

ROADMAP

Title of the initiative: **Directive on legal certainty of securities holding and transactions**
Lead DG/contact person: MARKT
Expected date of adoption of the initiative (month/year): 15/09/2010
Date of modification: 24/3/2010

Initial IA screening & planning of further work

A. Context and problem definition

What is the political context of the initiative? How does this initiative relate to past and possible future initiatives, and to other EU policies?

This initiative aims at dismantling four of the so called Giovannini Barriers to safe and effective cross-border clearing and settlement of securities in the EU.

What are the main problems identified?

- An increasing part of securities holding and transactions happen cross-border. However, the legal framework in force in Member States governing holding and transactions of securities through securities account differs considerably. Additionally, national rules often prohibit the depositing of securities issues in a Member State different from the one of the location of the issuer.
- This leads to legal uncertainty and operational inefficiency, both hampering a fully integrated European Market for securities post-trading.
- In legal terms, three consequences arise from this situation: (a) account holders cannot always be entirely sure whether they received a good interest in a cross border transaction; (b) the securities of an account holder might be endangered in case of the insolvency of an intermediary intervening in their holding; (c) it might be difficult, or even impossible, for an account holder to access the rights flowing from securities, like for example dividends or interests and voting rights, in case the securities are held cross border.
- In operational terms, holding chains of securities are more complicated and longer than necessary and restrictions hamper effective competition in this field.

Is EU action justified on grounds of subsidiarity?

As the directive aims at a harmonisation of law, Member States cannot address the issue satisfactorily without a common legislative instrument.

B. Objectives of EU initiative

What are the main policy objectives?

- The first policy objective is a simplification of holding and transaction by way of harmonising Member States' law. This relates to the substantive law as well as the conflict-of-law aspect.
- The second policy objective is to abolish rules hampering the deposit of securities issues into a depository located in a different Member State.

Does the objective imply developing EU policy in new areas or in areas of strategic importance?

No. The area is already partly covered by other initiatives, notably the Financial Collateral Directive and the Settlement Finality Directive.

C. Options

What are the policy options? What legislative or 'soft law' instruments could be considered?

- Option 1: no action in this field.
- Option 2: improvement of the situation by promoting amelioration of the law of Member States on a voluntary basis.
- Option 3: addressing the issue in the form of a directive.
- Option 4: addressing the issue in the form of a regulation.
- Option 5: leaving the issue to global harmonisation efforts, as for example the Geneva Securities Convention on intermediated Securities and the Hague Securities Convention.

Would any legislative initiatives go beyond routine up-date of existing legislation?

Yes, the proposal would entail the creation of new rules.

Does the action proposed in the options cut across several policy areas or impact on action taken/planned by other Commission departments?

Yes, Settlement Finality Directive, Financial Collateral Directive, MiFID, Winding-up Directive
ECB-CESR Recommendations

Explain how the options respect the proportionality principle.

The retained option will not go beyond what is necessary to achieve the set objectives.

D. Initial assessment of impacts

What are the significant impacts likely to result from each policy option (cf. list of impacts in the impact assessment guidelines), even if these impacts would materialise only after subsequent Commission initiatives?

1. Option 1: the uncertainty and inefficiency described above will persist though the number of cross-border transactions will even increase steadily in the future.
2. Option 2: some improvements are possible but would remain limited. Market participants must be able to rely on the legal framework and its interoperability of national laws. This goal cannot be achieved on the basis of a purely voluntary exercise, as the legislation in the field of securities is very complex.
3. Option 3: a directive would be capable of delivering the necessary degree of detail with binding force. Member States would have to adapt their internal legal framework accordingly. The national legal framework would generally remain intact, which is important for the interaction with other areas of law, for example company law.
4. Option 4: under a regulation, the degree of harmonisation would be even higher than under a directive. However, a Regulation would create a legal regime independent from the remainder of the national law. A regulation would be more intrusive. Equally a directive is capable of addressing the issues in a sufficient manner, a regulation would be therefore be no proportionate and consequently inappropriate in terms of subsidiarity.
5. Option 5: would be unable to cover the whole range of policy objectives; harmonising effect is not strong enough to guarantee an internal market for securities clearing and settlement.

Could the options have impacts on the EU-Budget (above 5 Mio €) and/or should the IA also serve as the ex-ante evaluation, required by the Financial Regulation?

N/A

Could the options have significant impacts on simplification/administrative burden or on relations with third countries?

Member states would have to implement legislative changes; regulatory authorities and courts would simply apply this new framework.

At present, relevant cross-jurisdictional questions regarding securities holding and disposition do already exist; they are complicated and are expected to be facilitated, also with third countries.

Who is affected?

Account providers: Commercial banks, custodian banks, brokers, central securities depositories

Account holders: Any natural or legal person, i.e. investor, both retail and wholesale

E. Planning of further impact assessment work

What information and data is already available? What further information needs to be gathered? How will this be done (e.g. internally or by an external contractor) and by when? What type and level of analysis will be carried out (cf. principle of proportionate analysis)?

- Main internal available data: (a) *2008 Advice of the Legal Certainty Group on solutions to legal barriers related to post-trading within the EU*; (b) *2006 Advice of the Legal Certainty Group with Annexes Compendium of the relevant laws of Member States and Anecdotal Evidence*; (c) Legal assessment of certain aspects of the Hague Securities Convention (2006 Commission staff working paper)
- further information needed: specific data on isolated issues will be gathered through research carried out by the Commission staff with the help of the Legal Certainty Group during the first quarter of 2009.
- The analysis will be a very detailed one against the background that the solution of the problems identified will require not inconsiderable changes to the law of the Member States.

Which stakeholders & experts have been/will be consulted, how and at what stage?

- Expert consultation: the Legal Certainty Group is an advisory group of the Commission made up of 35 eminent legal experts in the field of securities law. The group has been preparing its two studies on the present subject since 2005. The Group will be consulted again during the phase of the impact assessment.
- Member States consultation: the work of the Legal Certainty Group has been presented to the Member States in the Council's Civil Law Committee two times before the beginning of the impact assessment. During the phase of the impact assessment, two further consultations are planned.
- Consultation of the public: an open conference on the findings of the Legal Certainty Group was held on 23/10/08 in Brussels, the invitation to which was largely circulated and was also available on the DG Markt's homepage. The work of the Legal Certainty Group was documented on the DG Markt's homepage since 2006. During the phase of the impact assessment, a public consultation will be held, on the basis of a questionnaire and a text setting out the principles of the future initiative.
- Member States Expert Working Group; four meetings between February and June 2010.
- Second public consultation, similar to the first, but on a much more detailed text, April/Mai 2010