EuropeanIssuers

aisbl - ivzw
Rue Belliard 4-6
B-1040 BRUSSELS

Tel : +32 (0)2 289 25 70
Fax : +32 (0)2 502 15 60

info@europeanissuers.eu
www.europeanissuers.eu

RESPONSE TO THE COMMISSION CONSULTATION ON THE CONFLICT OF LAWS RULES FOR THIRD PARTIES EFFECTS OF TRANSACTIONS IN SECURITIES AND CLAIMS

30 JUNE 2017

INTRODUCTION

Without issuers and investors there would be no capital markets in Europe. In the past issuers and investors were domiciled in the same jurisdiction and their relationship was governed by the laws of the same country. The rise of cross-border investments and intermediaries[1] have contributed to uncertainty for companies and end investors. This is mainly due to intermediaries applying laws other than the laws under which a security has been created regarding transfer and holding of securities, while investors are not always aware or in agreement with that. This has deprived end investors not only of legal certainty but very often of their property rights and their ownership in a security they have paid for (see the annex for examples).

Most EU countries give property rights to end investors. Some legal concepts used in other EU countries have the same effect, namely so called "trust" concepts, while practically do not allow for the same level of comfort in exercising shareholders rights.

The basic principle that end investors, i.e. persons having invested their own money directly in a security (excluding investors in UCITs), are the owners of that security, should be acknowledged. That legal position should give end investors the right to establish a direct relationship with the issuer and to enjoy and enforce all rights stemming from the security also against third parties. The role of intermediaries is to serve issuers and end investors. They should not be allowed to change the legal position of end investors and the bundle of rights and obligations evidenced by a "security".

A "security", be it a registered or bearer share, a bond, a derivative evidenced in paper or book entry form, or another financial instrument, is a bundle of rights and obligations which are created or constituted under the laws of state, normally in case of shares the law of the issuer. When investing in a security, end investors know or can find out what is their legal position as end investor in that security under the "creation law" (which is the law of the issuer, for shares 'lex societatis'), which rights they enjoy and what their obligations may be. Any application of one or more other laws may lead to significant conflicts between the "creation law" and others.

We suggest that any initiative should focus on:

- how investors could be encouraged to contribute better to the European economy and how their investments can be better protected against risks;

[1] By intermediaries we understand all actors connecting and providing services (e.g. trading, transferring or holding of securities) to the end investors and the issuers. This includes CSDs (Central Securities Depositories), custodian banks, CCPs (Central Counterparty Clearing House), other clearing houses, etc.

- how companies can be encouraged to offer more investment opportunities and how the legal framework can help it.

We would like to voice concerns over the wording of the consultation document seeming to focus on intermediaries and favouring approaches not sufficiently addressing the needs of issuers and investors. For instance, The Hague Convention and the UNIDROIT Convention have failed as were seen as favouring the interests of certain intermediaries. Also, the wording of Annex 1 seems too narrow and limits the definition of "security".

We believe that a thorough analysis of the consultation document may result in different approaches regarding who is the owner.

RESPONSE TO SPECIFIC 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)? Please elaborate on your reply if you have further information.

-**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

In practice, there is no need at all to obtain legal opinions in cross-border transactions. Issuers and end investors can be very safe in their analysis of the legal situation when they both rely on the creation law of the security to assess their legal position and what should be done in case of transfer of a security.

Also for intermediaries it is very simple and it is their prerogative before starting offering services touching upon another country to obtain legal advice about the legal situation in their country. Before starting business in a new environment, the legal framework of that country should be explored.

Only in rare circumstances legal opinions are necessary and only when EU MS are concerned. Overall, the practice to obtain legal opinions is an Anglo-Saxon practice and does not have a civil law equivalent. Anglo-Saxon financial intermediaries tend to use it based on legal concepts under which obtaining legal advice in form of a legal opinion may give a bona fide defence against other claims. However, obtaining legal opinions does not change a bit of the basic legal situation.

Any professional legal opinion in a cross-border situation must contain analysis of applicable laws. However, we see only a very limited need to obtain legal opinions in a certain situation.

The consultation document rightly evokes the risks arising out of the application of different laws to one cross-border situation.

Example: Case of a French end investor B banking with the French local bank C and willing to buy a share of a German issuer A. Unknown to the French end investor, bank C uses the services of a global custodian (bank D), incorporated in Pennsylvania (USA), which runs their European operations out of London as a branch office of its US corporation. That global custodian D may use the services of German

bank E as a local sub custodian in certain situations and the services of another intermediary F which normally supplies internet voting platforms to investors but acts sometimes as a local German sub custodian.
Although the French investor assumes to have acquired a German security by ordering its bank to buy it and book it into his account, according to German law or maybe French law as bank accounts law, the relationship between C and D may, according to the agreement between both parties, be governed by English or US Pennsylvania law, and the agreement may well allow D to move around the "relevant account" from Paris to London to Pittsburgh without the consent of either bank C or the French investor B. If in that situation D asserts ownership of the shares in A based on the legal situation of the USA and the account agreements and the place of the relevant account approach title in the shares in A is not acquired by B although A, B and C wanted to achieve just that.

When analysing the situation, one should differentiate between:

- the relationship between end investor and issuer and who should be recognised as a shareholder by the issuer:
- the relationship between seller and buyer of security;
- the relationship between the seller or the buyer of security and their respective banks and other intermediaries they directly deal with;
- the relationship between intermediaries;
- One may also differentiate between the relationship between end investor and issuer and how one acquires or disposes of ownership in a security on one side and the question of how to create a security interest over securities owned and held by an end investor on the other side.

It may not be necessary to have all relationships governed by the same law. E.g., the question who has to be recognised as a shareholder may necessitate additional actions that entails aspects other than the simple act of trading shares and/or fulfilling all contractual obligations arising out of trade agreement.

Nevertheless, the most important guiding principle should be that end investors should always enjoy full ownership of a security they have paid for and that they should be recognised as a shareholder or bondholder by the issuer, only if the conditions set by the applicable creation law have been fulfilled. No other laws, especially no laws which are made applicable by contractual agreements between intermediaries should be allowed to interfere with that basic principle or to change the relationship between issuer and end investor in any aspect.

The consultation evokes extreme situations on the legal risk and create systemic risk. Empirical evidence shows that this is the case only in situations where intermediaries are given ownership rights in securities they do not own and do not have paid for and they have used without explicit prior consent and knowledge of end investors to do their own intermediaries business. For example, in the insolvency of Lehman Bros it turned out that that American bank had used securities of their clients or of their clients' customers without the prior written consent and explicit knowledge, leading to severe consequences.

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

-I don't know

If no, please explain why.

If yes, please provide concrete examples or specify in which legal context this problem might arise, pointing also to relevant national provisions where possible.

If yes, please give an estimate of the magnitude of the issue (e.g. number or value of transactions that might be concerned).

If yes, please explain how market participants deal with such legal uncertainty.

We believe such a situation can only arise when the conflict of laws questions are answered in a way that applicable law may be the law of any account agreement other than the relevant account under the *lex rei sitae* rule (PRIMA approach deriving from Arts. 83 and 94 of the Settlement Finality Directive (SFD), from Art. 9 of the Directive on financial collateral arrangements (FCD) and from Art. 29 of the Winding Up Directive), which is not the creation law of the security and not the law where the end investor is domiciled. As outlined above, the confusion created by choice of law clauses must be avoided and can easily be done by acknowledging that ownership in a security in the relationship between company and shareholder/end investor must be determined by the applicable creation law (the law under which the security has been constituted). If that law allows for the acquisition and disposal of a share to be subject to another law, then that should be the law of the place where the end investor has the securities account, which we understand to be the relevant account. To determine which obligations a bank as end investor banks has towards that end investor, the law of the domicile of the end investor should be applied. In no case any other law should be applicable just to avoid the fall of large participant financial market shall be avoided. Also, it should not be allowed to change the place of the relevant account without the consent of the end investor.

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

- I don't know.

- If yes, which rules, 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?

- If no, please explain how you interpret and apply the Place of the Relevant Intermediary Approach (PRIMA), in which types of transactions and in which Member State(s)?

We understand the question refers to a specific conflict of law rules in directives and regulations of the EU which are mentioned in the footnotes in section 3 on book entry securities.

Indeed, there may be theoretical situations in which is not clear how to apply those rules, especially in the age of digitalisation and provision of services cross-border. For instance, the relevant account in the chain of intermediaries described above could be defined as the account of end investor B with bank C, the account of the bank C the bank D of the account of the bank D with a bank E or the relationship between the issuer and its CSD, which would normally involve establishing an account of the issuer at the CSD.

There may also be conflicts in case of registered shares, on one side between the register of the issuer and the bookings in that register and on the other the bookings in other account agreements in the custody chain. Those conflicts can be solved by looking at the relationship between the issuer and end investor in a way different from looking at the relationship between buyer and seller of registered share and the relationship between an end investor and the bank C. For example, the seller of registered shares may have sold those registered shares to investor B and that trade may have been settled cash versus delivery in the end investors accounts on both their ends. Even if bank C may have failed to forward the end investor's data to issuer A, necessary for registration of end investor B with A, in that case it might happen that B cannot exercise shareholders rights because B has not complied with its obligation under applicable corporate law requirement to forward its data to A. The question which obligations bank C has to discharge itself of may be governed by the law of the account agreement between B and C.

Currently, we believe that in the MS of the EU the question how a security, including title in that security, is acquired and disposed should be governed by the applicable laws under which the securities have been constituted or created. Nevertheless, considering that both the law of creation governs the acquisition and disposal of securities, there is a need to ensure consistency between them. In all European jurisdictions, either the applicable corporate law or the Custody law applies to the rights on securities (*in rem* rights): ownership of securities usually results from the entry of the securities in the buyer's account or at a time when the debit of the securities account of the seller's bank and the credit of the securities account of the purchaser's bank, becomes effective. In a cross-border situation, European jurisdictions designate, in accordance with the three above referred to directives, the *lex rei sitae* as the law applicable to third party (not including the issuer) effects of in rem rights on securities. To ensure consistency between both set of rules, the location of the relevant account could coincide with the securities account of the purchaser's bank at the purchaser's domicile.

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 statuary rules, case law and/or legal doctrine.

As a pan-EU organisation we cannot respond referring to 1 MS, but in general in most MS financial instruments are covered.

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

-Yes

- No

- I don't know

- If no, what could be the appropriate conflict of laws solution for those assets in your opinion?

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

-Yes

- No

- I don't know

- If no, what could be the appropriate conflict of laws solution for those assets in your opinion?

All directives quoted in the consultation documents have been transposed to national law. Also, the definition of financial interest instruments has been used.

For example, in Germany registered shares are in general covered by those directives but, as explained above, the relationship between the end investor and the issuer may be subject to other assessments other than the relationship between end investors and their banks. The full enjoyment by end investors of all rights and obligations being expressed in a registered share may necessitate more actions by intermediaries and end investors than what is subject of the said directives. This is natural because the directives have a limited scope and cannot deal with corporate law matters.

The appropriate conflict of laws solution for registered shares and other registered securities is to always apply the creation law, the law under which the registered securities have been created. Only by applying that principle, it is avoided the risk that end investors do not acquire full title in the security and will not enjoy all rights they have paid for. Also, the bigger and sometimes even systemic risk of intermediaries applying another law to the situation with the effects of loss of ownership in securities they have paid for by end investors can only be avoided by applying that principle.

Exchange traded derivatives are covered by the European conflict of law rules quoted in the consultation document if and to the extent that they are registered with a CSD.

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

Under the direct holding system, only the investor holding the securities account opened in the books of the authorised financial intermediary, which is either at the bottom or at the upper end of the chain, acting for own account, is the owner of the securities. Therefore, the relevant account is the account opened by the end investor. The other securities accounts in the chain are only mirrors of such a securities account.

On the other hand, indirect holding system may distinguish between "legal" title (where, to become a shareholder, it is necessary to have one's name entered on the register of the company's members) and "beneficial" ownership, where one person (the beneficiary) owns the asset but legal title is in another person's (the trustee's) hands. The intermediary holding client securities as custodian is generally characterised as a trustee, with the end investor enjoying property rights (in particular the right to the benefits) in the securities as beneficiary under said trust. In Germany, the relevant record for conflict of law purposes in case of securities created under German law and put into central custody

with the German CSD is always the German law. Under the German law all other intermediaries are deemed to be only servants of the end investor and intermediated only procession of a security thus giving the end investor complete and unfettered ownership rights in a security they have paid for. This assumption is also used in cases about the intermediaries outside Germany may not completely understand the concept in order to not disenfranchise end investors of their ownership rights in a security they have paid for.

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.

- 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.

As stated above we believe that the application of different substantial laws in one cross-border holding chain may create problems in practice especially in cases there a "securities entitlement" of "trust" approach is applied.

In France, as mentioned above, the conflict of law rules do not provide any objective criterion to be taken into account to determine the location of the securities account. In practice, this means that the securities account is located in the country where the custody services are provided.

In Belgium, the law provides that the register in which the securities is recorded is presumed to be located in the place of the principal establishment of the person that holds the individual accounts. The same rule applies to securities held in book-entry form.

In Germany, the PRIMA approach is applied with a view to the relationship in question in certain cases. That means that for instance for the financial collateral directive the relevant account may be the account of one of the parties even in case both parties are intermediaries. If one of those parties has used the securities in question as a collateral without the consent of the owner of the securities that may lead to damage claims of that owner against the intermediary.

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.

We do not see big difficulties encountered due to the dispersal of conflict of laws rules in European directives and in national laws with the exception of the PRIMA question. The definition of the place of the relevant account approach should:

- never collide with the laws under which a security has been constituted; and
- thus, should be the account of the issuer with the CSD or the account opened in the end-investor's name at the bottom of the holding chain.

If that approach is not followed, it should always be the account of the end investor and the laws of their domicile to protect the end investor which has invested own money in a security against both

imbalanced negotiation power and the effects of agreements by other parties without consent or knowledge of the end investor.

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

-Yes, see below

-No

-I don't know

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

Any added value in addressing those issues can be seen in the **clarification** that the laws under which a security has been constituted (the company law for shares) are decisive for the relationship between the end investor and the issuer on one side, and for the disposal of and acquisition of securities on the other side. Only by applying such principle it can be ensured that conflicts between different laws will not arise. Those laws must have priority over other laws in case of conflict.

If that approach is not taken, PRIMA should be compulsorily defined as the account of the end investor with its bank at the domicile of the end investor. In any case it must be avoided that intermediaries are allowed to change the place of the relevant account, which can be very easy using modern technology and thus changing applicable laws. All other accounts in a custody chain are mere "mirror accounts" and should not be governed by different rules when it comes to ownership in a security.

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

- Yes, see below

- No

- I don't know

-If yes, do you have specific proposals as to which issues should be addressed and how? What would be the order of priority for addressing these issues?

We would favour limited changes to the PRIMA rule since its implementation has proven satisfactory, as Commission´s previous consultations have shown and as facts since then suggest. Preference should for example be given to the identification of the branch where the end investor has opened an account as the place of the relevant account (rather than the Head office which leaves the parties with significant freedom to choose the applicable law) where the securities' account is actually maintained.

See question 8 above. We would explicitly like to mention the question of registered shares where it is of utmost importance that the laws under which those shares have been created cover all aspects of the relationship between end investor and issuer on one side and the question of acquisition and disposal of those shares on the other.

For bearer shares applicable creation law would normally entail that they are anonymous; ownership in the security is evidenced by possessing the security. This concept could be used also in book entry situations. One approach could be to use the book entries in the relevant CSD's accounts on one side

and the accounts of the end investors with their banks on the other to determine ownership in those shares.

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

- I don't know

-If yes, please explain your opinion and indicate the relevant national provisions

that could generate problems.

- If no, please explain your opinion.

If the European rule clarified that the conflict of law rule rules always applies the laws under which the securities have been created, the problem as described in question 10 would disappear.

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

- I don't know

First, we would like to clarify that "third party effects" should not comprise the relationship between the end investor and the issuer, because that is the most important and essential relationship which is evidenced in a security. Third parties can thus only be other persons, but not to the end investor or the issuer.

Secondly, we do not believe that an overarching reform of conflict of law rules is needed in view of the fact that, firstly, the existing *lex rei sitae* rule already covers most (over 90%) of the uses of securities and, secondly, its implementation has proven satisfactory. Even for dematerialised securities the place of the end investor and the account they have opened with a bank is the relevant factor, if there are no conflicts between the applicable corporate law and the law of the end investors account.

Currently, the principle of application of the laws under which a security has been created is widely observed in the EU and that should be acknowledged by all MS. If the responses to the consultation show that someone questions that, it may be worth clarifying that principle.

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

(1) the law of the Place of the Relevant Intermediary Approach (PRIMA);

(2) the law governing the contract (please select among the following options) (i) the applicable law is chosen by the parties to the account agreement provided that the intermediary has a 'qualifying office' in the country whose law has been chosen, and in the absence of such a choice, determined by objective rules based on the PRIMA connecting factor (the approach of the Hague Securities Convention); (ii) the applicable law is chosen by the participants of the securities settlement system designated under the Settlement Finality Directive; (iii) the applicable law is chosen by the parties to the transaction, and in the absence of such choice, determined by objective rules in accordance with the Rome I Regulation;

(3) the law under which the security is constituted;

(4) other solution(s) – please specify.

You can select more than one option in response to Question 12. When making your choice 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.

The appropriate connecting factor should always be the law under which a security is constituted for all questions governing the relationship between the end investor in the issuer and the acquisition and disposal of ownership in a security. If that law allows for the *lex rei sitae* to be different and rule on the question of acquisition and disposal of securities that should be accepted. In that case in order to avoid further conflicts between different laws of different account agreements in a custody chain for those specific questions the law of the account agreement of the end investor (where he has opened an account and that must not be changed without the consent of the end investor).

The reasons for the choice are:

- Only that approach avoids the application of conflicting laws to different questions of the relationship between the end investor and the issuer and the acquisition of and disposal of ownership.
- The expropriation of end investors by the application of legal concepts which take away ownership in securities from the end investor.
- The negotiating power of end investors is normally much smaller than the negotiating power of global custodian banks or other financial intermediaries. Any approach referring to the law of the account agreement between intermediaries for thus deprive end investors of their rights in securities or cause them additional cost.
- That approach provides clarity also for intermediaries and enables them to once and for all obtain legal opinions for all states in which they want to do business.
- The PRIMA approach when using an intermediaries account except the CSD's accounts will almost certainly create inflation or deflation of securities and violate the notary function which is necessary in order to safeguard an efficient and reliable capital market. As can be witnessed in non-European capital markets, using that approach every day creates significant errors in the books of intermediaries. It also creates uncertainty as to who owns what and how much. It also creates legal problems to the issuer. This approach deprives end investors of their securities by simple erroneous bookings by an intermediary. An approach basing acquisition or disposal of ownership on the bookings of those intermediaries and the accounts maintained

by those intermediaries would thus jeopardise the stability of the capital markets and runs contrary to the goals of the capital markets union.

All securities should be governed by the "creation law" approach, especially registered securities. However, the question of establishing a security interest may be addressed using the approach of the end investors account as PRIMA.

c) In any case, the specific question in case an end investor wishes to use securities owned by that end investor as collateral for credit that an investor takes from someone else, the question of how to determine a security interest (normally a pledge or other form similar to a pledge) can be validly established, may be governed by the law of the end investors account with the intermediary. For that purpose, we assume that the end investor would hold that account in the place of its domicile. That should also apply in case the end investor is a) a retail end investor and b) domiciled in another country then where the account has been opened in order to protect end investors in their quality as consumers.

Sub-question to Question 12 answer (1)

a) Please select how should PRIMA be determined:

(1) separately at each level of the holding chain, or

(2) globally for the whole holding chain (Super-PRIMA). If you prefer Super-PRIMA, please specify which account should be solely relevant for conflict of laws purposes in your view.

b) Please select how should the place of the relevant intermediary be determined:

(1) the intermediary's registered office; or

(2) the intermediary's central administration; or

(3) the intermediary's branch through which the account agreement is handled:

(i) identified by an account number, code or other objective means of identification

(Please specify which means should be used to identify the branch) or

(ii) as contractually stipulated in the account agreement; or

(4) other – please specify.

Sub-question to Question 12 answer (2)(i) a) If you support option (2)(i), do you think the best way is for the Union to become party to The Hague Securities Convention?

-Yes

-No

-I don't know

- If yes, do you have data that could help assessing the benefits of a global solution for the EU?

- If no, do you have data that could help assessing the drawbacks of The Hague Securities Convention for the EU?

b) Do you consider the Hague Securities Convention should be supplemented by the adoption of a regulatory framework to address potential problems identified so far in discussions on its signature by the Union?

-Yes (please explain how)

-No (please explain why)

-I don't know.

The European Union should never become a party to the Hague Securities Convention because such convention eventually would lead to the expropriation of European investors to the benefit of non-European custody banks. The Hague Convention is seriously and essentially flawed because:

- it does not acknowledge the importance of the laws under which securities are created;
- it does not acknowledge the interests of end investors but its application deprives them of their property rights to the benefit of international custody banks;
- it does not account for the imbalanced negotiation power of end investors on one side and large international banks on the other side;
- its application will create severe and unsolvable problems between applicable creation law and the laws of the account agreements.
- It may even create additional legal problems not currently existing in case different parties in the custody chain submit their contractual relationship to different laws.

The Hague Securities Convention should not be supplemented, it should be completely disregarded.

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

a) an estimated increase / decrease of the number or value of transactions which you are able to undertake in your business (please quantify if possible)

b) an estimated increase / decrease of your legal due diligence costs (please quantify if possible)

c) an estimated increase / decrease of the profitability of your business (please quantify if possible)
d) a change in your business model and the way in which you operate your business

e) any other advantages (please specify and provide relevant data if possible)

f) any other disadvantages (please specify and provide relevant data if possible)

a) The use of option 1,2 or 4 will lead to a significant increase of the number and value of transactions which end investors are able to undertake once they have legal certainty. The use of options 1, 2 and 4 will create uncertainty and may lead to a decrease in the number of value of such transactions.

b) The use of option 1, 2 or 4 will lead to a significant increase in due diligence cost for end investors and issuers.

c) The business of end investors will become more costly if solution 3 is not taken into consideration. Also, issuers would incur higher costs if intermediaries are given decisive powers over those legal aspects with the use of the PRIMA approach.

d) That question seems to refer to intermediaries.

e) The advantage of solution 3 is a clarification of the existing situation and the avoidance of any conflicts between securities law and creation law. It will help lowering the cost for end investors to obtain full title security and enjoy the full benefits of the investments. It will also help intermediaries to once and for all legally assess any situation and thus avoid later confusion.

f) The disadvantages of the Hague Convention, the approaches under option 1,2 and 4 have been explained above. The European commission will certainly carefully analyse how to establish faith in the capital markets union and whether this can best be achieved by putting the interests of end investors above the interests of intermediaries.

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:

a) taxation (please specify and quantify if possible)

b) transfer of risks between central depositaries, banks and depositors (please specify and quantify if possible)

c) the effectiveness of clearing and settlement systems (please specify and quantify if possible)

d) the identification of credit institutions' insolvency risks (please specify and quantify if possible)

e) the exercise of voting rights attached to securities (please specify and quantify if possible)

f) the remuneration of the ultimate owners of securities (please specify and quantify if possible)

g) combating market abuse (please specify and quantify if possible)

h) combating money laundering and terrorist financing (please specify and quantify if possible)

a) Neither solution would have a direct effect on taxation.

b) Option 3 would have positive effect on the transfer of risk between CSD's banks and depositors because they all can then align their business practices with the clarification of applicable laws.

c) Clearing and settlement systems are not affected negatively by the introduction of option 3. They will almost certainly be affected by an option which gives intermediaries the right to designate applicable laws simply by the account agreement or moving the relevant account from one location to the other. In order to safeguard and improve effectiveness of the clearing and settlement system options 1 and 2 must be avoided.

d) The clear expression of the principle of ownership of the end investors helps clarifying that no insolvency of any credit institution can affect those rights.

e) The exercise of voting rights attached securities is much easier in case the creation law is acknowledged across Europe also were all intermediaries. In that case, it would clear to everybody that the end investor only is allowed to exercise those rights and that all

intermediaries are obliged to serve the interests of the end investor. That is also the basic principle of the revision of the Shareholders Rights Directive 2017.

f) We are uncertain what the question aims to evoke as an answer. End investors meaning ultimate owners of securities will not be remunerated by intermediaries.

g) The approach under option 3 will certainly help combating market abuse by certain intermediaries which enjoy dominant or monopolistic position in capital markets. If they have to comply with applicable creation law they cannot abuse their market power to force application of their own home country law on European end investors.

h) If option 3 is mandatory the risk of money laundering and terrorist financing is reduced because intermediaries cannot apply more opaque laws of a non-European state to their relationship any more. This would help avoiding using bearer securities in order to disguise illegal actions all launder money of finance terrorist activities.

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: - the steps necessary to render rights in book-entry securities effective against third parties - priority issues - other (please specify)

The laws under which securities have been constituted or created should cover the steps necessary to render rights in book-entry securities effective both against the issuers and against third parties and also between the parties of the trade in those securities and for intermediaries being involved in such actions.

That law should also decide on priority issues.

If European laws and regulations use another approach, that law should only determine the relationship between intermediaries and their clients, but not between and investors and third parties or and investors and issuers.

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?

The laws under which securities have been created in case of non -compliance by intermediaries and that non-compliance resulting in end investors losing out, especially incurring economic and legal damages, should also be decisive in case the law of the account agreement between the end investor and its intermediary is insufficient to properly protect the end investor against malpractice non-compliance of the intermediary. For instance, intermediaries not forwarding shareholder data for proper registration of that shareholder in the register of the issuer should pay compensation for losses suffered by the end investor based on the creation law.

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

- Yes, very important (please estimate the number or value of transactions concerned per year)

- Yes, important (please estimate the number or value of transactions concerned per year)

- Neutral (please estimate the number or value of transactions concerned per year)

- No

- I don't know. The amount of certificated securities is difficult to estimate.

b) How often are certificated securities being used as collateral in practice?

- Very frequently (please estimate the number or value of transactions concerned per year)

- Frequently (please estimate the number or value of transactions concerned per year)

- Sometimes (please estimate the number or value of transactions concerned per year)

- Rarely (please estimate the number or value of transactions concerned per year)

- Never

- I don't know

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 (please provide reference and indicate the connecting factor)

-Yes, there is case law (please provide reference and indicate the connecting factor)

-Yes, there is legal doctrine (please provide reference and indicate the connecting factor)

- No

- I don't know

Yes, there are statutory rules which refer to the creation law of the security for most aspects. However, they referred to the lex rei sitae for all legal questions around transfer of ownership and pledging those securities.

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

- Yes (please explain your answer)

- No

- I don't know

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

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 (please explain)

- No (please explain)

- I don't know

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

a) an estimated increase / decrease of the number or value of transactions which you are able to undertake in your business (please quantify if possible)

b) an estimated increase / decrease of your legal due diligence costs (please quantify if possible)

c) an estimated increase / decrease of the profitability of your business (please quantify if possible)

d) a change in your business model or the way in which you operate your business

e) any other advantages (please specify and provide relevant data if possible)

f) any other disadvantages (please specify and provide relevant data if possible)

The current rules are as stated under question 18 in most Member States. Only if there is uncertainty in one member state it may be worth expressing that rule with effect for the whole European Union.

In any case the deciding law should always be the laws under which the securities have been created. This is especially true in the case of registered shares. Down the entry into the register of the issuer is a decisive factor.

For bearer shares if the creation law allows the right evidenced in the paper follows the right to the paper and that is treated by a conflict of law rules of the lex rei sitae.

We do not assume any increase or decrease in the number of value of transactions all legal due diligence cost or profitability are a change in business model are other advantages or disadvantages to such clarify rule save if there is a Member State but this rule is not being applied currently.

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

- I don't know

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

- I don't know

- If yes, please specify:

a) Which elements do you verify under the law governing the assigned claim (e.g., assignability of the claim, effectiveness of the assignment against the debtor, other)?

Normally, the assign ability of the claim and the effectiveness of the assignment against the debtor and other parties is being verified.

b) How much of the legal costs of a transaction involving an assignment of claims would be allocated to legal due diligence regarding e.g. the assignability of the underlying claim, the perfection of the assignment, or the enforceability of the claim by the assignee against the debtor?

Very small portion

c) Approximately what percentage of the total transaction costs (legal and other) would be allocated to the legal due diligence required in connection with the above situations?

- If no (i.e. if you do not undertake due diligence with respect to the underlying claims but accept the legal risks relating, e.g., to the assignability of the claim or its enforceability against the debtor), please explain the reasons for this:

- costs of due diligence

- impossibility to undertake individual verification of the law applicable to each claim assigned

- other (please explain)

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 (please explain your answer)

- No

- I don't know

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

Only clarification of existing principles may be helpful if there is uncertainty in a member state.

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) the law applicable to the contract between assignor and assignee

3

(2) the law of the assignor's habitual residence

4

(3) the law governing the assigned claim

1

(4) other solution(s) (please specify and give reasons for your choice)

2

Question 27 For each of the above options (1)-(4) please indicate the scale of advantages or disadvantages in terms of:

a) an estimated increase / decrease of the number or value of transactions which you are able to undertake in your business (please quantify if possible)

-1

b) an estimated increase / decrease of your legal due diligence costs (please quantify if possible)

+1

c) an estimated increase / decrease of the profitability of your business (please quantify if possible)

-1

d) a change in your business model or the way in which you operate your business

e) any other advantages (please specify and provide relevant data if possible)

0

f) any other disadvantages (please specify and provide relevant data if possible)

Option 3 is the best solution because only that solution will ensure that the claim is assignable under the law governing the claim and application of that law ensures uniform effects also against third parties.

a) The number of value of transactions may decrease because solution 1 and 2 may create discrepancies between the law governing the assign claim and the other aspects and uncertainty and discrepancies may cause a negative change in the number and value of transactions. On the other hand, uniformity of applicable law and all those aspects may increase the number and value of transactions.

b) Legal due diligence costs for options 1 and 2 are likely to increase if there is more than one bond applicable. That may cause the legal due to cost and decrease in option 3.

d) No change in the business model is expected.

Applicable law should determine the conflict of law rules for the steps necessary to render rights and claims effective against third parties and stole on priority issues.

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 claims effective against third parties - priority issues - other (please specify)

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

- priority issues

other

Question 29 - In your experience, how frequently are claims constituting financial instruments other than book-entry securities or other claims traded on financial markets being assigned? - Very frequently (please estimate the number or value of transactions concerned per year)

- Frequently (please estimate the number or value of transactions concerned per year)

- Sometimes (please estimate the number or value of transactions concerned per year)

- Rarely (please estimate the number or value of transactions concerned per year)

- Never

- I don't know

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 (please provide reference and indicate connecting factor)

Yes, the statutory rules in conflict of law rules.

-Yes, there is case law (please provide reference and indicate connecting factor)

-Yes, there is legal doctrine (please provide reference and indicate connecting factor)

- No

- I don't know

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?

No. The laws under which financial instruments have been created should govern all aspects of those financial instruments during the lifetime.

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 (please provide reference and indicate connecting factor)

-Yes, there is case law (please provide reference and indicate connecting factor)

-Yes, there is legal doctrine (please provide reference and indicate connecting factor)

- No

- I don't know

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

- I don't know

- If yes, please:

a) 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) specify what conflict of laws solution you recommend

c) 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 claims effective against third parties

- priority issues

- other: please explain

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

a) for the purpose of securing rights and obligations potentially arising in connection with a system designated under the Settlement Finality Directive?

- Yes

- No

I don't know

b) to central banks of Member States or to the European Central Bank?

- Yes

- No

- I don't know

- If yes, please:

a) provide arguments that would justify the departure from the general solution for claims and/or the specific solution for cash held in accounts. Would such a solution have any impact on the market, business models, risks, etc.?

b) specify what conflict of laws rule you recommend

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

- Very frequently (please estimate the number or value of transactions concerned per year)

- Frequently (please estimate the number or value of transactions concerned per year)

- Sometimes (please estimate the number or value of transactions concerned per year)

- Rarely (please estimate the number or value of transactions concerned per year)

- Never

- I don't know

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 (please provide reference and indicate connecting factor)

-Yes, there is case law (please provide reference and indicate connecting factor)

-Yes, there is legal doctrine (please provide reference and indicate connecting factor)

- No

- I don't know

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

- I don't know

- If yes, please:

a) 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) specify what conflict of laws solution you recommend

c) 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 claims effective against third parties

- priority issues

- other: please explain

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

- Very frequently (please estimate the number or value of transactions concerned per year)

- Frequently (please estimate the number or value of transactions concerned per year)

- Sometimes (please estimate the number or value of transactions concerned per year)

- Rarely (please estimate the number or value of transactions concerned per year)

- Never

- I don't know

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 (please provide reference and indicate connecting factor)

-Yes, there is case law (please provide reference and indicate connecting factor)

-Yes, there is legal doctrine (please provide reference and indicate connecting factor)

- No

- I don't know

Yes, there are statutory rules in place. The assignment of claims is possible according to the law under which those claims have been created.

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

- I don't know

- If yes, please:

a) 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) specify what conflict of laws solution you recommend

c) 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 claims effective against third parties

- priority issues

- other (please specify)

No, there are statutory rules in place. The law under which the assigned claims have been created shall govern those questions.

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

Yes. Please see our introductory remarks.

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ANNEX

Example: use of laws other than the laws under which a security has been created regarding transfer and holding of securities by intermediaries.

Under the US Uniform Commercial Code ownership of end investors in a security they have paid for and believe to have acquired is not vested to the end investor, but is given to an intermediary and replaced by a “security entitlement” of the end investor (called “beneficial owner”), which is basically a claim against their bank. This bank than purports to be the owner of a security vis-à-vis the issuer and behaves as the end investor even in legal circumstances in which the laws under which the securities have been created (or “constituted”) do not allow for that.