette la bozza di nota sui profili giuridici del Fintech esaminata in riunione e già modificata, per approvazione entro la stessa data.

Cordiali saluti

Il Segretario Generale
Alessandro Carretta

DISTRIBUZIONE:

BANCA FARMAFACTORING	Massimiliano BELINGHERI (**) Massimiliano GUALLA Mario GUSTATO
BANCA IFIS	Francesca TREVISANATO
BANCA SISTEMA	Salvatore MARRONE
CREDEMFACTOR	Patrizia CALZA Federico RUGGIERO
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EXPRIVIA	Dario GRECO
GE CAPITAL FUNDING SERVICES	Emiliano VERNIERO
MEDIOCREDITO ITALIANO	Caterina MAIOLINO Giovanni SALVESTRINI
SACE FCT	Carlo SENZANI Cristina SIRONI
SG FACTORING	Domenico GALLUZZO Inna LAZURKO
UBI FACTOR	Stefano CARUGATI Rossana RONGO

(*) Coordinatore della Commissione Legale

(**) Presidente della Commissione Legale

Verbale riunione del Gruppo di lavoro

Fintech

Data e luogo

9 marzo 2018, h. 11.00 presso Assifact, via Cerva 9 Milano.

Ordine del giorno

1. Approvazione verbale della riunione precedente
2. Aspetti civilistici del Fintech
3. Varie ed eventuali

Presenti

Cfr. Foglio presenze allegato

Alla riunione partecipa, su invito del Coordinatore, il dott. Andrea Monteverde, dello Studio Legale De Nova.

Verbale

1. Approvazione verbale della riunione precedente

Il verbale della riunione precedente è approvato all'unanimità senza modifiche.

Riguardo ai follow up identificati:

- Modificare ed integrare la nota sulla regolamentazione fintech in accordo con quanto deciso nella presente riunione

La nota è stata integrata e sarà discussa, nella sua versione finale, nella presente riunione.

- Monitorare l'avanzamento dei lavori del Gdl "IV direttiva antiriciclaggio" sul tema dell'identificazione nelle piattaforme digitali

Il Gdl "IV direttiva antiriciclaggio" sta proseguendo l'approfondimento delle modalità di adeguata verifica a distanza, con specifico riferimento all'utilizzo di metodologie online. Allo stato attuale, il sistema bancario sta ancora studiando le modalità corrette per svolgere l'adeguata verifica a distanza al fine dell'apertura di conti correnti online ad imprese e persone giuridiche. Emergono comunque alcuni spunti, in via di discussione, secondo cui il bonifico rappresenta uno dei metodi, ma non l'unico, per completare gli adempimenti di adeguata verifica (ad esempio, si segnalano in alternativa anche l'attivazione di un SDD ovvero, ove disponibile, il ricorso al servizio opzionale aggiuntivo SEDA attraverso cui la conferma avviene tramite uno scambio telematico fra gli operatori e non necessita di attivare effettivamente un SDD, facilitando e velocizzando lo scambio informativo).

2. Aspetti civilistici del Fintech

Il dott. Monteverde presenta al Gdl le proposte di integrazione della nota sulla regolamentazione fintech in merito a:

- Legge applicabile al contratto e ai vari profili che caratterizzano la cessione del credito
- L'individuazione del foro avente competenza giurisdizionale in caso di controversia

Il Gdl approva le integrazioni proposte (cfr. Allegato 2) e suggerisce di introdurre il riferimento alle proposte di regolamento attualmente in corso di emanazione in merito alla legge applicabile in merito all'efficacia della cessione del credito nei confronti dei terzi. Tale profilo della cessione non è disciplinato dal Regolamento Roma I e quindi, ad oggi, l'individuazione della legge applicabile non è uniforme a livello UE. La proposta di Regolamento (cfr. Allegato 3) intende così risolvere il problema della definizione della legge in forza della quale risolvere il conflitto tra cessionario e terzi che vantino diritti sui crediti ceduti e la questione dell'opponibilità della cessione al fallimento del cedente. Tra le diverse opzioni vagliate, ed in linea con la posizione espressa storicamente dall'EUF, la Commissione ha proposto che l'efficacia della cessione del credito nei confronti dei terzi debba essere disciplinata dalla legge del paese in cui il cedente ha la propria residenza abituale al tempo della cessione (art. 4, par. 1), coerentemente con quanto ci eravamo detti durante l'ultimo incontro. Accanto a tale regola generale si prevede che, nel caso in cui la cessione abbia ad oggetto a) mezzi monetari accreditati su un conto acceso presso un istituto di credito ovvero b) crediti derivanti da uno strumento finanziario, l'efficacia della cessione del credito nei confronti dei terzi sia disciplinata dalla legge del credito ceduto (art. 4, par. 2). La soluzione prospettata, quindi, riprende quanto proposto (senza successo) dalla Commissione durante i lavori preparatori del Regolamento Roma I, in conformità a quanto previsto dalla UN Convention on the Assignment of Receivables in International Trade e dal Regolamento UE relativo alle procedure di insolvenza (nel quale viene indicata come legge disciplinante la procedura di insolvenza la legge del paese in cui si trova il centro degli interessi principali del debitore).

Con la riunione odierna il Gdl ritiene conclusa la prima fase di analisi dei profili giuridici del fintech. La nota così modificata sarà approvata a distanza.

Sarà proposto un nuovo calendario per due/tre incontri fino a maggio per discutere dei temi di trasparenza, usura, privacy ecc...

3. Varie ed eventuali

Non essendovi altri argomenti da discutere, la seduta viene tolta alle 13.00.

Follow up

- Modificare ed integrare la nota sulla regolamentazione fintech in accordo con quanto deciso nella presente riunione
- Proporre nuovo calendario riunioni

Allegati

1. Foglio presenze
2. Bozza di nota “Fintech: innovazione e impatti delle tecnologie nel sistema bancario e finanziario” – Estratto paragrafo sulla regolamentazione
3. 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

RIUNIONE DEL GRUPPO DI LAVORO "FINTECH"

9 marzo 2018, ore 11.00

Assifact è impegnata nel rispettare a pieno le leggi antitrust italiane ed europee. Pertanto, i lavori e le discussioni devono seguire quanto stabilito nell'ordine del giorno ed essere condotti nel rispetto della vigente normativa Antitrust, del Modello di organizzazione e gestione associativo, del Codice etico e del Codice Antitrust che vi sono stati messi a disposizione precedentemente al momento delle nomine e comunque in occasione della riunione.

Ogni partecipante alla riunione è tenuto ad evitare ogni discussione che possa in via diretta o indiretta, esplicita o implicita, porsi in contrasto con le norme che regolano la concorrenza. A tal fine è necessario evitare il rilascio e lo scambio di informazioni sensibili, sia in forma orale che scritta, che possano avere effetti sulle proprie o altrui strategie commerciali (es. dati non pubblici relativi a politiche di pricing, strategie di marketing e comunicazione, costi e ricavi, condizioni commerciali). Quanto sopra riguarda sia le discussioni in riunione, sia le conversazioni informali prima e dopo l'incontro. Ogni partecipante deve essere consapevole che le suestese indicazioni hanno carattere meramente esemplificativo e non esaustivo e che pertanto è necessario adottare la massima cautela ed evitare di discutere durante la riunione di temi sui quali non si abbia la certezza che siano conformi alla disciplina antitrust.

Con la firma del "foglio presenze" e la partecipazione alla riunione si esprime l'accettazione del Codice Antitrust di Assifact con assunzione di responsabilità per il rispetto delle norme a tutela della concorrenza.

PRESENZE

Membri:

BANCA FARMAFACTORING

Massimiliano GUALLA

BANCA IFIS

Mario GUSTATO

Francesca TREVISANATO

BANCA SISTEMA

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UBI FACTOR

Stefano CARUGATI







Rossana RONGO

ASSIFACT

Nicoletta BURINI

Valeria FUMAROLA

Diego TAVECCHIA







Fintech

Innovazione e impatti delle tecnologie nel sistema bancario e finanziario

[OMISSIS]

3 . Fintech e profili giuridici

Il quadro regolamentare

Allo stato attuale, il mondo FinTech non è immediatamente inquadrabile nell'ambito della regolamentazione esistente, e a livello istituzionale persiste il dibattito sugli interventi normativi da porre in essere per regolamentare il fenomeno. La Banca d'Italia è intervenuta nel dibattito sia fornendo chiarimenti circa la riserva di attività di raccolta del risparmio fra il pubblico, con specifico riferimento ai portali online di *lending based crowdfunding*¹, sia attraverso una Audizione del Vice Direttore Generale della Banca d'Italia Fabio Panetta² nella quale il tema è stato esaminato e dalla quale è possibile trarre alcune informazioni circa gli orientamenti dell'Autorità di vigilanza in materia.

Nello specifico, vale la pena evidenziare il seguente passaggio, tratto proprio da quest'ultimo documento:

"Il quadro regolamentare dei servizi finanziari è già oggi molto articolato. È pertanto auspicabile che ulteriori misure normative siano gradualì e proporzionate, basate su uno stretto dialogo con gli operatori. Una regolamentazione ridondante finirebbe per frenare l'innovazione. Gli interventi dovranno rispondere alle esigenze del mercato, presidiandone i possibili rischi.

È necessario un approccio europeo e uno stretto coordinamento fra autorità. L'integrazione dei mercati richiede regole comuni da applicare con criteri omogenei. Prescrizioni normative valide solo entro i confini domestici

¹ Banca d'Italia, provvedimento recante disposizioni per la raccolta del risparmio dei soggetti diversi dalle banche dell'8 novembre 2016.

² Camera dei Deputati VI Commissione (Finanze), Indagine conoscitiva sulle tematiche relative all'impatto della tecnologia finanziaria sul settore finanziario, creditizio e assicurativo, Audizione del Vice Direttore Generale della Banca d'Italia Fabio Panetta, 29 novembre 2017

sarebbero inadeguate a disciplinare un fenomeno che travalica i limiti territoriali nazionali. Gli arbitraggi normativi vanno evitati, garantendo parità di condizioni tra paesi. Sono queste le linee guida che hanno consentito lo sviluppo dei servizi di pagamento, fortemente interessati dalla spinta tecnologica, le cui norme sono armonizzate a livello europeo.

Va altresì garantita la parità di condizioni tra operatori tradizionali e nuovi operatori, per stimolare una concorrenza sana, basata sul principio secondo cui a rischi uguali si applicano norme e controlli anch'essi uguali. Una regolamentazione ad hoc per le Fintech non risponderebbe a criteri di efficacia, in quanto le imprese innovative svolgono funzioni diverse tra loro e per lo più riconducibili ad attività già disciplinate da norme specifiche. Il quadro regolamentare dovrebbe essere neutrale rispetto al fattore tecnologico. Si pone l'esigenza di applicare attentamente il principio di proporzionalità, per evitare oneri eccessivi a carico degli operatori di minori dimensioni.

La tutela della clientela va posta in primo piano, per assicurare la fiducia nel sistema finanziario. Sono essenziali trasparenza e informazione, al fine di consentire scelte consapevoli da parte dei clienti. Le autorità possono contribuire in misura significativa, favorendo lo sviluppo delle conoscenze finanziarie, un obiettivo a cui la Banca d'Italia dedica sforzi rilevanti."

Senza voler entrare in questa sede nel dibattito, appare senz'altro condivisibile l'orientamento generale della Banca d'Italia verso una regolamentazione:

- proporzionale all'attività svolta e ai rischi assunti;
- uniforme fra i paesi europei;
- uniforme fra operatori tradizionali e nuovi operatori;
- a garanzia della tutela della clientela, sia essa composta da imprese (prenditori) e/o risparmiatori (investitori).

La presente sezione intende esaminare l'attività svolta dai soggetti Fintech operanti, direttamente o indirettamente, nell'ambito della cessione dei crediti commerciali da parte delle imprese, cercando di collocarla, almeno in astratto, nell'ambito della regolamentazione attualmente applicabile in Italia, proprio secondo il principio enunciato da Fabio Panetta secondo cui *"a rischi uguali si applicano norme e controlli anch'essi uguali"*. A tal fine, si procede di seguito ad una sintetica trattazione delle esigenze alla base dello sviluppo delle soluzioni Fintech per il sostegno al capitale circolante, delle risposte fornite dal mercato e dei modelli di business Fintech ricorrenti prima di presentare alcune riflessioni in merito all'inquadramento regolamentare dei soggetti che offrono tali soluzioni.

Le esigenze a base dello sviluppo delle nuove forme di finanziamento del capitale circolante

Una serie di esigenze sono alla base dello sviluppo delle nuove forme finanziamento del capitale circolante:

- a. rinvenire forme alternative a quelle tradizionali di erogazione del credito – banche e intermediari finanziari – per consentire alle imprese una maggiore facilità di accesso al credito;
- b. connesso a quanto sopra, rinvenire un miglioramento delle condizioni del finanziamento per effetto della competitività esistente (e delle aste);

- c. accelerare il processo istruttorio e, conseguentemente, velocizzare l'iter di erogazione del credito attraverso:
 - i. lo sviluppo di tecnologie in grado di valutare il merito di credito;
 - ii. la possibilità di usufruire e razionalizzare i dati racchiusi nei BIG DATA;
 - iii. la messa in relazione più soggetti tra loro distanti annullando la necessità di una presenza fisica e facilitando anche le operazioni cross-border;
- d. aprire nuovi scenari di investimento a investitori privati o imprese.

Ulteriori esigenze delle imprese derivano o conseguono da quelle sopra riportate che possiamo definire primarie, quale, ad esempio, dall'esigenza sub a) consegue che i primi soggetti che si rivolgono a strumenti alternativi del credito sono imprenditori aventi maggiori difficoltà di accesso al credito (per scarso merito di credito, per utilizzo appieno dei castelletti, per le minori regole che ad oggi governano tali forme di finanziamento, etc...).

La risposta del mercato

A fronte delle esigenze, ma potremmo definirle anche nuovi bisogni del mercato, questi ha risposto in maniera multiforme, estrema celerità e competitività rispetto al tradizionale strumento dell'anticipo su fattura.

La risposta del mercato, per quanto riguarda nello specifico il settore della cessione del credito commerciale, si configura nell'uso di piattaforme digitali più o meno sofisticate che consentono sia di accelerare e snellire il processo che di dare luogo a modelli di business diversi quali invoice auction, supply chain finance, dynamic discounting ecc.

Prima risposta l'hanno fornita i Factor, modificando le loro prassi operative, rendendo sempre più sofisticata la cessione del credito.

Ulteriori risposte sono rappresentate da nuove forme di piattaforme tecnologiche in grado di realizzare le esigenze, o le nuove domande, delle imprese: stando ai risultati dello studio dell'Osservatorio Supply Chain Finance del Politecnico di Milano, risulta che ad oggi in Italia si possano rintracciare quattro modelli di riferimento per il fintech: i) cessione del credito, ii) invoice auction, iii) dynamic discounting e iv) supporto (es. rating).

Ai fini della presente analisi, si ritiene utile focalizzarsi per il momento sui primi due.

Nonostante questa prima classificazione, si ritiene che i modelli di business degli operatori siano comunque assai variegati (e ancora non sia stata esplorata l'intera gamma potenziale dei servizi fintech) e che pertanto, dal punto di vista della regolamentazione, una analisi puntuale porterebbe a risultati eccessivamente frammentati e più vicini al "case study". Pertanto si ritiene necessario astrarre alcuni punti chiave senza riferimenti ai soggetti specifici, limitandosi a presentare riflessioni di più alto respiro e segnalando alcuni punti di attenzione.

La riflessione sulla regolamentazione applicabile deve necessariamente tenere conto del punto di vista sia di chi offre il servizio fintech sia di chi opera sulla piattaforma in qualità di "investitore" (inteso come colui che investe nell'acquisto dei crediti commerciali, non rilevando per il perimetro di analisi il soggetto che mette i fondi a favore delle imprese Fintech).

Come funzionano le piattaforme per la cessione del credito?

La piattaforma di invoice auction fornisce un marketplace dove investitori esterni alla supply chain (che teoricamente dovrebbero essere i medesimi di cui sopra) competono per l'acquisizione dei crediti secondo un meccanismo di asta.

Più precisamente un acquirente invita i propri fornitori a fare una offerta per il pagamento immediato delle fatture approvate. La piattaforma gestisce l'asta e informa acquirente e fornitori sul risultato della stessa

Nel caso delle piattaforme di invoice trading la cessione viene materialmente organizzata sul sito Internet. Il processo prevede che l'impresa interessata all'anticipo della fattura inviata ad un'altra società privata sottoporrà al portale la documentazione richiesta. Quest'ultimo selezionerà le proposte da accettare sulla base di una serie di parametri relativi sia alla fattura presentata (rispetto in particolare al merito di credito del cliente) sia all'impresa stessa. Il processo di rating viene effettuato con il supporto di provider quali Modefinance (attualmente leader nell'ambito dell'invoice trading) o Cerved Rating Agency e consultando database commerciali.

Se l'istruttoria viene superata, la fattura verrà sottoposta sul portale di invoice trading ai possibili investitori. Benché da un punto di vista legale non sia obbligatorio, si cerca di ottenere sempre il parere favorevole del debitore.

Il meccanismo di acquisto prevede in genere un'asta al rialzo, o comunque un meccanismo di offerta competitiva agli investitori iscritti alla piattaforma. Chiaramente la remunerazione dell'investitore dipenderà dalla differenza fra il prezzo di acquisizione del credito e il corrispettivo della fattura.

L'acquirente della fattura dovrà quindi anticipare all'impresa una percentuale significativa del corrispettivo (tipicamente 85% o 90%) mentre il saldo sarà liquidato alla scadenza. Il rischio dell'operazione viene generalmente sopportato dall'investitore (pro soluto), il quale dovrà attivarsi in proprio in caso di mancato pagamento della fattura.

Con la piattaforma Dynamic Discount è l'acquirente che offre ai propri fornitori un pagamento anticipato a fronte di uno sconto sulla fattura. In questa modalità di intervento l'acquirente sfrutta la propria liquidità per conseguire dei benefici economici (lo sconto) in assenza di presenza di Banche e Intermediari finanziari.

Chi cede i crediti sulle piattaforme digitali?

I crediti ceduti tramite le piattaforme che svolgono l'attività oggetto di esame sono di norma crediti di natura commerciale (fatture) ossia crediti rivenienti dall'attività d'impresa del soggetto cedente. Dalle analisi svolte la clientela target di queste soluzioni possiede solitamente alcuni tratti tipici, almeno in questa fase di primo utilizzo:

- si trova in condizioni di difficoltà nell'accesso al credito tradizionale

- è una piccola media imprese con fatture individuale al di sopra di una soglia minima (che va dai 1.000 ai 10.000€³).
- In alcuni casi, vengono posti dei limiti in termini di
 - forma societaria (Società di capitali, S.p.A. o S.r.l.)
 - fatturato (es. oltre 1,5 milioni di euro)
 - dimensioni della clientela (es. oltre 5/10 milioni di euro di fatturato)
 - settore di appartenenza della clientela.

Va comunque evidenziato che, in futuro, ogni impresa potrà trovare più conveniente o più agevole cedere tramite piattaforme Fintech.

I crediti commerciali ceduti sono normalmente relativi a fatture già emesse (o in generale, a prestazioni già eseguite o prodotti già consegnati).

Chi può acquistare i crediti commerciali?

Con riferimento agli investitori, in generale si ritiene che possano operare come acquirenti di crediti commerciali nell'ambito di piattaforme digitali:

1. Banche
2. Intermediari finanziari

Banche e intermediari finanziari sono abilitati dal TUB a concedere finanziamenti alla clientela in qualsiasi forma. Com'è noto, fra le attività ammesse al mutuo riconoscimento figurano:

“2) operazioni di prestito (compreso in particolare il credito al consumo, il credito con garanzia ipotecaria, il factoring, le cessioni di credito pro soluto e pro solvendo, il credito commerciale incluso il «forfaiting»)”⁴.

L'esercizio dell'attività bancaria (raccolta di risparmio ed esercizio del credito) dell'attività, nonché l'esercizio dell'attività nei confronti del pubblico di concessione di finanziamenti sotto qualsiasi forma formano oggetto di riserva rispettivamente per le banche (art. 10 TUB) e per gli intermediari finanziari autorizzati, iscritti in un apposito albo tenuto dalla Banca d'Italia (art. 106).

Nello specifico, l'attività di factoring e le cessioni di credito pro soluto e pro solvendo rientrano quindi in tale riserva. Banche ed intermediari finanziari sono pertanto, per definizione, abilitati ad acquisire i crediti commerciali, anche mediante l'uso di piattaforme digitali proprie o di terzi.

3. Fondi chiusi alternativi

³ 2° Report italiano sul Crowdfunding, Politecnico di Milano – Dipartimento di Ingegneria Gestionale

⁴ Decreto legislativo 1° settembre 1993, n. 385 - Testo unico delle leggi in materia bancaria e creditizia

I Fondi chiusi alternativi (FIA) risultano abilitati dal D.L. 14 febbraio 2016, n. 18 ad investire in crediti verso soggetti diversi dai consumatori⁵.

4. *Imprese di assicurazione italiane e Sace*

5. *Società veicolo per la cartolarizzazione dei crediti*

Il D.L. 24 giugno 2014, n. 91 (art. 22, comma 1) ha modificato l'art. 114 del TUB introducendo il principio secondo cui *“Non configura esercizio nei confronti del pubblico dell'attività di concessione di finanziamenti sotto qualsiasi forma l'operatività, diversa dal rilascio di garanzie, effettuata esclusivamente nei confronti di soggetti diversi dalle persone fisiche e dalle microimprese, come definite dall'articolo 2, paragrafo 1, dell'allegato alla raccomandazione 2003/361/CE della Commissione europea, del 6 maggio 2003, da parte di imprese di assicurazione italiane e di Sace entro i limiti stabiliti dal decreto legislativo 7 settembre 2005, n. 209, come modificato dalla presente legge, e dalle relative disposizioni attuative emanate dall'IVASS”*.

Le condizioni alle quali le imprese di assicurazione possono, congiuntamente ad una banca o ad un intermediario finanziario, investire i propri attivi concedendo finanziamenti diretti sono definite nel Provvedimento IVASS 21 ottobre 2014 n. 22, che modifica il Regolamento n. 36 del 2011. In generale, si sottolinea che i requisiti includono che il prestatore sia diverso da persone fisiche o microimprese e che sia individuato da una banca o intermediario finanziario, che deve trattenere un interesse economico nell'operazione sino a scadenza.

Sempre il “Decreto Competitività” allarga ulteriormente la platea dei potenziali soggetti acquirenti di crediti commerciali modificando anche la Legge 30 aprile 1999, n. 130, introducendo la possibilità per le società di cartolarizzazione di “[...] *concedere finanziamenti nei confronti di soggetti diversi dalle persone fisiche e dalle microimprese* [...]” nel rispetto di talune condizioni, simili al caso precedente, che richiedono che i prestatori siano individuati da una banca o intermediario finanziario, che i titoli emessi siano destinati ad investitori qualificati e che la banca o l'intermediario finanziario trattienga un interesse economico nell'operazione.

Pertanto, sebbene imprese di assicurazione e società di cartolarizzazione possano astrattamente configurarsi come potenziali acquirenti di crediti commerciali, esse non sembrano poter prescindere dall'ausilio di una banca o intermediario finanziario per svolgere tale tipo di attività.

6. *Privati*

Dal punto di vista civilistico, i privati possono acquistare crediti ai sensi degli artt. 1240 e segg. del Codice Civile, purché non lo facciano con carattere di imprenditorialità e professionalità. La presenza dei profili di continuità e professionalità comporterebbero, per il privato, la necessità di organizzarsi in una delle forme previste dalla regolamentazione applicabile a tale ambito.

⁵ Art. 17: “[...] *i FIA italiani possono investire in crediti, a valere sul proprio patrimonio, a favore di soggetti diversi da consumatori, nel rispetto delle norme del presente decreto e delle relative disposizioni attuative ai sensi degli articoli 6, comma 1, e 39. [...]*”

6.1 Crowdfunding e istituti di pagamento

Ci si può inoltre chiedere se consentire, nell'ambito di una piattaforma Fintech, l'acquisto di crediti commerciali da parte di soggetti privati quali le persone fisiche configuri una attività di raccolta di risparmio tra il pubblico da parte del gestore della piattaforma o del prestatore di fondi. Il tema è già stato affrontato con riferimento alle piattaforme di *social lending* (o *lending based crowdfunding*): tale attività, come già menzionato, è stata infatti oggetto di uno specifico intervento di Banca d'Italia nel quale l'Istituto di vigilanza ha rammentato che l'attività di raccolta del risparmio tra il pubblico è vietata, sia ai gestori dei relativi portali online sia ai prestatori. L'eterogeneità dei servizi offerti non consente di intervenire con una regolamentazione ad hoc, ma la stessa Banca d'Italia ha sottolineato che:

"[...] per quanto riguarda i gestori, non costituisce raccolta di risparmio tra il pubblico:

— la ricezione di fondi da inserire in conti di pagamento utilizzati esclusivamente per la prestazione dei servizi di pagamento dai gestori medesimi, se autorizzati a operare come istituti di pagamento, istituti di moneta elettronica o intermediari finanziari di cui all'art. 106 del TUB autorizzati a prestare servizi di pagamento ai sensi dell'art. 114-novies, comma 4, del TUB;

— la ricezione di fondi connessa all'emissione di moneta elettronica effettuata dai gestori a tal fine autorizzati.

Per quanto riguarda, invece, i prestatori, non costituisce raccolta di risparmio tra il pubblico:

— l'acquisizione di fondi effettuata sulla base di trattative personalizzate con i singoli finanziatori. Al riguardo, avute presenti le modalità operative tipiche delle piattaforme di social lending, le trattative possono essere considerate personalizzate allorché i prestatori e i finanziatori sono in grado di incidere con la propria volontà sulla determinazione delle clausole del contratto tra loro stipulato e il gestore del portale si limita a svolgere un'attività di supporto allo svolgimento delle trattative precedenti alla formazione del contratto. Per non incorrere nell'esercizio abusivo della raccolta del risparmio, i prestatori si avvalgono esclusivamente di piattaforme che assicurano il carattere personalizzato delle trattative e sono in grado di dimostrare il rispetto di tale condizione anche attraverso un'adeguata informativa pubblica.

— l'acquisizione di fondi presso soggetti sottoposti a vigilanza prudenziale, operanti nei settori bancario, finanziario, mobiliare, assicurativo e previdenziale. [...]"

Sotto tale profilo, gli operatori che gestiscono piattaforme online di social lending hanno sovente richiesto l'autorizzazione ad operare come Istituti di pagamento al fine di controllare direttamente i flussi di denaro rivenienti dalla propria attività⁶. Peraltro, giova ricordare che tali soggetti sono altresì abilitati, in deroga alla riserva di attività, a concedere finanziamenti alle condizioni richiamate dalle relative Disposizioni di vigilanza⁷:

"Gli istituti possono concedere finanziamenti relativi ai servizi di pagamento indicati ai punti 4, 5 e 7 dell'articolo 1, comma 1, lett. b) del decreto legislativo 27 gennaio 2010, n. 11, nel rispetto delle seguenti condizioni:

a) il finanziamento è accessorio e concesso esclusivamente in relazione all'esecuzione di un'operazione di pagamento;

⁶ Audizione del Vice Direttore Generale della Banca d'Italia Fabio Panetta, 29 novembre 2017, Cit.

⁷ Banca d'Italia, Disposizioni di vigilanza per gli istituti di pagamento e gli istituti di moneta elettronica.

b) il finanziamento è di breve durata, non superiore a dodici mesi. Può essere di durata superiore a 12 mesi il finanziamento concesso in relazione ai pagamenti effettuati con carta di credito;

c) il finanziamento non è concesso utilizzando fondi ricevuti o detenuti ai fini dell'esecuzione di un'operazione di pagamento;

d) a fronte del rischio di credito derivante da tali finanziamenti, gli istituti sono tenuti a mantenere la dotazione patrimoniale minima stabilita nel Capitolo V (pari al 6%, Ndr.)."

Di per sé, tuttavia, l'acquisto e l'anticipo di crediti commerciali non sembra possedere il requisito di accessorialità e di esclusiva relazione all'esecuzione di un'operazione di pagamento. Infatti, la linea di credito può essere concessa da tali soggetti esclusivamente ai fini dell'esecuzione di ordini di pagamento a valere sul conto dell'utilizzatore di servizi di pagamento, requisito che non pare sposarsi con l'attività di acquisto di crediti commerciali. Pertanto si ritiene che l'istituto di pagamento possa operare come fornitore della piattaforma digitale e gestore dei pagamenti relativi all'operatività di compravendita dei crediti fra investitori e prenditori, ma non direttamente come investitore.

Quali discipline applicabili ai provider delle piattaforme tecnologiche (Fintech)?

Il mondo delle piattaforme online dedicate alle soluzioni di capitale circolante per le imprese appare assai eterogeneo. Sebbene non sia possibile, né opportuno in questa fase, scendere nel dettaglio di ciascuno dei business model individuati, si ritiene di poter identificare alcuni modelli di riferimento, e nello specifico:

a) I soggetti che acquistano i crediti in nome proprio

Tali soggetti, indipendentemente dall'utilizzo o meno di una piattaforma tecnologica per snellire il processo di acquisto dei crediti commerciali, devono sottostare alle regole richiamate nel paragrafo precedente per i partecipanti alla piattaforma in qualità di investitori. Sotto questo profilo non si ritiene incidere neppure l'eventuale cartolarizzazione dei crediti a seguito dell'acquisto.

b) I soggetti che operano come fornitori di servizi tecnologici direttamente alle istituzioni finanziarie

I soggetti che prestano servizi tecnologici direttamente alle istituzioni finanziarie dovrebbero essere classificati come meri fornitori delle stesse e pertanto non assoggettati a specifiche regolamentazioni. In questo caso, la piattaforma è normalmente utilizzata in favore dei clienti dell'istituzione, configurando una mera "digitalizzazione" del servizio offerto da quest'ultima.

c) I soggetti che si offrono sul mercato come soluzioni per l'incontro di domanda e offerta di crediti commerciali tramite piattaforme di invoice auction

d) I soggetti che offrono un servizio di comparazione di offerte commerciali di operatori abilitati per l'acquisto dei crediti commerciali

I soggetti che offrono direttamente un servizio al pubblico tramite strumenti tecnologici, sia esso di supporto alla compravendita di crediti commerciali fra una pletera di venditori (le imprese) e una pletera di compratori

(gli investitori), ovvero servizi di comparazione fra le offerte formulate da diversi investitori, mettono senza dubbio in relazione degli investitori con la potenziale clientela per la concessione di finanziamento sotto qualsiasi forma (nel caso di specie, factoring o comunque anticipo su crediti).

Spesso, tali soggetti svolgono anche una prima valutazione della clientela attraverso modelli di scoring o algoritmi propri o forniti da altri soggetti.

Ai sensi dell'art. 128-sexies del TUB, che recita:

“1. È mediatore creditizio il soggetto che mette in relazione, anche attraverso attività di consulenza, banche o intermediari finanziari previsti dal Titolo V con la potenziale clientela per la concessione di finanziamenti sotto qualsiasi forma.

2. L'esercizio professionale nei confronti del pubblico dell'attività di mediatore creditizio è riservato ai soggetti iscritti in un apposito elenco tenuto dall'Organismo previsto dall'articolo 128-undecies. [...].”

Si ritiene pertanto che tale attività sia riservata ai mediatori creditizi. Tale orientamento appare rafforzato dall'esistenza, sul mercato, di iniziative analoghe nel settore dei mutui e dei prestiti personali.

Ove la soluzione Fintech preveda la possibilità di investire anche da parte di privati e persone fisiche, si potrebbe configurare la necessità di verificare il rispetto delle relative riserve di attività. Spesso gli operatori del crowdfunding ricorrono allo statuto di istituto di pagamento.

Le summenzionate riflessioni si basano sul principio che, nel momento in cui un soggetto si pone in maniera professionale in un determinato ambito (nel caso, l'acquisto di crediti commerciali o la messa in relazione di banche o intermediari finanziari con la potenziale clientela al fine della concessione di finanziamenti sotto qualsiasi forma), esso debba essere assoggettato alle regole previste per tale ambito.

I profili di attenzione sotto i profili giuridici

Oltre alle questioni di natura prettamente regolamentare, l'ingresso di nuovi operatori e l'utilizzo di nuove tecnologie pone in evidenza profili di natura civilistica.

Nell'ambito di queste piattaforme, i crediti sono ceduti con modalità “spot”, diversamente dal contratto di factoring tradizionale che rappresenta un contratto “di durata”, e riguardano fatture già emesse. Sebbene non vi siano controindicazioni all'uso di piattaforme per agevolare la cessione di crediti anche nell'ambito di un contratto di cessione in massa di crediti futuri, l'assenza di un contratto quadro di factoring e la possibilità di cedere solo i crediti che si vogliono cedere, senza vincolarsi in un contratto nell'ambito di rapporti che si chiudono con la singola presentazione, rappresentano proprio i tratti distintivi dell'esperienza offerta dalle piattaforme Fintech ai clienti.

È infatti necessario, per approcciarsi correttamente alle piattaforme digitali, riprendere i principali temi civilistici già affrontati, a suo tempo, per l'esame del contratto di factoring, tenendo presente che in questo caso, la consueta trilateralità del rapporto di factoring (cedente – factor – debitore ceduto) si arricchisce di un ulteriore soggetto, il fornitore della piattaforma, così che il rapporto acquisisce sotto un certo punto di vista il carattere di quadrilateralità (cedente – piattaforma fintech – investitore – debitore ceduto). Diventa quindi opportuno esaminare:

1. Quali sono le reali controparti del contratto;
2. La natura del contratto e i servizi effettivamente offerti;
3. La legge applicabile al contratto e ai vari profili che caratterizzano la cessione del credito;
4. L'individuazione del foro avente competenza giurisdizionale in caso di controversia;
5. Qual è l'efficacia e gli effetti del contratto tra le parti, verso i debitori e verso i terzi di tale contratto, con particolare riferimento all'utilizzo di nuove tecnologie per lo scambio di informazioni (es. distributed ledger);
6. Come viene gestita l'eventuale fase patologica del credito;
7. Qual è il soggetto responsabile dei danni derivanti da un eventuale malfunzionamento del software;
8. Come sono svolti gli adempimenti richiesti dalla disciplina sulla protezione dei dati personali e per il contrasto all'utilizzo del sistema finanziario a fini di riciclaggio, nonché dalla disciplina in materia di usura e trasparenza.

Essendo i modelli di business dei soggetti Fintech decisamente variegati, non è possibile affrontare in maniera dettagliata questi aspetti. È però possibile porre in evidenza i profili che possono costituire elementi di criticità.

1. Le reali controparti del contratto.

Con riferimento alle controparti del contratto, va distinto il caso in cui il soggetto fintech acquisisce le fatture in proprio, sia per il tramite di una piattaforma proprietaria che prestata da un fornitore tecnologico, che però non entra in contatto con il cliente, dal caso in cui il cliente si rivolge ad una piattaforma online con un proprio brand e che offre un servizio di messa in contatto della clientela con investitori. Nel primo caso, si configura un contratto di cessione del credito simile a quello "tradizionale", non rilevando in questa fattispecie l'eventuale preordinata ricezione del credito a veicoli per la cartolarizzazione. Nel secondo caso, i profili di attenzione riguardano sicuramente l'esistenza o meno di un contratto quadro, che regola le condizioni generali del servizio offerto, stipulato fra il soggetto Fintech e i suoi investitori e/o prenditori, così come l'esistenza o meno di contratti che regolano le singole cessioni effettuate con ciascun investitore che acquisisce, mediante asta o meccanismi diversi, le fatture caricate in piattaforma e proposte in cessione.

2. La natura del contratto e i servizi effettivamente offerti.

I nuovi modelli di business possono rimettere in discussione la natura del contratto alla base della cessione del credito. Giova ricordare che il factoring è un contratto atipico e non standardizzato, che comprende una ampia gamma di servizi di natura amministrativa, finanziaria e di garanzia, variamente composita sulla base delle esigenze della clientela. La logica della piattaforma prevede, nella sua formulazione attuale, una standardizzazione più spinta dei prodotti offerti, mentre in chiave evolutiva ci si può attendere una diversificazione al crescere della complessità dei bisogni della clientela effettivamente servita.

Se nel contratto di factoring è ormai pacificamente accettato sia in dottrina che in giurisprudenza l'orientamento secondo cui la causa del contratto è *vendendi*, tenendo in considerazione la complessità dei servizi offerti e la mera eventualità dell'anticipazione che configura la componente finanziaria del servizio, nell'ambito delle cessioni effettuate tramite piattaforma Fintech si registra normalmente l'assenza di servizi di gestione del credito (mentre è frequente la previsione, di default o facoltativamente, di cessioni "pro soluto").

Il finanziamento acquisisce quindi una rilevanza centrale nell'operazione di anticipo tramite piattaforme Fintech.

Spesso, il debitore ceduto riceve comunque una notifica dell'avvenuta cessione mediante la piattaforma. In ogni caso, nel caso di operazioni pro solvendo, non pare normalmente essere prevista una effettiva gestione del credito commerciale, quanto piuttosto la normale attività di recupero crediti nei confronti del cedente che si trovasse nella condizione di non rimborsare il controvalore anticipato alla data pattuita. Nel caso di operazioni pro soluto, talvolta è previsto uno scarto (es. 10% del valore nominale) rispetto all'anticipazione del credito che viene pagato al momento dell'incasso ma non viene restituito in caso di inadempienza del debitore. Alcune piattaforme prevedono inoltre, nel caso di operazioni pro soluto, che l'investitore possa fare affidamento su plafond assicurativi concessi da imprese di assicurazione del credito partner sui crediti offerti in cessione. In alcuni casi, in caso di ritardo di pagamento da parte del debitore ceduto, è altresì previsto un termine di alcuni mesi dalla scadenza durante i quali maturano interessi aggiuntivi a carico del cedente.

3. La legge applicabile al contratto e ai vari profili che caratterizzano la cessione del credito.

Le imprese FinTech, operando tramite piattaforme *online*, possono offrire servizi *cross-border* con maggiore frequenza rispetto ad un'impresa tradizionale. In questi casi diventa, quindi, centrale individuare la legge che disciplina l'operazione di *factoring* e il foro avente competenza giurisdizionale in caso di controversia con il cliente finanziato.

Partendo dall'identificazione della legge applicabile, bisogna distinguere i rapporti tra *factor* e cedente, da un lato, e i rapporti tra *factor* e debitore ceduto, dall'altro.

a) Rapporti tra factor e cedente.

La disciplina dei rapporti tra *factor* e cedente si rinviene nel contratto di *factoring* e, infatti, l'art. 14, comma 1, Regolamento Roma I⁸ prevede che *"I rapporti tra cedente e cessionario [...] nell'ambito di una cessione [...] di credito nei confronti di un altro soggetto («il debitore») sono disciplinati dalla legge che, in forza del presente regolamento, si applica al contratto che li vincola"*⁹.

Il contratto di *factoring* sarà pertanto regolato in primo luogo dalla legge scelta dalle parti (art. 3). In questo caso però se, al momento della scelta, tutti gli elementi pertinenti alla situazione sono ubicati in un paese diverso da quello la cui legge è stata scelta, devono essere applicate anche tutte le disposizioni – interne e comunitarie – alle quali la legge di tale paese non permette di derogare convenzionalmente (art. 3, parr. 3 e 4).

⁸ Regolamento (CE) n. 593/2008, il quale si applica indipendentemente dal fatto che i contraenti siano o meno residenti in uno Stato membro dell'UE.

⁹ L'art. 12, Regolamento Roma I, definisce l'ambito della legge applicabile, prevedendo che *"1. La legge applicabile al contratto ai sensi del presente regolamento disciplina in particolare: a) la sua interpretazione; b) l'esecuzione delle obbligazioni che ne discendono; c) entro i limiti dei poteri attribuiti al giudice dalla sua legge processuale, le conseguenze dell'inadempimento totale o parziale di quelle obbligazioni, compresa la liquidazione del danno in quanto sia disciplinata da norme giuridiche; d) i diversi modi di estinzione delle obbligazioni nonché le prescrizioni e decadenze; e) le conseguenze della nullità del contratto.*

2. Per quanto concerne le modalità di esecuzione e le misure che il creditore dovrà prendere in caso di esecuzione difettosa, si avrà riguardo alla legge del paese in cui ha luogo l'esecuzione".

In mancanza di scelta esercitata ai sensi dell'art. 3, si applica invece la legge del paese nel quale la parte che deve effettuare la prestazione caratteristica del contratto ha la residenza abituale al momento della conclusione del contratto (art. 4, par. 2), ossia, nel caso di società, nel paese della sede dell'amministrazione centrale¹⁰ ovvero, nel caso di persona fisica che agisce nell'esercizio della sua attività professionale, nel paese della sede dell'attività principale (art. 19).

La prestazione caratteristica nel contratto di cessione è la prestazione del cedente e infatti il Regolamento Roma I prevede che se il contratto di cessione ha *causa vendendi* si applica la legge del paese di residenza del venditore (art. 4, par. 1, lett. a). Tuttavia, il contratto di *factoring* non si compone solo di cessioni di crediti con *causa vendendi*, ma comprende anche i servizi offerti dal *factor*, quali la gestione e l'incasso dei crediti, con relativa liquidazione, l'assunzione del rischio di insolvenza (se la cessione è senza rivalsa) e la concessione di anticipi. Ne consegue che la legge applicabile al contratto di *factoring* è la legge del paese di residenza (non del cedente, ma) del cessionario, ossia del *factor* in quanto parte che presta il servizio (art. 4, par. 1, lett. b).

Tale conclusione rimane ferma non solo per il *factoring* "tradizionale", ma anche per il *factoring* "FinTech". Infatti, anche nel *factoring* "FinTech", pur con l'assenza – ad oggi – dei servizi di gestione del credito, il *factor* svolge determinati servizi a favore del cedente, come la concessione di anticipi e, nel caso di operazioni *pro soluto*, l'assunzione del rischio di insolvenza.

Al riguardo, è opportuno sottolineare la possibilità che la piattaforma fintech, ove viene concluso il contratto di *factoring* "FinTech", imponga ai propri partecipanti l'utilizzo di un modello contrattuale nel quale venga indicata come legge del contratto una legge diversa da quella del *factor* o del cedente, e che potrà plausibilmente essere quella della piattaforma fintech.

In ogni caso, è opportuno precisare che, una volta individuata la legge che disciplina il contratto, la sua applicazione può incontrare i limiti dell'ordine pubblico e delle norme di applicazione necessaria. Il primo limite, infatti, preclude all'applicazione delle disposizioni straniere solo qualora essa risulti incompatibile con l'ordine pubblico del foro (art. 21). Il secondo limite, invece, rende applicabili quelle norme che pretendono di essere applicate "a tutte le situazioni che rientrino nel loro campo di applicazione, qualunque sia la legge applicabile al contratto" (art. 9, par. 1). Esse possono essere norme della legge del foro ovvero norme del paese in cui il contratto deve essere eseguito, in quest'ultimo caso esse però possono essere applicate solo se rendono illecito l'adempimento del contratto (art. 9, par. 3).

È opportuno in questa sede richiamare la proposta di Regolamento recentemente emanata dalla Commissione Europea in merito all'efficacia della cessione del credito nei confronti dei terzi¹¹. Tale profilo della cessione non è disciplinato dal Regolamento Roma I e quindi, ad oggi, l'individuazione della legge applicabile non è uniforme a livello UE. La proposta di Regolamento intende così risolvere il problema della definizione della legge in forza della quale risolvere il conflitto tra cessionario e terzi che vantino diritti sui crediti ceduti e la questione dell'opponibilità della cessione al fallimento del cedente. Tra le diverse opzioni vagliate, ed in linea con la posizione espressa storicamente dall'EUF, la Commissione ha proposto che l'efficacia della cessione del

¹⁰ Nel caso in cui il contratto sia concluso nel quadro dell'esercizio dell'attività di una filiale, di un'agenzia o di qualunque altra sede di attività, o se, secondo il contratto, la prestazione deve essere fornita da tale filiale, agenzia o sede di attività, la residenza abituale coincide con il luogo in cui è ubicata la filiale, l'agenzia o altra sede di attività.

¹¹ European Commission, 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, 12 marzo 2018.

credito nei confronti dei terzi debba essere disciplinata dalla legge del paese in cui il cedente ha la propria residenza abituale al tempo della cessione (art. 4, par. 1), coerentemente con quanto ci eravamo detti durante l'ultimo incontro. Accanto a tale regola generale si prevede che, nel caso in cui la cessione abbia ad oggetto a) mezzi monetari accreditati su un conto acceso presso un istituto di credito ovvero b) crediti derivanti da uno strumento finanziario, l'efficacia della cessione del credito nei confronti dei terzi sia disciplinata dalla legge del credito ceduto (art. 4, par. 2). La soluzione prospettata, quindi, riprende quanto proposto (senza successo) dalla Commissione durante i lavori preparatori del Regolamento Roma I, in conformità a quanto previsto dalla UN Convention on the Assignment of Receivables in International Trade e dal Regolamento UE relativo alle procedure di insolvenza (nel quale viene indicata come legge disciplinante la procedura di insolvenza la legge del paese in cui si trova il centro degli interessi principali del debitore).

b) Rapporti tra *factor* e debitore ceduto.

La cessione del credito determinata il sorgere non solo di rapporti tra cedente e cessionario, ma anche di rapporti tra cessionario e debitore ceduto, i quali però sono disciplinati non dal contratto di *factoring*, rispetto al quale il debitore è terzo, ma dalla legge che disciplina il credito ceduto. L'art. 14, al par. 2, infatti prevede che *"La legge che disciplina il credito ceduto [...] determina la cedibilità di questo, i rapporti tra cessionario [...] e debitore, le condizioni di opponibilità della cessione [...] al debitore e il carattere liberatorio della prestazione fatta dal debitore"*.

Pertanto, la legge che disciplina il credito ceduto determina anche la cedibilità di questo, ma sul punto appare necessaria una precisazione. In base alla lettera della norma citata si potrebbe ritenere che la possibilità di cedere crediti futuri sia materia della legge del credito ceduto. Al contrario, in questo caso, l'ammissibilità o meno della cessione dipende dalla legge che disciplina il contratto di cessione, in quanto la cedibilità di un credito futuro è questione di determinabilità dell'oggetto del contratto di cessione.

c) Rapporti tra *factor*, cedente e piattaforma fintech.

Come visto, nel caso in cui il contratto venga concluso su una piattaforma fintech, il *factoring* in luogo della consueta trilateralità del rapporto può acquisire il carattere della quadrilateralità. Conseguentemente è opportuno individuare la legge che regoli il rapporto tra i soggetti che operano sulla piattaforma (*factor* e cedente) e la piattaforma stessa e quindi il contratto con il quale i primi accedono alla seconda.

In tale circostanza, è possibile che la piattaforma predisponga un modello contrattuale, le cui condizioni generali individuino la legge applicabile al contratto. In caso contrario, il rapporto sarà disciplinato dalla legge del paese di residenza della piattaforma, in quanto si tratta di un contratto di prestazione di servizi con conseguente applicazione del criterio di collegamento di cui all'art. 4, par. 1, lett. b).

Nel caso in cui si applichi la legge italiana, la disciplina di riferimento dipende dalla natura del soggetto acquirente: la Legge 21 febbraio 1991, n. 52 prevede infatti una riserva dell'applicazione delle disposizioni ivi contenute quando *"concorrono le seguenti condizioni"*:

- a) *il cedente è un imprenditore;*
- b) *i crediti ceduti sorgono da contratti stipulati dal cedente nell'esercizio dell'impresa;*
- c) *il cessionario è una banca o un intermediario finanziario disciplinato dal testo unico delle leggi in materia bancaria e creditizia emanato ai sensi dell'art. 25, comma 2, della legge 19 febbraio 1992, n. 142, il cui oggetto sociale preveda l'esercizio dell'attività di acquisto di crediti d'impresa o un soggetto, costituito*

in forma di società di capitali, che svolge l'attività di acquisto di crediti, vantati nei confronti di terzi, da soggetti del gruppo di appartenenza che non siano intermediari finanziari oppure di crediti vantati da terzi nei confronti di soggetti del gruppo di appartenenza, ferme restando le riserve di attività previste ai sensi del citato testo unico delle leggi in materia bancaria e creditizia."

Pertanto, l'applicazione della Legge 52/91 è riservata a banche e intermediari finanziari (nonché a società di natura "captive", ovvero operanti esclusivamente nei confronti di crediti o debiti del gruppo industriale di appartenenza).

Alle società di cartolarizzazione è applicabile la Legge 30 aprile 1999, n. 130. A tali soggetti sono altresì state recentemente estese alcune delle disposizioni previste dalla Legge 52/91, e nello specifico il disposto dell'articolo 5, commi 1, 1-bis e 2¹², e sempre con la Legge 52/91 condividono un trattamento di favore in termini di esclusione della revocatoria sui pagamenti dei debitori ceduti oltreché un trattamento di favore, ancora più spinto rispetto alla Legge 52, nei confronti dei cedenti (con termini per la revocatoria ridotti¹³). Esse godono altresì dell'esenzione dall'applicazione degli articoli 69 e 70 del regio decreto 18 novembre 1923, n. 2440, nonché in generale di tutte le altre disposizioni che richiedano formalità diverse o ulteriori¹⁴. Ciò rappresenta un indubbio vantaggio per tali soggetti in termini di costi e formalità con riferimento alla cessione dei crediti verso la pubblica amministrazione (sebbene allo stato non risultino iniziative focalizzate su questo tipo di mercato).

Tutti gli altri soggetti possono, nei limiti delle riserve di attività previste dalla Legge e dei requisiti ad essi imposti, acquistare crediti ai sensi del Codice Civile.

4. L'individuazione del foro avente competenza giurisdizionale in caso di controversia.

Un ulteriore quesito posto dall'operatività *cross-border* attiene all'identificazione del foro avente competenza giurisdizionale in caso di controversia con il cliente finanziato. A tal fine è necessario distinguere il caso in cui il convenuto sia domiciliato in uno Stato membro dell'UE dal caso in cui non lo sia.

a) Convenuto domiciliato in uno Stato membro dell'UE.

Nel caso in cui il convenuto sia domiciliato in uno Stato membro si applica il Regolamento Bruxelles I bis¹⁵, il quale prevede che *"le persone domiciliate nel territorio di un determinato Stato membro sono convenute, a*

¹² "1. Qualora il cessionario abbia pagato in tutto o in parte il corrispettivo della cessione ed il pagamento abbia data certa, la cessione è opponibile: a) agli altri aventi causa del cedente, il cui titolo di acquisto non sia stato reso efficace verso i terzi anteriormente alla data del pagamento; b) al creditore del cedente, che abbia pignorato il credito dopo la data del pagamento; c) al fallimento del cedente dichiarato dopo la data del pagamento, salvo quanto disposto dall'articolo 7, comma 1.

1-bis. Ai fini dell'ottenimento della data certa del pagamento è sufficiente l'annotazione del contante sul conto di pertinenza del cedente, in conformità al disposto dell'articolo 2, comma 1, lettera b), del decreto legislativo 21 maggio 2004, n. 170.

2. È fatta salva per il cessionario la facoltà di rendere la cessione opponibile ai terzi nei modi previsti dal codice civile."

¹³ Legge 30 aprile 1999, n. 130, art. 4, comma 4: "4. Per le operazioni di cartolarizzazione disciplinate dalla presente legge i termini di due anni e di un anno previsti dall'articolo 67 del regio decreto 16 marzo 1942, n. 267, e successive modificazioni, sono ridotti, rispettivamente, a sei ed a tre mesi."

¹⁴ Legge 30 aprile 1999, n. 130, art. 4, comma 4bis.

¹⁵ Regolamento (UE) n. 1215/2012.

prescindere dalla loro cittadinanza, davanti alle autorità giurisdizionali di tale Stato membro” (art. 4)¹⁶. Tuttavia, accanto a questo foro (detto “generale”), è prevista la competenza giurisdizionale di altri fori (detti “speciali”), purché appartenenti ad uno Stato membro.

In particolare per la materia contrattuale si attribuisce competenza giurisdizionale anche all’autorità del luogo di esecuzione dell’obbligazione dedotta in giudizio, il quale, nel caso di prestazione di servizi, coincide con il luogo in cui i servizi sono stati o avrebbero dovuto essere prestati in base al contratto (art. 7, par. 1, lett. b)).

Però il contratto fintech viene stipulato e eseguito completamente *online* e quindi diviene impossibile individuare il luogo dove il servizio è stato o avrebbe dovuto essere prestato. In tale circostanza, tuttavia, la Corte di Giustizia¹⁷ ha avuto modo di precisare che *“in caso di impossibilità di stabilire il luogo della fornitura principale dei servizi tanto sulla base delle disposizioni del contratto stesso quanto alla luce della sua esecuzione effettiva, occorre individuare tale luogo in un altro modo che rispetti al tempo stesso gli obiettivi di prevedibilità e di prossimità perseguiti dal legislatore”*, e ha così identificato come foro competente il foro del luogo in cui è domiciliato il prestatore di servizi e dunque il *factor*.

Le parti del contratto possono comunque prorogare la competenza del foro così individuato, eleggendone uno da loro scelto (art. 25).

b) Convenuto non domiciliato in uno Stato membro dell’UE.

Se il convenuto non è domiciliato in uno Stato membro, la competenza giurisdizionale è disciplinata dalla legge degli Stati membri (art. 6, Regolamento Bruxelles I *bis*). Nel caso dell’Italia la normativa di riferimento è posta dalla l. 31 maggio 1995, n. 218, in forza della quale sussiste la giurisdizione italiana a condizione che il convenuto sia domiciliato o residente in Italia ovvero vi abbia un rappresentante che sia autorizzato a stare in giudizio a norma dell’art. 77 c.p.c. (art. 3, comma 1).

A tale criterio di collegamento generale, la l. 218/1995 affianca criteri speciali (art. 3, comma 2), che per quanto riguarda la materia contrattuale, rinvia alle disposizioni del Regolamento Bruxelles I *bis* così estendendone il campo di applicazione.

Infine, anche la l. 218/1995 consente alle parti di prorogare la giurisdizione ed eleggere il foro, purché essa sia in forma scritta e abbia a oggetto diritto disponibili (art. 4).

¹⁶ L’art. 63 precisa che “1. Ai fini dell’applicazione del presente regolamento, una società o altra persona giuridica è domiciliata nel luogo in cui si trova: a) la sua sede statutaria; b) la sua amministrazione centrale; oppure c) il suo centro d’attività principale.

2. Per quanto riguarda l’Irlanda, Cipro e il Regno Unito, per «sede statutaria» si intende il «registered office» o, se non esiste alcun «registered office», il «place of incorporation» (luogo di acquisizione della personalità giuridica), ovvero, se nemmeno siffatto luogo esiste, il luogo in conformità della cui legge è avvenuta la «formation» (costituzione)”.

¹⁷ Sentenza 11 marzo 2010, causa C-19/09, *Wood Floor Solutions Andreas Domberger*.



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2018/0044 (COD)

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

{SWD(2018) 52 final} - {SWD(2018) 53 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

The Commission's priority is to further strengthen Europe's economy and stimulate investment to create jobs and sustain growth. In order to reach this objective, there is a need for stronger, deeper and more integrated capital markets. Efficient and safe post-trade infrastructures are key elements of such well-functioning capital markets. Following on from the 2015 Action Plan on Capital Markets Union (CMU), in May 2017 the Commission's Mid-term Review set out the remaining actions which will be taken to put in place the building blocks of the CMU by 2019, with the objective of removing barriers to cross-border investment and lowering the costs of funding. Completing the CMU is an urgent priority.

As part of the CMU Action Plan 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 securities¹, presented in parallel, implement this commitment. The Communication clarifies the Commission's views on important aspects of the existing Union acquis with regard to the law applicable to the proprietary effects of transactions in securities and accompanies this legislative proposal on the third-party effects of assignments of claims. Matters governed by the Financial Collateral Directive², the Settlement Finality Directive³, the Winding-up Directive⁴ and the Registry Regulation⁵ are not affected by this legislative proposal⁶.

The general objective of this proposal is, in line with the objectives of the CMU Action Plan, to foster cross-border investment in the EU and, thereby, facilitate access to finance for firms, including SMEs, and consumers. The specific objective of this proposal is to help to increase cross-border transactions in claims by providing legal certainty through the adoption of uniform conflict of laws rules at Union level.

Indeed, in order to increase cross-border transactions in claims and securities, clarity and predictability as to which country's law applies to determine who owns a claim or a security after a cross-border transaction are essential. Legal uncertainty as to which national law determines who owns an asset further to a cross-border transaction means that, depending on which Member State's courts or authorities assess a dispute concerning the ownership of a

¹ COM (2018) 89.

² Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, OJ L 168, 27.6.2002, p. 43–50.

³ Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, OJ L 166, 11.6.1998, p. 45–50.

⁴ Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions, OJ L 125, 5.5.2001, p. 15–23.

⁵ Commission Regulation (EU) No 389/2013 of 2 May 2013 establishing a Union Registry pursuant to Directive 2003/87/EC of the European Parliament and of the Council, Decisions No 280/2004/EC and No 406/2009/EC of the European Parliament and of the Council and repealing Commission Regulations (EU) No 920/2010 and No 1193/2011, OJ L 122, 3.5.2013, p. 1–59.

⁶ See Article 9(1) and (2) of the Financial Collateral Directive (FCD), Article 9(2) of the Settlement Finality Directive (SFD) and Article 24 of the Winding-Up Directive (WUD). While the FCD and the SFD refer to book-entry securities, the WUD refers to instruments the existence or transfer of which presupposes the recording in a register, account or centralised deposit system (WUD).

claim or a security, the cross-border transaction may or may not confer the expected legal title. In case of insolvency, when the questions of ownership and enforceability of rights resulting from cross-border transactions are put under judicial scrutiny, legal risks stemming from legal uncertainty may result in unexpected losses.

The uniform rules laid down in this proposal will designate which national law should determine the ownership of a claim after it has been assigned on a cross-border basis and, thereby, eliminate legal risk and potential systemic consequences. The introduction of legal certainty will promote cross-border investment, access to cheaper credit and market integration.

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

Factoring is a crucial source of liquidity for many firms. In factoring, a company (the assignor, most often an SME) assigns (sells) its receivables to a factor (the assignee, often a bank) at a discount price as a means for the assignor to obtain immediate cash. The factor will collect the money owed for the invoices and accept the risk of bad debts. The majority of users of factoring are SMEs: Small represent 76%, Medium 11% and Large 13%. Factoring for SMEs is thus regarded by the industry as a basis for economic growth, as SMEs may find sourcing traditional lending more challenging⁷. Europe as a region is the largest factoring market world-wide and represents 66% of the world market⁸.

Example of factoring

An SME C needs immediate cash to pay its suppliers. The invoices to its customers are only due for payment in three months. SME C (assignor) decides to assign (sell) its invoices to a factor (assignee), bank B, at a discount price in order to obtain immediate cash from B. The discount price at which SME C sells its invoices to B account for B's fees and commission.

In collateralisation, claims such as cash credited to a bank account (where the customer is the creditor and the bank is the debtor) or credit claims (that is, bank loans) can be used as financial collateral to secure a loan agreement (for example, a consumer can use cash credited to a bank account as collateral to obtain credit, and a bank can use a credit loan as collateral to obtain credit). The collateralisation of credit claims for the financial industry is very important. About 22% of the Eurosystem⁹ refinancing operations are secured by credit claims as collateral¹⁰.

⁷ Factoring and Commercial Finance: A Whitepaper, p. 20, by The EU Federation for the Factoring and Commercial Finance Industry (EUF).

⁸ Factoring in Europe as a region amounted to EUR 1,566 billion in 2015. The top European markets are the UK, France, Germany, Italy and Spain. The global factoring market was EUR 2,373 billion in 2015. Source: Factors Chain International FCI.

⁹ The Eurosystem is composed of the European Central Bank and the national central banks of the Member States which have adopted the euro.

¹⁰ About 22% of the Eurosystem refinancing operations are secured by credit claims as collateral, amounting to some EUR 380 billion as at Q2 2017, of which about EUR 100 billion represented credit claims mobilised on a cross-border basis. Overall, the Eurosystem had mobilised some EUR 450 billion in cross-border collateral as at end-June 2017.

Example of collateralisation

An SME C (assignor) wants to get a loan from bank A (assignee) to build a bigger warehouse, using the claims it has against its customers as collateral (or security). If SME C goes bankrupt and cannot pay the credit back, bank A (the collateral taker) will be able to recover its debt by enforcing the claims that SME C had against its customers.

Securitisation enables the assignor, called ‘originator’ (for example, a company or a bank) to refinance a set of its claims (for example, motor vehicle rents, credit card receivables, mortgage loan payments) by assigning them to a ‘special purpose vehicle’ (SPV). The special purpose vehicle (assignee) then issues debt securities (for example, bonds) in the capital markets reflecting the proceeds from these claims. As payments are made under the underlying claims, the special purpose vehicle uses the proceeds it receives to make payments on the securities to the investors. Securitisation can lower the cost of financing because the special purpose vehicle is structured in such a way as to make it insolvency-remote. For companies, securitisation can provide access to credit at lower cost than bank loans. For banks, securitisation is a way to put some of their assets to better use and free up their balance sheets to allow for further lending to the economy¹¹. As part of the Capital Markets Union Action Plan, the Union has adopted legislation to promote a safe and liquid market for securitisation. These rules aim to re-establish a safe securitisation market in the EU by differentiating simple, transparent and standardised securitisation products from more opaque and costly ones. For all types of securitisation, legal certainty about who owns the assigned claim is crucial.

Example of securitisation

A large retail chain C (assignor) assigns its receivables arising from the use by customers of its in-house credit card to a special purpose vehicle A (assignee)¹². A then issues debt securities to investors in the capital markets. These debt securities are secured by the income stream flowing from the credit card receivables that have been assigned to A. As payments are made under the receivables, A will use the proceeds it receives to make payments on the debt securities.

¹¹ The market volume of securitisation issuance was EUR 237.6 billion within the EU in 2016, with EUR 1.27 trillion outstanding at the end of 2016 - AFME Securitisation Data Report Q4 2016.

¹² This example is an adaptation of the illustration used in the UNCITRAL Legislative Guide on Secured Transactions, pp. 16-17.

Why is legal certainty important?

Ensuring the acquisition of legal title over the assigned claim is important for the assignee (for example, a factor, a collateral taker or an originator) as third parties could claim legal title over the same claim. This would give rise to a priority conflict, that is, a situation in which it would need to be determined which of the two rights, the right of the assignee or the right of the competing claimant, should prevail. A priority conflict between the assignee of the claim(s) and a third party can arise in essentially two situations:

- if a claim has been assigned twice (accidentally or not) by the assignor to different assignees, a second assignee could claim legal title over the same claim. The law applicable to the third-party effects of the assignment of claims will resolve the priority conflict between the two assignees of the same claim;
- in case the assignor becomes insolvent, the creditors of the assignor will want to know whether or not the assigned claim still forms part of the insolvency estate, that is, whether or not the assignment was effective and thus the assignee has acquired legal title over the claim. The law applicable to the third-party effects of the assignment of claims will resolve the priority conflict between the assignee and the creditors of the assignor.

In purely domestic assignments of claims, it is clear that national substantive law will determine the third-party (or proprietary) effects of the assignment of claims, that is, which requirements must be met by the assignee in order to ensure that he acquires legal title over the assigned claims in case a priority conflict should arise. However, in a cross-border scenario, several national laws can potentially apply and assignees need clarity as to which of such laws they must observe in order to acquire legal title over the assigned claims.

Legal risk

The applicable law, that is, the national law that applies to a given situation with a cross-border element, is determined by conflict of laws rules. In the absence of uniform Union conflict of laws rules, the applicable law is determined by national conflict of laws rules.

Conflict of laws rules on the third-party effects of assignments of claims are currently laid down at Member State level. Member States' conflict of laws rules are inconsistent as they are based on different connecting factors to determine the applicable law: for example, the conflict rules of Spain and Poland are based on the law of the assigned claim, the conflict rules of Belgium and France are based on the law of the assignor's habitual residence and the conflict rules of the Netherlands are based on the law of the assignment contract. National conflict of laws rules are also unclear, in particular where they are not laid down in statutory law.

Inconsistency in Member States' conflict of laws rules 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. This lack of legal certainty as to which national law applies to third-party effects creates a legal risk in cross-border assignments which does not exist in domestic assignments. Faced with this legal risk, an assignee may react in three different ways:

- (i) if the assignee is not aware of the legal risk or chooses to ignore it, it may end up facing unexpected financial losses if a priority conflict arises and it loses legal title over the assigned claims. The legal risk stemming from the legal uncertainty as to who owns a claim further to a cross-border assignment emerged during the 2008 financial crisis, for example in

the Lehman Brothers International (Europe) collapse, where the inquiry into the legal ownership of assets is still ongoing today¹³. Uncertainty about the ownership of claims can thus have knock-on effects and deepen and prolong the impact of a financial crisis;

(ii) if the assignee decides to mitigate the legal risk by seeking specific legal advice as to which national laws can potentially apply to the third-party effects of the cross-border assignment and comply with the requirements under all such laws to ensure legal title over the claims assigned, it will incur higher transaction costs of between 25% and 60%¹⁴ which are not required for domestic assignments;

(iii) if the assignee is deterred by the legal risk and chooses to avoid it, it may forego business opportunities and market integration may be reduced. Given the current absence of common conflict of laws rules regarding the third-party effects of assignments of claims, assignments of claims are mainly done on a national rather than on a cross-border basis: for example, the dominant type of factoring is domestic and, in 2016, it represented around 78% of total turnover¹⁵.

If the assignee decides to carry out the assignment, the inconsistency between Member States' conflict of laws rules means that the outcome of a priority conflict as to who owns a claim further to a cross-border assignment will vary depending on the national law applied by the Member State's court or authority assessing the dispute. Depending on the national law applied, the cross-border assignment may or may not confer the expected legal title on claimants.

Added value of uniform rules

Currently, uniform Union conflict of laws rules determine the law applicable to the *contractual obligations* of transactions in claims and securities. In particular, the Rome I Regulation¹⁶ determines the law applicable to the contractual relationships between the parties to an assignment of claims (between the assignor and the assignee and between the assignee and the debtor) and between the creditor/assignor and the debtor. The Rome I Regulation also determines the law applicable to the contractual relationship between the seller and the buyer in transactions in securities.

Uniform Union conflict of laws rules also determine the law applicable to the *proprietary effects* of transactions in book-entry securities and instruments the existence or transfer of which presupposes their recording in a register, an account or a centralised deposit system in three Directives, namely the Financial Collateral Directive, the Settlement Finality Directive and the Winding-Up Directive. However, no uniform Union conflict of laws rules have been adopted on the law applicable to the proprietary effects of assignments of claims. This proposed Regulation aims at filling this gap.

¹³ Joint Administrators of Lehman Brothers International Europe (LBIE), *Fifteenth Progress Report*, 12.4.2016. See <http://www.pwc.co.uk/services/business-recovery/administrations/lehman/lehman-brothers-international-europe-in-administration-joint-administrators-15th-progress-report-12-april-2016.html>

¹⁴ See the responses to Question 23 of the public consultation by the EU Federation for the Factoring and Commercial Finance Industry (EUF); the French Banking Federation (France); the Asset Based Finance Association Limited (ABFA) (UK).

¹⁵ The EU Federation for the Factoring and Commercial Finance Industry - EUF Yearbook, 2016-2017, p. 13.

¹⁶ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6–16.

The common conflict of laws rules laid down in the proposed Regulation provide that, as a general rule, the law of the country where the assignor has its habitual residence will govern the third-party effects of assignments of claims. However, the proposed Regulation also lays down exceptions which subject certain assignments to the law of the assigned claim where the general rule would not be suitable and also a choice of law possibility for securitisations aimed at expanding the securitisation market.

The adoption of uniform conflict of laws rules at Union level on the third-party effects of assignments of claims will bring significant added value to financial markets.

First, the legal certainty brought by the uniform rules will enable assignees to comply with the requirements of only one national law to ensure the acquisition of legal title over the assigned claims. This legal certainty will eliminate the legal risk currently linked to cross-border assignments of claims in terms of unexpected losses and possible knock-on effects, increased transaction costs, missed business opportunities and reduced market integration. The uniform conflict of laws rules laid down, in particular, for securitisation, recognise the practice of large operators of applying the law of the assigned claim to the third-party effects of assignments of claims but aim, at the same time, at enabling smaller operators to enter or strengthen their presence in the securitisation market by subjecting the third-party effects of their assignments to the law of the assignor's habitual residence. The flexibility in the conflict of laws rules applicable to securitisation will facilitate the expansion of the securitisation market with new market entrants and the creation of new business opportunities.

Second, the uniformity of the conflict of laws rules among Member States will ensure that the same national law will apply to resolve any priority conflict which arises between the assignee and a competing claimant regardless of which Member State's court or authority examines the dispute.

The introduction of legal certainty will in this way promote cross-border investment, which is the ultimate goal of this proposed Regulation pursuant to the Capital Markets Union Action Plan.

What is a claim?

A claim is the right of a creditor against a debtor to the payment of a sum of money (for example, receivables) or the performance of an obligation (for example, delivery obligation of the underlying assets under derivative contracts).

Claims may be classified in three categories:

- (i) The first category would cover 'traditional claims' or receivables, such as money to be received for unsettled transactions (for example, money to be received by a company from a customer for unpaid invoices).
- (ii) Financial instruments as defined in MiFID II¹⁷ include securities and derivatives traded on financial markets. While securities are assets, derivatives are contracts which include both rights (or claims) and obligations for the parties to the contract. The second category of claims would be claims arising from financial instruments (sometimes referred to

¹⁷ Financial instruments are listed in Section C of Annex 1 of MiFID II, Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173, 12.6.2014, p. 349–496.

as 'financial claims'), such as claims arising from derivative contracts (for example, the amount due after the calculation of the close-out in a derivative contract).

(iii) The third category of claims would be cash credited to an account in a credit institution (such as a bank), where the account holder (for example, a consumer) is the creditor and the credit institution is the debtor.

This proposal concerns the third-party (or proprietary) effects of the assignment of the above-mentioned claims. It does not cover the transfer of the *contracts* (for example derivative contracts), in which both rights (or claims) and obligations are included, or the novation of contracts including such rights and obligations. As this proposal does not cover the transfer or the novation of contracts, trading in financial instruments, as well as the clearing and the settlement of these instruments, will continue to be governed by the law applicable to contractual obligations as laid down in the Rome I Regulation. This law is normally chosen by the parties to the contract or is designated by non-discretionary rules applicable to financial markets.

Claims arising from financial instruments as defined in MiFID II, such as claims arising from derivative contracts, are relevant for the proper functioning of financial markets. Similarly to securities, trade in financial instruments such as derivatives generates large volumes of cross-border transactions. Financial instruments such as derivatives are often recorded in book-entry form.

The form of recording the existence or transfer of financial instruments such as derivatives, whether in book-entry form or otherwise, is governed by Member State law. In some Member States certain kinds of derivatives are recorded in book-entry form and are regarded as securities while, in other Member States, they are not. Depending on whether or not, under national law, a financial instrument such as a derivative contract is recorded in book-entry form and regarded as a security, the authority or court dealing with a dispute as to who has legal title over the financial instrument or over the claim arising from that financial instrument will apply the conflict of laws rule on the proprietary effects of the transfer of book-entry securities or the conflict of laws rule on the proprietary effects of the assignment of claims.

This proposal concerns conflict of laws rules on the third-party effects of the assignment of 'traditional claims', 'financial claims' (that is, claims arising from financial instruments such as derivatives not recorded in book-entry form and not regarded as securities under national law) and 'cash credited to a credit institution', all of which are referred to as 'claims'.

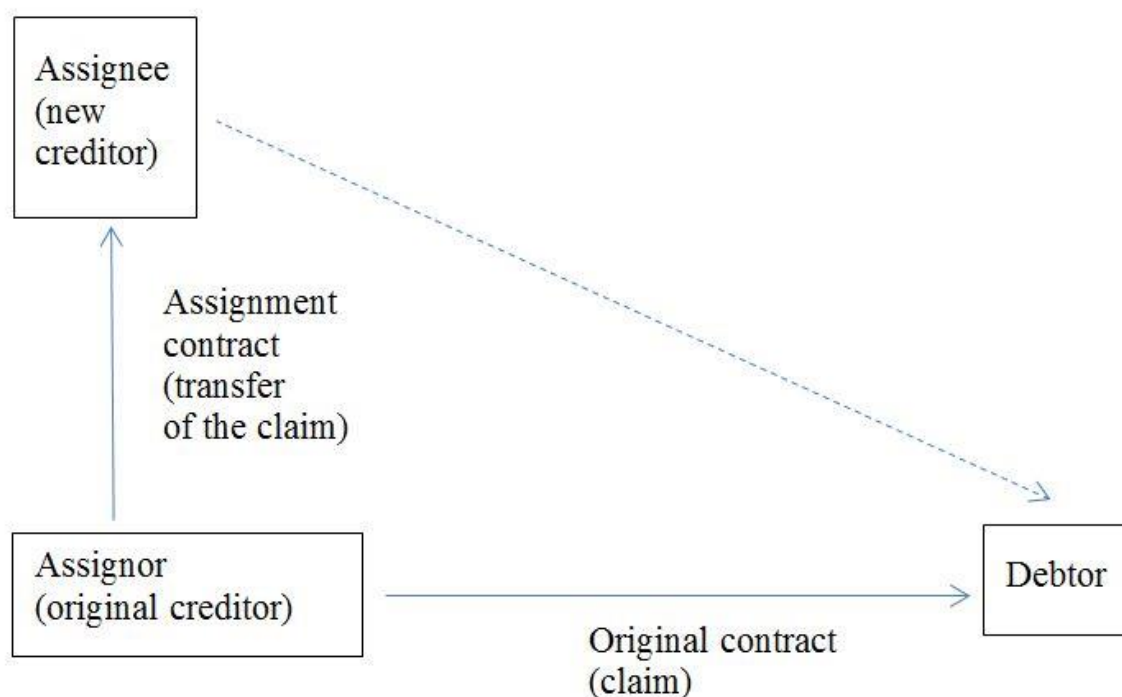
The third-party effects of transactions in financial instruments such as derivatives recorded in book-entry form and regarded as securities under national law are governed by the conflict of laws rules applicable to the proprietary effects of transactions in book-entry securities and instruments the existence or transfer of which presupposes their recording in a register, an account or a centralised deposit system laid down, in particular, in the Financial Collateral Directive, the Settlement Finality Directive and the Winding-Up Directive. The scope of the conflict of laws rules in this proposal and the scope of the conflict of laws rules in these three Directives do not therefore overlap as the former apply to claims and the latter apply to book-entry securities and instruments the existence or transfer of which presupposes their recording in a register, an account or a centralised deposit system¹⁸. The three Directives are clarified by

¹⁸ See Article 9(1) and (2) of the Financial Collateral Directive (FCD), Article 9(2) of the Settlement Finality Directive (SFD) and Article 24 of the Winding-Up Directive (WUD). While the FCD and the

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

What is the assignment of a claim?

In an assignment of a claim, a creditor ("assignor") transfers his right to a claim against a debtor to another person ("assignee").



Clarity as to who owns a claim further to its cross-border assignment is relevant for participants in financial markets and also for the real economy. This is because the assignment of claims is often used by firms as a mechanism to obtain liquidity or access to credit.

In factoring, for example, a company (the assignor) sells its claims at a discount price to a factor (the assignee), often a bank, in exchange for immediate cash. The majority of factoring users are SMEs (87%)¹⁹.

The assignment of claims is also used by consumers, companies and banks to have access to credit, for example in collateralisation. In collateralisation, claims such as cash credited to a bank account or credit claims (that is, bank loans) can be used as financial collateral to secure a loan agreement (for example, a consumer can use cash credited to a bank account as collateral to obtain credit, and a bank can use a credit loan as collateral to obtain credit).

Finally, the assignment of claims is also used by companies and banks to borrow money from capital markets through the assignment of multiple similar claims to a special purpose vehicle and the subsequent securitisation of such claims as debt securities (for example, bonds).

¹⁹ SFD refer to book-entry securities, the WUD refers to instruments the existence or transfer of which presupposes the recording in a register, account or centralised deposit system (WUD). Factoring and Commercial Finance: A Whitepaper, p. 20, by The EU Federation for the Factoring and Commercial Finance Industry (EUF).

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

Development of the conflict of laws rules on assignments of claims

With the increasing interconnectivity of national markets, assignments of claims often involve a cross-border element (for example, the assignor and the assignee, or the assignee and the debtor, are located in different countries). The laws of several countries can thus potentially apply to the assignment. Conflict of laws rules laid down at Union or Member State level must determine which national law applies to the various elements of a cross-border assignment of claims.

Conflict of laws rules on cross-border assignments of claims concern two elements: (1) the contractual element, which refers to the parties' obligations towards each other; and (2) the proprietary element, which refers to the transfer of property rights over the claim and which can therefore affect third parties.

The Rome I Regulation on the law applicable to contractual obligations harmonised conflict of laws rules at Union level with regard to the **contractual elements** of the assignment of claims. The Regulation thus contains uniform conflict of laws rules with regard to (i) the relationship between the parties to the assignment contract - the assignor and the assignee²⁰, and (ii) the relationship between the assignee and the debtor²¹. The conflict of laws rules of the Rome I Regulation also apply to the relationship between the original creditor (the assignor) and the debtor²².

In contrast, there are no conflict of laws rules at Union level with regard to the **proprietary elements** of the assignment of claims. The proprietary elements or third-party effects of an assignment of claims refer in general to who has ownership rights over a claim and, in particular, to: (i) which requirements must be fulfilled by the assignee in order to ensure that he acquires legal title over the claim after the assignment (for example, registration of the assignment in a public register, written notification of the assignment to the debtor), and (ii) how to resolve priority conflicts, that is, conflicts between several competing claimants as to who owns the claim after a cross-border assignment (for example, between two assignees where the same claim has been assigned twice, or between an assignee and a creditor of the assignor).

The question of which law should govern the third-party effects of assignments of claims was first considered when the 1980 Rome Convention was being converted into the Rome I Regulation²³ and then during the legislative negotiations leading to the adoption of the Rome I Regulation. The Commission proposal for the Rome I Regulation chose the law of the assignor's habitual residence as the law that should apply to the third-party effects of the assignment of claims²⁴. Ultimately, no conflict of laws rule on the third-party effects of

²⁰ Article 14(1) of the Rome I Regulation.

²¹ Article 14(2) of the Rome I Regulation.

²² Articles 2 and 3 of the Rome I Regulation.

²³ Question 18 of the Green paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, [COM\(2002\) 654 final](#), p. 39–41.

²⁴ Art. 13(3) of the Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM(2005) 650 final.

assignments was included in the Regulation²⁵ due to the complexity of the matter and the lack of time to deal with it in the required level of detail.

However, Article 27(2) of the Rome I Regulation acknowledged the significance of this unresolved issue by requiring the Commission to present a report on the question of the effectiveness of assignments of claims against third parties accompanied, if appropriate, by a proposal to amend the Regulation²⁶. To this end, the Commission contracted an external study²⁷ and, in 2016, adopted a report presenting possible approaches to the matter²⁸. In its report, the Commission noted that the absence of uniform conflict of laws rules determining which law governs the effectiveness of an assignment of a claim against third parties and the questions of priority between competing claimants undermines legal certainty, creates practical problems and results in increased legal costs²⁹.

- **Consistency with existing policy provisions in the policy area**

This proposal complies with the requirement laid down in Article 27(2) of the Rome I Regulation that the Commission should publish a report and, if appropriate, a proposal on the effectiveness of an assignment of a claim against third parties and the priority of the assignee over the right of another person. The proposal harmonises conflict of laws rules on these issues as well as the scope of the applicable law, that is, the matters that should be governed by the national law designated as applicable by the proposal.

The proposal is consistent with existing Union instruments on applicable law in civil and commercial matters, in particular with the Rome I Regulation as regards the claims covered by the scope of the two instruments.

The proposal is also consistent with the Insolvency Regulation³⁰ as regards the connecting factor which designates the law applicable to insolvency proceedings. The law of the assignor's habitual residence chosen by the proposal as the law applicable to the third-party effects of assignments of claims coincides with the law applicable to the insolvency of the assignor as, under the Insolvency Regulation, the main insolvency proceedings must be opened in the Member State where the debtor has its centre of main interests (COMI). Most questions relating to the effectiveness of the assignments of claims made by the assignor arise in case of the assignor's insolvency. The insolvency estate of the assignor will vary depending on whether or not the legal title of assigned claims has been transferred to the assignee and thus on whether or not the assignment of claims made by the assignor can be regarded as effective against third parties (for example, its creditors). Subjecting priority issues and the effectiveness of the assignments of claims against third parties, such as the creditors of the assignor, to the same law that governs the assignor's insolvency is intended to facilitate the resolution of the assignor's insolvency.

²⁵ Cf. Article 13(3) of Proposal for a Regulation of the European Parliament and of Council on the law applicable to contractual obligations, [COM\(2005\) 650 final](#) and Article 14 of the [Rome I Regulation](#).

²⁶ Article 27(2) of the Rome I Regulation.

²⁷ British Institute of International and Comparative Law (BIICL), Study on the question of effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person, 2011 ([‘BIICL Study’](#)).

²⁸ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over the right of another person, [COM\(2016\) 626 final](#) ([‘Commission Report’](#)).

²⁹ Commission Report, p. 12.

³⁰ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141, 5.6.2015, p. 19–72.

- **Consistency with other Union policies**

The aims of the initiative are coherent with Union policies on financial market regulation.

To facilitate cross-border investment, the Capital Markets Union Action Plan envisages targeted action on rules on the ownership of securities and the third-party effects of assignments of claims. The Action Plan further specifies that the Commission should propose a legislative initiative to determine with legal certainty which national law should apply to securities ownership and the third-party effects of the assignment of claims.

By reducing the legal uncertainty that may discourage cross-border assignments of claims or lead to additional costs for those transactions, this proposal will contribute to the objective of encouraging cross-border investment. By reducing the losses that might occur when market participants are not aware of the legal risk stemming from legal uncertainty, the proposal is fully consistent with the objective of investor protection set out in a number of Union financial market regulations. Finally, by harmonising conflict of laws 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.

In accordance with the Capital Markets Union Action Plan, this proposal on claims is complemented by a non-legislative initiative on the law applicable to the proprietary effects of transactions in securities. Currently, conflict of laws rules on the proprietary effects of cross-border transactions in securities are laid down in the Financial Collateral Directive, the Settlement Finality Directive and the Winding-Up Directive. As indicated, the scope of the conflict of laws rules in this proposal and the scope of the conflict of laws rules in these three Directives do not overlap as the former apply to claims and the latter apply to book-entry securities and instruments the existence or transfer of which presupposes their recording in a register, an account or a centralised deposit system³¹.

Although uniform conflict of laws rules have been adopted in respect of securities in the three above-mentioned Directives, these rules do not use identical wording and are interpreted and applied differently in Member States.

The Impact Assessment carried out in relation to both claims and securities showed that the total absence of common conflict of laws rules regarding the proprietary effects of assignments of claims is one of the factors that results in assignments of claims being made on a national rather than on a cross-border basis. In contrast, with regard to transactions in securities, the residual legal uncertainty resulting from the different interpretations of the existing Directives does not appear to hinder the development of substantial cross-border markets. This, together with the little tangible evidence of material risk in respect of securities, supported the choice of a non-legislative initiative as the preferred policy option for securities.

In short, the main difference between the areas of claims and securities is that, while there is a complete absence of EU conflict of laws rules on the proprietary effects of assignments of claims which implies a need for a legislative measure to remove the legal risk from cross-

³¹ See Article 9(1) and (2) of the Financial Collateral Directive (FCD), Article 9(2) of the Settlement Finality Directive (SFD) and Article 24 of the Winding-Up Directive (WUD). While the FCD and the SFD refer to book-entry securities, the WUD refers to instruments the existence or transfer of which presupposes the recording in a register, an account or a centralised deposit system (WUD).

border assignments of claims, three Directives already include conflict of laws rules on the proprietary effects of transactions in securities which, even if not uniformly worded, require only the adoption of soft law measures.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The legal basis of the proposal is Article 81(2)(c) TFEU which, in the area of judicial cooperation in civil matters having cross-border implications, specifically empowers the Parliament and the Council to adopt measures aimed at ensuring “the compatibility of the rules applicable in the Member States concerning conflict of laws (...).”

By reason of Protocol No 22 to the TFEU, legal measures adopted in the area of freedom, security and justice, such as rules on conflict of laws, do not bind or apply in Denmark. By reason of Protocol No 21 to the TFEU, the UK and Ireland are also not bound by such measures. However, once a proposal has been presented in this area, these Member States can notify their wish to take part in the adoption and application of the measure and, once the measure has been adopted, they can notify their wish to accept that measure.

- **Subsidiarity**

The current legal uncertainty and the legal risk stemming therefrom are caused by divergent Member State substantive rules governing the third-party effects of assignments of claims. Member States acting individually could not satisfactorily remove the legal risk and barriers to cross-border assignments of claims as national rules and procedures would need to be the same or at least compatible in order to work in a cross-border situation. Action at Union level is needed to ensure that, throughout the Union, the same law is designated as the law applicable to the third-party effects of assignments of claims regardless of which Member State’s courts or authorities assess a dispute on the ownership of an assigned claim.

- **Proportionality**

Currently, each Member States has (i) its own substantive rules governing the third-party effects of assignments of claims, and (ii) its own conflict of laws rules designating which national substantive law governs such third-party effects. Both the substantive rules and the conflict of laws rules of the Member States are different and, in a number of cases, the conflict of laws rules are unclear or not laid down in statutory legislation. These divergences create legal uncertainty which results in legal risk, as the substantive laws of various countries can potentially apply to one cross-border assignment.

In order to provide legal certainty, the EU could propose to (i) harmonise the substantive rules of all Member States governing the third-party effects of assignments of claims, or (ii) harmonise the conflict of laws rules applicable to the third-party effects of assignments of claims. The solution proposed is to provide legal certainty through the harmonisation of conflict of laws rules. This is a more proportionate solution in line with the subsidiarity principle as it does not interfere with national substantive law and only applies to assignments of claims with a cross-border element.

Such action relating to the third-party effects of assignment of claims is suitable to achieve the objective of providing legal certainty and removing the legal risk from cross-border

assignments of claims, thereby facilitating cross-border investment, access to cheaper credit and market integration, without going beyond what is necessary to achieve the aim.

- **Choice of the instrument**

The desired uniformity of the conflict of laws rules can only be achieved through a Regulation as only a Regulation ensures a fully consistent interpretation and application of the rules. In line with previous Union instruments on conflict of laws rules, the preferred legal instrument is thus a Regulation.

3. RESULTS OF STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENT

- **Stakeholder consultations and collection and use of expertise**

The Commission actively engaged with stakeholders and conducted comprehensive consultations throughout the impact assessment process. The consultation strategy set out a number of actions to be organised by the Commission, in particular an on-line public consultation; two meetings with Member State experts, one with experts on conflicts of laws and another with experts on financial markets; and a high-level Expert Group composed of academics, legal practitioners and industry members with expertise on both conflict of laws rules and financial markets. The consultation strategy also included a study contracted by the Commission and conducted by the British Institute of International and Comparative Law (BIICL) on the question of the effectiveness of assignments of claims against third parties and priority conflicts between competing claimants. The Inception Impact Assessment, published on 28 February 2017, received no feedback from stakeholders.

The study contracted by the Commission showed that the laws most commonly applied today to resolve conflicts of laws concerning the third-party effects of assignments of claims are the law of the assignor's habitual residence (for example, Belgium, France, Luxembourg in respect of securitisation), the law governing the assigned claim (for example, Spain, Poland) and the law of the contract between the assignor and the assignee (for example, the Netherlands).

The on-line public consultation opened on 7 April 2017 and closed on 30 June 2017, which complies with the standard of a minimum of 12 weeks for Commission public consultations. The objective of the public consultation was to receive input from all stakeholders concerned, in particular those involved in factoring, securitisation, collateralisation and trading of financial instruments, as well as from legal practitioners and experts on conflict of laws rules on the third-party effects of assignments of claims.

The Commission received 39 responses to the public consultation. Among the respondents were 5 governments, 15 industry associations, 4 companies, 2 law firms, 2 think tanks and 5 private individuals. From the financial sector, the interests of banks, fund managers, regulated markets, central counterparties (CCPs), central security depositories (CSDs), securities issuers and investors were represented. No replies were received from consumer organisations.

In terms of geographical coverage, responses came from different Member States: 13 responses from stakeholders located in the UK, 9 responses from France and Belgium, 3 responses from Germany and the Netherlands, 2 responses from Spain, 1 response from Finland, 1 response from the Czech Republic and 1 response from Sweden.

In general, when stakeholders were asked whether, in the previous five years, they had encountered difficulties in securing the effectiveness of cross-border assignments of claims against third parties other than the debtor, more than two thirds of the stakeholders that responded stated that they had encountered difficulties. Out of the stakeholders that responded to the question whether Union action would bring added value in addressing the difficulties encountered, 59% answered positively and 22% responded negatively.

Regarding the law that should be chosen in a Union legislative initiative, stakeholders were asked to indicate their preferences in three separate questions. Out of the stakeholders that responded to each of the three separate questions, 57% of stakeholders favoured the law of the assignor's habitual residence, 43% favoured the law of the assigned claim and 30% preferred the law of the assignment contract. Some respondents based their replies on the conflict of laws rules applicable in their Member State, while others based their replies on the law that they apply in their current practice.

In support of the assignor's habitual residence, stakeholders argued that this law can be determined easily, would provide greater legal certainty and respect more than any other solution the economic logic of important trade practices. Stakeholders that supported the law of the assigned claim argued that this law would respect the principle of party autonomy and potentially lower transaction costs.

- **Impact assessment**

The options analysed in the Impact Assessment are the following:

- ✓ Option 1: Law applicable to the assignment contract

Under this connecting factor, the law that governs the contract of assignment between the assignor and the assignee would also govern the proprietary effects of the assignment of claims. The assignor and the assignee can choose any law to govern their assignment contract.

- ✓ Option 2: Law of the assignor's habitual residence

Under this connecting factor, the third-party effects of the assignment of claims would be governed by the law of the country in which the assignor has its habitual residence.

- ✓ Option 3: Law governing the assigned claim

Under this connecting factor, the third-party effects of the assignment of claims would be governed by the law that governs the assigned claim, that is, the credit in the original contract between the creditor and the debtor which is subsequently assigned by the creditor (assignor) to a new creditor (assignee). The parties to the original contract can choose any law to govern the contract which includes the claim subsequently assigned.

- ✓ Option 4: Mixed approach combining the law of the assignor's habitual residence and the law of the assigned claim

This mixed option combines the application of the law of the assignor's habitual residence as a general rule and the application of the law of the assigned claim to certain exceptions, namely (i) the assignment of cash credited to an account in a credit institution (for example a bank, where the consumer is the creditor and the credit institution is the debtor), and (ii) the assignment of claims arising from financial instruments. This mixed option also lays down the

possibility for the assignor and the assignee to choose the law of the assigned claim to apply to the third-party effects of assignments in the context of a securitisation. The possibility for parties in a securitisation to remain subject to the general rule based on the law of the assignor's habitual residence or choose the law of the assigned claim aims at catering for the needs of both large and smaller securitisation operators.

✓ Option 5: Mixed approach combining the law of the assigned claim and the law of the assignor's habitual residence

This mixed option combines the application of the law of the assigned claim as a general rule and the application, as an exception, of the law of the assignor's habitual residence to the assignment of multiple and future claims. Under this option, the third-party effects of the assignment of trade receivables by a non-financial company (for example, an SME) in the context of factoring would remain subject to the law of the assignor's habitual residence. The third-party effects of the assignment of multiple claims by a financial company (for example, a bank) in the context of securitisation would also be subject to the law of the assignor's habitual residence.

This proposal is based on option 4, which chooses the law of the assignor's habitual residence as 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. Given that the proposal does not deal with relationships between the parties to a contract but with the rights of third parties, applying the law of the assignor's habitual residence as a general rule is the most suitable option because:

- 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. In contrast, the law that governs the assigned claim and the law that governs the contract of assignment cannot be predicted by third parties as such laws are most of the times chosen by the parties to the contract;
- in the case of bulk assignments of claims, it is 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;
- 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 which is consistent with the Union acquis on insolvency, that is, the 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 insolvency³²;
- it is the only law which is consistent with the international solution enshrined in the 2001 United Nations Convention on the Assignment of Receivables in International Trade. This can create synergies and save legal due diligence and litigation costs for market participants who operate on a global basis.

³² For example, the French Banking Federation (FBF) states in its response to the public consultation that, as part of due diligence, French banks typically check the law applicable to the assignor's insolvency,

In addition, even when, currently, the parties choose to apply the law of the assigned claim to the third-party effects of their cross-border assignment, most of the times they also look at the law of the assignor's habitual residence to make sure that the acquisition of legal title over the claims assigned will not be prevented by overriding mandatory rules of the country of the assignor's habitual residence, in particular the rules laying down publicity requirements such as the obligation to register the assignment of claims in a public register to make it known and effective towards third parties³³.

On the other hand, the mixed nature of this option 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. This mixed option offers additional flexibility by laying down the possibility for the assignor and the assignee in the assignment of claims in a securitisation to choose the law applicable to the third-party effects of the assignment, thereby enabling both large and smaller operators to engage in cross-border securitisations.

A joint Impact Assessment report covering both the law applicable to the ownership of securities and the law applicable to the third-party effects of assignments of claims was submitted to the Regulatory Scrutiny Board (RSB) on 8 November 2017. The RSB issued a negative opinion on the impact assessment and made a number of common recommendations for improvements. With regard to claims, the RSB asked for more detailed information on the options that were being considered as to the law applicable to the third-party effects of assignments of claims. The impact assessment was revised and resubmitted to the RSB on 18 January 2018. On 1 February 2018 the RSB issued a positive opinion with reservations. With regard to claims, the RSB recommended that more information be provided on the one-off costs that some market participants would incur as a result of the adoption of uniform conflict of laws rules. The recommendations for improvement were taken into account in the impact assessment to the extent possible.

- **Fundamental rights**

The objectives of this initiative fully support the right to property enshrined in Article 17 of the Charter of Fundamental Rights of the European Union³⁴. By clarifying which law governs the proprietary effects of assignments of claims, this proposal would contribute to upholding the right to property as it would diminish the risk that the ownership of investors or collateral takers over claims might be hindered.

By reducing cases of fall-outs and financial losses due to the absence of uniform provisions on the law applicable to the proprietary effects of assignments of claims, this proposal would positively impact the freedom to conduct a business set out in Article 16 of the Charter.

By harmonising the conflict of laws rules on the proprietary effects of assignments of claims, this proposal would discourage forum shopping as any Member State's court or authority hearing a dispute would base its judgement on the same national substantive law. This would facilitate the right to an effective remedy set out in Article 47 of the Charter.

³³ For example, the German Banking Industry Committee states in its response to the public consultation that, in securitisation transactions, parties need to check notice or registration requirements. The Association for Financial Markets in Europe (AFME) states in its response that parties must check whether the assignment will be effective under the law of the assignor.

³⁴ Charter of the Fundamental Rights of the European Union, OJ C 326 of 26/10/2012, p. 391.

4. BUDGETARY IMPLICATIONS

The proposal will have no impact on the Union budget.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The Commission will monitor the impact of the proposed initiative by way of a questionnaire sent to key stakeholders. The questionnaire will aim at gathering information on trends in the number of cross-border assignments, trends in due diligence costs further to the adoption of a uniform conflict of laws rule, and the one-off costs related to changes in legal documentation. The impact of the proposed solution will be evaluated in a report prepared by the Commission five years after the date of application of the proposed instrument.

The monitoring of the impact of the adoption of a uniform conflict of laws rule will cover the areas of factoring, collateralisation, securitisation and the specific assignments of cash credited to an account in a credit institution and the assignment of claims arising from financial instruments such as derivative contracts.

The analysis will take into account that the volume of assignments, the transaction costs and the nature of hidden risks in cross-border assignments of claims are influenced by a number of different economic, legal or regulatory factors unrelated to legal certainty on the law applicable to the third-party effects of such assignments.

- **Detailed explanation of the specific provisions of the proposal**

Article 1: Scope

This article defines the scope of the proposed Regulation taking into account existing Union legislation and, in particular, the scope of the Rome I Regulation.

Article 1(2) contains a list of exclusions from the scope of the proposed Regulation. These matters will be governed either by existing Union legislation or by national conflict of laws rules.

Article 2: Definitions

This article first defines the main concepts on which the proposed Regulation is based, namely “assignment”, “claim” and “third-party effects”. The definition of “assignment” is aligned with that contained in the Rome I Regulation. It refers only to a voluntary transfer of a claim, including contractual subrogation. It covers both outright transfers of a claim and also the transfer of a claim as collateral or security.

The definition of “claim” in the proposed Regulation codifies the general understanding of what a claim is under the Rome I Regulation, namely a broad concept referring to a debt of whatever nature, whether monetary or non-monetary, and whether arising from a contractual obligation governed by the Rome I Regulation or a non-contractual obligation governed by the Rome II Regulation. The definition of “third-party effects” is determined by the material scope of the proposed Regulation.

The article defines “habitual residence” in line with the definition contained in Article 19(1) of the Rome I Regulation, that is, as the place of central administration for companies and as the principal place of business for a natural person acting in the course of his business activity. The proposed Regulation does not include a definition of habitual residence equivalent to the definition contained in Article 19(2) of the Rome I Regulation, that is, as the place of location of a branch, because of the uncertainty that such a rule would create if the same claim was assigned by the assignor’s central management and also by the management of a branch located in a different country.

The concept of “habitual residence” will generally coincide with the centre of main interest (COMI) used in the Insolvency Regulation.

The article defines “credit institution” in accordance with Union legislation governing credit institutions; “cash” in accordance with the Financial Collateral Directive; and “financial instrument” in accordance with MiFID II.

Article 3: *Universal application*

This article establishes the universal character of the proposed Regulation by providing that the national law designated as applicable by the proposed Regulation can be the law of a Member State or the law of a third country.

Article 4: *Applicable law*

This article provides for uniform conflict of laws rules on the third-party effects of the assignment of claims. The article lays down in paragraph 1 a general rule based on the law of the assignor’s habitual residence, two exceptions in paragraph 2 based on the law of the assigned claim and, in paragraph 3, a possibility for the assignor and the assignee in a securitisation to choose the law of the assigned claim as the law applicable to the third-party effects of the assignment. A rule applicable to priority conflicts between assignees arising from the application of the law of the assignor’s habitual residence and the law of the assigned claim to the third-party effects of two assignments of the same claim is laid down in paragraph 4.

According to the general rule, the law that governs the third-party effects of assignments of claims is the law of the country where the assignor has its habitual residence at the material time.

The article also deals, in the second subparagraph of paragraph 1, with the so-called *conflict mobile*, that is, the rare occurrence in which the assignor changes habitual residence between two assignments of the same claim as, in such cases, competing assignments could be subject to different national laws. The rule on *conflict mobile* provides that the applicable law will be the law of the assignor’s habitual residence at the time at which one of the two assignments first becomes effective against third parties; in other words, at the time at which one of the assignees first completes the requirements to make the assignment effective against third parties.

When, as in the case of a syndicated loan (a loan offered by a group of lenders - referred to as a syndicate - to a single borrower for large projects), each creditor within a group of creditors owns a share of the same claim, the law of the assignor’s habitual residence will govern the third-party effects of an assignment made by a creditor of his own share of the claim.

Paragraph 2 of the article provides that the third-party effects of certain assignments are, as an exception, subject to the law of the assigned claim. The law of the assigned claim refers to the law that governs the contract between the original creditor/assignor and the debtor from which the claim arises. With this exception the proposed Regulation lays down a conflict of laws rule which adapts to the needs of market participants involved in these specific assignments. The assignments whose third-party effects are subject to the law of the assigned claim are: (i) the assignment of cash credited to an account in a credit institution; and (ii) the assignment of claims arising from financial instruments.

On the first exception: Where an account holder (for example, a consumer) places cash in an account in a credit institution (for example, a bank), there is an initial contract between the account holder (the creditor) and the credit institution (the debtor). The account holder is the creditor of a claim against the credit institution, the debtor, for the payment of the cash credited to the account in the credit institution. An account holder may wish to assign the cash credited to his account in a credit institution to another credit institution as security to obtain credit. In such cases, the law that will govern who has ownership title over the claim once the cash has been assigned as collateral will not be the law of the habitual residence of the account holder (the assignor) but the law that governs the assigned claim, that is, the law that governs the contract between the account holder and the first credit institution from which the claim arises. For third parties such as creditors of the assignor and competing assignees, greater predictability is provided if the law applicable to the third-party effects of the assignment of the cash credited to an account in a credit institution is the law applicable to the cash claim. This is because it is generally assumed that the claim that an account holder has over cash credited to an account in a credit institution is governed by the law of the country where the credit institution is located. This law is normally chosen in the account contract between the account holder and the credit institution.

As to the second exception: The third-party effects of assignments of claims arising from financial instruments, such as derivative contracts, should be subject to the law governing the assigned claim, that is, the law governing the financial instrument such as the derivative contract. A claim arising from a financial instrument could be, for example, the amount due after the calculation of the close-out in a derivative contract. Subjecting the third-party effects of assignments of claims arising from financial instruments to the law of the assigned claim rather than the law of the assignor's habitual residence is essential to preserve the stability and smooth functioning of financial markets as well as the expectations of market participants. These are preserved as the law that governs the financial instrument from which the claim arises, such as a derivative contract, is the law chosen by the parties or the law determined in accordance with non-discretionary rules applicable to financial markets.

The third paragraph of the article deals with the law applicable to the third-party effects of assignments of claims pursuant to a securitisation. Securitisation enables the assignor, called 'originator' (for example, a bank or a company) to refinance a set of its claims (for example, motor vehicle rents, credit card receivables, mortgage loan payments) by assigning them to a 'special purpose vehicle' (SPV). The special purpose vehicle (assignee) then issues debt securities (for example, bonds) in the capital markets reflecting the proceeds from these claims. As payments are made under the underlying claims, the special purpose vehicle uses the proceeds it receives to make payments on the securities to the investors. Securitisation can lower the cost of financing because the special purpose vehicle is structured in such a way as to make it insolvency-remote. For corporates, securitisation can provide access to credit at lower cost than bank loans. For banks, securitisation is a way to put some of their assets to better use and free up their balance sheets to allow for further lending to the economy.

Currently, large assignors and assignees (for example, large banks) involved in securitisations apply the law of the assigned claim to the third-party effects of the assignment. 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 one same country. The special purpose vehicle must then comply with the requirements laid down in the law of only one country to ensure that it acquires legal title over the bundle of assigned claims. Given that large operators often carry out securitisations on a cross-border basis, that is, with the originators being located in different Member States, applying the law of the assignor's habitual residence to the third-party effects of the assignment of claims in these cases would be more cumbersome for the assignee as it would need to comply with the requirements laid down in the laws of various countries, that is, the laws of each of the countries where an originator is located.

In contrast, smaller operators (for example, smaller banks and corporates) most often need to apply the law of the assignor's habitual residence to the third-party effects of the assignment of claims in a securitisation because the claims included in the package to be assigned to the special purpose vehicle are governed by the laws of different countries. In such cases, smaller assignees could not apply the law of the assigned claim to the third-party effects of the assignment as they would not be equipped to comply with the requirements to obtain legal title over the assigned claims under each of the laws governing each of the claims included in the package. Instead, it is easier for smaller assignees to comply with the requirements under only one law, namely the law of the assignor's habitual residence.

In short, by providing for a choice of law, paragraph 3 of this article aims at not affecting the current practice of large banks of applying the law of the assigned claim to the third-party effects of assignments in securitisations where the assigned claims are all subject to the same country's law but the assignors (originators) are located in various Member States. At the same time, paragraph 3 aims at making it possible for smaller banks and corporates to enter or strengthen their position on the securitisation market by being able to become the assignees of multiple claims subject to different countries' laws.

In any event, the flexibility offered by paragraph 3 enables securitisation operators to decide for each securitisation whether to choose the law of the assigned claim or remain subject to the general rule based on the law of the assignor's habitual residence depending on the structure of their securitisation, in particular on whether the assigned claims are subject to the law of one or various countries, and on whether there is one or more originators and they are located in one or various countries. Paragraph 4 of this article lays down a conflict of laws rule to resolve priority conflicts between assignees of the same claim when the third-party effects of the assignment of the claim have been subject to the law of the assigned claim in one assignment and to the law of the assignor's habitual residence in another assignment. This situation can occur (normally accidentally and in no particular order) in case a claim has been first assigned in factoring, collateralisation or a (first) securitisation in which no choice of law has been made and, subsequently, in a (second) securitisation in which the parties chose the law of the assigned claim as the law applicable to the third-party effects of the assignment. The third-party effects of assignments of claims in factoring, collateralisation or a (first) securitisation in which no choice of law has been made would all be subject to the law of the assignor's habitual residence. In contrast, the third-party effects of assignments of claims in a (second) securitisation where the parties chose the law of the assigned claim would be subject

to the law of the assigned claim. The proposed Regulation provides for an objective factor to determine which law should apply to resolve the priority conflict between assignees: the law that should apply would be the law applicable to the third-party effects of the assignment of claims which first became effective against third parties under its applicable law. This rule is consistent with the rule applicable to *conflict mobile* under paragraph 1 of this article and, like that rule, is based on the time at which the assignment of claims first becomes effective against third parties because the proposed Regulation concerns third-party effects.

Article 5: *Scope of the applicable law*

This article harmonises a non-exhaustive list of issues that should be governed by the national substantive law designated as the law applicable to the third-party effects of the assignments of claims. This article therefore spells out the content of the concept “third-party effects” (or proprietary effects) of the assignment of claims. In general, the applicable law will determine who has acquired legal title over the assigned claim. In particular, the applicable law should govern two main issues in order to determine whether a person has acquired legal title over the assigned claim:

- (i) the effectiveness of the assignment of the claim against third parties: that is, the steps that need to be taken by the assignee in order to be able to assert his right over the claim towards third parties – for example, registering the assignment with a public authority or registry, or notifying the debtor in writing of the assignment; and
- (ii) priority issues: that is, the determination of whose right has priority in cases of conflict between competing claimants – for example, between competing assignees when the same claim has been assigned more than once, or between an assignee and another right-holder, for example a creditor of the assignor or the assignee in insolvency cases.

The term ‘third parties’ should be understood as third parties other than the debtor, as all aspects affecting the debtor are, pursuant to Article 14(2) of the Rome I Regulation, governed by the law of the assigned claim (that is, the law that governs the original contract from which the assigned claim arises).

The modalities for the creation of rights and the transfer of rights may vary under the legal orders of the Member States. Given that the proposed Regulation has a universal character and can therefore designate as the law applicable to the third-party effects of assignments of claims the law of any country, the proposed Regulation aims at covering a variety of possible priority conflicts between competing claimants. The proposed Regulation covers priority conflicts arising not only from assignments of claims (for example, between two assignees of the same claim) but also from legally or functionally equivalent mechanisms, in particular the transfer of a contract and the novation of a contract, which can be used to pass on a contract and thus both the rights (the claim) and obligations arising from that contract. The law designated as applicable by the proposed Regulation should therefore govern not only priority conflicts between competing assignees but also priority conflicts between an assignee and a competing claimant who has become the beneficiary of a claim further to the transfer of a contract or the novation of a contract. It should be stressed that the proposal does not designate the law applicable to the transfer of contracts or the novation of contracts (for example, the law applicable to the novation of derivative contracts), but only the law applicable to possible priority conflicts over a claim first assigned and then transferred again (the same claim or the economically equivalent claim) by means of a transfer of contract or a novation of contract. If the proposed Regulation did not cover priority conflicts between an assignee and a beneficiary of a claim further to the transfer of a contract or the novation of a contract, a situation of legal uncertainty could arise whereby both an assignee and the

competing beneficiary of the claim further to the transfer or novation of a contract would require payment from the debtor and no common conflict of laws rule could apply to resolve that conflict.

Article 6: Overriding mandatory provisions / Article 7: Public policy

These articles provide for possibilities to apply the law of the forum instead of the law designated as the applicable law by Article 4. Overriding mandatory provisions could refer, for example, to the obligation to register the assignment of claims in a public registry.

Articles 8 to 12: General issues of application of conflict of laws rules

These articles deal with general issues of application of conflict of laws rules in line with other Union instruments on applicable law, in particular the Rome I Regulation.

Article 10: Relationship with other provisions of Union law

This article aims at safeguarding the application of *lex specialis* laying down conflict of laws rules on the third-party effects of assignments of claims in relation to particular matters.

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 EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty on the Functioning of the European Union, and in particular Article 81(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee³⁵,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice. For the progressive establishment of such an area, the Union is to adopt measures relating to judicial cooperation in civil matters having cross-border implications to the extent necessary for the proper functioning of the internal market.
- (2) Pursuant to Article 81 of the Treaty, these measures are to include those aimed at ensuring the compatibility of the rules applicable in the Member States concerning the conflict of laws.
- (3) The proper functioning of the internal market requires, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict of law rules in the Member States to designate as the applicable law the same national law irrespective of the Member State of the court in which an action is brought.
- (4) Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) does not cover the questions of third-party effects of assignment of claims. However, Article 27(2) of that Regulation required the Commission to submit to the European Parliament, the Council and the European Economic and Social Committee a report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person which should be accompanied, if appropriate, by a proposal to amend that Regulation and an assessment of the impact of the provisions to be introduced.

³⁵ OJ C , , p. .

- (5) On 18 February 2015 the Commission adopted a Green Paper on Building a Capital Markets Union³⁶ which stated that achieving greater legal certainty in cases of cross-border transfer of claims and the order of priority of such transfers, particularly in cases of insolvency, is an important aspect in developing a pan-European market in securitisation and financial collateral arrangements, and also of other activities such as factoring.
- (6) On 30 September 2015 the Commission adopted a Communication with an Action Plan on Building a Capital Markets Union³⁷. This Capital Markets Union Action Plan noted that differences in the national treatment of third-party effects of assignment of debt claims complicate the use of these instruments as cross-border collateral, concluding that this legal uncertainty frustrates economically significant financial operations, such as securitisations. The Capital Markets Union Action Plan announced that the Commission would propose uniform rules to determine with legal certainty which national law should apply to the third-party effects of the assignment of claims.
- (7) On 29 June 2016 the Commission adopted a report on the appropriateness of Article 3(1) of Directive 2002/47/EC on financial collateral arrangements³⁸ focusing on the question whether this Directive works effectively and efficiently as regards formal acts required to provide credit claims as collateral. The report concluded that a proposal of uniform rules regarding the third-party effects of assignment of claims would allow determining with legal certainty which national law should apply to the third-party effects of the assignment of claims, which would contribute to achieving greater legal certainty in cases of cross-border mobilisation of credit claims as collateral.
- (8) On 29 September 2016 the Commission adopted a report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over the right of another person. The report concluded that uniform conflict of law rules governing the effectiveness of assignments against third parties as well as questions of priority between competing assignees or between assignees and other right holders would enhance legal certainty and reduce practical problems and legal costs relating to the current diversity of approaches in the Member States.
- (9) The substantive scope and the provisions of this Regulation should be consistent with Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II),³⁹ Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I),⁴⁰ Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast),⁴¹ and Regulation (EU) 2015/848 on insolvency proceedings.⁴² The interpretation of this

³⁶ COM(2015) 63 final.

³⁷ COM(2015) 468 final.

³⁸ COM(2016) 430 final.

³⁹ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, p. 40-49.

⁴⁰ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6-16.

⁴¹ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1-32.

⁴² Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141, 5.6.2015, p. 19-72.

Regulation should as much as possible avoid regulatory gaps between these instruments.

- (10) This Regulation implements the Capital Markets Union Action Plan. It also fulfils the requirement laid down in Article 27(2) of the Rome I Regulation that the Commission should publish a report and, if appropriate, a proposal on the effectiveness of an assignment of a claim against third parties and the priority of the assignee over the right of another person.
- (11) 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 lack of legal certainty creates a legal risk in cross-border assignments of claims which does not exist in domestic assignments as different national substantive rules may be applied depending on the Member State whose courts or authorities assess a dispute as to the legal title over the claims.
- (12) If assignees are not aware of the legal risk or choose to ignore it, they may face unexpected financial losses. Uncertainty about who has legal title over the claims assigned on a cross-border basis can have knock-on effects and deepen and prolong the impact of a financial crisis. If assignees decide to mitigate the legal risk by seeking specific legal advice, they will incur higher transaction costs not required for domestic assignments. If assignees are deterred by the legal risk and choose to avoid it, they may forego business opportunities and market integration may be reduced.
- (13) The objective of this Regulation is to provide legal certainty by laying down common conflict of laws rules designating which national law applies to the third-party effects of assignments of claims.
- (14) A claim gives a creditor a right to the payment of a sum of money or the performance of an obligation by the debtor. The assignment of a claim enables the creditor (assignor) to transfer his 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 Regulation⁴³.
- (15) The conflict of laws rules laid down in this Regulation should govern the proprietary effects of assignments of claims as between all parties involved in the assignment (that is, between the assignor and the assignee and between the assignee and the debtor) as well as in respect of third parties (for example, a creditor of the assignor).
- (16) The claims covered by this Regulation are trade receivables, claims arising from financial instruments as defined in Directive 2014/65/EU on markets in financial instruments⁴⁴ and cash credited to an account in a credit institution. Financial instruments as defined in Directive 2014/65/EU include securities and derivatives

⁴³ In particular Articles 3, 4 and 14.

⁴⁴ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173, 12.6.2014, p. 349–496.

traded on financial markets. While securities are assets, derivatives are contracts which include both rights (or claims) and obligations for the parties to the contract.

- (17) This Regulation concerns the third-party effects of the assignment of claims. It does not cover the transfer of the contracts (such as derivative contracts), in which both rights (or claims) and obligations are included, or the novation of contracts including such rights and obligations. As this Regulation does not cover the transfer or the novation of contracts, trading in financial instruments, as well as the clearing and the settlement of these instruments, will continue to be governed by the law applicable to contractual obligations as laid down in the Rome I Regulation. This law is normally chosen by the parties to the contract or is designated by non-discretionary rules applicable to financial markets.
- (18) Matters governed by the Financial Collateral Directive⁴⁵, the Settlement Finality Directive⁴⁶, the Winding-Up Directive⁴⁷ and the Registry Regulation⁴⁸ should not be affected by this Regulation.
- (19) This Regulation should be universal: the law designated by this Regulation should apply even if it is not the law of a Member State.
- (20) Predictability is essential for third parties interested in acquiring legal title over the assigned claim. Applying the law of the country where the assignor has its habitual residence to the third-party effects of assignments of claims enables the third parties concerned to easily know in advance which national law will govern their rights. The law of the assignor's habitual residence should thus apply as a rule to the third-party effects of assignments of claims. This rule should apply, in particular, to the third-party effects of the assignment of claims in factoring, collateralisation and, where the parties have not chosen the law of the assigned claim, securitisation.
- (21) The law chosen as a rule to apply to the third-party effects of assignments of claims should enable the determination of the applicable law where future claims are assigned, a common practice where multiple claims are assigned, such as in factoring. The application of the law of the assignor's habitual residence enables the determination of the law applicable to the third-party effects of the assignment of future claims.
- (22) The need to determine who has legal title over an assigned claim often arises when defining the insolvency estate where the assignor becomes insolvent. Coherence between the conflict of laws rules in this Regulation and those laid down in Regulation (EU) 2015/848 on insolvency proceedings is therefore desirable. Coherence should be achieved through the application as a rule of the law of the assignor's habitual residence to the third-party effects of assignments of claims, as the use of the assignor's habitual residence as connecting factor coincides with the debtor's centre of main interest used as connecting factor for insolvency purposes.

⁴⁵ Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, OJ L 168, 27.6.2002, p. 43–50.

⁴⁶ Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, OJ L 166, 11.6.1998, p. 45–50.

⁴⁷ Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions, OJ L 125, 5.5.2001, p. 15–23.

⁴⁸ Commission Regulation (EU) No 389/2013 of 2 May 2013 establishing a Union Registry pursuant to Directive 2003/87/EC of the European Parliament and of the Council, Decisions No 280/2004/EC and No 406/2009/EC of the European Parliament and of the Council and repealing Commission Regulations (EU) No 920/2010 and No 1193/2011, OJ L 122, 3.5.2013, p. 1–59.

- (23) The 2001 United Nations Convention on the Assignment of Receivables in International Trade provides that the priority of the right of an assignee in the assigned receivable over the right of a competing claimant is governed by the law of the State in which the assignor is located. The compatibility between the Union conflict of laws rules laid down in this Regulation and the solution favoured at the international level by the Convention should facilitate the resolution of international disputes.
- (24) Where the assignor changes its habitual residence between multiple assignments of the same claim, the applicable law should be the law of the assignor's habitual residence at the time at which one of the assignees first makes his assignment effective against third parties by completing the requirements under the law applicable on the basis of the assignor's habitual residence at that time.
- (25) In accordance with market practice and the needs of market participants, the third-party effects of certain assignments of claims should, as an exception, be governed by the law of the assigned claim, that is, the law that governs the initial contract between the creditor and the debtor from which the claim arises.
- (26) The law of the assigned claim should govern the third-party effects of the assignment by an account holder of cash credited to an account in a credit institution, where the account holder is the creditor/assignor and the credit institution is the debtor. Greater predictability is provided to third parties, such as creditors of the assignor and competing assignees, if the law of the assigned claim applies to the third-party effects of these assignments as it is generally assumed that the claim that an account holder has over cash credited to an account in a credit institution is governed by the law of the country where the credit institution is located (rather than by the law of the habitual residence of the account holder/assignor). This law is normally chosen in the account contract between the account holder and the credit institution.
- (27) The third-party effects of the assignment of claims arising from financial instruments should also be subject to the law governing the assigned claim, that is, the law governing the contract from which the claim arises (such as a derivative contract). Subjecting the third-party effects of assignments of claims arising from financial instruments to the law of the assigned claim rather than the law of the assignor's habitual residence is essential to preserve the stability and smooth functioning of financial markets. These are preserved as the law that governs the financial instrument from which the claim arises is the law chosen by the parties to the contract or the law determined in accordance with non-discretionary rules applicable to financial markets.
- (28) Flexibility should be provided in the determination of the law applicable to the third-party effects of assignments of claims in the context of a securitisation in order to cater for the needs of all securitisers and facilitate the expansion of the cross-border securitisation market to smaller operators. Whilst the law of the assignor's habitual residence should apply as the default rule to the third-party effects of assignments of claims in the context of a securitisation, the assignor (originator) and the assignee (special purpose vehicle) should be able to choose that the law of the assigned claim should apply to the third-party effects of the assignment of claims. The assignor and the assignee should be able to decide that the third-party effects of the assignment of claims in the context of a securitisation should remain subject to the general rule of the assignor's habitual residence or to choose the law of the assigned claim in function of the structure and characteristics of the transaction, for example the number and location of the originators and the number of laws which govern the assigned claims.

- (29) Priority conflicts between assignees of the same claim may arise where the third-party effects of the assignment have been subject to the law of the assignor's habitual residence in one assignment and to the law of the assigned claim in another assignment. In such cases, the law applicable to resolve the priority conflict should be the law applicable to the third-party effects of the assignment of the claim which has first become effective against third parties under its applicable law.
- (30) The scope of the national law designated by this Regulation as the law applicable to the third-party effects of an assignment of claims should be uniform. The national law designated as applicable should govern in particular (i) the effectiveness of the assignment against third parties, that is, the steps that need to be taken by the assignee in order to ensure that he acquires legal title over the assigned claim (for example, registering the assignment with a public authority or registry, or notifying the debtor in writing of the assignment); and (ii) priority issues, that is, conflicts between several claimants as to who has title over the claim (for example, between two assignees where the same claim has been assigned twice, or between an assignee and a creditor of the assignor).
- (31) Given the universal character of this Regulation, the laws of countries with different legal traditions may be designated as the applicable law. Where, further to the assignment of a claim, the contract from which the claim arises is transferred, the law designated by this Regulation as the law applicable to the third-party effects of a claim assignment should also govern a priority conflict between the assignee of the claim and the new beneficiary of the same claim further to the transfer of the contract from which the claim arises. For the same reason, the law designated by this Regulation as the law applicable to the third-party effects of a claim assignment should also apply, where novation is used as a functional equivalent of the transfer of a contract, to resolve a priority conflict between an assignee of a claim and the new beneficiary of the functionally equivalent claim further to the novation of the contract from which the claim arises.
- (32) Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions, which should be interpreted restrictively.
- (33) Respect for international commitments entered into by the Member States means that this Regulation should not affect international conventions to which one or more Member States are parties at the time when this Regulation is adopted. To make the rules more accessible, the Commission should publish the list of the relevant conventions in the *Official Journal of the European Union* on the basis of information supplied by the Member States.
- (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.
- (35) Since the objectives of this Regulation cannot be sufficiently achieved by the Member States and can rather, by reason of the scale and effects of this Regulation, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on the European Union. The desired uniformity of the conflict of laws rules on the third-party effects of assignments of claims can only be achieved through a Regulation as only a Regulation

ensures a consistent interpretation and application of the rules at national level. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.

- (36) In accordance with Article 3 and Article 4a(1) of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, the [United Kingdom] [and] [Ireland] [have/has notified their/its wish to take part in the adoption and application of the present Regulation] [are/is not taking part in the adoption of this Regulation and are/is not bound by it or subject to its application].
- (37) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the treaty on European Union and the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.

HAVE ADOPTED THIS REGULATION:

CHAPTER I

SCOPE AND DEFINITIONS

Article 1

Scope

1. This Regulation shall apply, in situations involving a conflict of laws, to the third-party effects of assignments of claims in civil and commercial matters.

It shall not apply, in particular, to revenue, customs or administrative matters.

2. The following shall be excluded from the scope of this Regulation:

- (a) assignment of claims arising from family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations;
- (b) assignment of claims arising from matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;
- (c) assignment of claims arising from bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;
- (d) assignment of claims arising from questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body;
- (e) assignment of claims arising from the constitution of trusts and the relationship between settlors, trustees and beneficiaries;

- (f) assignment of claims arising from life insurance contracts arising out of operations carried out by organisations other than undertakings referred to in Article 2(1) and (3) of Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)⁴⁹ the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or to a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work.

Article 2

Definitions

For the purposes of this Regulation:

- (a) ‘assignor’ means a person who transfers his right to claim a debt against a debtor to another person;
- (b) ‘assignee’ means a person who obtains the right to claim a debt against a debtor from another person;
- (c) ‘assignment’ means a voluntary transfer of a right to claim a debt against a debtor. It includes outright transfers of claims, contractual subrogation, transfers of claims by way of security and pledges or other security rights over claims;
- (d) ‘claim’ means 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;
- (e) ‘third-party effects’ means 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, creditors of the assignor and other third parties;
- (f) ‘habitual residence’ means, for companies and other bodies, corporate or unincorporated, the place of central administration; for a natural person acting in the course of his business activity, his principal place of business;
- (g) ‘credit institution’ means an undertaking as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013⁵⁰, including branches, within the meaning of point (17) of Article 4(1) of that Regulation, of credit institutions having their head offices inside or, in accordance with Article 47 of Directive 2013/36/EU⁵¹, outside the Union where such branches are located in the Union;
- (h) ‘cash’ means money credited to an account in a credit institution in any currency;

⁴⁹ Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), OJ L 335, 17.12.2009, p. 1–155.

⁵⁰ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ L 176, 27.6.2013, p. 1–337.

⁵¹ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176, 27.6.2013, p. 338–436.

- (i) ‘financial instrument’ means those instruments specified in Section C of Annex I of Directive 2014/65/EU⁵².

CHAPTER II

UNIFORM RULES

Article 3

Universal application

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

Article 4

Applicable law

1. Unless otherwise provided for in this Article, the third-party effects of an assignment of claims shall be governed by the law of the country in which the assignor has its habitual residence at the material time.

Where the assignor has changed its habitual residence between two assignments of the same claim to different assignees, the priority of the right of an assignee over the right of another assignee shall be governed by the law of the habitual residence of the assignor at the time of the assignment which first became effective against third parties under the law designated as applicable pursuant to the first subparagraph.

2. The law applicable to the assigned claim shall govern the third-party effects of the assignment of:

- (a) cash credited to an account in a credit institution;
- (b) claims arising from a financial instrument.

3. 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.

The choice of law shall be made expressly in the assignment contract or by a separate agreement. The substantive and formal validity of the act whereby the choice of law was made shall be governed by the chosen law.

4. 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.

⁵² Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173, 12.6.2014, p. 349–496.

Article 5

Scope of the applicable law

The law applicable to the third-party effects of assignment of claims pursuant to this Regulation shall govern, in particular:

- (a) the requirements to ensure the effectiveness of the assignment against third parties other than the debtor, such as registration or publication formalities;
- (b) the priority of the rights of the assignee over the rights of another assignee of the same claim;
- (c) the priority of the rights of the assignee over the rights of the assignor's creditors;
- (d) the priority of the rights of the assignee over the rights of the beneficiary of a transfer of contract in respect of the same claim;
- (e) the priority of the rights of the assignee over the rights of the beneficiary of a novation of contract against the debtor in respect of the equivalent claim.

Article 6

Overriding mandatory provisions

1. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

2. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a Member State for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the third-party effects of assignments of claims pursuant to this Regulation.

CHAPTER III

OTHER PROVISIONS

Article 7

Public policy (*ordre public*)

The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.

Article 8

Exclusion of renvoi

The application of the law of any State specified by this Regulation means the application of the rules of law in force in that State other than its rules of private international law.

Article 9

States with more than one legal system

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of the third-party effects of assignments of claims, each territorial unit shall be considered as a State for the purposes of identifying the law applicable under this Regulation.
2. A Member State which comprises several territorial units each of which has its own rules of law in respect of the third-party effects of assignments of claims shall not be required to apply this Regulation to conflicts of laws arising between such units only.

Article 10

Relationship with other provisions of Union law

This Regulation shall not prejudice the application of provisions of Union law which, in relation to particular matters, lay down conflict of laws rules relating to the third-party effects of assignments of claims.

Article 11

Relationship with existing international conventions

1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict of laws rules relating to the third-party effects of assignments of claims.
2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.

Article 12

List of Conventions

1. By [*date of application*], Member States shall notify the Commission of the conventions referred to in Article 11(1). After that date, Member States shall notify the Commission of all denunciations of such conventions.
2. Within six months of receipt of the notifications referred to in paragraph 1, the Commission shall publish in the Official Journal of the European Union:
 - (a) a list of the conventions referred to in paragraph 1;
 - (b) the denunciations referred to in paragraph 1.

Article 13

Review clause

By [*five years after the date of application*], the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. If appropriate, the report shall be accompanied by proposals to amend this Regulation.

Article 14

Application in time

1. This Regulation shall apply to assignments of claims concluded on or after [*date of application*].
2. The law applicable pursuant to this Regulation shall determine whether the rights of a third party in respect of a claim assigned after the date of application of this Regulation have priority over the rights of another third person acquired before this Regulation becomes applicable.

Article 15

Entry into force and date of application

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from [*18 months from date of entry into force*].

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Brussels,

For the European Parliament
The President

For the Council
The President