SUBJECT MATTER
1. On 12 March 2018, under the Capital Markets Union Action Plan, the European Commission published a Communication (subject to a separate EM on document 7358/18) and a legislative proposal aimed at reducing legal uncertainty on cross-border transactions within the EU relating to securities and claims. The legislative proposal concerns changes to the law applicable to the third-party effects of assignments of claims and is designed to increase cross-border transactions in claims by providing legal certainty through the adoption of uniform conflict of laws rules at Union level.
2. A claim is a creditor’s right, against a debtor, to the payment of a sum of money or the performance of an obligation. Claims under the proposal fall into three categories:

   a. Claims arising from financial instruments, e.g. claims arising from derivative contracts, and cash credited to an account in a credit institution, where the account holder is the creditor and the credit institution is the debtor;
   b. Securitised claims; and
   c. Most other claims, or receivables, e.g. money to be received for unsettled transactions.

3. The assignment of a claim is the transfer of that right from the original creditor (the assignor) to another (the assignee). The proposed Regulation is not concerned with whether an assignee is entitled to bring legal proceedings against the underlying debtor; that is governed by the Rome I Regulation, and depends upon the law governing the underlying debt. The proposed regulation concerns the third-party, or proprietary, effects of an assignment, i.e. entitlement to the proceeds of the underlying debt, including as between two successive assignees of the same claim or between an assignee and the estate of an insolvent assignor.

4. The Commission is concerned there is a lack of legal certainty, which creates a legal risk in cross-border assignments that does not exist in domestic assignments. The Commission argues this can result in unexpected financial losses, higher transaction costs, and foregone business opportunities and reduced market integration. The uniform rules the Commission is proposing are intended to designate which national law should determine the ownership of a claim as a result of its assignment on a cross-border basis. The Commission argues that introduction of legal certainty will promote cross-border investment, access to cheaper credit, and market integration.

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

The Regulation

6. The Regulation defines key concepts for the purposes of its own contents, including ‘assignment’, ‘claim’, ‘third-party effects’, and ‘habitual residence’.

7. The Regulation establishes the general rule that the law that governs the third-party effects of assignments of claims is the law of the country where the assignor has its habitual residence at the material time.

8. It also establishes that the third-party effects of certain assignments are, as an exception, subject to the law of the assigned claim. This refers to the law that governs the contract between the original creditor and the debtor from which the claim arises. This exception applies to (i) the assignment of cash credited to an account in a credit institution; and (ii) the assignment of claims arising from financial instruments.
9. The Regulation also lays down the possibility, in the context of a securitisation (which is not defined), for the assignor and the assignee to choose the law of the assigned claim to apply to the third-party effects of assignments. This is intended to cater for the needs of both large and smaller securitisation operators.

10. There are exceptions from the scope of the proposal, e.g. certain life insurance contracts, assignments arising from the constitution of trusts, and the assignment of claims arising from matrimonial property regimes.

SCRUTINY HISTORY
11. None directly on this proposal. The last time the EU attempted to legislate in this area was in the context of the Rome I Regulation. This issue was not included in the agreed Regulation. The Commons European Scrutiny Committee cleared the Rome I proposal from scrutiny on 16 July 2008 and the House of Lords EU Committee cleared from scrutiny on 18 June 2008.

MINISTERIAL RESPONSIBILITY
12. The Chancellor of the Exchequer has responsibility for United Kingdom policy on European Union monetary and economic issues. The Foreign and Commonwealth Secretary and the Secretary of State for Exiting the EU are responsible for overall United Kingdom policy towards the European Union. The Secretary of State for Justice has an interest in the rules of applicable law in the UK.

INTEREST OF DEVOLVED ADMINISTRATIONS
13. Whilst Financial Services regulation is a reserved matter under the UK's devolution settlements and no devolved administration interests arise, Private international Law is a devolved matter. The Devolved Administrations have been consulted on those aspects of this EM.

LEGAL AND PROCEDURAL ISSUES
i. Legal basis
14. The Treaty on the Functioning of the European Union confers on the European Institutions the competence to adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction (Article 81(2)(c) TFEU). This extends to legislation dealing with the functioning of cross-border transactions within the EU relating to securities and claims. The Justice and Home Affairs opt-in is a consideration; under the United Kingdom’s Protocol (No 21) to the TFEU the United Kingdom does not take part in the adoption and application of the proposed Regulation unless it elects to do so.

ii. European Parliament Procedure
15. The Regulation is due to be adopted by the Ordinary Legislative Procedure.

iii. Voting procedure
16. Member States will be required to vote by Qualified Majority Voting.

iv. Impact on United Kingdom Law
17. If the UK elects to take part in the adoption and application of the proposed Regulation, the Regulation will form part of UK law on the date that it comes into force (the twentieth day following publication in the Official Journal of the European Union), and will be applicable 18 months after that date.
v. Application to Gibraltar
18. The Regulation will be applicable to Gibraltar. If the United Kingdom decides to opt in, the scope of any adopted Regulation will extend to Gibraltar.

vi. Fundamental Rights analysis
19. In its explanatory memorandum, the Commission states that the proposal complies with fundamental rights, and highlights that the initiative's objectives support the right to property, enshrined in Article 17 of the Charter of Fundamental Rights of the European Union. The Commission says that, by clarifying which law governs the proprietary effects of assignments of claims, this proposal would contribute to upholding the right to property as it would diminish the risk that the ownership of investors or collateral takers over claims might be hindered.

APPLICATION TO THE EUROPEAN ECONOMIC AREA
20. These proposals are not applicable to the EEA.

SUBSIDIARIETY
21. By its nature the subject matter (third-party effects of assignments of claims in cross-border cases) is cross-border. It can be beneficial and appropriate for certain rules to be decided at EU level to enable certainty and predictability for cross-border families. The Government notes, however, that in some areas of the proposal (as highlighted in the paragraphs that follow) further consideration of the application of subsidiarity is required.

POLICY IMPLICATIONS
22. On 23 June 2016, the EU referendum was held and the people of the United Kingdom voted to leave the European Union. The Government respected the result and triggered Article 50 of the Treaty on European Union on 29 March 2017 to begin the process of exit. Until withdrawal, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will also continue to negotiate, implement and apply EU legislation.

23. The Government recognises that there are different applicable law rules on the third-party effects of the assignment of claims amongst Member States, and supports identifying ways to deliver greater legal certainty and reduce legal risk in cross-border assignments.

24. At present, the scope of the proposed Regulation encompasses all ‘claims’, i.e. a right to claim for a debt of whatever nature, whether monetary or non-monetary, subject to a very limited number of exceptions. The Government has concerns that the wide scope of this proposal will have unintended consequences for the assignment of claims. In particular, the proposal's application of the law of the assigned claim and its scope concerning financial instruments is unclear, and could produce unexpected results with respect to the range of financial transactions and contracts falling within and beyond its scope.

25. The Government has yet to be persuaded that the proposed regulation as currently drafted is the most effective way of achieving the stated objectives of this legislative proposal, namely increasing cross-border investment in the EU by delivering greater legal certainty and, thereby, facilitating access to finance for firms, including SMEs, and consumers.
26. As this proposal has been brought under Article 81(2)(c) TFEU, the UK’s Title V opt-in applies. The text was presented to the Council in English on 16 March 2018 and assigned to HM Treasury as the lead department on 2 April 2018. Therefore, the eight-week period for Parliament to consider the opt-in expires on 28 May 2018. When deciding whether to opt in, the Government will give careful consideration to the policy and legal implications highlighted above, in particular the potentially unintended scope of the regulation as currently drafted.

CONSULTATION
27. In preparation of this proposal, Member States were consulted by the Commission on which applicable law should govern the third-party effects on claims. Member states were divided on which law should apply. The Commission also undertook a public consultation, which expressed an opinion that the majority favoured the law of the assignor’s habitual residence. The Government intends to seek views from interested parties.

IMPACT ASSESSMENT
28. The executive summary of the impact assessment and the impact assessment accompanying the legislation outline the potential options which could be pursued to address the inconsistencies between, and lack of clarity of, Member State conflict of laws rules. The Commission’s preferred option is the adoption of an EU legislative initiative harmonising conflict of laws rules on the effects on third parties of assignments of claims. The Commission expects this to have a positive impact on the economy.

Regulatory Scrutiny Board Opinion accompanying the legislative proposal
29. The RSB’s First Opinion was negative. The RSB’s Second Opinion on the Commission’s Impact Assessment was positive, but with reservations. It acknowledged that the report had been significantly reworked to reflect the Board’s recommendations and welcomed the additional assessment of options covering financial claims, but highlighted significant shortcomings in the Impact Assessment that still needed to be addressed. The positive opinion was given on the understanding that the report would be further adjusted, in particular to further justify the preferred option on securities in relation to the findings of the evaluation, and to address the consistency between the two solutions found for claims and securities.

FINANCIAL IMPLICATIONS
30. There are no direct financial implications of the Commission proposal on either the budget of the EU nor for the UK Exchequer.

TIMETABLE
31. The Commission’s proposal was published on 12 March 2018. Negotiations in Council Working groups are expected to start in June 2018 and continue into 2019. The timetable for discussions in the European Parliament has not yet been established.
32. Should the UK wish to opt in to this proposal HMT will have to provide its notification to the President of the Council within three months of the proposal’s presentation to the Council, by 28 June 2018.