



BANKING AND FINANCE

# Public consultation on the conflict of laws rules for third party effects of transactions in securities and claims

Fields marked with \* are mandatory.

## Introduction

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Factoring, securitisation, acceptance of collateral are transactions that financial markets heavily rely on. But the rules determining whether proprietary rights have been validly transferred in a transaction in securities or claims differ across Member States. In order to have certainty about the effects of a cross-border transaction on third parties, it is crucial to know which country's law is applicable. However, the rules that designate the applicable law (so-called "conflict of laws" rules) are also different, uncertain and sometimes even inconsistent across the EU. As a result, there is legal uncertainty in cross-border transactions as to which law applies and whether a transaction has validly transferred ownership or not.

To facilitate cross-border investing the CMU Action Plan envisages action on securities ownership and thirdparty effects of assignment of claims. The CMU Communication further specifies that the Commission will propose a legislative initiative to determine with legal certainty which national law shall apply to securities ownership and to third party effects of the assignment of claims.


The purpose of this public consultation is to gather stakeholders' views on the practical problems and types of risks caused by the current state of harmonisation of the conflict of laws rules on third party effects of transactions in securities and claims and to gather views on possibilities for improving such rules.

This consultation document and the accompanying questionnaire are structured along four subject matters: book-entry securities (Section 3), certificated securities (Section 4 – both sections being mainly relevant for the securities industry), claims (Section 5 - primarily relevant for the factoring and banking industry), and a specific subset of claims that might need different solutions (Section 6 - primarily relevant for securitisation, banking and the derivative market industry).

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**Please note:** In order to ensure a fair and transparent consultation process **only responses received through our online questionnaire will be taken into account** and included in the report summarising the responses. Should you have a problem completing this questionnaire or if you require particular assistance, please contact [fisma-securities-and-claims@ec.europa.eu](mailto:fisma-securities-and-claims@ec.europa.eu).

More information:

- [on this consultation](#)
- [on the protection of personal data regime for this consultation](#) 

## 1. Information about you

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\*Are you replying as:

- a private individual
- an organisation or a company
- a public authority or an international organisation

\*Name of the public authority:

Ministry of Finance / Ministry of Security and Justice of the Netherlands

Contact email address:

The information you provide here is for administrative purposes only and will not be published

\*Type of public authority

- International or European organisation
- Regional or local authority
- Government or Ministry
- Regulatory authority, Supervisory authority or Central bank
- Other public authority

\*Where are you based and/or where do you carry out your activity?

- Austria
- Belgium
- Bulgaria
- Croatia
- Cyprus
- Czech Republic
- Denmark
- Estonia
- Finland
- France
- Germany
- Greece
- Hungary
- Iceland
- Ireland
- Italy
- Latvia
- Liechtenstein
- Lithuania
- Luxembourg
- Malta
- Norway
- Poland
- Portugal
- Romania
- Slovakia
- Slovenia
- Spain
- Sweden
- Switzerland
- The Netherlands
- United Kingdom
- Other country

\*To which member State(s) will your replies relate to?

- Austria
- Belgium
- Bulgaria
- Croatia
- Cyprus
- Czech Republic
- Denmark
- Estonia
- Finland
- France
- Germany
- Greece
- Hungary
- Iceland
- Ireland
- Italy
- Latvia
- Liechtenstein
- Lithuania
- Luxembourg
- Malta
- Norway
- Poland
- Portugal
- Romania
- Slovakia
- Slovenia
- Spain
- Sweden
- Switzerland
- The Netherlands
- United Kingdom
- EU 28
- More than one EU member State
- Other country

\*Field of activity or sector (*if applicable*):

*at least 1 choice(s)*

- Accounting
- Auditing
- Legal consulting
- Banking
- Credit rating
- Insurance
- Pension provision
- Investment management (e.g. hedge funds, private equity funds, venture capital funds, money market funds, securities)
- CCP
- CSD
- Regulated market
- Issuer
- Investor
- Academia
- Other
- Not applicable

\*Please specify your activity field(s) or sector(s):


Legislation on financial law, regulatory, private international law



## Important notice on the publication of responses

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\*Contributions received are intended for publication on the Commission's website. Do you agree to your contribution being published?


(see [specific privacy statement](#) )

- Yes, I agree to my response being published under the name I indicate (*name of your organisation /company/public authority or your name if your reply as an individual*)
- No, I do not want my response to be published

## 2. Your opinion

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### Section 2: what is the issue and how do markets deal with it?

Please [refer to the corresponding section of the consultation document](#)  to read some contextual information before answering the questions.

**Question 1: Do you observe in practice that legal opinions on cross-border transactions in securities and claims contain an analysis of which law is applicable (conflict of laws)?**

- Yes, always where relevant
- In general yes, but not in all relevant situations
- In rare cases yes, but often not
- No, in general legal opinions do not include an analysis of which law applies
- I don't know / I am not familiar with legal opinions

Please elaborate on your reply to Question 1 if you have further information:

General remark: since this is the opinion of two ministries (Finance, Justice), we cannot answer every question with regard to practice. With respect to legal opinions, we can only say what practitioners tell us.

**Question 2: Do you think that default of a large participant in the financial market who holds assets in various Member States could possibly create difficult conflict of laws questions, putting in doubt who owns (or has entitlement to) which assets?**

- Yes
- No
- Don't know / no opinion / not relevant

If you answered YES to question 2, please provide concrete examples or specify in which legal context this problem might arise, pointing also to relevant national provisions where possible:

See for instance the problems mentioned in the Report by Goode, Kanda and Kreuzer (Explanatory Report on the Hague Securities Convention), especially page 20.


If you answered YES to question 2, please give an estimate of the magnitude of the issue (e.g. number or value of transactions that might be concerned):

If you answered YES to question 2, please explain how market participants deal with such legal uncertainty:


As far as those market participants tell us they try to make transactions 'double bound' complying with different sets of law where they want to be sure at every stage of the transaction (including enforcement). This is something they will keep doing if there would be a uniform European rule on the applicable law to third party effects since most cases are not limited to intra-EU but go beyond that.

## Section 3: book-entry securities (primarily relevant for the securities industry)

### 3.1 Shortcomings of the current situation

Please [refer to the corresponding section of the consultation document](#)  to read some contextual information before answering the questions.

#### 3.1.1 Unclear location of securities accounts

Please [refer to the corresponding section of the consultation document](#)  to read some contextual information before answering the questions.

**Question 3: Are you aware of actual or theoretical situations where it is not clear how to apply EU conflict of laws rules, or their application leads to outcomes that are inconsistent?**

- Yes
- No
- Don't know / no opinion / not relevant




If you answered YES to question 3, please explain which rules leads to outcomes that are inconsistent, what is their interpretation and in which Member State(s)? What is the impact of such ambiguity? How does the market deal with this ambiguity?

See answer to question 2.

The PRIMA rule is implemented slightly differently in different MS. E.g. Belgian law regards PRIMA in case of a branch of a Belgian SA in the Netherlands as referring primarily to the law of the offices of the SA (and not of the branch), unless proven otherwise, whereas in the Netherlands PRIMA is applied taking into account all the relevant circumstances of the case, which would normally refer to the law of the branch in the Netherlands, rather than the SA in Belgium.

Most practioners we spoke to did not, however, regard this as a problem in practice.

### 3.1.2 Unclear which assets are credited to a “securities account”

Please [refer to the corresponding section of the consultation document](#)  to read some contextual information before answering the questions.

**Question 4 a): In your Member State, which financial instruments are considered to be covered by the EU conflict of laws rules? Please provide references to relevant statutory rules, case law and/or legal doctrine.**

The most relevant article which defines the scope of "financial instruments" is Annex I, Part C, of Directive 2014/65/EU (MiFID). It is up to the European Court of Justice, not to individual Member States, to determine which financial instruments are covered by this Annex.


**Question 4 b): In particular, are registered shares considered to be covered by the EU conflict of laws rules in your Member State?**

- Yes
- No
- Don't know / no opinion / not relevant

**Question 4 c): In particular, are exchange-traded derivatives considered to be covered by the EU conflict of laws rules in your Member State?**

- Yes
- No
- Don't know / no opinion / not relevant


### 3.1.3 Unclear which is the relevant account

Please [refer to the corresponding section of the consultation document](#)  to read some contextual information before answering the questions.

**Question 5): In your Member State, how do statutory rules, case law and/or legal doctrine answer the question which is the relevant ‘record’ for conflict of laws purposes? Please provide references.**

Article 10:141 Civil Code (CC) with regard to property of transferable shares: the law of the State where the relevant account is held (PRACA), which is the account that is credited or debited to accomplish the transaction.

### 3.1.4 Unclear how many laws apply in a holding chain and how they interact

Please [refer to the corresponding section of the consultation document](#)  to read some contextual information before answering the questions.

**Question 6 a): Please describe how exactly you define and apply in practice the Place of the Relevant Intermediary Approach (PRIMA) in your Member State? If appropriate, please provide references to relevant case law and/or legal doctrine that corroborate your interpretation.**

This is not always clear. Some scholars argue that the factors to determine the relevant intermediary should be objective and ascertainable for both the account holder and third parties.


Problems may arise when a jurisdiction defines the place of the relevant intermediary as the registered office (which is the office of the legal person), and another jurisdiction defines that place as the branch which had the "client contact". We prefer the latter interpretation (branch which had the client contact). It is certainly not the State where the computer is located which administers the transactions (which is not ascertainable for third parties, and which may have a very soft connection with the transaction and the parties)

Are you aware of any case law?

- Yes
- No
- Don't know / no opinion / not relevant

**Question 6 b): In your experience, do different substantive laws in one cross-border holding chain interact smoothly or do they create problems in practice? Please provide examples.**


### 3.1.5 Fragmented legal framework

Please [refer to the corresponding section of the consultation document](#)  to read some contextual information before answering the questions.

**Question 7: In your experience, what is the scale of difficulties encountered because of dispersal of conflict of laws rules in EU directives and national laws? Please provide examples.**

## 3.2 Possible ways forward


### 3.2.1 Status quo

Please [refer to the corresponding section of the consultation document](#)  to read some contextual information before answering the questions.

**Question 8: Do you see added value in Union action to address issues identified in Section 3.1. of this public consultation?**

- Yes
- No
- Don't know / no opinion / not relevant

### 3.2.2 Targeted amendments to EU rules

Please [refer to the corresponding section of the consultation document](#)  to read some contextual information before answering the questions.

**Question 9: Do you think that targeted amendments to the relevant EU legislation containing conflict of laws rules would solve the identified problems?**

- Yes
- No
- Don't know / no opinion / not relevant


**Question 10: If there was a targeted solution clarifying which record is relevant for determining the applicable law, do you expect problems if within one Member State the legal relevance of record(s) for conflict of laws purposes does not coincide with the legal relevance of record(s) under substantive law?**

- Yes
- No
- Don't know / no opinion / not relevant

If yes, please explain your opinion and indicate the relevant national provisions that could generate problems:

One could imagine that a difference between the factors which determine the relevant record for conflict of laws rules and the factors which determine the factors which determine the relevant record for other purposes, would lead to undesirable frictions between those two.

### 3.2.3 Overarching reform of EU rules

Please [refer to the corresponding section of the consultation document](#)  to read some contextual information before answering the questions.

**Question 11: Do you think that an overarching reform of conflict of laws rules on third party effects of transactions in book-entry securities is needed to provide for legal certainty?**

- Yes
- No
- Don't know / no opinion / not relevant

Please explain your reply to question 11:

The basic approach should be: first of all, clarify article 14 of Rome I (with respect to third parties effects of securities). If needed, make some exceptions to the clarified article 14.

As far as we know, some jurisdictions consider securities as claims, other jurisdictions consider them as goods. This qualification problem should be addressed.

**Question 12: If you prefer an overarching reform, what would be the appropriate connecting factor in your view?**

(You can select more than one option in response to Question 12)

- Option 1: the law of the Place of the Relevant Intermediary Approach (PRIMA)
- Option 2: the law governing the contract
- Option 3: the law under which the security is constituted
- Option 4: other option(s)

**Option 1: the law of the Place of the Relevant Intermediary Approach (PRIMA)**

When you choose option 1, please also explain:

a) the reasons for your preference,

We prefer that the Hague Securities Convention will be ratified by the EU. We should not reinvent the wheel. Moreover, this Convention has already been ratified by the US; it is practical to have the same solutions in relations within the EU as in relations EU - US.

This would mean that the applicable law is the law expressly agreed in the account agreement, with some restrictions to the laws that can be chosen. If no law is chosen, the applicable law is the law of the State where the office of the relevant intermediary is located.

Practitioners prefer the solution in which the property rights/securities/third part effects are governed by the same law as the law that governs the account (as a result of which execution of those rights is more easy).

It is preferable that the account agreement can provide expressly that a specific law is applicable; the Hague Securities Convention has the safeguard that parties cannot choose whatever law they like, but provides for a limited choice of law. In almost every case, parties choose the law of the account, which is almost always the law of the State where the branch is which had "client contact". Chosen law is ascertainable for the parties.

This does not mean that the Hague Securities Convention is ideal. Probably the most important thing an account holder wants to know, is whether, in case an insolvency proceeding would be opened against his intermediary, the securities account is part of the bankruptcy estate or belongs to the account holder. However, as is pointed out in the Explanatory Report to the Convention (page 14) , "the conflict of laws provision of the Convention will not assure, or even typically produce, the result that one single law will govern all the issues specified in Article 2(1) of the Convention with respect to credits and dispositions at all levels in the chain of intermediaries and account holders between the originating account holder and the ultimate counterparty." Nevertheless, we support ratification.

b) which classes of book-entry securities you think each selected option should cover,

c) in which scenario the selected option should apply in your view.

If you choose option 1, please also select how should PRIMA be determined:

- separately at each level of the holding chain
- globally for the whole holding chain (Super-PRIMA)

If you choose option 1, please also select how would you determine the place of the relevant intermediary?

- the intermediary's registered office
- the intermediary's central administration
- the intermediary's branch through which the account agreement is handled
- other

If you choose intermediary's branch, please also select whether the branch should be identified:

- by an account number, code or other objective means of identification or
- as contractually stipulated in the account agreement

### Option 4: other option(s)

When you choose option 4, please explain what would be the appropriate connecting factor in your view:

see above: parties have the limited right to choose the applicable law.

Please also explain:

a) the reasons for your preference,

b) which classes of book-entry securities you think each selected option should cover,

c) in which scenario the selected option should apply in your view.

**Question 13: For each of the options 1 to 4 in Question 12 above, as you defined these in your answers, please indicate the scale of advantages – disadvantages**

**Option 1: the law of the Place of the Relevant Intermediary Approach (PRIMA)**



Option 1: please indicate the scale of advantages / disadvantages in terms of:

	<b>-2</b> (significant DECREASE)	<b>-1</b> (some DECREASE)	<b>0</b> (no change)	<b>+1</b> (some INCREASE)	<b>+2</b> (significant INCREASE)
a) an estimated increase /decrease of the number or value of transactions which you are able to undertake in your business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
b) an estimated increase /decrease of your legal due diligence costs	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
c) an estimated increase /decrease of the profitability of your business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

d) a change in your business model and the way in which you operate your business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
e) any other advantages	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
f) any other disadvantages	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Please specify what other advantage(s) you can see to option 1, and provide relevant data if possible:

see answer to question 12.

**Option 4: other option(s)**

Option 4: please indicate the scale of advantages / disadvantages in terms of:

	<b>-2</b> (significant DECREASE)	<b>-1</b> (some DECREASE)	<b>0</b> (no change)	<b>+1</b> (some INCREASE)	<b>+2</b> (significant INCREASE)
a) an estimated increase /decrease of the number or value of transactions which you are able to undertake in your business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
b) an estimated increase /decrease of your legal due diligence costs	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
c) an estimated increase /decrease of the profitability of your business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

d) a change in your business model and the way in which you operate your business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
e) any other advantages	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
f) any other disadvantages	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

**Question 14: In your view, on which of the following issues would options (1)-(4) in Question 12 above have any positive or negative impact:**

**Option 1: the law of the Place of the Relevant Intermediary Approach (PRIMA)**

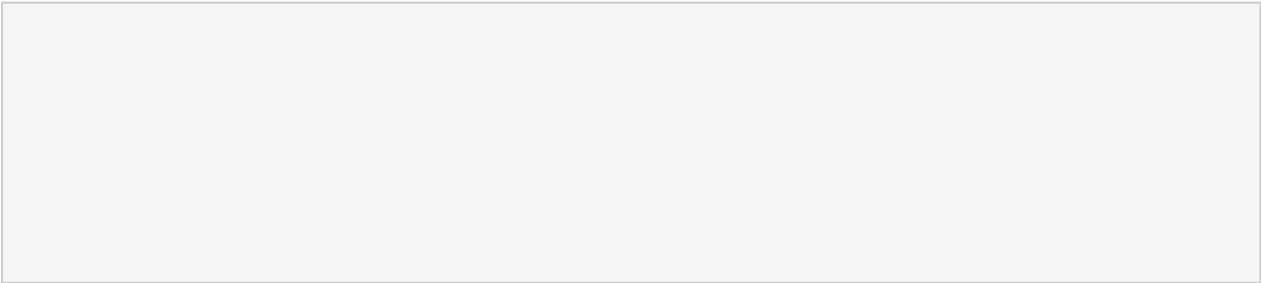
Option 1: please quantify if possible:

	-2 (Very NEGATIVE)	-1 (NEGATIVE)	0 (no impact)	+1 (POSITIVE)	+2 (very POSITIVE)
a) taxation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
b) transfer of risks between central depositaries, banks and depositors	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
c) the effectiveness of clearing and settlement systems	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
d) the identification of credit institutions' insolvency risks	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

e) the exercise of voting rights attached to securities	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
f) the remuneration of the ultimate owners of securities	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
g) combating market abuse	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
h) combating money laundering and terrorist financing	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>



Please explain your answer as the positive or negative impact of option 1 on the effectiveness of clearing and settlement systems:



**Option 4: other option(s)**

Option 4: please quantify if possible:

	-2 (Very NEGATIVE)	-1 (NEGATIVE)	0 (no impact)	+1 (POSITIVE)	+2 (very POSITIVE)
a) taxation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
b) transfer of risks between central depositaries, banks and depositors	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
c) the effectiveness of clearing and settlement systems	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
d) the identification of credit institutions' insolvency risks	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

e) the exercise of voting rights attached to securities	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
f) the remuneration of the ultimate owners of securities	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
g) combating market abuse	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
h) combating money laundering and terrorist financing	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

**Question 15: Which issues should be covered by the scope of the applicable law determined by such conflict of laws rules on third party effects of transactions in book-entry securities (e.g. the steps necessary to render rights in book-entry securities effective against third parties, priority issues, etc.)?**

- the steps necessary to render rights in certificated securities effective against third parties
- priority issues
- other

Please specify what other issues should be covered by the scope of the applicable law determined by such harmonised conflict of laws rules (in relation to question 15):


All property law aspects, including property law aspects between parties to the transaction as far as substantive law considers the legal effect of the transaction between parties also as a matter of property law should be covered by such conflict of laws rule.

**Question 16: Do you have other suggestions for conflict of laws rules for third party effects of transactions in book-entry securities or opinions on this topic that you have not expressed yet above?**

To make as little distinction as possible between different kinds of financial instruments/book-entry securities as possible.

## Section 4: certificated securities (primarily relevant for the securities industry)

### 4.1 Shortcomings of the current situation

Please [refer to the corresponding section of the consultation document](#)  to read some contextual information before answering the questions.

**Question 17 a): Do transactions in certificated securities still play an important role in your Member State?**

- Yes, very important
- Yes, important
- Neutral
- No
- Don't know / no opinion / not relevant

**Question 17 b): How often are certificated securities being used as collateral in practice?**

- Very frequently
- Frequently
- Sometimes
- Rarely
- Never
- Don't know / no opinion / not relevant


Please explain your reply to question 17 b) and estimate the number or value of transactions concerned per year:

**Question 18: Are conflict of laws rules on third party effects of transactions in certificated securities easily identified in your Member State?**

- Yes, there are statutory rules
- Yes, there is case law
- Yes, there is legal doctrine
- No
- Don't know / no opinion / not relevant

## 4.2 Possible ways forward

### 4.2.1 Status quo

Please [refer to the corresponding section of the consultation document](#)  to read some contextual information before answering the questions.

**Question 19: Do you see added value in Union action to address the identified issues with regard to certificated securities?**


- Yes
- No
- Don't know / no opinion / not relevant

If no, what would be the appropriate action in your view?

It would be of very limited use to harmonise rules on traditional paper securities when these hardly exist.

Moreover, we wonder whether most Member States already have more or less the same conflict of laws rules. If so, official harmonisation is not of great use.

### 4.2.2 Harmonising of conflict of laws rules

Please [refer to the corresponding section of the consultation document](#)  to read some contextual information before answering the questions.

**Question 20: Do you consider that conflict of laws rules on third party effects of transactions in certificated securities should be harmonised at EU level?**

- Yes
- No
- Don't know / no opinion / not relevant

Please explain your reply to question 20:

See answer to question 19.

**Question 21: If you consider that harmonising conflict of laws rules on third party effects of transactions in certificated securities is the appropriate option:**

a) What connecting factor do you recommend for **certificated registered shares**?

b) What connecting factor do you recommend for **certificated bearer securities**?

c) Which issues should be covered by the scope of the applicable law determined by such harmonised conflict of laws rules?

- the steps necessary to render rights in certificated securities effective against third parties
- priority issues
- other

**Question 22: For each of the options a) and b) in Question 21 above, as you defined these in your answers, please indicate the scale of advantages – disadvantages**

**Option a): the connecting factor you recommend for certificated registered shares**



Option a): please indicate the scale of advantages / disadvantages in terms of:

	<b>-2</b> (significant DECREASE)	<b>-1</b> (some DECREASE)	<b>0</b> (no change)	<b>+1</b> (some INCREASE)	<b>+2</b> (significant INCREASE)
a) an estimated increase /decrease of the number or value of transactions which you are able to undertake in your business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
b) an estimated increase /decrease of your legal due diligence costs	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
c) an estimated increase /decrease of the profitability of your business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

d) a change in your business model and the way in which you operate your business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
e) any other advantages	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
f) any other disadvantages	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>


**Option b): the connecting factor you recommend for certificated bearer securities**

Option b): please indicate the scale of advantages / disadvantages in terms of:


	<b>-2</b> (significant DECREASE)	<b>-1</b> (some DECREASE)	<b>0</b> (no change)	<b>+1</b> (some INCREASE)	<b>+2</b> (significant INCREASE)
a) an estimated increase /decrease of the number or value of transactions which you are able to undertake in your business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
b) an estimated increase /decrease of your legal due diligence costs	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
c) an estimated increase /decrease of the profitability of your business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

d) a change in your business model and the way in which you operate your business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
e) any other advantages	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
f) any other disadvantages	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

## Section 5: claims (primarily relevant for the factoring and banking industry)

Please [refer to the corresponding section of the consultation document](#)  to read some contextual information before answering the questions.

### 5.1 Shortcomings of the current situation

Please [refer to the corresponding section of the consultation document](#)  to read some contextual information before answering the questions.

**Question 23: In the past 5 years, have you encountered problems in practice in securing the effectiveness of assignments against persons other than the assignee and the debtor (e.g. a second assignee, a creditor of the assignor or of the assignee) in transactions with a cross-border element?**


- Yes
- No
- Don't know / no opinion / not relevant

**Question 24: In a typical transaction with a cross-border element involving an assignment of claims, do you undertake legal due diligence with respect to the underlying claim under the law governing the assigned claim?**

- Yes
- No
- Don't know / no opinion / not relevant

### 5.2 Possible ways forward


### 5.2.1 Status quo

Please [refer to the corresponding section of the consultation document](#)  to read some contextual information before answering the questions.

**Question 25: Do you see added value in Union action to address the identified issues in the area of assignment of claims involving a cross-border element?**

- Yes
- No
- Don't know / no opinion / not relevant

### 5.2.2 Harmonising of conflict of laws rules

Please [refer to the corresponding section of the consultation document](#)  to read some contextual information before answering the questions.

**Question 26: What conflict of laws rule on third party effects of assignment of claims would you favour?**

**Please indicate your order of preference among the below options ranging from 1 (best solution) to 4 (least preferred solution):**

	1 (BEST solution)	2	3	4 (LEAST preferred solution)
(1) the law applicable to the contract between assignor and assignee	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
(2) the law of the assignor's habitual residence	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
(3) the law governing the assigned claim	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
(4) other	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

**Question 27: For each of the options 1, 2, 3 and 4 in Question 26 above, please indicate the scale of advantages – disadvantages**

**Option 1: the law applicable to the contract between assignor and assignee**

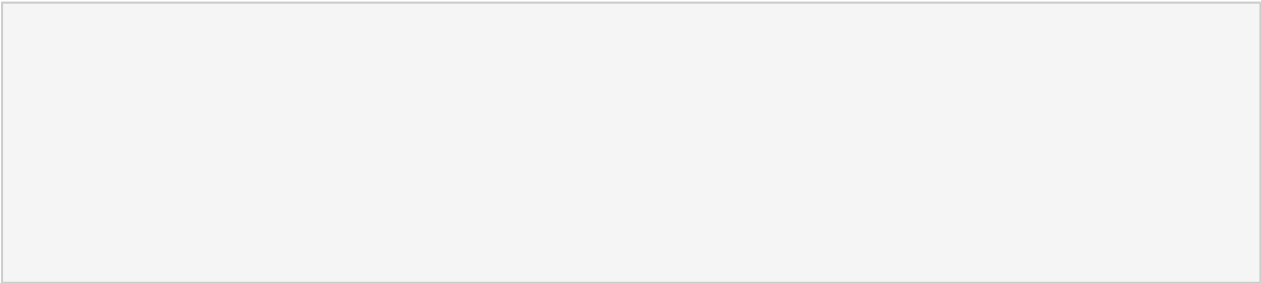


Option 1: please indicate the scale of advantages / disadvantages in terms of:

	<b>-2</b> (significant DECREASE)	<b>-1</b> (some DECREASE)	<b>0</b> (no change)	<b>+1</b> (some INCREASE)	<b>+2</b> (significant INCREASE)
a) an estimated increase /decrease of the number or value of transactions which you are able to undertake in your business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
b) an estimated increase/decrease of your legal due diligence costs	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
c) an estimated increase/decrease of the profitability of your business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

d) a change in your business model and the way in which you operate your business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
e) any other advantages	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
f) any other disadvantages	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Please explain your answer as the advantages or disadvantages of option 1 in terms of increase/decrease of your legal due diligence costs:

A large, empty rectangular box with a thin black border, intended for the user to provide their explanation regarding the advantages or disadvantages of option 1 in terms of legal due diligence costs.

Please specify what other advantage(s) you can see to option 1, and provide relevant data if possible:

Assignments of claims are a very important part of the financial industry in which assignor and assignee will be professional parties writing extensive contracts to govern their relationship. A conflict of laws rule which takes the applicable law to their contract as the relevant connecting factor for the property law aspects of the assignment respects the importance of clarity there en prevents surprises. Also, under Art. 14 of Rome 1 the law applicable to the contract between the assignor and assignee is already the applicable law to the property aspects between the parties (see under 38 of the recitals).

It is extremely important that NO DISTINCTION IS MADE BETWEEN VARIOUS PROPERTY LAW ASPECTS. They should all be governed by the same conflict of laws rule. The fact that the aspects of the position of the debtor are governed by the law applicable to the assigned claim does not change this, as these aspects regarding the debtor are all part of the law of obligations. For those national laws under which a distinction is made between property law aspects of an assignment and aspects under the law of obligations, unity of the law applicable to property law aspects is of the essence.

An important safeguard for this option is already included in Rome I with its restrictions in Art. 3 to prevent abuse of party autonomy.

## **Option 2: the law of the assignor's habitual residence**

Option 2: please indicate the scale of advantages / disadvantages in terms of:

	<b>-2</b> (significant DECREASE)	<b>-1</b> (some DECREASE)	<b>0</b> (no change)	<b>+1</b> (some INCREASE)	<b>+2</b> (significant INCREASE)
a) an estimated increase /decrease of the number or value of transactions which you are able to undertake in your business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
b) an estimated increase /decrease of your legal due diligence costs	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
c) an estimated increase /decrease of the profitability of your business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

d) a change in your business model and the way in which you operate your business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
e) any other advantages	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
f) any other disadvantages	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

Please explain your answer as the advantages or disadvantages of option 2 in terms of increase/decrease of your legal due diligence costs:

Please specify what other disadvantage(s) you can see to option 2, and provide relevant data if possible:

Adding a third applicable law to any international assignment means complicating this type of transaction enormously. Rome I, Art. 14 already has two applicable laws involved for assignment. It would be very disadvantageous to have yet another law to be taken into account for each transaction. It is a solution which we could never support. It would be preferable to have no harmonisation on this point than to have the law of the habitual residence of the assignor as the applicable law for third party effects/property law aspects of an assignment. This law does not offer any better protection to third parties than the law applicable to the contract between the assignor and assignee. Eventhough the latter law will often be the law chosen by the parties to the assignment contract, it has the restrictions of party autonomy laid down in Art. 3 of Rome I. Once chosen, it is easy to establish which law this is. The law of the habitual residence of the assignor, however, might even change during the process by the assignor moving his habitual residence from one state to another state.

### **Option 3: the law governing the assigned claim**

Option 3: please indicate the scale of advantages / disadvantages in terms of:

	<b>-2</b> (significant DECREASE)	<b>-1</b> (some DECREASE)	<b>0</b> (no change)	<b>+1</b> (some INCREASE)	<b>+2</b> (significant INCREASE)
a) an estimated increase/decrease of the number or value of transactions which you are able to undertake in your business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
b) an estimated increase /decrease of your legal due diligence costs	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
c) an estimated increase /decrease of the profitability of your business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>



d) a change in your business model and the way in which you operate your business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
e) any other advantages	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
f) any other disadvantages	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

## Option 4: other solution(s)

Option 4: please indicate the scale of advantages / disadvantages in terms of:

	<b>-2</b> (significant DECREASE)	<b>-1</b> (some DECREASE)	<b>0</b> (no change)	<b>+1</b> (some INCREASE)	<b>+2</b> (significant INCREASE)
a) an estimated increase /decrease of the number or value of transactions which you are able to undertake in your business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
b) an estimated increase /decrease of your legal due diligence costs	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
c) an estimated increase /decrease of the profitability of your business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

d) a change in your business model and the way in which you operate your business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
e) any other advantages	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
f) any other disadvantages	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>


**Question 28: Which issues should be covered by the scope of the applicable law determined by the conflict of laws rule?**

- the steps necessary to render rights in certificated securities effective against third parties
- priority issues
- other

Please specify what other issues should be covered by the scope of the applicable law determined by the conflict of laws rule (in relation to question 28):

All property law aspects as explained above under 27. Also, NO DISTINCTION SHOULD BE MADE BETWEEN VARIOUS TYPES OF INDUSTRY. Whether it is securitization, factoring or any other type of assignment OTHER THAN CASH IN ACCOUNTS, they should all be governed by the same conflict of laws rule as regards the property law aspects.

**Section 6: certain specific situations in which claims might need different treatment (primarily relevant for securitisation, banking and derivative market industry)**

Please [refer to the corresponding section of the consultation document](#)  to read some contextual information before answering the questions.

**Question 29: In your experience, how frequently are claims constituting financial instruments other than book-entry securities and/or other claims traded on financial markets assigned, i.e. transferred?**

- Very frequently
- Frequently
- Sometimes
- Rarely
- Never
- Don't know / no opinion / not relevant

Please explain your reply to question 29 and estimate the number or value of transactions concerned per year:

**Question 30: Are conflict of laws rules on third party effects of assignment of claims constituting financial instruments other than book-entry securities and other claims traded on financial markets easily identified in your Member State?**

- Yes, there are statutory rules
- Yes, there is case law
- Yes, there is legal doctrine
- No
- Don't know / no opinion / not relevant

Please explain your reply to question 30 and provide reference and indicate the connecting factor:

**Question 31: Would it be useful to provide for a specific conflict of laws rule on third party effects of assignment of claims constituting financial instruments other than book-entry securities and/or other claims traded on financial markets which is different from your preferred solution for claims in general?**

- Yes
- No
- Don't know / no opinion / not relevant

### 6.1 Cash in accounts

Please [refer to the corresponding section of the consultation document](#)  to read some contextual information before answering the questions.

**Question 32: In your experience, does cash collateral play an important role?**

- Yes, very important
- Yes, important
- Neutral
- No
- Don't know / no opinion / not relevant

Please explain your reply to question 32 and estimate the number or value of transactions concerned per year:

Practitioners from the banking sector told us so

**Question 33: Are conflict of laws rules on third party effects of assignment of cash held in accounts easily identified in your Member State?**

- Yes, there are statutory rules
- Yes, there is case law
- Yes, there is legal doctrine
- No
- Don't know / no opinion / not relevant

Please explain your reply to question 33 and provide reference and indicate the connecting factor:

The applicable law is the law of the assigned claim

**Question 34: Would it be useful to provide for a specific conflict of laws rule on third party effects of assignment of cash held in accounts which is different from your preferred solution for claims in general?**

- Yes
- No
- Don't know / no opinion / not relevant



a) If you answered YES to question 34, please provide arguments that would justify the departure from the general solution. Would such a solution have any impact on the market, business models, risks, etc.:

b) If you answered YES to question 34, please specify what conflict of laws solution you recommend:

We have been told by practioners and market parties that cash in accounts are extremely relevant and are a different type of claim than other claims. They should be governed by the law applicable to the assigned claim.

c) If you answered YES to question 34, please specify which issues should be covered by the scope of the applicable law determined by such a conflict of laws rule:

- the steps necessary to render rights in certificated securities effective against third parties
- priority issues
- other

Please specify what other issues should be covered by the scope of the applicable law determined by the conflict of laws rule (in relation to question 34c):

All property law aspects.


**Question 35 a) : Do you consider that a specific rule, different from the above, is needed for cash collateral being provided for the purpose of securing rights and obligations potentially arising in connection with a system designated under the Settlement Finality Directive?**

- Yes
- No
- Don't know / no opinion / not relevant

**Question 35 b) : Do you consider that a specific rule, different from the above, is needed for cash collateral being provided to central banks of Member States or to the European Central Bank?**

- Yes
- No
- Don't know / no opinion / not relevant

## 6.2 Credit claims used as financial collateral

Please [refer to the corresponding section of the consultation document](#)  to read some contextual information before answering the questions.

**Question 36: In your experience, are credit claims used as financial collateral outside the Eurosystem credit operations?**

- Very frequently
- Frequently
- Sometimes
- Rarely
- Never
- Don't know / no opinion / not relevant


**Question 37: Are conflict of laws rules on third party effects of assignment of credit claims easily identified in your Member State?**

- Yes, there are statutory rules
- Yes, there is case law
- Yes, there is legal doctrine
- No
- Don't know / no opinion / not relevant

**Question 38: Would it be useful to provide for a specific conflict of laws rule on third party effects of assignment of credit claims which is different from your preferred solution for claims in general?**

- Yes
- No
- Don't know / no opinion / not relevant

### 6.3 Claims used as underlying assets in securitisation

Please [refer to the corresponding section of the consultation document](#)  to read some contextual information before answering the questions.

**Question 39: In your experience, how frequently are claims used as underlying assets in securitisations?**

- Very frequently
- Frequently
- Sometimes
- Rarely
- Never
- Don't know / no opinion / not relevant

Please explain your reply to question 39 and estimate the number or value of transactions concerned per year:

**Question 40: Are conflict of laws rules on third party effects of assignment of claims used as underlying assets in securitisations easily identified in your Member State?**

- Yes, there are statutory rules
- Yes, there is case law
- Yes, there is legal doctrine
- No
- Don't know / no opinion / not relevant

Please explain your reply to question 40 and provide reference and indicate the connecting factor:

The law of the contract between assignor and assignee applies (cf. Art. 14 par.1 Rome I) also to all property law aspects. We have 20 years of experience with this applicable law and not encountered any problems.

**Question 41: Would it be useful to provide for a specific conflict of laws rule on third party effects of assignment of claims used as underlying assets in securitisations which is different from your preferred solution for claims in general?**

- Yes
- No
- Don't know / no opinion / not relevant

**Question 42: Do you have any other comments on the topic of this public consultation?**

Please, keep things simple:

- one rule to cover all types of financial instrument by becoming a party to the Hague Securities Convention

-one rule to cover all property law aspects of all types of assignment of claims regardless of the industry (securitization, factoring or otherwise), being the law applicable to the contract between assignor and assignee, EXCEPT for cash in accounts

- One rule to cover all property law aspects regarding the assignment of cash in accounts, being the law applicable to the assigned claim (=law applicable to the account).

### 3. Additional information

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To ensure that responses cover all the relevant information and to help assessing the responses we strongly encourage you to answer the questions in the questionnaire. Should you wish to provide any additional information (e.g. a position paper, report) or raise specific points not covered by the questionnaire, you can upload your additional document(s) here:

## **Useful links**

[Consultation details \(http://ec.europa.eu/info/finance-consultations-2017-securities-and-claims\\_en\)](http://ec.europa.eu/info/finance-consultations-2017-securities-and-claims_en)

[Specific privacy statement \(https://ec.europa.eu/info/sites/info/files/2017-securities-and-claims-specific-privacy-statement\\_en.pdf\)](https://ec.europa.eu/info/sites/info/files/2017-securities-and-claims-specific-privacy-statement_en.pdf)

[More on the Transparency register \(http://ec.europa.eu/transparencyregister/public/homePage.do?locale=en\)](http://ec.europa.eu/transparencyregister/public/homePage.do?locale=en)

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## **Contact**

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