

London, 24 November 2008

**ESSF's Legal Committee welcomes the Second Advice of the European Commission's *Legal Certainty Group* as well as the progress made during the *UNIDROIT* Diplomatic Conference to adopt a Convention on Substantive Rules regarding Intermediated Securities**

**Introduction**

The European Securities Services Forum<sup>1</sup>, ESSF, affiliated to SIFMA, represents the interests of major users of post-trade securities services in Europe.

The ESSF aims at the creation of an efficient pan-European capital market as well as an appropriate and enabling legal framework therefor.

The Legal Committee of the ESSF, comprising senior legal counsels of its member firms, is acutely aware of the legal uncertainty caused by existing differences in legal regimes, and has therefore consistently and systematically supported the work performed in Europe – and at a global level – to reduce legal uncertainty through legal harmonisation. As early as in 2002, ESSF (then called European Securities Forum, ESF) took the view, when responding to the European Commission's consultation on clearing and settlement, that highest priority should be given to the development of a single legal framework.

The 2001 and 2003 Giovannini Reports identified 15 barriers for an efficient post-trading sector, divided into 3 parts: (a) national differences in technical requirements and market practice, (b) differences in tax procedures, and (c) legal certainty. The legal barriers contribute to increasing (i) the complexity of holding securities cross-border, and (ii) the cost for transactions and credit. Moreover they cause difficulties and uncertainty among investors when exercising their rights in corporate actions abroad.

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<sup>1</sup> [www.sifma.org](http://www.sifma.org), <http://essf.sifma.org/>

## Position

Against this background, the ESSF Legal Committee welcomes and endorses the Second Advice published by the European Commission's *Legal Certainty Group* on 22 August 2008. In its view, the Advice, if followed, would allow swift and targeted legislative action by the European Commission with a view to dismantle Giovannini Barrier 13 and to meaningfully contribute to the removal of Barriers 3 and 9.

Although it is not within the realm of market users to determine the legislative technique for implementing the Legal Certainty Group Recommendations, there is a strong feeling among market participants, that a *Regulation* rather than a Directive – with less room for diverging interpretation and transposition – would provide for effective and thorough harmonisation particularly required for Recommendations 1 through 11.

Given ESSF's commitment to actively contribute to dismantling operational Giovannini Barriers, in particular Barrier 3 (processing of corporate actions), it strongly supports the Legal Certainty Group's Recommendation 13.a on recognition of different holding patterns.

The ESSF Legal Committee equally welcomes the progress made at the Diplomatic Conference, held in Geneva from 1 to 12 September 2008 under the auspices of *UNIDROIT*, to adopt a Convention on Substantive Rules regarding Intermediated Securities. It will continue to lend its support to this critically important initiative of legal harmonisation at a global level with a view that at the final session of the diplomatic Conference to be held in Geneva in 2009 the work will be finalised and the Convention adopted.

The ESSF Legal Committee is particularly pleased by the *compatibility of the Second Advice of the Legal Certainty Group with the text of the UNIDROIT Convention* on Substantive Rules regarding Intermediated Securities. The final legal technical issues (notably in the areas of treatment of the "good faith" acquirer of securities and the legal consequences of earmarking) appear to have been resolved.

The ESSF and its members remain committed to meaningfully contribute to the removal of those Giovannini barriers for which the private sector has assumed responsibility. At the same time, inter alia in the legal area, it works with the public sector (where its Legal Committee welcomes representatives from Central Banks and the European Commission) to support the removal of legal barriers. Without the efforts of both the private and the public sector, the targeted efficiency increase will not be achieved.