

24 April 2019

Pavel SVOBODA  
Chair, Committee on Legal Affairs  
European Parliament  
Rue Wiertz  
Altiero Spinelli 06F365  
1047 Brussels



Dear Mr Svoboda

**European Commission proposal for a regulation on the law applicable to the third-party effects of assignments of claims**

The role of the Financial Markets Law Committee (the “FMLC” or the “Committee”) is to identify issues of legal uncertainty, or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks, and to consider how such issues should be addressed.

On 12 March 2018, the European Commission (the “Commission”) published a proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims (the “proposed regulation”).<sup>1</sup> The proposed regulation applies the law of the assignor’s habitual residence to third-party effects, subject to various exceptions. On 13 February 2019, the European Parliament published its legislative resolution (the “legislative resolution”) adopting the proposed regulation, albeit with some amendments.<sup>2</sup>

Notwithstanding the U.K.’s decision to exercise its right not to opt-in to the proposed regulation,<sup>3</sup> as the proposed regulation proceeds through the European legislative process, the Committee would like to draw attention to the difficulties which will arise in applying the law of the assignor’s habitual residence.

The Committee has previously engaged with this topic, first in response to the European Commission’s consultation on the proposed regulation.<sup>4</sup> That response stated that the third-party consequences of assignments of claims should be governed by the law of the assigned claim rather than the law of the assignor’s habitual residence. The Committee has

<sup>1</sup> Proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims COM/2018/096 final - 2018/044 (COD), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0096>.

<sup>2</sup> European Parliament legislative resolution of 13 February 2019 on the proposal for a regulation of the European Parliament and of the Council on the law applicable to the third party effects of assignments of claims (COM(2018)0096 – C8-0109/2018 – 2018/0044(COD)) (Ordinary legislative procedure: first reading), available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2019-0086+0+DOC+XML+V0//EN&language=EN>.

<sup>3</sup> See the letter from the Economic Secretary (HM Treasury) to the European Scrutiny Committee, available online: [http://europeanmemoranda.cabinetoffice.gov.uk/files/2018/07/Assignment\\_of\\_claims\\_-\\_HOC\\_letter\\_from\\_the\\_Economic\\_Secretary.pdf](http://europeanmemoranda.cabinetoffice.gov.uk/files/2018/07/Assignment_of_claims_-_HOC_letter_from_the_Economic_Secretary.pdf).

<sup>4</sup> On 1 April 2006, the FMLC published a paper in response to the Commission’s proposal for Rome I, indicating its concerns about the then proposed application of the assignor’s habitual residence to third-party effects in draft Article 13(3), available online: <http://fmlc.org/wp-content/uploads/2018/02/Issue-121-Legal-assessment-of-the-conversion-of-the-Rome-Convention-to-a-Community-instrument-and-the-provisions-of-the-proposed-Rome-I-Regulations.pdf>.

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continued to express this view,<sup>5</sup> most recently in a letter to the European Commission sent in July 2018, (the “**2018 Letter**”, enclosed here for ease of reference) in which the Committee reiterated the most important reasons for this preference.<sup>6</sup>

Recent discussions with industry participants have confirmed the difficulties in applying the assignor’s habitual residence. In addition, experts have drawn the FMLC’s attention to two new concerns arising from the legislative resolution. First, under the proposed regulation there are at least three different rules that might govern the consequences of an assignment. The main rule is in Article 4(1) of the proposed regulation, applying the law of the assignor’s habitual residence to the third-party effects of an assignment. Then there are two categories of exceptions: Article 4(2) exempts the assignment of certain types of claims (bank accounts and financial instruments) while Article 4(3) exempts the assignment of claims in pursuit of a type of transaction (securitisations). The legislative resolution proposes that the second of these exceptions be deleted: Amendment 12 deletes the recital explaining the exception and Amendment 22 deletes Article 4(3).

In the 2018 Letter, the Committee highlighted the characterisation issues which would arise owing to the exceptions, and the considerable legal work which would have to be undertaken for market participants to be confident whether they are within the main rule or outside it. The deletion of the exception in respect of securitisations, however, does not resolve the issue and leads to other concerns. It would be difficult to pinpoint the law of the habitual residence of the assignor with regards to, for example, portfolios which are traded multiple times, including portfolios of non-performing loans (“**NPLs**”), whereas the law of the claim would remain the same. Market participants have raised concerns that such difficulties are likely to affect adversely the ability of vendors to sell portfolios, and hence affect the price of portfolios. This could cause reluctance amongst vendors to dispose of their assets causing wider implications for entities looking to restructure their balance sheets away from non-core assets and their NPLs.

A second uncertainty is caused by Amendment 6 of the legislative resolution which adds the following new recital 14a to the proposed regulation:

This Regulation is not intended to alter the provisions of Regulation (EC) No 593/2008 regarding the proprietary effect of a voluntary assignment as between assignor and assignee or as between assignee and debtor.

The application of Regulation (EC) No 593/2008 on the law applicable to contractual obligations (“**Rome I**”) exclusively to the proprietary effects relating to debtors means that two different sets of rules will apply to two subsets of relationships. The FMLC has observed elsewhere that this distinction also runs into difficulties of characterisation and may lead to significant uncertainty as to the governing law.<sup>7</sup>

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<sup>5</sup> On 1 October 2006, the FMLC published a further paper with suggested drafting amendments for the proposal for Rome I, available online: <http://fmlc.org/wp-content/uploads/2018/02/Issue-121-Suggestions-for-amendments-to-Articles-7-and-13-of-Rome-I.pdf>. Ultimately, the third-party effects of assignments were not included in the text of Rome I but the presently proposed regulation adopts the same position as the initial proposal for Rome I.

See also the FMLC’s paper published on 1 March 2010 regarding a review of Article 14 of Rome I, available online: <http://fmlc.org/wp-content/uploads/2018/02/Issue-137-Response-to-2009-MoJ-Discussion-Paper.pdf>.

<sup>6</sup> FMLC, Letter to European Commission: Proposed Regulation on the Law applicable to the “Third-party Effects” of the Assignment of Claims, (31 July 2018), available at: <http://fmlc.org/letter-to-european-commission-proposed-regulation-on-the-law-applicable-to-the-third-party-effects-of-the-assignment-of-claims-31-july-2018/>.

<sup>7</sup> See *supra* fn 3

Given the complexities highlighted in this and previous publication(s), the Committee continues to consider that applying the law of the assigned claim will best promote legal certainty and clarity in cross-border assignments.

I and Members of the Committee would be delighted to meet you to discuss the issues raised in this letter. Please do not hesitate to contact me should you wish to arrange a meeting or if you have any questions.

Yours sincerely,

A handwritten signature in cursive script that reads "Joanna Perkins". The signature is written in dark ink and is positioned above the printed name and title.

Joanna Perkins  
FMLC Chief Executive