

- The Chairman -

Mr David Wright
European Commission
DG Markt Internal Market and Services
2, rue de Spa
B-1000 Brussels

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Contact person: Stéphane Kerjean
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Dear Sir,

Re: Interaction of the work of the Legal Certainty Group and of UNIDROIT

I would like to convey to you some concerns that have been raised within the European Financial Market Lawyers Group (EFMLG) regarding the respective developments and timing of the work of the European Commission's Legal Certainty Group (LCG) in finalising its advice on new EU legislation regarding book-entry securities and of UNIDROIT in finalising its draft Convention on intermediated securities¹.

As you know, the EFMLG was established in 1999 with the support of the European Central Bank in order to discuss initiatives that would lead to the harmonisation of European Union (EU) financial markets². Of these, the absence of a harmonised legal regime governing the holding and transfer of financial instruments in the EU received particular attention in the EFMLG's past activities.

The complexity of market infrastructure resulting from the different legal and operational systems for the holding of securities requires a solid legal basis to achieve a fully integrated and efficient European capital market. The EFMLG has long been of the view that there is a pressing need to fill the gap created by the absence of a harmonised legal regime governing the holding and transfer of financial instruments within the EU. In that respect, the EFMLG's 2003 report³ clearly highlighted the need for legislation to harmonise the legal regime governing the holding and transfer of financial instruments by way of book-entries.

¹ Preliminary draft Convention on Substantive Rules regarding Intermediated Securities, UNIDROIT 2007.

² The EFMLG is composed of lawyers of those credit institutions based in the EU which are most active in the European financial markets, namely the banks of the Euribor and Eonia panels.


³ 'Harmonisation of the legal framework for rights evidenced by book-entries in respect of certain financial instruments in the European Union', EFMLG report, June 2003 (See www.efmlg.org).

The EFMLG has closely observed and strongly supports the ongoing legal initiatives of the LCG at Community level and UNIDROIT on a global scale. It understands that the Swiss Government has now called for a diplomatic conference regarding the draft UNIDROIT Convention for September 2008. At the same time, the LCG has been asked to finalise its work by the end of 2008. The EFMLG notes that both projects are largely compatible. However, in the course of the LCG's work, some critical substantive divergences seem to have emerged between the two projects. These relate, for instance, to the status of designating entries (earmarking) and control agreements and their interaction with good faith acquisition and priority rules. Furthermore, the current version of the draft UNIDROIT Convention still has a number of unresolved issues, *inter alia*, insolvency effects, the protection of good faith acquirers, the coverage of Securities Settlement Systems and Central Securities Depositories and the interaction with regulatory provisions. There is a risk that these topics may not be adequately resolved before or at the diplomatic conference.

The EFMLG recognises the need for rapid progress of these ongoing initiatives. At the same time and in light of experiences with the Hague Convention on the Law applicable to certain rights in respect of securities held with an intermediary, it appears that the success of an international convention such as UNIDROIT's draft Convention and its widespread ratification and application require first, that, (i) the EU as a whole has adopted its own robust stance on the matter based, in particular, on the upcoming LCG report, and (ii) the provisions of the convention remain compatible with the principles of the '*acquis communautaire*' on financial legislation. Against this backdrop, these considerations might speak in favour of the postponement of the UNIDROIT diplomatic conference to avoid sub-optimal or incompatible results from a European perspective.

The EFMLG trusts that you find these observations helpful and remains ready to offer its assistance whenever required by the Commission.

Yours sincerely,



Antonio Sáinz de Vicuña