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1 June 2009

Mr Jorgen Holmquist  
Director General, DG Internal Market & Services  
European Commission  
C107 5/32  
B-1049 Brussels  
Belgium

Dear Mr. Holmquist

**Consultation Paper: Legislation on Legal Certainty of Securities Holding and Dispositions (G2/PP D (2009))**

The remit of the Financial Markets Law Committee ("FMLC") is to identify issues of legal uncertainty, or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks and to consider how such issues should be addressed.

On 5 May 2009, it was suggested to the FMLC that it should respond, from a legal certainty perspective, to the European Commission's consultation paper headed "Legislation on Legal Certainty of Securities Holding and Dispositions"<sup>1</sup> (the "Paper"). The FMLC agreed to do so and established an ad hoc Working Group, which included certain UK members of the Legal Certainty Group, to discuss the contents of the Paper. This letter is the result of those discussions and represents a submission in response to the Paper by the FMLC.

The FMLC's main area of concern is the "conflicts-of-laws" issue since, as the Paper acknowledges,<sup>2</sup> it remains uncertain which law determines legal rights related to securities held through financial intermediaries. It is the view of the FMLC that the Hague Securities Convention is the most certain of the options put forward to date and that the objections made to this convention are unconvincing.

There is also the continuing question as to whether any future legislation on the legal effect of book entries should be restricted to account providers that are regulated by a competent authority and, indeed, are compliant with the relevant regulatory regime.<sup>3</sup> The FMLC is strongly opposed to proposals for any such restriction. This is, in part, because these proposals ignore the fundamental conceptual distinction between law and regulation. It is also the FMLC's view that the adoption of any such proposals would cause significant adverse effect to the systemic protection of account holders and the stability of the system. If this restriction is imposed, unregulated account providers will nevertheless continue to participate in the holding and settlement of book-entry securities, but account holders in such

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<sup>1</sup> Brussels, 16/04/2009, G2/PP D(2009)

<sup>2</sup> See section 1.5 of the Paper, "Identification of the applicable law"

<sup>3</sup> In fact, the scope of the proposed restriction is not entirely clear and the FMLC would be grateful for some further clarification in this respect

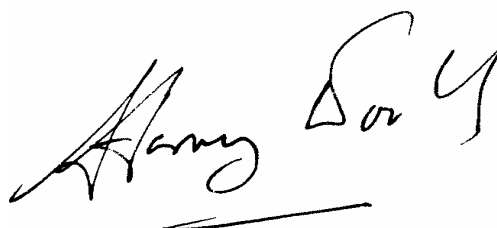
entities will be unable to take advantage of the benefits and protections which the future legislation confers. As a result, these account holders will be deprived *inter alia* of the certainty afforded by the future legislation as to the effectiveness of their acquisitions and dispositions<sup>4</sup> and excluded from certain protections for their holdings in the event of the insolvency of the account provider.<sup>5</sup> They will instead be subject to the substantive provisions of national law which, in the FMLC's view, will grow increasingly uncertain over time because member states are unlikely to update such provisions after the new regime has been legislated. Indeed, it would defeat the purpose of introducing a new substantive regime for the European Community if it were still incumbent upon member states to continue to legislate for the same matter at national level.

The FMLC is pleased to note that the Paper is largely in line with the UNIDROIT negotiations and is hopeful that the forthcoming diplomatic session (Geneva, October 2009) will conclude the UNIDROIT project. It is important that the European Commission decides whether or not to sign this convention before the implementation of any future legislation on the legal effect of book entries. Furthermore, it is important that the particularisation in such legislation of recommendations received during this consultation process is considered in light of the prospective ratification and implementation of the UNIDROIT convention, if a decision to sign the convention is taken.

As you are aware, the FMLC is an organisation which focuses only on issues of legal certainty in the international financial markets and so is only concerned with the aspects of the Paper which relate to legal certainty. It is, however, the FMLC's understanding that a number of UK trade associations will also respond to the Paper.

The FMLC would welcome the opportunity to discuss this further if that would be useful.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Lord Woolf', with a horizontal line underneath.

Lord Woolf

|            |                      |                            |
|------------|----------------------|----------------------------|
| Copies to: | Mario Nava           | (EUI Commission Markt.G.2) |
|            | Philipp Paech        | (EUI Commission Markt.G.2) |
|            | Konstantinos Tomaras | (EUI Commission Markt.G.2) |
|            | Hannah Gurga         | (HM Treasury)              |

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<sup>4</sup> See section 1.3 of the Paper, "Acquisition and disposition of book entry securities". The requirements which need to be fulfilled in order to render the acquisition of securities (or of a security interest in securities) legally effective is described in section 1.2 of the Paper as "the most relevant aspect of any future European legislation in the field of securities held through account providers"

<sup>5</sup> See section 1.4 of the Paper, "Integrity of the issue and protection in the event of insolvency of the account provider"