

Legal Certainty Group's 2nd Advice

Eddy Wymeersch
CESR

General

- High Quality Work
- Clearly conceived - well written
 - Neutrality v.a.v. Legal systems: functional approach is the only realistic one
 - Sometimes, will create tension with national legislations
 - Major Step towards better functioning of securities markets in Europe

What Action Now ?

Commission Recommendation? Too weak

Regulation: same legal effect in all States: do not contribute to further confusion!

Further harmonisation work to be started
where can we go beyond the functional
or technical provisions?

Some Comments

- Too many interesting points to comments
- Many aspects will not be mentioned: on exportability: right proposal !
- Focus on two in the present crisis
 - ◆ Investor protection
 - ◆ Risk

Investor Protection

- Has this been a major concern in this Advice?
- Neutrality with respect to existing holding systems
 - ◆ E.g. Direct identification of client throughout the holding pyramid gives better protection to investor e.g. In case of loss sharing
 - ◆ Is loss sharing the only and best mechanism
 - The investor with a safe holding can loose it due to later circumstances: why not Lifo approach?

Investor Protection

- Are securities protected in multi-tiered holdings
 - ◆ Pledging of client securities to guarantee account holders liabilities?
 - ◆ Mifid answer is poor:small letters in usual contract forms
 - ◆ Real response is in the holding structure: direct registration in all accounts
 - ◆ Rehypothecation for professionals only?

Investor Protection

- Transient Legal Regime
 - ◆ In multi-tiered holding structure
 - ◆ Legal regime of Investor A is changed in legal regime of higher tier account B provider. In case of insolvency, Investor's rights will be determined by legal regime B= is loss of legal protection under A
 - ◆ Need for further harmonisation?

Risks

- Conditional transfer
 - ◆ Is seen as instrument to secure Integrity (R9)
 - ◆ Creates credit risks in the system: should we encourage it? Are there convincing arguments supporting it in light of increased risk? Should this not be collateralised?

Risks

- Corporate Actions are considerable operational risk, but also financially
- Here only processing of corporate actions and differences in national law
- Differences affect exercise of rights
 - ◆ Voting rights are often not exercised for lack of organisation
 - ◆ Companies do not know their shareholders creating risks of stability: custodians should transmit shareholder names to issuers, but opt out may be requested by investors.

To Conclude

- Big Step Forward
- Adoption at EU level is now urgent
- Implementation in Member States will be crucial
- Further work on these and related, substantive subjects