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Dear Jeff,

The EU Federation for the Factoring and Commercial Finance Industry (EUF) has noted with interest the ongoing policy development in the UK regarding the effects of contractual clauses between the assignor and his debtors which concern bans on assignments of receivables arising from these contractual relationships.

As the UK government has recognised, using accounts receivables as collateral for invoice financing is of particular importance to SMEs. We understand the original aim of policy development in this area was to nullify ban on assignment clauses in debtors' terms of sale as these serve no benefit to effective market functioning but rather prohibit the debtors' suppliers from selling the debts or receivables to a third party financier such as invoice discounting and factoring companies.

As you are aware, such ban on assignment terms are nullified in many jurisdictions within the EU and around the world, and the EUF strongly welcomes the UK government's focus and action on this issue. However the EUF would be deeply concerned about the negative impact recent additions to the draft legislation may have on the factoring and commercial finance industry in the UK and the 42,000 client businesses it supports.

I wanted to set out these concerns in this correspondence and also provide a brief summary of the situation in other jurisdictions within the EUF. If it would be helpful please feel free to pass this correspondence on to colleagues in the UK government working on these proposals as you see appropriate.

The EUF notes that the current draft of the UK legislative proposal has been amended so as to limit the nullification of bans on assignment and to allow certain exceptions: the extent of the nullification of any bans on assignments will be limited to B2B-contracts only, it will not extend to exclusivity clauses for supply chain finance and it will also not extend to clauses in

contracts which protect commercial confidentiality (cf. the public consultation of the Department for Business, Innovation & Skills of December 2014 at <http://tinyurl.com/k8ucjr2>).

The EUF respectfully suggests that the latter two exceptions create too much room for circumvention and will hence thwart the original aim of the legislative proposal. The exception for contractual clauses which protect commercial confidentiality, in particular, is likely to be used as a way to avoid the nullification of contractual clauses which ban assignments, in particular by large debtors who use their market power over SME-suppliers to impose their terms of sale. By including these exceptions from the nullification of bans on assignments, the intended positive benefits for the ability of SMEs to use the debts owed to them to access appropriate forms of finance would *de facto* be undermined if not even reversed.

The EUF would point out that many other jurisdictions have introduced similar rules to counteract contractual bans on assignment, but none of these have included comparable exceptions for exclusivity clauses on supply chain finance and for clauses which protect commercial confidentiality. In addition, we are not aware of any issues relating to commercial confidentiality that have arisen in any jurisdictions as a result.

On the international level, the EUF notes that UNIDROIT Convention on International Factoring of 1988 and the UNCITRAL Convention on the Assignment of Receivables in International Trade of 2001 both include provisions that state that the assignment of a receivable shall be effective notwithstanding any ban on assignments agreed upon between the assignor and the debtor.

In the UNIDROIT Convention, only a Contracting State of the Convention can declare that this general rule has no effect on debtors which have their place of business in that Contracting State. No specific exceptions are foreseen.

In the UNCITRAL Convention, according to article 9 (3), the ineffectiveness of contractual bans on assignments covers assignments of receivables arising from certain payment obligations (e.g. for credit card transactions) and contracts (e.g. for the supply of goods and services). Again, no other exceptions are foreseen.

As noted above, this is consistent with national laws in numerous EU member states. For your and colleagues' information we provide a number of notable examples below.¹ It should also be noted that invoice finance is a significant source of finance for SMEs in all these jurisdictions:

- In Austria, prohibitions or bans on assignments contained in general terms and conditions are not valid. However, even if contractual bans on assignments are stipulated in detail in each case and hence valid according to § 1396a of the Austrian Civil Code, they do not make the assignment ineffective. The only exception from this

¹ The following information on the different legal systems in certain EU member states is based upon the EUF's publication "Factoring, Receivables Finance & ABL – A Study of Legal Environments across Europe" (2013) which can be obtained from the EUF.

provision applies to bans on assignments agreed upon with a corporate body under public law. There are no exceptions for exclusivity clauses on supply chain finance and for clauses which protect commercial confidentiality.

- In Germany, § 354a of the German Commercial Code states that in the case of contractual relationships which are commercial transactions for both contractual parties or where the debtor is a corporate body under public law, assignments regarding receivables from such contracts are effective and valid, despite any contractual bans on assignments. The only exception to this rule relates to receivables from a loan agreement, the creditor of which is a credit institution according to the German Banking Act (we understand that the draft UK legislation includes a similar carve out for financial services). There are no exceptions for exclusivity clauses on supply chain finance and for clauses which protect commercial confidentiality.
- According to Estonian law, contractual prohibitions on the assignment of receivables can be agreed upon between the parties of a contract, but this has no effect on third parties and hence does not restrict the assignment.
- In France, contractual bans on assignment are not legally valid. Again, there are no exceptions for exclusivity clauses on supply chain finance and for clauses which protect commercial confidentiality.
- In Italy, contractual prohibitions of assignments can only be enforced against a factoring company if it can be proven that the factoring company knew of the contractual prohibition at the time of the assignment. Otherwise, the assignment is valid against the debtor. In any case, the assignment remains valid between the factoring company and the assignor. There are no exceptions from this rule.
- Contractual bans on assignment are not valid in Lithuanian law, as defined in the Civil Code.
- In Romania, Law 99/1999 states that any agreement that prohibits the assignment or requires the debtor's consent to the assignment is null and void. Therefore, assignments will valid despite any contractual bans on assignments. There are no exceptions from this rule which has apparently not been altered by the new Romanian civil code of 2011.

As noted above, the EUF applauds the UK government for taking steps to address the effects of bans on assignment in restricting the finance available to SMEs. However we would offer caution against the exceptions included in the latest version of the draft legislation which, in the Federation's opinion, run counter to the stated objective of action in this area.

The EUF wishes that the UK government considers the above examples of how bans on assignments have been addressed in other EU member states, and adopts an approach that



is as harmonized as possible. Otherwise there would be a risk of creating a distortion in the competition between factoring and invoice financing companies operating in the EU, which would be contrary to the aim of a 'level playing field' in Europe.

The EUF would be pleased to provide any further information that is required on these matters.

With kind regards

A handwritten signature in blue ink, appearing to read 'John Gielen', is written over a light blue circular stamp.

John Gielen
Chairman - EUF