

DG Internal Market and Services
Financial Services Policy and Financial Markets
Financial Markets Infrastructure Unit
European Commission
B-1049 Brussels

(by e-mail to markt-consultation-sld@ec.europa.eu)

21 January 2011

Dear Sirs,

European Commission consultation: Legislation on legal certainty of securities holding and dispositions

The International Capital Market Association ("ICMA"), Register of Interest Representatives identification number 0223480577-59, is pleased to respond to the above consultation.

ICMA is a self regulatory organisation and an influential voice for the global capital market. It represents a broad range of capital market interests including global investment banks and smaller regional banks, as well as asset managers, exchanges, central banks, law firms and other professional advisers. ICMA's market conventions and standards have been the pillars of the international debt market for over 40 years. See: www.icmagroup.org.

ICMA is very grateful to the Commission for the extension of time given to respondents until today.

We set out our responses in the Annexes to this letter and would be pleased to discuss them with you at your convenience.

Yours faithfully,

A handwritten signature in black ink, appearing to read "D. Hiscock", with a long horizontal line extending to the right.

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Annex 1

The responses in this annex relate to ICMA's primary market constituency that lead-manages syndicated bond issues throughout Europe. This constituency deliberates principally through ICMA's Primary Market Practices Sub-committee¹, which gathers the heads and senior members of the syndicate desks of 21 ICMA member banks, and ICMA's Legal and Documentation Sub-committee², which gathers the heads and senior members of the legal transaction management teams of 19 ICMA member banks, in each case active in lead-managing syndicated bond issues in Europe.

From the issuer's perspective, ICMA would like only to emphasise a few points to generally bear in mind when developing the proposed legal certainty legislation, from the bond issuer's perspective and in relation to bonds primarily deposited with the two international central securities depositories (ICSDs), Euroclear and Clearstream.

1. The 'owner' of the bond (i.e. the person able to give good discharge to the issuer for payment of its debt) is, and should remain, the initial top-level holder of the bond – namely, as the case may be (depending on the form of the bonds), the ICSDs' 'common depository', the ICSDs' 'common safekeeper' or one of the ICSDs.
2. Issuer notices to investors are and should remain validly delivered if they are delivered in accordance with the contractual terms and conditions of the bonds. These often provide that, whilst the bonds are in 'global' form, such notices are to be delivered, as the case may be, to the ICSDs, their common depositories or their 'common service providers'.
3. Different investors hold through custody chains that vary in length and structure. Accordingly, the issuer is not and should not be affected by such differences that are outside its knowledge and control – something that may be relevant in any considerations of 'equal treatment' of investors.

¹ <http://www.icmagroup.org/About-ICMA/ICMAs-Committees/Primary-Market-Practices-Sub-committee.aspx>.

² <http://www.icmagroup.org/About-ICMA/ICMAs-Committees/Legal-and-Documentation-Sub-committee.aspx>.

Annex 2

ICMA EUROPEAN REPO COUNCIL

DG Internal Market and Services
Financial Services Policy and Financial Markets
Financial Markets Infrastructure Unit
European Commission
B-1049 Brussels

21 January 2011

Dear Sirs,

Response submission from the ICMA European Repo Council

Re: European Commission Consultation Paper - Harmonisation of securities law

Introduction:

On behalf of the European Repo Council (“ERC”) of the International Capital Market Association (“ICMA”), the purpose of this letter is to provide feedback primarily concerning the repo oriented aspects of the European Commission’s 5 November 2010 consultation paper on the harmonisation of the legal framework for securities holding and transactions.

The ERC was established by ICMA in December 1999, to represent the repo community in Europe. It is composed of practitioners in the repo field, who meet regularly to discuss market developments in order to ensure that practical day-to-day issues are fully understood and dealt with adequately.

The repo market is one of the largest and most active sectors in today’s money markets. It provides an efficient source of money market funding for financial intermediaries while providing a secure home for liquid investments. Repo is also used by central banks as their principal tool in open market operations to control short-term interest rates. Repos are attractive as a monetary policy instrument because they carry a low credit risk while serving as a flexible instrument for liquidity management, which benefits the functioning of financial markets. Central banks are also able to act swiftly as lenders of last resort during periods of market turbulence by way of the repo market.¹

¹ The ERC has published a White Paper on the operation of the European repo market, the role of short-selling, the problem of settlement failures and the need for reform of the market infrastructure. This paper sets out in greater detail what the repo market is and its benefits and is attached, together with a supplementary Annex.

In a repo transaction securities are exchanged for cash with an agreement to repurchase the securities at a future date. The transaction is fully collateralised, with the cash securing the seller's securities and the securities securing the buyer's cash. Collateral is key to the proper functioning of repo markets. In the event of default, the collateral can be sold and exposure to the defaulting party can be netted off.

In the international market, the ICMA Global Master Repurchase Agreement (GMRA)² provides a robust legal framework for documenting repo transactions. Supervisory authorities recognise the effect of the GMRA netting provisions for regulatory capital and large exposure requirements provided, inter alia, that a reasoned legal opinion has been obtained to the effect that, in the event of a legal challenge, the relevant courts and administrative authorities would find that, where a counterparty fails owing to default, bankruptcy, liquidation or any other similar circumstance, the regulated firm's claims and obligations pursuant to the GMRA would be limited to a net sum under the law of the relevant jurisdiction(s), and which meets certain other requirements. Accordingly, ICMA obtains and annually updates legal opinions on the GMRA from 62 jurisdictions worldwide. These opinions cover both the enforceability of the netting provisions of the GMRA as well as the validity of the GMRA as a whole.

The ERC notes that on 5 November consultative proposals in respect of the harmonisation of the legal framework for securities holding and transactions were announced by the European Commission. The ERC further notes that the objective of this consultation is to inform the preparation of a formal Commission legislative proposal scheduled for adoption before summer 2011.

Commentary:

Whilst there are many interesting issues discussed in this consultation paper, the ERC is for now going to primarily restrict its focus to those aspects that bear most directly on repo. As the ERC sees it, there are particularly pertinent matters relating to the crediting of securities to holder's accounts and collateral arrangements.

A. Crediting of securities to holder's accounts:

Paragraph 4.1.2 of the consultation states that "...an account provider may credit the accounts of its account holders... only if it holds a corresponding number of securities...". The ERC understand that this reflects a desire for clarity regarding the account holders legally settled position, with a clear distinction and control over any amounts conditionally credited or debited on the basis of "contractual settlement".

The ERC is concerned to ensure that there is a full and open discussion in respect to the use of participants security depot accounts for the processing of repo settlements. Repo is a fundamental secured funding activity of a firm's long inventory. The accuracy of a firm's secured funding activity relies upon a firm's ability to see net unfunded positions at a depot level. The use of separate depot accounts for the settlement of repo as distinct from cash security transactions has the potential to complicate the single view of unfunded positions. The ERC believes there is a need to ensure that operational impacts at both agents and participants are adequately weighed up; and evaluated against the desire to reflect security positions and movements in a depot structure that reflects each type of contractual arrangement used.

² The GMRA is the most extensively used cross border repo master agreement and has reduced the risks associated with previously poorly documented repo transactions.

The ERC notes that the arrangements under consideration in the consultation proposals need to be carefully developed to take account of repo (and other types of financing) trades, in addition to underlying cash securities trades. The ERC considers that whilst it is right to seek certainty regarding the legal position with respect to holdings of securities, this should not lead to the imposition of rigid constraints that could act to impede established market practise for the efficient (repo) financing of securities positions.

B. Collateral arrangements:

Paragraph 22.1 defines “earmarking” (at point “(p)”) and “control-agreements” (at point “(q)”), which the ERC envisage may be used in context of certain market arrangements for securities given as collateral, in which the collateral provider seeks to retain authority over actions in respect of the securities in question. Repos governed by the GMRA consist of a sale of securities (with full title transfer) and an agreed future repurchase of equivalent securities. As such their legal basis is different to a collateralised loan (such as a simple security pledge or mortgage). In developing this legislative proposal the ERC consider that it is important to ensure that no confusion arises regarding these different legal forms of transaction, so that repo collateral (i.e. purchased securities) continues to be capable of being managed in the robust way that is already established in the market.

Concluding remarks:

The ERC appreciate the valuable contribution made by the European Commission's examination of the issues articulated in this consultation paper and would like to thank the European Commission for its careful consideration of the repo oriented points made in this response. The ERC remains at your disposal to discuss any of the above points.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'De Vidts', with a long horizontal flourish extending to the right.

Godfried De Vidts

Chairman

ICMA European Repo Council

cc : *ICMA European Repo Committee*
ICMA European Repo Operations Group