

How recommendations 1 – 14 would tie in with the global context

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Legal Certainty Group Advice

2008 Advice of the Legal Certainty Group addresses three strands of legal uncertainty:

- Recommendations 3-11: Principles of a possible future legislation about the legal effects of book entries on securities accounts
- Recommendations 12-14: Abolition of differences in national law affecting the processing of corporate events
- Recommendation 15: Abolition of restrictions on location of securities issue

Overview on EU legislative and market infrastructure initiatives

- Harmonisation of law
 - Intermediated securities (Legal Certainty Group)
 - Collateral Law (Collateral Directive)
 - Company law (Shareholders' Rights Directive)
 - Conflicts of law regimes (SFD, Collateral Directive, Banks Winding-Up Directive)
 - Fiscal compliance procedures (FISCO)
- Regulatory aspects (MiFID, CESR-ESCB recommendations)
- Self regulation (Code of Conduct)
- Harmonisation of technical standards and infrastructure services (CESAME, T2S)

⇒ *Coordination of EU initiatives?*

Overview on international activities

- Harmonisation of law
 - Intermediated securities and collateral law (UNIDROIT)
 - Conflicts of law regimes (impact of Hague Securities Convention)
- Regulatory aspects (Impact of Basel II, CPSS-IOSCO recommendations)
- Harmonisation of technical standards (ISO)

⇒ *Coordination with EU initiatives?*

Interactions of recommendations 3-11

Substantive law

CD, SFD (revision ongoing)

EU Legal Certainty Group
Recommendations 3-11

Global: draft UNIDROIT Convention
on Intermediated Securities

Technical standardisation

CESAME
T2S

Global: ISO

Conflict-of-laws

EU CD, SFD,
Banks Winding-up Directive

Global: Hague Securities Convention

Regulation

CESR-ESCB, national regimes,
MiFID

Global: CPSS-IOSCO

Interaction with the SFD review

SFD provides legal certainty for systems as a key part of the securities clearing and settlement infrastructure by:

- Reduction of systemic risks
- Protection of settlement on a gross or net basis against the effects of insolvency proceedings
- Certainty on the applicable law

=> any major malfunction of a system could endanger the overall stability of the financial system

On-going review of the Settlement Finality (2008 Commission proposal), i.a.:

- Recognising role of system operators and their cross-participation
- Cross-system finality
- Coverage of clearing systems
- Protection of night-time settlement

⇒ *Fully compatible with LCG Advice*

Interaction with UNIDROIT

Overlap:

- Unidroit = global; LCG = regional (EU)
- Unidroit = international Convention; LCG = advice for prospective legislation
- Scope as regards book-entry securities nearly identical

Timing?

- Last Unidroit Diplomatic Conference session in September 2009
- Possible proposal for EU legislation?

Interaction with UNIDROIT

Largely compatible with LCG Advice

Many outstanding compatibility issues with the LCG advice and EU acquis have been removed, i.a.:

- Disposition requirements: designating entries and control agreements
- Good faith protection and priority rules
- Interaction with insolvency law
- Interaction with system's rules
- Rules regarding for collateral transactions

Higher degree of harmonisation needed/desirable on an EU level, e.g.:

- Protection of systemic stability
- Corporate actions
- Regulatory regime

⇒ *Need for continuous co-ordination*

Interaction with private international law

- Determination of the applicable law necessary precondition for the application of substantive rules regarding the holding and transfer of intermediated securities
- Existing EU regime in SFD, Collateral Directive and Banks Winding-up Directive has a limited personal and material scope
- Globally: Hague Securities Convention to determine the law applicable to cross-border dispositions of indirectly held securities in December 2002
- Convention is not compatible with existing *acquis communautaire*
- Signature of Hague Securities Convention by the EU is blocked, following concerns raised by Member States, EP and ECB
- Commission had originally proposed signing of the Convention and is now seeking a solution to resolve the deadlock

Interaction with private international law

- Existing EU conflict of laws regime needs improvement
 - Limited personal and material scope
 - Differences of application by Member States regarding the localisation of an account (legal vs. technical maintenance)
 - Working hypotheses:
 - Reinforce the current approach applied by Community law (cf. focus on legal responsibility) – no immediate global solution - or
 - Reconcile concerns regarding the exercise/extent of choice through a common regulatory approach, possibly supported by technical identifiers – with the ultimate aim of seeking global compatibility
- ⇒ *Need for action at the EU level to ensure comprehensive and coherent approach to conflicts of law regime and substantive*

Interaction with regulatory rules

- Absence of a harmonised comprehensive regulatory framework for the holding and transfer of intermediated securities in the EU
- Some aspects addressed by EU law (e.g. MiFID rules on safeguarding client's assets and access rights)
- Recourse to regulatory standards at a global level and EU level with a view to providing a consistent minimum basis for adequate regulation
 - CPSS-IOSCO Recommendation for Securities Settlement Systems, January 2001
 - CPSS-IOSCO Recommendations for Central Counterparties, November 2004
 - CPSS Central bank oversight of payment and settlement systems, May 2005
 - Eurosystem Standards for the use of EU Securities Settlement Systems in the ESCB credit operations, January 1998
 - CESR-ESCB Recommendations for securities clearing and settlement systems
- Whether self-regulatory measures can provide an alternative (Code of conduct for clearing and settlement) is still open for judgement

Interaction with regulatory rules

⇒ *Need for a comprehensive regulatory framework beyond the current standards complementing LCG Advice on an EU level and UNIDROIT on a global level in view of i.a.:*

- Providing a consistent basis for adequate regulation
- Promoting the integration and competitiveness of financial markets without undue costs for market participants
- Enhancing the safety, soundness and efficiency of clearing and settlement of financial instruments
- Fostering investor protection
- Protection of financial stability and mitigating systemic, operational and legal risk
- Supporting interconnectivity on a global level through adherence to accepted international standards

Interaction with technical standardisation

Clearing and Settlement Advisory and Monitoring Expert Group (CESAME)

- Focussing on Giovannini barriers to be resolved by private sector, e.g.:
 - differences in information technology and interfaces
 - intra-day settlement finality
 - technical corporate actions processing
 - operating hours and settlement deadlines

TARGET2-Securities

- Provision by the Eurosystem of a borderless and secure single technical platform for CSDs for the settlement of securities in central bank money

Interactions of recommendations 12-14

Harmonisation of Company Law

Company Law Directives

Shareholders' Rights Directive
Shareholders Rights Recommendation

Solving technical problems stemming from holding pattern

Shareholders' Rights Directive Article 13

Legal Certainty Group
Recommendations 12-14

CESAME work on Barrier 3

Relation to the Shareholders' Rights Directive

Shareholders' Rights Directive:

- facilitating the (cross-border) exercise of shareholders' rights in general meetings
- removal of certain legal impediments to the effective (cross-border) exercise of voting rights (e.g. regarding disclosure requirements, authorisation requirements, split voting, voting by proxy) - Article 13 SRD

LCG Advice:

- addresses certain technical legal aspects of corporate actions processing (Giovannini barrier 3), such as flow of information in a holding chain and the role of intermediaries in this respect or the exercise of rights by the intermediary based on authorisation

⇒ *LCG Advice only provides general principles ("facilitating the exercise of rights"), allowing for specific EU and national legal acts to provide details*

Relation to the work of CESAME/CESAME2

- The operational aspects of differences in corporate actions processing (Giovannini barrier 3) were addressed by CESAME in cooperation with industry groups (EuropeanIssuers, ESSF, ECSDA, EBF, ESBG, EACB)
 - Work on joint market standards on corporate actions, e.g. on:
 - Mandatory distributions
 - Reorganisations
 - Transaction management
 - General meetings (notice, record date, notification of attendance)
 - Dismantling of Giovannini barrier 3 on corporate actions shall also be under the mandate of CESAME2
- ⇒ *Technical standardisation a necessary corollary to legal harmonisation*

Challenges

- *Creating a coherent EU and eventual global legal environment for secure and efficient securities holding, clearing and settlement, also cross-border*
- *Consistent approach encompassing substantive law, market practices and regulatory standards*
- *Flexible framework to cater for market developments/technical innovation*
- *Global harmonisation is desirable, however, a higher degree of internal coherence may be required within the EU*
- *The current re-assessment of the existing legal regime in the EU and on-going initiatives provide a unique window of opportunity*