



**EUROPEAN COMMISSION**

Internal Market and Services DG

FINANCIAL SERVICES POLICY AND FINANCIAL MARKETS  
**Financial markets infrastructure**

Brussels, 22 February 2007  
PP D(2007)

**LCG-5**

**LEGAL CERTAINTY GROUP  
2007/2008 ADVICE  
SUBJECT 1 ("BOOK-ENTRY")**

**SCOPE – GOING BEYOND MINIMUM HARMONISATION**

**PRELIMINARY DISCUSSION DRAFT**

In previous discussions Members noted that the current 2006 Advice of the Legal Certainty Group remained close to the level of harmonisation achieved under the current Unidroit draft Convention. There seems to be broad agreement that this level of harmonisation represented the absolute minimum that was needed to be achieved in the field of determining the legal effects of book-entries to securities accounts. However, several commentators raised the issue that it should be possible, on the basis of this minimum harmonisation, to achieve a higher degree of integration. Inconsistencies which could not be removed on the global level could well be addressed in the EU Internal Market with a view to fostering account holder protection, stability of the system and competitiveness.

Several commentators proposed to take some inspiration from the current Unidroit draft Convention: a number of matters, though closely linked in substance to the legal effect of book entries, were expressly not addressed by the draft as the number of countries supporting harmonisation in this regard was not sufficient. These issues could be identified with a view to analysing the benefits potential harmonisation within the EU.

The following list of issues is inspired by references to "non-Convention law" (the difference between this term and "domestic law" law or similar left aside for the present analysis) which are found in the Unidroit draft and is intended to initiate a discussion on whether and to what extent any future EU legislation should go beyond the level of minimum harmonisation. The list follows no logic but the sequence of occurrence of the issues in the Unidroit text (only relevant references are taken into account).

The LCG might consider whether rules on the following subjects should be included in the scope of its advice:

- 1) receiving dividends and exercising voting rights by intermediaries, *cf.* Unidroit Article 5 Para 1(a)(ii), 2006 Advice 5.2.1.3 and LCG Subject 2;
- 2) the possibility to hold securities outside the holding system, i.e. not through any account provider, *cf.* . Unidroit Article 5 para 1(c) and 2006 Advice 5.2.1.2;
- 3) a definition of the nature of securities which goes beyond its characteristics regarding transfer and holding by book-entries, *cf.* Unidroit Article 5 para 1(d);
- 4) the nature of limited interests (not full property) which are created involving a credit to a securities account, *cf.* Unidroit Article 5 para 3;
- 5) circumstances which trigger the rise and becoming effective of a non-consensual security interest in book-entry securities, *cf.* Unidroit Article 8 para 5;
- 6) interests in book-entry securities which are created under a regime which does not require a book-entry, and their relationship to book-entry interests, *cf.* Unidroit Article 9;
- 7) evidential requirements for the acquisition and disposition of book-entry securities, *cf.* Unidroit Article 10;
- 8) effectiveness against third parties, validity, conditionality and reversal of book-entries, *cf.* 2006 Advice 5.6 and Unidroit Article 11 and 2006 Advice 5.2.7;
- 9) priority of non-consensual security interests over other interests, *cf.* Unidroit Article 13 para 5.
- 10) details on the means by which and the time within an account provider is hold to eliminate an imbalance in its accounts, *cf.* Unidroit Article 19 para 2 and 2006 Advice 5.2.8/5.2.9.6;
- 11) obligations of an account provider with respect to book-entry securities and its liabilities in this respect, *cf.* Unidroit Article 20 para 1 and 2006 Advice 5.2.9;
- 12) allocation/segregation of securities, *cf.* Unidroit Article 21 para 3, 2006 Advice 5.2.9.5 and MiFID;
- 13) loss sharing in case of shortfall, *cf.* Unidroit Article 22 para 1;

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