



**UNIDROIT COMMITTEE OF GOVERNMENTAL EXPERTS
FOR THE PREPARATION OF A DRAFT CONVENTION ON
SUBSTANTIVE RULES REGARDING INTERMEDIATED
SECURITIES
INFORMAL WORKING GROUP ON ARTICLE 14 OF THE
DRAFT CONVENTION**

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Informal Working Group on Article 14 of the draft Convention

Comments on the questionnaire concerning acquisition by an innocent person

(submitted by the European Commission)

The EU Commission would like to congratulate the drafters of Document 96 for efficiently attracting the delegations' attention to various crucial points in the context of Article 14 of the UNIDROIT draft Convention on Substantive Rules regarding Intermediated Securities (the "draft Convention") and submits the following answers to the questionnaire. Please note that the *acquis communautaire* does not contain any rules on good-faith acquisition applicable in the framework of intermediated securities.

In general, we agree with the description of Article 14 as set out in Doc. 96. However, we would like to draw the attention of the other delegations to the following points:

1. Alongside the ECB, we would seek clarification on Article 14(5), following which a system's rules may override the protection of an acquisition of intermediated securities involving a defective earlier entry (Article 14(2)), whereas a system's rules are unable to override the protection against the interests of a third party in the intermediated securities (Article 14(1)). The motivation for this distinction seems to be not entirely clear.

2. Furthermore, the discussion on Article 14 points to differences in the conceptual understanding of the draft Convention. Two previously circulated comments relate to the potential of inflation of the number of securities credited to accounts as a consequence of applying the good faith rule of Article 14.

(a) The ECB in its earlier e-mail made reference to Article 14(2), wondering whether this rule also apply to defective entries which happen on a level of the holding chain higher than that of the relevant account holder and intermediary. In particular, it needed to be clear whether an account holder can acquire intermediated securities by way of good faith under 14(2) even in case his relevant intermediary did not receive the securities because of a defective entry higher up the chain.

(b) The German Government, in its reply to the questionnaire (Doc. 98, p. 4) has made a closely related point by stating that in its opinion, inflation could not happen as a consequence of good faith acquisition, following an unauthorised debit under Article 13(1).

The EU Commission believes that the uniform interpretation of the mechanisms and consequences of the application of Article 14 is conditional for the success of the draft Convention.

3. Regarding 14(1), we would like to underline the common understanding that the provisions of the draft Convention are not intended to alter rules regarding the burden of proof. In many jurisdictions, rules regarding the burden of proof are derived from the wording of the material provision. In the context of Article 14(1), there are two options: either the claimant has to substantiate the bad faith of the account holder (acquirer), or the latter has to demonstrate his good faith. The EU Commission believes that the traditional national rules are best positioned to address the burden of proof in the present scenario. Therefore, it should be made clear that the wording of Article 14(1) has no influence in this respect. Probably, a clarification in the future Explanatory Report would be sufficient.