

ECSDA response to the European Commission consultation on conflict of laws rules for third party effects of transactions in securities and claims

This paper constitutes European Central Securities Depositories Association's (ECSDA's) response to the [consultation](#) issued by the EU Commission on 7 April 2017 on conflict of laws rules for third party effects of transactions in securities and claims.

ECSDA represents 41 European Central Securities Depositories (CSDs), across 37 European countries. The members of the association are located both within and outside of the European Union. The association encompasses all CSDs from markets that have joined T2S ECB project. Jointly, ECSDA's members hold securities valued at more than € 53bn, and annually deliver securities worth more than €1.1 tn.

Introduction

We thank the European Commission for the opportunity to provide our view to the questions raised in the consultation.

Before responding to the consultation, we would like to highlight that the nature of many questions of the consultation requires detailed responses revealing the differences in each jurisdiction. For these questions, we felt that it was more appropriate to refer the reader to the individual responses to the consultation from ECSDA members, rather than providing a joint answer. In our response, we therefore focus on the questions where a common position across different CSDs could be found.

We also note that useful information and concrete examples about individual ECSDA members which are part of the T2S project can be found in the European Central Bank's fact-finding exercise on *Conflicts of laws issues in T2S markets*¹.

Key considerations

The legal certainty of securities settlement and holdings is of utmost importance for the resilience of CSDs' ecosystems and the safety of their operations. Since their creation, European CSDs are familiar with, and able to identify potential conflicts of laws relating to their operations and aim to remove or mitigate related legal risks. For this reason, European CSDs have contributed to the creation of conflict of laws rules carefully crafted to address special needs of securities settlement systems. We try to make sure that the certainty provided by these rules is not altered in new pieces of law.

We do not see an urgent need for an overarching reform of conflict of laws rules on third party effects of transactions in book-entry securities for legal certainty in the European Union for the following reasons:

- European CSDs believe that the legal environment in which they operate is sufficiently secure. It recognises the special role played by the Securities Settlement Systems and addresses their special needs. It generally allows CSDs to adequately deal with conflict of laws, including if any would arise in a situation of a default of a large participant.
- The European legislators have already proposed the conflict of laws rules in the Settlement Finality and the Financial Collateral Directives (SFD and FCD, as they are amended by the Directive 2009/44/EC) and the Winding up Directive (2001/24/EC). We believe that they help to ensure sufficient legal certainty for securities transfers and collateral movements involving European Securities Settlement Systems (SSSs) (i.e. EU CSDs designated under SFD and FCD).

This applies even more to certificated securities, as the relevance of certificated securities in respect of cross-border transactions is continuously decreasing.

¹ Published by the T2S Harmonisation Steering Group on 10 November 2015, http://www.ecb.europa.eu/paym/t2s/progress/pdf/ag/mtg29/item_4_20151116.pdf

ECSDA would prefer to discourage the legislators from reviewing pieces of legislation that are well-functioning. We perceive that the result would be an increase in legal uncertainty, in the event that the CSD legal environment is changed, and the number of existing conflict of laws approaches.

If the EU moves ahead with an isolated EU solution, a fine-tuning of the current framework (which functions well from a CSD perspective) would be preferable to an over-arching reform. If ever European legislators would still conclude that an overarching reform of conflict of laws rules on third party effects of transactions in book-entry securities is needed for legal certainty, it should provide for a solution that addresses all types of securities movements, including collateral or other portfolio management-related movements.

In our view, the most plausible connecting factor is the PRIMA approach. We believe that it would be the most optimal compromise because historically the EU conflict of laws rules for CSDs have been based on the PRIMA approach. The rules have proved to function well for the CSDs in the past and do not require a change.

1. The issue with conflict of laws and how to deal with it

Q1. 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

Please refer to the responses of individual ECSDA members.

Q2. 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 that the current legal environment of the European CSDs generally allows to adequately deal with conflict of laws, if any would occur in a situation of a default of a large participant, among others thanks to the SFD, FCD and Winding up Directive.

Please refer to the responses of individual ECSDA members.

2. Book entry securities

Q.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)?

Please refer to the responses of individual ECSDA members.

Q.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.

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?

Please refer to the responses of individual ECSDA members.

Q5. 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.

Please refer to the responses of individual ECSDA members.

Q6. 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.

Please refer to the responses of individual ECSDA members.

Q7. 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.

The legal certainty of securities settlement and holdings is of utmost importance for the resilience of CSDs’ ecosystems and the safety of their operations. Since their establishment, European CSDs are familiar with, and fully able to identify potential conflicts of laws relating to their operations and aim to remove or mitigate related legal risks.

For this reason, European CSDs have contributed to the creation of conflict of laws rules carefully drafted to address their special needs. Therefore, we do not see an urgent need for an overarching reform of conflict of laws rules on third party effects of transactions in book-entry securities for legal certainty in the European Union.

For examples of national laws, please refer to the responses of individual ECSDA members.

Q8. Do you see added value in Union action to address issues identified in Section 3.1. of this public consultation?

-Yes

-No

-I don't know

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

No.

ECSDA would prefer to discourage the legislators from reviewing pieces of legislation that are well-functioning. We perceive that the result would be an increase in legal uncertainty, in the event that the CSD legal environment is changed, and the number of existing conflict of laws approaches.

If the EU moves ahead with an isolated EU solution, a fine-tuning of the current, well-functioning for CSDs, framework would be preferable to an over-arching reform. If ever European legislators would still conclude that an overarching reform of conflict of laws rules on third party effects of transactions in book-entry securities is needed for legal certainty, it should provide for a solution that addresses all types of securities movements, including collateral or other portfolio management-related movements.

In our view, the most plausible connecting factor is the PRIMA approach. We believe that it would be the most optimal compromise because historically the EU conflict of laws rules for CSDs have been based on the PRIMA approach. The rules have proved to function well for the CSDs in the past and do not require a change.

Q9. Do you think that targeted amendments to the relevant EU legislation containing conflict of laws rules would solve the identified problems?

- Yes

- 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?

As mentioned in our key messages and in our response to question 2, ECSDA believes that the current conflict of law rules provided by SFD and FCD support that the conflict of laws which would potentially affect the functioning of settlement systems are properly managed. ECSDA would recommend the legislators to preserve pieces of law which are functioning well today.

Thus, in order to tackle any remaining issues related to book-entry securities, we believe that a targeted approach is more appropriate than an overarching reform. If the EU moves ahead with an isolated EU solution, a fine-tuning of the current, well-functioning for CSDs, framework would be preferable to an over-arching reform.

Q10. 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.

We are confused by the question. In our opinion, the PRIMA rules should determine the substantive rules applicable to the transfer of the securities from the relevant account.

Q11. 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

The current legislative environment recognises the special role played by the Securities Settlement Systems and addresses their special needs. It was carefully crafted in order to achieve the current level of certainty for CSDs. From the perspective of CSDs, we do not perceive the need for an overarching reform of conflict of laws rules on third party effects of transactions in book-entry securities. In our view, a targeted approach is more appropriate to tackle precise issues. This approach is preferable to a generic approach that risks altering the current well-functioning conflict of law rules relevant for Securities Settlement Systems, like the ones included in SFD and FCD.

Q12. 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.

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.

As stated above, we do not perceive the need for an overarching reform of conflict of laws rules on third party effects of transactions in book-entry securities. If ever European legislators would still conclude that an overarching reform is needed for legal certainty, it should provide for a solution that addresses all types of securities movements, including related to portfolio management and specifically collateral. Otherwise, this would completely circumvent the contractual will of the parties to determine and document their rights at each level of the chain. Determining only one record in the chain could indeed lead to a situation where the relevant law could be a law which does not know, as a matter of substantive law, the rights which the credit to the account are supposed to represent. It may even re-characterise them as a claim instead of an in rem right. We are also not sure to understand how there could be a difference between the relevant record for conflict of laws purposes and for purposes of substantive law if the place of the relevant account (*lex rei sitae* or *lex situs*) is precisely to determine the enforceability of that proprietary rights against third parties.

For that reason, we do not see the law under which the security is constituted (option 3) as the appropriate connecting factor. Indeed, introducing a rule whereby all ownership aspects of a security held in a multi-tier chain are determined by the law constituting the security would have

dramatic impacts on the business of CSDs which could no longer offer services governed by a single law.

The connecting factor preferred by ECSDA members is the PRIMA approach as it is reflected in the SFD, FCD and the Winding up directive. For historical reasons, the conflicts of laws taking into account the special needs of the securities settlement systems have been based on the PRIMA rule and they have proven to function well for CSDs.

Q13. 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)**

ECSDA expects that an overarching reform would result in a review of legal opinions covering the conflict of laws questions. We would like to emphasise the challenge created for CSDs, if the constituting law solution is chosen and CSDs can no longer provide collateral management services under a single law.

Q14. 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)**

No comments.

Q15. 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)**

ECSDA wishes to note that it is not possible to have different laws which determine, on the one hand, the nature of the asset and the rights flowing from that asset and, on the other hand, the

enforceability and priority ranking of proprietary rights. This is elaborated in the response to question 10 whereby a conflict of law rule is exactly meant to identify the relevant substantive law.

Q16. 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?

No comments.

3. Certificated securities

Q17. 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

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

Please refer to the responses of individual ECSDA members.

Q18. 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

Please refer to the responses of individual ECSDA members.

Q19. 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?

In line with our views regarding the book-entry securities, we see an even lesser value to address the issues for certificated securities, given that they are less and less frequent in the European Union.

Q20. 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

In line with our response to the previous question, we do not see a need to harmonise the conflict of laws rules for certificated securities.

Q21. 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 (please specify)

ECSDA would like to point out a clear difference between the issuance and the circulation of securities. On one side, the creation of securities includes the initial credit of securities at the issuance account of the so-called issuer CSD or the Common depository/Common service provider/Common safekeeper. And on the other side, the transfer of securities. The immobilisation of securities through a CSD and the application of article 3 of CSDR should be sufficient to cover the transfer of “certificated registered shares” and “certificated bearer securities”. However, there is no conflict of law in the area of the initial recording and entry into the CSD, as to the creation of the right or the entitlement towards the issuer or holders of certificates.

Q22. 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)*

No comments.

4. Claims

Q23. 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

- If yes, please specify:

a) **How frequently do these difficulties arise in practice?**

- several times per week

- several times per month

- several times per year

b) **Which category or categories of third parties (e.g. creditors of the assignor, a second assignee) most commonly give rise to difficulties?**

c) **Please describe shortly as many situations as possible in which these problems have arisen. Please explain whether you were able to overcome the problems and, if so, how.**

d) **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?**

Please refer to answers of the individual ECSDA members.

Q24. 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)?**

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?**

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)

Please refer to answers of the individual ECSDA members.

Q25. 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?

No comments.

Q26. 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
- (2) the law of the assignor's habitual residence
- (3) the law governing the assigned claim
- (4) other solution(s) (please specify and give reasons for your choice)

No comments.

Q27. 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)
- 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)

No comments.

Q28. 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)

No comments.

5. Certain specific situations in which claims might need different treatment

Q29. 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

Please refer to the answers of individual ECSDA members.

Q30. 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, 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

Please refer to the answers of individual ECSDA members.

Q31. 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
- I don't know
- If yes, please:
 - a) indicate precisely which claims should be covered by such a specific rule
 - b) 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?
 - c) specify what conflict of laws solution you recommend
 - d) 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)

No comments.

Q32. In your experience, does cash collateral play an important role?

- Very important (please estimate the number or value of transactions concerned per year)
- Important (please estimate the number or value of transactions concerned per year)
- Neutral (please estimate the number or value of transactions concerned per year)
- Not important
- I don't know

It does play an important role in our view.

Q33. 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

Please refer to the answers of individual ECSDA members.

Q34. 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

No comment.

Q35. 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?
 - 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

No comment.

6. Credit claims used as financial collateral

Q36. 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

No comments, as the CSDs are not involved in services related to management of financial collateral in forms of securitisation or credit claims.

Q37. 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

Please refer to the answers of individual ECSDA members.

Q38. 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*

No comments.

Q39.

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*

No comments.

Q40. 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*

Please refer to the answers of individual ECSDA members.

Q41. 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 comments.

Q42. Do you have any other comments on the topic of this public consultation?

No other comments.

Contacts and references

Our EU Transparency Register number is 92773882668-44.

For any questions on this paper, please contact Anna Kulik, ECSDA Secretary General, at info@ecsd.eu or +32 2 230 99 01.